DOMESTIC VIOLENCE AND THE LAW IN COLONIAL AND POSTCOLONIAL AFRICA

by Emily S. Burrill, Richard L. Roberts, and Elizabeth Thornberry
Domestic Violence and the Law in Colonial and Postcolonial Africa

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Preface

Domestic violence is fraught and complex, as a lived experience and a social and historical unit of analysis. From conference to published volume, this project has been deeply influenced by spirited and engaging discussions with colleagues regarding our use of the term domestic violence—that is, why we use the term domestic violence and not sexual violence, gender-based violence, or household violence. In their chapters, Codou Bop and Pamela Scully both make impassioned arguments for using gender-based violence as the appropriate analytical category.

Here, we use the term domestic violence to indicate overwhelmingly controlling and punitive behavior—whether physical, psychological, or emotional—directed by one member of a household toward another as a means of establishing dominance. Such punitive actions very often take the form of gender-based violence, but not always. “Domestic,” in this sense, indicates a realm of shared living space oriented around relationships within households. Given the range of complex African residential patterns, living spaces were often gendered, often contained several generations, and consisted of kin as well as dependents of various kinds. We recognize domestic space and household relationships as processual and linked to larger social relationships and movements rather than part of a binary relationship that pits the private against the public. Using the term domestic allows us to talk about kin-based violence, marriage-based violence, gender-based violence, as well as violence between patrons and clients who shared the same domestic space.

Domestic violence, as a legal and criminal category and a cause for social activism, is often associated with European and North American contexts that center on the nuclear family. Our use of the term is also tied to a tradition and recent history of legal and political liberalism; however, the chapters that follow reveal the ways in which domestic space and domestic relationships take on different meanings in African contexts that extend the boundaries of family obligation, kinship, and dependency. Therefore, we use the term domestic violence recognizing the potential limitations of the term as a unit of analysis but with the expectation that it will provoke further discussion and research.
Domestic Violence and the Law in Africa

EMILY BURRILL, RICHARD ROBERTS, AND ELIZABETH THORNBERRY

SINCE THE 1990s we have seen an explosion of public attention paid to domestic violence within Africa. New pressure groups have formed, new laws have passed, and new names have been given to old kinds of violence. From People against Women Abuse in South Africa to Raising Voices in Uganda to Women in the Law and Development in Ghana, African men and women have organized—albeit with varied success—to push the issue onto national and international political agendas. Domestic violence itself, however, is not a recent phenomenon in Africa, nor are struggles against it. Given the importance of ideas of family and kinship in many African political systems, it is not surprising that families themselves have often been the site of violent coercion. This volume uncovers the history of domestic violence in Africa and illuminates the challenges faced by contemporary attempts to end domestic violence. By bringing together activists, legal scholars, anthropologists, and historians, this volume puts into conversation disciplinary approaches to the problem of domestic violence and thus provides enhanced perspectives on the complexities of domestic violence and efforts to address it.

The history of domestic violence in Africa comprises two interwoven narratives. The first describes changes in the experience of violence within the family, helping us understand why the form and prevalence of family-based violence changed over time in particular communities. However, we also recognize that the idea of domestic violence as a category of analysis is not a universal phenomenon. Rather, as Linda Gordon writes, the "modern history of family violence is not the story of changing responses to a constant problem, but, in large part, of redefinition of the problem itself." A second narrative thus tracks the changing definitions of the "problem" of domestic violence. The essays in
this volume form an argument for the need to understand the changing definitions of domestic violence in order to understand the persistence of these acts of violence and for the need for legal definitions and solutions.

It is fitting, then, to start with a definition of our own. In recent years, acts once called domestic violence have increasingly been relabeled by both activists and academics. The terms gender-based violence, violence against women, and intimate partner violence are most commonly used to describe violence committed by men against their partners. These terms have the merit of drawing our attention to the gendered nature of such violence, and of challenging characterizations of such violence as a private matter rather than a public concern. Many of the chapters in this volume, however, are concerned with the production and perpetuation of precisely such a conception. In many parts of colonial and postcolonial Africa, legal responses to violence within the family differed from responses to other kinds of violence. Violence that was understood as domestic was often punished less harshly, if at all. By retaining the term domestic violence we wish to emphasize the importance of such an understanding to the histories under examination.

We therefore define domestic violence broadly, to include all acts of violence which are seen by those who inflict, endure, or regulate them as being justified by a familial relationship. By using this definition, we also wish to draw attention to the connections between violence committed by men against women and other forms of violence that are justified through the institutions and ideologies of kinship and family. Violence between parents and children, violence between co-wives in polygynous marriages, and even—as Katherine Luongo demonstrates in her chapter—violence against suspected witches were all shaped by such ideologies.

This volume brings together perspectives on the problem of domestic violence in Africa from historians, anthropologists, activists, and legal scholars. The first and second parts of the volume are devoted to analyses of domestic violence under colonialism, and the third part focuses on the contemporary period. Taken together, the contributors to this volume demonstrate how changes in the colonial past set in motion structures of domination that persist into the present. They also draw attention to the ongoing struggles within Africa to change these systems of domination. African states are signatories to all the major international conventions protecting women from discrimination and against violence as basic human rights but often with reservations that deflect and delay the application of these rights. This volume links these reservations to colonial legal regimes that privileged the maintenance of custom over women’s desires to escape violent relationships.

All of the chapters in this volume focus on some aspect of the law, a focus that stems from the importance given to legal reform in recent efforts to combat domestic violence in Africa. Several essays in the second part examine shifts in the law around domestic violence during colonialism, and essays in the third part of this volume evaluate postcolonial efforts at legal reform. Other contributors use court records to find traces of domestic violence; and still others show how some Africans used the courts to challenge violent partners; whereas other contributors demonstrate how the law was changed to prevent women from using the courts to escape domestic violence. Taken together, their research demonstrates that, while law has shaped the history of domestic violence in fundamental ways, domestic violence nonetheless persists. Legal practice both shapes and is shaped by larger public understandings of domestic violence.

Although legal reform remains integral to efforts to reduce violence within households, the history of domestic violence in African legal systems reveals the difficulties facing current reformers. At the same time, several of the essays contained in this volume find in domestic violence a window into the ways that Africans and colonial administrators have given meaning to the major social changes of the nineteenth and twentieth centuries. The intellectual and social history of domestic violence illuminates the challenges faced by those in charge of African legal systems—whether colonial administrators, traditional leaders, or postcolonial African judges—as they struggled to regulate societies in states of change. Attempts to eradicate, or simply to regulate, domestic violence sparked debates about the proper relationship between law, culture, and gender relations as well as the contents of African custom. These debates continue to be central problems in many African legal systems.

This introductory essay locates the essays that follow in several frameworks. In addition to legal history, we discuss the place of domestic violence in the history of the family as well as contemporary debates about the interaction between international human rights theory and local cultures. An understanding of these contexts helps illuminate not only the chapters in this volume but also the predicament of current struggles against domestic violence in Africa.

EXPLAINING DOMESTIC VIOLENCE

In 2005, the World Health Organization conducted a global survey of the prevalence of intimate partner violence, one subset of domestic violence. We have drawn the accompanying table of categories of intimate partner violence from the WHO study and an earlier UN report; they are equally useful for thinking about the broader range of domestic violence referred to in this book. The WHO 2005 study found that between 15 percent and 71 percent of the ever-partnered women respondents had experienced some form of physical or sexual violence in their lifetime. The lowest rate was found in an urban Japanese setting and the highest rate in a rural province of Ethiopia. The
TABLE 1 Categories of Intimate Partner Violence, UN 1989 Report and WHO 2005 Study

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physical Violence</td>
<td>slapping and throwing something, pushing or shoving, pinching, pulling a woman’s hair, hitting, choking, clubbing, kicking, dragging, burning, throwing acid or boiling water, threatening or actually using a weapon</td>
</tr>
<tr>
<td>Sexual Violence</td>
<td>being forced to have sexual intercourse when the female partner did not want to because she was afraid of what her partner might do, was forced to do something sexual that she found degrading or humiliating, specific attacks on the breasts or genitals</td>
</tr>
<tr>
<td>Emotional Violence</td>
<td>being insulted or made to feel bad about herself, being belittled or humiliated in front of others, being scared by the male perpetrator by the way the male partner looked at her, by yelling, by smashing things, by having the male partner threaten to hurt someone she cared about, harassment, degrading comments, threatening with divorce or intentions of taking another wife</td>
</tr>
<tr>
<td>Controlling Behavior</td>
<td>being kept from seeing friends, being restricted from seeing her family of birth, by the male partner insisting on knowing where she is at all times, by ignoring her or treating her with indifference, by getting angry if she spoke to another man, by being suspicious that she was unfaithful, and by demanding that she ask his permission before seeking health care for herself, isolation, deprivation of physical and economic resources, restricting access to family income, excessive possessiveness</td>
</tr>
</tbody>
</table>


wide variation in these findings suggests that intimate partner violence is not an unchanging human propensity but rather produced by historically contingent factors including colonialism, poverty, cultural beliefs, and barriers to education.

Explanations of this variation move from theories that seek the origin of abuse in individualized causes to those that seek to explain the problem within broader structural and cultural contexts. The earliest theories fell within a medical paradigm, described domestic violence as pathological, and focused on individual household deviance. More recent research has rejected the model of individual deviance but noted the importance of individual-level risk factors such as personal history of violence, economic deprivation, and substance abuse. At the level of the family, resource theories posit that decision-making power in the household derives from the “value” of resources that each person brings to the relationship. Family systems theory seeks to understand individuals within their interconnected family roles; the most sophisticated versions of this model see household members constantly jockeying and renegotiating control in the family, with domestic violence as a strategy employed by the household head to enforce his culturally sanctioned control over family members and dependents. Proponents of social learning theory, which finds support in studies of child abuse, have described violence as a social statement learned from role models in the family or community. Also at the community scale, social disorganization theory describes domestic violence as resulting from the weakness of people’s ties to the communities in which they live. On the broadest scale, feminist theories focusing on patriarchy as a form of domination locate the causes of domestic violence at the level of whole societies whose institutions and culture reinforce the power of men over women. Although such theories concentrate on violence between male and female intimate partners, they employ models of power within the family that can be extended to other forms of violence, particularly violence committed by older family members against younger ones. Recent research has begun to integrate these levels of causation into “ecological” models that account for the interplay between them.

AFRICAN FAMILY HISTORIES

To understand the changing role played by violence within African families, we must start by looking to the broader history of the family. Historically, in Africa as elsewhere, family structures have shown substantial variability. The normative family structure in contemporary Euro-American culture—a nuclear family made up of a husband, wife, and their children—is actually a relatively recent variant of much more complex configurations of kin and dependents. The pioneering debates in comparative family history centered on changes in family structure as a result of the process of industrialization in Europe and North America. A central question driving this research was the question of when and how the “modern” family emerged.

By contrast, despite a strong interest in social history, family history has not gained much traction among Africanists. There is a paradox here, since Africa was an important site for the development of anthropological theses on kinship. In a world where kinship so deeply shaped social relations, it would seem that evidence about “families” should be readily available. However, very little work resembling what European and American students of the family have achieved has been conducted in Africa. With a few exceptions (white settler
South Africa, Portuguese census and parish records, a handful of Amharic and Arabic family histories or tarikhs, historians of Africa do not have the necessary data to trace subtle patterns of change in fertility and mortality over time, as has been done in Europe and North America.

Even where sources are available, however, Africanists must confront the very notion of the family as the unit of analysis. The family form that lies at the heart of the great debates in family history may not be appropriate to the great variety of family systems that characterize Africa’s past and present. Indeed, recent research by Naomi Todmor suggests that the “nuclear” (or “proto-nuclear”) family as the nominal unit for family history may not be as meaningful as originally thought in Europe. Todmor argues that the eighteenth-century English “family” was a flexible unit, composed of a vast cast of individuals who lived and interacted in a household. Included in this unit might be spouses, children, other relations, servants, apprentices, boarders, and sojourners. Thus, she suggests that the household is the more useful and accurate unit of analysis.

The concept of the household, if used carelessly, can also obscure important dynamics. Jane Guyer has warned social scientists working in Africa against taking the family household as a basic unit of analysis lest this focus elide power struggles within households, whether between older and younger generations or between husbands and wives. Historians of domestic violence must conceptualize the household as a site for negotiations between numerous actors who are tied together by kinship—real or fictive—rather than a cohesive unit.

Some of these dynamics have been highlighted in the work of Jack Goody, whose research in northern Ghana suggested that African families do not fit the European template or even the broader concept of household. Rather, the complexity of African households should be interpreted in terms of the intersecting units of production (those who worked together), of consumption (those who ate together), of reproduction (those who generated descendants together), and of co-residence (those who lived together). Goody’s work permits us to conceptualize the diverse spatial and gender dimensions of African polygynous households, which may have included several wives, each with her own unit of reproduction and residence. In this volume, Cati Coe in particular examines the extended nature of the household in the Gold Coast through the lens of rape cases of debt pawns and adopted kin.

Flexible definitions of domestic units and diachronic approaches have led to the examination of the “family as a process” that “translates the impact of large structural changes to its own sphere.” The idea of the family as a process within the context of changing societies echoes the ecological model of family violence, which seeks to integrate large- and small-scale causes of family violence. It also recalls a paradigmatic debate on social history. We can, following the lead of Charles Tilly, study the household as an institution that changed as a result of the development of the colonial and postcolonial state and the emergence of industrial and global capitalism. Alternatively, as David Cohen advocates, we can examine the household as it translates wider processes of change through its interior architecture, mediating these pressures and interpreting them through categories and processes of adaptation that have emerged over centuries of experimentation. Both approaches to social history share the assumption that households are not static and that all households interact with other institutions and processes of change.

The forces that shaped household dynamics in Africa include the slave trade, conversion to Islam and Christianity, the redefinition of ideas of “custom” and
“tradition” under colonial rule, new colonial legal systems, the end of slavery, male labor migration and the resulting feminization of poverty in rural areas, the emergence of new forms of property and new means of accumulation in the colonial and postcolonial economies, urbanization, and the HIV/AIDS pandemic. Space does not permit more than a cursory discussion of the impact of these forces, but family history in Africa must be attentive to them and to their persistent legacies. The slave trade deepened the commoditization of rights in persons. The tendency to retain female slaves in Africa while exporting men consolidated ideologies of patriarchy. As Europeans scrambled to claim African territories as colonies in the late nineteenth century, they used antislavery rhetoric as part of their civilization missions and set in motion conditions that led to the end of slavery within Africa. In areas where slavery was a widespread institution, the end of slavery ushered in profound changes in household organizations whether or not slaves left their masters. Where slaves remained with or close to their former masters, new ideologies and practices of dependency emerged. Masters whose slaves left them turned to their households to make up for this labor shortage. Those slaves who left their masters needed to establish their own households and often struggled to succeed. The end of slavery was exactly the kind of pressure on households that exacerbated struggles over obligations, reciprocity, and power and resulted in incidences of domestic violence, as Marie Rodet and Emily Burrell and Richard Roberts discuss in their chapters.

In the twentieth century, the rise of industrial capitalism and cash-crop farming led to widespread labor migration by men and major transformations in the households that they left behind. The absence of adult men resulted in increased agricultural labor for women and children, leading some women to increase their reliance on sisters and female friends for survival. The face of rural poverty became increasingly female, and migration also increased women’s vulnerability to diseases such as tuberculosis and HIV that were carried by men returning from work. Large-scale migration toward urban centers accelerated after World War II, leading to the formation of new types of households in urban settings. To cope with the struggles of urban life, many city dwellers adopted bilateral descent systems that allowed them to claim assistance from a wider pool of kin.

