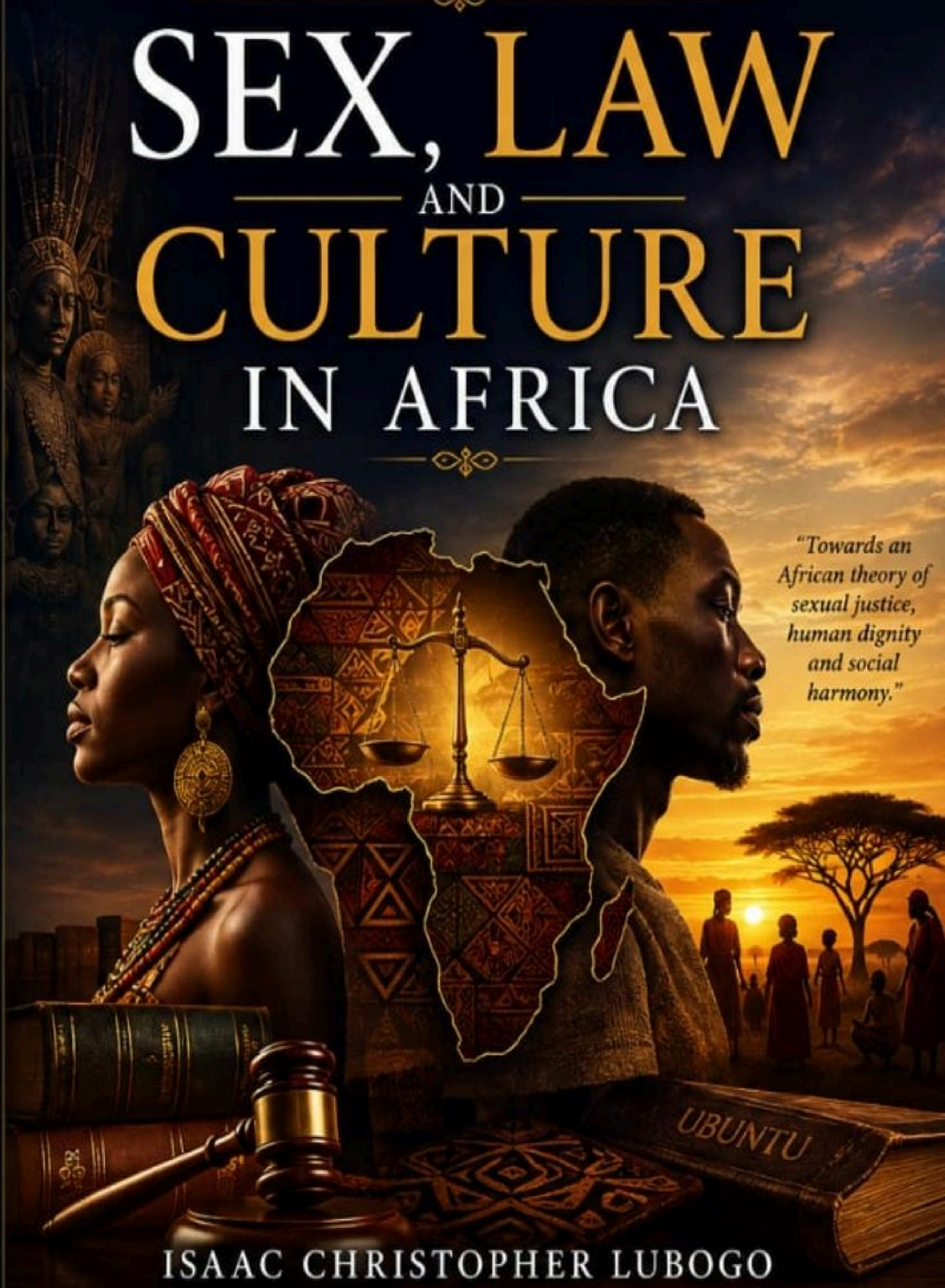

SEX, LAW AND CULTURE IN AFRICA
ISAAC CHRISTOPHER LUBOGO

SEX, LAW AND CULTURE IN AFRICA

A JURISPRUDENTIAL, PHILOSOPHICAL AND SOCIO-LEGAL INQUIRY

SEX, LAW AND CULTURE IN AFRICA

BY

ISAAC CHRISTOPHER LUBOGO

"Towards an African theory of sexual justice, human dignity and social harmony."

SUIGENERIS PUBLISHERS

Bukandula Tower, Plot 15, Rubaga Road, Kampala, Uganda

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First Edition — June 2026

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A Jurisprudential, Philosophical and Socio-Legal Inquiry

First published 2026 by Suigeneris Publishers

Bukandula Tower, Plot 15, Rubaga Road, Kampala, Uganda

Email: Suigeneris.magnum.opus@gmail.com

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ISBN: 978-9913-0-12345-6

Typeset in Garamond 12pt. Printed and bound in Uganda.

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DEDICATION

To the countless African women and men whose bodies have been sites of legal, cultural, and religious contestation — may this work contribute to your liberation, dignity, and freedom.

To the memory of those who suffered under colonial sexual laws that criminalised their love, their identities, and their existence.

To the future of African jurisprudence — may it be decolonised, compassionate, and grounded in Ubuntu: "A person is a person through other people."

And to all who seek justice through scholarship.

ACKNOWLEDGEMENTS

The author acknowledges with gratitude the scholars and institutions whose work makes a book of this scope possible.

Professor Sylvia Tamale of Makerere University — the first female Dean of Law in Uganda and founder of the Law, Gender and Sexuality Research Centre — whose edited volume African Sexualities: A Reader (Pambazuka Press, 2011) and whose article "Exploring the Contours of African Sexualities: Religion, Law and Power" (African Human Rights Law Journal, 2014) shaped the theoretical architecture of this book. Her courage in conducting and publishing sexuality scholarship in a hostile intellectual environment is an inspiration to every African scholar who follows.

Professor Marc Epprecht of Queen's University, Canada, whose Heterosexual Africa? (Ohio University Press, 2008) provided the historical foundation for the book's treatment of pre-colonial sexuality and colonial transformation. Professor Ifi Amadiume of Dartmouth College, whose Male Daughters, Female Husbands (Zed Books, 1987) remains the definitive anthropological account of gender fluidity in pre-colonial African societies.

Justice Yvonne Mokgoro of the South African Constitutional Court, whose Ubuntu jurisprudence — particularly her judgment in S v Makwanyane (1995) — established the philosophical framework for the central argument of this book. The five-judge bench of the Constitutional Court of Uganda that delivered the judgment in Women's Probono Initiative v Attorney General (2025), which is analysed extensively in Chapters Five and Twelve.

Dr Maureen Owor-Mapp of the University of Birmingham, whose 2025 article on decolonising judicial education provides the pedagogical framework that informs the book's approach throughout. Dr Ingrid Zundel of the University of Bayreuth, whose 2025 doctoral dissertation on SOGIESC rights in the African human rights system is the most current and authoritative treatment of that subject available.

The team at Suigeneris Publishers, Kampala, whose editorial professionalism and

institutional support made this publication possible. And the students, advocates, judges, and activists across Africa whose questions, cases, and courage remind us daily why this scholarship matters.

PUBLISHER'S FOREWORD

Suigeneris Publishers, Kampala

Bukandula Tower, Plot 15, Rubaga Road, Kampala, Uganda

It is with profound pride and intellectual conviction that Suigeneris Publishers presents Sex, Law and Culture in Africa: A Jurisprudential, Philosophical and Socio-Legal Inquiry to the world of scholarship, legal practice, and public discourse.

This book arrives at a moment of extraordinary significance. Across the African continent, questions of sexuality, legal regulation, and cultural identity are being contested in courtrooms, legislatures, places of worship, and the streets. From the Constitutional Court of Uganda's landmark 2025 judgment on polygamy in Women's Probono Initiative v Attorney General, to the continuing debate about colonial anti-sodomy laws that criminalise the intimate lives of millions of Africans, to the epidemic of gender-based violence that claims the lives and dignity of women and girls daily — the intersection of sex, law, and culture in Africa has never demanded more urgent scholarly attention.

Isaac Christopher Lubogo is uniquely positioned to address this intersection. A prolific legal scholar, advocate, and founder of Suigeneris Consultancy, he brings to this work a deep grounding in African jurisprudence, constitutional law, Ubuntu philosophy, and decolonial legal theory. His previous works — spanning constitutional law, family law, intellectual property, and African legal philosophy — have established him as one of the most productive and original legal scholars of his generation on the African continent. He is the recipient of the Africa Law Tech Award (2022) and the SMEGAfrica Excellence Scholar Award (2025), recognitions that speak to both the quality and the relevance of his scholarship.

What makes this book exceptional is not merely its scope — though its scope is indeed extraordinary: twelve substantive chapters spanning pre-colonial Africa to the digital age, covering marriage, consent, gender-based violence, reproductive rights, religion, technology, and comparative law — but its animating philosophical framework.

Lubogo grounds his analysis in Ubuntu jurisprudence: the African philosophical tradition captured in the maxim umuntu ngumuntu ngabantu, "a person is a person through other people." He argues, persuasively, that Ubuntu does not contradict sexual rights but demands them — that compassion, human dignity, and group solidarity, properly understood, require the protection of every person's bodily integrity and sexual autonomy.

The book is written for multiple audiences: law students seeking a comprehensive treatise on sex and law in Africa; practising lawyers and judges who need doctrinal analysis of the relevant law; policymakers and legislators who must craft legal reform; academics and researchers in law, gender studies, anthropology, and African studies; and informed general readers who want to understand why questions of sexuality lie at the heart of Africa's constitutional future.

Suigeneris Publishers has long been committed to publishing African scholarship that is rigorous, original, and courageous. This book embodies those values. It does not flinch from controversy. It engages honestly with colonial legacies, patriarchal power, religious authority, and cultural diversity. It proposes reforms that will not please everyone — but that is the nature of serious scholarship. Ideas that challenge entrenched power rarely do.

We commend this work to every reader who believes, as we do, that the realisation of justice in Africa depends in part on the quality of its scholarship. Sex, Law and Culture in Africa is a contribution to that indispensable enterprise.

The Editorial Board

Suigeneris Publishers

Kampala, Uganda — June 2026

PREFACE

Isaac Christopher Lubogo
Suigeneris Consultancy, Kampala, Uganda

I began writing this book with a question that would not leave me alone: why does African law so consistently fail African bodies?

I do not mean this rhetorically. I mean it as a precise empirical and jurisprudential puzzle. African penal codes criminalise consensual sexual conduct that has long been decriminalised in the very countries that wrote those codes. African family law enables child marriage while prohibiting it in rhetoric. African criminal law formally outlaws gender-based violence while doing almost nothing to prevent or redress it. African religious and cultural authorities regulate sexuality with an intensity that bears no relation to the harm their regulations prevent. And all of this is dressed up — by states, by courts, by religious bodies, by cultural spokespeople — in the language of African tradition, African values, African identity.

My argument in this book is simple: this is not African tradition. It is colonial law wearing African clothes. The anti-sodomy provisions that criminalise same-sex conduct in 32 African countries were written by Victorian British, French, Belgian, and Portuguese administrators who are long dead and whose own countries have long since repealed those very laws. The subordination of women in marriage, the erasure of women's property rights, the construction of female sexuality as a problem to be managed — these are not pre-colonial African inventions; they are the products of the intersection of colonial law, Victorian morality, and the selective reinterpretation of customary law by male elites who found patriarchy useful.

At the same time, I am aware of the danger of simply replacing one form of intellectual colonialism with another. The answer to colonial sexual law is not to import European sexual liberalism wholesale and impose it on African societies in the name of "human rights." Africa has its own philosophical traditions — rich, sophisticated, and deeply relevant — and chief among them is Ubuntu: the ethic of human solidarity,

compassion, and relational dignity captured in the maxim umuntu ngumuntu ngabantu. This book argues that Ubuntu, properly understood and applied, provides the philosophical foundation for an African theory of sexual justice that is neither colonial nor apologetic, neither anti-Western nor anti-African, but authentically, rigorously, compassionately African.

This book is written as a book — not a research paper, not a dissertation, not a collection of academic notes. I have tried throughout to write prose that is clear, engaging, and accessible to any intelligent reader, while maintaining the scholarly rigour that the subject demands. The footnotes are there for those who wish to follow the sources; the text should be readable without them. I have tried to write the book I wished existed when I was a law student trying to understand why African law treated sexuality the way it did.

I have debts of gratitude too numerous to discharge in a preface. I am grateful to the scholars whose work informs every page of this book — most especially Sylvia Tamale of Makerere University, whose African Sexualities: A Reader and whose decades of courageous scholarship have transformed the field; Marc Epprecht of Queen's University, whose Heterosexual Africa? demolished the myth that sexual diversity is "un-African"; Ifi Amadiume of Dartmouth, whose Male Daughters, Female Husbands opened the door to understanding pre-colonial African gender; and Yvonne Mokgoro, whose Ubuntu jurisprudence provided the philosophical foundation for this work's central argument.

I am aware of my positionality as a male scholar writing about topics that disproportionately affect women and sexual minorities. I have sought throughout to centre the voices of those most affected. Any shortcomings in this regard are my own responsibility.

This book is dedicated to all who believe that law should serve human dignity rather than constrain it. May it contribute, however modestly, to the realisation of that belief.

Isaac Christopher Lubogo

Suigeneris Consultancy, Kampala, Uganda

June 2026

TABLE OF CONTENTS

PRELIMINARY PAGES

Publisher's Foreword v

Preface by the Author ix

Acknowledgements xiii

Table of Contents xv

List of Cases xx

List of Legislation xxii

List of International and Regional Instruments xxiv

List of Abbreviations xxv

THE CHAPTERS

CHAPTER ONE · Introduction: Understanding Sex, Law and Culture in Africa 1

I. The Problem This Book Addresses 2
II. Why Africa? Why Now? 6
III. Objectives and Research Questions 9
IV. Scope, Method and Sources 12
V. Conceptual Framework: Sex, Sexuality, Gender, Culture, Law 16
VI. Theoretical Framework: Four Lenses 22
VII. The Structure of the Book 26

CHAPTER TWO · African Sexuality Before Colonialism 29

I. The Myth of a Sexually Conservative Africa 30
II. Diversity of Pre-Colonial Sexual Norms by Region 35
III. Gender Fluidity in Pre-Colonial Societies 43
IV. Marriage Systems: Bridewealth, Polygyny and Alliance 50
V. Initiation, Education and the Body 57
VI. Indigenous Regulation: Elders, Councils and Custom 63
VII. What Pre-Colonial Africa Teaches Modern Law 69

CHAPTER THREE · How Colonialism Transformed African Sexuality 75

I. The Colonial Encounter: Sex, Power, and Classification 76
II. Victorian Morality Imposed: Mission, Law and Shame 83
III. The Criminalisation of African Sexuality 90

IV. Colonial Courts and the Repugnancy Clause98
V. Selective Tradition: Entrenching Patriarchy105
VI. The Colonial Legacy Today: Laws That Outlived Their Makers111

CHAPTER FOUR · The Jurisprudence of Sexuality119
I. Natural Law and African Sexual Ethics120
II. Legal Positivism: Separating Law from Morality127
III. Feminist Jurisprudence: The Woman Question134
IV. Critical Legal Studies: Law as Power141
V. Sociological Jurisprudence and Legal Pluralism148
VI. Ubuntu Jurisprudence: An African Foundation155
VII. Reconciling Law, Culture and Human Rights163

CHAPTER FIVE · Marriage, Family and Sexual Rights171
I. What Is Marriage? Definitions Across Plural Systems172
II. Customary Marriage: Recognition, Bridewealth, Consequences179
III. Religious Marriage: Christian and Islamic Forms186
IV. Civil Marriage: Registration, Capacity, Monogamy193
V. Divorce, Separation and the Bridewealth Trap200
VI. Polygamy: The Women's Probono Initiative Case (2025)207
VII. Cohabitation and the Legal Gap215
VIII.Rights and Obligations of Spouses222

CHAPTER SIX · Consent, Autonomy and Sexual Justice229
I. The Anatomy of Consent230
II. Age, Capacity and the Law237
III. Sexual Assault: Legal Frameworks Across Africa244
IV. Marital Rape: From Hale's Doctrine to Modern Law252
V. Power, Economics and the Coercion of Consent259
VI. Consent in Digital Spaces266

CHAPTER SEVEN · Gender, Power and Sexuality273
I. Patriarchy and Its African Manifestations274
II. Masculinity, Femininity and the Sexual Double Standard281
III. Gender-Based Violence: Scope, Law and Failure288
IV. Female Genital Mutilation: Harm, Culture and Law296
V. Child Marriage: Poverty, Power and Prohibition303
VI. Sexual Exploitation and Trafficking310
VII. The Economics of Sex: Survival, Agency and Exploitation317

CHAPTER EIGHT · Sexuality and Human Rights325
I. The International Framework326

II. The African Human Rights System333
III. Constitutional Protection of Sexual Rights in Africa340
IV. Privacy, Dignity and Bodily Integrity347
V. Reproductive Rights: Abortion, Contraception, Maternal Health354
VI. Sexual Minorities and the Human Rights Debate361

CHAPTER NINE · Religion, Morality and Sexual Regulation369
I. Christianity and African Sexual Ethics370
II. Islam and African Sexual Ethics377
III. African Traditional Religion: A Different Vision384
IV. The Devlin–Hart Debate in African Perspective391
V. Whose Morality? Whose Community?398
VI. The Future of Moral Regulation in Africa405

CHAPTER TEN · Sexuality, Technology and the Digital Age413
I. Social Media, Identity and Sexual Behaviour414
II. Online Relationships and Dating Platforms421
III. Pornography, Obscenity and the Limits of Regulation428
IV. Artificial Intelligence and the Future of Sexual Harm435
V. Cyber Exploitation: Revenge Porn, Sextortion, Grooming442
VI. Building a Digital Sexual Rights Framework for Africa449

CHAPTER ELEVEN · Comparative Perspectives457
I. East Africa: Uganda, Kenya, Tanzania, Rwanda458
II. West Africa: Nigeria, Ghana, Senegal466
III. Southern Africa: South Africa, Botswana, Zimbabwe474
IV. North Africa: Egypt, Morocco, Tunisia482
V. Europe: Lessons in Decriminalisation and Reform490
VI. Asia: India, Thailand and the Decolonial Moment497
VII. Lessons for Africa504

CHAPTER TWELVE · Towards an African Theory of Sexual Justice511
I. Reimagining Sexual Rights in an African Key512
II. Decolonising Sexual Jurisprudence519
III. Ubuntu and Human Dignity as Foundations526
IV. Community and Individual: A False Dichotomy533
V. A Contextual African Framework for Sexual Justice540
VI. Recommendations: States, the African Union, the World547
VII. Conclusion: The Demand of African Humanity554

BACK MATTER

Appendix A — Key International and Regional Instruments561

Appendix B — Selected African Cases567

Appendix C — Selected Ugandan Cases573

Appendix D — Research Questionnaires577

Appendix E — Interview Guides583

Bibliography589

- Legislation589
- Cases591
- International and Regional Instruments593
- Books594
- Journal Articles and Book Chapters596
- Theses and Dissertations598
- Reports and Policy Documents598

Subject Index601

About the Author615

CHAPTER ONE
INTRODUCTION
Understanding Sex, Law and Culture in Africa

I. The Problem This Book Addresses

African law has a sexuality problem. This is not a polite observation. It is a precise and urgent diagnosis.

Consider the following. Section 145 of Uganda's Penal Code Act criminalises "carnal knowledge against the order of nature" — a provision copied verbatim from the Indian Penal Code written by Lord Macaulay in 1860 for British India. The United Kingdom repealed the equivalent provision in England and Wales in 1967. Uganda retains it to this day, using it — alongside the Anti-Homosexuality Act of 2023, which imposes life imprisonment — to criminalise the intimate lives of thousands of Ugandans. The same provision, in almost identical language, appears in the penal codes of Kenya, Tanzania, Nigeria, Zimbabwe, and twenty-five other African countries.[1]

Now consider this. Approximately 125 million African girls are or have been married as children, many before the age of fifteen. Female genital mutilation has been performed on an estimated 200 million women and girls globally, with sub-Saharan Africa and North Africa accounting for the overwhelming majority of cases. Approximately 45.6 percent of African women experience intimate partner violence in their lifetimes — more than double the global average. In many African countries, a husband cannot legally be convicted of raping his wife. In several, adultery is a criminal offence for women but not for men.[2]

These are not coincidental failures. They are structural. They reflect the intersection of three forces that this book analyses in depth: **colonial legal transplants** that imposed Victorian sexual morality on African societies without consent or cultural grounding; **patriarchal power structures** that selectively deploy "culture" and "tradition" to maintain male control over female sexuality; and **legal pluralism's darker face,** in

[1] Sylvia Tamale, "Exploring the Contours of African Sexualities: Religion, Law and Power" (2014) 14(1) African Human Rights Law Journal 150, 152.
[2] UNICEF, Child Marriage in Africa (UNICEF 2020) 3.

which multiple legal orders — state law, customary law, religious law — compete to regulate sexuality, with women and sexual minorities bearing the costs of every contradiction.

The result is a continent where sexuality is simultaneously over-regulated and under-protected. Over-regulated, because consensual adult conduct is criminalised on the basis of colonial-era morality. Under-protected, because the sexual violence, exploitation, and subordination that actually harm real people go largely unremedied.

II. Why Africa? Why Now?

Africa is a continent of 1.4 billion people spread across 54 countries, 3,000-plus ethnic groups, and more linguistic and cultural diversity than any comparable landmass on earth. Writing about "African sexuality" or "African law" requires constant humility about generalisation.

