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### Women's Legal Rights

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### Summary and Keywords

In the colonial and postcolonial period, African women have advocated for legal reforms that would improve the status of women across the continent. During the colonial period, European common and civil law systems greatly influenced African indigenous legal systems and further entrenched patriarchal aspects of the law. In the years since independence, women's rights advocates have fought, with varying degrees of success, for women's equality within the constitution, the family, the political arena, property rights, rights to inheritance, rights to be free from gender-based violence, rights to control their reproductive lives and health, rights to education, and many other aspects of life. Legal developments at the international, national, and local levels reflect the efforts of countless African women's rights activists to improve the status of women within the region.

Keywords: Africa, gender, women's rights, Maputo Protocol, constitutional law

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Like those in other regions of the world, legal systems in Africa have evolved to reflect greater recognition of women's equality rights within the last half-century. A significant number of women have gained access to formal political representation in many states in the region. Women have fought for and achieved important reforms within national legal systems, offering better protection against gender-based violence, greater access to education, increased recognition of land and property rights, and improved health outcomes. International human rights law has also changed to reflect greater recognition of women's human rights. Local, national, and regional women's rights activists throughout Africa regularly invoke international human rights law in their struggles to promote women's rights in their own countries and communities.

Despite these gains, however, women within the region have not achieved gender equality and continue to face legal barriers in the fight for equality. As with other parts of the world, much work remains to be done in the region before women enjoy equality as full citizens under the law and as equal partners in the ongoing project of shaping their families, communities, and states. Throughout the region, women's legal advocacy organizations work tirelessly to reform the law to promote women's rights, often with few resources.

## Women's Legal Rights

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Colonialism has had a lasting impact on contemporary African states. Although colonialism in Africa existed before the Berlin Conference of 1884–1885, the conference accelerated colonial rule on the continent such that by 1900, European countries had claimed dominion over 90 percent of the continent.<sup>1</sup> European colonizing governments drew territorial boundaries without reference to the important indigenous factors such as ethnic and socio-economic diversity.<sup>2</sup> They also dramatically altered the indigenous legal systems that were in place prior to colonization by importing aspects of their own European legal systems and imposing them on the African indigenous populations living under colonial rule.

The imposition of European law led to plural legal systems in many states.<sup>3</sup> The colonial government often retained African customary law or religious law to govern disputes among indigenous Africans and those related to personal or family law.<sup>4</sup> A plural legal system in which indigenous customary law continued to apply in areas of personal law was common in the British colonies of the region. Under indirect rule, colonial authorities allowed customary law to govern personal or family law disputes as long as the relevant customary law was not “repugnant to natural justice and morality.”<sup>5</sup> The result of this divided jurisdiction was a plural legal system in which statutory, customary, and religious law operated simultaneously within a given country. The race or religion of the parties or the substantive nature of the grievance often determined the applicable system of law.<sup>6</sup>

During the colonial period, customary law was constructed and understood in a variety of ways that distorted the pre-colonial meaning of custom. Colonial courts created “official” versions of custom based on evidence provided by experts, such as elders and traditional leaders. The perspectives of such experts, who had experienced a loss of authority and power, were often skewed in an effort to preserve gender and social privilege.<sup>7</sup> Armstrong et al. observe:

The employment of these traditional authorities in the [customary law] formulation process gave the laws thus produced the appearance of being a record of customary law as practiced by the people, whereas they were in reality the versions of customary law which reflected the interests of the traditional authorities and the colonial administration.<sup>8</sup>

Armstrong and others advocate for a dynamic understanding of customary law as “living law” that evolves and changes with the changing circumstances of social life. Such an understanding of customary law involves a fluidity and flexibility in its interpretation that may benefit women seeking an interpretation of custom that reflects women’s lived experiences. Since independence, many Francophone African countries adopted an “integrationist course by trying to absorb customary law into the general law, codifying elements of customary law in statutes.”<sup>9</sup>

As African countries gained independence in the 1960s and 1970s, the newly independent states enacted constitutions that reflected a commitment to independent governance and, in many cases, an attempt to reconcile the difficult choice-of-law questions that arise within plural legal systems. In an effort to preserve cultural identity and foster

## Women's Legal Rights

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a post-independence notion of nationhood, many countries protected the role of customary law in governing the structure and rights within families. At the same time, some of the new, post-independence constitutions also included important rights guarantees, including the right to be free from discrimination based on sex or gender.

This chapter focuses on the evolution of women's legal rights in the post-colonial period. It explores the complexity of the plural legal systems prevalent in most contemporary African legal systems. Africa is a diverse continent and this chapter cannot offer a comprehensive look at any particular legal systems within the region. Instead, the chapter identifies trends and offers examples of how legal systems at the local, national, and international level have adapted to reflect the growing call for gender equality around the world.

## Sources of Gender-Based Legal Protection

### International Law

International and regional treaties provide significant protection for women's rights around the world. Treaties and conventions create binding legal obligations on the countries that ratify them. The primary international treaty that protects women's rights is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which the United Nations General Assembly adopted in 1979. CEDAW protects a wide range of gender-based rights, including rights related to non-discrimination, gender-based stereotyping, prostitution, participation in public life, nationality, employment, education, health, economic and social benefits, special rights for rural women, equality under law, and equality in marriage and family life. The majority of African states have ratified or acceded to the treaty. Many countries, however, have noted reservations to key provisions, indicating that they do not agree to be bound by those particular provisions.