Meanwhile, successful urban dwellers often sought to “shrink” kinship relations in order to control new forms of accumulation. Such a shrinkage of kinship obligations was linked to cycles of the domestic group, as urban residents nurtured kinship connections in rural areas in anticipation of their eventual burials or as safety nets for retirement or respite from the chaos of urban life. In her chapter, Codon Bop points to these processes in the creation of the “modern Senegalese family” as the site of domestic violence that occurs in the absence of restraint from wider kinship groups. Data from the WHO 2005 study show that the prevalence of intimate-partner violence is usually higher in rural provinces than in urban centers of the same country. The only African nation in the survey that included both rural and urban sites was Tanzania, where 56 percent of rural women experienced physical or sexual violence by an intimate partner compared to 41.3 percent of urban women. This finding suggests the importance of historical investigation into the processes of urbanization for understanding contemporary patterns of domestic violence.

Set against the backdrop of these broad changes are three nested structural processes that shaped domestic violence during the colonial and postcolonial periods. The first is the insertion of the household into the broader structure of colonial domination. Colonial governments sought to collect revenue from Africans to pay for colonialism. Colonial taxation systems in colonial Africa exhibited a characteristic paradox: as in Europe, the household head was normally responsible for payment, but tax regimes also reflected the desires of colonial administrators to remake individuals and the family. Thus, the characteristic British “hut” tax was intended to discourage polygyny by taxing men on their “extra” wives, while tax policy in the Belgian Congo was designed to bolster the birth rate. In French West Africa, by contrast, the household head owed a simple tax for all adults in his household, reflecting the government’s desire to access labor. All of these taxation systems reified the household as a foundational unit of colonial domination. Taxation added to the financial challenges of the household head, who in turn likely drew on his household labor to help generate the cash or commodities required to pay the tax. In rural South Africa, for example, the burden was borne largely by women who were most vulnerable to the consequence of their male guardian’s failure to pay tax: the loss of land rights. Thus, the effort to make African societies legible at the level of the family encouraged administrators to turn a blind eye to internal family dynamics, including domestic violence. This process is what other scholars of Africa called the colonial project of domestication—that is, the process by which African households were connected to the political economy of colonialism. Domestication was an economic process, but it also contributed to the consolidation of moral authority and the reordering of household relations within the state and among members of the household itself.

Second, men’s efforts during the colonial period to increase their control over the labor of their wives led to conflicts over the separate wealth and income that women controlled. In many parts of sub-Saharan Africa, property systems permitted wives to accumulate wealth that was separate from the general household wealth. In many cases, marriage brought male and female labor systems together for the benefit of the household, but wives retained some portion
of their time after completing domestic and agricultural chores to devote to their own enterprises.\(^9\) Income derived from these enterprises provided women with some autonomy within marriage and could be used for women's strategies to promote their own or their children's well-being. The financial demands of the colonial period, however, motivated household heads to exert increased control over women's wealth and to prevent women from using their labor independently from the household.\(^{36}\) Such actions fall under the expanded definitions of domestic violence that scholars have recognized in recent years.

Finally, in much of Africa marriage was and is legitimated through bridewealth. Bridewealth—the third of these nested processes—was a strategic investment that built and maintained webs of kinship and organized and controlled labor. Bridewealth often involved the transfer over a number of years of goods (grain, livestock, and cash) and services (weaving, herding, and occasional farmwork) from the husband's kin to those of his bride. In return, the husband and his kin group received the rights to the bride's labor power (at least for that portion of the day customarily devoted to household chores and other activities which contributed to the well-being of the household, such as farming, weeding, and spinning), her reproductive power, and her domestic services.\(^{37}\)

Colonial administrators' failure to understand the complex flow of goods and obligations involved in bridewealth transfers was reflected in the legal systems they imposed. As the value of bridewealth increased in many places throughout the subcontinent during the colonial period, some husbands also understood the higher value of bridewealth to confer on them fuller control over their wives' labor and sexuality and enhanced patriarchal authority. At the same time, economic pressures often limited the ability of husbands to pay bridewealth and contributed, particularly in the postcolonial period, to a rise in long-term domestic relationships that did not attain the status of marriage. Domestic violence must be understood in relation to the complex ways in which local processes of change shaped household relationships.

In many ways, the analyses of domestic violence in this volume contribute to a greater understanding of a broader history of the family. Martina Salvante's chapter illustrates the creation of new forms of family life during the Italian colonization of Eritrea, while Emily Burrill, Richard Roberts, and Marie Rodet examine the reconfiguration of households in French Sudan (Mali) after the abolition of slavery there. Studying domestic violence forces us to examine the constant renegotiations of power relations within families.

**Defining Domestic Violence:**

**Human Rights and the Problem of Culture**

Efforts to combat domestic violence within Africa have been plagued by accusations that it is a Western concept without relevance to African cultures. There is a certain truth to this charge. The emergence of an international feminist movement, with the resulting campaigns against domestic violence, has shaped much of the work done to combat domestic violence in Africa. However, this work also has local roots. One of the contributions of this volume is to demonstrate the complicated past of the cultural categories that people have used to make sense of domestic violence in Africa.

In the West, the identification of domestic violence as a problem has its origins in the child protection movement in industrializing countries during the middle of the nineteenth century, itself a result of the novel identification of childhood as a distinctive phase of human life.\(^{38}\) Protection of children from cruelty became, in turn, a means of opening up the household to public scrutiny. This scrutiny also revealed other forms of family violence, including wife beating.

In the United States in the twentieth century, the problem of domestic violence became a medical one. The "battered child syndrome" was first used in the public health literature in the early 1960s.\(^{39}\) By 1976, every state in the United States mandated reporting of evidence relating to the battered child syndrome. In the 1970s, the "battered wife syndrome" became a central element of the women's movement and shifted the problem of domestic violence out of the hands of the medical and social services and into the judicial sphere, as courts recognized a history of violent abuse as a defense in cases where women killed their abusive husbands.\(^{40}\) Along with the medicalization of domestic violence came new legislation. By the early 1990s, major industrial countries had enacted new legislation criminalizing violence against women.\(^{41}\)

These developments in the industrialized world intersected with the internationalizing human rights movement, giving rise to an international women's rights movement that played an important role in the mobilization of international actors and states to enact legislation protecting women against discrimination and against violence as basic human rights.\(^{42}\) The concept of human rights emerged primarily out of Western political theories of the rights of the individual to autonomy and freedom. The concept gained legal status in the international legal system that emerged after World War II. The United Nations Charter (1945) and the Universal Declaration of Human Rights (1948) codified a normative system of rights that adhere to people precisely because they are human.\(^{43}\) From the beginning, the conception of human rights articulated in this international system included gender equality. Campaigns by gender activists have made this commitment explicit, resulting in the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child followed in 1989.\(^{44}\) Both conventions explicitly identify violence against women or children as a violation of their rights.
The strategies of the international women's movement have influenced struggles against domestic violence in Africa. However, human rights discourse has not been seamlessly translated into national or local legal arenas. Scholars have identified this as a problem of scale, in which different discourses and practices prevail at different levels.45 As Sally Engle Merry recently argued, international discourses do not neatly fit into vernacular discourses about justice, dignity, and emancipation. Merry has emphasized the role of the "translator" in bridging this gap. She writes that "translators refashion global rights agendas for local contexts and reframe local grievances in terms of global human rights principles and activities." Indeed, domestic violence programs that merge human rights discourse with local idioms have emerged in numerous African societies. However, states can resist global human rights discourses and regimes by arguing that such ideas are opposed to local culture and values.46 Benedetta Faedi (in this volume) details the recourse to such cultural arguments in the exceptions that numerous African countries have to their ratification of CEDAW where its provisions conflict with local understandings of religious or customary law. As Faedi describes, states bowed to significant pressure to ratify international human rights conventions but sought ways to avoid implementing them. In place of what may be termed blunt international instruments of human rights, Faedi calls instead for empowering regionally based human rights commissions and courts as a way of resolving the tensions with what states invoke as "local culture" to delay implementation.

Few students of culture today would invoke Edward B. Tyler's classic late nineteenth-century definition of culture as "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."48 Tyler's description of culture as a bounded entity, shared by all members of the community, supported European understandings of Africa as a patchwork of distinct "tribal societies." Most scholars today would agree that culture is better understood as a composite of practices that are contested, changing, connected to relationships of power, and shaped by historical influences. Within popular discourse, however, culture remains a powerful concept that carries a sense of deep tradition and national essence.49 In Africa, such references to culture often involve claims about the continuity of cultural structures from the precolonial to the postcolonial era.

The chapters in this volume contribute to the analysis of the place of culture within both historical and current debates about women's rights and legal protections from violence and discrimination. Unfortunately, none of our contributors deals directly with precolonial Africa. We hope that this volume inspires future research in that vein. However, the work included here highlights the major reconfigurations in family ideology that took place across Africa during the colonial period. Chapters by Burrill and Roberts, Rodet, Elizabeth Thornberry, and Sanvante make clear that ideas about the duties and obligations of different family members changed over time. At stake in these debates was the status of the household head and his rights over his dependents. Far from being stable, during the colonial period these rights were constantly challenged in the face of pressures from women, junior dependents, and from colonial officials whose views of African families also changed, as chapters by Stacey Hynd and Elke Stockreiter describe. These findings do not exclude the possibility of continuities in cultural understandings of the family between the precolonial and postcolonial periods. However, we should be suspicious of appeals to an unchanging culture, in Africa as elsewhere.

In her chapter in this volume, Saida Hodžić analyzes the very different trajectories of efforts to ban female genital cutting and domestic violence in sub-Saharan Africa, both of which emerged out of the international women's movement. Although it might seem likely that efforts to ban FGC would bump up against cultural justifications for the continuation of the practice, Hodžić describes the relatively frictionless process of banning the practice. In contrast, efforts to promote national legislation to prohibit domestic violence failed miserably. Hodžić explores the complex ways in which international human rights discourse was marshaled in sub-Saharan Africa and the place of government-civil society interactions during these two campaigns. Culture was invoked differently in each effort, which lends support to the contention that culture is a malleable element in the debates around women's rights and domestic violence.

Despite being a signatory to all the major international human rights conventions, Senegal is still a site of domestic violence, and reforms instituted by the state actually perpetuate the conditions of such violence. Scott London in this volume explores the ways in which women with complaints of domestic violence are required to attend mandatory reconciliation sessions. London describes how women's complaints go unheeded by male mediators who tend to defer to husbands' explanations of domestic "troubles" and thus reassert the power of patriarchy.

But culture is not invoked randomly in the debates about domestic violence in Africa. Codou Bop, a Senegalese activist, argues in her chapter that culture is repeatedly invoked as the prop for patriarchy and thus lies at the heart of the persistence of domestic violence. The only solution is to change the culture. Bop's conclusion raises questions about the possibility of translating alternative visions of power and authority into local idioms. But how is this to be accomplished?

In a bold argument about efforts to eliminate female genital cutting, Gerry Mackie has proposed mobilizing local pressure groups to change the conventions surrounding marriage so that FGC would no longer be seen as a precondition for proper marriage in sub-Saharan Africa. Mackie makes clear
that the success of such a campaign cannot rest on the actions of individuals or individual families but must be based on communities acting together to change cultural practices. Several African-based NGOs (nongovernmental organizations), such as Engender Health in South Africa and Raising Voices in Uganda, work with men and have pursued a similar strategy in their efforts to combat domestic violence. By using men’s associations—especially age-grade associations—efforts are under way to harness cultural institutions to change cultural practices by creating new collective standards that disapprove of domestic violence.**

**REGULATING DOMESTIC VIOLENCE: LEGAL SYSTEMS AND MORAL ECONOMIES**

The tension between competing conceptions of domestic violence is not, however, present only in human rights discourse and its collision with notions of culture. It is a fundamental feature of the legal arena. All societies have some form of legal pluralism in which multiple systems of normative beliefs and legal practices coexist. In precolonial Africa, various forms of indigenous law existed side by side with shari’a (Islamic law) and, during the era of the slave trade, with forms of European and canon law. Colonialism, however, generated what John Griffiths has termed juristic legal pluralism, which gave formal structure to the interactions between different legal systems. The classic example of colonial legal pluralism was the dual legal system that recognized and separated preexisting “native” law from the received law of the metropole. Colonial legal pluralism can be understood as an encounter between dynamic, local processes of change in indigenous societies that predated colonial conquest and continued after conquest, and dynamic and changing forms of colonization.

Colonial systems implemented dual legal systems for reasons of both practicality and international law. The protectorate, which granted indigenous authorities sovereignty over internal affairs while placing them under the guardianship of an imperial power, was the predominant international legal instrument of late nineteenth-century imperial expansion. This structure also allowed imperial powers to delegate much of the work of governance to indigenous rulers. The protectorate sliced off those characteristics of sovereignty that involved capital crimes and other crimes considered to be threats to public order and singled them out for criminal prosecution, usually in courts run by the European colonial officials. Disputes relating to families and personal status were relegated to a residual category of customary or family law, often controlled by existing native authorities. Thornberry (in this volume) examines the impact of this dual classification on sexual assault cases in South Africa, which often fell into the cracks between these two systems.

MAP 3. Southern and Central Africa

In order to exert some control over the African courts it supervised, the superior imperial power sought to make legible indigenous law. This process has been referred to as the invention of tradition, and it often took the form of collaboration between indigenous authorities (often merely male elders who were thought to be custodians of local knowledge) and colonial officials to generate handbooks of customary law. Indigenous law became customary law through this process and these handbooks served as guides to colonial magistrates in adjudicating cases and appeals brought to their courts. The production of customary law gave significant power to native informants to reshape gender relations and forms of authority. Male household heads used these opportunities
to consolidate their power. Colonial magistrates also shaped customary law according to their perceptions of African societies and African families.38

There were, however, limits on what could be invented. In Muslim communities, where the protectorate model recognized the regime of shari'a, and qadis became employees of colonial states when they served as assessors or judges on native courts, the ability to invent tradition was restricted by the circulation of written legal texts.39 Even in nonliterate communities, however, the precarious hegemony of the colonial regime depended on its ability to manipulate the symbols and institutions of precolonial authority; it could not stray too far from popular consensus on the contents of custom.40 Rather, the invention of tradition gave rise to what Sara Berry calls "an era of intensified contestations over custom, power, and property" within African courts.41 One of the central focuses of these debates was the appropriate level of subservience that wives and other dependents owed to household heads.

The delegated sovereignty of the protectorate also generated policy and legal problems for colonial administrations, especially when custom or shari'a came into conflict with metropolitan and colonial rights. In this volume, Stockreiter discusses such a conflict, over the status of child brides in Zanzibar. Although British colonial legal policy granted shari'a wide autonomy in civil disputes in Zanzibar, a crisis was provoked when an activist colonial official decided that the child marriages condoned by shari'a resembled child rape cases in England and were therefore "repugnant" to civilization. Colonial officials were often deeply ambivalent about customary practices and occasionally intervened based on the repugnancy clauses found in most imperial legal codes. Thus, the British outlawed corporal punishments sanctioned by shari'a, and the French sought to mandate women's consent in marriage.42 These actions contributed to the ongoing debates and struggles over the nature of custom that played out in colonial courts.

