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Women of the World:

Laws and Policies Affecting Their Reproductive Lives

The Center for Reproductive Law and Policy
International Federation of Women Lawyers (Kenya Chapter) F.I.D.A.-K

Ethiopia Ghana Kenya Nigeria South Africa Tanzania Zimbabwe

WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES. ANGLOPHONE AFRICA

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Glossary

Frequently used abbreviations

AIDS
Acquired immunodeficiency syndrome

FGM
Female genital mutilation

HIV
Human immunodeficiency virus

MCH
Maternal and child health

MOH
Ministry of health

NGO
Non-governmental organization

PHC
Primary health care

STDs
Sexually transmitted diseases

Frequently used terms

Common law:
Common law is a body of law that develops and derives from judicial decisions, as distinguished from laws brought forth through legislative enactments.

Civil law:
Civil law, which derives from Roman law, is a legal system in which statutes provide the principal source of rights and obligations.

Customary law:
Customary laws are the rules of law which by custom are applicable to particular communities.

Iddat:
Pursuant to Islamic law principles, *iddat* is the period a woman must wait before remarrying, following divorce or her husband's death.

Levirate union:
The term "levirate union" refers to the situation in which a husband dies and his widow may remain living at his home and have sexual relations with a male relative of the deceased — usually the younger brother of the deceased, who is next in order of seniority — to have children.

Talaq:
The principal form of Islamic divorce is *talaq*, the unilateral repudiation of the marriage by a husband.

Tort:
A tort is a private civil wrong or injury, other than one that occurs within a contractual agreement, for which the court will provide a remedy in the form of an action for damages.

Foreword

This report on Anglophone Africa is the first in a unique series of collaborative reports describing and analyzing the content of formal laws and policies affecting women's reproductive lives in approximately 50 nations around the world. Future reports, which will be produced jointly in collaboration with national-level non-governmental organizations in each country profiled, will focus on East and Southeast Asia, Eastern and Central Europe, Francophone Africa, Latin America and the Caribbean, the Middle East and North Africa, and South Asia. In addition to examining the content of such measures in specific nations, each report will identify trends that emerge in particular regions. An eighth and final report will build on the regional analyses to provide a global synthesis of the trends in laws and policies regarding reproductive health and rights.

This series of reports seeks to enhance knowledge regarding the vast range of formal laws and policies that affect women's reproductive lives and to identify regional and global trends. The real-life impact of such laws and policies, particularly for women, stands in sharp contrast to the dearth of information in many Southern and nonindustrialized nations regarding their scope and level of specificity. We are committed to making such information accessible to a wider audience, particularly at the regional and international levels. It is our hope that the provision of such information will promote legal and policy advocacy to advance reproductive health and the status of women around the world.

Anika Rahman
Director, International Program
The Center for Reproductive Law and Policy
May 1997

1. Introduction

Reproductive rights are internationally recognized as critical both to advancing women's human rights and to promoting development. Governments from all over the world have, in recent years, both acknowledged and pledged to advance reproductive rights to an unprecedented degree. Such governmental commitments — at major international conferences such as the Fourth World Conference on Women (Beijing, 1995), the International Conference on Population and Development (Cairo, 1994), and the World Conference on Human Rights (Vienna, 1993) — have set the stage for moving from rhetoric to reality in the arena of women's human rights. But for governments and non-governmental organizations ("NGOs") to work towards reforming laws and policies so as to implement the mandates of these international conferences, they must be informed about the current state of national level formal laws and policies affecting reproductive rights.

Laws and policies create the framework by which governments affect the behavior of billions of people. In terms of reproductive health care, laws and policies are essential tools used to deny, obstruct, condition availability, or promote access to services. Nonenforcement of existing laws and the absence of law are equally important. For example, laws can act as barriers to reproductive health services by criminalizing medical procedures, such as abortions, or by imposing restrictions, such as requiring the consent of a spouse for obtaining contraceptives or a sterilization. Selective prosecution, or even nonenforcement, of certain laws can lead to lowering the quality of care and providing a tool with which to discriminate against women and service providers. In terms of reproductive rights, laws not only provide the basis for the recognition or negation of such rights, but also reflect the conditions that determine whether women and men are able to exercise these rights. For example, in societies in which women are legally unable to acquire or hold property or are legally unequal to men within marriage, women's ability to control their reproductive lives is limited by the social norms reflected in the laws that subordinate women. The degree to which formal laws and policies influence people's lives depends on numerous factors relating to the actual enforcement of such norms. Yet there can be little doubt that formal laws and policies establish societal objectives and regulate the conditions of individual lives.

