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# **Enhancing child protection through harmonising customary and formal laws**

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# Main points

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- Legal pluralism and customary laws in Africa
- FGC as a ritual violence
- Early marriage as a cultural issue
- State of Affairs: Facts and figures
- What could be done to improve child protection:  
Priority Areas for Action

# Legal Pluralism and Customary Laws in Africa

- Legal pluralism refers multiplicity of forms of law
- Legal pluralism is not the only formal law is not the only relevant and people's lives.
- In most laws are widely applied.
  - 85 % heard in traditional fora.
  - Used by many
  - Relatively low in Cameroon (20%)
- Children are subjected two juridical realms: the customary laws and the formal legislative framework



**“Our legal life is constituted by the intersection of different legal orders”**

## Legal Pluralism and Customary Laws in Africa . . . (cont'd)

### Public perception on formal and traditional legal systems

Attributes	Customary	Formal
Long distance to tribunals	2	54
High cost of legal transactions	1	57
Complex processes	2	44
Simple processes	59	13
Possibility for appeal	4	50
Quick verdict	66	13
Reporting (recording) system missing or inefficient	59	0
Less competent judges / less trained	34	13
Transparent	62	14
Consistency in the procedures and decision	55	25
Incoherent procedures and decisions	6	23
Flexible	57	1

## Legal Pluralism and Customary Laws in Africa . . . (cont'd)

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### Main attributes of the customary system:

- Accessibility
- Quick 'justice'
- Transparency
- Flexibility

### Demerits of the customary justice system

- Inconsistency and subjectivity in decisions
- Inequality before the law
- Tend to replicate patterns of power imbalances (fail to allow participation of women, children)

## Legal Pluralism and Customary Laws in Africa . . . (cont'd)

- It may take up a spiritual nature; harmful methods of evidence extraction.
- Absence of systematic reporting/recording cases
- Competency of 'judges'
- Less possibility for appeal
- The big question: *To what extent are these legal orders consistent with the basic human rights principles?*
- States central to a human rights analysis of plural legal orders
  - Take action when non-state legal orders violate human rights.
  - Borrow positive attributes from each of the system to enhance better human rights protection.

## Legal Pluralism and Customary Laws in Africa . . . (cont'd)

### The good practice in Sierra Leone

- An attempt at juridical ‘marriage’ between the formal and the traditional legal systems in Children’s Act.
- Article 48 (1) introduced the concept of a *Chieftom child welfare committee* at the village level.
- Bringing together congregation of actors whose object is to advance the enjoyment of the rights of the child including the paramount Chief
- Some of the duties of the child welfare committee:
  - Promote child rights awareness and enjoyment
  - Monitor the advancement of girl child education;
  - Prevent domestic violence and all forms of gender based violence;
  - Provide advice to children, parents and other community members in promotion of the best interests of the child;

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## **A disclaimer**

**More than 35 categories of harmful practices exist. This presentation focuses on FGC and early marriage, but recognises these practices as major barriers to the realisation of the rights of children.**

# FGC as a ritual violence

- Rituals and customs are normative essence of African customary laws.
- *Identity*: FGC plays a symbolic role in identity and cultural formation
- Girls viewed as bearers of cultural identity; their body used as an instrument to achieve this identity
- Rite of passage into womanhood; a practice to confer social acceptance.
- FGC has two faces:
  - Ritualistic face
  - Physically-loaded violent face

*(both shrouded in festive and celebrative mood)*

## FGC as a ritual violence. . . (cont'd)

- ***Spiritual element:***
  - It is believed that the practice protects the practitioner and the circumcised girl;
  - Banning the practice may generate a sense of spiritual vulnerability.
- ***Rewarding:*** FGC considered beneficial to the girl child; believed to bring respect.
- These customary underpinnings are the factors for resistance in abolishing the practice.
- In communities where rituals are not associated with FGC, aggressive awareness creation campaigns is key in achieving the desired behavioural changes.

# Early marriage as a cultural issue

- ❑ The traditional conception: Marriage is entered into among families instead of among individuals.
- ❑ It can't be broken on whatever grounds – divorce or death.
- ❑ Marriage becomes problematic when it takes place with a child who is not physically and mentally mature .
- ❑ Some cultural underpinnings: a young girl should not have two menses inside her family home.
- ❑ Lack of birth registration; difficult to determine exact age.