Using court cases, Rodet and Salvante (in this volume) describe how the French and Italian colonial states intervened in the domestic sphere if they felt that certain practices were undermining family stability or racial hierarchy. Rodet discusses how colonial policy changed as significant numbers of divorces were granted to women who complained of domestic violence. Worried about the lack of family stability, the colonial administration began to criminalize battered wives who left abusive husbands, sentencing them to prison terms. Salvante discusses how Italian Fascist ideas of racial purity led the colonial state in Italian East Africa to intervene aggressively in long-term domestic relationships between Italian settlers and African women. The police did not concern themselves with short-term sexual encounters across the racial divide but descended aggressively into the homes of Italian settlers if they suspected that stable, affective relationships existed.

However, neither the colonial state nor its male interlocutors managed to fully control the claims about domestic violence that were made in court. Several chapters in this volume demonstrate that women's agency in bringing cases of domestic violence to the courts challenged the practices of patriarchy. Stacey Hynd's chapter explores the challenges the colonial legal system faced when confronted with a wife who killed her violent husband. Rodet uses cases of domestic violence to examine women's efforts to end abusive relationships. Battered women may have escaped from abusive households in these individual cases, but they did not fundamentally challenge the bases of patriarchy and the logic of domestic violence. Burrill and Roberts propose in this volume that marriage and household formation should be seen as a form...
of “moral economy” in which men and women enter into a complex set of interlocking relationships that were shaped in part by prevailing assumptions regarding the acceptable limits of exploitation.67 As Susan Amussen writes about domestic violence in early modern England, “No one denied there was an appropriate place for discipline within the household. The difficulty was ensuring that its use stayed within acceptable limits.”68 When these limits were exceeded, aggrieved individuals brought complaints forward to various forums for dispute resolution, whether informal kinship meetings or formal courts, often invoking this very idea of inappropriate violence. The WHO 2005 study lends support to the “moral economy” concept of the household because it indicates that high percentages of women accept a certain degree of violence in their daily lives. The term “patriarchal bargain” was coined by Deniz Kandiyoti to challenge monolithic notions of patriarchy prevalent in Western feminist thought. Kandiyoti argued, from localized case studies in the Middle East, Africa, and Southeast Asia, that many Muslim women engaged in a bargain with patriarchy as a survival strategy.69 Emily Burrill’s study of domestic murders in Sikasso, Mali, demonstrates that women were actively complicit in the maintenance of patriarchy—including domestic violence—as long as it remained within certain limits.64 The limits recognized by women in Sikasso and elsewhere were not necessarily the same as those recognized by men, much less colonial administrators; all of these groups did engage each other in an ongoing debate over the appropriate exercise of violence within the family.

AFRICAN VOICES IN THE COURTROOM

The authors in this volume rely heavily on court records as a source of evidence. Using court records to uncover domestic violence raises important epistemological questions. In her chapter, Hynd asks how students of domestic violence can use court records in the colonial past when the very concept of domestic violence was not yet invented and neither courts nor litigants used the term. However, many of the chapters in this volume—including Hynd’s own—demonstrate the crucial importance of conceptions of family to both the practice and adjudication of certain forms of violence. In a variety of times and places, moral economies of violence permitted men to use violence against their wives, parents against their children, or household heads against their many dependents.

In seeking to reconstruct these moral economies, court records provide an invaluable resource. They reveal the importance of ideologies of family to kinds of violence that do not fit easily into definitions of domestic violence derived from international experience. Katherine Luongo peels away the layers of a witchcraft case to discover that sexual violence lay at its source. Luongo argues that Africans often understood and explained domestic violence through frameworks such as witchcraft. In her chapter, Thornberry describes the importance of ideas about family to the distinction between customary and criminal law in colonial South Africa. The testimony in these cases allows her to reconstruct understandings of sexual violence held by women and their families, which contradicted the understandings of colonial officials.

Court case provides, as Koni Benson and Joyce Chadya have recently argued in their study of rape in colonial Bulawayo, a “rare opportunity to hear women speaking about their lived experiences.”70 Sally Engle Merry’s study of law and colonialism in Hawaii’s notes that court records provide an opportunity “to glimpse the tensions and conflicts of everyday life, to hear the stories of ordinary people who were not otherwise producing archival texts, and to understand the complex role of legal institutions” in the colonization of the islands.68 Used carefully, court records can even provide some hints at the prevalence of domestic violence. The 1989 UN report stated that police reports “present only the tip of the iceberg” of the prevalence of domestic violence, and suggested that the level of domestic violence might be better estimated using records of divorce cases, especially in industrialized countries where violence in the family is often presented as ground for divorce.69

Court records also reveal the role played by legal processes in disrupting or reinforcing patterns of domestic violence. Susan Hirsch has applied linguistic and discourse analysis to Swahili women’s disputes brought before the qadi’s courts in Mombassa. Hirsch uses both records from the court and her own observations of disputes. By bringing disputes before the qadi’s court, Swahili women both negotiated marital disputes and refashioned gender in the process. In narrating their troubles before the qadi, women confronted and reimagined Swahili gender norms that demand silence and subordination. Qadi’s courts thus became “sites of resistance” not only because women challenged gendered norms but also because the judgments tended to favor women.70 In Senegal, however, Scott London demonstrates in his chapter in this volume that, far from being empowered by their complaints of domestic violence, women found that court-mandated mediation sessions turned their complaints into criticisms regarding their lack of obedience to their husbands.

Using court records to write about domestic violence is, however, not straightforward. Records of domestic violence are often scattered among the various court systems. Such cases may have appeared before criminal courts in trials for rape, murder, or assault caused by violence in the domestic sphere (see chapters by Coe, Hynd, Luongo, and Thornberry) as well as before courts charged with dealing with civil disputes, such as divorce or child custody, where domestic violence in some form was invoked by the disputants (see chapters by Burrill and Roberts, London, Rodet, and Stocktrete).
Even when relevant cases are located, court records have limitations. They are not necessarily representative of the society that produced them; courts in communities with high levels of domestic violence might hear few cases about it, precisely because domestic violence is not considered a crime worthy of prosecution. The grievances we hear have been altered by the process of transforming the dispute into a legal wrong, by court procedures, by translating the testimony from local languages into colonial ones, and by the act of committing the claims to writing. Students working with court records must also be mindful of the fact that the law changes. Procedures change; appeals exert backward pressure on legal practices; new legal categories and concepts are introduced.

Nor were these changes always intentional; there were always unintended consequences to the impositions of new legal regimes. The French created exactly such conditions when they realized that the 1903 colonial legal system that provided opportunities to African women to seek divorce from their husbands actually created what they called "family instability." Here was a case where the French drew on recent metropolitan legal changes that permitted women to sue for divorce and imposed their sense of rights into a colonial situation. Rodet in this volume discusses how the colonial administration of French Soudan sought to control the new rights given to wives (to seek divorce and to give consent in marriage) by punishing them for abandoning their conjugal homes. It is this mutual reconfiguring of legal and cultural definitions that makes the colonial period so important for understanding the history of domestic violence in Africa, as well as the challenges faced by those who are grappling with the problem today.

Amina Mama, a Nigerian feminist scholar, argues that activists and scholars concerned with domestic violence in Africa must look to the colonial period to understand the meaning and quality of African domestic violence in the present. She argues that colonial states sought to separate women and men into distinct Eurocentric gender categories whereby women were relegated to so-called private spaces and restricted from movement and migration, while men were encouraged to work outside the home and engage with state tools in public (albeit highly monitored) ways. Such processes of separation created a new domestic space for intimate violence. The chapters that follow support Mama's characterization of the colonial period and flesh out the nature of colonial contributions to the perpetuation of domestic violence. Despite occasional gestures toward liberal reform, the legal structures of colonial Africa tended to condone domestic violence, particularly violence perpetrated by husbands against their wives but also violence against children and older women. The state prioritized stability over the protection of vulnerable groups and relegated questions involving the family to the arena of custom.

Because of the colonial and postcolonial state's role in defining domestic space, Mama argues that the state cannot be the mechanism for change. Rather, grassroots, non-state-based solutions to violence in postcolonial African contexts have the most potential for combating household-based gender violence. However, Mama also notes a handful of promising state-funded projects especially in Uganda and Tanzania. In these cases, vocal elected officials, particularly female elected officials, and successful media and informational programming backed by state funding, provide hopeful models of state participation in anti-domestic violence reform. These successes are linked to the fact that they emerged from localized knowledge production (a version of Merry's vernacularization), but they are also supported by international movements and organizations. The chapters in the third section of this volume, which focus on the contemporary period, analyze the successes and limitations of current approaches to domestic violence in several African countries. They demonstrate the lingering effects of the debates initiated during the colonial era.

It is the importance of these lasting repercussions that makes the conversation among historians, anthropologists, activists, and legal scholars over domestic violence in Africa initiated in this volume necessary. Interdisciplinary dialogue helps us understand the changing patterns of domestic violence over time, fleshing out the models of social scientists and explaining how changes in family structure and in broadly shared understandings of people's duties and obligations within the family have shaped patterns of violence within the family. The contributors to this volume remind us that because acts of domestic violence are ultimately about power and linked to larger sociocultural values, scholars should look more closely at the links between violence in the household, social and economic strife, and challenges to local political authorities and disputes over state power. All of the contributors to this volume provide models for this interconnected research agenda through the use of legal records, court testimony, and debates about legislation, and thus provide inroads to new understandings of African domesticity, the family, and law during the colonial and postcolonial periods.

The history of domestic violence also provides a window onto the ways in which Africans interpreted the major social changes of the nineteenth and twentieth centuries. Members of households who violently subjugated other household members did so within the intimate space of family relationships, but these acts were part of larger sociocultural connections. Court records and legal documents reveal that quite often, domestic violence took place under conditions of increasing shortages of material, political, and social resources.
associated with the shifting terrain of colonial rule and globalization. By contrast, victims of domestic violence sought out courts because they provided new avenues for confronting these shifting patterns of power consolidation. The history of domestic violence reveals the intimate, embodied experiences of power. Those chapters that examine the contemporary situation are also keenly aware of the challenges facing those who wish to implement greater protections for women within households.

The contributions to this volume reveal that, while the prevalence of domestic violence has changed over time, the problem of domestic violence has changed even more. It has been redefined as a problem for states, a problem for communities, a problem for families, and a problem for human rights activists. All of these definitions remain contested, and efforts to end domestic violence are, in no small part, efforts to control the definition of the problem. Regardless of how we define the problem, violence within the domestic sphere continues to take its toll on women, children, men, and society as a whole.

NOTES

This introduction grows out of an engagement with our contributors, colleagues, the anonymous readers of our manuscript, and the editors of the New Histories of Africa series at Ohio University Press. In particular, we want to thank Babacar Fall, Sarah Roberts, and Helen Stacy.


9. These included the Mens Weste (from the journal Annales d’histoire economique et sociale) approaches to the past and cliometrics in the form of demographic studies using large samples.


30. World Health Organization Multi-country Study on Women’s Health and Domestic Violence against Women: Initial Results on Relevance, Health Outcomes and Women’s Responses (2005), available online: http://www.who.int/gender/violence/who_multicountry_study/en/ table_4.1 p. 28. Ethiopia had only a rural site, where 71 percent of the women ever experienced violence, and Namibia had only an urban site, where 36 percent of the women ever experienced violence. The higher incidence of rural violence appeared also in Bangladesh, Brazil, Peru, and Thailand.


43. There is a prehistory to human rights on the international scene, starting with the effort to abolish the slave trade, the Haitian revolution that borrowed foundational concepts from the French Revolution, and the effort to abolish slavery. See also the framing of international human rights even for colonial populations in articles 22–24 in the Covenant of the League of Nations (1919). See Lynn Hunt, Inventing Human Rights (New York: Norton, 2007).

44. Both conventions were preceded by UN declarations: the Declaration on the Elimination of Discrimination against Women in 1967 and the Declaration on the Rights of the Child in 1959. Unlike the conventions, the declarations were not ratified by individual countries and therefore had only persuasive power.


49. Merry, Human Rights and Gender Violence, 12–16.

50. See the discussion of customary law, below, for more on this issue.


52. We are reminded of the successful campaigns against foot-binding in late nineteenth-century China. Like female genital cutting in some areas sub-Saharan Africa, foot-binding was in parts of China a requirement for respectable marriage. No individual could give up the practice without risking her marriage prospects. Foot-binding began to end after hundreds of years when “pledge societies” emerged in the last part of the nineteenth century that made collective and public pledges to renounce the practice. Pledge societies spread together with public education programs that explained that the rest of the world did not practice foot-binding and that there were significant health and economic advantages to ending the practice. By 1911, when China enacted a legal prohibition against foot-binding, the practice was already discredited by these communal pledges. See Dorothy Ko, Cinderella’s Sister: A Revisiting History of Footbinding (Berkeley: University of California Press, 2005).


58. Chanock, Law, Custom, and Social Order; Roberts, Litigants and Households.


68. Merry, Colonizing Hawai‘i, 9.

69. UN, Violence against Women in the Family, 17–19.


73. See Roberts, Litigants and Households, chap. 4.


75. Ibid., 60.

76. See also Lynn Thomas, Politics of the Womb: Women, Reproduction, and the State in Kenya (Berkeley: University of California Press, 2003), and Dorothy Hodgson and Sheryl McCurdy, eds., "Wicked" Women and the Reconfiguration of Gender in Africa (Portsmouth, NH: Heinemann, 2002) for their discussions of the connections between gender relations at home and larger sociopolitical dynamics.
TESTIMONY AND NARRATIVES of violence feature prominently in the second part of this volume. The stories that emerge from these sources demonstrate that across the diversity of colonial experiences, European rule in Africa tended to increase the vulnerability of women and children to domestic violence. Even in places where the colonial administration made attempts to raise the status of women, the imperative of maintaining order quickly trumped concerns for women's welfare. Thus, Elke Stockkreiter finds that in colonial Zanzibar, a lone official's crusade against child marriages was suppressed by an administration more concerned with political stability. In many places, colonial regimes systematically tried to procure the cooperation of male elders by reinforcing their power over women and younger men. Colonial officials also brought European models of patriarchal control to their administrative practices. In colonial Kenya and Malawi, Stacey Hynd finds that colonial officials regularly commuted sentences for men convicted of murdering their wives, and Elizabeth Thornberry's research in South Africa reveals the reluctance of British administrators to believe women's accusations of rape. In South Africa, dissatisfaction with colonial responses to sexual assault led Africans to maintain parallel judicial systems that avoided the colonial state entirely. Katherine Luongo shows the ways in which victims of epistemological and intimate violence, manifested in witchcraft, narrated their suffering within cases of physical violence that the Kenyan colonial state recognized as actionable.

