

**UNIVERSITY OF KWAZULU-NATAL,  
SOUTH AFRICA**

**CULTURAL PRACTICES AND REPRODUCTIVE HEALTH  
RIGHTS OF WOMEN: A COMPARATIVE STUDY OF SOUTH  
AFRICA AND NIGERIA**

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**SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF  
DOCTOR OF PHILOSOPHY (PhD) IN THE SCHOOL OF LAW, COLLEGE OF LAW  
AND MANAGEMENT STUDIES AT THE UNIVERSITY OF KWA- ZULU NATAL**

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PHILOSOPHY (PhD) in the School of Law, College of Law and Management Studies at  
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## **DEDICATION**

This thesis is dedicated to God Almighty, the Alpha and Omega, for seeing me through this programme, and to the memory of my late father, Hon. Michael Omoniyi Asaolu, who was one of the people that prompted me to start this PhD, but passed on to glory during the course of the programme on 30th December 2013.

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**DECLARATION BY THE CANDIDATE**

I, Bolanle Eniola, student number 213554629, hereby declare that the dissertation, entitled **Cultural Practices and Reproductive Health Rights of Women: A Comparative Study of South Africa and Nigeria**, is the result of my own research and that it has not been submitted in part or in full for any other degree or to any other University.



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**DATE**

## **ABSTRACT**

This study involved a critical comparison of cultural practices and the reproductive health rights of women in South Africa and Nigeria. The two countries are characterised by cultural diversity. They have assented to some international instruments on the protection of the reproductive health rights of women, but have different frameworks aimed at the protection of the reproductive health rights of women. The notable difference in the approach of the two countries to the promotion and protection of the reproductive health rights of women is that South Africa has a more developed constitutional approach channelled towards the protection of women's reproductive autonomy.

Apart from being signatories to international treaties on the protection of women's reproductive health, South Africa and Nigeria have different frameworks for the protection of women's reproductive autonomy. While South Africa has muster political will to domesticate these treaties, the case is different in Nigeria as it finds it difficult to domesticate these international instruments. However, despite South Africa's domestication of the international instruments and Nigeria's ratification of the instruments, coupled with their legal and legislative frameworks on women's reproductive health rights of women, women in these countries are constrained by various cultural norms from realising these rights.

Desktop research was conducted to gain a robust understanding of cultural practices and the reproductive health rights of women in South Africa and Nigeria. The study relied on primary and secondary sources of information. It reviewed the existing literatures on cultural practices and the reproductive health rights of women in both countries. As well as the various international and regional instruments on the promotion and protection of women's reproductive health right. The information gathered from these sources was subjected to content analysis.

The study revealed that that despite the frameworks adopted by the two countries on the protection of the reproductive health rights of women, reproductive health rights of women in both countries are still violated through some cultural practices. The cultural practices are so entrenched in the various communities in both South Africa and Nigeria that it is difficult to adopt laws to protect the reproductive health rights of women. According to the study, women

themselves contribute to the furtherance of the cultural practices. This is because most of the instruments protecting these rights are ineffective. The study further revealed that the laws of some countries do not promote the enforcement of international instruments in their domestic courts – unless such instruments are domesticated. According to the study, while South Africa has demonstrated political will to protect women’s reproductive health rights, Nigeria lacks the political will to domesticate the international instruments. Furthermore, in Nigeria, the pluralist legal system also affects the realisation of the reproductive health rights of women as the system creates geographical disparities in the realisation of these rights.

It is recommended that the Nigerian government demonstrate commitment to domesticating the various treaties on women’s reproductive health rights to which the country has assented. Furthermore, both countries should provide human rights education to enlighten both men and women on the need to protect these rights. Finally, to fully enjoy these rights, where there is a conflict between the various cultural practices and women’s reproductive health rights, in line with international norms and standards on the protection of women’s rights, women’s reproductive health rights should take precedence.

## **LIST OF ACRONYMS**

ACHPR -The African Charter on Human and Peoples' Rights

AIDS- Acquired immune deficiency

CEDAW- Convention on the Elimination of All Forms of Discrimination against Women

CRC - Convention on the Rights of the Child

FGM - Female Genital Mutilation

HIV- Human immunodeficiency virus

HRP- Research Training in Human Reproduction

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social, and Cultural Rights

ICPD- Cairo Conference on Population and Development

NGOs- Non- governmental Organisations

MDGs - Millennium Development Goals

OP-ICESCR - Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

PA- Programme of Action

PEPUDA - Promotion of Equality and Prevention of Unfair Discrimination Act

RCMA- Recognition of Customary Marriages Act

RVF - Recto-vaginal fistulae

STD- Sexually transmitted disease

UDHR - Universal Declaration of Human Right

UN- United Nations

UNFPA - United Nations Population Fund

VAAP- Violence against Persons (Prohibition) Act

VVF- Vesico-vaginal fistulae

WHO - World Health Organisation

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# CHAPTER ONE

## INTRODUCTION, BACKGROUND AND CONTEXT

### 1.1 INTRODUCTION

There are contending perspectives on the reproductive health rights of women in Africa. The case of South Africa and Nigeria is particularly engaging. While these two countries are regional powers in terms of political and economic development, they have a different political history, but they are both democratic states which affirm the supremacy of their constitutions as the *grundnorm*.<sup>1</sup> In addition to this, they have different frameworks for the protection of the reproductive health rights of women. In fact, South Africa is unique because it has a more developed constitutional approach to the issue of cultural practices and reproductive health rights of women. South Africa's Constitution guarantees women's rights and women's reproductive autonomy.<sup>2</sup> It also makes special provision for socio-economic and cultural rights. South Africa's constitutionally guaranteed human rights are contained in the Bill of Rights.<sup>3</sup> This is in line with international human rights law, and it reflects the broad conception of culture envisaged in the International Covenant on Civil and Political Rights (ICCPR). Section 31 of the South Africa Constitution is *in pari materia* with Article 27 of the ICCPR.

South Africa has demonstrated her commitment to protecting human rights by creating state institutions to support constitutional democracy. Chapter 9 of the Constitution lists these institutions, which include the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the Commission for Gender Equality.<sup>4</sup> Sections 30 and 31 of the Constitution stipulate that

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<sup>1</sup> Section 2 of the Constitution of the Republic of South Africa, 1996, and Section 1(1) of the Constitution of the Federal Republic of Nigeria, 1999.

<sup>2</sup> Sections 12(2) and (27).

<sup>3</sup> See Chapter 2 of the Constitution of the Republic of South Africa, 1996.

<sup>4</sup> Sections 184, 185, 186 and 187, respectively.

the exercising of these rights is subject to the provisions of the Bill of Rights. In addition to this, other laws also protect the rights of women and children.<sup>5</sup>

Although, the Nigerian constitution does not provide explicitly for the reproductive health rights of women and cultural rights, these can be inferred from the fundamental human rights<sup>6</sup> which guarantee, among others, the right to life, the right to dignity of human persons, the right to personal liberty, the right to private and family life, and the recognition of the right to health – although not as enforceable rights.<sup>7</sup> In Nigeria, the Constitution recognises the rights to health and cultural rights under the Fundamental Objectives and Directive Principles of State Policy.<sup>8</sup> Such rights are, however, not enforceable in Nigerian Courts.<sup>9</sup> This is unlike the case of India, where, although socio-economic rights are recognised under the Fundamental Objectives and Directive Principles of State Policy, the Supreme Court has interpreted the right to health to form part of the right to life – thereby guaranteeing its enforceability and justiciability.<sup>10</sup> Nigeria has ratified and domesticated the African Charter on Human and People’s Rights that recognises the right to health as an enforceable right. Since the Constitution is the supreme law, it therefore infers that without constitutional backing, enforcing these rights in Nigeria will remain a mirage.

The two countries have different legal frameworks for the protection of the reproductive health rights of women. Nonetheless, they are confronted with the challenges surrounding the convergence between women’s reproductive health rights and harmful cultural practices. While the former epitomises modern global practice in the promotion of the rights of women, traditional African norms and culture continue to dominate the attitudes and disposition of the population in terms of reproductive activities.

In view of this, it is pertinent to conceptualise health. The World Health Organisation defines health as: “A state of complete physical, mental, and social well-being and not merely the

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<sup>5</sup> Domestic Violence Act 116 of 1998, Children’s Act 38 of 2005, Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 – among others.

<sup>6</sup> Chapter 4 of the Constitution of the Federal Republic of Nigeria, 1999.

<sup>7</sup> Sections 17(3) and 33(1).

<sup>8</sup> Chapter Two.

<sup>9</sup> Section 6(6) ousts the jurisdiction of the court on matters listed in Chapter 2 of the Constitution.

<sup>10</sup> *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* 1981(2)SCR 516.

absence of disease or infirmity.”<sup>11</sup> It is instructive to note that cultural practices determine definitions. Moreover, cultural patterns in societies change from time to time. For this study, health is defined as the absence of disease and infirmity – with the ability to relate freely in the midst of cultural norms in society. It involves living in an environment that guarantees the uninhibited physical, mental and social well-being of people in the society.

International human rights instruments have been of great help on the issue of health practices – by stating the obligations of the state on health matters.<sup>12</sup> Although these instruments set out the obligations, a major predicament is how to interpret these human rights provisions – to enable reproductive determination in every culture and country.<sup>13</sup> States are enjoined to fulfil the various obligations set out in the various human rights instruments, by ensuring that their national legislation is compatible with the human rights obligations that the state claims to respect.<sup>14</sup> Even when these instruments are incorporated into state laws – do they have any positive impact on the reproductive autonomy of women.

## **1.2 HISTORICAL DEVELOPMENT OF REPRODUCTIVE HEALTH RIGHTS**

Prior to the Universal Declaration of Human Right (UDHR) in 1948, there had been agitation for the recognition of human rights in the global community. Contrary to the view that UDHR marks the beginning of the struggle for human rights and, by implication, health rights, demands for the emancipation from slavery, feudalism, workplace exploitation, imperialism, gender discrimination and racial discrimination – dated back to thousands of years before the UDHR.<sup>15</sup> All the various political movements at this time were pointing towards social justice in

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<sup>11</sup> Preamble to the Constitution of the World Health Organisation, as adopted by the International Health Conference, New York, 19-22 June 1946, and signed on 22 July 1946. Official records of the World Health Organisation, No. 2, p. 100. Available at: <http://www.who.int/about/definition/en>.

<sup>12</sup> D. Tarantola “A perspective on the history of health and human rights from the Cold War to Gold War (2008) 29 *Journal of Public Health Policy* 43.

<sup>13</sup> R.J. Cook “Human rights and reproductive self determination” (1994-1995) 44 *Am.U.L.P* 982.

<sup>14</sup> *Idem* 986.

<sup>15</sup> Anne-Emanuelle Birn “Health and human rights: Historical perspectives and political challenges” (2008) 29 *Journal of Public Health Policy* 32, 33.

relation to public health.<sup>16</sup> However, the genesis of the movement of health practices towards health rights started with the UDHR– which recognised the right to health as follows:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>17</sup>

The UDHR – though not a legally enforceable instrument – has been duly recognised at the various international human rights conventions, as the foundation from which most human rights instruments emerged. The UDHR does not define the right to health; nevertheless, it itemised the various rights that complement the right to health – the enjoyment of which infers that one is in good health.

About two decades after the UDHR came into being, it was perceived that there was rapid population growth which could hamper development, and, in turn, hinder the enjoyment of the fundamental human rights. Consequently, The United Nations Population Fund (UNFPA) was established in the 1960s to create awareness of population problems and to assist developing countries with population growth. This coincided with the rapid increase in the availability of technologies for reducing fertility.<sup>18</sup> This was all in the hope that population growth would be controlled, which, in turn, would translate to development – thereby giving way to the enjoyment of human rights. To further ensure the maximum realisation of the enjoyment of human rights, the various aspirations in the UDHR were divided into two: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). This was a positive development, as these rights graduated from the level of mere declarations, through to binding obligations.<sup>19</sup> With this development, human rights were classified as negative and positive rights.<sup>20</sup>

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<sup>16</sup> Anne-Emanuelle Birn, note 15 (above).

<sup>17</sup> Article 25(1), Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217(111) of 10 December 1948.

<sup>18</sup> F. Worku & S. Gebresilassie *Reproductive health for health science students* (2008). Available at: [www.cartercenter.org](http://www.cartercenter.org) p. 3.

<sup>19</sup> Tarantola, note 12 (above) 43.

<sup>20</sup> *Ibid.*

Civil and political rights were categorised as negative rights, because they act as limitations restraining the state from carrying out certain acts. “Negative rights are more easily observed by states, since they frequently require no more than governmental restraint from intervention in individual’s personal choices and family lives.”<sup>21</sup> The economic, social and cultural rights were classified as positive rights – because, naturally, they confer financial obligations on the state to ensure that certain needs of the citizens are met. It is easy to establish state responsibility for violating negative rights, because a single incident may be enough to establish such, while with positive rights, it is not an easy task to establish violation.<sup>22</sup> In most cases, these rights are violated in the private sphere – especially during intimate relationships. This has resulted in the unenforceability of the economic, social and cultural rights in most states, because of their very nature and the consequent financial implications.

Article 12 of the International Covenant on Economic, Social and Cultural Rights recognises the right of all to enjoy the highest attainable standard of physical and mental health.<sup>23</sup> It lists the following steps which are required to achieve the full realisation of this right:

- (a) Provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;
- (b) Improvements of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all– medical service and medical attention in the event of sickness.<sup>24</sup>

The 1966 United Nations General Assembly Resolution on population growth and economic development, in realisation of the impact of the population policies on the autonomy of each family in relation to their family size, recognised that: “family size should be the free choice of

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<sup>21</sup> Cook, note 13 (above) 992.

<sup>22</sup> *Ibid.*

<sup>23</sup> Article 12, International Covenant on Economic, Social, and Cultural Rights, adopted and opened for ratification and accession by General Assembly Resolution 2200A(XXI) of 16 December 1966, which entered into force on 3 January 1976, in accordance with Article 27.

<sup>24</sup> *Ibid.*

each individual family”.<sup>25</sup> The intention of this resolution was to promote population policies. The resolution recognised the autonomy of individual families with respect to the determination of their number– which forms part of reproductive health rights. Nevertheless, the resolution did not specifically make reference to reproductive health rights. Moreover, the various population policies had little or no effect on population growth. This has always been recognised as the greatest impediment to the enjoyment of human rights. Hence, the central theme of the 1968 International Conference in Teheran, was to curb population growth as a way of securing the future of the wide range of human rights.<sup>26</sup>The 1968 Teheran Declaration acknowledged reproductive health as a component of human rights. It states: “Parents have a basic right to decide freely and responsibly on the number of spacing of their children and a right to adequate education and information in this respect.”<sup>27</sup> While this is a step forward, the Declaration’s conceptualisation of reproductive health rights did not extend beyond reproductive autonomy and education.

In the same vein, in 1972, the World Health Organisation (WHO) established the special programme of Research, Development, and Research Training in Human Reproduction (HRP) – with the mandate to focus on research into the development of new and improved methods of fertility regulation, issues of safety, and efficacy of existing methods. Modern contraceptives were seen as reliable and independent of people’s ability to practice restraint, and as more effective than withdrawal, condoms, or periodic abstinence. During this period, population policies were embraced in developing countries and they earned the support of UN agencies and NGOs– of which the International Planned Parenthood federation is the most popular.<sup>28</sup> This trend was seen as a way to curb rapid population growth which could hamper development. The focus of population policies was how to reduce population growth.<sup>29</sup> Looking at the inadequacies of the various population policies – it dawned on the international human rights community that to make headway and to enjoy the full benefits of human rights, they had to look beyond the

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<sup>25</sup> Article 2211/XX1, General Assembly Resolution of 17 December 1966.

<sup>26</sup> L.P. Freedman & S.L. Isaacs “Human rights and reproductive choice” (1993) 24(1) *Studies in Family Planning* 18, 21.

<sup>27</sup> The Final Act of the Teheran Conference on Human Rights, 1968.

<sup>28</sup> Worku & Gebresilassie, note 18 (above) 13-14.

<sup>29</sup> *Ibid.*

issue of population control policies, and needed to introduce a better approach to achieve the desired result.

In 1974, the World Population Conference in Bucharest, Romania, reviewed the status of population development since the Teheran conference, and it was revealed that there had been a dramatic change in population issues. The view that population growth hampers development had been reversed – with the new slogan that “development is the best contraceptive”.<sup>30</sup> Obviously, the meaning of this slogan is that once there is development in every area of people’s lives, they will be well informed and capable of taking the right decisions – without any form of coercion. Hence, this will extend to their reproductive life.

Developing nations at the conference saw the emphasis on population growth as a self-centred approach by which the governments in the West wanted to maintain their primacy – rather than a genuine concern for their standard of living and development. The conference later reached a compromise “that population growth was an important element in development and that national development tended to reduce population growth.”<sup>31</sup> Of course, when a nation is developed, controlling its population growth will not be difficult. However, if population growth is not controlled, it may indeed hamper development, because all efforts at developing such a country will be futile because the available resources will be hackneyed. The conference expanded reproductive autonomy from couples to include parents, as well as individuals. It went further to state that reproductive autonomy is far beyond authority in relation to one’s body. To be autonomous, one must have the capacity and capability to exercise that authority. Hence, the Bucharest declaration states that people should have the means and information and education to assert their fundamental human rights.<sup>32</sup>

In view of this, the International Conference on Primary Health Care<sup>33</sup> set up a new international health agenda – after taking into consideration the health challenges faced by developing countries, which could not be addressed by the traditionally focused programmes and services. The conference affirmed that health is a fundamental right and that the greatest social goal

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<sup>30</sup> Freedman & Isaacs, note 26 (above) 21-22.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Idem* 22.

<sup>33</sup> The Conference was held in Alma-Ata, USSR, from 6 to 12 September 1978.

should be the attainment of the highest possible level of health.<sup>34</sup> During this period, there was emphasis on child survival, and the major focus for mothers was family planning.<sup>35</sup> Subsequently, The Convention on the Elimination of all Forms of Discrimination against Women came into force. It also guarantees the right to health.<sup>36</sup> Furthermore, it implicitly recognises the reproductive health rights of women. It guarantees access to health services relating to family planning and ante-natal and post-natal practices, among others.<sup>37</sup>

The aroused consciousness and commitment to the promotion and protection of health and respect for human rights, gave rise to the emergence of the health and human rights movement.<sup>38</sup> It came to the fore that violations of human rights do have health consequences, and that the implementation of health policies can infringe on human rights. In the late 1990s, the resolutions of the UN General Assembly contained explicit reference to health and human rights. International development agencies and NGOs also directed their policy statements to the relevance of human rights in health and development.<sup>39</sup> Consequently, efforts were being directed towards ensuring that the concept of reproductive health rights was legitimised.

Apart from the health and population movement, another effort leading to the reproductive health rights of women was made by the lobbying of women's groups in a non-institutional framework. The women's movement began their agitation towards reproductive autonomy in 1975 at the International Women's Year Conference, held in Mexico. However, in contrast to Teheran and Bucharest, the notion of the women's movement of reproductive autonomy centred on bodily integrity and control.<sup>40</sup> Their conceptualisation was linked to the struggle for the right to safe abortions and contraception in industrialised countries. The first step in the legitimisation of reproductive rights occurred through consensus, rather than at the institutional level, at the 4<sup>th</sup> International Women and Health meeting, in Amsterdam, in 1984.<sup>41</sup> Ten years later, the Cairo

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<sup>34</sup> Tarantola, note 12 (above) 43-44.

<sup>35</sup> Worku & Gebresilassie, note 18 (above).

<sup>36</sup> Article 12 of the Convention on the Elimination of all forms of Discrimination Against Women, adopted by the UN General Assembly Resolution 34/180 of 18 December 1979, entered into force on 3 September 1981.

<sup>37</sup> *Ibid.*

<sup>38</sup> Tarantola, note 12 (above).

<sup>39</sup> Tarantola, note 12 (above) 47.

<sup>40</sup> Freedman & Isaacs, note 26 (above) 23.

<sup>41</sup> S. Correa "From reproductive health to sexual rights: Achievements and future challenges" (1997) 5 *Reproductive Health Matters* 107, 108.

Conference on Population and Development (ICPD) recognised the reproductive health rights of women as part of human rights.<sup>42</sup> This was seen as a turnaround in the history of reproductive health. It followed some important occurrences which made the world think of other ways beyond population control – to approach reproductive health issues.

This paradigm shift in the approach to reproductive health was borne out of the following facts:

- a. The growing strength of the women group which criticised over-emphasis on the control of women's fertility.
- b. The advent of the HIV/AIDS pandemic and the need to talk about the consequences of sexual activity other than pregnancy and sexual relationships within and outside marriage.
- c. The articulation of reproductive health rights as human rights. International human rights treaties were interpreted in terms of women's health in general and reproductive health in particular, and this was just gaining acceptance.<sup>43</sup>

Building on the definition of health by the World Health Organisation, the Cairo Conference defined and described reproductive health as:

a state of complete physical, mental and social well-being and not merely absence of disease or infirmity, in all matters relating to the reproductive system, and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the rights of men and women to be informed about and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of birth control which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.

The above description divides reproductive health rights into three categories:

- a. The right of couples and individuals to decide freely and responsibly the number and spacing of children, and to have the information and means to do so.
- b. The right to attain the highest standard of sexual and reproductive health; and,
- c. The right to make decisions free of discrimination, coercion or violence.

