

DANISH INSTITUTE
FOR HUMAN
RIGHTS

Dissolution of Marriage,
Legal Pluralism
and Women's Rights
in Francophone
West Africa

Stéphanie Lagoutte (ed.)

with the participation of
Abraham Bengaly (Mali),
Boukar Youra (Niger)
and Papa Talla Fall (Senegal)

Bamako, Dakar, Niamey and Copenhagen

2014

**Dissolution of Marriage, Legal Pluralism
and Women's Rights
in Francophone West Africa**

Stéphanie Lagoutte (ed.)

**with the participation of
Abraham Bengaly (Mali), Boukar Youra (Niger)
and Papa Talla Fall (Senegal)**

**Danish Institute for Human Rights
Bamako, Dakar, Niamey and Copenhagen**

2014

Title: Dissolution of Marriage, Legal Pluralism and Women's Rights in Francophone West Africa

Authors: Stéphanie Lagoutte (ed.), Abraham Bengaly, Boukar Youra and Papa Talla Fall

ISBN: 978-87-91836-95-4

EAN: 9788791836954

Translation © 2014 Jesse Kirkwood

This publication was originally published in French (Stéphanie Lagoutte (dir.): *Rupture du lien matrimonial, pluralisme juridique et droits des femmes en Afrique de l'Ouest francophone* (avec Abraham Bengaly, Mali, Boukar Youra, Niger et Papa Talla Fall, Sénégal. Bamako, Niamey, Dakar et Copenhague, Institut danois des droits de l'homme, 2014). Some minor changes have been made to the English translation by the editor of the publication.

Typesetting: CREA PUB (Mr. Traoré) – Bamako - Mali

© 2014 Danish Institute for Human Rights

Wilder Plads 8K

DK - 1403 Copenhagen K

Tel. +45 3269 8888

www.humanrights.dk

This document may be wholly or partially reproduced provided that the author and source are cited.

TABLE OF CONTENTS

Thanks.....	5
List of Abbreviations.....	6
Introduction: Dissolution of Marriage, Legal Pluralism and Women's Rights	7
Part 1 – Mali	21
Part 2 – Niger	41
Part 3 – Senegal	61
Conclusions and Proposals	84
Consolidated Bibliography	88

THANKS

This regional research project received the scientific and financial support of the Danish Institute for Human Rights (DIHR) in Copenhagen, in partnership with the Institute for Human Rights and Peace (IHRP) at the Cheikh Anta Diop University in Dakar. Professor Amsatou Sow SIDIBE of the IHRP inspired this research which is above all the result of the work of a regional network of a dozen researchers from Burkina Faso, Mali, Niger and Senegal, coordinated by Stéphanie LAGOUTTE, senior researcher at the DIHR with the support of Monique ALEXIS and DIHR West Africa team.

The objective of the project was to document and analyse the problems encountered at the dissolution of marriage and to explore the legal and non-legal solutions that would ensure a better protection of rights in the family context. The purpose of the project was also to build the capacities of the team of researchers in terms of research project design, methodology and the conducting of a well-documented and objective study.

Eminent academics, including Professor Abdoul Aziz KEBE, head of the Arabic Department at the Cheikh Anta Diop University in Dakar, Professor Abdoullah CISSE of the Gaston Berger University in Saint-Louis and Professor Tidjani ALOU, dean of the Faculty of Economic and Legal Sciences at the Abdou Moumouni University in Niamey, all contributed their expertise to discussions and debates with the research team at various phases in the process.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
CA	Court of Appeal
CADU	Cheikh Anta Diop University (Dakar, Senegal)
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
FCFA	CFA francs
FELS	Faculty of Economic and Legal Sciences
DIHR	Danish Institute for Human Rights (Copenhagen, Denmark)
IHRP	Institute for Human Rights and Peace (Dakar, Senegal)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JO	<i>Journal officiel</i> (official records of legislative and some regulatory texts)
JP	<i>Justice de paix</i> (type of first instance court)
MGC	Marriage and Guardianship Code (<i>Code du mariage et de la tutelle</i> , Mali)
PFC	Personal and Family Code (<i>Code des personnes et de la famille</i> , Mali)
TD	<i>Tribunal départemental</i> (Departmental Court) (Senegal)
TDHC	<i>Tribunal départemental hors cadre</i> (Special Departmental Court) (Dakar, Senegal)
TGI	<i>Tribunal de grande instance</i> (type of first instance court)
TGIHC	<i>Tribunal de grande instance hors classe</i> (type of first instance court)
TI	<i>Tribunal d'instance</i> (type of first instance court)
TP	<i>Tribunal de Paix</i> (type of first instance court) (Senegal)
TPI	<i>Tribunal de première instance</i> (type of first instance court)
UDHR	Universal Declaration of Human Rights

INTRODUCTION

Dissolution of Marriage, Legal Pluralism and Women's Rights **Stéphanie Lagoutte¹**

Over the past few years, a team of senior researchers, young academics and legal practitioners from francophone West Africa has been exploring the difficult issue of the legal situation of women during divorce. As our research, meetings and discussions have progressed, the project has evolved and diversified. This process led to the publication in January 2014 of three studies relating respectively to Mali, Niger and Senegal. The present regional publication is the result of our work to this date. It presents an abridged version of the three national studies as well as first thoughts on common areas and challenges arising from this work.

The purpose of this introductory chapter is to retrace the intellectual journey that, from Niamey to Dakar via Ouagadougou, Cotonou, Bamako and Copenhagen, has enabled a consideration of the rather complex context of divorce in francophone West Africa. The study has led to an understanding of the challenges posed by the formal and informal legal pluralism that exists in the region as well as the need to protect women's rights in these very difficult situations. At the same time, we have also given thorough consideration to the methodological and practical aspects involved in developing the research project. We have come to understand the limits inherent to this project from a practical point of view, for example the enormous difficulties encountered in terms of access to relevant sources. Finally, it has been possible to reflect on and discuss the ways in which research and researchers can help illuminate topics and debates that relate to societal, religious and political issues of an often very sensitive nature.

Genesis of the project

The idea for this project began in Niger where a small group of researchers at the Faculty of Economic and Legal Sciences (FELS) in Niamey were working on various problems related to family law, human rights and legal pluralism. Presentation and debates at meetings and conferences² showed that the conditions in Sahelian countries shared several common features:

¹ Senior researcher at the Danish Institute for Human Rights (DIHR) and scientific coordinator of the project entitled "Protection de la famille lors de la dissolution du mariage en Afrique de l'Ouest [Protection of the Family during the Dissolution of Marriage in West Africa]".

² Conferences organised in Niger in 2005-2006, meetings between researchers in the region (Ouagadougou, 2007) and at the DIHR in Denmark in 2007-2008. (within the framework of the DIHR's Research Partnership Programme).

legal pluralism was not always recognised or formalised; there was massive political, religious and social sensitivity surrounding the subject of divorce; and there was few entry points for human rights in family affairs, whether in law or practice.

Against this backdrop, the Danish Institute for Human rights (DIHR) initiated, in partnership with African researchers, a sub-regional project entitled "Protection of the Family during the Dissolution of Marriage in West Africa". From the outset, the objective of this project was to document and analyse the problems encountered by women in the event of divorce and to explore the legal and non-legal solutions that would allow better protection of rights in the family context. A network of researchers from Benin, Burkina Faso, Mali, Niger and Senegal was gradually formed, with varying degrees of formality. The Institute for Human Rights and Peace (IHRP) at the Cheikh Anta Diop University of Dakar was formally linked to the project to anchor the research work in a regionally-focused institution and to profit from the expertise of its director, Professor Amsatou Sow SIDIBE, specialist in legal pluralism relating to family matters.³

We initially sought to plan a project that would take the legal and social difficulties that women appeared to face during divorce as its starting point. We therefore needed to map out these difficulties and consider how to ensure a higher level of protection of women's rights. However, as the research undertaken by the group progressed, and through interviews conducted in the field and feedback meetings with those involved in each country, it quickly became apparent that the issue of legal and normative pluralism was central to every debate: what kind of divorce were we talking about? And what kind of marriage? Which law, custom or norm was being applied? Thus, before even considering the problems facing women, it was necessary to clarify and attempt to document the various legal and practical challenges that might be encountered.

This mapping and documentation process was followed by an analysis of the findings gathered by the teams of researchers, which in turn resulted in the publication of the three national studies. Each study attempts a typology of formal and informal divorces before identifying some of the difficulties facing women, mainly in terms of the causes and effects of divorce. These studies, while not exhaustive by any means, represent the beginning of a scientific, and well-documented investigation of divorce in the countries concerned. We have chosen to gather them here in a joint publication to provide an up-to-date summary of these complex legal and practical situations. This publication also attempts to take the first steps towards sketching an overall picture of the challenges common to the three countries regarding women's access to more equitable divorces.

³ Professor Amsatou Sow SIDIBE is the author of *Le pluralisme juridique en Afrique (l'exemple du droit successoral sénégalais)*. Paris: LGDJ, 1991.

Complexity of the situation: Common issues and areas of difficulty in the countries investigated

In the area of women's divorce, Mali, Niger and Senegal share a number of common features. These extend to formal divorce law, the traditions and customs of the population, the formal and informal relationship between the law and customary norms, as well as between the civil and traditional authorities that apply them.

At the formal legal level, the countries of francophone West Africa each possess a constitution proclaiming universal freedom, equality and human rights as well as a respect for international human rights instruments. In these countries, marriage and divorce are governed by family codes that often⁴ draw on an inadequate and outdated French model, both in relation to the local context and also in terms of international human rights instruments. In any event, this legal framework has almost no impact in practice, because of the population's lack of access to civil authorities (such as registry offices and even local courts), when seeking to settle family affairs. Indeed, the countries which are the object of this study are still characterised – allowing for variations between countries and regions – by a strong adherence to customary laws and practices and by a distinct preference for intra-familial settlement of marital disputes.

In this traditional context,⁵ marriage is regarded as a social necessity and divorce as a disaster for all the persons involved, and especially for the woman, for her family and for her community. Divorce is thus a difficult, shameful and taboo subject. The social difficulties encountered by women are compounded by the common problem of acute economic hardship, which puts women at risk of becoming extremely vulnerable in the event of divorce. Leaving home often means women lose their means of subsistence (their husband, plot of land, or small business run from the home) and, in certain cases, their children. Women enter into marriage following customary law and practices and generally divorce accordingly, i.e. they are repudiated by their husband or, more rarely, leave the conjugal home. Recourse to the civil courts is not an option in the majority of cases, and even when it is, the legal procedure is strewn with obstacles and entails a heavy financial burden.

There are various forms of interaction between civil and customary law. In some countries, customary marriages can be formalised, sometimes even as late as the point of requesting a civil divorce,⁶ whereas in other countries they are ignored by law.⁷ Similarly, customary dissolution (repudiation)

⁴ The situation in Senegal is rather different, since an ambitious Family Code has been in place since 1973 (see *infra* Part 3 on Senegal). Mali also has a Family Code, which is applied in a fairly arbitrary manner, having been enacted just before the 2012 coup d'état (see *infra* Part 1 on Mali).

⁵ The term "traditional context" is used by the authors of the three studies in this work. This is a general term used to indicate the informal, rural (occasionally also urban) contexts in which informal or customary family norms apply.

⁶ See the situation in Senegal, *infra* Part 3.

⁷ It should be noted that the Committee on the Elimination of Discrimination against Women requires member States to make the registering of customary or religious marriages compulsory. Nevertheless, the Committee considers that those who are unable to have their marriage recorded in an official register must not be penalised, in particular if they are prevented from doing so by a lack of infrastructure, information or education; See General Recommendation No. 29 on Article 16 (2013): Economic consequences of marriage, family relations and their dissolution, CEDAW/C/GC/29, para. 25-26.

is in some cases registered – directly or indirectly – by the civil court and its effects controlled. In other cases, repudiation by the man can be transformed into a civil divorce due to reciprocal fault, or even due to the fault of the wife. Repudiation by the husband may also be prohibited, and considered a legitimate ground for divorce for the woman. Various authorities intervene in this tangle of situations: community leaders, civil and legal authorities, customary assessors for the courts as well as religious leaders, imams, *marabouts* or religious organisations. The place of Islam in matters of marriage and divorce is thus another common feature of the countries examined by this study. It appears that, in the vast majority of cases,⁸ Islamic divorce practices constitute the shared basis for the various customary laws in the three countries studied. Here again, there is a great deal of confusion regarding the customary, religious/Islamic and civil standards applicable to marriage, inter-spousal relations, and divorce.

It is also striking that these countries allow so few entry points for human rights in family matters, whether in law or practice. Generally speaking, judges are ill-informed about national and international human rights standards as well as the international and regional commitments undertaken by their respective States. Even if they are aware of them, case law analysis shows that they do not apply them. As for the parties to the proceedings, they are ill-informed or unaware of their rights and do not seek out the institutions or associations which would, within the constraints of their often limited resources, potentially be able to help.

Finally, it is worth noting that the political context does not encourage peaceful and balanced debate on a subject which involves sensitive issues such as the place of family in society, marriage and divorce, the implementation of human rights standards at the national level and the role of Islam and Islamic organisations in society. Two of the states involved, Mali and Niger, are affected by serious problems linked to the presence of radical Islamist movements and terrorist groups within their territory⁹ and the general rise of a new form of Islam often perceived as exogenous to society. In this particularly sensitive context, any attempt to reform family law becomes an enormous political undertaking and threatens destabilisation for those in power.

The legal framework for human rights

A legal human rights framework is in place in the three countries, which have all adopted the main relevant international and regional legal instruments.¹⁰ These instruments protect, *inter*

⁸ The situation is different for Christian minorities, both Catholic and Protestant, for whom recourse to civil marriage and divorce is more common due to fact that canonical rules have not been absorbed into tradition, as is the case in Islamic law.

⁹ Suffice it here to recall the invasion of northern Mali by these groups, who imposed sharia law following the March 2012 coup d'état (which lasted until January 2013); Niger, meanwhile, is caught between these armed groups in the north and the Boko Haram sect in the south (north of Nigeria). For information on Mali, see the Human Rights Watch world report on the situation in Mali in 2013, published in January 2014 (<http://www.hrw.org/world-report/2014/country-chapters/mali>); see also: War Crimes in North Mali, a report by FIDH and AMDH, July 2012 (<http://www.fidh.org/en/africa/mali/War-Crimes-in-North-Mali-12660>).

¹⁰ Niger is alone in ratifying CEDAW with reservations and having not yet ratified the Maputo Protocol. See below on reservations to CEDAW.

alia, the basic rights of the people involved in a divorce. This includes the Universal Declaration of Human Rights (UDHR)¹¹, the two international covenants of 1966 relative, on the one hand, to civil and political rights (ICCPR)¹² and, on the other hand, to economic, social and cultural rights (ICESCR),¹³ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁴ the Convention on the Rights of the Child (CRC),¹⁵ the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,¹⁶ the African Charter on Human and Peoples' Rights (ACHPR),¹⁷ the African Charter on the Rights and Welfare of the Child (ACRWC),¹⁸ and the Protocol to the ACHPR on the Rights of Women in Africa, known as the Maputo Protocol.¹⁹

Since its adoption in 1948, the UDHR has proclaimed that “the family is the natural and fundamental unit of society and is entitled to protection by society and the State”.²⁰ This provision also proclaims the right to marry and found a family as well as the principle of the free consent of the spouses and the prohibition of discrimination between the spouses: “Men and women of full age [...] have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and upon its dissolution”. Article 23.4 of the ICCPR stipulates that: States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.²¹

Woman and children belong to the categories of vulnerable people given special attention by international human rights law. Thus, the 1979 CEDAW stipulates that “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without

¹¹ Universal Declaration of Human Rights, December 10, 1948. In its first constitution (September 22, 1960) Mali proclaimed its adherence to the UDHR.

¹² International Covenant on Civil and Political Rights, December 16, 1966. Mali: adhesion on July 16, 1974; Niger: March 7, 1986; Senegal: February 13, 1978.

¹³ International Covenant on Economic, Social and Cultural Rights, December 16, 1966. Mali: adhesion on July 16, 1974; Niger: March 7, 1986; Senegal: February 13, 1978.

¹⁴ Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979. Mali: adhesion on September 10, 1985; Niger: October 8, 1999; Senegal: February 5, 1985.

¹⁵ Convention on the Rights of the Child, November 20, 1989. Mali: adhesion on September 20, 1990; Niger: September 30, 1990; Senegal: July 31, 1990.

¹⁶ Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, December 10, 1962. Mali: adhesion on August 19, 1964; Niger: December 1, 1964; not signed by Senegal.

¹⁷ African Charter on Human and Peoples' Rights, June 27, 1981. Mali: adhesion on January 22, 1982; Niger: July 15, 1986; Senegal: June 15, 1982.

¹⁸ African Charter on the Rights and Welfare of the Child, July 1990. Mali: adhesion on June 3, 1998; Niger: December 11, 1999; Senegal: September 29, 1998.

¹⁹ Protocol to the ACHPR on the Rights of Women in Africa (Maputo Protocol), July 2003. Mali: ratified on January 13, 2005; Niger: signed on July 6, 2004, but not ratified; Senegal: December 27, 2004.

²⁰ UDHR, Article 16.3.

²¹ See also: ACHPR, Article 18.1. Regarding all these provisions, see the commentary of Article 16 of the UDHR by Stéphanie LAGOUTTE and Ágúst Thór ÁRNASON: Article 16, in: Gudmundur ALFREDSSON and Asbjörn EIDE (ed.): *The Universal Declaration of Human Rights. A Common Standard of Achievement*. The Hague: Martinus Nijhoff Publishers, 1999, pp. 325-357.

delay a policy of eliminating discrimination against women".²² In particular, CEDAW specifies that the States Parties must take "all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations".²³ Similarly, ACHPR stipulates that "the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions".²⁴

Reservations to CEDAW

With regard to CEDAW, it should be noted that while all three countries have signed and ratified this Convention, Niger has done so with reservations. The general question of reservations made for religious or cultural reasons is an issue of great concern for the Committee on the Elimination of Discrimination Against Women and for certain States Parties to the Convention who, for many years now, have been opposed to what they regard as a practice that renders the meaning and content of CEDAW null.²⁵

Under Article 28.2 of CEDAW, reservations that contravene the principle of equality between men and women are not permitted. Thus, making a reservation to Article 2, which commits States to take all appropriate measures to "modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women", is equivalent to calling into question the very principle of non-discrimination against women. It should be noted that Article 16, which pursues equality between men and women within the framework of marriage or the entirety of family relationships, is the most disputed article in the Convention. More than 50 per cent of the States that put forward reservations made them regarding this article.²⁶

²² CEDAW, Article 2. This article is restated in Article 2 of the Protocol to the ACP on the Rights of Women, Maputo Protocol, July 11, 2003. The term "discrimination against women" means any distinction, exclusion or restriction made on the basis of sex which has "the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (CEDAW, Article 1).

²³ CEDAW, Article 16.

²⁴ ACHPR, Article 18.3.

²⁵ Women's Rights Committee, General Recommendation No. 20 (1992): Reservations to the Convention, published in the Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.1 (1994). More specifically concerning CEDAW Article 16, which relates to marriage and family relations, the Committee also asks the States to withdraw their reservations concerning this article – see Committee on the Elimination of Discrimination Against Women, General Recommendation No. 21 (1994): Equality in marriage and family relations, published in the Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.1 (1994), para. 41-47. See also Committee on the Elimination of Discrimination Against Women, General Recommendation No. 29 on article 16 (2013): Economic consequences of marriage, family relations and their dissolution, CEDAW/C/GC/29, para. 54.

²⁶ See the study by Marsha A. FREEMAN: *Reservations to CEDAW: An Analysis for UNICEF*, Policy and Practice Discussion Paper, UNICEF, 2009; Hanna Beate SCHOEPP-SCHILLING, 'Reservations to the CEDAW: An Unresolved Issue or (No) New Development', in Ineta ZIEMELE (ed.): *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or reconciliation*, Leiden: Martinus Nijhoff Publishers, 2004, pp. 3-39; Bouet-Devrière Sabine, *La question des réserves à la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes: les dangers d'une négation légitimée des droits de la femme*, Les Cahiers Rémois no. 1, 1999 (www.univ-reims.fr).

Like many other countries, Niger made several reservations to CEDAW regarding the provisions relating to family relationships.²⁷ Niger claims that these provisions cannot be immediately applied because they are “contrary to current customary laws and practices, which, by their nature, can only be modified with the passage of time and the evolution of society, and cannot, therefore, be revoked by an act of authority”.²⁸ These reservations led the French and Dutch governments to lodge official objections with the Secretary-General of the United Nations (UN). According to them, such reservations, and in particular that concerning Article 2, are manifestly contrary to the object and goal of the treaty and nullify Niger’s commitments. They are clearly not authorised by the Convention.²⁹

Moreover, during its investigation of Niger,³⁰ the Committee on the Elimination of Discrimination Against Women exhorted the country “to expedite its efforts towards the withdrawal, within a concrete time frame, of its reservations”,³¹ recalling that the reservations to Articles 2 and 16 are contrary to the object and purpose of the Convention. The Committee adds, rightly, that Niger “has not entered reservations to other human rights treaties, which all contain the principle of equality between women and men and the prohibition of discrimination on the basis of sex”.³² By contrast it should be noted that, more recently, Niger did not ratify the Maputo Protocol on women’s rights, despite signing it in 2004.

Niger is not alone in maintaining discriminatory reservations. An analysis of the periodic State reports submitted to the Committee shows laws of other States Parties still contain discriminatory measures against women.³³ This includes States that have not registered reservations to the Convention. The absence of reservations upon ratification of or adherence to CEDAW is therefore far from a guarantee of its provisions being implemented.

The debate regarding the validity of the reservations issued by Niger is in fact very far removed from the concrete concerns of those on the ground, whether they be judges, plaintiffs, their lawyers or those involved in informal divorces. Nevertheless, such debate bears witness to

²⁷ In particular subparagraphs (d) and (f) of Article 2, Article 5, subparagraph (a), and Article 16, subparagraphs (c), (e) and (g) of paragraph 1.

²⁸ See the reservations made by the Government of Niger on the website of the United Nations High Commissioner for Human Rights / Committee on the Elimination of Discrimination Against Women.

²⁹ Communications registered by France (November 14, 2000) and the Netherlands (December 6, 2000) with the Secretary General, accessible on the website of the United Nations High Commissioner for Human Rights / Committee on the Elimination of Discrimination Against Women. The Netherlands states that “it is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties”.

³⁰ Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Niger, June 11, 2007, CEDAW/C/NER/CO/2. These observations relate to the combined initial and second periodic report of the Niger, CEDAW/C/NER1-2.

³¹ *Ibid.* para 10.

³² *Ibid.* para 9.

³³ General Recommendation No. 21 (1994), cited above, paras 45 and 46.

the complex issues surrounding national policy in Niger that make the lifting of these reservations difficult, as well as to the wider debate within the UN regarding the numerous reservations, of a general nature, made to CEDAW. This debate also shows that when it comes to the elimination of discrimination against women, gaps remain between the rights outlined in CEDAW and promoted by the Committee, the reality on the ground, and the inclinations of some governments.

However, one may also view Niger's reservations as evidence of a pragmatic approach towards the reality of implementing CEDAW's provisions in a country where customary laws and practices are still the principal source of normative standards in matters of family relations, and where civil courts must often assume responsibility for applying such customary law.³⁴ Such a pragmatic approach does not prevent traditional practices of marriage and divorce from evolving so that they eventually comply with the principle of equality stated in Niger's constitution and the duly ratified international instruments.

The place of divorce in international human rights instruments

The various texts cited above endorse principles and rules applicable to family relationships, including the dissolution of marriage and therefore divorce. Generally speaking, they charge the State with three duties: 1) A duty to respect rights, requiring the State not to intervene in the enjoyment of rights; 2) A duty of protection, which requires the State to prevent and sanction any violation of these rights by a third party; and 3) A duty to promote these rights, which implies that the State will adopt the appropriate measures, in particular legislative, budgetary and legal measures, necessary to their full realisation. Hence, the protection of spouses during divorce may be ensured by a range of different measures: the adoption of adequate legislation; the establishing of courts that are accessible to all; the development of services supplying information, advice and legal aid; and the creation of qualified and adequately financed social services.

Two paramount principles govern the termination of a marriage: freedom and equality (and its corollary, non-discrimination). The main international human rights instruments all make provisions for the dissolution of marriage, even if they do not directly mention a right to divorce.³⁵ It can indeed be argued that the general principle of freedom guarantees each spouse the right to request divorce, if only to exercise their freedom to marry: this freedom therefore implies that the principle of the "indissolubility of marriage" has nowadays become irrelevant.³⁶ In any event, if divorce is provided for in national law, the principle of equality between the spouses must be respected.³⁷ This means an equal right for both the man and the woman involved in a marriage to demand its dissolution.

³⁴ See *infra* Part 2 on Niger.

³⁵ ICCPR, Article 3; CEDAW, Article 16 and Maputo Protocol, Article 7.

³⁶ On this point, see Boubacar HASSANE, "Prolégomènes à une éventuelle réforme du droit du divorce au Niger" in *Les droits de la femme et de l'enfant. Réflexions africaines*, dir. Stéphanie LAGOUTTE and Nina SVANEBERG, Paris, Editions Karthala, 2011, p. 139. On the sanctioning or prohibition of divorce, see LAGOUTTE & ÁRNASSON, cited above, p. 337.

³⁷ Divorce is expressly mentioned in General Observation No. 19 on Article 23 of the ICCPR adopted by the United Nations Human Rights Committee in 1990, HRI/GEN/1/Rev.1 (1994).

Specific and concrete details pertaining to the dissolution of marriage have been identified by the Committee on the Elimination of Discrimination Against Women through periodic review of the State reports presented to it as well as through two general recommendations made in 1994 and 2013.³⁸

As a preliminary note, it is relevant in our context of legal pluralism to note that the Committee on the Elimination of All Forms of Discrimination Against Women is, as a matter of principle, critical of the existence of multiple systems of family law. The Committee believes that in such systems, customary laws (or other informal standards) governing personal status vary according to an individual's identity, for example according to his or her ethnicity or religion. Therefore the Committee asks States to adopt a written family code, or a code of laws relating to personal status, that guarantees the equality of spouses or cohabitants, independent of their religion or ethnic group. In the absence of such an instrument to unify or codify family law, the Committee stresses it is critical that all parties are able to decide, at every stage of the relationship (inception of marriage, during marriage and in the event of dissolution), whether it is religious, customary or civil law that is being applied. All these formal or informal standards must comply fully with the fundamental principle of equality between men and women.³⁹

We shall see that while it is possible in all three countries to opt for a civil law regime, field research shows that, particularly in Mali and Niger, this option is almost entirely unheard of among large portions of the population. Thus the applicable standards regarding marriage and divorce remain first and foremost those based on ethnic criteria, independent of an at times inadequate civil legal framework with which the population is not fully familiar.

In its 2013 General Recommendation, the Committee addressed the economic consequences of divorce. It noted that:

- The circumstances of the divorce (the fault being attributed in whole or in part to one of the spouses) should not affect the financial obligations (maintenance or compensation) between the spouses.
- The granting of divorce to the woman should not be subject to her repaying any dowry received upon marriage.
- Free legal aid (covering court costs and lawyer fees) should be accessible to women.
- The mode of division of property upon divorce must be equitable, meaning that
 - women should have the legal capacity to hold and administer property before, during and after the marriage;
 - women may choose a matrimonial regime which provides for the division of property acquired during the marriage;

³⁸ General Recommendation No. 29 (2013), cited above, paras 39-48. See also General Recommendation No. 21 (1994), cited above.

³⁹ See General Recommendation No. 29 (2013), cited above, paras 12-15.

- indirect contributions to household income are taken into account during the division of property.

According to the Women's Rights Committee, these elements are all part of the State's guarantee of both *de jure* and *de facto* equality between men and women during divorce.