5  Sex, Violence, and Family in South Africa's Eastern Cape

ELIZABETH THORNBERRY

IN OCTOBER 1893, a Xhosa-speaking woman named Nondaba described to the resident magistrate of King William's Town the following experience:

I was sleeping in our hut with my mother, Nosenti, Noponi, and Nossiyi, and I was awake late in the night or towards the morning by someone having connection [intercourse] with me. I was lying on my side and the person was behind me. I could feel when I awoke that he had penetrated me. I jumped up and caught hold of him, and then I screamed out and my mother came and shut the door of the hut. The other women were aroused; we threw up the fire and found the person Christmas. We kept him there till the next morning when we handed him over to the police. I was examined next morning by a board of matrons. . . . I was a virgin up to that night.1

In the nineteenth-century Eastern Cape, Nondaba's experience was not unusual. In King William's Town district alone, thirty-eight cases with a similar pattern of facts—a woman complaining of sexual assault while sleeping, often in the presence of several witnesses—appeared before the magistrate between 1847 and 1902. In Xhosa, such assaults were labeled ukuzuma, and defined to a 1950s ethnographer as to "have sexual relations with a woman while asleep," with the further explanation that someone who commits ukuzuma "is despised . . . his punishment is that he should be thrashed when caught."2 The colonial court system, however, was more lenient. Christmas, the man Nondaba accused of raping her, was found not guilty at his trial.

These cases do not fit contemporary definitions of "domestic violence," including that employed in this volume. The parties involved were not family.
members, or husband and wife. In most cases, they had no prior intimate relationship—while a few of the assailants claimed to be the lovers or “sweethearts” of the women they assaulted, most did not. Nor were these cases recognized as domestic violence by the men and women of the nineteenth century who dealt with them. Although the term “domestic violence” had not come into common usage yet, British colonial administrators recognized categories such as “wife-beating,” while African men and women understood certain kinds of violence within the family as operating according to different rules than extramarital violence.

However, the adjudication of ukuzumza cases reveals that ideas about the separation between public and domestic spheres influenced a much broader range of cases than those which are normally understood as domestic violence. I argue in this chapter that an analysis of ukuzumza cases—and, particularly, of the reluctance of the British administration to convict the men who committed these offenses—illuminates the broader history of domestic violence. These cases crossed the boundaries between customary and criminal law that the colonial administration was trying to create; they brought “domestic” issues of sexuality and family relationships into the sphere of the criminal court system. An analysis of their adjudication therefore reveals the British colonial system’s commitment to maintaining a separation between these spheres, and the consequences of that commitment for their ability to comprehend and apply Xhosa custom in colonial courts.

Definitions of domestic violence in both the nineteenth century and the contemporary period center on an idea of the family as part of the “private” sphere, defined in opposition to such “public” institutions as the state, the workplace, and even religious institutions. Feminist critiques of domestic violence in recent Western history argue that this division between the private family and public institutions has insulated violence within the family from state intervention. However, historians have described institutions of the family as operating in very different ways in many African contexts. Slavery in Africa has famously been understood as operating through the language of kinship, while other studies have emphasized the importance of ideas of relatedness to religious identity and trade networks.

In Southern Africa, including Xhosaland, family ties were a fundamental idiom of political culture. Writing in 1934, the Xhosa intellectual J. H. Soga described the “tribe” as “an aggregation of clan units, as the latter is of family units, all descended from one progenitor.” In precolonial Xhosaland, precisely because of the centrality of concepts of relatedness to political and social life, the term family could cover a wide range of relationships. Relatives could be people of the same clan, with whom intermarriage was forbidden even if the exact genealogical connection was unknown. They could be members of the same patrilineal household; they might include a man’s younger brothers and their descendents as well as his own wives, unmarried daughters, sons, and sons’ wives and children. Within that household, however, uterine families—one mother and her children within a polygynous family—might feel particularly strong affective bonds, and form alliances in family disputes. For women marriage entailed entry into a new lineage. Wives experienced their marital household very differently from their natal household, owing great deference to their parents-in-law and avoiding spaces (such as the cattle kraal) to which daughters of the family were allowed access. Well into maturity, a woman might turn to her natal family for support in disputes with her husband, or her husband’s family.

Meanwhile, British colonial officials brought with them their own emergent idea of the private sphere of the family, in which the normative family involved a man and women united in monogamous marriage as well as their children. Inculcation of this model of family relations was one of the major concerns of British missionaries working in the area, from whose families many early colonial officials emerged. African converts, numerous in nineteenth-century Xhosaland, integrated these different models of the family in a variety of ways, with some renouncing polygyny and embracing a version of British domesticity and others formulating new defenses of polygyny.

This proliferation of models of the family posed a problem for the British colonial administration. Colonial officials struggled to create a recognizable judicial structure with which to govern Xhosaland. The structure that emerged depended—as I argue below—on a separation between criminal law and civil law in which civil law became the repository for Xhosa custom. This separation, in turn, was determined in large part by an ideology that saw family relations as fundamentally outside the purview of state control.

The men in several ukuzumza cases explained their actions with reference to marriage. Of all the articulations of family in nineteenth-century Xhosaland, marriage was one of the most recognizable to British eyes. Colonial courts systematically recognized the claims of women’s assailants to some kind of domestic status, defining these cases as lovers’ quarrels that ought to be left to African families to resolve according to African “custom.” These cases reveal the creation of legal categories that marked off violence within the family as different from other, more public, forms of violence. The ambiguous nature of these cases entangled British officials, African women and their families, and the African men accused of assault in an ongoing argument over what kinds of violence were worthy of state attention.

This issue is an important one for African history. As discussed elsewhere in this volume, contemporary legal and political discourses on domestic violence often emphasize the foreignness of the category to African conceptions of family

Elizabeth Thornberry

Sex, Violence, and Family in South Africa’s Eastern Cape
VIOLENT ACTS

Domestic violence in its more obvious forms did appear in the colonial court system on a regular basis. Incidents of domestic violence—including that directed by men at wives, but also violence between siblings, against children, or against aging parents (usually women)—were prosecuted in criminal courts. In 1884, Nhlanzane was fined forty shillings for “beating and otherwise ill-treating his wife.” Assault cases constituted a substantial part of magistrates’ caseloads. Prosecutions for crimes such as imputing witchcraft, arson, and even theft also contain evidence of domestic violence. The most detailed evidence can be found in cases of murder. When Booy Swart was convicted of murdering his wife in 1861, the investigation revealed a lengthy history of abuse.

As in colonial Mali and Zanzibar, domestic violence also came to judicial notice during divorce proceedings (see chapters by Rodet, Stockteiter, Burrill and Roberts in this volume). Divorces in customary marriages were handled according to British interpretations of customary law. The interpretation of customary law that prevailed in British Kaffraria, the administrative district that included King William’s Town, recognized domestic violence as a legitimate reason for divorce. John Maclean’s Compendium of Kafir Laws and Customs informed its readers that “if a woman absolutely refuses to live with her husband, on account of ill-usage...the only remedy he has is to demand that the dowry be refunded to him; but the law will not support him even in this, if she has borne him a family of children.” Sigidi, a wealthy older man, similarly explained to a government commission on Xhosa law that “if the husband is entirely in the wrong, and his conduct forces her to leave him...then the cattle need not be returned to the husband, or only in part, where there are children.” If the woman was childless, bridewealth might have to be returned, but women could use evidence of abuse as leverage against their own parents. Such evidence could persuade magistrates to order the marriage dissolved and the bridewealth refunded despite the reluctance of the wife’s family.

As a result, the archives are relatively rich in evidence about the prosecution of domestic violence in the colonial Eastern Cape. A brief survey of cases from King William’s Town reveals a colonial administration relatively unconcerned about violence directed by men against their wives and other dependents. Allegations of abuse raised in divorce cases almost never resulted in a criminal investigation; they did not always even result in divorce. Magistrates dealt with most criminal cases of domestic violence using their summary jurisdiction, typically giving sentences of a month’s imprisonment or less. There is substantial room for future research on this subject. This chapter, however, focuses on cases that involved violence on the margins of family structure—incidents of ukuzumza, in which women were sexually assaulted within their homes. These cases forced British officials and African families into debates over the appropriate roles of family and state in regulating violence. They illustrate the effects of the colonial courts’ tendency to separate customary law and criminal law—and to define the difference in a way that excluded certain violent acts from criminal prosecution precisely because they were seen as too domestic.

Nondaba’s case, quoted at the beginning of this chapter, was far from unique. It was one of thirty-eight ukuzumza cases that found their way into the colonial court system between 1856 and 1902—almost a third of the total number of cases of rape and attempted rape. In 1888, Martha Sizimile told the court that she was “sleeping in the same hut [as] my sister Lydia, my grandmother Mabula, my brothers Samuel, Elijah, Mark, and Isaac, and Gijana, the prisoner,” when she awoke to find Gijana having sex with her. Unsurprisingly, when she woke up and screamed, Gijana was quickly apprehended.

Very few of these thirty-eight cases resulted in convictions. Only ten (26 percent) even went to trial. The result was dismissed by the solicitor general or remitted to the resident magistrate on lesser charges. African women routinely faced skepticism about their lack of consent in cases of sexual assault. Testifying before the Cape Colony’s 1885 Commission on Native Law and Custom, Frank Streetfield, a resident magistrate in the Transkei, told the Commission on Native Law and Custom that “I do not give lashes for rape, or what is called rape by natives, always. No case of bona fide rape has ever come before me.” Streetfield’s skepticism of women’s claims of rape was typical, although his choice to accommodate them in the court system nonetheless was not. Nor was such skepticism limited to Britain’s colonies. In early nineteenth-century Britain, Anna Clark has estimated that only 17 percent of rape complaints resulted in a guilty verdict at trial. In King William’s Town, only two of six sexual assault cases involving Europeans as both complainants and accused resulted in guilty verdicts. However, in the Eastern Cape, women assaulted at night and in domestic space faced greater skepticism than those assaulted on the road or in another public space. A full 57 percent of the sexual assault cases with African protagonists that fell into the latter categories went to trial—a rate twice as high as for ukuzumza cases. The stories of women like Nondaba simply did not fit with magistrate’s ideas of what criminal sexual assault looked like.
The Roman-Dutch common law governing the Cape Colony defined rape as "unlawful sexual intercourse with a woman without her consent," and incidents of rape were to be prosecuted in criminal courts that had jurisdiction over both African and European inhabitants of the region. However, the colonial judicial system was not the only forum for adjudicating cases of sexual assault. Cases might be settled, and cattle or other goods paid by the man’s family to the woman’s, through informal negotiations or an appeal to authority figures outside the colonial legal system. Although the officially appointed headmen were legally forbidden to settle cases, many did so anyway. Even within the colonial judicial system, there were alternatives to criminal charges for women and their families. Magistrates did a brisk business settling cases in which a man was charged with seduction or adultery—categories that would cover most of the sexual assault cases considered here. The presence of alternative methods for adjudicating sexual assault cases forces us to ask how they were assigned to different legal categories. I argue in this chapter that magistrates regarded these criminal rape cases as, in fact, violations of civil or customary law.

CRIME, TORT, CUSTOM:
DEFINING JURISDICTIONS IN BRITISH KAFFRARIA

King William’s Town lies in the western part of South Africa’s contemporary Eastern Cape Province, an area known in English during the nineteenth century as Kaffraria and then British Kaffraria, and in the twentieth century as the Ciskei. For the Xhosa-speaking inhabitants, it was kwaXhosa or kwaRharhabe, named after two esteemed chiefs of earlier generations. Home to a number of different Xhosa political units, the area was a contested frontier between the Cape Colony and independent chieftoms for the first half of the nineteenth century, and was gradually incorporated into the colony during the second half of the period.

The complex judicial landscape of the nineteenth-century Eastern Cape arose from a fundamental indecision on the part of colonial administrators. On the one hand, their presence in the area was justified largely through the language of "civilization," and the benefits of British civilization included access to British justice. On the other hand, the Eastern Cape frontier remained a politically unstable place. The easiest way to keep the peace was often to interfere as little as possible in the internal affairs of African communities, and to rely instead on chiefs and other preexisting structures of authority. In short, officials in the Eastern Cape were torn between what were later labeled direct and indirect rule. In the legal arena, they had to choose between applying British laws in British courts or continuing to enforce some version of "native law and custom." This was not a struggle in any way unique to the Eastern Cape, or even to British colonialism. However, the conquest of the Eastern Cape forced the issue at a time when British colonial policy was in flux, and theories of indirect rule were still being formulated. The result was a particularly complex legal landscape.

The Cape Colony annexed British Kaffraria in 1866 at the culmination of a long period of political turmoil. Before colonial conquest began in the early part of the century, the area had been inhabited primarily by various Xhosa-speaking polities. Disputes were resolved either directly between families or in courts of male elders presided over by chiefs, who articulated the decision of the court.32 Death sentences and corporeal punishment seem to have been rare, limited to cases of witchcraft and offenses against the chief; more common were fines imposed on offenders, which might be distributed to the family of the victim of a crime, or kept by the chief himself.33 Chieftaincy authority was articulated through genealogy, but depended in large part on political prowess. Commoners disgruntled with a chief’s decision might appeal to a more powerful chief or even choose to switch allegiance entirely.

After an abortive attempt at annexation to the Cape Colony in 1835, British Kaffraria was proclaimed a British colony in 1848 at the end of a major war.34 Civil commissioners were instructed to "rule the British Kafirians through the medium of their chiefs."35 In practice, the area remained under martial law until 1853. In 1855, chiefs were given government salaries in return for giving up personal control over fines paid in their courts. Magistrates were also posted with chiefs "to assist ... in their deliberations and sentences." In the long term, the colonial government hoped that "European laws will, by imperceptible degrees, replace their barbarous customs."36 In 1866, an ordinance extended the laws of the Cape Colony to British Kaffraria; in 1866 it was formally annexed to the Cape.37 From 1860 onward, then, British Kaffraria was officially governed by the Roman-Dutch common law of the Cape.38

Immediately, however, practical problems in implementing Roman-Dutch law became apparent. The most pressing issue was the law of inheritance. Most of the area’s residents were unwilling to marry in civil or religious ceremonies, which would limit husbands to one wife. From the perspective of colonial law, then, almost all Xhosa children were illegitimate and would not inherit. To remedy this situation, the 1864 Native Succession Ordinance recognized marriages according to "Native custom" and provided that the estates of Africans who had been married in this way would also be divided according to customary rules.39

The 1864 act thus gave legal status to African custom within the Eastern Cape’s legal system.30 Although this legal status was technically confined to marriage and inheritance, in practice magistrates in British Kaffraria applied it much more broadly. Magistrates in the Cape Colony presided over
courts with summary jurisdiction in minor criminal and civil cases.\cite{footnote} Faced with African litigants who claimed rights and obligations in the language of custom, magistrates found it necessary to give some recognition to customary law—at least in civil cases. In King William's Town district there were by the 1880s three special magistrates who tried “native cases, cases of ukulobola (bride wealth), and civil cases between the natives” according to their understanding of Xhosa custom.\cite{footnote} As one of them later explained, “I have since my appointment deemed it part of my duty to adjudicate upon all Native Civil Cases brought to the Special Magistrates Court for hearing. They have always been dealt with as informal cases . . . and decided according to native law and custom.”\cite{footnote} According to James Rose Innes, the Undersecretary for Native Affairs and former resident magistrate in King William’s Town, “special magistrates . . . exercised jurisdiction, and to my mind improperly because illegally.”\cite{footnote} I refer to the patchwork of courts that in some way recognized customary law in civil cases as the informal court system, following the language used by magistrates themselves.\cite{footnote}

This recognition of custom in civil cases was tolerated by the administrators who were painfully aware of their own failure to monopolize judicial authority in the area. As the colony continued to extend its reach east beyond the Kei River, the chief magistrate of the newly acquired territories warned that “if natives do not consider the laws framed for their government just and suitable to their condition, there is the fear that they will take their cases to the Chiefs and Headmen, which will be a very serious retrograde move.”\cite{footnote} Indeed, despite the best efforts of the colonial government, many Africans continued to do just that. The archives of the colonial courts are peppered with cases that had previously been decided by a chief or headman. Kama, a powerful chief in the King William’s Town area, spent much of the 1860s negotiating with colonial authorities to allow him some authority to settle civil cases.\cite{footnote} A modus vivendi was eventually reached: whereas in 1862 the magistrate tried to suspend a headman for deciding an adultery case, by the 1880s his successor was hearing bride wealth cases appealed from the court of Kama’s son without objection.\cite{footnote}

However, the state was less willing to tolerate the usurpation of its authority in criminal cases: a headman who heard a case of rape in 1893 was forced to apologize to the court, saying, “I know I am not allowed to try cases. The man was brought to me a prisoner, and yet I tried the case and let him off.”\cite{footnote}

The informal solution that was reached in British Kaffraria was formalized when the Cape Colony annexed the first part of the Transkei in 1877. Courts were authorized to apply “native law” in civil suits between two Africans, while criminal code was a modified version of Roman-Dutch law.\cite{footnote} Not all civil law, then, was customary law. In the Transkei, disputes where at least one party was European were adjudicated according to Roman-Dutch law. This clause protected the property interests of white traders who did business in the Transkei, as well as European employers. In practice, it meant that the bulk of customary law cases dealt either with family law (marriage and divorce, adultery and seduction, and inheritance) or land disputes. In British Kaffraria, the division was even more blatant. Because the customary law system came into being as an ad hoc measure, it covered only litigation that magistrates decided could not be properly handled by European civil law—again, primarily family law cases and small property disputes.

