

# The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa\*

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## Abstract

The opposition of “culture” and “rights” is not uncommon in feminist legal discourse. This paper argues that such an approach is fraught with danger as it creates an extremely restrictive framework within which African women can challenge domination; it limits our strategic interventions for transforming society and essentially plays into the hands of those seeking to perpetuate and solidify the existing structures of patriarchy. Drawing examples from a parallel research on Gender, Law and Sexuality, I propose that a more critical and interpretative approach to these two concepts may present a different perspective to either the idyllic or nostalgic portrayals of “tradition” often displayed in mainstream feminist legal thinking.

*Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.*

*Art. 33.6, Constitution of the Republic of Uganda, 1995*

## I. Introduction

Mainstream feminists often present the two concepts of “culture” and “rights” as distinct, invariably opposed and antagonistic. We are persuaded to believe that the concepts “culture” and “rights” are polar opposites with no possibility for locating common ground where new synergies can be developed for social transformation.

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This is especially true in the case of theorists of African women's rights where culture is viewed as being essentially hostile to women. Narrow interpretations of culture that collapse it with "custom" or "tradition" and assume these to be natural and unchangeable exacerbate the problem.<sup>1</sup> In this paper I do not intend to rehash the universalism/cultural relativist debate that raged within international human rights discourse during the 1980s and 1990s,<sup>2</sup> but rather to explore, using the example of sexual rights, the emancipatory potential of culture to enhance the quality of women's lives in Africa. I will argue against the commonly held belief that holds "culture" and "rights" in binary opposition and surface the limitations that stem from such distinction on our strategic interventions for transforming society.

The term "sexual rights" is used advisedly in this paper, despite the fact that it has never been recognized in the international community. "Sexual rights" here refer to the variously defined rights in existing international and national bills of rights that relate to human sexuality. These include: respect for bodily integrity; protection from violence; the right to privacy; right to decide freely the number, spacing and timing of children; right to sexuality education; equal protection of the law and non-discrimination; etc. At the same time, I am aware of the limitations of constructing sexuality exclusively within a rights framework.<sup>3</sup>

I am personally wary of "either-or" or "black and white" questions that posit complex social issues on a binary plane. One need not reduce oneself (for they are both reductionist positions) to either the 'Universalist Camp' or the 'Relativist Camp.' After all, as Schech and Haggis argue, cultures are fluid and interactive rather than distinct from each other.<sup>4</sup> They are in constant flux, adapting and reforming. Internal and external socio-political and economic forces drive them. Cultures are in many ways structured by and a reflection of the power dynamics of a given society.<sup>5</sup> In sum, cultures lend and cultures borrow; they can be as oppressed, colonized, exploited, submerged and depreciated as they may be liberating and empowering. Both Universalists and Relativists are touched by all these qualities of culture. The 2001 anthology, *Culture and Rights* cautions us against the exaggerated irreconcilability and incommensurability of the terms "rights" and "culture."<sup>6</sup> It suggests that a "new path" may be cleared if we shift our focus from such opposition to that of "the inherent tensions between an abstract ideal and its implementation in the real world, between principle and practice."<sup>7</sup>

1 - See e.g., David M. Bigge and Amélie von Briesen, "Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in *Magaya v. Magaya*," 13 *Harvard Human Rights Journal* 289 (2000).

2 - Universalists argue that international human rights law establishes a set of norms that are universally applicable while relativists argue that there is no such thing as universal 'moral truths' and that the structure of human rights needs to recognize cultural differences when applying human rights norms. See e.g., Peter Schwab, and Adamantia Pollis (Eds.), *Toward a Human Rights Framework*, New York: Praeger Publishers (1982); Makau Mutua, "Savages, Victims and Saviors: The Metaphor of Human Rights," *Harvard International Law Journal* Vol. 42: 201-245 (2001).

3 - Alice Miller, for example, warns of the danger in attempts to fit all sexuality within a rights claim paradigm. See Alice Miller, "Sexual Rights, Conceptual Advances: Tensions in Debate," Unpublished Paper presented at the "Sexual, Reproductive and Human Rights Seminar," organized by CLADEM, November 5-7, 2005 in Lima, Peru.

4 - See Susanne Schech and Jane Haggis, *Culture and Development: A Critical Introduction*, Oxford: Blackwell, (2000).

5 - Sheelagh Stewart, "The Contribution of Gender Training to Equality between Women and Men in DFID Development Management" (Final Report), London: DFID, Social Development Division (1998).

6 - See Jane Cowan, Marie-Benedicte Dembour and Richard Wilson (Eds.), *Culture & Rights: Anthropological Perspectives*, Cambridge: Cambridge University Press (2001); also see Éva Brems, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse," *Human Rights Quarterly* 19: 136-164 (1997); Bonny Ibhawoh, "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights

in the African State," *Human Rights Quarterly* 22: 838-860 (2000); and J. Oloka-Onyango and Sylvia Tamale, "'The Personal is Political,' or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism," *Human Rights Quarterly* 17: 691-731 (1995).

7 - Ibid. p.8.

8 - The African concept of Ubuntu (humanness) refers to understanding diversity and the belief in universal bond and sharing. See Mogobe Ramose, *African Philosophy through Ubuntu*, Harare: Mond Books (1999).

9 - For an example of a study that explores the potential of African customary systems in achieving gender justice (with respect to land tenure), see Ann Whitehead and Dzodzi Tsikata, "Policy Discourses On Women's Land Rights In Sub-Saharan Africa: The Implications Of The Re-Turn To The Customary," *Journal of Agrarian Change*, Vol. 3 (1 & 2): 67-112 (2003).

10 - See Leslye Obiora Amede, "Reconsidering African Customary Law," *Legal Studies Forum* 17(3): 217 (1993); Gordon Woodman, "Customary Law, State Courts and the Notion of Institutionalisation of Norms in Ghana and Nigeria," In A. Allot and G.R. Woodman (Eds.) *People's Law and the State*, 143-63. Dordrecht: Foris Publications, 1985; and Takyiwaa Manuh, "Women's Rights and Traditional Law: A Conflict," *International Third World Legal Studies, Association and the Valparaiso University School of Law* (1994).

11 - E.g., see Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd Ed.), Ithaca: Cornell University Press (2002). For a critique of Western discourse on the subject of culture see Oloka-Onyango and Tamale, supra note 6.

12 - See Article 27.