Principal lines of enquiry and hypotheses for research

In light of the international and regional human rights framework regarding marriage and divorce, applicable in whole or in part in the three countries, and given the fact that their constitutions proclaim the principles of freedom and equality,⁴⁰ the questions posed by the group of researchers were focused on two lines of inquiry.

First of all, it was necessary to determine the law applicable to divorce, in order to enable an assessment of its compatibility with the international and regional human rights framework. During preliminary research, it quickly became apparent that divorces often took the form of repudiation of marriages which were themselves customary, whether or not they were registered with the civil authorities. The connections between civil law and customary norms being very different from one country to another, it was thus necessary to roughly categorise the various forms of divorce, to enable an assessment of the difficulties encountered by women in each of the various situations. Above all, this meant identifying the forms of divorce, the law applicable to divorce given the plurality of legal sources regarding personal status, and the formal or informal authorities involved in this field. It was thus necessary to establish a typology of divorce in the three countries that was as well-documented as possible. This typology would be closely linked to a typology of marriage.

Once the various legal and practical situations had been mapped, the researchers aimed to identify the problems encountered by women. From the very start, it was clear there were two kinds of problem: those of a practical and concrete nature (linked to economic and social vulnerability, the religious and traditional context), and those related to the legal aspects of

⁴⁰ In Mali, Article 2 of the Constitution of February 25, 1992, states that "all Malians are born and live free and equal in their rights and duties. Any discrimination based on social origin, colour, language, race, sex, religion, or political opinion is prohibited". The preamble to this constitution refers to the "determination to defend the rights of women". In Niger, several provisions of the Constitution of November 25, 2010, proclaim the principle of the equality of all before the law (Preamble, Articles 8 and 10) and Article 22 focuses on the elimination by the State of all forms of discrimination concerning women and young girls, on the development of public policies assuring their full development and their participation in national development, and on the State's taking of measures to combat violence done to women and children. In Senegal, the Constitution of January 7, 2001 recalls, in its preamble, the nation's commitment to the principles of equality and non-discrimination through the "rejection and elimination of all forms of injustice, inequality and discrimination". The first article of the Constitution ensures the equality of all citizens, regardless of origin, race, gender or religion. Article 7, subparagraph 4 states: "All human beings shall be equal before the law. Men and women shall be equal in law".

divorce (inadequacy of the law, civil law's recognition or lack thereof of the customary aspects of marriage and divorce, access to courts, women's lack of information, inadequate training for judges etc.). To this was added the question of the extent to which the national legal framework, the domestic courts' case-law, and the practical situations in which women found themselves, all complied with the principles of human rights proclaimed and recognised in the three countries. The idea was therefore to identify the rights likely to be compromised in the different situations of divorce.

These varied questions required answers of both a legal and a sociological or anthropological nature, since it was necessary to determine not only the law in force and its application by the judiciary but also the reasons for the lack of recourse to this law among the people of the three countries. From this very broad basis, we then needed to develop a methodology that met the requirements not only of our lines of inquiry, but also of the financial and human resources available to us.

Methodological approach

Within the complex context described above, little research has been done on the family, law and human rights, except for in Senegal where universities and research centres are well-developed. There have been several monographs published in Senegal on the family and on women's rights, as well as academic legal articles on family law. In Niger, a small group of researchers at the FELS have conducted several studies, some of which have been published. In Mali, sources of a doctrinal legal or general nature are almost non-existent. Nevertheless, as in the other two countries, legal practitioners, students and some non-government organisations (NGOs) show considerable interest in family law.⁴¹

Conscious of the methodological limitations resulting from the fact that the researchers embarking on this project were all jurists, we gave ourselves four main tasks:

- Overcoming the difficulty of access to formal legal sources (legislative texts and in particular the case law which is rarely published or properly filed);
- Gathering testimonies from people affected by divorce procedures to understand the difficulties they face;
- Finding ways to document the informal aspects of divorce (customary marriage, repudiation etc.);
- Maintaining a dialogue with those involved by keeping them updated on the project and providing them with the preliminary results of the research.

The methodology chosen by each team of researchers is described in detail in each section, but in this introduction we examine what they have in common as well as the difficulties encountered.

⁴¹ See the consolidated bibliography at the end of this work as well as the footnotes to the three sections.

In relation to access to case law, each of the three teams carried out an extensive sampling of judgments and related documents from first instance courts.⁴² This sampling was conducted in the capital city as well as in more remote geographical areas. It was thoroughly planned by the project researchers and teams of investigators – master's or doctoral students – who then visited the chosen jurisdictions. In some cases, the investigators had access to court decisions but were not always able to photocopy or transcribe them. In Mali, for example, some clerks refused to show the judgements, even in anonymised form. In Senegal however, researchers had easier direct access to court decisions.

Overall, the methodological approach of the studies meant that each team of researchers collected a few hundred decisions from a dozen national and local jurisdictions. There was a greater number of decisions sampled in Senegal, where people are more likely to have recourse to courts, which function better than in Mali and Niger. The low number of decisions collected in these two countries is itself illustrative of this situation. In addition, the variation in quality of judgments is representative of regional and national disparities in the training of judges and, indirectly, that of legal practitioners in general (for example lawyers and legal clinics).

During their field visits, Malian and Nigerien investigators met with judges, lawyers and other justice officials as well as women's rights associations, to understand how divorce cases were handled at the local level. During these discussions and by speaking with religious and traditional leaders, they were able to gather information on informal divorce practices, the role of the traditional and religious leaders, and the connections between customary divorces and civil proceedings. The Nigerien researchers also chose to study the Islamic Association of Niger (*Association Islamique du Niger, AIN*) to understand its growing role in divorce matters.

The challenge inherent in the collection of field data for this kind of research project lies in maintaining a balance between exhaustiveness and representativeness of the data gathered. Clearly, the researchers did not have the resources to carry out qualitative interviews on a large scale that would enable sociological or anthropological documenting of the informal practice of divorce in the three countries. This is why the principal stress was laid on sampling court rulings, the analysis of which was supplemented by targeted qualitative interviews which strove to provide an understanding of how the civil system is perceived by those concerned. The interviews further canvassed the reality of the informal forms of divorce. To compensate for the impossibility of carrying out extensive surveys in the field, the researchers also chose to enlist the help of a number of key individuals in their work through field interviews, but also by providing explanations of their research work and results during larger consultation workshops.⁴³

⁴² For example, court minutes or repudiation certificates in Niger or the archive of divorce cases in Senegal.

⁴³ Each national study was the subject of at least one consultation at a workshop that presented the work, as well as substantive discussions held during meetings in Dakar in 2008, 2011 and 2013. These meetings involved researchers from Mali, Niger, Senegal, Burkina Faso and Denmark, as well as representatives of the IHRP, LASDEL (*Laboratoire d'études et de recherche sur les dynamiques sociales et le développement local*), in Niamey and the DIHR.

The three studies presented in this work follow the structure outlined above: First, a survey of different kinds of divorce to understand the complexity of the situation at the local level. This mapping is followed by an analysis of the legal grounds for, and effects of, divorce that highlights key issues concerning the protection of women's rights. A short joint conclusion gathers the researchers' various recommendations for further study at the conclusion of their national studies. These supplement and give greater perspective to the analysis of the situations observed on the ground, and seek to open up further debate that is as reflective and constructive as possible.

PART 1: MALI

*This part is an abridged and edited version of the study on divorce in Mali produced by Dr. Abraham BENGALY, lecturer and researcher, in collaboration with Maître Amadou Tiéoulé DIARRA, lawyer and lecturer, Mohammed AG AGUISSA, research assistant, and Ibrahim Amadou MAIGA, research assistant, all affiliated with the Faculty of Law at the University of Bamako in Mali.*⁴⁴

The concept of divorce is closely related to a society's ideas about marriage. Malian society oscillates between two conceptions of marriage, one individualistic and the other community-based. In the first conception, marriage is seen as a means of enabling the development of individuals: in the event of discord, divorce is a possibility available to both people involved. On the other hand, the community-based conception of marriage stresses collective values, stability and the preservation of society: marriage is seen as an institution which does not depend solely on individual will, but is related to the expectations and requirements of one's extended family and society. These individual and social aspects of marriage – and of divorce – are complicated by political, religious and cultural issues against a backdrop of serious economic instability that has been exacerbated by the conflict in the North of the country.

Over the last few decades, divorce has become more widespread in the Republic of Mali.⁴⁵ However, divorce is not a new institution in the country. It existed before independence as a semi-formalised element of Malian personal status as established through French civil law and local customary law.⁴⁶ Civil divorce was regulated from 1962 by the Marriage and Guardianship Code.⁴⁷ Since 2011, it has been regulated by the new Personal and Family Code,⁴⁸ which regulates divorce by mutual consent of the spouses for the first time. These civil law provisions coexist, in practice, with various traditions and customary laws relating to the matter. All these formal and informal standards result in different modes of divorce (different grounds and consequences for divorce) and different procedures.

Under customary law, marriage is not regarded as an everlasting or permanent contract. Rather, the dissolution of marriage is accepted. The same applies for the large majority of Mali's strongly Islamised society which follows religious rules in family matters. These rules,

⁴⁴ See BENGALY, Abraham et al.: *Projet de recherche sur la rupture du lien matrimonial en Afrique de l'Ouest: Etude sur le Mali*. Bamako: Observatoire des Droits Humains et de la Paix and Danish Institute for Human Rights, 2014.

⁴⁵ Women's rights groups such as the APDF, Wildaf and religious leaders whom we met during our research between July and December 2012 were unanimous on this point. See also: *Etude sur la problématique du divorce au Mali* conducted by RECOFEM, May 2012.

⁴⁶ *Les coutumiers juridiques de l'Afrique occidentale française de 1935*, Comité d'Etudes historiques et scientifiques de l'Afrique Occidentale Française, Tome 2, Paris: Editions Larose, 1939.

⁴⁷ Law 62-17/AN-RM of February 3, 1962 enacting the Marriage and Guardianship Code (MGC).

⁴⁸ Law 2011-087 of December 30, 2011 enacting the Personal and Family Code (PFC). The promulgation of this law took place a few days before the beginning of the January 2012 crisis in Mali. Some judges continue to apply the 1962 MFC through lack of awareness of the new provisions.

based on the Koran, allow the dissolution of marriage under certain conditions. Hence the most common form of divorce in Mali is the customary or Muslim repudiation,⁴⁹ through which the husband unilaterally imposes divorce on his wife. The situation is different for the Christian minority whose doctrine makes no allowance for divorce. It must be noted that, for many years, customary or Muslim repudiation was prohibited by the 1962 Marriage and Guardianship Code and by the Penal Code.⁵⁰

Given the plurality of legal sources regarding the status of persons, this study on divorce in Mali seeks to provide a clear analysis of the law and standards applicable to divorce. Further, we aim specifically to shed light on the human rights challenges that women face in the event of divorce.

The preparatory phase of the research project made it possible to establish all the conditions necessary to begin the mission in the field. It consisted of a literature review that included previous studies, reports obtained from research institutions and accumulated supplementary documents. Parallel to this, a team of researchers from the Bamako Law Faculty and legal practitioners set about developing the tools for data gathering in the field and preparing the logistic and material aspects of the mission while taking into account the difficulties arising from the conflict and security situation in Mali.

Thus visits were planned to jurisdictions agreed upon within the research team⁵¹ and court decisions were gathered from the first instance courts, the Bamako Court of Appeal and the Supreme Court. Moreover, interviews and research were carried out in the field with resource persons as well as at the institutions and structures that play a role in the sphere of women's rights. Finally, factual data on divorce was collected through surveys of the following target groups: divorced men and women, religious and traditional leaders, leaders of civil society organisations as well as judicial personnel (judges, lawyers, bailiffs, clerks). The data was collected on the basis of interview guides developed by the group of researchers. In the interest of ensuring the reliability of the raw data, the same questions were asked to different institutions and contacts involved in the field of women's rights, in order to cross-check the responses.

The analysis of the data included the examination of legislative and regulatory texts, court decisions, interviews, testimonies, the opinions of the resource persons, newspaper articles, reports and other available works. Doctrinal analysis using written sources on divorce in Malian law proved very useful (articles, Master thesis, records from symposiums, conferences, different studies on the subject, as well as the law enacting the new Family Code and all the

⁴⁹ We will see that customary law and Islam are often closely linked.

⁵⁰ According to the provisions of Article 58 of the MGC, repudiation is prohibited. Repudiation pronounced in violation of this interdiction is without effects for the woman. Article 184 of the Malian Penal Code prohibits repudiation, and sanctions it with a penalty of 15 days to 3 months imprisonment and/or of a fine of 20,000 to 120,000 FCFA.

⁵¹ Kayes, Sikasso, Ségou, Kati and Bamako.

debates which preceded its development and adoption). The volume of the doctrinal sources collected is ultimately not that large.⁵²

We have organised the analysis of our data into four sections: a typology of divorce in Mali (1), access to divorce (2), grounds for divorce (3) and effects of divorce (4).

1. TYPOLOGY OF DIVORCE

Before independence, marriage and the family were primarily regulated by customary law⁵³ and a few isolated texts. There was a plurality of rules applicable to divorce. Since 1962, a Family Code has been in force, but in practice, divorce is always subject to this kind of normative pluralism. Several normative systems for the dissolution of marriage therefore coexist in Mali: legal divorce (1.1), religious divorce (1.2) and customary divorce (1.3).

1.1. Legal divorce

After gaining independence, Mali developed a Marriage and Guardianship Code (MGC)⁵⁴ which later underwent several modifications.⁵⁵ As Malian society evolved, this legislation, although revolutionary for its time, became unsuited to the reality on the ground and sometimes contrary to the treaties, conventions and international agreements ratified by Mali.⁵⁶ In 2012, the new Personal and Family Code (PFC) came into effect.⁵⁷

According to the PFC, it is the judge or court that grants the divorce. The divorce proceedings are subject to the general rules governing court proceedings. On account of its essentially personal nature, only the spouses are entitled to bring divorce proceedings, in cases provided for by the law. The proceedings cannot be brought on behalf of the spouse by creditors or heirs. The status of spouse is required not only when bringing proceedings, but also throughout the proceedings until the judgement or decision declaring the divorce is final.

⁵² In the longer version of the Mali study, we illustrated our analysis using example cases, based on real facts reported during interviews with the resource persons.

⁵³ *Les coutumiers juridiques de l'Afrique occidentale française*, cited above.

⁵⁴ Law 62-17/AN-RM of February 3, 1962 enacting the Marriage and Guardianship Code.

⁵⁵ The rules relating to consent for marriage and monogamy were modified by Law 63-19/AN-RM of January 25, 1963. The rules relating to guardianship were modified and supplemented by ordinance 26/CMLN of March 10, 1975. Ordinance 73-36 of July 31, 1973, enacting the Family Relations Code, supplemented the Marriage and Guardianship Code. Concerning marital status, Law 68-14/AN-RM of February 17, 1968 on the organisation of marital status was repealed and replaced by Law 87-27AN-RM of March 16, 1987 governing marital status, itself supplemented by Law 88-37/AN-RM of February 8, 1988. These texts were in turn repealed and replaced by Law 06-04 of June 28, 2006 governing marital status.

⁵⁶ The law was seen as insufficient particularly with regard to succession, endowments and the protection of incompetent persons.

⁵⁷ Law 2011-087 of December 30, 2011 enacting the Personal and Family Code (PFC).

1.2. Religious divorce

In Mali three monotheistic religions coexist: Islam, which is the religion of the vast majority of Malians, Catholicism and Protestantism.⁵⁸

In Islam, the marriage of a man and a woman represents both the divine consecration of their relationship and a private contract established between them. The future spouses freely commit, in the presence of an imam and at least two witnesses, to live together as husband and wife, and begin a family on the basis of love and mutual protection. While affirming that the contract concluded by the spouses on the day of their marriage is supposed to last for eternity, Islam allows a couple in crisis to request divorce. Thus, even if it is said that in Islam “divorce is, among the things permitted by God, the one he most detests”, divorce procedure is established and accepted.⁵⁹ Sura 65 of the Koran talks about divorce in 12 verses. It seems that repudiation is assimilated to divorce from the outset. Hence only the man may initiate separation: he merely has to declare “I no longer want you as a spouse ” and the divorce is completed. He may also reverse his decision at will. Apart from a few exceptional cases, it seems that the future of a marriage is always decided by the husband.⁶⁰ According to the Koran, divorce may only be considered after attempts at reconciliation. Verse 1 of Sura 65 says: “O Prophet, when you [Muslims] divorce women, divorce them for [the commencement of] their waiting period and keep count of the waiting period, and fear Allah, your Lord. Do not turn them out of their [husbands’] houses, nor should they [themselves] leave [during that period] unless they are committing a clear immorality. And those are the limits [set by] Allah. And whoever transgresses the limits of Allah has certainly wronged himself. You know not; perhaps Allah will bring about after that a [different] matter”. Legal separation is thus obligatory but does not *ipso facto* necessitate suspension of spousal duties, excluding those of a sexual nature. This separation may last for a maximum of three months at the end of which, if there has been no reconciliation, the divorce is obtained and the woman regains her freedom.

For Catholics, marriage is a sacrament. It creates a sacred bond between the spouses that commits them for life: “What God has joined together, man must never separate”, states the Gospel.⁶¹ In other words, the bonds of religious marriage cannot be broken. Even so, the Church accepts that a religiously married couple may eventually need to separate or even obtain a civil divorce. Even if the fact of living separately from one’s spouse is no longer considered a sin or a reason for exclusion (excommunication), the Church does not allow the religious remarriage of a divorced spouse, as it is impossible to break the sacred bond of marriage in order to celebrate a second marriage. A direct consequence of this position is that a baptised Christian wishing to marry a divorced person is unable to enter into religious marriage. However, nothing prevents a civil remarriage.

⁵⁸ See also the section on the influence of religion, below.

⁵⁹ From an interview conducted in September 2012 with Imam Oumar BARRO, representative of the High Council of Islam in Kayes.

⁶⁰ *Idem*.

⁶¹ Gospel according to Mark 10, 2-16.

As for Protestants, it is above all civil marriage that is recognised as valid and sufficient. Marrying in church is not given the same special importance as for Catholics. During the ceremony, the spouses exchange their promises of fidelity, love, truth, and then the pastor blesses their union. What takes place is a simple blessing, since marriage is not regarded as a sacrament. In the event of discord, the Protestant Church will provide support for the spouses with the goal of reconciling them. If all these attempts fail, the Protestant Church recognises the failure of the union and accepts the couple's divorce. It also allows for the blessing a new union, following authorisation from the relevant synodal commission which will examine their case.⁶²

1.3. Customary divorce

The majority of marriages in rural areas are conducted not before a civil registrar, but rather before an assembly of local leaders acting as town council (*le vestibule*). The consent of the spouses is not asked for, nor required, as long as the families agree. The choice of future spouse is carefully made by the families in order to give the future home a solid foundation, under the watchful eyes of the relatives. In this way, many marriages conducted according to the customary laws and traditions of different ethnic groups pay no heed to the law which a. o. requires the expression of the free consent of both spouses.

Divorce is considered a source of social tension and sometimes conflict between people or clans. Several decades ago, one researcher noted: "Among the Bambara and Malinke, divorce was formerly rare, being perceived as a dishonourable act. Many elderly men refused to attend the divorce palaver which was held outside the village".⁶³ Many statements collected during our field research among elderly people in the Ségou region revealed similar views. Divorce is, in the traditional environment, a very serious decision. Formerly, those who divorced brought shame on their family and could in certain cases be rejected by their clan. It was reported to us that for the Bambara, "the tree under which divorce was pronounced would die two years later". Any family in which two or three divorces took place was disgraced and in some cases it might be difficult to find further husbands or wives. These families were then labelled, for their levity and lack of respect for promises given, using the phrase "Mogo sébè duw tè".⁶⁴

Thus, in the traditional environment, all possible measures are taken to avoid divorce except when there are particularly serious grounds for it: insults,⁶⁵ infidelity or impotence. In any event, the divorce generally requires a very time-consuming process, except in the cases of serious insults where it may be expedited. It should be noted that a husband's impotence does not always lead to divorce, as the family may be able to find an alternative consisting in the establishing of a bond between the wife and another man for the purpose of reproduction.

⁶² Interview with Priest CAMARA of the Catholic Parish of Kayes, September 2012.

⁶³ See Moussa TRAVELE, quoted by the authors of the *Rapport sur le droit de la famille* published by the Institut National de Formation Judiciaire, Bamako, 1996, p. 86.

⁶⁴ Transl. "These families are not respectable".

⁶⁵ These are often offensive remarks made about the father or mother of one of the spouses or attacks on the dignity of the spouse's family (personal observation by the authors of the report).

Bambara tradition tends to promote the indissolubility of marriage, even if in reality it provides a way out in situations where marriage undermines the dignity of one of the parties. The idea is summed up by the proverb: "Marriage is not some fancy boubou that one can remove whenever one wants". In practice, divorce is mainly initiated by men. It is the husband who may repudiate his wife and ask for the repayment of all or part of the dowry. There are, however, cases where the wife leaves her husband and initiates hereby the divorce. Still, even in cases where the husband's fault is known to all, there is little acceptance of the idea that the woman might initiate the end of the marriage. Divorce is preceded by discussions and the intervention of various relatives, in particular the wife's maternal uncle, whose advice is the most solicited.

2. ACCESS TO DIVORCE

Articles 325 to 371 of the Personal and Family Code (PFC) deal with the dissolution of marriage through divorce;⁶⁶ the general provisions, articles 326 to 336, provide for access to divorce and articles 353 to 363 lay down the procedure for divorce. These provisions deal with attempts at reconciliation, the emergency measures to be taken during the divorce proceedings (art. 356), legal separation, and the possibility of a counter-request for divorce. According to these provisions, both spouses have the right to request divorce and are treated in an equal manner during the process. However, in practice, women encounter many difficulties, which we will examine in this part of the study.

2.1. Difficulties of a legal and judicial nature

During our research, we noted that certain judges simultaneously apply both codes, i.e. the 1962 Marriage and Guardianship Code (MGC) and the 2011 Personal and Family Code (PFC). This situation was observed in the Kayes and Sikasso regions. The coexistence of these two texts is the result of a lack of diffusion and awareness-raising for the new PFC. This is why judicial personnel have expressed a sincere desire for the introduction of a training scheme about the new Code for judges responsible for matrimonial cases. One magistrate also explained that "the judge is there to serve the parties, which means he is bound to whichever provisions they request (...), this is why he must be informed, passive and impartial".⁶⁷ According to him, the two texts must coexist, solely in the interest of the parties, and can thus be alternately applied. This view is clearly alarming in terms of the protection of the rights and legal security of the persons concerned.

⁶⁶ PFC, Title IV, Chapter I.

⁶⁷ Statement by Ousmane FATI, investigating judge of the Sikasso TPI, August 2012 interview.

A number of those interviewed also mentioned the lack of awareness of international conventions in the field of matrimonial cases. Human rights organisations in Mali have long demanded that family-related legislative provisions be brought into line with international law.⁶⁸ Mali has adhered to many international conventions that impose obligations upon States, asking them to take the measures necessary to protect the rights of those concerned, and in particular to correct situations that discriminate against women.⁶⁹ A study relating to national policy and an action plan for human rights⁷⁰ has also established that Mali is making constant efforts to harmonise its national legislation with the international legal instruments that it has ratified. Article 116 of the 1992 Constitution provides for the direct implementation of specific legal instruments, including CEDAW and the Maputo Protocol, by Malian judges.⁷¹ However, in practice, Malian judges seem to have opted for a dual system and refuse to apply international law in the absence of a concordant legislative standard. The Supreme Court was thus able to state: "It should be noted that even if ratified international treaties recommend equality between men and women, the fact remains that in matters of succession this principle will only be applicable once integrated into domestic law; that as this has not yet been achieved, the devolution of estates will be made according to the customary law of the parties".⁷²

2.2. Women's access to justice

Generally speaking, there are in Mali numerous obstacles to access to justice: legal procedures are characterised by esoteric language, rigorous formality, long procedures, unnecessary referrals, difficulties in obtaining the delivery of judgements in a timely manner, and so on.⁷³ This general situation also concerns women who commence legal proceedings.

Interviews conducted with the judges and judicial personnel of courts in Kayes, Sikasso, Ségou and Bamako on the subject of divorce reveal a lack of awareness among women of their rights

⁶⁸ For example: The Association of Malian Jurists (*Association des Juristes Maliennes*, AJM), the Malian Human Rights Association (*Association Malienne des Droits de l'Homme*, AMDH), the Association for the Progress and Protection of Women (*Association pour le Progrès et la Défense des Femmes*, APDF), the Syndicate of Women's Associations and NGOs (*Coordination des Associations et ONG Féminines*, CAFO), and Wildaf: Women in Law and Development in Africa.

⁶⁹ For example: The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on the Rights of Women (Maputo Protocol). See the introductory chapter of this study and footnotes on the international and regional instruments ratified by Mali.

⁷⁰ Mamadou DIAKITE, *Etude sur la politique nationale en matière des droits humains*, PCDHG, 2011.

⁷¹ "Treaties or agreements that are properly ratified or approved, once published, have supremacy over the laws subject, in the case of each treaty or agreement, to its application by the other party". This provision is an exact copy of article 55 of the French Constitution of October 4, 1958.

⁷² Supreme Court, Civil Chamber, judgement No169 of March 4, 2009.

⁷³ On this subject, see *Rapport final de l'étude sur l'état des lieux en matière des droits humains*, Synergie Conseil SARL, July 2002; *Etude sur la politique nationale en matière des droits humains*, by Mamadou DIAKITE, cited above; *Etude sur l'état d'harmonisation de la législation nationale avec les conventions internationales et régionales des droits humains ratifiées par le Mali*, APPDH, 2004; *Etude sur l'état d'harmonisation de la législation nationale avec les instruments juridiques internationaux et régionaux des droits humains ratifiés par le Mali*, by Malik COULIBALY, PCDHG, 2011.

in the event of divorce, due mainly to a lack of information regarding the divorce process. Moreover, many women cannot cope with the cost of bringing proceedings before the formal justice system (deposit costs, fees for establishing the case, bailiff fees, lawyer fees, etc).⁷⁴ In the majority of cases, they are forced to abandon the exercise of their right to divorce before the court. Thus, many women who might easily win their proceedings lose through a lack of resources.⁷⁵

According to a 2012 study on problems relating to divorce in Mali,⁷⁶ women seldom benefit from legal aid or advisory services: of the 66 surveyed women who initiated divorce proceedings in 2010, only 22 i.e. 33.33% were granted representation by a lawyer.⁷⁷ Legal aid allowing a person without resources to obtain an exemption from the payment of costs of proceedings and to exercise his or her rights in the courts is provided for by law.⁷⁸ However the decree which fixes the rules by which this law is applied and establishes legal aid offices is not really implemented, and the activity of these offices on the ground thus remains limited through lack of financial resources.⁷⁹ A few women's rights structures attempt to accompany women in order to facilitate their access to justice and thus guarantee them fair proceedings.⁸⁰ Lastly, the women who do manage to reach the courtroom then face the complexity of the procedural rules. They are often discouraged because of the remote nature of the courts. In spite of the demands of NGOs, Malian women continue to be marginalised in their interactions with the courts.

These financial difficulties related to legal proceedings for divorce are accompanied by a variety of more general economic and financial difficulties faced by women in particular.

2.3. Economic and financial difficulties

The study of gender inequality and poverty in Mali conducted by the Observatory for sustainable human development revealed that inequality between men and women is present everywhere in Mali. It is evident not only on the level of access to formal and informal/customary power structures but also in terms of access to factors of production and basic social services.⁸¹

⁷⁴ Interview with judge Sidi ABOUHARAIRATA, investigating judge (*juge d'instruction*) for Kati TPI (October 2012).

⁷⁵ *Idem*.

⁷⁶ *La problématique du divorce au Mali*, interim report, RECOFEM, May 2012.

