

# Decoded

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## An Analysis of Laws Against Rape in Africa

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This study presents an analysis of two aspects of laws against rape in African states, their content and the occurrence of change, in order to show that laws against rape cannot be seen as universal. It tests two hypotheses: women in government and war are related to changes in rape law and content must be locally pertinent to be effective. Findings show that although laws are converging to international norms, laws against rape which recognize local practices and understandings of rape are better equipped to fight rape incidence within a country and that international standards are not always the most effective way to understand rape at a local level. Findings also illustrate that there is no uniform circumstance under which a rape law changes; every incidence of change is the result of a variable combination of factors.

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## Chapter I. Introduction: Breaking the Taboo

In the past two decades, 31 out of the 54 countries in Africa have changed their rape laws. The majority of countries changed their laws concerning rape within a period of twenty years, a singular occurrence in the post-colonization time period. Africa's law changes have not occurred in a vacuum; changes regarding women's sexual rights that have occurred recently in rape laws across Africa parallel similar changes internationally. In international and domestic law globally, the increasing prominence of the notions of consent and coercion in rape laws and the removal of unjust provisions such as those which require the victim to prove their resistance to the crime<sup>1</sup> demonstrate that the way in which women's sexual rights are understood is changing. The Millennium Development goals exemplify the growing focus of international organizations on improving the inequality of women in all areas of society. The increasing emphasis on women's equality globally in addition to recent law-changing trends and the heavy toll that sexual violence has taken on African populations during war and peace makes a review of rape laws in Africa timely and central.

This study illustrates that although African states' laws against rape appear to be converging to international norms, the circumstances in which they exist and the laws themselves cannot be said to be universal. Based theoretically in MacKinnon's concept that rape stems from environmental inequality,<sup>2</sup> this study argues that the laws against rape in African states are diverse in the functionality of their content as well as in the manner in which they change. This study presents a statistical analysis of two aspects of laws against rape in addition to case studies in order to convey that the laws vary across the continent in spite of convergence to international norms. The occurrence of a change in rape law in African states is the first aspect of rape laws under analysis. The content of each state's law is the second aspect under analysis. Previous scholars question whether variables such as war and the presence of women in government influence a change in law, and scholars also suggest that country's historical legacies shape law content. This study tests these hypotheses and argues that there is a great amount of variability between cases. Before presenting the analysis, it is first necessary to break the taboo and discuss how the alteration of laws against rape and the particulars of their content impacts women in African states.

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<sup>1</sup> Weiner, Phillip. "Evolving Jurisprudence," 1207-1237.

<sup>2</sup> MacKinnon, Catharine A. *Feminist Theory of State*.

Pearl Mali, a young South African girl, was 12 years old when her mother arranged for her to be ‘correctively raped.’<sup>3</sup> Believing that Pearl was a lesbian because she was a “tomboy,” one day Pearl’s mother came home from church with an older man. Pearl wasn’t sure of the circumstances but “money was involved.” According to Pearl, “[s]he [her mother] said if I don’t do what is right I won’t get my lunch tomorrow.” The man came into her room and locked the door, after which he began to hit her. She screamed, bringing her mother to the door. “Pearl you are making noise, shut up,” her mother said. The man proceeded to rape Pearl. The next day, without mentioning the events of the previous day, her mother invited the man to move in. He became Pearl’s ‘de-facto husband’ and over the next four years he regularly raped her with the intent of making her straight. When Pearl went to the police, they laughed at her when she said the most recent rape had been the week previous because they believe that a raped woman would come to them immediately.

Pearl later became pregnant, at which time she went to the police again. This time the court issued a restraining order. In spite of the court order, the man came to her house soon after she gave birth. "He wanted to touch me again so I was fighting and fighting [him]. He kicked me on my waist and all the stitches got loose." Her mother and the man took away her child when he was seven months old because they believed that Pearl was still a lesbian. They said that if she touched and fed the baby, "it will make him gay." Pearl moved out of the house and sought help from the court system, but after three years she is still trying to get custody of her child and is only allowed to see him on the weekend.

Although South Africa appears to be a burgeoning, progressive democracy, stories like Pearl’s highlight underlying ironies. In 2010 the United Nations Office on Drugs and Crime named South Africa the country with the most reported rapes per 100,000 people.<sup>4</sup> An estimated fifty percent of women in South Africa will be raped during their lifetime, yet most rape goes unreported. Of the 25 cases of rape that reach trial in South Africa each year on average, only 1 results in conviction.<sup>5</sup> CIET, an NGO combatting violence, reported that 20% of men assert that the victim "asked for it." In the Eastern Cape Provinces, 25% of men questioned in an anonymous survey by the Medical Research Council said they had raped at least once. Of these

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<sup>3</sup> The testimony comprising this illustrative case was collected by photographer Clare Carter in South Africa, in Strudwick, Patrick. "Crisis in South Africa."

<sup>4</sup> Harrendorf, Stefan, Markku Heiskanen, and Steven Malby, eds. International Statistics on Crime and Justice. 25.

<sup>5</sup> Harrendorf, Stefan, Markku Heiskanen, and Steven Malby, eds. International Statistics on Crime and Justice.

men, 75% reported the victim was less than 20 years old and 10% said their victim was less than 10 years old. In Soweto, 25% of schoolboys considered what they called "jackrolling" –gang rape – to be "fun."<sup>6</sup> These statistics illustrate that the Sexual Offences Act does not address underlying inequalities in South Africa and therefore insufficiently meets the needs of victims. MacKinnon asserts, "[R]ape laws fail because they do not recognize the context of inequality in which they operate, focusing as they so often do on isolated proof of non-consent against a false background presumption of consent in the context of a presumed equality of power that is not socially real,"<sup>7</sup> and indeed this phenomenon is visible in South Africa. The corrective rape plaguing South Africa<sup>8</sup> is just one sexual assault-related issue that the law neglects to address. Pearl Mali's experience underlines the message that South Africa's Sexual Offences Act, despite having components deriving from international norms, fails to recognize how the population perceives and copes with sexual crimes.<sup>9</sup>

In 2007, South Africa passed the Sexual Offences Act, which includes many components commonly found in definitions of rape used by international criminal tribunals.<sup>10</sup> Although paralleling international law in many aspects, the Act falls short of addressing the specific circumstances of the sexual offences that proliferate in South Africa. The law does not mention 'corrective rape,' nor does it address the failings of enforcement or the ineffectiveness of the court system. While the Act does address the rape of minors and includes many other progressive concepts concerning rape, it also illustrates the distance between the lawmakers' thoughts on rape and the experiences of the populace. Sections 15 and 16 of the Sexual Offences Act made consensual sexual contact such as 'kissing' and 'petting' criminal between teens of the ages 12 to 16.<sup>11</sup> The high court of Pretoria later declared these sections unconstitutional because they violated the 'dignity' of children and subjected them to criminal prosecution that was deemed

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<sup>6</sup> Strudwick, Patrick. "Crisis in South Africa."

<sup>7</sup> MacKinnon, Catherine A. "Defining Rape Internationally." 955.

<sup>8</sup> One support group in Cape Town noted that they receive 10 new cases of corrective rape weekly. The country appears to be becoming more homophobic; the term 'corrective rape' was first coined by charity workers in the early 2000s and since then Clare Carter, a photographer who has collected the most information on the issue in the form of interviews, has noticed an increase in the violence of the attacks. This extreme homophobia takes place within a country where LGBT people possess equal rights (South Africa was the first country to declare this in 1997) and where gay marriage has been legalized (it was legalized in 2005). Strudwick, Patrick. "Crisis in South Africa."

<sup>9</sup> Republic of South Africa. Criminal Law.

<sup>10</sup> Republic of South Africa. Criminal Law.

<sup>11</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC) (3 October 2013)

harmful instead of protective.<sup>12</sup> By failing to comprehend the underlying causes of the rampant rape incidence in South Africa and yet including many standards of international criminal law, the 2007 South African Sexual Offences Act demonstrates the tension which exists in African rape laws between how rape is understood in international norms and how it is understood on a local level.

Pearl is one victim out of thousands in Africa, and her experience of the South African legal system sheds light on laws in other African states as well. The analysis presented by this study in the pages that follow fills the gap in existing literature on rape laws, which consists predominately of case studies and does not present conclusions regarding the African continent as a whole. This study answers questions that concern fundamental aspects of the security of women's sexual rights in Africa and yet remain unanswered. What causes laws against rape to change? What influences have the most significant impact on content? Is the discussion of women's sexual rights a domestic or an international discussion? The remainder of this study tests the following hypotheses informed by previous scholars' findings: the occurrence of conflict and the presence of women in the political process are two of the most significant factors influencing legislative changes in African states, and effective laws against rape acknowledge the circumstances in which they function.

The study is organized as follows. The next section provides an overview of the literature concerning rape law's vital role in society, legislative changes in laws concerning women's rights, and the dynamics of the international and domestic components of said laws. It notes the limitations of this existing literature. The chapter on methods offers an outline of the analysis and clearly elucidates theoretical linkages to previous work. The methods chapter also explains the operationalization of the variables and presents preliminary descriptive statistics. The subsequent chapter presents the statistical analysis of the data and includes several case studies to provide narratives where the statistical analysis could not. The final chapter offers a conclusion to the study and implications for further research.

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<sup>12</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC) (3 October 2013)

## Chapter II. What We Talk About When We Talk About Rape<sup>13</sup>

Before reporting the two part analysis of African rape laws and showing how results suggest the variation of rape legislation, a review of relevant literature will be presented. This perspective of this study is based in the theory of Catharine MacKinnon, who asserts that rape fundamentally derives from an environment of inequality.<sup>14</sup> This theory guides the analysis of laws against rape and the review of relevant literature. Scholars have suggested different mechanisms influencing laws regarding sexual rights, some of which institutionalize inequality and others which challenge gender inequality. The law that results from these mechanisms may therefore address the inequality present in the society it governs, or it may ignore or enforce that inequality. In discussing how laws represent gender inequality, this study takes a critical view of universalism, in this case the idea that it may be possible to have a set of law components that are universally functional in addressing the crime of rape. This section will first elucidate its basis in MacKinnon's theory of sexual rights and inequality. Next it will examine the mechanisms purported by scholars to influence laws on rape, and finally it will critique the theory of universalism sometimes used in assessments of laws against rape, following the work of previous scholars on sexual violence.

### II.I. Environments of Inequality

The South African example cited above anecdotally shows the impact rape has in women's lives, but why does rape occur and in what terms should rape be discussed? How does society create rape, and how does rape influence society in return? Previous work, especially Catharine MacKinnon's,<sup>15</sup> illustrates that rape is not a simple crime; it is deeply rooted social, political, and economic realities. An overview of the literature pertaining to the influences on African laws against rape will follow a review of the theoretical understandings of rape.

MacKinnon argues that "rape should be defined as sex by compulsion, of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime."<sup>16</sup> She makes the polemical argument that a woman cannot give consent when she lives in a society where her rights are unequal to men's.<sup>17</sup> MacKinnon stresses that a law cannot be

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<sup>13</sup> Heading title reference to Carver, Raymond. *When we Talk about Love*.

<sup>14</sup> MacKinnon, Catharine A. *Feminist Theory of State*.

<sup>15</sup> MacKinnon, Catharine A. *Feminist Theory of State*.

<sup>16</sup> MacKinnon, Catharine A. *Feminist Theory of State*. 245.

<sup>17</sup> MacKinnon, Catharine A. *Feminist Theory of State*.



separated from the society in which it exists. She states, “In the context of international humanitarian law, to look to coercion to define rape is to look to the surrounding collective realities of group membership and political forces, alignments, stratifications, and clashes.”<sup>18</sup> She argues that requiring consent assumes that the victims live in a world free of discrimination, while requiring coercion acknowledges the circumstances that complicate one’s ability to give consent.

Not only are men and women unequal in society, but male dominance and female submission is often interpreted as erotic, as evinced by popular movies, magazines, and books, notably the recent international bestseller *Fifty Shades of Grey*, a S&M erotic romance. MacKinnon argues that because a woman’s power is perceived to derive from that woman’s desirability to men, this “so-called power presupposes more fundamental social powerlessness.”<sup>19</sup>

Other scholars endorse MacKinnon’s theory that rape is a crime stemming from lack of equality. Schulhofer argues that at the core, rape is the denial of sexual autonomy, meaning the ability to maturely choose sexual experiences free from social, economic, physical, and psychological pressures.<sup>20</sup> Schulhofer argues “the issue of sexual autonomy must be addressed directly, not as a byproduct of the endless and hopelessly confusing definitional debates about the meaning of force.”<sup>21</sup> Schulhofer uses the following example to demonstrate that a person’s right to autonomy applies not only to their property, but also to their sexuality. He writes that if a 5’2”, 100 pound woman sitting in the park is approached by a 6’, 200 pound man who demands her wallet, it would be interpreted that she gives the wallet to him out of justified fear and coercion not out of the desire to give him a gift, and that he deserves punishment for the theft. Yet if the same situation occurred and the man demanded sex instead, society would question the woman’s behavior and argue that the man did not knowingly commit a crime.<sup>22</sup> Why is it that if a wallet is taken, the crime is clear, and yet if access to a woman’s body is taken, the crime is unclear? Instead of focusing on the presence of force or consent, scholars argue, laws should

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<sup>18</sup> MacKinnon, Catharine A. “Defining Rape Internationally.” 957.

<sup>19</sup> MacKinnon, Catharine A. “Defining Rape Internationally.”

<sup>20</sup> MacKinnon, Catharine A. “Defining Rape Internationally.”

<sup>21</sup> Schulhofer, Stephen J. *Unwanted Sex*.

<sup>22</sup> Schulhofer, Stephen J. *Unwanted Sex*. 13.

focus on the presence of coercive circumstances: “any conduct that threatens to violate the victim’s *rights*.”<sup>23</sup>

Many factors have prevented the legal system from recognizing rape as a crime violating personal sexual autonomy. In reference to the United States court system in the early to mid-20<sup>th</sup> century, Schulhofer states “Courts were obsessed with the idea that a woman might fabricate an accusation of rape.”<sup>24</sup> This obsession was conveyed by the strict burdens of proof placed on the victim—the crime of rape necessitated the use of force and the resistance of the victim in most all circumstances. In the 1950s in the United States a “Model Penal Code” was developed in which the definition of rape excluded the notion of consent, required that the victim suffer serious injury, and was highly saturated with the belief that women were “unable to express their sexual desires directly;” it was believed that even if a woman said no, they might still mean yes.<sup>25</sup> Even now, there is a grey area regarding consent. A 1992 survey of American attitudes toward sex found that 22% of American women felt that they had been forced into having sex, the majority by significant others or acquaintances, while only 2% of American men said they had sex with a woman by means of force.<sup>26</sup> States in the US in the twentieth century often required the corroboration of evidence that a rape occurred in addition to the prompt complaint of the victim. Law enforcement and court systems regard victims with “skepticism and insensitivity.” Today, many states retain the requirement of force in acts of rape.