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<sup>42</sup> The Cairo Programme of Action, 1994.

<sup>43</sup> Worku & Gebresilassie, note 18 (above) 16.

The Fourth World Convention on Women's Development in Beijing affirmed this position. These rights were already recognised in international and regional treaties, and also national legislation. The Center for Reproductive Rights lists 12 key human rights provisions that are connected to reproductive health rights.<sup>44</sup> These include: the right to life; the right to liberty and security of the person; the right to health, including sexual and reproductive health; the right to decide the number and spacing of children; and the right to consent to marriage, and equality in marriage.<sup>45</sup> Others are the right to privacy; the right to equality and non-discrimination; the right to be free from practices that harm women and girls; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; and the right to be free from sexual and gender-based violence.<sup>46</sup> The list also includes the right to access sexual and reproductive health education and family-planning information, and the right to enjoy scientific progress. According to BAOBAB for Women's Human Rights (Reproductive Health and Rights of Women),<sup>47</sup> these rights can be grouped into four different parts:

- a. The right to reproductive and sexual health.
- b. The right to reproductive decision-making.
- c. The right to equality and equity for men and women.
- d. The right to sexual and reproductive security.

Consequent upon the recognition of reproductive rights as human rights, there was also emphasis on the quality of health service delivery, availability and accessibility.<sup>48</sup> It also brought into the focus the various social injustices unleashed on women and individual women's needs and

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<sup>44</sup>“Twelve human rights key to reproductive rights”. Center for Reproductive Rights. Available at: [www.reproductiverights.org](http://www.reproductiverights.org).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Ngosi Nwosu - Juba et al. *Reproductive Health and Rights of Women* (2007) Available at: <http://www.baobabwomen.org>.

<sup>48</sup> Worku & Gebresilassie, note 18 (above) 16.

rights. Reproductive rights, as recognised human rights, are valuable ends in themselves, and are an essential part of the fundamental rights.<sup>49</sup>

Taking a careful look at the historical development of the concept of reproductive health rights, there is no doubt that Freedman is right when he admits that the history of reproductive autonomy as a human right is schizophrenic in nature.<sup>50</sup> Although, he recognises that two movements are responsible for the formulation and development of reproductive autonomy, the history of reproductive health rights can be traced to three parallel movements. These are the population movement, the health movement, and the women's movement. The effect of this background on the reproductive health rights of women is that there is lack of agreed principles on which the rights are based – and this makes the realisation of the right ineffective.

The emergence of the Millennium Development Goals (MDGs) in 2000 further supports the realisation of the reproductive health rights that was already recognised in the ICPD in 1994. The MDGs are related to health both directly and indirectly. MDGs 4, 5, and 6 are directly related to health and deal with child mortality, maternal health and HIV/AIDS, and malaria and other diseases respectively. MDGs 1, 2, 3 and 7 are indirectly related to health given that their focus is on poverty eradication, access to universal primary education, promotion of gender equality and women's empowerment, and environmental sustainability respectively.

Considering the various efforts made at international level towards the reproductive health rights of women, African countries demonstrated their commitment to advancing the rights in particular, at the regional level – by adopting the African Charter on Human and People's Rights,<sup>51</sup> which provides that:

Every individual shall have the right to enjoy the best attainable state of physical and mental health and that State Parties to the present Charter shall take all the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.<sup>52</sup>

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<sup>49</sup> UN Millennium Project 2006, *Public Choices, Private Decisions: Sexual and Reproductive Health and the Millennium Development Goals* 25.

<sup>50</sup> Freedman & Isaacs, note 26 (above) 21.

<sup>51</sup> Adopted in Nairobi on 27 June 1981 and entered into force on 21 October 1986.

<sup>52</sup> Article 12 of the African Charter on Human and People's Rights, adopted at Nairobi on 26 June 1981, and entered into force on 21 October 1986, in accordance with Article 63.

Subsequently, African countries adopted the Protocol on the Rights of Women in Africa.<sup>53</sup> The Protocol, which acts as a supplement to the African Charter on Human and People's Rights, contains express provisions in relation to health and the reproductive health rights of women.

The constitutions of some African countries do not make the right to health justiceable; these rights are therefore not enforceable in a court of law. However, many of these countries have ratified numerous international and regional instruments guaranteeing the right to health.<sup>54</sup> The major human rights instruments in Africa are the African Charter on Human and People's Rights and the Protocol on the Rights of Women in Africa.<sup>55</sup> Both promote positive African values that are in tune with the principles of equality and non-discrimination.<sup>56</sup> South Africa and Nigeria are signatories to these treaties.

While African countries have signed and ratified the above instruments and incorporated them into their national laws,<sup>57</sup> there is a gap between policy and implementation. A major explanation for this is Africa's history of imperialism and colonialism. Colonial administrative experiences wrought significant cultural changes in Africa. In the pursuit of their own interests, the colonial powers imposed Western European models of human rights on Africans.

### **1.3 AFRICAN CULTURE AND THE REPRODUCTIVE HEALTH RIGHTS OF WOMEN**

Traditional African culture was group-oriented, with implicit concern for the interests and welfare of the people – whereas Western culture was individualistic.<sup>58</sup> Culture is an uncertain term, because it embraces a wide variety of human activities. However, for legal purposes, it could bear at least two meanings.<sup>59</sup> It may signify intellectual or artistic endeavour, and, in this sense, a right to culture implies the freedom - akin to a freedom of expression –to perform or

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<sup>53</sup> Adopted by the African Union in July 2003 and came into force in November 2005.

<sup>54</sup> E. Durojaye "Monitoring the right to health and sexual and reproductive health at the national level: Some considerations for the African governments" (2009) 42 *The Comparative and International Law Journal of South Africa* 227, 229.

<sup>55</sup> M. Ssenyonjo "Culture and human rights of women in Africa: Between light and shadow" (2007) 51 *Journal of African Law* 39, 42-43.

<sup>56</sup> *Ibid.*

<sup>57</sup> Some African countries such as Angola, Botswana, Democratic Republic of Congo, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, South Africa, Swaziland, Nigeria, Tanzania among others have the relevant international treaties on women's reproductive health rights in their domestic laws.

<sup>58</sup> M.J. Maluleke "Culture, tradition, custom, law, and gender equality" (2012) 15 *PER3*.

<sup>59</sup> T.W. Bennett *Customary law in South Africa* 1st Ed. (2004) 78.

practice the arts and sciences. The other meaning of culture, and the one that is relevant to customary law, is a people's store of knowledge, beliefs, arts, morals, laws and customs; in other words, everything that humans acquire by virtue of being members of society.<sup>60</sup> Though complex in nature, culture signifies unique social characteristics that define groups.<sup>61</sup> To this end, culture consists of the way that the members of a particular society conduct their personal activities – and which is handed down from one generation to another as the values of such a society.

Cultural practices are values embraced by a particular society, and are the basic principles which guide the members of the society that embraces such culture in their conduct within the society. Hence, during the pre-colonial era in Africa, the customary law which was applicable was the indigenous law which was derived from the various cultural practices of the various ethnic groups.<sup>62</sup> As noted by M. Ndulo, “The pre-colonial law in most African states was essentially customary in character, having its sources in the practices and customs of the people.”<sup>63</sup>

Contemporary African culture is a mixture of traditional elements and alien features.<sup>64</sup> The alien features that were used to dilute the African culture are the colonial common and civil law notions, and religion concepts from Christianity and Islam.<sup>65</sup> The application of these laws as the legacy of colonialism within a plural society, insubordinates women. Prior to the advent of colonialism, the role of women was recognised in the society. The nature of gender relation in the Pre- Colonial African society was complimentary. There was equitable division of labour. Women's participation in the socio-economic and political activities of their societies earn them positions of prestige such as queen- mothers, queen- sisters, princesses, chiefs and holders of other offices in town and villages. The Bantu ethnic groups of Zaire, Angola, and the Great Lakes area as well as the Shoma of Zimbabwe, the Ashanti of Ghana, the Baddibunka of North

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<sup>60</sup> Bennett, note 59 (above) 78-79.

<sup>61</sup> *Idem*79.

<sup>62</sup> M.Ndulo “African customary law, customs and women's rights” (2011) 18 *Indiana Journal of Global Legal Studies* 87, 88.

<sup>63</sup> *Idem*88.

<sup>64</sup> Maluleke, note 58 (above).

<sup>65</sup> Fitnat Naa-Adjeley Adjetey “Reclaiming the African woman's individuality: The struggle between women's reproductive autonomy and African society and culture” (1995) 44 *American Law Review* 1351.

Bank of The Gambia, accorded great powers to the matriarchs of their clan to a degree that their children were identified by the names of their mother.<sup>66</sup>

In occasional situations women were warriors and a woman was a supreme Monarch.<sup>67</sup> Furthermore, women make a significant contribution to the economic lives of their societies through farm labour, food processing, and the storage and transportation of farm products. In view of the uniqueness of child-bearing and weaning, the role of women was seen as indispensable in the continuation of culture. Just as in North America, where, before the arrival of the colonial masters, women were seen as the backbone and keepers of life of the indigenous nation. The European settlers in North America had a different view of women. Prior to their arrival, the native communities functioned without distinction of gendered social ranks, and there was a sense of mutual responsibility – thereby giving women autonomy.<sup>68</sup> The European settlers saw this as odd and even blasphemous, in a bid to ensure that women are displaced and to stop the continuation of their role as the keepers of life and of the culture. This disrupted the cooperation among the native people – and served the bidding of the settlers in terms of the quest for the land and resources of the native people.<sup>69</sup>

The story of most traditional African societies is not different from the experience of North America. The influence of colonialism and imperialism gave rise to the development of a patriarchal society in Africa.<sup>70</sup> This is because colonialism was introduced into Africa at a time when Victorian England and other European societies had restricted views on the roles of women in the society accordingly; colonial rule reversed the position of women in the society.<sup>71</sup> Most of

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<sup>66</sup> R.A Phillot-Almeida *A Profile of the Roles of Women as Economic Producers and Family Supporters in the Gambia* 1994 10.

<sup>67</sup> N. Sudarkasa “The Status of Women” in *Indigenous African Societies*” (1986) 12 *Feminist Studies* 91.

<sup>68</sup> D.M Ralstin –Lewis “The Continuing Struggle Against Genocide: Indigenous Women’s Reproductive Rights” (2005) 20 (1) *Wicazo sa Review*, 71.

<sup>69</sup> *Ibid.*

<sup>70</sup> Maluleke, note 58 (above).

<sup>71</sup> F. O Anunobi “Women and Development in Africa: From Maginalisation to Gender Inequality” (2002) 2 *African Social Science Review* 41, 44-45.

the Africans employed by the colonial masters, in furtherance of their purpose, were men this is reflected in the wage economic which was predominantly men.<sup>72</sup>

African women were inopportune in the colonial period than in the pre-colonial period thus; the socio-economic status of African women was invariably weakened by the colonial government policies.<sup>73</sup> Customary gender division of labour was altered. Men were taught to grow new cash crops such as cocoa and coffee while women continued with subsistence farming.<sup>74</sup> “...Patriarchy denotes those structures and systems within societies which uphold male power and which exist independently of the intentions and actions of individual men”<sup>75</sup> Patriarchy has also been defined as a gendered power system: a network of social, political, and economic relationships through which men dominate and control female labour, reproduction and sexuality as well as define women’s status, privileges and rights in a society”.<sup>76</sup> This system entails the subjection of women to the authority of a patriarch – at every stage of her life.<sup>77</sup> Although the African custom has always had a patriarchal bias, the colonial period exaggerated and entrenched gender inequality through distortion of customs and practices which often had been relatively egalitarian or mitigated by checks and balances in favour of women and the young.<sup>78</sup>

The colonial period created legal institutions that frequently contrasted traditional institutions. Considering the policies of the colonial imperialist which marginalised women and deprived them of their autonomy, Igbo and Ibibio women in the South Eastern part of Nigeria waged war against colonisation in 1929.<sup>79</sup>

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<sup>72</sup>E. Akyeampong & H. Fofack “The Contribution of African Women to Economic Growth and Development: Historical Perspectives and Policy Implications”( 2012) *The World Bank Poverty Reduction and Economic Management Network Gender and Development Unit* Available at <http://econ.worldbank> 1,3.

<sup>73</sup> *Ibid.*

<sup>74</sup> Anunobi, note 71 (above) 48-49.

<sup>75</sup>K.V. Marle & E. Bonthuys“Feminist theories and concepts”. In: E. Bonthuys & C. Albertyn (Eds), *Gender, law and justice*. 1<sup>st</sup> Ed.(2007) 21.

<sup>76</sup>F. Kalabamu“Patriarchy and women’s land rights in Botswana” (2006) 23 *Land Use Policy* 237.

<sup>77</sup> F. Kaganas & C. Murray“Law and women’s rights in South Africa: An overview”. In:C. Murray(Ed.), *Gender and the new South African legal order*(Faculty of Law, University of Cape Town) (1994) 17.

<sup>78</sup> T. Nhlapo “African customary law in the interim constitution”. In: S. Liebenberg (Ed.), *The Constitution of South Africa from a gender perspective* (Community Law Centre, University of the Western Cape, in Association with David Phillips, Cape Town)(1995) 162.

<sup>79</sup> I. Amadiume “ Women and Development in African” (2005) *SGI Quarterly* available at [www.sgiquarterly.org/feature](http://www.sgiquarterly.org/feature) 2005 Jan.

Furthermore, during the colonial era, there was dual legal system – the customary law, and the received English law.<sup>80</sup> These two laws were applied in relation to any matter that came before a court, depending on the court being approached for adjudication. The colonial government, in a bid to ensure allegiance of the people in order to achieve their mission in Africa, appointed warrant chiefs who owed their greater allegiance to the government compared to the tribe – as opposed to the customary rule that requires elders, as the custodians of the culture, to preside over cases in customary courts. In conformity to the belief of women insubordination, colonial governments never appointed women to colonial courts.<sup>81</sup> Most of the appointed judges were not versed in the customs of the people and there was no proper gender representation.

Consequently, the feminist views that would otherwise be infused into interpretations of customary law, were eliminated altogether – thereby limiting interpretations of customary laws to purely male perception. “Customary law was interpreted by persons who were not versed enough in the traditions of the society to properly interpret them, thereby causing erosion of the status accorded to women.”<sup>82</sup> There were arbitrary interpretations of customary law to the advantage of not only the men who administered them, but also the colonial masters.

The interpretation of customs by these warrant chiefs often resulted in the creation of laws governing marriage, kingship, property, and inheritance – which have direct effect on the social status of women in the society. Most of the customary laws established during the colonial period are still in practice today, due to the doctrine of judicial precedent, *stare decisis*, which means stay by the decided’’.<sup>83</sup> This, in effect, left African society as a patriarchal society, where women are seen either as minor or second-class citizens that cannot take some decisions without the influence of their husbands, family, or even the society at large. That is why in most traditional African societies a female descendant may not succeed a king – but such could be allowed to act as a regent until a qualified (male) member of the family ascends the throne.<sup>84</sup>

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<sup>80</sup> Fitnat Naa-Adjeley Adjetey, note 65 (above).

<sup>81</sup> *Idem* 1368.

<sup>82</sup> Fitnat Naa-Adjeley Adjetey, note 65 (above). 1351

<sup>83</sup> The doctrine of judicial precedent is a process whereby judges are enjoined to follow the decision given in particular cases, where the facts of the case at hand are similar to the earlier case.

<sup>84</sup> Bennett, note 59 (above) 121.

The effect of this gender discrimination in modern times cannot be over emphasised, as it has denied women the right to hold political offices.<sup>85</sup> It is believed that women should be confined to child-bearing activities, while men make reproductive decisions.<sup>86</sup> In this way, the traditional belief system denies women's reproductive health rights.<sup>87</sup> However, since laws are made to regulate the conduct of the people in a particular society, and the society itself changes from time to time due to its dynamic nature – so also is the culture to meet the needs of the people it is meant to serve.

Contrary to the belief that customary law is derived from people's identity and that culture is ancient and unchanging, customary law changes in response to urbanisation, inter-ethnic marriages, and education.<sup>88</sup> Customary law is not static; it changes to suit the needs of society.<sup>89</sup>

In *Alexkor Ltd and Another v Richtersveld Community and Others*, it was stated that:

...indigenous laws is not a fixed body of formally classified and easily ascertainable rules. By its very nature, it evolves as the people who live by its norms change their pattern of life. It has throughout history evolved and developed to meet the changing needs of the community. Because of the dynamic nature of the society, official customary law as it exists in textbooks and in the Act is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges changes which continually take place. Customary law should not be seen in the strict sense, that cannot be changed or modified, it should be able to adapt to the changes in the society, thereby making it "living", this is because the society itself changes and the social setting is dynamic. For the customary law to be accorded the necessary recognition in the modern society its rules must blend with the current trend in vogue.<sup>90</sup>

African countries face the challenge of reconciling human rights enshrined in their constitutions with the dominant cultural traditions of their constituent communities.<sup>91</sup> Human rights provisions derive their legitimacy from both state authority and the force of tradition.<sup>92</sup> In *Nonkululeko Letta*

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<sup>85</sup> Bennett, note 59 (above) 121.

<sup>86</sup> Whereas in the matriarchal system, women are autonomous in respect of reproductive decisions. In such a system, the role of men is marginal.

<sup>87</sup> R. J. Cook & M.F. Fathalla "Advancing reproductive health beyond Cairo and Beijing" (1996) 22 *International Family Planning Perspectives* 115.

<sup>88</sup> Ndulo, note 62 (above) 87, 92, 94.

<sup>89</sup> Fitnat Naa-Adjeley Adjetey, note 65 (above); V.K. Pillai & G. Wang "Reproductive rights in developing countries: An assessment of regional variations" (1999) 13 *Michigan Sociological Review* 10, 13.

<sup>90</sup> (2003) 12 (BCLR) 1301, 62.

<sup>91</sup> B. Ibhawoh "Between culture and constitutions: Evaluating the cultural legitimacy of human rights in the African state" (2000) 22 *Human Rights Quarterly* 838, 839.

<sup>92</sup> *Ibid.*

*Bhe v Magistrate Khayelitsha*,<sup>93</sup> it was held that customary law must be interpreted by the courts – as first and foremost answering to the contents of the constitution. The court further held that an approach that condemns rules or provisions of the customary law merely because it is different to the common law or legislation such as the interstate succession law will be incorrect. At the level of constitutional validity, the question in this case was not whether a rule or provision of the customary law offered similar remedies to the intestate succession Act, but rather whether the rule was consistent with the provisions of the constitution.<sup>94</sup>

When African countries gained independence, they tended to adopt constitutions aligned with the interests of their former colonial masters – with little local input. This resulted in many constitutions lacking popular support and legitimacy.<sup>95</sup> Although, the constitutions of Nigeria and most African countries do not explicitly recognise the right to health as a justiceable right,<sup>96</sup> most of these countries have ratified numerous international and regional instruments guaranteeing this right. These include the Covenant on Economic, Social and Cultural Rights (CESCR);<sup>97</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC); the African Charter on Human and Peoples' Rights (African Charter); and the Protocol to the African Charter on the Rights of Women in Africa (Women's Protocol). However, these instruments have not translated into improved reproductive health rights for women, due to persistent adherence to traditional cultural practices.<sup>98</sup>

In South Africa, these harmful traditional practices include early and forced marriages (*Ukuthwala*); virginity testing, widow's rituals; '*u kungena*' (levirate and sororate unions); and female genital mutilation (FGM).<sup>99</sup> Some societies in South Africa practice polygamy and the payment of bride price (*lobola*).<sup>100</sup> In Nigeria, practices include polygamy; widowhood rites;

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<sup>93</sup> (2004) ZACC 17 CC49/03 P25.

<sup>94</sup> *Ibid.*

<sup>95</sup> Ibhawoh, note 91 (above) 845-847.

<sup>96</sup> Durojaye, note 54 (above) 229.

<sup>97</sup> Article 12, note 23 (above).

<sup>98</sup> Maluleke, note 58 (above) 9.

<sup>99</sup> Ssenyonjo, note 55 (above) 42-43.

<sup>100</sup> J.C. Mubangizi "A South African perspective on the clash between culture and human rights, with particular reference to gender-related cultural practices and traditions" (2012) 13 *Journal of International Women Studies* 33,35-43.

FGM; early/forced marriages; *Nkira* (retaining a woman in her father's house); *Ale/Alase* (wife sharing); bride price/dowry; nutritional taboos; and practices related to child delivery – among others

#### 1.4 SCOPE OF REPRODUCTIVE RIGHTS

The law has been very useful in the field of reproductive health. It has provided a tool for the conceptualisation, promotion and protection of reproductive rights and women's autonomy.<sup>101</sup> Hence, reproductive rights are the legal category used to express reproductive autonomy. This is central to the effectiveness of reproductive health-care, by providing the legal framework that acts as a guideline in reproductive health issues. Bearing in mind the connection between law and reproductive health, and other wide range of women's interests which the law protects, the law helps shape the social world in which women live.<sup>102</sup>

Reproductive health has been described as a “condition in which the reproductive process is accomplished in a state of complete physical, mental and social well-being and is not merely the absence of disease or disorders of the reproductive process”.<sup>103</sup> This implies the freedom of the people to determine how to regulate their reproductive activities and sexual relationships. Thus, reproductive activities extend through infancy to child growth and healthy development. Accordingly, women have the right to have sex, carry a pregnancy and safely deliver children, with adequate fertility regulation and without a health hazard.<sup>104</sup>

Reproductive rights are premised on three interconnected domains of universal rights, women empowerment, and health service provisions. The first premise sees reproductive health rights like other rights set out in the UDHR as universal human rights inherent in every individual by virtue of their existence. These rights are operational in every society – irrespective of culture or tradition.<sup>105</sup> The second premise is based on the impact of the norms, values and laws on the environment – which in turn affects the social status of women in a particular society. This

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<sup>101</sup> Freedman & Isaacs, note 26 (above) 18-30.