⁷⁷ *Idem* p. 35. The figure was 34.61% in 2009. The situation is noticeably better in the district of Bamako. In Commune VI, 48 women out of the 108 who were undergoing divorce proceedings were assisted by a lawyer, i.e. 44.44% in 2009 (in 2010: 47.50%).

⁷⁸ Law 01-082 of August 24, 2001.

⁷⁹ A Decree of October 2006 establishes legal aid offices in the seat of each TPI and Justice de Paix à Compétence Etendue. See also: *Evaluation de l'appui pour l'accès des couches vulnérables à la justice*, OXFAM/NOVIB A WILDAF/Mali, January 2011, p. 32.

⁸⁰ The organisation WILDAF Mali is regularly present during proceedings concerning women and children, supporting the hiring and briefing of lawyers for the follow up of proceedings.

⁸¹ *Etude sur les inégalités de genre et pauvreté au Mali* conducted by the Observatory for sustainable human development (*Observatoire pour le Développement Humain Durable*, ODHD), p. 6. The study identified three forms of inequality: interpersonal inequality which affects bonds of marriage and filiation, economic inequality and inequality of access to power (both formal and informal). The groups most affected by these inequalities are women and children. The persistence of inequalities is largely explained by reinterpretation of the sociocultural and religious relationships existing between men and women (p. 7).

In terms of resources, women are less educated and have fewer material advantages or prospects for well-paid work than men. The majority of women work in farm or subsistence agriculture. They are agricultural workers or may even work for nothing, in order to provide for their family's basic needs. As well as the agricultural sector, women also work in the informal sector that includes petty trade or handicraft businesses. These kinds of jobs, often done from home, rarely involve a salary and simply enable women to survive.⁸²

This lack of financial resources can prevent women from considering divorce an option. For example, since there are no courts in villages, divorce applicants must go to the department's main town, which entails transport costs that these women are unable to cover. Moreover, even in the rare cases where they manage to begin legal proceedings for divorce, they usually do not have the financial means to see the proceedings through.⁸³

2.4. The influence of Islam

The dominant religion in Mali is Islam, to which 90% of the population adhere. The remaining 10% practise either a Christian religion or traditional religions.⁸⁴ As mentioned above, the dissolution of marriage is therefore traditionally managed according to Islamic rules (repudiation), which discriminate between the wife and the husband. With the appearance of the MGC in 1962, the promotion and emancipation of women recommended by the Malian State since 1996 and then the PFC in 2011, Malian legislators have endeavoured to restore balance between men and women regarding civil divorce.

Muslim religious leaders continue to exert a real and significant influence on people and society in general.⁸⁵ The High Council of Islam (*Haut Conseil Islamique*) objected in 2009 to the Personal and Family Code, with the support of part of the population. This influence of religious leaders on government decisions means their involvement is inevitable, thus further bolstering their power. Moreover, the population readily turns to these Islamic authorities for the settling of private disputes, including divorce. In practice, these religious authorities deliver genuine religious 'rulings' that, for those concerned, are a substitute for court judgements.

Moreover, the dominant idea in major monotheistic religions that wives owe obedience to their husbands was re-established by article 316 subparagraph 1 of the PFC which states: "Within the limits of the respective rights and duties of the spouses enshrined in this Code, the woman owes

⁸² On this point, see Aderanti ADEPOJU's analysis of spousal inequality, in his work entitled *La famille africaine: politiques démographiques et développement*. Paris: Karthala, 1999, p. 253.

⁸³ This was a common observation among those interviewed during our field research.

⁸⁴ Figures vary somewhat concerning this distribution: Bintou SANANKOUA claims 1% Christians and 9% animists (*L'islam dans les sociétés de l'Afrique subsaharienne: défis et réponses*, presented at the International Colloquium in Dakar, 4 and 5 February 2008, p. 3), whereas the US State Department in its 2008 report on religion in Mali claimed a distribution of 5% and 5% (International Religious Freedom Report 2008, accessible on the State Department website).

⁸⁵ Some even see this as evidence of increased influence related to a rise in political Islamism, V. Poudiougou DIACHARI, *Mali: les dessous de la crise politique et sécuritaire*, 1000 Mots, No 4, June 2013

obedience to her husband, and the husband, protection to his wife". It should be recalled here that the maintaining of such a provision was central to the disagreements between the State and Islamist currents during the debate over the adoption of the Personal and Family Code in 2009. It must be recognised that the maintaining of this provision in the PFC goes against the principle of equality between men and women enshrined in the Malian Constitution and the international and regional instruments to which Mali is a party.

Finally, divorce cases brought by women are considered by Muslim religious leaders to show a lack of respect to the husband. One of the most commonly used religious arguments is the fact that the submission of women to men is required by religious texts.⁸⁶ However, this submission can under no circumstances be servile, oppressive or stifling for the woman. If that is the case, the religion in question is no longer a path of fulfilment for her, but rather becomes a prison.⁸⁷ In any event, the undisputed sway that religion holds over women pushes them, in many cases, to give up on legal proceedings, especially in divorce cases.⁸⁸

In our interviews, certain religious leaders explained that they work with both the MGC and the Koran and point out that the same causes of divorce are given in civil law as in the Koran.⁸⁹ They remark that, unlike in proceedings before the civil court, an attempt at conciliation is obligatory in Islam, even for divorce by mutual consent. But unlike judges, who insist on the wishes of the parties, the imam or *marabout* asks the two families involved to bring the spouses to an understanding. If this step is unsuccessful, the divorce is granted.

2.5. Society's perspective

In Malian society, marriage is a "social necessity".⁹⁰ It concerns not only the spouses but also their two families: once marriage has been initiated, a social pact is formed that binds these two families together through the mobilisation of the community. It is undeniable that the breakdown of this pact through divorce has social consequences. Regardless of whether it is conflictual or amicable, therefore, divorce is never insignificant. It initiates a period of instability and disruption. Its effects are not restricted to private matters between the separating spouses. Divorce redefines the relationships of each party to his or her children, friends and other relatives; it may also have an important economic impact on the local community.⁹¹

⁸⁶ Amadou T. DIARRA, *Plaidoyer pour une effectivité des droits de la femme au Mali*, WILDAF/Mali, 2002, p. 30.

⁸⁷ *Idem*, p. 31.

⁸⁸ See passage below on the difficulties encountered by women. These difficulties largely compromise the intentions of the December 2, 2011 legislation insofar as they are of a religious nature in a society that has long been deeply Islamised.

⁸⁹ This was the case with Imam Oumar BARRO of Kayes, interviewed at the time of research in September 2012.

⁹⁰ Sarafilou COULIBALY and Tapa DIALLO, *Les effets du divorce à l'égard de la femme en droit malien*, Master's thesis, Faculty of Legal and Economic Sciences (Mali University), Bamako, 2001, p. 7.

⁹¹ In a society where agriculture is the principal occupation, women, in addition to their housework, play an essential role through active involvement in field labour. The wife is thus seen as a source of income who must contribute to her husband's prosperity, and her departure has an economic impact on the community.

While the right to divorce is granted to women as well as men in Malian law, it is exercised in a wholly different manner. Essentially, the exercise of this right exposes women to various forms of pressure and prejudice. Interviews carried out in the field very clearly reveal a number of sociocultural constraints. For some, women are always sidelined and required to be submissive.⁹² Elsewhere, it was remarked that it is always the woman “who is seen to be at fault, never the man. She is viewed with suspicion by those around her and sometimes even pointed at in public. That means it is difficult for her to enter a new marriage. These prejudices cause her to become disapproved of, marginalised, isolated...”.⁹³ Both traditional and modern Malian society therefore condemn unmarried, single or divorced women, who are perceived as “abandoned, pathetic, scorned”.⁹⁴ Field research demonstrated that even though women sometimes live in appalling conditions of economic and emotional instability,⁹⁵ they often prefer to forgo judicial action in order to avoid this kind of marginalisation. They prefer instead to turn to family (both biological and marital relatives),⁹⁶ friends, or religious leaders and seek a reconciliation, compromise or amicable settlement rather than opt for the court.

Finally, our interviews revealed that some men intentionally affect malevolent behaviour in order to force their wife to initiate the divorce, so as to avoid having to bear the costs of proceedings. As soon as the judge grants the divorce, they make an appeal but neglect the case, in order to cause embarrassment for their wife. In some cases, the rejected husband may even refuse to divorce, thus preventing his wife from remarrying and having children.

3. GROUNDS FOR DIVORCE

Article 325 of the PFC allows spouses to choose from one of the options suggested in the Code: divorce by mutual consent (3.1), divorce on the grounds of marital breakdown (3.2) or divorce on the grounds of fault (3.3). This represents a break with the old system, which was based on contentious divorce.⁹⁷ The endorsement of divorce by mutual consent by the new Code can be seen to represent a change from *institutional marriage* to *contractual marriage*.

⁹² Statements collected at the Association DEMESO legal clinic, July 2012.

⁹³ Interview of Bintou F. SAMAKE, President of WILDAF/Mali, July 2012.

⁹⁴ Interview with Mody COULIBALY, clerk to the Sikasso TPI, August 2012.

⁹⁵ *Idem*.

⁹⁶ *Evaluation de l'appui pour l'accès des couches vulnérables à la justice*, OXFAM/NOVIB A WILDAF/Mali, cited above.

⁹⁷ The 1962 MGC introduced contentious divorce, giving either spouse the ability to request divorce for five different reasons: adultery; excesses, abuse or serious insults rendering married life impossible; the conviction of a spouse for a serious crime; serious alcoholism; the inability of the spouse to satisfy marital obligations (art. 59 of the MGC). Moreover, the wife was entitled to request divorce when the husband refused to provide for her basic needs in terms of food, housing, and clothing. Non-payment of the dowry after the expiry of the period fixed in the marriage contract could also constitute a reason for the woman (art. 60 of the MGC). In reality, this last reason is never invoked by women. Arising from now-outdated customary practices, it has no effect on divorce rates. On this point, see *Rapport sur la problématique du divorce*, RECOFEM, cited above, p. 23.

3.1 Divorce by mutual consent

The introduction of the PFC in 2012 constituted a revolution in Malian divorce law. The two spouses can now regulate the termination of their marriage “by friendly settlement”. When jointly requesting divorce, they are not required to make their reasons known. They are required simply to submit a draft agreement, settling the consequences of the divorce, for the judge’s approval.⁹⁸ There is currently no case-law available, but we may briefly outline this new procedure using the provisions of the PFC as a guide.

In general, the spouses may freely determine the conditions and consequences of the termination of marriage as long as they are not contrary to public order, common decency or the interests of any children.⁹⁹ The consent of the spouses is valid only if it is the result of a genuine act of free will. It must be given regarding not only the termination of marriage, but also the disposition of any assets and children from the marriage.¹⁰⁰

As for formal requirements, the request must be presented in writing at the civil court for their shared residence, or that of the one of the spouses, either by the spouses in person, or by their respective lawyers or a lawyer chosen by mutual agreement. After consideration of the submitted documents,¹⁰¹ the judge hears the spouses separately, then together, and if need be assisted by their lawyers.¹⁰² He can make any comments deemed appropriate and must ensure their consent. He may ask them any questions he considers useful regarding the disposition of their assets and their children’s future.

If the spouses persist in their intention to divorce, and if the judge considers that the agreement complies with legal requirements, he may suggest to them the possibility of renewing their request after a three month “reflection period”. If not renewed within six months of the expiry of this period, the joint request becomes null and void. If the request is renewed after the end of the reflection period, the judge grants the divorce if he is assured that the will of each spouse is genuine and that each spouse has freely consented to the agreement.¹⁰³ The

⁹⁸ Art. 337 of the PFC.

⁹⁹ Art. 339 of the PFC.

¹⁰⁰ Art. 340 of the PFC. However, no request for divorce by mutual consent can be made within the first six months of the marriage or when one of the spouses is placed under one of the protective schemes concerning incapable adults (art. 338 of the PFC).

¹⁰¹ The request must be accompanied by: a copy of the marriage certificate; the birth certificates of any minors; a matrimonial agreement if one exists; an inventory of all movable and immovable assets; a written agreement establishing the custody, education and maintenance of the children, as well as the disposition of assets upon liquidation of the community, if necessary (art. 341 of the CPF).

¹⁰² Art. 342 of the PFC.

¹⁰³ By making this ruling, the judge also approves the agreement as to the consequences of divorce, if applicable. He can refuse to approve it and not pronounce the divorce if he deems that the convention does not sufficiently serve the interests of the children or one of the spouses (art. 343 of the PFC).

judgement of divorce by mutual consent is handed down as a final decision.¹⁰⁴ Once the judgement has become final, the marriage bond is dissolved and the agreements reached by the spouses regarding their assets and children become enforceable.¹⁰⁵

3.2 Divorce on the grounds of marital breakdown

Either spouse may request divorce on the grounds of prolonged breakdown of the relationship when the spouses have lived separately for three years or in the event that one of the spouses is unable to fulfil marital obligations.¹⁰⁶ The same applies when the mental state of the spouse has for at least three years been so altered that there is no longer any semblance of shared life between the spouses, and that the spouses cannot be reasonably expected to return to such a state in the future.¹⁰⁷

The spouse requesting divorce on the grounds of marital breakdown must bear all the costs.¹⁰⁸ If the other spouse claims that divorce would have material and moral consequences amounting to exceptional hardship, either for themselves, given their age and the length of the marriage, or for the children, the judge denies the request.¹⁰⁹ The judge may deny the request *ex officio* when it appears that divorce would have material and moral consequences amounting to extreme hardship, as provided in Article 344 of the PFC.

Judges may assimilate some cases of divorce on the grounds of fault to divorce on the grounds of marital breakdown.¹¹⁰ First and foremost is the issue of the inability of one of the spouses to fulfil marital obligations. Thus the court granted a divorce on the grounds of marital breakdown on the basis that the husband had not had intimate relations with his wife for four years.¹¹¹ Further, neglect of the wife in her husband's absence may also be assimilated to marital breakdown.¹¹² Thus the court granted a divorce on the grounds of marital breakdown,

¹⁰⁴ Art. 344 of the PFC.

¹⁰⁵ Art. 345 of the PFC. The judgement is enforceable against third parties once entered in the civil registers. A copy of the final judgement is addressed by the court to the civil registrar for the place where the marriage was conducted and for the birthplace of the parties, so that it may be noted in the margins of their marriage and birth certificates (art. 346 of the PFC).

¹⁰⁶ Art. 348 of the PFC.

¹⁰⁷ Art. 349 of the PFC.

¹⁰⁸ Art. 350 of the PFC.

¹⁰⁹ Art. 351 of the PFC.

¹¹⁰ See below.

¹¹¹ Judgement No 62, February 10, 2011, of the Kayes TPI (Divorce - custody). See also the illustrative case of Mrs Binta DIALLO, un-employed and without qualifications, married to her cousin, a stockbreeder. Their marriage was arranged by their families as is customary among their people (the Fulani), without a civil ceremony. During the first three years of marriage, they had no children. Following an illness, her husband became infertile. She remained in this situation for ten years. When she wanted to leave him, their relatives were opposed to the idea. It was thirteen years later that she was permitted to divorce after her family realised the reality of the situation. At the age of forty, Mrs DIALLO has remarried to another cousin and is expecting a child.

¹¹² See Article 348 of the PFC: "Either spouse can request divorce on the grounds of prolonged marital breakdown when the spouses have lived separately for three years or in the event that one of the spouses is unable to fulfil marital obligations".

with fault lying entirely with the husband, on the basis that the husband has intentionally left his wife approximately five years previously and, during the entire period, had not provided for his wife or the two children he left behind and had failed to make any contact.¹¹³

3.3. Divorce on the grounds of fault

According to Article 352 of the PFC, a spouse may request divorce on the grounds of fault for the following reasons: adultery; excesses, abuse or serious insults rendering married life impossible; the conviction of a spouse for a serious crime (*peine dégradante ou infamante*); serious alcoholism or drug addiction; failure to honour a substantial commitment. The wife can request divorce if the husband refuses to provide her basic needs: food, housing, clothing and medical care.

3.3.1. The committing of adultery by one of the spouses

Adultery committed by a spouse constitutes a violation of the duty of fidelity to which the two spouses must adhere. It consists in a married person maintaining sexual relations with a person other than his or her spouse. Adultery on the part of the husband or wife constitutes peremptory grounds for divorce. Adultery may be ascertained by a court bailiff assigned for that purpose. A single substantial piece of evidence of adultery obliges the judge to grant the divorce.¹¹⁴ Although very often cited by divorce applicants, the grounds of adultery are virtually impossible to prove, except for *in flagrante* cases or when the wife becomes pregnant during the husband's prolonged absence.

3.3.2. Desertion

It is common practice for the refusal of a wife to live with her husband to constitute desertion, which constitutes fault within the legal terms of Article 352 of the PFC. The judge can therefore pronounce divorce due to the fault of the defendant (the wife), on the grounds that she refused to live with her husband at the residence chosen by him, and then proceed to give the father custody of the children.¹¹⁵

3.3.3. Excesses, abuse and serious insults rendering married life impossible

A 2012 study provides examples of what constitutes serious insults, excesses or abuse. These relate to the refusal of marital duties, excessive sexual appetite, jealousy and death threats.¹¹⁶ Also relevant is when a spouse has concealed the existence of a child resulting from a relationship preceding the marriage, or when a spouse has concealed a pregnancy arising from a

¹¹³ Judgement No 62, February 10, 2011, of the Kayes TPI. The judge gave the mother custody of the minors while providing extensive rights of access for the father. He ordered the father to pay the costs.

¹¹⁴ Judgement No 357/2012, October 25, 2012, of Kayes TPI (Divorce and custody).

¹¹⁵ Judgement No 156/2011, April 14, 2011, of Kayes TPI (Divorce - custody).

¹¹⁶ *Rapport sur la problématique du divorce*, RECOFEM, cited above, p. 25.

man other than the fiancé. These various grounds are invoked by both women and men. However, the refusal of marital duties was cited specifically by men, while women tended to complain about their husband's excessive sexual appetite.¹¹⁷

For example, the court granted divorce on the grounds of mutual incompatibility, excesses and serious abuse, due to the fault of the husband, on the grounds that there had been no intimate relations between him and his wife for four years.¹¹⁸ Similarly, the court granted divorce due to the fault of the husband on the grounds of excesses, abuse, serious insults, and the husband's inveterate alcoholism, which rendered married life impossible.¹¹⁹

Under the MGC of 1962, when a request for divorce was filed due to excesses, abuse or serious insults, the judge was not able to allow the divorce immediately, even when the case was well-founded. In such cases, before granting the request, he gave the woman permission to leave her husband.¹²⁰ Thus in an interlocutory ruling, the court decided not to make a final decision, but preferred to give the spouses a one year trial period.¹²¹ This provision is not repeated in the PFC, although as for all divorce proceedings, that does not mean there are no attempts at conciliation.¹²²

3.3.4. Failure to honour a substantial commitment

Pursuant to Article 352 of the PFC, a spouse may request divorce in the event of failure of the other to honour a substantial commitment made in view of marriage. These grounds for divorce are often closely related to other grounds for divorce. Thus the court granted a divorce due to the fault of the husband, on the grounds of his refusal to return to the marital home and his failure to provide for the needs of his wife.¹²³

The substantial commitment could extend to the inability of the spouse to fulfil marital obligations. With this not made clear, the judge must interpret the text in order to determine the real

¹¹⁷ *Ibid.*

¹¹⁸ Judgement No 062, February 10, 2011, of Kayes TPI (Divorce – mutual incompatibility – serious excesses and abuse).

¹¹⁹ Judgement No 208, June 7, 2012, of Sikasso TPI (Divorce – excesses, abuse and serious insults): “In giving this judgement by default, the judge has applied the law correctly; since the fact that the defendant neither appeared nor concluded in court lends further support to the applicant. Consequently, the court receives the request of the applicant, declares it well-founded, grants the divorce due to the fault of the husband, gives custody of the children to their mother and orders the father to pay maintenance of five thousand CFA francs (5000 FCFA) per month and per child”.

¹²⁰ Article 75 of the MGC.

¹²¹ Judgement No 51, January 25, 2012, of the civil chamber of the Bamako Court of Appeal (Divorce on the grounds of excesses, abuse and serious insults): “By taking this provisional measure, the judge has applied the law correctly while rejecting the petitioner's request as ill-founded. In the absence of new developments or reasonable evidence, the court has definite grounds to give the spouses a one year trial period”.

¹²² Art. 354 to 357 of the PFC.

¹²³ Judgement No 210, December 26, 2012, of Kati TPI (Divorce on the grounds of failure to honour a substantial commitment).

intention of the parliament. It is important to stress that the inability of the husband to achieve the sexual act is regarded under customary law as a failure to fulfil marital duties. Above we saw that this situation can also be treated as a breakdown of the marital relationship.

3.3.5. Neglect and refusal to provide for basic needs

Neglect and refusal to provide for the wife's basic needs on the part of the husband constitutes a fault on the grounds of which only the wife may request divorce. The PFC specifies that "neglect" here means failure to provide food, housing, and clothing, as well as medical care.¹²⁴

The PFC no longer makes any mention of the non-payment of dowry after the expiry of the period agreed in the marriage contract. Arising from customary practices, non-payment of the dowry formerly constituted grounds for the woman to request divorce, though it was rarely invoked. Even if this factual situation has little effect on the number of the divorces, in practice it represents a concern for some women. It is perhaps surprising that whereas dowry continues to be provided for under the Code,¹²⁵ non-payment of the required sum can have no legal consequence.

The fact that these grounds for divorce are only available to the wife appears to be an implicit effect of the provisions of Article 34 of the MGC¹²⁶ repeated in Article 316 of the PFC which states: "Within the limits of the respective rights and duties of the spouses enshrined in this Code, the woman owes obedience to her husband, and the husband, protection to his wife". Moreover, Article 319 of the PFC states: "The husband is the head of household (...) household expenses are the responsibility of the husband. Married women with their own income may contribute to household expenses". In practice the non-contribution of the wife to household costs does not lead to divorce, because Malian tradition places that burden exclusively on the husband. The Code obliges women with an income to contribute to the household, but men do not invoke the Code in court even if they fail to do so.

As a final remark on the grounds for divorce, it should be noted that in practice, the majority of divorces are granted on the grounds of excesses, abuse and serious insults, which have become a "catch-all" allowing many husbands to rid themselves of their wife for a wide range of reasons. This is the case, for example, with the failure of the woman to fulfil her duty of obedience to the husband,¹²⁷ which is seen as a serious insult, punishable by divorce.¹²⁸

¹²⁴ Judgement No 147, June 9, 2011, of Bamako District Commune IV TPI (Divorce – custody of children and maintenance). See also Judgement No 209, December 26, 2012, of the Kati TPI (Divorce on the grounds of insults and neglect): the court granted the divorce due to the fault of the husband, on the grounds that the instances of insults and neglect invoked against the husband were well established and constituted fault under article 352 of the Personal and Family Code.

¹²⁵ Article 288, subparagraph 1 of the PFC states: "Dowry is obligatory and is of a symbolic nature".

¹²⁶ "The husband is the head of the household. Consequently, the household expenses are in principal his responsibility".

¹²⁷ Art. 316 of the PFC: "Within the limits of the respective rights and duties of the spouses enshrined in this Code, the woman owes obedience to her husband, and the husband, protection to his wife. The spouses owe each other fidelity, protection, succour and assistance. They commit to a shared life founded on affection and respect". See above.

¹²⁸ Interview with Mr COULIBALY, chief clerk of the Kayes court of appeal, September 2013.

4. EFFECTS OF DIVORCE

The judgement granting divorce dissolves the marriage from the date it becomes final. It releases the spouses from their matrimonial duties, and has a number of consequences, outlined hereafter, for the spouses themselves and for any children. This is a field in which there is very little existing case-law.

4.1. The dissolution of marriage

This means termination of the matrimonial bond. A valid marriage will undeniably have occurred in the past, and one cannot pretend the spouses were never married. Concerning the future, however, the status of “spouse” ceases for both husband and wife. The effects of the divorce begin on the day of the court decision, at least concerning the consequences for each spouse’s status – i.e. the ability to remarry. Note that divorced women cannot enter into a new marriage for a period of three months after the divorce.¹²⁹ The purpose of the waiting period is to avoid conflicts over the legitimate paternity of any children conceived while the spouses undergo divorce proceedings. The three-month period corresponds to the waiting period that must be observed in Islam.¹³⁰

4.2. Property consequences

Matrimonial regimes, the dissolution of the marriage community, the liquidation of shared assets or the division of the spouses’ inheritances are dealt with in Book III of the PFC. Except for divorce by mutual consent, the effects of which are determined by an agreement between the spouses, approved by the judge,¹³¹ the property consequences of all judicial divorces must be regulated by the judge who grants the divorce, and this regardless of the marriage settlement adopted by the spouses.¹³²

¹²⁹ Art. 366 of the PFC.

¹³⁰ This system is different from French civil law, which used to impose a waiting period of 300 days (covering the 9 months required for gestation), a restriction that was abolished in 2004 with the arrival of new methods making it possible to determine the paternity of a child.

¹³¹ Art. 341 to 343 of the PFC.

¹³² Appeals No 255 and 263, June 16 and 19, 2006, Judgement No 166, August 6, 2007, Legal Section - 1st Civil Chamber of the Supreme Court (Divorce - damages - inconsistency between the grounds pleaded and the judgement – liquidation and division of matrimonial interests). Pursuant to articles 47 and 48 of the MGC on dissolution of the marriage, each spouse who provides proof of ownership of an asset is authorised to recover it. The proof that an asset belongs to a spouse will be decided by an authenticated certificate in the case of immovables; the ownership of movables will be proved by any available means; when ownership of an asset cannot be established, the asset will be divided equally between the spouses.

4.3. Consequences of the divorce for children

Children of the marriage should not have to suffer as a result of their parents' divorce. To this end, children of the dissolved marriage retain all rights and privileges that they enjoy based on the laws and agreements pertaining to their parents' marriage.¹³³ The children will be placed in the custody of the spouse who won proceedings, i.e. the one in whose favour the divorce was granted. In theory, this excludes the spouse who was determined to be at fault in the divorce, unless the court orders that, in the best interests of the children, all or some of them are to be placed in the care and custody of either the other spouse or a third person. The court's decision on the matter is determined according to information collected either through a request made to the family or through the public prosecutor.¹³⁴

In some cases, women refuse to apply for custody of their children because their income is inadequate.¹³⁵ However, the two spouses retain the right to monitor, provide for and educate the children regardless of the person to whom they are entrusted. Other than in exceptional circumstances, rights of access are granted to the parent who does not gain custody.

4.4. Maintenance

According to the sampled case-law, the spouse determined to be at fault in the divorce must pay the other spouse maintenance in cases where the divorce places the latter in a situation of need.¹³⁶ Even in the case of a divorce due to reciprocal fault, the judge's decision to grant custody of the minors to their mother can mean the husband is ordered to pay maintenance.¹³⁷

Nevertheless, Article 368 of the PFC now only provides for the case of "a wife in a situation of need arising from a divorce granted for the fault of the husband". She is entitled to maintenance, without prejudice to the damages she may also request. The maintenance cannot exceed a quarter of the husband's total income; this fraction is reduced for polygamous marriages.¹³⁸ The pension is paid for a maximum period of five years, but may cease to be payable earlier if, for example, the woman remarries.

¹³³ Art. 364 of the PFC.

¹³⁴ Art. 369 of the PFC.

¹³⁵ This was the case with one of the people interviewed, Mrs Assitan BALLO who, after her divorce, returned to live with her maternal family, without her children, but from time to time receives visits from her children.

¹³⁶ Judgement No160, March 7, 2012, Civil Chamber of the Bamako Court of Appeal (Divorce - custody of children and maintenance).

¹³⁷ Judgement No 27, January 27, 2011, Sikasso TPI (Divorce – custody of children and maintenance): "The court agreed to the requests of the parties, entrusted custody of the minors to their mother in their own best interest, ordered the husband to pay maintenance established at 10,000 FCFA per month and per child and made the costs of proceedings chargeable to both parties".