By contrast, although there was a category for civil Roman-Dutch law, there was no category for customary criminal law. Disputes could be adjudicated according to customary or criminal law, but not a combination of the two. Magistrates had to decide whether complaints made to them in the language of custom properly belonged in civil court, in which case customary law could apply, or criminal court, in which case Roman-Dutch law was applicable. However, the division between criminal and civil law was derived from the British common law, not from Xhosa or other African legal traditions. Applying it to customary law fundamentally altered the content of custom. Since the publication of Martin Chanock’s Law, Custom and Social Order, scholars of African legal history have acknowledged the changes necessary to create a relatively stable customary law out of the living tradition of customary practice, although debate continues over the relative contribution of British and African ideas to the end result.\cite{footnote} This debate has mostly taken place over the sets of issues that typically came to be included in customary law: the law of marriage, inheritance, and property. The influence of the process on shaping criminal law has received comparatively little attention. However, the actions taken by magistrates in dealing with these rape cases illustrate how the bifurcation of criminal and civil law and the consequent definition of all customary law as civil could excite certain kinds of violent acts from the purview of criminal law.

The equation of customary and civil law in colonial governance had its roots in British understandings of their own legal system. Chanock himself notes the prevalence in Northern Rhodesia and Nyasaland (present-day Zambia and Malawi) of the idea that, in the words of one administrator, “in Early Law all Crimes are Torts”—as opposed to English law, which recognized the “clear distinction between the civil wrong which is compensated by damages to the individual, and the criminal wrong which is compensated by fine or forced labor extracted by the community.”\cite{footnote} From their earliest attempts to describe Xhosa legal traditions, British administrators in Xhosaland called on the categories of “civil” and “criminal” law. The 1858 publication of John Maclean’s Compendium was the first major attempt to collect and disseminate information about Xhosa “law and custom” in order to aid local administrators.\cite{footnote} One of volume’s contributors explained that:
For convenience, Kafir Laws may perhaps be divided into Criminal and Civil, as with us; but then the cases classed under these two heads will be a very different classification from ours.

Criminal Cases will comprise such only as are prosecuted by the chiefs themselves, and the fines for which are claimed by them as their inalienable right; and which fines are denominated 'ixizi.'

All other cases will come under the head of Civil Cases. These are prosecuted by the plaintiffs, and the fines, if compensation, are always awarded to, and claimed of right by them.64

The division of wrongs into civil and criminal categories was emerging in the nineteenth century as a fundamental category of English common law. In his Commentaries on the Laws of England, William Blackstone described the division as one between private and public wrongs.65 A few decades later Jeremy Bentham reformulated the difference, defining criminal laws as those which the state had singled out for punishment, a framework that shaped theories of the law through the nineteenth century.66 The distinction was increasingly recognized in practice as well. Peter King has found that, in Essex, the proportion of assault cases in which nominal fines were imposed (usually in conjunction with an out-of-court compensation settlement) fell from 83 percent of guilty verdicts in 1748–52 to 22 percent in 1819–21, while the percentage ending in imprisonment rose from 7 percent to 60 percent over the same time period.67

The use of categories imported from European legal philosophy created difficulties for administrators in describing African legal practice. William Browne, a former chief magistrate of the Transkei, who was raised in King William's Town, acknowledged in 1925 that “the distinction between civil and criminal cases as drawn by the natives was not quite the same as drawn by us.”68 Despite this discrepancy, Browne explained that “since our rule has displaced that of the native chief, no chief or headman is permitted to decide any criminal case, these are all dealt with by our courts. In any civil case or dispute, chiefs and headmen are allowed to arbitrate.” The distinction between civil and criminal law was also the dividing line between chiefly and magisterial authority, between “native custom” and British law. In order for the system to work, British administrators had to define these spheres as mutually exclusive.

SEXUAL ASSAULT, MARRIAGE, AND THE FAMILY
Shoemorning Xhosa customary law into British legal categories worked best when the acts in question could be easily identified in those categories. Killing, in other words, could be easily labeled as murder, or perhaps culpable homicide. Disputes about bridewealth could be subsumed under divorce law. To be sure, the process of identification stripped these disputes of their thick meanings and transformed them into technically defined wrongs—such transformations are characteristic of all legal systems.69 Some disputes, however, proved much harder to categorize. Witchcraft, for example, had no place in Roman-Dutch criminal law, but Africans seemed to recognize it as criminal, sometimes executing suspected witches. The colonial administration responded by creating new statutory crimes for both the practice of witchcraft and false accusations of witchcraft.

Sexual assault presented another major difficulty for British officials seeking to divide disputes into customary and criminal wrongs. Rape cases confounded administrators who wanted to use demands for compensation (rather than penal punishment or fines that would accrue to the state) as a criterion to distinguish between civil and criminal acts. Many rape victims—in both ukuzuma and other rape cases—demanded compensation. As one woman told the court, “I should not have brought a case against him, but he now denies the whole matter and refuses to pay my husband damages.”70 Such statements were common, if counterproductive. Explaining, as another woman did, that if her assailant “had given the cattle both my husband and myself would have been satisfied. This would have been according to Kafir Custom” did not convince the solicitor general to prosecute her case. Many British officials shared the view that the status of a wrong in Xhosa “law and custom” could be deduced from the punishment exacted from an offender—and that offenses for which compensation was paid to families were not criminal at all. Rather, they fell properly under the rubric of “civil” law and, by extension, African “custom.” In Xhosa land, this conception of criminal law meant that the willingness of magistrates to prosecute sexual assault depended on victims’ families’ willingness to remove themselves and their claims for compensation from the legal arena.

Families who demanded payment of damages for the rape of a daughter or wife were accused of “condon[ing] the crime by offering to take cattle as payment.”71 In order to persuade magistrates to take them seriously, they had to strenuously deny “agreeing that [the accused] should pay for having had connection with my daughter.”72 Testimony that a woman’s husband had demanded payment of a “fine” after her assault was enough to convince the solicitor general that there was “no evidence of a rape being committed upon the prosecutrix.”73 In the eyes of British colonial officials, the desire for compensation was incompatible with recognition of the crime of rape. Their fixation on evidence of compensation, moreover, located this categorization in African rather than British legal categories. Magistrates did not argue that Africans were responding inappropriately to acts of rape. Instead, they interpreted
demands for compensation as evidence that rape had not occurred. If any offense had been committed, it was a customary (civil) rather than a criminal one. Indeed, cases that involved forcible sex were tried in the informal customary court system. In one such case, Songo sued Nongqala for "having assaulted his [Songo's] wife and had [sic] forcible connection with her." Songo received "two head of cattle or 15 pounds."54 Unlike criminal fines, the money was paid to Songo himself and not to the government. In hearing rape charges as civil cases (a clear distinction in the record-keeping systems, if not always in practice), magistrates made space in the law for families who wished to seek restitution in cases of sexual assault—but they did so by defining them out of the criminal court system.

Ukuzumza cases were troubling for other reasons as well. British officials simply did not accept that women in these cases had not consented. In 1875, for example, Botshani was fined five pounds in civil court after Nante brought a charge of rape against him. The magistrate's verdict recorded that it was "proved that Botshani entered the hut of Nante and lodged therewith during the night. If anything occurred it must have been partly allowed by the women. I have much doubt if Botshani can take place when there are two grown up girls in the same hut."55 This case was actually heard in the informal civil court system, probably because Nante's family had demanded compensation. Although recorded as a civil charge of rape, this case had been effectively downgraded to one of adultery; five pounds was a typical fine for cases of adultery and seduction. The solicitor general remarked in one case prosecuted in criminal court that the victim's "story as to the rape is an extremely improbable one" and described another as a "very peculiar case."56 British administrators expected rape victims' bodies to bear the signs of violent struggle, and repeatedly questioned why the victims in ukuzumza cases had not struggled more. While Xhosa men and women took for granted that men might succeed in sneaking in to have sex with an unconsenting woman while she was asleep—and that they deserved to be punished for it—British administrators found the whole idea implausible.

In order to understand such cases, British officials examined the statements of both victims and assailants for explanations other than violent sexual assault. Although most men accused in these sexual assault cases declined to make any statement, a few explained their actions either directly to the court or to others who reported their explanations. Their statements returned again and again to the theme of marriage. In doing so, they located their acts in a particular kind of kin relation, positioning themselves as potential sons-in-law to women's fathers. Kupiso, whose confession resulted in one of the four guilty verdicts, told the court, "I wanted to steal Nontzoone and make her my wife.... I woke her up for the purpose of asking her to be my wife." When she refused and began to call for her father, Kupiso "threw her down and ravished her."57 Nomuggwala also alluded to the connection between marriage and sex when she told the court that her attacker "had every day called me his wife, but I thought he was only joking."58 The testimony in another case also linked the assault to marriage; Katazwa's erstwhile sweetheart raped her after her father warned him to stay away and arranged her marriage to another, much older, man.59 Mary's assailant claimed (and she denied) that "I proposed to Mary and she accepted me," seeking to explain his presence in her family's home as a part of courtship behavior.60 Xam Nkokhla, accused of the rape of a fourteen-year-old girl, reportedly approached her first and "said I want to make you my wife."61 All of these men framed their assaults in terms of marriage rather than sex.

Women and their families also equated marriage and sex. Jesse Swaartland, assaulted in her own hut at night, testified that she woke up and "asked [her assailant] if I was his wife."62 Nor was such rhetoric limited to sexual assaults within the home. Nosamunti, assaulted on a footpath, used the same language, also telling the court that she "asked [her assailant] if I was his wife."63 This man later defended his actions by saying that he "did not know she was a married woman—I thought she was a girl."

These statements should not be taken to indicate approval of the sexual assault of unmarried girls; after all, the men in all of these cases ended up in court. Rather, they suggest that Xhosa men and women perceived a fundamental link between sex and marriage. They objected to sexual assault in part because it was sex outside of marriage—a wrong in and of itself. Litigation over adultery and the seduction of unmarried women formed a substantial portion of the caseload in the civil court system.64 Indeed, after bridewealth cases, seduction and adultery cases were the most important reasons that magistrates were forced to recognize customary law in their attempts to satisfy Africans' demands for a properly functioning justice system. While seduction and adultery were both torts in Roman-Dutch common law, they had largely fallen into disuse, and the standards of evidence were difficult to meet. Most obviously, suing for adultery under the common law required proof of civil or Christian marriage. Veldman, a prominent headman living in the Transkei, responded when asked about the defects of colonial law with the complaint that "there is no law providing for the seduction of girls in the colony, and it is equally so with married women.... There is no law punishing adultery. A man's wife may return to her friends, and in the colony he cannot get his dowry back."

Older African men, at least, were heavily invested in asserting their control over female sexuality through litigation over seduction and adultery.65 Marriage itself, however, was a circumstance in which at least some residents of the Eastern Cape sanctioned coercion, and even violence. Ngqabin, a Xhosa man, told the 1883 Commission on Native Law and Custom that a woman "is not consulted" before her marriage:

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She is called to the kraal where the men are assembled, and they say to her, "you must smear yourself with red clay to-day, we are going to send you to so-and-so," meaning her intended husband. She then gets herself ready and the bridal party leaves accordingly. Even if the girl says she does not wish to go with the man mentioned, she will be compelled to do so. If she goes to the chief, she would be ordered to obey her parents.

Ngqaba was a relatively wealthy man, with an interest in convincing the colonial government of his rights over his children. He acknowledged under questioning that "sometimes, when she is very obstinate, they send the man's cattle back again" to dissolve the marriage. William Shaw Kama, a well-known chief and Methodist preacher, testified that whereas "according to the old custom, if a girl refused to go where her father wished her, she was beaten," things had changed: "When a girl refuses a marriage because she doesn't like the man who wished to marry her, her will now-a-days carries the point." The necessity of women's consent for marriage was hotly debated in nineteenth-century Xhosaland.

British officials took from such statements the idea—only partially correct, as the caveats of Afrikaner men themselves reveal—that forced marriages were part of Xhosa custom. They also understood adultery and seduction as wrongs against a girl's family rather than against herself—and in this case, they agreed with the bulk of Xhosa public opinion. In seeking to understand ukuzuma cases, then, they turned to the concepts of seduction, adultery, and even marriage. All of these legal categories fell under customary civil law rather than Roman-Dutch criminal law.

The categorization of ukuzuma rape cases was, theoretically, based on an understanding of Xhosa customary law. However, Xhosa women and their families did not share the need to delineate precisely between civil and criminal offenses. They objected to ukuzuma because it was sex outside marriage, and because it was nonconsensual. While Xhosa fathers, in particular, might support coercion in the context of marriage, they were nonetheless indignant about coerced sex outside of marriage. The testimony of Bobani, a sixty-seven-year-old man interviewed in the 1950s, is worth quoting at length:

A person who zuma (have sexual relations with women who are asleep) is always having a difficult time because women are always talking about him... All the people of the location are always talking about his ukuzuma (creeping practices). An izuma [person who commits ukuzuma] has no isimilo [good character] because he is a cruel man... Women dislike an izuma very much. They dislike to have sexual relations with a person who has nothing to do with them (not in love with them). It is like ukuba (stealing)...

An izuma is like a thief as you would hear people saying to him, since you leave so late in the night you want to take away other people's goats...

Among the Xhosa, the izimilo [character traits] that are regarded as utterly bad are ubusela (thieving) and ukuzuma (creeping). An izuma is hated by everybody. People insult others by ubuzuma (being an izuma).

In his explanation—the substance of which is confirmed in other interviews done at the same time—Bobani differentiates ukuzuma from rape committed during the day or by force, but he also distinguishes it sharply from consensual seduction or adultery, such as might occur between a woman and someone who is in love with her. Moreover, he emphasizes the objection of women themselves, rather than their fathers or husbands, to ukuzuma.