## Early marriage as a cultural issue. . . (cont'd)

### The economics of early marriage

- There are both 'demand' side and 'supply' side factors perpetuating the practice.
- On the supply side
  - High costs of raising children (girls may be viewed as an economic burden)
  - As a way to protect girls from violence or sexual advances from men
  - Attractive bride price
- On the demand side
  - Preference for younger brides
  - Longer reproductive lives
  - Younger women who are less assertive and easily controllable
  - Better performance of household activities
  - Less likely to have had previous sexual contact

# State of Affairs: Facts and figures

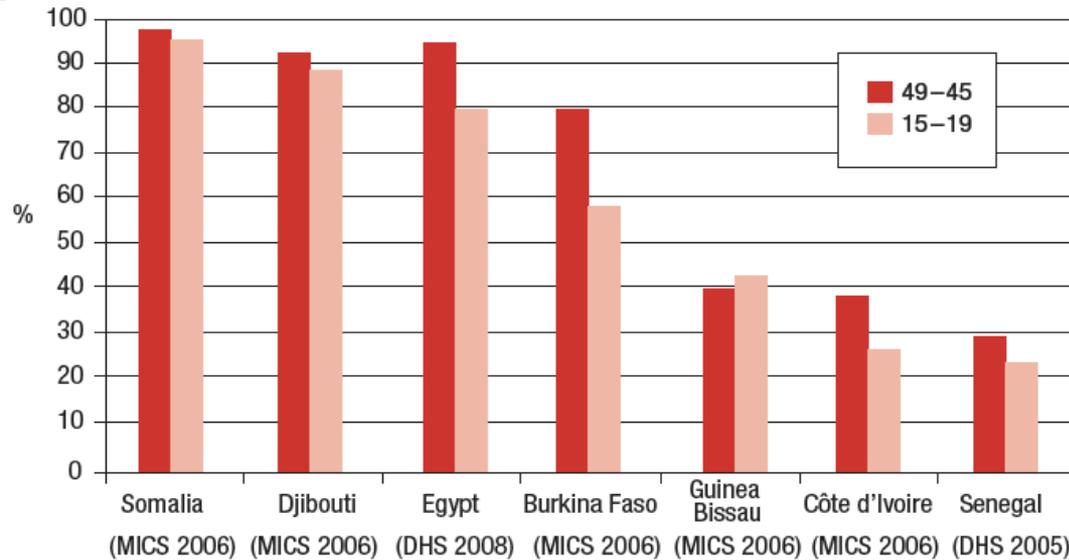
## Countries with minimum age at marriage less than 18

	Girls	Boys
Benin; Tanzania	15	18
Burkina Faso		20
Cameroon; Sudan		18
Chad	17	18
DRC; Gabon	15	18
Guinea	17	18
Guinea Bissau; Zambia	16	16
Malawi	15	15
Namibia; Niger	15	18
Senegal; Swaziland; Zimbabwe; Kenya	16	18
Sudan	13	15