There are also a number of regional treaties that specifically protect the rights of African women and girls. These include the African Charter on Human and Peoples' Rights (the "African Charter"), the Protocol to the African Charter on the Rights of Women in Africa (the "Maputo Protocol"), and the African Charter on the Rights and Welfare of the Child (ACRWC). Although some have criticized the African Union (AU) as ineffective in enforcing rights against states that are accused of rights violations, the Maputo Protocol's entry into force in 2005 was widely hailed as a success for women in the region. The Protocol builds on the rights articulated in CEDAW and offers a particularized version of those rights that more accurately reflects the rights and priorities of African women. As of 2018, 40 of the 55 AU member states have either ratified or acceded to the Maputo Protocol.<sup>10</sup>

Several subregional treaties also attempt to promote respect for human rights within subregions of the continent. For example, the Southern African Development Community (SADC) is a group of 15 countries that has significantly contributed to the promotion of

## Women's Legal Rights

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women's rights through its own regional treaties. SADC's organizing treaty, for example, prohibits gender discrimination. SADC member states have also adopted additional protocols to promote women's rights and eradicate gender-based violence. The Economic Community of West African States (ECOWAS) and the East African Community (EAC) also commit member states to principles of non-discrimination and gender equality.

In addition, women's rights continue to be a focus for law reform efforts within international and regional bodies. For example, in 2015, the United Nations General Assembly adopted the 2030 Agenda for Sustainable Development, which includes provisions seeking to "achieve gender equality and empower all women and girls," "eliminate all forms of violence against women and girls in the public and private spheres," and "[e]nsure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies, and practices."<sup>11</sup> Activists within the region often draw upon international and regional human rights treaties to advocate for change at the national level.

## Constitutional Law

Constitutional law is typically a country's highest source of law. Constitutions generally define the structure of government and include guiding principles for individual rights and restraints on governmental action. In analyzing its database of treaties, constitutions, and laws found in African countries, the Women's Legal and Economic Empowerment Database for Africa notes that all countries in the region "recognize the principle of nondiscrimination in their constitutions, in the treaties they have signed, or both."<sup>12</sup> Many of the newly independent governments included non-discrimination provisions in their post-colonial constitutions while others have added constitutional non-discrimination protection for women in the years since independence.

Although many post-colonial constitutions included protection against sex discrimination, many specifically excluded customary and family law from the ambit of protection, including The Gambia, Lesotho, Sierra Leone, and Zambia.<sup>13</sup> Because the legal issues that most significantly affect women fall within family or personal law, these exclusionary clauses within constitutions often have a detrimental impact on women. One example is the Lesotho Constitution. As amended in 1993, the Lesotho Constitution retains a structural impediment to women's equality. Lesotho's Constitution includes a general non-discrimination clause that states: "Subject to the provisions of subsections (4) and (5), no law shall make any provision that is discriminatory of itself or in its effect." Subsections (4) and (5), however, exclude from non-discrimination protection issues related to "marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description."<sup>14</sup> Under this provision, for example, a woman who alleged gender discrimination in the inheritance of her deceased husband's property would have no constitutional non-discrimination protection. Although Lesotho has retained this exclusion, Zimbabwe and other countries have eliminated similar exclusions through constitutional reform processes within the last two decades. As a result of these

constitutional reform processes throughout the region, South Africa, Kenya, and many other countries subject all laws, including customary law, to constitutional scrutiny.

## Women, Governance, and Citizenship

Although women in pre-colonial African communities enjoyed leadership roles at the local level, colonial authorities shifted substantial political authority to male leaders during colonization.<sup>15</sup> In the late 20th and early 21st centuries, African women gained, and in some cases regained, access to both formal and informal political structures in many countries. Levels of female representation at the national level within some African countries are among the highest in the world. Although women's representation in government at the local and national levels has increased, however, governance continues to be male dominated. Even in countries with increased numbers of women in elected offices, feminist legislators have often struggled to pass legislation designed to enhance women's rights.

More than 50 percent of countries in sub-Saharan Africa have implemented some type of gender quota to increase women's representation at the national and, sometimes, regional or local level.<sup>16</sup> In Senegal, the Seychelles, and South Africa, women occupy more than 40 percent of parliamentary seats.<sup>17</sup> SADC and other subregional bodies have played an important role in promoting increased representation for women within national decision-making institutions. In some cases, armed conflict has been the impetus for establishing gender quotas in the peace-building and reconstruction process.

International human rights law and many national laws in the region recognize women's right to participate at all levels of political decision-making. Despite marked progress in women's representation in formal, national political bodies, however, women's political roles remain constrained in many informal systems of traditional leadership and customary law within the region. Before colonialism, women's defined roles included active community engagement and traditional leadership.<sup>18</sup> Colonialism brought redefined gender roles and an enhanced role for men in the public sphere.<sup>19</sup> Women continue to struggle to reestablish political roles in the more traditional arenas of customary leadership and traditional authorities.