Although rape is a crime of inequality, it is not often recognized as such. So how is rape recognized by law? Scholars illustrate that legal definitions of rape are generally constituted by one or more of three components: use of force, lack of consent, or coercion.<sup>27</sup> The amount of force legally necessary to constitute rape may be severe, even life threatening force. Critics of legal standards of force and consent argue that because coercion inherently derives from an inequality in the relationship between two people, it may take verbal, economic, psychological, and social forms.<sup>28</sup>

Not only has there been an ongoing discussion concerning what rape *means* and how it should be defined domestically, there has also been a similar progression of thought in

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<sup>23</sup> Schulhofer, Stephen J. *Unwanted Sex*. 132.

<sup>24</sup> Schulhofer, Stephen J. *Unwanted Sex*. 18.

<sup>25</sup> The following draws from Schulhofer, Stephen. 1998. 22-23.

<sup>26</sup> Robert T. Michael et al., *Sex in America* 221 (Boston : Little, Brown, 1994) (results of national survey, conducted through the National Opinion Research Center, University of Chicago).

<sup>27</sup> Weiner, Phillip. “Evolving Jurisprudence.”; Schulhofer, Stephen J. *Unwanted Sex*.

<sup>28</sup> Schulhofer, Stephen J. *Unwanted Sex*.

international courts. Weiner chronicles the development of rape in international law through the cases tried by the international criminal tribunals.<sup>29</sup> Despite the progress that has been made, an international definition of rape does not yet exist, and much progress is still necessary. The struggle to develop international law represents the struggle to develop rape law at lower levels as well. Weiner cites that today, there are three issues in which rape definitions are inconsistent. These inconsistencies revolve around whether consent is a piece of the crime, whether the description of the crime is general or specific, and how to balance the rights of the victim and the accused.<sup>30</sup> The Akayesu, Kunarac, and Fujundiza decisions are the primary basis of international law today, and have all included the notions of consent, coercion, and clarity in different forms.<sup>31</sup> Despite the consideration of these international criminal courts, there is still no consensus in international law over the definition of rape.<sup>32</sup> As Viseur Sellers states,

The international courts and tribunals that redress gender- based violence have spurred more than just a definitional tension of legal elements. The differing versions of the elements of rape as an international crime provided by the ICTY/ICTR Gacumbitsi/Kunarac, the SCSP, the ECCC, the recent SCSL definition, and the ICC exist jurisdictionally concurrently to each other.<sup>33</sup>

These conflicting definitions lead to unresolved tension surrounding the persecution of rape globally, and raise questions regarding women's equality before the law and fair access to justice.

Worldwide, there have been recent developments in laws against rape. For example, corroboration of a victim's testimony is no longer required in many courts in the US and internationally, and the same applies to the requirement that the victim resist their attacker.<sup>34</sup> Rape shield rules have been established in many courts to prevent victims from being questioned about their sexual histories, which was done in order to reflect supposed moral flaw.<sup>35</sup> The harassment that many victims faced and continue to face in court impedes proper reporting of crimes. International courts, Weiner states, have also rejected appellant claims that PTSD

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<sup>29</sup> Weiner, Phillip. "Evolving Jurisprudence."

<sup>30</sup> As cited in Weiner, Phillip. "Evolving Jurisprudence."

<sup>31</sup> Weiner, Phillip. "Evolving Jurisprudence."

<sup>32</sup> Weiner, Phillip. "Evolving Jurisprudence."

<sup>33</sup> Viseur Sellers, Patricia. "Prosecution of Sexual Violence." 25.

<sup>34</sup> As cited in Weiner, Phillip. "Evolving Jurisprudence."

<sup>35</sup> Weiner, Phillip. "Evolving Jurisprudence."

negatively impacts a victim's credibility. Also, international courts and tribunals seem to be in accord with modern national courts in maintaining that rape is gender neutral.<sup>36</sup>

Both internationally and at a national level there remains disagreement over how rape should be defined. The debate over the necessity for consent, as opposed to use of force or coercion, has not been resolved. Requirements for mens rea<sup>37</sup> that attempt to protect the rights of the accused complicate this matter. The need to prove the lack of consent in some courts limits women's use of them.<sup>38</sup> Weiner argues that more progress must be made concerning rape shield laws and abortion laws regarding children conceived in rape as well.<sup>39</sup>

It's necessary to illustrate that this conflict over how rape should be defined is incredibly significant. It is terribly ironic that such a destructive crime should be surrounded by an aura of uncomfortable silence and uncertainty. The following paragraphs seek to portray the destructiveness of rape and why it is vital that laws against rape recognize fundamental environments of inequality in a functional manner.

Rape can have profound impacts on communities. In times of peace, women often blame themselves for being raped, which is emotionally destructive not only to the woman, but also to any family or communal unit to which the woman belongs. Furthermore, rape and sexual abuse endangers a woman's ability to provide for herself and her dependents because in many societies in Africa and in Asia, the resources distributed to women through inheritance or marriage reflect the 'virtue' they possess in the eyes of society.<sup>40</sup> If the perception of a woman's virtue is damaged, she consequently loses resources, or property. A woman in these societies is beholden to men in her life—boyfriends, fathers, husbands, sons—for resources, and they in turn are given the power to dictate her sexual behavior.<sup>41</sup> In times of war, rape is a crime that occurs on such a massive scale, in such personalized ways, with such obscene methods that it may be linked to 'social fragmentation.'<sup>42</sup> Sideris, who interviewed female refugees who were raped during Mozambique's civil war described:

They argued that when one woman was raped, the whole community felt the rape. They pointed out that those present were also dehumanized. Relatives and compatriots, who

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<sup>36</sup> Weiner, Phillip. "Evolving Jurisprudence."

<sup>37</sup> Mens rea is understood to mean a person's consciousness that an act is criminal—the mental part of the crime.

<sup>38</sup> Viseur Sellers, Patricia. "Prosecution of Sexual Violence."

<sup>39</sup> Weiner, Phillip. "Evolving Jurisprudence."

<sup>40</sup> Meintjes et al. *The Aftermath*.

<sup>41</sup> Meintjes et al. *The Aftermath*.

<sup>42</sup> Sideris, Tina. "Rape in War and Peace."

were drawn into the public degradation of the rape victim by their witness to the attack and their participation in the assault, were shamed and humiliated... [R]ape resulted in the breakdown of family and community functioning...<sup>43</sup>

Sideris shows that during war when terrible atrocities are committed—family members are forced to rape other family members, women are forced to marry the men that killed their true husbands, men are forced to partake in the rape of their wives—the actions attack not only individuals, but the framework of the community itself by perverting social norms.

Catharine MacKinnon elegantly explains the impact that laws against rape have on victims and communities:

The degree to which the actualities of raping and being raped are embodied in law tilt ease of proof to one side or the other and contribute to determining outcomes, which in turn affect the landscape of expectations, emotions, and rituals in sexual relations, both every day and in situations of recognized group conflict.<sup>44</sup>

Thus one who has never been raped, and perhaps never will be, is still unconsciously impacted by the rape legislation in effect in their jurisdiction. The outcomes of rape cases tell society what is acceptable and what is not, and dictates how they expect to be treated by others. Defining the crime of rape impacts how rape is understood by the populace in addition to aiding the prosecution of the crime which is so destructive to individuals and communities. Thus it is essential that in the definition of rape laws recognize the gender inequality fueling the crime.

## **II.II. The Transformative Mechanisms of Sexual Rights Law**

How do mechanisms create and transform this environment of inequality in which rape occurs? Although literature discusses these mechanisms and their potential results, there is insufficient attention paid to how and why laws against rape change in particular. Furthermore, most studies on the topic of rape legislation are case studies and lack a comprehensive and comparative perspective. Previous scholars cite the following mechanisms of transformation in sexual rights law: women in government, war, colonialism, religion, legal pluralism, the framing of the law, and international influence. The following section will provide an overview of the discussion on these topics.

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<sup>43</sup> Sideris, Tina. "Rape in War and Peace." 148.

<sup>44</sup> MacKinnon, Catharine A. "Defining Rape Internationally." 940.

Many scholars identify the presence of women in government as a potential influence on policymaking concerning women's rights. Scholars debate whether the presence of women in government has the expected effect—an actual translation of women's issues into policy.<sup>45</sup> Scholars argue that in order to substantially represent women in a legislative body, a critical mass of women, 30%, must be present.<sup>46</sup> Women gain access to positions in African governments in post-conflict periods in part because conflict creates a group of women willing and capable of leading. The effort of local women's movements and international forums to accomplish legislative change and institute quotas have contributed to the presence of women in government, according to Bauer and Britton. Some scholars show that women in government may appear to represent their constituencies while in fact their actions are restrained by authoritarian governments or party allegiances.<sup>47</sup>

Scholars identify conflict as another influence on legislation, and thus a discussion of legislation against rape would be incomplete if it did not recognize the large imprint war leaves on a country. Scholars argue the women gain power during wartime, but in many instances this power is later reversed in the period following the war.<sup>48</sup> Women often make advances during conflict. Women may take more leadership roles in their communities and positions of power in military hierarchies, both of which contribute to an increased awareness of their political power to affect change. However, scholars have observed that post-conflict societies may experience a reversal of these gains in societal, political, and religious institutions, some of which are discussed later in this paragraph, due to the non-recognition of women's agency as actors during wars. In addition to the long lasting effects of bodily harm women experienced during the war, women may lose access to education and political positions of leadership. Women returning to their communities after war may find that they have lost property rights because they are now widows, or that their land has been given away. They may lose their jobs or find themselves relegated to the informal sector. Women who had taken part as combatants or been victims of the atrocities during the war may be ignored by demobilization schemes that focus primarily on men. They may become ostracized by their communities. Being the main provider of subsistence foodstuffs, these post-conflict changes towards women may cause famine. Women additionally

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<sup>45</sup> See Hassim, Shireen. "Virtuous Circle of Representation."

<sup>46</sup> Bauer, Gretchen and Hannah Evelyn Britton. *Women in African Parliaments*.

<sup>47</sup> See Longman, Timothy. "Rwanda." See also Hassim, Shireen. "Virtuous Circle of Representation."

<sup>48</sup> The following paragraph is informed by Bop, Codou. "Women in Conflict."

face increased social violence privately and publicly at the hands of males who seek to reestablish their control in the post-conflict society.<sup>49</sup> Although evidence shows this backlash against women post-conflict, African women are not passive victims and they do not always lose their gains. War has a transformative effect on traditional gender roles, and women must harness these transformations in the post-conflict period in order to make them long-lasting.<sup>50</sup>

Scholars cite that colonialism has greatly influenced sexual rights laws. The colonial experience has left its impact on legal systems around the world, and laws against rape have not been excluded from this influence. For example, until the 1950s,<sup>51</sup> most American states laws contained some form of Blackstone's eighteenth century definition of rape, "carnal knowledge of a woman forcibly and against her will,"<sup>52</sup> and marital rape was legal, following the seventeenth century judgment of British Chief Justice Lord Hale, "by their matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract."<sup>53</sup>

Law in Africa is a type of dualism—the law of the former colonizers on one hand and customary law on the other hand. However, scholars argue that customary law does not embody African 'tradition,' in fact tradition was fundamentally altered by colonialism.<sup>54</sup> Martin Chanock states:

The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion. And it also came to be a new way of conceptualizing relationships and powers and a weapon within African communities which were undergoing basic economic changes, many of which were interpreted and fought over by those involved in moral terms.<sup>55</sup>

Customary law, he argues, constituted a way of defending against the changes colonialism introduced. Changes to customary law embodied not only colonial powers' influence, but also the influence of Africans "whose growing involvement in wage labour and market agriculture

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<sup>49</sup> Turshen, Meredith. "Engendering Relations."

<sup>50</sup> Meintjes et al. *The Aftermath*.

<sup>51</sup> The following draws from Schulhofer, Stephen J. *Unwanted Sex*.

<sup>52</sup> Blackstone, William. *Commentaries on the Laws of England*.

<sup>53</sup> Hale, Matthew. *History of Pleas of Crown*.

<sup>54</sup> Customary law is used in the sense in which Chanock used it: "the norms and practices existing in the pre-colonial period and...those used in dispute-settlement, not involving government agencies, under colonial rule. Customary law refers to the norms and practices recognized by the courts in the colonial period." Chanock, *Law, Custom, and Social Order*.

<sup>55</sup> Chanock, Martin. *Law, Custom, and Social Order*. 4.

was leading them towards different interpretations of obligations and proprieties.”<sup>56</sup> The expansion of agriculture in the colonial period led to increased attempts to control household labor sources and land. This fight over labor manifested itself in altered customary law that promoted elders’ control over their descendants and husbands’ control over women and children.<sup>57</sup> Chanock argues that colonialism changed customary law, and yet the native peoples continued to view customary law as a continuation of “Africanness,” a defense against foreign influence, and “an important part of nationalist ideology in Africa.”<sup>58</sup>

Later, as the economy and society of Africa continued to change, indirect rule stymied legal reform as African leaders used courts to defend social order rather than enforce rights.<sup>59</sup> Chanock explains:

[L]egal nationalism now endorsed customary law as the essentially African part of the colonial legal system upon which the new African law was to be built. This made it impossible to see the customary law as having been created by colonialism.<sup>60</sup>

Customary law became a series of very old laws with no defined origin date. It was best known by the oldest person in a village, meaning it essentially became a “living expression of native public opinion.”<sup>61</sup>

Furthermore, colonizers institutionalized their religious values by interweaving them into law. Chanock argues that customary law was “a morality idealized in a way which made it compatible with the new mission morality.”<sup>62</sup> Women could not legally leave their husbands if they wanted to, because legally women were men’s ‘property.’<sup>63</sup> In Nigeria during the 1920s, the introduction of Christianity, a religion “embedded in Victorian notions of gender” underlay tensions in the “Women’s War.”<sup>64</sup> In Senegal, where conservative Islam has been allied with “Western-trained politicians” since colonial times, Islam “appears to have institutionalized a subservient role for women.”<sup>65</sup>

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<sup>56</sup> Chanock, Martin. *Law, Custom, and Social Order*. 54.

<sup>57</sup> Chanock, Martin. *Law, Custom, and Social Order*.

<sup>58</sup> Chanock, Martin. *Law, Custom, and Social Order*.

<sup>59</sup> Chanock, Martin. *Law, Custom, and Social Order*.

<sup>60</sup> Chanock, Martin. *Law, Custom, and Social Order*. 54.

<sup>61</sup> Malawi National Archives NC1/21/3, 11/7/28. As cited in Chanock, Martin. *Law, Custom, and Social Order*.

<sup>62</sup> Chanock, Martin. *Law, Custom, and Social Order*.

<sup>63</sup> Chanock, Martin. *Law, Custom, and Social Order*.

<sup>64</sup> Van Allen, “Sitting on a Man.” As cited in Tripp et al., *African Women’s Movements*. 42. See also Longman, Timothy. “Rwanda.”

<sup>65</sup> Creevey, Lucy. “Senegal.” 155.