¹³⁸ 1/8 for two wives; 1/12 for three wives and 1/15 for four wives (art. 368).

In the event of divorce, maintenance is often not granted and even if it is, the amount is trivial, because of the husband's lack of income, or is not actually paid. In many practical situations, women who do not work depend entirely on their husband. However, our interviews revealed that some women do not claim the maintenance to which they are entitled, through ignorance or even simply reserve. This lack of income following divorce puts women in a vulnerable position, for example in terms of housing. Even for women with a sufficient income, social considerations mean that they often return to live with their family in order to escape the criticism, prejudice and difficulties that a life alone entails.

Finally, it should be noted that according to the Supreme Court, a request for damages can be made on the basis of either Article 84 of the MGC for the repairing of material or moral prejudice caused by the dissolution of the marriage or Article 125 of the law establishing the general rules on obligations (equivalent to Article 1382 of the Civil Code) to repair any damage caused to others through one's own fault, even as a result of carelessness, clumsiness or negligence.¹³⁹

CONCLUSION

The above constitutes an examination of the work of Malian legislators and judges regarding family law in general and divorce law in particular. In 2011-2012, the legislation was amended to correct certain persistent areas of discrimination between the spouses in divorce. It also enabled non-contentious divorce. Thus the respect of individual choices, the respect of human rights and their corollary, equality or non-discrimination all formed the slogan of the new Personal and Family Code. However, although Malian law has progressed, there are still numerous obstacles to the realisation of equity between spouses in divorce. This imbalance between men and women can be explained by the extreme tenacity of the customs and traditions that still constitute law in some parts of the country.

This coexistence of civil and customary law indicates the legal pluralism that exists in Malian society and continues to pose numerous challenges regarding women's rights. Moreover, a number of the difficulties evoked above are also due to the economic and social problems facing Mali, whether this be the vulnerable position of women in some areas or the problems with the Malian legal system taken as a whole, which relate both to its content and to the availability of resources. It is thus clear that there remains a great deal of work to be done in order to refine the legislative framework of the family, provide a framework for customary law that respects both local needs and the rights of all Malians, while giving increased practical support to the courts, public institutions, social services, traditional and religious institutions as well as the civil society.¹⁴⁰

¹³⁹ Appeal No 255 and 263, June 16 and 19, 2006, Judgement No 166 of August 6, 2007, Legal Section - 1st Civil Chamber of the Supreme Court. Thus, according to the Court, by rejecting the woman's request for damages despite the grounds on which the husband was found to be at fault in the divorce, the Court of Appeal did not satisfy the requirements of Article 463 of the Code of Civil, Commercial and Social Procedure because of the discordance between the grounds and the judgement.

¹⁴⁰ See also conclusions and proposals, below.

PART 2: NIGER

This part is an abridged and edited version of the study on divorce in Niger produced by Mr Boukar YOURA, human rights adviser to the Danish Institute for Human Rights, with Mr Mazou Moussa ABDOULAYE, jurist, and Mr Ibrahima Halilou GUINSAOU, jurist, under the supervision of Dr Boubacar HASSANE, lecturing researcher at the Faculty of Economic and Legal Sciences of the Abdou Moumouni University in Niamey.¹⁴¹

Marriage is undoubtedly one of the most striking social phenomena in human societies: the ways in which it is celebrated, as well as the rules of its dissolution, vary from one country, culture, and environment to the other. With regard to the dissolution of marriage in Niger, there exists not only a plurality of rules that apply but also a variety of types of divorce and of people involved. This poses several problems in terms of ensuring the consistency of the applicable standards. In Niger, there are four types of divorce: civil divorce, legal customary divorce, informal customary divorce and repudiation. For civil divorce, there are no particular difficulties in applying the provisions of the Civil Code. On the other end, when it comes to applying customary law, there are difficulties in terms of consistency and hierarchisation. A combined reading of Article 171 of the November 25, 2010 Constitution¹⁴² and Article 63 of Law 2004-50¹⁴³ make it possible to determine the place of customary laws in the hierarchy of legal standards: they must conform not only to the laws which secure public order and the freedom of the people, but also to any properly ratified treaties or international agreements, as well as to the constitution.

In everyday reality, Nigerien citizens are familiar with customary law, in the sense that it is endogenous and therefore naturally accepted. On the other hand, textual standards, whether they be legal, international or constitutional, are perceived as esoteric standards that originated “elsewhere” and are not fit to be invoked in court, making them all the more difficult to enforce. What applies to ordinary citizens also, to a certain extent, applies to the judges responsible for the application of the law in a broad sense. Indeed, there is no guarantee that all judges are familiar with the international human rights instruments, and even those who are may find it difficult to apply them. When applying customary law, the judge is in a comfortable situation because the

¹⁴¹ See YOURA, Boukar et al: *Projet de recherche sur la rupture du lien matrimonial en Afrique de l'Ouest: Etude sur le Niger*. Faculty of Economic and Legal Sciences of the Abdou Moumouni University and Danish Institute for Human Rights, 2014.

¹⁴² “Treaties or agreements that are properly ratified or approved, once published, have supremacy over the laws subject, in the case of each treaty or agreement, to its application by the other party”. It should be specified that the principle of reciprocity does not apply in human rights cases.

¹⁴³ “Subject to compliance with properly ratified international agreements, legislative provisions or fundamental rules concerning public order or the freedom of the people, courts apply the customs of the parties: in matters relating to [...] divorce [...]”.

general population adheres to these norms. Originating from the same society, the judge is often as attached to the traditions in question as ordinary citizens.

Some authors have even gone as far as to say that it is Nigerien judges who have Islamised the law relating to personal status.¹⁴⁴ The case of repudiation is particularly illustrative of the judicial and practical situation regarding divorce in Niger. Repudiation is a customary practice that contravenes the Constitution and international human rights instruments adopted by Niger. However, as we shall see, it is also the standard method of divorce and, acting pragmatically, Nigerien legislators have sought to regulate its effects.

Generally speaking, there is a degree of reserve on the part of the authorities who, while conscious of their national and international human rights obligations, are sceptical as to their effective implementation, as we saw concerning the reservations made to CEDAW by the Nigerien government or its refusal to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Over and over again, attempts at improving the situation of women within marriage have failed in Niger; the same applies to the various attempts to secure the adoption of a Family Code.¹⁴⁵ Similarly, some of the recommendations made to Niger after coming before the Universal Periodic Review (UPR) organised by the Human Rights Council related to this difficult integration of women's rights into Niger's legal system.¹⁴⁶

Taking this highly complex social and political context into account, the team of Nigerien researchers investigated the various issues relating to divorce and human rights in Niger. The research centred around two lines of enquiry: on the one hand, a typological analysis of the forms of divorce existing in Niger, the people involved, and the grounds for and effects of divorce, as well as an identification of the law applicable to them, in a country with a plurality of legal sources regarding personal status; on the other hand, an explorative analysis of the human rights likely to be compromised in divorce situations, and of the challenges faced by women during divorce.

To this end, the research team adopted the following methodology. They would, on one hand, conduct a literature review and, on the other hand, carry out field research by means of interviews and questionnaires. The literature review involved the national and international human rights texts to which Niger is bound; rulings from courts in the city of Niamey, and from those in the Tahoua region, were also examined. Statistics on divorce were also collected

¹⁴⁴ See Acts of the Colloquium entitled "Quel droit de la famille pour le Niger?" held in Niamey, November 21 to 23, 2005.

¹⁴⁵ See Acts of the Colloquium entitled "Quel droit de la famille pour le Niger?", cited above. See also the failure of the Nigerien government to adopt a bill to protect young girls in education.

¹⁴⁶ In particular, see Recommendations No 76-12, 76-13 and 76-25. All the documents relating to the UPR are accessible on the site of the Office of the High Commissioner for Human Rights: www.ohchr.org/EN/HRBodies/UPR/Pages/NESession10.aspx.

in these two areas. Our results are therefore presented in four main sections: a typology of divorce (1), access to divorce (2), grounds for divorce (3) and effects of divorce (4).

1. DIFFERENT TYPES OF DIVORCE

In Niger, divorce, understood as the dissolution of a validly established marriage, may take several forms. Unlike in other countries, it is not exclusively granted in court. Many other institutions intervene in the matter, regardless of their entitlement under law to do so. We may thus distinguish four types of divorce.

1.1. Legal civil divorce

This means dissolution of marriage resulting from the application of the provisions of the Civil Code (art. 229 to 305) that takes place before a first instance court (*Tribunal de Grande Instance*). It should be specified that this is the French Civil Code of 1804 that was transposed to Niger with minor modifications. In reality, Nigerien citizens practically never refer to it in matters of marriage and divorce. Only the few people who have married under this Code may see it applied to them in the event of divorce. Thus, divorce rulings made according to the provisions of this code are rather rare¹⁴⁷ and it is the application of customary law that basically remains the rule.¹⁴⁸

1.2. Legal customary divorce

This is a divorce granted by the judge according to the customary law of the parties (if the two spouses follow the same custom), of the wife (if two Nigerien spouses follow different customs) or of the Nigerien husband (if the wife is foreign).¹⁴⁹

1.2.1. Customary law

In Niger, customary law is an integral part of the legal system. Its application is only restricted by its conformity to duly ratified international treaties or agreements, and to the laws and rules securing public order and the freedom of the people.¹⁵⁰

¹⁴⁷ Some instances nonetheless exist. See Judgement No 216, July 7, 2008, Civil Chamber of the Niamey Court of Appeal.

¹⁴⁸ See customary judgement No 08/12, February 24, 2012, of Niamey TGHC which reversed, on appeal, a customary judgement by the judge for Niamey Commune III in which the judge applied a set of customs to which the parties did not adhere.

¹⁴⁹ Art. 66 of Law 2004-50, July 22, 2004, establishing the organisation and competence of courts in the Republic of Niger.

¹⁵⁰ Art. 63 of Law 2004-50 cited above.

In matters of customary law, local courts are competent.¹⁵¹ Customary divorce rulings are appealed before the first instance court (*TGI*) rather than before a court of appeal. Regarding customary divorce, courts are obliged to enlist customary assessors, who should be familiar with the customary law of the parties - from first instance judgements right up to cassation level.¹⁵² Although these assessors have only an advisory role, their absence or even the mere lack of mention of their identity in the ruling can lead to its annulment.¹⁵³

The content of different customary practices as well as familiarity with them is an area to be treated with caution. Analysis of court decisions reveals that the customary rules are essentially identical regarding issues of divorce and have a shared basis in Islam. Hence the same customary assessors would ultimately be qualified to give advice about any kind of customary divorce. Indeed it seems that the assessors are appointed not according to their knowledge of customary practice but rather their knowledge of Islam. Analysis of these rulings leads one to conclude that they have all been influenced by Islam to the extent that the fundamental differences in their application to various aspects of the dissolution of marriage are no longer noticeable. Whether one labels a customary law "Islamised" or not, the influence of Islam is always present. It is not overly rare to find rulings, albeit first-instance ones, carrying the simple note "Islamic customary law" or "Muslim customary law".¹⁵⁴ In the two regions of the country where court rulings were collected, a range of customary practices were observed, but they all overlap in their content on divorce. These include: Adarawa or Baadaré,¹⁵⁵ Islamised Bouzou,¹⁵⁶ Muslim Beri Beri,¹⁵⁷ Djerma,¹⁵⁸ Islamised or Muslim Djerma,¹⁵⁹

¹⁵¹ Note that regarding divorce under the Civil Code, it is the first instance courts (*tribunaux de première instance, tribunaux régionaux and tribunaux de grande instance*) that are competent (their French names have varied according to the different legal systems that have been in place).

¹⁵² See Law 63-18, February 22, 1963 (still in force), articles 36 (§2) and 38; Law 2004-50, July 22, 2004, articles 5, 43 and 84; Decree No 62-221/MJ, August 25, 1962 enacting articles 5 subparagraph 3, 36 and 51 of Law 62-11, March 16, 1962; Law 90-10, June 13, 1990 determining the composition, organisation, duties and functioning of the Supreme Court.

¹⁵³ Provisions of Law 63-18, February 22, 1963 establishing the rules of procedure to be followed before the JP (this law is still applied). See also judgement of the judicial chamber of the Supreme Court No 93-24/C, June 24, 1993: "Whereas upon review of the contested decision, the court notes that the Dosso court, although dealing with a customary matter, did not enlist assessors; whereas under these conditions the court was not legally formed; whereas due to this fact the contested decision must be overturned for violation of Article 5, subparagraph 4, of Law 62-11, March 16, 1962". The same judgement also states: "Concerning the second plea: Violation of Articles 36, subparagraph 2, 37 and 38 of Law 63-18, February 22, 1963, in that the contested decision indicates neither the names of the assessors, nor the customs of the parties and in particular does not contain a comprehensive statement of the customs applied".

¹⁵⁴ See customary judgement No 006, April 12, 1990, of the Chintabaraden JP.

¹⁵⁵ Judgement No 36, December 2, 2005; judgement No 007, October 20, 2011, of the Keita TI; judgement No 002, May 5, 2011, of the Keita TI.

¹⁵⁶ Judgement of April 27, 2004 of the Tahoua TR.

¹⁵⁷ Customary judgement No 20, April 30, 2012, of the Niamey Commune II court.

¹⁵⁸ Customary judgement, No 260, December 13, 2011 of the Niamey Commune III court; customary judgement No 15, September 14, 2010, of the Niamey Commune I court; customary judgement No 6/11, February 18, 2011, of the Niamey TGIHC.

¹⁵⁹ Customary judgement No 82, June 5, 2012, of the Niamey Commune III court; judgement No 44, April 3, 2012, of the Niamey Commune III court; customary judgement No 26/2010, February 15, 2010, of the Madaoua TI; customary judgement No 26, May 25, 2012, of the Niamey TGIHC; customary judgement No 17, June 15, 2007, of the Niamey TGIHC.

Hausa,¹⁶⁰ Islamised or Muslim Hausa,¹⁶¹ Islamic,¹⁶² Fula (Peul)¹⁶³ or Islamised or Muslim Fula,¹⁶⁴ Sonrai¹⁶⁵ or Islamised or Muslim Sonrai,¹⁶⁶ Touareg or Targui,¹⁶⁷ Islamised or Muslim Touareg.¹⁶⁸ Essentially, there are as many customary practices as there are ethno-linguistic groups, that is to say a multiplicity of different combinations of Islamic rules and ancient or contemporary practices specific to the various groups. In its rulings, the Supreme Court nevertheless appears not to accept customary practices that cannot be linked to an ethno-linguistic group.¹⁶⁹ In other court decisions, the customary norm being used is cited within quotation marks even though there is no textual support for the various customs that are applied, except for "Islamic customary practice" or "Muslim customary practice".¹⁷⁰

The absence of a full explanation of the customary law applied or, worse, a complete failure to mention the customary law applied, will result in the annulment of the judgement on appeal or in cassation. The judge himself may raise these grounds when the parties neglect to do so.¹⁷¹ In addition, while Islamic divorce practices seem to be the common basis for the various customary practices, there is still a clear concern for respecting specific ethno-linguistic features in the area of divorce. Indeed, the application of one custom in the place of another is not tol-

¹⁶⁰ Customary judgement No 05, December 21, 1998, of the Chintabaraden JP (Hausa custom for the parties and application of Muslim custom in the case); customary judgement No 029, December 4, 2009, of the Niamey TGIHC; customary judgement No 30, December 11, 2009, of the Niamey TGIHC.

¹⁶¹ Customary judgement, February 17, 2012 of the Niamey Commune III court; customary judgement No 48/2010, March 8, 2010, of the Madaoua TI; customary judgement No 18/11, July 8, 2011, of the Niamey TGIHC.

¹⁶² Customary judgement No 006, April 12, 1990, of the Chintabaraden JP. It should be observed that this judgement could have been annulled on appeal if one of the parties had opposed the application of this Islamic custom. This is what happened in customary judgement No 011, 16/06/2006, of the Niamey TGIHC regarding a divorce in which one of the parties claimed to follow Christian custom. In that case, the judge stated that "there is no Christian custom, only the Christian religion".

¹⁶³ Customary judgement No 12/2011 of the Niamey Commune V court; customary judgement No 28, September 26, 2008, of the Niamey TGIHC; customary judgement No 02, February 2, 2007, of the Niamey TGIHC.

¹⁶⁴ Customary judgement No 18, June 24, 2002, of the Chintabaraden TI; customary judgement No46/2011, December 22, 2011, of the Niamey Commune V court; customary judgement No14/2010 of the Madaoua TI.

¹⁶⁵ This is sometimes known as Djerma-Sonrai custom, see customary judgement No 10, April 11, 2008.

¹⁶⁶ Customary judgement No 006, March 14, 2008, of the Niamey TGIHC.

¹⁶⁷ Customary judgement No 006, February 20, 2009, of the Niamey TGIHC.

¹⁶⁸ Customary judgement No 265, December 20, 2011, of the Niamey Commune II court; judgement No 11, October 24, 2005, of the Chintabaraden TI; customary judgement No 8, March 18, 2002, of the Chintabaraden TI.

¹⁶⁹ Judgement No 06-127, April 27, 2006, of the Judicial Chamber of the Supreme Court: "Whereas in law, as the appeal judge has noted, the 'Islamised Gaoboro' custom does not exist, 'Gaoboro' meaning 'people of Gao'; and whereas these 'people of Gao' may be Touareg, or equally may be Sonrai; now therefore, by annulling the decision which is submitted to him, the appeal judge has applied the law correctly".

¹⁷⁰ Note that even in this case, there is no reference to any Koranic verse or other Islamic text.

¹⁷¹ See Judgement No 94-12/C, April 14, 1994, of the Judicial Chamber of the Supreme Court; Judgement No 06-127, April 27, 2006, of the Judicial Chamber of the Supreme Court; customary judgement No 41, December 2, 2011, of the Niamey TGIHC; customary judgement No 26, May 25, 2012, of the Niamey TGIHC. In both judgement, the judges cited ex officio the violation of article 38 of Law No 63-18, July 22, 1963, establishing the rules of procedure to be followed before the JP dealing with civil and customary matters.

erated by the higher courts and can lead to the invalidation of a judgement for this reason.¹⁷² Lastly, these customs evolve over time, but their applicability before the courts is only permitted in conformity with the laws in force, properly ratified international agreements and when full awareness is shown of the essentially changing nature of any customary standard and of the country's more general development.¹⁷³

Regarding the competence of the customary assessors who are supposedly experts on customary law and there to advise the judges, no Islam-related qualification is required, although the actual situation suggests that this might be necessary considering the Islamic influence mentioned above. The applicable texts do not specify precisely what kind of qualifications one must have in order to be appointed as customary assessor,¹⁷⁴ except in the case of the judicial chamber of the Supreme Court dealing with customary cases which "is required to appoint two French-speaking assessors who either follow the same custom as the parties, or are well-recognised for their competence in these matters".¹⁷⁵ In fact, we may note, following the analysis of decisions collected in these two areas, that to be a customary assessor, it is necessary to have solid knowledge of Islamic practices in addition to belonging to an ethno-linguistic group or having well-recognised knowledge of the practices of this group as regards divorce. The question nevertheless remains whether, considering the modest or even derisory remuneration¹⁷⁶ for the assessors established by the decree mentioned above, the courts are really able to appoint assessors with such qualifications.

1.2.2. Procedure for legal customary divorce

The procedure for legal customary divorce begins with a preliminary phase of obligatory conciliation before the local first-instance court.¹⁷⁷ The judge is required to attempt to dissuade the parties requesting a divorce. Failure to conduct this stage can result in the annulment of

¹⁷² For example, customary judgement No17, June 5, 2009, of the Niamey TGIHC, reads: "Whereas all the parties have claimed that they follow Sonrai custom; whereas under article 63 subparagraph 2 of Law No 2004-50 [...], the courts are to apply the custom of the parties; whereas in this case the first judge in his decision noted the custom of the parties as the Touareg custom; therefore, it must be ruled that the first judge wrongly applied the custom of the parties." Further down, the judgement contains the following: "In particular, overrides the contested judgement and its provisions relating to the preliminary conciliation phase and the non-respect of the custom of the parties [[C'est quoi le sujet du verbe ici?]]".

¹⁷³ See these conditions recalled by the judicial chamber of the Supreme Court (State Court Judgement No 83-2/C, January 20, 1983) and stipulated in law 2004-50 (conformity with properly ratified international agreements).

¹⁷⁴ Decree No 62-221/MJ, August 25, 1962, enacting articles 5 subparagraph 3, 36 and 51 of Law No 62-11, March 16, 1962, establishing the legal system for the Republic of Niger. Article 1 of this decree states that: "The assessors with local law status that the first instance courts (*juges de paix, juges des tribunaux de première instance, tribunaux de première instance* and *sections des tribunaux*) are required to appoint, when ruling on customary matters, shall be selected from a list drawn up at the beginning of each legal year, by decree of the Minister of Justice, after a proposal from the Minister of the Interior.

¹⁷⁵ Law No 90-10, June 13, 1990, establishing the composition, organisation, duties and functioning of the Supreme Court. Provision renewed in Law No 2000-10, August 14, 2000, establishing the composition, duties and functioning of the Supreme Court in article 31.

¹⁷⁶ 500 FCFA per session in a first-instance court and 1000 FCFA per session in an appellate court, according to article 5 of the August 25, 1962 decree.

¹⁷⁷ Provision of the 1963 law on the rules of procedure to be followed before the JP, still in force.

the judge's decision except in cases of extreme urgency.¹⁷⁸ If the attempt fails, the court hearing the case notes the non-conciliation and then decides in chamber.

As noted earlier, the presence of customary assessors for the parties is obligatory; the presence of an assessor for the wife is especially important. Indeed, it is the wife's custom which is applied as long as she is Nigerien and her custom does not contravene the international agreements duly ratified by Niger, the legal provisions or basic rules securing public order and the freedom of the people, and as long as the woman has not renounced her custom.¹⁷⁹ As the assessors have only an advisory role, it is the judge who is required to make a decision after hearing the parties.

The parties attend with or without the assistance of a lawyer. We have counted that, out of a total of 36 appeal judgements gathered from the Niamey TGIHC, 21 judgements occurred without the parties being assisted by their lawyer; 13 took place with the assistance of a lawyer for each party; two judgements occurred with the assistance of a lawyer for the wife and two with the assistance of a lawyer for the husband. In addition, none of the judgements in the first-instance courts indicate the presence of a lawyer.¹⁸⁰

The appeal is made to the court that gave the judgement, within two months of the decision. For a cassation appeal, the limit is one month from the date of the appeal judgement.¹⁸¹

1.3. Informal customary divorce

Researcher Boubacar HASSANE has established that in Niger certain authorities intervene, in an informal manner and in the absence of any legal basis, in the dissolution of marriage: these are traditional leaders and religious authorities.¹⁸² While the traditional leaders have conciliatory competence according to the law,¹⁸³ this is not the case for the religious authorities, which are in no way entitled to intervene in divorce cases. Further, these religious authorities deliver divorce judgements that closely resemble court decisions.¹⁸⁴

¹⁷⁸ Ruling No 96-33/C, June 6, 1996, of the judicial chamber of the Supreme Court; see also customary judgement No17, June 5, 2009, of the Niamey TGIHC.

¹⁷⁹ Art. 63 and 66 of law 2004-50.

¹⁸⁰ Six judgements collected from the Niamey Commune II Court; seven judgements from the Niamey Commune V Court; 24 judgements from the Chintabaraden TI.

¹⁸¹ Cassation appeals are made by filing with the registry of the appellate court. A significant number of Supreme Court rulings indicate that the parties did not submit a brief and were satisfied with simply going through the formality of appeal. In such a case, "[...] any petitioner who does not submit a brief containing pleas in law in support of his declaration of appeal prevents the court from exerting due judicial control in accordance with the law". However, the appeal is still useful because the Supreme Court may, even in the absence of briefs submitted by the parties, raise the grounds for appeal in cassation ex officio. See Ruling No07-068, March 22, 2007, of the judicial chamber of the Supreme Court.

¹⁸² HASSANE B., "Prolégomènes à une éventuelle réforme du droit du divorce au Niger" in Stéphanie LAGOUTTE and Nina SVANE BERG (dir.), *Les droits de la femme et de l'enfant, Réflexions africaines*, Karthala, 2011, p. 140.

¹⁸³ Art. 15 subparagraph 1 of Ordinance 93-028, March 30, 1993, enacting the traditional authority statute as modified by Law 2008-22, June 23, 2008: "Traditional leaders have conciliatory powers towards the parties in customary, civil and commercial cases."

¹⁸⁴ See appendices 3 and 4 of the long version of the study on divorce in Niger (YOURA, Boukar et al., 2014, cited above).

Research conducted at the headquarters of the Islamic Association of Niger (*Association Islamique du Niger*, AIN) in Niamey establishes that this association grants several hundred divorces every year (meaning repudiation rulings or divorce decisions).¹⁸⁵

1.4. Repudiation

“Repudiation is a form of unilateral dissolution of the marriage by the husband, who holds exclusive and discretionary power to do so”.¹⁸⁶ Defined as such, repudiation can be registered legally by the judicial authority¹⁸⁷, or informally by the customary or religious authority. Based on the frequency of this kind of dissolution of marriage, one could say that it is the most popular form of divorce in Niger, since legally registered cases exceed cases of legal customary divorce by some margin, without even allowing for unregistered cases which are likely to be still more numerous.¹⁸⁸

Islam does not recommend divorce and, by extension, cannot be a cause of the high rate of repudiation in Niger. On the contrary, divorce is generally considered to be “the thing authorised by Allah which he detests the most”.¹⁸⁹ Thus the practice of repudiation seems principally to persist because men have not felt the need to eliminate it. Governments are afraid to initiate reforms that would improve the situation of women in matrimonial relations because they fear that such reforms will not be approved by a majority in parliament where women are under-represented; these governments also fear that the male electorate will turn against them in future elections.

After several failed attempts to secure the adoption of a family code in Niger, there is currently no legal text that specifically regulates repudiation. Although it is regarded as the prerogative of the husband to terminate the marriage unilaterally, and although it theoretically takes place outside the legal system, Nigerien judges have been intervening more and more regularly in the matter: They register it upon establishment of written proof and at the ex-spouse's request. While the judge cannot comment on the appropriateness or correctness of the husband's decision to end the marriage, he may however, at this point, add certain juridical consequences to the ruling or order he issues, so as to influence the effects of the repudiation. Thus, in his finding, the judge recognises the husband's wishes, very often stating that customary law and Islam authorise repudiation; he then decides on the future of the couple's children, either according to their request or through his own initiative, except when there is a friendly settlement between the parties,¹⁹⁰ and makes a decision re-

¹⁸⁵ 640 divorces in 2000, 1008 in 2005, 287 in 2011. See the statistical table in the long version of the study on divorce in Niger (YOURA, Boukar et al., 2014, cited above). See also: ‘La répudiation, une autre forme de violation des droits des femmes’, *Aïcha*, No 17, Mars-Avril 2010, p. 10.

¹⁸⁶ HASSANE B., cited above, p. 128.

¹⁸⁷ Article 79 subparagraph 1 of Law 2004-50.

¹⁸⁸ As an illustration, for the year 2010, there were, in Niamey, 398 repudiations recorded versus 99 divorces granted; for the same year, in the Tahoua region, there were 234 repudiations recorded versus 99 divorces granted. (Statistics Branch of the Ministry of Justice).

¹⁸⁹ From a Hadith in which Abu Dawud and Ibn Majah from Ibn Umar, record the words of the Prophet Muhammad, *Aïcha* magazine, cited above, p. 10.

¹⁹⁰ Art. 79 subparagraph 2 of Law 2004-50.

garding the personal assets of the ex-spouses, and whether or not they must observe the period of waiting.¹⁹¹ In fact, some repudiation rulings contain most of the information that a customary divorce judgement might contain, and it is often difficult to distinguish the two except by title.