The Maputo Protocol specifically addresses women's right to participate in the determination of cultural policies. Article 17 of the Protocol states that women have a right to "participate at all levels in the determination of cultural policies" and requires states to "enhance the participation of women in the formulation of cultural policies at all levels."<sup>20</sup> These provisions of the Protocol underscore the need for women to be involved in the formulation of not only national legislative policies but also local cultural and customary policies.

In addition to having a formal, public role in all levels of policymaking, women's equality requires that they have equal rights to all aspects of citizenship. Unfortunately, women's citizenship rights remain compromised in ways that go beyond participation in policymaking. Within some countries in the region, women continue to struggle to pass citizen-

## Women's Legal Rights

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ship on to their children on an equal basis with men and to pass citizenship to their foreign-born spouses on a basis of equality with men. Guinea, Mali, Mauritania, Senegal, Sierra Leone, Somaliland, Sudan, Swaziland, and Togo are among the most restrictive with respect to women's citizenship rights. These countries restrict women's ability to confer citizenship to both foreign spouses and children.<sup>21</sup>

A number of countries recognize women's rights to pass citizenship to both their children and to a foreign-born spouse, while some recognize women's citizenship rights along one vector but not the other. Tunisia, Algeria, and Egypt, for example, passed legislation between 1993 and 2003 that would allow a woman married to a foreigner to pass her citizenship and nationality on to her children.<sup>22</sup>

Both Zimbabwe and Botswana reformed discriminatory nationality laws as a result of litigation. Botswana's Citizenship Act of 1982 stipulated that only men and unmarried women could convey citizenship to their children. In a landmark 1991 case, *Unity Dow*, a women's rights lawyer who would later become the first female High Court Judge in Botswana, sued to challenge the discriminatory law. Dow, a Motswana married to an American man, was unable to pass Botswana citizenship to two of her children. In defending the facially discriminatory legislation, the Botswana government used "patrilineal principles grounded in customary law to justify the discrimination."<sup>23</sup> Nevertheless, Dow prevailed in a groundbreaking case in which she used constitutional non-discrimination law and provisions of CEDAW to argue that the law unfairly discriminated against women. A similar case in 1994 in Zimbabwe, *Rattigan and Others v. Chief Immigration Officer of Zimbabwe*, resulted in a Supreme Court decision, followed by legislative action, imposing a gender-neutral citizenship rule.

## Women's Legal Capacity and Rights within Marriage

Women's rights within marriage and the family have a profound impact on women's quality of life. Within the region, states organize family law in a variety of ways. Some countries, like Tanzania, have passed specific legislation such as the Law of Marriage Act of 1971. Other countries, particularly former French colonies, have a civil or family code. Regardless of the particular structure of the family law system, however, almost all the countries in the region have attempted to reconcile the conflicting demands of statutory, customary, and religious law.

In the last 50 years, a number of countries have formally enhanced women's legal capacity. Prior to these reforms, in some African countries, the colonial law dictated that women enjoyed legal recognition only as daughters, wives, and widows. Women, therefore, existed as perpetual legal "minors," with all of the constraints on their rights that go along with minority legal status. Two years after it officially gained independence in 1980, Zimbabwe passed the Legal Age of Majority Act (LAMA), which provided that all Zimbabweans attained adulthood at age 18. The Act was hailed as a major victory for women in

## Women's Legal Rights

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the country, who, prior to passage of the LAMA, lacked legal capacity and could not enter into contracts, consent to marriage, or otherwise make legally enforceable decisions without male consent. Countries such as South Africa, Namibia, Botswana and Lesotho have followed suit and have taken steps to ensure women's enjoyment of rights within marriage. With the passage of its Matrimonial Property Act 88 of 1984, for example, South Africa eliminated the concept of "marital power," which specifically limited married women's decision-making authority, empowering women to make decisions within their marriages. Namibia's 1996 Married Person Equality Act, Botswana's 2004 Abolition of Marital Power Act, and Lesotho's 2006 Legal Capacity of Married Person's Act all enhanced women's power within the marital relationship.<sup>24</sup>

Throughout the region, women continue to struggle to achieve widespread equality in marriage. Some countries still privilege male decision-making within the family through head-of-household laws, many of which are largely a by-product of French colonial rule. Some countries still recognize a husband's right to determine the marital domicile. Other countries preserve male decision-making within the family through laws that require a wife to seek her husband's permission to open a bank account, enter into a legal contract, apply for a loan, or seek work outside the home. In Egypt, for example, where Shari'a law governs areas of personal and family law, wives must obtain their husband's consent to travel abroad.<sup>25</sup>

Within some plural legal systems, such as Tanzania, couples may choose to marry according to customary, religious, or civil law. Tanzania's Law of Marriage Act of 1971 (LMA) preserves the choice to marry under customary, religious, or statutory law, but the LMA also establishes certain rights within marriage that apply regardless of the type of marriage. In some countries within the region, women's rights within marriage may vary considerably depending upon the type of marriage into which the couple has entered. Where there is a choice to marry under customary, statutory, or religious law, customary law marriage remains popular. In Ghana, for example, a 1988 study shows that 80 percent of Ghanaian marriages occurred under customary law.<sup>26</sup>

Customary marriage requirements further vary depending on the traditions of a particular ethnic group and sometimes even vary within the group.<sup>27</sup> As Phillips and Morris note, "Any attempt to sketch in a few pages the outlines of African customary marriage must inevitably illustrate the dangers of generalization on a subject so great in its range and variety."<sup>28</sup> The following discussion, therefore, focuses only on the broad parameters of marriage systems and does not attempt to provide a detailed description of marriage under civil, customary, or religious law.

