



**STRATEGIC LITIGATION IN  
FRANCOPHONE WEST AFRICA:  
COMPARATIVE REFLECTIONS ON LEGAL  
CONTEXT, SYSTEMS AND PRACTICE**

**INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA)**

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## ABBREVIATIONS

ACHPR	African Charter of Human and People’s Rights
CPC	Criminal Procedure Code
CSO	Civil Society Organisations
ECOWAS	Economic Community of West African States
FLN	Feminist Litigation Network
FSL	Feminist Strategic Litigation
FWA	Francophone West Africa
IAC	Inter-African Committee on Traditional Practices affecting the Health of Women and Children
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights (ICESCR)
ISLA	Initiative for Strategic Litigation
LGBTQI+	Lesbian Gay Bisexual Transgender Queer Intersex +
LSC	Litigating for Social Change
NHRI’s	National Human Rights Institutions
OHADA	Organisation pour l’Harmonisation du Droit en Afrique (Organisation for the Harmonisation of Law in Africa)
PVTW	Political Violence Targeting Women
SOGIE	Sexual Orientation and Gender Identity
SL	Strategic Litigation
SRLN	Sexual Rights Litigation Network
UDHR	Universal Declaration of Human Rights
UPR	Universal Periodic Review
WAEMU	West African Economic and Monetary Union
WRO	Women’s Rights Organisations

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## EXECUTIVE SUMMARY

As part of its overall objective to develop a pool of feminist lawyers and feminist jurisprudence in Africa, the Initiative for Strategic Litigation in Africa (ISLA), in partnership with Foundation for a Just Society, envisioned expanding its model into Francophone West Africa (FWA).

This publication is one of two works which detail ISLA's experience in FWA. In this specific work, we offer a comparative study between francophone (civil law) and anglophone (common law) legal systems, legal culture and representation, and how their similarities and differences can positively or negatively influence strategic litigation in FWA.

Some of the documented reflections are:

- i) The enabling factors for strategic litigation in FWA include constitutionalism, the existence of a pluralist civil society, supportive record of treaty ratification, and the institutional frameworks in place that advance women's rights.
- ii) The barriers for strategic litigation in FWA include, reluctance by lawyers and activists to engage in strategic litigation for fear of repercussion; a legal practice culture with limiting conceptualisation on how lawyers can engage in public interest strategic litigation within civil society organisations, beyond traditional bar practice; few number of women lawyers which means there is a small pool from which to draw and develop feminist lawyers; many FWA countries are patriarchal societies who are resistant towards gender equality and resistance towards progressive sexual and reproductive rights.
- iii) ISLA's model requires specific tweaking as it is designed for an Anglophone common law system. Therefore, ISLA will have to adapt its model to navigate the operational context in FWA and capitalize on existing enabling factors to advance strategic litigation.

# 1. INTRODUCTION

## 1.1 ISLA: An Overview

The Initiative for Strategic Litigation in Africa (ISLA) is a feminist and Pan-African organisation whose mission is to protect sexual and women's human rights through litigation and capacity strengthening initiatives. We use the law to hold state and non-state actors accountable for human rights violations based on gender and sexuality. Using a rights-based framework, we endeavour to improve the lives of women, girls, and people whose rights have been violated based on negative discrimination towards gender, sexual identity and orientation. Also, to highlight positive developments and emphasise cross-learning from various countries on the continent and seek to highlight and assert women's leadership and contribution in the African human rights system; while centring women's voices and experiences in the jurisprudence to surface gender bias.

We believe that strategic litigation, from a feminist point of view, is a critical tool in changing historically gendered exclusion, silencing, invisibilizing and violence that manifests as a failure to understand, contextually reframe, and claim entitlements under the law. As strategic litigation in this regard is underutilised, ISLA's goals are to create an enabling environment for strategic litigation to happen with focus on strengthening lawyers, social movements and institutions that work on strategic litigation; to strengthen civil society to respond to threats and attacks that weaken civil space and human rights broadly. We also seek to maximise the potential embedded in sudden political or social opportunities; and to develop feminist jurisprudence through the courts to hold state and non-state actors accountable.

Our work is designed to challenge patriarchy, class and power relations by centring women's voices and women's agency. ISLA believes that a sustained investment in local institutions and individuals is the key to creating a critical mass of domestic lawyers who can engage in strategic litigation. This method is used to bring about social change by taking on carefully selected cases to court and using them to change the law, practice, and public awareness. We work side-by-side with specific organisations and individuals to whom we provide ongoing capacity strengthening.

ISLA began and has continued working primarily in Anglophone Africa, including, in Kenya, Uganda, Tanzania, Nigeria, South Africa, Malawi, Liberia and Ghana in two broad thematic areas; Violence against Women (VAW) and Women's Socio-Economic Rights (WSER).

In order to expand the geographical reach of its interventions, ISLA has strategically positioned itself in Francophone West Africa (FWA), beginning in Burkina Faso and Côte d'Ivoire. The focus in the two pilot countries is on strengthening the protection of women against violence in all its forms. During this initial phase of implementation ISLA intends to apply lessons drawn from working in Anglophone Africa.

## 1.2. Objectives of the Publication

The key objectives of this publication are to:

- i) Draw a comparative analysis of differences and similarities between the legal systems, representation and culture in Anglophone West Africa and Francophone West African countries to identify challenges and enabling factors for effective application of Strategic Litigation.
- ii) Using the findings from the comparative analysis, to evaluate the FWA legal system in order to understand how to best strengthen the practice of Feminist Strategic Litigation in FWA.

## 1.3. Methodology and Structure of Publication

This publication was developed by a consultant contracted by ISLA. Secondary sources were utilized to obtain relevant information for this publication, from legal research, ISLA's strategic documents, consultation reports, documents from local partners and other open sources that allowed the consultant to triangulate their analysis from available information. This publication encompasses various areas. Section 2 delves into the comparative study of civil and common law legal systems, while section 3 offers insights into the human rights context in FWA, strategic litigation objectives, the legal culture in FWA countries, and legal representation. The next section provides a concise overview of regional and international frameworks applicable in FWA while Section 5 explores the enabling factors and potentialities of feminist strategic litigation in FWA and the challenges encountered in the implementation of strategic litigation in FWA. The final section presents the conclusion.



## 2. COMPARATIVE STUDY: THE CIVIL AND COMMON LAW SYSTEMS

### 2.1. Legal Systems In Africa: A Contextual Background

African countries consist of a diverse blend of religious, traditional, and western laws. Many of these combinations were not voluntarily developed instead, they were influenced by western colonization.<sup>1</sup> In the early 1900's several African nations had come under the political control of major colonial powers, including France, Great Britain, Germany, Portugal, and Italy. Upon colonization, these colonial powers focused on implementing their own laws within their respective colonies. In the late 1950's the struggle for independence ensued which resulted in colonized states gaining independence and adopting the western legal systems; because their own socio-economic and political traditional systems had been damaged<sup>2</sup>.

As a result of this, West African countries that were colonized by Great Britain (i.e. Anglophone West African countries, (e.g. The Gambia, Nigeria and Sierra Leone) predominantly apply the English common law system. Whereas, West African countries that were colonized by the French (i.e. Francophone West African countries e.g. Mali, Burkina Faso, Cote d'Ivoire and Benin) predominantly apply the French Civil law system.

Some countries have mixed legal systems. For example, South Africa and Scotland have elements from both civil law and common law systems<sup>3</sup>. Also, some states have opted to adopt certain elements of a differing legal system into their own, an example of this is the doctrine of *amicus curiae* being incorporated into the French legal system which is a common law doctrine<sup>4</sup>. Notably, legal system classifications are dynamic as states do not remain stagnant but are constantly evolving therefore, states rarely have strict adherence to one legal system model.

Notwithstanding this, civil and common law systems differ in several respects as summarised in the table below and discussed in subsequent paragraphs.

<sup>1</sup> Okeke, CN (2011). African Law in Comparative Law: Does Comparativism Have Worth? *Roger Williams University Law Review*, [online], vol. 16. Available at: [https://docs.rwu.edu/rwu\\_LR/vol16/iss1/1](https://docs.rwu.edu/rwu_LR/vol16/iss1/1) (Accessed: 23 July 2023).

<sup>2</sup> Mbondenyi, M. (2014). *International Human Rights and their Enforcement in Africa*. LawAfrica, p.85.