Colonialism created a multiplicity of systems providing justice and moral expectations by imposing European law and endorsing altered customary law. This legal pluralism is also an influence on sexual rights legislation. The legal pluralism in many regions of Africa means that women's rights, including property rights and rights in marriage, are governed by multiple systems at any given time, most of which are patriarchal.<sup>66</sup> The impacts of colonization are evident in these systems. Many countries have civil law systems influenced by the French system, where law is codified and courts determine judgments from these codes. Other countries have common law systems following the English tradition, where courts decide cases based on the precedence of previous court decisions. Both civil and common law systems were designed by colonial officials to increase the capital accumulation derived from the male labor force. Scholars assert that colonial authorities, as well as post-independence authoritarian regimes, have used sexual violence as a manner of maintaining control over their populations.<sup>67</sup> Colonial officials supported new interpretations of customary laws which punished women in harsher manners for crimes such as adultery, favored the spread of bridewealth marriage, and altered the practice of matrilineal inheritance.<sup>68</sup> As Chanock states in regard to one example, "the new law was founded on the male alliance against female indiscipline."<sup>69</sup> In most African countries, citizens are subject to customary law (such as tribal or clan law) or religious law (such as Sharia law) in addition to the civil or common law systems, which are also patriarchal. Where one law system gives a woman rights, another may take it away. In 1999, for example, the Zimbabwe Supreme Court ruled that tradition trumped both the constitution and the 1982 Majority Age Act in a 5-0 decision concerning a woman who had been evicted from her father's estate by her step-brother.<sup>70</sup> Due to the traditional patriarchy of Africa, the decision cited, a woman should be considered a 'junior-male' in the family, not an adult.

Furthermore, in addition to being contingent on "state openness to gender-related reform; the history of gender-related policies, such as colonial legal legacies; international norms, conventions, and treaties; and the specific interests of those in power to ally themselves with or

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<sup>66</sup> Legal pluralism has been defined as: "that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs." Griffiths, John. "What is Legal Pluralism?"

<sup>67</sup> Bauer & Britton. *Women in African Parliaments*.

<sup>68</sup> Chanock, Martin. *Law, Custom, and Social Order*.

<sup>69</sup> Chanock, Martin. *Law, Custom, and Social Order*.197.

<sup>70</sup> This example is informed by Turshen, Meredith. "Engendering Relations."

challenge opponents of gender-related reforms,<sup>71</sup> the passage of legislation on rape may be influenced by the framing of the reforms. Incorporating uncontroversial and controversial legislation in one omnibus bill has negatively impacted countries' ability to successfully pass reforms.<sup>72</sup> The characteristics of some laws make them less controversial and more likely to pass in comparison to others. Tripp et al. note that laws in Africa are rather unique because of the legal pluralism that exists in most countries; the incorporation of customary laws within formal legal systems has further stymied attempted change.<sup>73</sup> While reforms concerning discrimination have been mostly uncontroversial, laws which define women and children as property have been more difficult to challenge because they so profoundly affect family and clan institutions.<sup>74</sup> Family law has been more apt to change due to post-conflict conditions: "legislation pertaining to violence against women, land legislation, and legislation regarding family codes has been easier to pass in post-conflict contexts than non-post-conflict countries because of heightened concern around the issues and the high incidence of rape and domestic violence during and after conflict."<sup>75</sup>

Legislative changes are also due in part to the era in which they took place. Tripp et al. cite that since 1990, 38 African states have rewritten their constitutions, and 6 have heavily revised their constitutions.<sup>76</sup> These changes they attribute to post-conflict changes and shifts towards multipartyism and political opening. During the 1990s Africa saw a wave of democratizations—the number of democracies doubled between 1980 and 2007, and the number of authoritarian states shrank from one half to one third of the total states.<sup>77</sup> Paradoxically, Tripp et al. also mention that authoritarian states such as Zimbabwe have also instituted reforms in women's rights; these concessions to women's movements may be the state's attempt to increase the productivity of the female worker or to portray itself as a modernizer.

There have also been indirect international influences on African laws concerning gender. The following paragraph explains how previous scholars have described the diffusion of ideas concerning women's rights and how this process involves actors inside and outside a country.<sup>78</sup>

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<sup>71</sup> Tripp et al. *African Women's Movements*. 119.

<sup>72</sup> Tripp et al. *African Women's Movements*. 120.

<sup>73</sup> Tripp et al. *African Women's Movements*. See Chanock, Martin. "Neo-Traditionalism and Customary Law."

<sup>74</sup> Tripp et al. *African Women's Movements*.

<sup>75</sup> Tripp et al. *African Women's Movements*. 118.

<sup>76</sup> Tripp et al. *African Women's Movements*.

<sup>77</sup> Tripp et al. *African Women's Movements*.

<sup>78</sup> Tripp et al. *African Women's Movements*.

Perceptions of the West have influenced how African states have perceived women's rights. Tripp et al. write "In Africa, the term 'feminism' has often had carried with it the baggage of being regarded a Western and foreign construct," and as a foreign construct 'feminism' was portrayed by the African media and politicians as a dichotomous relationship between men and women in which men were the enemies.<sup>79</sup> This attitude, Tripp et al. state, was popular before the growth of women's advocacy organizations in the 1990s. Tripp et al. attribute the growing presence of women in government to several factors.<sup>80</sup> They specifically attribute female representation in government to the societal upheaval brought by war, the growth of women's movements in the 1980s and 1990s, the institutionalization of international norms concerning women's rights, and "the availability *and* deployment of resources to advance women." The influences of women's movements on national, regional, and global levels have contributed to changes in international norms, which are then included in governments' human rights agenda. International norms disseminate to state governments through several mediums: continental entities, sub regional organizations, international governmental organizations, and foreign donors, international NGOs, and foundations. The dissemination of international norms today happens primarily within Africa through regional networks. This has had a positive effect: "The fact that the external influences on African governments today are primarily coming from the continent itself has contributed in no small measure to the willingness on the part of Africa's leaders to embrace these new norms."<sup>81</sup> Although international norms are adopted by internal organizations and then promoted within the country, other influences on women's rights policy directly originate from internal NGOs and regional advocacy networks. UN conferences may mobilize internal organizations. The growth of communication networks and increasing use of the media as a strategic tool has increased the visibility of women's issues. International donors, although sometimes seen in a neo-imperialist view, have increased the capabilities of women's NGOs. Wealthier states have been found more likely to adopt policies on women's rights.

Influences on laws against rape generate content, but there is debate regarding how this content should be evaluated. The scholarly literature on sexual violence highlights the differences between how locals and international actors perceive sexual violence.<sup>82</sup> There is a

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<sup>79</sup> Tripp et al. *African Women's Movements*.69.

<sup>80</sup> Tripp et al. *African Women's Movements*.

<sup>81</sup> Tripp et al. *African Women's Movements*.2.

<sup>82</sup> Zongwe, 2012; Singleton, 2012; Cheney, 2012; Burnet, 2012; Abramowitz & Moran, 2012.

disconnect in some nations between the crime as it exists on the local level and how it is defined and prosecuted at the state level, which may in part be due to the influence of NGOs and other international donors. For example, Abramowitz and Moran state "Most expatriate NGO workers in Liberia are unaware of the history of gender relations in the country and of the daily realities in which men and women negotiate their responsibilities in the present moment."<sup>83</sup> They are also unaware of the ways in which the presence of international humanitarian organizations shapes the political economy of post-conflict spaces and asserts a powerful, but indirect, influence over permissible discourses in those spaces."<sup>84</sup> Also, Singleton looks at South Africa's 1999 Sexual Offences Act and "examines the wide disparity between some of the state discourses about coercion and consent and local beliefs and practices about the meanings of these terms."<sup>85</sup> Given the work of these researchers and others, it is worthwhile to investigate how domestic and international actors in states in both post-conflict and non-post-conflict African states influence laws against rape.

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<sup>83</sup> Abramowitz, Sharon and Mary H. Moran. "Postconflict Liberia." 138.

<sup>84</sup> Abramowitz, Sharon and Mary H. Moran. "Postconflict Liberia."

<sup>85</sup> Singleton, Judith L. "South African Sexual Offences Act." 59.

### Chapter III. Methods

The previous section shows that of the various factors impacting legislative changes in African states, the occurrence of conflict and the presence of women in the political process are two of the most significant. The previous section also shows that without acknowledging the conditions of inequality under which laws against rape function, they cannot be effective. The remainder of this study supports these two claims through analysis. Previous scholars have primarily employed regional case studies in their analysis of women's rights laws; in an effort to develop cross-regional conclusions, this study employs statistical analyses of the 52 countries in Africa in which laws against rape are observed. This section provides an outline of the analysis presented in the following chapters, and further elucidates the theoretical link between this study and previous literature.

To quantitatively test the first claim that conflict and the presence of women in political spheres influence changes in laws against rape, a statistical analysis is run on the sample of the 52 African states observed with laws against rape, seeking correlations between a change in law and the aforementioned variables, in addition to others. A change in law, scholars show, is the product of a complex combination of variables, among which the occurrence of war and the influence of women in the political process appear to be notably significant.<sup>86</sup> Scholars contest, however, whether women's gains during war may be sustained during the post-conflict period,<sup>87</sup> and whether women in government are able to translate the push for women's rights into actual policy.<sup>88</sup> This study clarifies whether these factors correlate to changes in laws against rape in particular, or whether other variables noted by scholars are more influential. The other variables tested in relation to a change in law include the colonial history of the state, the dominant religion of the state,<sup>89</sup> the type of legislation in which the law against rape is contained,<sup>90</sup> the regime type of the state,<sup>91</sup> and the presence of legal pluralism in the state.<sup>92</sup> Scholars have cited each of these variables as potential influences on legislation pertaining to women's issues. Given the prevalence in previous literature of discussions on war and the presence of women in

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<sup>86</sup> Bauer, Gretchen and Hannah Evelyn Britton. *Women in African Parliaments*; Tripp et al. *African Women's Movements*.

<sup>87</sup> Bop, Codou. "Women in Conflict."

<sup>88</sup> Hassim, Shireen. "The Virtuous Circle of Representation."

<sup>89</sup> Bauer, Gretchen and Hannah Evelyn Britton. *Women in African Parliaments*

<sup>90</sup> Tripp et al. *African Women's Movements*.

<sup>91</sup> Tripp et al. *African Women's Movements*.

<sup>92</sup> Meintjes et al., *The Aftermath*.

political processes, the correlations between these two variables and a change in law are expected to be stronger than correlations between a change in law and the latter mentioned variables. States that have recently altered their penal code are expected to have more comprehensive, clear definitions of rape. States that have experienced conflict within the past fifteen years are expected to have more severe punishments for rape and vice versa. Case studies provide alternative narratives and to potentially address any lingering questions.

To test the claim that a law against rape is not effective if it solely contains ‘universal’ components derived from international norms, a statistical analysis is run on the content sample comprised of the 52 laws against rape. Scholars have discussed the change in a law concerning women’s rights in relation to its content, in particular its sentencing, clarity, and its inclusion of international norms and locally pertinent<sup>93</sup> components.<sup>94</sup> Given that scholars have also connected laws concerning women’s rights to the religion of the state, the state’s regime type, the state’s colonial history, and the presence of legal pluralism within the state,<sup>95</sup> these variables will be considered in the analysis of laws’ content as well as in the analysis of the laws’ change. Several case studies provide additional insight into the manner in which the laws’ content fits the needs of the populace. The purpose of this analysis is to illustrate whether there is a tension between the international norms components of laws and the locally pertinent components of laws such as Abrahmowitz and Moran suggest.<sup>96</sup> Whether such a tension exists is inherently dependent on which category of variables has a greater impact on the content of a law: pre-existing conditions such as the colonial history of the state or the newly present conditions which caused the change in the law. The content analysis also questions whether there is a convergence to international norms, and explores how the components introduced by various influences interact with each other to form an effective law.

One goal of this study is to discover and analyze any tension that exists between components of international law and components pertinent to the local region. This tension is analyzed by

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<sup>93</sup> The term ‘locally pertinent’ refers to concepts and practices whose meaning and/or use may be particular to the region in which they are found, or may be different in that region in comparison to others.

<sup>94</sup> Tripp et al., *African Women’s Movements*; Zongwe, Dunia Prince, “New Sexual Violence Legislation.”; Singleton, Judith L. “The South African Sexual Offences Act.”; Cheney, Kristen. “Locating Neocolonialism.”; Burnet, Jennie E. “Situating Sexual Violence.”; Abramowitz, Sharon and Mary H. Moran. “International Human Rights.”

<sup>95</sup> Bauer, Gretchen and Hannah Evelyn Britton. *Women in African Parliaments.*; Tripp et al., *African Women’s Movements.*; Meintjes et al., *The Aftermath.*

<sup>96</sup> Abramowitz, Sharon and Mary H. Moran. “International Human Rights.”

distinguishing concepts which are common in international law from those which are particular to the specific country in which they were adopted, suggesting they are rooted in local history and tradition. It also explains if and how the influences alter the laws' clarity, severity, and content. Scholars such as Judith Singleton have discussed the tension between international and local understandings of rape, international and local, and how people's difficulty in connecting the two leads to misunderstandings. For example, she writes of the 2007 Sexual Offences Act of South Africa, which was heavily influenced by Western ideals of human rights, saying there is a "wide disparity between some of the state discourses about coercion and consent and local beliefs and practices about the meanings of these terms in the Zulu township of Mpophomeni."<sup>97</sup> Similarly, in their ethnography of postconflict Liberia, Abrahmowitz and Moran question whether "...there is a fundamental "incommensurability"<sup>98</sup> between global discourses about gender-based violence and local understandings of gender, power, violence, and moral behavior in postconflict Liberian life".<sup>99</sup> This study questions whether laws tend to be more international norms-focused, and thus perhaps more susceptible to the tension of understanding that Singleton discusses, or whether they employ locally pertinent understandings of rape.

The focus on African states presents the opportunity to observe laws at various different stages of development. Given the relatively recent period of colonialism, the durability of colonialism's institutional legacy has the potential to make African states more susceptible to influxes of international and Western norms. If African laws show both international influences and independently developed concepts of rape, how the two sources blend to create functioning law is of great interest.

The high rate of sexual violence that African nations have experienced during war and peace also add to the importance of studying the laws which combat rape in these states. Both South Africa and the Democratic Republic of the Congo have been called "the rape capital of the world,"<sup>100</sup> and the region of Southern Africa as a whole has the second highest incidence of rape in the world.<sup>101</sup> When such high incidences of rape occur in combination with rape laws at various stages of development, the victims of rape are unable to seek the services and justice

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<sup>97</sup> Singleton, Judith L. "The South African Sexual Offences Act."

<sup>98</sup> Povinelli, Elizabeth A. *The Cunning of Recognition*.

<sup>99</sup> Abrahmowitz, Sharon and Mary H. Moran. "International Human Rights." 122.

<sup>100</sup> Lloyd-Davies, Fiona. "Rape Capital of the World."

<sup>101</sup> Harrendorf et al. *International Statistics on Crime and Justice*.

they require. By focusing this study on Africa, this study assesses how rape laws in the region relate to international laws and how useful they are in addressing the needs of their communities.