Example of a repudiation statement:

*"In the presence of Amadou Djirmey Ibrahim, Judge of the Niamey Tribunal de Grande Instance Hors Classe, responsible for the Civil, Commercial, and Customary cases of Commune I; Appeared [X], born on [...] at [...], resident in the Recasement district of Niamey, who states that he has come before us to declare the repudiation of his wife, [Y], born on [...], resident in the Recasement quarter of Niamey, for incompatibility of temperament on this day, 03/03/2011; Whereas their union, established on [...] at [...], has produced three (3) children [...], of whom the eldest [...], and second eldest (aged 15 years) reside with the mother, while the youngest (aged 9 years) lives with the father; Whereas this repudiation conforms with the wife's Hausa custom, and should be registered; On these grounds, we hereby: Record the repudiation of [Y]; Annul their marriage certificate No [...]; Grant custody of the second child to the mother and that of the youngest to the father; Establish the maintenance for the second child as 25,000F per month, exclusive of education, clothing, and health costs; Order the father to pay the aforementioned maintenance; Order the restitution of personal effects; State that [Y] must observe the customary waiting period of three (3) menstrual cycles before being able to enter a new union validly; From all of which, we draw up this statement for all legal purposes it may serve."*¹⁹²

While there is no legal obligation on the part of the husband to declare a repudiation before the court, there is on the other hand a legal obligation for the court to act upon it as required by the law once the repudiation has been declared. Thus, article 79 of Law 2004-50, July 22, 2004, establishing the organisation and competence of the courts in the republic of Niger, obliges any court approached by a husband who has repudiated his wife to rule, except if there is an friendly settlement between the parties, regarding the consequences of this repudiation that has been approved by a competent judge. Nevertheless, the question remains as to why a husband would have the repudiation authorised by a judge, since in general the result is that he must pay financial costs. But the courts can also be approached by the couple or by the repudiated woman on her own, in order to rule on custody of the children and their maintenance. Thus, what initially appeared to be a marginal initiative on the part of some judges¹⁹³ has ended up becoming more widespread. Provision of article 79 of the law cited above aims to provide a portion of judicial control over the harmful effects of repudiation on the rights of the children resulting from the marriage and those of their repudiated mother. This step has

¹⁹¹ See statement of repudiation ruling, February 7, 2008, of the Tahoua TGI; statement of repudiation ruling No 081/2012, May 31, 2012, of the Niamey Commune I court; repudiation certificate No 44 /11/JCV, September 27, 2012, of Niamey Commune V court.

¹⁹² Statement of repudiation ruling No 007/2011, March 3, 2011, of the Niamey Commune I court.

¹⁹³ Repudiation certificate No 66, July 16, 1992, of the Niamey Commune II Court and repudiation certificate No 279, December 26, 2001, of the Niamey Commune II Court. These are the oldest repudiation certificates collected during the gathering of court decisions in Niamey and the Tahoua region.

given the courts the right to monitor the way in which repudiation occurs. Moreover, failure on the part of a husband to follow the procedure for repudiation can lead the courts to grant damages to the woman following a repudiation considered to have been unfair.¹⁹⁴

There are two main categories of judicial decisions relating to repudiation: repudiation rulings (1) and orders establishing child custody and maintenance (2).

1.4.1. Repudiation rulings

The different kinds of repudiation ruling have almost the same content and effects; the difference in title is of almost no importance. The main pieces of information provided in these rulings are: the name of the court where the ruling was made; title of the ruling (statement of repudiation record, statement of repudiation, certificate of repudiation, repudiation record) together with a reference number; the date of the decision; the composition of the decision-making body (usually the judge assisted by his clerk), in the presence of customary assessors (this is rare), and a lawyer for the repudiator (also rare); the appearance of the husband before the judge; the conformity of the repudiation with the customary practice of the parties and/or Islam; and a statement that the judge grants the husband's request.

The Statement of Repudiation Ruling (*procès-verbal de constat de répudiation*) is generally drawn up, at the request of the spouse who has appeared in court, by the judge with a clerk's assistance. Occasionally, however, it is drawn up in the presence of two customary assessors.¹⁹⁵ The ruling resembles a genuine divorce ruling except there is no mention of the presence of the repudiated wife, in spite of the fact that certain elements of the ruling give the impression that she is sometimes present or represented: "We note the reimbursement of the sum of 15,000F by the woman to the husband"¹⁹⁶ or: "Whereas the parties have declared that the marriage was not consummated, there are grounds to exempt I. A. from the period of waiting".¹⁹⁷ The ruling contains a "whereas clause" which states that the repudiation conforms with the customary practice of the parties or that Islam and the customary practice of the parties gives the husband the right to repudiate his wife unilaterally. We may also note that, in general, the courts go beyond what is required of them by the provision of article 79 of Law 2004-50. The same can also be said of the observation, or lack of observation, of the period of waiting by the repudiated woman, and the health and clothing expenses owed by the father, who does not have custody of the children. Sometimes, the statement of repudiation ruling is drawn up with the assistance of a lawyer, the counsel for the "repudiator", and takes on very similar characteristics to a court judgement.

¹⁹⁴ See customary judgement No 15, September 14, 2010, of the Niamey Commune I Court. In this particular case, the husband first vacated the conjugal home before declaring the repudiation by a telephone message.

¹⁹⁵ Statement of repudiation ruling No16/TI/1/2011 of the Illéla TI.

¹⁹⁶ Statement of repudiation ruling, February 7, 2008, of the Tahoua TGI.

¹⁹⁷ Statement of repudiation ruling No 24/TI/ABK, August 5, 2010, of the Abalak TI.

The practice of drawing up a *repudiation certificate* (*certificat de répudiation*) is not a consequence of the application of Law 2004-50, since there are repudiation certificates that predate it.¹⁹⁸ This suggests that the insertion of the provision of article 79 in Law 2004-50 was inspired by the initiative taken by the courts. The certificate of repudiation is generally drawn up, in the absence of assessors, by the judge with his clerk's assistance at the request of the "repudiator" or his representative. Occasionally the repudiation certificate is established in the presence of the two assessors representing the custom of the parties, which causes one to wonder whether it is really a repudiation that is taking place, especially if the ruling mentions certain transactions between the two ex-spouses.¹⁹⁹

The repudiation certificate may contain statements on the custody of the children and their maintenance or be issued along with a court order regarding custody and maintenance. Sometimes, the certificate specifies that the decision regarding the custody of the children and their maintenance is postponed, which implies that there should be a further social investigation with the goal of determining who should be given custody in the child's best interest.²⁰⁰ Just like the statement of repudiation record, the certificate of repudiation may contain statements regarding health, education or clothing expenses in addition to the maintenance to be paid by the father when he does not win custody of the children. One peculiarity of the certificate of repudiation is that the judge often applies customary rules with regard to custody and maintenance of the children without the presence of the customary assessors who are supposedly experts on these rules. This is revealed, for example, by the way in which custody is determined by whether or not a child has reached the age of seven.

The repudiation certificate may also include a transaction relating to the dowry and personal effects of the wife. There are numerous examples of this. A repudiation certificate contains a *nota bene* which states "The two parties agree the following: M. M. will keep the effects of Z. S. located at his residence in place of her dowry of 50,000F."²⁰¹ Other certificates mention the refunding of the dowry by the woman.²⁰² The certificate may also contain a transaction relating to the reimbursement by the woman of the expenses paid by the husband at the time of marriage, in exchange for repudiation.²⁰³ This is rather odd in the context of repudiations where, generally speaking, there is no repayment of the dowry by the woman. While article 79 relates to the devolution of common assets, it seems unlikely that the dowry should be considered a common asset. This gives one cause to wonder, in some cases, about the real nature of these "repudiation

¹⁹⁸ See, for example, repudiation certificate No 66 from the office of the judge for Niamey Commune II, dated July 16, 1992; repudiation certificate No 279, December 26, 2001 from the aforementioned Niamey Commune II judge.

¹⁹⁹ Repudiation certificate No 006/012, from the Keita TI, May 25, 2012.

²⁰⁰ Repudiation certificate No 17, January 30, 2012, from the Niamey Commune II (judge's chambers).

²⁰¹ Repudiation certificate No 46/12, July 26, 2012, from the Niamey Commune II (judge's chambers).

²⁰² Repudiation certificate No 25/2011, May 25, 2011, from the Niamey Commune IV court: "We note the reimbursement of the dowry by Mrs M. M. Y. on the 30.12.2010; we note that M. D. recovered his money in the ledger (*cahier de décharge*) on the 18.04.2011". See also repudiation certificate No 030/2012, April 10, 2012, from the Niamey Commune IV court.

²⁰³ Repudiation certificate No 006/012, May 25, 2012, from the Keita TI: "We authorise the decision of H. I. to repudiate his wife S. L. A. in exchange for the payment by the latter of the sum of 50,000F, representing the money transferred at the beginning of the marriage in question".

certificates". Occasionally, the husband may even appeal the repudiation certificate.²⁰⁴

Repudiation rulings (*constat de répudiation*) are drawn up in the same way as repudiation certificates, by the judge with his clerk's assistance, without any assessors present. They entail the annulment of the marriage certificate, and the recording of whether any children resulted from the marriage, without there being any information regarding the custody or maintenance of these children. This aspect suggests that these issues are to be settled by a separate ruling, such as a custody and maintenance order issued by the same court.²⁰⁵

The repudiation statement (*procès-verbal de répudiation*) is drawn up by the judge with a clerk's assistance in the same way as a repudiation ruling. It contains a record of the repudiation, as well as a statement on the granting of custody of the children resulting from the marriage. The repudiation ruling and the repudiation statement are striking in their brevity and include little information.²⁰⁶

1.4.2. Child custody and maintenance order

This court decision on the consequences of repudiation generally deals with the following areas: recording the termination of marriage between the spouses; annulling the marriage certificate if one exists; determining the custody of the children and ordering the father to pay maintenance if he does not obtain custody; ordering the father to pay school, health and clothing fees²⁰⁷ (without evaluation of these expenses as is the case for the maintenance); determining the rules regarding rights of access and lodging of the children; requiring the woman to observe the period of waiting or exempting her from it.²⁰⁸ According to the provision of article 79 of Law 2004-50, this order is provisionally enforceable and subject to ordinary means of appeal.

The child custody and maintenance order is issued following a repudiation ruling. When there is no friendly or valid agreement between the parties on child custody and maintenance, the order is issued after the matter has been taken to court by one of the parties,²⁰⁹ or by both the parties by mutual agreement, or through the court's own initiative if necessary.²¹⁰ In practice,

²⁰⁴ Customary judgement No 10, April 11, 2008, of the Niamey TGIHC. In this particular case, the husband claimed firstly that he was not heard by the judge who drew up the certificate of repudiation, and secondly that the certificate was drawn up without a clerk present. As for the wife, she claimed that it was the husband who had "asked the judge to grant him the divorce" during the attempted conciliation of the parties. The appeal judge declared himself incompetent to rule on a repudiation-related appeal and referred the parties and case to the civil court, on the basis of article 63 of Law 2004-50.

²⁰⁵ See the repudiation rulings of the court of Niamey's 3rd *arrondissement*, for example: repudiation ruling No 039/2012, April 25, 2012.

²⁰⁶ Statement of repudiation No 04/TI/ABK, April 8, 2011 of the Abalak TI.

²⁰⁷ Only school fees are mentioned by article 79 of the law 2004-50.

²⁰⁸ Generally speaking, all repudiation decisions include such a statement. It seems that the courts extend the case law established for divorce to cases of repudiation; the period of waiting is not actually listed as one of the issues upon which the court is required to rule in accordance with article 79 of Law 2004-50.

²⁰⁹ TI in the Tahoua region and Niamey Commune court.

it is generally the repudiated woman who applies to the court regarding child custody and maintenance in these repudiation cases. This is why the order is often found attached to the repudiation ruling and bearing the same date. The order can also be used to approve an agreement between the parties regarding child custody and maintenance.²¹¹ It contains information on which party is to be given custody as well as the maintenance sum and any securities for its payment.²¹² We may note the practice of a judge in Niamey's 5th *arrondissement*, who systematically attaches a child custody and maintenance order to the certificate of repudiation whenever there are children resulting from the dissolved marriage.²¹³

2. ACCESS TO DIVORCE

The plurality of types of divorce in Niger has consequences for the *de facto* and *de jure* status of men and women concerning the initiation of divorce and, more generally, access to divorce.

Men can repudiate their wives at their discretion, usually without even adhering to the conditions prescribed by customary law or religion.²¹⁴ Only men who married under the Civil Code do not have this option and are obliged to go to a judge in order to have their marriage dissolved. On the other hand, women require the intervention of traditional, religious or judicial authorities, whatever the type of divorce they are seeking. This recourse can in itself be an obstacle to divorce when one considers that the traditional and religious authorities are characteristically made up entirely by men. Whether women are able to overcome this initial obstacle depends, among other things, on their age, environment, level of education, experience and personality.

If they take the matter to court, Nigerien women, who live mainly in rural areas, must face the costs of getting to and staying in the place where the court is established.²¹⁵ A map of the judiciary in Niger reveals weak national coverage by the public justice system.²¹⁶ The number of judges relative to the

²¹⁰ Art. 79 of law 2004-50.

²¹¹ Child custody and maintenance order from the president of the Abalak court, January 11, 2012.

²¹² Orders issued by the judge of Niamey's 5th *arrondissement* and order from the president of the Abalak court, bearing the following note: "We state that in the event of difficulties, the matter shall be referred to us".

²¹³ For example: Certificate No 44/11/JCV, September 27, 2011, accompanied by child custody and maintenance order No 043, dated same.

²¹⁴ See Acts of the Colloquium entitled "Quel droit de la famille pour le Niger?" and Report from the Conference Group held on December 22, 2012 at ENAM (*Ecole Nationale d'Administration et de Magistrature*) by Mrs Diallo Achibi MAHADI and Mr Mohammed Taha MAYAKI on the topic "Répudiation au Niger: Eléments d'une enquête dans la ville de Niamey".

²¹⁵ The Nigerien legal map shows that there is a pressing need to bring justice closer to those who deserve it; this is additionally one of the recommendations made at the general assembly of the judiciary held in Niamey, 26 to 30 November 2012: "Revision of the Nigerien legal map in order to bring justice closer to those who deserve it"; "Bringing justice closer to those who deserve it through the creation in the medium term of courts in the new departments and in the long term in the major towns of communes".

total population also remains insufficient.²¹⁷ These factors explain the slow and cumbersome nature of the legal process, which contributes to the general impression of an inefficient judicial system.²¹⁸ It should be added that the assistance of counsel is impossible in the vast majority of cases because lawyers are rarely based outside the capital. Finally, women who do manage to access a judge are in some cases told that the divorce will only take effect once the woman has paid (reimbursed) her dowry.²¹⁹ If she does not have the means to fulfil this obligation, she cannot divorce.²²⁰

While traditional leaders and religious authorities compensate in practice for the absence or inaccessibility of courts in their territorial entities, their intervention is nevertheless slightly worrying. Their role is effectively to apply customary law and religious precepts that are not always compatible with women's rights as enshrined in Nigerien positive law.

Considering the above, we can thus state that there is, in Niger, a lack of equality between men and women regarding the right of access to divorce. Men may easily untangle or free themselves from undesired marriages whereas for women, especially those in rural areas, this entails an uphill battle which may end with them simply giving up.

3. GROUNDS FOR DIVORCE

The grounds for divorce are established by the provisions of the Civil Code (4.1) or are found in case-law (4.2). Further, informal divorce practices also entail the existence of other grounds for divorce (4.3). We will briefly consider them here.

3.1. Legal grounds for divorce

Articles 229 to 232 of the Civil Code enumerate several grounds for divorce. There is a distinction between peremptory and non-peremptory grounds.

Peremptory grounds for divorce are those that, once cited to support a divorce request and then

²¹⁶ For women in rural areas, the local court for divorce is the *tribunal d'instance* (TI) and the appellate court is the *tribunal de grande instance* (TGI). According to the current legal map of Niger, there is a TI for each departmental capital and a TGI for each regional capital, in addition to those in Konni and Arlit. This is in accordance with Law 2004-50 establishing the organisation and competence of the courts in the Republic of Niger.

²¹⁷ According to a statement by the Secretary General of the Independent Union of Judges in Niger, SAMAN (*Syndicat Autonome des Magistrats du Niger*), during a debate televised on Dounia, aired on Sunday November 24 2013, there are currently only 370 judges for the entire country, whereas the population of Niger is estimated at over 16 million. The Bar and the ANLC (*Association Nigérienne de Lutte contre la Corruption*) were other participants in this debate.

²¹⁸ The *Etats-Généraux* on Justice recommended, in the interest of better access to justice, the establishing of legal social services, the use before the courts of national languages rather than the official language, the regular translation of legal texts into national languages, in both paper-based and audio formats, the designation of female assessors within the courts to deal with the problems of women who are victims, the generalisation of the legal assistance system for vulnerable people.

²¹⁹ Customary judgement No 09/12, 2 March 2012, Niamey TGIHC.

²²⁰ Concerning the reimbursement of the dowry upon divorce, see the recommendations of the Committee for the Elimination of Discrimination Against Women in the introduction to this study.

proven, are subject neither to interpretation nor assessment by the judge. This applies firstly to adultery on the part of one of the spouses, which simultaneously constitutes grounds for divorce²²¹ and an infringement of criminal law.²²² It consists in having sexual relations with someone other than the spouse during marriage. This constitutes a serious violation of one of the duties of marriage: the duty of fidelity. However, in order to become valid grounds for divorce, the adultery must be proven. In practice, the proving of adultery remains very difficult, except for *in flagrante* cases. In addition, there is the case where a spouse is sentenced to what is termed a '*peine afflictive et infamante*'. This is a sentence pronounced in order to punish the commission of a serious crime, and involves the loss of liberty and certain civic rights (the right to vote, for example). With the convicted spouse having breached his or her duty to act honourably, the other spouse should not be obliged to share their partner's disgrace.

Non-peremptory grounds for divorce include excesses, abuse and serious insults. This means one spouse inflicting physical or emotional damage on the other. However, in order to constitute grounds for divorce, the action must meet three conditions. Firstly, it must constitute a violation of the duties and obligations of marriage. Secondly, this violation must be serious or frequent. Lastly, it must render continued marriage intolerable. If all these conditions are met, the judge will declare the dissolution of the marriage.²²³

3.2. Grounds contained in the case-law

Analysis of the collected court decisions revealed a wide range of grounds for divorce in the case-law. While some relate to civil legal grounds, the majority are based on customary law or are created by judges.

The desertion of the marital home by the woman is a violation of the duty of cohabitation

²²¹ Art. 229 of the Civil Code: "The husband may request divorce on the grounds of his wife committing adultery"; art. 230 of the same Code: "The wife may request divorce on the grounds of her husband committing adultery".

²²² Articles 286, 287 and 289 of the Penal code state respectively: "Adultery on the part of a married woman is the fact of this person having sexual relations with a man other than her husband", "Adultery on the part of a married man is the fact of this person having sexual relations with a woman other than his wife or wives", "Any person found guilty of adultery will be sentenced to an imprisonment of fifteen days to three months and a fine of 10,000 to 100,000 francs or to one of these two penalties only".

²²³ Ruling No 216, July 7, 2008, Civil Chamber of the Niamey Court of Appeal: "Whereas it is established from proceedings and the evidence on the record, in particular the properly verified testimony consisting of the statements of clearly identified persons regarding facts to which they were eyewitnesses and on which subject Z.I. answered in court, that this woman had in fact made abusive remarks concerning her husband, calling him a 'bastard', 'idiot', and 'worst enemy' and that she had inflicted physical violence on him, in particular threatening to kill him and pursuing him into the courtyard with a cleaver; Whereas a bailiff's report also mentions violent scenes and insults by Z.I.; Whereas this behaviour, conducted, according to testimony from a number of sources, in the presence of children and visitors, on the part of Z.I., who has not produced any denial other than her own that would counter the testimony submitted to proceedings, and noting the inadequacy for this purpose of a letter addressed to her husband by a notary who was fraudulently persuaded to do so by means of a donation, renders the continuation of married life intolerable; [...] Whereas there are therefore grounds to grant the divorce due to the fault of the wife".

required by marriage. A spouse's desertion of the marital home without valid reason gives the other spouse the right to request the dissolution of the marriage. Thus the court notes: "Whereas [...] he claims to have undertaken all possible efforts to reintegrate R.A into the marital home but she has categorically declined his proposals [...]".²²⁴ In a similar case, divorce is pronounced "due to the fault of the wife who refuses, for no clear reason, to return to the family home".²²⁵

Prolonged absence of the husband is a very common occurrence in some regions of Niger affected by rural depopulation. Thus the Tahoua Regional Court granted a divorce on the grounds of the absence of the husband for more than five years.²²⁶

Physical and/or verbal domestic abuse of the wife by the husband is common. It is addressed in the case-law in the following terms: "Whereas according to the Hausa customary law applicable in this case, physical abuse represents legitimate grounds for divorce; Whereas it is established and recognised by T.D. that he inflicted blows on and caused injury to Z.M. who was then his wife; whereas this fact was recorded by a medical certificate issued 19/12/2006 on behalf of the respondent by a doctor; whereas there are therefore grounds to dissolve the marriage of T.D. and Z.M. due to the fault of the husband".²²⁷ The case-law shows that husbands can also be the victims of violence.²²⁸

There are no texts allowing for the **infertility** of one of the spouses as grounds for divorce. But some courts accept it as such.²²⁹ Issues of **sexuality** or sexual incompatibility may also constitute grounds for divorce. Occasionally, judges dissolve the marriage due to the fault of the woman when she refuses "sexual relations with her husband, who is seen as too demanding".²³⁰

²²⁴ Customary judgement No 06/2011, February 18, 2011, Niamey TGIHC.

²²⁵ Customary judgement No 02/12, February 2, 2012, Niamey TGIHC.

²²⁶ Judgement of April 27, 2004, Tahoua TR. According to the Tahoua regional development programme (1999-2001), 63.78% of the region's male population was migrating away from rural areas. This is no longer a phenomenon but rather an established habitual behaviour among the population. Men depart and leave women and children behind. Many do not return, or return after several years of absence.

²²⁷ Customary judgement No19, July 14, 2008, Niamey TGIHC; see also customary judgement No 006, February 20, 2009, Niamey TGIHC; customary judgement No 29, December 4, 2009, Niamey TGIHC; customary judgement No 30, December 11, 2009, Niamey TGIHC; customary judgement No 5, March 3, 2011.

²²⁸ Judgement No 216 of the Niamey Court of Appeal, cited above.

²²⁹ Customary judgement No 7, April 6, 2007, Niamey TGIHC: "Whereas in the Djerma custom, which is the custom of the parties, the infertility of a spouse is grounds for divorce [...] it is therefore necessary to dissolve the marriage of the spouses". See also: customary judgement No 65, August 13, 2004, Niamey TR: "Whereas in the Fula (Peul) custom, which is the custom of the parties, the infertility of a spouse is grounds for divorce; whereas in this case there is a strong likelihood that A.I is infertile (no child after three marriages of several years duration; Mrs F's ability to give birth during their *de facto* separation)".

²³⁰ Customary judgement No 09/12, March 2, 2012, Niamey TGIHC; similarly, see customary judgement No 103, November 28, 2008, Niamey Commune III Court; judgement No 26 of the roll, 29 May 2008, Bouza TI; judgement dated January 20, 2007, Tahoua TGI.

The courts also accept the husband's neglect of his wife as grounds for divorce.²³¹ There are also other grounds such as mutual incompatibility or the declining of love.²³²

3.3. Grounds raised in informal divorce

This includes the grounds upon which traditional and religious authorities dissolve marriage, in addition to the husband's discretionary ability to repudiate his wife. These grounds mostly include those already cited above within the legal and jurisprudential context, owing to the fact that judges apply both civil and customary law themselves. However, polygamy, disobedience and a lack of respect for the husband and consorts, the interference of the parents in the couple's home, and poverty have also been considered grounds for divorce.²³³ The above grounds may also be valid for and mentioned in repudiation rulings. "Mutual incompatibility" occupies prime position and even seems to act as a catch-all used to dissimulate the true reason for the dissolution of marriage. The real cause of the widespread practice of repudiation is rooted in the propensity of men to "get rid" of their wives without having to justify their decision and, very often, in violation of religious rules or simple common sense.

4. EFFECTS OF DIVORCE

Here we consider the consequences of the termination of marriage in terms of their effect on women's rights. It appears without doubt that women's rights are best protected through a legal procedure for the dissolution of marriage with the assistance of a lawyer. Let us recall here that traditional and religious authorities apply customary or religious rules that may infringe women's rights as enshrined in the constitution and international human rights instruments. These authorities are not legally competent to dissolve marriages, nor do they possess legal means that would enable them to enforce their decisions. With no legal framework for repudiation in the courts, this is the form of divorce that most compromises women's rights.

4.1. Violation of the principle of human equality in law and in dignity upon dissolution of marriage

The practice of repudiation constitutes an infringement of the principle of gender equality and entails the violation of other rights of women and children. According to the 2010 Con-

²³¹ Customary judgement No 17, June 5, 2009, Niamey TGIHC. "Whereas customary law states that discord, lack of understanding within the marriage, or neglect are legitimate grounds for divorce; whereas it emerges from oral proceedings that the departure of F.A. is linked to the inability of A.A., her husband, to cope with family duties". See also customary judgement No 17, June 15, 2007, Niamey TGIHC; judgement No 22, May 18, 2006, Tahoua Court; and judgement dated February 8 of the Tahoua TGI.

²³² Judgement No 26, May 29, 2009, Bouza TI; judgement No 04/91, Tahoua TR.

²³³ Report from the aforementioned Conference on Saturday December 22, 2012 and interviews with those concerned by divorce-related problems.

stitution, currently in force, no negative discrimination based on gender may take place in Niger, even where a particular customary practice allows it. The Constitution refers to international human rights instruments in its preamble either by quoting them, or by referring more generally to Niger's ratification of the texts.²³⁴ It also contains several provisions proclaiming the principle of universal equality before the law.²³⁵ Moreover, article 22 focuses on the elimination by the State of all forms of discrimination concerning women and young girls, on the development of public policies assuring their full development and their participation in national development, and on the State taking measures to combat violence inflicted on women and children. It should also be noted that article 21 states: "The State and public authorities are required to protect the physical, mental and emotional health of the family, particularly of the mother and of the child".

Equality between men and women in the area of divorce requires that neither of the two parties benefit from any privilege to the detriment of the other. Man and woman being two entities with the same rights and the same dignity, it is thus inadmissible, from a human rights perspective, to recognise moral or intellectual superiority of men over women. However, this is what appears to be consecrated by giving men the power to repudiate their wives. In this situation, he is the sole instigator and judge of the advisability of continuing or ending the marriage. This exorbitant power is seen as a counterpart to the husband's responsibility and duties towards his family, where the woman is theoretically not required to do anything. However, while most customary practices make the woman subject to "positive discrimination" by not obliging her to manage the economic and financial side of the home, this should not justify her being denied certain rights that are established for men. This form of "positive discrimination" through customary practice, does not benefit the woman in the same way as positive discrimination should do. Reasonable positive discrimination is based on the principle of non-discrimination and equality in rights and in dignity, and consequently gives the woman certain advantages to compensate for her vulnerable situation: for example, the right to maternity leave, the right to maternity benefits, and the right to allotted time in which to breastfeed her baby, as recognised by International Labour Organisation conventions.²³⁶

4.2. Infringement of the right of ownership²³⁷

In customary matters, the matrimonial property regime is one of separation of assets. Thus, the initial assets of the husband and the wife generally remain distinct. This is not the case with assets acquired or produced during the marriage: in the event of a repudiation that is not legally recorded, these can in fact be lost by the woman. Another risk for the repudiated woman is related to the fact that she is unable to recover debts that her ex-husband may owe her. With the aforementioned rights being very often affected as a result of repudiation, the

²³⁴ See also the introductory chapter of this study.

²³⁵ Preamble, art. 8 and 10.

²³⁶ ILO, Convention No 183 of 2000 on maternity protection.

