

ACADEMIC PAPER

GENDER EQUALITY AND WOMEN'S EMPOWERMENT: CONSTITUTIONAL JURISPRUDENCE



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UN WOMEN



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ABBREVIATIONS

AFJB	Association des Femmes Juristes du Benin
BLAST	Bangladesh Legal Aid Services and Trust
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CONTRALESA	Congress of Traditional Leaders of South Africa
FGM	Female genital mutilation
GBV	Gender-based violence
ICCPR	International Covenant on Civil and Political Rights
ICECSR	International Covenant on Economic, Social and Cultural Rights
IDEA	International Institute for Democracy and Electoral Assistance
JGG	Just Governance Group
LAC	Latin America and the Caribbean
MENA	Middle East and North Africa
NGO	Non-governmental organization
UDHR	Universal Declaration on Human Rights
UN	United Nations
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women

EXECUTIVE SUMMARY

This exploratory global study of constitutional jurisprudence on gender equality and women's empowerment, conducted by the Just Governance Group as part of a project partnership between International IDEA and UN Women, reveals a series of important findings regarding the current state of lived realities for women living under constitutions which purportedly provide for equality between men and women and prohibit discrimination based on gender.

As is well-known, even the best drafted constitutions cannot change the lives of citizens by themselves. Numerous obstacles—including legislative and executive inertia or resistance to change, economic inequalities, social and cultural mores and imbalance of power in government and society—must be overcome before the words of the constitution become meaningful tools for societal change.

However, from the range of cases selected in this—admittedly brief—study, there are also several reasons to be optimistic about progress. Courts have shown themselves to be both progressive and strategic, willing to engage in social context and substantive equality analyses to arrive at equitable decisions in line with the spirit, not just the letter, of the law. Further, the cases demonstrate a wide range of different constitutional provisions which have been referenced to improve women's equity and agency, beyond non-discrimination and equality clauses.

In terms of issues particular to the plural legal systems, courts have used constitutional guidance on how courts should interpret different sources of law, both in terms of using constitutional compliance review to ensure customary law is not harmful to women's rights, and in using international treaties to fill gaps in legislation, to produce positive decisions with regards to the issues dealt with in the study (family law, gender-based violence and women's access to public life).

Another notable positive trend in the cases analyses was the benefit of broad standing requirements which allow both public interest litigation and the joining of amici curiae to the benefit of women litigants.

The vastly different contexts in which these constitutional provisions operate around the world do not allow for generalization, but we provide here some tentative recommendations for consideration which arise from the case analyses.

Recommendations

Constitutional provisions

Constitution-makers and women's rights advocates may consider the following provisions during reform processes:

1. Promote the constitutional provisions that were identified as contributing factors to successful decisions in this exploratory study; provide for purposive interpretation of the law based on its aims and objectives or on constitutional rights; allow organizations to have standing in constitutional cases related to the public interest (see the constitutions of South Africa, Zimbabwe and Colombia); permit differential treatment for disadvantaged groups in an effort to achieve equality through affirmative measures; recognize international law, especially international human rights law, as a source of law; and include mechanisms that permit the constitutional court to monitor previous constitutional decisions.
2. Seek the removal of provisions that exempt issues such as family-related matters, and/or customary authorities from complying with non-discrimination guarantees, or find ways to reconcile these competing claims.

CEDAW and international instruments

3. Women's rights advocates and *amicus curiae* should introduce specific provisions of CEDAW and other international human rights treaties in arguments before the courts to underscore the state's obligation to address inequality and discrimination, especially if there are gaps in the protections for women in legislation or the constitution.
4. Judges should consider applying international treaties ratified by the state to reinforce the obligations to advance gender equality and women's rights.

Judicial reasoning

Judges and judicial training institutes may wish to consider the following approaches supportive of gender equality and women's rights in litigation and judicial training programmes.

5. Apply innovative interpretative techniques such as social context analysis, substantive equality analysis, evidence-based decision-making and purposive interpretation to advance gender equality jurisprudence.
6. Examine all of the rights relevant in a case and proceed to balance and resolve the tensions between them through intersectional and purposive approaches that prioritize the rights in terms of the spirit, aims or values of the constitution. A detailed interpretation provides important information related to the issues to the government, the legislature and the public. This analysis, and a clear declaration of unconstitutionality, provides the basis for the implementation of the decision.
7. Assess whether groups of women or girls would be left unprotected because of a judgment. It is especially important to ensure that women's rights are not infringed to permit the continued application of a custom or practice that has been proven to be discriminatory.
8. Critically examine rules and practices that discriminate against women regardless of whether the rules and practices are culturally based or claimed to be central tenets of religion. Consider

the intersection of equality in cultural, religious and customary rights protected in the constitution. Situate women within their culture, religion and/or customary community.

9. Provide access to amici curiae or interveners to assist the court with broadening and developing a detailed understanding of the context and the jurisprudence.

Public-interest litigation approaches

Lawyers and women's rights advocates should consider approaches that have been identified as successful in the sample of cases in this study:

10. Gather significant evidence to demonstrate the disadvantage or harm experienced by women. Documentary evidence, especially reports published by an international agency or academic institution, is useful to support social context analysis by the court. Expert witnesses are especially important in criminal cases. For any type of public interest litigation, it is important to demonstrate how individual women and/or girls and women and/or girls who are differently situated are directly and negatively affected by the law, custom or practice in order to convince the court of its discriminatory effects.
11. If addressing customary law in the courts or customary authorities, argue for the application of a 'living law' approach in an effort to encourage the flexibility and evolution of customs that discriminate against women and/or girls.

Addressing gaps through further research

Women's rights organizations, research institutes, judicial institutes and others could study the gaps identified in this exploratory study to develop a more detailed understanding of the issues. Many of the gaps would need to be studied at the national or regional level rather than the international level.

12. Study the effects of landmark cases on women in similar situations and identify how to multiply the effects further through legislation, governmental action or civil society initiatives.

13. Study complex situations such as polygyny to identify the distinct challenges faced by the wives and children of second and subsequent marriages and the differential impact of judicial decisions on them.

14. Study the background to apparently successful cases and the methodology adopted by organizations that have effectively engaged in public interest litigation that has advanced women's

equality rights, especially in relation to customary, traditional or religious rules and practices that come into conflict with constitutional provisions.

15. Assess the constitutional training received by judges or customary and religious authorities that have a mandate to resolve or settle disputes between individuals and groups, and identify areas for improvement.

INTRODUCTION

Constitutions serve as the foundation and framework for the formulation and implementation of national legislation and policies. They possess the status of the highest norms against which all state acts and omissions are evaluated. Constitutional provisions are often inspired by the international human rights obligations of states, and therefore reflect a broad range of social, economic, cultural, political and civil rights and guarantees of public goods. The 20-year review of the Beijing Declaration and Platform for Action demonstrates that a number of states have introduced reforms to their constitutions in order to enshrine the principle of equality between women and men and the prohibition of discrimination on the basis of sex. Building on the prohibition of discrimination, some states have introduced provisions in constitutions to promote specific areas of gender equality, such as representation in national parliaments, economic and social rights, access to justice, equality in the family and marriage, and the creation of gender equality mechanisms.

The judiciary plays an important role in interpreting these constitutional provisions and laws. In 193 countries, constitutional review bodies have been created to determine the constitutionality of an action or inaction by both public and private entities and individuals. In the past 25 years, such bodies have contributed to the emergence of gender equality constitutional jurisprudence across a number of areas of law, such as citizenship, reproductive rights, education and decision-making. The impact of constitutional decisions on women is not always clear however, and the enforcement of constitutional decisions is generally a matter for the legislative and executive branches of government.

This global exploratory study of constitutional jurisprudence related to gender equality represents a preliminary assessment of how some courts from selected countries in the global south address tensions between constitutional provisions and customary, religious or 'traditional' (understood as patriarchal traditions) laws or practices. The study also attempts, albeit superficially, to understand how women and girls have been or will be affected by constitutional decisions.

1.1.

Objectives and scope

The objective of this exploratory study is to assess trends and patterns in judicial decision-making at the domestic level that applies constitutional provisions to address gender equality and women's rights when they are affected by customary, religious or patriarchal laws or practices.

1.2.

Overarching theme and sub-themes

The overarching theme of the study is how review courts address gender equality within plural justice systems, which are defined by the CEDAW Committee as:

the coexistence within a State Party of state laws, regulations, procedures and decisions on the one hand, and religious, customary, indigenous or community laws and practices on the other. Therefore, plural justice systems include multiple sources of law, whether formal or informal, whether state, non-state or mixed, that women may encounter when seeking to exercise their right to access to justice. Religious, customary,

indigenous and community justice systems...may be formally recognized by the state, operate with the acquiescence of the state, with or without any explicit status, or function outside of the state's regulatory framework. (CEDAW GR 33, para. 5)

It is to be expected that courts will need to compare and balance rights, such as religious principles, collective rights (including the right of indigenous peoples to administer justice within their own justice system) or an individual's cultural and religious rights with the right to equality and non-discrimination. This exploratory study examines how state courts, using constitutional provisions, interpret, address and often change or limit religious, customary (including indigenous) or traditional patriarchal laws or practices that are deeply rooted in a culture in order to reach a positive result that respects women's equality.

Law itself is an expression of culture and both the law and culture are dynamic and evolving (Geertz 1983; Rosen 2006; Greenhouse 1998). According to the UN Human Rights Council: 'Culture permeates all human activities and institutions, including legal systems, in all societies across the world. Culture is created, contested and recreated within the social praxis of diverse groups interacting in economic, social and political arenas. It is manifested in individual and collective self-expression, understanding and practices' (2012: 4). Based on this broad understanding of culture and the relevance of law within a culture, the study considers systems of law or practices of legal regimes that are distinct from state law but that may or may not be formally recognized by the constitutional text of a state. These could include alternative, indigenous, customary, tribal or clan-based justice systems; or Islamic, Judaic, Christian or Hindu religious-based laws or practices. The study also considers the traditional (including patriarchal) legal principles or rules of the state legal culture that have historically presented obstacles to women's equality.

A preliminary review of constitutional jurisprudence related to the overarching theme revealed that constitutional challenges varied depending on the regional, subregional and national cultural context, which includes the operative legal regimes regulating women's

lives and the degree to which women's human rights had advanced. The researchers noted tensions between customary, religious and traditional patriarchal rules or practices in judicial decisions in relation to three sub-themes: family law, gender-based violence and women's access to public life (including nationality). These sub-themes are presented on a continuum beginning with family law, which was historically considered to be within the 'private' sphere, to gender-based violence and then women's access to the 'public sphere'.

Family law

CEDAW provisions call for states parties to take all appropriate measures to eliminate discrimination against women, including discrimination within marriage and the family. Article 16 (1) addresses a number of the issues relevant to family law jurisprudence reviewed in this study:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - (a) The same right to enter into marriage;
 - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
 - (c) The same rights and responsibilities during marriage and at its dissolution;
 - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Tensions between traditional, cultural or customary rules or practices and women's equality rights are exemplified in what has historically been considered the private institution of the family. Women claim their rights in relation to this institution through family law, customary law and/or personal (religious) law.

This sub-theme, relative to the overarching theme of this exploratory study, represented a significant level of constitutional litigation in Asia and Africa. The cases reviewed in this sub-topic address the issues of marriage, including customary marriage practices, polygyny and

adultery; dissolution of marriage, including the division of property; and inheritance. In these cases, the courts need to address the tensions between constitutional provisions and customary or religious marriage, divorce and inheritance practices and antiquated patriarchal common law or statutory principles that do not meet the equality rights provisions in constitutions or international instruments.

Gender-based violence

The recognition of gender-based violence (GBV), including domestic violence and sexual violence, as a public law issue in the 1990s placed heightened and more precise duties and responsibilities on state actors to address violence against women and girls, whether it occurs within the family, community or work, or as a tactic of armed conflict. This sub-topic relates to both the practices and principles in the state legal culture that have resulted in impunity for both state and private actors, and the practices in customary or religious communities that cause grievous harm to women, up to and including death.

GBV is defined as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’ (CEDAW General Recommendation no. 19: Violence against Women, 1992) and includes ‘...physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or in private life’ (article 1, UN Declaration on the Elimination of Violence against Women, DEVAW, 1993). Gender-based violence affects the human rights of women and girls, including the right to life, the right to equal benefit and protection of the law, the right to equality, the right to security and the right to dignity.

A significant level of constitutional litigation was identified in this sub-theme and cases were further grouped into specific issues. First, child marriage cases are addressed as an egregious violation of girls’ rights. It is important to recognize that child marriage, also referred to as early marriage or forced marriage, fits squarely within the sub-topic of GBV. Child marriage is increasingly being addressed within the framework of GBV (Girls Not Brides 2014) because early marriage is often forced and child brides are more often subject to physical and sexual violence. CEDAW

sets the minimum age of marriage at 18 years of age (the age of majority) and the Convention on the Rights of the Child (CRC) calls on states parties to abolish traditional practices that harm the child. Given that minors are not able to legally consent, all forms of child marriage can generally be considered forced. The second category of cases relates to the duty of the state to address domestic violence. These cases demonstrate the diminishing public/private dichotomy in human rights discourse and challenges to patriarchal legal principles. A third group of cases examines the duty of the state to address and redress sexual violence; and patriarchal evidentiary rules in cases of sexual violence are a fourth specific issue addressed in constitutional litigation. A fifth area of concern, especially in constitutional challenges in Latin America, are cases of sexual violence in armed conflict.¹ Finally, the tensions related to cultural rules and practices that are either used to justify GBV or amount to GBV are examined.

Women’s access to public life

This sub-theme captures several issues related to an expansive understanding of citizenship, in particular women’s equal rights in relation to nationality, family name, birth registration and therefore political participation. The cases reviewed challenge traditional patriarchal rules and practices that discriminate against women in the public sphere.

Article 9 of CEDAW places a duty on states parties to give women equal rights with men to ‘acquire, change or retain their nationality’. Meanwhile article 16 (1) (g) deals with ‘the same personal rights as husband and wife, including the right to choose a family name’. Narrowly conceived, citizenship relates to juridical civic issues such as the right to nationality, the ability to pass nationality or citizenship to marital partners and children, and birth registration (UNESCO 2016). These rights, to nationality and to choose a family name, are ‘gateway rights’ that allow women to exercise other rights and be active citizens in all aspects of public life to the same degree as men.

¹ Constitutional decisions from African countries affected by armed conflict were not found in the databases used.

Through the lens of international human rights law, citizenship has increasingly been defined as multidimensional (Davy 2014); and as an active practice or process in the social world as much as it is a status or identity vis-à-vis the state and political rights (Meer and Sever 2004; Sweetman et al. 2011). Feminist scholars have argued that the interpretation of citizenship should be reconceived from a gendered perspective: 'Gendered exclusion from citizenship is linked to the public/private divide that identifies men's role as being in the public world of politics and paid employment, and women's in caring and child-rearing in the home' (Meer and Sever 2004: 6).

Article 7 of CEDAW calls on states parties to:

take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular...ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

The study explores judicial decisions related to rules or practices that negatively affect women's ability to fully enjoy nationality and equal rights related to nationality, citizenship, identity, political participation and access to public places. On the latter issue, women's equality rights intersect with cultural and religious expression in the public sphere.

1.3.

Methodology, scope and sources

The study involved desk research and analysis of constitutional jurisprudence, especially by review courts (courts of appeal, supreme courts and constitutional courts) delivered

after 2000.² It involved a sampling and analysis of landmark constitutional jurisprudence (including that involving strategic litigation) from countries in four regions: Africa, Asia and the Pacific, Latin America and the Caribbean (LAC) and the Middle East and North Africa (MENA).³

While the study prioritizes the decisions of constitutional review courts, some lower court decisions are also included if they are considered landmark decisions that advance women's rights in three areas of law: family law, GBV and women's access to public life. Article 2 (f) of CEDAW obliges states parties 'To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. The study therefore identifies 'positive' decisions that advance women's rights within these thematic parameters and is limited in scope to those that address tensions between gender equality standards and patriarchal, religious, customary or traditional norms and practices.

The discussion in this report reflects an intersectional approach. The Human Rights Council's 2012 report on women's rights and cultural rights promotes a paradigm in which women should not have to choose women's rights over cultural rights, or vice versa, but realize their right to equality while exercising their cultural rights (UN Human Rights Council 2012: 5). The UN Special Rapporteur in the field of cultural rights proposed addressing the intersectionality of cultural rights and women's rights rather than examining 'whether and how religion, culture and tradition prevail over women's human rights' (UN Human Rights Council 2012: 4).

This study examines only those issues brought to formal state justice systems and not appeals to religious, customary or indigenous review tribunals. While some women seek to challenge and change traditions and practices within a customary or religious legal system,

2 The understanding is that cases such as *Visbaka v State of Rajasthan (India)*, *Attorney General v Unity Dow (Botswana)* and other pre-2000 judicial decisions have been discussed at length in the secondary literature and that it is important to examine more recent and lesser known decisions.

3 For the purposes of this study, due to similarities in some of the issues, Turkey is included in the Middle East and North Africa region.

often invoking international human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women, within an alternative, customary or religious system (Levitt and Merry 2009; Bourouba 2016a), others seek to challenge traditions and practices by means of

a constitutional challenge. It is also important to recognize that women have multiple legal identities and may engage with more than one legal regime in their daily lives. The choice of modes of engagement is influenced by the specific political and cultural context in each individual country.

Box 1

Sources

Cases relevant to the overarching theme and initial parameters noted above, that is, post-2000 domestic constitutional review or landmarks cases, were identified in databases and the secondary literature. The secondary literature made it possible to identify specific cases and the priority issues of national women's organizations and organizations that support strategic litigation. A bibliography of the secondary literature reviewed is attached as Annex A. At the same time, the following databases and websites were used to identify relevant judicial decisions:

- Cornell Law School, women and justice database;⁴
- Regional databases or websites such as the Southern Africa Legal Information Institute,⁵ and the African Human Rights Case Law database;⁶
- Francophone jurisprudence from superior courts;⁷
- National legal institute (lii) or court websites;
- Subject matter-specific databases, such as the Women's Link Worldwide Jurisprudence Database,⁸ or *Articulación Regional Feminista*,⁹ which assess and categorize the cases uploaded to their databases;¹⁰
- The Council of Europe website, which highlights important constitutional cases from around the world.¹¹

4 <<http://www.lawschool.cornell.edu/womenandjustice/Legal-and-Other-Resources/index.cfm>>

5 <<http://www.saflii.org/content/databases>>

6 <<http://www.chr.up.ac.za/index.php/about-the-african-human-rights-case-law-database.html>>

7 <<http://www.juricaf.org>>

8 <<http://www.womenslinkworldwide.org/observatorio/decisiones.php>>

9 <<http://www.articulacionfeminista.org/a2/index.cfm?aplicacion=app003&cnl=3&opc=30>>

10 <[http://www.womenslinkworldwide.org/premios/casos.php?esec=1\\$\\$-1\\$\\$-GBVvgBZ0ZyLnNBVvgB&i-di=en](http://www.womenslinkworldwide.org/premios/casos.php?esec=1$$-1$$-GBVvgBZ0ZyLnNBVvgB&i-di=en)>

11 <<http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/>>

Limitations

It is important to note that, for a number of reasons, it was not possible or practical to identify the same number of cases in each of the four regions. The databases referenced above are not always comprehensive or regularly updated (in part due to lack of resources). The francophone databases were especially limited. National and subregional

websites provided more recent court decisions. The regions are diverse and vary in terms of size, legal culture, regime type, the priority given to women's rights and the prevalence of constitutional litigation, especially strategic public interest litigation. According to some scholars (Kamga 2014; Fombad 2014a), Francophone African countries have not been

as fertile for constitutional litigation as some Anglophone countries, due in part to their different legal cultures and histories. Indeed, examining the francophone countries of Angola, Burundi, the Central African Republic, Chad, the Democratic Republic of the Congo, Congo, Equatorial Guinea, Gabon and Rwanda, Fombad (2014a) finds a widening gap between constitutional texts and practice in these countries.

While the initial plan was to balance the coverage of cultures and religions across the sub-topics, preliminary research revealed that the overarching and sub-themes were not uniformly covered by judicial decisions in all the regions. For example, the landmark cases that challenged civil codes or family-related matters in countries in Latin America tend to have occurred prior to 2000. On the other hand, more recently, women in Latin America have launched important court cases related to sexual and reproductive rights and egregious acts of gender-based violence during armed conflict or post-armed conflict. Given that the former issue is outside of the scope of this study, the issue of gender-based violence, for which post 2000 cases are available, is the predominant theme in the cases reviewed from that region. It was also noted that while in African and Asian countries women are challenging customary laws and practices, in the Latin American countries where indigenous law is formally recognized in constitutions, such as Colombia and Bolivia, indigenous women or their representative

organizations do not appear to be using the state courts to appeal decisions by indigenous authorities.¹² Similarly, constitutional cases related to women’s access to public life are more numerous in the MENA region and to a lesser extent in Asia and the rest of Africa. Where cases addressed more than one issue, the team dealt with them under only one sub-theme. A list of legal and judicial references can be found at Annex B. In sum, the case selection criteria and factors considered in the final selection of cases were:

- post-2000 decisions;
- domestic decisions;
- decisions published in English, French, Spanish, Arabic or Turkish;
- constitutional review or landmark decisions from lower courts where the constitution was referenced in the judicial decision;
- decisions that addressed tensions between religious, customary and traditional rules or practices that fall within the three sub-topics; and
- decisions that advanced gender equality.

Table 1.1 shows the number of cases by sub-theme and region.

¹² This was confirmed during the inception phase through interviews with experts/specialists in the region and through searches on national constitutional court sites.

Table 1.1
Number of judicial decisions by sub-theme and region

Sub-theme	Region				No. of cases by sub-topic
	Asia	Africa	MENA	LAC	
Family law	6	15	2	0	23
Gender-based violence (GBV)	11	5	1	6	23
Access to public life	3	4	9	0	16
Total decisions	20	24	12	6	62

ANALYSIS OF CONSTITUTIONAL JURISPRUDENCE: FAMILY LAW

In many jurisdictions, family law or family-related issues are addressed in culturally based regimes, such as religious or customary law, or alternative dispute resolution mechanisms. In these regimes and state legal systems women have historically been disadvantaged by patriarchal family arrangements that privilege men in marriage, the dissolution of marriage and inheritance. These three issues are explored under this sub-theme.

2.1.

Marriage

The cases in this issue area related to customary practices in marital arrangements address the definition of a domestic relationship and the characterization of adultery.

The custom of paying a 'bride price' was challenged in Uganda by the non-governmental organization, Mifumi, and 12 individual petitioners in *Mifumi (U) Ltd & Anor v Attorney General & Anor*. The appellants claimed that the marriage custom of paying a bride price—a payment or gift from the groom's parents to the bride's parents—as a precondition for a valid customary marriage is unconstitutional because it violates several articles of the Constitution of Uganda: article 31 (3), dealing with free consent of the man and woman when entering into marriage; article 21, which protects the right to equality and non-discrimination; and article 24, which refers to respect for human dignity and protection from inhuman treatment. Mifumi appealed the Constitutional Court's dismissal of the petition to the Supreme Court.

The Supreme Court of Uganda (Kampala) examined the term 'bride price' at the instance of one of the government respondents. Although the majority opinion agreed that the term was inaccurate because women

were not bought and sold, they continued to refer to the custom by its commonly used term. The majority judgement found that the custom did not result in inequality or domestic violence, as argued by Mifumi. The majority also found that the custom does not fetter the parties' free consent to enter into marriage. On both of these issues the majority found that the evidence (affidavits) submitted did not provide evidence that persons are forced into customary marriage, although the judge writing the majority opinion did note that there were reports of parents removing their daughters from school and forcing them to marry in order to receive the bride price. The majority did find the refund of bride price to be oppressive based on the affidavit evidence provided. The judge noted that in cases involving the dissolution of customary marriages where the bride's relatives had given gifts to the husband's relatives, these are not returned. With regard to the refund of the gifts provided to the bride's parents, the court found: 'In my considered view, the custom of refund of bride price devalues the worth, respect and dignity of a woman [...] the custom completely ignores the contribution of the woman to the marriage up to the time of its breakdown' (pp. 44–45). The majority therefore

declared that the refund violated article 31 (1)(b), which guarantees men and women equal rights at marriage, during marriage and at its dissolution. Furthermore, they found that the refund of a bride price is an example of an unconstitutional or prohibited custom pursuant to article 32 (2) of the Constitution, which states that: 'Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status, are prohibited by this Constitution'. Article 32 (1) permits affirmative action for groups 'marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them'.

The judgement was seen as a partial success (Wambi 2015). The majority in the Supreme Court (and the Constitutional Court) appeared to be reluctant to make a declaration on a notorious cultural practice. While they took judicial notice of the practice, the lead judgement briefly references the right to culture (article 37 of the Constitution) but does not provide guidance on the constitutional limitations on the right to practice one's culture. The dissenting or second opinion is more nuanced and contextual.¹³ The dissenting judge agreed with the decision in the lead opinion that the refund of a bride price is unconstitutional but went further by acknowledging the abusive aspects of the practice and assessing these against various constitutional provisions. She noted that the demand for a bride price by the bride's family will have fettered the free consent of a man and a woman intending to marry, contrary to article 31 (3) of the Constitution (pp. 66–67). This judge found the *payment* of a bride price to be inconsistent with article 21, as it promotes inequality, and is clearly contrary to article 31, equal rights in marriage, and article 33, which sets out the specific rights of women. The minority opinion referenced CEDAW, articles 2 (f) and 16 (1) (b) and (c).

The Supreme Court of India addressed the definition of domestic relationships, including cohabitation or 'live-in' relationships, in *Indra Sarma v VKV Sarma* in 2013. This case was the

first time the Supreme Court had examined the changing nature of marriage and the tensions between modern domestic relationships and traditional or religious marriage. The main issue of interest for the purposes of this study was the first issue addressed by the court: whether a live-in relationship amounts to a relationship that is akin to marriage, and thereby falls within the definition of a domestic relationship under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 (Domestic Violence Act).

The Supreme Court referred to the Hindu Marriage Act and the Domestic Violence Act to determine whether the two individuals had been in a domestic relationship. The court determined that the appellant was a mistress and had not presented sufficient evidence to prove the relationship was similar to a marriage, and therefore she was not entitled to seek remedies for domestic violence and maintenance. While the court appeared to punish the claimant for living with a married man, the decision is important because the court recognized the existence of cohabitation in India and defined the categories of domestic relationships that may or may not be established under section 2(f) of the Domestic Violence Act. The court (para. 37) described various categories of domestic relationship and noted whether they fall within the legislation. Domestic relationships can occur between: (a) an adult male and an adult female, both unmarried; (b) a married man and an adult unmarried woman, which, entered knowingly, *may* be a relationship 'in the nature of marriage'; (c) an adult unmarried man and a married woman, which, entered knowingly, *may* be a relationship 'in the nature of marriage'; (d) an unmarried adult female who unknowingly enters into a domestic relationship with a married male, which may be a relationship 'in the nature of marriage'; and e) same sex (gay or lesbian) relationships, which are not recognized under the Domestic Violence Act. The court noted the modern marital-like arrangements in Indian society that parliament recognized in the Domestic Violence Act by referring to 'domestic relationships' but the court called on parliament to revise the legislation to define live-in relationships and the remedies available at their dissolution.

13 This case, among others, does not characterize additional opinions that follow the first, presumably majority, opinion.

Another issue that causes tensions between equality rights protections and customary practices is the practice of polygyny, where custom or legislation allows men to marry multiple wives. The research identified four cases addressing polygyny, which is often described as polygamy, and one reference to polyandry, when one woman marries multiple men.¹⁴ The cases are from African (Benin and South Africa) and Asian (Indonesia and Papua New Guinea) jurisdictions.

Benin's Constitution (1990) directly incorporates the African Charter on Human and Peoples' Rights (including its 34 articles related to human rights) and provides liberal standing and access to individuals and NGOs seeking to challenge legislation and any interference by the state or private individuals with the provision of those rights. In addition, immediately before the Constitution was adopted, the *Forces Vivantes* National Conference was held in Benin in February 1990 and is said to represent early efforts to implement the rights of women in the country (World Organization Against Torture 2004). The Association Des Femmes Juristes du Benin (AFJB) was created in January 1990, and is an example of a civil society group whose work seems to have been bolstered by these developments. For example, the AFJB has played a significant role in establishing women's rights in the country, relying on both constitutional protections and various international agreements ratified by Benin. Recognizing that ancestral customs and lack of knowledge of rights and duties often result in human rights violations, the AFJB has pushed for the publication of written laws and promoted the rights and duties of citizens, with a particular emphasis on the rights of women and children (World Organization Against Torture 2004).

In **Review of the Constitutionality of family legislation**, the Benin Constitutional Court assessed the constitutionality of family legislation (*Le Code des Personnes et de la Famille*) in a 2004 reference from the National Assembly.¹⁵ This legislation had been promulgated only after considerable delay and sustained advocacy by women's groups.