The sample includes the rape laws of all 54 African states. The respective parliament, legislative assembly, president, or monarch enacted these laws, and national gazettes or journals of official government documents published many of them. Of the 54 states under observation, 2 did not have rape legislation to include in the study. The rape laws for the Republic of the Congo and Swaziland could not be located; the penal code of the Republic of the Congo was not available and Swaziland does not have a compiled penal or criminal code nor has the state enacted an act pertaining to sexual offences. The Sexual Offences and Domestic Violence Bill was published in the Swaziland Government Gazette Extraordinary in 2009 but has not been enacted. In order to perform the analysis, the countries were listed alphabetically and each was assigned a number for identification.

The majority of the laws pertaining to rape were located on the website of the United Nations Office on Drugs and Crime, which makes many domestic laws and other documents relating to crime available to the public. Some were only available from other sources such as Refworld, the World Intellectual Property Organization, the International Labour Organization, the Rule of Law in Armed Conflicts (RULAC) Project of the Geneva Academy of International Humanitarian Law and Human Rights, the UN Secretary-General's database on violence against women, and national government websites. In the case of several states, a reliable source of the legislation was difficult to locate. South Africa, for example, recently passed the Sexual Offences Act, but despite the media attention the Sexual Offences Act received when it was enacted, it was available only through Wikisource. In these instances, the importance of having the largest number of cases possible overcame the issue of using a less authoritative source.

Within the laws, the sections of the laws pertaining to rape were located within the larger piece of legislation. These sections included the definition of rape and the sentencing for the crime. In some laws, this section was one article comprising a sentence or two. In others, it was multiple articles of various lengths.<sup>102</sup>

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<sup>102</sup> For example, the Criminal Code of Ghana consists of the following:

Section 97—Rape.

Whoever commits rape shall be guilty of a first degree felony and shall be liable on conviction to imprisonment for a term of not less than five years and not more than twenty five years.

Section 98—Definition of Rape.

Rape is the carnal knowledge of a female of sixteen years or above without her consent.



Thus far, this chapter has discussed the theory behind the study, the methods, and the sample under observation. In the following sections, the dependent and independent variables are defined and operationalized. Preliminary descriptive statistics are included to lead into the data analysis in the next chapter.

### **III.I. Dependent Variables**

There are two dependent variables within the analysis: the change in laws against rape and the content of the laws against rape. The dependent variable ‘content’ is a collection of variables including clarity, severity, international content, and locally pertinent content which fall within the larger category of ‘content.’ The following pages describe the operationalization of these dependent variables.

#### *Change in Law*

Only one country did not change its law during the 20<sup>th</sup> or 21<sup>st</sup> century—Benin. Interestingly, the majority of the African states changed their laws governing rape between the years of 1990 and 2013; 31 countries changed their laws during this period while 21 countries did not change their laws. The countries which changed their laws within this period and those which did not both provide an opportunity to observe how content was related to a change in law in this period and which independent variables had the strongest relationship with the change. Without performing a time series analysis on each of the 52 states under observation, it is not possible to undertake the same analysis for the entire period of time in which states adopted their current laws. Thus, the most recent two decades afford an opportunity to analyze the relationship

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While the Ethiopian Criminal Code consists of the following:

(1) Whoever compels a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance, is punishable with rigorous imprisonment from five years to fifteen years.

(2) Where the crime is committed:

a) on a young woman between thirteen and eighteen years of age; or

b) on an inmate of an alms-house or asylum or any establishment of health, education, correction, detention or internment which is under the direction, supervision or authority of the accused person, or on anyone who is under the supervision or control of or dependent upon him; or

c) on a woman incapable of understanding the nature or consequences of the act, or of resisting the act, due to old age, physical or mental illness, depression or any other reason; or

d) by a number of men acting in concert, or by subjecting the victim to act of cruelty or sadism, the punishment shall be rigorous imprisonment from five years to twenty years.

(3) Where the rape has caused grave physical or mental injury or death, the punishment shall be life imprisonment.

(4) Where the rape is related to illegal restraint or abduction of the victim, or where communicable disease has been transmitted to her, the relevant provisions of this Code shall apply concurrently.

Article 621.- Compelling a Man to Sexual Intercourse.

A woman who compels a man to sexual intercourse with herself, is punishable with rigorous imprisonment not exceeding five years.

between a change in law, independent variables, and content-related variables that would not otherwise be possible.

### *International and Locally Pertinent Content*

The content of the rape laws was divided into two categories. One category contained content which is location pertinent and one contained components that are commonly found in international law definitions and other domestic definitions globally. Scholars have cited the incidence of three concepts in international law: consent, coercion, and the protection of the accused's rights.<sup>103</sup> International laws may be vague concerning the act of rape, or may feature detailed descriptions of the movements involved.<sup>104</sup> They might also reference the rights of the victim and rights concerning abortion.<sup>105</sup> Laws addressing rape locally might address problems including kidnapping for the purpose of raping, rape accompanied by sexual mutilation, and bridewealth.<sup>106</sup>

To determine which components of rape laws mirrored international norms, the definitions of the international courts and domestic courts in the international community provided a ground for comparison. The definitions of rape in the Akayesu case, the Kunarac case, and the ICC varied in the detail in which they described the act of rape and in the degree to which they required lack of consent or coercion, and yet all are significant recent interpretations of rape in international law.<sup>107</sup> Components of the rape laws under observation that paralleled international definitions included building block components such as gender neutrality, the notion of consent, the notion of coercion, and the use of a threat or force. Other international components delved deeper into what qualifies as rape, such as the use of threat or force against a third party (such as a child or relative) with the intent to coerce the victim, the victimization of a person characterized by a mental or physical state (such as age, disability, or unconsciousness) that makes them particularly vulnerable, the false representation of oneself as the victim's husband or significant other, and marital rape. Additional international components included opportunities for increased punishments such as the incidence of gang rape, an authority figure or caretakers' rape of a dependent, and a perpetrator transferring STDs to the victim. The prohibition of using a victim's sexual history in court as evidence of moral flaw and the protection of victims in court

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<sup>103</sup> Weiner, Phillip. "Evolving Jurisprudence."

<sup>104</sup> Weiner, Phillip. "Evolving Jurisprudence."; MacKinnon, Catharine A. "Defining Rape Internationally."

<sup>105</sup> Weiner, Phillip. "Evolving Jurisprudence."

<sup>106</sup> Abramowitz, Sharon and Mary H. Moran. "International Human Rights."

<sup>107</sup> As cited in Weiner, Phillip. "Evolving Jurisprudence."

suffering from mental distress such as PTSD were also delineated as international components due to similarities in international laws. Several other components of rape definitions appeared in the category of ‘international norm,’ but those listed above were the most commonly seen. The full list appears in the codebook in the appendix.

Components of the African laws which pertained to local understandings of rape suggested by scholars were coded as ‘locally pertinent.’ Weiner<sup>108</sup> and MacKinnon<sup>109</sup> suggested components of rape laws aligned with international norms, and other scholars demonstrated components of rape laws more rooted in local norms and understandings of rape.<sup>110</sup> While denoting ‘location pertinent’ understandings of the crime, any wording in the law that implied a reflection on morality such as ‘decency,’ ‘honest,’ ‘la pudeur’ [translated from French: modesty], etc. were coded as locally pertinent because an implication of morality is inherently contextual and cannot be considered universal. Any traditionally religious descriptions of rape were also coded as locally pertinent. These descriptions included wording such as ‘unnatural offense,’ which is the remnant of sodomy laws,<sup>111</sup> and ‘carnal knowledge’. Mentions of traditions followed in some cultures, such as the dowry system, were also coded as locally pertinent.’ Additional components categorized as ‘location specific’ included subjective assessments such as the notion that victims and perpetrators must be of a particular sex for the crime to constitute rape (i.e. women cannot commit rape, men cannot be raped) and the notion that males below certain ages are incapable of having sexual intercourse. Other components in this category concerned marriage traditions, some of which conveyed a subjective understanding of honor. These components were those such as the allowance of the consummation of marriage above the age of 12, the termination of the perpetrator’s punishment if the perpetrator marries the victim, the requirement that the family of a raped virgin must be ‘compensated,’ and the statement that sex cannot be rape if it occurs between two married persons. The full list of components that were included as locally pertinent rather than internationally normative is located in the codebook in the appendix.

Several problems surfaced at this stage in the research. One of the difficulties with an analysis of laws against rape is that many definitions do not clearly separate the crime of ‘rape’

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<sup>108</sup> Weiner, Phillip. “Evolving Jurisprudence.”

<sup>109</sup> MacKinnon, Catharine A. "Defining Rape Internationally."

<sup>110</sup> Abramowitz, Sharon and Mary H. Moran. "International Human Rights."; Singleton, Judith L. "South African Sexual Offences Act."; Burnet, Jennie E. "Situating Sexual Violence."

<sup>111</sup> Long, Scott. "British Sodomy Laws Linger."

from other related crimes like sexual assault. The ‘definition’ of rape in a law, is often much more complex than say, a dictionary definition. Each definition both defines the act of rape and outlines the sentencing mechanism. The sentencing mechanism may lay out a variety of other crimes and or conditions which increase or decrease the punishment merited by the perpetrator.<sup>112</sup> Without the ability to question an authority on the law in question, if subsequent articles cited previous ones outlining rape seemingly with the intent of continuation, it was included as part of the definition of rape.

Another difficulty was one of translation. Consistent with the colonial past of many African countries, laws were written in English, French, Portuguese, Spanish, and Arabic. By nature, law is comprised of very precisely intended words, and thus to translate several French, Portuguese,

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<sup>112</sup> To demonstrate the complexity, observe the section pertaining to rape in the Penal Code of the Seychelles, which is comprised of 7 separate articles, Articles 130 to 137:

“Offences Against Morality

130. Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape.

131. Any person who commits the offence of rape is liable to be punished with imprisonment for life.

132. Any person who attempts to commit rape is guilty of a felony, and is liable to imprisonment for life.

133. Any person who, with intent to marry or carnally know a woman of any age, or to cause her to be married or carnally known by any other person, takes her away, or detains her, against her will, is guilty of a felony, and is liable to imprisonment for seven years.

133A. (1) Any person who unlawfully takes an unmarried girl under the age of eighteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her and against the will of such father or mother or other person, if she is taken with the intention that she may be unlawfully and carnally known by any man whether any particular man or generally, is guilty of a misdemeanor. (2) It shall be a sufficient defense to a charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of eighteen years.

136. (1) Any person who unlawfully and carnally knows any girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for life.

(2) Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for fourteen years.

136A. (1) Any person who unlawfully and carnally knows any girl not under the age of thirteen years but under the age of fifteen years is guilty of a misdemeanor.

(2) It shall be a sufficient defense to a charge under this section if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of fifteen years.

137. Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, is guilty of a felony, and is liable to imprisonment for fourteen years.”

In the Seychelles Penal Code, Articles 130 through 132 define the crime of rape and dictate a sentence. However, the following five articles add complicated conditions which increase the sentence or dictate a separate sentence. All of these conditions were included as components of the crime of rape in the analysis, and thus were included in the overview of content.

and Arabic terms and expressions into English in order to categorize them proved problematic. Two expressions exemplify this difficulty. In various laws, those of Rwanda, Mozambique, Mauritius, etc., ‘attentats a la pudeur’ and ‘atentado ao pudor,’ appeared, seemingly implying the notion of honor to the crime. The words ‘pudeur’ and ‘pudor’ translated to ‘modesty,’ but the phrase as a whole translated to sexual assault. A fluent professor at the University of Michigan confirmed that the phrases did indeed carry the implication of honor, so these components were coded as locally pertinent. Similarly, the literature concerning the laws of Algeria cited that the phrase ‘hatk al-‘ardh’ which appears in the Arabic translation of the law also literally contains an implication of honor.<sup>113</sup> Marzouki writes:

[T]he Arabic text uses the phrase hatk al-‘ardh (attack on the honor) rather than the more explicit ightisab (rape). This alters the character of the crime from a violent sexual offense against an autonomous individual to an offense that primarily affects family honor.

Consequently, if the victim is not married, the rapist may avoid punishment by marrying her and expunging the dishonor.<sup>114</sup>

The connotation of honor in this description of the crime excluded the component from the international norms category.

After dividing the content, the number of specific components that fell into each category, ‘international norms’ and ‘locally pertinent,’ were tallied. This led to the count of ‘international norms’ components and ‘location specific’ components existing in each law. The comparison of the two counts suggested whether the law leaned more towards international norms, or more towards local, domestically based interpretations of rape. For example, Zambia’s law against rape contained 7 counts of ‘location specific’ components. The law presumed that a male under age 12 was incapable of sex. Moreover, it used gender specific terms in addition to the terms ‘carnal knowledge,’ ‘offenses against morality,’ and ‘carnal knowledge against the order of nature.’ It also included within the crime of rape the crime of abducting or detaining a woman with intent to marry or carnally know her, and maintained that if the perpetrator believed the victim was above 12 years old this was sufficient to defend him from the charge of raping a minor.<sup>115</sup> These components are not frequently found in international law.

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<sup>113</sup> Marzouki, Nadia. "Algeria."

<sup>114</sup> Marzouki, Nadia. "Algeria." 6.

<sup>115</sup> The Republic of Zambia. The Penal Code Act.

Zambia's penal code also included 9 counts of 'international norms' components; these components included in regards to rape mentions of incest, consent, force, threats, fear of harm, minors, the mentally disabled, and the use of false representations or personating the husband in order to rape. Zambia's count of 'international norms' components was greater than its count of 'location pertinent' components, and thus it leaned more towards international norms.

The majority of the laws included more international components than locally pertinent components. When the counts of international content were compiled for the laws as an aggregate, the mode was 7 counts, the median was 7, and the average was 8.6. When the counts of locally pertinent content were compiled, the mode was 0 counts, the median was 1, and the average was 2. Locally pertinent components were less frequent in the laws. Figure 1 of the appendix displays this information.

### *Sentence*

The sentencing for perpetrators convicted of rape is included in the overview for the benefit of analyzing the severity of the sentences, and what influences relate to the severity. Developing a measure of severity is challenged by the vague terms expressing the sentencing, the reliance of some sentences on the jury, and the large variances in sentences from country to country, both in length of the punishment and form of the punishment. For example, the sentences encountered varied from 5-10 years imprisonment to death, life imprisonment, hard labor, corporeal punishment, to undefined terms of imprisonment.

The laws' sentences were separated into categories of equal or very similar sentences. A total of 23 different sentences were found. These sentences were then separated into varying degrees of severity, each of which were given a number of 1 through 10, 1 being the least severe, 10 being the most severe. This categorization is to be taken hesitantly, because the lack of clarity often made categorization difficult.

Degree 1 is defined simply as "imprisonment." This means that the law included no more detail than 'imprisonment' to draw conclusions from. Degree 2 was < 5 years imprisonment to 10 years imprisonment. Degree 3 was 10 years imprisonment. In the next degrees of severity x was used to represent the relative law's sentence and greater than or equal to and less than or equal to signs to define the boundaries of the sentence. Degree 4 was  $\geq 5$  years imprisonment to 10 years imprisonment, degree 5 was  $\geq 5$  years imprisonment to  $10 < x \leq 20$  years imprisonment, degree 6 was  $\geq 5$  years imprisonment to  $x \geq 20$  years imprisonment. Degree 7 was a certain

period (undefined) of imprisonment to life imprisonment, degree 8 was hard labor of undefined length, and degree 9 was death. Degree 10 is a miscellaneous category of sorts and includes sentences that contained combinations of death, hard labor, corporeal punishment, and banishment.