In this paper, the term "culture" is broadly interpreted to mean the various ways that social business is conducted and mediated through language, symbols, rituals and traditions and influenced by issues such as race, ethnicity, religion, material base, and so forth. In sum, we are all cultural beings in the sense that we are influenced by an infinite number of social forces that have shaped our mental outlook and perspectives on life. The collectivity of those experiences constitutes the cultural context within which we operate. Culture has numerous manifestations; it is not static but constantly changing and responding to shifting socio-economic and political conditions. In this sense, the value-assessment that is often made of cultures and cultural practices is misplaced, given that all cultures have aspects that are positive and others that disempower. Needless to say, there are many cultural norms and values that are rights-supportive, egalitarian and uplifting; many aspects of "African culture" promote and reinforce women's rights.

My reference to "African Culture" throughout this paper is not because I have no sense of the richness and diversity of African people's heritage. I use the term deliberately to highlight those aspects of cultural ideology that are widely shared among Africans (e.g., the communitarian, solidaritarian and *ubuntu*<sup>8</sup> ethos), and politically to call attention to the common historical legacies inscribed in cultures within Africa by forces such as colonialism, capitalism, imperialism and globalisation.

Mainstream legal feminist scholarship within and outside Africa largely tends to view culture in negative terms and to consider it an impediment to effective legal reform. Although this indictment is not totally unfounded, such beliefs have the totalizing effect of obscuring the potential that culture may hold as an emancipatory tool.<sup>9</sup> Feminist lawyers tend to fall in this intellectual trap more than say, feminist anthropologists, sociologists or historians, pitting culture against rights and uncritically subordinating customary law to statutory law. This model stems from the pluralist legal systems that African states inherited from colonialism which were based on a hierarchical paradigm that subjected the application of culture to the "repugnancy" test. Only those indigenous practices and values that were not repugnant to (colonial) natural justice, equity and good conscience passed the test.<sup>10</sup> The same individuals normally speak of "Rights" as if they are "culture-less" at best or at worst, borne of a "superior culture."<sup>11</sup>

The 1948 Universal Declaration of Human Rights (UDHR) guarantees the right

for everyone to freely participate in the cultural life of the community.<sup>12</sup> The right to culture is also an integral part of other fundamental rights enunciated in the UDHR such as freedom of conscience, expression and religion. However, when the UDHR was drafted, debated and adopted in the aftermath of World War II, only a handful of women and no sub-Saharan African sat on the floor of the UN General Assembly. Even the broad character of the rights articulated in the UDHR frame reflects normative values, inspirations and interests of Western culture of a specific stage of historical evolution. Many scholars have critiqued the overall culture and approach of the UDHR as: narrowly focusing on the individual's relationship to the state<sup>13</sup>; rooted in a Western liberal philosophy<sup>14</sup>; echoing male values<sup>15</sup>; and built on heterosexual perspectives of the human being.<sup>16</sup> Hence, the international "rights" discourse is not value-free, but is greatly underpinned by a hegemonic philosophy and assumptions that reflect the interests and values of the actors that drafted the UDHR. In other words, such discourse is woven around an ethnocentric paradigm that reinforces the position of those with economic, political, and social power (who are mainly western, white, middle class, male, heterosexual, etc.).

Despite the fact that the UDHR recognizes the right to culture, cultural rights have, in the words of Karim and Wayland, "remained the least developed in terms of legal content and enforceability."<sup>17</sup> This is partly due to the fact that culture is unbounded and is in constant flux with new traditions, customs and experiences constantly emerging. Hence, it is clear that the "human rights" discourse emanates from a specific historical context. It has a culture.<sup>18</sup> Like all other cultures, that culture cannot lay claim to common values nor to universalism. The potential that culture holds for emancipating women in Africa is often buried in the avalanche of literature many feminist scholars devote to the 'barbaric' cultural practices such as female genital mutilation. Not only is there an acute lack of sensitivity to and recognition of grassroots and local initiatives undertaken by African groups and activists, but the missionary zeal applied to the enterprise often produces a negative backlash.

The next section of the article uses broad strokes to sketch out the landscape against which "African culture" is played out. Section three surfaces and explores the similarities and continuities between "African Feminisms" and "Cultural Relativism." The aim is to establish that the two concepts do not have to be treated as incompatible—that culture and feminism are much more than distant cousins. In section four of the paper, the phenomenon of sexuality is used to elaborate the

13 - E.g., see Rebecca Cook (Ed.), *Human Rights of Women: National and International Perspectives*, Philadelphia: University of Pennsylvania Press (1994); Naim, Abd Allah Ahmad, "Human Rights in the Arab World: A Regional Perspective," *Human Rights Quarterly* Vol. 23(3): 701-732 (2001).

14 - See Mutua (2001), supra note 2; Josiah Cobbah, "African Values and the Human Right Debate: An African Perspective," *Human Rights Quarterly* 9: 309-331 (1987).

15 - See Rebecca Cook, "Women's International Human Rights Law: The Way Forward," in Rebecca Cook (Ed.), *Human Rights of Women: National and International Perspectives* Philadelphia: University of Pennsylvania Press (1994); Hilary Charlesworth, "What are 'Women's International Human Rights'?" in Rebecca Cook, *Human Rights of Women*, (1994).

16 - See Dianne Otto, "Everything is Dangerous: Some Post-Structural Tools for Rethinking the Universal Claims of Human Rights Law" *Australian Journal of Human Rights* Vol. 5: 17-47 (1999).

17 - Karim H. Karim and Sarah Wayland, "Culture, Governance and Human Rights," in Francois Matarasso (Ed.) *Recognizing Culture* (2001) at: [www.comedia.org.uk/downloads/Recognising%20Culture.pdf](http://www.comedia.org.uk/downloads/Recognising%20Culture.pdf), (last visited on June 11, 2006).

18 - Sally Engle Merry also critiques the unspoken fact that global legal processes are engaged in cultural transformation. She argues that "In the human rights process governing violence against women, there emerges from time to time a conception of culture as homogeneous, static, 'primitive' and resistant to change." She adds that, "Such a concept of culture often serves to marginalize as 'other' those to whom it is attributed." See Merry "Constructing a Global Law-Violence Against Women and the Human Rights System," *Law and Society Inquiry* Vol. 28: 941-977 at pp. 973-4 (2003).