Boko Nadjo (Coordinator of Women in Law and Development in Africa, WILDAF, Benin) describes the initial law reform efforts, which began in 1995, and the way in which the recommendations were effectively shelved by the National Assembly until 2002, when sustained political pressure from women's advocacy groups, human rights networks, trade unions and the women's movement forced an engagement with the issues. In April 2002 they organized a large march on the National Assembly. The President of the National Assembly refused to meet with them, so they held a press conference to mobilize support. The Family Code was voted in in June 2002. Although an improvement, the new Code still contained provisions on polygamy and women giving up their name on marriage. It was these provisions that were the subject of constitutional challenge in the reference case. The Constitutional Court held that religious and cultural practices, including polygamy, are subject to constitutional scrutiny, including the right to equality (article 26). The constitutional guarantee of equality overrides family law legislation with respect to a number of legislative provisions, including article 74, which provides that men can be polygamous but not women. In addition, article 12 (1) of the law did not allow a wife to keep her maiden name. A series of related provisions in the legislation that implicitly recognized polygamy were also held to be unconstitutional. It is important to note the significance of strong advocacy leading to this decision, including by a wide range of actors from civil society and a prominent member of the National Assembly, the wife of a former president and prime minister, who also applied to the court in this case, requesting that the court find a number of other provisions unconstitutional. As a further demonstration of the strength of political movements for equality in Benin, advocacy groups were finally successful in 2004 in pushing for new legislation (*Le Code des Personnes et de la famille*, enacted 7 June 2004) in response to the court's ruling. The new code abolished polygamy, recognized the equality of spouses and provided for equal rights in inheritance and property, legislatively sidelining the customary law that was inconsistent with women's equality.¹⁶

14 Polygyny is generally provided for in customary law but not polyandry, so the use of the term polygamy is over-inclusive.

15 The researchers reviewed an English summary of the case but the full version of the original decision in French could not be located.

16 *Le Code des Personnes et de la Famille* (2004) eliminated the applicability of customary law in art. 1030: 'les coutumes cessent d'avoir force de loi en toutes matières régies par le ... code'.

In a 2005 decision by the National Court of Justice of Papua New Guinea, *Magiten v Beggie*, the plaintiff husband claimed to have married his first wife's sister and protested that this second wife married his brother. The plaintiff claims that the defendants' marriage, of his second wife and brother, violated custom (he alleged a serious breach of custom). The judgement reviewed marriage customs in the cultural context and applied a seven-step test to determine the validity, applicability and enforceability of a custom. Article 55 of the Constitution of Papua New Guinea provides for equality rights and Schedule 2 (2.1) recognizes custom as underlying law so long as it is not inconsistent with the Constitution, a statute or general principles of humanity. The Constitution begins with a list of National Goals and Directive Principles, which include a number of pronouncements related to equality. The National Court adopted a literal approach to interpretation of the Constitution and a formal equality approach when it found that customary law was discriminatory because it recognized polygyny but not polyandry. Ultimately, however, the court relied on another aspect of customary law and concluded that the husband had not paid a bride price in his second marriage; and furthermore that his first marriage was a statutory marriage under the Marriage Act. This statute does not permit polygyny and therefore the court ultimately found that the defendants had not breached custom because the plaintiff had not actually married the defendant, essentially annulling the 'second marriage'. The judgment relied on domestic precedent, particularly a case in which the judge declared that 'the Constitution is the modern culture' (p. 18). The court recognized that customary law evolves and therefore modern custom rather than ancient traditions are the source of custom, but appeared to find a solution that would please both parties and avoid any explicit declaration on the constitutionality of multiple marriages.

In the 2007 Indonesian case *Re M Insa*, the petitioner, Insa, wished to practice polygyny without interference from the state. Law no. 1 of 1974 on Marriage required men wishing to marry more than one wife to submit an application to a court in his locality (articles 3 and 4 of the Marriage Law); and for the applicant to demonstrate the consent of any other wife or wives and that the applicant

was able to guarantee fair treatment, among other things (article 5 of the Marriage Law). Insa petitioned the Constitutional Court for a judicial review, claiming that his decision to practice polygyny was part of his religious practice of Islam and that the Marriage Law contravened his constitutional right to practice his religion (articles 28 E and 29). The court did not apply constitutional provisions related to equality rights (articles 27, 28 D, H and I) in its analysis. Instead, it justified state regulation of polygyny in terms of women's rights established in the Qur'an and the teachings (*Sunnah*) of the Prophet. The court found that the state's duty did not violate the petitioner's constitutional rights as the Marriage Law only provides that polygyny must be practiced in accordance with each religion. In this case, Islam provides that it must be practiced with fair and equal treatment of all wives and their children. The court did not apply domestic precedent or international human rights instruments to aid its interpretation of the Constitution. The decision is an example of a positive result derived from an interpretation and application of Islamic principles.

The 2013 judgment of the South African Constitutional Court in *Mayelane v Ngwenyama* is important in terms of developing 'living' customary law and tools for interpreting customary law, as well as for prospectively recognizing women's equality rights in the context of polygynous customary marriages. The case centred on the interpretation of section 7 (6) of the Recognition of Customary Marriages Act. This section addresses proprietary interests in situations where the husband wishes to enter into a second customary marriage. The appellant and respondent were both wives of the deceased. Both widows attempted to register customary marriages *after* the demise of the deceased because the husband had failed to apply to a court to approve a written contract to regulate matrimonial property pursuant to section 7 (6) of the above-mentioned Act. The first wife claimed that the second marriage was null and void, as she had not given consent. However, the High Court found that the Act did not require consent. Three amici curiae (friends of the court) were admitted to help the Constitutional Court interpret customary law and practice: the Women's Legal Centre Trust, the Commission for Gender Equality and the Rural Women's Movement.

The judgement in *Mayelane v Ngwenyama* applied judicial reasoning techniques consistent with an equality rights approach, although the result could not satisfy both wives. The Constitutional Court undertook social context analysis, using equality as the central interpretative principle, explored the tensions between constitutional guarantees and provided interpretative tests related to customary law. In relation to the first element, the court considered both the current and the historical context in which 'group interests were framed in favour of men and often to the grave disadvantage of women and children' (citing *Gumede v President of Republic of South Africa and Others*, note 23 at para. 19). The court emphasized the centrality of section 9 of the Constitution (right to equality) and section 10 (right to dignity). The court concluded that the 'first wife's right to equality and human dignity [are not] compatible with allowing her husband to marry another woman without her consent' (para. 71). However, the rights of the second wife were less explored.

The text of the South African Constitution provides for purposive interpretation by the court when tensions arise between laws and the Constitution. Article 39 (2) states: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. The court examined the Recognition of Customary Marriages Act in relation to 'living customary law' and noted the purpose of the Act was to recognize but also transform customary marriages in order to achieve gender equality (also citing *Gumede v President of South Africa*). Drawing on submissions from the amici curiae, the Constitutional Court interpreted the customary law to be evolving in a way that is consistent with women's equality and constitutional guarantees. In this case, the court examined customary law and practices through new evidence presented by the amici curiae and developed the customary law to encompass the requirement for consent. The court also considered whether there was any explicit provision in the Recognition Act with respect to consent (finding none) and finally applied the Constitution to rule that the consent of the first wife was a necessary dignity- and equality-related component of a further customary marriage. Finding that there was no consultation with or no consent by the first

wife, the court declared the second customary marriage null and void. Recognizing that the decision would affect women already in polygynous marriages, the court ruled that the impact of the decision should be prospective rather than retrospective. Nonetheless, this argument does not seemingly assist the second wife in this case. The decision leaves open questions regarding the balancing and resolution of the conflicting rights of multiple women in polygynous relationships.

While *Mayelane v Ngwenyama* dealt with Xitsonga customary law, the decision clearly imposes consent requirements on other systems of customary law, or leaves open the risk of invalidity of subsequent marriages, even though polygyny is expressly allowed. Various secondary sources have criticised the decision as leading to uncertainty with respect to the potential unequal treatment of different wives in polygynous marriages, and the potential inequality between different wives under different customary traditions. For example, the Women's Legal Centre argued that the rights of all women must be considered, and the other two amici curiae argued for an adaptive approach to living custom (Spies 2015). As Kruuse and Sloth-Nielsen (2014, 1732) conclude: 'With regard to the consequences of *Mayelane v Ngwenyama* for equality, the resultant non-validity of the marriage of the second wife (whose husband failed to inform the first wife of his intention to marry) ironically makes the second wife dependent on the vagaries of male behaviour to determine her standing as under any formal system of patriarchy. This is an invidious position indeed'. The Recognition Act and the *Mayelane v Ngwenyama* decision invoke the same degree of state intervention and involvement of the first wife in subsequent polygynous marriages in South Africa as the Indonesia decision does.

Two cases, from the Republic of Korea (South Korea) and South Africa, dealing with the legal rules pertaining to adultery were included in this study, even though they discriminated against women, to demonstrate the evolution of legal cultures in relation to traditional patriarchal rules. In 2015, in the *Adultery Case*, the Constitutional Court of South Korea assessed the constitutionality of article 241 of the Criminal Code that imposed imprisonment as the punishment for adultery or fornication. The petitioners

were prosecuted under this provision and subsequently filed a motion for constitutional review of the article. The impugned provision read: '1. A married person who commits adultery shall be punished by imprisonment for not more than two years. The same shall apply to the other participant. 2. The crime in the preceding section shall be prosecuted only on the accusation of the victimized spouse. If the victimized spouse condones or pardons the adultery, an accusation can no longer be made'. The court found that the above-cited provision violated the petitioners' rights to sexual self-determination and privacy. The court concluded that criminal punishment is not an appropriate deterrent for adultery. The existence of social condemnation and recourse to divorce in the event of adultery are deterrents enough. The case gained significant attention internationally (Sang-Hun 2015; *The Guardian* 2015). According to these reports, the number of female accused had increased in the years before this case was decided, and it was suggested that the law had become a way of naming and shaming women. The fact that this provision was declared unconstitutional now meant that women have greater legal freedom and certainty in their marriages. However, in another 2015 case, the Supreme Court of South Korea effectively upheld the blaming of adulterous spouses by upholding a precedent that barred adulterous spouses, characterized as those responsible for the break-up of the marriage, from petitioning for divorce (Global Legal Monitor 2015).

In a 2015 case before the South African Constitutional Court, *DE v RH*, a non-adulterous husband (DE) brought an action invoking the 'law of delict' with respect to adultery against two individuals, his wife and her lover. The Supreme Court of Appeal had decided that there was no longer any action in torts for insult to self-esteem (*contumelia*) and/or loss of comfort and society (*consortium*). The Constitutional Court undertook a social context analysis of adultery, noting that the history of claims of adultery is 'deeply rooted in patriarchy' (para. 14), and then considered whether the tort should continue to exist. The court considered the role of the judiciary in the development of common law and how constitutional norms 'infuse public policy' (para. 17, citing *Paulsen and Another v Slip Knot*). After an extended discussion of South African cases and changing attitudes, and a review of

decisions and law from various jurisdictions related to adultery, the court considered the significance of marriage. In paragraph 45, the court cited international obligations with respect to the protection of marriage and the foundational role that marriage plays in the formation of the family unit. The court referred to the African Charter (art. 18), the Universal Declaration of Human Rights (UDHR), article 16 (1) and (3), and International Covenant on Civil and Political Rights (ICCPR), article 23(1) and (2); but did not see those rights as requiring states to strengthen an ailing marriage from adultery. The Constitutional Court upheld the decision of the Supreme Court of Appeal, concluding that although the common law must be interpreted subject to constitutional values and the constitutional right of the non-adulterous spouse to dignity, it does not overcome the constitutional rights of the other spouse and the third party to privacy, freedom of association and freedom and security of the person.

2.2.

Divorce

The six judicial decisions related to the dissolution of marriage raise a variety of issues. Custody issues and the rights of spouses living in different countries are addressed in a Tunisian (MENA) case and the rights of spouses in relation to the division of property in customary or statutory marriages are addressed in five African cases.

In a 2009 Tunisian case, *A.A. H. v BB. H.A.*, the husband appealed a decision by the lower court regarding child custody arrangements because he lived in Egypt and the mother wanted to remain in Tunisia. The lower court had awarded custody of the children to the mother and visitation rights to the father on Sundays and official and religious holidays. The father argued he would not be able to exercise his parental rights and further argued that his wife should go to the Egyptian courts for *khul'a*.¹⁷

¹⁷ *Khul'a* is the right of a wife to divorce her husband in Islam. In a situation, such as in this case, where the husband refuses to divorce his wife, in a *khul'a* arrangement the wife may waive maintenance payments and/or return the dowry in return for a divorce.

After finding jurisdiction, the court ruled that *khul'a* would not enable the wife to exercise her financial rights and, most importantly, the *khul'a* option contradicts Tunisian legal options, which are based on women's rights to dignity, equality between the sexes, protection of the privacy of family life, and respect for constitutional freedoms under the Tunisian Constitution of 1959 (articles 5, 6, 9 of the Constitution). The court also referenced art. 16 (1) (a) and (b) of CEDAW to justify its decision. The Court of Cassation confirmed the decision of the lower court by rejecting the husband's custody argument and concluding that the guiding principle in custody decisions is the child's best interests not the interests of either parent.

The following five appellate decisions relate to the division of property in situations of customary or statutory marriages in the African region. In the case of *Masusu v Masusu* the High Court of Botswana (at Lobatse) reviewed the decision of the Customary Court of Appeal (at Gaborone). The wife had sought a divorce based on claims of domestic violence before the village level customary authority and was awarded custody of minor children and a proportion of moveable property. The husband received the house as well as a proportion of other property. The wife appealed to the Customary Court, which then awarded the wife the matrimonial home. On appeal, the Customary Court of Appeal reverted to the village level decision, awarding the husband the home because of the rule in Tswana customary culture that retains property in the husband's clan. A woman marries *into* the man's clan, and the matrimonial homestead, even if outside of the clan's territory, reverts to the patrilineal clan's ward. The wife appealed to the High Court. The presiding judge found that the Customary Court of Appeal had erred by accepting new evidence introduced by the husband at appeal that the wife had had an extra-marital relationship, when at the trial the husband had admitted that the divorce application was due to his own conduct. Second, the High Court found that the Customary Court of Appeal had failed to recognize the supremacy of the Constitution and especially the right to equality and non-discrimination. It is important to note that the High Court rejected the reasoning of the Customary Court of Appeal in relation to the division of property, saying

the reasoning 'relegates the wife to some kind [of] worker without rights to that which she has worked for' (para. 18). Instead, the High Court recognized the wife's contribution to the matrimonial property, referencing national precedent in *Attorney General v Unity Dow* and the Constitution, to find that the proceeds from the sale of the matrimonial home must be shared equally.

In South Africa, in the case of *Gumede v President of South Africa et al.*, the Constitutional Court reviewed the constitutionality of codified Zulu custom in the KwaZulu and Natal Acts and section 7 (1) of the Recognition of Customary Marriages Act (Recognition Act). The codified customary law recognizes the male head of the family as the owner of all family property while section 7 of the Recognition Act provides for the division of communal property at the dissolution of a customary marriage contracted after passage of that legislation. Section 7 (1) of the Recognition Act provides that customary law governs marital property if the marriage was entered into prior to the Recognition Act: 'A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouse in an antenuptial contract which regulates the matrimonial property system of their marriage'. Section 7 (6) states: 'A husband in a customary marriage who wishes to enter into a further customary marriage with a woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriage'.

The wife, having married prior to 1998 when the Recognition Act came into force, argued that the above-cited laws unfairly discriminated on the basis of gender and race, and sought to confirm their invalidity before the Constitutional Court. The government, not the husband, resisted her claims. The Constitutional Court accepted the Women's Legal Centre Trust as *amicus curiae*.

The decision in *Gumede v President of South Africa et al.* applied social context analysis, the gender equality provision of the Constitution (s. 9 (3)), the pluralist context and the court's

role, and references from academics. Notably, the Constitutional Court was reluctant to address the issue of race discrimination (s. 5) and therefore multiple forms of discrimination were not addressed in its analysis.

In relation to social context analysis, the court reviewed the situation that led to the Recognition Act and the particular disadvantage of the wife in this case. The court acknowledged the historical context and the impetus behind the Recognition Act to 'remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary "unions"' (para. 16, citing three academics to support its observation). The court also noted previous decisions where women have been disadvantaged in customary law and went on to note that the wife was not in formal employment throughout the lengthy marriage because the husband 'did not permit her to work' (para. 7) and that she had few resources other than a government pension and occasional contributions from her children.

The court acknowledged the tensions between customary law and the Constitution in the first paragraph of its judgement:

At one level, the case underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage. At another level, the case poses intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law, which lays down a common normative platform.

The court's conclusion affirmed the prior court's decision that provisions in the three laws are inconsistent with gender equality (s. 9 (3) of the Constitution). The court ordered that all customary monogamous marriages, whatever the date of marriage, not yet terminated by death or divorce become marriages of community property.

The decision in *Gumede v President of South Africa et al.* recognized South Africa's international obligations under CEDAW, the

African Charter, the Protocol to the African Charter and the ICCPR, as referenced and built on by a series of previous constitutional decisions (see e.g. *Bhe*, a 2003 case discussed below) examining customary law and constitutional guarantees of gender equality.

The 2012 case of *Mensah G. v Mensah S.* was heard on appeal by the Supreme Court of Ghana. The husband (Stephen) and wife (Gladys) had married under customary law in 1987 and shortly afterwards converted this to a statutory marriage.¹⁸ The wife argued that the marriage had broken down due to the husband's relationship with another woman, whom he brought into one of the homes jointly acquired during their marriage. The Supreme Court enumerated the considerable property accumulated during the marriage, which the petitioner wife claimed should be divided equally. The court accepted the wife's position that property acquired during a marriage should be divided equally at its dissolution (at p. 21):

We are therefore of the considered view that the time has come for this court to institutionalise this principle of equality in the sharing of marital property by spouses, after divorce, of all property acquired during the subsistence of a marriage in appropriate cases. This is based on the constitutional provisions in article 22 (3) and 33 (5) of the Constitution of 1992, the principle of Jurisprudence of Equality and the need to follow, apply and improve our previous decisions in *Mensah v Mensah* and *Boafo v Boafo* ([2005-2006] SCGLR 705]) already referred to *supra*.

The strength of this decision was due to the courts consideration of the social context analysis, its historical review of case law, and the integration of substantive equality principles and international obligations.

Social context analysis was developed in two ways. First, the court assessed the wife's contribution to the businesses operated by the couple (pp. 3-6). Second, while undertaking a historical review of the case law, the judgement explained the development of

18 There is more than one *Mensah v Mensah* case reported in Ghana. The first names of the appellant and respondent are noted for the purpose of clarifying the specific case under discussion.

the 'substantial contribution principle', among other equality-related issues (pp. 10–18). In its review of case law, the court examined the historical disadvantage women have experienced during divorce and the division of property through the application of either customary or common law rules that privilege men. In turn, the court applied principles that, although not explicitly identified by the term 'substantive equality', led to equality in the result. The court stated:

Thus, even if this court had held that the petitioner had not made any substantial contributions to the acquisition of the matrimonial properties, it would still have come to the same conclusion that the petitioner is entitled to an equal share in the properties so acquired during the subsistence of the marriage. This is because this court recognises the valuable contributions made by her in the marriage like the performance of household chores referred to *supra*, and the maintenance of a congenial domestic environment for the respondent to operate and acquire properties. Besides, the constitutional provisions in article 22 (3) of the Constitution of 1992 must be construed to achieve the desired results which the framers of the Constitution intended.

The provisions of the Constitution of the Republic of Ghana, 1992 relevant to this case include article 22 (2), which directed that parliament 'as soon as possible' enact legislation regulating the property rights of spouses, and 22 (3), which states that spouses shall have equal access to property jointly acquired during marriage. The court interpreted article 33 (5) as reinforcing the guarantee and protection of all fundamental human rights, including women's property rights, economic and cultural rights and practices (p. 8). Article 33 (5) states: 'The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man'.

The court integrated international instruments into its equality analysis. For example, it referenced the 'Jurisprudence of Equality

Principle', defined by the 'International Association of Women Judges (...) as "the application of international human rights treaties and laws to national and local domestic cases alleging discrimination and violence against women"' (p. 24). The judgment then applied the UDHR (article 1) and CEDAW (articles 1 and 5). Article 1 of CEDAW defines discrimination against women and article 5 calls on states parties to take appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary 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 men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

The decision in *Mensah v Mensah* is part of a string of cases solidifying women's right to equitable distribution of property on the dissolution of marriage through fact-specific inquiry. However, some uncertainty remains about whether a finding of substantial contribution is still required to determine that the spouse enjoys an interest in the marital property (Evelyn 2013: 25–30).

The Ghanaian case of *Esseku v Inkoom et al.* is an appeal by the husband of a High Court decision that decided in favour of his wife. The couple was married for over 30 years under Akan customary law. The husband claimed that he had divorced his wife in 1995 in accordance with Muslim tradition and custom. However, the divorced couple and their five children continued to live in the matrimonial home, to which the wife built certain additions and made renovations in 1998. The husband sold the home in 2003 without the permission of the wife. (The person who purchased the home was the second defendant.) He forcibly ejected his wife and the children from the home without giving them any notice that the property had been sold. The wife then brought an action against the husband and the

person who bought the house. She claimed that the marriage had not been dissolved and she wanted her interest in the property recognized, an injunction to prevent the husband from disposing of the property, an order setting aside the sale of the house and damages for trespass. The husband, on the other hand, argued that the High Court erred when it declared the sale of the house null and void. He said that his wife had not proved that she had made financial contributions to the property in question. He also pointed out that the legal title of the matrimonial home had always been in his name, and that his wife had never registered any adverse interest in the property.

The husband and wife had married under Akan customary law and in 1995 the husband lodged a complaint against his wife at the Ahmadiyya Marriage Committee in the locality of Tema. The committee investigated his claim and granted the dissolution of marriage based on Muslim tradition and custom. However, under Akan customary law, both families (the wife's and the husband's) must meet in order to settle the dissolution of the marriage. If no agreement is reached, the marriage must be dissolved in accordance with Akan customary law.

In 2013 the Superior Court of Appeal decided that, under customary law, the marriage between the parties in question had not been dissolved because customary marriage must be dissolved in accordance with the custom under which the couple had been married. In other words, anyone who marries under customary law must dissolve the marriage in accordance with customary law. The court then assessed the wife's substantial contribution. It found that the wife had supported the family during the time that the husband had been laid off from his job, and that this was sufficient evidence to show that she had made a substantial contribution, which would have entitled her to a half share in the matrimonial home. In addition, the wife also built the additions to the house, an act that should also be seen as a substantial contribution to the matrimonial home. Because the additions were built without any objection from the husband, he was estopped from denying her contribution.¹⁹

¹⁹ The doctrine of estoppel prohibits a claimant from making arguments on an issue that is contrary to his or her previous positions.

The Superior Court of Appeal relied on the constitutional provision 22(3) that provides for equal access of the spouses to joint property. The court cited *Mensah G v Mensah S.* (discussed above) and agreed that even if it had found that the wife had made no substantial contribution, article 22 (3) of the Constitution requires that marital property must be distributed equally between the spouses in accordance to the principle of 'equity is equality' (p. 11).

Although the decision is progressive, it fails to address the fact that the Ghanaian government has not made it possible for Muslims to register their marriages under the Marriage Act (Evelyn 2013). Therefore, if the wife had been married only according to Muslim tradition, the court may have treated the marriage on a par with concubinage since religious marriages are not recognized in law. In that case, the wife would not have been entitled to protection from either the courts or customary law.²⁰ This is another example of a case in which the deemed nullity of the marriage might allow customary practices to escape scrutiny.

In the 2013 decision of the Supreme Court of Uganda on the case of *Rwabinumi v Bahimbisomwe*, the central issue was what constitutes joint property under the Marriage Act, and how it is to be divided on dissolution of the marriage. The Supreme Court found that the Court of Appeal and trial judge had erred in law but not in fact. The appellate court had confirmed the trial judge's award to the wife of half of the joint property. At the Court of Appeal, the opinion of the majority found that property becomes joint property at the time the marriage occurs, and that spouses have rights to equal shares of the joint property based on the Constitution of Uganda of 1995 (article 31 (1)) and verses from the Bible. The Court of Appeal referenced the Bible to aid its interpretation of joint property based on the fact that the husband and wife had married in a Christian ceremony pursuant to the Marriage Act. Article 31 (1) of the Constitution states: 'Men and women of age 18 years and above

²⁰ It is interesting to note that a broad coalition of women's organizations in Ghana prepared 'The Women's Manifesto for Ghana' (The Coalition on the Women's Manifesto for Ghana 2004). The manifesto provides a guide for women and to state institutions on the concerns related to women's rights, including discriminatory cultural practices and the systemic issues that undermine constitutional guarantees.

have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution’.

The Supreme Court disagreed with the Court of Appeal referencing the parties’ religious vows and the Bible, given that ‘Uganda is a secular state, which is not governed by Canon (*sic*) law, but by the Constitution, statutory law, case law as developed from common law and doctrines of equity; principles of justice, equity and good conscience’ (p. 19). Unfortunately, the Supreme Court’s decision is not infused with an equality analysis. Instead, the court re-examined how to assess substantial contribution in order to determine joint property in marriage. The Supreme Court affirmed that property acquired prior to marriage is excluded from joint property, even though the couple lived in a house acquired by the husband prior to marriage. Regarding the calculation of a contributing spouse’s share in the joint property, the Supreme Court found that the contribution does not have to be monetary or direct and that the share does not have to be restricted to 50 per cent. The Supreme Court disagreed that article 31 (1) requires equal division of property irrespective of the direct or indirect contribution of a spouse to the contested property. Nonetheless, the court affirmed the division of property made by the trial judge and then urged parliament to enact legislation to clearly define what constitutes matrimonial property. Pending that legislation, the court determined that the determination of marital property and its division should be based on the facts of each case, rather than an assumption of equal division.

2.3. Inheritance

Ten cases deal with discrimination against daughters according to inheritance rules derived from customary law or presumed Islamic principles. Seven cases are from three African countries (Botswana, Kenya and South Africa) where customary law is commonly applied, especially in matters related to the family; two cases are from the Pacific Island of Vanuatu; and one decision is from the MENA region (Tunisia).

The Tunisian case, *H M Q and S M S S Q (wife of S) v Th S Sh Q and D A R Q*, is the only inheritance decision reviewed that relates to the religious beliefs of the parties. The wife and two brothers of a deceased man brought a claim against the two daughters of the deceased, stating that they had both married non-Muslim men and were therefore not entitled to inherit their father’s estate. The Court of Cassation found that marriage to a non-Muslim does not render the person non-Muslim and, furthermore, that such a marriage is not a criterion that prevents inheritance in Islam. The judgment relied on two constitutional provisions of the 1959 Constitution (as amended to 2008), which was in effect until the events of the Arab Spring brought about a new constitution. The court referenced article 6, that all citizens shall have the same rights and duties and shall be equal before the law, and article 32, which gave prevalence to international treaties, ratified by the President and approved by the Chamber of Deputies, over domestic law. The court supported its decision with two international instruments: CEDAW, article 16 (1) (b), which provides for men and women to have the same rights to choose a spouse and enter into marriage freely; and article 26 of the ICCPR, which provides for equality and equal protection of the law, and prohibits discrimination based on a number of grounds, including sex and religion. It is one of the few cases related to personal status law that has reached a constitutional court in the region (Bourouba 2016b). Tunisia withdrew all of its reservations to CEDAW in 2014 (Human Rights Watch 2014).

In two land disputes in Vanuatu extended families contested the inheritance rights of women in customary law. Article 95 (3) of the Constitution of Vanuatu, 1980 recognizes customary law as having effect as part of the law of Vanuatu, and customary land ownership and land transfer are addressed in articles 73 and 74, respectively. Article 73 declares that all land in Vanuatu belongs to indigenous customary owners and their descendants, while article 74 states that rules of custom will be the basis for land ownership and land use. The facts at issue in both cases relate to women’s right to inherit land in customary law. According to custom, land is transferred or inherited along patrilineal lines. Matrilineal descendants can only claim land when there are no surviving male heirs. The judgements were heard, one before the Island Court of Malekula and the other before the Supreme

Court, on appeal from the Island Court. The Island Court Act, in section 10, provides that 'customary law will be administered so far as the same is not in conflict with any written law'.

In the 2008 decision by the Island Court of Malekula on *Meltenoven v Meltesaen*, the judge referenced article 5 of the Constitution, which sets out fundamental rights including the right to equal treatment under the law, and article 2 (e) of CEDAW, which obliges the state to 'take all appropriate measures to eliminate discrimination against women...'. Importantly, the judge did not reference article 2 (f) of CEDAW, which is relevant to the facts of the case. Article 2 (f) provides that the state must 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. In fact, despite references to the equality provisions in the Constitution and CEDAW, and article 7 of the Constitution which calls on individuals to 'respect and act in the spirit of the Constitution', the judge decided on the facts of the case that there were no surviving male heirs and that the woman, as the daughter of the deceased chief, was the rightful owner under customary law. The judge did not directly make a declaration on the constitutionality of customary land ownership rules.

In the second Vanuatu case considered here, *Lapenmal v Awop*, the Supreme Court also addressed matrilineal versus patrilineal land ownership. One claimant argued that there were no surviving males in the family tree and that she therefore had the right to inherit the land. Another claimant argued that women cannot own land. The Island Court decision found the woman (the respondent on appeal) to be the custom owner. The Supreme Court referenced article 2 (e) and (f) of CEDAW; and went on to interpret articles 73 and 74 in the light of article 5 of the Constitution, citing the precedent setting case of *Noel v Toto* of 1995. In the end, the court did not need to make a pointed declaration in the manner of *Noel v Toto*. Instead, the judge supported the finding of the Island Court that customary law provides an exceptional right of succession to surviving daughters in the absence of surviving sons (para. 39). The interpretation of customary law through the lens of CEDAW and constitutional provisions has increased since 1995, the year Vanuatu ratified CEDAW and the Supreme Court decided the *Noel v*

Toto case. That decision found that customary land ownership remained the source of law in Vanuatu, subject to the constitutional limitation (article 5) that the customary rules are not discriminatory against women.