And yet certain patterns are clear enough. The colonial legal infrastructure — especially the British penal code template — was applied with remarkable consistency across British Africa. The intersection of that infrastructure with local customary and religious law has produced recognisable patterns of sexual regulation and sexual injustice that recur, with local variation, from Kampala to Lagos, from Nairobi to Lusaka, from Accra to Khartoum.

This book focuses on the patterns while respecting the variations. It draws most heavily on East Africa (Uganda, Kenya, Tanzania), West Africa (Nigeria, Ghana, Senegal), Southern Africa (South Africa, Botswana, Zimbabwe), and North Africa (Egypt, Morocco, Tunisia). Where material from other countries is relevant, it is incorporated. The analysis is not exhaustive; it is analytical — looking for the structural forces that explain the patterns and proposing the frameworks that could change them.

The urgency of "why now?" is answered by events. In 2025, the Constitutional Court of Uganda delivered a landmark judgment on polygamy. In 2025, the most current academic literature on SOGIESC rights in the African human rights system was published. In 2023, Uganda enacted the Anti-Homosexuality Act imposing life imprisonment. In 2024, Ghana's parliament debated a bill that would criminalise LGBTQ "activities." In 2019, Botswana decriminalised same-sex conduct. The landscape is shifting — in contradictory directions — and scholarship must keep pace.

III. Objectives and Research Questions

This book pursues seven objectives. First, to document the historical evolution of sexual norms in Africa from pre-colonial times through colonial transformation to the present. Second, to provide a rigorous jurisprudential analysis of the frameworks — natural law, positivism, feminist theory, critical legal studies, sociological jurisprudence, and Ubuntu — through which the law of sexuality can be understood. Third, to examine the specific doctrinal areas where law and sexuality intersect: marriage, consent, gender-based violence, reproductive rights, and the rights of sexual minorities. Fourth, to evaluate the international, regional, and constitutional human rights frameworks available to protect sexual rights in Africa. Fifth, to analyse the emerging challenges of technology and the digital age. Sixth, to synthesise these analyses into an African theory of sexual justice grounded in Ubuntu philosophy. Seventh, to propose concrete, actionable recommendations for legal reform.

The primary research question is: How can African legal systems reconcile the regulation of sexuality with the realisation of sexual justice for all persons, given the continent's history of colonialism, legal pluralism, and cultural diversity? Secondary questions examine: the characteristics of pre-colonial sexual norms and their colonial transformation; the jurisprudential frameworks for understanding sexual regulation; the specific legal rules governing marriage, consent, and sexual offences; the adequacy of human rights frameworks for protecting sexual rights; the role of religion and morality; the challenges of technology; comparative perspectives; and the content of an African theory of sexual justice.

IV. Scope, Method and Sources

The scope of this book is doctrinal, comparative, and socio-legal. The primary method is doctrinal legal analysis — systematic exposition and critique of the relevant legal rules, cases, and principles — supplemented by historical, anthropological, and sociological analysis where necessary to understand the social context and effects of legal rules.

The comparative method is used extensively in Chapter Eleven, drawing comparisons across African sub-regions and with European and Asian jurisdictions. The socio-legal method is used throughout to analyse not just law on the books but law in action: how legal rules are actually experienced by women, sexual minorities, and survivors of sexual violence in African societies.

Primary sources include constitutions (particularly Uganda 1995, Kenya 2010, South Africa 1996), legislation, and case law from multiple jurisdictions. Secondary sources prioritise African scholars — particularly Sylvia Tamale, Ifi Amadiume, Marc Epprecht, Yvonne Mokgoro — while engaging with the wider global scholarship on sexuality and law. The book incorporates scholarship as recent as 2025, including the landmark judgment in Women's Probono Initiative v Attorney General (2025 UGCC 6) and doctoral and journal scholarship published in 2025.

V. Conceptual Framework

Sex and Sexuality

"Sex" in this book refers primarily to biological and physiological characteristics. "Sexuality" is broader and richer: it encompasses sexual orientation, sexual behaviour, sexual desire, sexual identity, and sexual relationships. The World Health Organization (2006) defines sexuality as "a central aspect of being human throughout life" that "encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction."

The crucial point — made by Tamale (2011), Epprecht (2008), and Amadiume (1987) — is that *sexuality cannot be understood outside its social context.*[3] It is not a natural fact independent of history, culture, and power. It is produced, organised, and regulated by the social forces that this book analyses.

Gender

This book uses "gender" to refer to socially constructed roles, behaviours, expressions, and identities. A central argument, developed in Chapter Two, is that African gender systems were historically far more fluid than the binary Victorian categories (masculine/feminine, husband/wife) imposed by colonial law. Amadiume's documentation of "male daughters" and "female husbands" in pre-colonial Igbo society is foundational here.[4]

Culture and Legal Pluralism

Culture in this book means, following the UNESCO Universal Declaration on Cultural Diversity (2001), "the set of distinctive spiritual, material, intellectual and

[3] Sylvia Tamale (ed), African Sexualities: A Reader (Pambazuka Press 2011) 11.
[4] Ifi Amadiume, Male Daughters, Female Husbands: Gender and Sexuality in an African Society (Zed Books 1987) 45.

emotional features of society." The crucial insight, which this book insists on throughout, is that *culture is not static.* As Tamale (2014) argues, "culture is constantly negotiated, contested, and recreated." The deployment of "African culture" or "African tradition" to justify harmful sexual practices is, as often as not, a political act — the selection and freezing of particular practices, at a particular historical moment, to serve particular interests, usually those of men, elders, and religious authorities.

Legal pluralism — the co-existence of multiple legal orders in the same social field — is a permanent feature of African legal systems. Statutory law, customary law, religious law (Islamic and Christian), and international law all claim authority over sexuality in African societies. Understanding how these orders interact, conflict, and resolve their contradictions is essential to understanding how sexuality is regulated in Africa.[5]

VI. Theoretical Framework: Four Lenses

This book draws on four theoretical frameworks, which are elaborated in Chapter Four but introduced here.

Feminist Legal Theory

Feminist legal theory, as developed by Catharine MacKinnon, Carol Smart, Katharine Bartlett, and — in the African context — Sylvia Tamale, examines how law reflects and perpetuates patriarchal power structures. It asks: whose experiences does the law reflect? Whose interests does it protect? Who bears the costs of legal rules, and who enjoys the benefits? In the context of sexuality, feminist legal theory reveals that most African law has been written by men, for men, about women's and minorities' bodies.[6]

Critical Legal Studies

Critical Legal Studies challenges the claim that law is neutral, objective, and determinate. It argues that legal rules are indeterminate — they do not dictate unique correct outcomes — and that legal reasoning masks political choices. In the context of African sexuality, CLS reveals how legal categories like "consent," "obscenity," "unnatural offences," and "customary law" are politically constructed and deployed to serve

[5] John Griffiths, "What is Legal Pluralism?" (1986) 24 Journal of Legal Pluralism 1, 2.
[6] Katharine Bartlett, "Feminist Legal Methods" (1990) 103(4) Harvard Law Review 829, 837.
[6] Catharine MacKinnon, Toward a Feminist Theory of the State (Harvard University Press 1989) 157.

dominant interests.[7]

Postcolonial Theory

Postcolonial theory illuminates how colonial law transformed African societies — and how colonial legal legacies persist. The central insight, for this book, is that the "African tradition" and "African culture" deployed to justify sexual regulation are themselves colonial constructions: selections and reifications of particular practices that serve neo-colonial and patriarchal power.

Ubuntu Jurisprudence

Ubuntu — the African philosophical concept captured in the Nguni Bantu maxim *umuntu ngumuntu ngabantu* ("a person is a person through other people") — provides the normative foundation for this book's central argument. As Ramose (1999) articulates it, "I am because we are."[8] In S v Makwanyane (1995), the South African Constitutional Court described Ubuntu as enveloping "group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity."[9] Justice Mokgoro elaborated: "In its fundamental sense it denotes humanity and morality."[10]

Applied to sexuality, Ubuntu requires four things: respect for each person's sexual autonomy and bodily integrity as expressions of human dignity; protection of vulnerable community members — including women and sexual minorities — from harm, as an expression of group solidarity; sexual laws motivated by compassion and care, not moral condemnation; and conformity only to norms genuinely necessary for community survival — not the enforcement of majority preferences about how minorities should live.[11]

VII. The Structure of the Book

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[7]Roberto Unger, The Critical Legal Studies Movement (Harvard University Press 1986) 1.
[8]Mogobe Ramose, African Philosophy Through Ubuntu (Mond Books 1999) 49.
[9]S v Makwanyane 1995 (3) SA 391 (CC) para 308 (Mokgoro J).
[10]Yvonne Mokgoro, "Ubuntu and the Law in South Africa" (1998) 4 Buffalo Human Rights Law Review 15, 17.
[11]Drucilla Cornell and Nyoko Muvangua (eds), Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence (Fordham University Press 2012) 2.
[11]Maureen Owor-Mapp, "Decolonising Judicial Education: Engaging Customary Laws in Gender Equality Discourse" (2025) 15(6) Oñati Socio-Legal Series 1970, 1975.
[11]Women's Probono Initiative v Attorney General, 2025 UGCC 6 (Uganda Constitutional Court).
[11]Ingrid Zundel, Claiming SOGIESC Rights through the African Human Rights System (PhD dissertation, University of Bayreuth 2025) 12.

The book is organised as follows. Chapter Two documents the diversity and sophistication of pre-colonial African sexual cultures, dismantling the myth of a sexually conservative Africa. Chapter Three analyses the colonial transformation of African sexuality and the enduring legal legacies of that transformation. Chapter Four provides the jurisprudential framework for understanding the regulation of sexuality across multiple theoretical traditions. Chapter Five examines the law of marriage and family, including the 2025 Constitutional Court of Uganda judgment on polygamy. Chapter Six addresses consent, autonomy, and sexual violence. Chapter Seven analyses gender, power, and sexuality, including gender-based violence, female genital mutilation, and child marriage. Chapter Eight maps the international, regional, and constitutional human rights frameworks for sexual rights. Chapter Nine examines the role of religion and morality in sexual regulation. Chapter Ten addresses the emerging challenges of technology, the internet, and artificial intelligence. Chapter Eleven provides comparative perspectives from across Africa, Europe, and Asia. Chapter Twelve synthesises the analysis into an African theory of sexual justice, grounded in Ubuntu and decolonial feminism, and proposes concrete recommendations for reform.

CHAPTER TWO

AFRICAN SEXUALITY BEFORE COLONIALISM

I. The Myth of a Sexually Conservative Africa

One of colonialism's most durable legacies is a lie about Africa's sexual past. The lie goes like this: Africa, before European contact, was a continent of strict heterosexual monogamy, clearly defined gender roles, and universal condemnation of sexual diversity. Homosexuality was "un-African." Polygamy was traditional. Women's sexuality was regulated and contained. This was the natural, traditional order of African societies.

Every element of this narrative is false, and scholars have systematically demolished it. Marc Epprecht's *Heterosexual Africa?*[12] — the most rigorous historical account of the subject — documents the existence of same-sex practices across pre-colonial Africa. Ifi Amadiume's *Male Daughters, Female Husbands* demonstrates that gender in pre-colonial Igbo society was a social role, not a biological destiny — that women could occupy male social positions and marry other women. And Sylvia Tamale's edited collection, *African Sexualities: A Reader* (2011), assembles the work of dozens of African scholars, activists, and artists to demonstrate the extraordinary diversity of African sexual cultures before, during, and after colonialism.

The myth of the sexually conservative Africa was not produced by African societies. It was produced by European colonial administrators, missionaries, and anthropologists who arrived in Africa with prior convictions about the relationship between sexual order and civilisation, and who saw what they expected to see — or, when they saw otherwise, explained it away as degenerate excess rather than cultural complexity.

This chapter documents what Africa actually looked like before colonialism, insofar as the historical and anthropological record allows us to know. The picture is one of extraordinary diversity — diverse across regions, diverse across ethnic groups, diverse across time — and of a sophistication about sexuality that colonial law systematically destroyed.

[12] Marc Epprecht, Heterosexual Africa? The History of an Idea from the Age of Exploration to the Age of AIDS (Ohio University Press 2008) 5.

II. Diversity of Pre-Colonial Sexual Norms by Region

West Africa

West Africa, home to some of the continent's most populous and politically sophisticated pre-colonial societies, exhibited remarkable diversity in sexual and gender norms.

In Igbo society in what is now south-eastern Nigeria, Amadiume's research documented what she called "female husbands" — women who married other women — and "male daughters" — daughters who assumed male social roles and obligations within their families. These were not marginal or transgressive practices; they were institutionalised features of Igbo social organisation, recognised and regulated by kinship and legal custom. A woman who was wealthy, successful, and sonless could become a "female husband," taking a wife, assuming male social authority, and transmitting her property and lineage. Her marriage was socially valid; her children were her legal children; her authority was real.

Among the Akan of modern-day Ghana, the office of Queen Mother — the ohemaa — gave women formal political authority that was not subordinate to male authority but parallel to and in certain respects superior to it. Akan political philosophy recognised women's authority as grounded in matrilineal descent; the Queen Mother was, in the purest sense, the guardian of the lineage.

West African coastal cities — the Swahili cities of East Africa had equivalent institutions — were sites of cosmopolitan sexual culture shaped by trade with Arabia, the Mediterranean, and later Europe. The documentation of same-sex relations in pre-colonial coastal West Africa is significant precisely because it predates systematic European contact and cannot be attributed to Western influence.

East Africa

In pre-colonial Buganda, the ssenga institution provided structured sexual education. The *ssenga* — a paternal aunt — was responsible for initiating young women into adult sexual life: teaching them about sexual pleasure, how to manage sexual jealousy in polygynous households, how to use breastfeeding and abstinence for birth spacing, and the cultural and spiritual dimensions of sexuality. This was not prudish or shame-based education; it was frank, practical, and designed to produce sexually

capable and autonomous adults.

The Lovedu people of what is now Limpopo province, South Africa — renowned for their Rain Queen, *Modjadji* — practiced female marriage. A woman of sufficient status and wealth could take a wife. The practice was recognised, regulated, and socially legitimate. Its purpose was not identical to modern Western understandings of same-sex relationships; it served kinship, inheritance, and social continuity functions. But it demonstrates, unmistakably, that African societies had legal and social categories for women's authority over other women.

Central and Southern Africa

The Bangongo of the Congo Basin documented ritualised same-sex practices associated with healing, spiritual power, and the management of transitions between life phases. The Zulu of what is now South Africa had the institution of the inkotshane, in which young men living in the royal homestead formed structured relationships that included physical intimacy. These relationships were understood as preparation for adult heterosexual marriage, not as its replacement — but they were recognised, regulated, and socially integrated.[13]

The point, as Epprecht insists, is not to project modern Western LGBTQ identity back onto pre-colonial Africa. It is simpler than that: African societies were not uniformly or rigidly heterosexual. They made room for sexual and gender diversity within their social and cosmological systems. The claim that homosexuality is "un-African" is a claim about a world that never existed.

III. Gender Fluidity in Pre-Colonial Societies

The evidence reviewed above suggests that gender, in many pre-colonial African societies, was understood as a social role rather than a biological destiny.

This matters enormously for the legal analysis that follows. Modern African family law — built on colonial foundations — treats the gender binary as natural, given, and unchangeable. A man is a man; a woman is a woman; marriage is between a man and a woman. These assumptions are treated as reflecting African tradition. But the historical record suggests they reflect, rather, the imposition of Victorian gender

[13]Epprecht (n 3) 48.
[13]Fiakumah (n 22) 22.

categories on societies that had more complex understandings.

Amadiume makes the argument precisely: in Igbo society, gender was an achieved social status, not an ascribed biological fact. A woman could achieve male social status through wealth, achievement, and social performance. The categories were not the same as modern Western gender identity — the concepts are not translatable without distortion — but they demonstrate that African societies had sophisticated, flexible frameworks for understanding human gender that colonial law flattened and destroyed.[14]

IV. Marriage Systems: Bridewealth, Polygyny and Alliance

Marriage in pre-colonial Africa was primarily an institution of social alliance, economic cooperation, and lineage continuity — not primarily a romantic or sexual institution, though love and desire were certainly factors in many marriages.

Bridewealth — the transfer of goods, livestock, or money from the groom's family to the bride's family — was the central institution of African marriage. It was nearly universal across sub-Saharan Africa, though its form, scale, and meaning varied enormously. As Pitluga (2011) notes, bridewealth was not, as colonial administrators imagined, the "purchase" of a wife.[15] It was a transfer that recognised the social value of the bride's family's contribution, created alliances between families, and — crucially — established legal paternity over children born to the marriage. Where bridewealth was paid, children born to the wife belonged to the husband's lineage; where it was not, they belonged to the wife's.

Polygyny — the marriage of one man to multiple wives — was widely practiced across pre-colonial Africa, particularly by men of wealth and social status. Colonial administrators and missionaries condemned it as immoral; modern African feminists critique it as a structure of gender inequality. Both critiques miss important dimensions of the institution. In its pre-colonial context, polygyny served economic functions (multiple wives could cultivate more land, produce more food, raise more children), social functions (alliances with multiple families), and — in some societies —

[14] Amadiume (n 4) 67.
[15] Pamela Pitluga, "Making the African State through Marriage Law Reform" (2011) 8 Hastings Race and Poverty Law Journal 287, 292.

redistributive functions (wealthy men were expected to support multiple households).[16]

Pre-colonial African marriage also included forms not recognised in modern law: levirate marriage (a widow marrying her late husband's brother, to maintain the lineage connection), sororate marriage (a man marrying his late wife's sister), and — as documented above — female marriage (women marrying women).

V. Initiation, Education and the Body

One of the most significant features of pre-colonial African sexual regulation was the institutionalisation of sexual education through initiation systems. These systems provided structured, communally sanctioned education in sexuality, reproduction, and adult social roles.

The details varied enormously across cultures. In the Chewa and Nyanja societies of what is now Malawi, Zambia, and Tanzania, the Nyau and Chinamwali initiation ceremonies provided explicit sexual education for young men and women respectively. In Buganda, the ssenga institution — the paternal aunt as sexual educator — was a formal, socially recognised role. Among the Ndebele of Zimbabwe, male and female initiation schools provided detailed instruction in adult sexuality. Among the Xhosa of South Africa, the ulwaluko male initiation involved a period of separation and instruction that included explicit teaching about male sexual roles and responsibilities.

Colonialism — particularly Christian missionary colonialism — systematically attacked initiation systems. Missionaries condemned them as immoral, pagan, and barbaric. Colonial governments supported the missionaries. The result, in many societies, was the destruction or severe disruption of the only formal mechanism for sexual education that existed. The vacuum thus created was filled, in the short term, by Victorian prudishness and Christian sexual shame; in the long term, by the HIV/AIDS epidemic that ravaged communities without the sexual knowledge that initiation had provided.[17]

VI. Indigenous Regulation: Elders, Councils and Custom

[16]Tamale (n 1) 28.
[17]Josephine Fiakumah, Sexuality and the Law: The Disproportionate Impact of Colonialism on Ghana's Sexual Landscape (MA thesis, Erasmus University Rotterdam 2022) 18.
[17]Tamale (2014) (n 2) 156.
[17]Tamale (2014) (n 2) 158.

Pre-colonial African societies regulated sexuality through mechanisms that were often more nuanced and context-sensitive than the binary criminalisation later imposed by colonial law.

Sexual disputes — allegations of adultery, paternity disputes, forced sexual contact, complaints about sexual neglect — were typically resolved through councils of elders. In Buganda, the Lukiiko provided a forum for such disputes. Among the Zulu, the inkosi and his advisors had jurisdiction over sexual matters. Among the Igbo, village assemblies and the ozo title-holders arbitrated disputes. These mechanisms were not perfect; they reflected the power imbalances of their societies, particularly the subordination of women to men and juniors to elders. But they were genuine dispute resolution mechanisms, embedded in local knowledge, social norms, and community accountability.

The contrast with colonial criminal law is sharp. Colonial law imposed binary categories — crime or not-crime — on social situations that customary systems had addressed through graduated, contextual, remedial processes. A woman who complained of being forced into sex by her husband in a pre-colonial Igbo community might have had recourse through the omu institution or through her family's social pressure. Under colonial law, her husband could not be convicted of rape, and she had no remedy at all.

VII. What Pre-Colonial Africa Teaches Modern Law

The historical record of pre-colonial Africa offers three important lessons for modern African law.

First, sexual diversity is indigenous to Africa. The "un-African" charge levelled at same-sex relationships, gender diversity, and non-reproductive sexuality is historically false. Pre-colonial African societies made room for these realities within their social and legal systems. The criminalisation of sexual diversity is the colonial intervention, not its opposite.

Second, African legal systems had sophisticated mechanisms for regulating sexuality that were not based on criminalisation. The destruction of these mechanisms by colonial law left a regulatory vacuum that has never been adequately filled. An African theory of sexual justice — proposed in Chapter Twelve — must recover this

tradition of contextual, remedial, community-based regulation.

Third, gender in pre-colonial Africa was not the Victorian binary imposed by colonial law. African societies had richer, more complex understandings of gender and its relationship to social role, political authority, and sexual life. Modern African law's insistence on the gender binary is, in this respect too, a colonial legacy masquerading as African tradition.

CHAPTER THREE

HOW COLONIALISM TRANSFORMED AFRICAN SEXUALITY

I. The Colonial Encounter: Sex, Power, and Classification

The colonial encounter transformed African sexuality more radically and more lastingly than any other period in African history. Understanding why requires understanding what colonialism was — not just a political and economic project, but an epistemic one: a massive effort to classify, order, and regulate the peoples, bodies, and practices of colonised societies according to European categories and European values.