19 - See *Women and Law in Southern Africa, In the Shadow of the Law: Women and Justice Delivery in Zimbabwe*, Harare: Women and Law in Southern Africa (WLSA) Research and Educational Trust (2000); also see Venia Magaya's *Sacrifice: A Case of Custom Gone Awry*, Harare: Women and Law in Southern Africa (WLSA)

Research and Educational Trust (2001, 37).

20 - Speech by Frantz Fanon, *Wretched of the Earth*, London: Pelican Books (Speech to Congress of Black African Writers) (1959).

21 - See Chandra Talpade Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourse," *Feminist Review* 30: 65-88 (Autumn 1988). Also see Cherrie Moranga and Gloria Anzaldúa, *This Bridge Called My Back: Radical Writings by Women of Color*, New York: Kitchen Table: Women of Color Press (1983); Trinh Minh-Ha, *Woman Native Other*, Bloomington & Indianapolis, IN: Indiana University Press (1989); Lata Mani, "Multiple Mediations: Feminist Scholarship in the Age of Multinational Reception," *Feminist Review* 35: 24-41 (1990); Uma Narayan, *Dislocating Cultures: Identities, Traditions and Third-World Feminism*, New York: Routledge (1997); Spivak Gayatri, *A Critique of Post-Colonial Reason: Towards a History of the Vanishing Present*, Cambridge, MA: Harvard University Press (1999).

22 - See An-Na'im, Abdullahi Ahmed, "Problems of Universal Cultural Legitimacy for Human Rights," Pp. 331-368 in *Human Rights in Africa: Cross-Cultural Perspectives* Abdullahi Ahmed An-Na'im and Francis Deng, (Eds.), Washington, D.C.: Brookings Institution (1990); An-Na'im, Abdullahi Ahmed (Ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*. Philadelphia, PA: Univ. of Pennsylvania Press, (1992).

23 - See Schiebinger, *Nature's Body: Gender in the Making of Science*, Boston: Beacon Press (1993: 169). Sarah Baartman died in France in 1816, aged 26 where her remains remained displayed at the Museum of Mankind until the 1970s. In 2002, her remains were finally returned for a dignified burial in South Africa.

24 - For a critical re-creation of the racism and sexism at the heart of European imperialism, see Barbara Chase-Reboud, *Hottentot Venus*, New York: Doubleday (2003); also see Sander Gilman, "Black bodies, white bodies: Toward an iconography of female sexuality in late nineteenth-century art, medicine, and literature," In H.L. Gates, Jr. (Ed.), "Race," *Writing, and Difference*, Chicago: University of Chicago Press (1986).

main argument being presented, expounding on the attributes that culture holds for women's empowerment. Sexuality is used as a base to explore the relationship between rights and culture because of the key role it plays in maintaining the patriarchal control of African women. The final section of the paper consists of some concluding remarks and pointers to the future.

## II. Placing 'African Culture' in Context

Most of what is understood as "Culture" in contemporary Africa is largely a product of constructions and (re)interpretations by former colonial authorities in collaboration with African male patriarchs.<sup>19</sup> As Frantz Fanon bluntly put it: "After a century of colonial domination we find a culture which is rigid in the extreme, or rather what we find are the dregs of culture, its mineral strata."<sup>20</sup> In feminist legal studies, culture is often viewed as a deviation from the path of human rights. Scholars like Chandra Mohanty have demonstrated effectively how 'first world' feminists have represented 'third world' women as helpless victims of culture, as objects devoid of any agency.<sup>21</sup> Mohanty extends this critique to urban middle class 'third world' scholars who write about their own cultures and rural sisters in the same colonizing fashion. Such approaches are myopic and dangerous as they create an extremely restrictive framework within which African women can challenge domination. Some legal scholars such as Abdullahi An Na'im approach culture in a nuanced and refreshing fashion, seeking to integrate its local understanding within the human rights discourse and advocating for internal cultural transformation.<sup>22</sup>

An analysis of the construction of "rights" in the area of sexuality for African women demonstrates the value-laden nature of what passes as "rights." The sexuality of African women is usually portrayed in negative terms. As far back as the "Hottentot venus," images of Western imperialist caricatures of African sexuality were part of a wider scheme to colonize and exploit the 'black race' from the 'dark continent.' The naked body of Sarah Baartman, the Khoekhoe woman (pejoratively referred to as the "Hottentot Venus") was forcibly taken to Europe in the early 1900s and paraded on the streets of several European cities like a zoo animal. Londa Schiebinger, reports that Sarah Baartman was "exhibited like a wild beast" with a focus on her buttocks and genitalia "which, for an extra charge, viewers could poke and prod."<sup>23</sup> Texts from nineteenth century reports authored

by white explorers, missionaries and anthropologists reveal a clear pattern of the ethnocentric and racist constructions of African sexuality. They foisted gross simplifications on extremely complex realities. Narratives equated black sexuality with primitiveness. African sexuality was depicted as primitive, exotic and bordering on nymphomania. Perceived as immoral, bestial and lascivious, Africans were caricatured as having lustful dispositions. Their sexuality was read directly into their physical attributes; and the attributes were believed to reflect the culture and morality of Africans.<sup>24</sup>

By constructing Africans as bestial, the colonialists could easily justify and legitimise the fundamental objectives of colonialism: it was a ‘civilizing mission’ to the barbarian and savage natives of the ‘dark continent.’ The imperialists executed this mission with force, brutality, paternalism, arrogance, insensitivity and humiliation. The body was a focal target of this assault. As Shreya Bhattacharji observes:

*Within the discourse of hegemonic othering, constituted at the imperio-colonial frontier, the body-scape of the woman—be it black and/or white—remains its most strategic and most problematic site. Already in Renaissance travel and exploration writings, the subconscious, perverse, and sexual instincts of the male European traveler-investigator are inscribed on the black female body-scape. The black female body is blatantly distorted by multiple allegations, whether anomalous genitalia, insanity, lesbianism, or sexual excessiveness.*<sup>25</sup>

A racist misreading of African cultures such as polygyny, bridewealth and “widow inheritance” reinforced such stereotypes of African women. Orthodox religions—especially patriarchal forms of Christianity and Islam—stress the impurity and inherent sin associated with women’s bodies.<sup>26</sup> Through proselytising, Africans were encouraged to reject their previous beliefs and values (read culture) and to adopt the “civilised ways” of the colonial masters.<sup>27</sup> By using African women’s sexuality we can see how a people’s culture can be discursively and ethnographically constructed as the ‘Other’ – abnormal, the antithesis of modernity and rights. My aim in the remaining part of this paper is to identify the liberating potential of “African culture” and to promote culturally grounded changes through creative thinking about women’s sexual rights.