The remaining African cases dealing with inheritance address similar tensions between constitutional guarantees of equality and customary law. The courts applied various interpretative approaches in order to overcome the apparent limitations of customary law.

In the Botswana case of *Mmusi v Ramantele*, Ngwaketse customary law denied female heirs the right to inherit the family residence in favour of the first-born son to the exclusion of all other relatives, male or female. The High Court found that the custom discriminated against the female claimant in violation of the Constitution. The Court of Appeal recognized gender equality principles in article 3 (a) of the Constitution but avoided a constitutional interpretation. Instead, the appellate court applied principles of equity and natural justice to find that the customary rule that discriminates based on gender 'would not be in accordance with humanity, morality or natural justice' or 'with the principles of justice, equity and good conscience' (para. 35). The judge affirmed the 'evolutionary nature' and 'flexibility' of customary law (ibid.). The decision has been criticized as somewhat disappointing since it ultimately referred the matter back to the family members to resolve and arguably did not give sufficient guidance to the Customary Courts. (The applicant was 80 years old, and the matter had already been in three levels of courts over 7 years, including the Customary Courts, the High Court and finally the Court of Appeal.) Nor does the decision explicitly affirm the changing recognition of women's contributions (Rautenbach 2016; Fombad 2014 a).

In three Kenyan cases—*Rono v Rono*; *Re the Estate of Andrew Manunzyu Musyoka (Deceased)*; and *Re the Estate of Lerionka Ole Ntutu (Deceased)*—the facts are similar: a man dies leaving more than one wife and numerous children and in the three different local customary law regimes (Keiyo, Kamba and Masai) daughters are prohibited from inheriting. The main issues relate to gender inequality in customary law and whether customary law or the Succession Act should apply. Article 29 of the Succession Act does not discriminate between married and unmarried

children. Nor does it discriminate between daughters and sons. In particular, it defines a 'dependant' as 'the children of the deceased', and therefore does not make a distinction between children of either sex. However, article 32 of the Succession Act excludes agricultural land, and the crops and livestock on that land, to which customary law should apply.

Article 82 (3) of the 1963 Constitution provided for equality in a formal sense and non-discrimination in relation to race, tribe, place of origin or residence or other local connexion, political opinion, creed or sex.²¹ However, article 82 (4) allows discriminatory laws to stand in certain situations:

(a) with respect to persons who are not citizens of Kenya; (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (c) for the application in the case of members of a particular race or tribe of customary law ...; or (d) whereby persons of a description mentioned in subsection (3) may be subjected to restrictions, privileges or advantages [as is] ... reasonably justifiable in a democratic society.

In the 2005 case of *Rono v Rono* the deceased left two wives and nine children (six daughters and three sons). The second widow, who had no sons, challenged the division of the estate. The property had been divided so that the sons received a larger share of the inheritance, based on the belief that the daughters would marry and leave to live in their husband's home. Furthermore, according to Keiyo customary law, female daughters have no right to inherit from their father's estate. The High Court applied customary law. The court agreed that the female children would have an unfair advantage because they would enjoy the property of their future husbands, but adjusted the division of property to increase the share of the second widow. However, the appellant argued that the Succession Act should apply.

The Court of Appeal surveyed other laws and provisions in an effort to balance customary law and gender equality. Customary law is applicable in Kenya, according to the

21 These three cases predate the 2010 Constitution of Kenya.

Judicature Act, section 3(2) '... [where it] is not repugnant to justice and morality or inconsistent with any written law...'. Article 82(1) of the Constitution of Kenya, 1963 (as amended to 2008) prohibited any law that is discriminatory in itself or in effect; but this needs to be considered in relation to article 82(4) which allowed for discriminatory laws when they deal with matters of family or personal law or members of a tribe applying customary law.²²

The Court of Appeal then turned its attention to international human rights law to determine whether that could clarify the inconsistencies. The court recognized that there have been many debates in Kenya regarding the application of international law to the domestic context. Kenya has generally subscribed to the common law view that international law becomes part of the domestic law only when it has been specifically incorporated. However, the Court of Appeal ultimately concluded that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. The court invoked Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms to support this view.²³ The Court of Appeal proceeded to review not only CEDAW, but also various other human rights treaties, including the UDHR, the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter of Human and Peoples' Rights. The court found that

22 It is important to note that the Constitution of Kenya, 2010 provides broader protection against discrimination. Article 27 specifies culture as a prohibited ground for discrimination: '4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth'. Article 60 (1) states that 'Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles....f. elimination of gender discrimination in law, customs and practices related to land and property in land'.

23 Principle 7 of the Bangalore Principles states that: 'It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law'.

the Succession Act, rather than customary law, should apply. The majority decision divided the deceased's property among the two wives and the nine children, providing equal amounts between the wives and lesser but equal amounts of land among the nine children, regardless of gender, but without making any direct declaration on equality and non-discrimination. A dissenting judge found that the Succession Act (s. 40) provided that in polygamous families the property should be divided according to the number of children in each unit, without distinction because of sex, with each wife receiving the same amount as a child.

The other two Kenyan cases follow *Rono v Rono* in terms of the application of international human rights treaties. In the 2005 case, *Re the Estate of Andrew Manunzyu Musyoka (Deceased)*, the judge reviewed domestic and international law and addressed discrimination based on sex more directly: 'I do find that the Kamba customary law is discriminatory in so far as it seeks to deny PW1 her right to her father's estate. That law is repugnant to justice and good morals and would not be applicable in this case' (p. 8). The court instead applied the Succession Act, given that section 40 of the legislation does not discriminate between female and male children. In the 2008 case, *Re the Estate of Lerionka Ole Ntutu (Deceased)*, the court was still more forthright and purposive in its interpretation of article 82 (4) of the 1963 Constitution:

Thus in my opinion, the provision of Section 82(4) (b) of the Constitution was not and cannot have been made so as to deprive any person of their social or legal right only on the basis of the sex. Finding otherwise would be derogatory to human dignity and equality amongst sex universally applied (*sic*). I shall add that taking the view otherwise shall definitely create imbalance and absurd situation. I shall, without any reservation, find that even if provisions of Section 32 [of the Succession Act] do apply to the Uasin Gishu area and even if Masai customary law would be applicable to the estate, the customary law which shall abrogate the right of daughters to inherit the estate of a father cannot be applicable as it shall be repugnant to justice and morality. (pp. 8–9)

These three Kenyan cases provide precedents for gender equality in cases where customary

law would have denied daughters the right to inherit. The decisions have also been recognized as an important shift in strengthening judicial application of international law, in contrast to what has been characterized as an indifferent approach by the Kenyan courts to international law (Orago 2013). This indifference was apparently justified by the Judicature Act, which does not enumerate international law as a source of law in Kenya's domestic legal system. The Constitution of Kenya of 2010, however, explicitly recognizes international law in article 2 (5) and (6).

Three South African cases were decided together by the Constitutional Court in 2004 as they each dealt with intestate succession in the context of customary law (also referred to as indigenous law in the judgment) and constitutional guarantees. The unified decision (*Bhe*) deals with equality and non-discrimination, the status of customary law, the constitutionality of the male primogeniture rule and the legal position of extra-marital children in the context of customary law in the following cases:

- *Bhe and Others v Magistrate Khayelitsha and Others*: The petitioner sought to overturn the customary law practice that prevented minor daughters from inheriting from their father's intestate estate based on the customary rule of male primogeniture.²⁴
- *Shibi v Sithole and Others*: The petitioner sought to overturn the customary law rule of male primogeniture, which prevented the sister of a deceased brother from inheriting under intestacy.
- *South African Human Rights Commission & Women's Legal Centre Trust v President of the Republic of South Africa, Minister of Justice and Constitutional Development*: The Human Rights Commission made an application to invalidate article 23 of the Constitution Act (regarding application of customary law) as infringing other rights such as equality (s. 9), human dignity (s. 10), the rights of children (s. 28) for

24 In the Botswana decision of *Mmusi v Ramantele*, the High Court had accepted the petitioner's argument that the customary law rule should not be termed 'male primogeniture' as that principle has its roots in European feudalism. The Court of Appeal in that case noted that the result was the same in that daughters and other children were prevented from inheriting property.

all women and children prevented from inheriting by reason of legislative provisions and/or the customary rule of male primogeniture.

The Constitutional Court found section 23 of the Black Administration Act, and connected regulations which established a separate regime for intestacy for the estates of black people, to be unconstitutional due to its inconsistency with the rights to equality and human dignity. The court also found the principle of male primogeniture as applied to intestacy to be unconstitutional as it infringed the rights to dignity and equality, and the rights of children, and therefore overruled the principle. The court took an expansive approach (as urged by the application by the South African Human Rights Commission & Women's Legal Centre Trust) to consider the implications for vulnerable children, including all girl children and extra-marital boy children.

To reach this decision the court needed to interpret and balance a number of constitutionally protected rights, including the rights to human dignity (s. 10), equality (s. 9) in relation to gender and birth, and to cultural diversity (s. 30 and 31). The Constitution of South Africa recognizes the validity of customary law and traditional leaders (Chapter 12 of the Constitution). For example, section 211(3) states that: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. The court noted that customary law was to be accommodated, not merely tolerated. The analysis then turned to other constitutional guarantees related to cultural diversity and the need to interpret customary law through the spirit and objectives of the Bill of Rights (s. 39 (2)).

After finding section 23 of the Black Administration Act unconstitutional through the purposive interpretation called for in section 39 (2), the court then turned to an examination of customary law and the changing context. Recognizing the tension between written customary law and the dynamism and flexibility of customary law, the court concluded that the principle of male primogeniture violates the right of women to human dignity and to equality (at paras 91–92):

It is a form of discrimination that entrenches past patterns of

disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under the constitutional order....[The implication] that women are not fit or competent to own and administer property ... subject[s] these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender.

This unified judgment is notable as strategic public interest litigation. The Women's Legal Centre Trust was an applicant in both *Bhe* and the case with the South Africa Human Rights Commission. In addition, the court accepted the Gender Equality Commission as *amicus curiae*. The case is identified as one in a series of cases that promotes a dynamic approach to the interpretation of customary law. Thandabantu Nhlapo (2014) describes the case as 'easily the most celebrated' (p. 11) of a cluster of cases leading to *Shilubana and Others v Nwamitwa* (reviewed below in women's access to public life), *Gumede v President of South Africa et al.* and *Mayelane v Ngwenyama*, all of which contributed to an elaboration of approaches to customary law and the ascertainment of customary law.

2.4.

Summary observations related to family jurisprudence

Constitutional provisions in family law cases

The right to equality and non-discrimination was, naturally, the most frequently cited constitutional right in the family law cases reviewed. In addition, the constitutional rights cited were the right to dignity in six cases: *Mifumi* (Uganda), *Mayelane and DE v RH* (South Africa), *AAH v BBHA* (Tunisia), *Re Estate of Lerionka Ole Ntutu (Deceased)* (Kenya) and *Bhe* (South Africa); the right to privacy of the family in *AAH v BBHA* and the Tunisian custody case; children's rights in *Bhe*; the rights to culture in *Mifumi* and cultural diversity in *Bhe*; the right to privacy of the individual in the adultery cases from South Korea and South Africa; spousal property rights in *Mensah* (Ghana),

equal rights at marriage, during marriage and on its dissolution in *Mifumi* and in *Rwabinumi v Bahimbisomwe* (Uganda); and the right to protection from inhuman treatment in *Mifumi*.

In the family cases reviewed affirmative action (special or different treatment) provisions to protect disadvantaged groups, including women, were not applied by the courts. Two types of constitutional provisions supported the resolution of tensions between customs and protected rights. First, provisions that call for consistency between custom and constitutional rights aid the courts in resolving tensions. For example, the Constitution of Uganda, in article 32 (2), states that: 'Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status, are prohibited by this Constitution'. This provision was applied by the Supreme Court of Uganda to declare the refund of a bride price unconstitutional (*Mifumi*). Similar clauses that recognize custom and its application by courts but subject it to the constitutional rights were referenced by the National Court of Papua New Guinea (*Magiten v Beggie*) and the South African Constitutional Court (*Bhe*).

Second, some constitutions provide guidance to the courts on how to interpret rights where tensions exist. For example, section 39 (2) of the Constitution of South Africa requires the courts to use a purposive interpretation: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

Finally, a limited number of cases referenced constitutional provisions that incorporate international law into domestic law. The 2010 Constitution of Kenya explicitly recognizes international law as a source of law. However, the Court of Appeal in *Rono* (decided in 2005 under the previous constitution) applied international customary and treaty law in the absence of explicit incorporation of international law. The 2009 Tunisian inheritance decision (*Z.B., H.M.Q and S.M.S.S.Q. (wife of S) v. Th.S.Sh.Q and D.A.R.Q.*) referenced article 32 of the 1959 Constitution, which gave precedence to international treaties if ratified by the President and legislature. Article 20 of the 2014 Constitution of Tunisia recognizes

universal human rights in the preamble, and the supremacy of international law over national law but not the Constitution.

Application of CEDAW and other international human rights treaties

CEDAW was referenced generally or its specific provisions (1, 2 (e) and (f), 5, and/or 16 (1)) were applied in ten (43 per cent) of the 23 cases: *Mifumi* (in the second or concurring opinion), Uganda; two Tunisian decisions (on child custody and inheritance); *Mensah* (Ghana); two Vanuatu inheritance cases (*Meltenoven* and *Lapenmal*); *Gumede* (South Africa); and *Rono, Estate of Andrew Manunzyu Musyoka*, and *Estate of Lerionka Ole Ntutu* (the inheritance cases from Kenya). Six of the ten cases dealt with inheritance in relation to either customary law (five cases) or religious beliefs (one case).

Other international human rights treaties, such as the UDHR, the ICCPR, the ICECSR and the African Charter, were referenced in seven decisions: *DE v RH* (South Africa); *Mensah* (Ghana); *Rono, Estate of Andrew Manunzyu Musyoka* and *Estate of Lerionka Ole Ntutu* (Kenya); *Gumede* (South Africa); and the Tunisian inheritance decision.

There is huge potential for international treaties to fill legislative gaps and address contradictions between domestic legislation and customary law. This was especially obvious in the Kenyan inheritance cases, but will depend to some extent on how that potential is shaped or reinforced by the Constitution.

Innovative approaches to judicial reasoning and strategic public interest litigation

Certain approaches to judicial reasoning supported advances in gender equality in family cases. Detailed social context analysis was used in four of the judgements examined to situate women in the historical and current social context of countries or localities. This occurred in three South African decisions (*Gumede*, *DE v HR* and *Mayelane*) and one Ghanaian decision (*Mensah*).

Interpretation and discussion to balance competing rights is another important approach to resolving tensions. In *Bhe*, the Constitutional Court analysed and balanced the rights to equality, dignity and cultural diversity. In *Rono*, the Court of Appeal in Kenya interpreted custom and gender equality to resolve these tensions.

In three South African cases, the courts appointed or admitted women's advocacy organizations or other interested groups as interveners or amici curiae (in *Gumede*, *Mayelane* and *Bhe*). One successful element of these cases, the ability of a 'friend of the court' or an intervener to influence the judges' decisions, was apparent in two judicial decisions. In one of the South African decisions (*Gumede*) the Constitutional Court explicitly adopted some of the arguments of the *amicus curiae*. In another (*Bhe*), the arguments of the interveners (the Women's Legal Centre Trust and the South African Commission) also prevailed. Purposive interpretation was applied to support equality objectives in three cases: two South Africa Constitutional Court decisions (*Bhe* and *Mayelane*) and the High Court of Kenya decision in *Re Estate of Lerionka Ole Ntutu*. National and/or extra-national case law or precedent were used in five decisions to support an interpretation of the claims in favour of gender equality (*Mensah*, *Rwabinumi*, *Masusu*, *Magiten* and *Lapenmal*).

It is not always apparent whether a party to a case has been supported by an organization and thus whether the case might be considered strategic or public interest litigation. However, at times, the participation of advocacy organizations as interveners or amici curiae makes that connection clear. Two cases in this sub-topic appeared to have been spearheaded by organizations, according to the decision or the discussion in secondary literature (*Mifumi*, Uganda, and the adultery case in South Korea). In the case of *Mifumi*, the non-governmental organization that launched the bride price litigation was partially successful in influencing the court in relation to the bride price refund, but lacked sufficient affidavit evidence of the negative impact of the bride price custom to justify an outright ban, according to the Ugandan Supreme Court.

Trends in the resolution of tensions

On one particular issue in this sub-theme, dissolution of marriage, there is a trend towards the equal division of matrimonial property, involving an analysis of contributions that includes indirect and non-monetary contributions, although a 50:50 division is not automatic in all countries. Judicial assessment of spousal contribution continues to be required pending definitive legislation in countries such as Uganda and perhaps Ghana.

It is relevant to note that the divorce cases examined were from African/North African countries and, with one exception (Tunisia), dealt with the division of property.

Another possible trend, given the limited sample of ten cases, is the consistent use of constitutional provisions (or natural justice in the case of *Mmusi v Ramantele*, Botswana) to overrule discriminatory customary or religious practices to ensure equality or equity for women, girls and children born outside of marriage in inheritance cases in sub-Saharan Africa (seven cases), the Asia-Pacific region (two cases) and North Africa (1 case).

Patterns in the resolution of tensions

Some patterns were identified in how the courts resolved tensions in the small sample of family law cases considered in this study. First, a number of decisions recognized that law (either customary or state law) evolves in order to implement equality rights and respond to changing societal and constitutional values, including the commitment to equality.

African courts referred to customary law as 'living law' in relation to a variety of issues' such as inheritance (*Mmusi v Ramantele*, Botswana; *Bhe v Magistrate Khayelitsha*, South Africa) and the division of matrimonial property (*Mayelane v Ngwenyama* and *Gumede v President of South Africa*, South Africa).

On statutory or common law, the courts recognized the need to update legal principles to ensure consistency with equality between men and women, among other rights. For example, the two adultery cases rejected traditional patriarchal rules that criminalized such conduct (in South Korea) and invaded an individual's right to privacy or freedom of association (*DE v RH*, South Africa,). In the case of *Sarma*, the court noted the changing types of domestic relationships in modern Indian society that should be recognized and defined in legislation.

Second, courts resolved tensions in a manner that strengthened women's rights, but how and the degree to which the courts protected women in relation to customary, religious or traditional rules or practices varied somewhat. Nonetheless, certain patterns emerged.

In the four cases related to polygyny the courts attempted to protect women, albeit by applying distinct approaches. The Benin Constitutional

Court banned the practice in its review of family legislation based on constitutional provisions, and specifically the commitment to equality. In the Indonesian case (*Re M Insa*) the Constitutional Court applied Islamic principles along with constitutional provisions to reject the husband's claim that the legislative requirement to seek a court's permission to enter subsequent marriages interfered with his religious practices. The Indonesian court affirmed that wives and children from different marriages should be treated fairly and equally. The South African Constitutional Court attempted to protect first wives in the case of *Mayelane v Ngwenyama*, even though subsequent wives would not enjoy the same protection.

In another example of a court interpretation protecting women, the Tunisian Court of Cassation rejected a husband's argument that his wife should use an Islamic divorce practice (*khul'a*) that would result in her having limited or no financial support for the child from the marriage.

Third, patterns emerged among the family law issues related to the extent to which courts would explicitly declare a custom or traditional patriarchal rule unconstitutional. For example, the Benin constitutional reference case is an example of a court declaring an outright ban on a customary practice (polygyny) for infringing the gender equality provisions of the constitution, even though legislators had sought to protect the custom.

Other decisions in the limited sample avoided banning customs. For example, in *Mifumi* the majority decision avoided dealing with some negative aspects of bride price in Uganda. The courts dealing with customary property inheritance in Vanuatu avoided declaring patrilineal ownership unconstitutional and found in favour of the woman by using an exception in customary law itself. In *Mayelane v Ngwenyama*, the South African Constitutional Court did not find polygyny discriminatory, but sought to moderate the custom in a way that was 'consistent' with gender equality, which is obviously quite difficult to do. There was a certain deference to custom in these cases.

Areas for further research

The cases reviewed revealed three gaps in the pluralistic contexts in which multiple legal norms are operating. Despite the constitutional recognition of gender equality, their application and interpretation mean that equality guarantees do not appear to have been fully applied by some customary leaders or courts, at first instance or appeal. This was noted in nine of the ten inheritance cases where women and girls were discriminated against by the application of custom (*Meltenoven and Lapenmal*, Vanuatu; *Mmusi*, Botswana; *Rono, Estate of Andrew Manunzyu Musyoka* and *Estate of Lerionka Ole Ntutu*, Kenya; and the three cases in the *Bhe* unified decision, South Africa).

The courts did not always provide sufficient direction to customary authorities, and therefore gaps in the protection of some women remain in complex situations. For example, in cases of polygyny, the rights of first wives were protected but the rights of subsequent wives were not clarified. Polygyny in South Africa was modified through decisions but the first wife's rights seem to trump the rights of subsequent wives. This gap was noted in *Gumede v President of South Africa*.

In addition, there was differentiation in how specific marriages were recognized and treated, which arguably allowed for what amounts to discrimination on the basis of religion. In the Ghanaian case, *Esseku v Inkoom*, one academic noted that Muslim (or any religious) marriages are not legally recognized and therefore differently situated women might lack the rights accorded to women married under customary marriage practices or other forms of marriage (Evelyn 2013).

3

ANALYSIS OF CONSTITUTIONAL JURISPRUDENCE: GENDER-BASED VIOLENCE

The family law decisions studied above centred on constitutional provisions with respect to equality rights and non-discrimination in an institution historically characterized as private and less subject to state intervention. The gender-based violence (GBV) cases reviewed in this section are distinct from the family related jurisprudence because the cases are of a criminal nature and thus clearly in the public sphere; and because the constitutional provisions invoked often relate to human dignity, security of the person and the right not to be subject to cruel and inhuman treatment, and not always to gender equality. However, many of the issues addressed under this theme, particularly domestic violence, have previously been deemed to be in the private sphere and outside of state responsibility.

3.1.

Child marriage

While the two appellate-level decisions related to child marriage analysed in this study are from Nepal and Zimbabwe, this is not an indication that the practice of child marriage is limited to Asia and Africa. The Inter-American Commission on Women marked the International Day for the Elimination of Violence against Women in November 2016 by noting that 29 per cent of girls in the Americas are married before they are 18 years of age (citing UNICEF 2014). In the MENA region the figure is somewhat lower—18 per cent of girls are married before the age of 18 (Girls Not Brides 2016, citing UNICEF).

In the Nepal case from 2005, *Sapana Pardhan Malla on behalf of the Forum on Women, Law and Development et al. v Prime Minister et al.*, the Supreme Court Special Bench held that the government was taking insufficient action

on child marriage. The Forum on Women, Law and Development (a rights advocacy group) claimed that the Eleventh Amendment to the National Code, 1963 'brought about equality in regard to the marriageable age of men and women' (p. 37). Section 2 of the Chapter on Marriage in the National Code stipulates that 'no marriage can be entered unless the age of man and woman is 18 years if the guardian has given consent and 20 years if consent of the guardian is not forthcoming and any marriage entered in contravention of that provision shall be punishable' (ibid.). The petitioner claimed that child marriage was still rampant and that section 4 (3) of the Marriage Registration Act, 1971 states that the age of marriage is 22 for males and 18 years for females. The petitioners claimed that the laws were inconsistent and discriminatory on

the basis of sex. It is important to note that the petitioners did not submit evidence of specific harm caused by child marriage to individual girls or women.

Towards the end of the judgement the Supreme Court undertook a brief social context analysis by referencing the disadvantaged situation of girls and women with regard to low literacy rates, widespread discrimination and the detrimental effect of early childbearing on women under 20 years of age (p. 43, citing a UNICEF report). The court then cited national census statistics on age at marriage for the categories 10–14 years of age and 15–49 years of age to demonstrate that despite a legal ban on child marriage, the practice was continuing (p. 45).

While the petitioners relied on article 11 (right to equality) of the 1990 Constitution and international instruments for their arguments, the court did not apply an equality rights analysis of any kind.²⁵ Instead, the court relied on article 1 of the 1990 Constitution, which stated that a law is invalid if it is inconsistent with the Constitution, and article 131, which stated that: 'All laws in force at the commencement of this Constitution shall remain in operation until repealed or amended, provided that laws inconsistent with this Constitution shall, to the extent of inconsistency, ipso-facto cease to operate one year after the commencement of this Constitution'. Because the petitioner did not provide evidence of an individual adversely affected by section 4(3) of the Marriage Act, the court held that article 131 did not apply. However, it concludes that section 4(3) of the Marriage Registration Act 'appears to be somewhat different in the context of men and women' (p. 43). Finally, in relation to the state's obligation to effectively punish child marriage, the court did make a strong pronouncement (p. 45):

It appears from the above-mentioned statistics that even though the national legal system has eradicated child marriage it still continues to remain in practice. Mere enactment of law cannot impart the correct meaning until and unless it is subjected to

effective implementation. Child marriage has been considered to be a serious offence and, therefore, placed (in) Annex 1 to the *State Cases Act*. Although the respondents have contended that the state is serious about this issue, it cannot be agreed that the law has been implemented effectively in this regard.

The effect of this decision appears to be in law only rather than in practice. One advocacy organization (Girls Not Brides) notes on its Nepal overview that the legal age of marriage in Nepal is 20 years of age for both sexes. However, a recent Human Rights Watch report (Barr 2016) criticizes the government for failing to take steps to end child marriage. The report states: 'Thirty-seven percent of girls in Nepal marry before age 18 and 10 percent are married by age 15, in spite of the fact that the minimum age of marriage under Nepali law is 20 years of age'.

Another public interest case supported by a variety of women's organizations and lawyers' associations, *Loveness Mudzuru and Ruvimbo Tsopodzwa v Minister of Justice, Legal and Parliamentary Affairs; Minister of Women's Affairs, Gender and Community Development; and Attorney General of Zimbabwe*, resulted in a more robust decision on child marriage by the Constitutional Court of Zimbabwe. In this case the petitioners were two women of 18 and 19 years old who had become pregnant and left school to live with their partners at the boys' parents' homes when they were 16 years of age. The petitioners claimed that the Marriage Act and the Customary Marriages Act were unconstitutional because, while the Constitution sets the age of marriage at 18, the Marriage Act allows girls to marry at 16 and the Customary Marriages Act does not provide for a minimum age for marriage. The respondents challenged the petitioners' standing pursuant to article 85 (1) of the Constitution and further denied that the age of marriage was 18.

The Constitutional Court applied a range of the interpretative approaches assessed in this study, undertook an exhaustive review of international instruments and referred to case precedents from other common law jurisdictions. Prior to assessing the issues, the court set out the provisions of the legislation and the Constitution. Article 78 (1) of the Constitution accords individuals over the age of 18 the right to start a family, while article 81(1) protects the rights of children and

25 Nepal reformed its Constitution in 2015. This case references the Constitution of 1990, in effect when this case was decided. Nepal had an interim Constitution from 2007 until the 2015 Constitution came into effect.

defines children as boys and girls under 18 years of age. Section 22 (1) of the Marriage Act, which predates the 2013 Constitution, states that a girl may marry at 16 years of age with the consent of her legal guardian(s).

On the first question, *locus standi*, the government argued that the petitioners' interests were not adversely affected and that they did not have standing before the Constitutional Court. Article 85 allows individuals whose rights have been infringed to approach the court for relief. The petitioners relied on 85 (1) (a): 'any person acting in their own interests;' and (d) 'any person acting in the public interest'. The court undertook a lengthy analysis of *locus standi* by reviewing research by academic and international organizations, as well as precedents from Zimbabwe, Canada, South Africa and India on the issue (pp. 8–25). It found in favour of access to justice for poor and marginalized sectors of society through public interest litigation. In this case the petitioners were acting on behalf of children, a marginalized group, and were accorded standing.

The court applied social context analysis to examine the causes of and the consequences of child marriage for the girls, families and society generally. The court noted that 26.2 per cent of those aged between 15 and 19 years of age were married. The judgment is infused with equality rights principles derived from article 81 of the Constitution, which affords girls and boys equal treatment, and international human rights instruments. The court made exhaustive reference to CEDAW, the UDHR, the CRC, the Convention on Consent to Marriage, the Minimum Age of Marriage and Registration of Marriages Act of 1962, the African Charter on the Rights and the Welfare of the Child, which sets the age of marriage at 18, and the Vienna Convention on the Law of Treaties (pp. 25–42). Furthermore, the court examined the observations of UN Committees, including the CEDAW Committee, on Zimbabwe's conflicting laws on the age of marriage.