Customary marriage often requires the payment of bridewealth. Fareda Banda notes, "The practice known amongst the Ndebele as *lobolo*, and by a myriad of other names in the many African tongues, has been understood as the transfer of cattle or livestock and/or money by a prospective bridegroom, or his family, to the family of the woman he intends to take as his wife."<sup>29</sup> Some ethnic groups require that a wife who is seeking a di-



## Women's Legal Rights

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orce repay the bridewealth before she may dissolve her marriage. In some cases, this economic requirement may discourage a woman from to seeking a divorce.

Customary and Islamic marriages are often potentially polygamous. Many but not all women's rights scholars within the region view polygamous marriages as inherently discriminatory toward women because the practice reflects and reinforces the power differential between a husband and his multiple wives.<sup>30</sup> There are a variety of other types of marital arrangements across the region, including, for example, levirate marriages in The Gambia and Zimbabwe, which occur when a woman's husband dies and she becomes the wife of one of the deceased's brothers. Those marriages may be symbolic or may involve a sexual relationship.

Customary and religious marriages may involve child brides. Most countries now have a minimum age of marriage, although often the minimum age is different for boys and girls. In many countries, the minimum age for marriage under statutory, customary, and/or Islamic law is several years younger for girls. For most African countries, the average minimum legal age of marriage without parental consent is 18. There is considerable variability in other countries, ranging from 15 years in Niger and Democratic Republic of Congo, to 22 years in Central African Republic.<sup>31</sup>

Many countries, however, still allow marriage at a younger age than the statutory minimum if there is parental consent. Increasingly, international human rights instruments such as the African Charter on the Rights and Welfare of the Child and the Maputo Protocol require that states adopt 18 as the minimum age of marriage. Despite the enactment of relevant legislation by many countries, enforcement remains a challenge, and the problem of child marriage remains widespread in some countries.<sup>32</sup> The health consequences of early marriage for girls and young women, described in the section "GENDER-BASED VIOLENCE," can be devastating.

## Property and Inheritance

In divorce, women often experience an unequal distribution of property. Although many countries require registration of customary marriages, the requirement is honored more in the breach than in the observance. When women are seeking a divorce in an unregistered customary marriage, they often receive little or nothing in the divorce.<sup>33</sup> In Egypt, Coptic Christian women lack any rights in the marital property during the marriage and at its dissolution. While a divorced mother may stay in the marital house to raise children, she must evacuate the home once her custody terminates.<sup>34</sup> Women are also disadvantaged in property distribution at divorce when their work is in the household or in the informal sector. Because they work in the formal labor sector in greater numbers than women, men are often able to provide proof of formal wages. Women, on the other hand, are often at the mercy of judges who may or may not be willing to consider women's household contributions in the valuation of marital property at divorce. Even when judges consider women's household contributions to the marital assets, they often undervalue those contributions as compared to the husband's wage work outside the home. In addi-

## Women's Legal Rights

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tion, legal title to property within a marriage or family is often registered in the man's name only. This puts women at a serious disadvantage when the court distributes property upon dissolution of marriage.

Women are also often severely disadvantaged in the context of inheritance. When a woman's husband dies, she may or may not inherit any property with which to support her children or herself. Under Tanzania's inheritance laws, for example, a widow married under customary law will likely inherit nothing. According to Tanzanian women's rights expert, Monica Magoke-Mhoja:

Customary law completely bars widows from inheriting land from their deceased husbands, even when the land is marital property, and subjects the widows to being "inherited" by men in her husband's family. It prohibits daughters from inheriting any family or clan land, limits them to inheriting small shares of property, and excludes daughters and widows from administering estates.<sup>35</sup>

Customary inheritance rules arose at a time when family and clan members provided support to widows and children upon the death of a husband/father. Over time, however, the tradition and the sense of community obligation to care for and support widows has morphed into practices that make women vulnerable to economic exploitation by the deceased husband's family.<sup>36</sup>

The practice of "widow inheritance" requires the male relatives of the deceased husband to marry the widow. Under customary law in Tanzania, the male relatives may ask the widow if she wishes to marry a male relative. Social and economic pressures on the widow often make this "choice" almost inevitable. Traditionally, in Egypt, rural women are especially likely to marry relatives of their deceased husbands. This stems from a number of factors including familial restrictions on remarrying in order to ensure that assets remain in the deceased's family's name.<sup>37</sup> In some countries, the phenomenon of "property grabbing" is common. In these cases, after a husband dies intestate, his family members will raid his home and grab property often neglecting the needs of the deceased's widow and children.<sup>38</sup>

Inheritance for women married under Islamic law differs from inheritance under customary or civil law. In Tanzania, for example, Muslim women also inherit half of what their male counterparts inherit under the law.<sup>39</sup> Although Tanzania's Law of Marriage Act integrated many aspects of marriage law, it did not include intestate succession rules. As a result, women married under customary and Islamic law are more likely to be severely disadvantaged in property distribution when a spouse dies without leaving a will.