In some cases, the degrees may not seem to increase sequentially from less to more severe; degree 9 to degree 10, for instance. However, it was interpreted that in some cases the combination of sentences was harsher than the single sentence standing alone. In other cases, between degree 3 and degree 4, for example, although the lower bounds of 4 are below the sentence of 3, the higher bounds create the potential for a more severe sentence.

Statistically, the average sentence had a severity of 5, the most common severity was 5, and the median severity was 5. The standard deviation of punishment was 2.4. Thus, the average punishment for rape encoded in African laws was a range of years of imprisonment: the lower bound of the sentence was usually 5 or more years and the upper bound was usually 10 to 20 years of imprisonment. However, a lower boundary of less than 5 years of imprisonment and an upper boundary of an indefinite period to life imprisonment was within the standard deviation.

### *Clarity*

The clarity of the African laws was examined in order to determine potential relationships between this variable and international or local content. The measurement system used to quantify clarity stemmed from consideration of international law. In international criminal law, there exists a disagreement of sorts between the relative usefulness of employing a clear description of body parts interacting to define rape or a general, vague description of the circumstances which constitute rape. The Akaseyu definition is highly general because the trial chamber deemed that “the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts.”<sup>116</sup> Other international definitions after Akayesu did not follow this interpretation and included more specific descriptions of body parts to define rape.

Following this discourse, laws were categorized as ‘clear’ or ‘unclear.’ If the law comprised of nothing more than “Whoever has carnal connection with another by force or threats or deceit shall be punished with a penalty of imprisonment for a period not exceeding 10 years,”<sup>117</sup> for

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<sup>116</sup> Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, 688 (Sept. 2, 1998).

<sup>117</sup> Article 407. State of Libya. Libyan Penal Code (English).

example, it was listed as ‘unclear.’ If there was a description of body parts included in the definition, it was marked as ‘clear.’ However, a mechanical description of body parts was not regarded as a conclusive measurement of the laws’ clarity, and so if the law did not have a mechanical description but did use the words ‘rape,’ ‘force,’ ‘consent,’ or ‘coercion,’ or a synonym, it was marked as ‘clear’ as well. The key words also derived from observation of criminal law definitions; Wiener cites that these are the common themes of rape law.<sup>118</sup> Thus, the distinction is a way of noting whether the laws are more similar to Kunarac in terms of its mechanical description, or if they have more in common with the Akayesu definition and its intentional vagueness.

The majority of the definitions of rape within the laws, 35, were categorized as ‘clear’ under this system, while 17 were categorized as unclear.

### **III.II. Independent Variables**

As aforementioned, the independent variables used in the analysis are those which were cited as influential in the work of other scholars. Three independent variables are analyzed only in relation to a change in law: war, the presence of women in government, and the type of legislation. Each of the other independent variables, colonial heritage, dominant religion, civil liberties, and legal pluralism, are analyzed with respect to both of the dependent variables, because all are suggested by scholars to be influential on both. What follows is a description of the independent variables.

#### *Type of Legislation*

The framing of a law is influential in its passage, which has been cited by previous scholars, as previous sections have noted. For this reason, the framing of the law was considered pertinent. The laws pertaining to rape in the 52 African states with observations were contained within one of three pieces of legislation: the penal code, the criminal code, or an act passed by the legislative body. Penal Codes contain the majority of domestic laws prohibiting rape. The frequencies of rape legislation occurring in criminal codes and separate legislative acts were equal. In the 52 cases with rape laws, 40 rape laws were contained within the penal code, 6 within the criminal code, and 6 within separate legislative acts.

#### *Colonial Heritage*

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<sup>118</sup> Weiner, Phillip. “Evolving Jurisprudence.”



The law system of a former country is often highly similar to the colonizer's law system, sometimes inheriting it precisely. For example, the penal code of Benin is still the Napoleonic Penal Code of 1810, a remnant of its past as a French colony. The Penal Code of Malawi states:

This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.<sup>119</sup>

Because the laws of a former colony are so heavily linked to the laws of its colonizer, it was essential to illustrate any possible connections between various African laws due to the shared colonial histories of the nations.

When cataloguing the colonial heritage, each country was labelled according to by which the country was formerly colonized. Of the African states, 18 states were formerly British colonies, 18 were French, 5 were Portuguese, 3 were Belgian, 1 was Spanish, 2 were Italian, 1 was German, 1 was American, 1 was a unification of former French and British colonies (Cameroon), and 1 was a unification of former British and Italian colonies (Somalia). One country, Ethiopia, had no colonial heritage. Except for a brief Italian occupation from 1936 to 1941, Ethiopia retained its original monarchy until 1974 when a military junta took power. The large number of categories within the variable colonial heritage may introduce statistical inaccuracy due to the relatively small number of cases under observation; however, limiting the number of categories would have been impossible without misrepresenting the past of the former colonies.

Originally, the language of the documents had been included as an independent variable; however, due to the strong correlation between language and colonial history, the language variable was dropped.

### *Legal Pluralism*

The analysis included the influence of legal pluralism on content and change. This inclusion draws attention to the fact that in many African countries, there are various systems that citizens may turn to for justice. The laws included in the study, therefore, may not be the law which victims of rape seek justice from. This diminishes the significance that laws have on the situation on the ground. It may be in these states that victims and potential perpetrators of sexual crimes

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<sup>119</sup> Chapter 2: "Interpretation." Republic of Malawi. Penal Code.

feel that the law is inapplicable to their circumstances, as Singleton suggests in her ethnography.<sup>120</sup> It was common for states under observation to feature a combination of common law, customary law, traditional law, and Islamic law. Of the 52 states where laws against rape were observed, only 10 states did *not* have legal pluralism, according to the CIA World Factbook.

### *Civil Liberties*

Categorizing the amount of freedom within of the states with laws against rape allows an analysis of which laws had popular support. If there was a high degree of civil liberties, one might expect to see a law that women played a role in implementing, if there were women present in the parliament.<sup>121</sup> If the government was authoritarian and there were few civil liberties, the law might be more subject to the personal beliefs of the head of state and therefore less representative of the prevailing views of the populace.

The regime type was represented by Freedom House's coding system for civil liberties, which gives countries a score of 1 through 7 based on the civil liberties under that country's government, 1 being the most free and 7 being the least free. Freedom House's civil liberties scores are used instead of Polity IV because Polity IV does not include scores for the Republic of Seychelles. This variable was treated as a lag variable, so the score reflects the civil liberties score given to the country the year previous to the law change. Freedom House began this project in 1973, which meant that several countries changed their laws before their civil liberties freedom was measured by the organization. For these cases, an alternative way of categorizing the civil liberties freedom within the country was developed. A score of 7 was ascribed to those countries which were under colonial rule at the time they changed their law given the oppressive nature of colonial rule. For those countries which were not under colonial rule at the time their law changed, the score attributed was the score for the first year the Freedom House survey was conducted, 1972, because the country was very often under the same single-party rule at the time of the law change and at the time of the first survey. An exception to this coding is Morocco, which was attributed a score of 7 because at the time of the change in law, the country was ruled by King Hassan II whose many human rights abuses included the death and forced exile of Moroccans.

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<sup>120</sup> Singleton, Judith L. "South African Sexual Offences Act."

<sup>121</sup> Bauer, Gretchen and Hannah Evelyn Britton. *Women in African Parliaments*.

### *Dominant Religion*

Religion can have an influence on the moral attitudes articulated by law. Many laws included terms such as “carnal knowledge,” “unnatural offences,” and “offences against morals,” which originate in religious texts and religious interpretations of sexual crimes. With these examples of the moral influence religion may have on law, the relation of the state under observation was included in the analysis.

The CIA World Factbook provided states’ dominant religion classifications. If an official religion was listed, that religion was denoted as the dominant religion. If there was not an official religion, the religion with the highest percentage of adherents in that state was used. The dominant religions observed in the African states were: Islam, indigenous beliefs, Catholicism, Christianity, syncretic Christianity (a mix of Christianity and indigenous beliefs), syncretic Catholicism (a mix of Catholicism and indigenous beliefs), Hinduism, Protestantism, and Zionism. Broader categories were developed from these religious observations to reduce the number of categories in order to ensure a more accurate analysis. The countries with syncretic religions were placed under the category of Christianity because, as seen in previous sections, colonizing powers imbedded religious-based morals systems into both codified and customary law, meaning that the religion of the colonizer, rather than the indigenous population, has been seen to be most influential in law. By combining branches of the same religion, the following categories were established: Islam, Christianity, Indigenous Beliefs, and Other.

The majority of the states, a total of 25 states, were some form of Christianity. The next most prevalent religion was Islam, with 22 state adherents. Of the remaining states, 4 followed indigenous beliefs, and 1 fell into the category of Other.

### *War*

War is a variable that represents, albeit paradoxically, the influence of external forces, because times of war bring external forces such as NGOs, intergovernmental organizations, and foreign powers into the country. The variable war is presented in two ways in this study. The first war variable, war, represents the occurrence of war in the period 1990 to 2013, in which the majority of the law changes occurred. A minority of the countries, 17 out of the 52 with rape laws, experienced a war during the period of 1990-2013. Sixteen of the countries under observation had at least one war in 1990s. Twelve of the countries under observation had at least one war in the 2000s. Twelve of the countries under observation experienced a war in both

decades. The second variable war, war past 10 years, represents the occurrence of a war in the country ten years before a given country's law changed. Of the 52 countries with observations, a minority, 18 countries, had a war in the ten years before their law on rape changed. Both the war variables preliminarily suggest that war does not have a significant relationship to a change in a country's law against rape, in contrary to what was hypothesized.

### *Women in Government*

An alternative explanation of a change in law is the internal influence of women in government. Scholars have asserted that women in government have an influence over legislation,<sup>122</sup> and thus a review of the women in government in African countries at the time of law change is critical to the analysis. As quotas are a significant medium through which women gain access to government positions,<sup>123</sup> the quotas for each country are included in the analysis as reported by the Quota Project. The quotas that existed as of 2012 are listed; there is a degree of error in the analysis resulting from the time lapse between when the laws were passed and when the quotas that were put in place. Filtering the quotas further by date in order to specify the date of law passage was not possible. The data regarding the lower or single house of government was used because there was more data available for these positions in government than for upper house or senate.

Of the 52 countries with rape laws, 18 did not have quota data listed on the Quota Project, the source of the data. Of the remaining countries, if the country had any legislated quotas in the single or lower house or if they had reserved seats, the country was listed as having a quota and notated it with a 1. If there was no legislated quota or reserved seats in the single or lower house, the country was listed as not having a quota and notated it with a 0. Of the 34 countries with reported quota information, 9 did not have quotas and 26 did have quotas.

To ascertain a better understanding of how many women were in government, the percentage of women in the lower or single house for each country was also included. Again, the use of the single/lower house data reflects the gaps in the upper house or senate data. The oldest data that was available from the Inter-Parliamentary Union (IPU) was used, which was the data from January 1997. This was the best option for the sample as a whole because it was the closest to

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<sup>122</sup> Bauer, Gretchen and Hannah Evelyn Britton. 2006. *Women in African Parliaments*.

<sup>123</sup> Bauer, Gretchen and Hannah Evelyn Britton. 2006. *Women in African Parliaments*.

1990, the beginning of the period in which the majority of laws changed, and had data for the majority of the countries.

Of the 52 countries with rape laws, 8 did not have reported percentages of women in government. Of the countries with reports, the percentages were defined by the following statistics: the mode was 3.7, the median was 7.1, and the mean was 9.9.

In an attempt to develop more reliable findings given the data available, the presence of women in government was also measured in a third way. Using the IPU dataset once more, the variable was treated as a lagged variable and only the countries which changed their laws on or after the year of 1998 were included. This filter reduced the sample to 15 countries. Of those 15 countries, the median percentage of women in government was 12.5 and the mean was 17.7.

## Chapter IV. Data Analysis

Overall, the findings suggest that increasing freedom in the past two decades has led to a convergence to international norms among laws against rape in Africa. Results also show that this convergence may negatively impact the functionality of the laws. Findings suggest that changes in law is not due to the occurrence of war or the presence of women in government, but may occur due to factors particular to an individual country. The following chapter is organized according based on the significance of results. First, the results elucidating the relationship between a change in law since 1990 and the independent content variables are reported because they demonstrate the above stated convergence to international norms. The results of the analysis of the law content were the next most significant, therefore these results are presented next. After, the analysis of changes in law is presented. In the latter two sections, the case studies present a great deal of insight.

### *Analysis of Change in Law Post 1990 and Content*

The relationship between a change in law since 1990 and the content-related dependent variables are of great interest because it demonstrates how content may change when a law change does occur. Significant results were found in these tests, as can be seen in Figure 1 below.

**I. Figure 1: Change in Law and Content**

Variable of Interest	Type of Variable	Test Performed	p-value
Clarity	Continuous	Pearson's chi-squared test	0.154
Severity	Continuous	T-test	0.0161
International Content	Continuous	T-test	0.0125
Locally Pertinent Content	Continuous	T-test	0.0563

A significant relationship was found between a change in law and the variables severity and international content. The relationship between locally pertinent content and a change in law was just over the level of significance. Only the relationship between a change in law and the clarity of the law was wholly insignificant. The correlation coefficients for change in law and the three variables severity, international content, and locally pertinent content were -.369, .301, and -.294 respectively. These results signify that as laws change, they become less severe, include more international content components, and potentially, although it was not found to be significant, contain fewer locally pertinent content components. These results are highly interesting. The severity correlation may be explained by a retreat from punishments such as

hard labor, exile, and corporal punishment and increased prevalence of imprisonment as punishment. The incorporation of international components when law changes occur suggests that laws are converging to international norms and putting less emphasis on locally pertinent content.

### *Analysis of Content of Law*

The second most significant findings were found in the content analysis. The statistical analysis of the content elucidates what characterizes African laws against rape. It also presents a relationship between the content which characterizes the laws and the influences which relate to their occurrence. Correlations were tested between the content of the African rape laws and independent variables categorizing the country. Correlations between the severity, clarity, and international and locally pertinent content of the laws and the dominant religion, regime, the legal system, and colonial history of the countries were tested.

The variable international content was tested in relation to the same four independent variables. The results may be seen below in Figure 2. Two significant relationships were found, between international content and civil liberties and between international content and legal pluralism.

#### **I. Figure 2: International Content and Country Categorizers**

International Content			
Variable of Interest	Type of Variable	Test Performed	p-value
Religion	Categorical	ANOVA	0.6200
Civil Liberties	Continuous	Correlation	0.0479
Legal Pluralism	Categorical	T-test	0.0000
Colonial History	Categorical	ANOVA	0.5800

The correlation coefficient between civil liberties and international content was -0.2785 and this was a significant result. Because Freedom House gives countries with more civil liberties low numbers and those with less civil liberties high numbers, these results suggest that when international content increases, civil liberties increase, which corroborates previous findings. The tests also showed that the international content of the law is significantly related to legal pluralism. This is interesting because international content was significantly related to law change but legal pluralism was not, but it is unclear what conclusions may be drawn from this result.