²³⁷ The right of ownership is guaranteed to all by article 28 of the November 25 2010 Constitution.

legislation was formed with the intention of protecting women, by obliging the court registering the repudiation to rule on the devolution of common assets.²³⁸ When the judge records the repudiation, he also rules on existing debts between the ex-spouses.

4.3. Attacks on moral integrity and the vulnerable situation of women

Repudiation can also be a time of psychological trauma for the woman, who may feel she has been arbitrarily dismissed, or more prosaically, “ousted from the home”, often while subject to antagonising or humiliating comments. The trauma can also be linked to the fact that, in an informal repudiation, the woman may be separated from her children on the same occasion. The dominant customary rule is that “children belong to the father” and can be taken away from their mother, even before the age of seven, which is the age from which it is commonly recognised that a father may claim “his” child. There is no mention of rights of access or of lodging the children in a way that is advantageous to the mother – this depends on the good-will of the husband or his relatives. In other cases, the wife may end up together with her children in a vulnerable position, the husband having refused to take any responsibility for them. There is no family benefits system in place to support such households. In practical terms, the situation is even more serious when the wife’s relatives are, for some reason, unable to help her. This is a frequent phenomenon in Niger.

CONCLUSION

The Nigerien population is governed by nominally diverse customary laws regarding the dissolution of marriage. The content of these customary laws is in reality very similar, since they have all been strongly influenced by Islamic precepts.

The practice of repudiation implies that there is no equality between men and women when it comes to the dissolution of marriage, since it is the husband alone who possesses this customary power to dissolve a marriage unilaterally. In Niger, the judges seized to record repudiation are barely able to comment on its constitutionality, nor its conformity with the international agreements duly ratified by the State, much less its legality; they are faced with a *fait accompli* which, although clearly in breach of the principle of universal equality on which the Nigerien state is founded, nonetheless does not constitute a punishable criminal offence. The judges are simply required to rule on the consequences of this act rather than to annul or prevent it.

Certainly, the intervention of the courts in the consequences of repudiation enables a better protection of women’s and children’s rights. In fact, a legally recorded repudiation gives almost the same degree of protection of women’s and children’s rights as a legal customary divorce.

²³⁸ Art. 79 of Law 2004-50 cited above.

However, the majority of repudiation cases, in particular due to the difficulty of accessing the justice service, are not recorded by the court. Indeed the husband is not obliged to declare repudiation before the court, and it is a fair assessment that the number of declared cases is insignificant compared to undeclared ones. Further, there is no clear reason why the husband would choose to engage in such proceedings.

While rulings that involve children often contain reference to the Convention on the Rights of the Child (CRC), there is no application of any international text relating to women's rights by domestic judges. However, the fact that Niger has issued reservations concerning certain provisions of CEDAW and not ratified the Maputo Protocol on the rights of women in Africa does not exempt it from adhering to the principle of equality between men and women in accordance with international human rights law and its own constitution.

The challenge for the State of Niger remains whether it can succeed in banning the practice of repudiation by legislative means or, at the very least, regulating it in order to give full effect to the principle of equality, which is outlined in both the 2010 Constitution and in various international human rights instruments that the country has duly ratified.

It may be argued that an important pragmatic step has already been taken, through the linking of informal repudiation with divorce law, giving the courts the right to monitor how this repudiation takes place and thus to secure a better protection of women's rights. Ultimately, it is clear that better knowledge by women of their rights, and a commitment to having them respected, are the best means of ensuring such rights are protected, even if it implies "forcing the hands" of the courts and political authorities.²³⁹

²³⁹ See also conclusions and proposals below.

PART 3: SENEGAL

This part is based on the study on divorce in Senegal produced by Mr Papa Talla FALL, Senior Lecturer in Law at the Cheikh Anta Diop University in Dakar (CADU), with the collaboration of Mrs Nogaye NDOUR, Assistant at the Faculty of Legal and Political Sciences at CADU and the participation of: Dr Fatou Kiné CAMARA, Lecturer in Law at CADU. The study also benefited from the participation of doctoral students at the CADU Law Faculty: Mrs Arame NDIAYE, Mrs Amayel DIOP, Mrs Diarra NDIAYE, Mr Baba FALL, Mr Ndongo SARR, Mr Mamadou SARR, Mr Ismaël SANE, Mr Moussa MONTERO, Mr Serigne Mansour WADE, Mr Bacary FALL, Mr Bassirou MBALLO and Mr Thiécoumba DIOUF (documentalist).²⁴⁰

The Senegalese Family Code regulates divorce: whatever the nature of the marriage, divorce necessarily takes place within the legal system.²⁴¹ Even marriages not registered civilly (recognised by law, which controls their effects) cannot be legally dissolved outside the court. Thus judges are required either to recognise divorce following the agreement of the spouses to end their union, in the case of divorce by mutual consent, or to grant it following a spouse's request, in the case of contentious divorce. For this reason, judges play a fundamental role in contentious divorce. They must ensure the equitable application of the provisions relating to divorce.

This study on the situation in Senegal seeks mainly to establish whether divorce as practiced in the Senegalese courts enables equity in the relationship between ex-spouses. Thus we must consider the implementation of the principles of equality and non-discrimination against women, enshrined in the Constitution and in the human rights conventions and agreements signed by Senegal.²⁴² By signing these instruments, Senegal has also committed itself to taking all necessary measures to ensure the protection, respect and effectiveness of the rights accorded to women. Further, the January 7 2001 Constitution recalls, in its preamble, the nation's commitment to the principles of equality and non-discrimination through the "rejection and elimination of all forms of injustice, inequality and discrimination". The first article of the Constitution ensures the equality of all citizens, regardless of origin, race, gender or religion. These rights are consolidated for women in article 7 subparagraph 4, which states that "All human beings are equal before the law. Men and women shall be equal in law".

The situation is in practice very complex. Certain sociological studies show that the issue of women's economic and social vulnerability is an important factor in the practice of divorce.²⁴³

²⁴⁰ See FALL, Papa Talla et al: *Projet de recherche sur la rupture du lien matrimonial en Afrique de l'Ouest: Etude sur le Sénégal*. Cheik Anta Diop University Institute for Human Rights and Peace and Danish Institute for Human Rights, 2014.

²⁴¹ Article 157 of the Family Code.

²⁴² See introductory chapter and examination of the international and regional human rights framework applicable to matters of family, marriage and divorce.

²⁴³ DIAL F. B., *Mariage et divorce à Dakar. Itinéraires féminins*. Paris: Karthala - CREPOS, 2008, 200p.

Professor Ismaila Madior FALL explains that: “The assertion of equality between men and women, between all Senegalese citizens, is of a highly symbolic nature in a social context defined by chiefdoms, castes and other forms of social inequality”.²⁴⁴ In practice, despite the binding nature of the Family Code’s provisions on divorce, many marriages are dissolved outside of the courts. We must therefore seek to understand how extrajudicial dissolution of marriage is potentially covered by family law.

In terms of methodology, this study is primarily based on a review of the legal texts relating to divorce,²⁴⁵ study of the appropriate legal doctrine,²⁴⁶ analysis of the 593 court rulings collected as part of the project, social science literature²⁴⁷ as well as a press file documenting the way in which the national media has treated information on divorce.²⁴⁸ All this data was then organised for the purpose of discussing whether or not divorce in Senegal can be said to be equitable.

Due to the lack of available case-law in Senegal (with the exception of the rare publication of records of Supreme Court judgements), the rulings were all gathered directly from the various courts. Research therefore took place on the level of the offices of the competent courts for divorce cases. These include both departmental and regional courts.²⁴⁹ Six regions²⁵⁰ were selected on the basis of several criteria: demographic weight, the volume of divorce litigation, the existence of religious households where traditional law continues to assert its presence, the level of urbanisation, and the poverty levels of those who have left the countryside for cities that are unable to accommodate them. On top of these criteria, we also had to consider geographical position, the size and ethnic make-up of the population, the volume of litigation, and the presence or influence of religious associations.

A visit to Senegal’s National Centre of Legal Archives (*Centre National des Archives Judiciaires*, CNAJ) in Louga allowed access to archived divorce cases, enabling us to identify the real causes of divorce,

²⁴⁴ FALL I. M., *Evolution constitutionnelle du Sénégal – De la veille de l’Indépendance aux élections de 2007*. Dakar: Collection du CREDILA, XXII, CREDILA/CREPOS 2007, p. 19.

²⁴⁵ The Senegalese Family Code is accessible in French on the website of the Senegalese Ministry of Justice: <http://www.justice.gouv.sn/droitp/CODE%20FAMILLE.PDF>.

²⁴⁶ See consolidated bibliography at the end of this study.

²⁴⁷ *Idem*.

²⁴⁸ Press file assembled by Thiécoumba DIOUF from the documentation department of the National Assembly.

²⁴⁹ Law 84-19, February 2, 1984 (JORS, March 3, 1984, p. 124) created the departmental courts (*tribunaux départementaux*, TD) as a replacement for the courts known as *justices de paix* in each department. Because of the disparities noted between different courts – relative to the volume of litigation – there is a reform plan which seeks to replace these departmental courts, based on administrative divisions, with *tribunaux d’instance* (TI); the regional courts will in turn be replaced by *tribunaux de grande instance* (TGI). The Court of Cassation also plays a role, but its rulings are of an exceptional nature because appeals on point of law are very unusual in divorce cases.

²⁵⁰ Dakar, Thiès, Saint Louis, Diourbel, Kaolack and Louga. Because of its remoteness and for budgetary reasons, the south of the country could unfortunately not be included in the study; nor could eastern Senegal. The non-inclusion of the southern part of the country was highly criticised by some participants at the national workshop, for reasons linked to the strong concentration of Christian and animist populations but also to their cultural practices which ascribe different roles to women. It would therefore be useful to supplement this study with an analysis of divorce case-law for each jurisdiction in the region.

which are not necessarily obvious from court rulings. Access to these archives also allowed us to observe, in cases that ended with dismissal, the survival of customary practices relating to marriage and divorce. In addition to the rulings, documents relating to divorce were also found at the CNAJ. These include letters requesting the regularisation, registration or approval of divorces, divorce petitions, submissions made by the parties (or their representatives), social investigation reports or certified records of desertion of marital home and family abandonment.

This study presents successively a short typology of divorce in Senegal (1), an analysis of access to divorce (2), the grounds for divorce accepted in Senegalese courts (3), and an analysis of the property and non-property consequences of divorce (4).

1. TYPOLOGY OF MARRIAGE AND DIVORCE

A short typology of divorce is necessary to an understanding of the overlap between civil (and formal) divorce and customary (and informal) divorce. This typology is closely linked to an analysis and presentation of the various types of marriage – both formal and informal – which continue to coexist in Senegal.

1.1. A variety of marriages

Article 114 subparagraph 1 of the Family Code provides for two types of marriage: civil marriage, performed by the civil registrar, and customary marriage, which the civil registrar records.²⁵¹ Registered customary marriage allows the couple to respect both the demands of their custom and those of the law.²⁵²

Normally, a marriage where there has been neither ceremony nor registration is considered an irregular marriage due to failure to involve the civil registrar. However, on account of the low rate of civil marriage for citizens at the time, the 1972 legislation did not penalise such marriage by invalidating it. Thus, article 146 of the Family Code only penalises this kind of marriage by making it partially unenforceable: the marriage is valid in terms of the relations between the spouses and with regard to certain third parties. However, it is not valid in interactions with the State, public authorities and public or private institutions, particularly when

²⁵¹ Article 130 of the Family Code states: “On the date and at the time and place indicated on the standardised form, the Civil Registrar or his delegate, (...) conducts the formalities required to solemnise marriage, in the presence of two witnesses of major age for each spouse (...)”.

²⁵² According to article 114 of the Family Code, a customary marriage may only be registered “when the engaged spouses perform a marital ceremony commonly practised in Senegal”. In practice, “customary” marriage essentially refers to religious marriage. All the applicable marital customs listed in Decree 25-91, February 23, 1961, are Islamic, Christian or animist (for example: Catholic Noon, Islamised Wolof, Muslim Sarakole, animist Malinké).

seeking to claim family benefits.²⁵³ The law makes it possible for spouses to regularise such a marriage within six months of the customary ceremony through a late declaration to the civil registrar who would have recorded it²⁵⁴ or, failing this, through a judgement from the competent departmental court authorising the marriage so that it can be recorded in the civil register.²⁵⁵

In summary, there are three categories of marriage in Senegal: civil marriage, registered customary marriage, and marriage that is neither conducted nor recorded by the civil registrar.

1.2. Legal types of divorce

Divorce can be defined as the dissolution of marriage during the spouses' lifetime. It results in a definitive termination of the marital bond, with the spouses each regaining their freedom. This separation takes place within a framework determined by society and the law. Before the introduction of the Family Code into Senegal, many marriages were subject to customary laws and marriage was very easily dissolved. The husband was both judge and party in the divorce. He was free to dissolve the marriage.²⁵⁶ Whatever the type of marriage, divorce has been required to take place within a legal framework since the entry into force of the Family Code on January 1, 1973. Article 830 of that code repeals all general and local customary laws, except for those relating to the formalities that traditionally established marriages.²⁵⁷

Article 157 of the Family Code allows for two types of divorce. On one hand, there is divorce by mutual consent, where the spouses agree not only on the dissolution of the marriage but also on its property consequences and other effects.²⁵⁸ On the other hand, there is contentious divorce, which may be granted at the request of one of the spouses if they invoke acceptable legal grounds.²⁵⁹ These grounds are laid out in article 166 of the Family Code.²⁶⁰ In practice, it should however be observed that in spite of the establishing of legal divorce, repudiation remains a reality in Senegalese society.²⁶¹

²⁵³ Art. 146 of the Family Code, titled "Penalty for failure to register marriage". In addition to this unenforceability, failure to register a marriage without legitimate reason can mean the spouses incur a fine of 3000 to 18,000 Francs (end of art. 146).

²⁵⁴ Art. 147 of the Family Code.

²⁵⁵ Art. 87 of the Family Code: "When a birth, death or marriage certificate has not been drawn up or the request for one is made belatedly, the *juge de paix* [currently, the judge of the departmental court] under whose jurisdiction the marriage should have been established shall be able to authorise, through a ruling, the recording of the marriage by the civil registrar (...)".

²⁵⁶ See 1.3. below.

²⁵⁷ In combination, these two texts meant that repudiation became prohibited after the Family Code's entry into force in January 1973.

²⁵⁸ Concerning the legal regime governing divorce by mutual consent, see articles 158 to 164 of the Family Code.

²⁵⁹ See articles 165 to 180 of the Family Code.

²⁶⁰ See section 3 below on the grounds for divorce.

²⁶¹ DIAL F. B., *Mariage et divorce à Dakar. Itinéraires féminins*. Paris: Karthala - CREPOS, 2008.

1.3. Repudiation

Customary divorce (*tass* in Wolof) may be defined as the dissolution of marriage according to customary rules. In practice, this means a repudiation according to Islamic rules, which consists in the man sending his wife back to her parents' home. Unlike customary marriage, which is recognised through the procedures of registration or the authorisation of a late registration, customary divorce/repudiation does not receive any legal recognition. Repudiation can in certain cases occur at the woman's request, but the decision to divorce is always the husband's: either he complies with the woman's request and repudiates her, or he does not. If he does, the authority that allowed the conducting or recognition of the marriage may carry out the civil dissolution of the union.

In practice, repudiation is rigorously governed by customary norms. Thus, for a repudiation to be valid, it must be explicitly declared by the husband. The spouses are also required to continue cohabiting in the marital home during the period of waiting.²⁶² Moreover, any resumption of physical intimacy during this period causes the dissolution of the marriage to be repealed.²⁶³ When repudiation is caused by the man, the wife is customarily given the right to take with her anything from the conjugal bedroom as well as her kitchen utensils; she is given custody of young children as a rule, and generally allowed full custody of her daughters, whose education is considered a mother's prerogative. On the other hand, when repudiation is the result of an explicit request by the wife, the man may demand the restitution of the dowry and any gifts offered when the marriage was formed. This demand for restitution of the dowry has, like customary divorce, been strongly opposed by Senegalese legislators, who attempted to neutralise its negative effects through the 1967 law concerning expenses related to family ceremonies.²⁶⁴ Article 6 of this law states that "expenses related to marriage, associated ceremonies and expenditure for gifts (...) and celebrations cannot exceed 15,000 FCFA". Whatever the ruling, the judge applies this law rigorously whenever the man makes a request for restitution of a sum exceeding the legal amount.²⁶⁵

In preparatory studies prior to the adoption of the Family Code in 1973, it was observed that marriage was too easy to dissolve under customary law.²⁶⁶ The Options for the Family Code Committee (a committee made up of experts, clerics and traditional leaders, whose role was to consider possible provisions in the code) made repeated mention of this issue in the course

²⁶² At this stage, repudiation is more similar to legal separation than to actual divorce.

²⁶³ There is a *Ceddo* custom whereby if the wife is pregnant, the validity of the repudiation depends on the gender of the child to be born: if it is a boy, the marriage is assured; if it is a girl, separation is permitted (observation by author).

²⁶⁴ Law 67-04, February 24, 1967. Concerning the reimbursement of the dowry upon divorce, see the recommendations of the Committee for the Elimination of Discrimination Against Women in the introduction to this study.

²⁶⁵ *Pikine* TD No 325, April 24, 2006: "In offering his wife the sum of 1,150,000 FCFA (...), Mr Diop deliberately violated the law (...) Consequently, his claim for its reimbursement is ill-founded".

²⁶⁶ DECOTTIGNIES R., *Requiem pour la famille africaine*. Dakar: Pedone, 1965, p. 278.

of its work. The conclusion it came to was that it was necessary to abolish repudiation as a means of dissolving marriage. Thus today, repudiation is prohibited by law and penalised by the courts. Through the prohibition of repudiation, and more generally through organising the civil procedure for divorce, the 1973 Code was thus intended to give marriage more stability.²⁶⁷ The prohibition of repudiation was also a way of refusing to recognise in law this traditional expression of excessive and discretionary power of husbands over their wives.

In practice, repudiation nevertheless remains a reality in Senegal: it appears explicitly in more than one hundred divorce decisions examined for this research project.²⁶⁸ These judgements show, for example, that repudiation may occur simply as a result of an argument between the spouses.²⁶⁹ They also show that repudiation can become a formidable weapon when spouses who have had a customary divorce go to court in order to comply with the law. In theory, in the event of repudiation of the woman by the man, the marriage is dissolved due to the fault of the husband on the grounds of serious insult. In practice, however, situations can be rather complex: for example, it is not rare for men to retract his repudiation and thus oppose the traditional remarriage of his wife, or even to prosecute her for bigamy despite having publicly repudiated her.²⁷⁰ When it is the wife who instigates the repudiation, she may end up being prosecuted for deserting the marital home by her husband who, in order to get revenge, retracts the repudiation he had granted her.

2. ACCESS TO DIVORCE

Under article 157 of the Family Code, divorce necessarily involves the intervention of a judge, in this case the departmental court judge.²⁷¹ The Family Code does not discriminate regarding access to divorce proceedings. Thus, although under article 152 of the Code the husband is considered dominant during marriage as head of the household, the law provides for equal access of the spouses to divorce. There are two kinds of divorce provided for by the Family Code: divorce by mutual consent and contentious divorce.

2.1. Divorce by mutual consent

Divorce by mutual consent means there is a joint request for divorce. The two spouses apply to the court through this joint request. If one of the spouses does not agree, no divorce by mutual consent is possible.

²⁶⁷ FALL P. T., 'Réflexions critiques sur le divorce en droit sénégalais', *Revue Droit Sénégalais* n° 12, Toulouse 1 (à paraître).

²⁶⁸ From 593 rulings that were consulted, processed and analysed for this project.

²⁶⁹ For example, an argument about "leaving the house keys with the shopkeeper"; see Dakar TD No 2396, November 3, 2009.

²⁷⁰ Pikine TD No 408, August 18, 2008.

²⁷¹ Departmental courts (*tribunaux départementaux*, TD) are a local type of court, instituted by Law 84-19 of February 2, 1984 establishing Senegal's legal organisation. These are the competent courts for divorce cases. Their rulings can be appealed before the regional court of the jurisdiction in which they are located. The departmental and regional courts essentially correspond to the administrative divisions of the country.

For some authors, consent is never equally mutual between the two spouses.²⁷² An examination of Senegalese legal archives – at the National Centre of Legal Archives²⁷³ – also enabled us to observe that many of the divorce requests that had been removed from the court rolls were requests that were allegedly for divorce by mutual consent, but were effectively intended to provide legal validation for a repudiation of the wife by the husband. In one case rejected by the Louga departmental court, the spouses had applied to the court to dissolve their marriage by mutual consent.²⁷⁴ In their joint request, they stated that they had conducted a customary divorce within the family and sought to regularise their action with the court. In fact, customary divorce had taken place after the woman had twice committed adultery, with the result that she had given birth to two children out of wedlock with different fathers. In reality in this case, the divorce was imposed by one of the spouses on the other. Moreover, in the majority of these falsely consensual divorces, the parties do say themselves that the procedure is a request for “regularisation of divorce”, or for “registration of divorce”, etc.

It should be noted that of more than five hundred proceedings brought before departmental courts across the country (in particular Dakar, Rufisque, Pikine, Thiès, Tivaouane, Diourbel, Louga and Saint Louis), divorce by mutual consent represents barely 10% of the total.²⁷⁵ In the vast majority of cases, divorce is contentious.

2.2. Contentious divorce

For contentious divorce, either spouse may apply to the court in order to obtain a declaration of divorce. However, many observers believe that the Family Code has enabled greater justice for women in this matter. Men are no longer regarded as the main players in determining the ultimate outcome of a marriage: considering the customary laws that the code has repealed, a giant step has been taken in terms of the protection of women's rights. Others have even gone as far as labelling the Family Code a “women's code”,²⁷⁶ although other authors remain critical.²⁷⁷ It has been observed that there remains a certain reluctance to approach the courts: in a society still rooted in traditional values, state justice continues to receive a negative press, especially when it comes to family cases.²⁷⁸ A significant part of the population still finds it difficult to accept the idea of a wife ‘dragging’ her husband before the court in order to divorce. As the proverb goes, “you don't wash your dirty linen in public”. Women therefore have difficulty accessing the courts because of social and family pressure, even in cases of abuse and marital violence.²⁷⁹

²⁷² For example, a husband whose wife has committed adultery often ends up imposing a divorce by mutual consent by threatening a divorce for adultery that would cast shame on the wife. From this point of view, mutual consent is a fiction. See also: MAZEAUD H. ‘Le divorce par consentement forcé’, *D.* 1963, Chr. 141.

²⁷³ Visit to the Senegal National Centre of Legal Archives in Louga, November 2012.

²⁷⁴ Contents of a divorce request case that was removed from the court rolls; unreleased.

²⁷⁵ Court rulings collected for this study (2000-2012 period).

²⁷⁶ PERRET T., *Le Code satanique*, *Africa International* No 216, May 1989.

²⁷⁷ KANE M., ‘La condition de la femme sénégalaise mariée selon la coutume islamisée’, *Rev. Jur. et Pol.* 1974, p.779 et seq.

²⁷⁸ FALL P. T., ‘La rupture du mariage coutumier en droit sénégalais: l'imbraglio juridique’, *Nouvelles annales africaines*, 2011/2.

²⁷⁹ DIAL F. B., *Mariage et Divorce à Dakar*, cited above.

In practice, an examination of the court judgements collected for this study reveals that the divorce petitions made by women represent just over 75% of the total. This can be partly explained by the fact that in order to divorce, one is required to produce a marriage certificate (for either a marriage before a civil registrar, the recording of a customary marriage by a civil registrar, or a ruling authorising the civil registration of a marriage)²⁸⁰ and that the majority of civilly registered marriages involve people living in towns and cities. With urbanisation, women are subject to fewer family pressures and are therefore more capable of initiating legal proceedings.²⁸¹ In rural areas, on the other hand, and occasionally also in urban areas, repudiation is practically the rule, notwithstanding the entry into force of the Family Code prohibiting it.

It is difficult to separate the issue of contentious divorce from that of repudiation because many marriages are in fact ended by the repudiation of the wife by the husband. In law, while repudiation is not accepted as a legal form of divorce, it is also not penalised as such. The court, which cannot maintain the marriage under the pretext that the repudiation is not recognised, inevitably becomes the authority that formalises the repudiation. However, the court does restrict some of its effects by considering it a "serious insult" which constitutes a grounds for separation due to the fault of the husband.²⁸² However, adjustment to the legislation will be necessary if there is the conviction that this repudiation can and must be eradicated in the interests of the legal process.

3. GROUNDS FOR DIVORCE

According to article 165 of the Family Code, either spouse may request divorce by basing their action on one of the grounds set out in article 166. This article stipulates that divorce may be granted on the following grounds:

- Declared absence of a spouse;
- The committing of adultery by a spouse;
- The sentencing of either spouse for a serious crime;
- Neglect of the wife by the husband;
- Failure by either spouse to honour any commitments made when entering into marriage;
- Desertion of the family or marital home;
- Serious ill-treatment, excesses, abuse or insults rendering continued marriage intolerable;
- Permanent and medically proven infertility;
- The serious and incurable illness of either spouse, discovered during the marriage;
- Mutual incompatibility rendering continued marriage intolerable.

While the majority of grounds for divorce enumerated in article 166 can be invoked equally by either spouse, there is a notable exception: the neglect of the wife by the husband, who

²⁸⁰ FALL P. T., 'La rupture du mariage coutumier en droit sénégalais', cited above.

²⁸¹ DIAL F. B., *Mariage et Divorce à Dakar*, cited above.

²⁸² FALL P. T., 'La rupture du mariage coutumier en droit sénégalais', cited above.

may only be invoked by the wife. There is also the much-debated question of divorce for mutual incompatibility rendering continued marriage impossible, which some consider to be a disguised form of repudiation.

On the ground, from the 593 rulings examined, there is a clear prevalence of divorce for mutual incompatibility, followed respectively by divorce for neglect, desertion of the family or home, divorce by mutual consent, for serious insults rendering continued marriage impossible, and divorce for ill-treatment and abuse. The other grounds for divorce appear marginal (disease, adultery or failure to honour commitments) or are not present at all (conviction for a serious crime, declared absence, or medically proven infertility). For each of the studied forms of contentious divorce, the grounds invoked are seldom exclusive: either the applicant invokes two or more different grounds simultaneously, or the defendant reacts in turn by invoking his or her own grounds; finally, sometimes the judge may himself invoke grounds if the parties fail to establish a firm basis for their claims. Some grounds are almost systematically coupled together, such as neglect and desertion of home or family, or serious insults and abuse.

Finally, it may be observed that women obtain divorce principally on the grounds of mutual incompatibility and neglect by the husband. These grounds are distinctive in that they existed before the Family Code, but also and especially because they make it possible to disguise the real reasons for the divorce petition.

We will consider, in turn, the grounds available to either spouse (3.1), neglect of the wife by the husband (3.2) and divorce for mutual incompatibility (3.3).

3.1. Grounds available to either spouse

3.1.1. Declared absence of a spouse

Absence is defined by the first subparagraph of article 16 of the Family Code as the legal situation of a person whose existence is rendered uncertain through a lack of contact. It constitutes a *de facto* situation that must be recorded by the courts. These proceedings generally concern men since, traditionally, it is men who leave their families to seek better lives elsewhere, although the situation is changing to include women.²⁸³ In practice, these grounds are almost never invoked for divorce proceedings. When faced with an absence, spouses generally prefer to invoke other grounds for divorce, particularly those of neglect or the desertion of family or home.²⁸⁴

²⁸³ On divorcing an absentee spouse, see MBAYE M. N., *Nouvelles annales africaines*, No1-2009, p. 96 et seq.; on the phenomenon of female migration, see COULIBALY-TANDIAN O. K., *Le savoir circuler au féminin: stratégies d'actrices, diversités des parcours et impacts sur les rapports sociaux de sexe*, Communication au symposium Migration et mondialisation (enjeux actuels et défis futurs), Dakar, 18 to 20 November 2009.