## Gender-Based Violence

Intimate partner violence is a problem all over the world. Africa is no exception. Rates of intimate partner violence remain high throughout the region. Estimates from 2016 suggest that 36 percent of the sub-Saharan population has experienced intimate partner vio-

## Women's Legal Rights

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lence.<sup>40</sup> In one study, one fourth of the countries in the African region reported a lifetime prevalence of intimate partner physical and/or sexual violence of at least 50 percent.<sup>41</sup> The percentage of women who have experienced physical and/or sexual violence from an intimate partner at some time in their lives ranges from 13 percent in South Africa to 46 percent in Sudan and 78 percent in Angola.<sup>42</sup>

Countries have developed a range of strategies for addressing the problem of intimate partner violence. Many countries have amended their criminal laws to explicitly prohibit the practice. Other countries use pre-existing criminal provisions, such as general criminal prohibitions on assault, and apply those general provisions to the specific problem of intimate partner violence. Some African countries have created civil remedies for victims of intimate partner violence, such as Ghana's 2007 Domestic Violence Act, which allows a court to issue a civil order for protection.

In every country in the region, women's rights groups have initiated public education campaigns about intimate partner violence in an effort to raise awareness of the problem. These public education campaigns often attempt to raise awareness about how victims might use the legal system to escape a physically and mentally abusive relationship. Women in rural areas, in particular, often have difficulty accessing the formal legal system for redress and sometimes turn to traditional or community leaders, who may attempt to reconcile the parties or impose customary sanctions on the perpetrator.

Rape within marriage is not criminalized in several countries in the region, including Lesotho, Nigeria, and Tanzania.<sup>43</sup> Women who are in violent marriages often experience sexual violence. Because women who experience intimate partner violence often experience an imbalance of power that affects every aspect of their relationship, they are often unable to negotiate safe sex. Intimate partner violence therefore increases a woman's vulnerability to HIV/AIDS and leaves her more susceptible to unplanned pregnancy.

Throughout the region, and the world, women suffer from rape and other forms of sexual violence in alarming numbers. In a communication concerning Ethiopia, the African Commission on Human and Peoples' Rights observed, "[R]ape is one of the most repugnant affronts to human dignity and the range of dignity-related rights, such as security of the person and integrity of the person. . . ." Countries within the region generally prohibit rape outside of marriage and other forms of sexual assault, but enforcement and prosecution remain a challenge in many countries.<sup>44</sup> In the Republic of Congo, for example, the government prosecuted less than 25 percent of the reported cases of rape in 2016.<sup>45</sup> In addition, victims are sometimes required to pay for the police report or the medical examination following a rape allegation. These costs discourage women from reporting or pursuing prosecution.

Women's rights activists have successfully initiated reforms to the laws related to sexual assault in some countries within the region. In response to lobbying by women's rights groups, the Egyptian government reformed its law in 1991, changing a law that permitted men to escape prosecution and punishment if they married the rape victim. In addition, the government created 150 counseling centers to assist rape victims.<sup>46</sup> Somaliland

## Women's Legal Rights

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introduced a bill prohibiting rape in early 2018. Although many activists hailed the legislation as a victory for women, others expressed concern that the definition of rape requires the victim to prove “use of force, intimidation or threat” rather than lack of consent.<sup>47</sup>

A number of African countries have also experienced high levels of sexual assault in areas of armed conflict in the last several decades, including Burundi, Republic of Congo, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of Congo, Ethiopia, Liberia, Nigeria, Rwanda, Sierra Leone, Somalia, Sudan, and Uganda.<sup>48</sup> In these areas, rape becomes a weapon of war perpetrated against those considered to be the enemy in the conflict. The victims of sexual assault include women, men, girls, and boys. Wartime rape is sometimes motivated by a desire to change the ethnic make-up of disputed areas. Pramila Patten, Special Representative of the Secretary General on Sexual Violence in Conflict, notes “stigma and victim blaming gave the weapon of rape its uniquely destructive power, shredding the social fabric, turning victims into outcasts and leaving children conceived as a result of wartime rape at risk of being stateless and susceptible to recruitment, radicalization, trafficking and exploitation.”<sup>49</sup>

Female genital cutting (FGC) is defined as “all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons.”<sup>50</sup> Ethnic groups in 28 countries in Africa practice FGC. Although precise incidence rates are unavailable, the World Health Organization estimated that, by 1998, 136,797,440 women and girls throughout Africa had undergone some form of FGC.<sup>51</sup> Prevalence rates range from 98 percent in Djibouti to 5 percent in the Democratic Republic of the Congo (DRC) and Uganda. Egypt, Mali, Somali, Sudan, Togo, Burkina Faso, Eritrea, Ethiopia, Gambia, and Sierra Leone all have prevalence rates above 70 percent.<sup>52</sup>

The reasons for performing FGC on girls vary. One study in Sierra Leone cited the following explanations for FGC: “tradition, societal acceptance, religion, increasing chances of marriage, preservation of virginity, female hygiene, prevention of promiscuity, enhancement of fertility, to please husband, and to maintain good health.”<sup>53</sup> In many places, the practice is deeply entrenched in the traditions of local communities. As a result, efforts to eradicate FGC have been largely unsuccessful and have been seen as an attack on local culture. At times, involvement of Western feminists has complicated the conversation, causing some to defend the practice against what is seen as Western influence and critique.