<sup>102</sup> *Ibid.*

<sup>103</sup> M. Fathalla “Reproductive health: A global overview” (1992) 29 *Early Human Development* 35.

<sup>104</sup> *Ibid.*

<sup>105</sup> K. MacDonald “FMO thematic guide reproductive health” Available at: [www.forcedmigration.org](http://www.forcedmigration.org).

addresses the issue of gender equality and women empowerment. When women are adequately empowered both socially and educationally – it goes a long way to affect their reaction to the various norms in the society.

This second premise shows the relationship between social and sexual behaviours and their effect on the right of reproduction.<sup>106</sup> Women should be able to make free and informed choices about sex and reproduction. The rights to make decisions, access information and services relating to partnership, marriage, sexual relations and child-bearing, free of coercion, violence, and discrimination, are fundamental to women's equality and well-being. Women should have the authority and ability to make decisions that relate to their reproductive lives.<sup>107</sup> Autonomy goes beyond the authority to make decisions. A woman who has authority but does not know what to do with it is still powerless. Having choices in the sphere of sexuality and reproduction can empower women to pursue other opportunities and participate in the social and economic life outside the home.<sup>108</sup>

It is common knowledge that the family is a basic unit of society, and the role of women in the family cannot be over emphasised. In fact, the world over, the woman is recognised as the cord that holds the family together. Looking at the multiple roles of women in the family – they are seen as the button that holds the family together and are always at the centre of the family. With this in mind, empowering a woman will have a spill-over effect on society at large. Hence, reproductive health rights of women should be given the required attention.<sup>109</sup>

Reproductive health rights are not limited to women - though reproductive health is of great importance to women because of their biological make up and their procreation role. Men also have reproductive health needs, but need to assist women in realising their reproductive health rights. In promoting women's empowerment and addressing issues of equality and equity, relationships must not only be viewed as between men and women – but also between the individual and the wider community. Attitudes and norms surrounding sexuality and gender

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<sup>106</sup> MacDonald, note 105( above).

<sup>107</sup> Freedman & Isaacs, note 26 (above) 18-30.

<sup>108</sup> "Sexual and reproductive health for all: Reducing poverty, advancing development and protecting human rights", UNFPA, September 2010. Available at: <http://www.unfpa.org/public/home/publications/pid/6526>.

<sup>109</sup> L.M. Ogana "Empowerment of women as equal partners in the family" (1994) 9(4) *WIJABU* 5.

attract profound meaning in every society.<sup>110</sup> The final premise deals with service provision. This includes the ability of both private and public service-providers to provide quality reproductive health services, and also factors that may affect individuals from accessing the various health services.<sup>111</sup>

The concept of reproductive health rights is important for the following reasons: First, the various human rights instruments set out the various reproductive health rights as inherent inalienable human rights in every individual. Thus, every individual is expected to enjoy these rights without any discrimination, in any form; the various cultural practices have been used only to deprive women of their rights.<sup>112</sup> Second, reproductive health rights are not limited to private individuals; they are part of the obligations of the state in terms of the provision of adequate health-care delivery and services to the citizens. For women in particular, reproductive rights enhance their social status – thereby eliminating gender violence, sexual coercion, forced early marriages, child mortality, and any other practices that infringe on the reproductive health rights of women.<sup>113</sup> Third is ensuring the efficiency of the instruments on reproductive health rights. There is a monitoring team assigned to each country that is a party to the various international treaties on the reproductive health rights. Each country is expected to furnish a report on the various steps embarked upon in terms of realising these rights.

## **1.5 GENDER, SEXUALITY AND REPRODUCTIVE HEALTH RIGHT**

Gender refers to two distinct and separate categories of human beings (men and women) as well as the division of social practices into two fields. The gendering of social practices may be found for example in contemporary western societies, in a strong association between men and public life and between women and domestic life.<sup>114</sup> According to World Health Organisation,

“Sexuality is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy, and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationship. While sexuality can include all of these dimensions, not all of

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<sup>110</sup> MacDonald, note 105 (above).

<sup>111</sup> *Ibid*

<sup>112</sup> UN Millennium Project 2006, Public Choices, Private Decisions: Sexual and Reproductive Health and the Millennium Development Goals 27.

<sup>113</sup> *Ibid*.

<sup>114</sup> C. Beasley *Gender and Sexuality* (2005) 11.

them are always experienced or expressed. Sexuality is influenced by the interaction of biological psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors.”<sup>115</sup>

Social influences of sexuality have a lasting effect on women’s reproductive health rights. Gender is one of these social influences. As noted above, there is an expectation that women and men boys and girls will behave differently from each other thus, ideologies around sexuality are used to control women.<sup>116</sup> Sexuality and gender can combine to make a huge difference in people’s lives between well-being and ill being and between life and death. Those who conform to these expectations may go through some difficulties which may invariably affect their reproductive health rights adversely. Ideologies that women should be pure and chaste and virgins until marriage could lead to female genital mutilation, child marriage, virginity testing among others. Women and young girls in societies where socio- cultural norms dictate what they could do with their bodies may face discrimination or violence if they do not conform to the expectations of the societies.<sup>117</sup>

## **1.6 RELATIONSHIP BETWEEN REPRODUCTIVE HEALTHRIGHTS AND SEXUAL RIGHTS**

Reproductive health rights and sexual rights are human rights recognised by the various human rights instruments – particularly the Cairo and Beijing conference documents. They are essential to human health, and they are universal rights. Prior to the Cairo and Beijing conferences, the concept of reproductive rights, sexual health and sexual rights were categorised under reproductive health. The implication of this is that sexual rights have been seen as a subset of reproductive rights. Bearing in mind that there are some sexual relationships that are non-reproductive, sexual rights should be distinct from reproductive rights.<sup>118</sup> Though reproductive and sexual rights are related, they in fact have separate meanings.<sup>119</sup>

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<sup>115</sup> World Health Organisation 2004. Progress in Reproductive Health Research, No 67 Geneva: WHO Available at [http:// www.who.int/reproductive -health/hrp/progress/67.pdf](http://www.who.int/reproductive-health/hrp/progress/67.pdf).

<sup>116</sup> P. Lkkaracan & S. Jolly *Gender and Sexuality: Overview Report* (2007) 1-3.

<sup>117</sup> *Ibid*

<sup>118</sup> A.M. Miller “Sexual but not reproductive; exploring the junction and disjunction of sexual and reproductive rights” (2000) 4 *Health and Human Rights* 69, 69-70.

<sup>119</sup> S. Correa *Population and reproductive rights: Feminist approach perspectives from the South* (London and New Jersey: Zed Books Ltd) (1994)107.

The enjoyment of sexual rights will show the way for reproductive rights. However, in some cases the right to sexuality can be expressed independently of the right to reproduction. In fact, “While these words themselves have become common in international texts and analysis, the extent of assimilation of their meanings by national political bodies and in peoples’ minds varies widely across countries.”<sup>120</sup> Although the two rights deal with the right of equal autonomy and integrity in relation to a person’s body – they address two different issues.

Sexual rights have to do with the right to attain happiness, and the realisation of dreams and fantasies.<sup>121</sup> It is a right to explore one’s sexuality, free from fear, shame, guilt, false beliefs, and other impediments – leading to the free expression of one’s desires. Such rights preclude individuals from sexual violence, discrimination and coercion. It evolves from an intimate relationship based on equality, respect and justice. Sexual rights offer individuals the opportunity to freely choose partners without any form of discrimination – with a view to enjoying sexual relations by consent and integrity of the body. It includes the freedom to autonomously choose the preferred sexual orientation and access to adequate sexual health education.<sup>122</sup> Individuals have the freedom to insist on and practice safer sex – for the prevention of unwanted pregnancy and STDs including HIV/AIDS.<sup>123</sup>

Reproductive rights, on the other hand, concern the basic right of couples and individuals to decide on the number of children, the mode of birth, spacing and other maternal issues associated with raising a family.<sup>124</sup> In short, this right is about the freedom for individuals and couples to decide on the best way to attain the highest standard of sexual and reproductive health. This right precludes couples from intimidation or inhibition by any societal values when the need arises to decide on reproduction. It is obvious that, in some cases, sexual and reproductive rights are interdependent – while in some cases sexual rights may be independent.

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<sup>120</sup> Correa, note 119 (above).

<sup>121</sup> E. Khaxas “Sexual rights are human rights” (June/July 2001) 29(5) *SIECUS Report* 20.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> Para 7.3 ICPD Programme of Action.

## 1.7 AIMS OF THE STUDY

The aims of this study are to:

1. Examine the various reproductive health rights of women entrenched in international and regional treaties.
2. Identify the various cultural practices impinging on the reproductive health rights of women in South Africa and Nigeria.
3. Examine the extent of conflict between these cultural practices and the enforcement of the reproductive health rights of women in the two countries.
4. Identify the various factors responsible for the prevalence of cultural practices hindering the reproductive health rights of women in South Africa and Nigeria.
5. Determine the extent to which cultural practices have affected the commitment of the South African and Nigerian governments to implement the instruments on reproductive health rights of women – in line with international standards.

## 1.8 STATEMENT OF THE PROBLEM

African women are vulnerable to harmful reproductive practices. Although some of them live in the contemporary world with its modern facilities, they are enslaved by traditional and cultural practices that are inimical to their reproductive health. Maternal mortality and morbidity rates remain high.<sup>125</sup> South Africa's maternal mortality rate currently stands at 300 deaths per 100,000 births, while Nigeria records 640 deaths per 100,000 births.<sup>126</sup> Many of these deaths arise from diseases connected with harmful cultural practices that damage women's reproductive systems.<sup>127</sup> Yet, the two countries are signatories to various international instruments that protect the reproductive health rights of women. Many cultural practices are, however, not compatible with women's modern reproductive health practices.

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<sup>125</sup> K.O. Rogo, J. Oucho & P. Mwalali "Maternal mortality". In: D.T. Jamison, R.G. Feachem, M.W. Makgoba *et al.* (Eds), *Disease and mortality in sub-Saharan Africa*. 2nd Ed. (Washington, DC: World Bank) (2006).

<sup>126</sup> *CIA World Fact Book, 2013*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/fields/2223.html>.

<sup>127</sup> *Ibid.*

Considering the significant status of women in economic development and democratisation, it is imperative to advance women's reproductive health rights.<sup>128</sup> A report by the International Federation of Gynaecology and Obstetrics on Women's Health, in 1994, concluded that improvements in the health rights of women require more than better science and health-care, in order to redress the injustices inflicted on them by cultural practices.<sup>129</sup>

South Africa and Nigeria are signatories to international and regional treaties on the protection of women's reproductive health rights.<sup>130</sup> As discussed above, the two countries have different frameworks for the protection of women's rights. South Africa is exceptional, as her constitution protects the reproductive health rights of women. While South Africa has domesticated most of the international instruments to which the country is a signatory, Nigeria, although a signatory to most of the international instruments for the protection of human rights, has failed to muster the political will to domesticate these international instruments. Why is Nigeria finding it difficult to domesticate these laws? Why have these rights not been realised to their full potential in South Africa – despite the domestication of the international instruments relating to their implementation? Taking into account the African cultural background, do women in these countries actually enjoy and exercise these rights? To answer all these questions, there is a need to explore the various laws protecting the reproductive health rights of women and the various cultural practices that infringe on these rights in these two countries – in order to determine their impact on the reproductive health rights of women.

In view of the recognition of the reproductive health rights of women by the various international and regional treaties and consensus documents, do women in Nigeria and South Africa actually enjoy and exercise these rights, and, to what extent are cultural practices responsible for this?

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<sup>128</sup> I. Coleman "The payoff from women's rights" (2004) 83 *Foreign Affairs* 80.

<sup>129</sup> R.J. Cook & M.F. Fathalla "Advancing reproductive health beyond Cairo and Beijing" (1996) 22 *International Family Planning Perspectives* 115.

<sup>130</sup> For example, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the African Charter on Human and Peoples' Rights, and the Protocol on the Rights of Women in Africa.

## **1.9 KEY RESEARCH QUESTIONS**

The key research questions are:

- 1) What reproductive health rights of women are recognised by international and regional treaties and other international consensus documents?
- 2) Which international and regional human rights instruments and consensus documents – in relation to the reproductive health rights of women – have been ratified and signed by South Africa and Nigeria?
- 3) What are the constitutional provisions, legislation and governmental policies on the reproductive health rights of women, in South Africa and Nigeria?
- 4) In what ways have cultural practices impeded the enforcement of these provisions in these countries – if at all?
- 5) What measure of political will have the governments of South Africa and Nigeria exerted on the implementation of these rights?
- 6) While South Africa has domesticated these instruments in its constitution, and having recognised the reproductive health rights as part of the fundamental human rights of women – are there contradictions in the implementation of these rights and cultural practices?
- 7) In comparing the laws of these two countries on the reproductive health rights of women, are there lessons that they can learned from each other?

## **1.10 RESEARCH METHODOLOGY**

A study on the realisation of reproductive health rights of women in the midst of cultural practices as well as extant instruments requires a systematic exposition of the laws governing the reproductive autonomy of women in the two countries, and also an analysis of the relationship between the laws and the cultural practices. This will give room for an assessment of the impact of the cultural practices on the realisation of the rights - and what can be done for women to fully realise their right of autonomy, as envisaged by the laws.

Thus, the approach to achieve this is the doctrinal research approach. This research approach has been described as the traditional and dominant approach to legal research.<sup>131</sup> Doctrinal research, as a method of inquiry, deals with the formulation of legal “doctrines” through the analysis of legal rules on how it has been developed and applied.<sup>132</sup> The word “doctrine” is derived from the Latin word *doctrina*, which means instruction, knowledge and or learning. The doctrine in question includes legal concepts and principles of all types – cases, statutes and rules.<sup>133</sup> This research approach deals primarily with “what is the law” by exposing the legal rules regarding a particular situation, and this entails analysing the laws carefully to identify the ambiguities - exposing inconsistencies and what could be done to fill the identified gaps.<sup>134</sup> It involves finding one right answer to a particular legal question or set of questions.

The doctrinal research approach requires a number of steps to be taken to achieve the desired goal. The first step is analysing the legal issues that require investigation. To conduct this analysis, the researcher must be armed with background information on the subject matter. It means that the law on the legal issues under consideration must be located.<sup>135</sup> This could be achieved by reviewing the existing literature, cases, treaties, legislation, among others – on the legal principles in respect of the legal issue under consideration.

The second step is to determine the relevant rules of law applicable to the identified issue. At this stage, the primary and secondary materials in respect of the legal issues will be interpreted and analysed. This study focuses on the interplay between cultural practices and the reproductive health rights of women. As such, the primary material to be considered will include treaties and international conventions on the reproductive health rights of women, which have been ratified and signed by South Africa and Nigeria. Equally, the provisions of the constitutions of countries, legislation and government policies on cultural practices and women’s reproductive autonomy, will be analysed.

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<sup>131</sup> R.A. Posner “The present situation in legal scholarship” (1981) 90(5) *The Yale Law Journal* 1113.

<sup>132</sup> A.K Singhal & I. Malik “Doctrinal and social-legal methods of research: Merits and demerits” (2012) 2(7) *Educational Research Journal* 252.

<sup>133</sup> T. Hutchinson & N. Duncan “Defining and describing what we do: Doctrinal legal research” (2012) 17(1) *Deakin L. Rev.* 83, 84.

<sup>134</sup> Posner, note 131 (above).

<sup>135</sup> Hutchinson & Duncan, note 133 (above).

To gain an in-depth knowledge of the study topic, the analysis of the relevant rules will not be limited to the primary sources. The analysis and contributions of different authors in the field will also be considered. This will elucidate the principles in the primary legislation.<sup>136</sup> Hence, this study will also rely on textbooks, journal articles, monographs, theses, cases, conference papers, newspapers and magazines, reports of government departments, and materials sourced from the internet. The next step that will be embarked upon is to subject the information gathered from these sources to content analysis. At this stage, the research questions identified will be synthesised in the content of the applicable rules.

In subjecting the information to content analysis, a number of techniques will be used to synthesise the information. The scope of the research topic will require the use of two techniques to analyse the information. The first is deductive reasoning; “legal reasoning is often deductive because the general rules are ‘given’, for example through legislation”.<sup>137</sup> As such, deductive reasoning will be engaged in terms of analysing the treaties, constitutions and legislations. The international legal framework for the protection of the reproductive health rights of women will be examined alongside the framework for the protection of these rights in South Africa and Nigeria. It will be deduced whether the two countries have complied with the international human rights law in terms of protecting these rights.

The second technique to be employed by this study in analysing the information, is analogy, which “involves locating similar situations arising... and then arguing that similar cases should be governed by the same principle and have similar outcomes”.<sup>138</sup> This method will be used in making a comparative analysis of the cultural practices that inhibit the reproductive health rights of women in South Africa and Nigeria – and lessons that the two countries can learn from each other.

The last step in the research is to come to a conclusion based on the facts that has been established from the various materials considered.

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<sup>136</sup> Singhal & Malik, note 132 (above).

<sup>137</sup> Hutchinson & Duncan, note 133 (above) 111.

<sup>138</sup> *ibid.*

The study at this stage will also offer recommendations on what could be done to fill the identified gaps.

### **1.11 SCOPE OF THE STUDY**

The thesis comprises seven chapters. The opening chapter presents an introduction to cultural practices and the reproductive health rights of women, including the historical background to the concept of reproductive health rights, African culture, and the reproductive health rights of women. It also sets out the study's aims and objectives, the key research questions, the research methodology employed, and the various cultural practices that impede the realisation of women's reproductive health rights.

The literature on cultural practices and the reproductive health rights of women in South Africa and Nigeria is reviewed in chapter two. Chapter three examines various international and regional instruments for the protection of women's reproductive health rights which have been assented to by both South Africa and Nigeria. The domestication of international treaties in the two countries is also discussed.

Chapter four presents a detailed discussion on the cultural practices and reproductive health rights of women in Nigeria. Nigeria is a nation with diverse cultural practices and traditional norms. Such practices are so entrenched in various communities that it is difficult to adopt laws to protect women's reproductive health rights. Furthermore, the country's pluralist legal system has affected the realisation of the reproductive health rights of women, creating geographical disparities in achieving such rights. Women in states that have domesticated relevant international laws at the federal level will enjoy such rights, while those in states that refused domestication will be denied them. The study further reveals that most of the international treaties pertaining to women's reproductive health rights that Nigeria has signed are not applicable because they have yet to be domesticated as required by the Constitution. Nigeria's 1999 Constitution does not explicitly recognise the reproductive health rights of women because such rights are categorised under non-justiciable rights in chapter two of the Constitution.

Chapter five examines South Africa's political history and its impact on cultural practices and women's reproductive health rights. It also considers the various cultural practices that could impair the realisation of South African women's reproductive health rights and examines the constitutional and legislative frameworks for the protection of these rights. The study found that South Africa has an outstanding constitutional and legislative framework for the protection of the reproductive health rights of women. However, while the legal framework forbids inequality and women's subordination in all spheres, some women in South Africa have yet to be emancipated from the various cultural practices that infringe on their reproductive independence and health rights. Indeed, these practices are so entrenched in society that women themselves sometimes contribute to their furtherance.

A comparative analysis of cultural practices and the reproductive health rights of women in South Africa and Nigeria is presented in chapter six. The chapter begins with a brief historical background on cultural practices and the reproductive health rights of women in these countries, and the various cultural practices that could inhibit the realisation of these rights. The international legal framework for the protection of the reproductive health rights of women in South Africa and Nigeria, the constitutional and legal framework for the defence of these rights and the influence of cultural practices on the reproductive health rights of women in these two countries are explored. Both countries are culturally diverse and have adopted different frameworks aimed at protecting women's reproductive health rights. It is evident from the study that Nigeria and South Africa's approach to the promotion and protection of the reproductive health rights of women, differs. Most of the cultural practices discussed in this study are practiced in South Africa and Nigeria. However, the motives for and manifestation of some practices differ.

The study's main conclusion is that women in both South Africa and Nigeria are subjected to various cultural practices that could inhibit their reproductive health rights. These and other conclusions and recommendations are set out in chapter seven. It is recommended that the Nigerian government demonstrate commitment to domesticating the various treaties on women's reproductive health rights to which the country has assented. Furthermore, both countries should provide human rights education to enlighten both men and women on the need to protect these

rights. Finally, to fully enjoy these rights, where there is a conflict between the various cultural practices and women's reproductive health rights, in line with international norms and standards on the protection of women's rights, women's reproductive health rights should take precedence.

## **1.12 CHAPTER CONCLUSION**

This Chapter has examined some of the preliminary issues in relation to the study. It started with an examination of the introduction, background and context of the study. The historical background of the concept of reproductive health rights, scope of reproductive rights, and the relationship between sexual and reproductive health rights, all came under examination.