The next content-related dependent variable that was tested in relation to the four country-categorizing independent variables was locally pertinent content. Two significant relationships were found, which can be seen in Figure 3 below. Locally pertinent content was found to have a significant relation to civil liberties and legal pluralism.

**II. Figure 3 Locally Pertinent Content and Country Categorizers**

Locally Pertinent Content			
Variable of Interest	Type of Variable	Test Performed	p-value
Religion	Categorical	ANOVA	0.7100
Civil Liberties	Continuous	Correlation	0.0032
Legal Pluralism	Categorical	T-test	0.0011
Colonial History	Categorical	ANOVA	0.9600

The correlation coefficient for locally pertinent content and civil liberties was 0.4046, arguing that the two variables have a rather strong relationship. As the locally pertinent content components in a law increase, the civil liberties within a country decrease. This is interesting because it suggests that locally pertinent components are more frequent in countries with few freedoms, despite the fact that scholars have argued that explicitly recognizing local practices and understandings of crimes may assist in the punishment and prevention of that crime.<sup>124</sup> This finding demonstrates the difference in locally pertinent components: while some components are beneficial because they recognize existing inequalities or issues and punish them, others codify such inequalities or issues. The relationship between legal pluralism and locally pertinent content was also significant, which is unsurprising because the existence of multiple law systems and the presence or absence of locally pertinent components within those law systems is very much related.

The correlation between the content of the laws and some of the variables which categorize the countries is notable after finding a correlation between the content and the change in law. The content of the law is related to the change in law as well as to the relatively stable characteristics of the country, which suggests that the content is being influenced from without in some way, such as the diffusion of ideas, as well as from within. The most meaningful results show that the international content of a law is related to the atmosphere of freedom within a country, while the locally pertinent content of a law is related to the lack of freedom. More freedom within a country also means less severe laws. An additional interesting result is legal

<sup>124</sup> Abramowitz, Sharon and Mary H. Moran. "International Human Rights."



pluralism is related to severity, international content, and locally pertinent content. Overall, the results suggest that as countries become freer, they are creating more international-norms-focused laws against rape which are less severe and less likely to mention locally pertinent components.

The content variable severity was also tested in relation to religion, civil liberties, legal pluralism, and colonial history. A significant relationship was found between the severity of the sentence and civil liberties and legal pluralism. The p-value for the relationship between severity and colonial history was just over the significance mark at .0522. These results may be seen in Figure 4 below.

**I. Figure 4: Severity and Country Categorizers**

Severity			
Variable of interest	Type of Variable	Test Performed	p-value
Religion	Categorical	ANOVA	0.5120
Civil Liberties	Continuous	Chi-squared test	0.0314
Legal Pluralism	Categorical	T-test	0.0018
Colonial History	Categorical	ANOVA	0.0522

The correlation coefficient for severity and civil liberties was 0.3017, and from this one can come to the conclusion that as the severity of a law increases, the civil liberties score increases, which corroborates previous results: less free countries have more severe laws. The results of the test between severity and legal pluralism suggests that the mean of the severity in countries without legal pluralism was higher than in countries with legal pluralism, meaning countries without legal pluralism have less severe laws. Perhaps it is the case that the population in countries with legal pluralism is less likely to use the codified law for judicial purposes, and thus the codified law is managed differently than countries without legal pluralism. The relationship between the sentences' severity and the colonial history was not significant, although it was close. Again, this may be a result of the abundance of categories within the colonial history variable. This suggests that legal pluralism is more prevalent in countries with particular colonial histories, which is not surprising given the different tactics used by different colonial administration. For example, British administrations used indirect rule and reinforced customary law, while French administrations did not.

The final variable tested in relation to religion, civil liberties, legal pluralism, and colonial history was the clarity of the law. The results can be seen in Figure 5 below. No

significant relationship was found, signifying that the clarity of a law either depends on other unknown factors, or perhaps that the method of coding was inaccurate.

## II. Figure 5: Clarity and Country Categorizers

Clarity			
Variable of Interest	Type of Variable	Test Performed	p-value
Religion	Categorical	Chi-squared	0.8593
Civil Liberties	Continuous	T-test	0.0523
Legal Pluralism	Categorical	T-test	0.1090
Colonial History	Categorical	Chi-squared	0.1240

### IV.I. Variations in Understanding: Case Studies

In order to portray how this convergence to international norms may be affecting communities within the countries, the analysis presents the interaction of the content components through case studies. Performing interviews within these communities would have been ideal; however, these case studies serve as adequate substitutes. These case studies consider the interaction of international and locally pertinent content within African laws against rape in order to determine what effect the convergence to international norms may imply for communities. Various laws within the sample highlight what Singleton explains as “tensions between universalism and cultural relativism concerning sexuality, sexual violence, and the law.”<sup>125</sup>

This tension between international norms and local takes different forms. In some states, local practices are not included and citizens find it difficult to apply to their situations. Singleton argues that in South Africa, “local meanings of rape and consent among young women and men differ from legal definitions of the state.” While South Africa’s law very clearly reflects international norms by using the word ‘consent’ and using careful gender neutrality, relying on the phrases ‘any person (“A”)’ and ‘any person (“B”),’ Singleton maintains that the law’s lack of inclusion of local practices such as *ilobolo* (bride price) and *ukushela* (courtship) detracts from the effectiveness of the law.<sup>126</sup> In other states local practices are included, but the included practices are those which infringe on women’s rights. In this way the state sanctions injustice.

In this section, the content will be analyzed with a focus on this tension, and the utility of these laws will be analyzed. Laws in Africa may be converging to what is understood to be international norms, but what effect is this having on society? Are laws becoming more useful

<sup>125</sup> Singleton, Judith L. "South African Sexual Offences Act."

<sup>126</sup> Singleton, Judith L. "South African Sexual Offences Act"

for the populations within these countries with changing laws, or less useful? Understanding the ways in which the content creates functional or nonfunctional laws is a valuable insight into African laws against rape. The interaction of content components is presented by means of case studies.

The cases of the Central African Republic (CAR) and Chad were chosen for several reasons. CAR is the setting of ongoing civil conflict, and the human costs of the conflict have attracted the attention of the media, international organizations, other states, and NGOs. Situated within this scrutiny is CAR's definition of rape, which includes 4 counts of international components and 0 locally pertinent components. Some may say that the definition is commendable because it includes key components of international laws; however the case study illustrates that the law is inadequate in addressing the situation on the ground despite its international components, therefore illustrating the tension between international and local components of rape laws. The case study of Chad is similarly illustrative because although it does not include all the typical components of international laws against rape, it does specifically address marital rape, which is a problem of staggering proportions within the country. By including a locally pertinent component, the definition is addressing the particular needs of the population and is better equipped to protect women's sexual rights.

### **III. Central African Republic (CAR)**

Articles 116 and 117 of the Criminal Code of 2007 define the crime and punishment of rape in that country.<sup>127</sup> As is common in international laws, the law is gender neutral, increased the sentence for perpetrators who rape children, use violence, or are authority figures in the eyes of the victim. The law also punishes rape with the death penalty when the perpetrator causes the death or the victim or accompanies the rape with abduction, torture, or 'acts of barbarity' against the victim. Despite the relative detail of the law and inclusion of concepts from international law, it does not address critical issues within the country, where periods of violence have terrorized communities intermittently over the past 15 years. Sexual violence against men and women—including the young and very old—has been used by fighters as a psychological weapon. Rape, gang rape, forced marriage, and the transmission of HIV/AIDS through rape are ongoing issues, and yet the law does not criminalize these actions. Raped women are ostracized by their

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<sup>127</sup> Articles 116-117. Central African Republic. Criminal Code.

communities. Without access to treatment, rape victims die of AIDS.<sup>128</sup> One woman said, “We only want justice, and only this will console us of this humiliation inflicted on us by the killers,” (IRIN 2005). Although the law complies largely with international norms, including 4 counts of international components and 0 locally pertinent components, by failing to address the situation on the ground that the people of CAR face, the law is ineffective at addressing the needs of the populace.

#### IV. Chad

The law against rape in Chad appears on first impression to contain more components of international law than locally pertinent components. The section of the penal code in which this law is stated contains 2 counts of locally pertinent components and 5 counts of international components. Despite containing international components, the law lacks many other components which have become prevalent in international laws against rape, including the notions of consent and coercion and the recognition of circumstances in which the victim may be unable to give consent due to mental incapacity or a state of unconsciousness among others. The crime of rape outlined by Article 274 is distinguished from other ‘indecent’ acts delineated by Articles 271-273 only by the perpetrator’s use of violence.<sup>129</sup> In this definition, “[r]ather than nonconsent being a presumed corollary of the presence of force, evidence of force became reduced to evidence of nonconsent.”<sup>130</sup> Those critiquing Chad’s law from the perspective of international

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<sup>128</sup> IRIN. "Central African Republic."

<sup>129</sup> "Chapitre Premier

Du viol et des attentats et outrages a la pudeur

Art. 271. Toute exhibition de nature á offenser la pudeur, faite publiquement ou en présence de témoins involontaires est un outrage public á la pudeur et sera puni d'un emprisonnement de trois mois á deux ans et d'une amende de 5000 é 100000 francs.

Art. 272 Sera puni des peines portées á l'article précédent, sans préjudice des peines plus graves prévues par les articles 273 á 278, quiconque aura commis un acte impudique ou contre nature avec un individu de son sexe mineur de vingt-et-un ans.

Art. 273. L'attentat á la pudeur consommé ou tenté sans violence sur la personne d'un enfant de l'un ou de l'autre sexe âgé de moins de treize ans sera puni de deux á dix ans d'emprisonnement.

Art. 274. Lorsque l'attentat aura été consommé ou tenté avec violence, il sera puni des peines du viol, suivant les distinctions portées aux articles 275 et 276.

Art. 275. Le coupable de viol, sera puni des travaux forcés á temps.

Art. 276. Lorsque le viol aura été commis sur la personne d'un enfant au-dessous de l'âge de treize ans ou avec l'aide d'une ou de plusieurs personnes ou par un ascendant de la victime, le peine sera celle des travaux forcés á perpétuité.

Art. 277. La consommation d'un mariage coutumier avant que la fille n'ait atteint l'âge de treize ans ost assimilée au viol et punie comme telle.

Art. 278. Dans tous les cas prévus aux articles 273 á 278 précédents les dispositions de l'article 31 pourront en outre être appliquées. Les ascendants seront obligatoirement déchus des droits de puissance paternelle." Articles 271-278. Republic of Chad. Penal Code. [https://www.unodc.org/tldb/pdf/Legis\\_Database\\_Chad\\_CP6.pdf](https://www.unodc.org/tldb/pdf/Legis_Database_Chad_CP6.pdf)

<sup>130</sup> MacKinnon, Catharine A. "Defining Rape Internationally."

norms might assert that the law lacks vital components meant to protect victims and the rights of women.

Chad's law does, however, address a locally pertinent custom that is not specifically presented in international laws, and that is the consummation of forced marriage. Article 277 states, "Consummation of a customary marriage before the girl has reached the age of thirteen is considered rape and punished as such."<sup>131</sup> At 72%, Chad has one of the highest prevalence rates of forced early marriage in the world, exacerbated by natural disasters and civil unrest.<sup>132</sup> Consequentially, adolescent fertility and maternal mortality rates are also high.<sup>133</sup> Various international conventions including the 1990 African Charter on the Rights and Welfare of the Child recommend the marriageable age to be 18 years. While the country of Chad permits marriage at an extremely young age, the specific recognition of the prevalence of early forced marriage in codified law confirms awareness at the state level that many girls endure forced marriage.

The section of Chad's penal code relating to rape highlights inconsistencies between it and international norms concerning consent. While Chad's law does not contain mention of consent, the clause concerning forced marriage is a significant recognition of the extraordinary circumstances endured by girls within that country. In this way the law addresses, albeit inadequately, a critical issue in the region.

#### *Analysis of Change in Law*

The following section presents the least informative findings: those pertaining to a change in law post 1990. The statistical analysis suggests that the change of laws concerning rape in the past two decades is not related to war or the percent of women in government, but instead is related to the format of the law in question and the amount of civil liberties within the country. Change occurred more frequently when the law was compiled in an acts or criminal code. Change also occurred more frequently in countries with more civil liberties. The analysis shows that when laws change, they tend to have less severe sentences and include more international content components. The associations found suggest that changes are the result of the gradual need for updating and the freedom present within a country rather than an immediate force such as war or women in government. The analysis did not answer every question,

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<sup>131</sup> Articles 271-278. Republic of Chad. Penal Code.

<sup>132</sup> Myers, Juliette, and Rowan Harvey. "Breaking Vows."

<sup>133</sup> As cited in Myers, Juliette, and Rowan Harvey. "Breaking Vows."

however. Why was colonial history not more related to change in law? Also, if the type of legislation is significant, why were equal instances of penal codes changing and not changing their laws observed? Furthermore, if laws are converging to international norms, why were women in government and war, variables which in part represent the diffusion of international influences, more significant?

**I. Figure 6: Correlations to Law Change**

Variable of Interest	Type of Variable	Test Performed	p-value
Dominant Religion	Categorical	Fisher's exact test	0.25
Colonial Heritage	Categorical	Chi-squared test	0.1136
Type of Legislation	Categorical	Fisher's exact test	0.024
Legal Pluralism	Categorical	Fisher's exact test	0.72
Civil Liberties	Continuous	T-test	7.22E-09

The correlation between a change in law and independent variables other than the presence of war and women were tested, which can be seen in Figure 6. These variables included dominant religion, colonial heritage, type of legislation, legal pluralism, and civil liberties. Scholars have cited their influence on both dependent variables, a change in law and law content, and thus these independent variables appear in the analysis in two instances. While these variables were posited to have correlations to the content of the laws because they pertain to the fundamental structure of the countries under observation and of the laws themselves, correlations to changes in law were not initially expected because they were not thought to build any pressure for an imminent change of laws. Unlike war, whose violence requires immediate reaction, and women in government, who are motivated by term limits and need to quickly effect change to satisfy constituents, these variables construct no sense of immediacy. Interestingly, strong relationships were found between some of the variables and changes in law. These will be discussed in the following paragraphs.

A significant association was found between changes in laws and the type of legislation. Fisher's exact test produced a p-value of .024. Figure 7 displays the contingency table showing change in law by type of legislation.