European colonial administrators arrived in Africa with a set of convictions about sexuality and civilisation. Civilised societies, in the Victorian imagination, were sexually ordered: men and women occupied clearly distinct roles; sexuality was subordinated to reproduction within monogamous Christian marriage; "deviant" sexuality — same-sex relations, prostitution, concubinage, promiscuity — was a mark of barbarism. The African body, in this imagination, was hypersexual — closer to nature than to civilisation — and therefore in need of European moral guidance.

As Tamale (2014) documents, the colonial project in Africa was "simultaneously an economic, political and moral project." The missionary and the magistrate were partners. The mission station and the district office worked together to transform African sexual cultures. The tools were several: the Christian church, which condemned African traditional sexual practices as pagan and immoral; the colonial school, which taught European gender roles and sexual norms; the colonial courts, which applied European-derived law and the repugnancy clause to undermine customary law; and the colonial penal code, which criminalised sexual conduct that European moral standards condemned.

II. Victorian Morality Imposed: Mission, Law and Shame

Victorian morality was characterised by a specific set of sexual beliefs: that the proper domain of sexuality was monogamous Christian marriage; that sex outside this domain was sinful and — in the case of same-sex relations, prostitution, and certain other acts —

criminal; that female sexuality needed to be contained and controlled; and that the purpose of marriage was reproduction and the maintenance of the patriarchal family.

Christian missionaries were the frontline agents of this moral transformation in Africa. They condemned African traditional initiation ceremonies as immoral and licentious. They condemned polygamy as incompatible with Christian civilisation, despite the fact that polygamy was central to the social organisation of most African societies they encountered. They constructed female dress, body decoration, and public behaviour as indicators of sexual propriety or its absence. As Bakare-Yusuf (2011) notes, the African body — "once celebrated in ritual and art" — became, under missionary influence, "a site of shame."[18]

Islam, which had been present in parts of Africa long before European colonialism, also contributed to the transformation of African sexual cultures — particularly in West Africa and East Africa — through its own regulatory frameworks: Qur'anic marriage law, the prohibition of zina (premarital sex), and the gendered regulation of public space and dress. The interaction between Islamic law, customary law, and colonial statutory law created particularly complex plural legal situations in Muslim-majority areas.

The combined effect of Christian missionary activity and colonial legal imposition was what might be called a sexual shame revolution: the introduction of the idea that the body itself, and particularly the sexual body, was a site of sin and potential transgression. This was profoundly foreign to African Traditional Religion, which celebrated the body, and to the frank, practical sexual education provided by initiation systems. The shame revolution did not eliminate African sexuality; it drove it underground, creating a culture of silence, denial, and shame around sex that — scholars argue — contributed significantly to the HIV/AIDS epidemic that devastated Africa in the 1980s and 1990s.

III. The Criminalisation of African Sexuality

Colonial penal law criminalised a specific set of sexual conduct with remarkable

[18]Bibi Bakare-Yusuf, "Nudity and Morality: Legislating Women's Bodies and Dress in Nigeria" in Tamale (ed) (n 1) 116, 122.
[18]Tamale (2014) (n 2) 152.
[18]Epprecht (n 3) 12.

consistency across colonial Africa.

The British template was the Indian Penal Code (1860), written by Lord Macaulay for British India. Section 377 criminalised "carnal intercourse against the order of nature" — a formulation derived from the English ecclesiastical law concept of sodomy, itself derived from Roman Catholic natural law theology. This provision was transplanted, in near-identical language, across British Africa. In Uganda it became Section 145 of the Penal Code. In Kenya, Section 162. In Nigeria, Sections 214 to 217. In Tanzania, Section 154. As Tamale (2014) observes, "colonial-era offences (adultery, pornography, prostitution, abortion, sodomy) remain in African penal codes while being repealed in former colonial metropoles."[19]

Colonial Power	Key Sexual Offences Imposed	S t a t u s i n N e t r c p c l e T c c a y
United Kingdom	Sodomy (s 377 IPC), indecency, obscenity, abortion	N c s t r e p

[19] Tamale (2014) (n 2) 165.

		e a l e d b y 1 9 7 0 s
France	Unnatural acts, public indecency, abortion	M o s t r e p e a l e d b y 1 9 8 0 s
Belgium	Sodomy, obscenity, prostitution (Congo)	R e p e a l e d b y 1 9 8 0 s
Portugal	Vicious acts, lewdness	R

	(Angola, Mozambique)	epealed 1975-1983
Germany	§175 (same-sex conduct, Tanzania, Togo)	Repealed 1969 (West)/1988 (East)

The table above illustrates the central irony: the colonial powers criminalised

sexual conduct in Africa that they subsequently decriminalised in their own societies. Uganda's Anti-Homosexuality Act 2023 criminalises conduct that the United Kingdom decriminalised in 1967 — fifty-six years earlier. The "African tradition" being enforced by 32 African criminal codes is a Victorian British invention.[20]

The criminalisation of abortion across most of colonial Africa was equally significant. Abortion was criminalised — typically, using the same penal code templates — across British, French, Belgian, and Portuguese Africa. Yet abortion was a practice that African women had engaged in and African healers had facilitated for centuries. The criminalisation was not the enforcement of African tradition; it was the imposition of European Catholic and Protestant moral theology on African societies.

IV. Colonial Courts and the Repugnancy Clause

Colonial administrations established dual legal systems: European courts applying European law for European settlers, and Native Courts applying customary law for African subjects. The bridge between these systems was the repugnancy clause.

The repugnancy clause, included in native court legislation across British Africa, provided that customary law would not be applied by colonial courts if it was "repugnant to natural justice, equity and good conscience." In practice, "natural justice" meant Victorian English moral standards. Customary practices that colonial administrators found offensive — particularly practices relating to women's property, marriage, divorce, and sexuality — were declared "repugnant" and refused recognition.[21]

The repugnancy clause was applied with both breadth and selectivity. It was applied broadly to condemn practices that served women's interests or recognised female authority — the omu institution, female marriage, women's property rights in bridewealth disputes. It was applied selectively to leave intact practices that served male interests — the inferior status of women in customary marriage, the assignment of children to patrilineal families, the absence of remedies for marital sexual coercion.

As Pitluga (2011) concludes, "colonial courts created a legal no-man's land where African women had neither customary protections nor civil protections." This is not an

[20]ILGA, State-Sponsored Homophobia Report (ILGA 2023) 12.
[20]Tamale (2014) (n 2) 165.
[21]Pitluga (n 20) 298.
[21]Rex v Bishan Singh, 1923 UGHCC 1 (Uganda High Court, 1923).

overstatement. By undermining customary law without replacing it with genuinely protective alternatives, colonial courts left women in a worse legal position than they had occupied before colonialism.

V. Selective Tradition: Entrenching Patriarchy

One of colonialism's most significant contributions to African gender and sexual politics was not the imposition of wholly new practices but the freezing and institutionalisation of particular customary practices while eliminating others.

Colonial administrators needed African intermediaries to govern. They identified and empowered male "chiefs" and "elders" as the custodians of customary law. This had two effects. First, it excluded women from the authoritative interpretation of customary law, even in societies where women had held significant authority. The Baganda Queen Mother, the Igbo omu, the Akan Queen Mother — all saw their authority undermined or eliminated by colonial administrators who would only deal with male authorities. Second, it privileged the versions of customary law that served male interests.

The result is what scholars call "customary law as invented tradition": a body of rules presented as ancient, authentic African custom, but actually the product of colonial-era codification by male intermediaries working with colonial administrators who shared their gender interests. This invented tradition typically features: women as legal minors under male guardianship; bridewealth giving husbands extensive control over wives' sexuality and labour; patrilineal property rights excluding women; and the absence of remedies for marital sexual coercion.

VI. The Colonial Legacy Today: Laws That Outlived Their Makers

Most African countries retained colonial penal codes at independence. The reasons were multiple: nationalist leaders wanted political independence, not legal revolution; colonial-trained lawyers were comfortable with familiar legal frameworks; the process of wholesale legal reform was expensive and complex; and many colonial-era provisions seemed politically useful — particularly those regulating sexuality, which gave post-colonial states tools for social control.

The result is a continent in which some of the most consequential laws governing sexuality were written not by Africans for Africans, but by Victorian British, French,

Belgian, and Portuguese administrators for colonial subjects — administrators who are long dead, in countries that have long since repealed the very laws they imposed on Africa.

The reform movement, though slow, is real. South Africa decriminalised same-sex conduct in 1998 and legalised same-sex marriage in 2006 — the first country in Africa and fifth in the world.[22] Angola decriminalised in 2019. Botswana decriminalised in 2019, following a landmark High Court judgment in *Motshidiemang v Attorney General.* Mozambique decriminalised in 2015. Seychelles in 2016. But 32 African countries continue to criminalise same-sex conduct — a direct, concrete, living legacy of Victorian colonial law.

The argument that sexual diversity is "un-African" is itself a colonial legacy. It was constructed — as Epprecht demonstrates — precisely to justify the criminalisation of practices that existed in Africa before colonialism and that colonial law sought to eliminate. It is, in the most precise sense, a lie dressed as tradition.

[22]National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (CC).

CHAPTER FOUR
THE JURISPRUDENCE OF SEXUALITY

I. Natural Law and African Sexual Ethics

Natural law theory holds that law is grounded in reason — in principles discoverable through human reason that are objective, universal, and morally binding. For Aristotle, natural law was grounded in the natural purpose (telos) of human capacities: sex's natural purpose is reproduction; therefore non-reproductive sex is contrary to natural law.[23]

Aquinas developed this Aristotelian framework within a Christian theological context: certain acts are intrinsically wrong (malum in se) because they violate the natural law that God has inscribed in human reason. The Thomistic tradition identifies several intrinsic sexual goods — life (reproduction), fidelity, and sacrament — and judges sexual acts by their conformity to these goods. Same-sex acts, contraception, masturbation, and non-reproductive heterosexual acts are condemned as contrary to the natural law order of sexuality.[24]

Modern natural law theorists, most prominently John Finnis of Oxford, maintain this tradition in philosophical rather than theological form. Finnis argues that certain "basic goods" — including marriage, understood as the permanent exclusive union of a man and a woman — are self-evidently valuable and cannot be realised by same-sex relationships. This argument has been extensively influential in African jurisprudence, particularly in courts and legislative debates that draw on religious authority.[25]

The critique of natural law in this context is powerful. Natural law arguments deployed in African sexual regulation are not, as they claim to be, universal principles of reason. They are a specific tradition — Catholic natural law — that has no particular claim to African authenticity. More fundamentally, natural law's telos-based reasoning assumes facts about human sexuality that are contested: is reproduction really the "natural purpose" of sex? If it were, why do humans (unlike most other mammals)

[23] Aristotle, Nicomachean Ethics, Book V, ch 1.
[24] Thomas Aquinas, Summa Theologica, I-II, Q 91, art 2.
[25] John Finnis, "Law, Morality, and 'Sexual Orientation'" (1994) 69(5) Notre Dame Law Review 1049, 1055.

engage in sex throughout the reproductive cycle, including when conception is impossible? Natural law's certainty about the natural purposes of human sexuality is purchased at the cost of ignoring human experience.

II. Legal Positivism: Separating Law from Morality

Legal positivism — associated with John Austin, Herbert Hart, and Hans Kelsen — holds that law is a human creation, distinct from morality, and that its validity depends on its social source (whether it was validly enacted by the appropriate authority) rather than its moral content.

Hart's refinement of positivism is most relevant for this book. His *The Concept of Law*[26] distinguishes between primary rules (rules imposing duties and obligations) and secondary rules (rules about how primary rules are made, changed, and adjudicated). The "rule of recognition" — the ultimate criterion for identifying valid law — is a social fact, not a moral principle. On this account, the validity of Uganda's Anti-Homosexuality Act 2023 depends on whether it was enacted in accordance with Uganda's constitutional procedures, not on whether it is morally justified.

The "separation thesis" — Hart's insistence that law and morality are conceptually distinct — generates the famous Hart-Fuller debate. Lon Fuller argued that law has an "internal morality" — a set of principles (consistency, clarity, prospectivity, practicability) that a system of rules must satisfy to be law at all. Rules that systematically fail these principles are not bad law; they are not law. Fuller's argument has particular relevance for African penal codes that criminalise conduct that can be defined only by reference to contested moral standards ("carnal intercourse against the order of nature" — what precisely does this phrase mean?).[27]

III. Feminist Jurisprudence: The Woman Question

Feminist legal theory examines how law reflects and perpetuates patriarchal power structures — and how it might be reformed to promote gender equality. Its central methodological move — what Bartlett (1990) calls "asking the woman question" — involves always asking how legal rules reflect or ignore women's experiences, interests,

[26] HLA Hart, The Concept of Law (Clarendon Press 1961) 88.
[26] HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71(4) Harvard Law Review 593, 599.
[27] Lon Fuller, The Morality of Law (Yale University Press 1964) 33.

and perspectives.

The "woman question" applied to African sexual law yields revealing answers. Marital rape exemptions ask: who designed the rules of marriage, and for whose benefit? (Men, for men's benefit.) FGM asks: why is this practice defended as "cultural tradition" when it causes severe physical and psychological harm, and when it serves to control female sexuality rather than enhance it? The law of consent asks: whose experience of sexual encounters does the law reflect — men's, or women's?

African feminist jurisprudence, developed most powerfully by Sylvia Tamale, adds a crucial dimension to these questions: the intersection of gender with race, colonial history, and economic underdevelopment. Tamale's framework of the "three I's" — ideas, interests, and institutions — analyses how ideologies (religious, cultural, colonial), material interests (economic and political), and institutions (courts, churches, universities, families) interact to produce and maintain the sexual subordination of African women.[28]

This book adopts Tamale's framework. Every chapter asks: whose ideas have shaped this area of law? Whose interests does it serve? Which institutions enforce it? And — critically — how can it be reformed to serve the interests of justice?

IV. Critical Legal Studies: Law as Power

Critical Legal Studies (CLS), which emerged in American law schools in the 1970s and 1980s, argues that law is not a neutral technical system but a political one — that legal rules are indeterminate, that legal reasoning masks political choices, and that law perpetuates existing power structures under the guise of objectivity and necessity.

The CLS insight most relevant to this book is indeterminacy: the observation that legal rules do not determine unique correct outcomes, because the same legal materials can be used to support conflicting results. The legal category "consent" is a paradigm example. Consent can be understood narrowly (no means no) or broadly (yes means yes requires affirmative expression of consent); it can be assessed objectively (what would a reasonable person think?) or subjectively (what did this person think?); it can be instantaneous or ongoing; it can be vitiated by intoxication or not. Judges and legislators choose among these possibilities, and their choices reflect their

[28]Tamale (2014) (n 2) 154.

assumptions about gender, sexuality, and social power.

In the context of African sexual regulation, CLS reveals how legal categories like "unnatural offences," "obscenity," "customary law," and "public morality" are politically constructed — deployed not to neutrally describe reality but to enforce particular sexual norms and exclude particular persons and practices from legal recognition.

V. Sociological Jurisprudence and Legal Pluralism

Sociological jurisprudence, associated with Roscoe Pound and Eugen Ehrlich, insists on the distinction between "law in books" (the formal legal rules in codes, statutes, and judgments) and "law in action" (the legal rules as actually experienced and applied in social life).

The distinction is crucial for African sexuality. African penal codes criminalise same-sex conduct; but most African countries rarely prosecute for it, using the criminal law instead as an instrument of harassment, blackmail, and social control. African family law formally requires registration of marriages; but most Africans marry under customary law that is never registered. African law formally criminalises FGM; but in many communities FGM continues to be performed widely with effective impunity.

Legal pluralism — the presence of multiple legal orders in the same social field — is the central feature of African legal systems relevant to sexuality. As Griffiths (1986) defines it, "legal pluralism is the presence in a social field of more than one legal order." In Africa, statutory law, customary law, Islamic law, and Christian religious norms all claim authority over sexuality simultaneously and often in contradiction.

VI. Ubuntu Jurisprudence: An African Foundation

Ubuntu is not merely a philosophical concept. It is a jurisprudential one — a principle that has been recognised and applied by courts as a source of legal obligation and as an interpretive principle in constitutional law.

The South African Constitutional Court gave Ubuntu its most significant judicial recognition in *S v Makwanyane* (1995), the death penalty case, where the court held unanimously that the death penalty violated the constitutional rights to dignity and life. Justice Mokgoro, in her concurring judgment, identified Ubuntu as an indigenous philosophical foundation for the constitutional values of human dignity and equality:

"Ubuntu... envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity."

Ramose (1999) articulates the philosophical content of Ubuntu: "The *umuntu* (human being) is in a process of continual unfolding, of becoming more and more humane... in and through relationships with others."[29] On this account, Ubuntu is not a static set of rules but a dynamic normative orientation — towards compassion, solidarity, and the enhancement of each person's humanity through community.

Applied to sexuality, Ubuntu requires the following. First, human dignity demands respect for each person's sexual autonomy: the capacity to make sexual choices free from coercion, violence, and legal criminalisation of consensual conduct. Second, group solidarity requires protection for the most vulnerable community members — women, sexual minorities, children — from sexual harm. Third, compassion requires that sexual laws be motivated by genuine care for human wellbeing, not by moral condemnation of those who are different. Fourth, conformity to basic norms requires only adherence to norms genuinely necessary for community survival — not the enforcement of majority sexual preferences through criminal law.[30]

Cornell and Muvangua (2012) note that Ubuntu "is not simply an indigenous or African ideal but has universal purchase beyond South Africa."[31] Owor-Mapp (2025) extends this insight into a programme for legal education: "Ubuntu-inspired decolonial pedagogy" can transform how lawyers and judges approach questions of gender, sexuality, and customary law.[32]

VII. Reconciling Law, Culture and Human Rights

The apparent tension between human rights (individual, universal) and culture (communal, particular) is one of the most contested questions in African jurisprudence. This book argues that the tension is, to a significant extent, a false one — produced by a misunderstanding of both human rights and African culture.

Human rights are not a Western cultural imposition, as African governments frequently argue when they resist sexual rights obligations. The claim to be treated with

[29]Ramose (n 5) 49.
[30]Mokgoro (n 7) 17.
[31]Cornell and Muvangua (n 8) 2.
[32]Owor-Mapp (n 9) 1985.

dignity, to be protected from violence, to make intimate decisions without state coercion — these are universal human interests, not European inventions. What is historically contingent is not the interest but the institutional framework (international treaties, national courts, human rights bodies) through which the interest is now pursued.

African culture, as argued in Chapter Two, is not a fixed set of rules but a living, diverse, contested tradition. The "African culture" that criminalises same-sex relations is largely a colonial invention. The "African culture" that justifies FGM is one interpretation — contested within African societies — of what culture requires. The dialogic approach advocated by Owor-Mapp (2025): engaging with customary law critically, separating protective practices from harmful ones, and giving voice to those whose rights are restricted, offers a better framework than either wholesale rejection of customary law or uncritical deference to it.

CHAPTER FIVE
MARRIAGE, FAMILY AND SEXUAL RIGHTS

I. What Is Marriage? Definitions Across Plural Systems

Marriage is one of the most heavily regulated human relationships in any legal system, and one of the most contested. In Africa's plural legal systems, the question "what is marriage?" receives multiple answers simultaneously — from statutory law, customary law, religious law, and constitutional law.

Black's Law Dictionary defines marriage as "the legal union of a couple as spouses."[33] But this definition begs every interesting question: what makes a union "legal"? Who counts as a "couple"? What does "spouses" mean? In Africa, these questions are answered differently by different legal orders. Statutory law typically requires monogamous civil registration. Customary law typically requires bridewealth payment, family consent, and ceremonial celebration — and may permit polygyny. Islamic law requires nikah ceremony, mahr, and witnesses — and permits up to four wives. And the Constitution of Uganda (as interpreted in the 2025 Women's Probono Initiative case) recognises all of these as valid, despite their contradictions.

II. Customary Marriage: Recognition, Bridewealth, Consequences

Customary marriage is the most common form of marriage in Africa, particularly in rural areas. Understanding its legal framework is essential for understanding the sexual rights of the majority of African women.

The essential elements of customary marriage vary across communities, but typically include: consent (of the parties and, critically, of the families), capacity (minimum age, absence of prohibited relationship), bridewealth transfer, and ceremonial celebration with community witnesses. As Tamale (2011) notes, "bridewealth remains central to African marriage systems, shaping gender relations, sexual expectations, and women's autonomy."

Bridewealth has been the subject of sustained feminist critique. The critique runs

[33] Black's Law Dictionary (11th edn, West 2019) 1154.

as follows: bridewealth transfers establish a husband's sexual rights over his wife; they create an expectation that the wife's sexual and reproductive services belong to the husband's family; they make divorce financially costly for the wife's family (who must return the bridewealth); and they therefore trap women in marriages — including abusive ones — against their will. The counter-argument is that bridewealth is a social institution that creates obligations on both sides: it requires the husband's family to contribute to the wife's family, and it creates social accountability that protects women who might otherwise be abandoned without remedy.

The legal recognition of customary marriages varies across Africa. South Africa's Recognition of Customary Marriages Act (1998) provides the most comprehensive recognition: customary marriages are valid and recognised for all legal purposes, including succession, property division on divorce, and the protection of spouses' rights. In Uganda, the Customary Marriages Registration Act (Cap 248) recognises customary marriages, but many are never registered, creating practical problems of proof.

III. Religious Marriage: Christian and Islamic Forms

Christian marriages — solemnised by a licensed minister and registered in a civil registry — are straightforwardly recognised in most African legal systems as valid civil marriages with the same rights and obligations as any civil marriage.