**19 countries in Africa have minimum age at marriage below 18**

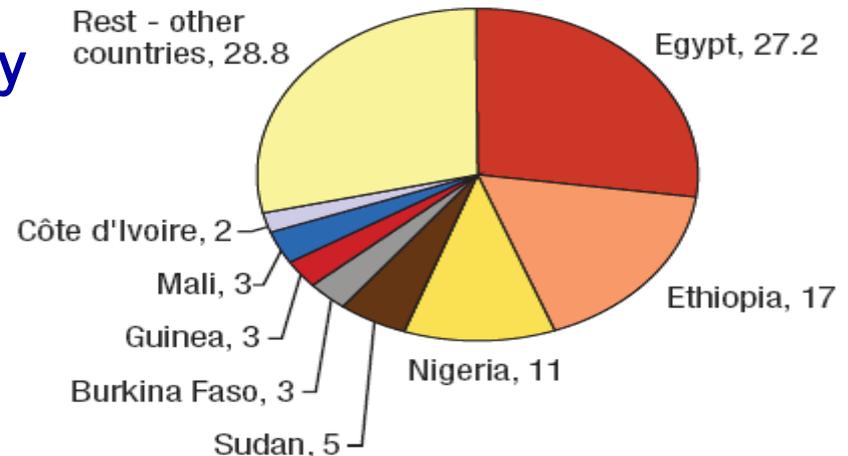
## Prevalence of FGC



91.5m girls and women (10years+) in Africa are subjected to the practice

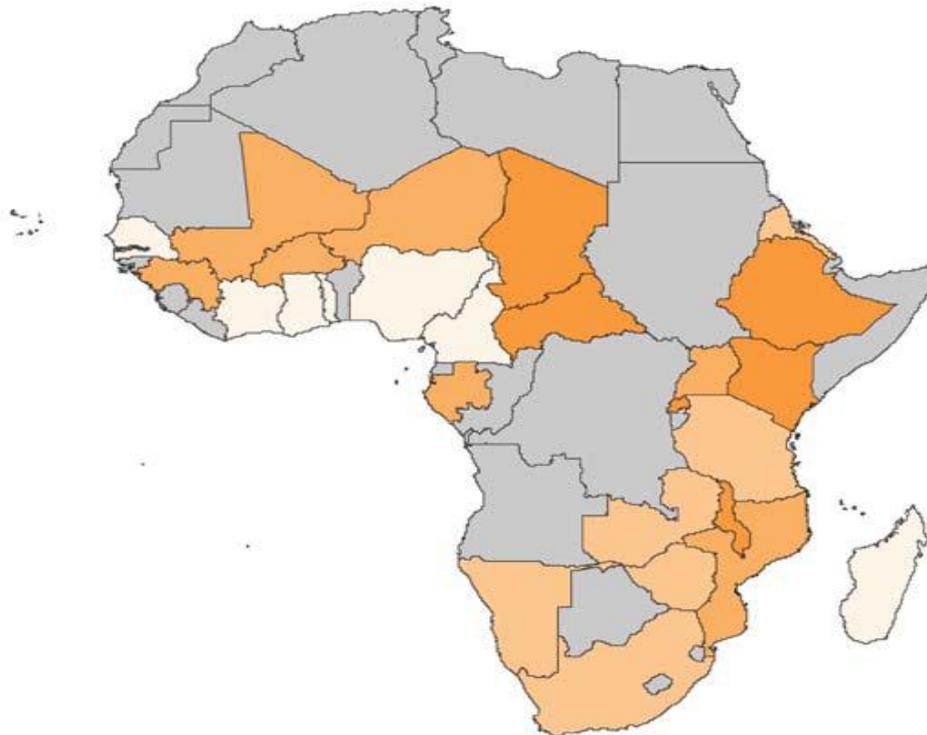
12.4m are 10-14 years (WHO)

## Relative percentage by country



## State of Affairs: Facts and figures . . . (cont'd)

### Strong link between poverty and early marriage



Ratio: richest 20%/poorest 20%



□ Strong correlation between poverty and early marriage (*girls in poor household are twice more likely to be child brides*).

□ Countries with dark orange are those with higher poverty and early marriage.

# What could be done to improve child protection: Priority Areas for Action

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1. Improving the formal justice system by adapting useful aspects from traditional justice systems
  - Improving on accessibility, delays, transparency.
2. Transforming the traditional justice system
  - Sensitising adjudicators on harmful practices and their implications on children
  - Learning from the formal courts to improve on the consistency and predictability of decisions and introduce record-keeping.
  - Facilitating election of women to serve as arbitrators in traditional justice systems
  - Hearing from the horses mouth:** giving children and woman voice in court proceedings.

## Priority Areas for Action . . . (cont'd)

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### 3. Work towards recognizing children's rights as a cultural issue

- Focus towards the adoption of practices that provide cultural legitimacy and acceptance to children's issues.

### 4. Abolishing the violent aspects of community rituals accompanying traditional practices

- Retaining the rituals that surround FGC and early marriage but *purifying it of its violence taints*.
- Their abolition might spell the entire extinction of a culture or a community.

Juridical 'marriage' of *Rites* and *Rights*



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Thank you