In many communities, FGC marks a girl's passage from girlhood to womanhood. In other communities, practitioners perform FGC on infants or very young girls. In many countries, practitioners are women, often elders in the community. In most communities where it is practiced, FGC is seen as a requirement for marriage. As a result, many families are reluctant to resist the tradition out of fear that their daughters may be rendered unmarriageable, a social and economic consequence that is difficult for many to bear. As Esther Kisaakye describes, “Since FGM is usually carried out at a particular time of the year, and

## Women's Legal Rights

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involves many young girls in the same age group, there is the fear of losing the psychological, moral and material benefits of 'belonging', if one fails to undergo FGM."<sup>54</sup>

The health consequences of FGC are often quite severe. These may include "severe bleeding or hemorrhaging, shock from the pain associated with the procedure, risk of infections—especially when unsterile cutting instruments are used or if they are used on several girls at once—and urinary retention."<sup>55</sup> Additional long-term complications include anemia, cysts, scarring, difficulty urinating, urinary tract infections, fistulas, prolonged labor, and infertility. FGC also may cause sexual, psychosexual, mental, and emotional problems for women and girls who undergo the procedure.

Legislative efforts to curb the practice have enjoyed limited success. Some commentators believe that legislative bans simply drive the practice underground. Some countries, such as Burkina Faso, Central African Republic, Djibouti, Ghana, Guinea, and Sudan have enacted legislative bans on the practice. There have been a limited number of prosecutions in countries such as Ghana, and it is unclear whether the legislative ban actually acts as a deterrent to the practice.<sup>56</sup> Nevertheless, criminal prohibitions on FGC send an important signal that the practice is an unacceptable violation of the human rights of women and girls. At a minimum, legal prohibitions must be accompanied by social and educational campaigns designed to curb and eventually eliminate the practice.

Some such campaigns have enjoyed success. For example, a campaign in Kenya that advocates for an alternate, non-harmful rite of passage for girls has been successful in reducing the incidence of FGC in some communities. As of 1998, more than 50 percent of the 14 million women in Kenya had undergone FGC.<sup>57</sup> Two decades ago, the Programme for Appropriate Technology in Health (PATH) and Maendeleo Ya Wanawake Organization (MYWO) collaborated on a project designed to "help communities abandon the practice of female genital mutilation by developing an alternative ritual."<sup>58</sup>

After conducting research in one community concerning the motivations for FGC, PATH and MYWO designed an alternative rite of passage that preserved the celebratory aspects of the ritual, including dancing, singing, and feasting, and gift-giving. Organizers eliminated the ceremonial cutting and offered education in women's and girls' health and empowerment instead. PATH and MYWO work with families in the community to educate them about the dangers of FGC. They also work with community leaders, practitioners of FGC, and men and boys in the community to achieve buy-in throughout the community.

## Reproductive Rights and Health

Access to safe, legal abortion is critical to the enjoyment of women's reproductive rights. Abortion allows women to make decisions about whether and when to bear children. When women have access to safe abortion, the rate of complications from the procedure is low and the mortality rate from unsafe abortion is one per 100,000 procedures.<sup>59</sup>

## Women's Legal Rights

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Abortion is illegal in many countries within the region. Throughout sub-Saharan Africa, only Cape Verde and South Africa have generally legalized abortion. In most other countries in the region, abortion is legal only when the mother's life is in danger. Some countries, including Benin, Chad, Ethiopia, Ghana, Mali, Swaziland, and Togo, have been working to expand the exceptions to the prohibition on abortion.<sup>60</sup> As a result of the widespread prohibition on abortion, many women turn to unsafe, illegal abortions. In Nigeria, for example, despite an abortion ban that allows exceptions only to save the life of the mother, an estimated 610,000 abortions are performed in the country each year.<sup>61</sup>

In much of the region, complications from unsafe abortions are one of the leading causes of death for women admitted to the hospital. Every year, over 600 million unsafe abortions are performed throughout the continent, resulting in approximately 30,000 fatalities.<sup>62</sup> Of all the deaths around the world that occur due to unsafe abortions, 40 percent of those deaths occur in Africa.<sup>63</sup> Beyond the mortality rate from unsafe abortions, many women who undergo the procedure in unsafe conditions experience complications, including uterine perforation, hemorrhage and mild to severe infection.