This report details the factual content of national laws and policies in key areas of reproductive health and women's empowerment in seven Anglophone African nations — Ethiopia, Ghana, Kenya, Nigeria, South Africa, Tanzania, and Zimbabwe. Expansive in its scope, this report discusses laws enacted by legislatures and legal principles developed by courts while also examining relevant policies issued by government entities such as ministries, administrative agencies, and official councils or commissions. These bodies articulate policies, adopt binding regulations, and/or develop government policies and programs that can have a significant impact on reproductive health and rights. The report concludes with an analysis of the status of the laws affecting reproductive health and rights as well as women's empowerment, a discussion of regional trends, and a description of regional models of laws and policies that promote reproductive rights.

I. Common Features of the Nations Selected

For the purposes of this report, the seven Anglophone African nations being discussed have three critical common features — a shared legal tradition, similar reproductive health problems, and the low status of women. These similarities exist despite geographic, economic, religious, and political diversity among the seven nations. Not only are these countries located in various parts of Africa, they also demonstrate the economic realities of the continent. Most of the nations are low income, yet the extent of poverty varies greatly. Two countries, Ethiopia and Tanzania, are among the poorest countries in the world with average per capita gross national product ("GNP") estimated at $100 and $90, respectively. In contrast, South Africa's average per capita GNP of approximately $2,980 makes it one of the richest nations in sub-

Saharan Africa. Both within and between each country, religious practices vary, with Christianity, Islam, and traditional beliefs prevalent among the seven nations. Finally, each country's current political condition differs. Nigeria is ruled by its military; Ethiopia and South Africa are democratic nations that have recently emerged from major internal changes; Ghana is a democracy that is now governed by its previous military ruler; Kenya and Zimbabwe are democracies; and Tanzania is a socialist state that has moved toward a multiparty democratic state.

A. SHARED LEGAL TRADITION

Despite many differences, the Anglophone African region shares a critical common legal and political history. All the nations — with the exception of Ethiopia — achieved independence from the British after World War II. Unlike many other countries in sub-Saharan Africa, Ethiopia was not colonized by foreign interests; it was, however, occupied by Italy between 1936 and 1941. Thus, due to their history of colonization, all of the countries but Ethiopia inherited a legal system based on English common law. Nonetheless, Ethiopia has a legal system that contains elements of the English common law tradition. The common law system comprises the body of principles and rules of action that derive their authority solely from usages and customs of immemorial antiquity, particularly the ancient unwritten law of England, or from court judgments and decrees. Although courts have a particularly important role to play in the development of legal principles within the common law system, most recent legal developments in the seven Anglophone African nations profiled have occurred in the form of statutory interventions.

Two countries, South Africa and Zimbabwe, have also been affected by another European legal tradition — Roman-Dutch law. Originally the law of the province of Holland, Roman-Dutch law was imposed on nations colonized by the Dutch. Once the former Dutch colonies passed to the British crown, these laws were modified and influenced by English common law. In South Africa, for example, constitutional law, administrative law, and the laws of procedure and evidence have developed along English lines; criminal law, however, is a combination of elements of Roman-Dutch law and English common law, while the law of property is almost exclusively derived from Roman-Dutch law.

All of the nations have combined the English common law system with other indigenous legal regimes. Each of the seven nations is characterized by a mosaic of laws in which common law traditions often govern in most realms of law except family law, which is typically governed by African customary law and certain specific religious laws. African customary law is a blend of African customs and imported colonial common and civil law principles. Such customary law often applies to such matters as: property ownership; marriage and divorce; matters affecting the status of women, including the status of widows and children, child custody, legitimacy, and adoption; and intestate succession and administration of intestate estates. Additional religious legal regimes are derived from two major religions — Islam and Hinduism. Islamic law, known also as Mohammedan law, is a body of rules that gives practical expression to the religious faith of the Muslim, and the content of this law is based on religious principles. When Muslims are exempt from the application of secular legal principles, they follow the principles of Islamic law. But in Ghana, Kenya, and Tanzania, Muslims are required to submit to general marriage laws. Hindu law applies to Hindus, who live primarily in Kenya and Tanzania, in most issues relating to family law.