<sup>3</sup> Husa p. 6.

<sup>4</sup> Initiative for Strategic Litigation in Africa, *Comparative Perspectives on Amicus Curiae Practice in Africa*. Available at: <https://www.the-isl.org/wp-content/uploads/2023/02/ISLA-Insights-Issue-3-Comparative-Perspectives-on-Amicus-Curiae-Practice-in-Africa-Ebook.pdf> (Accessed: 25<sup>th</sup> July 2023) p.52.

Common Law	Civil law
Does not always have a written constitution	Always has a written constitution
Judicial decisions are binding upon third parties and lower courts.	Judicial decisions are not binding on third parties. However constitutional court's decisions on laws are binding.
Legal scholar's writings have little persuasive value on courts decisions	Legal scholar's writings have significant influence over the courts' decisions.
Judges interpret the law and if the court system involves a jury the judge guides the members of the jury.	Judges apply the law.
Judges play a passive role during hearings	Judges play an active role.
Usually a hierarchical court system therefore appellate court decisions are usually binding.	Usually have specialised courts and have fewer appeals.

## 2.2. Origin and Application of the Civil law system

The civil law system originated in mainland Europe during the Middle Ages and extended to the colonies of European imperial powers like Spain and Portugal<sup>5</sup>. This system is predominantly codified law<sup>6</sup> based on Roman law therefore, its legal principles are fixed in legislation and judicial decisions are generally not binding. The law developed as a result of the fact that the state was involved in the provision of services and therefore, would take the responsibility of investigating and questioning individuals so as to dispense justice<sup>7</sup>.

The civil law trial system is often characterised by an inquisitorial style of practise<sup>8</sup> whereby all the relevant facts are provided to the judge and the judge's role is to question witnesses and deduce evidence (by calling additional witnesses or other relevant evidence). The onus of prompting evidence is on the judge instead of on the parties to the proceedings<sup>9</sup>. In addition, applications by the parties to the proceedings are made in writing and the judge responds in writing.

Lawyers are involved as advisors to their clients rather than key actors in the trial. Emphasis is placed on pre-trial inquiries and the trial is seen more as a closing

<sup>5</sup> Husa, V.J.M. (2016). Future of Legal Families. *Oxford Handbooks Scholarly Research Reviews [online]*. Oxford University Press. Available from: <https://doi.org/10.1093/oxfordhb/9780199935352.013.26>.

<sup>6</sup> Black's Law dictionary defines codification as: "The process of collecting and arranging the laws of a country or state into a code, i.e. into a complete system of positive law, scientifically ordered, and promulgated by legislative authority".

<sup>7</sup> Pakes, F. (2014) *Comparative Criminal Justice*. 3<sup>rd</sup> ed. Routledge. p. 117.

<sup>8</sup> Joireman, S.F (2001). Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy. *Journal of Modern African Studies [online]*. Vol. 39 no 4.

<sup>9</sup> Pakes *op. cit.* p. 112.

ceremony (more of a verification of the evidence<sup>10</sup>) of the process rather than a key aspect of it.<sup>11</sup> In criminal trials, the accused person is usually not required to plead to the charges as they are the subject of the investigation. Moreover, the rules of evidence are applied marginally, as the courts are trusted with the experience to judge the evidence on merit therefore, courts can decide to ignore certain evidence if necessary, ideally, all evidence is presented at trial<sup>12</sup>.

### 2.3. Origin and Application of the Common law system

The common law system developed in medieval England and spread globally through the British colonies. This legal system is predominantly uncodified and based on the doctrine of precedent by the high courts (*stare decisis*). The doctrine of precedent means that cases which have similar issues ought to be decided by the application of similar principles of law. The application of this doctrine means, that every court is bound to follow the decisions made by a higher-ranking court and, generally, appellate courts also have to follow their own decisions<sup>13</sup>.

This means that the law develops based on decisions made by the higher courts rather than through legislation, regulations or policies. Husa (2016) describes this well by stating<sup>14</sup>:

'The English legal system gives us the idea of legal precedent and the reliance on the body of cases decided in the past to guide the present decision of a judge. This allows for the development and flexibility of a legal system over time...Employment of the common law is a methodology of resolving disputes rather than the application of a particular rule.'

The common law trial system is characterised by an adversarial style of practise in which Joireman (2001) described as<sup>15</sup>:

'An adversarial system, such as that which is in use in both the United States and Britain is one in which the parties to a dispute are pitted against one another in a relatively brief, oral contest with the expectation that competition between the two sides will reveal the truth. The plaintiff, the defendant and lawyers representing them are gathered together to present their case before a jury and a judge, who is expected to be an impartial arbiter of justice. This system is typified as adversarial because of the oppositional relationship between the lawyers for the plaintiff and the defendant in the trial.'

<sup>10</sup> Ibid.

<sup>11</sup> Ibid p. 111.

<sup>12</sup> Ibid p. 116.

<sup>13</sup> Kenya Law reports. What is law reporting? [online]. Available from: <http://kenyalaw.org/kl/index.php?id=124>

<sup>14</sup> Husa *op. cit.* p. 5.

<sup>15</sup> Joireman *op. cit.* pp. 6-7.

Moreover, the role of the state in the common law system developed due to a lack of trust towards the government by its citizens and therefore, the administration of justice was left to 'the people'<sup>16</sup>, such that, the government is also subject to the rule of law. Consequently, the state's role is limited and passive, it does not provide for the dispensation of justice but provides an impartial forum for it. Both parties to a trial are required to present their arguments and the judge renders a decision based on what was presented<sup>17</sup>. Applications can be made both orally or in writing. As a result, trials can be frequently interrupted by legal arguments and questioning of witnesses which is done by lawyers and can be confrontational. In this system, the judge's role is more of an umpire<sup>18</sup> rather than an active participant.

## 2.4. Constitutional review

Strategic litigation may entail using constitutional review in order to change or challenge a law or policy that infringes on a country's constitution or international human rights norms.

Constitutional review in some countries, is the assessment of the constitutionality of the laws. It is aimed at preventing violation of the rights granted by the constitution and seeks to ensure that the actions and decisions of political authorities align with their constitutions.<sup>19</sup> This mechanism strives to bridge the divide between a constitution that exists theoretically and one that is actively implemented.

The way constitutional review is implemented differs from state to state, using either judicial or political institutions. The judicial model entails using courts to control and review the constitution whereas the political model entails the parliament or a quasi-judicial body having the mandate to do the same. Within the two aforementioned institutions various models exist<sup>20</sup>.

Most civil law countries have one specialized institution such as a constitutional court or council that is charged with the mandate of conducting a constitutional review (also known as a centralized fusion model). This was developed due to the fact that

<sup>16</sup> Pakes *op. cit.* p.118.

<sup>17</sup> *Ibid* p. 117.

<sup>18</sup> *Ibid* p. 114-115.

<sup>19</sup> Black's law dictionary defines a constitution as; "In public law, the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers. In a more general sense, any fundamental or important law or edict;..."

<sup>20</sup> *Ibid*.

judicial precedent does not have much impact in these countries. The West African countries that use this model are; Benin, Cape Verde, Guinea, Mali, Niger and Togo who have constitutional courts in charge of constitutional cases, while Burkina Faso, Côte d'Ivoire, Mauritania and Senegal have constitutional councils<sup>21</sup>.

On the contrary, common law countries usually apply a dispersed model whereby different courts can hear and make decisions on constitutional review cases and the doctrine of precedent applies. Nigeria and Liberia are the two West African Countries that apply this model. In Nigeria the Supreme Court, Federal Court of Appeal and High Court can hear Constitutional cases. The High court has the power to enforce and interpret the constitution and the Supreme Court and Court of Appeal can hear appeals from the High Court<sup>22</sup>.

Notably, although the chosen model of constitutional justice frequently aligns with a country's particular legal framework, often shaped by their colonial past, this has not been a consistent pattern. For example, Gambia, Ghana, and Sierra Leone, have common law roots but have embraced a centralized supreme-court review model, resembling the approach found in civil law systems<sup>23</sup>.

## 2.5. Judicial independence

An independent judiciary empowered to carry out constitutional review, which involves determining whether executive and legislative decisions align with the constitution, significantly impacts the system of checks and balances in a state. The extent of courts' involvement in such deliberations, their powers and autonomy determine how effective they are. The independence of the judiciary is influenced by the selection and removal of judges and its financial autonomy.