In the nineteenth-century cases as well, it is clear that women and their families did not perceive ukuzuma as equivalent to seduction or adultery. They insisted that "I never consented to his having connection with me," or that "I screamed and he got on top of me... I resisted all I could, but he was too strong for me." Many of them desired compensation, and in this the assailants may have been lucky; if not for the British presence, they might have found themselves the recipients of immediate and violent retaliation, which Bobani described as the traditional punishment for ukuzuma: "An izuma... is simply caught by the woman victim and then the other women are aroused by her shouts. They all take pieces of wood and attack him. Men also come and hit the izuma." In any case, the women who brought criminal cases after ukuzuma assaults saw no contradiction between their desire for compensation and their assertion that they had been assaulted against their will. They and their families objected to ukuzuma both because it happened outside of marriage and because it was nonconsensual. However, the British colonial legal system could only recognize one or the other wrong. In interpreting ukuzuma sex as a civil offense, best dealt with through customary law, they forced women to choose between defining the wrong done to them as rape, in which case the British courts were likely to reject their claims entirely, and receiving compensation for the wrong done to them.

The outcomes of the ukuzuma cases discussed in this chapter were the result of two distinct processes. Men who committed these assaults framed them in terms of marriage, either because they actually aspired to marry the women...
involved or because they wished to avoid punishment by mimicking consensual sexual relationships. Magistrates were extremely unlikely to find assailants guilty of rape. They believed that sex had occurred but that it was consensual. Any hint that a family sought compensation confirmed this view, as did references to marriage.

Over the long term, the view prevailed that some kinds of sexual assault—particularly those in which assailants aspired to marriage—were appropriately understood not as criminal but rather as customary civil offenses. The British colonial legal system defined certain kinds of assaults as outside the purview of the criminal justice system because of their association with the family. The opposition of customary and criminal law, and the association of the realm of the family with the former, made it almost impossible to prosecute one of the most common types of sexual assault in a criminal court.

Although ukuzuma cases would not meet common descriptions of domestic violence, their outcome was determined by their association with familial categories: seduction, adultery, and marriage. This bifurcation of the legal system into criminal and customary law, combined with an understanding of customary law as the law appropriate for the domestic sphere, set the stage for claims about the customary status of certain kinds of coerced sex, claims that continue to have consequences in contemporary South Africa. By taking men's claims of wanting to marry women as evidence for women's consent to sex, courts naturalized violence within a broad range of "family" relationships.

NOTES

1. Preliminary Evidence in the Case of Christmas, 10/2/93, SGC 1/1/124, Western Cape Provincial Archives and Records Service, Cape Town (hereafter CA). Dates given in court cases refer to the date of filing creation or reception, as noted in the SGC series, for ease of reference.

2. MS 1889, Archives of the Institute for Social and Economic Research, Cory Library, Grahamstown (hereafter ISER). Although I have not found the word "ukuzuma" used in nineteenth-century documents—probably because the relevant material is almost all in English—I apply it to the material because the definitions given by this informant and others fit nearly perfectly the set of practices that appear in the nineteenth-century sources. The word is distinguished from ukudwengula, which implies rape by violent force.

3. "Sweethart" was the standard nineteenth-century translation of the Xhosa word imetsha, from the verb ukumetsha. See a discussion of ukumetsha relationships later in this chapter.


9. 17 January 1884, v/MDT 1/2/1, CA.

10. Amatole Museum, Record Book of the Supreme Court of British Kaffraria, 25 September 1861.


13. Although this chapter deals with King William's Town district, this statement applies broadly in the Eastern Cape.

14. See v/KWT 1/1/A–324, CA, for criminal cases. Divorce cases appear most commonly in the informal court system described later in this chapter. The divorce cases are scattered throughout the following series: MDS, v/MDT, v/KKH, v/TAM.

15. See SGC 2/1/1–2/1/5, CA. These records mention 164 cases of rape and attempted rape, of which 121 had complete records. Of these, 99 involved Africans as both assailants and victims; the 38 cases thus constitute more than a third of the cases of sexual assault between Africans.


18. Anna Clark, Women's Silence, Men's Violence: Sexual Assault in England, 1770–1845 (New York: Pandora, 1987), 71. Clark's data suggest that roughly 17 percent of complaints might result in both a trial and a guilty verdict. Clark's data are from the early part of the century and are thus not directly comparable, but they do provide the best published case for comparison.


20. The term civil law is used throughout this chapter to refer to the body of law defined in opposition to criminal law, and not to refer to a codified system of law defined in opposition to the common law. This usage is congruent with nineteenth-century British practice.

21. A note on terminology: although the word kaffir, or kafr, became in the twentieth century an extremely denigrating racial insult, it was used in the
nineteenth century as a synonym for Xhosa, including by those Xhosa who spoke English. I have tried not to use the word gratuitously in quoted material, but there is no avoiding its presence in the official name for this region for much of the nineteenth century.


23. J. D. Warner, "Mr. Warner's Notes," in *Compendium of Kafir Laws and Customs*. Warner equated cases in which the chief kept the fines as criminal cases, and all others as civil cases, but this differentiation is suspect.


26. Despatch from Governor Sir George Grey to the Right Hon. Sir William Molesworth (No. 46, High Commissioner), 18 December 1855, Further Papers Relative to the State of the Kaffir Tribes, 6 June 1856, No. 9, BPP.

27. Ordinance 1 of 1856, Crown Colony of British Kaffraria.

28. The Cape Colony was governed by a version of Roman-Dutch law with strong English influences, the result of successive Dutch and British colonial regimes. For a concise history of the sources of Cape law, see Reinhard Zimmerman and Daniel Visser, eds., *Southern Cross: Civil Law and Common Law in South Africa* (Oxford: Clarendon Press, 1996).

29. British Kaffraria No. 10 of 1854, same as Cape Colony No. 18 of 1864. Note that the Cape was not the only part of the empire grappling with this problem at the time. In 1865, the Indian Succession Act made similar provisions for British India.

30. The idea of "custom" already had a precise meaning in British law, where popularly accepted rights and responsibilities (usually in the relationship between landholders and surrounding farming communities) carried legal force. (See E. P. Thompson, * Customs in Common: Studies in Traditional Popular Culture* [New York: New Press, 1993].) For a nineteenth-century British perspective on the role of custom in law, see J. H. Balfour Browne, *The Law of Usages and Customs: A Practical Law Text* (London: Stephen & Haynes, 1875). Within South Africa, too, the legal concept of custom had played an important role in reconciling the Roman-Dutch and English legal systems. In fact, the failure of Afrikaners to take into account the history of the idea of custom in British legal thought represents a major failure in our current explanations of the development of customary law in British Africa. However, remedying this gap is beyond the scope of this chapter.

31. Resident Magistrates' Courts Act, No. 20 of 1856, Cape Colony. The act gave magistrates jurisdiction in civil cases where the damages claimed were less than twenty pounds, and in criminal cases where the sentence imposed was less than two years, although the limits of this jurisdiction evolved slightly over the years.

32. Report and Proceedings with Appendices of the Commission on Native Laws and Customs (Cape Town: W. A. Richards and Sons, 1883), testimony of W. B. Chalmers, 261. *Ukubulaba* (to pay bridewealth/hikazi) refers to the gift (usually of cattle) made by a husband to his bride's family. If marriages failed, for whatever reason, men commonly brought court cases to demand the return of their bridewealth.

33. Robert J. Dick to Civil Commissioner, King William's Town, Tamasha, 15 January 1890, TAM, CA.

34. Report of the Commission on Native Laws and Customs, James Rose Lines, 499.

35. Thus, in Middledrift, the formal court of the resident magistrate, which handled both civil and criminal cases according to Roman-Dutch law, coexisted with an informal court, which handled mostly cases involving bridewealth, seduction, and adultery. Compare s/KWT HZ4/1, CA, with s/MDT 5/4/1, CA. When the area received its own magistrate in 1894, he too appears to have operated a parallel court system. Compare s/MDT 5/4/1–2, CA, with s/MDT 5/4/2, CA. For reference to "informal" cases see *Hakan v. Kauza*, 23 April 1885, s/KWT HZ4/1, CA.


37. See Statement by Kama, 22 September 1862, and Statement by Kama, 13 November 1865, BK 88, CA. As the second statement in particular reveals, the hierarchy of judicial authority was closely aligned to the hierarchy of political authority. When a headman complained that Kama did not have the authority to hear appeals from cases that the headman had settled, he did so as part of an assertion that Kama was not, in fact, a chief.

38. See letter from A. Bisseg, 18 March 1865, BK 88, CA; 16 August 1866, *Zake v. Zeka*, s/KWT HZ4/1, CA.

39. Preliminary Examination in the Case of Dyassop, 24/9/95, SCG 1/425, CA.

40. Transkei Annexation Act (Act 13 of 1877); Proclamations 110 and 112 of 1875.


42. P. J. Macdonnell, quoted ibid., 75.

43. Maclean, *Compendium of Kafir Laws*.

44. J. D. Warner, "Mr. Warner's Notes," ibid., 55.


50. Preliminary Evidence in the Case of Bantu, 12 May 1876, SGG 1/1/18, CA.
51. Preliminary Examination in the Case of Jordan, 2 May 1880, SGG 1/1/18, CA.
52. Preliminary Examination in the Case of Dickaway, 2 June 1884, SGG 1/1/1448, CA.
53. Preliminary Evidence in the Case of Bantu, 12 May 1876, SGG 1/1/118, CA.
55. *Nunie v. Botshani*, 7 June 1875, MDS 2, CA.
56. Preliminary Examination in the Case of Nywebeni, 26 June 1874, SGG 1/1/67, CA; Preliminary Examination in the Case of Kwahluka, 2 October 1868, SGG 1/1/28, CA.
57. Preliminary Examination in the Case of Kupiso, 7 March 1870, SGG 1/1/62, CA.
58. Preliminary Examination in the Case of Gqeka, 25 January 1/77, SGG 1/1/35, CA.
59. Preliminary Examination in the Case of Jordan, 10 August 1880, SGG 1/1/81, CA.
60. Preliminary Examination in the Case of Bota Soduwa, 4 May 1893, SGG 1/1/442, CA.
61. Preliminary Examination in the Case of Xam Nkokhla, 6 January 1897, SGG 1/1/535, CA.
62. Preliminary Examination in the Case of Kolis Lukazi, 4 May 1897, SGG 1/1/535, CA.
63. Preliminary Examination in the Case of Dyassop, 24 March 1893, SCC 1/1/425, CA.
64. Not all sex outside of marriage was subject to litigation; widows and divorced women were permitted greater sexual freedom.

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Elizabeth Thornberry
12 Domestic Violence as a Human Rights Violation

The Challenges of a Regional Human Rights Approach in Africa

BENEDETTA FAEDI

INTERNATIONAL LEGAL DISCOURSE has since the 1990s defined human rights to include rights to equality, security, and dignity and the enjoyment of fundamental freedoms. In this framework, domestic violence constitutes one of the most pervasive human rights violations. Analyzed as a historical manifestation of unequal power relationships between men and women, gender-based violence fosters practices of domination over and discrimination against women that leads to the failure of women to advance and fully participate in society.

The estimated number of victims varies from 15 percent to 71 percent among countries. The prevalence of domestic violence reveals that, contrary to popular belief, the home is often not the safest place to be. Instead, intimate abuse may occur most often within family relationships. Because of the emotional breakdown of values and trust that women endure within the home, incidents of domestic violence are highly underreported by victims fearing retaliation or secretly bearing the shame of the aggression.

In contrast, historical biases and strategies of convenience shape states’ policies of noninterference and nonintervention in family matters, ignoring the fact that tolerance of such crimes and claims of extraneousness already entail complicity in the violence inflicted. In the words of Rosa Brooks, “[W]idespread domestic violence is possible only when state structures encourage, tolerate, or consistently fail to remedy it.” Particularly in Africa, where local governments counterpose cultural and religious diversity claims to international standards, the human rights debate on domestic violence seeks a balance between traditions and modernity, customary practices and fundamental rights.

By interpreting domestic violence as a violation of women’s human rights, this chapter aims to provide a general legal appreciation of intimate abuse in its formulation under the international treaties devoted to women’s rights. The analysis of domestic violence as an international human rights issue reveals the limitations of this approach in facing the deep disjuncture between international law benchmarks and local realities. By examining international human rights instruments for women’s rights, on the one hand, and, on the other, signatories’ resistance to comply with their obligations and adequately implement treaties’ provisions in domestic legal systems, the chapter sheds light on the gap between international law aspirations and human rights outcomes. It also acknowledges the continuing tension between universal standards and grassroots arrangements. As an alternative approach, the chapter proposes insights into strengthening the key role that regional human rights institutions may play in leading a constructive dialogue on strategies for change among diverse actors and, hence, responding adequately to practices of abuse in the private space. Specific references to and instances of the distinctiveness and challenges of the African system follow throughout the chapter.

DOMESTIC VIOLENCE AS A HUMAN RIGHTS VIOLATION

Domestic violence has been generally understood as a private issue, on the grounds of an idealized image of the home as a place of safety and security away from government involvement. However, research has revealed that “far from being a place of safety, the family can be [a] cradle of violence and that much of this violence is directed at the female members of the family.” A 2005 study by the World Health Organization (WHO) reported that intimate partner abuse is the most prevalent yet relatively hidden and ignored form of violence in women’s lives. Although comprehensive statistics are hard to come by, the proportion of victims ranged from 15 percent to 71 percent with most countries falling between 25 percent and 62 percent.

In spite of the systematic and widespread domestic violence affecting women, it was only since the 1990s and after considerable efforts, that the international community came to focus on human rights for women, classifying intimate partner abuse as a pervasive and specific form of violence, constituting a human rights violation. The first international instrument espousing gender equality as its focus and acknowledging women as victims of unique human rights violations was the Convention on the Elimination of All Forms of Discrimination against Women (hereafter the Convention). Adopted in 1979 by the United Nations General Assembly, the Convention defined the term discrimination against women to encompass any distinction, exclusion, or restriction made on the basis of sex that has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women of human rights.
One of the most significant endeavors of the international community to eradicate practices of violence against women worldwide, the Declaration also encouraged data collection and compilation of statistics concerning intimate abuse and the prevalence of different forms of violence against women. Its most significant legacy has been in the form of studies on the causes, nature, gravity, and consequences of practices of abuse against women as well as the evaluation of the effectiveness of measures and strategies implemented to prevent and redress violence against women.¹⁶

**LIMITS OF AN INTERNATIONAL HUMAN RIGHTS APPROACH TO DOMESTIC VIOLENCE**

The categorization of domestic violence as a human rights issue has important and critical consequences. Acknowledging violence against women as a violation of human rights conveys binding obligations on states parties to prevent, eliminate, and prosecute practices of abuse against women as well as holding states accountable if they fail to comply with such commitments. Thus, states must take all appropriate measures to combat inequality and protect and promote human rights for women through international and domestic legal means. The concept of state responsibility has traditionally been understood under international law on human rights violations as arising only when acts of violence against women can be imputed to the state or any of its agents. Because intimate abuse involves private individuals, domestic violence crimes have long been deemed outside the scope of state accountability. Since the 1990s, however, the concept of state responsibility has been expanded to include not only state actions but also omissions and the failure to take appropriate measures to protect and promote women's rights. Accordingly, in addition to refraining from committing violence against women through their own agents, states must also fulfill the obligation to prevent human rights violations by private individuals by investigating relevant allegations, prosecuting the perpetrators, and providing adequate remedies for victims. States can therefore be held accountable for domestic violence because "although the state does not actually commit the primary abuse, its failure to prosecute the abuse amounts to complicity in it."¹⁵

In theory, then, states have a duty to protect women from violence and can be held accountable if they fail to comply with those undertakings. The standard of due diligence required has been articulated in General Recommendation no. 19, setting forth the fact that states parties "may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."¹⁶
States' liability, therefore, should be construed on a case-by-case basis, through the criterion of reasonableness, based on the general principles of nondiscrimination and good faith. Yet, the standard of due diligence requires states parties to use any appropriate measures at their disposal to address both individual acts of violence against women and structural causes so as to prevent future violations and punish wrongdoers.