The court found that culture cannot be used as an exception to the prohibition on child marriage: 'Section 78(1) of the Constitution permits no exception for religious, customary or cultural practices that permit child marriage, nor does it allow for exceptions based on the consent of a public official, or of the parents or

guardian of the child' (p. 49). The court reviewed the negative effects of early pregnancy on girls and stated: 'pregnancy can no longer be an excuse for child marriage' (p. 53). The age of marriage was deemed to be 18 years through a purposive interpretation of the Constitution and thus section 22 (1) of the Marriage Act was struck down. The success of this case lies in the interpretative tools and international instruments used by the court. Another factor was the support received by the petitioners from a well-known lawyer (Tendai Biti) and numerous organizations. The court's decision was published in January 2016. In March 2016 the Government of Zimbabwe announced that it was banning the payment of a bride price (Mavhinga 2016).

3.2.

Duties of the state to address domestic violence

International human rights law calls on states parties to investigate, prosecute and punish violence against women and girls. The following several cases consider the measures taken by governments to address GBV, especially violence in the domestic sphere. Three decisions deal with legislation challenged by men as unconstitutional based on the right to a fair hearing and/or the right to equality.

In a 2012 Guatemalan constitutional case 3009–2011 challenged the constitutionality of the *Ley Contra el Femicidio y Otras Formas de Violencia Contra la Mujer* [Law against Femicide and other Forms of Violence Against Women of 2008, Femicide Law]. The petitioner, Romeo Silverio Gonzalez Barrios, claimed that three provisions of the Femicide Law were unconstitutional. Sections 7 and 8 provide for the criminalization of violence against women. Section 7 defines physical, property-related, sexual and psychological violence as a crime and section 8 defines economic violence against women as a crime. Section 5 states that the crimes identified are to be prosecuted in the public sphere. The Constitutional Court of Guatemala upheld these provisions as constitutional.

A number of constitutional provisions were raised by the petitioner and examined by the

court. Given that the petitioner argued that the crimes established in the law applied to men and were therefore discriminatory, the decision mostly revolves around the right to equality. Article 4 of the Constitution of 1985 states (in English) that: ‘...all human beings are free and equal in dignity and rights. Men and the women, whatever their civil status may be, have equal opportunities and responsibilities. No person can be subject to servitude or to another condition that diminishes his or her dignity’. The petitioner made reference to article 66 (‘Guatemala is formed by diverse ethnic groups among which are found the indigenous groups of Mayan descent’). The court concluded that the state recognizes, respects, and promotes such groups’ forms of life, customs, traditions, forms of social organization, use of indigenous attire, languages and dialects; and that the petitioner had not presented any evidence related to how the three provisions of the Femicide Law negatively affect respect for indigenous customs.

The court applied a number of approaches to arrive at its decision. First, it undertook a significant social context analysis of inequality with respect to the dominance of men over women and unequal relations between men and women, which are characterized as a cultural pattern of discriminatory conduct. Second, the court applied purposive interpretation combined with a substantive equality analysis. The court noted the intent of the legislation, to address women’s inequality, and that differential treatment is permitted in response to women’s different reality. The law is intended to address the obstacles to the full exercise of rights by women. The substantive equality analysis is important to highlight because the Guatemalan Constitution does not include a provision explicitly calling for affirmative measures to address situations of inequality. Third, the court referenced two international instruments: CEDAW and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para). The court placed particular emphasis on article 7 of the Convention of Belem do Para, which sets out the specific undertakings by the states parties to prevent, investigate and punish violent acts against women.

Women’s organizations in Guatemala have lobbied for state action due to the high rate of

femicide and other violent crimes perpetrated against women. Organizations continue to monitor the implementation of the Femicide Law (Grupo Guatemalteco de Mujeres 2010). Following the decision of the Constitutional Court, women’s rights defenders within state institutions made renewed calls for action (CERIGUA 2013). An NGO recently organized a petition against a proposal to use conciliation as a preliminary mechanism for resolving cases that fall within the purview of the Femicide Law (Mujeres Transformando el Mundo 2016). Feminists have often problematized the resort to mediation and conciliation in cases of violence because of the power imbalance, and a range of soft law documents recommend that states parties avoid using mediation in cases of violence against women (CEDAW 2013; UN DEA 2010).

In another case in the Latin America and the Caribbean region, *Francois v Attorney General of St. Lucia*, a man accused of domestic violence challenged the constitutionality of a provision of the Domestic Violence Act of 1995. The decision of the High Court of Justice in 2001 found that section 4 (3) of the Act, which provides for an *ex parte* order (an emergency restraining order), violated his right to a fair hearing (article 8 of the Constitution of St. Lucia) and freedom of expression (article 10). At the outset of the court’s decision, the judge examined the ‘phenomenon of domestic violence’, stating succinctly that it ‘is a scourge’ (p. 5). He referenced a South African decision related to the obligation of the state to prevent domestic violence and to protect the right enshrined in article 1 of the Constitution of St. Lucia: specifically that everyone, without discrimination, is entitled to ‘life, liberty, security of the person, equality before the law and the protection of the law’. Although the particular *ex parte* order was deemed *ultra vires* because the terms of the order did not accord with the Act, the court nonetheless found that the Domestic Violence Act did not infringe the constitutional rights of the applicant. The decision has been recognized as representing a shift in Commonwealth Caribbean decisions related to violence against women in the private or family sphere (Robinson 2011: 7) by declining to treat the matter as private.

In Jesus C. Garcia, Petitioner, v The Honorable Ray Alan T. Drilon, Presiding Judge, Regional Trial Court-Branch 41, Bacolod City, And Rosalie Jaype-Garcia, For Herself In Behalf Of Minor

Children, Namely: Jo-Ann, Joseph And Eduard, Jesse Anthone, All Surnamed Garcia [Jesus Garcia], a case in the Philippines from 2013, the circumstances were similar to the Francois case. The decision of the Supreme Court of Manila begins by examining the background to the legislation in question. After nine years of advocacy work by women's rights groups in the Philippines, Republic Act no. 9262, An Act Defining Violence against Women and their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefor, and for Other Purposes [Violence Against Women Act], took effect on 27 March 2004. This law is landmark legislation that defines and criminalizes violence against women and their children by intimate partners, such as husbands, ex-husbands, persons dating or having sexual relationships with or a person who has had a child with the woman. The law provides for the issuance of protection orders by district, ward or village (Barangay) officials. The Violence against Women Act also allows the courts to act to prevent further acts of violence against women and their children and outlines the responsibilities of Barangay officials, prosecutors, health care providers, social workers and government officials.

Rosalie Jaype-Garcia filed a petition seeking a temporary protection order due to acts of physical, psychological and economic violence by her husband. The Regional Trial Court found reasonable grounds to believe that there was imminent danger of violence against wife and children and therefore issued several temporary protection orders against the husband, imposing many conditions against him. The husband, Jesus Garcia, appealed the protection orders to the Court of Appeal, claiming they were unconstitutional. After that court dismissed his appeal the husband appealed to the Supreme Court. The petitioner claimed that the Act violated his rights to equal protection and due process, and that there had been undue delegation of judicial power to barangay officials.

The Supreme Court used social context analysis, substantive equality principles and international instruments in its reasoning to determine that the temporary protection orders did not violate the husband's rights, that the court can decide not to send a matter to mediation, and that Barangay officials have the power to issue temporary protection orders. The opinion of majority and concurring

justices addressed the social context by assessing the wife's situation in terms of power relations in domestic violence cases and in the context of power relations between men and women generally. In addition, the court referred to statistics provided by the Philippine Commission on Women (the national machinery for gender equality and women's empowerment) to substantiate the prevalence of violence against women.

The two opinions both use substantive equality arguments to justify affirmative measures to support victims of violence against women. Like the situation in Guatemala, the Constitution of the Philippines does not contain a provision to support affirmative measures to achieve equality (other than on political representation). However, article III, section 1 of the Constitution provides for equal protection. While both opinions refer to the need to achieve equality through differential treatment, the concurring justice in the Philippines case explicitly referenced substantive equality:

(T)he persistent and existing biological, social and cultural differences between women and men prescribe that they be treated differently under particular conditions in order to achieve substantive equality for women. Thus, the disadvantaged position of a woman to a man requires the special protection of the law. . . . The government's commitment to ensure that the status of a woman in all spheres of her life is parallel to that of a man requires the adoption of Republic Act no. 9262. Unless the woman is guaranteed that the violence that she endures in her private affairs will not be ignored by the government, as a human being, then she can neither achieve substantive equality nor be empowered.

The Supreme Court referenced international legal instruments as an additional source of state obligations to protect women from violence in society. The court compared provisions of the Violence against Women Act to provisions in the UDHR and CEDAW to further justify the legislation and demonstrate the state's fulfillment of its obligations. It also referenced other international human rights treaties ratified by the Philippines.

Constitutional challenges by women in respect of the inaction of indigenous or customary authorities in relation to GBV were not found by this study. However, in an appeal to the Colombia Constitutional Court (T-1026-08) by indigenous authorities the issue was mentioned in the facts of the case. Regional penitentiary officials had refused to act on an order received from indigenous authorities to imprison two indigenous men, both of whom had been sentenced through traditional communal processes. One of the men had been sentenced for acts of domestic violence. This decision is noted simply as an example of indigenous authorities punishing domestic violence and the right of those authorities to determine a customary sanction or to send the perpetrator to prison in the ordinary justice system, if they deem the crime warrants incarceration. In another case before the Constitutional Court of Colombia (T-002-12) indigenous authorities challenged the intervention of state courts in three cases involving sexual assault of children within indigenous communities. The Constitutional Court found that the cases violated the right to jurisdictional autonomy and ordered the cases be returned to the indigenous authorities. Thus, in these cases, legal pluralism worked to recognize the jurisdiction of indigenous authorities to punish violence against women and children, and to insist on state compliance with orders emerging from indigenous authorities.

Two further cases related to sexual violence in the context of intimate relationships will be examined before turning to other decisions related to sexual assault and violence. In the Nepalese public interest case, *Kumaria Pangen et al. v Prime Minister et al.*, seven petitioners associated with the Forum for Women, Law and Development claimed that the *Muluki Ain* (Criminal Code) violated their constitutional rights under the Interim Constitution of 2007, including the right to equality. The Criminal Code provides for a lower sentence of 3-6 months for rape within marriage. There was direct evidence of marital rape in this petition, as the first petitioner was raped by her husband. In section 1 of the Chapter on Rape in the Criminal Code, rape is deemed to be: 'intercourse . . . established with any woman without her consent, or where intercourse is established with a girl below 16 years of age without her consent' (p. 48).

The majority decision of the Supreme Court, Special Bench found rape to be a serious offence, determined the lower sentence for marital rape to be discriminatory and ordered the government, specifically the Ministry of Law, Justice and Parliamentary Affairs, to make amendments to address the discriminatory sentencing policies. The decision included a basic social context analysis to examine the effect of rape on a victim. Although the government respondents relied on a previous Supreme Court precedent to argue that rape by a husband has less impact on a woman than if she is raped by someone who is not her husband, the majority decision explicitly recognized that the impact of rape on the wife and society is significant and she can potentially be re-victimized repeatedly. The 'consenting opinion' (the authors read this as dissenting) appears to conclude that marital rape can only occur when the spouses are legally separated. Otherwise, sex between husband and wife is deemed to be consensual. This would appear to contradict the inclusive definition of rape in the Criminal Code.

The Supreme Court applied a literal interpretation of the Criminal Code section dealing with rape and a formal interpretation of the petitioners' right to equality without applying specific Constitutional provisions to reach its decision. Thus, while the decision is not rich in interpretation it reaches a progressive conclusion. The consenting opinion calls on the legislature to define marital rape in a way consistent with the lesser punishment.

The second decision on marital rape is from the Solomon Islands. In *Regina v Gua* one of the husband's defence claims was that because the defendant was legally married to the victim at the time the alleged rape took place, it is impossible in law for him to have committed rape, based on the common law rule of marital exemption. In its judgment of October 2012 the High Court (Criminal Jurisdiction) found the cases relied on by the defence to be outdated. While the decision is brief, it applies social context analysis, a formal equality approach and international law in its reasoning to forcefully conclude that the marital exemption rule is unconstitutional.

The High Court characterized the marital exemption rule with respect to rape as discriminatory 'anachronistic and offensive' (paras 59-60): 'The time when women are

considered sex objects or as subservient chattel of the husband in Solomon Islands has gone' (para. 50) The court's equality analysis references two provisions of the Constitution: article 3, which guarantees all individuals the protection of the law without discrimination; and article 15 (4), which describes discrimination as different treatment because of sex, among other grounds. However, this latter article also permits different treatment if it is for the advancement of a disadvantaged group. Although the equality analysis is rather brief, the court declared that because women are guaranteed equal rights and freedoms to men, this should be taken to mean that women are afforded protection from all forms of discrimination. The High Court buttressed its conclusion with reference to articles 15 and 16 of CEDAW to support its equality rights reasoning.

While the High Court was progressive in its reasoning and overturned the marital exemption rule, it nonetheless considered the wife's conduct during marriage as a mitigating factor and thus arrived at a relatively lenient sentence of four years imprisonment. The Director of Public Prosecutions appealed the sentence to the Court of Appeal. The appellate court upheld the lower court's decision to abolish the rule on marital exemption, but held that the defendant should have been given a longer sentence and substituted a sentence of seven years. As a result of this decision, the Solomon Islands Law Reform Commission was commissioned to make recommendations with respect to the law and in 2013 published its *Review of the Penal Code and Criminal Procedure Code Second Interim Report: Sexual Offences*. The report recommends that new legislation should clearly state that a husband can be convicted of raping his wife; that is, a new offence of rape should be drafted so that it is clear that it applies to all people, even where there is a marriage relationship between the victim and the accused (Solomon Islands Law Reform Commission 2013: 71). This demonstrates the way in which a combination of litigation and advocacy can lead to both jurisprudential law reform and subsequent state law reform.

3.3.

Duty of the state to address and redress sexual violence

The Indian case of *The Chairman, Railway Board v Chandrima Das and Others [Railway Board]* is an appeal case that addressed issues of nationality and the vicarious liability of the government for acts of sexual violence by public employees. Chandrima Das, a lawyer at the Calcutta High Court, filed a petition under article 226 of the Constitution against the Chairman and Railway Board to claim compensation for the victim, Hanuffa Khatoon, a Bangladeshi national who was gang raped by employees of Howrah Railway station and a nearby building on Indian territory. The High Court awarded her compensation because the rape was committed by employees of the Indian Railway.

The Railway argued that it was not obligated to pay compensation to Khatoon as she was not an Indian national. The Railway further argued it was not liable to pay compensation since the employees committed individual acts of rape against her and not in their capacity as employees of the company. It argued it should not be vicariously liable; and that any compensation or remedies available to Khatoon were within the jurisdiction of private law rather than public law.

The Supreme Court applied social context analysis, equality analysis, domestic precedent and international human rights instruments to inform its constitutional decision in favour of the petitioner/victim. The court examined violence against women and concluded that since it is an affront to human dignity, the case involved a public law issue, and a non-national has the right to invoke the Constitution of India.

The Supreme Court referred to article 226 of the Constitution of India as enabling the complainant to bring forth her claim as a non-national of India. Article 226 permits the Indian judiciary to make orders against a government or authority pertaining to causes of action that arise within the territory of the

court's jurisdiction 'notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories'. The case turned on the victim's right in article 21: 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.

The court reviewed domestic precedent to find that the victim was able to make a public law claim for a remedy in tort. The petitioner was also found to have *locus standi* based on public interest litigation provisions of the Constitution. The court provided a nuanced analysis of equality as it determines that rape is a violation of a fundamental right (to life and liberty) guaranteed in article 21. The court also interpreted the principle of equality as an important element of the right to life and personal liberty, which is supported by commitments to equality within the UDHR and the Declaration on the Elimination of Violence against Women. Thus, these international obligations buttressed the domestic constitutional obligations

In conclusion, the Indian Supreme Court found that employees of the Railway are essential components of government machinery and that the government can be vicariously liable for its employees' acts. The appeal was dismissed and the Railway was ordered to pay the compensation ordered by the High Court. The case is an important precedent with respect to state responsibility for violence against women and the precedent that non-nationals have the capacity to appeal to gain constitutional rights in India. The case is referred to in a subsequent case referred to as the 'Marine Drive Rape Case', a case in which the High Court of Mumbai concluded that a rape victim's testimony was a sufficient basis for the conviction of an ex-police officer.²⁶ The Railway Board case is also cited as an example of judicial activism that eased a paradigmatic shift from rules-based laws to rights-based laws to promote gender justice (Babbar 2012).

A landmark case from South Africa, *Carmichele v Minister of Safety and Security et al.*, has had an international impact (Ripples v Police; Maluleke and Madonsela 2004) as an early precedent for the recognition of gender-based violence as discrimination and for the recognition of a positive state obligation to prevent that

violence. The case had a lengthy process that is worth explaining in detail. In 1995 the plaintiff, Carmichele, was grievously assaulted by a man named Coetzee who was then charged with attempted murder and housebreaking. This attack occurred after the man had been released on his own recognizance pending trial for the charge of rape of a different woman. The plaintiff claimed that members of the South African Police Service and the public prosecutors had negligently failed to comply with a legal duty they owed to her to take steps to prevent Coetzee from causing her harm. At the trial in 1997 the court found that the plaintiff had failed to make a prima facie case of wrongfulness, which is the primary element for delictual liability.²⁷ The subsequent appeal to the Court of Appeal failed on the same ground. The plaintiff then submitted an application to the Constitutional Court. While the constitutional case, decided in 2001, is the immediate focus below, it is important to note that the Constitutional Court ordered a new trial. At that trial the court found in favour of the plaintiff in 2002. The Ministry of Safety and Security and the Ministry of Justice appealed the second trial decision and the Court of Appeal dismissed that appeal in November 2003.

The Constitutional Court changed the course of the case. In its reasoning it applied national and international case precedent and implicit reference to international obligations related to discrimination. The court noted that the first trial court and the Court of Appeal had not 'had regard' to the constitutional rights to equality, life, human dignity, freedom and security, and personal privacy. Nor did those courts develop the common law in the spirit of the Bill of Rights, as required in article 39 (2) of the Constitution (which requires purposive interpretation, as noted above). The Constitutional Court found that the police have a positive duty to protect women from violence in order to protect their rights to dignity and freedom, and security of the person (para. 62). Furthermore, South Africa has a duty under international law to prohibit gender-based discrimination that has the effect of impairing the enjoyment of rights (para. 63).

26 *State of Mumbai v More* (2006)

27 Delictual liability refers to a civil wrong that consists of an intentional or negligent breach of duty of care that inflicts loss or harm and which triggers legal liability for the wrongdoer.

The Centre for Applied Legal Studies, an organization based at the University of the Witwatersrand, which conducts research and engages in advocacy, litigation and training for the promotion and protection of human rights in South Africa, was involved as *amicus curiae* before the Constitutional Court. In the critical finding of a positive duty on the police, in paragraph 62, the court cited the *amicus curiae*.

The 2013 Kenyan case of *C.K. & 11 others v Commissioner of Police/Inspector General of the National Police Service & 3 others* (Ripples v Police) queried whether the police's failure to investigate crimes of sexual violence against 11 girls infringed their fundamental rights and freedoms under the Constitution. The NGO Ripples International acted on behalf of 10 of the 11 victims, those 10 being children, and also acted as petitioner in its own right. The Kenya National Human Rights Commission acted as friend of the court. The 2012 judgment of the High Court at Meru uses social context analysis, international instruments, national, foreign and international case law as precedent and multiple human rights to reach its decision that 'the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first 11 petitioners' complaints of defilement violates the first 11 petitioner's fundamental rights and freedoms' (p. 10).

In its social context analysis, the judge focused on the harm/trauma caused to the first 11 petitioners. The judge reviewed the circumstances surrounding the sexual assault (defilement) and noted the severe consequences for the victims—psychological harm, fear of contracting HIV/AIDS and other STDs, and the negative effects of the separation from their families, school, friend and community when they had to leave their homes to seek shelter with Ripples International. The judge also recognized the climate of impunity resulting from the failure of the respondents to act and linked this omission directly to the psychological damage arising from 'their alienation from family, schools and their own communities' (p. 7).

The judge observed that not only had the petitioners' rights under the Constitution of Kenya been violated, but their rights under 'the general rules of international law,

including any treaty or convention ratified by Kenya, which form part of the law of Kenya as per article 2(5) and 2(6)' (p. 6) were also violated. The judge examined the provisions of the CRC, CEDAW, the ICCPR, the African Charter and the African Charter on the Rights and Welfare of the Child and concluded that the failure to investigate also violated these international and African human rights instruments. Case law from Kenya and South Africa, including Carmichele and decisions of the Inter-American and European Human Rights systems, were referenced by the judge in the assessment of the duty of the state to protect girl children from sexual violence.

While the court referenced many provisions of the 2010 Constitution there was particular emphasis on article 21, which establishes the duty of the state to protect rights. Article 21 (3) is of particular importance in this case: 'All state organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities'.

The court referenced various rights, including equality and non-discrimination (article 27), human dignity (article 29) and protection from abuse, neglect and all forms of violence and inhuman treatment (article 53(1) (d)), as well as various articles providing for access to justice. In conclusion, the court ordered the Ministry of Justice to formulate policy on the Sexual Offences Act and implement the guidelines provided in the Reference Manual on the Sexual Offences Act. It also ordered all the respondents (the police, Director of Public Prosecutions, Ministry of Justice) to report back to the court on the implementation of the orders.

The judgment referenced the arguments of the petitioner Ripples International but not the *amicus curiae*. The case has had a positive impact by creating momentum and political will inside the police to develop investigative guidelines on cases of sexual violence (Sampson 2016). It is important to recall that the Constitution was reformed in 2010 and according to Maingi (2012), the Federation of Women Lawyers in Kenya played a critical role in securing women's rights in the constitutional reform process. They collaborated with many

women's groups and legal authorities to ensure that the constitution-building process recognized women's right to equality. This included high-level legal processes, such as drafting laws, and using the media as strategic platforms for awareness raising and political networking to ensure gender equity and equality were translated into the Constitution of Kenya 2010. The judgment thus consolidates that activism and further publicizes and entrenches the responsibility of the state to women with respect to GBV.

In another African case involving police officers, three on-duty uniformed officers raped a woman after offering her a ride home. The officers were convicted of rape and kidnapping. In 2005 the South African Constitutional Court, in the case of *K v Minister of Safety and Security*, dealt with the woman's claim, after she had been unsuccessful at the High Court and the Supreme Court of Appeal, that the rules of vicarious liability were in conflict with the Constitution or that they failed to give effect to the spirit, purport and objectives of the Bill of Rights. The appellant claimed her rights to equality, dignity, privacy and freedom and security of the person had been violated.

The Constitutional Court relied on social context analysis, domestic precedent, extra-national decisions, the academic literature and an expansive interpretation of the common law on vicarious liability to find in favour of the appellant. While the social context analysis is brief, it is important to note because the court quoted the *amicus curiae*, the Commission on Gender Equality, regarding the threat of sexual violence being central to women's subordination (p. 14).

Regarding the common law on vicarious liability, the court relied on article 39 (2) of the Constitution, which states that 'when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. The court then reviewed the academic literature and jurisprudence on vicarious liability from South Africa and other countries, especially with respect to sexual assault by employees. The court concluded that the opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust which harmonizes with the constitutional

mandate of the police and the need to ensure that mandate is successfully fulfilled. When the police officers raped the applicant while on duty and in uniform, they were simultaneously committing a crime and failing to perform their duties to protect the applicant. In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed by the policemen and the purposes of their employment. This close connection rendered the respondent liable vicariously to the applicant for the wrongful conduct of its employees. The case built on Carmichele to recognize the seriousness of GBV and attach responsibility (vicarious liability) to the state (Minister of Safety and Security) for the actions (rape and kidnapping) and omissions (to protect) of the police officers on duty.

3.4.

Evidentiary rules in cases of sexual violence

Women have faced significant barriers to gaining access to justice in cases of GBV. Common law rules were perpetuated to minimize women's claims of sexual assault against men. Three cases are reviewed briefly below. Two relate to the requirement for corroborating evidence in order to prosecute sexual offences. A third case deals with the forensic evidence in such cases.

In 2003, the Court of Appeal of Kenya delivered its judgment in the case of *Mukungu v Republic*. John Mwashighadi Mukungu, the appellant, was convicted of the offence of rape contrary to section 140 of the Penal Code of the Republic of Kenya and sentenced to imprisonment for ten years. The complainant was forced to have sexual intercourse with the accused appellant after he dragged her to a nearby house. He then left her in the house where he bolted the door, returning with another man who also forcibly had sexual intercourse with her. The complainant testified that many people in her village saw Mukungu forcing her into the house where she was sexually assaulted but no one attempted to help her. After the assault, the complainant made attempts to

report the sexual assault to a village elder, who was unable to assist her due to his own health problems. Finally, she was able to make a report to a female police constable at the Voi police station. The constable arrested and charged Mukungu. The complainant was medically examined to confirm she had had recent sexual intercourse, corroborating part of her testimony. However, the accused did not undergo a medical examination. Therefore, there was no medical evidence to establish a connection between him and the alleged offence. At trial, another witness testified that the complainant came to her house the night of the sexual assault to seek help. This witness corroborated facts about the complainant's appearance in her claim against the accused. Furthermore, the complainant maintained that the appellant was known to her by sight but not by name, so she was able to identify him in a line-up but not by name.

The Court of Appeal dismissed the appeal in a fairly brief judgment that used social context analysis and a formal reading of equality rights protections. The court considered the disadvantages of all women in cases of sexual offences compared to complainants in cases of other offences and determined that discriminatory treatment occurred unjustifiably by requiring corroboration. This is because insistence on corroboration is based on the assumption that women and girls tend to fabricate stories when reporting sexual assault. The court stated that: 'The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences'. In its decision, the court recognized that women as an entire class are disadvantaged by this requirement in the case of sexual offences and that in the context of constitutional protection this amounts to discrimination based on sex.

In 2004, the Fiji Court of Appeal addressed the same issue in *Balelala v State*. The Magistrate's Court found the defendant guilty of wrongful confinement and 'carnal knowledge without consent'. He was sentenced to one year in prison for wrongful confinement and ten years for rape. The defendant detained the victim, a tourist, overnight and raped her repeatedly. Throughout the ordeal he threatened her with a knife. When the victim was examined, there were signs of bruising and scratches, as well as traces of semen on her clothing and inside her vagina. No DNA testing was performed to

determine whether the semen sample came from the defendant. However, the victim identified the defendant in a police line-up.

The defendant, the appellant in this case, argued that there had been no corroboration and therefore it was therefore dangerous to convict him on her word alone; and that the physical evidence found (semen, bruising and scratching, her belongings in the area where the rape occurred) did not amount to corroboration. The Court of Appeal reviewed progressive jurisprudence and international rules of procedure and applied a formal equality interpretation to deny the appeal by the accused.

The court reviewed the law of corroboration and observed that throughout history in cases of sexual assault, there has been a general assertion that female evidence in such cases is intrinsically unreliable. Eventually, this gender-biased assumption found its way into common law. The court referenced old English legal writing on this subject, which suggested that women and girls often had a tendency to fabricate stories of sexual assault 'for all sorts of reasons'. The court found that in many jurisdictions, the corroboration rule had generally only been applied to female victims of sexual assault. This effectively resulted in victims of sexual assault being placed in a 'special category of suspect witnesses'. The court examined other jurisprudence, including the Supreme Court of Canada case *R v Seaboyer* which identified and debunked a number of rape myths. The court recognized that these rape myths are a reflection of a flawed and gendered understanding of the world and have been unfairly demeaning to women. The court pointed out that Canada has abolished the requirement for corroboration, as has New Zealand to an extent; and it has been struck down in cases by courts in South Africa, Bangladesh, Namibia and the USA. It also pointed out that the Rules of Procedure and Evidence for the International Criminal Court and of some International Criminal Tribunals also exclude any requirement for corroboration in relation to crimes of sexual assault.

The court took a formal approach to equality after a brief reference to CEDAW, finding that the evidence of female victims of sexual assault should be treated in the same way as evidence given by victims of other criminal offences. If a

warning regarding the reliability of evidence is given to the jury, then this should be because of the particulars of the case, rather than because the victim is a woman. Therefore, in order to give full force and effect to the Constitutional principle of equality before the law, the rule of corroboration should be abandoned.

In 2013 the Supreme Court of Bangladesh, High Court Division, received a writ petition to order a *Rule Nisi* against the government in the case *Bangladesh Legal Aid Services and Trust (BLAST) v Bangladesh (Ministry of Health and Family Welfare, Ministry of Home Affairs, Director of Health Services, Inspector General of Police)*.²⁸ The petition claimed that the ‘two-finger test’ used by the Ministry of Health in medico-legal reports in cases of the rape of women and girls violated the fundamental rights of survivors, including the rights to equality, non-discrimination, life, health and freedom from cruel, inhuman or degrading treatment. If more than two fingers could be inserted into a woman or girl’s vagina, doctors assumed the victims were ‘habituated to sexual intercourse’. Article 102 of the Constitution allows the High Court to order any person or authority to take action to enforce fundamental rights. The *Rule Nisi* ordered the government to demonstrate why the use of the test should not be ruled unlawfully performed and in violation of the fundamental rights of patients. The respondents were also obliged to show why they should not be directed to take measures to prohibit the use of the test. The court placed the onus on the respondent government actors to show within six weeks why they shouldn’t be ordered to consult experts on gender-sensitive examination of victims, to prepare guidelines, and why doctors should not be prohibited from commenting on whether a rape victim is ‘habituated to sexual intercourse’. Pending the court’s ruling the respondent Ministry of Health and Family Welfare was ordered to convene a committee of forensic, criminal justice and public health experts who support survivors of sexual violence in order to prepare comprehensive guidelines for police, doctors and judges on the examination and treatment of women and

²⁸ A *rule nisi* is an order setting out certain conditions. If the respondent does not explain why the conditions should not apply the decision of the court is final.

girl survivors of sexual violence. According to the website of the petitioner (BLAST), the court convened experts to provide their opinion on medico-legal examination of sexual assault survivors in August 2016 (BLAST 2016).