In anglophone jurisdictions, the process of selecting judges involves the engagement of political institutions, the justification for this is that involving multiple institutions in making the decision, prevents appointment of judges who are bias towards a specific institution<sup>24</sup>. Whereas their removal involves external actors though their procedures differ.

Francophone countries on the other hand, have the different institutions select their candidates, the overall effect of this is that; though each elected candidate has a bias

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

toward a specific institution, they will balance out as each institution had a chance to select a candidate. With regard to removal of Judges, francophone countries generally ensure that this is an internal matter dealt with by the judiciary<sup>25</sup>.

In Burkina Faso, although the 1991 Constitution (revised in 2015), provides that the judicial power is independent (Article 129), Article 131 provides that '*The President of Faso is the guarantor of the independence of the judicial power...*'. The President is assisted by the Superior Council of the Magistrature which he is the President of.

This raises the question of judicial independence. The United States Department of State, 2015 Country Reports on Human Rights Practices, reported that, the constitution in Burkina Faso provides for an independent judiciary but the judiciary is corrupt and subject to influence by the executive arm of government.<sup>26</sup>

In Cote D'Ivoire, Article 139 of the Constitution 2016, provides that the judicial power is independent. The President of the Republic is the guarantor of the independence of judicial power. He is assisted by the Superior Council of the Magistracy. Article 145 provides that the head of the Superior Council of the Magistracy is appointed by the President. Also, it affirms the independence of Magistrates under Article 140. However, it does not list its Constitutional court as one of the independent judicial organs. Article 152 of the Constitution creates the Constitutional Council whose role it is to, deal with constitutional and electoral matters. It has the power to decide on the constitutionality and interpretation of laws, conformity of international treaties and agreements with the constitution, it is also the judge of electoral disputes, amongst other key functions.

Human Rights Watch reported the following regarding judicial independence in Cote D'Ivoire:<sup>27</sup>

'While the Cote d'Ivoire constitution provides for an independent judiciary, the Ivorian judiciary has in practice succumbed to pressure from the executive branch and outside influences, most notably corruption. More politically sensitive cases are reported to be subject to pressure from the executive branch, ruling party or ethnic interests. Fairness in criminal cases are often undermined by corrupt magistrates and judges. There are also concerns that the overt political activity or affiliation of some justice ministry personnel might create the perception of bias or, in some cases compromise their independence in politically sensitive cases.'

In Senegal, Article 88 of the Constitution provides for the independence of the Judiciary from the Executive and Legislature and that it is exercised by the

<sup>25</sup> *Ibid.*

<sup>26</sup> United States Department of State (2015). *Country Reports on Human Rights Practices - Burkina Faso*, 13 April 2016 [online]. Available from: <https://www.refworld.org/docid/57161292c.html> [accessed 4 August 2023].

<sup>27</sup> Human Rights Watch Briefing Paper (October 2004). *Accountability for Serious Human Rights Crimes Key to Resolving Crisis*, [online]. Available from: <https://www.hrw.org/legacy/french/backgrounder/2004/cote1004/> [accessed 6 August 2023].

Constitutional Council, the Supreme Court, the Court of Accounts and the Courts and Tribunals. Article 89 provides that the Constitutional Council is appointed by the President of the Republic.

The role of the Constitutional Council is to review the constitutionality of laws, international commitments competence between the executive and the legislative power, as well as of the applications of unconstitutionality raised before the Court of Appeal or the Supreme Court (Article 92). Despite this, in 2021 the United States Department of Government reported that the Senegal judiciary<sup>28</sup>:

“...was subject to corruption and government influence...The judiciary is formally independent, but the president controls appointments to the Constitutional Council, the Court of Appeal, and the Council of State, and he and the minister of justice co-chair the High Council of the Judiciary, the body responsible for managing magistrates’ careers. Judges are prone to pressure from the government on corruption cases and other matters involving high-level officials or supporters of the government.”

On 8<sup>th</sup> December 2022 during the opening session of the Asia Pacific Justice Forum Professor Margaret Satterthwaite, UN Special Rapporteur on the independence of judges and lawyers, highlighted the importance of an independent judiciary for countering rising authoritarianism and stated as follows<sup>29</sup>:

“... An independent judiciary is vital to the protection of all human rights. It's absolutely essential to resisting undue influence, ensuring equality, and providing remedies for justice problems. It's easy to understand why judicial independence is important...Guarantees of judicial independence and integrity, structural, legal, and individual are all important for ensuring that all people, no matter their station or their situation, can get a fair hearing.”

Judicial independence guarantees the promotion of human rights in an impartial manner with the best interests of the people involved in the case being considered without undue political influence or individual interests. Judicial independence is important for strategic litigation as such cases have the ability to challenge discriminatory laws, policies and practices that impact groups of people negatively. Therefore, the advancement of strategic litigation is threatened by a lack of judicial independence.

<sup>28</sup> United States Department of Government (2022). *Senegal 2021 Human Rights Report* [online]. Available from: [https://www.state.gov/wp-content/uploads/2022/03/313615\\_SENEGAL-2021-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2022/03/313615_SENEGAL-2021-HUMAN-RIGHTS-REPORT.pdf) [accessed 26 September 2023].

<sup>29</sup> See her full remarks available from; <https://worldjusticeproject.org/news/role-independent-judiciary-protecting-rule-law> [accessed 20 September 2023].

## 3. CONTEXTUAL ANALYSIS: STRATEGIC LITIGATION AND SOCIAL CHANGE IN FWA

### 3.1 Overview of the human rights context in FWA

In its 2021/22 report, Amnesty International<sup>30</sup> reports that sub-Saharan Africa is marked by unstable post-colonial states where democracy, the rule of law and the enjoyment of human rights are challenged, particularly during electoral cycles. Moreover, colonial-era laws and inequalities continue to impede the enjoyment of the right to equality, and in some cases have even expanded to further impede the enjoyment of human rights.

Human rights, especially those related to political participation, such as freedom of expression, are often violated, and the media and human rights defenders are among those under government scrutiny. The prolonged expectation of a new political class, the distrust engendered by the desire to amend constitutions to maintain power, and the revolt against the growing enrichment of a privileged minority close to the heads of state are some of the other forms of crisis observed in Francophone West Africa (FWA).

Further, the resurgence and persistence of coups, terrorist attacks and violent extremism, especially in Burkina Faso, Mali, Niger and Mauritania, represent a real security and democratic threat<sup>31</sup>. These countries are plagued by terrorist attacks and intimidation of communities leading to serious human rights violations that undermine democratic gains<sup>32</sup>. For example, Boko Haram preventing girls from accessing education. These threats force states to focus and prioritize their programs and resources in the security domain, thus neglecting other development sectors such as the improvement of the judicial system and the protection of women's rights. In such a context, the recognition and protection of the rights of girls, women, sexual and gender minorities take a back seat.

<sup>30</sup> Amnesty International Report. [2022]. *The state of the world's human rights 2021/2022* [online]. Available from: <https://www.amnesty.org/en/documents/pol10/4870/2022/en/> [accessed: 24 July 2023].

<sup>31</sup> Africa Center for Strategic Studies. *Region focus* [online]. Available from: <https://africacenter.org/fr/focus-sur/sahel/> [accessed 21<sup>st</sup> July 2023].

<sup>32</sup> Africa Center for Strategic Studies [2022]. *The Growing Threat of Violent Extremism in Coastal West Africa*. Available from: <https://africacenter.org/fr/spotlight/la-menace-croissante-de-lextremisme-violent-en-afrique-occidentale-cotiere/> [accessed 21<sup>st</sup> July 2023].



### 3.1.1 Political instability and insecurity

Insecurity and political instability in the FWA countries<sup>33</sup> is exacerbated by violent extremism and terrorism in the Sahel that attempts to penetrate coastal areas. This has led to a breakdown of trust between the government, the armed forces and the population. The incursions and terrorist attacks perpetrated by armed groups on the civilian population, the defence and security forces are placing the G5<sup>34</sup> Sahel countries and Côte d'Ivoire in an unprecedented state of high risk. The resulting inter-community crises have generated large numbers of displaced people, particularly in Burkina Faso, Mali and Niger. These conflicts and armed attacks have resulted in serious violations of the rights of girls, women and gender non-conforming persons, both through conflict-related crimes and the imposition of ultra-conservative intolerant religious rules.