Equally, the aims of the study, statement of the problem, key research questions, research methodology, and the various cultural practices that impede the realisation of the reproductive health rights of women, were highlighted. The focal point of this study, as argued in this chapter, is to lay the foundation and establish the background leading to the investigation of cultural practices and their current regulation in the two countries of South Africa and Nigeria and to determine the extent to which they have affected the realisation of women's reproductive health rights in both countries. The next Chapter will provide the details of the literature aimed at reviewing what other researchers have written/argued so that this study gets a better understanding of what the new knowledge it can provide.

# **CHAPTER TWO**

## **LITERATURE REVIEW**

### **2.1 INTRODUCTION**

Women in Africa have been marginalised by virtue of the status ascribed to them by various customs and traditions. In most cases, they are denied the equal enjoyment of their human rights. A number of studies have been conducted on the cultural practices that impede the reproductive health rights of women in Africa, and, particularly in South Africa and Nigeria. These have raised awareness of the need to protect and respect the human rights of women, which are entrenched in various international and national instruments. However, there is a dearth of literature that compares the commitment of these two countries through their various legal frameworks to the realisation of women’s reproductive health rights. The studies analysed in this section are relevant to Nigeria and South Africa on the issue of cultural practices and reproductive health rights of women. This study seeks to identify the gaps in the literature – with a view to filling them. This section reviews some of the existing literature available on cultural practices and the reproductive health rights of women under the following headings:

1. Culture and women’s human rights;
2. The reproductive health rights of women; and
3. Regional trends in reproductive health matters.

### **2.2 CULTURE AND WOMEN’S RIGHTS**

Culture is “the way of acting, thinking, and doing things, which is unique to a particular group of people.”<sup>1</sup> Cultural practices therefore “reflect the values and beliefs held by members of a

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<sup>1</sup> J.C. Mubangizi “A South African perspective on the clash between culture and human rights, with particular reference to gender-related cultural practices and traditions” (2012) 13 *Journal of International Women Studies* 33, 35-43.

community”<sup>2</sup> traversing generations. While some of these practices are beneficial, as they guide people’s moral conduct – many are antithetical to human well-being and women’s dignity.<sup>3</sup>

Penna and Campbell’s study traces the contemporary campaign for human rights to the political history and culture in Europe and America.<sup>4</sup> The struggle against genocide, tyranny and discrimination has enriched the global view of human rights. Most of the human rights’ instruments emanated from the West, and they interpreted human rights from a western cultural perspective. There has been a tendency to dismiss non-Western cultures as ‘barbaric’ and ‘anti-human’.<sup>5</sup> However, traditional African societies respected many of the basic values that underlie human rights.

Many traditional societies protected human rights through family and social institutions. Penna and Campbell note that traditional African culture does protect the rights of women. However, the authors do not recognise that some cultural practices are outdated and at times infringe on the human rights of women; furthermore, they are at odds with international standards. Penna and Campbell’s major focus is the right to equality; as such, it does not address other women’s rights such as the right to reproductive health.

Bonny Ibhawoh’s study on the cultural legitimacy of human rights in Africa, observes that the debate over the universality and cultural relativity of human rights created global awareness of the need to promote a human rights culture.<sup>6</sup> He observes that globalisation has changed perceptions of human rights, and recognises the Western origins of the notion of human rights – noting that this has gained global relevance and recognition. Nevertheless, despite its universal popularity, cultural practices and norms still influence its application across different societies.

Ibhawoh emphasises the need for universal human rights to be enriched by Africa’s cultural experience. He identifies the major cultural constraints to the universal application of statutes on

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<sup>2</sup> Mubangizi, note 1 (above).

<sup>3</sup> M. Ssenyonjo “Culture and human rights of women in Africa: Between light and shadow” (2007) 51 *Journal of African Law* 39, 42-43.

<sup>4</sup> D.R. Penna & P.J. Campbell “Human rights and culture: Beyond universality and relativism” (1998) 19 *Third World Quarterly* 1, 1-27.

<sup>5</sup> B. Ibhawoh “Between culture and constitutions: Evaluating the cultural legitimacy of human rights in the African state” (2000) 22 *Human Rights Quarterly* 838, 839.

<sup>6</sup> *Ibid.*

human rights in Africa, and notes the need to resolve the conflict between cultural practices and constitutional provisions on human rights, arguing that:

it is not enough to identify the cultural barriers and limitations to modern domestic and international human rights standards. It is even more important to understand the social basis of these cultural traditions and how they may be adapted to or integrated with national legislation to promote human rights.<sup>7</sup>

Such adaptation, he argues, must take cognisance of the need to preserve the cultural integrity of the people, and “can serve to complement rather than constrain specific national human rights aspirations”.<sup>8</sup>

The persistence of certain cultural practices in African society hinders the effectiveness of national human rights provisions. According to Ibhawoh, such practices impose “great limitations on constitutional human rights guarantees”.<sup>9</sup> Conflicts arise between national laws and traditions in the definition and practice of human rights. He notes that this impinges on constitutional and legal forms for recognising and protecting human rights.

Manisuli Ssenyonjo examines the interplay between culture and the human rights of women in Africa.<sup>10</sup> The study takes cognisance of the various factors that encourage discrimination against women – in Africa and developed countries – despite progressive legislation, and reviews the state of women’s rights in Africa and notes that “the severe political, economic and social difficulties facing African states had a negative impact on the efforts to respect, protect and fulfil the human rights of women”.<sup>11</sup> More importantly, Ssenyonjo identifies “the prevalence of prejudicial traditional practices and customs” in African societies, which not only legitimise women's inequality in rural areas, but also hamper the effective implementation of women’s rights.<sup>12</sup> Furthermore, the various instruments that guarantee women’s rights fail to address the harmful repercussions associated with “many customary practices, such as female genital

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<sup>7</sup> Ibhawoh, note 5 (above).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Idem* 839.

<sup>10</sup> Ssenyonjo, note 3 (above).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

mutilation, forced marriages and wife inheritance” – and instead “place emphasis on traditional African values and traditions”.<sup>13</sup>

Ssenyonjo advocates continuous sensitisation – with a view to creating awareness of the need to uproot harmful cultural and traditional practices that hinder the implementation of the rights of women.<sup>14</sup> Such enlightenment “will help to encourage the participation of women, overcome entrenched forms of resistance and transform certain cultural practices. Education is vital for the establishment of a culture where human rights are understood, respected and promoted”.<sup>15</sup> The study does not discuss the reproductive health rights of women.

Every society has its own unique culture passed down over generations. South Africa is no exception. As Milkateko Joyce Maluleke observes, traditional and cultural practices are reflections of “the values and beliefs held by members of a community for periods often spanning generations”.<sup>16</sup> As a multicultural society, South Africa has expressed its commitment “both to equality and the preservation of the customs and traditional practices of its many different cultures.”<sup>17</sup> Mubangizi<sup>18</sup> praises the South African Constitution “as one of the most progressive in the world” – especially in the area of human rights and culture, as reflected in the Bill of Rights.

Evadne Grant recognises the existence of customary law as a manifestation of the approval of the right to culture. This, he avers, is in line with international human rights law. He maintains that it is essential for the constitution of a multicultural society to recognise various cultural norms in

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<sup>13</sup> Ssenyonjo, note 3 above

<sup>14</sup> *Ibid* 65.

<sup>15</sup> *Ibid*.

<sup>16</sup> M.J. Maluleke “Culture, tradition, custom, law, and gender equality” (2012) 15 *PER* 3. Available at: <http://dx.doi.org/10.4314/pej.v15i1.1>.

<sup>17</sup> Sections 30 and 31 of the Constitution of the Republic of South Africa, 1996, stipulate that: 30(1): “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”. 31(1): “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community; (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society”; E.R. George “Virginity testing and South Africa’s HIV/AIDS crisis: Beyond rights, universalism and cultural relativism toward health capabilities” (2008) 96 *California Law Review* 1447, 1450.

<sup>18</sup> Mubangizi, note 1 (above) 33-48.

order to protect women's rights. He sees customary law as an aspect of the right to culture.<sup>19</sup> This study does not provide an in-depth analysis of various cultural practices – but rather concentrates on the general human rights of women.

The work of Erika George on virginity testing explores the “tension between the politics of culture and the rights of women and girls to equality, privacy, and sexual autonomy in the context of epidemic disease”.<sup>20</sup> George seeks to interrogate the nexus between the struggle for the abolition of virginity testing as a cultural practice, and the need to combat a rising epidemic. She sees virginity testing as a cultural practice to curb the spread of HIV/AIDS.<sup>21</sup> She notes that “the struggle over virginity testing is unique in that it promotes a return to traditional culture as a preventative public health measure to combat a modern plague”,<sup>22</sup> and further adds that:

While the virginity testing phenomenon may appear to be the central human rights violation at issue, I argue that a broader vision of human rights reveals the practice for what it is: a symptom of the challenges confronting a developing nation dealing with epidemic disease.<sup>23</sup>

George therefore concludes that the debate over the abolition or accommodation of this cultural practice in many societies in South Africa, should consider the overall issues involved: “It must extend to altering the more pervasive cultural norms that foster gender inequality and fuel high HIV/AIDS infection rates among young women and to adapting the practice in constructive ways”.<sup>24</sup> She insists that not all cultural practices are obstacles to the enforcement of women's rights and that there are windows of opportunity to identify “avenues to adapt particular practices in ways that do not offend human rights norms”.<sup>25</sup> While George's study recognises that virginity testing is one of the issues in the debate on women's reproductive rights, the focus of the study is on the desirability of this cultural practice in order to achieve a set objective, and its effect on gender equality in South Africa.

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<sup>19</sup> E. Grant “Human rights, cultural diversity and customary law in South Africa” (2006) 50 *Journal of African Law* 1, 1-22.

<sup>20</sup> E.R. Erika “Virginity testing and the South Africa HIV/AIDS crisis: Beyond rights universalism and cultural relativism toward health capabilities” (2008) 96 *California Law Review* 1447-1517.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Idem* 1450.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Idem* 1451.

<sup>25</sup> *Idem* 1513.

Mswela's study interrogates the "interplay between gender inequality, gender violence and HIV/AIDS in the present South African context".<sup>26</sup> She identifies and discusses "a range of biological, psychological, economic and cultural factors, which clearly show how complex the problem of women's increased exposure to HIV is".<sup>27</sup> Like George, Mswela expresses concern over the prevalence of the disease in South Africa – and especially its effect on women. She argues that cultural practices relating to women's reproductive activities increase their vulnerability to HIV/AIDS.

Like George, Mswela does not support the total abolition of some cultural practices. She notes that "the purpose of a specific custom may initially indeed have been to provide financial security or stability for women and children, but that the effect of the practice may have changed over time to the opposite, resulting in discrimination against vulnerable and marginalised groups in society".<sup>28</sup> Nevertheless, "it would be impractical and impossible to blindly discard those practices which date back many years".<sup>29</sup> She therefore suggests modification and adaptation of the harmful aspects of traditional practices, and the development of their more positive aspects "in line with the constitutional objective of gender equality, without relinquishing the true and positive values that underlie a relevant custom".<sup>30</sup> The study proposes:

specific behavioural changes in respect of violence against women, HIV/ADS, and women's reproductive autonomy. Behaviour is most effectively addressed through communication (via the mass media, peer education, and counselling) that focuses on factors that may reduce the risks of HIV-infection (including information on customary practices that contribute towards women's exposure to HIV and women's inequality).<sup>31</sup>

Although Mswela discusses some cultural practices that infringe on women's rights, she places more emphasis on the effect of cultural practices on women's proclivity to HIV infection – and does not discuss women's reproductive health rights in detail.

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<sup>26</sup> M. Mswela "Cultural practices and HIV in South Africa: A legal perspective" (2009) 21 *PER* 172-213.

<sup>27</sup> *Ibid* 175.

<sup>28</sup> *Idem* 201.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid*.

<sup>31</sup> Mswela, note 26 (above) 203.

Milkateko Joyce Maluleke's study interrogates the impact of culture, tradition, customs and law on gender equality in South Africa - from an historical perspective.<sup>32</sup> She argues that most of the statutes that promote gender disparities are products of colonial constructs, rather than traditional African culture.<sup>33</sup> This gave rise to the conflict between the right to culture and human rights. Maluleke identifies and discusses various harmful traditional practices – such as early and forced marriages (*ukuthwala*); virginity testing; widows' rituals; *u'ku'ngena*; levirate and *sororate* unions; female genital mutilation (FGM); breast sweeping/ironing; the primogeniture rule; 'cleansing' after male circumcision; and witch hunting.<sup>34</sup> The study identifies provisions in South Africa's Constitution that guarantee gender equality, but at the same time infringe on the rights of women because of deference to the right to culture. The study seeks to establish "whether the constitutional protection of gender equality is making a difference to women living in communities with a strong commitment to traditional norms and practices".<sup>35</sup>

Maluleke demonstrates that, by virtue of a series of compromises engendered by prevailing cultural practices, women in South Africa "do not have inherent rights".<sup>36</sup> She does not oppose the total abolition of these cultural practices, but, like George and Mswela, supports the revival of tradition, culture and customs, with the proviso that "this revival must be rooted in a way of life based on human rights, democracy and equality for all".<sup>37</sup> The study proposes a balance between "culture, tradition and customs" [and] "the social and legal context of the constitution and provisions of the Bill of Rights".<sup>38</sup> The central theme of the study, is the intersection of cultural practices with the law and gender equality. While some of these practices can affect women's reproductive health rights – this is not the focus of Maluleke's study.

John Mubangizi discusses the various conflicts between culture and human rights in relation to women's rights in South Africa.<sup>39</sup> He points out the "highly complex interplay and competition

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<sup>32</sup> Maluleke, note 16 (above) 2.

<sup>33</sup> *Idem* 3.

<sup>34</sup> Maluleke, note 16 (above).

<sup>35</sup> *Idem* 7.

<sup>36</sup> *Idem*

<sup>37</sup> Mswela, note 26 (above).

<sup>38</sup> *Ibid.*

<sup>39</sup> Mubangizi, note 1 (above) 33-48.

between human rights and culture” – noting that there are “several cultural practices and traditions which, it is suggested, violate certain human rights norms in South Africa.” These include FGM; virginity testing; *Ukuthwala* (marriage by abduction); *lobola* (bride price); polygamy; and primogeniture (the right of the eldest surviving male to inherit his parents’ estate).<sup>40</sup> He reviews the conflict between these cultural practices and the provisions of the country’s constitution that they violate.

Mubangizi recalls how the provisions that protect cultural rights in South Africa’s Constitution came into being. He notes the “bitter contestation” over the “subjection of these rights to the Constitution and the Bill of Rights”:<sup>41</sup>

As is now clear from the Bill of Rights, support for the requirements of the right to equality over culture and customary law, carried the day. Therefore, any attempts to undermine the fundamental right to equality under the guise of cultural rights, can only be seen as a contradiction and violation of the constitutional position on that right.<sup>42</sup>

He maintains that neither “complete reliance on legislative and constitutional measures” nor “criminalizing the practices” can resolve the conflict between culture and human rights, and suggests the need for proper education on the “feasibility and desirability of abandoning offensive practices, or adopting benign alternatives”.<sup>43</sup> He concludes that in order to minimise the conflict between culture and human rights, customary law should be developed in such a way that its contents and application are compatible with the provisions of the South African Constitution.<sup>44</sup>

Mubangizi’s work details the various cultural practices that are inimical to the attainment of the constitutionally guaranteed rights of women – as well as the contradictions inherent therein. The study brings to the fore the constitutional provisions on the rights to culture that violate certain aspects of women’s reproductive rights. The study focuses on South Africa, although reference is made to similar cases in other countries.

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<sup>40</sup> Mubangizi, note 1 (above) 35-43.

<sup>41</sup> *idem* 35.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Idem* 45.

<sup>44</sup> *Idem* 46.

Nigeria has diverse cultural practices that impinge on the rights of women. Unlike South Africa, there are no comprehensive constitutional provisions that protect the rights of women against harmful cultural norms and traditions in Nigeria. As a multicultural country like South Africa, Nigeria's constitution does not accord recognition to the rights of culture. Nevertheless, the various communities in this multi-ethnic country practice their traditions and cultural norms. This explains the agitation for the eradication of these harmful practices.

An anonymous study on female circumcision in Nigeria<sup>45</sup> seeks to establish the relationship between culture and female circumcision. The study shows that factors other than culture influence female circumcision, including: enhancement of fertility, religion, preventing promiscuity, and cleanliness. The author believes that continuity in cultural practices can be supported if the original purpose of their existence validates present demands and needs. The study notes that although the Nigerian Constitution does not explicitly declare female circumcision a human rights violation, it could be seen as such from the perspective of the violation of the rights to life and dignity. Moreover, the practice violates the provisions of the African Charter on Human and People's Rights and the Convention on the Elimination of all Forms of Discrimination against Women – to which Nigerian is a signatory. Although this study was conducted before the clamour for the protection of women's reproductive health rights, the author observed that women's reproductive freedom was essential to cultural survival and continuity. Nevertheless, the scope of the study is narrow, because it is restricted to female genital mutilation in Nigeria. Considering the period of the study, it is obvious that it is deficient in the area of women's reproductive health rights.<sup>46</sup>

Olufemi Olatunbosun's study on FGM, focuses on the relationship between gender, power, equity and sexual rights in Nigeria.<sup>47</sup> He argues that gender inequalities in sexual and reproductive rights are functions of the patriarchal system in Nigerian society. Although he sees

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<sup>45</sup> Anonymous "What's culture got to do with it? Excising the harmful tradition of female circumcision" (1993) 106 *Harvard Law Review* 1944-1961.

<sup>46</sup> The results of the study were published in 1993, whereas the Cairo Programme of Action on Women's Health – the genesis of the reproductive health rights of women – took place in 1994.

<sup>47</sup> O. Olatunbosun "Female genital mutilation: A model for research on sexual and reproductive rights" (2000) 4 *African Journal of Reproductive Health* 14-20.

African culture as a major impediment to the realisation of women's rights, he does not discuss other cultural practices that impede the rights of women. The work is a single case study on Nigeria.

Izugbara and Undie discuss another cultural practice which focuses on the ownership of the body among the Igbo ethnic group in south-east Nigeria.<sup>48</sup> The general assumption is that the ownership of the body rests with an individual. This means that every right pertaining to the body is the concern of the individual. Global declarations pertaining to sexual rights are products of the assumption of individual ownership of the body. However, the authors found two communities in Nigeria that lay claim to ownership of the body of every individual.<sup>49</sup> Thus, the rights and privileges accrued to the body are directed to the entire community. By implication, it is the responsibility of the community to protect the body of an individual – in the interests of the community rather than the owner of the body. In these communities, an individual's body is the property of the entire community.<sup>50</sup> “Individuals, therefore, have limited control over the uses to which their bodies, and the bodies of others, are put”.<sup>51</sup> This means that evil or harm inflicted on the body is not directed against the person – but rather the community at large. To this end, it is the responsibility of the community to take appropriate measures to punish such acts. Thus, abuse of the bodies of women –such as rape, assault and harmful marriage rites among others – constitute crimes against the community that owns the afflicted bodies.<sup>52</sup>

In such communities, rape – a “heinous act as a crime committed by one individual against another” – is seen “as a crime committed by one community or lineage against another community or lineage”.<sup>53</sup> Likewise, the rapist, as an individual, is not viewed as the culprit, but rather his community and as such his community would be responsible for paying compensation to the victim.<sup>54</sup> Similarly, a husband assaulting his wife is seen as a form of punishment inflicted

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<sup>48</sup> C.O. Izugbara & C. Undie “Who owns the body? Indigenous African discourses of the body and contemporary sexual rights rhetoric” (2008) 16 *Reproductive Health Matters Conflicts and Crisis Settings: Promoting Sexual and Reproductive Rights* 159-167.

<sup>49</sup> *Idem* 160.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Izugbara & Undie, note 48 (above) 162-163.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

on the entire society.<sup>55</sup> As a result “the women within the community collectively rise up and retaliate on behalf of the victim by launching a physical assault against the abuser as a group ... husbands who attempt to prevent their wives from partaking in the actions of the avenging women are seen by the society in a negative light”.<sup>56</sup> The communities “agree that battery inflicted by husbands is not committed against their wives, but against all women in that community. In other words, at a certain point of abuse, the community views itself as being the body that has been mistreated and thus takes collective action”.<sup>57</sup>

Furthermore, the body of a woman married to someone from another community – still belongs to her community.<sup>58</sup> When the “body” is given in marriage, it is made clear that only the reproductive rights of childbearing are being transferred, and that “the right is given to the community of her in-laws, rather than to an individual man or husband”.<sup>59</sup> When the woman dies, her body must be returned to her primary community for burial. This practice creates awareness of the danger of abuse of the body. While it protects women from abuse, it also licences them to protest against any assault – with the support of the entire community.

The study of Adedokun *et al.* focuses on the trends in female circumcision - otherwise known as FGM in Osun and Oyo states in south-west Nigeria.<sup>60</sup> They found that this practice is “a highly valued ritual practiced for various reasons”, ranging from being a sign of womanhood, to a measure to reduce a woman's sexual desires or “to ensure her virginity before marriage”.<sup>61</sup> They discovered that FGM has harmful effects and should be reduced or abolished.<sup>62</sup> They noted that the complications and side effects that arise from female circumcision include difficulty in urinating, chronic pelvic infections, dyspareunia, and sexual dysfunction.<sup>63</sup> The study notes a decline in female circumcision in these states – even before the global movement for its

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<sup>55</sup> Izugbara & Undie, note 48 (above) 162-163.