Islamic marriages present more complex questions. Nikah — the Islamic marriage ceremony — requires the offer and acceptance of the marriage contract, presence of witnesses, and typically the payment of mahr (dower) by the husband to the wife. Islamic law permits polygyny (up to four wives, with equal treatment required) and recognises forms of divorce (talaq, khul, faskh) that have no equivalent in civil law. The recognition of Islamic marriages in civil courts varies across Africa: in northern Nigeria, Islamic personal law (under Sharia) is applied comprehensively; in Uganda and Kenya, Islamic marriages are recognised as valid marriages for some purposes but civil courts apply statutory family law principles in disputes.

A woman married under Islamic law faces specific vulnerabilities: her husband may take additional wives without her consent; he may pronounce talaq (repudiation) without court process; and her mahr, while contractually enforceable in Islamic courts, may not be enforceable in civil courts. Islamic feminist scholars — Amina Wadud, Asma

Lamrabet, Ziba Mir-Hosseini — argue that these vulnerabilities are the product of patriarchal interpretation of Islamic law rather than its authentic content, and that Islamic jurisprudence contains the resources for gender equality.

IV. Civil Marriage: Registration, Capacity, Monogamy

Civil marriage — contracted through state registration — is typically monogamous and governed entirely by statutory law. Civil marriage provides the clearest legal rights and protections for spouses, including community of property, inheritance rights, and court-enforced obligations of maintenance and support.

Requirements for civil marriage across African jurisdictions typically include: minimum age (18 in Uganda, Kenya, and most sub-Saharan African countries); absence of an existing valid marriage; consent of both parties, given personally and freely; absence of prohibited degrees of relationship (no marriage between parent and child, sibling and sibling, and other close relatives); and solemnisation by an authorised celebrant.

The "monogamous trap" — a phrase used in Ugandan jurisprudence — refers to the rule that a man who contracts a civil marriage cannot subsequently contract a valid customary polygamous marriage. The logic is that civil marriage is inherently monogamous; a man who is already civilly married cannot marry again. This rule has been applied — in the O'Brien case and subsequent decisions — to protect civil wives from polygamy, but it creates significant legal uncertainty for men who move between legal systems.

V. Divorce, Separation and the Bridewealth Trap

Divorce law in Africa reflects the same legal pluralism as marriage law, with civil, customary, and religious divorce procedures operating in parallel.

Civil divorce is available on grounds that vary by jurisdiction: adultery, cruelty, desertion, and — increasingly — irretrievable breakdown of marriage. Civil divorce entitles both parties to a division of marital property and, typically, maintenance for a financially dependent spouse.

Customary divorce presents more complex problems, particularly for women. In most customary law systems, divorce requires the return of bridewealth from the wife's

family to the husband's family. This requirement can trap women in abusive marriages: "the bridewealth return requirement," as Tamale (2011) notes, "can trap women in abusive marriages, as their families may be unable to repay the bridewealth." A woman who leaves an abusive husband without formal divorce may find herself unable to remarry, because the bridewealth has not been returned, and subject to claims by her husband that she remains his wife.

VI. Polygamy: The Women's Probono Initiative Case (2025)

The 2025 judgment of the Constitutional Court of Uganda in Women's Probono Initiative v Attorney General is the most significant recent African judgment on the constitutionality of polygamy, and it raises fundamental questions about the relationship between equality rights and cultural rights in African constitutionalism.

The Women's Probono Initiative petitioned the Constitutional Court, challenging the constitutionality of the provisions of Ugandan law that permit men to marry multiple wives under customary law. The petitioners argued that polygamy violates Articles 21 (equality) and 32 (affirmative action for women) of the Constitution of Uganda, because it creates a sexual inequality — men may have multiple spouses, women may not — that has no objective justification and causes concrete harm to women in polygamous marriages.[34]

The five-judge bench of the Constitutional Court, presided over by Justice Margaret Tibulya, dismissed the petition. The court held that polygamy is protected by Article 37 of the Constitution (the right to participate in the cultural life of one's community) and Article 29 (freedom of religion, which protects polygamous practices in Islamic law). The court reasoned that the right to culture includes the right to practice polygamous marriage, and that this right takes precedence over the equality claim.[35]

The judgment is controversial, and this book subjects it to sustained critique. The court's reasoning, while formally defensible, sits uncomfortably with a human rights framework that prioritises equality and non-discrimination. Three specific criticisms deserve attention.

First, the court's reading of Article 37 is extraordinarily broad. The right to culture

[34]ibid, Petitioners' Submissions, para 23.
[35]Women's Probono Initiative v Attorney General, 2025 UGCC 6, para 45 (Tibulya J).

cannot plausibly be interpreted to protect every cultural practice, including those that cause concrete harm to identifiable persons. If culture could always trump equality, the Maputo Protocol's prohibition on FGM would be unenforceable. The constitutional provision requires a balancing test, and the court did not adequately perform it.

Second, the court did not adequately address the asymmetry of polygamy as practiced. Polygamy in Uganda permits men to take multiple wives; it does not permit women to take multiple husbands. This asymmetry is not inherent in the concept of plural marriage; it is a patriarchal feature of the particular customary practice under challenge. A gender-neutral right to plural marriage would not be subject to the same equality objection.

Third — and most importantly for this book — the court did not apply an Ubuntu framework to the analysis. Ubuntu requires that the dignity and autonomy of every person in the plural marriage be respected. A polygamous marriage in which co-wives have no voice in the decision to add additional wives, no right to an equal share of resources, and no practical exit option without forfeiting their children and property does not satisfy Ubuntu's requirements of compassion and human dignity.

VII. Cohabitation and the Legal Gap

Cohabitation — two people living together in a sexual relationship outside marriage — is increasingly common across Africa, particularly in urban areas and among younger generations. Yet the legal frameworks for cohabitation remain almost entirely undeveloped.

In most African countries, a cohabiting couple has no rights against each other on the termination of their relationship. There is no right to a division of property accumulated during cohabitation. There is no right to maintenance. There is no automatic inheritance right. Children of cohabiting couples may face difficulties establishing paternity and access rights. The "cohabitation gap" disproportionately affects women, who typically contribute unpaid domestic labour to cohabiting relationships and who are economically disadvantaged if the relationship ends without legal remedy.

South Africa has begun to address the cohabitation gap through judicial recognition and legislative proposal. Uganda, Kenya, and Nigeria have not. The

recommendation of this book — elaborated in Chapter Twelve — is that all African countries should enact cohabitation legislation providing for property division, maintenance, and children's rights on the termination of cohabiting relationships.

VIII. Rights and Obligations of Spouses

Marriage creates a bundle of legal rights and obligations that vary significantly across African jurisdictions and legal systems.

Common obligations include: mutual support and maintenance (each spouse must financially support the other, though enforcement is weak in many jurisdictions); cohabitation (an obligation to live together, though courts are reluctant to specifically enforce it); fidelity (an obligation not to commit adultery, though the consequence is typically divorce rather than criminal liability in most civil law systems); and joint responsibility for children's welfare.

The marital rape exemption — the rule that a husband cannot be convicted of raping his wife — was, until relatively recently, a feature of most African legal systems. Its historical origin is in Matthew Hale's statement in 1736 that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."[36]

This doctrine is legally and morally indefensible. It treats marriage as a once-for-all grant of sexual consent, ignoring that consent is ongoing and revocable. It treats the wife as her husband's sexual property. And it is inconsistent with constitutional protections of dignity, equality, and bodily integrity. South Africa criminalised marital rape in 1993 and confirmed the law's application in S v Mvundlana (2009). Uganda's Domestic Violence Act (2007) criminalised marital rape. Kenya criminalised it in 2006. But Nigeria and Tanzania have not. The recommendation of this book is the immediate criminalisation of marital rape across all African jurisdictions.[37]

[36]Matthew Hale, History of the Pleas of the Crown (Professional Books 1736) vol 1, p 629.
[37]S v Mvundlana 2009 (1) SACR 43 (KZD) para 12.

CHAPTER SIX

CONSENT, AUTONOMY AND SEXUAL JUSTICE

I. The Anatomy of Consent

Consent is the axis around which modern sexual offences law turns. Non-consensual sexual contact is assault; consensual contact is not. The simplicity of this principle is deceptive, concealing some of the most contested questions in criminal law.

What must consent be, for it to be legally effective? The law across jurisdictions has moved, unevenly and imperfectly, towards requiring that consent be: voluntary (freely given, without coercion, threats, or undue pressure); informed (based on accurate information about what is being consented to); specific (consent to one act is not consent to other acts, or to the same act on other occasions); capacitated (given by a person with the mental and physical capacity to understand the nature of the act); and revocable (a person may withdraw consent at any time, including during sexual activity).

South Africa's Sexual Offences Act (2007), the most comprehensive sexual offences legislation in Africa, defines consent as "voluntary or uncoerced agreement."[38] The Act is gender-neutral, criminalises all forms of penetration without consent, and includes a list of circumstances that negate consent — including where consent is given as a result of threats, force, fraud, or intoxication.

II. Age, Capacity and the Law

Capacity to consent to sexual activity is determined primarily by age. The age of consent — the age below which a person cannot legally consent to sexual activity — varies significantly across Africa and interacts uneasily with the prevalence of child marriage.

The age of consent in sub-Saharan Africa ranges from as low as 11 in some northern Nigerian states (under Sharia provisions that link the age of consent to puberty) to 18 in Uganda, Kenya, Tanzania, and Zimbabwe. South Africa sets it at 16. The Maputo Protocol calls for a minimum age of marriage of 18 — which, if implemented, would

[38]Sexual Offences Act 32 of 2007 (South Africa), s 1.

effectively impose a minimum age of sexual consent of 18 across all signatory states. As of 2026, most states that have ratified the Maputo Protocol have not fully implemented its age of marriage requirement.

The interaction between child marriage and the age of consent is a structural contradiction in many African legal systems. A girl of 15 cannot legally consent to sexual activity under the criminal law — but she can be lawfully married under customary law, and once married, her husband's sexual access to her is unquestioned (in jurisdictions that retain the marital rape exemption). The criminal law and the marriage law are therefore in direct conflict, and the marriage law — the older, more culturally embedded institution — typically prevails in practice.

III. Sexual Assault: Legal Frameworks Across Africa

The legal definition of sexual assault varies significantly across African jurisdictions, reflecting the same colonial legal diversity that characterises other areas of sexual law.

In common law jurisdictions (most of English-speaking Africa), rape was traditionally defined as penile penetration of the vagina without consent. This definition excluded male rape, oral rape, and penetration with objects from the definition of "rape," treating them as lesser offences. Most jurisdictions have reformed this definition — South Africa in 2007 most comprehensively — to a gender-neutral offence of sexual assault covering all forms of penetration without consent.

The practical implementation of sexual assault law across Africa falls far short of its formal requirements. Under-reporting is epidemic: studies consistently find that fewer than 10 percent of sexual assaults are reported to police in most African countries. The reasons are multiple and well-documented: fear of the perpetrator (particularly where he is a family member or employer); shame and social stigma (including the common cultural practice of blaming the survivor); distrust of police (who often re-victimise survivors through insensitive questioning, demands for bribes, or failure to investigate); lack of forensic capacity; the requirement for medical evidence that many survivors cannot access; and the evidentiary difficulties of proving absence of consent.

IV. Marital Rape: From Hale's Doctrine to Modern Law

The marital rape exemption — one of the most pernicious doctrines in the history of sexual law — has ancient roots in English common law and recent history in African legislation.

Matthew Hale's statement in 1736 that "the husband cannot be guilty of a rape committed by himself upon his lawful wife" — with the reasoning that "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract" — was never subject to judicial authority even in England; it was a statement in a treatise. Yet it was adopted as law across common law jurisdictions, including in the African jurisdictions that inherited English common law.

The House of Lords finally abolished the marital rape exemption in England and Wales in R v R (1991). The South African Law Commission recommended abolition in 1985; parliament enacted it in the Prevention of Family Violence Act in 1993. Uganda's Domestic Violence Act (2007) criminalised marital rape. Kenya's Sexual Offences Act (2006) did the same. But as of 2026, Nigeria and Tanzania have not criminalised marital rape, and in several other African countries the position is uncertain.

S v Mvundlana (2009) — the South African case most directly on point — confirmed that a husband who has sexual intercourse with his wife without her consent is guilty of rape. The court explicitly rejected the Hale doctrine as incompatible with the constitutional values of dignity and equality.

V. Power, Economics and the Coercion of Consent

Formal legal analysis of consent assumes that "voluntary agreement" is straightforwardly identifiable: consent was either given or it was not. The sociological reality of sexuality — particularly in African contexts of significant gender inequality — is far more complex.

Economic dependency is among the most significant structural constraints on women's sexual consent. A woman who depends on her husband or partner for housing, food, children's school fees, and basic necessities may "consent" to sexual activity not because she freely chooses it but because the cost of refusal — being thrown out, losing access to resources, being subjected to violence — is too high to bear. The consent is formally voluntary in the sense that no immediate force was applied; but it is coerced by

the economic and social structure within which it is given.[39]

As Hunter (2002) documents in his study of sexual economies in KwaZulu-Natal, "transactional sex" — the exchange of sexual access for material goods — is not primarily a matter of commercial sex work but of the negotiation of romantic relationships in conditions of economic inequality. Young women exchange sexual access for "transport, airtime, clothes, food, and school fees" as part of relationships that both parties understand as romantic rather than commercial. Whether this constitutes "consent" in any meaningful sense is a question that the law has not adequately addressed.

VI. Consent in Digital Spaces

The digital revolution has transformed the landscape of sexual consent in ways that existing legal frameworks are struggling to address.

Non-consensual disclosure of intimate images — popularly known as "revenge porn" — involves the sharing of sexual images or videos without the consent of the person depicted. The harm is severe and well-documented: victims (predominantly women) experience profound psychological harm, reputational damage, professional consequences, and, in some cases, suicide. South Africa's Cybercrimes Act (2020) criminalises the disclosure of intimate images without consent. Kenya's Computer Misuse and Cybercrimes Act (2018) and Uganda's Computer Misuse (Amendment) Act (2022) contain relevant provisions. But enforcement is weak across all jurisdictions, and the social stigma of being a victim — rather than the perpetrator — remains powerful.[40]

Sextortion — the use of intimate images as leverage to extort money or further sexual images — is a rapidly growing form of cyber exploitation. It combines sexual coercion with financial crime and has the added feature that the perpetrator may be geographically remote, making prosecution and enforcement particularly difficult. The African Union's Continental AI Strategy (expected 2026) addresses some of these issues, but national implementation will take years.

[39]Mark Hunter, "The Materiality of Everyday Sex" (2002) 28(1) African Studies 100, 105.
[39]S v Makwanyane (n 6) para 308.
[40]United Nations, Cyber Exploitation and Online Sexual Violence in Africa (UN 2023) 8.

CHAPTER SEVEN
GENDER, POWER AND SEXUALITY

I. Patriarchy and Its African Manifestations

Patriarchy — the systematic domination of women by men, operating through social structures, cultural norms, economic arrangements, and legal rules — is the central organising principle of sexuality in most African societies. Understanding it is not optional for any book that takes sexual justice seriously.

Walby (1990) identifies six structures through which patriarchy operates: household production (women's unpaid domestic labour), paid employment (women's exclusion from well-paid work), the state (law and policy that privileges men), male violence (including sexual violence as a mechanism of control), sexuality (the sexual double standard that judges women but not men for sexual behaviour), and culture (representations that subordinate women).[41] All six structures are clearly visible in African societies, and all six are relevant to the law of sexuality.

The key insight for this book — elaborated in Chapter Three — is that African patriarchy is not simply the continuation of pre-colonial gender relations. It is, to a significant extent, a product of the intersection of colonial law, Christian missionary influence, and the strategic deployment of customary law by male elites. The colonial administrators who identified and empowered male "chiefs" as the custodians of customary law did so partly because they shared the assumption of male authority, and partly because male intermediaries were more useful for colonial purposes than the complex, gender-balanced authority systems that many African societies had actually developed.

This does not mean that pre-colonial Africa was a feminist paradise. Power differentials between men and women existed in most pre-colonial African societies, as they have in most human societies throughout history. But the form, intensity, and legal embodiment of those differentials were shaped and hardened by colonialism in ways that continue to determine the legal landscape of African sexuality.

[41] Sylvia Walby, Theorizing Patriarchy (Blackwell 1990) 20.

II. Masculinity, Femininity and the Sexual Double Standard

The sexual double standard — the set of social norms that judge women and men differently for the same sexual behaviour — is among the most persistent and damaging features of African sexual culture.

Connell (1995) introduced the concept of "hegemonic masculinity" to describe the dominant, socially celebrated form of masculinity in a given society — the form that legitimates patriarchy and defines what it means to be a "real man."[42] In most African social contexts, hegemonic masculinity includes sexual prowess and the number of sexual partners as markers of male status; the expectation that men will control women's sexual behaviour; and the equation of male authority with sexual authority over wives, daughters, and women generally.

The consequences of the sexual double standard for women are severe and well-documented. Women who have multiple sexual partners are condemned as promiscuous; men who have multiple partners are celebrated as virile. Women who are raped are blamed for their clothing, behaviour, or character; men who rape are excused on the grounds that they were provoked. Women who seek sexual pleasure outside marriage are disciplined; men who do the same are understood. These double standards are not merely cultural; they are encoded in law — in adultery provisions that treat female adultery as more serious than male, in rape laws that probe the survivor's sexual history rather than the accused's conduct, in marriage laws that permit male polygamy while prohibiting female polyandry.

III. Gender-Based Violence: Scope, Law and Failure

Gender-based violence — violence directed at a person because of their gender, or violence that disproportionately affects women and girls — is among the most serious and widespread human rights violations in Africa.

The World Health Organization estimates that approximately 45.6 percent of African women experience intimate partner violence in their lifetimes, compared to a global average of 27 percent.[43] Female genital mutilation has been performed on an estimated 200 million women and girls globally, with Africa accounting for the vast

[42]Raewyn Connell, Masculinities (Polity Press 1995) 77.
[43]World Health Organization, Violence Against Women Prevalence Estimates (WHO 2020) 12.
[43]World Health Organization, Female Genital Mutilation (WHO 2021) 2.

majority.[44] Child marriage affects approximately 125 million African girls.[45]

The Maputo Protocol (2003) — the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa — provides the most comprehensive regional legal framework for addressing GBV. Articles 3 and 4 require states to enact and enforce laws that prohibit and punish all forms of violence against women; to take measures to prevent violence; to provide services (shelters, legal aid, health care) to survivors; and to prosecute perpetrators effectively.

The gap between the Protocol's requirements and the reality of GBV law enforcement across Africa is enormous. Police routinely refuse to arrest men who assault their wives, treating domestic violence as a "family matter." Prosecutors lack the forensic evidence and legal expertise to prosecute sexual violence effectively. Courts are slow, expensive, and inaccessible to poor women in rural areas. And the structural conditions that make women vulnerable to GBV — economic dependency, limited education, weak social support networks — remain largely unaddressed by law.

IV. Female Genital Mutilation: Harm, Culture and Law

Female genital mutilation — the partial or total removal of the external female genitalia, or other injury to the female genital organs, for non-medical reasons — is one of the most contested intersections of cultural practice and human rights in Africa.

The World Health Organization classifies FGM into four types: Type I (partial or total removal of the clitoris and/or the prepuce); Type II (partial or total removal of the clitoris and the labia minora); Type III (infibulation — narrowing of the vaginal orifice through creation of a covering seal); and Type IV (all other harmful procedures to the female genitalia for non-medical purposes). All four types cause severe harm: immediate pain, bleeding, and infection; longer-term scarring, keloids, and recurrent infections; painful intercourse (dyspareunia); complications in childbirth; and significant psychological trauma.

The cultural defence of FGM is, in its strongest form, the argument that FGM is a rite of passage that marks a girl's transition to womanhood, establishes her marriageability, and secures her social status within her community. Remove FGM, the

[44]WHO (2021) (n 14) 2.
[45]UNICEF (2020) (n 12) 5.

argument goes, and you destroy the social institution through which women achieve recognition and security.

The counter-argument, advanced by African feminist scholars and validated by evidence, is that this cultural claim masks a mechanism of patriarchal control: FGM reduces or eliminates female sexual pleasure, reinforcing the sexual double standard by which female sexuality is dangerous and must be contained. The fact that many women defend FGM does not resolve this, because internalised oppression is a recognised feature of systems of domination.

The legal framework across Africa is one of formal prohibition and practical impunity. Most African countries with high FGM prevalence have criminalised it (Senegal 1999, Burkina Faso 1996, Kenya 2011, Uganda 2010, Ethiopia 2005), but enforcement is minimal. The better approach — adopted in some countries — combines legal prohibition with community-level education and the development of alternative rites of passage that preserve cultural meaning without causing physical harm.

V. Child Marriage: Poverty, Power and Prohibition

Child marriage — the formal marriage or informal union of a person under 18 years of age — is at once a product and a cause of gender inequality, poverty, and the failure of girls' education in Africa.

UNICEF estimates that approximately 125 million girls in Africa are or have been married as children. West and Central Africa has the highest prevalence: 41 percent of girls in the region are married before age 18. The drivers are multiple: poverty (daughters are seen as economic burdens; bridewealth from their marriage provides immediate income); gender inequality (girls are valued primarily as wives and mothers, not as individuals with autonomous futures); customary law that sets no minimum age of marriage or sets it below 18; religious norms (in some Islamic communities, marriage immediately after puberty is considered appropriate); and conflict (parents marry daughters off early to protect them from sexual violence in conflict zones — often delivering them instead to domestic violence).

The consequences of child marriage are devastating and well-documented. Girls who marry before 18 are more likely to experience complications in pregnancy and childbirth, which remain the leading cause of death among adolescent girls in Africa.

They are far less likely to complete secondary and tertiary education. They are more likely to experience domestic violence, because the power differential between a young girl and an adult husband is extreme. And their daughters are more likely to marry young themselves — perpetuating the cycle.