25 - Shreya Bhattacharji, “Sex and empire building in the fiction of Chinua Achebe,” *Studies in Media & Information Literacy Education*, Vol. 4, Issue No. 4, (November 2004).

26 - Aileen Goodson, *Therapy, Nudity & Joy*, Los Angeles: Elysium Growth Press (1991).

27 - Mutua, *supra* note 2.

28 - Ronald Thandabantu Nhlapo, “International Protection of Human Rights and the Family: African Variations on a Common Theme,” *International Journal of Law, Policy & the Family* Vol. 3(1): 1-20 (1989).

29 - See Rebecca Cook (Ed.), *The Human Rights of Women: National and International Perspectives*, Philadelphia: University of Pennsylvania Press (1994).

30 - See Diana Fox and Maima Hasci (Eds.), *Women’s Rights As Human Rights*, Lewiston, NY: Edwin Mellen Press, (1999).

31 - Indeed some African countries, such as Zambia, Mauritius, Zimbabwe, Northern Nigeria and Kenya still carry such provisions in their constitutions today.

### III. Crossing the Thin Line Between ‘African Feminisms’ and Cultural Relativism

The war cry for feminists in Africa is: “pay attention to gender” while that of relativists is: “pay attention to culture.” When one recognizes that the institution of gender is constructed within the context of “culture,” and that the two are very closely linked, one begins to appreciate the potential for the harmonization of the chanting of the war cries. Indeed, the close connection between gender, sexuality, culture and identity requires that African feminists work within the specificities of culture to realize their goals. This requires us to move away from the dogmatic and rigid view of culture. We need to creatively discard the oppressive aspects of culture and embrace the liberatory ones.<sup>28</sup>

A common thread that runs through all feminist movements in Africa is the struggle to extend human rights to the female citizens of the continent. The usual snag that such activists immediately confront is the conceptual divide between the so-called “public” and “private” spheres. The traditional human rights framework places an emphasis on the duty of the state to uphold the rights of its citizens within the public sphere (i.e., politics and the market). The state (as opposed to individuals, communities, multinational corporations, etc.) is taken to be the primary violator of rights.<sup>29</sup> In most African states, colonial laws provided that the long arm of rights did not extend into the private or domestic sphere. In pluralist legal systems, this realm was basically governed by the indigenous customs and culture. This meant that communities or individuals within the community that violated women’s rights (e.g., through domestic violence or female genital mutilation) fell outside the ambit of the human rights structure and fell under the jurisdiction of culture.<sup>29</sup> Many post-independence constitutions of African states exempted personal (private) laws (e.g., marriage, divorce, adoption, burial, inheritance and succession) from the operation of the nondiscrimination principle.<sup>31</sup>

When many of us joined the women’s rights movements in our small continental corners decades ago, we nurtured ideas and actions that we thought would change our world. Today, feminist activists around the continent are ironically fighting tooth and nail to halt the changes that are threatening to roll back hard-won gender equity gains and social progress. Most of these changes are a result of a wide and

multi-faceted backlash against women's rights worldwide. The backlash and resistance is presented in various forms of fundamentalisms (economic, religious, cultural, etc.) Cultural fundamentalism or essentialism refers to the rigid, unquestioning adherence to a belief system and usually involves the 'freezing' of a people's cultural norms (e.g., through codifying). It usually manifests itself through neo-liberal and neo-conservative politics.

In Africa, when the backlash is placed against the backdrop of political monopoly, economic deprivation, poverty, violence, displacement, adjusting economies and globalization, the crisis multiplies tenfold. Take the example of the debilitating repercussions that the so-called 'Global Gag Rule' of the current Bush administration in the US are having on women's sexualities in Africa. This rule is a 2001 executive order issued by the Bush administration in the USA restricting foreign NGOs who receive USAID family planning assistance from using any other funds to support abortion-related services or advocacy. Using the enormous power derived from financial resources, the US government precludes individuals and organizations that receive US funds from engaging in any form of advocacy regarding the right to abortion. As a result, numerous USAID-funded facilities have had to close down in Africa (and elsewhere in the underdeveloped world) due to this policy. This has basically meant a closure of the taps on the much-needed funds for the important and often life-saving work of such groups, especially for poor women.<sup>32</sup> The US \$15 billion President's Emergency Plan for AIDS Relief (PEPFAR) initiative, which is based on conservative ideologies (abstinence-only, anti-prostitution, etc.), is another example of a policy with a potential to reverse much of the progress that has been made in HIV/AIDS prevention.<sup>33</sup>

The African Charter on Human and People's Rights (Banjul Charter) mainly differs from the other regional human rights instruments that preceded it (e.g., the European and American counterparts), in that it was highly inspired by African "traditions and values" (read culture).<sup>34</sup> African culture is normatively associated with women (as both its custodian and conduit). Article 18.2 of the Banjul Charter, which provides: "The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community" has come under scathing attack for sanctioning repressive structures such as the family assisted by patriarchal morals and traditional values.<sup>35</sup> Other scholars, such as Lisa Kois have argued that Article 18 is a progressive and liberating mechanism in the

32 - Numerous Family Planning Associations and Marie Stopes clinics around the continent (Kenya, Ethiopia, Lesotho, Uganda, etc.) for example, which used to provide contraceptive services, prenatal and postnatal care, childhood immunization, malaria screening, were forced to close down as a direct result of this policy. One does not need to speculate on the effect that such a policy has had on maternal and infant mortality, HIV/AIDS prevalence and women's reproductive health in these countries.

33 - See "Protesting PEPFAR" Policy Alert, In *Plainspeak: Talking About Sexuality in South and Southeast Asia*, Issue No. 2: 33-35 (January 2006).

34 - See Preamble to the Banjul Charter.

35 - See e.g., Makau Mutua, "The African Human Rights System in a Comparative Perspective: the Need for Urgent Reformulation," *Nairobi Law Monthly* 44: 27-30 (1992).

36 - Lisa Kois, "Article 18 of the African Charter of Human and Peoples' Rights: A Progressive Approach to Women's Human Rights," *East African Journal of Peace & Human Rights*, 3: 92-114.