²⁸⁴ MBAYE M. N., 'Le divorce de l'absent', cited above.

3.1.2. The committing of adultery by a spouse

Adultery is defined as the failure of a spouse to adhere to his or her duty of fidelity. In concrete terms, it means having sexual relations with a person other than one's spouse. It is prohibited by article 329 et seq. of the Penal Code. Both husband and wife may invoke adultery as grounds for divorce. This represents notable progress from customary laws, which considered adultery a more serious offence when committed by a wife than by a husband.²⁸⁵ However, the consequences of infidelity vary greatly for polygamous couples, as subparagraph 2 of article 129 of the Family Code specifies: "However, for polygamous husbands, practices allowed by custom cannot in themselves constitute adultery". For women, extramarital sexual relations will always be considered adultery.

Adultery constitutes peremptory grounds for divorce and does not require the judge to exercise his discretion: if adultery is proven, the divorce must be granted.²⁸⁶ Divorce on the grounds of adultery belongs to the category of divorce on the grounds of fault, and may only be obtained if the petitioning spouse can provide proof of the act of adultery. Supplying this proof is particularly difficult, with adultery being a criminal offence in Senegal.²⁸⁷ Case-law's requirements for proof of adultery are a reproduction of article 331 subparagraph 2 of the Penal Code.²⁸⁸ In practice, adultery is proven either through *in flagrante*, or through confession from the spouse alleged to have committed adultery. This confession may result from the accused spouse admitting having a child with a third party during marriage, or from a wife who admits giving birth to a child which is not the husband's.²⁸⁹

In court practice, both wives and husbands raise these grounds for divorce. It should be noted that, in many judgements, in the absence of proof for the adultery allegations, the divorce is granted on the grounds of serious insult²⁹⁰ if there are compromising facts but no proof of carnal relations (for example, surprising one's husband with his mistress in the conjugal home).²⁹¹ Similarly, the judge may grant the divorce on the grounds of serious misconduct or

²⁸⁵ NDIAYE Y., 'Le divorce et la séparation de corps', *N.E.A* 1979, p. 46.

²⁸⁶ *Idem*.

²⁸⁷ It is punishable by a fine of 20,000 to 100,000 FCFA according to the actions of the other spouse, who is in charge of proceedings (Penal Code, art. 330).

²⁸⁸ Article 331 subparagraph 2 of the Penal Code states: "The only evidence which may be admitted against the defendant charged [with adultery] will be, in addition to *in flagrante* offences, evidence resulting from a confession or letters or other items written by the defendant". According to article 331, the person with whom the adultery was committed is liable to the same penalty as the culprit.

²⁸⁹ Pikine TD No 325, April 24, 2006, in which the court grants divorce due to the mutual fault of the spouses for desertion of the marital home (by the woman) and adultery (by the husband, who admitted having a child out of wedlock); Dakar TDHC No 8, May 5, 2010, granting divorce in particular due to the fault of the woman for adultery, with her confessing sexual relations with another man with whom she had a child; Rufisque TD No 62, February 9, 2012, where the husband admits having a daughter with a woman who was not his wife.

²⁹⁰ See for example: Mbour TD No 47/12, August 4, 2010.

²⁹¹ Rufisque TD, judgement No 154, June 15, 2010.

shameful behaviour when the spouse applying for divorce on the grounds of adultery is unable to establish proof.²⁹² In one case, the judge notes “the wife’s failure to fulfil her duty of self-restraint, through her repeated excursions and development of an amorous relationship, thereby humiliating her husband”, although the husband was unable to supply proof of the adultery which supposedly led him to repudiate his wife.²⁹³ These examples pose a problem insofar as it is arguable that although no proof of adultery is supplied, the honour and reputation of the woman are tarnished by the husband’s accusations and the penalty imposed by the court, which, through the phrase “mutual fault”, legitimates these accusations.

In the Senegalese context, it should be noted that adultery is regarded as taboo and a shameful reason for divorce, which explains its unpopularity as grounds for divorce. From around 600 sampled decisions, only four are directly related to adultery.

3.1.3. The sentencing of either spouse to a ‘peine infamante’

Any man or woman having committed a criminal offence may be subject to a *peine infamante* i.e. a penalty involving the loss of liberties and/or civic rights. For a long time, Senegal’s socio-economic structure meant that men were more likely to come into conflict with criminal law than women (except for abortion, infanticide and assault cases). But social change means that more and more women are committing the same crimes as men and are consequently subject to the same penalties.²⁹⁴

3.1.4. Failure to honour the commitments made upon marriage

Spouses seeking divorce invoke these grounds only very rarely. According to NDIAYE, this would relate, for example, to the refusal of the husband to pay the outstanding dowry by the agreed date, the failure of the husband to observe monogamy (which would also constitute a violation of the law) or an attempt to modify the matrimonial regime (which would constitute fraud).²⁹⁵

In legal practice for divorce, the judge tends to assimilate failure to honour marital commitments to non-payment of the dowry, or the deferred part of the dowry, by the husband.²⁹⁶ In a case judged by the Thiès TD in 2008, the husband requested divorce because “his wife refused to come back to the conjugal home, due to her mother’s influence”, while the wife claimed in her defence that her husband “failed to honour the commitments made prior to marriage, in particular the agreement to allow her to continue her studies” and

²⁹² Rufisque TD No 247, August 25, 2005; Thiès TD No 586, November 5, 2001.

²⁹³ Mbacké TD, December 23, 2009.

²⁹⁴ On the criteria for a *peine infamante*, see NDIAYE Y., ‘Le divorce et la séparation de corps’, cited above, p. 48.

²⁹⁵ NDIAYE Y., ‘Le divorce et la séparation de corps’, cited above, pp. 51-52.

²⁹⁶ See article 6, Law 67-04, February 24, 1967, *JO* March 1, 1967. See also: Thiès TD No 107, March 15, 2004.

stopped providing for her. The judge chose not to pursue the matter, and pronounced divorce due to mutual fault on the grounds of neglect and mutual incompatibility.²⁹⁷

3.1.5. Desertion of the family or marital home

Desertion of the family or marital home means a spouse's departure from the shared residence without the other spouse's agreement, or the failure to fulfil the obligations inherent to one's position as spouse. These grounds for divorce can thus be invoked equally by husband or wife, but in reality, men are more often targeted. In civil and customary law alike, it is principally the husband who is responsible for family expenditure. Very often, unscrupulous husbands refuse to fulfil this obligation and leave their wife and children to fend for themselves. In consequence, more than 66% of the divorce petitions based on these grounds originate from women.

Desertion of the family or marital home may also concern women, who still often tend to move back to their parents' home when their own household is in a state of crisis. This traditional practice (*faay* in Wolof) consists in the wife leaving her household until the husband comes to fetch her; it thus tends to result in a settlement of the dispute under the parents' supervision, with them acting as guarantors to the agreement.²⁹⁸ The practice of *faay* is penalised in modern law through the use of "desertion of the family or marital home" as legal grounds for divorce. Many women learn this at their cost. In fact, even when the husband is at fault, he may sometimes use these grounds to obtain a divorce due to the fault of the wife, for deserting the family or marital home.²⁹⁹

Thus in one case, a woman was condemned for desertion of the family residence when, precisely because she wished to live with her husband, she refused to remain in the village while he lived in Dakar. However, the judge remarked that "the only exception allowed by article 153 of the Family Code is when the residence chosen by the husband presents physical or emotional dangers for her and her children (...)".³⁰⁰ Similarly, the judge in another case cited desertion of the family on the part of the wife and neglect on the part of the husband in order to dissolve the marriage due to reciprocal fault, whereas in fact the women only left the family home because "her husband had ceased providing for her (...) and continually prevented her from pursuing a professional activity".³⁰¹

²⁹⁷ Thiès TD No 365, July 28, 2008. See also Thiès TD No 569, December 15, 2003, S.D. c/ I.D. in which, in addition to the failure to honour commitments, the wife also cited ill-treatment, excesses and abuse. The latter grounds being adequately established, the judge used them to grant the divorce due to the fault of the husband.

²⁹⁸ See, respectively, the works of NDIAYE Y. and DIAL F. B. cited above.

²⁹⁹ Among the petitions sampled, almost 34% of divorce petitions using these grounds originate from men. For illustrative examples see THIAO A., 'Typologie des causes de divorces invoquées devant le tribunal départemental de Dakar', master's thesis, CADU 2010-2011 (under the direction of P. T. FALL)

³⁰⁰ Pikine TD No 118, February 8, 2011.

³⁰¹ Pikine TD No 295, April 11, 2004.

3.1.6. Ill-treatment, excesses, abuse or serious insults rendering continued marriage intolerable

Any spouse who is a victim may request divorce on the grounds of ill-treatment, excesses, or serious insults rendering continued marriage intolerable. Departmental court practice shows that this is invoked by husbands as well as wives. As for the sampled decisions, we may note that more than 70% of the cases based on these legal grounds were initiated by women.

These grounds cover several possibilities of differing natures: domestic violence, violence towards women and/or children, or much more rarely, violence towards the husband.³⁰² They constitute an elastic concept that the family judge may construe in various ways, and are some of the most liberal grounds in terms of judicial interpretation.³⁰³ Thus, interpretation of the notion of “ill-treatment” also allows the inclusion of violence committed outside the close family, in particular by one of the spouse’s families (often the husband’s), or by other relatives and friends.

In some rulings, the judge adjusts the grounds for divorce himself if it seems the woman has been subject to corporal punishment. Thus, in proceedings to establish a wife’s desertion of her family and use of vulgar language, the judge dissolved the marriage by ruling that fault lay with the husband for ill-treatment, excesses and abuse, which had justified his wife’s departure.³⁰⁴

In the absence of a legal definition for “serious insults”, the judge may consider various forms of behaviour as reason to grant the divorce. Thus, the judge may consider a serious insult to be the husband expressing doubts regarding the paternity of a child born during marriage, apart from in genuine cases where paternity is being disclaimed,³⁰⁵ or accusing his wife of being “promiscuous”,³⁰⁶ or the wife calling her husband impotent or her mother-in-law a prostitute.³⁰⁷ The degree to which the alleged insults may be considered offensive or serious, and how far they may render continued marriage intolerable, is a matter to be decided solely by the judge in question.³⁰⁸

Insults thus constitute, along with mutual incompatibility, some of the most flexible grounds for divorce. In addition to more obvious examples of serious insults, the judge may also class certain kinds of behaviour as an insult, such as the repudiation of the wife by the husband, or the atmosphere or circumstances surrounding the repudiation. The same applies to emotional

³⁰² This form of domestic violence, previously a taboo subject, is becoming increasingly discussed in the public sphere with the creation in Senegal of the Association of Husbands Victim to Domestic Violence (*Association des maris battus*). See also case law: Husband treated as a slave by his wife (Rufisque TD No 6, January 5 2012), or disrespectful behaviour towards one’s husband (Thiès TD, No 348, July 17, 2000, and No 37, January 14, 2000), etc.

³⁰³ FALL P. T., ‘Réflexions critiques sur le divorce’, cited above.

³⁰⁴ Mbour TD No 101, RG No 57/2011, March 30, 2011.

³⁰⁵ Dakar JP, No 364, May 26, 1977, husband named Diallo.

³⁰⁶ Pikine TD No 107, January 16, 2006.

³⁰⁷ Thiès TD No 107, March 6, 2008.

³⁰⁸ Dakar TDHC No 1215, June 12 1996. See also: Court of Civil and Commercial Cassation decision, December 2, 1998, No 06/RG/1998, No 60614.

neglect without valid reason. Thus, whenever a spouse or spouses approach the court following a repudiation, judges always dissolve the marriage by ruling that fault lies with the husband on the basis of serious insults,³⁰⁹ and will award compensation to the woman.³¹⁰ Sometimes, the judge does not even bother to categorise the repudiation as an insult, and instead directly considers repudiation as the grounds for divorce. This was the case in a Dakar TDHC case in which the judge “dissolves the marriage of the spouses (...) due to the fault of the husband, for repudiation”.³¹¹

The court has also granted divorce due to the reciprocal fault of the spouses on the grounds of “serious insults rendering continued marriage intolerable” in order to punish the husband for repudiating his wife and the wife for having insulted her mother-in-law.³¹² Similarly, the court was able to dissolve a marriage due to the reciprocal fault of the spouses on the grounds of serious insults when the facts show that the husband repudiated his wife and abandoned his children, claiming in his defence that his wife was involved in an extra-marital amorous relationship.³¹³ These judgements are illustrative of the complexity of the reality of divorce cases; they also demonstrate that a repudiation may easily be “recategorised” as a divorce due to reciprocal fault.

3.1.7. Permanent and medically proven infertility

The goal of marriage is to start a family; even today, permanent and medically proven infertility constitutes grounds for divorce. In any event, the text does not discriminate between men and women, since infertility may be discovered in both wives and husbands. In practice, in the event of a couple's infertility, the man is practically never stigmatised except in cases where he has been unable to consummate the marriage through impotence. Women who do not give birth suffer the consequences even when they are not responsible for the situation.³¹⁴ Finally, the widespread practice of polygamy means that men are less likely to invoke these grounds for divorce. Rather than divorcing, they prefer to enter a second marriage. This is perhaps why these grounds for divorce are so rarely invoked as to be practically anecdotal in case-law.

3.1.8. Serious illness of a spouse discovered during the marriage

The Family Code does not contain a definition or list indicating the serious and incurable illnesses that may constitute grounds for divorce. The only requirement given in the code is that the other

³⁰⁹ Rufisque TD No 2, January 8, 1981, Tivaouane TD No 81, May 28, 2009; Dakar TDHC No 2396, November 3, 2009; Dakar TDHC No 55, January 12, 2010.

³¹⁰ Thiès TD No 91, February 10, 2012.

³¹¹ Dakar TDHC No 55, January 12, 2010.

³¹² Rufisque TP No 2, January 8, 1981.

³¹³ Mbour TD No 47, August 4, 2010.

³¹⁴ According to DIOP, “the function of marriage offerings is to transfer the woman's power of procreation into the man's lineage”; see DIOP, A. B., *La famille Wolof*. Paris: Karthala, 1981, p. 202.

spouse must find out about the illness during the marriage. In medical terms, serious and incurable illnesses are considered those which are life-threatening and for which no cure is currently known to medical science. These grounds for divorce are vague, complex and difficult to employ³¹⁵. Supplying proof is not easy because of medical confidentiality, which may even be enforced against the other spouse.³¹⁶ Further, for moral reasons, invoking these grounds is often frowned upon, especially for women. This is why these grounds are particularly taboo and categorically excluded when deciding on a divorce. We found only one judgement based on these grounds for divorce, out of nearly six hundred decisions collected. A husband was able to obtain a divorce based on these grounds because his wife was depressed.³¹⁷ For the case, the husband supplied a certificate of his wife's illness issued by a doctor. The court ordered a social services investigation into the wife's health and granted divorce on these grounds.

If it is the husband who obtains divorce for serious and incurable illness, maintenance must be awarded to the woman to compensate for the fact that her husband will no longer be providing for her. This may be awarded for a maximum of three years and takes effect as soon as the judgement is declared. But it is terminated if the husband proves that he does not have adequate resources or if the woman remarries before this term comes to an end.³¹⁸ In the case cited above, the judge noted that the divorcing husband undertook to continue caring for his ex-wife, specifying that she would remain in his home since "her parents do not want to look after her and they have two adult children".³¹⁹

3.2. Neglect of the wife by the husband

These grounds for divorce may only be invoked by the wife. It is closely related to the fact that the husband is obliged by law to provide for his wife. Any failure on his part authorises the person to whom this obligation is owed – the wife – to request and obtain divorce. The Family Code borrows these grounds for divorce (neglect of the wife by her husband) directly from the Maliki Islamic ritual and from customary law.³²⁰

This difference in treatment in favour of women is no accident: the obligation to provide for one's wife is undoubtedly a counterpart to the significant power that the Code grants husbands regarding leadership of the household.³²¹ These grounds for divorce are regarded as the consequence of a duty which marriage implies for the husband: as previously explained, the husband is obliged to

³¹⁵ Complex because a pathological condition may be serious without being incurable; similarly, a condition may be incurable but minor. Other 'chronic' illnesses such as diabetes and high blood pressure are regarded as incurable pathological conditions. But their severity depends on the nature of the problem, for example: renal failure or heart attack. Or: cerebral malaria (interview with Dr. Aminata DIAGNE, gynaecologist at the Gaspard CAMARA hospital complex, April 2013).

³¹⁶ Pikine TD No 392, July 7, 2009.

³¹⁷ Dakar TDHC, No 196, January 29, 2009.

³¹⁸ Art. 262 of the Family Code modified by Law 89-01, January 17, 1989, *JO* No18.2, June 3, 1989.

³¹⁹ Dakar TDHC No 196, January 29, 2009.

³²⁰ NDIAYE Y., 'Le divorce et la séparation de corps', cited above, p. 49.

³²¹ Art. 152 of the Family Code.

provide for his wife. Nevertheless, familial and social changes may necessitate a debate on the appropriateness of such grounds for divorce in today's context, where, despite the mandatory provisions of the Family Code, many households are only able to exist because of women.

The high number of divorces on the grounds of neglect observed in the study is a good illustration of the popularity of these grounds among women: neglect represents practically a third of the collected decisions – around 200 out of 593 collected.³²² However, it should be noted that neglect often serves to disguise some other reason too shameful to mention: impotence of the husband, an inability to live together, the infidelity of a wayward spouse, desertion of the family or the husband's prolonged absence.³²³ Thus the neglect claimed by the woman and acknowledged by the husband was, in one case, a way of concealing the absence of a husband who had disappeared abroad without making any contact.³²⁴

Women also sometimes invoke these grounds in order to gain the independence necessary to run their own business. Thus the court dissolved the marriage on the grounds of mutual incompatibility, whereas the woman seeking divorce had based her action on neglect. The judge decided that the woman had always lived comfortably in the situation she was complaining about, and nothing about that situation had changed. In his view, the woman no longer wished to be married because it would limit her new business.³²⁵ As the sociologist Fatou Binetou DIAL showed in a 2008 study, divorce can be a means of emancipation and economic advancement for some women.³²⁶

3.3. Mutual incompatibility rendering continued marriage intolerable

These are the most criticised of all the grounds listed in article 166 of the Family Code. They are very flexible and in effect allow either spouse to exit the marriage with ease. Some legal scholars have seen it as a way of keeping repudiation alive,³²⁷ with one author going as far as calling divorce on the grounds of mutual incompatibility “repudiation in disguise”.³²⁸ Because of similar concerns, the law has been formulated so that a husband who obtains divorce on the basis of mutual incompatibility must pay maintenance to his ex-wife.³²⁹ This maintenance may be paid for between six months and one year and compensates for the fact that the husband

³²² Saint-Louis TD No 74, May 19, 2010; Rufisque TD No 244, November 26, 2007; Thiès TD No 536, November 13, 2006; Thiès TD No 431, July 21, 2013; Pikine TD No 678, December 4, 2000; Thiès TD No 91, February 10, 2012.

³²³ Divorce due to absence takes a particularly long time to obtain; see MBAYE M. N., ‘Le divorce de l’absent en droit sénégalais’, *NEA*, No 1, 2009, p. 93s.

³²⁴ Mbour TD No 166, July 17, 2001.

³²⁵ Diourbel TD No 76/12, June 1, 2012.

³²⁶ DIAL F. B., *Mariage et divorce à Dakar. Itinéraires féminins*. Paris: Karthala - CREPOS, 2008.

³²⁷ NDIAYE I. Y., ‘Réflexions sur une cause de divorce: l’incompatibilité d’humeur’, *EDJA* No 13, 1987, p. 2.

³²⁸ NDIAYE I. Y., ‘Le mariage à l’épreuve du droit traditionnel’, *Revue sénégalaise de droit* No 36, January-June 2011, p. 13 et seq. especially p. 36.

³²⁹ On the other hand, a woman may request and obtain divorce on the grounds of mutual incompatibility without having to pay any maintenance.

is no longer bound to provide for his wife; the maintenance is not subject to the wife being particularly vulnerable.³³⁰ Law 89-01 of January 17 1989 increased the duration of maintenance payments to the current period (six months to one year). Before this reform, maintenance was paid for three months. This change in legislation has consolidated the doctrinal view whereby mutual incompatibility is seen as a form of repudiation. Moreover, in legal practice, it may be invoked without the husband providing any precise facts, the judge refusing to exercise any discretionary power in such cases. Elsewhere, one author talks about “the ransom of the husband’s freedom” in connection with the maintenance paid to the wife in the event of divorce on the grounds of mutual incompatibility at the request of the husband.³³¹

On the whole, the assimilation of mutual incompatibility to repudiation nevertheless seems excessive. Firstly, mutual incompatibility is not, at least legally, a reason for divorce that only men can invoke. Either spouse, man or woman, is legally entitled to request divorce on these grounds. Repudiation, on the other hand, is almost entirely the husband’s prerogative and one which he may abuse (even if customary law does provide a list of grounds for divorce). Secondly, study of Senegalese case-law also reveals that mutual incompatibility is not only invoked by men as grounds for divorce. In this study, out of all the relevant decisions sampled, a little over 78% of the divorce petitions came from women and barely 22% from men.

These grounds for divorce offer great flexibility to the parties³³² and to the judge, who is not required to describe what exactly their incompatibility consists in.³³³ However, it is settled case-law that the judge will rule a divorce to be due to the fault of any husband who invokes mutual incompatibility without stating any particular grievance,³³⁴ since this suggests that the other spouse has not committed any fault. So as to describe the absence of fault for the other spouse, the judge stresses “the petitioning husband’s unequivocal desire to end the marriage”.³³⁵ The judge may also declare mutual incompatibility due to the shared or reciprocal fault of the spouses,³³⁶ for example by stating that “considering the couple’s environment and the sometimes unpleasant nature of the relationship between C. Diallo and his wife’s family, we may easily conclude that the incompatibility is sufficiently serious (...)”.³³⁷ Curiously, it also seems that when one of the spouses requesting divorce is unable to prove the invoked grounds, the judge raises the grounds *ex officio*; indeed, if he appears convinced that the divorcing spouse has no intention of remaining married, he then grants the divorce due to that spouse’s fault, in spite of the fact that mutual incompatibility has been shown to be objective grounds for divorce.³³⁸

³³⁰ NIANG M. B., ‘Solidarité familiale et vulnérabilité économique en droit de la famille sénégalais’, *Nouvelles annales africaines*, 2011/2.

³³¹ NDIAYE I. Y., ‘Le mariage à l’épreuve du droit traditionnel’, cited above.

³³² NDIAYE I. Y., ‘Réflexions sur une cause de divorce’, cited above, p. 2.

³³³ Thiès TD No 158, March 4, 2011.

³³⁴ Dakar TDHC, No 414, February 25, 2009.

³³⁵ Pikine TD No 210 bis, February 27, 2004 and No 60, January 19, 2004.

³³⁶ Saint-Louis TD No 153, June 8, 2011; Thiès TD No 319, June 28, 2010.

³³⁷ Pikine TD No 174, February 23, 2004.

³³⁸ NDIAYE I. Y., ‘Le mariage à l’épreuve du droit traditionnel’, cited above, and FALL P. T., ‘Réflexions critiques sur le divorce en droit sénégalais’, cited above.

In the final analysis, mutual incompatibility as grounds for divorce guarantees complete freedom to break up a marriage. It prevents marriage from being indissoluble when it has become unbearable for a spouse who is unable to successfully claim any other grounds for divorce.

4. EFFECTS OF DIVORCE

The purpose of this section is to give an outline of the two kinds of effects that divorce may have: property (4.1) and non-property (4.2) consequences. We consider here the effects of divorce established by law and the courts. The existence of legal solutions to ensure the equality of the spouses upon dissolution of marriage should not obscure the fact that in practice most divorces (particularly in the case of repudiation) are settled between families, without the intervention of the courts.

4.1. Property consequences of divorce

4.1.1. Dissolution of the matrimonial regime

This poses few difficulties in Senegalese law. Article 368 of the Family Code establishes three kinds of regime, not subject to any modification, to which spouses may adhere: separate property regime (a), dotal regime (b) and community property regime (c).³³⁹

a) The separate property regime is the common legal regime, applicable when the spouses do not explicitly request either of the other two regimes. Polygamous husbands and spouses whose marriage is not civilly registered are automatically subject to the separate property regime.³⁴⁰ This regime also conforms to many African traditions: upon the dissolution of a marriage, each spouse takes their own property with them. However, it can be difficult to distinguish property while the couple are happily married. The applicable rules of evidence are established in article 381 of the Family Code. Property litigation occurs only rarely and usually concerns movable assets. The spouse making a claim generally manages to establish entitlement by producing receipts or through witnesses.³⁴¹

b) The dotal regime is a regime whereby the wife receives, at the time of marriage, assets from people other than her husband. These assets (registered immovables, securities de-

³³⁹ On all these issues see, in particular, GUINCHARD S., 'Droit patrimonial de la famille du Sénégal', Coll. Bibliothèque Africaine et Malgache, t. XXXII. Paris, Dakar and Abidjan: LGDJ and Nouvelles Editions Africaines, 1980.

³⁴⁰ As discussed earlier, customary marriage is still valid even when not registered, though its effects are limited.

³⁴¹ As for real estate, article 379 of the Code of Civil and Commercial Obligations is the sole applicable law, and the only evidence it permits is an entry in the land register. See Supreme Court, Ruling No53, May 28, 1980, EDJA Review No 18, August 25, 1990.

posited in a dotal account or animals constituting livestock) belong to the wife but are managed by the husband for the duration of the marriage. Upon dissolution of the marriage, the husband must return them to the wife, who is the owner of the assets. It must be noted that none of the sampled decisions indicate the choice of such a regime.

c) Community property regime (joint ownership of moveables and acquests) may be selected only when the husband has opted for monogamy, which means this is not a very popular regime. In Senegalese law, this regime works in a similar way to that of separate property. It is only upon dissolution of marriage that it becomes necessary to distinguish between property not liable to be liquidated and other property.³⁴² In practice, departmental courts will designate a notary to liquidate the community under the supervision of a judge (*juge commissaire*).³⁴³ It should be noted that these rules for liquidation are only applicable in contentious divorces. In divorce by mutual consent, it is the spouses themselves who determine the property consequences of their marriage's dissolution.³⁴⁴

4.1.2. Payment of maintenance to an ex-spouse

The law states that a husband must pay maintenance to his ex-spouse in two cases, outlined by article 262 of the Family Code: divorce requested and obtained by the husband for mutual incompatibility (six months to one year) or for serious and incurable illness (maximum three years). The divorcing husband can only exempt himself from this obligation by showing that he does not possess adequate resources or that his ex-wife has remarried before the expiry of the periods stated in the law.

There is thus an unquestionable and genuine difference in treatment that favours women, supported by the traditional idea that a husband must work to provide for his wife and children. A consideration of the possibility of maintenance payments that take individual situations into account would be beneficial.

4.1.3. Damages

When a marriage is dissolved due to the fault of one of the spouses, the victim may ask the court to award damages to compensate for certain negative effects of the dissolution. The victim may be entitled to compensation for purely emotional damage for the suffering caused by the spouse who terminates the marriage. For example, the court awarded 500,000 FCFA in damages to a wife who obtained divorce for ill-treatment and abuse due to the fault of the husband.³⁴⁵ The judge deemed this "reasonable considering her emotional suffering as a result

³⁴² See article 393, subparagraph 2 of Code of Civil and Commercial Obligations.

³⁴³ For example: Dakar TDHC No199, January 29, 2008, see THIAO A., 'Typologie des causes de divorces invoquées devant le tribunal départemental de Dakar', master's thesis, FSJP/CADU, 2010-2011 (under the direction of P. T. FALL), appendix 12.

³⁴⁴ Article 158 subparagraph 2 of the Family Code states: "This consent [given by spouses divorcing by mutual consent] must relate not only to the dissolving of the marriage but also to the property consequences for the former spouses and to the future of any children resulting from the marriage". In this type of divorce, the judge merely records the agreement of the parties.