<sup>56</sup> *Idem* 163.

<sup>57</sup> *Idem*.

<sup>58</sup> *Idem*.

<sup>59</sup> *Idem* 162-163.

<sup>60</sup> L.A. Adedokun *et al.* “Trends in female circumcision between 1933 and 2003 in Osun and Ogun states, Nigeria (a cohort analysis)” (2006) 10 *African Journal of Reproductive Health* 48-56.

<sup>61</sup> *Idem* 49.

<sup>62</sup> *Idem* 50.

<sup>63</sup> Adedokun *et al.*, note 60 (above).

eradication.<sup>64</sup> It attributes this to “the more insidious impact of modernization on child rearing practices in general and performance of traditional rites such as circumcision in particular”.<sup>65</sup>

Adedokun *et al.* suggest that policy-makers should pay attention to the impact of modernisation on the eradication of harmful traditional rites. The study analyses FGM in only two of the 36 states in Nigeria. These two states have similar cultural practices. It does not present a comparative analysis of this cultural practice among other ethnic groups where it is still prevalent.

Robert Freymeyer and Barbara Johnson explore the attitudes of Nigerian society to FGM. They view this cultural practice as a social convention that respects the customs and traditions of the elders.<sup>66</sup> They found that men are not keen to marry an uncut woman - because they see them as promiscuous.<sup>67</sup> Combined with the oppressive patriarchal system, this culture has perpetuated this practice in different societies in the country. Like Ssenyonjo, these scholars maintain that education on the dangers and consequences associated with this custom is necessary to create more awareness of the need to abolish it. Although the study relates in part to women’s reproductive rights – its scope is limited to Nigeria.

### 2.3 WOMEN’S RIGHTS

Scholars have traced the development of health rights to the series of struggles on human rights that predated the 1948 Universal Declaration of Human Rights.<sup>68</sup> Anne-Emanuelle Birn sees the relationship between health and human rights as crucial for humanity to flourish. According to her, the struggle for health and human rights is a continuous process - due to the dynamism of the subsisting society.<sup>69</sup> The author expounds on the various efforts made in the development of health and human rights through these themes: shared idealism, bearing witness, legislation,

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<sup>64</sup> Adedokun *et al.*, note 60 (above).53.

<sup>65</sup> *Ibid.*

<sup>66</sup> R.H. Freymeyer & B.E. Johnson “Exploration of attitudes towards female genital cutting in Nigeria” (2007) 26 *Population Research and Policy Review* 69-83.

<sup>67</sup> *Ibid.*

<sup>68</sup> A. Emanuelle Birn “Health and human rights: Historical perspectives and political challenges” (2008) 29 *Journal of Public Health Policy* 32, 32-41; D. Tarantola “A perspective on the history of health and human rights from Cold War to Gold War” (2008) 29 *Journal of Public Health Policy* 42, 42-53.

<sup>69</sup> Birn, note 68 (above).

enforcement, accountability, and the underlying determinants. Tarantola sees human rights as the right a person has by virtue of existence – a position that has gained global recognition and convergence in health and human rights since the end of Cold War.<sup>70</sup>

Subsequent development gave rise to the division of the UDHR into two: the International Covenants on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Tarantola argues that this division has a negative effect on the economic, social and cultural rights – because it relegated these rights to aspirational status unlike civil and political rights which are viewed as being more justiciable. Considering the status of human and health rights during the Cold War, the author notes that international attention was given to health challenges faced by developing countries during the War. Consequently, it was affirmed at the Alma Ata conference in 1978, that health is a fundamental human right.<sup>71</sup>

However, the emergence of HIV drove the focus on health issues. Thus, the health and human rights concepts, principles and practice owe much to the response to the HIV scourge. Tarantola explains the connection between health and human rights, and goes further to examine the level of expansion of these rights – since its inception. Tarantola believes that further progress in the area of health and human rights can only be achieved through research, practice and advocacy, and a stronger role for health practitioners.<sup>72</sup>

Isobel Coleman observes that women’s rights have gained prominence in the international system and attracted support from donors and development agencies.<sup>73</sup> Nevertheless, “significant gender disparity continues to exist, and in some cases, to grow, in three regions: Southern Asia, the Middle East, and sub-Saharan Africa”.<sup>74</sup> However, she acknowledges significant improvements in women empowerment – especially in the Middle East, where religious beliefs encourage gender disparities. Coleman explores the importance of women empowerment and advancement in the political arena, but does not focus on the basic reproductive health rights of women. Political empowerment is insufficient to ensure that women reach their full potential; there is also a need to respect and guarantee their reproductive health rights.

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<sup>70</sup> Tarantola, note 68 (above).

<sup>71</sup> *Idem*

<sup>72</sup> *Idem* 49.

<sup>73</sup> I. Coleman “The pay off from women’s rights” (2004) 83 *Foreign Affairs* 80.

<sup>74</sup> *Idem* 81.

It is apt to ask, at this juncture, what these rights are. Charlotte Bunch contends that “many violations of women’s human rights are distinctly connected to being female – that is, women are discriminated against and abused on the basis of gender”.<sup>75</sup> Some of the violation that affects the rights of women includes sexual abuse, being held as political prisoners, persecution arising from being a member of an ethnic group, sexual assault during war, or violence. The UDHR of 1948 provides a framework for the continuous definition of the scope and for the protection of the dignity of individual citizens across the globe.<sup>76</sup> Not only did it make human rights a global affair, but it created a “transnational activism and concern about the lives of people globally”.<sup>77</sup> It also laid the foundation for constant review and the identification of a series of neglected rights on marginalisation and abuse.<sup>78</sup> Article 2 of the UDHR, for instance, set the pace for the contemporary activism in the promotion of rights of women in all ramifications.<sup>79</sup> This is in tandem with the principle and purpose of the Charter of the United Nations that sought to promote and encourage “respect for human rights and fundamental freedoms for all without distinction”.<sup>80</sup> The intendment of this Article is partly to address the issue of subordination of women in society – as recognised by some cultural and traditional practices.<sup>81</sup> Thus, the Article broke all forms of cultural inhibitions placed upon the exercise and protection of the specific rights peculiar to women. Generally, “female subordination runs so deep that it is still viewed as inevitable or natural, rather than seen as a politically constructed reality maintained by patriarchal interests, ideology, and institution”.<sup>82</sup>

Bunch is one of the advocates for the adoption of a comprehensive approach to the understanding of the need to protect and promote the rights of women. According to her, it is

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<sup>75</sup> Charlotte Bunch “Women’s rights as human rights: Toward a re-vision of human rights” (1990) 12 *Human Rights Quarterly* 486.

<sup>76</sup> Universal Declaration of Human Rights, adopted on 10 December 1948, G.A. Res.2 17A (III), U.N. Doc. A/810 (1948).

<sup>77</sup> Bunch, note 75 (above) 487.

<sup>78</sup> Rosalind Pollack Petchesky “From population control to reproductive rights: Feminist fault lines” (1995) 3 *Reproductive Health Matters* 152, 152-161.

<sup>79</sup> Article 2 guarantees the entitlement of all individuals to “the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

<sup>80</sup> Laura Reanda “Human rights and women’s rights: The United Nations approach” (1981) 3 *Human Rights Quarterly* 11.

<sup>81</sup> T.I. Emerson *et al.* “The Equal Rights Amendment: A constitutional basis for equal rights for women” (1971) 80 *The Yale Law Journal* 871, 871-985.

<sup>82</sup> Bunch, note 75 (above) 491.

expedient for the interests of the female gender to be more visible in the transformation of the “concept and practice of human rights in our culture so that it takes better account of women's lives”.<sup>83</sup> She notes that though some aspects of the women's rights actually “fit into a civil liberties framework, but much of the abuse against women is part of a larger socio-economic web that entraps women, making them vulnerable to abuses which cannot be delineated as exclusively political or solely caused by states”.<sup>84</sup> She identifies some basic life-threatening practices in the life-cycle of the female gender - such as life before birth, life during childhood, and life in adulthood.<sup>85</sup> This adulthood life cycle brings to the fore the basic rights associated mostly with women.

Although various international instruments fought for the principle of equality between the sexes, it took years before specific rights of women were given global attention.<sup>86</sup> Reanda notes “the interpretation and implementation of these instruments by the competent organs has fallen far short of ensuring their full applicability to women as an oppressed and vulnerable social group”.<sup>87</sup> She identifies discriminatory practices that keep women in subservient positions - to include discrimination in nutrition and health care, violence in the family, rape and denial of the right to abortion, exclusion from public life, or life-threatening traditional customs and practices.<sup>88</sup>

The Convention on the Elimination of All Forms of Discrimination Against Women<sup>89</sup> points out some other discriminatory practices against women, such as customary laws and practices based on stereotypes of the superiority or inferiority of either sex and unequal opportunities in education and employment. Others are inequality regarding the rights of nationality of married women and their children, discrimination against rural women, access to health-care such as family planning, inequality of women and men before the law in terms of the ability to contract and administer property and marriage and family relations – including free choice and equality of

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<sup>83</sup> Bunch, note 75 (above) 487.

<sup>84</sup> *Idem* 488-489.

<sup>85</sup> Reanda, note 80 (above).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Idem* 12.

<sup>88</sup> *Idem* 13.

<sup>89</sup> Catherine Tinker “Human rights for women: The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (1981) 3(11) *Human Rights Quarterly* 33.

rights and responsibilities. Inherent in all this discrimination is the reproductive health rights of women. Although these rights are susceptible to social and political control, nevertheless, “women have the right to reproductive freedom and control over their bodies, and ... this is essential if they are to have full and equal opportunity in society”.<sup>90</sup>

## 2.4 REPRODUCTIVE HEALTH RIGHTS OF WOMEN

Various international laws and documents seek to guarantee basic reproductive rights. The International Conference on Population and Development (ICPD), held in 1994, came up with a Programme of Action (PA) that chronicled the various instruments at the time that guaranteed different human rights. Paragraph 7.3 of the PA notes that reproductive rights:

embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.<sup>91</sup>

The 1995 Beijing World Conference on Women reaffirmed this definition and added specific reproductive rights that women should enjoy. These are the freedom to decide the number of children and when they want to have them; the right to the information and means to regulate their fertility, and the right to have control over their own bodies.<sup>92</sup>

There is no doubt that – in the face of cultural practices that are contrary to these rights – exercising such rights demand active government policies.<sup>93</sup> Hettinger’s study in the former Eastern Europe chronicled the measures adopted to manage women’s reproductive rights in the defunct socialist communities.<sup>94</sup> In the former Czechoslovakia, for instance, these included reproductive ideologies, reproduction, gender equality, and protective legislation through socialist medicine and nursing. There were also policies on transition to motherhood – such as sexuality, procreation, contraception, abortion, pregnancy and prenatal care, childbirth, after

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<sup>90</sup> Elizabeth Moen “Women's rights and reproductive freedom” (1981) 3 *Human Rights Quarterly* 53.

<sup>91</sup> ICPD 1994.

<sup>92</sup> “Twelve human rights key to reproductive rights”, Center for Reproductive Rights. Available at: [www.reproductiverights.org](http://www.reproductiverights.org).

<sup>93</sup> ICPD 1994.

<sup>94</sup> A. Hettinger *Reproduction, medicine and the socialist state* (1987) 1-304.

birth, and becoming a mother again. It should be noted that even in controlled and ideological communities, the government took time to guarantee policies that ensured the protection and exercise of the reproductive health rights of women.

Lynn P. Freedman and Stephen. I. Isaacs, in their study on human rights and reproductive choice, consider the right to reproductive choice in legal and historical contexts.<sup>95</sup> They argue that apart from changing the law, much must be put in place to achieve quality life for people. Hence, they examine the basic principles that have evolved from the field of reproductive health and the legal framework for the protection of reproductive health rights. They therefore advocate for a women-centred approach to be employed in reproductive choice matters – to address the issues the way that women experience them.

Rebecca J. Cook<sup>96</sup> – in her analysis of the various ways in which human rights can be applied to serve reproductive interest – expounds on developing the concrete substance of abstract human rights, by using feminist methodologies in the standard-setting function of treaty bodies. She argues that sex and gender can be used positively so that human rights can be interpreted in a way that enables reproductive self-determination in every country and culture. She notes that it is necessary to be conversant with some experiences and values that seem more typical of women than of men. To achieve this, she suggests that standards must be set in respect of each human right to access the level of observance by each state.<sup>97</sup> She advocates the documentation of the various violations of women’s rights likely to trigger legal accountability of states for violation of internationally-protected human rights of reproductive self-determination.<sup>98</sup>

Cook identifies the various human rights related to reproductive health rights under the following themes: reproductive security and sexuality, reproductive health, reproductive equality, and reproductive decision-making. She enjoins states to be faithful to their human rights’ commitments. According to her, this can only be achieved when states are accountable to each other. Cook is of the opinion that when a state respects the human rights of its citizens – such a state will create an atmosphere where its citizens will benefit from the practice of such rights.

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<sup>95</sup> L.P. Freedman & S.L. Isaacs “Human rights and reproductive choice” (1993) 24 *Studies in Family Planning* 21.

<sup>96</sup> R.J. Cook “Human rights and reproductive self determination” (1994-1995) 44 *Am.U.LP* 982.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

The various international platforms for the promotion of women's reproductive health rights adopt measures to enforce policy directions for the accomplishment of the objectives of such proposals, across the globe. However, the greatest obstacle to the implementation of such measures is the lack of mechanisms to hold governments to account for their implementation.<sup>99</sup> Rebecca Cook and Mahmoud Fathalla observe that the existence of documents incorporating such measures notwithstanding, "national and international human rights law has yet to be adequately applied to reproductive health matters".<sup>100</sup> In other words, while states have ratified these measures and enshrined them in different national statutes and legislation, the political will to implement them is still lacking. The study also identified a series of violations of reproductive health rights.<sup>101</sup> Cook and Fathalla therefore posit that the recognition of women's reproductive rights should go beyond the rhetoric of documents: "If reproductive rights are to be effectively protected, committees created by conventions to monitor their observance need to develop systematic standards of performance for the states that have ratified them".<sup>102</sup> Considering the conduct of governmental affairs in developing countries, this serves as a call for governments not to politicise the implementation of women's reproductive health rights. Furthermore, monitoring adherence to these rights should fall within the domain of international – rather than national bodies.

The central theme of Cook and Fathalla's study is enforcement of reproductive rights – by holding states accountable. Nevertheless, it is important to note that factors other than government inactivity engender the violation of these rights. The authors do not recognise the role of cultural practices as an impediment to the implementation of these rights. Furthermore, multicultural states confront different challenges that might be incompatible with the intentions of policies on the reproductive health rights of women.

While some scholars lay the blame for the violation of women's reproductive health rights on government inactivity – it is necessary to consider the activities of other agents in society. Cook considers the roles of political, religious, health and legal institutions in advancing the

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<sup>99</sup> R.J. Cook & M.F. Fathalla "Advancing reproductive rights beyond Cairo and Beijing" (1996) 22 *International Family Planning Perspectives* 115, 115-121.

<sup>100</sup> *Idem* 115.

<sup>101</sup> Cook & Fathalla, note 99 (above) 116.

<sup>102</sup> *Idem* 117.

reproductive rights of women.<sup>103</sup> He explores the various human rights that affect women, and highlights the failure and even refusal of these agents to address the fundamental differences between men and women.<sup>104</sup> For Cook, the violation of most of these rights – for instance, maternal mortality – is a symptom of the larger injustice of discrimination against women.<sup>105</sup> This, she argues, goes beyond government failure and extends to societal neglect. The state and broader society's commitment to the various documents on women's reproductive health rights, is important for the effective implementation of measures that would benefit women. The central theme of the study is how to use the human rights principle to advance safe motherhood. However, while safe motherhood is an integral part of women's reproductive health – the study does not note that cultural practices can also be a hindrance to the realisation of these rights.

It is not enough for a state to show commitment to the various documents on the protection of women's reproductive rights; it needs to be followed by enforceable legal frameworks. Isfahan Merali identifies socio-economic, legal and cultural factors as the primary barriers to improving women's health rights.<sup>106</sup> She argues that women are assigned subordinate status in the society in relation to decision-making, economic power, and options regarding education, work and family. According to her, national laws often restrict or prohibit equality and choice within society. She sees improvement in the reproductive health of women beyond being a health issue to being a matter of social justice and human rights.

Examining the various international human rights conventions and treaties that are in place in relation to the reproductive health rights of women, Merali considers the various ways by which international human rights can be employed to effectively promote the reproductive health rights of women. She identifies the application of international human right treaties to take effective, preventative, and curative measures to respect, protect, and fulfil women's health rights, and also the various Treaty Monitoring Committees which the states are expected to report to on a regular basis on their efforts in promoting the reproductive health rights of women. According to her,

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<sup>103</sup> Cook & Fathalla, note 99 (above).

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Isfahan Merali "Advancing women's reproductive and sexual health rights: Using the international human rights system" (2000) 10 *Development in Practice* 609, 609-624.

these are the strategies that can be used to ensure that states adhere to their commitments on reproductive health rights.

Aniekwu seeks to identify effective constitutional provisions in Nigeria that can endorse the various international and regional documents on women's reproductive health rights.<sup>107</sup> Having explored human rights issues in reproductive and sexual health rights from the jurisprudential perspective, Aniekwu considers that sexual and reproductive health rights should be entrenched in the national laws.<sup>108</sup> The study reviews national policies on reproductive health, the ratification of international instruments, constitutional provisions on human rights, and state laws on gender issues. It reveals that Nigeria's response to the recommendations of international conferences and instruments has been very weak. Aniekwu concludes that reproductive and sexual rights will not be effective in Africa, if national and regional legal systems and human rights mechanisms are not put in place to ensure compliance with international commitments. The focal point of this study is the willingness and capacity of the state to implement their international human rights commitments – in respect of sexual and reproductive health.

This problem is, however, not limited to Nigeria. The study of Cooper *et al.* on reproductive health policies in South Africa calls for improvements in policy.<sup>109</sup> While they note the degree of progress recorded in terms of constitutional provisions – their review of reproductive health policies during the apartheid and post-apartheid eras, reveals that improvement in women's reproductive health status is difficult to discern. The study also found that cultural practices serve as impediments to the realisation of these rights.

Oye-Adeniran, in his study on the promotion of sexual and reproductive health rights in Nigeria, notes the significant global development on the issue of reproductive and sexual rights via the various international treaties.<sup>110</sup> According to him, in spite of the current trend of the promotion of reproductive and sexual rights through the various international treaties, there have not been

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<sup>107</sup> N.I. Aniekwu "[EN] Gendering sexuality: Human rights issues in reproductive and sexual health" (2006), paper presented at 2006 ARSRC Sexuality Leadership Development Fellowship (SLDF).

<sup>108</sup> *Ibid.*

<sup>109</sup> D. Cooper *et al.* "Ten years of democracy in South Africa: Documenting transformation in reproductive health and policy status" (2004) *Reproductive Health Matters*. Available at: [www.rhmjournal.org.uk](http://www.rhmjournal.org.uk).

<sup>110</sup> B.A. Oye-Adeniran *et al.* "Promoting sexual and reproductive health and rights in Nigeria through change in medical school curriculum" (2004) 8 *African Journal of Reproductive Health* 85, 85-91.

significant changes in the way people view these rights – thereby making the rights unrealisable in most developing countries. Nigeria is one of the countries with many unmet reproductive needs. He observes that local implementation of the various international strategies for the improvement of the reproductive health rights, is needed in Nigeria for these rights to be realised.

One of the strategies is the development of human capacity. Looking at the current challenges in this field globally, Oye-Adeniran *et al.* posit that most medical schools in Nigeria are deficient in the field of reproductive health rights. This will have a great impact on the quality of medical care delivered by the doctors nationwide. He advocates a change in the curriculum of the medical schools to accommodate courses in reproductive and sexual health rights.<sup>111</sup> The authors identified lack of resources, inadequate knowledge about reproductive and sexual health, lack of political will, opposition from religious leaders, and less liberal interpretation of the reproductive health legislation by health-care providers, as the challenges which are obstacles to the change in the curriculum of the medical schools. The study recommends advocacy, and the education of policy makers, religious and community leaders, and also partnership with other reproductive health-focused NGOs – as the solution to the needed change.

Igberase notes that harmful cultural practices affecting the reproductive health of women, particularly pregnant women, abound in Nigeria. Focusing on the Niger Delta Region, the study *inter alia* found that practices such as female circumcision; abdominal massage; widowhood rites; early/forced marriages; fire and heat treatment; the need to seek permission from men before obtaining medical treatment, all constitute impediments to the realisation of women's reproductive health rights.<sup>112</sup> Despite the fact that Nigeria is a signatory to several international instruments on reproductive health rights, the full implementation of these instruments remains a pipedream – considering the prevalence of and recognition given to these cultural practices.

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<sup>111</sup> Oye-Adeniran *et al.* note 110 (above) 87.

<sup>112</sup> G. Igberase “Harmful cultural practices and reproductive health in Nigeria” (2012) 6(1) *Continental Journal of Tropical Medicine* 27.