3.5.

Sexual violence and armed conflict

Due to the history of intra-state armed conflict and the widespread use of sexual violence in those conflicts, the cases related to sexual violence perpetrated by armed actors have been hailed as far-reaching landmark decisions in the Latin America and the Caribbean region. This jurisprudence relates to GBV and therefore criminal-related legislation, constitutional provisions related to dignity and security of the person and international instruments related to humanitarian law regulating the conduct of armed actors.

In 2008 the Colombian Constitutional Court, in *Auto 092*, assessed the differential impact of Colombia’s armed conflict on women and the disproportionate impact of forced displacement on women. It is important to note that the Constitutional Court has competency to verify the state’s actions aimed at re-establishing constitutional rights (Decree 2591 of 1991). Based on this mandate, in 2007 the court invited representatives of displaced women’s organizations to attend a technical information session related to a previous decision (T-025-2004) that dealt with the rights of individuals displaced because of the armed conflict. That judgment in 2004 provided the public policy framework for the state’s assistance to displaced people and facilitated the strengthening of victims’ organizations (Auditor General of Colombia 2014). Civil society organizations monitored state compliance with decision *T-025-2004* (CODHES 2016).

The Constitutional Court applied social context analysis throughout its 261-page decision. For example, the court referenced structural violence; discussed how women in general were disadvantaged in the armed conflict; and examined the particular situation of women who had been forcibly displaced. The decision is infused with a substantive equality

approach throughout. The constitutional provisions referenced by the court included the right to equal protection and treatment without discrimination (article 13), the right to peace (article 22) and the declaration that men and women enjoy equal rights and opportunities (article 43). Article 13 reinforces substantive equality: 'The State shall promote the conditions so that equality may be real and effective and shall adopt measures in favor of groups that are discriminated against or marginalized'. The court also referenced CEDAW and several other international and Inter-American conventions. This constitutional framework permits the court to examine the differential impact of the armed conflict on women through the identification of risk factors and the human rights affected (with a special focus on sexual violence) in relation to international human rights law and international humanitarian law (Chapter III). The court then analysed the disproportionate impact of forced displacement on women by referencing various rights violations, including the rights to physical integrity, health, sexual and reproductive health, and education (Chapter IV).

The Constitutional Court recognized the intersectionality of women's rights and the multiple forms of disadvantage faced by displaced women through its orders to the government. First, the court declared that displaced women, children, youth and elderly are subject to 'multiple and strengthened constitutional protection' (p. 216). The government is obliged to 'prevent the disproportionate impact of displacement on women and to guarantee their effective enjoyment of fundamental rights' (p. 216). Second, the court ordered the government to attend to the causes of sexual violence against women in the armed conflict and ordered the Prosecutor General to investigate specific cases. Third, the court mandated the creation of 13 programmes to attend to the disproportionate and differential impact of the armed conflict on displaced women. The programmes initiatives to address domestic violence, land tenancy, health, education, sexual violence, the promotion of civic participation and prevention of violence against female leaders, psychosocial support and special programmes for indigenous women and Afro-Colombian women. The court set out the minimum elements that

must be considered by government agencies in the 13 programmes.

The court then communicated its decision to 27 organizations (national and international) so that they can monitor compliance, support the 600 displaced women named in the decision, and participate in the design of the 13 programmes. Following the decision, eight civil society organizations organized a monitoring group related to Auto 092. This group released at least six monitoring reports (Sisma Mujer 2016). Other organizations monitor the 13 programmes and the 'reserved annex' of the sexual violence cases that had been sent to the Prosecutor General (Casa de la Mujer 2016).

In the 2011 case of *Causa nr 12821, Molina, Gregorio Rafael s/recurso de casación* [Case no. 12821, Gregorio Rafael Molina, with regard to an appeal of the sentence], Argentina's Court of Criminal Cassation upheld the guilty verdict of the first instance criminal court that found Gregorio Molina, a non-commissioned air force officer, guilty of crimes against humanity for aggravated rape and attempted rape of women, among other crimes, including aggravated homicide against 38 men and women during the armed conflict (Women's Link Worldwide 2012). The appellate court held that a gender perspective was required due to the state's commitment to implement CEDAW and the Inter-American Convention, *Belem do Para*, and to the importance accorded to such international instruments under the Constitution. Furthermore, the court found that the rapes of women in military detention constituted a systematic practice that amounted to a crime against humanity, holding that the constitutive elements of a crime against humanity were well established in international customary law even though the codification of crimes of sexual violence as a 'crime against humanity' by the Statute of the International Criminal Court occurred only in 1998, many years after the Argentine internal armed conflict of 1976–1983.

In 2016 a Guatemalan criminal court released its decision in *C-01076-2012-00021 Of.2º. Tribunal Primero de Sentencia Penal* [Case No. 01076-2012-00021 of the Second Office, First Criminal Sentencing Tribunal], known as the Sepur Zarco case. This case represents strategic

litigation that resulted in a landmark decision and the first prosecution of crimes against humanity within the country where those crimes took place. Two women's organizations, Association of Women Transforming the World (*Mujeres Transformando el Mundo*) and the National Union of Guatemalan Women (*Unión Nacional de Mujeres Guatemaltecas*) initiated the case as co-accusers with the Prosecutor General, against two men, Esteelmer Francisco Reyes Girón, a retired Lieutenant Colonel in the Army of Guatemala (previously of military zone no. 6 in the community Sepur Zarco, Puerto Barrios, Izabal) and Heriberto Valdéz Asig, a former Military Commissioner (civilians during armed conflict who were given military roles).²⁹ The Lt. Colonel was charged with crimes against humanity against 11 civilian indigenous Mayan Q'eqchi' women, for using rape, sexual and domestic slavery and torture as a weapon of war and charged with the murder of one woman and two children in 1982. The former Military Commissioner was charged with forced disappearance and crimes against humanity committed in 1982.

A series of experts presented evidence that allowed the court to conduct an exhaustive social context analysis and to appreciate the full extent of injury and harm, including long-term physical, psychological and emotional harm. A gender anthropologist presented a report that included an assessment of how life had changed in the community once the military zone was established, including the effect on family income and family violence, and the state of war in the community which targeted men, especially those who belonged to the land committees established by state land reform institute to study and define traditional land ownership and use, and led to them being detained and disappeared. The victims were the spouses of these men. The 11 women lost land and their belongings, and were stigmatized in the community because they had lost their land and could not participate in communal agricultural production. They also suffered the stigma of being sexually enslaved, resulting in productive and reproductive failure (important in Q'eqchi'

29 There is a special mechanism, querrelante adhesive, in section 116 of the Guatemalan Criminal Procedure Code (Código Procesal Penal) that allows civil society organizations to initiate proceedings as a co-accuser.

culture) and of the disappearance of their husbands. The 11 women suffered physical and emotion harm, the armed conflict resulted in family breakdown and family violence disrupted traditional concepts of masculinity and femininity and increased sexual assault. The Q'eqchi' women were unable to provide sustenance for their families according to their ancestral tradition and their sacred book, the *Popul Vuh*. Finally, the army used the women as a means of aggression against the community.

This expert presented the distinct values of 'humanitarianism' for the victims compared to a judge's legal understanding of the term. She focused on the impact on the women having to submit sexually to troops rather than their husbands, and to the very troops who were responsible for the forced disappearances of their husbands. The expert also explained the cultural impact of having to give their food and labour, due to their children and families, to the troops when food, care and sex are connected to reciprocal communal and family obligations. As a result, the women were dislocated from their community. Gender equality analysis informed the court's assessment of the gender anthropologist's evidence (pp. 38–41), especially as it related to the impact of the crimes on the victims, gender relations in the community and local Q'eqchi' culture. However, the court made no specific reference to the equality provision in the Constitution (article 4).

After 20 days of testimony from victims and expert witnesses, the court convicted both men. The judgment sent a powerful message that perpetrators can be held to account. In addition, given the widespread sexual violence in the armed conflict, it symbolized that possibility for other victims as well. The case appears to have been successful because of the expert evidence presented by the prosecution and the co-accusers, and reference to international law as well as national legislation and the Constitution. The expert evidence presented and accepted by the court, in addition to the gender anthropologist mentioned above, included 18 other expert witnesses representing a number of academic disciplines and professions.

The court referenced international humanitarian law, international human rights law and specific documents related to the armed conflict in Guatemala prepared by

the Inter-American Commission on Human Rights and the Commission for Historical Clarification, as well as the Catholic Church's Report on Historical Memory (*Nunca Mas*). As human rights groups and women's rights groups had argued, sexual slavery and the use of rape as a weapon of war was widespread. The documentation of this assisted the court in arriving at its verdict. In addition to applying the Guatemalan *Código Procesal Penal* (Criminal Procedure Code) and the *Código Penal* (Criminal Code) the court referenced constitutional provisions, including article 46, which recognizes the pre-eminence of international law.

The court sentenced the two accused men for the crimes listed above, ordered individual monetary reparations to be paid by the accused men and made various orders on the government and on civil society organizations. Social reparations included orders to various government agencies to take positive steps to readdress the situation of inequality of the 11 women and the indigenous community. For example, the Ministry of Health was ordered to construct a health centre in the community; the Ministry of Education was ordered to improve the school infrastructure in primary schools in four communities, build a bilingual middle school, offer scholarships to families in Sepur Zarco, include information on this case in the curriculum and educational materials, translate the judgement into 24 Mayan languages (with the Ministry of Culture) and make a documentary film. The Ministry of Defence must include a course on women's human rights and laws related to the prevention of GBV in its training programme. Civil society organizations were ordered by the court to campaign for recognition of 26 February as a Day to Recognize the Victims of Sexual Violence.

3.6.

Customary, religious or patriarchal practices that violate the physical integrity and dignity of women

The selected cases are from Asian and African countries and relate to cultural rules or practices that discriminate against women in

terms of their physical integrity and human dignity. The rules or practices examined below were imposed by state, customary or religious authorities.

A 2002 case related to 'honour' as a defence for homicide was heard by the Lahore High Court in Pakistan. In *Muhammad Siddique v The State* the accused appealed his death sentence for the murder of his daughter, son in law and granddaughter. The accused and his son had tricked the daughter and son-in-law into meeting them by stating that the father was ready to accept their marriage after disowning his daughter because he did not agree with her choice of husband. The court applied social context analysis, Islamic principles and equality rights principles, and criticized the misuse of the Qur'an in its reasoning before dismissing the appeal.

The court first assessed the circumstances in which an offence justifies a conviction by using Islamic principles that are explicit in the provisions of the Criminal Code. This is termed *tazir*: the judge has the discretion to punish because the punishment is not stipulated in the text of the Qur'an. Such circumstances include heinous criminal acts, or 'acts which are symbolic of a certain bias or prejudice against a section of society; or which are committed in the name of a creed or committed in reaction to the exercise of a fundamental right by the victim; or which cause general alarm and shock public conscience and acts which have the effect of striking at the fundamentals of a civil society' (p. 454; para. 16). An accused can be acquitted of serious offences where there is a 'compromise', or forgiveness by the family of the deceased. However, the court noted that compromise 'may encourage the social trends which led to those crimes whereas upholding a conviction would convey social disapproval through the majesty of law' (page 454; para. 16). The High Court also noted that the act of the appellant is not unique act. Rather, '[i]t is symptomatic of a culture and a certain behaviour pattern which leads to violence when a daughter or sister marries a person of her choice' (para. 18, p. 455). The court cited statistics on 'honour killings' by the Human Rights Commission of Pakistan and concluded its social context analysis by stating that such acts are not religious but 'male chauvinism and gender bias at their worst' (para. 20, p. 455). The Lahore High Court invoked equality to condemn such crimes:

A murder in the name of honour is not merely the physical elimination of a man or woman. It is...a blow to the concept of a free dynamic and an egalitarian society. In great majority of cases, behind it at play is a certain mental outlook, and a creed which seeks to deprive equal rights to women i.e., inter alia the right to marry or the right to divorce which are recognized not only by our religion but have been protected in law and enshrined in the Constitution. (para. 24, p. 457)

The court also condemned the accused for the misapplication of Hudood Laws when the appellant registered a case against his daughter and her husband, presumably for adultery, when they were legally married.

The court used the text of the Qur'an to demonstrate Islam's warning that such practices are wrong: 'No tradition is sacred, no convention is indispensable and no precedent worth emulation if it does not stand the test of the fundamentals of a civil society generally expressed through law and the Constitution' (para. 24, p. 457). At the end of the judgment the court analysed the law as a tool for social change: 'Law is a dynamic process. It has to be in tune with the ever-changing needs and values of a society, failing which individuals suffer and social fabric breaks down. It is this dimension of law which makes it a catalyst of social change. Law, including judge-made law, has to play its role in changing inhuman social [mores]' (para. 24, p. 458). According to Minallah (2007), judicial activism in Pakistan has helped address various customs (*swara*, *vanni* and honour-related conduct) that discriminate against women and girls.

A 2007 Uganda Constitutional Court case addressed the centuries old practice of female genital mutilation (FGM). In the case *Law and Advocacy for Women in Uganda v Attorney General for Uganda* an NGO filed a petition asking that the custom and practice of FGM, as practiced by several tribes in Uganda, be declared inconsistent with the Constitution. The petitioners also relied on international human rights law to say that Uganda has a responsibility to end the practice.

The majority opinion of the Constitutional Court used social context analysis and a balancing of constitutional guarantees in

its reasoning. The social context analysis was fortified by two reports that discuss the negative consequences of FGM: a UN Interagency Statement and a report prepared by the petitioner NGO. In short, the court concluded that FGM is a cultural tradition aimed at controlling women's sexuality. Where it is practiced, family and friends create an environment in which the practice becomes a requirement of social acceptability. The court, relying on the above-mentioned reports, pointed out that FGM is a cultural and not a religious practice. Most importantly, the court relied on the negative consequences of FGM to conclude that the practice is unconstitutional, focusing particularly on the psychosexual consequences and social consequences for a woman's physical and mental health.

- The court then examined the constitutional guarantees that are relevant in the context of FGM. The court recognized that the Constitution provides, in article 37, that: 'Every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others'. However, the right to practice one's culture must not conflict with the following rights:
- Article 24: No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment.
- Article 32 (2): Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalized group...are prohibited.
- Articles 33 (1): Women shall be accorded full and equal dignity of the person with men [and] (3) The state shall protect women and their rights taking into account their unique status and natural maternal functions in society.
- Article 44: Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms: (a) Freedom from torture and cruel, inhuman or degrading treatment or punishment.

While the court invoked equality rights it also emphasized that any cultural practice must not constitute disrespect for human dignity or subject any person to any form of torture or cruel, inhuman or degrading treatment or

punishment. FGM was declared inconsistent with the Constitution and void as a custom. At the end of the decision, the court noted that the Government of Uganda had already tabled a bill to outlaw FGM, and that the bill had been passed in the legislature.

A case dealing with a 'virginity test' imposed by the Egyptian military was dealt with in *Samira Ibrahim Mohamed Mahmoud and Maha Mohamed Maamoun Hassan Abdallah v Head of the Supreme Council of the Armed Forces et al.* by the Court of Administrative Justice in Cairo in 2012. The first plaintiff was forced to undergo a virginity test on detention after her arrest during protests in Tahrir Square. The plaintiffs sought an injunction (cease and desist order) from the court against the military imposing virginity testing on detained women.

The court did not undertake social context analysis or reference equality rights. However, the case is identified as a progressive decision because of its use of Sharia principles, international human rights instruments and constitutional guarantees. The court referred to articles 7 and 10 of the ICCPR (prohibition on torture and the rights of detained individuals) and the Geneva Convention on the Treatment of Prisoners of War, which states, in article 14, that women should be treated humanely and with due regard to their sex. Nonetheless, because Islam is the religion of the state and principles of Sharia are the main source of legislation, the Sharia principle of protection and sanctity of the human body was the main justification used by the court to find in favour of the plaintiffs. The court referenced constitutional rights generally and then concluded that the virginity test (the administrative decision calling for the test) violated 'women's rights and their dignity'. Obviously, once again, this case must be contextualized against the backdrop of the specific political conjuncture in Egypt at that moment and the powers asserted by the state against prisoners generally and women specifically. These tactics of virginity testing by the state against women detainees could also be characterized as a form of sexual assault on women prisoners, and thus equivalent to examples from other jurisdictions in which sexual assault was used as a tool in the assertion of military and/or police power.

In *Advocate Md Salahuddin Dolon v Government of Bangladesh* in Writ Petition No. 4495 of

2009, a Bangladeshi court impugned an order by an education official that called on female teachers to wear veils in school.³⁰ The Bangladesh Legal Aid and Services Trust (BLAST) filed an application to be added as a co-petitioner, which was granted. The High Court of the Supreme Court of Bangladesh found that the education official had sexually harassed the teachers by issuing an unauthorized order that they must be veiled, and if they were not they were prostitutes. The High Court conducted social context analysis and applied national precedent, international human rights instruments and the provisions of the Constitution of Bangladesh to reach its decision.

The High Court observed that there was no uniform practice of veiling or head covering in the country but that there had been attempts to forcibly impose dress codes by private persons, extremist political organizations claiming to act on the basis of religion and public officials. The court referenced other cases to declare that harassment of women and girls was endemic (e.g. *Bangladesh Women Lawyers Association v Government of Bangladesh* in which the court issued guidelines on the prevention of sexual harassment and directed the government to enact legislation). The court noted that the referenced guidelines apply to public and private educational institutions.

The court examined traditional attitudes, customs and practices, and noted these are used to subordinate women and justify GBV (with reference to General Recommendation no. 19, CEDAW). The court looked to other international instruments as an 'aid to interpretation' of the provisions of the Constitution (part III) to determine the rights implicit within the constitutional rights, because a court cannot enforce instruments as treaties (even if ratified) if the state has not incorporated the treaties into domestic legislation. In addition to CEDAW, the court referenced the UDHR (articles 1, 2, 3 and 5), the ICCPR (articles 2, 17 and 19) and the

30 At first glance the case seems to deal with women's right to access a public space without discrimination. It is distinct from a veil case described below because an education official attempted to force female teachers to wear head coverings against their will and the court therefore interpreted the case as one of violence.

ICESCR (articles 3 and 7). The High Court interpreted the facts of the case in relation to the constitutional protections of equality between women and men in all spheres of the state or public life (article 28 (2)), equality of opportunity for all citizens with respect to employment...without discrimination because of religion, sex and other grounds (article 29), and freedom of religion, conscience and expression (article 39) to conclude that the order was unconstitutional.

In another 2010 Bangladesh case, *Bangladesh Legal Aid and Services Trust and others v Government of Bangladesh and others*, three petitioners (Writ Petition no. 5863 of 2009 with Writ Petition no. 754 of 2010 and Writ Petition no. 4275 of 2010) called on the High Court to issue a *Rule Nisi* against the government for its failure to ban extra judicial punishment. The petitions related to various instances of corporal punishment ordered by community members against women and girls as fatwas. One petition dealt with a 16-year-old girl who was raped and eight months later received 101 lashes after a fatwa edict by village arbitration. The rapist was not punished. In another petition the Muslim female victim had an affair with a Hindu boy in the same village and the village elders, including three Imams, ordered 101 lashes and the banishment of the girl. In still another petition a husband and wife received lashes after the husband had pronounced *talak* (an Islamic custom that allows the man to divorce) and then forced *hilla* (reconciliation in marriage).

The High Court used social context analysis, equality analysis and international instruments to support its decision. The court briefly analysed women's discrimination due to cultural attitudes and extra judicial penalties that men do not suffer. The court discussed the abuse of the Islamic practice of fatwa (a religious opinion) to include corporal punishment sanctioned by local committees that include Imams. The court was critical of Imams and communities that misinterpret Islamic principles and punish women and girls for actions that are not considered offences in Bangladeshi law (The petitions involved women or girls talking to a man outside of her home, premarital relations or giving birth to a child out of wedlock.) The court stated that Muslim laws do not permit such penalties and that there is no scope for such penalties in the traditional dispute resolution version of

Sharia. The court applied various constitutional provisions, such as equality before the law (article 27), prohibition of discrimination by the state (article 28), right to the protection of the law (article 31) and protection from torture or cruel, inhuman or degrading treatment (article 35 (5)). The state has an obligation to prevent and to punish ill treatment. The right to the security of the person was prioritized. The court ordered government action on criminal penalties against those who order extrajudicial punishment; and education about the law, especially the supremacy of the constitution and the rule of law, to discourage extrajudicial punishment 'in the name of execution of Islamic Sharia/Fatwa' (p. 21).

A similar 2014 public interest litigation case was brought before the Supreme Court of India in *Vishwa Lochan Madan v Union of India & Others*. The petitioner (a lawyer) claimed that the All India Muslim Personal Law Board was aiming to establish a parallel justice system. The Board, argued that because the justice system is expensive and difficult for women to access, local Islamic justice provided Sharia to those who want to use it. The petition was prompted by a large number of fatwas reported in the media. The lawyer provided examples of fatwas supported by the All India Muslim Personal Law Board: (i) Imrana, who was allegedly raped by her father-in-law and a fatwa issued after an inquiry from a journalist. The fatwa dissolved the marriage and decreed a perpetual injunction restraining the husband and wife from living together; (ii) A father-in-law rapes his daughter-in-law, but the perpetrator can only be held responsible if there is a witness or the woman's husband endorses his wife's allegation; and (iii) A 19-year old woman being asked to accept her 'rapist father-in-law' as her husband and divorce her actual husband.

While the Supreme Court did not find in favour of the petition, which called on the court to outlaw the local committees of the All India Muslim Personal Law Board, the court did limit the use of fatwas within, what it termed, an alternative dispute resolution mechanism. The case undertook a brief social context analysis and addressed the legality of fatwas. The court acknowledged that women are regularly subject to violence and that the fatwas sanction the victims of GBV rather than the perpetrators, noting that: 'A country governed by rule of law cannot fathom

it' (p. 14). The court focused on the legality of the fatwas:

[W]hatever may be the status of (the) Fatwa during Mogul or British Rule, it has no place in independent India under our Constitutional scheme. It has no legal sanction and cannot be enforced by any legal process. . . . The person or the body concerned may ignore it and it will not be necessary for anybody to challenge it before any court of law. It can simply be ignored. If any person or body tries to impose it, their act would be illegal... the Fatwa has no legal status in our Constitutional scheme.

The Supreme Court found that fatwas are not permissible unless requested by the person concerned. Fatwas should not touch on the rights of an individual at the request of a stranger, as was the case for Imrana. To do so, according to the court, would be a violation of basic human rights: 'It cannot be used to punish innocent. No religion including Islam punishes the innocent' (p. 15). The so-called Muslim Court has '... no legal status. It is bereft of any legal pedigree and has no sanction in laws of the land' (p. 12). The decision received significant national and international media attention (BBC 2014; Mahmood 2014).

3.7.

Summary observations related to gender-based violence

Constitutional provisions in GBV cases

While some courts relied on the right to equality to examine claims with respect to GBV (the Femicide Law challenge, Guatemala; *Jesus Garcia*, the Philippines; *R v Gua*, the Solomon Islands; *Balela*, Fiji; *Ripples*, Kenya; *Mukungu*, Kenya; *Auto 092*, Colombia; Law and Advocacy for Women in Uganda, the FGM case; and BLAST public interest litigation cases, writs no. 10663 and no. 4495, Bangladesh), many courts relied instead on a number of other rights. Various courts applied rights to equal protection of the law, human dignity and security of the person (*Carmichele*, South Africa; *Ripples*, Kenya; and *Samira Ibrahim Mohamed Mahmoud*, Egypt).

A limited number of decisions adopted a gender analysis, if not a gender equality provision, to interpret a woman's right to human dignity and security of the person. For example, the South African Constitutional Court in its decisions *Carmichele v Ministry of Safety and Security* and *K v Ministry of Safety and Security* interpreted common law principles from an equality rights perspective with the aid of section 39 (2), which requires a purposive interpretation of laws or common law principles related to liability in conformity with the Bill of Rights contained in the Constitution of South Africa.

The case of *Ripples* (Kenya) applied a unique provision to underscore the duty of the state to victims of violence. The High Court at Meru referenced article 21 (3) of the Constitution of Kenya, 2010, which calls on the state to address the needs of vulnerable groups. The Constitution of Colombia includes a reference to special measures in favour of marginalized groups in its provision related to the right to equality and non-discrimination (article 13). Thus, *Auto 092*, intended to address the situation of displaced women affected by the armed conflict, is infused with a substantive equality approach throughout. Where specific permission to treat groups differently or provisions calling for special measures are not contained in a constitution, courts can undertake a substantive equality analysis, as was the case in the Femicide Law challenge before the Guatemalan Constitutional Court.

Cases involving loss of life or grievous physical harm referenced constitutional provisions prohibiting torture or cruel, inhuman and degrading treatment. This prohibition was applied in *Ripples* (Kenya); Law and Advocacy for Women in Uganda; and two BLAST petitions (the two-finger test in cases of sexual assault, and extra judicial punishment). In the Constitution of Uganda this prohibition is explicitly non-derogable.

To address GBV, including practice claimed to be integral to a culture, courts applied constitutional provisions such as the right to culture (Law and Advocacy for Women in Uganda) and the freedom of religion, conscience and expression (BLAST petition no. 4495 related to forcing teachers to veil). In *Siddique* (Pakistan), where the accused attempted to defend his acts based on culture

or religion, the Lahore High Court based its response on the Qur'an and other Islamic principles to counter the defence of 'honour killing'.

In decisions related to crimes committed against women during armed conflict, distinct constitutional provisions were cited by the courts. For example, in the *Sepur Zarco* case (Guatemala) the court referenced the pre-eminence of international law in the area of human rights over domestic law (art. 46 of the Constitution of Guatemala). The Colombian Constitutional Court cited the right to peace in its decision in *Auto-092*. The court in the child marriage case *Loveness* (Zimbabwe) applied the rights of children, the right to form a family, and equal rights between boys and girls. Interestingly, the court in *Sapana Pardhan Malla*, the Nepalese child-marriage case, did not invoke any constitutional provision in its reasoning.

Application of CEDAW and other international instruments in GBV cases

In the GBV cases CEDAW was referenced generally to emphasize international obligations related to gender equality (*Loveness*, Zimbabwe; Femicide Law challenge, Guatemala; *Jesus Garcia*, the Philippines; *Ripples*, Kenya; *Auto 092*, Colombia; and *Gregorio Molina*, Argentina). The exception was *R v Gua* related to the marital exemption rule in instances of sexual assault. The Solomon Islands High Court cited sections 15 and 16 of CEDAW. In other decisions, courts cited the Committee's General Recommendation no. 19 or the UN Declaration on the Elimination of Violence Against Women (*Railway Board*, India; BLAST writ petition no. 4495, Bangladesh).

In addition, various cases cited the UDHR, the ICCPR and regional instruments such as the Convention of Belem do Para and the African Charter on Human and Peoples' Rights. The Convention on the Rights of the Child was referenced in *Loveness* (Zimbabwe) and *Ripples* (Kenya). These cases also referenced the African Charter on the Rights and Welfare of the Child, among other specific international instruments.

The cases involving armed conflict or states of emergency invoked international humanitarian law. In *Gregorio Molina*, the court referenced international customary law; in *Sepur Zarco* the Guatemalan sentencing

tribunal referenced common article 3 of the Geneva conventions, international human rights law and the American Convention on Human Rights; and in *Samira Ibrahim Mohamed Mahmoud* (Egypt) the court referenced the ICCPR and the Geneva Convention on the Treatment of Prisoners of War.

Innovative approaches to judicial reasoning and strategic litigation in GBV cases

Certain approaches to judicial reasoning supported advances in gender equality as a critical aspect of GBV.

Social context analysis was important in demonstrating the disadvantage or vulnerability of women or girls and specific groups of women and girls. In the Femicide Law challenge (Guatemala) and *Jesus Garcia* (the Philippines), the courts used social context analysis to demonstrate the disadvantage to Mayan Q'eqchi women and the high incidence of domestic and other forms of GBV to support the courts' substantive equality interpretation of constitutional provisions related to equality before the law and non-discrimination. In *Loveness*, the incidence and context of child marriage in Zimbabwe were examined in detail and UN reports were cited. Social context analysis provided the data to support the court's ban on child marriage. In *Ripples*, the after-effects on the individual petitioners were also an important element in influencing the court's decision.

The intersectionality of rights and multiple forms of discrimination were more evident in the GBV decisions than in the family-related decisions. For example, the Constitutional Court of Colombia, in *Auto 092*, examined the spectrum of rights of women and children and how the rights to equality, physical integrity, education, health and culture were disproportionately affected by the armed conflict. The court in *Ripples* also interpreted and reconciled various rights to reach its decision.

Two cases applied religious principles in response to discriminatory practices. In *Siddique*, the High Court of Lahore invoked the Qur'an to respond to the accused's defence; and in *Samira Ibrahim Mohamed Mahmoud* (Egypt) the Administrative Court applied Sharia principles, specifically related to the sanctity of the human body.