The legal framework is, again, one of formal prohibition and practical failure. The African Union's Campaign to End Child Marriage (2015) commits member states to eliminating child marriage by 2030. The Maputo Protocol requires a minimum age of marriage of 18. Most African constitutions prohibit age-based discrimination. But customary law — which sets no minimum age, or sets it at puberty — continues to validate child marriages in practice, and civil courts rarely intervene.

VI. Sexual Exploitation and Trafficking

Sexual exploitation — the coercion, manipulation, or forcing of a person into sexual activity for the benefit of another — takes multiple forms in Africa, from sex trafficking across borders to the exploitation of employees by employers, to the exchange of grades for sexual access in educational institutions.

The International Labour Organization estimates that 4.8 million people are in forced sexual exploitation globally, with Africa accounting for a significant proportion.[46] West Africa is a major source and transit region for trafficking to Europe (particularly to the sex industries of Italy, France, and Germany). East Africa trafficks to the Gulf States and Southeast Asia. Within Africa, trafficking for domestic labour and sexual exploitation is a serious problem in most countries.

The legal frameworks for addressing trafficking have developed significantly since the Palermo Protocol (2000). Most African countries have enacted anti-trafficking legislation. Uganda's Prevention of Trafficking in Persons Act (2009), Kenya's Counter-Trafficking in Persons Act (2010), and South Africa's Prevention and Combating of Trafficking in Persons Act (2013) all criminalise trafficking and establish protective frameworks for survivors. Implementation remains severely underfunded and inadequate.

VII. The Economics of Sex: Survival, Agency and Exploitation

[46] ILO, Global Estimates of Modern Slavery (ILO 2017) 15.

The relationship between sexuality and economics in Africa is intimate, complex, and politically charged. Understanding it is essential for any realistic assessment of consent, exploitation, and sexual justice.

Mark Hunter's research (2002) in KwaZulu-Natal documented what he called "the materiality of everyday sex": the fact that in conditions of profound economic inequality, sexual relationships are almost always economic relationships too. Young women in his study exchanged sexual access for "transport, airtime, clothes, food, and school fees" — not as commercial sex workers, not under physical coercion, but as participants in relationships that both parties understood as romantic. Yet the economic dimension was always present, structuring what was asked, what was given, and what was possible.

The implication for consent is profound: where economic dependency structures sexual access, "voluntary agreement" to sex may be technically present but practically coerced. A woman who agrees to sex because the alternative is losing her home, her children's school fees, or her employment has not consented in any morally robust sense, even if she has consented in the formal legal sense. Addressing sexual justice requires addressing economic justice — women's economic empowerment, equal access to employment and education, and the social protection systems that would make it possible for women to say no without catastrophic consequences.

CHAPTER EIGHT
SEXUALITY AND HUMAN RIGHTS

I. The International Framework

International human rights law provides a framework for sexual rights that is, in theory, binding on African states — and that, in practice, is contested, imperfectly implemented, and often deliberately ignored.

The core instruments of the international framework include the Universal Declaration of Human Rights (1948), which proclaims the right to dignity (Article 1), the right to security of person (Article 3), the right to privacy (Article 12), and the right to found a family (Article 16). The International Covenant on Civil and Political Rights (1966) protects privacy (Article 17), equality (Article 26), and the right to marry with free and full consent (Article 23). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) provides the most comprehensive framework for women's sexual and reproductive rights, including the right to determine the number and spacing of children (Article 16(e)).

The Human Rights Committee's landmark decision in *Toonen v Australia*[47] (1994) — holding that the criminalisation of same-sex conduct between consenting adults violated Articles 17 (privacy) and 26 (non-discrimination) of the ICCPR — established the principle that same-sex relationships are protected by international human rights law. The Committee held that "sex" in Article 26 includes "sexual orientation" as a prohibited ground of discrimination.

II. The African Human Rights System

The African human rights system — centred on the African Charter on Human and Peoples' Rights (the Banjul Charter, 1981) and its protocols — is unique in the global human rights landscape in that it formally recognises peoples' rights alongside individual rights, and imposes duties alongside rights.

The Banjul Charter's distinctive feature — its combination of individual rights,

[47] Toonen v Australia, Communication No 488/1992, UNHRC (1994).

peoples' rights, and duties — has been invoked by African governments to limit individual sexual rights on grounds of community morality. The "clawback clauses" in the Charter (provisions that limit rights "in accordance with the law" or "subject to law and order") have been used to justify restrictions on sexual rights that would be impermissible under the more absolute formulations of international human rights treaties.

The Maputo Protocol (2003) is the most significant regional instrument for sexual rights in Africa. Its Article 14 requires states to ensure that "the right to health of women, including sexual and reproductive health is respected and promoted" and to authorise "medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." As Zundel (2025) documents, "the African human rights system is increasingly engaged with SOGIESC rights, but state resistance remains significant."[48]

III. Constitutional Protection of Sexual Rights in Africa

African constitutions vary significantly in their explicit protection of sexual rights. South Africa's Constitution (1996) is the most protective: Section 9(3) explicitly prohibits discrimination on grounds of "sexual orientation," making South Africa one of the few countries in the world to constitute enshrine protection for sexual minorities.

Kenya's Constitution (2010) prohibits discrimination on grounds of "sex" and "marital status" but does not explicitly mention sexual orientation. Uganda's Constitution (1995) prohibits discrimination on grounds of "sex" but has been interpreted by courts as not protecting same-sex relationships. Most African constitutions follow this pattern: formal equality provisions that are broad enough, in principle, to include sexual minorities, but that courts have interpreted narrowly under the influence of social conservatism and religious lobbying.

The contrast between South Africa and Uganda is instructive. The South African Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[49] (1998) held that the criminalisation of same-sex conduct violated the constitutional rights to equality, dignity, and privacy. The Ugandan Constitutional Court

[48]Zundel (n 11) 12.
[49]National Coalition (n 29) para 28.

in *Mukasa v Attorney General*[50] (2023) upheld the criminalisation, reasoning that the moral consensus of Ugandan society, expressed through its religious and cultural traditions, justified the restriction. Same constitutional text; radically different judicial choices.

IV. Privacy, Dignity and Bodily Integrity

Privacy, dignity, and bodily integrity are the constitutional rights most directly implicated by the regulation of sexuality. Together, they constitute the normative core of sexual autonomy — the claim that intimate sexual decisions are the individual's to make, free from state intrusion.

In *Lawrence v Texas*[51] (2003), the US Supreme Court held that "liberty protected by the Constitution allows homosexual persons the right to make their own choices in their most intimate and private life." The judgment's reasoning — that intimate sexual conduct is a matter of personal liberty that the state may not regulate without compelling justification — has influenced courts across the common law world, including in Africa.

The right to bodily integrity — the right to control what happens to one's body — is the most direct basis for the legal claims of survivors of sexual violence, of women subjected to FGM, of girls forced into child marriage. It is explicitly protected in the Maputo Protocol (Article 4(2)(a)) and is implicit in every constitution that recognises the right to dignity.

V. Reproductive Rights: Abortion, Contraception, Maternal Health

Reproductive rights — the right to decide whether, when, and how many children to have, and to have access to the means to give effect to that decision — are among the most contested human rights in Africa.

Contraception access varies enormously: South Africa, Morocco, and Tunisia have relatively high access to modern contraception; Nigeria, the DRC, and Tanzania have among the lowest access rates in the world. The consequences of inadequate contraception access are predictable: high rates of unintended pregnancy, high rates of

[50] Mukasa v Attorney General, Constitutional Petition No 10/2023 (Uganda Constitutional Court, 2023) (tentative citation; full judgment pending).
[51] Lawrence v Texas, 539 US 558 (2003) 578.

unsafe abortion, and high rates of maternal mortality.

Abortion law across Africa ranges from absolute prohibition (Senegal, Mauritania, Madagascar, Gabon, Congo) to access on request in the first trimester (South Africa, Tunisia, Cape Verde). Between these extremes, most African countries permit abortion only in narrow circumstances — to save the woman's life, in some countries also for health, rape, incest, or fetal impairment. The Maputo Protocol's requirement (Article 14(2)(c)) that states authorise abortion in cases of rape, incest, sexual assault, and health risk is the most progressive abortion provision in any binding regional human rights instrument — and it has been ratified by 42 of 55 African Union member states. Yet most ratifying states have not enacted implementing legislation.

VI. Sexual Minorities and the Human Rights Debate

The rights of LGBTQ persons in Africa are the most contested dimension of sexual rights on the continent — politically, legally, and intellectually.

The debate is often framed as a binary: Western imperialism (the argument that LGBTQ rights are imposed on Africa by donor countries and international organisations) versus universal human rights (the argument that every person is entitled to dignity, equality, and privacy regardless of sexual orientation). This framing is unhelpful and, this book argues, wrong.

It is wrong because: the criminalisation of same-sex conduct in Africa is itself a colonial imposition (as Chapter Three demonstrates); the existence of same-sex practices and gender diversity in pre-colonial Africa is historically documented (as Chapter Two demonstrates); African LGBTQ persons are African — they are not Western agents promoting foreign values; and Ubuntu's commitment to the dignity and humanity of every person is incompatible with the criminalisation of persons on the basis of their sexual orientation.

The decriminalisation decisions of the South African Constitutional Court (1998), the Botswana High Court (2019 — *Motshidiemang v Attorney General*),[52] and the Indian Supreme Court (2018 — re s 377 IPC) demonstrate that decolonisation of sexual law is possible and judicially achievable. The argument that "African culture" requires criminalisation is refuted by the history documented in Chapter Two. What African

[52]Motshidiemang v Attorney General, MAHGB-000591-16 (Botswana High Court, 2019) para 101.

culture actually requires — once stripped of its colonial accretions — is Ubuntu: the dignity, solidarity, and compassion that recognise the full humanity of every person.

CHAPTER NINE
RELIGION, MORALITY AND SEXUAL REGULATION

I. Christianity and African Sexual Ethics

Christianity is the largest religion in Africa, with approximately 49 percent of Africans identifying as Christian. Its influence on sexual ethics — and through sexual ethics, on sexual law — is pervasive and, in many respects, profoundly conservative.

Most African Christian denominations maintain sexual ethics derived from the natural law tradition: sex is permitted only within heterosexual marriage; premarital sex is sinful; same-sex relations are condemned. These positions are not uniformly held — progressive African theologians, including those influenced by liberation theology and feminist theology, have developed more affirming frameworks — but they represent the dominant public position of most African churches.[53]

Tamale (2014) documents a particularly troubling dimension of Christian influence on African sexual law: the role of the US Christian Right in funding and organising anti-LGBTQ campaigns across Africa.[54] American evangelical organisations — including the Family Research Council and Focus on the Family — have invested heavily in African churches, providing funding, theological training, and political support to conservative African religious leaders campaigning against LGBTQ rights. Uganda's Anti-Homosexuality Act (2023) was, in part, the product of decades of this investment. The "African tradition" that the Act claims to protect was thus, to a significant extent, manufactured in America.

II. Islam and African Sexual Ethics

Islam is the second-largest religion in Africa, with approximately 42 percent of Africans identifying as Muslim. Islamic sexual ethics are derived from the Qur'an, the Hadith (the collected sayings and practices of the Prophet Muhammad), and the legal frameworks (fiqh) developed by the four main Sunni schools of jurisprudence.

The core Islamic sexual ethics relevant to this book are: sex is lawful only within

[53] Pew Research Center, Religion in Africa (Pew Research Center 2015) 4.
[54] Tamale (2014) (n 2) 170.

marriage; polygyny is permitted (up to four wives) on condition of equal treatment; premarital sex (zina) is prohibited and in classical fiqh is punishable by flogging or stoning (though these punishments are rarely applied in modern African states); homosexuality (liwat) is prohibited and similarly punishable in classical fiqh. In the 12 northern Nigerian states that have adopted Sharia law, these classical provisions have been formally enacted.[55]

Islamic feminists — Amina Wadud, Fatima Mernissi, Asma Lamrabet, Ziba Mir-Hosseini — have argued persuasively that the patriarchal interpretation of Islamic law is not inherent in the Qur'an but is the product of male jurisprudents who read their gender assumptions into divine texts. The Qur'anic principle of justice ('adl) and the concept of maslaha (public interest) provide, on the Islamic feminist account, the resources for a gender-equal interpretation of Islamic sexual ethics that protects women's dignity and autonomy.

III. African Traditional Religion: A Different Vision

African Traditional Religion — the ensemble of indigenous African spiritual beliefs and practices — has received far less attention than Christianity and Islam in discussions of African sexual ethics, partly because it is less institutionalised and partly because colonial education taught Africans to be ashamed of it. Yet ATR continues to influence sexual attitudes and practices across Africa, often in ways that are more life-affirming and body-positive than the imported Abrahamic traditions.

ATR's approach to sexuality is characterised, broadly, by: a positive valuation of the body as a site of spiritual power and community continuity; the centrality of fertility to spiritual well-being; the recognition of sexuality as a dimension of the sacred, not merely the profane; and, in many traditions, the recognition of spiritual intermediaries who occupy gender-variant roles. The sangoma tradition in South Africa, for example, includes significant numbers of gender-variant and same-sex attracted practitioners, whose spiritual gifts are understood as connected to their departure from normative gender roles.

IV. The Devlin–Hart Debate in African Perspective

[55] ibid 6.

The Devlin-Hart debate — the famous 1959-1963 exchange between Lord Patrick Devlin and Professor H.L.A. Hart about the proper relationship between law and morality — has shaped sexual law across the common law world, including in Africa.

Lord Devlin argued, in *The Enforcement of Morals*[56] (1959), that society has the right — indeed, the obligation — to enforce through law the moral norms that hold it together. Society is not merely a political arrangement but a moral community; and a community that tolerates acts it regards as grossly immoral endangers its own survival. On this account, the criminalisation of same-sex conduct is justified not because it harms specific victims but because it violates the shared morality of the community.

Hart responded, in *Law, Liberty and Morality*[57] (1963), that Devlin's argument proves too much and rests on empirical falsehoods. It proves too much because, if shared morality justifies criminalisation, then slavery and caste discrimination would be justified in societies where these were morally approved. It rests on empirical falsehoods because the "moral fabric of society" does not, in fact, dissolve when private consensual conduct that majorities disapprove of is decriminalised. No country that decriminalised same-sex conduct has experienced social collapse.

The Botswana High Court in *Motshidiemang v Attorney General* resolved this debate in Hart's favour: "the fact that the majority may disapprove of a practice does not justify criminalisation in a constitutional democracy." The court applied the harm principle — the rule that criminal law should be restricted to conduct that harms others — and found that consensual same-sex conduct between adults causes no harm to others and therefore cannot be criminalised consistently with constitutional principles of dignity and equality.

V. Whose Morality? Whose Community?

The deepest problem with Devlin's legal moralism, in the African context, is its assumption that "the community" has a single, coherent moral view that law can enforce.

African societies are morally plural. They include Muslims, Christians, ATR practitioners, and non-religious persons. They include people of very different ages, regions, educational backgrounds, and economic circumstances. They include people

[56] Patrick Devlin, The Enforcement of Morals (Oxford University Press 1959) 9.
[57] HLA Hart, Law, Liberty, and Morality (Oxford University Press 1963) 48.

whose experience of sexuality is heterosexual and those whose is not. The claim that "African culture" condemns same-sex relations is a claim about what some Africans believe — not what all Africans believe. And the claim that this majority moral view justifies criminalising a minority is precisely what constitutional democracy is designed to prevent.

Ubuntu provides a better framework. Ubuntu does not require everyone to conform to majority moral preferences; it requires that everyone be treated with dignity, compassion, and solidarity. A law that criminalises a person's most intimate relationships — that sends them to prison for loving in a way the majority disapproves of — does not satisfy Ubuntu's requirements. It enacts condemnation, not compassion. It excludes, not includes. It destroys community, by treating some community members as less than fully human.

VI. The Future of Moral Regulation in Africa

The future of moral regulation of sexuality in Africa is genuinely uncertain, and trends are pulling in contradictory directions.

The liberalising trend is real. South Africa decriminalised same-sex conduct in 1998 and legalised same-sex marriage in 2006. Botswana decriminalised in 2019. Angola decriminalised in 2019. Mozambique decriminalised in 2015. Seychelles decriminalised in 2016. Zimbabwe's Constitutional Court has referred same-sex criminalisation provisions for fresh consideration. The Maputo Protocol has moved African states, however slowly, towards expanded reproductive rights.

The restrictive trend is also real. Uganda enacted the Anti-Homosexuality Act in 2023, imposing life imprisonment for same-sex conduct. Ghana's Parliament debated the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill in 2024. Nigeria's Same-Sex Marriage Prohibition Act (2014) remains in force. Some African leaders have made opposition to LGBTQ rights a signature element of political identity.

The likely trajectory over the next decade depends on several factors: the strength and organisation of African civil society movements for sexual rights; the attitude of African courts, which have shown both courage (Botswana 2019) and timidity (Uganda 2023); the influence of international religious actors (particularly the US Christian Right); and the extent to which African political leaders find anti-LGBTQ

rhetoric politically useful. This book argues that the direction that Ubuntu demands — of compassion, dignity, and solidarity for all — is clear. Whether African law will follow is a political question.

CHAPTER TEN

SEXUALITY, TECHNOLOGY AND THE DIGITAL AGE

I. Social Media, Identity and Sexual Behaviour

The digital revolution has transformed sexuality — how people understand it, express it, negotiate it, and experience violations of it — in ways that existing legal frameworks are struggling to address.

Social media platforms — Facebook, Instagram, Twitter/X, TikTok, WhatsApp — have created new spaces for the expression and exploration of sexual identity. For LGBTQ Africans in countries where their identities are criminalised, social media has been particularly significant: it enables community-building, mutual support, access to information, and connection with international human rights networks, at least partially sheltered from the surveillance of states and families. The ability to find others who share one's experience, to learn that one is not alone, to access the knowledge that sexual diversity is normal and has existed throughout human history — these are not trivial benefits. They are, for many LGBTQ Africans, life-saving.

The same platforms have also been weaponised against LGBTQ Africans. In Uganda, following the passage of the Anti-Homosexuality Act in 2023, social media was used to identify, expose, and report LGBTQ persons to police. In Ghana, during the parliamentary debate on the Human Sexual Rights Bill in 2024, social media amplified moral panic, spreading disinformation about LGBTQ lives and facilitating harassment campaigns against activists.

II. Online Relationships and Dating Platforms

Dating applications — Tinder, Bumble, Grindr, and their local equivalents — have transformed how sexual relationships are initiated across Africa, particularly in urban areas.

For heterosexual users, dating apps have expanded the pool of potential partners, reduced the role of family intermediaries in partner selection, and provided a degree of anonymity that enables more candid presentation of sexual preferences. For LGBTQ

users in countries where same-sex conduct is criminalised, Grindr and equivalent apps offer the possibility of connection that would be impossible in public spaces — but at the risk of entrapment by police posing as potential partners, which is a documented law enforcement tactic in Uganda, Kenya, and Nigeria.

The legal framework for online relationships is underdeveloped across Africa. Most African countries lack specific legislation governing online harassment, cyber-stalking, or the fraudulent representation of identity in online relationships. The risks of catfishing (misrepresentation of identity), romance scams (fraudulent emotional relationships aimed at extracting money), and online-to-offline violence (perpetrators who use apps to identify and assault victims) are real and growing.

III. Pornography, Obscenity and the Limits of Regulation

Pornography — sexually explicit material produced for the purpose of sexual arousal — is formally prohibited in most African countries through colonial-era obscenity legislation. The practical enforceability of these prohibitions in the internet era is approximately zero.

Most African pornography prohibition statutes were drafted in the pre-internet era and contemplated the regulation of physical materials — magazines, films, videocassettes. They are procedurally inapplicable to internet content hosted on servers in other jurisdictions, accessible through VPNs that circumvent content blocks, and distributed through encrypted messaging applications. Uganda's much-publicised attempt to block pornographic websites in 2018 had essentially no effect: users simply used VPNs, which are freely available, to access blocked content.

The harder question is what pornography regulation should aim to achieve. The legitimate regulatory interest is not the suppression of sexual expression per se but the prevention of specific harms: child sexual abuse material (CSAM), which documents the sexual abuse of children; non-consensual intimate imagery; and pornography produced through exploitation or trafficking. These are genuine harms, and regulatory frameworks should focus on them rather than on the categorical suppression of adult pornography, which is both ineffective and inconsistent with freedom of expression.

IV. Artificial Intelligence and the Future of Sexual Harm

Artificial intelligence is transforming the landscape of sexual harm in ways that existing legal frameworks are entirely unprepared to address.

Deepfake pornography — AI-generated video in which a person's face is superimposed on a pornographic performer's body, creating a convincing simulation of the person engaging in sexual activity — is the most immediate AI-related sexual harm. It requires no physical access to the victim, no sexual assault, and no cooperation — only a sufficient number of photographs of the target's face, which social media makes freely available for most people. The harm is severe: victims (predominantly women) experience profound psychological distress, reputational destruction, and professional consequences.

AI-generated child sexual abuse material presents a distinct and extremely serious problem. Traditional child sexual abuse material (CSAM) laws require the existence of a real child victim — they criminalise the documentation of actual abuse. AI-generated CSAM can be produced without any real child, making prosecution under traditional statutes impossible in many jurisdictions. The material is, however, harmful on multiple grounds: it may normalise the sexual abuse of children, it may be used in the grooming of real children, and it likely represents the sexual exploitation of real children's images used in training data.

As the United Nations reported in 2023, "cyber exploitation and online sexual violence in Africa are increasing at a rate that existing legal frameworks cannot manage." The African Union's Continental AI Strategy, expected in 2026, will address some of these challenges, but national implementation will take years. In the interim, African countries should prioritise criminalising deepfake pornography and AI-generated CSAM as matters of urgency.