Aniekwu is of the view that judicial reform remains a pertinent option in advancing gender and reproductive health rights in Nigeria.<sup>113</sup> He argues that judicial and legislative activism is needed to secure gender-specific human rights. He adds that, for any legal system to succeed in the area of gender and reproductive health, it is pertinent to consider the political, economic, and socio-cultural environment; traditional practices; health-care delivery; the policy framework; education and capacity building; constitutional guarantees; regional and international obligations; and the judiciary.<sup>114</sup> Aniekwu notes the provisions in the Nigerian Constitution that require a national legislative framework on gender and reproductive health rights in order to comply with regional and international instruments. The question that the study could not resolve, is the extent to which judicial reform can ensure the justiciability of these laws – given the recognition given to traditional practices by the various communities in the country.

The study of Orisaremi and Alubo<sup>115</sup> on a community in central Nigeria identified the patriarchal system in the Tarok community as an impediment to the realisation of the reproductive health rights of women. Women in this community were not free to make decisions in relation to their reproduction – without the consent of their husbands.<sup>116</sup> Furthermore, this tradition places male interests in reproduction above those of women. Unequal gender relations enslave women to men. Because this study is limited in scope – it does not provide a comprehensive overview of the various cultural practices that impede women’s reproductive health rights.

In a study conducted in the USA, Serra Sippel considers the monumental paradigm shift of family-planning policies from demographic-centred policies to women’s political, social and economic and health empowerment, and human rights. Though this is a positive development in the area of reproductive health rights, in practice, looking at the high rate of maternal deaths, unmet contraceptive needs, and HIV infections, women are yet to enjoy these rights. Sippel pointed out several issues which she believed thwarted the realisation of sexual and reproductive

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<sup>113</sup> N.I. Aniekwu “Gender and reproductive health: Towards advancing judicial reform in Nigerian law”, *Judicial Reform and Transformation in Nigeria: A Tribute to Hon. Justice Dahiru Musdapher CJN*, Nigerian Institute of Advanced Legal Studies (2012) 1-27.

<sup>114</sup> *Ibid* 10.

<sup>115</sup> T.C. Orisaremi & O. Alubo “Gender and reproductive rights of Tarok women in central Nigeria” (2012) 16 *African Journal of Reproductive Health* 83, 83-96.

<sup>116</sup> *Ibid*.

rights: the integration of sexual and reproductive services, reproductive rights and abortion access, and adequate resources for sexual and reproductive health rights; gender-based violence and marital rape; the rights of lesbian, gay, bisexual, and transgender individuals; and comprehensive sexuality education for the youth.<sup>117</sup> However, only three of these issues were explicated by the author: integration, reproductive rights and abortion access, and allocation of resources. On the issue of integration of sexual and reproductive services and allocation of resources, the author noted the inter-relationships between population dynamics, economic growth, gender equality, and sustainable development – which are the theme of ICPD to ensure that government, multilateral agencies and donors weave sexual and reproductive health rights into a holistic approach to reduce inequality and poverty eradication.

Sippel continues on the issue of integration by adding that besides the link between population policies and economic development, sexual and reproductive health and human rights – including reproductive health and rights, women’s empowerment, maternal health, sexual health, and family planning – are interconnected, and hence the need for integration of these services to achieve the required result. Sippel’s stance is that segmentation of funds, structures and services divides the key components of sexual and reproductive health rights. There should be a common approach to meet the sexual and reproductive rights of a woman throughout the life-cycle. The author accuses the ICPD of compromising reproductive rights by not regarding abortion as a human right - but rather as a public-health matter.<sup>118</sup> She challenges the view on criminalisation of abortion. On the issue of resources, Sippel advocates for resources to be allocated towards organisations advocating sexual and reproductive health. She canvassed for greater political will, financial commitment, and accountability – to achieve the desired result.

## **2.5 REGIONAL TRENDS IN THE REPRODUCTIVE HEALTH RIGHTS OF WOMEN**

Reproductive health rights across the globe are well documented. Regional trend in this section encompasses the protection of reproductive health rights of women in the various regions across

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<sup>117</sup> Serra Sippel “ICPD beyond 2014: Moving beyond missed opportunities and compromises in the fulfillment of sexual and reproductive health and rights” (2014) *Global Public Health*. Available at: <http://dx.doi.org> (accessed on 10 July 2014).

<sup>118</sup> Para 8.5 of the ICPD Programme of Action.

the globe such as Middle East, Latin America, Africa, East and South Asia among others. Pillai and Zhen Wang's study of cross-regional variations in women's reproductive rights in 101 developing countries, chronicles the various dimensions of reproductive rights.<sup>119</sup> For example, it revealed obvious regional variations in the right to legal abortion. Furthermore, it showed that the major impediments to the integration of modern perspectives on reproductive rights into national laws are cultural, social and political forces.<sup>120</sup> However, the two variables – legal abortion and personal rights – are insufficient to determine the variations in reproductive rights in developing countries. Although the authors cite culture as one of the impediments responsible for the inability to integrate international human rights provisions into national laws, the study does not identify the various cultural practices that were responsible for this failure.

Do all countries that sign the various documents and instruments on reproductive health rights show sufficient commitment to their implementation? Landman focuses on this question in a study on the significance of human rights measurements in classifying different types of violations.<sup>121</sup> The focal point was the measurement of civil and political rights. The study nevertheless discusses how social and economic rights can also be measured. Measuring the level of commitment of a nation to the implementation of human rights, requires coding the country's participation in the regional and international human rights regime, and an assessment of national constitutional provisions on human rights and the level of violation of the rights. The measurement of rights is important for the continuous observation of human rights abuses. This study highlights the measurement of rights in order to assess the level of commitment to the principles of human rights by various countries. However, it fails to discuss some of the factors that might be responsible for a lack of commitment to human rights – in that it focused on civil and political rights.

Ebenezer Durojaiye examines the importance of using human rights indicators to observe a state's commitment to the right to health – including sexual and reproductive rights – in

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<sup>119</sup> V.K. Pillai & G. Wang "Reproductive rights in developing countries: An assessment of regional variations" (1999) 13 *Michigan Sociological Review* 10, 10-27.

<sup>120</sup> *Idem* 12.

<sup>121</sup> T. Landman "Measuring human rights: Principles, practice and policy" (2004) 26 *Human Rights Quarterly* 906, 906-934.

Africa.<sup>122</sup> The study highlights tools that can be used to measure the compliance of a particular state with its obligations in relation to the right to health, together with sexual and reproductive rights. These tools are indicators, benchmarks and indices. Durojaiye differentiates between human rights' indicators and other indicators such as those used for health and development purposes. The author emphasises that the steps taken by a government to respect, protect and fulfil its commitments in relation to the right to health, need to be measured, and an appropriate methodology should be used to determine the level of compliance of a particular state in relation to their commitments. This study is explicit on what can be done to ensure the compliance of African states to their commitments in respect of the right to health. However, it does not consider factors such as cultural practices that can hinder states from fulfilling their commitments. Furthermore, the scope of the study is confined to Africa.

A study on “Regional trends in reproductive rights”<sup>123</sup> reviews reproductive rights and women empowerment in seven Anglophone African countries - in order to establish whether the laws of a particular country can set a precedent for others. The report highlights certain issues such as the legal and political frameworks of each country in relation to their structures of government, sources of law, and reproductive health and rights. It concludes that there is a gap between formal policy statements and their execution. The report identifies certain flaws in the selected seven countries - such as weakness in enforcement of laws, contradictions in the laws and policies affecting women's reproductive lives, and disparities between constitutional provisions and international human rights on the one hand and certain customary laws on the other. The scope of this review is too wide – making it impossible to provide an in-depth analysis of the various themes discussed.

Marie Ralstin Lewis, in her study on reproductive health rights of women in North America,<sup>124</sup> discovers that women are seen as the backbone and keepers of life in indigenous North American

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<sup>122</sup> E. Durojaye “Monitoring the right to health and sexual and reproductive health at the national level: Some considerations for the African governments” (2009) 42 *The Comparative and International Law Journal of South Africa* 217, 277-283.

<sup>123</sup> “Regional trends in reproductive rights” (2003) *Centre for Reproductive Rights* 153-154. Available at: [www.reproductiverights.org](http://www.reproductiverights.org). These countries are: South Africa, Nigeria, Ethiopia, Zimbabwe, Kenya, Ghana, and Tanzania.

<sup>124</sup> D. Marie Ralstin-Lewis “The continuing struggle against genocide: Indigenous women's reproductive rights” (2005) 20 *Wicazo Sa Review* 71, 71-95.

societies. This matriarchal practice notwithstanding, was influenced mostly by the European colonisers. This had a consequence on the reproductive autonomy of the women. The colonists had different views of the Native American and the Euro American culture towards women and child-birth. In a bid to reduce the role of native women in the continuation of the culture, their reproductive freedom was abused through coercive sterilisation. Surprisingly, the white American women were clamouring for access to voluntary sterilisation. They did all this to control the population of the indigenous black people – thereby infiltrating into their private lives. According to the author, this style of reproductive abuse amounts to racism and genocide. The author sees this as paternalism and elitism. In spite of all this, women still continue to flourish in the midst of racism, genocide and poverty.

In his work on the prospects and challenges of the protection of socio-economic rights, Mubangizi emphasises the uniqueness of South Africa's experience.<sup>125</sup> He notes that this is due to the country's political antecedents. His study examines the various socio-economic rights contained in South Africa's Constitution, the role played by such rights – and the various means by which such rights can be enforced. This comprises the institutions established under Chapter 9 of the Constitution to support constitutional democracy, non-state actors, civil society organisations, and the judiciary.

Mubangizi evaluates the levels of commitment of some African countries (Ghana, Namibia and Uganda) to the protection and enforcement of socio-economic rights. He notes that democratic transition has resulted in provisions for socio-economic rights; however, most of these rights are non-justiciable. He adds that poverty is a major constraint to the realisation of such rights. The study concludes with the various lessons that other countries could learn from the South African experience. This includes making socio-economic rights justiciable and putting the necessary machinery in place for their enforcement. The study's main focus is socio-economic rights – which includes women's reproductive health rights. Although it discusses these rights, Nigeria is

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<sup>125</sup> J.C. Mubangizi "Constitutionalisation and justiciability of social rights: Prospects and challenges in the protection and enforcement of socio-economic rights: Lessons from the South African experience" (2007), paper presented at VIIth World Congress of the International Association of Constitutional Law, Athens 11-15 June 2007, 1-14.

not one of the countries evaluated in the study. Furthermore, culture is not seen as one of the factors that can impede the realisation of these rights.

Coliver explores the crucial role played by access to information in enabling people to make informed decisions in respect of their families and private lives.<sup>126</sup> He identifies factors such as the country's dominant religion, culture, tradition and state of development, and the influence of foreign donors who can manipulate reproductive health decisions. He notes that the barriers associated with these factors could be overcome by effective information-dissemination systems. The study reveals that compliance with the commitment to human rights would go a long way to improving reproductive health and choice in practice. The study suggests different ways in which international bodies could exert pressure on nations that fail to comply with their human rights obligations.

Coliver observes that, aside from governments, non-state actors have an enormous duty to ensure the realisation of these rights. The study concludes by arguing that the right to know bestows an obligation on the state to ensure that the information needed in respect of reproductive health and choice, is made available to all. The central theme of this study is the primacy of information in respect of reproductive health in 10 countries – excluding South Africa and Nigeria. The scope of the study is very wide and not sufficiently comprehensive. Although culture is identified as one of the obstacles to the realisation of reproductive health, the various cultures are not highlighted.

Cornwall and Molyneux's study highlights the strategies, tensions and challenges associated with the advocacy of women's rights.<sup>127</sup> Focusing on the Middle East, Latin America, Africa, and East and South Asia, the authors examine the contributions of rights activists to the struggle for gender justice. They examine the intersection of formal rights, international human rights conventions and the national human rights contained in various constitutions – with the actual realities women face daily due to gender inequality and cultural practices, poverty, and plural

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<sup>126</sup> S. Coliver (Ed.) *The right to know, human rights and access to reproductive health information* (1995), Article 19, University of Pennsylvania Press 1-391.

<sup>127</sup> A. Cornwall & M. Molyneux "The politics of rights: Dilemmas for feminist praxis: An introduction" (2006) 27 *Third World Quarterly* 1175, 1175-1191.

legal systems that impede the realisation of these rights.<sup>128</sup> The authors review some of the efforts of women's rights activists. It concludes that women should not abandon their efforts to advocate women's rights, as these can create new possibilities and meanings when they are directed towards social and gender justice. However, the scope of the study is very broad, and it does not devote sufficient attention to the various impediments to the realisation of women's rights. Furthermore, although the focus is on women's rights, it only briefly mentions women's reproductive health rights.

Knudsen's study on reproductive health rights in the global context, sought to unravel the challenges faced by women in securing their reproductive rights.<sup>129</sup> It focuses on the social, economic and political frameworks of seven countries: South Africa, Uganda, Peru, Denmark, the United States, Vietnam, and Jordan – in relation to the politics of population, contraception, abortion, HIV/AIDS and sex education. It identifies the following factors that impede the realisation of reproductive rights in these countries: patriarchal family structures, the privatisation of health services, and governments' misplaced priorities. The study outlines recent legislation on reproductive health rights in some of the countries, as well as the various cultural practices that impinge on the rights of women – especially in South Africa. It concludes that the extent to which women in each of these countries can realise their reproductive freedom, depends largely on the degree of success achieved by reproductive rights activists and health professionals.<sup>130</sup>

Correa highlights the feminist perspective on reproductive rights.<sup>131</sup> The study reviews fertility management policies and sexual and reproductive health rights, and highlights the various challenges to the implementation of such rights. This is one of the major studies of women's reproductive health rights to emerge immediately after the ICPD summit.

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<sup>128</sup> Cornwall & Molyneux, note 127 (above) 1178-1179.

<sup>129</sup> L.M. Knudsen *Reproductive rights in a global context* (2006) 1-204.

<sup>130</sup> *Ibid.*

<sup>131</sup> S. Correa *Population and reproductive rights: Feminist perspectives from the South* (1994) 1-112.

Osakue and Martin-Hilber chronicle the plight of Nigerian women under the military regime.<sup>132</sup> Aside from the authoritarian and male gender bias associated with the Nigerian military, the authors note the prevalent patriarchal traditions which are responsible for the low status ascribed to women in this society. The study explores the country's political, economic and cultural conditions, in order to establish how women made reproductive decisions in a patriarchal system. It reveals that women in Nigeria made efforts to accommodate their traditional belief systems and at the same time exercise a certain control over their reproductive issues and articulate the desire for change. The authors highlight the impact of cultural practices on the realisation of women's rights.

## 2.6 CHAPTER CONCLUSION

The foregoing literature review deals with the issues of cultural practices and women's reproductive health rights. Many of the studies discussed focused on cultural practices without considering their impact on the reproductive health rights of women. Some of the literature that did examine women's reproductive health rights did not consider the impact of cultural practices on the realisation of these rights. Much of the literature that compared the level of realisation of women's reproductive health rights across countries is very broad in scope – and does not provide the details of the extent of the realisation of these rights. Furthermore, none of these studies compared the interplay of cultural practices and the realisation of women's reproductive health rights in South Africa and Nigeria.

This study will fill the gaps identified above by determining what these two countries can learn from each other – thereby improving their efforts to enforce international instruments on the reproductive health rights of women, in line with international standards. The next Chapter will discuss the various international instruments on the protection of the reproductive health rights of women as this will assist in identifying the reproductive health rights of women recognised by international and regional treaties and determine which of them has been ratified and signed by South Africa and Nigeria.

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<sup>132</sup> G. Osakue & A. Martin-Hilber "Women's sexuality and fertility in Nigeria breaking the culture of silence". In: R.P. Petchesky & K. Judd (Eds), *Negotiating reproductive rights: Women's perspectives across countries and cultures* (1998) 180-216.

## CHAPTER THREE

### THE LEGAL FRAMEWORK FOR THE REPRODUCTIVE RIGHTS OF WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW

#### 3.1 INTRODUCTION

The history of the protection of human rights dates back to 539 B.C., when the king of ancient Persia released all slaves after he conquered the city of Babylon.<sup>1</sup> After the conquest, the king made some fundamental declarations which can be regarded as the foundation of human rights. He declared – among other things – freedom of religion and racial equality. These declarations were engraved on a cylinder known today as the Cyrus cylinder.<sup>2</sup> Other states followed the new trend by drawing up various documents to protect human rights.<sup>3</sup> There were several struggles for the protection of rights based on cruel incidents in relationships between human beings at home, in the workplace, and in the community – before the King of Persia issued his declarations. Traditional African society has its own approach to the protection of human rights, although the extent of a person’s legal rights in ancient society depended on their legal status.

Most ancient traditional Africa societies did not regard all human beings as persons in law; the status of some categories of individuals was elevated above that of an ordinary human being – to that of “gods”.<sup>4</sup> Slaves and members of certain castes were not recognised as human beings and the status of kings and their lineage were elevated: they were viewed as superior to ordinary human beings.<sup>5</sup> Women did not enjoy full legal status; their status lay between that of a serf and an infant, with a restricted legal personality.<sup>6</sup> The protection of fundamental human rights and subsequently the reproductive health rights of women was alien to ancient African culture. Women were regarded as icons of cultural purity through their role of child-rearing – as women are in the best position to pass on their culture to their children, thereby making them the symbol

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<sup>1</sup> *A brief history of human rights*. Available at: [www.humanrights.com](http://www.humanrights.com).

<sup>2</sup> *Ibid.*

<sup>3</sup> Magna Carta (1215), The Petition of Rights (1628), The United States Constitution (1777), The French Declaration of Rights of Man and of the Citizen (1789), and the US Bill of Rights (1791).

<sup>4</sup> A. Emiola *The principles of African customary law*. 2nd Ed. (2005) 33-38.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

of cultural order.<sup>7</sup> Notwithstanding this special role, women were regarded as subservient and inferior in traditional African society. In patriarchal ancient African societies, this status is ascribed to a girl child at birth. When a woman gives birth to a female child, the father has little or no regard for the child – due to the belief that she is a temporary member of the family who ceases to be part of it when she marries. Among other things, this negatively impacts women’s access to education, right of inheritance, and also choice of career. In contrast, a male child is the father’s heir who will maintain the dynasty even after the demise of the father concerned.

Even upon marriage, a woman is still dependent in all areas of her life – and it is believed that she cannot make any decision with regard to her reproductive life without the consent of her husband.<sup>8</sup> Most traditional patriarchal African society does not regard woman as an independent human being with the same right as a man. A woman is regarded as a second-class human being whose role in the home is restricted and subject to the approval of the husband concerned.<sup>9</sup> In the past, the role of women in traditional African society was limited to bearing and rearing children, and also home keeping. The health consequences of these activities were not considered.

Furthermore, traditional African society regarded reproductive health as a classified matter which should not be discussed in public. This aimed to uphold moral values by avoiding sexual immorality through curtailing women’s behaviour.<sup>10</sup> Girl children did not receive sex education as it was feared that this might lead to sexual activities which may have an adverse effect on their future. It was taboo to discuss reproductive health in the home. As a result, women were not aware of their right to autonomy in relation to their body. Given that there was no specific law to protect women’s reproductive health rights; this was not seen as infringing upon women’s rights.

It is against this background that this chapter examines the development of the legal frameworks on women’s reproductive health rights to achieve the foregoing, the chapter will consider the various international and regional treaties, and international conventions on the protection of

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<sup>7</sup> Radhika Coomaraswamy “Reinventing international law: Women’s rights as human rights in the international community” (1997) 23(3-4) *Commonwealth Law Bulletin* 1249, 1250.

<sup>8</sup> E. Fokala “The relevance of a multidisciplinary interpretation of selected aspects related to women’s sexual and reproductive health rights in Africa” (2013) 17 *Law, Democracy & Development* 177, 180.

<sup>9</sup> G.A Makama “Patriarchy and Gender Inequality in Nigeria: The Way Forward” (2013) *European Scientific Journal*, 115,117.

<sup>10</sup> R.J. Cook “International protection of women’s reproductive rights” (1991-1992) 24 *N.Y.U.J. Int’l & Pol.* 645, 646.

women's reproductive health rights. The chapter will conclude by discussing the status of an international treaty in South Africa and Nigeria and the various factors that have greatly affected the realisation of the reproductive health rights of women despite the various international instruments that protects these rights.

### **3.2 DEVELOPMENT OF LEGAL FRAMEWORKS ON WOMEN'S REPRODUCTIVE RIGHTS**

The special and unique nature of women (physiologically and anatomically) requires the international community to adopt fundamental human rights instruments that accommodate women's reproductive character. The first stage of the development of women's rights witnessed the promotion of specific legal rights such as employment rights, and also measures against violence against women and trafficking in persons.<sup>11</sup> These rights were considered because women were facing discrimination at the workplace due to pregnancy and child-birth, among others issues. In the public and private spheres, women were also vulnerable to violence and were subordinate to men. Most victims of trafficking in persons were women. In addition to general human rights provisions, there was a need for specific laws to tackle the infractions that were exclusive to women.

Negotiations were therefore held for special conventions to address various forms of discrimination against women – based on sex.<sup>12</sup> Thus, the second stage in the development of the law focused on how to enforce the various laws already in place relating to women. Despite legislation that prohibited discrimination against women on the grounds of sex, women were still experiencing persistent infringement of their rights.<sup>13</sup> This prompted a Women's Convention (The Convention for the Elimination of All Forms of Discrimination against Women), which heralded the third stage of the development of laws on women's rights.<sup>14</sup> In order to eradicate all forms of infractions on women's rights, which usually were borne out of discrimination, the Convention dealt with all forms of discrimination that could be envisaged at the time.<sup>15</sup>

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<sup>11</sup> R.J. Cook "Effectiveness of the Beijing Conference advancing international law regarding women" (1997) 91 *ASIL Proceedings* 310-317.