**II. Figure 7: Occurrences of Change in Law by Type of Law**

	Penal Code	Criminal Code	Act
No Change of Law	20	1	0
Change of Law	20	5	6

This association may be explained by a variety of reasons. All of the countries under observation that had laws written in the form of acts passed by the legislature had changed their laws. This may be the result of the nature of the legislature; being the most representative body of many governments, it is more subject to the changing attitudes of the people. The majority of criminal codes were also changed, and half of the penal codes were changed. The change of codes may result from the need to reform old laws. As Ferguson illustrates, the purpose of codified law is often to provide a model for the laws of states or provinces, and changes to codified law may either be to reform the law, or to restate current laws when the code becomes outdated.<sup>134</sup> Thus the changes of the criminal and penal codes observed may be the attempt of countries to modernize outdated laws. The fact that criminal codes were observed much less often than penal codes and observations of change were more frequent may signify that criminal codes are less accessible to lawyers and law enforcement and require more frequent updating.

There was also found to be a significant relationship between a change in law and the civil liberties within the country. The correlation was -0.653 and the p-value was 7.22E-9. Because Freedom House codes civil liberties on a scale where 7 is the least amount of civil liberties and 1 is the most, this strong and significant negative correlation means that law changes tend to occur where there are more civil liberties, and that the absence of a law change occurs in countries with few civil liberties. This is an unsurprising outcome, because many civil liberties signify that the country has an open political process with active populations and lively media networks.

An insignificant association was found between the change in law and the colonial history of the countries. The Chi-squared test produced a p-value of .1136, suggesting that a change in law is not likely related to the colonial heritage of a country. This is interesting because the contingency table presenting the change of law by colonial heritage suggests that there may be a relationship. This contingency table is Figure 8 below.

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<sup>134</sup> Ferguson, Pamela R. "Constructing a Criminal Code."

**I. Figure 8: Occurrences of Change in Law and Colonial Heritage**

	None	British	French	Portuguese	Belgian	Spanish	Italian	German	French, British	British, Italian	American
No Change of Law	0	7	9	0	0	1	2	0	1	1	0
Change of Law	1	11	9	5	3	0	0	1	0	0	1

It was hypothesized that a correlation between the change in law and the identity of the former colonizing country would exist because of the tendency of colonizing countries to impose their own legal system on their colony as well as the influence of the colonizer’s culture. Former colonies then share many similar laws in addition to similar cultural inheritances, which may contribute to them acting similarly in regards to their laws. It can be seen that majority of the former colonies of some countries such as Britain, Portugal, and Belgium changed their laws while the majority of former colonies of other countries such as Spain and Italy did not change their laws. The lack of correlation may be related to the multitude of categories within the colonial heritage variable. Because several current countries are amalgamations of territories colonized by two different states, this led to 11 categories, which may have disrupted the statistical accuracy.

**I. Figure 9: War and Women Correlations to a Change in Law**

Variable of Interest	Type of Variable	Test Performed	p-value
War	Categorical	Person's chi-squared test	0.83
% Women inclusive	Continuous	T-test	0.88
% Women exclusive	Continuous	T-test	0.00026
Quota	Categorical	Fisher's exact test	1

Figure 9 displays the correlations found between a change in African country’s laws and the independent variables representing war and women in government. The occurrence of war and the presence of women in government were not found to be significantly correlated to a change in law except in the case of the variable % Women exclusive; however % Women exclusive and a change in law had only a .095 correlation coefficient, signifying that the change in law is primarily related to other variables. Both war variables were also found to have an insignificant relationship to a change in law. Figure 10 is a contingency table showing the change in law by the presence of war in each country.



## II. Figure 10: Occurrences of Law Change and War

	No War	War
No Change of Law	15	6
Change of Law	20	11

The statistics demonstrate that not only was the hypothesis that war relates to changes in law unsupported, the alternate hypothesis that women in government relate to changes in law was also unsupported.

The statistical analysis revealed that the hypothesis positing that the occurrence of war in a country would positively correlate to a change in that country's rape legislation was unsupported. This suggests that scholars may be correct, that gains made during war may degenerate post-conflict.<sup>135</sup> Furthermore, the number of women in government, which was measured by quotas and percentages of women in the single or lower house, was not found to have a significant correlation to a change in law, which supports the findings of other scholars who show that women in government may vote along party lines or otherwise be unable to realize their goals.<sup>136</sup>

What these two findings imply about international and internal forces on national law in Africa is significant. It was hypothesized that war, which often features sexual violence, would bring a multitude of international influences into the country and focus attention on means of delivering justice to the victims. This was not found to be the case, suggesting that international forces post-conflict do not significantly influence rape legislation. Women in government were predicted to be a strong internal force interested in developing comprehensive rape laws; however, no significant relationship was found between them and the change in law in any of the three datasets used. Significant influences on rape laws may be internal, but their identity is unclear. Results suggest unexpectedly interesting relationships between change in law and the two independent variables colonial history and type of law.

In an attempt to suggest alternate narratives regarding why some laws changed and others did not and why the majority of laws changed in the period since 1990, the next section is composed of two case studies which present alternative narratives regarding why law changes occurred in various countries and not others. The cases of Morocco and Liberia were chosen because in several ways they are exceptional in comparison to the other cases under observation.

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<sup>135</sup> Meintjes, Sheila, Anu Pillay, and Meredith Turshen. *The Aftermath*,

<sup>136</sup> Bauer, Gretchen and Hannah Evelyn Britton. *Women in African Parliaments*.

The explanations they suggest in regard to their law change include the presence of women's advocacy groups, popular protest, and a female executive.

#### **IV.I.I. The Variability of Change: Case Studies**

##### **III. Morocco**

In 2012, the plight of Amina al-Filali, a 16 year old Moroccan girl who was forced by her family and a judge to marry her alleged rapist made international news. Seven months after the family of Amina al-Filali and a judge forced her to marry her rapist in order to defend her family honor, she committed suicide by eating rat poison.<sup>137</sup>

Close to two years after this incident, the Islamic government amended Article 475 of the Moroccan Penal Code. The article in question states that any person who abducts another without violence, threat, or fraud is sentenced to one to five years of imprisonment, and a section adds that this punishment is void if the perpetrator marries the victim subsequently.<sup>138</sup> Because the section of the article also included a clause stating that "he [the perpetrator] can no longer be prosecuted except by persons empowered to demand the annulment of the marriage and then only after the annulment has been proclaimed," prosecutors were essentially unable to pursue rape charges without the involvement of the family.<sup>139</sup>

Although the subsection concerning the subsequent marriage of the victim and the perpetrator was deleted, rights groups say more needs to be done to defend gender equality and protect women and children in the country.<sup>140</sup> The leader of a group that supports women victims of violence stated, "We are campaigning for a complete overhaul of the penal code for women."<sup>141</sup> BBC news notes that the law change follows the intense lobbying of women's rights activists.<sup>142</sup>

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<sup>137</sup> "Morocco amends controversial rape marriage law." BBC.

<sup>138</sup> "Article 475 Quiconque, sans violences, menaces ou fraudes, enlève ou détourne, ou tente d'enlever ou de détourner, un mineur de moins de dix-huit ans [176], est puni de l'emprisonnement d'un à cinq ans et d'une amende de 200 [177] à 500 dirhams. Lorsqu'une mineure nubile ainsi enlevée ou détournée a épousé son ravisseur, celui-ci ne peut être poursuivi que sur la plainte des personnes ayant qualité pour demander l'annulation du mariage et ne peut être condamné qu'après que cette annulation du mariage a été prononcée." Article 475. Kingdom of Morocco. Code Pénale du Royaume du Maroc.

<sup>139</sup> "Morocco amends controversial rape marriage law." BBC.

<sup>140</sup> "Morocco amends controversial rape marriage law." BBC.

<sup>141</sup> "Morocco amends controversial rape marriage law." BBC.

<sup>142</sup> "Morocco amends controversial rape marriage law." BBC.

Although Morocco has ratified international human rights treaties, the government has not enforced these treaties. Morocco changed its Family Code in 2004, but has been slow to adopt other laws protecting women's rights and victims of violence.<sup>143</sup> Delays may be attributed to the arrangement of government.

The International Herald Tribune reported, "In August 2011, judges formed the association of Moroccan judges, which now has 3,700 members, to protest judicial corruption and interference by the executive branch, which they say undermines their independence."<sup>144</sup> The judicial system is often relied upon to decide cases concerning the rape or marriage of minors. Some judges are conservative and enforce forced marriage in cases of rape to defend the family's honor; however, because judge's decisions are not collected and made public, there are inconsistencies throughout the country in law interpretation.<sup>145</sup> The Justice Ministry of Morocco issued a statement in January 2011 signaling it was in favor of the abolishment of Article 475, but the other branches of government were slow to act.<sup>146</sup> The Moroccan Islamist government is a constitutional monarchy headed by King Mohammed VI. Within the government, as of the most recent elections in the legislature, 17% of the members of the Assembly of Representatives were women, while only 2.2% of the Assembly of Councilors were women.<sup>147</sup>

The case of Morocco's Article 475 illustrates the sluggishness of the government's eventual response to the pressure of internal women's rights groups to institute law reform. In this case, international treaties seemed to provide little impetus, and the structure of the government impeded progress; the protests of women's groups at a grassroots level seem to have provided the momentum that changed the law.

#### **IV. Liberia**

President Ellen Johnson Sirleaf's leadership of Liberia exemplifies the power a female executive may have in altering legislation. Harvard-educated Johnson-Sirleaf lost the presidential elections in 1997 to warlord Charles Taylor, whose electoral success has been attributed to the population's fear that his loss would result in the country's slide into civil war once again,<sup>148</sup> but Johnson-Sirleaf was later elected in 2005 as the first female head of state in Africa and was

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<sup>143</sup> Alami, Aida. "Morocco Slow to Enforce Laws."

<sup>144</sup> Alami, Aida. "Morocco Slow to Enforce Laws."

<sup>145</sup> Alami, Aida. "Morocco Slow to Enforce Laws."

<sup>146</sup> Alami, Aida. "Morocco Slow to Enforce Laws."

<sup>147</sup> Alami, Aida. "Morocco Slow to Enforce Laws."

<sup>148</sup> Ellis, Stephen. *The Mask of Anarchy*.

reelected in 2011. Currently a 76 year old grandmother, she is known for breaking Liberia's rape taboo and advocating for victims in addition to rebuilding the country after 14 years of civil war. In 2011, she was awarded the Nobel Peace Prize.

Ellen Johnson-Sirleaf's story cannot be fully appreciated without placing it in the context of the Liberian civil wars. Ellen Johnson-Sirleaf had served as the Minister of Finance under President William Tolbert, but was exiled after Samuel Doe's coup in 1980. She returned to Liberia in 1980 to run for a senate position, but the president of Liberia, Samuel Doe, imprisoned her for speaking against his regime. When she was in prison, Doe's soldiers attempted to rape her. She was saved by another soldier from her own ethnic group who said, "I will sleep on the floor here in your cell tonight so no one hurts you."<sup>149</sup> She returned to the U.S. after serving a partial sentence, where she remained during the civil wars. The fighting of the first civil war began in 1989 when Charles Taylor invaded Liberia, which at the time was led by corrupt President Samuel Doe, and lasted until a peace agreement was signed in 1996. The second civil war was a conflict between the government and warring factions that intensified in 2000 and lasted until a peace agreement in 2003. Frequent fractionalization of fighting forces characterized the wars in addition to the widespread use of child soldiers, the occurrence of cruelties and other behaviors that shocked international observers, and the high incidence of rape.<sup>150</sup> In the post-conflict state, a multitude of challenges a multitude of challenges confronted Sirleaf. Soldiers had bombed the hydroelectric facilities in 1992, so there was no electricity or running water in the country, Monrovia was left with an abundance of former child soldiers in the streets, and the country held an enormous amount of foreign debt. In addition to working to resolve these staggering issues, a great deal of her work has been focused on the victims of rape.

Motivated by her experience of attempted rape as well as by her female support base,<sup>151</sup> Johnson-Sirleaf worked to change legislation regarding rape before she had even gained office. In 2005, she and a group of lawyers urged the legislature to stipulate sentences for rape, after which she remarked in disgust, "Do you know the farthest the legislature would go is seven

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<sup>149</sup> Cooper, Helene. "Iron Lady."

<sup>150</sup> Ellis, Stephen. *Mask of Anarchy*.

<sup>151</sup> UN agencies, the IRC, and other international organizations often cite the statistic that 75% of Liberian women were raped or sexually abused during the war, which derives from a World Health Organization survey whose methods and therefore results are contested. See Scully, Pamela, Karim, Sabrina and Bernstein, Erin. "Conflict Profiles: Liberia."

years?”<sup>152</sup> A new, tougher law was passed in 2007 under her administration, and although conviction rates remain low and the prevalence of rape is high, the number of rape trials has increased.<sup>153</sup>

Not only has she attempted to address the problem of rape, she has attempted to address the underlying problem of inequality in Liberia. In her inaugural address, Johnson-Sirleaf said that her priority was to "empower Liberian women in all areas of our national life," which she did by promoting micro-finance projects, increasing their presence in government and security sectors, building market halls, and ensuring property rights.<sup>154</sup> At one point she said, "If I had my way, I would have had an all-woman cabinet. But I didn't have enough women to fill those strategic positions."<sup>155</sup> This is a problem cited by scholars; the effort to increase female representation in government and reduce inequality is stymied by the lack of qualified candidates which results from the lack of equal opportunity in education and the workplace, and in this way there is a positive feedback mechanism.<sup>156</sup>

The influence Ellen Johnson-Sirleaf has spread to women and girls throughout the country is embodied in an article in the *World Affairs Journal*, which recounts the story of a UNICEF aid worker's experience in rural Liberia.<sup>157</sup> A fight between a girl and boy in a schoolyard was broken up by the principal of the school. In response to the principal's reprimand, "girls don't fight," the girl looked at him and said, "Mr. Principal, please take time how you talk to me. Don't forget a woman is president."

As president, Ellen Johnson-Sirleaf's focus on victims of rape and promoting women's rights have resulted in a stronger law against rape and a sense of women's empowerment throughout the country. As a longtime leading figure in Liberian politics and as an executive, she was able to implement change post-conflict which otherwise may have not occurred. The case of Liberia illustrates that the power of strong-intentioned individuals in positions of importance may trump other factors within the country which would stymie change. Liberia is highly exceptional among the cases under observation because of Ellen Johnson-Sirleaf's unique and debatably unparalleled capacity to implement change.

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<sup>152</sup> Cooper, Helene. "Iron Lady."

<sup>153</sup> Ford, Tamasin. "Ellen Johnson Sirleaf-Profile."

<sup>154</sup> Ford, Tamasin. "Ellen Johnson Sirleaf-Profile."

<sup>155</sup> Cooper, Helene. "Iron Lady."

<sup>156</sup> Bauer, Gretchen and Hannah Evelyn Britton. *Women in African Parliaments*.

<sup>157</sup> The following paragraph is informed by Cooper, Helene. "Iron Lady."