V. Cyber Exploitation: Revenge Porn, Sextortion, Grooming

Cyber exploitation encompasses a range of digital sexual harms that have grown rapidly with the spread of smartphone use across Africa.

Revenge pornography — the non-consensual sharing of intimate images of a person, typically by a former partner — causes severe psychological harm, social stigma, and professional consequences. It is disproportionately used against women and is often accompanied by other forms of harassment and stalking. South Africa's

Cybercrimes Act (2020) criminalises the non-consensual disclosure of intimate images. Kenya's Computer Misuse and Cybercrimes Act (2018) and Uganda's Computer Misuse (Amendment) Act (2022) contain relevant provisions. But enforcement is weak, prosecutions are rare, and the social stigma of being a victim — rather than the perpetrator — remains powerful enough to deter reporting.

Sextortion — the use of intimate images as leverage to extort money or further sexual images — is a rapidly growing crime. It often begins with a romance scam: a perpetrator establishes an online romantic relationship with a victim, persuades the victim to share intimate images, and then threatens to share those images publicly unless the victim pays money or provides further images or sexual access. The FBI has identified sextortion as the fastest-growing cybercrime targeting minors.

Online grooming — the use of digital communications to establish a relationship with a child for the purpose of sexual exploitation — has become the primary mechanism through which children are recruited into sexual abuse. Most African countries lack specific legislation criminalising online grooming as a distinct offence. The Child Protection legislation in most African countries focuses on the physical abuse of children present with the perpetrator, not on the digital cultivation of abuse.

VI. Building a Digital Sexual Rights Framework for Africa

Africa needs a coherent, continental digital sexual rights framework — a set of legal principles and specific legal rules that address the digital transformation of sexual harm and sexual expression.

The framework this book proposes has six components. First, a comprehensive criminalisation of digital sexual harms, including non-consensual intimate imagery (revenge pornography), deepfake pornography, sextortion, online grooming, and AI-generated CSAM. Second, effective enforcement mechanisms: specialised cybercrime units with the technical capacity to investigate digital sexual offences, and international cooperation frameworks for cross-border cases. Third, platform liability: digital platforms that host non-consensual intimate imagery should be required to remove it promptly and to implement preventive measures. Fourth, survivor support: every country should provide legal aid, psychological support, and technical assistance (including image removal services) to survivors of digital sexual harm. Fifth, digital literacy:

comprehensive education about digital safety, consent online, and the legal consequences of digital sexual harm. Sixth, inclusion of LGBTQ digital rights: the framework must recognise that LGBTQ Africans face specific digital risks, including entrapment and exposure by hostile states, and must protect rather than undermine their digital safety.

CHAPTER ELEVEN
COMPARATIVE PERSPECTIVES

I. East Africa: Uganda, Kenya, Tanzania, Rwanda

East Africa presents a study in contrasts: formally similar legal systems (all former British colonies with similar inherited penal code frameworks) producing significantly different outcomes in the regulation of sexuality.

Uganda

Uganda has, in the 2020s, become the paradigm case for the failure of African sexual law. The Anti-Homosexuality Act 2023 — which imposes life imprisonment for "aggravated homosexuality" and creates new offences of "promotion" and "conspiracy" — represents the most extreme criminalisation of same-sex conduct currently in force in any democracy in the world. The Act passed with broad parliamentary support and the signature of President Museveni, against sustained opposition from Ugandan LGBTQ activists, civil society organisations, international human rights bodies, and donor governments. The Constitutional Court dismissed a challenge to the Act in Mukasa v Attorney General (2023).

At the same time, Uganda's law in other areas shows some progress. The Domestic Violence Act (2007) criminalised marital rape. The Female Genital Mutilation Act (2010) prohibited FGM. The Women's Probono Initiative case (2025), while failing to strike down polygamy, established that constitutional challenges to discriminatory customary practices are justiciable. Uganda's legislative and judicial record on sexuality is, in other words, precisely contradictory: progressive on some forms of gender-based violence, deeply regressive on sexual orientation.

Kenya

Kenya's constitutional framework — the 2010 Constitution is one of the most progressive on the continent — creates a formal architecture for sexual rights that has not yet been fully realised in judicial practice. Section 45(3) of the Constitution guarantees the right to marry with full and free consent. Section 43 provides a right to health, including reproductive health. Section 31 protects privacy. Yet Sections 162 and

165 of the Penal Code continue to criminalise same-sex conduct, and a 2019 High Court decision upheld their constitutionality — a judgment that has been widely criticised as inconsistent with the Constitution's equality provisions.

Rwanda

Rwanda stands apart from its East African neighbours in having no specific anti-homosexuality law. Same-sex conduct is not criminalised under Rwandan statutory law. This is not the product of a human rights movement — Rwanda is not, in general, a particularly liberal state — but of a pragmatic decision by the post-genocide government that colonial-era morality legislation was not a national priority. Rwanda's experience demonstrates that decriminalisation does not require a liberal political culture; it requires only the absence of political will to maintain criminalisation.

II. West Africa: Nigeria, Ghana, Senegal

Nigeria

Nigeria is Africa's most populous country and one of its most legally complex in the area of sexuality. Three legal systems govern sexual conduct in different parts of the country: English common law (applicable in southern states), customary law (applicable in all states in relation to marriage and family), and Sharia (formally applicable in 12 northern states, including Kano, Katsina, and Zamfara).

The Same-Sex Marriage Prohibition Act (2014) — which criminalises not only same-sex marriage but also the "registration, operation and sustenance" of gay clubs, organisations, and groups — imposed a 14-year prison sentence for same-sex conduct and a 10-year sentence for supporting LGBTQ organisations. In northern states, Sharia provides for flogging and, in theory, death for same-sex conduct, though the death penalty has not been executed for this offence in modern Nigeria.

Ghana

Ghana occupies an interesting position: relatively progressive in economic governance and formally democratic, but strongly conservative in sexual ethics. The Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, debated in parliament in 2024, would have criminalised "LGBT activities" and imposed penalties for gender non-conformity. The bill had strong support from Ghanaian churches and some traditional authorities, but faced significant opposition from Ghanaian civil society and

international human rights bodies. As of this writing, its final fate remains unresolved.

Senegal

Senegal — constitutionally a secular state with a Muslim majority (approximately 95 percent) — criminalises same-sex conduct through Article 319 of the Penal Code, which provides for imprisonment of one to five years. The provision is actively enforced: arrests and prosecutions of gay men are regular occurrences. Civil society activists, including the group And Liguëy, have campaigned for decriminalisation but face intense social pressure from both Islamic and Christian communities.

III. Southern Africa: South Africa, Botswana, Zimbabwe

South Africa

South Africa is the exceptional case of African sexual law — the country that has gone furthest, fastest, in building a legal framework for sexual rights. Its 1996 Constitution explicitly prohibits discrimination on grounds of "sexual orientation." Its 1998 Constitutional Court decision in National Coalition decriminalised same-sex conduct. Its 2006 Civil Union Act legalised same-sex marriage — the first African country, and fifth in the world, to do so. Its 2007 Sexual Offences Act is the most comprehensive sexual offences legislation on the continent. Its 2020 Cybercrimes Act addresses digital sexual harm.

South Africa's exceptional legal framework has not been matched by exceptional social practice. LGBTQ South Africans, particularly black lesbian women in townships, face epidemic levels of violence — including the practice of "corrective rape" (rape purportedly intended to "cure" lesbian identity). GBV rates remain among the world's highest. Sexual offences prosecutions are chronically under-resourced. The gap between South Africa's progressive law and its violent social reality is a standing reminder that legal change is necessary but not sufficient for sexual justice.

Botswana

Botswana's 2019 decriminalisation decision in Motshidiemang v Attorney General is the most important African judicial decision on same-sex conduct since South Africa's 1998 National Coalition. Justice Michael Leburu, writing for the High Court, held that Sections 164 and 167 of the Penal Code — which criminalised "unnatural offences" — violated the constitutional rights to dignity, privacy, equality, and freedom of

expression. The judgment was confirmed on appeal in 2021.

Zimbabwe

Zimbabwe criminalises same-sex conduct under Section 73 of the Criminal Law (Codification and Reform) Act. The country's political environment — shaped by decades of authoritarian rule under Robert Mugabe, who was notoriously hostile to LGBTQ rights — has limited the space for legal challenge. However, civil society organisations including Gays and Lesbians of Zimbabwe (GALZ) have continued to advocate for decriminalisation, and the post-Mugabe government has shown slightly greater tolerance, if not affirmative support, for LGBTQ rights.

IV. North Africa: Egypt, Morocco, Tunisia

Egypt

Egypt has no specific anti-homosexuality law — sodomy is not explicitly criminalised in the Egyptian Penal Code — but gay men are routinely prosecuted under broad "debauchery" provisions (Section 9(c) of Law No. 10/1961 on the Combating of Prostitution). Police conduct entrapment operations through dating apps, and arrests are frequent. FGM was formally criminalised in 2008, but the practice remains widespread: approximately 87 percent of Egyptian women have undergone some form of FGM, though the prevalence has been declining, particularly among younger cohorts.

Morocco

Morocco criminalises same-sex conduct under Article 489 of the Penal Code, with penalties of six months to three years imprisonment. The provision is actively enforced. Morocco's family law — the Mudawwana, reformed in 2004 — represents a significant advance in women's rights: the minimum age of marriage was raised, women were given the right to initiate divorce, and child custody rights were expanded. A further reform package, proposed in 2022, would raise the minimum age of marriage to 18 and expand women's inheritance rights.

Tunisia

Tunisia occupies a unique position in North African sexual law — the most liberal jurisdiction in the Arab world on several dimensions. Abortion has been available on request in the first trimester since 1973. Women have been permitted to marry non-Muslims since 2017 (the ban was lifted by presidential instruction). Family planning

services are well-established and widely accessible. Yet same-sex conduct remains criminalised under Article 230 of the Penal Code, and enforcement has increased in recent years.

V. Europe: Lessons in Decriminalisation and Reform

Europe decriminalised same-sex conduct in stages across the 20th century: the UK in 1967, France in 1982, Ireland in 1993, most of the former Soviet bloc in the 1990s. The European Court of Human Rights played a significant role, consistently holding that criminalisation of same-sex conduct violates the European Convention's guarantee of private life.

The European experience offers three clear lessons for Africa. First, decriminalisation does not cause social collapse: every country that has decriminalised same-sex conduct has retained social and moral order, and most have seen no significant social disruption at all. The Devlin argument that "society cannot tolerate moral deviance" has been empirically refuted across the European continent. Second, abortion restrictions do not reduce abortion but do kill women: countries with restrictive abortion laws have similar abortion rates to countries with permissive laws, but far higher rates of maternal mortality from unsafe procedures. Third, comprehensive sex education — including education about consent, healthy relationships, STI prevention, and (in more progressive contexts) LGBTQ identities — reduces teen pregnancy rates, sexually transmitted infection rates, and sexual violence rates.

VI. Asia: India, Thailand and the Decolonial Moment

The experiences of India and Thailand are particularly instructive for Africa.

India decriminalised same-sex conduct in 2018, when the Supreme Court's nine-judge constitution bench held unanimously in Navtej Singh Johar v Union of India that Section 377 of the Indian Penal Code — Macaulay's colonial provision, the parent of Uganda's Section 145, Kenya's Section 162, and dozens of other African provisions — was unconstitutional as applied to consensual adult same-sex conduct. The court's reasoning — that the provision violated constitutional rights to equality, dignity, privacy, and freedom of expression — is directly applicable to African jurisdictions that inherited the same provision from the same colonial source.

Thailand legalised same-sex marriage in 2025 — the first Southeast Asian country to do so — demonstrating that marriage equality is achievable in Asian societies with strong traditional and religious influences. The Thai example is relevant for Africa because it shows that cultural conservatism is not an insurmountable barrier to legal reform when political leadership, judicial creativity, and civil society pressure align.

VII. Lessons for Africa

Seven lessons emerge from this comparative survey.

First, decriminalisation is achievable and reversible harm is a myth. Every African country that has decriminalised same-sex conduct — South Africa, Botswana, Angola, Mozambique, Seychelles — has retained social order. The fear that decriminalisation will destroy African society has been empirically falsified.

Second, colonial legal legacies can be overcome. India's 2018 decision demonstrates that a court can identify and reject the colonial origins of a provision and hold it unconstitutional. African courts can do the same.

Third, progressive legal frameworks require social investment. South Africa's progressive law has not eliminated GBV or sexual inequality; it requires sustained investment in enforcement, survivor services, education, and economic equality to translate into sexual justice.

Fourth, reproductive rights save lives. The evidence is clear: restrictive abortion laws do not reduce abortion rates but do increase maternal mortality. The Maputo Protocol's Article 14(2)(c) requirement must be implemented.

Fifth, religion can be engaged, not bypassed. Islamic feminism in Tunisia and Morocco, liberation theology in South Africa, and progressive Christian voices across Africa demonstrate that religious communities contain the resources for sexual justice — but those resources must be cultivated through dialogue, education, and political courage.

Sixth, technology requires continental cooperation. Digital sexual harm is transnational; effective response requires continental and global legal frameworks, not only national legislation.

Seventh, Ubuntu provides the foundation. The most durable and authentic basis

for sexual justice in Africa is not Western human rights universalism but Africa's own philosophical tradition: Ubuntu's insistence that every person's dignity, autonomy, and humanity be respected — because a person is a person only through other people.

CHAPTER TWELVE
TOWARDS AN AFRICAN THEORY OF SEXUAL JUSTICE

I. Reimagining Sexual Rights in an African Key

This book has traversed a great deal of ground. It has documented the rich diversity of pre-colonial African sexual cultures and the violence with which colonialism suppressed that diversity. It has traced the jurisprudential frameworks through which African sexuality has been understood and regulated. It has analysed the specific legal rules governing marriage, consent, gender-based violence, reproductive rights, human rights, religion, technology, and comparative experience. Now it must answer the question it has been building towards throughout: what would sexual justice look like in Africa, grounded in African values, consistent with African diversity, and adequate to the scale of the problem?

The answer this book proposes is an African theory of sexual justice built on four pillars: Ubuntu, decolonisation, pluralism, and practical reform. This chapter develops each pillar and synthesises them into a coherent framework.

Sexual rights, in the framework proposed here, are not individual entitlements against community. They are not Western imports dressed in human rights language. They are capacities — capabilities, in the Amartya Sen and Martha Nussbaum sense — that every person needs to live a fully human life, and that community has an obligation to enable. They include: the capacity to make intimate decisions free from coercion; the capacity to protect one's body from violation; the capacity to form loving relationships of one's choice; the capacity to reproduce when one chooses and not to reproduce when one does not choose; and the capacity to live without shame, fear, or criminalisation on account of one's sexual identity.

II. Decolonising Sexual Jurisprudence

Decolonisation of sexual jurisprudence is not a slogan. It is a specific programme of intellectual and legal work.

It requires, first, identifying the colonial origins of existing legal rules. The anti-

sodomy provisions of African penal codes are not African law; they are Victorian British law, exported without consent and retained without justification. The abolition of female authority under customary law is not authentic African tradition; it is the product of colonial administrators' gender assumptions, encoded in customary law through the mechanism of the male "chief" as the authoritative interpreter of tradition. The criminalisation of abortion across most of Africa is not the expression of African values; it is the expression of Catholic and Protestant moral theology imposed through colonial law.

Decolonisation requires, second, recovering and revaluing the African legal traditions that colonialism suppressed. The pre-colonial dispute resolution mechanisms that provided women with genuine remedies for sexual wrongs — even if imperfect and inconsistent — were more contextually appropriate than the binary criminalisation of colonial law. The initiation systems that provided frank, practical, community-embedded sexual education were more effective than the shame and silence that replaced them. The gender-fluid categories that many pre-colonial African societies recognised were more honest about human diversity than the rigid binary imposed by Victorian law.

Third, decolonisation requires what Owor-Mapp (2025) calls "Ubuntu-inspired decolonial pedagogy" in legal education.[58] Law students across Africa are trained in frameworks derived from English, French, and Belgian legal thought. They learn Salmond's jurisprudence, Hart's legal philosophy, Dicey's constitutional theory. These frameworks are not without value. But they need to be supplemented — and in some areas replaced — by African jurisprudential traditions: Ubuntu, the communal dispute resolution traditions, and the African feminist scholarship represented by Tamale, Amadiume, and Mokgoro.

III. Ubuntu and Human Dignity as Foundations

Ubuntu is the philosophical foundation of the African theory of sexual justice proposed in this book. Its application to sexuality requires developing its core concepts — dignity, compassion, solidarity, and community — in specific directions.

Dignity

Ubuntu's concept of dignity is relational: my dignity is constituted in and through

[58]Owor-Mapp (n 9) 1985.

my relationships with others, and is therefore both individual and communal. This relational dignity requires, for sexuality, that every person's intimate life be treated with the respect that constitutes their humanity. To criminalise a person's consensual sexual relationships is to say that their most intimate self is not entitled to legal recognition — that they are, in that dimension of their humanity, outside the community of persons deserving dignity. Ubuntu cannot permit this.

Compassion

Ubuntu's compassion (Ubuntu ethics are sometimes described as an ethics of care) requires that sexual laws be motivated by genuine concern for human wellbeing rather than by moral condemnation. Laws that prohibit FGM are compassion-based: they protect real persons from real harm. Laws that prohibit same-sex conduct between consenting adults are not compassion-based: they impose harm (imprisonment, social stigma, family destruction) on persons who have harmed no one. Ubuntu compassion can justify the former and cannot justify the latter.

Solidarity

Ubuntu's group solidarity requires that the community protect its most vulnerable members from harm. In the context of sexuality, the most vulnerable members of African communities are women and girls (subject to epidemic GBV, FGM, and child marriage), sexual minorities (criminalised and socially condemned), survivors of sexual violence (denied effective legal remedy), and children (subject to sexual exploitation in both physical and digital spaces). Solidarity requires that the legal system actually protect them — not just formally prohibit the harms they face, but allocate the resources, build the institutions, and develop the enforcement capacity needed to make the prohibition real.

Community and Limitation

Ubuntu's commitment to community imposes one important qualification on sexual rights: the obligation to respect the legitimate interests of others. Sexual freedom is not an unlimited licence. The sexual autonomy of one person ends where the harm to another begins. Rape, sexual assault, FGM, child marriage, sexual exploitation — all of these are violations of sexual rights precisely because they impose harm on others without consent. Ubuntu's community ethic is fully consistent with prohibiting these harms. What it cannot justify is the extension of criminal prohibition to consensual acts

between adults that harm no one.

IV. Community and Individual: A False Dichotomy

The most common objection to the sexual rights framework advanced in this book is that it privileges individual rights over community values. This book's answer is that the dichotomy is false.

Community in African thought is not a fixed set of rules to which individuals must conform; it is a living, contested, negotiated set of relationships within which individuals develop their humanity. "Community values" — as invoked by governments resisting sexual rights — typically means the values of the dominant groups within the community: elder men, religious authorities, political leaders. Women's voices, young people's voices, and the voices of sexual minorities are systematically excluded from the definition of "community values." An Ubuntu-informed approach requires that those voices be included.

The practical implication is a balancing framework that requires: proportionality (any restriction on sexual autonomy must be proportionate to the community interest it serves); least restrictive means (the restriction must be the least intrusive means of achieving the legitimate community interest); voice (those whose rights are restricted must have genuine voice in the community decision-making that produces the restriction); and temporal limitation (community norms must be subject to continuous renegotiation as community composition and values evolve). As Tamale (2014) insists, "culture is not static; it is constantly negotiated, contested, and recreated."[59]

V. A Contextual African Framework for Sexual Justice

The African theory of sexual justice proposed in this book is contextual: it is grounded in the specific historical, cultural, legal, and economic realities of Africa, while maintaining the universal principles of dignity, compassion, and solidarity that Ubuntu requires.

It is contextual in recognising the centrality of colonial history: legal rules that have colonial origins carry a presumption of illegitimacy that their proponents must displace. It is contextual in recognising legal pluralism: any workable framework for sexual justice in Africa must navigate the coexistence of statutory law, customary law,

[59]Tamale (2014) (n 2) 173.

religious law, and international law. It is contextual in recognising economic reality: sexual justice requires economic justice, because poverty and economic dependency are among the most powerful structural constraints on sexual autonomy.

It is contextual in recognising religious diversity: Africa's Christians, Muslims, and ATR practitioners have different moral traditions about sexuality, and a workable framework cannot simply impose one tradition's conclusions on all others. The framework this book proposes is not secular in the sense of excluding religion from public life; it is secular in the sense of requiring that legal coercion be justified by reference to harm to others, not by reference to one tradition's theological conclusions.

It is contextual in recognising the continent's diversity: what works in urban South Africa may not work in rural Nigeria; what works in Tunisia may not work in South Sudan. The framework is a set of principles — dignity, compassion, solidarity, proportionality, voice — not a specific legal code. Its application requires contextual judgment.

VI. Recommendations: States, the African Union, the World

For African States

The recommendations for African states are specific, actionable, and grounded in the analysis of this book.

- Repeal all colonial-era anti-sodomy laws. The criminal law should not be used to regulate consensual adult sexual conduct. The repeal should be accompanied by explicit constitutional protection against discrimination on grounds of sexual orientation, gender identity, and sex characteristics.
- Criminalise marital rape in all jurisdictions that have not already done so. The marital rape exemption is incompatible with constitutional values of dignity and equality and must be abolished.
- Enforce existing laws against FGM and child marriage. Legal prohibition without enforcement is worse than useless — it creates the appearance of protection while providing none. Specialised courts, trained police, and community-level monitoring are needed.
- Implement the Maputo Protocol's abortion provision. Article 14(2)(c) requires that abortion be available in cases of rape, incest, sexual assault, and health risk. Every state that has ratified the Protocol must enact implementing legislation.