National precedent and 'modern' constitutions containing equality rights provisions have allowed courts to develop and advance the law related to the duty of the state to prevent, punish and redress GBV. At least three cases involved amici curiae (*Ripples*, Kenya; *Carmichele*, South Africa; and *K v Minister of Safety and Security*, South Africa). In these cases, social context and equality rights analyses were extensively used, although only the two South African judgements referenced the arguments of the friends of the court. The *Ripples* decision relied more on the petitioner organization.

In the selected GBV cases the role of strategic public interest litigation was identifiable from the judicial decisions themselves. This was less clear in the family-related cases. Almost 50 per cent of the GBV cases (11 of the 23) were cases of public interest litigation. The constitutional or legislative provisions allowed in some cases enabled the participation of civil society organizations and individual lawyers.

Observations related to public interest decisions relate to procedural issues rather than innovative approaches. Standing was reviewed by the courts in two decisions (*Railway Board*, India; and *Loveness*, Zimbabwe). Both courts found in favour of the petitioners. The *Loveness* child-marriage case reviewed locus standi cases and constitutional provisions, and found in favour of expansive standing to ensure access to justice for marginalized groups. In the case of *Sepur Zarco* (Guatemala), the victims of sexual assault and slavery during the armed conflict were supported by women's organizations that used a co-prosecution mechanism to advance the criminal case. Constitutional provisions related to standing or public interest litigation were used in all the other public interest litigation cases in this sub-topic.

The public interest litigants in Bangladesh used the *Rule Nisi* mechanism to challenge discriminatory government policies or practices. The responsible government agency then had the burden of demonstrating why the discriminatory rule or practice should continue or to take steps to change the rule or practice. In addition, petitions from rights organizations pressed the courts to examine whether governments had taken sufficient action to address discrimination against women or girls. Examples include *Sapana*

Pardhan Malla (on child marriage) and the Indian and Bangladeshi petitions by regarding the use of fatwas by Islamic and community leaders to punish women and girls for conduct that allegedly violated religious or social norms.

Trends in GBV cases

Special measures to protect women and girls from GBV are increasingly being taken by governments, often in response to sustained lobbying and advocacy. For example, legislation designed specifically to address GBV and to protect women from violence was introduced and upheld as constitutional when challenged in St Lucia (*Francois*), Guatemala (Femicide Law) and the Philippines (*Jesus Garcia*). In other cases, special measures by the state were called for, for example, by the Colombian Constitutional Court (*Auto 092*).

In addition, there was a positive trend in elaborating and expanding states' duty of care related to GBV, especially sexual violence. The South African Constitutional Court decisions on *Carmichele v Ministry of Safety and Security* and *K v Ministry of Safety and Security*, and the Railway Board case (India) advanced jurisprudence related to state liability for acts of violence perpetrated by public employees. In *Ripples v Police* (Kenya) the court detailed and enforced the state's obligation to investigate and punish acts of violence against girls, enlarging the state's responsibility in respect of, and liability for, such acts.

Patterns in GBV cases

Customs or practices that violate women's human dignity and personal security were declared unconstitutional in a direct and explicit manner in the GBV decisions reviewed (see *Loveness*, Zimbabwe; and FGM in the Law and Advocacy for Women in Uganda case). This contrasts with some of the decisions on marriage and divorce, which left ambiguities regarding women's rights in relation to customary practices such as polygyny.

Traditional patriarchal rules or practices were overturned in cases from Asia and the Pacific and the MENA region. These included discriminatory evidentiary rules such as the marital rape exemption (*R v Gua*, Solomon Islands), the requirement for corroborative evidence in sexual assault cases (*Balelala*, Fiji; and *Mukungu*, Kenya) and the two-finger

test (BLAST writ petition, Bangladesh). Discriminatory physical examinations (virginity tests) during detention were banned in *Samira Ibrahim Mohamed Mahmoud* (Egypt).

Courts in some cases admonished defendants and religious or customary leaders who used religion or culture to attempt to justify GBV in the decisions of *Siddique* (Pakistan) and *Law and Advocacy for Women in Uganda* (the FGM case). In the case of fatwas, in the decision of the Bangladesh High Court (BLAST case) the court ordered government action, including criminal penalties against individuals who order extrajudicial punishment in the name of Islam. The Indian Supreme Court was more tolerant of local Islamic committees by limiting the use of fatwas to consenting parties seeking to resolve disputes through 'Muslim Courts'.

Criminal cases related to armed conflict demonstrated a strong reliance on international law to convict (*Gregorio Molina*, Argentina; *Sepur Zarco*, Guatemala) or seek the conviction (in *Auto 092*, Colombia) of armed actors accused of sexual violence during armed conflict.

Areas for further research

A number of the GBV cases declared practices such as FGM, child marriage, 'honour-based' defence arguments and invasive physical examinations unconstitutional. Some of these practices are based on religious or cultural arguments and this raises an interesting question about the influence a court decision can have on human behaviour that has been culturally reinforced. The Nepal child-marriage case (*Sapana Pardhan Malla*) is an example of the ineffectiveness of legislation banning child marriage and a government's failure or inability to end the practice. The decisions related to common law principles, such as the marital rape exemption, are easier to track through subsequent court decisions in the jurisdiction.

4

ANALYSIS OF CONSTITUTIONAL JURISPRUDENCE: WOMEN'S ACCESS TO PUBLIC LIFE

This sub-topic examines the tensions between traditional patriarchal, religious and customary rules or practices that have historically limited women's active and full participation in all aspects of public life. Fifteen cases related to women's access to public life are analysed. The cases are from three regions: nine from MENA countries, three from Asian countries and three from African countries. They address the full spectrum of rights related to women's ability to be active citizens, without discrimination, in various aspects of public life. In other words, the cases in this section address the obstacles faced by women in their attempts to exercise their human rights effectively in the public sphere. The first group of cases addresses the right to nationality, and specifically the right of a mother to pass on her nationality to her children. The next set addresses the right to register children or family members based on matrilineal lines. These first two groups of cases represent the foundational rights that allow women and their children to exercise other rights. The impugned rule or practice in these cases is the patriarchal notion that identity flows only along patrilineal lines. The third group of cases relates to women's ability to participate in political life and the state's obligation to take measures to remove barriers to women's exercise of their civil and political rights. The fourth set of cases tackles the patriarchal, religious or cultural rules that prevent women from gaining full and equal access to public spaces.

4.1.

Right of mother to pass nationality/citizenship to children

Five decisions (four from Egypt in 2015 and one from Iraq in 2006) relate to the right of women to pass on their nationality to their children. A woman's ability to pass on her nationality to her children is limited in approximately 27 countries, many in the MENA region (Theodorou 2014). These decisions reflect

the purely legal, but foundational, concept of citizenship as it relates to the interaction between the state and its citizens.

Iraq ratified CEDAW in 1986 with a reservation related to, among other things, article 9, dealing with equal rights to nationality and the ability

to pass nationality to children. In 2004–2005 Iraqi women voiced their concerns during the constitutional reform process with support from the United Nations and international NGOs (Norris 2007). The Constitution of Iraq, 2005 recognizes a mother’s ability to pass nationality to her children in article 18 (2), stating: ‘Anyone who is born to an Iraqi father or to an Iraqi mother shall be considered an Iraqi. This shall be regulated by law’ (emphasis added). The 1990 Constitution had simply stated that nationality would be regulated by the law.

In the 2006 Iraqi case *Saam and brothers v Minister of Interior* the appellants applied to the Minister to request Iraqi nationality pursuant to article 18 of the Constitution and section 3 (a) of the Citizenship Law (Law 26 of 2006). Their mother is Iraqi by nationality and their father is Palestinian. However, the children’s applications were denied by the ministry on the basis of article 6 of section 2 of Law 26 of 2006, which states that Palestinians cannot be granted Iraqi nationality in order to preserve their right of return. The Federal Court of Appeal did not undertake a social context analysis or elaborate on the gender equality provisions. Instead, the court relied on the literal text of article 18 of the Constitution and denied the relevance of section 3 (a) of the Law because these children have an Iraqi mother. The court found that the ministry should not have applied the ‘Palestinian exception’ and noted that the constitutional text states that either mother or father can pass nationality to their children.

In 2011, the Arab Spring led to constitutional reform in various countries in the MENA region. It was an opportunity for women to mobilize to reshape women’s constitutional rights. In Egypt women played a notable role in transforming the Constitution (Zambrana 2016). The Egyptian Constitution of 2014, article 6, states that: ‘Citizenship is a right to anyone born to an Egyptian father or an Egyptian mother. Being legally recognized and obtaining official papers proving his personal data is a right guaranteed and organized by law. Requirements for acquiring citizenship are specified by law’.

In the May 2015 decision of the Second Circuit Administrative Court, *Hazam, Shayma’ and Noora Abu Zettah v Minister of Interior and Head of Passports, Immigration and Citizenship*, three Gazans born in Egypt appealed the decision

of the ministry to refuse them Egyptian nationality. The mother of the children is Egyptian and the father Palestinian. The petitioners based their appeal on Law 154 of 2004, which modified Law 26 of 1975. The court stated that legislation has provided for equal opportunity to access Egyptian nationality for children from the mother or father in section 3 of Law 154 of 2004. The court also admonished the ministry, stating that there is an assumption that public administration will be a noble institution that will enforce the law fairly, and it had not.

The same court resolved another case on the same date in May 2015. In *Abeer Zeinadin as custodian of daughter Elin Halawani v President of the Republic and Minister of the Interior*, the Passports Department refused to issue Egyptian citizenship to a minor daughter. Abeer was married to a Syrian in 1995. She lived in Alexandria, Egypt, prior to moving to Syria, where she gave birth to Elin. The family then returned to Alexandria but her husband divorced her in 2000. The father died in 2008, making the mother the sole custodian of her daughter as a result of a decision by a Sharia court in Syria. Subsequently, Abeer married an Egyptian man and had another child with him. When she applied for citizenship for Elin, the department refused the application without giving a reason. The administrative court found that the ministry had violated article 6 of the Constitution of 2014 and Law 154 of 2004. The ministry was ordered to pay the appellant’s costs.

In the case of *Hamid v Minister of Interior et al.*, the Administrative Court ruled in favour of a man born to a Palestinian father and a Jordanian mother. The mother had been given Egyptian nationality in 2004 based on a ministerial decision before Law 154 of 2004 came into effect. The ministry refused to accept his application for nationality. The claimant appealed to the first committee mandated to hear an appeal, but that committee rejected his application. The claim was successful, in form and substance, at the second level of appeal—the State Council, Committee of State Commissioners, Court of Administrative Jurisdiction. His application for Egyptian nationality was approved based on his mother’s Egyptian nationality and article 6 of the Constitution. The ministry was ordered to pay costs.

In the fourth Egyptian case, *Mohammed Abdullah v Minister of Interior and Head of the Department of Passports, Immigration and Citizenship*, the child of an Egyptian mother was denied nationality. The court reviewed the criteria for the ministry granting nationality in article 4 of Law 26 of 1975, the modifications in Law 154 of 2004 and article 6 of the Constitution. In this case the ministry was also ordered to pay costs.

Despite the fact that the relevant constitutions and laws had been amended to permit mothers or fathers with Iraqi or Egyptian nationality to pass on their nationality to their children, the government authorities continued to deny applications. These five written decisions are very brief, involving a literal interpretation of the Constitution and amended legislation, and a formal equality approach. The decisions did not examine the government respondents' reasons for not applying the recently recognized rights of mothers. Furthermore, it is important to note that the courts did not need to invoke provisions related to the rights to equality and non-discrimination on ground of sex in order to reach decisions favourable to the mothers and their children.

4.2. Equality in identity-related registration

The ability to register individuals or groups with state institutions builds on the basic concept of citizenship as mediating the interaction between citizens and the state. Two judicial decisions rendered by the Constitutional Court in South Korea relate to the traditional practice of registering individuals and households in the father's name according to the Civil Code. In both cases the judges refer to article 36 (1) of the Constitution, which provides that 'Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the state shall do everything in its power to achieve that goal' (Constitution of the Republic of Korea 1948, as amended to 1987). The decisions held that the provisions of the Civil Code that require the registration of individuals or households in the father's name were unconstitutional due to

discrimination based on sex.³¹ It is important to note that both the South Korean cases relate to changes in family configurations.

In the 2003 *Use of Paternal Family Name Case*, the issue was the registration of individual children whose father had died. The mother had remarried and the stepfather had adopted the children and wished to give them his family name. Article 781 (1) of the Civil Code of South Korea required registration under the paternal family name. When the family filed an application at the Seoul district court to register in the adopted father's name, they were denied. The impugned article of the Civil Code was referred to the Constitutional Court. The majority decision of the court analysed equality provisions, albeit from a narrow perspective. The court cited the rights to individual dignity, equality based on sex and legal personality. However, the court noted that the unconstitutionality of the provision arose not from the fact that the father's name was the one privileged, but that it did not allow for exceptions where use of the father's family name might be unfair. The court further stated that when family circumstances change, the decision to change a surname is closely related to one's identity. Preventing a change of name as a person sees fit infringes that individual's right to personality. The concurring opinion found that the provision of the Civil Code violated article 36 (1) of the Constitution, which prescribes that 'Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the state shall do everything in its power to achieve that goal'.

The 2005 Korean decision, *Case on the House Head System*, related to traditional patriarchal rules contained in three provisions of the Civil Code. These provisions stated that families (article 778), individuals (781 (1)), and wives (826 (3)) must be registered along patrilineal lines.³² It is important to note that this system had repercussions for various areas of family law, including inheritance. In this case there were two categories of petitioners: families where the spouses had divorced and remarried; and husbands and wives who

31 It is important to note that South Korea also placed a reservation on article 9 of CEDAW when it ratified the Convention in 1984.

32 Apparently, this provision was not repealed after the *Use of Paternal Family Name Case* in 2003.

wished to register as a household without applying the patriarchal ‘head of household’ rule. The decision of the Constitutional Court demonstrated a more detailed analysis of culture and traditions compared to the constitutional guarantees of equality based on sex. In this judgment, the majority and dissenting opinions included social context analyses that assessed the historical tradition of registering a household in the father’s name. The majority found the rule to be discriminatory based on sex-role stereotyping and noted that feudal and patriarchal traditions could no longer be tolerated due to the supremacy of the constitutional values of individual dignity and equality between the sexes. The majority opinion pointed out that while ‘traditions’ and ‘cultural heritage’ are mentioned in article 9 of the Constitution, these concepts should be defined according to their contemporary meaning, with reference to constitutional guarantees.³³ The dissenting judges prioritized the tradition of patrilineal household registration over individual rights. The three provisions of the Civil Code declared unconstitutional were repealed following this decision and new provisions came into effect on 1 January 2008.³⁴ This constitutional decision, initiated through public interest litigation, ended a system, reconceptualized when Korea was under Japanese rule, of registration of the male head of the family (Yang 2005). This patrilineal system regulated ‘virtually every legal relation within the family’ (Yang 2005: 1).

4.3.

Women’s political participation

Four decisions relate to affirmative action, in the form of electoral quota laws, to promote women’s candidacies in elections at the national, subnational and municipal levels. One decision relates to women being allowed to assume the position of clan leader.

The active participation of women in electoral processes builds on the notion of citizenship

³³ ‘The State shall strive to sustain and develop the cultural heritage and to enhance national culture’.

³⁴ According to a note following the English summary of the judgment

as a process, within which women exercise their political rights based on affirmative measures to address the low number of women participating in democratic processes as candidates. Three cases from the MENA region (one in Algeria,³⁵ two from Iraq) involved constitutional references to confirm the constitutionality of electoral quota laws that benefit women. The fourth case, decided by the Court of Appeal of Lesotho, involved a challenge by a man to the constitutionality of an electoral quota law on the basis that the law favoured women and negatively affected him as an individual.³⁶ In all four electoral quota decisions the courts adopted a substantive equality analysis by acknowledging that special measures or differential treatment to achieve equality are permissible. This substantive equality approach is explicit in the constitutional texts of Iraq (article 16, Constitution 2005), Lesotho (article 26 (2), Constitution of Lesotho 1993, as amended to 2004) and Algeria.

In Algeria, constitutional amendments in 2008 allowed affirmative measures specifically related to women’s political participation: ‘The State shall work for the promotion of political rights of women by increasing their chances of access to representation in elected assemblies. The modalities of application of this Article shall be determined by an Institutional Act’ (article 31-bis, Constitution of the People’s Democratic Republic of Algeria 1989, reinst. 1996, rev. 2008). The particular institutional act, Organic Law no. 12-03 (the Organic Law), ‘defines the parameters of women’s representation in elected assemblies’ (Bourouba 2016a: 36).³⁷ In *Opinion no. 5 of 2012* the Constitutional Council responded to a request by parliament to review the constitutionality of the Organic

³⁵ Opinion no. 5/RMB/11 of 22 December 2011 of the Constitutional Council, Official Gazette, no. 1 (14 Jan. 2012).

³⁶ A similar challenge was brought to the Federal Electoral Tribunal in Mexico in 2010 when a male candidate was replaced by a female candidate by the political party Partido Acción Nacional. Comisión Interamericana de Derechos Humanos, *Estandares Jurídicos Vinculados a la Igualdad de Género y a los Derechos de las Mujeres en el Sistema Interamericano de Derechos Humanos: Desarrollo y Aplicación* (2011). OEA/Ser.L/II.143 p 105

³⁷ An organic law or institutional act refers to constituent legislation that sets out the rules for an institution or government to function.

Law. The Council did not undertake social context analysis to illustrate the need for electoral quotas, but it did confirm the substantive equality approach adopted by the legislative branch. The Council stated that the legislator could include criteria for achieving the equality specified in article 29 of the Constitution, as long as those criteria do not contradict that provision.³⁸ The Council also observed that any legal ruling should protect the political rights of women and not reduce those rights. So while the Council criticized the Organic Law, articles 2 (1) and (2) and 3 (1) and (2), for failing to explicitly mention expanding equal opportunities for women's representation, it also agreed that the law does discuss expanding the representation of women. This minor detail is not sufficient to invalidate the provisions of the Organic Law because the provisions are consistent with the intended objective. While the Council did not specifically cite international instruments, Bourouba (2016b) suggests that it implicitly referenced such instruments through its analysis of the Organic Law because the legislation itself directly references and incorporates CEDAW and the International Covenant on Civil and Political Rights (ICCPR) in its text. The legislative elections held on 10 May 2012 were the first opportunity to apply the provisions of the Organic Law, and this resulted in a representation rate of Algerian women of 31.5 per cent (Bourouba 2016b referencing Hassani 2013).

The two Iraqi cases relate to electoral quotas for women. The Iraqi High Federal Court in *Case 13-T-2007* decided on a reference from the legislature related to four distinct matters, one of which was the possibility of imposing quotas for women in the Law of Governorates. The legislature queried whether quotas would violate the right to equality and non-discrimination in article 14 and other provisions of the Constitution related to equal opportunities. Reading the electoral laws through a purposive lens also allowed the court to assess the aims or objectives of the legislators and compare those aims with the equality provisions in the constitutional text. The court suggested that the legislator should examine the aims of legislation to see

whether the measure is consistent with the Constitution. Article 14 states that: 'Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, colour, religion, sect, belief or opinion, or economic or social status'. Furthermore, article 16 (1) provides for measures to achieve equality: 'Equal opportunities shall be guaranteed to all Iraqis, and the state shall ensure that the necessary measures to achieve this are taken'. The Council confirmed that affirmative measures were not inconsistent with article 14 and recommended that Governorate Councils set a target of 25 per cent female representation as stated in section 49 (4) of the Law of Governorates.

In *Case 72-T-2009* the Iraqi Federal Court received a constitutional question from the legislature. A member of the president's council did not accept a modification to Electoral Law no. 16 of 2005, and so parliament requested the court's opinion on the constitutionality of the law. The specific issue was how to select representatives. The composition of the legislature is described in article 49 of the Constitution: there should be one representative per 100,000 inhabitants elected by direct secret ballot. Furthermore, section 49 (4) provides that not less than 25 per cent of the total number of members should be women. The court held that the Constitution did not discriminate between those in Iraq or those outside of Iraq, and that the only selection condition is that the proportion of women should not be less than 25 per cent of the elected members. The court noted that electoral mechanisms are the responsibility of the Independent Electoral Commission.

In the Lesotho case, *Ts'epe v The Independent Electoral Commission and Others*, in 2005 the Court of Appeal received a petition from a man who argued that the gender parity provisions in the Election Act that provide that women must make up one-third of the candidates were unconstitutional. The Court of Appeal undertook a social context analysis to illustrate the historical disadvantage faced by women in the political arena. The court recognized the historic disadvantage of women and specifically the fact that women make up 51 per cent of the population but hold only 12 per cent of the seats in the National Assembly: 'Thus while throughout the world, the underrepresentation of

38 Article 29 states: 'Citizens shall be equal before the law without any discrimination on the basis of birth, race, gender, opinion or any other personal or social condition or circumstances'.

women in public life is marked, in Lesotho the disparity is particularly acute' (para. 29). The court recognized that the holding of the first democratic local government election in Lesotho therefore presented an obvious opportunity to redress the balance. The court also adopted a substantive equality approach. While article 18 protects the right to be free from discrimination, the court examined the guiding principle contained in the chapter on Principles of State Policy. These principles prevailed over article 18. Specifically, the court invoked article 26:

- (1) Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens...
- (2) In particular, the state shall take appropriate measures in order to promote equality of opportunity for the disadvantaged groups in society to enable them to participate fully in all spheres of public life.

According to the court, the test for constitutionality requires an examination of 'whether, having regard to its nature and to special circumstances pertaining to those persons or to persons of any such description, [this] is reasonably justifiable in a democratic society' (para. 15). This test is derived from Canadian jurisprudence (*R v Oakes* [1986] 1 SCR 103). The court also cited South African constitutional jurisprudence in *Minister of Finance and Another v Van Heerden*: a 'substantive conception of equality inclusive of measures to redress existing inequality ... [is necessary or] the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow' (para. 31).

In the South African case of 2008, *Shilubana and Others v Nwamitwa*, the Constitutional Court addressed a number of issues, including the succession of a woman to the traditional chieftainship (Hosi) of the Valoyi community. Shilubana was the first daughter of a Hosi and had been appointed to the chieftainship position from which she had previously been barred due to the patrilineal tradition of the customary law of succession. Nwamitwa, a man who claimed that he would have otherwise have become Hosi, argued that the traditional authorities acted unconstitutionally by appointing Shilubana and changing the customary law of succession. The case had been heard in the High Court and then the

Supreme Court. The issues addressed before the courts were: whether a female can be appointed Hosi according to the customs and traditions of the Valoyi tribe; whether the royal family had acted according to customs and traditions when Shilubana was appointed; and whether the government decision recognizing Shilubana's appointment was consistent with the customs and traditions recognized in the Constitution.

Shilubana and other applicants argued that customary law is dynamic and that the Valoyi are able to amend their customs and traditions. The applicants argued that the only constraint on customary law is in article 211 (2) of the Constitution. Article 211 in its entirety states that: (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. The applicants argued that the appointment of Shilubana as Hosi 'was consistent with the rules and procedures of the community' (para. 29). The respondent argued that the appointment did not follow traditional family lineage and in particular male primogeniture.

The court admitted three amici curiae: the Commission for Gender Equality, the National Movement of Rural Women and the Congress of Traditional Leaders of South Africa (CONTRALESA). The first two friends of the court argued that customary authorities are able to develop their customs based on the approach recognized previously by the court—that customary law is living law, flexible and dynamic. CONTRALESA, on the other hand, argued that the Royal Family had made decisions without following the community's procedures.

The Constitutional Court of South Africa used social context analysis to acknowledge the history of customary law, which precluded women from becoming Hosi, and the historic disadvantage that resulted. The court, as in the other decisions examined above, relied on a flexible approach to customary law as living law in order to balance and integrate

multiple legal regimes. The court explained its approach in this case:

First, it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules and norms that has developed over the centuries. . . . Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, in line with the approach set out in *Bhe*. . . . [C]ourts embarking on this leg of the enquiry must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it. (para. 44)

In addition, the court strove to respect the right of communities to develop their law, while being attentive to traditions and practices, and recognizing both the important impacts of customary law and the need for customary law to conform to the Constitution. Customary law is inherently flexible but here traditional authorities acted in order to bring the customary law into conformity with the Constitution, and in particular with its equality provisions. At paragraph 81 the court noted:

. . . [C]ustomary law is living law and will in future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions, previous circumstances and practical needs, and of course the demands of the Constitution as the supreme law.

The court determined that the traditional authority did not act unconstitutionally when it decided to combine family bloodline with efforts to undo gender discrimination in the appointment of the chieftainship dating back to 1968. As Nhlapo argues, the *Shilbuana* case builds on *Bhe* and is a further 'endorsement of "enacted" living customary law and ... a harbinger of unprecedented uncertainty in the area of customary law succession to chieftainship' (Nhlapo 2014: 12).

Exercise of equality, cultural and religious rights related to women's access to public spaces and full participation in society

In this subsection four cases examine how women have challenged rules that impeded

their full and active participation in public spaces. In some cases, women had been banned from being active citizens in public spaces due to the public/private dichotomy that defines traditional gender relations.

The 2005 decision from Chad relates to an internal administrative decision of the Director General of Customs banning women from entering the customs office to conduct business. The 2014 decision of the Turkey Constitutional Court relates to the right of lawyers to wear head coverings during judicial proceedings. The 2016 decision from India was a public interest case brought by two women who protested the ban on women accessing the inner sanctum of a sacred Islamic religious site.

The Supreme Court of Chad in *Société des Femmes Tchadiennes Transitaires v Ministère des Finances* found the internal administrative note banning female forwarding agents from entry to be a violation of the constitutional provision protecting equal rights for men and women: 'Chadians of both sexes have the same rights and the same duties. They are equal before the law' (article 13, Constitution of the Republic of Chad 1996 as amended to 2005). The Chadian Court also buttressed its decision by referencing CEDAW generally. This decision was referenced by Chad as evidence to the Committee on the Elimination of All Forms of Discrimination against Women of the integration of the Convention into domestic law.³⁹

In the following three decisions the courts examined the intersection of constitutional provisions related to non-discrimination based on culture and religion.

In the 2007 South Africa case of *Member of the Executive Council of Education in KwaZulu-Natal v Pillay* the Constitutional Court addressed the constitutionality of a school's Code of Conduct

39 United Nations Committee on the Elimination of All Forms of Discrimination against Women, Responses to the list of issues and questions (CEDAW/C/TCD/Q/4) Pre-session working group, Forty-Fourth Session (22 October 2010), <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICA-qhKb7yhsqWC9Lj7ub%2FhrjVf1GxZMHEkm-PQyxxMCM2IFUjG5qxf3KY2VT6J6KD6mn-1KwCiZyBmHGwzBMKjImb4aoQA460G7i9qXM-Sq6e9hzO5V7Dr1hTjpwkLDB0XzsqNa1KJhhEeA%-3D%3D>>, accessed 22 November 2016.

barring most jewellery in school. Student Sunali Pillay was told she could not wear a nose stud to school. The mother of the student, as respondent before the Constitutional Court acting on behalf of her minor daughter, claimed the nose stud was part of her daughter's cultural and religious practice, and that the refusal amounted to discrimination based on religious and/or cultural expression. The Constitutional Court examined the 'place of religious and cultural expression in public schools' (para. 1).

This case represents the only decision that addresses constructive or indirect discrimination. This type of discrimination arises from a seemingly neutral rule that has, according to the complainant, a negative effect on her ability to practice an ancient South Indian tradition related to her Hindu culture and religion. Sunali had received her nose stud to mark her coming of age (the onset of her menstrual cycle). The mother accessed the Equality Court under the Equality Act to challenge the school's position. Section 6 of the Equality Act 'reiterates the Constitution's prohibition of unfair discrimination by both the state and private parties on the same grounds including, of course, religion and culture'. The court of first instance found that the practice was discriminatory but necessary to ensure uniformity among schools. The High Court, however, held that the ban on Sunali's use of a nose stud amounted to unfair discrimination against a member of a group that had faced historic discrimination in South Africa.

Unfair discrimination, by both the state and private parties, including on the grounds of either religion or culture, is specifically prohibited by sections 9 (3) and (4) of the Constitution, which read:

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

Three *amici curiae* were admitted by the Court: the Governing Body Foundation, an association of public school governing bodies, which argued the use of a nose stud would negatively affect discipline in schools; the Natal Tamil Vedic Society Trust, which supported Pillay's right to wear the nose stud; and the Freedom of Expression Institute, concerned with both freedom of expression issues and equality issues as raised by other parties. The court analysed the meaning of culture and religion and the interaction between the two:

The alleged grounds of discrimination are religion and/or culture. It is important to keep these two grounds distinct. Without attempting to provide any form of definition, religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. However, there will often be a great deal of overlap between the two; religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural. (para. 47)

The court recognized the intersection of rights in its decision and found that the nose stud was an expression of both culture and religion, and that it was not correct to force the practice into one category or the other:

the nose stud is not a mandatory tenet of Sunali's religion or culture. . . . But the evidence does confirm that the nose stud is a voluntary expression of South Indian Tamil Hindu culture, a culture that is intimately intertwined with Hindu religion, and that Sunali regards it as such. The question arises whether the nose stud should be classified as a religious or cultural practice, or both. This Court has noted that 'the temptation to force [grounds of discrimination] into neatly self-contained categories should be resisted'. That is particularly so in this case where the evidence suggests that the borders between culture and religion are malleable and that religious belief

informs cultural practice and cultural practice attains religious significance. As noted above, that will not always be the case: culture and religion remain very different forms of human association and individual identity, and often inform people's lives in very different ways. But in this matter, culture and religion sing with the same voice and it is necessary to understand the nose stud in that light—as an expression of both religion and culture. (para. 60)

In order to determine whether the school's Code of Conduct amounted to unfair discrimination, the court applied the principle of 'reasonable accommodation'. This principle is applied in equality rights cases to determine whether the public agency, service provider or employer can make an adjustment or exemption that will permit a member of a disadvantaged group to practice his or her culture or religion without undue hardship to the public agency, service provider or employer. Reasonable accommodation is considered an affirmative measure (para. 72). In this case the court examined whether the school could have recognized diversity by providing an exemption to Sunali without incurring undue hardship or expense (para. 73).