37 - Abdullahi A. An-Na'im and Jeffrey Hammond, "Cultural Transformation and Human Rights in African Societies," Chapter one in Abdullahi A. An-Na'im (Ed.), *Cultural Transformation and Human Rights in Africa*, London: Zed Books (2002). In the same volume also see the persuasive essays by Florence Butegwa, Celestine Nyamu-Musembi and Hussaina Abdullah that argue for the

struggle of African women's rights in land ownership, property rights and religious revivalism, respectively, within the wider framework of 'cultural transformation.'

38 - *Human Rights in Cross-Cultural Perspectives*, see note 20.

39 - *Ibid.*

40 - C.f. Barney N. Pityana "The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context," in Malcolm Evans & Rachel Murray (Eds.), *The African Charter on Human and People's Rights: The System in Practice, 1986-2000*, Cambridge: Cambridge University Press (2002) pp. 219-245.

41 - Article 28 of CEDAW allows for ratifying states to make unilateral statements or declarations excluding or modifying certain provisions in the treaty.

42 - These include: Algeria (Arts. 2, 9.2, 15.4, 16 & 29); Egypt (Arts. 9, 16 & 29); Ethiopia (Art. 29); Lesotho (Art. 2); Libya (Arts. 2 & 16b,c); Malawi (Arts. 2 & 29.2); Mauritania (any article that contradicts Sharia); Mauritius (Art. 29); Morocco (Arts. 2, 9.2, 15.4, 16 & 29); Niger (Arts. 2d, f, 5a, 15.4, 16.1c, e, g & 29); and Tunisia (Arts. 9.2, 15.4, 16c, d, f, g, h, 29).

43 - Malawi acceded to the Convention on March 12, 1989. See <http://www.un.org/womenwatch/daw/> (last visited on June 11, 2006).

struggle for women's human rights.<sup>36</sup> Furthermore, Article 29.7 calls upon each African citizen to "preserve and strengthen positive African cultural values in his (sic!) relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society."

We know that the ideological domestic site of the family is a gendered space closely associated with women (albeit headed by men). It follows therefore that the Banjul Charter views African women as the custodians of morals and traditional values. In as far as this holds true, when "rights" and "culture" are constructed as conflicting parallel systems, the points of contact between gender, rights and culture become extremely foggy. In other words, if in Africa culture is synonymous to women, and the concepts of "rights" and "culture" continue to be viewed as being at odds, it means that African women would have to first strip themselves of culture before enjoying their rights. Of course such a position is untenable and runs contrary to the logic of cultural rights. Moreover, even with their diverse backgrounds and experiences, the majority of African women (and men) easily relate to and appreciate cultural systems better than the "laundry list" of rights set out in the various bills of rights. Thus, African feminisms cannot afford the luxury of donning either the universalist garb or the relativist one. Culture is a neglected pathway to women's justice.

Abdullahi An-Na'im and Jeffrey Hammond make a persuasive argument for the dynamic concept of internal "cultural transformation" as the most practical guarantee of entrenching human rights in African societies.<sup>37</sup> They argue that culture has a significant impact on human rights paradigms around the world and as such culture is the best-suited vehicle for protecting rights. An-Na'im has also challenged the cultural and religious obstacles to women's rights through a reconceptualization of the opposition of culture and rights in theory and bridging their difference in practice.<sup>38</sup> He begins from the premise that state-centric efforts to protect human rights need to be supported by broader strategies for social and cultural transformation.<sup>39</sup> When women drummed the point home during the UN conference on Human Rights held in Vienna (1993) that "women's rights are human rights," emphasizing the indivisibility and interrelatedness of rights, they recognized the potential of culture to reinforce rights.<sup>40</sup> Returning to my point about the conceptual closeness of gender, culture, sexuality and identity in the African context, we can proceed to demonstrate how culture can be transformed

to bypass the polarity between “rights” and “culture” in order to achieve social transformation.

#### IV. Empowerment Through Culture: a Constructive Approach to ‘African Sexual Rights’

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has been ratified by 183 countries, also boasts of being the treaty with the highest number of reservations.<sup>41</sup> To date the UN has recorded 73 reservations, 11 of which emanate from countries on the African continent.

Articles 2 and 16, which call upon member states to eliminate all forms of discrimination against women (legal, cultural, religious, etc.) and the obligation to accord equal rights to men and women in matters of domestic relations, respectively, are core to the Convention. In many ways these reservations touch upon women’s sexuality, and their reproductive and sexual rights. Malawi submitted the following reasons for entering a reservation to Article 2:

*Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices.*<sup>43</sup>

This reservation and its subsequent withdrawal by the government of Malawi two years later, in October 1991, throws some light on the dynamics that play out between rights, culture and sexuality. It is true that diplomatic dialogue and political negotiations at the UN level played a role in Malawi’s “change of heart” regarding the reservation.<sup>44</sup> But for me the act of withdrawal (pun intended!) symbolized concession on the part of the Malawian authorities that the “deep-rooted nature of some traditional customs and practices” is not necessarily in conflict with the notion of rights; that cultural and social structures are not cast in stone.<sup>45</sup> They are in constant flux.

The African continent-equivalent of CEDAW is the Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol). Significantly, the Protocol provides for a positive cultural context on the African continent: *Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural practices.*<sup>46</sup>

44 - UNICEF, “A Bill of Rights for Women, But with Reservations,” in *The Progress of Nations, 1997* available at <http://www.unicef.org/pon97/> last accessed on May 18, 2006.

45 - Such an interpretation becomes plausible when one places the withdrawal in the context of Malawian politics at the time; serious challenges to the “life presidency” and authoritarian rule of Hastings Kamuzu Banda were beginning to take root from human rights activists, women’s rights advocates and other political groups.

46 - Article 17(1). Also see related Articles 1(g), 2(2) and 5.

47 - Most of these punitive laws regarding sexuality in our Penal Codes are listed under the subhead, “Offences Against Morality.”

48 - These demands were incorporated in a charter: Ley Revolucionaria de Mujeres (Revolutionary Law of Women). See Christine Engla Eber, *Women in Chiapas: Making History in Times of Struggle and Hope*, New York: Routledge (2003); R. Aída Hernández Castillo, “National Law and Indigenous Customary Law: The struggle

for Justice of Indigenous Women in Chiapas, Mexico” in Maxine Molyneux and Shahra Razavi (Eds.) *Gender, Justice Development and Rights*, Oxford: Oxford University Press (2002) Pp. 384-413; Mercedes Olivera, “Subordination and Rebellion: Indigenous Peasant Women in Chiapas Ten Years After the Zapatista Uprising” *The Journal of Peasant Studies*, 32(3&4), July/October 2005: 608-628.