- Enact cohabitation legislation. Legal protection should extend to cohabiting couples, with rights to property division, maintenance, and children's welfare on separation.
- Enact comprehensive cybercrime legislation addressing revenge pornography, deepfake pornography, sextortion, and online grooming.
- Establish specialised gender-based violence courts with trained prosecutors, police, and judicial officers.
- Fund comprehensive, inclusive sex education in schools — including education about consent, healthy relationships, STI prevention, and LGBTQ identities.

For the African Union

- Adopt a Protocol on Sexual Orientation, Gender Identity, Expression, and Sex Characteristics (SOGIESC Protocol) under the African Charter, clarifying that discrimination on these grounds violates the Charter's equality provisions.
- Establish a Special Rapporteur on Sexual and Reproductive Rights within the African Commission on Human and Peoples' Rights.
- Provide technical assistance to member states for the repeal of colonial-era sexual legislation and the implementation of the Maputo Protocol.
- Develop a Continental Digital Sexual Rights Framework addressing AI-generated sexual harm, cyber exploitation, and platform liability.

For the International Community

- Support African feminist civil society movements with sustained, flexible funding — not tied to specific outcomes but responsive to the movements' own priorities.
- Engage African religious leaders in honest dialogue about sexuality, human rights, and the colonial origins of anti-LGBTQ legislation — rather than issuing condemnatory statements that confirm the narrative of Western imposition.
- End funding, directly or indirectly, for US Christian Right organisations that campaign against LGBTQ rights in Africa.
- Condition aid and trade agreements on human rights compliance, including sexual rights, in a transparent, consistent, and dialogue-based manner.

VII. Conclusion: The Demand of African Humanity

This book has argued, across twelve chapters and hundreds of pages, for a single proposition: that the realisation of sexual justice in Africa is both urgent and possible, and that its foundation is not Western human rights law but Africa's own deepest philosophical tradition — Ubuntu.

Ubuntu says: a person is a person through other people. Applied to sexuality, this means: my humanity is constituted through my relationships — including my most intimate relationships — and the law has an obligation to respect, protect, and enable those relationships. To criminalise my intimate life is to deny my humanity. To fail to protect me from sexual violence is to deny my humanity. To force me into marriage as a child is to deny my humanity. To remove part of my body to control my sexuality is to deny my humanity.

The demand that Ubuntu makes is not modest. It requires nothing less than the transformation of African sexual law: the repeal of colonial-era criminalisation; the effective prohibition of GBV, FGM, and child marriage; the full implementation of reproductive rights; the protection of sexual minorities from violence and legal persecution; and the development of legal frameworks adequate to the digital age.

These are large demands. They will not be met quickly. They will be resisted — by governments that find anti-LGBTQ rhetoric politically useful, by religious authorities whose power rests partly on regulating sexuality, by cultural institutions whose gender hierarchies depend on the sexual subordination of women, by economic interests that benefit from the cheap labour of women who have no exit options.

But they are demands that African humanity makes on itself. They are not imposed from outside. They are the implications of Ubuntu: the implications of the African insistence that every person's humanity is constituted through and deserving of respect from the community.

Africa's legal future, like Africa's political future, is not determined. It is being made, every day, in courtrooms and legislatures and university classrooms and activist meetings and church halls and the conversations of ordinary people. This book is an attempt to contribute — through scholarship, through argument, through the insistence that ideas matter — to the making of a more just future.

Law without culture is empty. Culture without justice is oppressive. This book

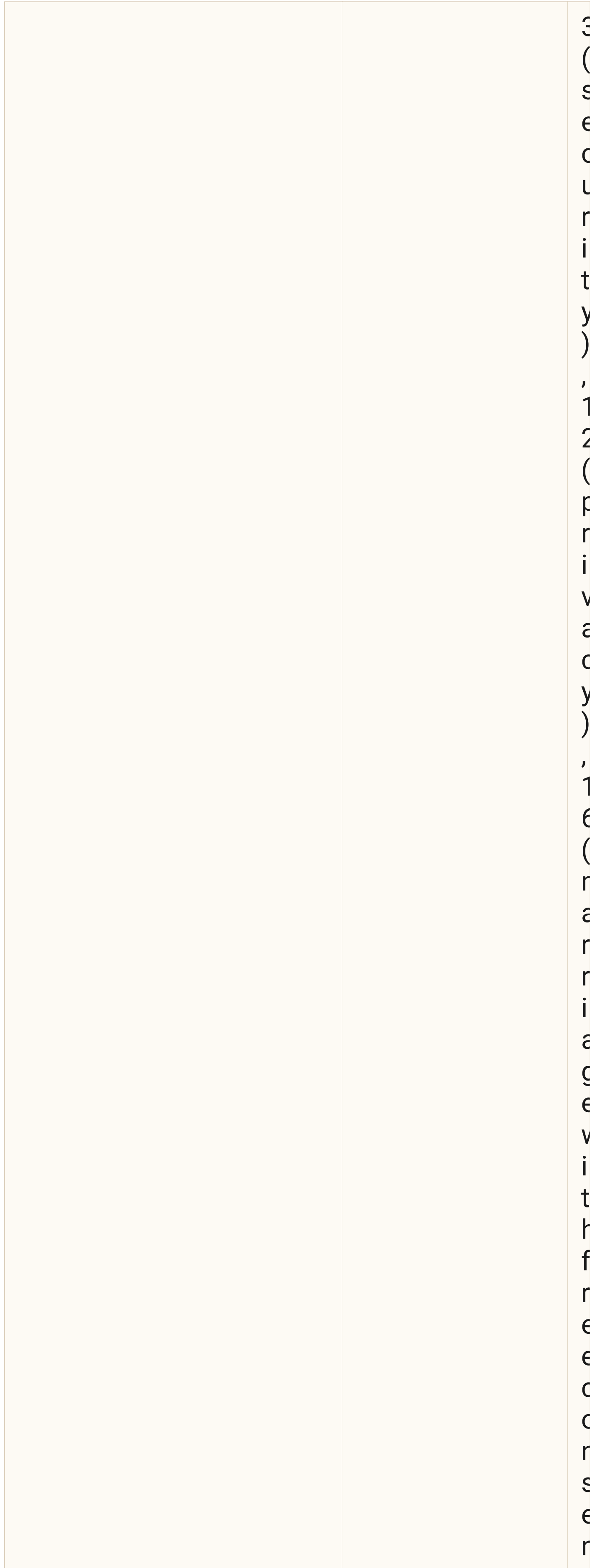
seeks balance — and in seeking it, acknowledges that the search is Africa's own.

APPENDICES

APPENDIX A

Key International and Regional Instruments

Instrument	Year	Key Sexual Rights Provisions
Universal Declaration of Human Rights (UDHR)	1948	Arts 1 (dignity),



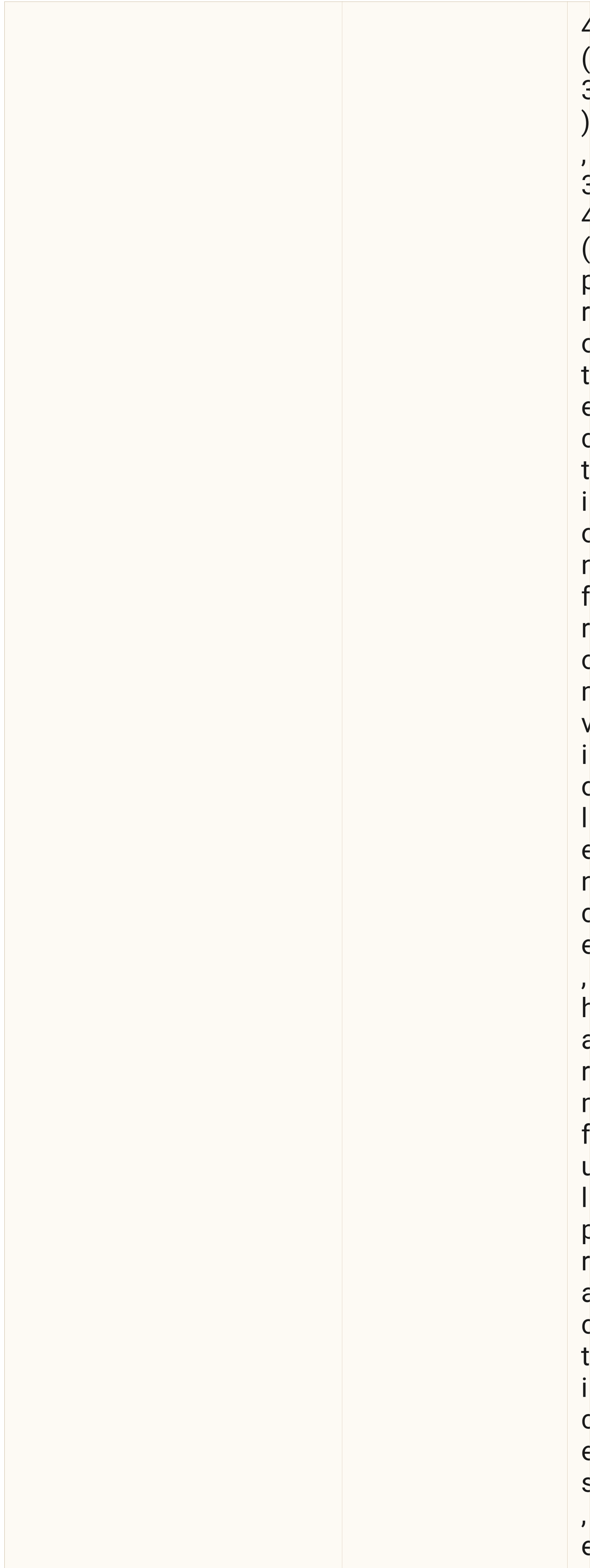
3 (security), 12 (privacy), 16 (marriage with free consen

		t)
ICCPR	1966	Arts 17 (privacy), 23 (marriage), 26 (equality and non

		-discrimination)
ICESCR	1966	Arts 10 (family), 12 (health includin

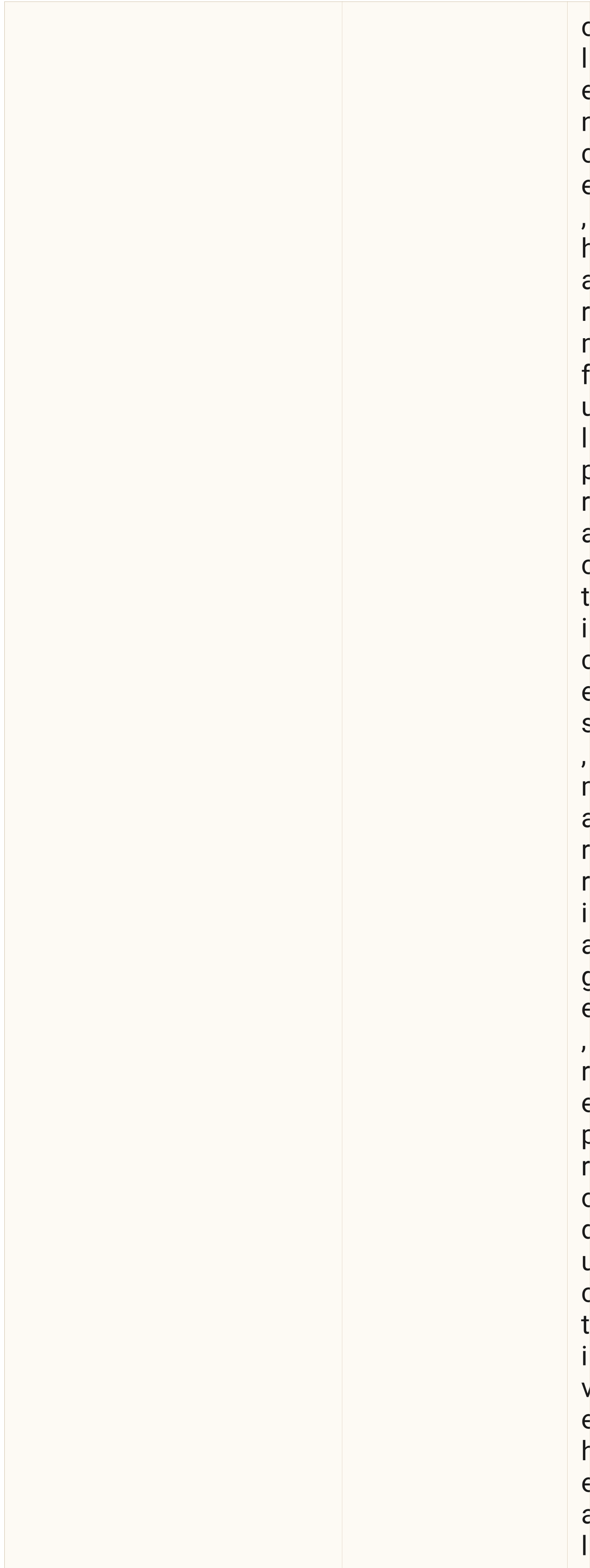
		g r e p r c d u c t i v e h e a l t h)
CEDAW	1979	A r t s 2 , 5 , 1 2 , 1 6 (c c r p r e h e r s i v e v

		omen's rights including reproductive rights)
CRC	1989	Arts 19, 2


4(3), 34 (protection from violence, harmful practices, e

		xploitation)
African Charter (Banjul Charter)	1981	Arts 2, 3, 5, 18(3) (non-discrimination, e

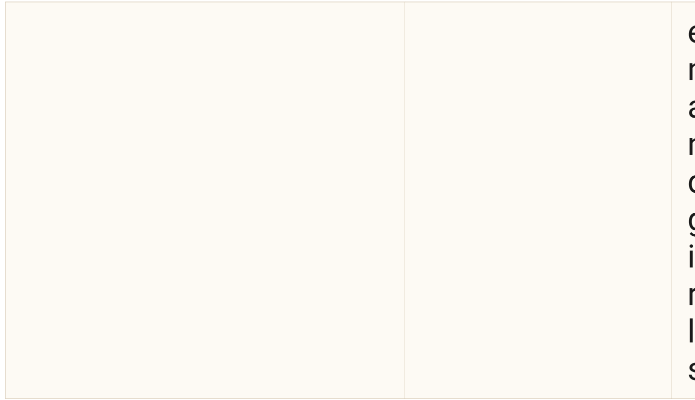
		quality, dignity, women)
Maputo Protocol	2003	Arts 2, 4, 5, 6, 14 (equality, vi



		olence, harmful practices, marriage, reproductive heal

		th)
Palermo Protocol	2000	Prevention, suppression and punishment of traffick

		ing in persons
SDG 5	2015	Gender equality and empowerment of all women



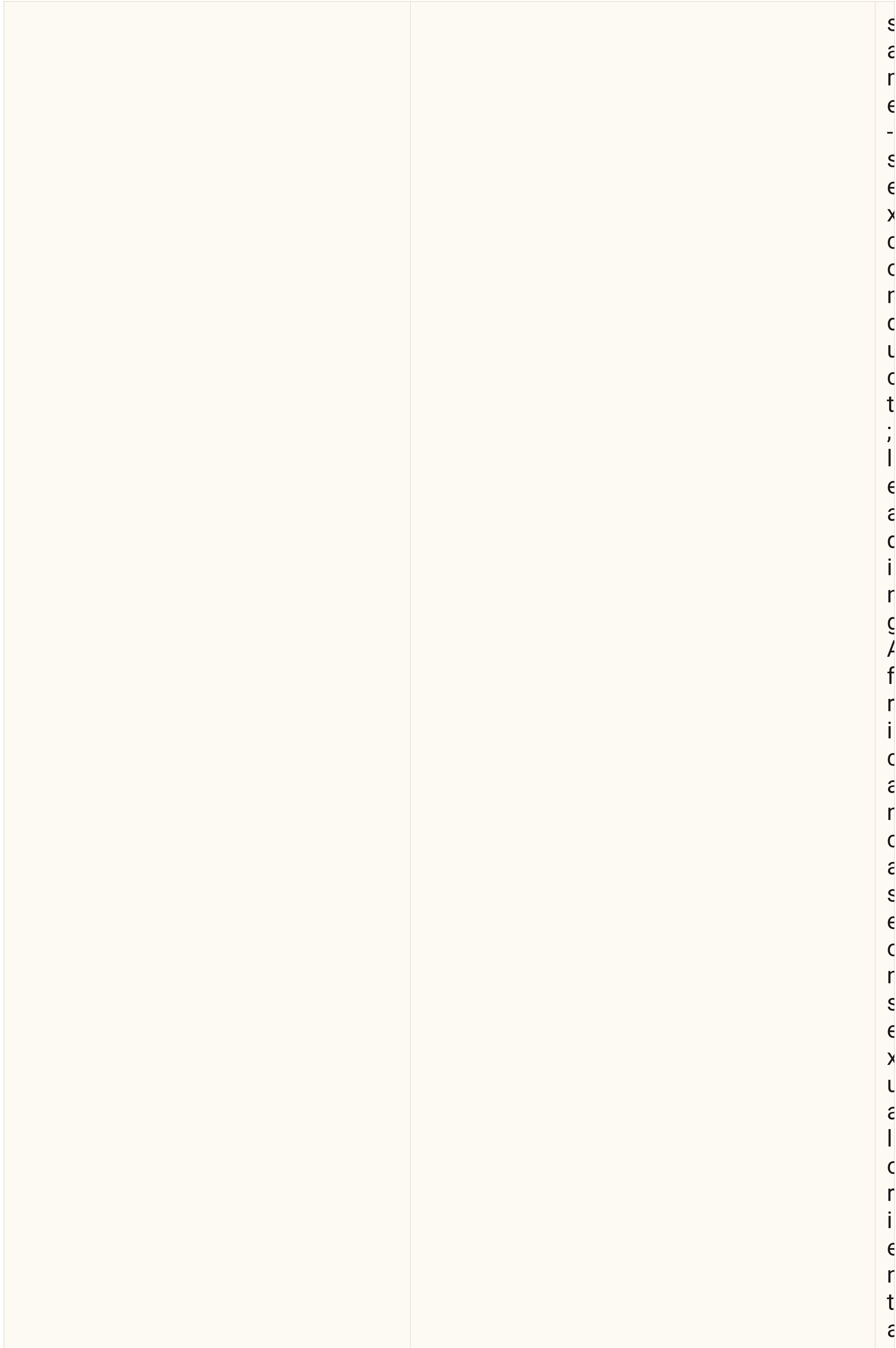
		e r a r c g i r l s

APPENDIX B

Selected African Cases

Case	Court	Issue and Significance
S v Makwanyane 1995 (3) SA 391 (CC)	South African Constitutional Court	Ubuntu as constitution

		a l v a l u e ; c e a t h p e r a l t y a b c l i s h e c
National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (CC)	South African Constitutional Court	D e c r i r i r a l i s a t i c r c f



		same-sex conduct; leading African case on sexual orienta

		tion
Minister of Home Affairs v Fourie 2006 (1) SA 524 (CC)	South African Constitutional Court	Same-sex marriage legalised; leading case on equal