The laws prohibiting abortion in almost all circumstances stem from laws established during the colonial period by the colonizing European governments. Health care providers from the region report that the laws and the accompanying social stigmas that surround them are deeply entrenched and difficult to reverse.<sup>64</sup> South Africa is an example of successful liberalization of abortion laws. After abortion was decriminalized in South Africa, abortion-related mortality decreased by 90 percent between 1998 and 2001.<sup>65</sup>

Some prohibitions on abortion punish a woman for obtaining or attempting to obtain an abortion. Ethiopia, for example, prohibits abortion except under limited circumstances, such as "grave and permanent danger to life or health."<sup>66</sup> A woman who obtains an abortion outside of the limited exceptions is subject to imprisonment for a period of time ranging from three months to five years. A person who has performed an illegal abortion is subject to "rigorous" imprisonment for up to five years. If the abortion provider has experienced some gain as a result of the procedure or is known to regularly perform abortions, the punishment increases to up to ten years of "rigorous" imprisonment.<sup>67</sup>

Laws throughout the region prohibit or substantially restrict access to abortion through a variety of requirements for any woman seeking an abortion. When abortion is allowed in limited circumstances, some countries, such as Zambia, require women to visit and receive approval from specialists who are not accessible in rural parts of the country. Other countries require a waiting period before a woman receives approval for an abortion, which can be an impediment to women who must travel to pursue authorization. Some countries require a woman to obtain written permission from her husband. Still others severely restrict access to information about contraception and abortion services.<sup>68</sup>

Access to contraception is inextricably linked to rates of abortion. If women are not able to access the contraception they need to prevent pregnancy, they are more likely to experience an unwanted pregnancy and more likely to seek out abortion services, whether those services are safe or unsafe. Throughout the continent, "only 13 percent of married

## Women's Legal Rights

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women use modern contraception . . . and usage is much lower in several countries in the region.”<sup>69</sup>

Unintended pregnancy is a particularly difficult problem for young women and girls in the region. In fact, countries within Africa experience some of the highest rates of adolescent pregnancy in the world. Niger, Mali, Angola, Mozambique, Guinea, Chad, Malawi, and Cote d'Ivoire have the highest rates across the globe.<sup>70</sup> Adolescent mothers throughout sub-Saharan Africa often experience debilitating and sometimes deadly complications from childbirth. The infants born to these mothers also face significantly greater health challenges and mortality rates.

Young mothers also “develop psychological problems from social stigma, [and] suffer physical and domestic violence in their attempt to meet the demands of pregnancy and child bearing.”<sup>71</sup> Yakubu and Salisu identify the following as factors associated with unintended adolescent pregnancy in sub-Saharan Africa:

early marriages, culture, religion, gender, poor social and economic support, curiosity and peer pressure, lack of comprehensive sexuality education, poor reproductive health services provision, poor attitude of health workers to providing contraceptive services for adolescents, . . . unmet need for contraceptives by adolescents, and fear of contraceptive side effects.<sup>72</sup>

Laws in some countries within the region, such as Tanzania and Sierra Leone, require that pregnant girls drop out of school. School officials in Tanzania often conduct mandatory pregnancy tests and routinely expel pregnant students.<sup>73</sup> The requirement that pregnant girls drop out of school also often prohibits the return to school after the girls have given birth. The policy makes it impossible for young mothers to complete their education and often results in fewer economic opportunities for adolescent mothers, beginning a cycle of poverty for families from which it is difficult, if not impossible, to break free. Although Cameroon, South Africa, and Zambia have developed policies that allow girls to re-enroll in school after they have given birth, school officials sometimes do not observe these “re-entry” policies.<sup>74</sup>

In addition to severely limiting educational options for adolescents, early pregnancy also exposes girls to a host of physical and emotional challenges. One of the most significant health problems caused by early marriage is obstetric fistula. Obstetric fistula is caused by “injury during childbirth, resulting in an abnormal opening between the vagina and the bladder (vesicovaginal fistula) or rectum (rectovaginal fistula), leading to continuous urinary or fecal incontinence.”<sup>75</sup> Because of incontinence, girls and women who suffer from fistula are often ostracized by family and community members, leading to psychological consequences that detrimentally affect quality of life for millions of girls.

Widespread access to delivery care and caesarean sections have largely eliminated the problem of fistula in the United States and Europe. Nevertheless, the United Nations estimates that 400,000 to 800,000 women suffer from untreated fistulas in Nigeria alone, where one in 18 women dies in childbirth.<sup>76</sup> Most of the women suffering from obstetric

## Women's Legal Rights

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fistula could reverse the condition through a relatively simple, \$300 surgery if only the operation were widely available. Unfortunately, in Mozambique, for example, only three surgeons perform the operation for the country's 17 million people.<sup>77</sup>

The severe and sometimes deadly consequences of early marriage and adolescent pregnancy underscore the need for countries to adopt and enforce laws that require a minimum age of marriage as early marriage is one of the factors contributing to widespread adolescent pregnancy. Forty percent of girls in sub-Saharan Africa marry before age 18. Of the 20 countries with the highest rates of child marriage, 15 of 20 are in Africa.<sup>78</sup> "In many African communities, it is common practice to give little girls as young as 10 years to marriage."<sup>79</sup>

International human rights law requires that states adopt a minimum age for marriage. The African Charter on the Rights and Welfare of the Child obligates States parties to establish 18 as the minimum age for marriage and to require the registration of all marriages. In states that have such laws, enforcement is often a problem. Although South Sudan enacted a law limiting marriage to those over the age of 18, "it is rarely enforced, particularly in rural areas."<sup>80</sup> The country has the world's fifth highest prevalence of child marriage, and statistics indicate that 17 percent of girls younger than 15 years of age are married.<sup>81</sup>

In addition, HIV/AIDS remains an epidemic in the region. As of 2011, about 34.2 million people around the world live with HIV/AIDS, and more than half of the people who are infected live in sub-Saharan Africa. Data from the region indicate that women are disproportionately affected by the HIV/AIDS epidemic there.<sup>82</sup> "In Zambia, for example, HIV prevalence among women aged 15–24 years was found to be nearly four times that of men in the same age group."<sup>83</sup> For women ages 15–24 in the region, AIDS-related illnesses are the second leading cause of death.