Moreover, there has been an increase of Political Violence Targeting Women (PVTW) in West Africa. This escalation can be attributed to a surge in violent incidents, by state forces rebels, political militias, identity/communal militias, violent mobs, and anonymous or unidentified armed groups. This has occurred particularly in countries like Nigeria, as well as in the Sahelian nations of Niger, Burkina Faso, and Mali<sup>35</sup>.

The most common form of PVTW during the years 2010-2020 in West Africa was non-sexual attacks, these are defined as “*violence of a non-sexual nature by an armed actor targeting an unarmed individual*”<sup>36</sup>. Other forms of PVTW were sexual violence, abductions, forced disappearances and mob violence amongst others.

PVTW not only negatively impacts women’s safety and security, it also significantly affects the overall state stability and hampers women’s political participation through fear and intimidation<sup>37</sup>.

The FWA region was hit by three coups d'état in less than a year in Mali<sup>38</sup>, Guinea<sup>39</sup> and Burkina Faso<sup>40</sup>, transitional governments composed mainly of military personnel

<sup>33</sup> Walther, O. (2020). Women and Conflicts in West Africa. *West African Notes*, no. 28. OECD Editions, Paris [online]. Available from: <https://doi.org/10.1787/d5004dd3-fr> [accessed: 21 July 2023].

<sup>34</sup> Burkina Faso, Chad, Mali, Mauritania and Niger

<sup>35</sup> Kishi, R. (2022). Political violence targeting women in West Africa. *West African Papers*, No. 34, OECD Publishing, Paris, [online]. Available from: <https://doi.org/10.1787b-214920en> [accessed: 21 July 2023].

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Anadolu Ajansi. (2021). *Mali: 5 coups since independence* [online]. Available from: <https://www.aa.com.tr/fr/afrique/mali-5-coups-detat-depuis-l-ind%C3%A9pendance/2471551> [accessed 22 July 2023].

<sup>39</sup> La Croix. (2021). Available from: <https://www.la-croix.com/Monde/Tentative-coup-dEtat-Guinee-2021-09-05-1201173837> [accessed 23 July 2023].

<sup>40</sup> BBC News Africa. [2022]. *Burkina Faso coup: Return of the military strongmen to West Africa* [online]. Available from: <https://www.bbc.com/news/world-africa-60138129> [accessed 22 July 2022].

were installed, parliaments were reconstituted and new institutions were created to replace democratically elected regimes. The resurgence of military coups in Mali, Burkina Faso and Guinea-Conakry in the last five years was justified by the architects on the inability of governments to curb security threats, bad governance or changes in the constitution to maintain power i.e. undermining the presidential term limits stipulated in the ECOWAS Protocol on Democracy and Good Governance.<sup>41</sup>

### 3.1.2 *Discrimination and violence against women*

The existing prejudices and socio-cultural constraints against women continue to fuel the violence and discriminatory acts of which they are victims. Access to fair and non-discriminatory working conditions, access to land, control of resources, recognition of sexual and reproduction rights, and decision making at the family level in communities in both Côte d'Ivoire and Burkina Faso are still the responsibility of men (husbands, fathers, uncles, heads of family, sons). Social systems are patriarchal and land rights are generally transmitted by men. Women do not have the right of ownership to land. Laws restrict women's access to land in two aspects being; ownership and enjoyment. Without a private property title, women are unable to claim to have a significant income from any kind of sustainable production. This represents a violation of their economic rights.

This has further been compounded with resource-related conflicts that affect most FWA countries. Conflicts between pastoralists and agrarian communities often lead to insecurity, discrimination and violence against women in multiple ways. The economic crises in the sub-region have been worsened by drought and floods which have led to food insecurity. Women are often relegated to role of reproduction and child-rearing. They are left behind and do not participate in the same way as men in the development process of their communities, even though they are involved in the production of goods and services that contribute to the improvement of the gross domestic product (GDP) of their country.

Following social demands and international commitments for the protection of women's rights, texts have been adopted in Côte d'Ivoire and Burkina Faso to correct disparities linked to unequal access to ownership and control of land for participatory socio-economic development. The major challenge remains the effective application of these texts by the respective States. The consecration of patriarchy in family codes, as is the case in Burkina Faso, the limitation of women's

<sup>41</sup> ECOWAS. (2001). *Protocol on Democracy and Good Governance* [online]. Available from: <https://www.eisa.org/pdf/ecow-as2001protocol.pdf> [accessed 21 July 2023].

access to land, the non-recognition of religious and customary marriages by the law, exacerbate discrimination against women and girls.<sup>42</sup>

### 3.1.3 Socio-cultural and legal barriers

In FWA, religious and customary marriages play an important role in society. In some countries, statutory law does not legislate on customary and religious marriages leaving a large portion of the population unprotected in case of a dispute or any other circumstances relating to these unions. For example, in Burkina Faso, the Law protects a widow's rights to inherit land from her husband however, the law does not apply to customary marriages. Conversely, customary law in Burkina Faso ignores inheritance rights for widows and daughters of the deceased; widows cannot inherit from their husbands and daughters are expected to acquire assets through marriage<sup>43</sup>. Moreover, in Senegal where a dual system of laws exists (both statutory and Sharia law) the statutory laws guarantee equal inheritance rights however, under Sharia law daughters receive half the amount that sons receive and widows receive a quarter of the inheritance<sup>44</sup>.

Generally, customary marriage is an agreement between the girl's family who agrees to give her to the boy's family. Young people, especially the girl, are not consulted and when they are, they do not have the right to refuse this choice at the risk of incurring family sanctions. Statutory legal recognition of these unions and streamlining any customary laws with statutory and international requirements would assist in enhancing the rights of women in such unions.

The silence of the statutory laws in the face of the persistence of harmful traditional and cultural practices such as female genital mutilation, the levirate<sup>45</sup>, the exclusion

<sup>42</sup> According to the Code of Persons and the Family adopted by Burkina Faso in 1991, the legal age for marriage is 17 for girls and 20 for boys. According to this code, marriage is early contrary to article 6 of the Protocol to the ACHPR on the rights of women.

<sup>43</sup> Landesa (2021). *Implementing progressive laws can accelerate securing women's land rights in Francophone Africa* [online]. Available from: <https://www.landesa.org/implementing-progressive-laws-can-accelerate-securing-womens-land-rights-in-francophone-africa/> [accessed 2<sup>nd</sup> October 2023].

<sup>44</sup> Ibid.

<sup>45</sup> Levirate is a special type of marriage where a brother of a deceased person marries his brother's widow, in order to continue his brother's lineage. The children of this remarriage have the same status as the children of the first husband (<https://www.cnrtl.fr/definition/levirat>)

of women for witchcraft<sup>46</sup>, slavery<sup>47</sup> in certain Fulani societies, the abduction<sup>48</sup> of girls for marriage signify the existence of discriminatory practices against women and the inaction of the State to put an end to these violations.

Except for Côte d'Ivoire and Benin<sup>49</sup> in FWA, there is unanimity in authorizing underage girls to marry in other countries within the sub-region. Countries such as Mali, Burkina Faso, Niger and Senegal have enshrined patriarchy in their legislation, with a strong influence of customs and religious norms. These provisions expose the young girl to early or forced marriages, early pregnancies, sexually transmitted diseases, psychological and physical violence. She bears the brunt and burdens of society, early and prematurely despite her vulnerability. In Côte d'Ivoire, the new law on marriage enshrines several provisions on the equality of men and women in a union.<sup>50</sup> However in spite of these legal advances, women are still perceived under the guardianship of their father, husband or son.

### 3.1.4 SOGIE based discrimination

Francophone West Africa has a high level of prejudice against people with a different sexual identity or orientation, particularly homosexuals. Homosexuality is perceived as a taboo and prohibited in West African communities. It is considered sacrilege making people who identify as gay, lesbian or bisexual (GLB) live in hiding, hence, increasing their vulnerability and susceptibility to violence. Some FWA countries such as Senegal have specific legal provisions criminalizing same sex consensual relationships, whereas others do not have such legal coding (e.g. Burkina Faso and Mali) however, religious and cultural norms undermine the rights of GLB persons.<sup>51</sup>

<sup>46</sup> With the exception of Côte d'Ivoire, most countries in Francophone West Africa do not legislate on cases of witchcraft on the grounds that the evidence cannot be established. However, the laws are silent on offences related to witchcraft such as exclusion from the community, physical and moral attacks on people, generally women, for witchcraft. These attacks can lead to death.