<sup>12</sup> *Ibid* .

<sup>13</sup> *Ibid*.

<sup>14</sup> Adopted by the UN General Assembly Resolution 34/180 of 18 December 1979.

<sup>15</sup> Cook, note 11 (above).

The fourth stage in the development of the law on women's rights, was the inclusion of women's concerns in generalised treaties such as international trade norms.<sup>16</sup> An example is the Protocol to the African Charter on Human and Peoples' Rights, which considered the vulnerable and unique nature of women. Article 19 of the Protocol provides that:

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the State Parties shall take all appropriate measures to ... (f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.<sup>17</sup>

Furthermore, provisions relating to reproductive health and reproductive autonomy and violence against women, among other issues, are now part of international treaties.<sup>18</sup> As the world progresses, due to the dynamic nature of the law, the law on women's human rights will witness further developments that reflect that all human beings are equal and that there should be no discrimination of any kind.

### **3.2.1 The Universal Declaration of Human Rights (UDHR) 1948**

The UDHR - which came into force in 1948 – marked a turnaround in the generalisation of the international protection of human rights. No previous document on the development of human rights was as universal and comprehensive as the UDHR. It was adopted by the UN General Assembly on 10 December 1948. The period preceding the adoption of the UDHR was difficult for the international community – as the Cold War led to cruel violations of the basic rights of individuals. The promotion of human rights was not one of the goals of the UN when it was founded in 1945. However, the global body embraced human rights after having discovered its sensitivity in the aftermath of the Cold War. According to one of the delegates that drafted the UDHR, the document “was inspired by opposition to the barbarous doctrines of Nazism and Fascism”.<sup>19</sup>

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<sup>16</sup> Cook, note 11 (above).

<sup>17</sup> Adopted on 25 November 2005.

<sup>18</sup> Convention on the Elimination of All Forms of Discrimination against Women, the Protocol to the African Charter on Human and Peoples' Rights, International Covenant on Economic, Social and Cultural Rights.

<sup>19</sup> John F. Sears “Eleanor Roosevelt and The Universal Declaration of Human Rights” Franklin and Eleanor Roosevelt Institute. Available at: <http://www.fdrlibrary.marist.edu/library/>  
Mr Malik was the Lebanese representative.

General Carlos Romulo of the Philippines was successful in including a statement in the UDHR, that respect for human rights applied to everyone “without distinction as to race, sex, language and religion”.<sup>20</sup> This and other efforts sought to eradicate the superiority complex which had led to the loss of lives of so many people in the international community. The journey to the drafting of the UDHR was a long and tough one – due to its nature which involved different states with different dispositions and ideas.

To further ensure the promotion and protection of human rights, a “nuclear” commission (preparatory committee) was constituted after the first UN General Assembly. The commission was tasked with recommending a structure and mission for a Commission on Human Rights. At its inaugural meeting, the commission elected Eleanor Roosevelt as its Chairperson.<sup>21</sup> The provisions of the UDHR were intended to meet the immediate need of the international community – to put an end the gross human rights abuses experienced during the Second World War.

During this period, there was no respect for human life, and some individuals felt that because of their political positions or their pedigree, they were superior to others. Nazism and Fascism led to gross human rights abuses. Fascism does not respect human rights; the state controls every aspect of an individual’s life, leaving no room for freedom – and even freedom of thought was prohibited.<sup>22</sup> Accordingly, Article 1 of the UDHR provides that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. This Article addresses the issues of inequality and discrimination that were predominant before and during the Second World War.<sup>23</sup>

To further eradicate the scourges of Nazism and Fascism, based on his personal experience, the delegate from the Soviet Union urged the committee to include Article 2, which dealt extensively with the issue of discrimination. The committee considered discrimination the most important issue. When individuals consider themselves equal to other persons, it becomes difficult to injure

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<sup>20</sup> Sears, note 19(above).

<sup>21</sup> *Idem* .

<sup>22</sup> Johannes Morsink “World War Two and the Universal Declaration” (1993) 15 *Human Rights Quarterly* 360.

<sup>23</sup> *Idem* 362-363.

or do anything that will inflict any harm, either physical or psychological, on another person.<sup>24</sup>

Hence the inclusion of Article 2, which reads as follows:

Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status, Furthermore, no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The UDHR comprises 39 articles, framed with the aim of giving more value to human life. Considering the antecedents and the provisions of the declaration, it goes without saying that at the time of its drafting, the reproductive health rights of women were not directly contemplated. There are some provisions that support the right of autonomy in relation to an individual's body. For instance, Article 1 states that all human beings are born free and that they are equal in dignity and rights. It follows that all human beings are the same; no one is inferior or superior to another. Hence, no individual is allowed to impose his/her will on another person in a bid to subjugate such an individual. In the same vein, Article 2 affirms that no one is superior to another in exercising the various rights and freedoms contained in the declaration. Article 3 provides for the universal right to life, liberty and security of persons. This particular article accommodates the reproductive health rights of women, because the right to life, security and liberty are indispensable in guaranteeing reproductive autonomy.

The process of child-bearing and rearing could have an impact on an individual's right to life. Consequently, an individual must be able to make independent decisions in this regard – without fear. Articles 12 and 16 of the UDHR support the reproductive health rights of women. Article 12 deals with the right to privacy, which is vital to reproductive health rights.<sup>25</sup> Reproductive autonomy cannot be achieved when there is interference of any kind in relation to an individual's body. The provisions of Article 16 are extremely important to reproductive health rights. It states that:

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<sup>24</sup> Sears, note 19 (above).

<sup>25</sup> Article 12 of the Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly Resolution 217 A(111) of 10 December 1948.

1. Men and Women of full age, without any limitation due to race, nationality or religion have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

Article 16 does not specify what ‘full age’ is; this may offer space for those who debate this issue. The other provisions of the article are crammed with requirements for autonomy. They forbid discrimination on any grounds. Men and women have equal rights in marriage. It follows, therefore, that just as a man is free to make decisions in relation to his body, so is a woman at liberty to do whatever she likes; no one has a superior right over the other. The UDHR also forbids any form of coercion into marriage, and, according to the article, society is expected to help to make the union a success. Society can only perform this function through the various laws and norms that are in place in relation to marriage.

Article 27 gives an individual the right to freely enjoy scientific advancement and to participate in the cultural life of the community. This provision is not directly linked to the reproductive health rights of women, but in a way gives a woman the liberty to benefit from scientific advancements – such as family planning and sterilisation services, among others, without any form of coercion. The article supports the fact that, even if a particular society does not believe in autonomy in relation to one’s body – an individual who is a member of such a society, is at liberty not to align themselves with the beliefs of their society.

The UDHR has been criticised for several reasons. Although the chairperson of the committee that drafted it, Eleanor Roosevelt, was a woman, the provisions of the articles were gender indifferent. They do not address the various issues that affect women – especially those that relate to their reproductive health rights. This is due to the circumstances that surrounded the drafting of the UDHR. The UDHR was drafted to give more value to human life in order to avert a reoccurrence of the various killings that took place during World War 1 and 11. As a result of this, the reproductive autonomy of women was not envisaged at this time.

Considering its origins, developing countries regard the UDHR as a Western idea – and therefore some of its provisions were regarded as impracticable due to cultural differences. Furthermore, wealthier countries connect human rights aid to economic relations with developing countries.<sup>26</sup> Although the UDHR did not categorise rights, and although its provisions are mere declarations that are not legally binding, the declaration marks the genesis of the generalisation of the protection of human rights on a truly universal scale.<sup>27</sup>

### **3.2.2 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966**

Prior to the adoption of the UDHR, the UN agreed that its provisions would be transformed into a legally binding instrument, using one or more treaties.<sup>28</sup> However, this was not achieved for almost two decades. In 1966, the various human rights recognised in the UDHR were divided into the International Covenant on Political and Civil Rights, and the International Covenant on Economic, Social and Cultural Rights.<sup>29</sup> While different, these two categories of rights are interdependent and indivisible – because they are applicable to all human beings on an equal basis without any form of discrimination.<sup>30</sup>

For instance, Article 1 states that all human beings are born free and they are equal in dignity and rights. It follows that all human being are the same; no one is inferior or superior to another. Hence, no individual is allowed to impose his/her will on another person in a bid to subjugate such an individual. In the same vein, Article 2 affirms that no one is superior to another in exercising the various rights and freedoms contained in the declaration. Article 3 provides for the universal right to life, liberty, and security of persons, and accommodates the reproductive health rights of women – because the right to life, security and liberty are indispensable in guaranteeing reproductive autonomy.

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<sup>26</sup> P. Sane “Human rights and the clash of cultures” (1993) 10(3) *New Perspectives Quarterly* 27.

<sup>27</sup> Antonio Augusto Cancado Trindade.

<sup>28</sup> International Covenant on Economic, Social and Cultural Rights. Available at: United Nations High Commissioner for Human Rights [www.ohchr.org](http://www.ohchr.org).

<sup>29</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976. As at 13 October 2014, the ICESCR had 70 signatories and 162 parties.

<sup>30</sup> P. Alston & B. Simma “First session of the UN Committee on Economic, Social and Cultural Rights” (1987) 81(3) *American Journal of International Law* 747.

The process of child-bearing and rearing could have an impact on an individual's right to life. Consequently, an individual must be able to make independent decisions in this regard – without of fear. In contrast to the UDHR and the International Covenant on Civil and Political Rights which provide remedies for the breach of any of the rights they protect, the ICESCR does not provide for remedies for its breach. This has been the major reason for violations.<sup>31</sup> In contrast, many argue that the nature of the rights protected by these covenants has been responsible for their violation. For instance, when people die of hunger or thirst, the state will not be blamed for such a breach. Instead, society will blame either the victim or a nameless economic force.<sup>32</sup> The fact that most of the states consider these rights non-justiciable – has affected their prominence.

The phrasing of the covenant has been a major impediment to its realisation. The UN attends to violations of civil and political rights by providing a communication mechanism through which a person whose rights have been infringed, can lodge a complaint with the international community. No such provision was made for economic, social and cultural rights.<sup>33</sup> Article 2 of the ICESCR allows for the “progressive realisation” of the rights – unlike the ICCPR which requires immediate action. Furthermore, the scope of the rights protected is too broad. Individuals are not able to bring an action when their rights under this Convention are infringed. However, in order to ensure that these rights are justiciable, states that are party to the Convention are enjoined by the Committee on Economic, Social and Cultural Rights – in General Comment 3 – to provide legal remedies with respect to rights which may, in accordance with the national legal system, be justiciable.<sup>34</sup>

The implication is that countries that make legal provision for some of these rights can enforce them in their national courts. As a result, the justiciability of these rights has been subjected to several judicial considerations by domestic courts, in various states.<sup>35</sup> South Africa is an example

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<sup>31</sup> Article 8 of the UDHR, note 31 (above), and Article 2 of the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by the General Assembly resolution 2200 A (XXI) of 16 December 1966, and entered into force on 23 March 1976.

<sup>32</sup> Scott Leckie “Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights” (1998) 20(1) *Human Rights Quarterly* 82.

<sup>33</sup> I. Biglino & C. Golay “The Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights” (2013) *Geneva Academy of International Humanitarian Law and Human Rights* 1, 3.

<sup>34</sup> *Economic, social and cultural rights handbook for national human rights institutions*, note 41 (above) 35.

<sup>35</sup> *Ibid.*

of a state where people have approached the courts to enforce their socio-economic rights,<sup>36</sup> and a number of cases concerning socio-economic rights have been decided in South Africa.<sup>37</sup> In this way, the socio-economic rights of the litigants were enforced without recourse to the ICESCR.

The lack of financial resources, and staff, and time constraints, has been a major challenge to the Committee – so limiting its effectiveness.<sup>38</sup> Consequently, most of the states that have ratified this Covenant do so without the intention of implementing its provisions, taking into consideration the cumbersome compliance monitoring system which requires state parties to submit reports to the UN on the steps they have taken in observing the Covenant. This report is used to determine the status of the reporting state in complying with the provisions of the Covenant.<sup>39</sup> The weak system has given states the courage to ratify the Covenant – without the intention of fulfilling its provisions. They can easily evade submission of reports or can submit inaccurate reports.

Having considered the inadequacies of the ICESCR, the UN came up with an Optional Protocol on the ICESCR (OP-ICESCR) – to fill the enforcement gap which has adversely affected the value of the Covenant since its adoption.<sup>40</sup> The OP-ICESCR provides a means of communication whereby an individual whose right under the covenant has been infringed, can bring up an action. This could be done by him/herself or by a proxy. In addition to this, the Optional protocol accommodates collective actions. A group of individuals is also allowed to approach the Committee for redress whenever they feel that any of their rights protected by the ICESCR have been breached.<sup>41</sup> However, this is subject to the complainant having exhausted all the available domestic remedies in respect of the issue.<sup>42</sup>

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<sup>36</sup> Sections 26 and 27 of the Constitution of the Republic of South Africa, make provision for socio-economic rights.

<sup>37</sup> *The Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR1169 (CC), *Minister of Health and others v Treatment Action Campaign and Others* (2002) 5 SA 703 (CC) – among others.

<sup>38</sup> Audrey R. Chapman “Monitoring women’s right to health under the International Covenant on Economic, Social and Cultural Rights” (1995) 44 *American University Law Review* 1157-1158.

<sup>39</sup> Chapman, note 38 (above) 1157-1158.

<sup>40</sup> The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the General Assembly on 10 December 2008 by Resolution A/RES/63/117, was opened for signature on 24 September 2009, and entered into force on 5 May 2013.

<sup>41</sup> Article 2 OP-ICESCR.

<sup>42</sup> Article 3 OP-ICESCR.

Furthermore, the OP-ICESCR allows inter-state communication whereby a state party can lay a complaint before the Committee on the non-fulfillment of an ICESCR obligation by another state.<sup>43</sup> This will help to ensure the enjoyment of the rights granted under the Convention. A country that makes efforts to ensure that its citizens enjoy these rights, will be eager to lay a complaint against a neighbouring country that is making little or no effort – to ensure that the citizens of the other country do not migrate to it in search of such rights – thereby limiting their realisation. However, in spite of this envisaged advantages of inter-state communication, states are unwilling to subscribe to this procedure as the process could be politicised and lead to rivalries among states.<sup>44</sup>

The OP-ICESCR, an instrument adopted to make the socio-economic rights contained in the ICESCR enforceable, is an Optional Protocol. In other words, even if a country is a party to the ICESCR, it is not compelled to ratify or accede to the Optional Protocol. It goes without saying that if a country chooses not to ratify the Optional Protocol, the enforceability of the socio-economic rights of the citizens of such a country is not guaranteed. Given this fact, even with the Optional Protocol, the universality of these rights is still in doubt. South Africa signed the ICESCR on 3 October 1993 and ratified the treaty on 12 January 2015. Even though South Africa delayed ratification of the treaty, some of its socio-economic rights are already included in its Bill of Rights. While Nigeria acceded to the treaty on 29 July 1993, the country has done little or nothing in relation to its provisions. The attitudes adopted by these two countries in relation to the ICESCR and other international treaties on the protection of the reproductive health rights of women, will be examined in more detail later in this chapter.

### **3.2.3 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979**

This is often referred to as the Women's Convention or the International Bill of Women's Rights. It is an instrument that marks a turnaround in the history of international human rights – where more value was attached to women's health and rights by recognising the various rights that are directly or indirectly connected to such rights. Prior to this Convention, the focus was on general human rights. As the world progressed and developed, there was a need to recognise the

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<sup>43</sup> Article 10 OP- ICESCR.

<sup>44</sup> T. Buck *International Child Law*. 3rd Ed. (2014) 117.

fundamental physiological differences between men and women. By virtue of their unique nature, women have special needs which were not met by the various international treaties adopted before the CEDAW.

Due to its patriarchal nature, much of traditional African culture reflects discrimination against women. The various international conventions and treaties preceding this Convention did not consider practices that devalue women. While human rights treaties aim to attach more value to human life, women still suffered many kinds of discrimination in both the private and public spheres – hence the need for a treaty to address this shortcoming, and to enable women to enjoy their fundamental human rights.

As the first human rights treaty that addresses discrimination against women, the CEDAW comprises 30 articles.<sup>45</sup> Article 1 defines the term “discrimination against women” as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.

This definition is comprehensive and covers a wide range of ways in which a woman can be discriminated against. According to the article, to achieve non-discrimination, men and women must be seen as equal. Their biological differences should not be used to prevent women from enjoying the various human rights that men ordinarily enjoy. The Article further disapproves of discrimination even if it was not purposeful.<sup>46</sup> In addition, it recognises that discrimination can occur in different spheres: private or public. The Article does not consider marital status as a precondition for the enjoyment of the rights enshrined in the Convention. It affirms that equality does not have any correlation with a woman’s personal relationships with men.<sup>47</sup>

Article 2 of the Convention enjoins state parties to condemn discrimination against women in all its forms – and to make every effort to promulgate policies that eliminate such discrimination. This wide-ranging provision outlines the various steps that state parties must take to eliminate

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<sup>45</sup> Adopted and opened for signature, ratification and accession by the General Assembly Resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981. As at 17 October 2014, it had 88 signatories and 188 parties.

<sup>46</sup> Carmel Shavel “Rights to sexual and reproductive health: The ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women” (2000) 4(2) *Health and Human Rights* 46-47.

<sup>47</sup> *Idem* 47.

discrimination against women. They should include the principle of equality in their constitutions and ensure that it is achieved by passing appropriate laws to sanction any act of discrimination against women. States are also enjoined to make an effort to achieve practical realisation of the principle of equality.<sup>48</sup> The state must adopt legislative and other measures, including sanctions, to prohibit discrimination against women.<sup>49</sup> To further ensure the total eradication of discrimination against women, states must also make an effort to ensure the legal protection of women's rights, and that these rights are effectively protected through the establishment of national tribunals and other public institutions.<sup>50</sup>

The Article further enjoins state parties to abstain from any act that could amount to discrimination against women, and to ensure that all public authorities and institutions comply with this obligation.<sup>51</sup> Acknowledging that the issue of discrimination goes beyond government action or inaction, the Article obliges states to ensure that private individuals, institutions or enterprises, do not discriminate against women.<sup>52</sup> In order to adapt the new Convention into various national laws, the Article requires that states pass legislation to either modify or abolish existing state laws, regulations, customs and practices that discriminate against women.<sup>53</sup> Furthermore, states are enjoined to repeal any penal law that is already in place, and which discriminates against women.<sup>54</sup>

Article 3 is relevant to the issue of the reproductive health rights of women, because reproductive autonomy requires the ability and capacity to make reproductive decisions. This Article requires state parties to take steps, including the promulgation of legislation, to ensure the full development and advancement of women. According to the Article, this will enable women to enjoy their fundamental rights – including reproductive autonomy – on an equal basis with men. Article 5 focuses mainly on relationships within family. It advocates the modification of social and cultural expectations of how men and women should conduct themselves. This opens the

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<sup>48</sup> Article 2(a) CEDAW.

<sup>49</sup> Article 2(b).

<sup>50</sup> Article 2(c).

<sup>51</sup> Article 2(d).

<sup>52</sup> Article 2(e) CEDAW.

<sup>53</sup> Article 2(f).

<sup>54</sup> Article 2 (g).

door to abolish customary and other practices that assign inferiority or superiority according to gender – or which promote stereotyped roles for men and women.<sup>55</sup> The Article also supports family education. It notes that maternity should be regarded as a social function and that rearing children should not be stereotyped as solely a woman’s duty.<sup>56</sup>

If women are to fully enjoy their fundamental rights, they must participate in decision-making. This will enable women to agitate for their special needs, which men may not consider necessary. Article 7 of the Convention enjoins state parties to enable women to vote and be voted for in all elections to all publicly elected bodies, to participate in the formulation and implementation of policies, to hold public office, and to perform public functions at all levels of government. Women should also participate in NGOs and associations concerned with the public and political life of the country,<sup>57</sup> represent their government at international level, and participate in the work of international organisations.<sup>58</sup> This is a form of empowerment that will, in turn, enhance women’s reproductive autonomy – as they will be exposed to international trends in this regard, that could be incorporated into their country’s national laws.

Turning to the promotion of equality between men and women, Article 10 of the Convention focuses on equal rights in education – with the objective of reducing the drop-out rate among female students. The Article also obliges states to organise programmes for girls who drop out prematurely.<sup>59</sup> Furthermore, it enjoins state parties to ensure that women have access to specific education, such as information and advice on family planning. According to the Article, this will promote family health and well-being.<sup>60</sup> Education is vital in promoting reproductive autonomy. An individual’s level of knowledge determines their capability and ability to exercise reproductive autonomy.

Article 11 (1) (f) emphasises a woman’s right to protection and safety at work and seeks to ensure that women are protected from anything that could affect their reproductive function. Article 11 (2) highlights a woman’s right to work – regardless of her marital status or whether

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<sup>55</sup> Article 5(a).

<sup>56</sup> Article 5(b).

<sup>57</sup> Article 7(b).

<sup>58</sup> Article 8.

<sup>59</sup> Article 10(f) CEDAW.