49 - See note 33.

50 - Ann Whitehead and Dzodzi Tsikata, *supra* note 8, p. 83.

51 - For example, the bill recognizes the property rights of cohabiting parties, women’s non-monetary contribution as wives or cohabittees and the concept of “irretrievable breakdown of marriage”; it prohibits widow inheritance and vetoes bridewealth as an essential element of marriage; it introduces conditions that must be fulfilled before a polygynous man takes on subsequent wives (e.g., proof of economic capability, keep wives in separate homes, treat all wives equally, etc.).

Hence, we see the Protocol not only continuing in the same spirit of its parent charter (the Banjul Charter) in elevating the positive aspects of culture, but also affirming and reinforcing the language of CEDAW. It further recognizes and validates African women’s agency in challenging culture as a concept of power/ authority and reshaping it so that it connects with rights. Rather than condemning culture, the provision recognizes its positive potential, and underlines the necessity for the full and equal participation of women in determining what these should be. Turning the lenses to the main subject of this paper, the culture of sexuality in contemporary Africa holds both positive and negative attributes. However, the spotlight is usually focused on the negative aspects such as disease, violence and repression. In fact the whole subject is shrouded in taboo, secrecy and reticence. Laws, mainly based on Judeo-Christian-Islamic values and morality are set out in the national Penal Codes to regulate and ultimately control women’s sexuality.<sup>47</sup> One of the most remarkable and inspiring examples of women exercising agency in recreating culture and denaturalizing gender inequality is found in the Zapatista women of Chiapas (Mexico) who in the 1990s eloquently articulated their rights within their cultural communities and successfully claimed their customary rights, including the right to control their bodies.<sup>48</sup>

There are two main reasons why patriarchal, capitalist societies need to regulate and control the sexuality and reproductive capacity of women. First of all, it serves to keep women’s bodies in the domestic arena, where, as “decent wives” and “good mothers” they remain dependent on their breadwinner husbands. Secondly, and more importantly, it is supposed to guarantee the paternity and legitimacy of the children of the marriage. This is considered vital to ensuring that descent through the male line is retained and that property is bequeathed to the husband’s offspring. In order to achieve this objective, the law makes sure that women remain monogamous and stick to one partner. At the same time, the law does not disturb or challenge the polygynous sexuality of African men. The basis of such rationale that only serves the interests of patriarchy and capitalism must be challenged through the “internal cultural transformation” model proposed by An-Na’im and Hammond.<sup>49</sup>

It should be noted that even in the matrilineal societies of western, central and southern Africa, matrilineality exists within an entrenched patriarchal context. This means that for all practical purposes, women are subordinated to men even in matrilineal societies; the only basic difference being that inheritance and authority

passes through women to the male of the line. However, such communities at least realize the futility in retaining strict control of women's sexuality. So, in order for men to ascertain their line of descent, they pass over their inheritance to a sister's son or daughter.

In the rapidly changing socio-economic life of Africans, the options of using culture as a tool for enhancing rights (read: cultural transformation) have expanded; cultural spaces have widened with the greater emergence of multicultural and "lifestyle-diverse" societies. Using what Whitehead and Tsikata refer to as a "(re)turn to the customary,"<sup>50</sup> I take examples drawn from Uganda to demonstrate how the potential of usefully and creatively employing traditional values and practices to overcome patriarchal control. I also demonstrate how women can reclaim their bodily integrity as well as their sexual and reproductive rights, even in the context of the taboos associated with sexual matters.

The first example is derived from the long-standing attempts by Ugandan women's rights groups, led by feminist lawyers to reform laws relating to domestic relations. In a struggle that spans four decades, women's rights activists in Uganda had been trying to get government to change the discriminatory laws governing marriage, divorce, property ownership, as well as to introduce the concepts of marital rape and equality within the family.<sup>51</sup> Women's sexuality sat at the core of the proposed reforms, which were largely considered too radical. This is because sexuality is a site for the production of hegemonic gender discourse. Hence, it was a milestone achievement when the Domestic Relations Bill (DRB) was finally tabled in parliament on December 9, 2003. It reached Committee stage in early 2005. However, the state of euphoria that such a development caused within the Ugandan women's movement was quickly dashed by the colossal controversy that swirled inside and outside parliament, in the media and on the streets. The Committee on Legal and Parliamentary Affairs launched a scathing attack on the contents of the bill. As if that was not bad enough, on March 29, 2005 hundreds of women (the majority of whom were covered in hijabs) took to the streets in Kampala to demonstrate against the bill. Describing it as a "coup against family decency," the status quo activists swore to oppose the passing of the proposed law. Patriarchal Cultural leaders were totally behind the protestors.<sup>52</sup> A few weeks later, the DRB was shelved for "more extensive consultations." With his eyes fixed on his bid to win a fifth term in office during the February 2006 elections, President Museveni declared that "it (the DRB) was not urgently needed."<sup>53</sup>

52 - See for example, "Buganda supports Muslims on DRB—Muliika" Daily Monitor July 7, 2006. Daniel Muliika is the Katikkiro (prime minister) of the Buganda kingdom.

53 - See William Rwebembera, "Home Bill May Wait—Museveni," New Vision, April 28, 2005. Also see Hon. Latif Ssebagala (MP), "Muslims Will Never Accept DRB as Law," New Vision May 10, 2006; Janet Walsh, "The Hidden Costs of the DRB," accessed at: <http://hew.org/english/docs/2005/06/07/uganda11092.htm>

54 - "False consciousness" is a Marxist notion that capitalist relations are maintained partly by the oppressive ruling class convincing the masses that existing power relations are natural and the latter serving the interests of the ruling class without being aware that they are doing so. Radical feminists in the west have used this term to describe the consciousness of women who 'capitulate' with patriarchal culture.

55 - See Ayesha Imam who calls for a progressive/feminist interpretation of Muslim laws: "The Muslim Religious Right (Fundamentalists) and Sexuality," Women Living Under Muslim Laws (WLUML) Dossier 17: 7-25 (June 1997). Also see Hajiya Bilquis Yusuf, Sexuality and the Marriage Institution In Islam: An Appraisal," Lagos: Africa Regional Sexuality Resource Centre (2005).