B. COMMON REPRODUCTIVE HEALTH PROBLEMS

Each of the seven nations is characterized by high levels of maternal and infant mortality and the large number of children borne by each woman. Among these countries, the range of these rates varies. Nigeria's maternal mortality rate, ranging from 800 to 1,500 deaths per 100,000 live births, is estimated to be among the highest in the world. Its infant mortality rate of 83 deaths per 1,000 births is also regarded as high. The average number of children born by a Nigerian woman is six. In Ethiopia, all these three indicators are also regarded as being high. Ethiopia's maternal mortality rate is estimated to be 560 per 100,000 live births, its infant mortality rate is between 99 and 123 per 1,000 births, and the average number of children borne by an Ethiopian woman is 6.8. South Africa, on the other hand, boasts some of the best rates in sub-Saharan Africa in terms of maternal and infant mortality and fertility rates. The average maternal mortality rate is 32 per 100,000 live births; this average rate reflects a maternal mortality rate as low as 5 per 100,000 amongst Indians to as high as 58 per 100,000 amongst Africans. While racial breakdowns are not available for the most recent infant mortality rate in South Africa, the annual average infant mortality rate is estimated to be 46 per 1,000 births. The average number of children borne by a South African woman is estimated to be 4.1. High rates of maternal mortality are partially attributable to women's lack of access to emergency obstetric services and to the very limited circumstances in each country in which a legal abortion is available. The high rates of infant mortality can be partly explained by women's lack of access to postnatal care and information. The large number of children borne by women, however, is a reflection of cultural attitudes

in predominantly rural societies where each child is viewed as an asset.

Although the prevalence rates for the incidence of human immunodeficiency virus ("HIV") and acquired immunodeficiency syndrome ("AIDS") are widely regarded to be underreported, the official number of HIV-infected people remains extremely high in many of the seven Anglophone African nations discussed in this report. Zimbabwe has one of the fastest growing HIV/AIDS prevalence rates in the world. Since 1985, over 48,000 cases of AIDS have been reported in Zimbabwe. In 1993, it was estimated that 841,700 persons in Kenya were infected with HIV; in 1996, the World Health Organization reported 64,647 cases of AIDS in Kenya. In 1994, the estimated number of AIDS cases in Tanzania was 250,000; the estimated HIV infection rates based on blood donor prevalence indicates that, by 1995, 1 to 1.5 million Tanzanians were infected by HIV/AIDS. Even the richest country in sub-Saharan Africa, South Africa, is suffering from high rates of HIV/AIDS. In the beginning of 1995, it was estimated that between 1.8 and 2 million South Africans were infected with HIV and that between 12,000 and 15,000 people had AIDS.

Finally, in all the seven nations, adolescents suffer from many unique reproductive health problems. In many nations, traditional practices harmful to women, particularly teenage women, continue to exist. For example, in Ethiopia, Ghana, and Kenya, a significant number of women — 90%, 30%, and 50% respectively — undergo female genital mutilation ("FGM"), also referred to as female circumcision. Early marriage and early pregnancy are also prevalent in Anglophone Africa, often compounding the health problems caused by traditional practices. Early sexual intercourse can cause tearing in the genital region, while childbearing at a young age is correlated with higher incidence of obstructed labor, anemia, and obstetric fistulae. The youngest rates of marriage are to be found in Tanzania and Ethiopia. In Tanzania, the median age of first marriage is 17 years; by the age of 20, more than 95% of women have married at least once. In Nigeria, the mean age at first marriage is 16 years, and half of all women have children by the age of 20. The highest age of first marriage occurs in Zimbabwe and South Africa. In 1994, the average age of first marriage in Zimbabwe was 19 years and 62% of women were married by the age of 20.