<sup>47</sup> Slavery has been abolished, but in some ethnic groups there is a strong social hierarchy creating upper and lower classes. Thus, certain categories of populations still do not consider themselves to be emancipated, as is the case of the Tuareg and Rimaibé Peuhl in Niger, Mali and Burkina Faso. They will not do anything without the opinion of their master, even if he violates their fundamental rights. The silence of these States in the face of these practices is a violation of fundamental human rights prohibiting the practice of slavery, servitude and trafficking in human beings, as provided for in Article 4 of the UDHR and Article 8 of the ICESCR.

<sup>48</sup> The new Malian Family Code establishes the father as the sole head of the family ("puissance paternelle"). The legal age for marriage is 18 for the man and 16 for the woman. In addition, in certain cases, marriage may be authorised from the age of 15. The new code seriously violates Mali's international obligations, enshrined in the United Nations Convention on the Elimination of All Forms of Discrimination against Women, ratified in 1985, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, ratified in 2005.

<sup>49</sup> Côte d'Ivoire and Benin have complied with the Convention on the Rights of the Child on the age of the child, i.e. any person under the age of 18 years for whom it is impossible to enter into marriage.

<sup>50</sup> LO I n° 2019-570 of 26 June 2019 relating to marriage article 2. A man and a woman before the age of eighteen may not enter into marriage. Article 5 - A man and a woman consent to their marriage alone.

<sup>51</sup> ILGA World. (2023). *ILGA World Maps [online]*. Available from: <https://ilga.org/maps-sexual-orientation-laws> [accessed 2 October 2023].

## 3.2 Strategic Litigation In Francophone West Africa

### 3.2.1 Objectives of strategic litigation

Strategic litigation, also described as ‘impact litigation’ or public interest litigation, uses case law to achieve legal and social change through pivotal legal cases. Beyond succeeding in court, strategic litigation, involves selecting and bringing a case to court with the aim of catalysing significant legal and social change.<sup>52</sup> Examples of strategic litigation include; contesting the constitutionality of legislation, challenging discriminatory government strategies, instituting criminal or civil cases for offenses such as war crimes, crimes against humanity, or human rights abuses such as torture, extrajudicial executions, and sexual or gender-based violence.<sup>53</sup>

Strategic Litigation aims to produce social impact through law by challenging existing legal structures, strengthening judicial institutions, supporting the development of legislation and supporting an interpretation of the law conducive to the full respect of human rights the provocation of public debate and citizenship education.<sup>54</sup> Strategic litigation can thus encourage changes in social, institutional and cultural attitudes towards the respect of human rights by contributing to the fight against impunity for human rights violations.

Strategic Litigation is said to be Feminist Strategic Litigation (FSL)<sup>55</sup> when it brings an intersectional feminist analysis into the courtroom so that courts understand the broader context of cases and how their decisions affect women and other marginalized groups. When requested to share views on ISLA’s approach of using FSL, Ariane GOUEME stated that:

Laws are based on socio-cultural constraints, influenced by patriarchy and protect women less. Feminist Strategic Litigation is therefore a needed tool in protecting of women’s rights that will certainly bring about a paradigm shift. Society will eventually accept that equality between men and women is a right.<sup>56</sup>

As mentioned hereinabove<sup>57</sup>, litigants in FWA countries, can institute constitutional review mechanisms albeit, within differing forms and procedures; e.g. in Burkina Faso, Cote D’Ivoire, Mauritania and Senegal have Constitutional Councils who carry out the role of Constitutional review, interpretation and enforcement of the Bill of Rights.

<sup>52</sup> UN Women. (2011). *Engage in strategic litigation [online]*. Available from: <https://www.endvawnow.org/en/articles/948-engager-des-litiges-stratigiques.html> [accessed on: 3 August 2023].

<sup>53</sup> Lawyers Without Borders Canada. *Stories of voluntary cooperation [online]*. Available from: [https://asfcanada.ca/wp-content/uploads/2022/08/asfc\\_prodef\\_stories-of-voluntary-cooperation.pdf](https://asfcanada.ca/wp-content/uploads/2022/08/asfc_prodef_stories-of-voluntary-cooperation.pdf) [Accessed on: 3<sup>rd</sup> August 2023].

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Lawyer at Voix de Femmes, Burkina Faso and the LSC unit of ISLA.

<sup>57</sup> Par 2.3.

### 3.2.2 Legal culture

Legal culture has been defined as; the values, ideas and attitudes that a society has with respect to its law<sup>58</sup>. Attitudes and views regarding the judicial system within the different FWA countries vary based on; customs, religion and the perceived legitimacy of the actors within the criminal justice system, amongst others<sup>59</sup>.

Some examples of public attitudes towards the justice system in FWA are; in Benin majority of Beninese believe that people are treated unequally before the law and state officials who commit crimes are less likely to get punished<sup>60</sup>. In Mali, public trust in the judiciary is low as it is perceived to be corrupt, slow and bias. A minority of Malians use the judicial system whereas majority prefer to use traditional/customary laws to settle disputes<sup>61</sup>. In Burkina Faso, 47% of citizens reported having little trust in the judiciary. Moreover, majority of citizens are of the opinion that the judiciary is unpredictable, inaccessible and expensive as they need to use lawyers and many must travel long distances to access court. Also, that courts are subject to corruption and pressure by influential people<sup>62</sup>. In Senegal, in order to improve access to justice, the government introduced “justice houses” which are semi-formal courts that provide mediation and conciliation services as well as, dealing with civil and minor criminal matters. The program has been reported as being effective<sup>63</sup>. Notably, the World Justice Project rule of law index ranks Senegal as 7<sup>th</sup> out of 34 countries in Sub-Saharan Africa in both civil and criminal justice<sup>64</sup>.

Friedman<sup>65</sup> notes that the effectiveness of any law depends on the response of the members of the public whose interests are at issue. Moreover, that legal culture can determine public compliance with the law, this can translate to the application of strategic litigation- the more public confidence there is in the judicial system of a country, the more likely they are to engage in strategic litigation.

<sup>58</sup> Friedman, L. M. (1969). Legal Culture and Social Development. *Law & Society Review [online]*, 4(1), 29-44. Available from: <https://doi.org/10.2307/3052760> [accessed 3rd October 2023].

<sup>59</sup> UN Women. *Informal justice systems: creating a course for human rights-based engagement, summary [online]*. Available from: <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2013/1/Informal-Justice-Systems-Summary.pdf> [accessed 3rd October 2023].

<sup>60</sup> Afro Barometer. (2021). *In Benin, is justice fair for all? [online]*. Available from: <https://www.afrobarometer.org/articles/au-benin-la-justice-est-elle-equitable-pour-tous/> [accessed 3 October 2023].

<sup>61</sup> Afro Barometer. (2017). *In Mali, citizens' access to justice compromised by perceived bias, corruption, complexity (online)*. Available from: <https://www.afrobarometer.org/publication/ad166-mali-citizens-access-justice-compromised-perceived-bias-corruption-complexity/> [accessed 3rd October 2023].

<sup>62</sup> United States Institute of Peace (2021). *A Sahel Town Builds a Way to Improve Reforms and Foreign Aid [online]*. Available from: <https://www.usip.org/publications/2021/10/sahel-town-builds-way-improve-reforms-and-foreign-aid> [accessed 3<sup>rd</sup> October 2023].

<sup>63</sup> World Justice Project. *Senegal- A nation of Contrasts [online]*. Available from: <https://worldjusticeproject.org/ruleoflawso-lutions/part-2-senegal---nation-contrasts> [accessed 3<sup>rd</sup> October 2023].

<sup>64</sup> World Justice Project. *WJP Rule of Law index [online]*. Available from: <https://worldjusticeproject.org/rule-of-law-index/global/2022/Civil%20Justice/> [accessed 3<sup>rd</sup> October 2023].

<sup>65</sup> Friedman, p. 41-43.

### 3.2.3 Legal representation in domestic courts

The OECD defines access to justice as:

“...the ability of individuals and businesses to seek and obtain a just resolution of legal problems through a wide range of legal and justice services. These services include legal information, counsel and representation, formal (e.g. courts) and alternative dispute resolution, and enforcement mechanisms”<sup>66</sup>.