56 - Charmaine Pereira, "Where Angels Fear to Tread?" Some Thoughts on Patricia McFadden's "Sexual Pleasure as Feminist Choice," Feminist Africa Issue No. 2 (2003). Also see Awusabo-

Asare et al., who write about married women's right to sexual pleasure among the matrilineal Akan of Ghana, K. Awusabo-Asare, J. Anarfi and D. Agyeman "Women's Control over their Sexuality and the Spread of STDs and HIV/AIDS in Ghana," Health Transition Review, 3: 69-83 (Supplementary Issue 1993).

57 - cf. Agnes Runganga and Peter Aggleton, "Migration, the Family and the Transformation of a Sexual Culture", Sexualities, 1, 1: 63-81 (1998) who have also recorded similar observations in contemporary Zimbabwe.

58 - See Sylvia Tamale, "Eroticism, Sensuality and 'Women's Secrets' Among the Baganda: A Critical Analysis" Feminist Africa Issue No. 5 (2005). Available at [www.feministafrica.org/05-2005/feature-sylvia.htm](http://www.feministafrica.org/05-2005/feature-sylvia.htm) (last visited on June 11, 2006).

59 - The practice is common with several other Bantu-speaking communities in eastern and southern Africa.

60 - See WHO definition of Type IV female genital mutilation at <http://www.who.int/mediacentre/factsheets/fs241/en/>. (last visited on June 11, 2006).

Ugandan Legal feminists who were left agape, scratching their heads, learnt a few lessons about the limitations of using the legal reform strategy in achieving gender equity on family and sexuality matters. A significant message that was put across to the women's movement was never to take for granted, ignore or erase the complexities and contradictions of women's realities. We must invoke the core values of our societies to engender transformation; find those values that resonate from indigenous cultures that will speak to the rights repertoire, as feminists know it. The women who participated in the protest march were obviously not reading from the same page as the legal feminists and they rejected being subjected to what they perceived as the straightjacket of legalism. It was not a case of "false consciousness"<sup>54</sup> as some people would have us believe, but an "alternative consciousness" borne out of their perceptions and lived experiences. They were not willing to "risk" further abuse by rejecting deeply entrenched beliefs on such a sensitive facet of their lives.

Perhaps the proposed changes would have been more palatable to the ordinary woman if they had been presented as a (re)turn to the positive aspects of culture or Sharia. For example, secular law could lean on and borrow a leaf from Muslim laws, which lay out humane treatment and egalitarian principles for polygynous wives.<sup>55</sup> Another case in point is that under Sharia and in many Ugandan cultures, the woman's right to pleasure is guaranteed and sexual violence within marriage is frowned upon. Pereira reminds us that, "Within Islam, women also have formal rights to sexual satisfaction in marriage, and the denial of such satisfaction constitutes grounds for divorce."<sup>56</sup>

My own work on the sexuality of Baganda women has shown, for instance, how changes in the political economy of Uganda as well as the scourge of HIV/AIDS have fundamentally changed and reconstructed the traditional cultures of sexuality.<sup>57</sup> Through a socio-cultural analysis of the institution of Ssenga (sexual initiation by the paternal aunt), I discovered how the evolution of Ssenga practices has allowed Baganda women to negotiate agency, autonomy and self-knowledge about their sexuality. This illuminated the liberatory value of indigenous institutions, and represented a very different perspective to their idyllic or nostalgic portrayals as repositories of "tradition", often seen in mainstream legal feminist thinking. Indeed, commercialisation, professionalisation, commodification and modernity have invested the institution of Ssenga with new scope for challenging subordination and sexual control.

My study revealed many examples of contemporary Ssengas that carry emancipatory messages concerning women's autonomy and economic independence. Explicit and daring topics regarding women's pleasurable sexuality, such as "female ejaculation" and "clitoral orgasm" have become part of Ssenga's repertoire of tutoring techniques. While the traditional message from Ssenga focused on men's sexual pleasure, young Baganda women today are demanding that men also receive training in how to please their female partners. They have largely rejected the sexual ideology that privileges men over women, one that locates female sexuality in a medicalised/reproduction realm. By insisting on pleasurable sex for themselves, these young women have refocused culture and used the erotic as an empowering resource to claim justice. While the patriarchal-heteronormative agendas and discourses embedded within Ssenga were unmistakable, women's subversive and counterhegemonic "silent struggles" allow them to negotiate agency, providing a neat example of how African women can inherit and shape cultures of their own that go beyond the discourse of rights imposed from above.<sup>58</sup>

My second example analyzes the "body politics" behind the controversial cultural labia of African women. In the first part of this example, I discuss the practice of elongating the labia minora among the Baganda of the central region<sup>59</sup> and in the second part I analyse the struggle against genital mutilation among the Sabinu and Pokot of eastern Uganda. The World Health Organisation (WHO) defines both practices as female genital mutilation.

The practice of elongating the labia minora is classified and condemned by the WHO as type IV FGM. It lumps this procedure together with FGM procedures that pose health hazards to women.<sup>60</sup> My study on women's sexual pleasure among the Baganda revealed that the WHO completely disregards the ways in which this practice, encoded within the Ssenga institution, have enhanced sexual pleasure for women, and expanded their perceptions of themselves as active sexual beings. The practice serves three main purposes: (a) to enhance the erotic experience of both the male and the female<sup>61</sup>; (b) the elongated labia serve as a kind of self-identifier for Baganda women – the stamp of legitimacy for a "true" Muganda woman;<sup>62</sup> and (c) it serves the aesthetic function of bringing pleasure to men who enjoy looking at and fondling the out-stretched labia of a woman.

Through such discourse, the WHO in essence wrote this African practice of sexual

61 - When the elongated labia are touched and manipulated in the correct manner during foreplay or mutual masturbation, they may be the source of immense pleasure to the couple

62 - It does not seem to matter that the practice of elongating the labia is practised by several other communities in Uganda and even beyond.

63 - *Supra* note 40.

64 - See Nahid Toubia, *Female Genital Mutilation: A Call for Global Action*, (2nd Ed.), New York: Rainbo Publications (1995).

65 - See J. Oloka Onyango, "Law, Custom and Access to Justice in Contemporary Uganda: A Conceptual and Analytical Review," Unpublished Paper prepared for the World Bank conference on New Frontiers of Social Policy; Dar-es-Salaam, December 12-15, 2005.