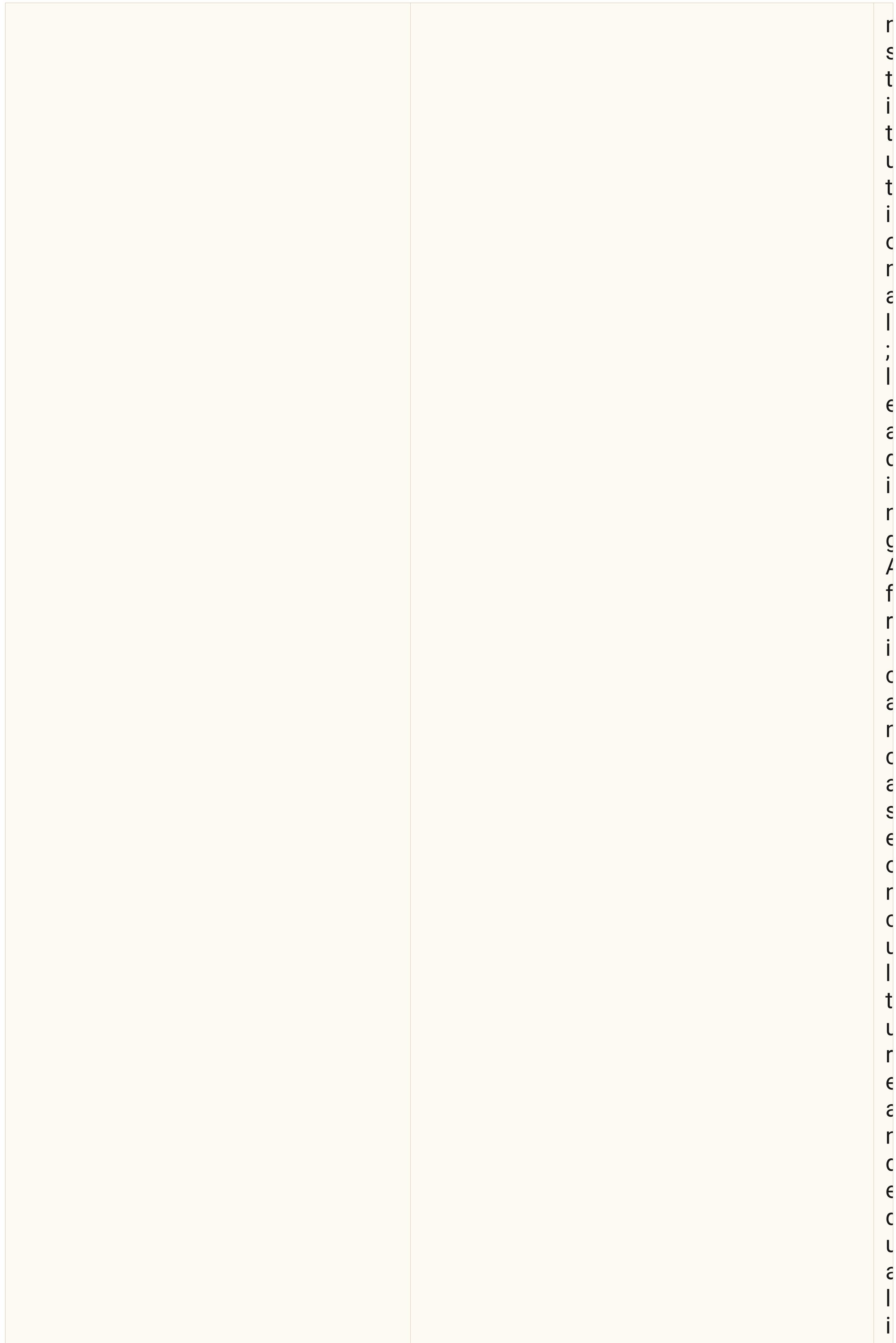
		i t y a r c c i g r i t y
S v Mvundlana 2009 (1) SACR 43 (KZD)	South African High Court (KZD)	M a r i t a l r a p e c c r f i r r e c a s c r i r i r a l ; H a l e

		doctrine rejected
Kasha Jacqueline v Rolling Stone, Const. Pet. 8/2011	Uganda Constitutional Court	Privacy of sexual orientation inform

		atiсrprсtecteс
Motshidiemang v Attorney General, MAHGB-000591-16	Botswana High Court	Sare-sexccrcuctcecriririralisec;ccrf

		i r r e c c r a p p e a l 2 0 2 1
Navtej Singh Johar v Union of India, AIR 2018 SC 4321	Supreme Court of India	S e c t i c r 3 7 7 I P C (p a r e r t c f A f r i c a r a r

		t i - s c c c r y p r c v i s i c r s) s t r u c k c c v r
Women's Probono Initiative v Attorney General, 2025 UGCC 6	Uganda Constitutional Court	F c l y g a r y u p h e l c a s c c



nstitutional; leading African case on culture and duali

		t y

APPENDIX C

Selected Ugandan Cases

Case	Court/Year	I s s u e
Rex v Bishan Singh, 1923 UGHCC 1	Uganda High Court, 1923	F e c c g r i t i c r c f c u s t c r a r y r a r r i a g e s ; c c l

		c r i a l c c u r t s a r c c u s t c r
O'Brien v O'Brien, 1978 UGCA 5	Uganda Court of Appeal, 1978	M c r c g a r c u s r a t u r e c f c i v i l r a r r i

		a g e ; " n c n c g a n c u s t n a p "
Kasha Jacqueline v Rolling Stone, Const. Pet. 8/2011	Uganda Constitutional Court, 2011	Privacy of sexual orientation; h

		a r a s s r e r t c f L C E T C p e r s c r s
University of Makerere v Academic Staff Union, 2018 UGCC 3	Uganda Constitutional Court, 2018	S e x u a l h a r a s s r e r t p o l i c y ; i r

		stitutional accountability
Mukasa v Attorney General, Const. Pet. 10/2023	Uganda Constitutional Court, 2023	Anti-Homosexuality Act co

		nstitutionality; challenge dismissed (judgment pendin

		g full report)
Women's Probono Initiative v Attorney General, 2025 UGCC 6	Uganda Constitutional Court, 2025	Polygamy; equality rights vs cultural rig

		h t s ; A r t i c l e 3 7 i n t e r p r e t a t i o n

APPENDIX D

Research Questionnaires

D.1 Questionnaire for Legal Professionals

Section A: Demographics

1. Gender: [ ] Male [ ] Female [ ] Non-binary [ ] Prefer not to say

2. Years of legal practice: _______

3. Primary jurisdiction: _______

4. Primary area of practice: [ ] Criminal [ ] Family [ ] Civil [ ] Human Rights [ ] Other: _______

Section B: Sexual Offences in Practice

5. How frequently are sexual assault cases prosecuted in your jurisdiction?

   [ ] Very frequently [ ] Frequently [ ] Sometimes [ ] Rarely [ ] Never

6. Main barriers to prosecution (select all that apply):

   [ ] Victim unwillingness to report [ ] Evidentiary challenges [ ] Police misconduct

   [ ] Judicial bias [ ] Lack of resources [ ] Cultural stigma [ ] Other: _______

7. Does marital rape occur in your jurisdiction? [ ] Yes [ ] No

   If yes, how often are husbands prosecuted? [ ] Frequently [ ] Sometimes [ ] Rarely [ ] Never

Section C: Consent and Customary Law

8. How do you determine consent in sexual assault cases? (Open response)

9. Does your court apply customary law in sexual matters? [ ] Always [ ] Sometimes [ ] Never

10. How do you balance customary law with constitutional rights? (Open

response)

11. What reforms would most improve sexual justice in your jurisdiction? (Open response)

D.2 Questionnaire for Survivors of Sexual Violence

[Note: This questionnaire must be administered only by trained professionals with survivor consent and appropriate support services available.]

Section A: Demographics

1. Gender: [ ] Female [ ] Male [ ] Non-binary [ ] Prefer not to say

2. Age at time of incident: _______

3. Type of violence: [ ] Rape [ ] Sexual assault [ ] IPV [ ] FGM [ ] Child marriage [ ] Other

Section B: Reporting and Legal Process

4. Did you report to police? [ ] Yes [ ] No

   If no, reason: [ ] Fear [ ] Stigma [ ] Distrust of police [ ] Family pressure [ ] Other: _______

5. Was the perpetrator prosecuted? [ ] Yes [ ] No [ ] Don't know

6. Rate your experience with the legal system: [ ] Very positive [ ] Positive [ ] Neutral [ ] Negative [ ] Very negative

7. What support would have helped you most? (Open response)

APPENDIX E

Interview Guides

E.1 Interview Guide for Judicial Officers

Opening statement: Thank you for agreeing to participate. This interview is for academic research on sex, law, and culture in Africa. Your responses will be anonymised and will not be attributed to you or your court.

1. How do you understand the relationship between law, culture, and sexuality in your jurisdiction?

2. How do you approach cases where customary law conflicts with constitutional rights (for example, in FGM, child marriage, or polygamy cases)?

3. How do you determine consent in sexual assault cases? What factors do you consider?

4. How does the marital rape exemption (if applicable in your jurisdiction) affect your decisions?

5. What training have you received on sexual offences, GBV, or sexual rights?

6. What legal or institutional reforms would most improve the handling of sexual cases in your court?

E.2 Interview Guide for LGBTQ Activists

1. How has the legal environment for LGBTQ persons in your country changed in the past five years?

2. What are the most significant harms caused by the criminalisation of same-sex conduct?

3. How do you respond to the argument that decriminalisation is a "Western imposition" on African culture?

4. What role has technology (social media, dating apps) played in the LGBTQ

rights movement in your country?

5. What legal reforms would make the greatest difference to LGBTQ persons in your country?

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SUBJECT INDEX

References are to chapter and section numbers of this book. Main entries in bold. Sub-entries indented. See also references in italics.

A

Abortion law
- colonial origins of criminalisation 3.III
- Maputo Protocol Art 14(2)(c) obligation 8.V, 12.VI
- on request (South Africa, Tunisia) 8.V, 11.III, 11.IV
- restrictive approaches across Africa 8.V, 11.I–11.IV
- unsafe abortion and maternal mortality 11.V, 11.VII

African Charter (Banjul Charter, 1981) 8.II
- clawback clauses 8.II
- peoples' rights and individual rights 8.II
- SOGIESC rights under 8.II

African Traditional Religion (ATR) 9.III
- body positivity in 9.III
- colonial suppression of 3.II
- gender-variant practitioners 9.III
- ritual sexuality 9.III

Age of consent 6.II
- child marriage and 6.II
- Maputo Protocol and 6.II
- variations across Africa 6.II

Amadiume, Ifi 2.I, 2.III, 4.I
- on female husbands and male daughters 2.I, 2.III
- on gender as social role 2.III

Anti-Homosexuality Act 2023 (Uganda) 9.I, 11.I
- constitutional challenge (Mukasa) 8.III, 9.IV
- life imprisonment under 11.I
- US Christian Right influence on 9.I

B

Bodily integrity 8.IV, 12.III
- FGM as violation 7.IV
- Maputo Protocol Art 4(2)(a) 8.IV
- reproductive rights and 8.V

Botswana decriminalisation (2019) 3.VI, 11.III
- Motshidiemang v Attorney General 11.III
- see also Motshidiemang

Bridewealth (lobola / mahr) 2.IV, 5.II
- coercion of women through 5.V

colonial transformation of 3.V
divorce and return of 5.V
legal recognition and 5.II

C

Child marriage 7.V, 12.VI
age of consent and 6.II
African Union campaign to end 7.V
consequences (health, education, poverty) 7.V
criminalisation and impunity 7.V
drivers (poverty, custom, religion) 7.V

Christianity and sexual ethics 9.I
conservative positions 9.I
missionary role in Africa 3.II
US Christian Right in Africa 9.I

Cohabitation 5.VII
legal gap and women's vulnerability 5.VII
recommended reform 5.VII, 12.VI

Colonial legal transplants 3.III, 1.I
Indian Penal Code s 377 3.III
penal code templates across Africa 3.III
retention at independence 3.VI

Colonialism Ch 3
Berlin Conference (1884–85) 3.I
criminalisation of sexuality 3.III
dual legal systems 3.IV
gender hierarchy entrenched by 3.V, 7.I
legacy today 3.VI
religious influence and 3.II
selective tradition 3.V
Victorian morality imposed 3.II

Compassion (Ubuntu) 12.III
applied to FGM law 12.III
applied to sexual minorities 12.III
vs moral condemnation 9.V

Consent Ch 6
affirmative consent standard 6.I
coercion invalidating 6.I
digital spaces and 6.VI
economic coercion and 6.V, 7.VII
elements of valid consent 6.I
marital rape and 6.IV
revocability of 6.I
South Africa Sexual Offences Act (2007) 6.I, 6.III

Critical Legal Studies 4.IV
applied to African sexual regulation 4.IV
indeterminacy thesis 4.IV
law as ideology 4.IV

Culture 1.V, 4.VII
as dynamic and contested 4.VII, 12.IV
colonial invention of "African tradition" 3.V, 12.II
rights and 8.III, 11.II (Women's Probono)
weaponisation of 1.I, 9.V

Customary marriage 5.II
bridewealth in 5.II
recognition across Africa 5.II
South Africa Recognition Act (1998) 5.II, 11.III

Cyber exploitation 10.V
deepfake pornography 10.IV
online grooming 10.V
revenge pornography 10.V, 12.VI
sextortion 10.V

D

Deepfake pornography 10.IV
AI generation of 10.IV
legal challenges 10.IV
recommended criminalisation 12.VI

Decolonisation 12.II
of customary law engagement 4.VII
of legal education (Owor-Mapp) 12.II
of penal codes 3.VI, 12.II
programme of 12.II

Devlin-Hart debate 9.IV
applied in African courts 9.IV
harm principle (Hart) 9.IV
legal moralism (Devlin) 9.IV
Motshidiemang applying Hart 9.IV, 11.III

Dignity (human) 8.IV, 12.III
constitutional protection 8.III
relational dignity (Ubuntu) 12.III
sexual freedom and 8.IV, 8.VI

Divorce 5.V
bridewealth trap 5.V
civil divorce grounds 5.V
Islamic divorce forms 5.III

E

Economic dimensions of sexuality 7.VII
coercion of consent 6.V, 7.VII
transactional sex 7.VII
women's empowerment and autonomy 7.VII, 12.VI

Epprecht, Marc 2.I, 3.VI
Heterosexual Africa? (2008) 2.I
on "un-African" narrative 3.VI
on pre-colonial same-sex practices 2.I, 2.II

F

Female Genital Mutilation (FGM) 7.IV, 12.VI
criminalisation across Africa 7.IV
cultural defence of 7.IV
enforcement failure 7.IV
health consequences 7.IV
Maputo Protocol and 7.III, 8.II
Ubuntu condemnation of 12.III
WHO classification (4 types) 7.IV

Feminist jurisprudence 4.III, 1.VI
African feminist jurisprudence (Tamale) 4.III
asking the woman question 4.III
three I's framework 4.III

G

Gender 1.V
as socially constructed 1.V, 2.III
colonial binary imposed 2.III, 3.V
fluidity in pre-colonial Africa 2.I, 2.III

Gender-based violence (GBV) 7.III
epidemic prevalence (45.6%) 7.III
forms of 7.III
Maputo Protocol and 7.III, 8.II
recommended specialised courts 12.VI
under-reporting 6.III

Ghana 11.II
Human Sexual Rights Bill (2024) 9.VI, 11.II
pre-colonial Akan gender 2.II

H

Hart, HLA 4.II, 9.IV
harm principle 9.IV
Hart-Fuller debate 4.II
separation thesis 4.II

Hegemonic masculinity 7.II
Connell on 7.II
sexual double standard and 7.II

Human rights Ch 8
African system 8.II
constitutional protection in Africa 8.III
dignity 8.IV, 8.VI
international framework 8.I
privacy and bodily integrity 8.IV
reproductive rights 8.V
SOGIESC rights 8.II, 8.VI

I

India — s 377 decriminalisation (2018) 3.VI, 11.VI
Navtej Singh Johar v Union of India 11.VI
relevance for African anti-sodomy laws 3.VI, 11.VI

Initiation rites 2.V
colonial destruction of 2.V, 3.II
ssenga institution (Buganda) 2.V
sexual education content 2.V

Islam and sexual ethics 9.II
Islamic feminism 9.II
Islamic marriage (nikah) 5.III
polygyny permitted under 5.VI, 9.II
zina prohibition 9.II

J

Jurisprudence of sexuality Ch 4
critical legal studies 4.IV
feminist 4.III
legal pluralism 4.V
natural law 4.I
positivism 4.II
Ubuntu 4.VI

K

Kenya 11.I
Constitution 2010 and sexual rights 11.I
FGM criminalised (2011) 7.IV
Marriage Act (2014) 5.II
Penal Code s 162 3.III, 11.I
Sexual Offences Act (2006) 6.IV

Kinship systems 2.IV
matrilineal 2.IV
patrilineal 2.IV
reproduction and 2.IV

L

Lawrence v Texas [2003] 8.IV

Legal pluralism 4.V, 1.V
multiple legal orders in Africa 4.V
sexuality regulation under 4.V

LGBTQ rights 8.III, 8.VI, 11.I–11.IV
colonial origins of criminalisation 3.III, 3.VI
comparative overview 11.I–11.IV
digital risks for LGBTQ Africans 10.I, 10.II
recommended reforms 12.VI
see also Same-sex conduct

M

Maputo Protocol (2003) 7.III, 8.II, 8.V, 12.VI
abortion (Art 14(2)(c)) 8.V, 12.VI
GBV (Art 4) 7.III
harmful practices (Art 5) 7.IV, 8.II
minimum marriage age 6.II, 7.V

Marital rape 5.VIII, 6.IV, 12.VI
abolition across Africa 6.IV
Hale doctrine (1736) 6.IV
Nigeria and Tanzania (not criminalised) 6.IV
recommended criminalisation 12.VI
S v Mvundlana (2009) 6.IV, App B
Uganda Domestic Violence Act (2007) 6.IV

Marriage Ch 5
civil marriage 5.IV
cohabitation 5.VII
customary marriage 5.II
definitions 5.I
divorce 5.V
Islamic marriage (nikah) 5.III
polygamy 5.VI
rights and obligations 5.VIII

Motshidiemang v Attorney General [2019] 3.VI, 9.IV, 11.III
harm principle applied 9.IV
same-sex conduct decriminalised 11.III

Mukasa v Attorney General [2023] 8.III, 9.IV, 11.I

N

National Coalition for Gay and Lesbian Equality [1998] 3.VI, 8.III, 8.VI, App B
dignity and equality 8.VI
leading African case on sexual orientation 3.VI

Natural law 4.I
Aquinas 4.I
Aristotle 4.I
critique of in African context 4.I
Finnis on same-sex relations 4.I

Nigeria 11.II
child marriage prevalence (44%) 7.V
marital rape not criminalised 6.IV
Same-Sex Marriage Prohibition Act (2014) 11.II
Sharia in northern states 11.II

O

Owor-Mapp, Maureen 4.VI, 12.II
"Decolonising Judicial Education" (2025) 4.VI, 12.II
Ubuntu-inspired decolonial pedagogy 12.II

P

Patriarchy 7.I
colonial construction of African patriarchy 7.I
Walby's six structures 7.I

Polygamy 5.VI, 12.IV
Islamic law and 5.VI, 9.II
pre-colonial Africa 2.IV
Women's Probono Initiative (2025) 5.VI
Ubuntu critique of asymmetric polygamy 5.VI, 12.IV

Privacy 8.IV
Lawrence v Texas 8.IV
National Coalition 8.III, 8.VI
sexual privacy 8.IV

Publisher's Foreword Foreword
Suigeneris Publishers Foreword

R

Ramose, Mogobe 4.VI, 1.VI
"I am because we are" 4.VI
African Philosophy Through Ubuntu (1999) 4.VI

Religion Ch 9
African Traditional Religion 9.III
Christianity 9.I
Islam 9.II
morality as source of law 9.IV

Repugnancy clause 3.IV
defined 3.IV
effect on women's customary rights 3.IV
selective application 3.IV

Reproductive rights 8.V, 12.VI
abortion 8.V
contraception access 8.V
Maputo Protocol (Art 14) 8.V, 12.VI

Revenge pornography 10.V, 6.VI, 12.VI
African legal frameworks 10.V
harm to survivors 10.V
recommended reform 12.VI

S

S v Makwanyane [1995] 4.VI, App B
Ubuntu as constitutional value 4.VI
Mokgoro J on Ubuntu 4.VI

Same-sex conduct 3.III, 3.VI, 8.III, 8.VI
32 African countries criminalising 3.III, 3.VI
colonial origins of criminalisation 3.III
decriminalised jurisdictions 3.VI, 11.III, 11.IV, 11.VI
pre-colonial African practices 2.I, 2.II
"un-African" narrative refuted 3.VI, 2.I

Ubuntu compatible with 12.III

Senegal 11.II

Sexual exploitation 7.VI
sex trafficking 7.VI
sex for grades 7.VI
see also Cyber exploitation

Sexual justice 1.I, Ch 12
African theory of 12.I–12.VII
components 12.I
decolonisation and 12.II
Ubuntu grounding 12.III

Social media and sexuality 10.I
benefits for LGBTQ Africans 10.I
risks and weaponisation 10.I

Sodomy laws 3.III, 3.VI
colonial origins 3.III
Indian Penal Code s 377 as parent 3.III, 11.VI
see also Same-sex conduct

South Africa 11.III
abortion on request (1996) 8.V, 11.III
constitutional framework (1996) 8.III
Cybercrimes Act (2020) 10.V
decriminalisation (1998) 3.VI, 11.III
same-sex marriage (2006) 11.III
Sexual Offences Act (2007) 6.I, 6.III, 6.IV

Sextortion 10.V
fastest-growing cybercrime targeting minors 10.V
recommended criminalisation 12.VI

T

Tamale, Sylvia 1.I, 4.III, Acknowledgements
African Sexualities: A Reader (2011) 1.I
African feminist jurisprudence 4.III
"Exploring the Contours" (2014) 1.I
three I's framework 4.III

Technology and sexuality Ch 10
artificial intelligence 10.IV
cyber exploitation 10.V
dating platforms 10.II
digital sexual rights framework 10.VI
social media 10.I

Thailand — same-sex marriage (2025) 11.VI

Toonen v Australia [1994] 8.I

Tunisia 11.IV
abortion on request (1973) 8.V, 11.IV
family law reforms 11.IV

U

Ubuntu 4.VI, Ch 12
applied to sexuality 4.VI, 12.I–12.III
compassion (karuna) 12.III
Cornell and Muvangua on 4.VI
dignity (dignitas) 12.III
group solidarity 12.III
jurisprudence in constitutional law 4.VI
Mokgoro J on 4.VI
Owor-Mapp on decolonial pedagogy 12.II
Ramose on 4.VI
S v Makwanyane (1995) 4.VI
same-sex relations compatible with 12.III
umuntu ngumuntu ngabantu 4.VI, 1.VI

Uganda 11.I
Anti-Homosexuality Act (2023) 9.I, 11.I
Domestic Violence Act (2007) 6.IV
FGM Act (2010) 7.IV
Penal Code s 145 3.III, 11.I
Women's Probono Initiative (2025) 5.VI, 12.IV

V

Victorian morality 3.II
characteristics of 3.II
clash with African diversity 3.II
missionary role in imposing 3.II

W

Women's Probono Initiative v Attorney General [2025 UGCC 6] 5.VI, 12.IV, App B–C
critique of (Ubuntu perspective) 5.VI, 12.IV
equality vs cultural rights tension 5.VI
holding (Tibulya J) 5.VI
polygamy upheld 5.VI

Z

Zundel, Ingrid 8.II
on SOGIESC rights in African system (2025) 8.II
PhD dissertation (Bayreuth 2025) 8.II

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This book offers a bold and comprehensive exploration of the intricate relationship between sex, law and culture in Africa. It interrogates historical legacies, legal frameworks, cultural norms, religious influences and contemporary challenges, proposing an African-centered jurisprudence that harmonizes human dignity, cultural identity and constitutionalism.

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ISBN 978-9913-0-12345-6