One of the obstacles preventing access to justice is the cost of legal representation, Afrobarometer<sup>67</sup> carried out a study where they evaluated access to justice (by looking at various factors including legal representation), across 36 different African countries and looked at the extent to which citizens interact with their legal systems and quality of their interactions. The study found that 38% of the participants in the study struggled to pay legal fees, 42% had difficulties obtaining the necessary legal counsel/advice and 47% could not understand the legal processes and procedures. In order to remedy this, some countries allow Non-Governmental Organizations (NGO's) to assist litigants in pursuing cases, or have statutes and rules on legal aid for the provision of free legal services to those who are unable to afford it.

Some countries in FWA such as Burkina Faso have legal frameworks that restrict NGO's from instituting litigation, thus making it difficult for NGOs to bring cases before the national courts on behalf of individuals. This limits the utilization of strategic litigation and applications of *amicus curiae* by NGOs.

In Burkina Faso, in order to be admissible before a court, one must have legal standing. An individual must be able to prove damage resulting from a criminal offence, direct damage, and personal damage. Under the last condition, i.e. personal injury, only those who have personally suffered the damage are entitled to bring an action. These are essentially the victim and their heirs. Such conditions restrict the scope of persons entitled to sue. As illustrated in the case of Voix De Femme, which was dismissed by the Court of Appeal in the excision case it brought in 2017, on the grounds that it did not have standing to sue and that the harm claimed was not personal<sup>68</sup>.

<sup>66</sup> OECD (2019). *Serving citizens: Access to Justice [online]*. Available from: <https://www.oecd-ilibrary.org/docserver/8b-8c48af-en.pdf?expires=1696351343&id=id&accname=guest&checksum=AA3AA090BC02105FCECCBAAB629714BF> [accessed 3<sup>rd</sup> October 2023].

<sup>67</sup> Carolyn, L. (2017). *Ambitious SDG goal confronts challenging realities: Access to justice is still elusive for many Africans Afrobarometer (online)*. Available from: [https://www.afrobarometer.org/wp-content/uploads/migrated/files/publications/Policy%20papers/ab\\_r6\\_policypaperno39\\_access\\_to\\_justice\\_in\\_africa\\_eng.pdf](https://www.afrobarometer.org/wp-content/uploads/migrated/files/publications/Policy%20papers/ab_r6_policypaperno39_access_to_justice_in_africa_eng.pdf) [accessed 3 October 2023].

<sup>68</sup> This is a potentially contentious strategic case, from the interview with the President of the Association Voix de Femme in the context of the fight to protect the sexual health of women and girls in Burkina Faso

Such circumstances, which appear to leave the possibility of legal action solely to the victim and their heirs, curtail the protection of rights as provided for in international and regional human rights conventions, which require that everyone has the right to have their case heard by a competent impartial court.

The conditions mentioned are also not conducive to the practice of strategic litigation, which sometimes requires the involvement of *amicus curiae*<sup>69</sup>. Amicus Curiae are a person or group of persons who are not a party to an action, but have a strong interest and expertise in the matter and who request the court for permission (or are invited by the court), to submit a brief pertaining to the case to assist the court in arriving at its decision. The inclusion of amicus curiae in cases concerning human rights assists courts with rich legal research and expertise from a domestic, regional and international perspective thus enriching jurisprudence.

The inclusion of *amicus curiae* in cases is a common law practise and is foreign to civil law countries, for this reason most FWA countries do not recognize it. Notably, France began to recognize amicus curiae in a Paris Court of Appeal case in 1988<sup>70</sup>, this raises the possibility of FWA countries following suit.

Some FWA countries such as Mali and Burkina Faso have laws governing the provision of Legal Aid to individuals who are unable to afford legal representation. In Mali the law provides for the waiver of legal fees and provision of a court-appointed lawyer. In the event that governments struggle to provide funds for the provision of legal aid, NGO's and the private sector often step in to assist<sup>71</sup>.

<sup>69</sup> The *amicus curiae* is a possibility offered to any natural or legal person to present information or opinions to the competent court which may help it to gather the elements necessary for the demonstration of the truth.

<sup>70</sup> Hogal Lovells (2010). *France and the concept of amicus curiae: what lies ahead?* (online). Available from: <https://www.lexology.com/library/detail.aspx?g=5863bcb7-8662-43ba-b66a-812bfc23b409> [accessed 3<sup>rd</sup> October 2023].

<sup>71</sup> USAID. *Mali's private sector pledges to help fund legal aid* (online). Available from: [https://pdf.usaid.gov/pdf\\_docs/PA00Z6B7.pdf](https://pdf.usaid.gov/pdf_docs/PA00Z6B7.pdf) [accessed 3<sup>rd</sup> October 2023].



## 4. NORMATIVE HUMAN RIGHTS' FRAMEWORKS IN FWA

### 4.1 International instruments

At the international level, the blue print for human rights is contained under the Universal Declaration of Human Rights (UDHR) which designed to be a "common standard of achievement for all peoples and nations,". The UDHR is the first document where fundamental civil, political, economic, social, and cultural rights that should be enjoyed by all individuals are explicitly outlined. The UDHR, in conjunction with the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR), collectively constitute what is commonly referred to as the "International Bill of Human Rights". All the FWA states have ratified the ICCPR and ICESCR however, not all have ratified their optional protocols for example; Senegal, Burkina Faso, Niger and Mali have not ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty however, Benin has<sup>72</sup>.

States have the obligation under International Law to prevent, investigate, and punish violence against women. Numerous international conventions, declarations and resolutions provide coverage for protecting and promoting women's rights, some of these include:

- Convention on the Elimination of All Forms of Discrimination against Women
- Optional Protocol to the Convention on the Elimination of Discrimination against Women
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
- Beijing Declaration and Platform for Action
- Declaration on the Elimination of Violence against Women<sup>73</sup>.

<sup>72</sup> United Nations Human Rights Office of the High Commissioner. *International Bill of Human Rights (online)*. Available from <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> [accessed on 4 October 2023].

<sup>73</sup> United Nations Human Rights Office of the High Commissioner. *International standards (online)*. Available from <https://www.ohchr.org/en/special-procedures/wg-women-and-girls/international-standards> [accessed on 4 October 2023].

## 4.2 Regional instruments

One of the most important regional instruments in Africa governing human rights, is the African Union Charter on Human and People's rights, (AU Charter). The AU Charter outlines and safeguards human rights and fundamental freedoms for individuals and groups across Africa. It was adopted by the African Union in 1981 and came into effect in 1986. The AU Charter not only emphasizes individual rights but also recognizes collective rights of peoples. It establishes a framework for member states to promote and protect human rights, social justice, and development on the continent<sup>74</sup>. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women or (the Maputo Protocol) was adopted in 2003 and entered into force in 2005. The Maputo Protocol promotes and protects the rights of women based on the principles of, non-discrimination, universality, equality, inalienability and participation of women<sup>75</sup>. All the FWA countries have ratified the AU Charter.

The African Commission on Human and People's rights (ACHPR) monitors the implementation of the AU Charter<sup>76</sup>, it also interprets and considers complaints of violations of the AU Charter and implements decisions taken by the AU organs, amongst other functions. All the FWA states have ratified the Maputo Protocol except Niger.

## 4.3 Overview of the domestication of regional and international instruments

There are two traditional approaches of domesticating international and regional law, these are; monist and dualist approaches. The monist approach finds that once a treaty has been ratified by a country, it forms part of the country's domestic laws and is therefore directly enforceable in its courts or by implementing authorities. The dualist approach involves the creation and adoption of national laws by the legislature once a treaty has been ratified. Generally, civil law countries tend to follow the monist approach and common law countries follow the dualist approach. Therefore, most FWA countries follow the monist approach<sup>77</sup>.

<sup>74</sup> African Union Charter on Human and People's rights. Available from: [https://au.int/sites/default/files/treaties/36390-treaty-0011\\_-\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf) [accessed: 3<sup>rd</sup> August 2023].

<sup>75</sup> The African Union. *Accountability Framework on the Elimination of Harmful Practices* [online]. Available from: [https://au.int/sites/default/files/newsevents/workingdocuments/41106-wd-AU\\_ACCOUNTABILITY\\_FRAMEWORK\\_ON\\_THE\\_ELIMINATION\\_OF\\_HARMFUL\\_PRACTICES- ENGLISH.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/41106-wd-AU_ACCOUNTABILITY_FRAMEWORK_ON_THE_ELIMINATION_OF_HARMFUL_PRACTICES- ENGLISH.pdf) [accessed 3<sup>rd</sup> August 2023].