## **Chapter 7: Conclusion**

The results show that increased civil liberties have introduced a convergence to international norms in laws against rape. MacKinnon's theory that rape derives from environments of gender inequality creates a framework with which to critique the concept of universalism, signifying that a convergence to international norms does not mean that laws can be considered functional for the societies they govern. To the contrary, the data, especially the case studies, suggest that laws against rape that recognize local practices and understandings of rape are better equipped to fight rape incidence within a country. International standards are not always the most effective way to understand rape at a local level, and to understand them in that manner is to enforce a paternalistic view of African states. It is therefore somewhat troubling that as countries have enjoyed increasing amounts of civil liberty in the past two decades, their laws have changed to incorporate more international components and fewer locally pertinent components. Findings also illustrate that there is no uniform circumstance under which a rape law changes; every incidence of change is the result of a unique combination of factors. It shows that the occurrence of a change in laws against rape in African nations is not significantly related to the occurrence of conflict or the presence of women in government as hypothesized. Instead, it may be that changes in laws relate to environments of increased liberty and the force of grassroots activism and inspired leadership.

The case studies present valuable insights into how laws against rape should be understood. The case studies presented an attempt to answer the questions left by the failure to demonstrate a link between war, women in government, and legislation changes. The narratives suggest that the presence of women's advocacy groups or an executive's individual strength and passion for putting women's issues on the policy agenda may implement change in spite of legislative and/or judicial impediments. The change in a law is particular to the unique characteristics and politics of that country—it is an internal affair. The results demonstrate that the most comprehensive laws perceive rape as an internal affair as well; those which address the specific circumstances of gender inequality within the countries are more functional than those that utilize broad international norms concepts. The case studies also illustrate that although the laws are converging to international norms, it will remain important for African states to realize that there is no 'one size fits all' approach when it comes to rape. As MacKinnon argues, rape is essentially

a story of inequality.<sup>158</sup> Without addressing the fundamental inequality of the society in which a law exists, it cannot adequately address the needs of the populace.

There are many opportunities for further research, as this topic is broad and scholars have only substantially addressed it on the level of individual case studies. Given the time constraints, a time series analysis of the correlations between war, women, and law change was not feasible. It would have been interesting to examine whether conducting a time series analysis would have produced a significant correlation between a change in law and the two independent variables. This analysis would potentially have been more revealing about the role of women in government in affecting policy change concerning women's issues than the role of war. Given that the incidence of war in Africa increased in the past decades<sup>159</sup> and given that the majority of the law changes occurred within the past two decades, if any significant correlation were to be found, logically the correlation should have appeared in the analysis of the past twenty years.

An additional opportunity for further research pertains to the effectiveness of laws against rape in Africa. How is the content of these laws related to the reporting and prosecution rates? Rape is known to be a crime that is extremely under reported. Furthermore, law enforcement officials as well as officials within court systems have been known to be insensitive towards victims, and even impede their attempts to seek justice. Again, we are brought to the example of South Africa and its new Sexual Offences Act—have all of its international components helped in the fight to report the incredible numbers of rape in the country and to prosecute the rapists, or has it been hindered by lack of understanding among the domestic populace due to its 'universal' components? These are the sorts of questions that perhaps researchers will address in the future.

This study has presented an analysis of rape laws in African states. It has analyzed changes in rape laws and their contents. It has distinguished important influences on both variables, and has elucidated what the results signify for the population governed by these laws. The most important message this study presents is that laws against rape cannot be universalized. Rape is a crime of inequality, and thus the locally specific underlying inequalities must be addressed. In order to provide equal access to the law and equal treatment under the law, regardless of location, the law must be capable of recognizing what understandings are salient to the populations they govern.

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<sup>158</sup> MacKinnon, Catharine A. *Feminist Theory of State*.

<sup>159</sup> Collier, Paul and Anke Hoeffler. "Incidence of Civil War in Africa."

## Databases

The following databases were used to collect the penal codes, criminal codes, and acts criminalizing rape within each country under observation.

United Nations Office on Drugs and Crime National Legal Resources Database,  
[https://www.unodc.org/tldb/laws\\_legislative\\_database.html](https://www.unodc.org/tldb/laws_legislative_database.html)

Rule of Law in Armed Conflicts Project at the Geneva Academy of International Humanitarian Law and Human Rights, <http://www.geneva-academy.ch/RULAC/>

International Labour Organization Natlex database,  
[http://www.ilo.org/dyn/natlex/natlex\\_browse.home?p\\_lang=en](http://www.ilo.org/dyn/natlex/natlex_browse.home?p_lang=en)

United National Refugee Agency Refworld database, <http://www.refworld.org/>

World Intellectual Property Organization WIPO Lex database, <http://www.wipo.int/wipolex/en/>

The UN Secretary-General's database on violence against women,  
<http://sgdatabase.unwomen.org/home.action>

Wikisource, [https://wikisource.org/wiki/Main\\_Page](https://wikisource.org/wiki/Main_Page)

The CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/>

Freedom House Freedom in the World Surveys, <http://www.freedomhouse.org/report-types/freedom-world#.UyjveahdVsk>

Quota Project Global Database of Quotas for Women, <http://www.quotaproject.org/>

Inter-Parliamentary Union Women in National Parliaments Database, <http://www.ipu.org/wmn-e/world.htm>



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Article 475. Kingdom of Morocco. Code Pénale du Royaume du Maroc, 1962.

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The Republic of Zambia. The Penal Code Act, 1931.

<https://www.unodc.org/tldb/showDocument.do?documentUid=1160>

Sections 97-98. The Republic of Ghana. Criminal Code.

[https://www.unodc.org/tldb/pdf/Ghana\\_Criminal\\_Code\\_1960\\_as\\_amended\\_2003.pdf](https://www.unodc.org/tldb/pdf/Ghana_Criminal_Code_1960_as_amended_2003.pdf)

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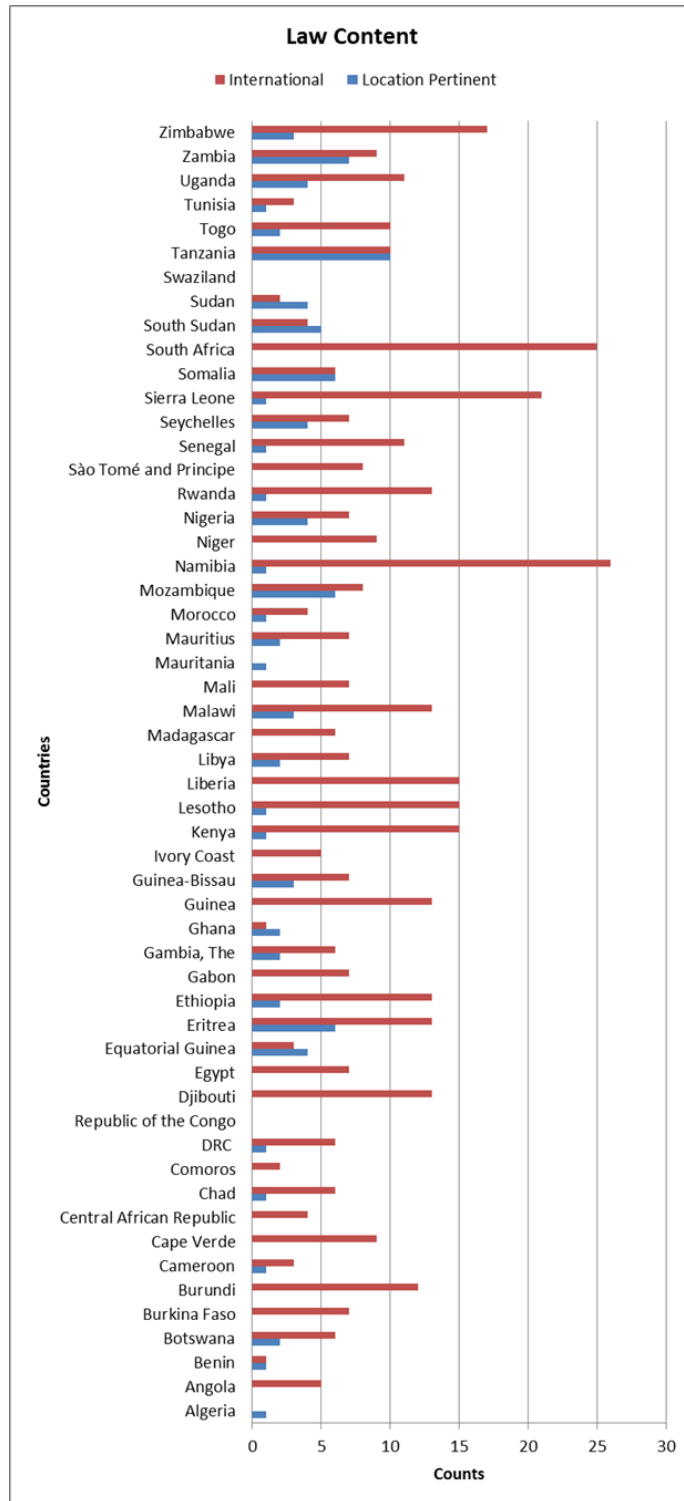
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# Appendix 1

Figure 1



## Appendix II

### Codebook

#### Country

1	Algeria
2	Angola
3	Benin
4	Botswana
5	Burkina Faso
6	Burundi
7	Cameroon
8	Cape Verde
9	Central African Republic
10	Chad
11	Comoros
12	DRC
13	Republic of the Congo
14	Djibouti
15	Egypt
16	Equatorial Guinea
17	Eritrea
18	Ethiopia
19	Gabon
20	Gambia, The
21	Ghana
22	Guinea
23	Guinea-Bissau
24	Ivory Coast
25	Kenya
26	Lesotho
27	Liberia



28	Libya
29	Madagascar
30	Malawi
31	Mali
32	Mauritania
33	Mauritius
34	Morocco
35	Mozambique
36	Namibia
37	Niger
38	Nigeria
39	Rwanda
40	São Tomé and Príncipe
41	Senegal
42	Seychelles
43	Sierra Leone
44	Somalia
45	South Africa
46	South Sudan
47	Sudan
48	Swaziland
49	Tanzania
50	Togo
51	Tunisia
52	Uganda
53	Zambia
54	Zimbabwe

**Language**

English	1
French	2
Spanish	3
Portuguese	4
English translation	5
French and English	6

**Change between 1990-2013 (Y/N)**

Yes	1
No	0

**Clarity**

Yes	1
No	0

**Mention of Location Pertinent Vocab**

Yes	1
No	0

## Location Pertinent Vocab

Count of number of mentions, including:

Gender specific
Perpetrator must 'know' the victim did not consent
Court decides sentences subjectively
Male under age 12 presumed incapable of carnal knowledge
'carnal knowledge' , 'carnal intercourse' , 'carnal violence' , 'carnal connection'
'offenses against morality'
Sufficient defense if perpetrator believed victim was not a minor
'carnal knowledge against the order of nature' , 'unnatural offences'
Abducting/detaining with intent to marry or have sex with victim
Death penalty
'attentats a la pudeur' , 'atentado ao pudor'
Consummation of marriage under 14 but above 12 permissible
Marriage allowable over age 12
Marriage below 12 allowable if marriage is not consummated
Marital rape allowable
Victim or victim's family must file a complaint to enforce law
Raped virgins must be compensated, 'dowry'
Perpetrator's subsequent marriage of the victim cancels punishment
Increased penalty for married perpetrators
Victim 'provoked' rape
'crimes against decency'
'seduction' is illegal
Chastity
'una doncella'
References to honesty of the victim
'attack on the honor' 'hatk al-'ardh'

### Mention of International Vocab

Yes	1
No	0

### International Vocab

Count of number of mentions, including:

Consent
Coercion
Surprise
False representations
Asleep
Unconscious
Intoxication
Recognition of vulnerable age
Force
Use of weapon
Intimidation
Drugging
Constraint
Altered state of consciousness
Violence
Incapable of resistance
Causing physical or mental injury
Torturing
Causing death
Accomplices
Age of rapist
Incest
Authority figures
Marital rape punished

Males under 14 capable of sexual intercourse
Crimes against minors
Crimes against mentally disabled
Conspiracy
Threats
Force
Fear of harm
Personation of husband
Ignorance of minor's age is not a valid defense
'against the will'
Increased punishment for repetition of crime
Punishment for causing pregnancy
Punishment for transmitting disease
Punishment for causing incapacity to work
Minors unable to give consent
Gender neutral
Victims may receive STD testing and treatment
Sex offenders tested for STDs
Sex offender registry
Sex offenders prohibited from some employment
Force against a third person to coerce victim
Threat against a third person to coerce victim
Violence against a third person to coerce victim
Victim may change mind regarding consent
Perpetrators that are caretakers of victim
Special allowance in court for 'vulnerable' witnesses
Increased punishment for gang rape
Abolition of cautionary rule relating to sexual offenses
Abolition of evidence of previous consistent statements
No jury inference from delay between offence and complaint

Evidence of psychological effects allowed
No evidence of previous sexual conduct allowed except for very special circumstances
Rape to consummate a marriage is illegal
Parental rights of the perpetrator waived

### Minimum Punishment

1	5-10 years imprisonment
2	2-10 years imprisonment
3	Imprisonment
4	10 years – life imprisonment
5	5-15 years imprisonment
6	4-10 years imprisonment
7	Hard labor
9	5-20 years imprisonment
10	10 years imprisonment
11	‘certain period’- life imprisonment
12	3-12 years imprisonment
13	Death or life imprisonment w/ or w/out corporal punishment
14	5-20 years forced labor and potential 1-5 years banishment
15	Hard labor, flogging, death
16	2-8 years imprisonment
17	10-20 years imprisonment
18	Life imprisonment

19	3-10 years imprisonment
21	-14 years imprisonment and potential fine
22	Life imprisonment w/ or w/out corporal punishment
23	Death

**Severity of Punishment**

1	Imprisonment
2	< 5 years imprisonment - 10 years
3	10 years imprisonment
4	$\geq 5$ years imprisonment – 10 years
5	$\geq 5$ years imprisonment – $10 < x \leq 20$ years
6	$\geq 5$ years imprisonment – $x \geq 20$ years
7	Certain period– life imprisonment
8	Hard labor
9	Death
10	Misc.: mix of death, hard labor, corporal punishment, banishment

**War**

Yes	1
No	0

**Dominant Religion**

1	Muslim
2	Sunni Muslim
3	Indigenous beliefs
4	Catholicism
5	Christianity
6	Syncretic Christianity (+ Indigenous)
7	Syncretic Catholicism (+ Indigenous)
8	Hindu
9	Protestant
10	Zionist

**Reduced Dominant Religion**

1	Islam
2	Christianity
3	Indigenous
4	Other

**Colonial Heritage**

0	None
1	British
2	French
3	Portuguese
4	Belgian
5	Spanish
6	Italian
7	German
8	French and British
9	British and Italian
10	American



### **Quota**

Yes	1
No	0

### **# Women in Parliament**

Percentage of women in lower or single house as of 1997
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### **Type of Legislation**

1	Penal Code
2	Criminal Code
3	Act

### **Civil Liberties**

Freedom House's score of civil liberties was used, which gives countries a score of 1 to 7 after assessing the amount of civil liberties the citizens of that country have, 1 being the highest amount of freedom, 7 being the lowest amount of freedom.<sup>160</sup>

### **Legal Pluralism**

Yes	1
No	0

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<sup>160</sup> Freedom in the World Country Ratings by Region: 1972-2013. Accessed February 17, 2014.