C. LOW STATUS OF WOMEN

In all of the seven nations, women generally fare far worse than men. Gender inequalities in access to education are prevalent in each country. For example, in Tanzania, although girls make up 48% of children in primary school, they represented only 18% of students attending an undergraduate university in 1992-93. In Kenya, 27.1% of females aged six and above have not received any formal education compared to 16.5% of males. Disparities between the number of women and men in the paid labor force also exist. In South Africa, while women comprise 36% of the total workforce, African women constitute 18% of the workforce and 48% of the unemployed. In Nigeria, 34% of the labor force is comprised of women. In addition, legal discrimination against women persists in all the countries, particularly in terms of rights under family law. Generally, women do not have the same rights to marry and divorce as men; their rights to inheritance, particularly if they are widows, are also often curtailed. Finally, in many countries, women's ability to own property is also limited in practice by customary law.

II. National-Level Information Discussed

In light of the shared legal traditions, reproductive health problems, and low status of women in Anglophone African nations, this report presents an overview of the content of laws and policies that relate to specific reproductive health issues as well as women's rights more generally. Each country is presented separately, but the information provided is organized uniformly in four main sections to enable regional comparisons.

The first section of each chapter briefly lays out the basic legal and political structure of the country being analyzed, providing a critical framework within which to examine the formal laws and policies affecting women's reproductive rights. This background information seeks to explain how laws are enacted, by whom, and the manner in which they can be challenged, modified, or repealed. It further lays the foundation for understanding the manner in which certain policies may be enacted.

In the second part of each chapter, we detail the laws and policies affecting specific reproductive health and rights issues. While not addressing all reproductive health matters, this segment describes laws and policies for major reproductive health issues that have been the concern of the international community and of governments. The report thus reviews governmental health and population policies, with an emphasis on general issues relating to women's status. It also examines laws and policies regarding contraception, abortion, sterilization, FGM, and HIV/AIDS and other sexually transmitted diseases ("STDs").

The next portion of each chapter provides insights into women's legal status in each country more generally. To evaluate women's reproductive health and rights in these seven

Anglophone African countries, it is essential to explore their status within the society in which they live. Laws relating to women's legal status are important because they reflect societal attitudes that will affect reproductive rights. Moreover, such laws often have a direct impact on women's ability to exercise reproductive rights. The legal context of family life, a woman's access to education, and laws and policies affecting her economic status can contribute to the promotion or the prohibition of a woman's access to reproductive health services and her ability to make voluntary, informed decisions about such care. The report describes laws and policies regarding: marriage, including divorce and custody; property rights; labor rights; access and rules regarding credit; access to education; and the right to physical integrity, including laws on rape, domestic violence, and sexual harassment.

The final section of each chapter focuses on the reproductive health and rights of adolescents, recognizing that discrimination against women often begins at a very early age and leaves women less empowered than men to control their sexual and reproductive lives. Women's unequal status in society may limit their ability to protect themselves against unwanted or coercive sexual relations and thus from unwanted pregnancies, HIV/AIDS, and STDs. Furthermore, young women are often subjected to harmful traditional practices such as FGM. The segment on adolescents focuses on laws and policies relating to five areas: reproductive health; FGM; marriage; sex education; and sexual offenses against minors. Each of these subjects presents significant rights issues and can have direct consequences for women's health.

This report is the product of a collaborative process involving The Center for Reproductive Law and Policy, based in New York, and eight NGOs from Anglophone Africa committed to women's empowerment issues. The regional coordinator for the project was the International Federation of Women Lawyers-Kenya ("FIDA-Kenya"), based in Nairobi. The other collaborative NGOs involved in the process were: the Inter Africa Group in Addis Ababa, Ethiopia; the International Federation of Women Lawyers-Ghana ("FIDA-Ghana") in Accra-North, Ghana; Women Legal Aid Center in Dar-es-Salaam, Tanzania; the Women's Health Project in Johannesburg, South Africa; Lawyers for Human Rights in Pietermaritz, South Africa; The Civil Liberties Organisation in Lagos, Nigeria; and Women in Law and Development in Africa in Harare, Zimbabwe. We all hope that this publication will be useful in efforts to promote reproductive health and rights, especially at the national and regional levels. The achievement of such rights is critical not only to the advancement of women, but also to the development of nations.