The Constitutional Court undertook social context analysis to assist with its determination of unfair discrimination by reviewing the history of disadvantage experienced by marginalized groups in the education system in South Africa, especially during the apartheid regime. The court looked to Canadian and US precedent related to reasonable accommodation. The court found that accommodation is most appropriate when dealing with an apparently neutral rule that may have the effect of further marginalizing groups in a diverse society (para. 78).

The Constitutional Court confirmed the conclusion of unfair discrimination made by the High Court given that the Code of Conduct itself and the school did not allow for an exemption. The court clarified the effect of its decision:

It does not abolish school uniforms; it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices. There should be no blanket distinction between religion and culture.

There may be specific schools or specific practices where there is a real possibility of disruption if an exemption is granted. Or, a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform. The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption. However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not. (para. 114)

This case addresses and vindicates the issue of a religious/cultural practice as an equality rights issue. The school is thus obliged to provide reasonable accommodation to avoid the characterization of their behaviour—in this case the school code—as 'unfair'. The court recognized that cultural and religious expression are central to autonomy and dignity, and that these practices should be accommodated and indeed celebrated as indicative of the richness of diversity.

In the *Headscarf Case (2014/256)* before the Turkey Constitutional Court, a Muslim lawyer challenged a decision by a Family Court judge to bar her from appearing before him wearing a headscarf. The lawyer wore the headscarf after a previous ban on head coverings in the courtroom had been lifted by a decision of the State Council in 2012. The Constitutional Court found that the lawyer's rights had been violated under article 24 (freedom of conscience, religious belief and conviction) and the equality rights provision in article 10 ('Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion, and sect, or any such grounds. Men and women have equal rights'). The lawyer and the court emphasized freedom of religion and non-discrimination since religion was the rationale used by the lower court to justify its refusal to allow the lawyer to appear. The majority of the Constitutional Court interpreted articles 24 and 10 in the light of other constitutional provisions, including articles 2 and 5. Article 2 defines Turkey as a 'democratic, secular, and social state governed by the rule of law', among other prevailing values. Article

5 provides the basis for the court to apply a substantive equality approach. That provision recognizes that it is the duty of the state to remove obstacles that will restrict individuals' rights. In the decision, the court compared the petitioner with women who do not wear headscarves but found that such a comparison in treating different women the same creates inequality. The court referenced national and extra national precedents and international instruments such as the ICCPR (art. 2, non-discrimination) and the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (UN General Assembly A/RES/36/55). This decision departs from the 2005 decision of the European Court of Human Rights (ECHR) in the case of *Leyla Şahin*, in which the court had found that the ban on headscarves at the University of Istanbul was justified in principle and proportionate to the aims of secularism and pluralism. The ECHR also took note of the importance of preventing extremists from imposing religious symbols on others in Turkey.

In a recent case before the High Court of Bombay, *Niaz and Soman v State of Maharashtra, Haji Ali Dargah Trust and Charity Commissioner*, two female members of the national secular autonomous mass movement (Bharatiya Muslim Mahila Andolan) launched a public interest litigation after finding that women's access to the sanctum sanctorum of the Haji Ali Dargah in Mumbai had been barricaded.⁴⁰ To balance the petitioners' claims of freedom of religion (article 25) with those of the respondent Haji Ali Dargah Trust (freedom to manage religious affairs, article 26) the court undertook an assessment involving two tests to decide the first issue of whether the admittance of women in close proximity to the grave of a male Muslim saint amounted to a sin in Islam.

The first test applied was an 'essential function test': is restricting entry to women an essential and integral part of Islam? The second test addressed the place of such restrictions, if valid, within Islam—whether such practices are integral to the faith. If these questions were answered in the affirmative, state intervention in religious practices would be restricted. The court used literal interpretation

to determine that the passages from the Qur'an and Hadith, including those that dealt with menstruation, did not ban women from entry. The second main issue related to the Trust's ability to use article 26 to shield itself from state intervention to protect women's freedom of religion. The court decided that the Trust had been established as a public charitable trust for educational and management purposes, and not for religious purposes. The Court of Bombay held that the ban violated the women's rights to equality before the law (article 14), protection from discrimination (the state shall not discriminate against any citizen on the grounds, among others, of sex and religion, article 15); and freedom of conscience and religion (article 25). While the result was favourable to the women, the court did not apply a substantive equality analysis in relation to women's disadvantage in Islam or address multiple forms of, or intersectional, discrimination. The interpretative techniques were formal and literal and international instruments were not referenced. Nonetheless, this public interest case generated significant reaction in the media after the decision was published on 26 August 2016. Given the high number of visitors noted in the court's decision—30,000 to 40,000 visitors daily, increasing to 50,000 to 60,000 daily on Thursdays, Fridays and Sundays—it is clear that a large number of women will be positively affected by the decision.

It is important to note that India ratified CEDAW in 1993 but made a reservation pursuant to article 5 (a). This provision of the Convention states that: 'States Parties shall take all appropriate measures: (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary 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 men and women'. The reservation on this article states that India 'shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent'. The constitution and the approach taken by the court are sensitive to intervention in religious matters.

40 Cases filed under article 226 of the Constitution are referred to as public interest litigation.

4.4.

Summary of observations related to women's access to public life

Constitutional provisions: women's access to public life

The judicial decisions reviewed in this sub-topic involved a narrower range of constitutional provisions than the GBV sub-topic. Provisions protecting the right to gender equality and non-discrimination were invoked by the courts in South Korea, Chad and South Africa.

Some of the cases invoked a specific constitutional provision. For example, in the nationality cases constitutional provisions define how nationality can be passed to children. Iraq and Egypt introduced provisions that allow nationality to be passed on by a mother or father in their constitutions of 2005 and 2014, respectively. Thus, both parents do not have to be citizens to pass on Egyptian or Iraqi nationality; and nor is this right restricted to fathers.

In the electoral quota cases, constitutional provisions permitting special measures, affirmative action or different treatment were applied by the courts in Iraq and Lesotho. In *Shilubana* (South Africa) a provision (s. 211 of the Constitution of South Africa) relating to customary authorities and customary law was interpreted in conjunction with gender equality provisions

In other cases, provisions were related to religious freedoms (the *Headscarf Case*, Turkey; *Hai Lai Dargah Trust*, India; *Pillay*, South Africa). In the case of *Pillay* and the *Case on the House Head System* (South Korea), provisions related to culture or cultural heritage were also applied in the decisions.

Application of CEDAW and other international instruments: women's access to public life

In this sub-topic, only one court, the Supreme Court of Chad, referenced CEDAW in a general manner in *Société des Femmes Tchadiennes Transitaires v Ministère des Finances*.

Innovative approaches to judicial reasoning and strategic litigation: women's access to public life

Several of the cases were straightforward in that the courts only had to declare that the government had not applied legislation properly—as was the situation in the nationality cases. However, in other cases judicial reasoning supported women's access to public life and resolved tensions between constitutional rights, or between cultural or religious practices and rules.

An intersectional approach (interpretation and balancing of rights) was employed by the Constitutional Court of South Africa in *Pillay*, where the court balanced the student's right to equality based on culture and religion. Similarly, the same court undertook a careful analysis of customary law and gender equality rights to examine the tensions between hereditary chieftainships and constitutional rights.

In the *Haji Ali Dargah* (India) and the *Headscarf Case* (Turkey) the courts balanced freedom of religion with other rights. Both these decisions prioritized analysis of religious over gender equality provisions. The ban on women entering the inner sanctum of the mosque in India was blatantly discriminatory against women; however, the court analysed and balanced equality between men and women with interpretative tests related to the right to religious freedom and the right to be free from interference from the state. The Turkey case related to the change in an apparently gender-neutral rule on head covering in courtrooms. In both instances the courts resolved the equality claims by emphasizing and attending to obstacles to religious practice rather than gender discrimination. In a sense the decisions failed to explicitly recognize multiple forms of discrimination or the intersectionality of rights when resolving the tensions between religion-related rules and constitutional rights to equality. In contrast, an intersectional approach would have directed itself to the specific situation of, for example, Hindu women, and the ways in which restrictions on their access to public spaces affect their rights to equality, autonomy and dignity, and freedom of religion as both women and Hindus.

The 2007 Iraqi decision on the constitutionality of electoral quotas took a purposive interpretative approach when it reviewed the objectives and aims of the quota law under review.

Only two cases were identified as public interest litigation cases. The *Haji Ali Dargah* case was initiated by Bharatiya Muslim Mahila Andolan, described by the court as a 'national secular autonomous mass movement of Muslim women' (para. 5). In this case the petitioners provided evidence that they had attempted to resolve the issue without lodging a petition before the court. The summary of the South Korean *Case on the House Head System* made no reference to any organizations supporting the litigation.

Trends in the resolution of tensions: women's access to public life

The cases in this subtopic demonstrate progress on women's active participation in public spaces and processes in societies characterized by traditional belief systems. For example, in the cases from South Korea and South Africa, ancient belief systems were challenged by modern constitutional rights.

Patterns in the resolution of tensions: women's access to public life

Direct discrimination involves a rule or practice through which public or private sector officials treat individuals (women in the cases examined in this study) differently to other individuals because of a personal characteristic that is a prohibited ground for discrimination. The cases involving direct discrimination were the cases in which women were explicitly banned

from entry into public spaces (Chad and India), the nationality cases from the MENA region and the Korean registration cases. This type of direct discrimination was resolved easily and succinctly through literal interpretation and formal equality in the judicial reasoning.

The South African case of *Pillay* provided an example of indirect or constructive discrimination where the school's rule prohibiting a student from wearing a nose stud was held to violate her right to equality because the rule (the Code of Conduct) did not allow for exceptions that would recognize and accommodate cultural and/or religious identity. The Turkish case challenging the wearing of a head covering in court occurred shortly after a rule prohibiting head coverings had been lifted. While not a case of adverse effect discrimination, it was an example of multiple discrimination (or intersectionality) where equality is related to more than one prohibited ground for discrimination. The decision of the Constitutional Court of Turkey involved more nuanced balancing of secularism with individual rights to religious expression than the decision of the ECHR, *Leyla Şahin*.

Gaps: women's access to public life

In these summary observations the gaps relate to strategic public interest litigation. While the involvement of organizations in supporting the litigation in the GBV cases was evident either in the court decisions or from secondary research, it is not always possible to identify whether a case represents one in which women's and other organizations are leading or providing support. In this subtopic the decisions did not provide sufficient information about innovative approaches. The full impact of the decisions on women beyond the individual petitioners cannot be determined with any degree of certainty.

5

CONCLUSIONS

The overarching objective of this exploratory study is to explore trends and patterns in judicial decisions at the domestic level when applying constitutional provisions to address gender equality and women's rights where they are affected by customary, religious or patriarchal laws or practices.

More specifically, this exploratory study had specific objectives to:

1. Identify constitutional provisions that have contributed to women's equality;
2. Explore the extent to which CEDAW and other international human rights treaties have informed legal arguments before the courts and judicial reasoning;
3. Identify and assess innovative approaches to judicial reasoning and strategic public interest litigation in selected cases in terms of how they promote gender equality and other gender-related rights; and
4. Identify areas for further research to strengthen the comparative analysis of gender equality constitutional jurisprudence in relation to the thematic issues addressed in this exploratory study.

The study involved the analysis of just 62 judicial decisions from 30 countries in four regions. The decisions were selected because they involved tensions between constitutional provisions and customs, traditional patriarchal principles or religious or cultural practices; and they represented positive results for women's human rights on all, or some, of the issues addressed by the courts. Admittedly, the scope of the study is limited thematically, qualitatively and quantitatively and therefore the conclusions need to be considered within these narrow parameters. The conclusions are organized below in a manner that responds to the objectives

5.1

Constitutional provisions

Provisions that support the resolution of tensions between rights and customary, traditional, religious or cultural rules and practices

The constitutional provisions invoked by the courts were reviewed in the summary of each subtopic. A range of constitutional provisions was invoked to make a determination in the decisions examined for this exploratory study.

The courts invoked the broadest range of constitutional rights to resolve the GBV cases. It was noted, however, that the courts did not necessarily apply gender equality provisions

to resolve GBV cases. Judges can resolve a discriminatory situation for female claimants without necessarily invoking arguments or constitutional provisions related to the right to equality and non-discrimination based on sex. Provisions permitting affirmative action or special measures to improve the situation of marginalized groups, including women and girls, were applied more often in GBV decisions and the electoral quota decisions in the 'Women's access to public life' subtopic. Special measures were not used in the area of family law.

Constitutional provisions supported the resolution of tensions between customary, traditional, religious or cultural rules and practices, and women's rights. For example, customary law is often limited by constitutionally protected rights. Some constitutions recognize customary law but circumscribe its application based on constitutional rights or international treaties. As Muna Ndulo (2011) notes, this approach has been influenced by the elaboration of international and regional human rights norms such as, for example, CEDAW, the ICCPR, the ICESCR, the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The constitutions of South Africa and Uganda are two examples where customs are limited by rights in the constitutional text. In addition, the Constitution of Canada prohibits 'laws, cultures, customs and traditions which are against the dignity, welfare or interest of women' (art. 32 (2)). However, in some countries, such as Botswana, customary law is exempted from scrutiny with respect to rights. In the case of *Mmusi*, the Botswana Court applied natural justice principles to overcome the exception in sub-sections 15(4)(c) and (d) of the Constitution, which permits discrimination in family-related matters—marriage, divorce, devolution of property, among others—and in matters addressed by customary law.

The constitutional provision in the South Africa Constitution (subsection 39(2)) is pivotal when the Constitutional Court analyses the intersection of equality rights, customary law and statutory law. Although this provision mandates the application of the purposive approach, this approach can be applied in the absence of an explicit provision.

While there does not have to be explicit recognition in the text of the Constitution of the application of international treaties for them to apply, explicit provisions provide the court with an additional source of law to resolve tensions and advance women's rights and gender equality. A number of constitutions specifically incorporate international law into domestic law. This is the case for the Constitution of Kenya of 2010. Article 2 states, in part: '(5) The general rules of international law shall form part of the law of Kenya; (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'. The Constitution of Guatemala

moves beyond the recognition of international law as a source of law in the country to declare that international human rights law, where Guatemala has ratified a treaty or agreement, has supremacy over domestic law (art. 46).

Constitutional provisions that influence access to constitutional adjudication in the first place may also play an important role, including in influencing the degree to which strategic public interest litigation can become a driving force in advancing women's rights.

Provisions providing access to courts and strategic litigation

Strategic public interest litigation is more prominent in countries where the constitution includes explicit public interest litigation 'access' provisions related to *locus standi* or writs related to rights. Positive examples of access cross the four regions: Bangladesh, India, Pakistan, Benin, Colombia, South Africa, Uganda and Zimbabwe. For example, article 102 (1) of the Constitution of Bangladesh provides for public interest litigation. The Bangladeshi courts have applied a liberal meaning to the phrase 'on the application of any person aggrieved', expanding the scope of persons that are permitted to bring a case.

Based on the countries sampled, it seems that a number of African countries have more precise or broader guarantees of access to the courts. The Ugandan Constitution is explicit that persons as well as organizations can access the court (article 50). Similarly, the South African Constitution guarantees ample access in section 38, particularly through 38(d) which makes 'public interest' a ground on which a person may 'approach a court'.

The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

As Jagwanth and Murray (2005) argue, the South African experience is a testament to the importance of accessible forums and judicial training on equality and human rights.

In two decisions analysed in this study (the *Railway Board* case in India and the child-marriage case, *Loveness Mudzuru*, in Zimbabwe) the courts reviewed the constitutional provisions and *locus standi* precedent and found in favour of the individual's right to access the courts. The Indian Constitution allows every High Court to issue orders or writs to enforce rights (articles 32 (2) and 226), thereby permitting access for individuals and organizations to petition the courts to protect any rights. The individuals who have had their rights violated do not, therefore, need to be the petitioner. The Zimbabwe Constitution of 2013 also explicitly guarantees ample access in article 85 (1), using the same text as South Africa.

In the MENA region access to constitutional remedies varies. The Constitution of Turkey allows for individual applications in article 148. Article 165 of the Algerian Constitution does not provide for individual applications. Instead, the Constitutional Council reviews legislation at the request of the President. The Iraqi Constitution does not address access to the Supreme Court on constitutional matters. The 2014 Tunisian Constitution establishes a Constitutional Court but does not include a provision on applications to petition for the enforcement of rights. In the Egyptian Constitution of 2014 article 99 provides for criminal action for rights violations, but not other forms of constitutional claims:

Any violation of personal freedom, or the sanctity of the private life of citizens, or any other public rights and freedoms which are guaranteed by the Constitution and the Law is a crime. The criminal and civil lawsuit arising out of such a crime shall not abate by prescription. The affected party shall have the right to bring a direct criminal action. The State shall guarantee fair compensation for the victims of such violations. The National Council for Human Rights may file a complaint with the Public Prosecutor of any violation of these rights, and it may intervene in the civil lawsuit in favour of the affected party at its request. All of the foregoing is to be applied in the manner set forth by Law.

In Latin America and the Caribbean, the Constitution of Colombia is recognized for its

broad mandate and accessibility by citizens (article 241). In Guatemala, the success of human rights cases related to the armed conflict, for example the *Sepur Zarco* case, is related to the provision of the Criminal Procedure Code that allows civil society organizations to act as co-accusers. A separate law, and not the Constitution, regulates applications related to the constitutionality of a law.

5.2

Application of CEDAW and other international human rights treaties

CEDAW was referenced most frequently in decisions related to family law or the family (10 of 23, or 43 per cent of cases), followed by GBV decisions (7 of 23, or 30 per cent of cases) and in one decision in the women's access to public life cases (6 per cent). In the GBV sub-topic a general recommendation of the CEDAW monitoring body, the Committee on the Elimination of Discrimination against Women (General Recommendation no. 19, 1992), was referenced by BLAST writ. no. 4495 in relation to harassment and forced use of a veil. The higher number of references to CEDAW in family law or family cases might be a demonstration of the challenges faced by the courts in advancing women's equality in the private sphere and in relation to customs that enjoy widespread support and general practice. Articles 1, 2, 5 and 16 were the most common CEDAW provisions specifically referenced in family law decisions.

In situations where a constitution explicitly recognizes international obligations and/or where the courts are willing to rely on the binding nature of international obligations such as CEDAW, there is considerable potential for international treaties to fill legislative gaps and overcome contradictions between domestic legislation and customary and/or religious law.

International and regional human rights standards were used as interpretative tools or as sources of law, depending on the state of constitutional or legislative recognition of international law. In the cases examined, customs, practices and rules were more

explicitly denounced as discriminatory where judges invoked international human rights standards.

International and regional human rights instruments other than CEDAW were applied by courts in family-related and GBV cases: seven family-related decisions referenced the UDHR, the ICCPR, the ICESCSR and the African Charter, among other declarations; and 11 GBV decisions applied the above-mentioned treaties in addition to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Convention of Belem do Para (*Auto 092*, Colombia and *Gregorio Molina*, Argentina), international customary law (*Gregorio Molina*, Argentina), the Geneva conventions (*Auto 092*, Colombia; *Sepur Zarco*, Guatemala and *Samira Ibrahim Mohamed Mahmoud*, Egypt) and the Convention on the Rights of the Child (*Ripples*, Kenya and *Loveness*, Zimbabwe).

5.3.

Innovative approaches to judicial reasoning and strategic litigation

The analysis of the 62 decisions enabled the identification of new and successful approaches adopted by the courts, *amici curiae* and petitioners.

Innovative approaches to judicial reasoning

The review of cases focused on the interpretative approaches used to support equality rights analysis. A number of conclusions could be drawn from the use of specific approaches. Social context analysis was applied in 24 of the 62 decisions. The majority of the GBV judgements applied this technique to illustrate the disadvantage and harm caused to women and girls (17 of 23 decisions). Four decisions related to family law applied social context analysis (three from South Africa and *Mensah v Mensah* in Ghana) and three decisions on women's access to public life applied the technique (*Lesotho and Shilubana* and *Pillay* in South Africa). While the technique was more prevalent in African courts it was also used in Asian (in Bangladesh, Nepal, Pakistan, India, the Philippines and the Solomon Islands) and Latin American courts (in Colombia and Guatemala).

Two further interpretative approaches were used to complement social context analysis. First, a substantive equality analysis of constitutional equality and non-discrimination provisions was used by the courts to assess the disadvantage experienced by women in relation to a certain issue. This allowed the courts to order affirmative measures, especially where a constitutional text did not contain an explicit provision on affirmative measures to justify different treatment. A substantive equality approach was explicitly applied on eight decisions: *Mensah v Mensah*, three GBV cases and four cases related to increasing women's political participation through electoral quotas. It was used implicitly in one decision (St Lucia) dealing with an accused's challenge to the Domestic Violence Act. The electoral quota cases in the women's access to public life sub-topic involved less substantive equality analysis due to the application of constitutional provisions allowing affirmative measures. The decisions involving the most developed substantive equality analysis were in the GBV sub-topic: the Femicide Law challenge before the Guatemalan Constitutional Court, the case of Jesus Garcia in the Supreme Court of the Philippines and the Colombian Constitutional Court's *Auto 092*, which provided for special programmes for women affected by armed conflict—particularly displaced women and victims of sexual violence in the context of the armed conflict.

Evidence-based and participatory consultations also complemented the social context approach. Reviewing statistics or academic reports allowed judges to provide more robust declarations to guide public policy and programmes or future judicial decisions. Examples of such decisions are those from South Africa, Colombia and Bangladesh. These courts also have a tendency to engage in judicial activism. For example, in *Auto 092*, on women affected by the armed conflict, the Colombian Constitutional Court called on organizations to provide information to the court in advance of its judgment, and identified organizations to receive the judgment and monitor its implementation.

Purposive interpretation of constitutional or legislative provisions was applied in fewer cases but this technique also supports positive outcomes for gender equality. The judge interprets constitutional provisions through the

lens of the overarching purpose of a provision or constitutional values. This approach contrasts with the literal interpretation of constitutional texts. Three family law cases (*Mayelane* and *Bhe* in South Africa and the Kenyan case *Re Estate of Lerionka Ole Ntutu*) applied this approach when interpreting customary law and/or statutory law dealing with marriage (polygyny) or inheritance. Some GBV cases took this approach: (a) *Carmichele*, a positive duty on the police to protect women from violence; (b) *K v Security Minister*, vicarious liability in a sexual assault case; (c) *Lovness*, the Zimbabwe child marriage decision; and (d) the Guatemalan decision on the Femicide Law challenge. On women's access to public life, the 2007 Iraqi electoral quota decision and the *Shibulana* case applied this approach.

African and Pacific courts approached customary law as living or evolving law. This enabled courts to review long-held customs from the perspective of the modern norms and values set out in a constitution. The South African Constitutional Court, while emphasizing the constitutional importance of accommodating and recognizing customary law, expounded on this approach to a greater degree than other courts. It has characterized customary law as 'living customary law', and thus able to adapt to constitutional guarantees, including on gender equality (see *Mayelane*; *Bhe v Magistrate Khayelitsha*; *Gumede v President of South Africa* and *Shilubana*).

When courts weigh multiple and conflicting rights to achieve a balance or resolution to the tensions caused by the intersection of rights, the resulting jurisprudence can set a precedent in future cases and guide policymakers in complex situations. This approach involves consideration of the content and limits of the rights based on constitutional values or higher-level objectives. In this exploratory study, a number of decisions applied this type of judicial reasoning. In family law cases, two South Africa Constitutional Court decisions exemplified the intersectional interpretative approach (*Bhe* and *Mayelane*). In the GBV cases, intersectional analysis was undertaken by the Colombia Constitutional Court in *Auto 092* and the High Court at Meru in *Ripples*. Multiple rights were examined in *Pillay* (South Africa) and to an extent the *Haji Ali Dargah Trust* (India) case concerning women's access to public life.

Several decisions, especially those of the Constitutional Court of South Africa, referenced the arguments of *amicus curiae* that were adopted in the judgment. This occurred in *Gumede*, *Carmichele* and *K v Minister of Safety and Security*.

Innovative approaches to strategic public interest litigation

Innovative approaches were less visible in the judicial decisions. The GBV criminal cases, however, provided more indications of litigation techniques. On family law and women's access to public life there were only limited references to arguments presented by petitioners or interveners.

The sample of cases in this exploratory study demonstrated a range of litigation modalities, such as public interest, court-initiated monitoring, references from legislative bodies, and civil and criminal litigation in review and first instance courts. Courts issued progressive judgements on all types of litigation.

As noted above, almost half the GBV cases analysed can be characterized as strategic or public interest litigation.⁴¹ Women's organizations, legal associations and individual lawyers tended to provide the court with more comprehensive analyses of the contested rule, custom or practice. Cases litigated at the initiative of women's organizations, such as *Sepur Zarco* (Guatemala) and *Mayelane* (South Africa), resulted in more contextual analysis and equality rights claims.

Both *amici curiae* and public interest litigants provided the courts with important contextual or legal analysis related to gender equality. In only three exceptions the courts found insufficient evidence to support some of the petitioners' claims in cases of public interest litigation: the *Mifumi* bride-price case in Uganda, the *Sarma* domestic relationship case in India and the *Sapana Pardhan Malla* case on child marriage in Nepal. *Rule Nisi* orders were used by BLAST to force the government

41 It is important to note that it may not be evident in the style of cause (name) of the case or within the decision whether a case involves public interest litigation. For example, secondary literature provided information in the South Korean Case on the House Head System on the association of non-governmental organizations that formed to challenge the civil code (Yang 2005).

to explain why a discriminatory practice (the two-finger test and fatwas) should not be immediately discontinued.

5.4.

Trends

This study has revealed some positive trends in relation to advances in gender equality, although these need to be verified against a broader range of court decisions. One positive trend appears to be judicial recognition that patriarchal rules and practices, emerging from common law, codified law, customary law or religious law, cannot be sustained where they conflict with changing societal attitudes and constitutional values. Decisions such as: *R v Gua* (the Solomon Islands), on the marital rape exemption; the two adultery cases (South Korea and South Africa); *Balelala v State* (Fiji), on evidentiary requirements to corroborate sexual assault; and *Sarma* (India), where the Supreme Court examined the changing definition of domestic relationships, overturned common law principles or criticized narrowly conceived laws that discriminate against women or some groups of women. In South Africa, the common law was characterized as necessarily evolving to accommodate constitutional rights in the case of *DE v RH* (adultery) and *Carmichele* (duty of the state to protect women from GBV), as applied to the law of delict and the torts related to adultery and the state's duty of care. In these South African cases, common law principles were held to be 'deeply rooted in patriarchy' and thus inconsistent with a range of constitutional values such as dignity, privacy, freedom of association and security.

The duty of states to prevent, investigate and punish cases of violence, especially sexual violence, was advanced in criminal and civil (tort) law in jurisprudence from all four regions considered in this study. In terms of the civil tort of vicarious liability, the cases of *Carmichele* and *K v Minister of Safety and Security et al.* (South Africa) and the *Railway Board* (India) broadened the duty of care of the state and its agents with regard to the harm caused either directly (e.g. by the police officers who raped the petitioner in *K v Ministry of Safety and Security*, and the railway employees who raped a Bangladeshi national in *Railway Board*) or indirectly (in the case of *Carmichele*, where the

state failed to take sufficient action to prevent further sexual assault by a repeat offender) to women. The jurisprudence reflected a positive trend in confirming that all types of GBV, such as domestic violence, sexual violence and harmful cultural practices including FGM, must be addressed by the state in the public sphere; and that failure to act is discriminatory. The constitutional decision on the Femicide Law in Guatemala found that new offences of violence against women should be dealt with in the public sphere and are not discriminatory against men. Similarly, the decisions of *Francois v Attorney General* (St Lucia) and *Jesus Garcia* (the Philippines) conferred a duty of care on the state to take affirmative measures to prevent, investigate and punish violence against women. The decision in *Ripples* (Kenya) dealt with police failure to investigate cases of sexual violence against girls and set in motion a number of institutional reforms. Cultural and religious justifications of GBV were not accepted by the court in the *Siddique* case related to an 'honour defence' for murder (Pakistan) and in an FGM case (Uganda).

National jurisprudence related to acts of sexual violence during internal armed conflict was advanced with the aid of developments in international law that occurred after the end of the armed conflicts in Argentina and Guatemala. The convictions in *Gregorio Rafael Molina* (Argentina) and *Sepur Zarco* (Guatemala) occurred over 30 years after the end of the internal armed conflicts in the two countries. These cases represent a positive trend in the fight against impunity for crimes committed against women because they are women.