66 - See Gita Gopal, *Gender-Related Legal Reform and Access to Economic Resources in Eastern Africa*, World Bank Discussion Paper No. 405 available at: [www-wds.worldbank.org/external/default/WDSCContentServer/1/W3P/IB/1999/10/19/000094946\\_99100712470269/Rendered/INDEX/multi\\_page.txt](http://www-wds.worldbank.org/external/default/WDSCContentServer/1/W3P/IB/1999/10/19/000094946_99100712470269/Rendered/INDEX/multi_page.txt) (last visited on June 11, 2006).

enhancement into the broad negative rubric of "harmful cultural practices" that violate the rights of women and children. Far from suffering feelings of "incompleteness, anxiety and depression"<sup>63</sup> that the global health body associates with this practice, most of those interviewed in this study spoke positively of this cultural practice. This "lived experience" of Baganda women contradicts the negative blanket characterisation of the cultural practice of labia elongation offered by the WHO. Furthermore, the WHO position completely disregards the issue of agency; unlike other cultural practices where there is compulsion and force, the practice of clitoral elongation is a voluntary one. It belongs in the same category of genital (breast, labial and clitoral) piercing and enhancing—practices that are fairly common in Western countries, but which have never been condemned by WHO, despite their potential to do harm. Conversely, WHO does not isolate the precise nature of the medical damage caused by elongation.

In the "reverse" practice of incising the clitoris and/or labia practiced by the Sabinu and Pokot communities of eastern Uganda, the cultural practice is associated with "women's purity" and its proponents argue that it makes women more virtuous by reducing their sexual desires. The culture is so strongly associated with the identity status that most women would rather risk the health harms that are linked to it than face social ostracization. But there is no doubt that this cultural practice also violates women's bodily integrity and their sexual and reproductive rights.<sup>64</sup>

The struggles to eradicate FGM in Uganda have a long and protracted history. When government attempted to outlaw the practice, it created a severe backlash by pushing it underground with vigilante groups consisting of youthful males hunting down "defectors" and forcibly subjecting them to the knife. Government quickly retreated and the solution found was to engage the communities practising the ritual in finding alternative means of preserving the essence of the culture (the rite of initiation) while eradicating the violent form in which that rite was practiced.<sup>65</sup> Alternative, symbolic rituals have slowly replaced the mutilation procedure. It was extremely important for the communities to preserve the underlying positive aspects of the practice by celebrating the rite of passage into adulthood and engender a sense of cultural identity.<sup>66</sup> Notions of women's sexual purity were radically whittled down with the termination of the incising practice.



## V. Concluding Remarks

What the above examples demonstrate is that culture is a double-edged sword that can be wielded creatively and resourcefully to enhance women's access to justice. The social legitimacy that "culture" enjoys around the African continent is an indicator to all feminist activists of its importance and possibilities. For many African women the sustainable solutions to their oppression, exploitation and subordination hardly lie in vague, alien legal rights, but in a careful and creative deployment of the more familiar cultural norms and values. Thus far, the blunted tools of human rights have had a very limited effect on the lives and realities of African women. While the top-down constitutional and legal framework is necessary as a foundational touchstone of women's rights, our activism must begin from the assumption that bottom-up approaches anchored in local cultures and traditions are more likely to succeed than those working from without.

To make the argument that culture is important and that strategically, we need to proceed from the ground up is not to suggest that culture should be reinforced. But rather, that culture needs to be approached in a dynamic and unritualized fashion, examining the linkages between its positive aspects and the emancipation of women. After all, the evolution of culture is shaped by agency; activism implies agency and legal feminist agency will come from a conscious understanding of the social, economic and cultural lives of the African women we are trying to reach out to. Whitehead and Tsikata pose the important questions: How do cultural processes actually work? Can women seize opportunities within systems that discriminate against them to press their claims in deciding whether to change the system or retain it? It is the essential task of any project designed to liberate women's sexuality to address these questions. Radical transformation of women's sexuality can happen within culture.

Currently the voices that are the loudest and that get listened to in African cultural discourse are mostly those of fundamentalists who have a selective view of culture. When it suits their hetero-patriarchal interests, they will fly the cultural flag to keep women in a subordinate position. It is vital that we surface the positive, egalitarian aspects of African culture and use it to our advantage; that we (re) interpret the underlying values within our culture with the changing socio-economic circumstances. We must not be shy to be heard speaking out in support of culture. But our embrace must not be uncritical. It must be undergirded by an

appreciation first, of the limitations of cultural reductionism and the many negative practices that have been heralded in its name. Secondly, and most importantly, such an embrace must at all times be informed by the critical questions relating to human rights such as equality, non-discrimination, equity and tolerance.

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FOR WOMEN'S HUMAN RIGHTS

## Sex Matters

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## Contents

Introduction, 7  
Urgent Action Fund- Africa, 15

### Narratives

Sex At Fourteen, 21  
Is Homosexuality Unafrikan? 25  
Gay Rights: The view from Uganda, 29  
Denying sex workers their human rights is opening the door to HIV/AIDS, 33  
When women say No, they mean No: Why rape must be stopped, 37  
While pro-choice and pro-life groups battle, women continue to die:  
The case for repealing East Africa's archaic abortion laws, 41

### Profiles

Dr Eunice Brookman-Amisshah on Abortion, 47  
Njoki Ndung'u on Sexual Violence, 51  
Dr Sylvia Tamale on Commercial Sex Work, 55  
Saïda Ali on Youth Sexuality, 59  
Nduku Kilonzo on Liverpool VCT, 63  
Pouline Kimani on The Rights Of Sexual Minorities, 69

### Papers

Unsafe Abortion – An Infringement Of Women's Reproductive Rights, 75  
Sexual Violence, 99  
HIV/AIDS Programming and Sexuality of Young People Perinatally Infected  
with HIV, 113  
Sexual rights as human rights: operationalisation by stealth, 125  
The Right to Culture and the Culture of Rights:  
A Critical Perspective on Women's Sexual Rights in Africa, 149  
Youth Sexuality and the ABC Model: Priorities, Problems and Policy, 179  
Youth Sexuality and the ABC Model: Priorities, Problems and Policy, 211  
Sexual Rights: Challenges & Opportunities Facing the Human Rights and  
Women's Movement and HIV/AIDS Service Providers in East Africa, 213