Further procedures to enhance state accountability for violence against women are contained in the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (hereafter the Optional Protocol). In force since 22 December 2000, the Optional Protocol includes a complaints procedure enabling individuals to petition for or to complain about violations of rights and an inquiry procedure allowing the CEDAW committee to conduct inquiries into serious and systematic abuses of women's human rights occurring within the states parties to the Optional Protocol. Under the complaints procedure the CEDAW committee is able to focus on individual cases and develop jurisprudence for any particular matter; through the inquiry procedure the CEDAW committee can investigate substantial abuses in which individual communications and complaints have failed, address a broad range of critical issues in a particular country, and release specific recommendations on the structural causes of violence. The lack of a judicial enforcement mechanism to enact the provisions of the Convention implies that the primary tool of compliance relies on the judiciary of states parties responsible for recasting domestic law to conform to the treaty.

Despite the effort to overcome states' timidity to intervene in the private realm and take positive actions against intimate abuse, the figures mentioned in the first section of this chapter regarding the perpetration of domestic violence suggest the shortcomings of the system and the inadequacy of the responses. To date 185 countries, including 52 African states, have either ratified or acceded to the Convention, meaning that over 90 percent of the members of the United Nations have agreed to be parties to the treaty. However, only 88 countries, including 24 African states, have acceded to the Optional Protocol and to be bound by its improved and additional enforcement mechanisms for women's human rights. Yet, despite the fact that the Convention is one of the most broadly ratified international human rights instruments, it also has the highest number of reservations by its states parties.

States may, indeed, ratify the treaty with reservations about specific items by declaring themselves not to be bound by certain provisions. However, in article 28, paragraph 2, the Convention borrows the provision from the Vienna Convention on the Law of Treaties, clarifying the fact that a state party may make a reservation unless it is incompatible with the object and purpose of the treaty itself. A recent study reveals that the Convention counts 123 reservations, declarations, and interpretative statements, which are, in substance, reservations as well. Three-quarters of these (76 percent) refer to essential parts of the text itself rather than to its application procedures. To date, 57 countries, which represent approximately 31 percent of states parties, have entered the treaty with reservations.

Some of those reservations clearly undermine core portions of the Convention, subverting its ultimate goals. In Africa, states that have declared such reservations include Algeria, Morocco, Egypt, and Lesotho. Algeria, for instance, agreed to apply the provisions of article 2, which condemns discrimination against women and calls for an appropriate eradication policy, on condition that they do not conflict with the provisions of the Algerian Family Code. Algeria also declared that "the provisions of Article 16 concerning equal rights for men and women in all matters relating to marriage, both during marriage and at its dissolution, should not contradict the provisions of the Algerian Family Code." The government of Morocco entered a more precise reservation to article 2, explaining that "certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah, which strives, among its other objectives, to strike a balance between spouses in order to preserve the coherence of family life." Furthermore, Morocco argued that the equality of the kind expressed in article 16 is considered "incompatible with the Islamic Shariah, which guarantees to each of the spouses rights and responsibilities within a framework of equilibrium and complementarity in order to preserve the sacred bond of matrimony." Similarly, Egypt entered a reservation to article 16, declaring that equal rights and responsibilities on entry into and at dissolution of marriage among men and women is "out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity, which guarantees true equality between the spouses." As an example of an African country that is not predominantly Muslim, the government of Lesotho declared itself not to be bound by article 2 "to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship.""}

Anne Bayefsky reports that article 2 elicited five general reservations, eight normative general declarations and interpretative statements, and twelve more specific reservations, whereas article 16 has reached a total of twenty-five reservations. Several states parties objected to these reservations based on the fact that they are incompatible with the object and purpose of the
Convention and, therefore, are prohibited by virtue of its article 28, paragraph 2. However, tolerance has been recommended by the CEDAW committee on the ground of securing extensive participation in the treaty; the CEDAW committee is also reluctant to invalidate a state party’s ratification because of its reservations. Compliance with the obligation to submit national reports at least every four years on the status of the measures undertaken for the application of the treaty is also lacking. Countries that have delayed submission of states parties’ periodic reports exceed twenty-nine, including twelve African states that have never delivered a report since the ratification, utterly disregarding their commitments.

States parties’ incentives for entering international human rights treaties arise from their wish for recognition within the international community and the desire to benefit from the trade relations and foreign aid or investments that such recognition may imply. Experts have emphasized that ratification often facilitates bilateral aid among countries as well as aid from the European Union and UN agencies. But Bayefsky emphasizes another reason: states might enter into a treaty for the sole purpose of the ratification itself, believing that the relatively harmless monitoring system and timid enforcement mechanisms will not affect national positions. Oona Hathaway, in her study on human rights treaty compliance, explains that due to the weak monitoring and enforcement procedures of human rights instruments, states can benefit from the positive appreciation they acquire in the international arena from ratification and, hence, the simultaneous decreased pressure for improvements, without bearing significant costs or collateral consequences.

In addition to these structural limitations, a number of practical problems exist. The crucial argument for state responsibility for widespread intimate abuse and patterns of impunity collides with the lack of accurate reporting. Inadequate documentation and unreliable statistics are common problems with regard to human rights abuses against women and even more so when such abuses are perpetrated in private settings. The lack of reliable and regular data impedes a longitudinal understanding of domestic violence, a meaningful comparison of existing information, and a sensitive evaluation of the impact and effectiveness of extant measures addressing intimate abuse. Moreover, without detailed data and information on the incidence of domestic violence and the failure of criminal justice responses it becomes difficult to file a case against states to hold them accountable or to promote political intervention and effective policies in the respective countries.

Another limitation of the international human rights approach is its focus on acts of violence and crimes rather than on their structural causes. Practices of discrimination and violence against women are rooted in systemic imbalances in gender relationships. Disparities in intimate liaisons are simply a dismal reflection of broader social and economic inequalities. The prosecution of perpetrators is only a first step in addressing domestic violence and surely not a permanent solution unless such prosecution is combined with positive state measures concerning, inter alia, education, economic development, health policy, and other basic services. The international human rights system already faces a critical task in confronting states’ gender bias in the application of the law. It would be even more challenging to direct states to intervene in the discriminatory features of a society in order to pursue social programs for change.

**FINDING A NEW WAY: A REGIONAL HUMAN RIGHTS APPROACH TO DOMESTIC VIOLENCE**

In an attempt to promote international peace and security, chapter 8 of the Charter of the United Nations provides for regional arrangements or agencies devoted to the maintenance of mutual order among states, the development of peaceful settlements, and enforcement action under the authorization of the Security Council. Nevertheless, the treaty does not mention any human rights cooperation at the regional level, revealing the UN’s concern that regionalism could have been the “expression of a breakaway movement, calling the universality of human rights into question.” It was only in 1977 that the General Assembly endorsed a new approach toward regional human rights instruments, urging states parties to enter into agreements with one another, “with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights.”

Despite the UN’s ambivalence with respect to regionalism and its suitability for addressing human rights violations and promoting adequate responses, regional arrangements and agencies have sprung up since after the adoption of the Charter of the United Nations in Europe, Latin America, and Africa. The first comprehensive treaty in this field was the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the European Convention), adopted by the Council of Europe in 1950 and entered into force in 1953. Arising in response to the atrocities committed in Europe during the Second World War, the European Convention established the first enforcement mechanism for the obligations of its member states articulated in a complaints procedure and an international court for the adjudication of human rights cases. A further significant evolution of the two institutions entrusted with such duties, the European Commission of Human Rights and the European Court of Human Rights (hereafter the European Court), established in 1954 and 1959, respectively, included the adoption of a procedure for hearing individual complaints against member states in 1968. The most judicially developed of all the regional human rights instruments,
the European Court currently exercises extensive jurisdiction over the forty-seven member states of the Council of Europe.

Unlike the European system, the impetus for the establishment of the inter-American human rights system in Latin America came from the states of emergency and ruthlessness of military and authoritarian regimes, the failure and corruption of the domestic judiciary, and the widespread practices of torture, disappearance, and executions of political opponents. Established in 1948 at the Inter-American Conference in Bogotá, Colombia, with a view "to strengthen the peace and security of the continent and promote and consolidate representative democracy," immediately after its constitution, the Organization of American States adopted the American Declaration of the Rights and Duties of Man.

The hostility and reluctance of governments toward the development of a specific human rights treaty and effective monitoring machinery in the region delayed the creation of the Inter-American Commission on Human Rights (hereafter the Inter-American Commission) until 1959 and the adoption and entrance into force of the American Convention on Human Rights (hereafter the American Convention) until 1969 and 1978, respectively. Ratified by twenty-five nation-states to date, the American Convention, inter alia, establishes the Inter-American Court of Human Rights (hereafter the Inter-American Court) in its chapter 8. Unlike in the European Convention, only states parties and the Inter-American Commission have the right to submit a case to the Inter-American Court, excluding any individual recourse.

On the subject of discrimination against women, the European Convention includes a nondiscriminatory provision on the basis of sex for the enjoyment of the rights and freedoms set forth in the treaty. But the American Convention only urges states parties to ensure the equality of rights and the adequate balancing of responsibilities of the spouses during marriage and in the event of its dissolution. Further recommendations issued by the Council of Europe emphasize the extent, seriousness, and negative consequences of domestic violence, encouraging states parties to take social and emergency measures for the protection of victims and the prevention of similar incidents.

In contrast to the nontreaty status of the Council of Europe’s recommendations, the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women sets forth binding obligations for (currently) thirty-two states parties and declares that violence against women shall be understood as any physical, sexual, and psychological act of violence that occurs, inter alia, within the family or domestic unit, including rape, battery, and sexual abuse. It acknowledges that violence against women is an offense against human dignity and a manifestation of the historically unequal power relationships between women and men.

An increasing body of jurisprudence concerning violence against women has recently been produced by the European and inter-American human rights systems, representing an important set of precedents for the applicability of international human rights law to state and individual responsibility for practices of abuse against women. References to some of these decisions dealing specifically with domestic violence will serve as a source of comparison and insight for the purpose of the subsequent analysis of the African human rights system.

THE REGIONAL HUMAN RIGHTS SYSTEM FOR WOMEN IN AFRICA

The most recent, controversial, and least developed among the regional human rights regimes is the African system, established in 1981 with the adoption of the African Charter on Human Rights and Peoples’ Rights (hereafter the African Charter) by the Assembly of the Heads of States and Government of the Organization of African Unity (hereafter the OAU). Inspired by the anti-colonial endeavors of the late 1950s, the OAU moved from its initial focus on eradicating colonialism in the region to the subsequent goal of promoting "the unity and solidarity of African states, as well as defense of their territorial integrity and independence." Despite the intention of facilitating internal relations and forging a regional approach toward external powers, the OAU was hampered by the legacy of colonialism in Africa. Anticolonial struggles themselves had created a commitment to the inviolability of territorial borders and noninterference in the internal affairs of member states that ultimately hindered the development of a human rights system.

Although the constitution of the OAU goes back to 1963, a regional human rights treaty was not established until the adoption of the African Charter in 1981, which entered into force only in 1986. Reaffirming the pledge to eradicate all forms of colonialism from the continent, the African Charter urges member states to coordinate and intensify their collaboration and efforts to achieve a better life for the peoples of Africa as well as to promote international cooperation with respect to the Charter of the United Nations and the Universal Declaration of Human Rights. It establishes an African Commission on Human and Peoples’ Rights (hereafter the African Commission) as a measure of safeguard for the terms of the treaty as well as the promotion and protection of the human and peoples’ rights in the region. Similar to the European and inter-American regimes for human rights, the African Charter encompasses monitoring and enforcement mechanisms for member states’ obligations, including a complaints procedure by a state party concerning another state party as well as a procedure for complaints by individuals and national or international institutions that have exhausted local remedies.
A breakthrough for the African human rights system was the 1998 adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereafter the African Court). The African Court entered into force only in 2014, and its judges were finally elected in 2006. It is intended to be an organ of the African Union (which came into being in 2002 out of a merger of the OAU and the African Economic Community) and to complement and reinforce the protective mandate of the African Commission. Among other things, it provides that states parties, the African Commission, and African intergovernmental organizations are entitled to submit complaints against a member state. However, unlike in the case of the European Court, individuals and nongovernmental organizations are unable to invoke its jurisdiction unless provided otherwise at its sole discretion and by the appropriate declaration duly signed by the respective state. This double obstacle not only precludes the direct access of individuals to the court but also impedes the functional growth of its jurisprudence. The consequences of such barriers will be particularly important for cases involving domestic violence, because of states' reluctance to intervene in those matters primarily because of their concern about being held accountable.

The general provision contained in the African Charter for the elimination of discrimination against women and the protection of women's rights should be read together with the duty of states to protect the physical health and morals of the family as well as the duty of individuals to preserve the harmonious development of the family and work for the cohesion and respect of the family relationship. Commentators contended, however, that the solely nondiscriminatory provision on women's rights under the African Charter was inadequate, particularly in the face of discourses that equate traditional culture with male dominance. The evident lack of consideration of human rights violations specific to women under the African Charter was finally addressed in the extended process of drafting conducted by the African Commission in view of the auspicious Protocol on the Rights of Women in Africa (hereafter the African Protocol), adopted in 2003 by the African Union.

The African Protocol goes further than the Convention in its content, embracing basic rights for women, such as education, health, employment, food security, and housing, together with explicit prohibitions of harmful practices and inequity in marriage. Emphasis is placed on the elimination of gender-based violence, first, by defining violence against women as any act that causes or may cause them physical, sexual, psychological, or economic harm, including the threat to endure such aggression or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life; second, by requiring states parties to enact and enforce laws to prohibit all forms of violence against women, including unwanted or forcible sex, whether the violence takes place in private or public settings; and, finally, by soliciting states parties to ensure the protection of every woman's right to be respected in her dignity and protected against all forms of violence either sexual or verbal.

The African Protocol requires that states parties ensure the adoption of its provisions in their respective domestic legal systems and that they periodically report "the legislative and other measures undertaken for the full realization of the rights [therein] recognized." States parties are also required to provide for appropriate judicial, administrative, or legislative remedies to any woman whose rights or freedoms have been violated. As is the case for other human rights treaties, however, the African Protocol does not provide enforcement mechanisms. In this scenario, the delay in the establishment and full operation of the African Court has contributed to creating a vacuum in the actual effectiveness of the treaty and the evolution of an African human rights system for women. Commentators might question the usefulness of a human rights instrument in the first place. It is relevant to counter that even the smallest impact that human rights mechanisms may have is still worth the effort when it comes to gender rights. Furthermore, the key role of human rights treaties in devising international benchmarks for domestic legal systems and raising awareness of women's rights and needs cannot be ignored.