<sup>76</sup> For more information see the African Court website. Available from: <https://www.african-court.org/wpafc/african-court-of-african-commission/#:~:text=The%20Court%20may%20transfer%20a,massive%20violations%20of%20human%20rights.>

<sup>77</sup> Bernard, M. (2015). 'Legal reception in the AU against the backdrop of the monist/dualist dichotomy', *The Compara-*

Once states ratify human rights treaties they assume corresponding duties and obligations to respect, protect and fulfil human rights. In this regard, the obligation to respect prohibits the state from preventing people from enjoying their rights. The obligation to protect refers to all the measures that the State must take to guarantee the safety of people, without distinction, against violations of their rights, which is why specific texts are adopted to protect the vulnerable and other marginalized individuals. The obligation to fulfil requires the state to take positive steps towards realising citizen's enjoyment of their rights<sup>78</sup>.

By ratifying international human rights treaties, governments commit to establishing domestic measures and laws that align with their treaty responsibilities. In cases where domestic legal processes fall short in addressing human rights violations, there are mechanisms and procedures for individuals to submit complaints or communications at regional and global levels. These mechanisms aim to ensure that local adherence to international human rights standards is upheld, executed, and enforced<sup>79</sup>.

Strategic litigation provides an opportunity for individuals, legal entities or groups of individuals to hold the State accountable for violations of its obligations, thereby contributing to the advancement of human rights.

#### 4.4 Exercising regional and international remedies for human rights violations

In the event that states fail to fulfil their obligations to protect, respect, fulfil or promote human rights in accordance with treaty commitments, they may be called to account by individuals, National Human Rights Institutions (NHRI's), other states parties, NGOs, inter-governmental organizations or international organizations. They may do this through various mechanisms such as; human rights monitoring bodies and periodic reviews such as the Universal Periodic Review (UPR), which is a mechanism of the United Nations Human Rights Council requiring Member States to undergo a peer review of its human rights records every 4.5 years<sup>80</sup>. The UPR

tive and International Law Journal of Southern Africa, Vol. 48, No. 1, pp. 144-161. Available from: [https://www-jstor-org.bris.idm.oclc.org/stable/pdf/26203831.pdf?refreqid=excelsior%3A787b03355f078e9125e22ef32baa15a8&ab\\_segments=&origin=&initiator=&acceptTC=1](https://www-jstor-org.bris.idm.oclc.org/stable/pdf/26203831.pdf?refreqid=excelsior%3A787b03355f078e9125e22ef32baa15a8&ab_segments=&origin=&initiator=&acceptTC=1) [accessed 4th October 2023].

<sup>78</sup> United Nations Human Rights Office of the High Commissioner. *Instruments & Mechanisms: International Human Rights Law (online)*. Available from: <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law#:~:text=By%20becoming%20parties%20to%20international,the%20enjoyment%20of%20human%20rights> [accessed 4th October 2023].

<sup>79</sup> *Ibid.*

<sup>80</sup> United Nations Human Rights Office of the High Commissioner. *Universal Periodic Review (online)*. Available from: [https://www.ohchr.org/en/hr-bodies/upr/upr-home#:~:text=The%20Universal%20Periodic%20Review%20\(UPR,rights%20re-](https://www.ohchr.org/en/hr-bodies/upr/upr-home#:~:text=The%20Universal%20Periodic%20Review%20(UPR,rights%20re-)

can be utilized to improve the human rights situation in respective countries and to exert pressure on states to fulfil their human rights commitments. International mechanisms are ideal particularly for states that are concerned with maintaining a positive human rights reputation in the global political sphere.

The African Commission on Human and Peoples' Rights (AUCPHR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), complement the international mechanisms such as the Universal Periodic Review (UPR). The AUCPHR is a quasi-judicial body charged with the role of; monitoring the implementation of the AU Charter; interpreting and considering complaints of violations of the Banjul Charter and; implementing decisions taken by the AU organs, amongst others.

Of particular relevance herein is the AUCPHR's power to consider complaints and issue recommendations therein, or refer the matter to the African Court or vice versa. It can receive claims of human rights violations from member states, ordinary citizens, a group of individuals and NGOs. The complainant or author of the communication does not need not be related to the victim of the abuse in any way however, the victim must be mentioned. However, the complainant must exhaust all domestic remedies before lodging the complaint. Notably, should the communication indicate that it relates to a series of serious human rights violations, the AUCPHR refer it to the AU Assembly, Heads of States and the Peace and Security Council of the AU<sup>81</sup>.

When national judicial pathways fail, NGOs with recognized legal standing can proceed to regional courts, either to condemn the violation of a right by the state or to bring about social change. The courts that are applicable to FWA countries are; the African Court on Human and Peoples' Rights<sup>82</sup> (The African Court), and the Economic Community of West African States Court (ECOWAS Court).

The African Court is the only judicial organ given the role of protecting human rights in Africa through its decisions and is therefore crucial for the promotion and protection of human rights in Africa. Individuals as well as the member states to the AU Charter, African Intergovernmental Organizations and NGOs with observer status can institute cases before the court, only if the infringing State; is a party to the treaty establishing the Court or expressly recognises its jurisdiction as provided

[ords%20every%204.5%20years](#). [accessed 4<sup>th</sup> October 2023].

<sup>81</sup> African Union. Guidelines for submitting complaints [online]. Available from: <https://achpr.au.int/en/guidelines-submitting-complaints> [accessed 4<sup>th</sup> October 2023].

<sup>82</sup> The Court was established by pursuant to Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol). All the FWA states have ratified the protocol except Guinea.

for in Article 5(3)<sup>83</sup> of the Protocol to the African Court and after the complainant has exhausted available domestic remedies. The Court also allows *amicus curiae* briefs from interested parties with relevant expertise<sup>84</sup>.

The African Court has heard a significant number of cases to date and in doing so has ordered states to comply with regional and international laws. An example of this is, where the African Court ordered the State of Côte d'Ivoire to reform the Independent Electoral Commission (2016)<sup>85</sup> and that the Independent Electoral Commission ought to take all necessary measures to remove the obstacles preventing one of the Ivorian politicians, Mr. SORO Kibafory Guillaume, from enjoying his right to be elected<sup>86</sup>. Mr. SORO Kibafory Guillaume was contesting for presidential elections in October 2020. In response, the State of Côte d'Ivoire disagreed with the Courts' decision and withdrew from the African Court, thus undermining the rule of law<sup>87</sup>.

Benin also withdrew its ratification to the protocol establishing African Court in 2020 following a decision by the Court where it issued an order for provisional measures ordering the suspension of communal and municipal elections<sup>88</sup>.

The withdrawal of Côte d'Ivoire and Benin from the African Court precludes individuals and NGOs from using the court to claim about the violation of human rights. Consequently, organizations working to defend women's rights in Côte d'Ivoire and Benin have lost one of the means of effective legal action. This dangerous step backwards for the protection of human rights restricts feminists' judicial action at the continental level and forces them to explore the use of national courts, which are often under the control of political power and patriarchy.

In Africa, Regional Economic Communities have been formed to promote economic integration amongst neighbouring states there are 8 RECs in Africa. Of particular relevance to FWA is ECOWAS which was created in 1978 and consists of: Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo. Despite its focus being

<sup>83</sup> Article 5(3) states that: "The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol..

<sup>84</sup> The Centre for Human Rights University of Pretoria has issued various *amicus* briefs to the African Court see their website for more information: [https://www.chr.up.ac.za/images/researchunits/litigation/cases/Prince\\_v.\\_South\\_Africa\\_Decision\\_255\\_of\\_2002\\_AcmHPR\\_Dec\\_07\\_2004.pdf](https://www.chr.up.ac.za/images/researchunits/litigation/cases/Prince_v._South_Africa_Decision_255_of_2002_AcmHPR_Dec_07_2004.pdf)

<sup>85</sup> See the judgement available from: <http://www.african-court.org/en/images/Cases/Judgment/Apl.%20044%20-2019%20-%20Suy%20be%20Gohore-%20English.pdf>

<sup>86</sup> See the decision available from: <https://www.african-court.org/fr/images/Ordonnance-Mesures-Provisoires-Req.012-2020-Guillaume-Kibafory-Soro-et-Autres-c.-Rpublique-de-Cte-Divoire.pdf>

<sup>87</sup> Jeune Afrique. [online]. Available at: <https://www.jeuneafrique.com/937179/politique/affaire-guillaume-soro-la-cote-divoire-se-retire-du-protocole-de-la-cour-africaine-des-droits-de-lhomme/>

<sup>88</sup> Jeune Afrique. [online]. Available from: <https://www.jeuneafrique.com/934704/politique/pourquoi-le-benin-se-retire-du-protocole-de-la-cour-africaine-des-droits-de-lhomme/>

economic cooperation with its member states ECOWAS has comprehensive legal and policy documents concerning women's rights.