³⁴⁵ She had requested ten million FCFA.

of the termination of marriage at such an age [approximately 30 years old]”.³⁴⁶
 Judges who refuse to grant the requested sum base their decision on the victim’s inability to show proportionality between the requested sum and the suffering caused.³⁴⁷

When it comes to compensation, spouses are treated equally, though it may be observed that in court practice the majority of claims for damages, whether successful or not, are made by women. It is very common for Senegalese women to give up their own business at their husband’s request, either in order to assist him in his business or to take better care of their children. As most spouses are married under the regime of property separation, wives who have contributed to the success of their husband’s business are entirely unable to claim part of it in the event of the marriage’s dissolution. The question thus arises as to whether the wife may then request compensation for prejudice to her ability to maintain her standard of living. Civil liability claims do not enable one to recover ownership of the private property of another person. Wives can therefore only request payment of damages as compensation for material or emotional prejudice. Even then, the husband must have been determined to be at fault in the divorce. However, whether or not the husband is determined to be at fault, genuine equity would mean she receives compensation for the personal sacrifices she has made for her husband and children. Here again, a more detailed examination of certain difficult individual situations would be beneficial.³⁴⁸

4.2. Non-property consequences of divorce

We must distinguish here between the consequences for the spouses and those for the children.

4.2.1. Consequences for relationship between the spouses

As far as the spouses are concerned, all legal ties cease to exist. However, the law allows the divorced wife to continue using her married name unless the husband explicitly opposes this.³⁴⁹ For the duration of the marriage, the woman is entitled to use her husband’s name: the use of the husband’s patronymic name is a consequence of marriage. Logically, this right should cease when the marriage is dissolved. In practice, however, sudden inability to use

³⁴⁶ Dakar TDHC No 2181, December 5, 2006.

³⁴⁷ Dakar TDHC No 1980, August 31, 2010: “Whereas divorce was granted due to the fault of Kh. A. R. B., M. G.’s request is in principle well-founded; whereas the sum of 5,000,000 FCFA is clearly exaggerated, especially since M. G. has not proven proportionality between this sum and her suffering; whereas a sum of 500,000 FCFA is fairer [...]”.

³⁴⁸ The only alternative available to women seeking to be recompensed for their efforts is to invoke the notion of a *de facto* company, outlined in article 115 and regulated by articles 864 and following of the Uniform Act Relating to Commercial Companies and Economic Interest Groups. *De facto* companies are companies formed on the basis of several people acting, often unconsciously, as business associates. This is the case when two spouses or cohabitants both make use of the assets of a business belonging to one of them. See BONNARD J., *Droit des sociétés*, Paris: Hachette 2010/2011, p. 41.

³⁴⁹ Art. 176 subparagraph 3 of the Family Code.

the husband's surname can cause prejudice to the wife when her economic, literary or artistic business is tied to the surname acquired through marriage.

Another non-property consequence concerns only women. Unlike men, they are unable to remarry without observing a period of waiting. Whether the marriage is dissolved in court or by repudiation, women cannot remarry validly without complying with this period. In customary law, this period is three months or four months and ten days according, respectively, to whether the marriage was dissolved through divorce or through the husband's death. Article 112 of the Family Code establishes this period as 300 days starting from the dissolution of the preceding marriage. The same text also states that women can choose to observe a shorter period in line with the customary law. In applicable cases, any child born three months or four months and ten days after the dissolution of the marriage due to the divorce or death of the husband will be irrefutably considered not to be the offspring of the previous husband.

This rule is intended to avoid the difficulties which can arise when establishing the paternity of a child born after the marriage's dissolution. Certainly, the development of scientific and medical techniques (use of DNA, blood types etc.) capable of dispelling any doubt as to the filiation of a child raises the question of whether the period of waiting is still a relevant concept. However, systematic speculation regarding the filiation of children born from divorced mothers or remarried widows is not yet considered to be consistent with current social mores or to be in the child's interest.

4.2.2. Consequences for the relationship with the children

When ruling on custody, the judge must consider the children's own interests in a context where there is very often conflict between the parents over custody, rights of access and contributions to the financial burden that the children represent.

a) Custody and rights of access: For legally dissolved marriages, the judge must consider the best interests of the child. In order to gain an objective appreciation of the child's situation, the judge arranges for a social worker to carry out an investigation of the family before ruling on the matter. In practice, small children are often entrusted to the mother with rights of access provided for the father. The majority of divorce decisions which give custody to the father concern teenagers. However, small children may occasionally be entrusted to the father when they live together harmoniously, so as not to cause disruption to their lives.³⁵⁰ As for rights of access, the phrasing used by the judge can be a source of interpretation, with him generally using the phrase "greatest rights of access (*droit de visite le plus large*)" for the father³⁵¹ or mother³⁵² according to which parent receives the rights.

³⁵⁰ Dakar TDHC No 1598, July 20, 2010.

³⁵¹ See thesis by THIAO A., cited above, appendices 9, 12 and 13.

³⁵² Dakar TDHC No 1598, cited above. The judge ruled "it is appropriate to entrust...Mb.C. to his father, the greatest rights of access being reserved for the mother".

b) Payment of maintenance by the father: When custody is given to the mother, the judge orders the father to pay maintenance in order to provide for the children of the marriage. When doing so, the judge considers the father's income as well as the needs of the child. Thus the amount of maintenance to be paid varies according to the father's resources and the number of dependent children resulting from the marriage.³⁵³

This maintenance can create many problems in the relationship between ex-spouses. Some men consider the maintenance ordered by the judge to be too much of a burden, and then seek to avoid paying it by any means necessary. For example, to avoid having to pay maintenance of 250,000 FCFA per month, the director of a private clinic mentioned, in particular, the suspension of all business since 2002 for health reasons and the absence of any salary since April 2002.³⁵⁴ According to various sources, some men even resign from their jobs in order to avoid paying the maintenance. Men sometimes approach the court seeking judicial review because they are convinced that their ex-wife will use the maintenance for other purposes. Finally, some women have difficulty obtaining their maintenance even though the law enables them to do so.³⁵⁵

Since the current provisions of the Family Code dictate that expenditure related to the care of the children is automatically the responsibility of the father, there can be resentment from indebted fathers, especially when the wife receives custody of the children while also having a higher income.

While women who obtain custody following a divorce decision do receive maintenance, this is not the case for the majority of women whose marriage is terminated customarily. Many divorced women live with children who have been abandoned by their father. The financial contribution towards maintenance of the children depends on the husband's income, and on his generosity in the case of customary divorces.³⁵⁶ These single-parent families generally subsist on very little, with many surviving through petty trade in particular. Genuine disparity therefore arises between divorced women depending on whether or not a court was involved in the termination of their marriage.

³⁵³ For example: 35,000 FCFA or 40,000 FCFA for a single child: Dakar TDHC, respectively No 1824 bis, August 10, 2010, and No 1015, June 10, 2003; 100,000 FCFA for two children: Dakar No 202, January 29, 2008; or 200,000 FCFA for three children: Dakar No 18, January 8, 2008.

³⁵⁴ Dakar TDHC No 2778, May 6, 2003.

³⁵⁵ Observations by researchers involved in this project.

³⁵⁶ See statements from divorced women, in DIAL F. B., cited above, pp. 142 to 144.

CONCLUSION

Analysis of divorce practice makes it clear that divorces granted by the courts do enable a real guarantee of equity and legal certainty. Despite its limitations (in particular, people's notions about the justice system, especially in family matters), judicial divorce seems to be the best option when terminating a marriage. We have seen that Senegalese women are able to call on state justice to dissolve their marriages, but many still have difficulties accessing legal divorce. Many marriages are dissolved through repudiation, despite it being prohibited since the entry into force of the Family Code. Repudiation remains a significant factor in the dissolution of marriage.

Moreover, as the report for the national good governance program states: "For the vast majority of the population, justice fails to fulfil its role. It is slow, expensive, complex, inaccessible, inequitable and often unsuited to the sociocultural environment."³⁵⁷ When it comes to divorce, these problems are exacerbated by a lack of assistance from the relevant social services, which are often slow to respond because they lack the necessary human and material resources.

The fact that Senegalese legislation requires customary marriages to be terminated by judicial divorce, with compulsory regularisation of the marriage beforehand, results in an unfair treatment of women. When such a marriage is terminated by repudiation, it is only the woman who risks being punished by the courts, since the ex-husband may withdraw his decision and take action against his wife and her new husband for bigamy. This discrediting of women is enabled by the fact that while repudiation does not result in legal dissolution of the marriage, on the other hand the husband, whose marriage has been conducted customarily, is legally considered polygamous. He may remarry without legally divorcing his first wife whereas she may not. Ultimately, it is the opposition of customary and legal divorce that means that not all women benefit from the same treatment when it comes to the dissolution of marriage.³⁵⁸

³⁵⁷ National Good Governance Program, April 2002,

http://www.proddel.sn/img/doc_Plan_National_Bonne_Gouvernance.doc, and cited in the report of the Senegal Supreme Court, 2010.

³⁵⁸ See also conclusions and proposals below.

CONCLUSIONS AND PROPOSALS

The three main parts of this study reveal that, whether due to the influence of legislators or judges, family law is evolving. Although this evolution is clearly in the direction of greater equality between women and men, there are still numerous obstacles to genuine equality between spouses during marriage and in the event of divorce. Against this backdrop, we put forward the following list of common challenges faced by all three countries:

- The legislation applicable to marriage and divorce does not entirely conform with the international commitments made by these countries regarding women's rights;
- Customary laws can be discriminatory against women and their effects can place women in extremely difficult situations;
- Social and economic instability mean women are particularly vulnerable during marriage and in the event of divorce;
- Religion and culture continue to carry great importance in family matters, with complicated political consequences – especially regarding the possibility of reforming family law;
- Finally, in all three states, and in Mali and Niger in particular, the legal systems face a considerable dearth of human and financial resources. The justice system is slow, expensive, complex, inaccessible to many, inequitable and often unsuited to the socio-cultural environment. When it comes to divorce, these problems are exacerbated by a lack of assistance from the relevant social services, which are themselves under-resourced.

Each state faces specific legal challenges. Mali must work to publicise and properly implement its new Personal and Family Code, which remains unfamiliar to judicial personnel and the wider population. Niger must work to ensure the effective application of provisions relating to the place of customary law in its legal system. Senegal appears to require a more systematic enforcement of the obligation for spouses to register a marriage, to guarantee the possibility of legal divorce should they wish dissolution at a later date.

There are also some common lessons learned from the three studies. The overall picture is that, whatever the country concerned and the state of its law, repudiation remains the most common way of ending a marriage. It is generally recognised that the practice of repudiation contributes to perpetuating inequality between men and women when it comes to the dissolution of marriage, since it is the husband alone who possesses the customary or Islam-derived power to dissolve a marriage unilaterally. Thus, the challenge that arises regarding divorce is the same in all three countries: how do we understand and potentially provide a framework for this informal and widespread way of terminating marriages?

Divorce and law

Although the principle of equality and non-discrimination is recognised constitutionally and in civil law in all three jurisdictions, discriminatory elements remain within family law. References to marital authority, a wife's obedience to her husband, and a husband's obligation to provide for his wife's needs create a fundamental distinction between the spouses. The possibility of divorce on the grounds of neglect of the wife by the husband, as well as the fact that it is often only women who may receive maintenance, create additional forms of differential treatment between spouses and ex-spouses. These conceptions of divorce, developed as a way of compensating for the different roles of the two spouses during marriage, are based on deep-seated socio-cultural notions of the relationship between spouses, which nevertheless have very real consequences for women. The same applies to civil repudiation rulings in the case of Niger. We can see here that family law legitimises situations that are inherently non-egalitarian, while trying to limit their more dramatic effects. Solutions seeking to redefine or regulate repudiation, set out in the limited case-law available in the three countries, have the benefit of being pragmatic and well-adapted to the reality of the inequality encountered in practice. But they also entrench a *de facto* and sometimes legal inequality between spouses during divorce. For this reason, these solutions create problems in terms of conformity with the norms of international and regional human rights law, which require differences in treatment to be justified objectively to be considered legitimate.

The harmonisation of national texts, and if necessary of court practice, with international and regional legal instruments relating to women's rights would make it possible to establish a legal framework likely to ensure the protection of women's rights without necessarily precluding the recognition of the extensive legal pluralism existing in matrimonial matters.

Divorce and legal pluralism

As we have seen, the Committee on the Elimination of All Forms of Discriminations against Women is very critical of the multiplicity of the family law systems, since in such systems the application of civil and customary law (or other informal standards) determining personal status is subject to the individual's ethnicity or religious affiliation. In the three countries studied, although the possibility of choosing a civil law regime exists matrimonial and family matters are usually and primarily dealt with informally and incidentally, are regulated before civil courts.

Faced with fairly similar situations, each of the three countries has made different decisions, both on a legislative and a practical level. In Mali, civil family law does not officially take customary law into account: in theory, the two systems exist independently of each other. In practice, Malians resort to the civil law system rarely, preferring instead to turn to local religious authorities (imams or *marabouts*) to have their separation recorded or officiated over. Senegal has opted for a mixed solution: customary marriages may be recorded in the civil reg-

ister, even after their customary celebration, while divorce must always take place through civil channels. Repudiation is prohibited, and a woman's repudiation by her husband may lead to the husband being found to be at fault in the divorce. Nevertheless, the sampled judgements demonstrate that divorce by mutual consent, as well as certain grounds for divorce, can easily be used to cover instances of repudiation. In such cases, judges do have the ability to decide on certain consequences of the separation, but practice in the courts demonstrates that this does not always work in the woman's favour. In Niger, we saw that the Constitution provides a framework for legal pluralism. Marriage may be customary, civil and/or legal and repudiation can be recorded by the court. In certain cases, the courts have adopted the legal practice of limiting the negative effects of repudiation, in particular in terms of the financial situation of women, who may be legally entitled to maintenance paid by the father for the benefit of any children in her custody. This practice was also later incorporated into the legislation. The husband may sometimes be obliged to pay damages to the wife for unfair repudiation, although this is rare. In Niger a legally recorded repudiation gives almost the same degree of protection of women's rights as a legal customary divorce.

Developments in Niger and Senegal demonstrate clearly that mediation of the effects of repudiation by the courts generally ensures a better protection of women's rights. Nevertheless, in Niger, this pragmatic approach, which takes account of the customary laws that informally govern personal status, also creates problems regarding the compliance of Nigerien law with the international and regional human rights framework. It is indeed the application of these customary laws that prevent Niger from retracting its reservations to the Convention on the Elimination of Discrimination Against Women.³⁵⁹

Finally, it should be noted that in most areas of the three States, the majority of repudiations are not recorded by the courts, due in particular to the difficulty of accessing the justice system. In such cases, repudiated women who are driven from their home often face disastrous consequences in terms of their ability to provide for themselves and their children.

Proposals and areas for further study

Following our research in Mali, Niger and Senegal, various proposals and areas for further study can be suggested. They are generally a response to the challenges and concerns that this research project has sought to identify and analyse. We have grouped them under three headings:

- 1)- Refining the legislative and judicial framework for family cases
 - Bring civil family law into line with international and regional human rights standards
 - Implement an obligation to register all marriages, and ensure it is enforced on the ground
 - Encourage judges to apply the law in its entirety and in conformity with constitutional provi-

³⁵⁹ See introductory chapter on reservations to CEDAW.

sions and international and regional human rights standards

- Develop local family justice systems to provide a better guarantee of equal access to justice and strengthen the powers of courts, public institutions, social services, traditional and religious institutions as well as civil society organisations

2)- Providing consideration for customary law within a framework that respects both local needs and universal rights

- Create a national dialogue on the role of customary law in matrimonial matters
- Formalise the way in which customary and religious authorities intervene and encourage such authorities to protect the rights of all parties concerned
- Encourage a better appreciation by women of the customary laws applied to them so that they may take maximum advantage of these laws
- Consider how the judiciary might provide a civil legal framework for customary law

3)- Giving increased practical support to women undergoing divorce

- Make justice more accessible to women by removing practical obstacles such as the remoteness of the public justice system, financial barriers and excessive bureaucracy involved in divorce proceedings
- Establish or strengthen socio-legal structures (legal clinics) in their mission to inform, listen to, advise and mediate on behalf of women undergoing divorce
- Increase and extend legal assistance for women
- Improve women's appreciation and awareness of their rights

To conclude, the analysis of divorce practice in the three studies leads us to conclude that divorce granted in court offers a real guarantee of equality between men and women, as well as legal security. Despite its limitations – in particular, people's notions about the justice system in family matters – judicial divorce seems to be the best option when terminating a marriage. However, this legal form of divorce is only rarely an option in practice. Legislators and judges cannot afford to ignore this reality, and must both work to ensure that the rights of all those involved in divorces are protected.

CONSOLIDATED BIBLIOGRAPHY

Books

- ADEPOJU A., *La famille africaine : politiques démographiques et développement* [Family in Africa : Demographic policies and Development]. Paris: Karthala, 1999.
- ANCEL M., *Le droit de la famille en Afrique noire et à Madagascar* [Family Law in Black Africa and Madagascar]. Paris: AISJ, 1968.
- BARA DIOP A., *La société wolof: tradition et changement* [Wolof Society: Tradition and Change]. Paris: Karthala, 2012.
- DECOTTIGNIES R., *Requiem pour la famille africaine* [A Requiem for the African Family]. Dakar: Pedone, 1965.
- DIOUF, N., *Droit de la famille. La pratique du tribunal départemental au Sénégal* [Family Law. Departmental Court Practice in Senegal]. Dakar: Collection Espace juridique, Abis Editions, 2011.
- DIAL F. B., *Mariage et divorce à Dakar. Itinéraires féminins* [Marriage and Divorce in Dakar. Feminine Itineraries]. Paris: Karthala - CREPOS, 2008.
- DIOP, A. B., *La famille Wolof* [The Wolof Family]. Paris: Karthala, 1981.
- DJOGBENOU J., *Droits de l'Homme Paix et Développement: La Contribution à l'étude du code des personnes et de la famille* [Human Rights, Peace and Development: Contribution to the Study of the Personal and Family Code]. Cotonou: Editions Juris Ouanilo, 2007.
- FALL I. M., *Evolution constitutionnelle du Sénégal – De la veille de l'Indépendance aux élections de 2007* [Constitutional Change in Senegal – From the Eve of Independence to the 2007 Elections]. Dakar: Collection du CREDILA, n°XXII, CREDILA/CREPOS, 2007.
- GUINCHARD S., *Droit patrimonial de la famille du Sénégal* [Family Inheritance Law in Senegal]. Paris, Dakar and Abidjan: Coll. Bibliothèque africaine et malgache, t. XXXII, LGDJ and Nouvelles éditions africaines, 1980.
- KOUASSIGAN G. A., *Quelle est ma loi? Tradition et modernisme dans le droit privé de la famille en Afrique noire francophone*. [Which Law is Mine ? Tradition and Modernism in the Private Family Law of Francophone Black Africa] Paris: Pedone, 1974.
- NDIAYE Y., *Le divorce et la séparation de corps* [Divorce and Legal Separation], Dakar: Nouvelles éditions africaines, 1979.
- SIDIBE A. S., *Le pluralisme juridique en Afrique (l'exemple du droit successoral sénégalais)*. [Legal Pluralism in Africa (The Example of Senegalese Inheritance Law)]. Paris: LGDJ, 1991.

Articles

- ADJAMAGBO-JOHNSON B., 'Législations et changements familiaux en Afrique sub-saharienne francophone' [Legislation and the Changing Family in Sub-Saharan Francophone Africa], in *Ménages et familles en Afrique: Approche des dynamiques contemporaines*, Les Etudes du CEPED, No 15, 1997, pp. 239 et seq.
- CHAÏBOU A., 'La jurisprudence nigérienne en droit de la famille et l'émergence de la notion

de coutume urbaine' [Nigerien Family Case-law and the Emerging Idea of Urban Customary Law], *Journal of Legal Pluralism*, 1998, No 42, pp. 157-170.

FALL P. T., 'Réflexions critiques sur le divorce en droit sénégalais' [Critical Reflections on Divorce in Senegalese Law], *Revue Droit Sénégalais* n° 12, Toulouse 1 (à paraître).

FALL P. T., 'La rupture du mariage coutumier en droit sénégalais: l'imbroglie juridique?' [Customary Divorce in Senegalese Law: A Legal Imbroglie?], *Nouvelles annales africaines*, 2011/2.

GUINCHARD S., 'Les grandes orientations du Code sénégalais de la famille' [Principal Elements of the Senegalese Family Code], *Penant*, 1978, pp. 175-204.

HASSANE B., 'Prolégomènes à une éventuelle réforme du droit du divorce au Niger' [Introduction to a Possible Reform of Divorce Law in Niger], in LAGOUTTE S. et SVANEBOG N., *Les droits de la femme et de l'enfant, Réflexions africaines*. Paris: Khartala, 2011, pp. 123-154.

KANE M., 'La condition de la femme sénégalaise mariée selon la coutume islamisée' [The Status of Married Senegalese Women Under Islamised Customary Law], *Rev. Jur. et Pol.*, 1974, pp. 779 et seq.

KOUASSIGAN G. A., 'Famille, droit et changement social en Afrique noire francophone' [Family, Law, and Social Change in Black Francophone Africa], in *Famille, Droit et changement social dans les sociétés contemporaines*, Travaux des VIII^{es} Journées d'études juridiques Jean Dabin, organised by the Centre de Droit de la Famille, March 25 and 26, 1976 in Woluwe-St-Lambert, Bruxelles, Bruylant and LGDJ, 1978, pp. 161-220.

MBAYE M. N., 'Le divorce de l'absent' [Absentee Divorce], *Nouvelles Annales Africaines*, no. 1-2009, p. 96 et seq.

NDIAYE I. Y., 'Le mariage à l'épreuve du droit traditionnel' [Marriage and Traditional Law], *Revue sénégalaise de droit* no. 36, 2011, pp. 13 et seq.

NDIAYE I. Y., 'L'envers du droit traditionnel dans le code de la famille' [The Reverse of Traditional Law in the Family Code], *Revue de l'Association de droit pénal, droit sénégalais*, July-December 1995.

NDIAYE I. Y., 'Réflexions sur une cause de divorce: l'incompatibilité d'humeur' [Mutual Incompatibility as Grounds for Divorce], *EDJA* No 13, 1987, pp. 2 et seq.

NIANG M. B., 'Solidarité familiale et vulnérabilité économique en droit de la famille sénégalais' [Family Solidarity and Economic Vulnerability in Senegalese Family Law], *Nouvelles annales africaines*, 2011/2.

SARR D., 'Les causes de rupture du lien matrimonial de 1872 à 1946' [Grounds for Marital Separation from 1872 to 1946], *Annales africaines*, 1976, pp. 170 et seq.

TANKOANO A., DIALLO I. K. et MAÏGA D., 'La réceptivité du droit en milieu rural nigérien' [The Responsiveness of Law in Rural Niger] in *Les services juridiques en milieu rural (Afrique de l'Ouest)*, Genève, Commission Internationale des Juristes, 1987.

VANDERLINDEN J., 'Le juge et la coutume en Afrique aujourd'hui' [Judges and Customary Law in Africa Today], *Afrique contemporaine*, 1990, pp.156 et seq.

Reports and Studies

***The three studies carried out as part of the research project into the dissolution of marriage in Francophone West Africa:**

BENGALY, Abraham et al.: *Projet de recherche sur la rupture du lien matrimonial en Afrique de l'Ouest: Etude sur le Mali* [Research project on the dissolution of marriage in Francophone West Africa: Mali study]. Observatoire des Droits Humains et de la Paix and Danish Institute for Human Rights, 2014.

FALL, Papa Talla et al.: *Projet de recherche sur la rupture du lien matrimonial en Afrique de l'Ouest: Etude sur le Sénégal* [Research project on the dissolution of marriage in Francophone West Africa: Senegal study]. Cheik Anta Diop University Institute for Human Rights and Peace and Danish Institute for Human Rights, 2014.

YOURA, Boukar et al.: *Projet de recherche sur la rupture du lien matrimonial en Afrique de l'Ouest: Etude sur le Niger* [Research project on the dissolution of marriage in Francophone West Africa: Niger study]. Faculty of Economic and Legal Sciences at the Abdou Moumouni University and Danish Institute for Human Rights, 2014.

***Mali:**

Rapport sur la problématique du divorce au Mali [Report on the issues surrounding divorce in Mali], RECOFEM, May 2012.

Etude sur la politique nationale en matière des droits humains [A study of national human rights policy], by Mamadou DIAKITE, PCDHG, 2011.

Etude sur l'état d'harmonisation de la législation nationale avec les instruments juridiques internationaux et régionaux des droits humains ratifiés par le Mali [A study of the harmonisation of national legislation with the international and regional legal human rights instruments ratified by Mali], by Malik COULIBALY, PCDHG, 2011.

Evaluation de l'appui pour l'accès des couches vulnérables à la justice [An evaluation of the support for access to justice by the vulnerable], OXFAM/NOVIB et WILDAF/Mali, presented by Alifa Habib KONE, January 2011.

Recueil de Textes Législatifs et Règlementaires sur la Femme, l'Enfant et la Famille [A Compilation of Legislative and Regulatory Laws relating to Women, Children and the Family], 1st Edition, Ministry for the Promotion of Women, Children and the Family (Secrétariat Général), Bamako, CNDIFE 2007.

Plaidoyer pour une effectivité des droits de la femme au Mali [An Appeal for Real Women's Rights in Mali], by Amadou T. DIARRA, under the supervision of WILDAF/Mali, 2002.

Etude sur les aspects juridiques du développement économique [A Study of the Legal Elements of Economic Development], prepared for UNESCO under the direction of André TUNC, Dalloz, 1966.

***Niger:**

Acts of the Colloquium entitled 'Quel droit de la famille pour le Niger?' [The Future of Family Law in Niger] held in Niamey, November 21 to 23, 2005, organised by the FELS in partnership

with the DIHR, Niamey: FELS-DIHR, 2005.

Report from the General Assembly of the Judiciary, Justice Consultation Bureau, Niamey, November 26 to 30, 2012.

Report from the conference on the theme: 'Répudiation au Niger: Eléments d'une enquête dans la ville de Niamey' [Repudiation in Niger: An Enquiry in Niamey] organised by Mrs Diallo Achibi MAHADI and Mr Mohamed Taha MAYAKI at ENAM, December 22, 2012.

DANISH INSTITUTE FOR HUMAN RIGHTS

This regional publication on the dissolution of marriage, legal pluralism and women's rights in Francophone West Africa is an outcome of a research project initiated by the Danish Institute for Human Rights in partnership with African researchers.

The research project aims at documenting and analysing the problems encountered at the dissolution of marriage and at exploring possible legal and non-legal solutions in order to secure a better protection of the rights of the persons involved. The purpose of the research project is also to build the capacities of the researchers' teams in terms of project design, methodology and completion of a well-documented and objective study.

In this publication we have gathered the three studies on Mali, Niger and Senegal together with an introductory chapter that presents the issues at stake in terms of legal pluralism and protection of human rights. A conclusion takes stock of concerns, challenges, proposals and possible paths for future work and reflection.

Each study starts with a survey of the different kinds of divorce, both formal and informal, which are to be found in each country. It then considers a number of difficulties encountered by women, mostly in terms of grounds for and effects of divorce. Far from being exhaustive, these studies should rather be seen as the commencement of a scientific work on legal and more informal aspects of divorce in the three countries.

The work on this joint publication was directed by Stéphanie LAGOUTTE, Senior researcher at the Danish Institute for Human Rights with the participation of the main authors of the three national publications: Abraham BENGALY, Lecturer at the University of Bamako, Papa Talla FALL, Senior Lecturer in Law at the Cheikh Anta Diop University in Dakar and Boukar YOURA, human rights adviser for the Danish Institute for Human Rights in Niamey.

This publication has been made within the framework of the West Africa Programme of the Danish Institute for Human Rights.