THE CHALLENGES OF A REGIONAL HUMAN RIGHTS APPROACH TO DOMESTIC VIOLENCE IN AFRICA

Resistance to regionalism in the human rights regime has gradually been overcome by the appreciation of the world's heterogeneity as well as the conclusion that "only within limited segments of the globe can we find the cultural foundations of common loyalties, the objective similarity of national problems, and the potential awareness of common interests which are necessary for the effective functioning of multilateral institutions." The diversity and complexity of the world, embracing cultural, economic, physical, and religious disparities, are hardly capable of being channeled into the higher level of common involvement and joint commitment that an international human rights scrutiny implies. Applications of the principle of universality typically face the defensive hostility of those countries still haunted by colonial memories and yet struggling to find a balance between customary laws and traditions on the one hand, and international standards and Western models, on the other.

In contrast, a regional interpretation of international solutions to local problems might be a more advantageous and practical pursuit. After all, responsibility and compliance are easily achieved in the first place and more likely to endure in the long term when they emerge from a spontaneous awareness.
of cohesion and mutuality, rather than unpopular impositions or antagonistic sanctions. It is worth mentioning, however, that the suitability of a regional approach to human rights primarily depends on the nature of the issue to be addressed. Because of their global scale, some problems may actually need to be treated solely by global agencies, whereas others could be more successfully resolved through the cooperation with an intermediate body more receptive to local identities and needs.

Regional human rights instruments can serve the purposes of attaining a better understanding of social patterns and popular perceptions of human rights issues; appreciating the extent of the violations and their potential causes; portraying a reliable scenario of on-the-ground conditions; envisaging effective and practical responses; and translating international treaty provisions into people’s lives locally. This is equally true for women’s human rights in the private domain, intimately intertwined with traditional practices, patriarchal values, and social dynamics and, hence, requiring local interpretations of universal texts.

Like other regional human rights regimes, the relatively new African system confronts the challenge of crafting the general principles contained in the paramount international human rights mechanisms to specific situations. It faces the critical task of filling the gap between transnational human rights standards, on the one hand, and local culture and traditional claims on the other. Tailoring provisions of the Convention and its Optional Protocol to practical formulations applicable in local contexts serves to support women’s rights activists in their struggle against abuse. When such activists question traditional practices and impugn patterns of domestic violence, they should rely not only on the transnational prohibitions but also on the intermediate regional instruments pressuring governments to comply with international obligations as well as promoting local arrangements for human rights and social justice.

The deep gulf between international law aspirations and human rights violations mirrors the ongoing tension between universal principles and grassroots initiatives and ultimately impels regional human rights regimes to lead a constructive dialogue on strategies for the protection of women. Giving local groups a voice and space in global settings through the mediation of regional institutions facilitates nation-states’ assimilation of international standards and specifically raises consciousness in local cultures of international human rights benchmarks. Particularly in Africa, where the anticolonialist heritage still rebuffs transnational interference in internal matters and hampers improvement in women’s conditions in favor of tradition and cultural relativism, a regional human rights approach to domestic violence can be a valuable tool in conciliating external pressure and local resentment in order to provide adequate protective strategies.

Following the example of international human rights monitoring bodies, regional mechanisms contribute to enhancing state accountability with respect to violence against women and to producing relevant jurisprudence in the field to serve as precedents for future cases. For instance, in the AT v. Hungary decision, the CEDAW committee remarked that the lack of specific legislation addressing domestic violence itself constitutes a violation of human rights and fundamental freedoms for women. In the AT v. Hungary case, the victim lamented that she had been subjected to regular severe domestic violence and death threats by her husband for four years. She stated that she was not able to visit a shelter because no shelter in Hungary was equipped to provide assistance to a mother and her two children, one of whom was brain-damaged. She also denounced the fact that no protection or restraining orders were available at the time under Hungarian law. In response to her complaint, the CEDAW committee expressed its concern for the lack of specific legislation and measures to combat domestic violence in the country, including protection or exclusion orders and shelters for victims. The CEDAW committee declared that the state party’s failure to comply with its obligations constituted a violation of the victim’s human rights and, particularly, her right to security of person. In its capacity as monitoring body of the Convention, the CEDAW committee recommended that the state party provide the victim and her family with immediate and effective assistance, including a safe home, psychological and legal support, and “reparation proportionate to the physical and mental harm undergone and to the gravity of the violation of her rights.”

Other decisions with respect to domestic violence issued by the CEDAW committee include the Şahide Goekes v. Austria and Fatima Yildirim v. Austria cases. In both decisions, the CEDAW committee reaffirmed that under international law states parties may also be held accountable “for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.” In both cases, the CEDAW committee noted that the state party was in breach of its due diligence obligation to protect the victims and promptly investigate and prosecute the perpetrators. In the case of Maria da Penha Maia Fernandes v. Brazil, the Inter-American Commission declared that the state party’s failure to prosecute and punish a perpetrator of domestic violence after more than fifteen years of investigation “form[ed] a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil through ineffective judicial action.” It also stated that the state party’s violation contravened the member state’s international commitments and eventually revealed its tolerance and complicity in the violence inflicted.

It is still too early to assess the work of the newly completed African Court, but we can hope that it will pursue a similar course in addressing violations
of women’s human rights occurring in the private domain. Mindful of the
African nations’ struggle for independence and their distinctive customs, the
African Court will be better placed than any international monitoring body to
demarcate the threshold between gender, religion, cultural diversity claims,
and harmful practices. Disaggregating culture from a specific practice and
distinguishing it from a gross violation of the human right to bodily integrity
will be a critical challenge for the institution but also one of its key functions.
Equally difficult will be producing substantive jurisprudence on domestic
violence, given the dual barriers which preclude individuals and nongovern-
mental organizations from submitting direct complaints to the African Court
unless provided otherwise at its sole discretion and by the apostate declaration
duly signed by the respective state. Under the current framework, govern-
ments that resist engaging in positive measures to prevent intimate abuse will
find it relatively simple to avoid having to defend their actions before the
African Court.

Another practical limitation of the international human rights approach to
the matter, the lack of reliable data on the incidence and pervasiveness of
domestic violence cases, can be better monitored and addressed by the regional
alter ego of the UN Rapporteur on the Rights of Women in Africa. Appointed
by the African Commission in 1999, the mandate for the Special Rapporteur
on the Rights of Women in Africa includes serving as a focal point for the
promotion and protection of the rights of women in the region; assisting Af-
rican governments in the development and implementation of their relevant
policies as well as with the domestication of the African Protocol; undertaking
fact-finding missions and comparative studies for the investigation and report-
ing on the situation of women’s rights in the various African countries; and
finally designing guidelines for nation-states to ensure adequate responses to
violence against women in cooperation with the other actors responsible within
both the international and regional human rights arenas. Under the terms of
the mandate, the Special Rapporteur on the Rights of Women in Africa can
entreat national institutions to collect accurate statistics on domestic violence
crimes for the purpose of raising awareness of the issue and promoting political
responses. She or he can pursue informative and constructive dialogues with
nongovernmental organizations dealing on-the-ground with violence against
women in the various African countries; and, furthermore, she or he can be-
come an institutional interlocutor for local initiatives advocating strategies for
the eradication of domestic violence and alternative responses of social justice.

A regional strategy for addressing domestic violence should promote the
active involvement of the civil society in pressuring local governments to ful-
fill their reporting obligations with the African Commission on legislative and
practical measures that have been undertaken to combat intimate abuse. For
instance, the mandate of the Special Rapporteur on the Rights of Women in
Africa should be expanded to include monitoring and reporting on the status
of the implementation of the African Protocol. Advocacy with national institu-
tions should be pursued to raise awareness of the incidence and pervasiveness
of violations as well as of the content and resources of the African Protocol
and the human rights system for women in the region. An effective adaptation of
the treaty’s provisions for local contexts and social justice requires the improve-
ment of communication among diverse institutional actors to overcome politi-

cal reluctance to encourage new policy recommendations, legal reforms,
and financial resources, as well as judiciary, implementation, and reporting
mechanisms for the African Protocol. Legislative intervention must remove
dichotomies and antagonistic tensions between international instruments
and domestic constitutions. Coordinating civil society organizations’ efforts
to combat domestic violence is also essential to strengthening their voice and
action in the national and international arena. Partnership and cooperation
between media and local institutions and regional human rights bodies can
facilitate accurate disclosure of data and information regarding intimate abuse
in order to sensitize public opinion, governments, and the international com-

munity to domestic violence. Furthermore, women’s advocates and activists
should advance their agenda to promote gender-capacity building in national
and regional institutions, including the African Court.

In Africa, the intermediate function of regional human rights institutions rep-
mresents an important tool for translating universal rights into the daily struggles
of African women who face domestic violence. However, the most critical
limitation on an effective application of international human rights law to
domestic violence remains the broader spectrum of social and economic inequalities
affecting women in both the public and the private domain, which often translate
into practices of gender-based violence. Effective responses and long-term solu-
tions for such structural and institutional gaps require the engaged efforts and
commitment of both transnational and national agents. Regional human rights
instruments focusing on women’s rights certainly represent key players, pur-
suing the preeminent task of mediating between cultural diversity claims and
international human rights standards as well as directing international coopera-
tion and national policies toward the implementation of adequate measures to
combat gender inequality and domestic abuse.

The pervasiveness of domestic violence worldwide calls for a multilayered
approach and strategies for change. Historically and socially understood as
products of unequal gender relationships, patterns of abuse perpetrated in the
domestic space came recently to be recognized as human rights violations.
Women's activists advanced their agenda to raise awareness on the issue in the international arena. Their efforts gained momentum and led to the adoption of the Convention on the Elimination of All Forms of Discrimination against Women in 1979 and of other international human rights instruments equally devoted to women's rights and their need of protection. The international human rights approach to domestic violence employs overarching benchmarks that serve the dual purpose of pressuring governments to take appropriate measures to address and prosecute domestic violence crimes and supporting local activists in their struggle against states' inertia.

Despite the value of an international human rights response to intimate abuse, the chapter revealed also its structural and methodological limitations. Lack of accurate data and enforcement mechanisms as well as state parties' overuse of treaty reservations eventually undermine the effectiveness of the international human rights machinery to combat domestic violence. In other words, particularly by entering the treaty with reservations incompatible with its object and purpose, "too many nations give lip service to the international human rights system while actual progress at the nation-state level on substantive legal and administrative reforms stagnates." Given the flaws of the international human rights approach to domestic violence, the chapter suggests an alternative: regional human rights institutions may have the power to interpret the incentives and rationale for governments' noncompliance and recast treaty provisions into domestic legal systems. Particularly in Africa, where international standards are still perceived as an ongoing reminder of colonialist imperialism, a regional human rights approach to domestic violence can contribute to loosening the tension between international law aspirations and local claims and, ultimately, crafting adequate responses to domestic violence.

NOTES


6. See generally WHO, Multi-country Study on Women's Health and Domestic Violence against Women.
8. "States parties" are the states that have ratified the treaty, and, therefore, they are bound by the relevant provisions.
9. CEDAW, arts. 2 and 5.
10. CEDAW, arts. 17–21.
13. Specifically, paragraph 25 of General Recommendation no. 19 provides that "Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships... These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality."
15. Ibid., art. 2(a).
16. Ibid., art. 4.
20. UN, Advancement of Women, In-Depth Study on All Forms of Violence against Women, 74.
22. See Ratifications and Accessions to CEDAW.
23. See Ratifications and Accessions to the Optional Protocol to CEDAW.
24. According to art. 2 (d) of the Vienna Convention on the Law of Treaties adopted in 1969 the term reservation "means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."
25. See art. 28 (a) of the CEDAW and art. 19 of the Vienna Convention on the Law of Treaties.

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29. See Algeria's reservations to arts. 2 and 16 of CEDAW.
30. See Morocco's reservations to art. 2 of CEDAW.
31. See Morocco's reservations to art. 16 of CEDAW.
32. See Egypt's reservations to art. 16 of CEDAW.
33. See Lesotho's reservation to art. 2 of CEDAW.
35. See art. 28 (2) of the CEDAW, which states that reservations that are incompatible with the object and purpose of the treaty shall not be permitted.
38. Merry, Human Rights and Gender Violence, 79.
41. UN, Advancement of Women, In-Depth Study on All Forms of Violence against Women, 56.
42. Thomas and Beasley, "Domestic Violence as a Human Rights Issue," 59.
43. Charter of the United Nations, chap. 8, arts. 52 and 53.
44. Karel Vasak and Philip Alston, eds., The International Dimension of Human Rights (Westport, CT: Greenwood Press, 1982), 2451.
57. See arts. 5 (3) and 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights stating that "at the time of the ratification of [the African] . . . Protocol or any time thereafter, the State shall make a declaration accepting the competence of the [African] Court to receive cases under article 5 (3) of [the African] . . . Protocol. The African Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration." According to art. 5 (5) "[t]he [African] Court may entitle relevant non-governmental organizations (NGOs) with observer status before the [African] Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol."
58. See arts. 18 and 29 (1) of the African Charter on Human Rights and Peoples' Rights.
59. For instance, according to the terms of Nigeria's initial report to the CEDAW committee: "[T]he authority in the home is the monopoly of the man . . . Any attack on discrimination against women must honestly attack cultural and inhibiting factors inherent in the primary unit . . . In traditional society, a woman is treated as chattel, to be bought and sold, discarded at will, inherited and disposed of with other property upon the death of her husband and without consent . . . True there are no provisions discriminatory of women in our statute books, but it is equally true that there are no enforceable laws that offer her succor when she is discriminated against by customs, administrative directives and discriminative religious practices . . . There are still no enforceable laws that protect against traditions, attitudes, customs, religion and illiteracy," as reported by Vincent O. Orlu Norchielie, The African Human Rights System (Leiden, the Netherlands: Martinus Nijhoff, 2001), 134.
61. Ibid., art. 26.
62. Ibid., art. 25.

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65. Merry, *Human Rights and Gender Violence*, 104.
67. Ibid.
70. Stacy, *Human Rights for the Twenty-first Century*.
71. See arts. 5 and 34 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.

**AFTERWORD**

**Finding Gendered Justice in the Age of Human Rights**

PAMELA SCULLY

This volume is so important in that it creates a field for placing domestic violence and human rights within historical and political contexts of the colonial and the postcolonial. History and historical consciousness are crucially important to contemporary engagements around issues relating to domestic violence. This volume combines a number of literatures and fields that do not often come together: that of historical work on domestic violence, colonial African history, and contemporary human rights. While each of these literatures is fairly well developed in and of itself, placing domestic violence within African colonial history is innovative, as is the conversation developed, if implicitly, in this book between colonial history and contemporary human rights activism. History tends to play a relatively small role in theorizing human rights and gender.1 One of the central challenges facing local women’s rights activists working within the international human rights frame is how to navigate the tensions arising from local conditions deeply informed by colonial histories of violence and subjugation, and a transnational human rights agenda, which denies its own relationship to the colonial project. In fact, the conversation between colonial African history, women’s history, and international human rights is crucial if women’s rights are indeed going to be integrated into societal transformations in the twenty-first century. Such a dialogue is by and large implicit rather than explicit in the volume. This afterword explicitly makes the case for the importance of historical conceptualization to foster a better understanding of the complicity of the West in creating the very sites of violence against women that now travel under the sign of “local” culture. I argue that historical consciousness is crucial for developing ethical collaborative relationships between transnational elites and local activists around women’s issues.