Since the early 2000s, there has been a rise in the criminalization of HIV/AIDS transmission throughout Africa. In 2005, at a workshop in Chad, 18 countries from West and Central Africa participated in the drafting of a document known as the Model Law for HIV/AIDS. This law essentially worked to criminalize HIV/AIDS transmission and exposure. As one critic pointed out, "the model law particularly targets and exposes women to criminal prosecutions."<sup>84</sup> This is because women are more likely to know their HIV/AIDS status as a result of pregnancy-related visits to clinics. By 2016, HIV transmission or exposure had been criminalized in 30 countries in sub-Saharan Africa. Botswana, South Africa, Uganda, and Zimbabwe have experienced a rise in prosecutions of transmission cases since 2015.<sup>85</sup>

## Feminist Lawyers as Agents of Change

Feminist lawyers established a number of law reform organizations dedicated to improving women's legal rights. Those organizations included, among others, the African Women Lawyers Association (AWLA), Association of Women Jurists, the International Fed-



## Women's Legal Rights

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eration of Women Lawyers (FIDA), Women and the Law in Eastern Africa (WLEA), Women and the Law in Southern Africa (WLSA), Women and the Law in West Africa (WLWA), Women in Law and Development for Africa (WiLDAF), and Women Living Under Muslim Laws (WLUML). Beginning primarily in the 1980s, African feminist lawyers in these and other organizations launched campaigns to promote women's legal rights. These early women's legal rights organizations paved the way for the many others that operate within the region and continue to challenge patriarchal laws and policies.

Discussing the activism of women in Cote d'Ivoire, Jeanne Maddox Toungara observes, "Experience since independence suggests that as Ivorian women increase their involvement in political and economic arenas, they will decrease their dependence on men to act as their spokespersons."<sup>86</sup> In the years since independence, many African women have used litigation to challenge violations of their rights under the law. Activists have also organized to reform legislation to eliminate barriers to women's equality. These challenges have resulted in greater respect for women's rights within African legal systems.

Women's rights lawyers throughout the region have used strategic litigation to challenge discriminatory laws. Strategic action litigation is "a process in public interest law whereby members of a marginalized group deliberately and proactively take a test case to court for the purpose of establishing a positive legal precedent whose effect goes beyond the immediate litigants."<sup>87</sup> Strategic litigation gained considerable ground as a method of promoting rights in Africa in the 1990s.<sup>88</sup>

One of the early women's rights cases involved a lawsuit brought by Sara Longwe in Zambia. Longwe, herself a feminist lawyer, was denied access to the Intercontinental Hotel because she was unaccompanied by a man. She sued and won in 1992. Unity Dow, another women's rights lawyer turned litigant, successfully brought suit in Botswana to challenge that country's discriminatory nationality law. In a 2004 South African case, several women brought a constitutional challenge to the rule of male primogeniture as applied in the customary law of succession. The Constitutional Court concluded that the customary rule, which denied women's right to inherit from their deceased fathers, violated the constitution's prohibition on gender discrimination. Although only a small sampling of successful women's rights cases in the region, these cases represent significant victories for women. Even in successful cases however, women sometimes have difficulty enforcing a court's favorable judgment. A successful judgment in test case litigation can sometimes take years to enforce.

As noted earlier, the African region is a world leader in women's representation within national political bodies. In Rwanda, women hold 62 percent of the country's legislative seats.<sup>89</sup> Within governments across the continent, women hold high-level ministerial and cabinet positions. Liberia, the Central African Republic, Malawi, and Mauritius have all had female heads of state.

In addition to greater representation in national politics, women have fought to have their voices heard in the academy as well. Feminist legal scholarship in the region has explored the traditional leadership roles women enjoyed in the pre-colonial era, the ways in

## Women's Legal Rights

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which the “received” law from the colonial powers contributed to and intensified women’s subordination, and the challenges women sometimes face operating within plural legal systems. Because customary law is dynamic, women have a role to play in identifying and eliminating the harmful aspects of customary law while preserving the positive aspects.

Despite greater representation in decision-making, numerous legal victories securing women’s equality rights, and an impressive and evolving body of feminist legal scholarship in Africa, much work remains in the struggle for gender equality across the region. “To argue that African legal feminists have achieved a powerful body of work in the past decades is not to deny the realities of ongoing, and sometimes, mind-numbing, discrimination.”<sup>90</sup> Women’s rights activists in every country in the region continue to fight for law reform that will promote women’s rights. Of course, law reform alone will not adequately secure women’s equality. Governments must also commit to enforcing laws, providing economic support for women, and engaging in widespread public education campaigns to challenge patriarchal attitudes and social structures.

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