Moreover, the ECOWAS Court is a key judicial organ for upholding human rights and determining cases involving claims for the violation of human rights that occur in any member state. ECOWAS does not require a claimant to have exhausted their domestic local remedies before approaching it.

Strategic litigation can also be pursued at a domestic level to address gaps in human rights law, through the creation of jurisprudence on the subject, while referring to existing applicable regional or international treaties. This is how courts can support the development of legislation or interpretation of the law aligned with the protection and promotion of human rights.

## 5. ENABLING FACTORS AND POSSIBILITIES OF FSL IN FWA

Despite inherent challenges within the Francophone legal systems in the context of feminist strategic litigation, there still exists many enabling factors and possibilities in the region. These enablers are both legal and political in nature, as detailed below.

### 5.1 Monist Approach to International Law

Francophone African countries typically adhere to the monist approach to international law, whereby international agreements are automatically incorporated into domestic law upon ratification. Consequently, national courts are mandated to enforce international law without necessitating additional parliamentary procedures.<sup>89</sup>

In addition, the FWA states are known to be consistent in the ratification of international and regional texts. Legal instruments for the protection and promotion of women's rights, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Maputo Protocol, these are frameworks that provide a pre-condition for strategic litigation when ratified by states. Similarly, the Maputo Protocol's provisions on civil and political rights, physical and psychological integrity, sexual and reproductive health, non-marginalization and economic empowerment symbolize the commitment of African states to end discrimination, violence and gender stereotyping against women<sup>90</sup>.

The CEDAW has a mechanism for monitoring its implementation by states, namely the UN Committee on the Elimination of Discrimination against Women. This committee issues general recommendations for the interpretation of the articles of the convention. General Recommendation No. 25 (2004)<sup>91</sup> deals with "temporary measures" in favor of women. The issue of "temporary measures", also known as "positive discrimination" or "positive action" is often controversial in the field of equal rights for women and men. These are so-called positive discrimination measures to ensure equity by facilitating, for example, women's access to employment, credit,

<sup>89</sup> J Dugard International law: A South African perspective (2005) 47; Art 151 Constitution of Burkina Faso, 1992.

<sup>90</sup> See the Maputo protocol. Available from: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>.

<sup>91</sup> See General Recommendation No 25 available at: [https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf)

education, the quota system on electoral lists, on company boards, in professional training, amongst others.

These main conventions for the protection of women's rights have been ratified by almost all the FWA states, notably Burkina Faso on 14 October 1987<sup>92</sup> and Côte d'Ivoire on 18 December 1995<sup>93</sup>. These ratifications require States to take the necessary measures to align their domestic laws with regional and international laws. As mentioned hereinabove, recourse to regional and international mechanisms can be considered when national courts have been unable to redress the harm suffered by a victim.

However, as Killander and Adjolohoun correctly highlight, monist African French-speaking countries often exhibit reluctance in automatically implementing international treaties. Consequently, these treaties do not hold substantial influence in litigation within national courts.<sup>94</sup> Therefore, this monist approach presents a double-edged sword. While international treaties are automatically incorporated into domestic law, the reluctance of monist African French-speaking countries to implement them diminishes their significant influence in litigation within national courts.

## 5.2 Institutional and normative framework for the protection of women's rights

The normative and institutional framework refers to all the legal and institutional domestic arrangements aimed at guaranteeing the effectiveness of human rights. The control procedures indexed to the conventions and protocols oblige the signatory States to domesticate the recommended provisions in their legal framework. States have thus become aware of the impact of discriminatory practices and violence against women as an obstacle to the development of societies. Issues related to the respect of women's rights have become a cross-cutting theme and are considered in domestic policies. This provides a foundation for strategic litigation.

In Burkina Faso: Law No. 061-2015/CNT on the prevention, repression and reparation of violence against women and girls and care for victims; law on agrarian and land reorganization adopted in 1996 and revised in 2010 consider gender equality.

<sup>92</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&clang=\\_fr](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_fr)

<sup>93</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&clang=\\_fr](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_fr)

<sup>94</sup> M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in Killander, 'International law and domestic human rights litigation in Africa(2010).



Also, the national policy on land security in rural areas (PNSFMR) of 4 October 2007, provides for a reserve of 30% of the developed plots of land for women and disadvantaged people. In addition to legislative and regulatory texts, Burkina Faso has ministries for the promotion and protection of women and youth rights (Ministry for the Advancement of Women, Ministry of Human Rights, Ministry of Employment and Youth, permanent secretariat in charge of the fight against female circumcision, permanent secretariat of the national conference on gender promotion).

These structures implement government policies on the protection and promotion of women's rights. They also draft reports for treaty monitoring bodies and monitor implementation of the recommendations made by regional and international mechanisms to the State. Failure of implementation of treaty body recommendations can serve as a basis for strategic litigation.

In Côte d'Ivoire, the Constitution of November 2016, explicitly recognises the rights, freedoms and duties of every Ivorian woman and man. The Constitution prohibits all forms of discrimination against women, establishes the principles of equality between all citizens and ensures the protection of vulnerable persons. Additional frameworks in Côte d'Ivoire that advance women's rights are: Law No. 2014-430 of 14 July 2014 on the prevention, protection and repression of HIV/AIDS; Decree No. 2016-781 of 12 October 2016, which reinforces access to justice for indigent women victims; Law No. 2015-635 of 17 September 2015, which institutes compulsory schooling for children aged 6 to 16 in Côte d'Ivoire, and Decree No. 842 of 17 December 2014, which establishes a National Observatory for Equity and Gender (ONEG).

Côte d'Ivoire has also adopted and implemented several policies, programmes, action plans, strategies and projects for the promotion of women's rights, these include; (i) the Action Plan for the implementation of UN Security Council Resolution 1325; (ii) the Action Plan for the implementation of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); (iii) the 2007 National Women's Action Plan; (iv) the Innovative Management Project of the National Women and Development Fund; (v) the Operational Plan of the Equal Opportunities and Gender Policy (2014-2016); (vii) the Strategic Plan for Accelerating Girls' Education (2016-2018).

Although these countries have legal frameworks for the realisation of gender equality, the harsh reality is that inequalities and violence against women persists. The domestication of treaties and the national initiatives undertaken are yet to have a significant effect on reducing gender inequality.

## 5.3 Constitutionalism

Strategic litigation can only be fully practiced in a state where all are equal before the law. The FWA states have enshrined in their constitutions the principles and values that underpin their commitment to democratic regimes and respect for the rule of law. The provisions contained in the constitutions, advocate for the equality of all before the law. Even though most of the states in FWA have constitutional provisions, there are limitations to its application. Coups d'état and the rise of autocratic powers are hampering this constitutional foundation and undermining the rule of law. The failure of States to respect their constitutional obligation is an opportunity to engage in strategic litigation as a reminder of their obligations.

## 5.4 DIVERSE civil society

An important part of ISLA's work is motivated by the desire to create or strengthen strategic collaborations within feminist and Pan-Africanist social movements and civil society. The existence of this diverse civil society serves as a catalyst for ISLA to continue working on building a progressive civil society in the sub-region and enhance the skills in strategic litigation through building effective partnerships

## Conclusion

One of the main implications of the contextual diversity between Anglophone and Francophone Africa is the reality that the starting point for strategic litigation in each context differs. Therefore, this comparative examination of legal systems in Anglophone and Francophone Africa underscores the necessity for practitioners in feminist strategic litigation to recognize and adapt to these regional differences. Particularly, those operating in Francophone West Africa must be cognizant of unique legal frameworks and approaches, such as the prevalence of civil law systems and varying attitudes towards international treaty implementation. By acknowledging these distinctions, practitioners can effectively navigate legal landscapes and enhance their impact in promoting gender justice across diverse cultural and linguistic contexts.





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