A positive trend related to the approach of national courts to discriminatory practices based on religion or culture was observed in decisions from Asia and the Pacific, Africa and the MENA region. Some courts avoided outlawing widespread cultural practices. For example, the *Mifumi* case dealing with bride price only found the required refund of a bride price to be unconstitutional. However, a number of decisions outlawed practices where individuals or local religious or customary authorities defended discriminatory and harmful practices that violate women's human rights. Examples of cases where the courts forcefully rejected such practices are: (a) the constitutional reference to family law legislation in Benin, where the court outlawed

polygamy (actually polygyny) rather than just trying to limit the practice; (b) the case of FGM in Uganda, where the court found the practice to be unconstitutional on a number of grounds; (c) the *Siddique* so-called honour killings, where the High Court of Lahore rejected the accused's request to allow him to settle the case through religious practices and avoid criminal penalties; (d) *Bangladesh Legal Aid and Services Trust and others v Government of Bangladesh and others*, where the court criticized discriminatory fatwas involving extrajudicial punishment of women, especially victims of GBV; (e) the case of the *Haji Ali Dargah Trust* in India, which rejected arguments that the decision to ban women from the inner sanctum of the mosque was based on the Qur'an and found it discriminatory; and (f) the Tunisian court that protected a wife from a religious divorce practice (*khul'a*) that would have jeopardized her rights.

Of course, the fact that some courts have firmly rejected honour-related crimes or FGM will not necessarily end these practices. Progress is often uneven and practices continue despite a determination at law that they are illegal or unconstitutional. However, the issues of divorce and inheritance demonstrate progress towards equality of rights in the division of property at time of divorce or death, in both customary and statutory marriage arrangements.

The jurisprudence also reveals a positive trend for constitutional provisions that help courts to advance gender equality in accordance with international human rights standards. For example, the relatively small number of nationality cases at the constitutional level outside the MENA region represents a positive trend towards the entrenchment of the constitutional right of women to pass their nationality to their children regardless of the nationality of the father. Important constitutional and legislative changes were noted in the decisions from Egypt and Iraq, where government officials had failed to apply the law. A number of decisions also highlight the trend towards explicit recognition of affirmative measures to promote equality for disadvantaged groups, including women, in constitutional texts. Recent constitutional reforms in Iraq and Algeria, in 2005 and 2008 respectively, and the Constitution of Lesotho of 1993 allowed the courts to apply these provisions to recognize affirmative

measures and confirm that electoral quotas are not discriminatory against men. Many of the constitutions in Africa and Asia that either ushered in or further entrenched formal democracy have both recognized customary law and rendered customary law and practice subject to constitutional scrutiny, thereby advancing gender equality. Constitutional limitations on customary authorities aided the courts in cases related to the family and women's access to public life. Inheritance cases in the Pacific Islands (the Vanuatu cases of *Lapenmal v Awop* and *Meltenoven v Meltesaen*) and Africa (various cases from Kenya and South Africa dealing with customary inheritance and primogeniture practices) applied constitutional provisions that described customary law as a source of law, and that called on such law to be consistent with constitutional rights and/or written law.

5.5. Patterns

The study sought to identify patterns in how the tensions between constitutional provisions and customary, religious, traditional or cultural practices and rules were resolved by the courts in the sample of cases. The courts varied in how they finally resolved these tensions between the law or practice at issue and constitutional protections. While the study has a bias towards positive decisions, the responses can be differentiated in terms of the force of the findings on the constitutionality of the law or practice. In a very small number of cases the courts deferred to the legislative branch to resolve the issue. This occurred in the *Sarma* case (India) on the definition of a domestic relationship and *Rwabinumi v Bahimbisomwe* (Uganda) on the division of marital property in a divorce.

In other cases, the tensions were resolved in a manner that satisfied the equality rights of the particular woman involved in the case, but without an explicit declaration on the invalidity of the custom. This occurred in cases in the Pacific Islands, where customary law is a major source of law but must not contradict written laws, including constitutions. For example, in *Magiten* the National Court of Justice of Papua New Guinea made observations on the inconsistencies between the practice of

polygyny and constitutional equality provisions but found an alternative way to resolve the case without invoking constitutional provisions and without declaring the practice of polygyny unconstitutional. Similarly evasive approaches were taken in the cases related to customary land ownership in Vanuatu. The *Mayelane* decision of the South African Constitutional Court limited the customary practice of polygyny but the court interpreted customary law to be evolving in a way that is consistent with women's equality and constitutional guarantees. These decisions may provide guidance to public officials and customary authorities when faced with similar situations but do not prohibit the custom.

Other decisions explicitly declared a law or practice unconstitutional. In GBV cases, perhaps because of the very fact of the physical and psychological harm caused to women and girls, the tensions between patriarchal rules or culturally specific practices were recognized more directly than in some of the family cases. For example, legal rules related to domestic violence, including marital rape, have been progressively changed to dissolve the private/public dichotomy and place violence, no matter where it occurs, within the public sphere and the state's duty to act. This has also occurred in relation to the offence and tort of adultery (in South Africa and South Korea, respectively), the declaration on the unconstitutionality of polygamy (polygyny) in the Constitutional Court of Benin, the finding that FGM is unconstitutional in Uganda and on the unconstitutionality of the common law requirement for third party corroboration in sexual assault cases (the *Balelala* case in Fiji and the *Mukungu* case in Kenya).

It is also important to note that in a number of GBV cases the courts refused to accept arguments that customs that discriminate or harm women are part of religious expression. Instead, they were seen as cultural phenomena or simply discriminatory and thus unconstitutional (the FGM case in Uganda, the *Siddique* 'honour-killing' case in Pakistan and the *Haji Ali Dargah Trust* in India). In some of these cases, the courts examined religious texts and witnesses to make a determination on whether the impugned rule was a core aspect of religion.

The majority of the cases involving women's access to public life appeared to permit the

most straightforward resolution of tensions between patriarchal rules and nationality, identity registration or access to government buildings—as was the case of the women forwarding agents banned from entering the customs office in Chad. These cases amounted to direct discrimination, where the rule is discriminatory on its face by preventing women from enjoying the same rights as men. The cases involving affirmative measures to promote women's representation in elected office were examples of states and political parties adopting measures to advance women's equality. However, the cases dealing with prohibitions on women's access and the right to cultural expression in public spaces required the court to balance or address the intersection of multiple rights. The cases involving women's exercise of cultural or religious rights and gender equality rights (on wearing the headscarf in Turkey, women's access to the inner sanctum of a mosque in India and a Hindu student's use of a nose stud in South Africa) required a more detailed discussion of culture, religion and women's specific cultural identity in order to balance these rights. The public nature of women's discrimination in cases such as the citizenship claims could explain the ease of their resolution.

In some decisions, religious principles were examined to inform constitutional provisions or legislation in a manner that advanced gender equality. This was true in the *Insa* case, where the Indonesian Constitutional Court looked to the Qur'an to find whether the state had the ability to regulate polygyny and require the consent of the first wife, and to verify that this did not interfere with the petitioner's right to practice his religion. In the case of *Siddique* the Lahore High Court considered Islamic principles to reject an appeal to reduce the sentence passed for the murder of the perpetrator's daughter, son-in-law and grandchild.

5.6.

Areas for further research

The case analysis revealed gaps in terms of the constitutional framework, lack of protections for some groups of women and the ability of constitutional jurisprudence to change culturally rooted and sanctioned behaviour, or enforcement. Elements of the study objectives, for example, the identification of innovative approaches to strategic litigation and the effect of the cases on women's empowerment, could not be assessed based on the decisions alone and the limited amount of secondary literature.

A constitution can have gaps in the legal framework on gender equality. The presence of constitutional provisions that provide exceptions to the prohibition on discrimination are one example. In *Mmusi* (Botswana), the court relied on the principles of natural justice and the concept that customary law is 'living law' that is flexible. This resulted in it returning the inheritance case to the families for resolution through customary processes within the principles of fairness provided by the court.

The cases demonstrate that there may also be gaps in the protection of certain categories of women in complex situations that courts sometimes leave unresolved. For example, in cases of polygyny, first wives were protected but the rights of subsequent wives were not clarified. Polygyny in South Africa was modified by these decisions but a first wife's rights seem to trump the rights of subsequent wives. *Gumede v President of South Africa* is an example of the complexity of balancing rights in a pluralist context and where customary practices affect wives in different ways. In *Esseku v Inkoom* (Ghana), the court noted that Muslim marriages are not legally recognized and therefore women may lack the rights accorded to women married under customary marriage practices or other forms of marriage. Some courts avoided interpreting and balancing the rights of both appellants and respondents or avoided exploring constitutional provisions in depth. The most obvious instance of this was the Uganda bride-price case (*Mifumi*), where the majority opinion neglected to critically analyse the right to culture when it considered the cultural practice of paying a bride price. The decision avoided dealing directly with the

tensions between the right to gender equality and the right to culture, and only declared bride price refunds unconstitutional rather than other negative aspects of bride price or the entire practice. In *Mmusi*, the decision on a customary law inheritance case in Botswana avoided using constitutional provisions due to the constitutional exception enjoyed by customary law in matters related to the family. Instead, it resolved the issue in favour of the widow by resorting to the principles of natural justice. The Vanuatu customary land ownership cases also avoided directly analysing gender equality provisions and customs.

Various decisions, especially those that declare customs unconstitutional, raise the dilemma of enforcement and a gap that often exists between constitutional jurisprudence and practice. For example, the progressive decision in *Siddique* in Pakistan has not necessarily reduced the number of killings in the name of honour. The Uganda Supreme Court found the refund of the bride price to be unconstitutional but not the practice itself. How does the government implement the decision of a court with regard to refunds when the practice is widespread? Various other cases, such as the Bangladeshi and Indian cases related to fatwas, the FGM decision in Uganda, or the Benin decision to remove polygamy from family law, raise the same issue of changing future practice after judgements of unconstitutionality. The first instance decisions described in the cases analysed involving constitutionally recognized customary authorities—or decisions prescribed by informal Muslim committees in the fatwa cases—demonstrate that constitutional guarantees are not always known about let alone respected by customary, religious or cultural leaders.

This gap between law and practice also occurs in the cases involving women's access to public life. The nationality cases in Egypt, for example, appeared to be the result of the failure of government officials to properly apply the Constitution and enacted legislation.

While the cases identified as involving public interest litigation should advance women's equality to some degree, to precisely what degree is unknown. Similarly, for the most part the duration or type of legal services provided to women could not be determined through a review of the judicial decisions. In some cases,

such as *Sepur Zarco*, litigation techniques could be surmised from the decision itself. In that landmark Guatemalan case the women's organizations and prosecutors arranged for 24 expert witnesses in addition to other witness testimony. However, many constitutional cases are based on arguments and factums

and, unless the judges identify the arguments accepted from the parties to the case, the influence of public interest litigants is not obvious. Nor is the advocacy work done leading up to the successful litigation always apparent.

ANNEXS

Annex A. Bibliography of secondary literature

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Annex B: Legal and judicial references

B.1. Cases

Country	Cases
Algeria	Opinion No 05/RMB/11 of December 22, 2011 of the Constitutional Council, Official Gazette, no 1, 14 January 2012
Argentina	Case No. 12821, <i>Gregorio Rafael Molina</i> , Criminal Court of Appeal (Camara Federal de Casacion Penal), 2012
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India	<i>Indra Sarma v V K V Sarma</i> , Criminal Appeal No 2009 of 2013, (Supreme Court of India, Criminal Appellate Jurisdiction) <i>Niaz and Soman v State of Maharashtra, Haji Ali Dargah trust and Charity Commissioner</i> , Public Interest Litigation No 106 of 2014 (pil 106 14), decision of 26 August 2016, High Court of Judicature at Bombay (Ordinary Original Civil Jurisdiction) <i>The Chairman, Railway Board and others, Appellants v Mrs Chandrima Das and Others, Respondents</i> v AIR 2000 Supreme Court 988, Civil Appeal No 639 of 2000 (arising out of S L P © No 16439 of 1998, D/-28-1-2000 <i>Vishwa Lochan Madan v Union of India & Ors</i> , Writ Petition (Civil) No 386 of 2005, (Supreme Court of India, Civil Original Jurisdiction)
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The Philippines	<i>Jesus C Garcia, Petitioner v The Honorable Ray Alan T Drilon, Presiding Judge, Regional Trial Court-Branch 41, Bacolad City, and Rosalie Jaype-Garcia</i> , G R No 179267, 25 June 2013

Republic of Korea	<p><i>Use of Paternal Family Name Case</i> 17-2 KCCR 544, 2003 Hun-Ka5-6 (consolidated), December 22, 2005</p> <p><i>Adultery Case</i> [26 Feb 2015], 2009Hun-Ba17 KCCR</p> <p><i>Case on the House Head System</i>, 17-1 KCCR 1, 2001 HunKa9-10-11-12-13-14-15 and 2004 HunKa5 (consolidated), February 3, 2005</p>
Solomon Islands	<p><i>Regina v Gua</i> [2012] SBHC 118; HCSI-CRC 195 of 2011 (8 October 2012), (High Court of Solomon Islands)</p> <p><i>Regina v Gua</i> [2013] SBCA 2; Criminal Appeal Case 37 of 2012 (26 April 2013)</p>
South Africa	<p><i>Bannatyne v Bannatyne</i> SA 2002/31 (Constitutional Court)</p> <p><i>Bhe and Others v Khayelitsha Magistrate and Others</i> [2004] CCT 49/03 [2004] ZACC 17, [2005] (1) SA 580 (CC), [2005] (1) BCLR 1 (CC) (15 October 2004), (Constitutional Court of South Africa)</p> <p><i>Carmichele v Minister of Safety and Security</i> (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001) (Constitutional Court of South Africa)</p> <p><i>Daniels v Campbell and Others</i> (CCT 40/ 03) [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) (11 March 2004) (Constitutional Court of South Africa)</p> <p><i>DE v RH</i> (CCT 182/14) [2015] ZACC 18; 2015 (5) SA 83 (CC); 2015 (9) BCLR 1003 (CC) (19 June 2015) (Constitutional Court of South Africa)</p> <p><i>Gumede (born Shange) v President of the Republic of South Africa and Others</i> (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC) (8 December 2008) (Constitutional Court of South Africa)</p> <p><i>Hassam v Jacobs NO and Others</i> (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC) (15 July 2009) (Constitutional Court of South Africa)</p> <p><i>K v Minister of Safety and Security</i> (CCT52/04) [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC); [2005] 8 BLLR 749 (CC) (13 June 2005) (Constitutional Court of South Africa)</p> <p><i>Minister of Safety and Security and Another v Carmichele</i> (533/02) [2003] ZASCA 117; [2003] 4 All SA 565 (SCA) (14 November 2003) (South Africa Supreme Court of Appeal)</p> <p><i>Ngwenyama v Mayelane and Another</i> (474/2011) [2012] ZASCA 94; 2012 (4) SA 527 (SCA); 2012 (10) BCLR 1071 (SCA); [2012] 3 All SA 408 (SCA) (1 June 2012) (Supreme Court of Appeal)</p> <p><i>Shibi v Sithole and Others</i> (CCT 50/03, CCT 69/03, CCT 49/03) [2004] ZACC 18; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) (Constitutional Court of South Africa)</p> <p><i>Shilubana and Others v Nwamitwa</i> (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008)</p> <p><i>South African Human Rights Commission & Women's Legal Centre Trust v President of the Republic of South Africa, Min Justice and Constitutional Development</i> [2005] 1 SA 580, CCT 50/03, (Constitutional Court of South Africa)</p>
Saint Lucia	<p><i>Martinus Francois v the Attorney-General of St. Lucia</i>, Suit NO 69 of 2001 (High Court of Justice)</p>
Swaziland	<p><i>Attorney General v The Master of the High Court</i> (55/2014) [2016] SZSZ 10 (30 June 2016)</p>
Tanzania	<p><i>Naftal Joseph Kalalu v Angela Mashirima</i>, P Civil Appeal No. 145 of 2001 (High Court of Tanzania)</p>

Tunisia	<p><i>A A H (Woman) v BB H A</i>, Case 32561 [21 May 2009] (Court of Cassation)</p> <p><i>H M Q and S M SS Q (wife of S) v Th S Sh Q and D A R Q</i>, 31115 of 2008 [5 February 2009] Z Z B (Court of Cassation)</p>
Turkey	<p>Judgment 2014/256 of the Constitutional Court of Turkey: Headscarf Ban, Constitutional Court of Turkey, 2014</p>
Uganda	<p><i>Law & Advocacy for Women in Uganda v Attorney General of Uganda</i>, Constitutional Petitions Nos 13/05/& 05/06</p> <p><i>Law and Advocacy for Women in Uganda v The Attorney General</i>, Constitutional Petition No 08 of 2007 (Constitutional Court of Uganda at Kampala)</p> <p><i>Mifumi (U) Ltd & Anor v Attorney General & Anor</i> (Constitutional Appeal No 02 of 2014) [2015] UGSC 13 (6 August 2015)</p> <p><i>Rwabinumi v Bahimbisomwe</i>, Civil Appeal No. 10 of 2009 [2013] UGSC 5 (20 March 2013)</p> <p><i>Uganda Association of Women Lawyers and Five Others v Attorney General</i>, Constitutional Petition No 2 of 2003 (Constitutional Court of Uganda at Kampala)</p>
Vanuatu	<p><i>Lapenmal v Awop</i> [2016] VUJC 90; Land Appeal Case 76 of 2007 (8 July 2016)</p> <p><i>Meltenoven v Meltesaen</i> [2008] VUIC 14; Land Case 10 of 1985 (7 November 2008)</p>
Zimbabwe	<p><i>Loveness Mudzuru and Ruvimbo Tsopodzwa v Minister of Justice, Legal and Parliamentary Affairs; Minister of Women's Affairs, Gender and Community Development; and Attorney General of Zimbabwe</i>; Judgment No. CCZ 12/2015, Constitutional Application No. 79/14 (Constitutional Court of Zimbabwe).</p>

B.2. Legislation

Country	Legislation
Benin	Code des Personnes et de la Famille
Guatemala	Ley Contra el Femicidio y Otras Formas de Violencia Contra la Mujer, Decreto Número 22-2008 (Femicide Law)
India	Hindu Marriage Act, 1955 Protection of Women from Domestic Violence Act, 2005
Indonesia	Law No. 1 of 1974 on Marriage
Kenya	Judicature Act, Chapter 8, Laws of Kenya
South Africa	Black Administration Act 38 of 1927 KwaZulu Act on the Code of Zulu Law Act, 1985 Natal Code of Zulu Law Proclamation of 1987 Recognition of Customary Marriages Act, 1998
Tanzania	Fisheries Act 2003 Forest Act 2002 Kibondo District Council (Cultivation of Agricultural Land) By-laws 1994 (G N No 280 of 1994) Lindi Town Council (Cultivation of Agricultural Land) By-Laws, 1991 (G N No 392 of 1991) Regulation of Land Tenure (Established Villages) Act, 1992 (No 22 of 1992)
Uganda	Marriage Act, Cap. 251 Laws of Uganda (2000 Edition) Land Act 1998 (Act No 16 of 1998)

B.3. Constitutions

Constitution of the Arab Republic of Egypt 2014

Constitution of the Argentine Republic 1853, as amended to 1994

Constitution of Botswana 1966, as amended to 2006

Constitution of Colombia 1991, as amended to 2013

Constitution of the Federal Republic of Nigeria 1999, as amended to 2010

Constitution of the Independent State of Papua New Guinea 1975, as amended to 2014

Constitution of India 1949, as amended to 2014

Constitution of the Islamic Republic of Pakistan 1973, as amended to 2015

Constitution of the Kingdom of Swaziland Act 2005

Constitution of Lesotho 1993, as amended to 2004

Constitution of Nepal 2006, as amended to 2015

Constitution of the People's Democratic Republic of Algeria 1989 (reinst 1996, rev 2008)

Constitution of the People's Republic of Bangladesh 1972, as amended to 2014

Constitution of the Republic of Benin 1990

Constitution of the Republic of Chad 1996, as amended to 2005

Constitution of the Republic of Fiji 2013

Constitution of the Republic of Ghana 1992, as amended to 1996

Constitution of the Republic of Guatemala 1985, as amended to 1993

Constitution of the Republic of Indonesia 1945, as amended to 2002

Constitution of the Republic of Iraq 2005

Constitution of the Republic of Kenya 2010

Constitution of the Republic of Korea 1948, as amended to 1987

Constitution of the Republic of Madagascar 2010

Constitution of the Republic of the Philippines 1987

Constitution of the Republic of South Africa 1996, as amended to 2012

Constitution of the Republic of Tunisia 1959, as amended to 2008

Constitution of the Republic of Tunisia 2014

Constitution of the Republic of Turkey 1982, as amended to 2011

Constitution of the Republic of Uganda 1995, as amended to 2005

Constitution of the Republic of Vanuatu 1980, as amended to 1983

Constitution of the Republic of Zimbabwe 2013

Constitution of Solomon Islands 1978, as amended to 2014

Constitution of the United Republic of Tanzania 1977, as amended to 2005

B.4. International treaties

African Charter on Human and Peoples' Rights [Banjul Charter] (Nairobi, Kenya, 27 June 1981), 21 I.L.M. 59 (1981), entered into force 21 October 1986

African Charter on the Rights and Welfare of the Child (1 July 1990), entered into force 29 November, 1999

American Convention on Human Rights (San Jose, Costa Rica, 22 November 1969), 9 I.L.M. 673 (1970), entered into force 18 July 1978

Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 Dec. 1979) 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980), entered into force 3 Sept. 1981

Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages (New York, 7 November 1962), entered into force 9 December 1964

Convention on the Rights of the Child (New York, 20 Nov. 1989) 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989), entered into force 2 Sept. 1990

First Geneva Convention (Geneva, 12 August 1949), entered into force 21 October 1950

Second Geneva Convention (Geneva, 12 August 1949), entered into force 21 October 1950

Third Geneva Convention (Geneva, 12 August 1949), entered into force 21 October 1950

Fourth Geneva Convention (Geneva, 12 August 1949), entered into force 21 October

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women 'Convention of Belem do Para' (Belem do Para, 6 September 1994), entered into force 3 May 1995

International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 Mar. 1976 [the provisions of article 41 (Human Rights Committee) entered into force 28 Mar. 1979]

International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) 993 U.N.T.S. 3, entered into force 3 January 1976

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977), entered into force 7 December 1978

Universal Declaration of Human Rights (10 December 1948), U.N.G.A. Res. 217 A (III) (1948)

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331, entered into force 27 January 1980

Annex C. Content analysis

For the in-depth study of selected judicial decisions, the researchers undertook three types of assessment. First, constitutional texts were reviewed to identify important provisions related to women's equality and access to the courts. Second, researchers noted whether CEDAW had been ratified and if there were any reservations. Third, judicial decisions, the primary source of information for this study, were described and analysed based on the following elements:

- Facts and major issues
- Social context analysis. This analytical approach requires judges to examine diversity, disadvantage and difference so that judges can situate the claimants in their reality and avoid judicial bias. The approach is coherent with a substantive equality analysis.¹
- Interpretation of constitutionally recognized rights.
 - Rights provisions applied.
 - Approaches to the interpretation of equality. Two approaches were recorded: either formal or substantive equality. Formal equality considers whether individuals or groups have been treated the same or similarly to other individuals or groups. A substantive equality analysis involves an assessment of the purpose of the law and the impact of the law on the group that claims disadvantage. Substantive equality recognizes that differential treatment may be required to achieve equality in practice or equality of outcomes. Substantive equality analysis necessarily requires the constitutional judge to consider the context and impact of the law in question.
 - Researchers also noted whether the courts recognized and interpreted discrimination where multiple rights intersect. This is referred to as the intersection of rights or intersectionality.
 - Analyses of collective rights and individual rights, if applicable.
- Treatment of multiple legal regimes, if applicable.
- Other judicial interpretation techniques. For example, researchers noted the use of national or extra national precedent, use of reports, statistics or academic literature and the application of purposive or literal interpretation methods. Literal statutory interpretation refers to an approach where the judge applies the ordinary meaning of the text as a guide. The purposive approach to interpretation uses the broader objectives of the legislation to interpret the meaning of a provision. The latter approach allows the judge to ensure that a specific provision is not interpreted in a manner that is contrary to the spirit of the law.
- International instruments. The use of international UN or regional human rights treaties to interpret constitutional or legislative provisions was noted.
- Evaluation of the decisions. The researchers assessed the prominent factors that influenced the success of the claim. For example, did the court find in favour of gender equality or women's rights due to one or more of the following factors:
 - Judicial reasoning techniques
 - Strength of strategic litigation support
 - Strength of constitutional provisions

1 Social context education was made a formal and mandatory aspect of judicial education for federal judges in Canada when the Board of Governors of the National Judicial Institute (NJI) passed a resolution in 2006. The Social Context resolution by the Board of Governors of NJI notes that judicial education programs can consider contact with external experts and experiences to help judges understand social context. See: Claire L'Heureux-Dubé, 'Making a Difference: The Pursuit of a Compassionate Justice', 31 U. Brit. Colum. L. Rev. 1 (1997); and Integration Protocol for Social Context Education, <<http://njca.com.au/wp-content/uploads/2013/11/social-context-session.pdf>>.

- Substantive equality framework
- Effect of women’s participation in constitutional reform
- Involvement of and advocacy by amici curiae or interveners
- Explicit recognition of international obligations in constitutional text or in the decision.
- Finally, the researchers referred to the secondary literature or conducted a brief Internet search to determine whether women had been or were likely to be positively affected by the particular decision empowered.²

Comparative content analysis

Analysis began with the judicial decisions themselves. The elements described above were recorded in a template and the completed templates were organized by thematic sub-topic and by region. The analyses of the judgements were cross-referenced with the constitutional assessment of the country. The case analysis templates within a sub-topic were then reviewed and further issue areas identified. Similarities and differences among the decisions were identified within and across each sub-topic.

2 During the inception phase, it was found that there was insufficient information to determine the level of empowerment gained from a decision. ‘Empowerment is understood as the ability of an individual or group to utilize resources for the achievement of a desired result that leads to an improvement in their political, economic, legal, and/or social condition. It requires the existence of opportunities and the possibility to make choices. This process involves the active participation and self-advocacy of the individual or group’ (Just Governance Group, Co-Praxis, 1 May 2011). As a desk study the researchers had to rely on women’s rights organizations, news reports and academic analyses of cases to determine whether women were likely to be positively affected by a court’s decision.

ABOUT THE PARTNERS

The Just Governance Group

The Just Governance Group (JGG), formed in 2006 by a group of professionals from various countries in the Americas, is a multinational and multidisciplinary network of professionals that supports the development of just societies through its contribution to international initiatives. The growing network brings together development consultants and researchers from various countries, especially countries affected by conflict or in political or economic transition. JGG provides consulting services to inter-governmental organizations, development cooperation agencies, and national institutions on topics such as human rights, justice reform, gender equality, democratic development, security, conflict and peacebuilding. JGG has undertaken field work in the Americas, Asia, Europe and the Middle East, while many of its consultants also work in Africa. It has also conducted global multiple country evaluation and research initiatives.

JGG is characterized as a learning network. It uses its consulting initiatives as a basis for reflection and comparative analysis on governance topics and development practice in its knowledge publications (Multiples and Co-Praxis) and learning events. More information on JGG can be found on its website.

<<http://www.justgovernancegroup.org>>

International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

What does International IDEA do?

In the fields of elections, constitution-building, political parties, gender in democracy and women's political empowerment, democracy self-assessments, and democracy and development, International IDEA works in three main activity areas:

- providing comparative knowledge derived from practical experience on democracy-building processes from diverse contexts around the world;
- assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
- influencing democracy-building policies through the provision of comparative knowledge resources and assistance to political actors.

Where does International IDEA work?

Based in Stockholm, Sweden, International IDEA has offices in Africa, the Asia-Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations.

<<http://www.idea.int>>

UN Women

The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) is the UN organization dedicated to gender equality and the empowerment of women. A global champion for women and girls, UN Women was established to accelerate progress on meeting their needs worldwide.

UN Women supports UN Member States as they set global standards for achieving gender equality, and works with governments and civil society to design laws, policies, programmes and services needed to implement these standards. It stands behind women's equal participation in all aspects of life, focusing on five priority areas: increasing women's leadership and participation; ending violence against women; engaging women in all aspects of peace and security processes; enhancing women's economic empowerment; and making gender equality central to national development planning and budgeting. UN Women also coordinates and promotes the UN system's work in advancing gender equality

<<http://www.unwomen.org>>

In 2000, 189 Member States adopted the Millennium Declaration, outlining a global vision for eradicating poverty, fostering peace and security, protecting the environment, and achieving human rights and democracy.

Women's rights are recognized as a foundation for progress in all spheres. The Declaration pledges explicitly 'to combat all forms of violence against women and to implement the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)'. And it further recognizes the importance of promoting gender equality and women's empowerment as an effective pathway for combating poverty, hunger and disease and for stimulating sustainable development.

The Millennium Declaration also reconfirms the commitments made at the UN Fourth World Conference on Women in Beijing (1995) and other major world conferences such as the Rio Conference on Environment and Development (1992), the Vienna Conference on Human Rights (1993), the Cairo Conference on Population and Development (1994), the Copenhagen World Summit for Social Development (1995) and the Istanbul Conference on Human Settlements (1996).



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