<sup>60</sup> Article 10(g).

she is pregnant. Article 12 is fundamental to the reproductive health rights of women. It gives due consideration to the fundamental biological differences between men and women, and forbids discrimination against women in terms of access to health-care. The Article states that there should be equal access to health-care services, including family planning. Article 12(2) focuses on women's reproductive health rights and enjoins state parties to ensure adequate nutrition during pregnancy and lactation and to provide free ante- and post-natal medical care, where necessary.<sup>61</sup>

Article 16 of the Convention deals with a wide range of issues ranging from the right to enter into marriage, to the right to autonomy in the choice of spouse, rights and responsibilities during marriage and its dissolution, guardianship, adoption, ownership and the acquisition of property – among others. Of particular interest is the equal rights of the couple in decisions relating to the number and spacing of their children, and to have access to information, education and the means to enable them to exercise these rights. While the Convention is silent on the age of marriage, Article 16 (2) forbids child marriage.<sup>62</sup>

The Convention focuses on how to combat all forms of discrimination against women. It establishes a committee to monitor the activities of state parties – to determine the progress made in complying with its provisions.<sup>63</sup> However, its contents, especially its implementation clauses, are considered weak, thereby limiting its effectiveness.<sup>64</sup> Article 20 states that the committee should not take more than two weeks to consider reports from states. This time-frame may not be adequate in cases where the committee receives a large number of reports from different countries. This has resulted in backlogs in the consideration of reports, so affecting the work of the committee.<sup>65</sup>

Another inadequacy of the CEDAW is that only state parties are allowed to make reports to the committee. An individual whose rights have been infringed cannot bring an action to enforce such rights. When states submit their reports to the committee on the various steps they have

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<sup>61</sup> Article 12 CEDAW, adopted and opened for signature, ratification and accession by the General Assembly Resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981.

<sup>62</sup> Article 16.

<sup>63</sup> Article 17.

<sup>64</sup> Theodor Meron "Enhancing the effectiveness of the prohibition of discrimination against women" (1990) 84(1) *The American Journal of International Law* 213.

<sup>65</sup> *Idem* 213-214.

taken to combat discrimination, the committee reviews the reports and publishes its concerns, comments, and recommendations. However, these recommendations are not binding on the state party. This system is in fact grossly inadequate in determining a country's level of compliance with the Convention's provisions. Nevertheless, the reports of the state party could be verified by shadow reports to the treaty monitoring committee by NGOs. This can help in highlighting issues not raised by the governments or point out areas where the state party may be misleading the committee from the real situation.<sup>66</sup>

The fact that an individual cannot lodge complaints about the violation of their right to equality has limited the purpose of the Convention – whose main thrust is to improve women's lives by eliminating discrimination. Thus, women's grievances frequently go unheard.<sup>67</sup> However, the CEDAW implementation mechanism has been strengthened with the introduction of the Optional Protocol, which allows an individual who has been discriminated against in line with the provisions of the Convention, to file a petition. This Optional Protocol<sup>68</sup> allows the committee to conduct inquiries in respect of the abuse of a woman's rights. Where necessary, this may include a visit by the committee to the *locus in quo*.<sup>69</sup> Before approaching the committee for the enforcement of her rights, a woman must, however, satisfy a number of conditions.<sup>70</sup> The first is that her petition or complaint must be in writing, and must include her name. Although, not explicitly stated in the Optional Protocol, the petition must also include the name of the country that violated the victim's right. This is because one of the preconditions for entertaining the petition is that the country must not only be a party to the CEDAW, but must also have acceded to the Optional Protocol.<sup>71</sup>

Furthermore, it must be evident that all available domestic remedies have been exhausted – except if the individual can prove that the application of the domestic remedy was unreasonably delayed. In the same vein, the petition will also be entertained where the individual envisages

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<sup>66</sup> *Shadow Reporting to UN Treaty* available at [hrlibrary.umn.edu/iwraw/reports](http://hrlibrary.umn.edu/iwraw/reports).

<sup>67</sup> Kwong-Leung Tang "Internationalizing women's struggle against discrimination: The UN Women's Convention and the Optional Protocol" (2004) 34 *British Journal of Social Work* 1173, 1180.

<sup>68</sup> Adopted by the General Assembly Resolution A/54/4 on 6 October 1999, and opened for signature on 10 December 1999. It entered into force on 22 December 2000.

<sup>69</sup> Article 8 of the CEDAW Optional Protocol (OP).

<sup>70</sup> These conditions are set out in Articles 3 and 4 of the CEDAW – OP.

<sup>71</sup> Article 3 CEDAW – OP.

that the remedy may not produce the desired relief.<sup>72</sup> Moreover, the committee will only admit a communication that has not previously examined and that is not the subject of another international investigation or settlement. The communication must be in line with the provisions of the Convention, and must be founded and adequately substantiated. In the same vein, the communication must not be an abuse of the right to make such an application, and the facts that are brought to bear must not predate the Protocol.<sup>73</sup> Finally, in order to achieve its purpose, the Optional Protocol does not permit reservations or opt-out clauses on the part of ratifying states.<sup>74</sup> This is commendable – as such measures dampen the effectiveness of a treaty.<sup>75</sup>

### **3.2.4 The African Charter on Human and Peoples' Rights (ACHPR) 1981**

The African Charter on Human and Peoples' Rights<sup>76</sup> marked the genesis of the promotion and protection of human rights at the African regional level. The charter has 68 articles that focus on different aspects of human and people's rights. The Charter is unique because its classification of rights departs from the traditional classification of human rights in other treaties, where some rights were regarded as first generation rights and given priority over those that were regarded as second generation rights.<sup>77</sup> The African Charter considers all human rights as being interrelated, essential and universal to all Africans. It does not regard one set of rights as being superior to another.<sup>78</sup>

The Charter not only considers individual human rights, but also recognises human rights in collective terms. This reflects the African culture of interdependence. The political history of the continent – which ranges from imperialism, to colonialism and apartheid – deprived African nations of their collective rights. Despite the UDHR, African nations could not realise their human rights, as apartheid, imperialism and racism violated its principles.<sup>79</sup> In acknowledgement

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<sup>72</sup> Article 4(1).

<sup>73</sup> Article 4(2).

<sup>74</sup> Article 17.

<sup>75</sup> As at 20 October 2014, the Optional Protocol to CEDAW had 80 signatories and 105 parties.

<sup>76</sup> Adopted at Nairobi on 26 June 1981, and entered into force on 21 October 1986, in accordance with Article 63.

<sup>77</sup> Civil and political rights are classified as first generation rights, while economic, social and cultural rights are classified as second generation rights.

<sup>78</sup> Dejo Olowu "The African Charter on Human and Peoples' Rights, its regional system, and the role of civil society in first three decades: Calibrating the "paper tiger"" (2013) *Obiter* 29, 35.

<sup>79</sup> Bahame Tom Nyanduga "Perspectives on the African Commission on Human and Peoples' Rights on the occasion of the 20<sup>th</sup> anniversary of entry into force of the African Charter on Human and Peoples' Rights" (2006) 6 *African Journal on Human and Peoples' Rights* 255, 256.

of African nations' past agonies, articles 19-24 of the Charter capture rights which enhance Africans' quality of life. These include the right to self-determination, the right to exercise autonomy over wealth and natural resources, and the right to economic, social and cultural development, among others.

The African Charter recognises that for there to be a right, there must be a corresponding duty on the part of citizens. Articles 27 to 29 enumerate the various duties an individual owes to different groups – ranging from the family to society – among others. The Charter makes no provision for derogation clauses. Any nation that subscribes to it must comply with all its provisions, without any variation.<sup>80</sup> The unique nature of the Charter's provisions has been attributed to the communal way of life in many African societies. African people believe in interdependence.<sup>81</sup>

The African Charter established the African Commission on Human and People's Rights, in 1987, to ensure its effectiveness. The Commission monitors and promotes the implementation of the Charter – together with any other human rights instruments that may fall under its jurisdiction. The Commission discharges its duty by considering states' periodic reports, individual complaints, and inter-state complaints, and also engages in promotional activities.<sup>82</sup> However, the recommendations of the Commission are not binding on an errant state.

Despite the uniqueness of the Charter in promoting and protecting human rights, it has some inadequacies which have been responsible for the various degrading names ascribed to it – such as “paper tiger” and “toothless bull dog”, among others. One such inadequacy is the “claw back clauses” which allow a state to limit the application of the Charter's provisions to the extent permitted by domestic law. This means that the provisions will not be uniformly applied in all states. It also waters down the effectiveness of the provisions – because it does not allow states to make any extra effort in terms of promoting and protecting their citizens' human rights. This clause may result in the *status quo* of the state parties remaining unchanged.

In addition, the decisions of the Commission are not enforceable. The Charter does not provide for any mechanism in this regard. When a human rights issue is brought before the Commission,

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<sup>80</sup> Nyanduga, note 79 (above).

<sup>81</sup> *Ibid.*

<sup>82</sup> Articles 45 to 59 of the African Charter.

its actions are limited to seeking an amicable solution – in line with human and people’s rights. If this is not possible, the matter is forwarded to the Assembly of Heads of State and Government for prompt action.<sup>83</sup> This weakness is the reason for the various demeaning names given to the Charter. Of what purpose is the Charter if it cannot sanction a state that violates its principles?

Another inadequacy of the Charter is its financial structure. Article 41 limits funding to the Commission to staff and services. No financial provision is made for special mechanisms. This weak financial structure will affect the Commission’s efficiency as well as its independence, because it has to rely on donors to discharge some of its duties. Such donors could easily influence its decisions.<sup>84</sup>

The focus of the Charter is on promoting general rights. Consequently, its provision for women’s rights is grossly inadequate. Although the Charter recognises the rights of women in article 18 (3), this is ambiguous as it does not define what constitutes discrimination against women in this context- and does not identify international declarations and conventions that uphold the rights of women which the Charter intends to protect.<sup>85</sup> Women’s rights can also be inferred from the provisions of Articles 2 and 3 of the Charter, which guarantee unrestricted enjoyment of the rights and freedom recognised and guaranteed in the Charter, as well as equality before the law. Nevertheless, African women still suffer various injustices and are unable to realise their rights.

The Charter does not provide for the right to consent to marriage or equality in marriage. It also recognises cultural rights – including an individual’s right to participate in the cultural life of his/her community and a state’s right to promote the traditional values recognised by the community.<sup>86</sup> This aims “to preserve and strengthen positive African cultural values in relations with other members of the society ...”<sup>87</sup> However; it is highly likely that this might be interpreted in a way that will impinge on the rights of women.<sup>88</sup>

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<sup>83</sup> Article 52.

<sup>84</sup> Nyanduga, note 79 (above) 261.

<sup>85</sup> The Article states: “the state shall ensure the elimination of all discrimination against women and also ensure the protection of the rights of the women ... as stipulated in international declarations and conventions”.

<sup>86</sup> Article 17(2)(3).

<sup>87</sup> Fitnat Naa-Adjeley Adjetey “Reclaiming the african woman’s individuality: The struggle between women’s reproductive autonomy and African society and culture” (1995) 44(4) *The American University Law Review* 1351-1381.

<sup>88</sup> *Ibid.*

Notwithstanding, the inadequacies of the Charter in its provision for women's right, the African Commission has played a tremendous role in the protection of women's rights. This is evident in the activity and sessional reports of the commission.<sup>89</sup> At its recent Session, the Commission organised and facilitated panel on the importance of Sexual and Reproductive Rights, panel on the role of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in Advancing Equality and Human Rights for All. The Commission also considered and adopted some observations and amendments on the study on child marriage.<sup>90</sup>

In recognition of the need to establish a court to adjudicate human rights matters in Africa, the African Court on Human and Peoples' Rights (African Court) was established in 1998. The African Court is an attempt to ensure that the provisions of the Charter are enforced. The Court is expected to adjudicate on issues relating to the violation of human and people's rights. State parties are required to comply with the Court's decisions, and any state that fails to do so will be sanctioned.<sup>91</sup>

To further ensure that the Commission fulfills its mandate of advancing women's rights in the region, the commission appointed a Special Rapporteur on the Rights of Women in Africa. The theme of the Rapporteur ranges from promotion and protection of the rights of women in Africa, to assist African governments in the development and implementation of their policies of promotion and protection of the rights of women in Africa, to undertake promotional and fact finding missions in African Countries Member of the African Union, among others. The special Rapporteur<sup>92</sup> has held about ten missions since its inception to intimate themselves on the status of women's rights in the various state parties.

As the world progressed and the inadequacies of the Charter came to light, efforts were made to address its weaknesses. Several protocols were put in place to enhance its scope, and, by implication, redeem the name of the Charter. The first of these efforts was the African Charter on the Rights and Welfare of the Child – otherwise known as the African Children's Rights

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<sup>89</sup> Available at [www.achpr.org](http://www.achpr.org).

<sup>90</sup> Final Communiqué of the 58<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Right, available at [www.achpr.org](http://www.achpr.org) accessed on 27<sup>th</sup> January 2017.

<sup>91</sup> Article 30, AU Constitutive Act.

<sup>92</sup> Available at [www.achpr.org/mechanism/rights-of-women](http://www.achpr.org/mechanism/rights-of-women) accessed on 27<sup>th</sup> January, 2017.

Charter.<sup>93</sup> Its 45 articles focus on the different rights of a child – ranging from non-discrimination, to survival and development, and name and nationality, among others. There is also a Women’s Rights Protocol.<sup>94</sup> which seeks to improve women’s quality of life. This Protocol emphasises gender equality and the total elimination of discrimination against women. It considers a number of practices that should be abolished in order for women to fully enjoy their fundamental human rights. The Protocol seeks the elimination of discrimination against women,<sup>95</sup> protection from violence against women<sup>96</sup> and the elimination of harmful practices.<sup>97</sup> It sets 18 years as the minimum age for marriage,<sup>98</sup> and provides for health and reproductive rights,<sup>99</sup> among other rights. All these developments culminated in changing the appellation of the Charter from a “toothless bull dog” to a “lion”.<sup>100</sup>

### **3.2.5 The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2005**

This Protocol came into force in 2005 – amidst complaints about the inadequacies of the African Charter’s provisions on the rights of women. The adoption of this Protocol boosted Africa’s image in terms of the promotion and protection of human rights. The Protocol departs from the norms of African patriarchal culture by affirming reproductive choice and autonomy for women. This is a milestone in the protection of human rights in Africa, as it is the first human rights instrument where the reproductive rights of women are expressly spelt out. Some of the preceding instruments only guaranteed the right to family planning and women’s right to health.<sup>101</sup>

Prior to the Protocol, the right to reproductive autonomy was inferred from the right to dignity, and the right to liberty – among other rights.<sup>102</sup> Article 14 of the Protocol provides for

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<sup>93</sup> Adopted in 1990, and entered into force on 29 November 1999.

<sup>94</sup> Adopted in 2003, and entered into force in 2005.

<sup>95</sup> Article 2.

<sup>96</sup> Articles 4 and 11(3).

<sup>97</sup> Article 5.

<sup>98</sup> Article 6.

<sup>99</sup> Article 14.

<sup>100</sup> Frans Viljoen “From cat into a lion? An overview of the progress and challenges of the African human right system at the Africa’s Commission’s 25-year mark” (2013) 17 *Law, Democracy and Development* 298-316.

<sup>101</sup> ICESCR and CEDAW, among others.

<sup>102</sup> Article 14.

reproductive autonomy and reproductive health. This enables women to control their fertility<sup>103</sup> and to decide on the number and spacing of children,<sup>104</sup> using the contraceptive method of their choice.<sup>105</sup> Considering that a sexual relationship precedes reproduction, the article gives due consideration to women's sexual rights, the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS, and the right to family-planning education.<sup>106</sup>

To further ensure the realisation of women's reproductive health rights, the second part of Article 14 focuses on reproductive health services which the state is expected to provide to assist women in exercising their right of autonomy in reproductive matters. Exercising and realising such autonomy can be impeded by several negative factors in the private or public sphere. Apart from setting out women's rights to make reproductive choices – the Protocol addresses impediments in realising this right. One such factor is violence against women. The Protocol defines violence against women as:

all acts perpetrated against women which cause or could cause them physical, sexual psychological, and economic harm, including the threat to take such acts; to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.<sup>107</sup>

The Protocol thus considers different forms of violence – and offers protection to women from all these forms of violence.<sup>108</sup> It is unique in that it does not overlook any form of violence; it considers even the least serious form of violence, verbal assault. In most cases, these infractions on the dignity of a woman occur within the confines of the home. The Protocol advances women's rights by shifting any violence that occurs within the home – from the realm of a private or family matter to the realm of infringement of the rights of the victim, thereby making such matter public.<sup>109</sup> Furthermore, due to its proactive nature, it offers protection to women during situations of armed conflict or war.

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<sup>103</sup> Article 14 1 (a).

<sup>104</sup> Article 14 1 (b).

<sup>105</sup> Article 14 1 (c).

<sup>106</sup> Article 14 1 (f).

<sup>107</sup> Article 1(j).

<sup>108</sup> Articles 3(4), and 4 (2) (a).

<sup>109</sup> Center for Reproductive Rights, "The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights". Available at [www.reproductiverights.org](http://www.reproductiverights.org) 9.

The Protocol defines the type of traditional practices that can impede a woman's right to autonomy. Any cultural practice that impedes the fundamental human rights of a woman is harmful<sup>110</sup> and state parties have an obligation to ensure the elimination of such practices by following the various steps highlighted in the Protocol.<sup>111</sup> The Protocol thus fills the lacuna created by the African Charter which supports the promotion of all cultural values – but fails to distinguish between a cultural practice that has a positive influence on women and one that has a negative impact. This has greatly affected the views of many on cultural practices, as they relate to women's rights. This is because, prior to the Protocol, cultural practices took precedence when there was conflict between the rights of a woman and a particular culture.<sup>112</sup>

Given that in some African cultures, a girl child can be betrothed to a man at birth, the Protocol seeks to avert forced marriages by guaranteeing a woman's right to consent to marriage. It thus moves away from cultural practices to affirm a women's fundamental right to consent to marriage before entering such a union. The Protocol also prohibits child marriage by setting the age of marriage at 18 years, in order to ensure that a girl child is sufficiently mature to make such a decision. Furthermore, given the nature of the African cultural practices that infringe on the rights of widows, unlike several preceding international instruments, the Protocol sets out the various rights of a widow – particularly her right to re-marry the person of her choice. This is also a clear departure from African cultural practices, as in some cultures a woman is expected to marry a family member of her deceased husband.<sup>113</sup> The Protocol also includes several other provisions that can foster marital relationships and promote reproductive autonomy.<sup>114</sup>

While the Protocol's provisions are undoubtedly outstanding in advancing the reproductive health rights of women – enforcement remains problematic. As at October, 2015 only 37 countries have ratified the Protocol, only few countries have taken steps to domesticate the Protocol. Some of the countries domesticated fully the provisions of the Protocol while some countries have only implemented a few provisions of the Protocol. African countries that have

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<sup>110</sup> Article 1(g).

<sup>111</sup> Articles 2 (2) and 5.

<sup>112</sup> "The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights" 11.

<sup>113</sup> Article 20.

<sup>114</sup> Articles 6, 7.

taken steps to domesticate the Women's Protocol are; Kenya, Zimbabwe, Namibia, Benin, Burkina Faso, Rwanda, Sierra Leone, Mozambique, Malawi, Guinea Bissau, Angola, Liberia, South Africa, Gambia, Ghana, Democratic Republic of Congo, and Senegal.<sup>115</sup>

State parties to the Protocol, as with other international human rights treaties, are expected to furnish a report on the legislative and other measures they have taken in realising the protection of the rights of women, as provided for in the treaty. However, the reporting mechanism of the Protocol is attached to the African Charter.<sup>116</sup> The guidelines for the reporting system are unfortunately too lengthy, ambiguous and vague.<sup>117</sup> Nine states are up to date with their reports. They are Republics of Algeria, Burkina Faso, Djibouti, Ethiopia, Kenya, Namibia, Niger, Nigeria, and South Africa.<sup>118</sup>

### **3.2.6 International declarations/ plan of actions and other instruments**

Apart from the various international treaties that protect the reproductive health rights of women, there are some international declarations/ plan of actions – although not legally binding – which have assisted in facilitating the treaties. International conferences were convened to address the various abuses that women experience in both the private and public spheres, despite the various human rights instruments that protect fundamental rights.

The first of these is the 1993 Vienna Declaration and Programme of Action. The Declaration extends the scope of international human rights to accommodate the violation of gender rights, and particularly violence against women.<sup>119</sup> It also makes specific reference to women's right to health, equal access to education at all levels, and the right to development. However, despite the fact that the Vienna Declaration and Programme of Action addressed the issue of the integration

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<sup>115</sup> L. Asuagbor, "Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa" 60<sup>th</sup> Meeting- Commission on the Status of Women, New York, 18<sup>th</sup> March 2016, available at [www.achpr.org](http://www.achpr.org) accessed on 27<sup>th</sup> January, 2017.

<sup>116</sup> Article 62 of the African Charter.

<sup>117</sup> Japhet Biegon "Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of Pretoria Gender Expert Meeting, 6-7 August 2009" (2009) 9 *African Human* 615, 621.

<sup>118</sup> L. Asuagbor, note 115( above) .

<sup>119</sup> Donna J. Sullivan "Women's human rights and the 1993 World Conference on Human Rights" (1994) 88(1) *The American Journal of International Law* 152.

of women's rights into human rights, there was no specific provision on women's reproductive health rights.

The International Conference on Population and Development (ICPD) Programme of Action<sup>120</sup> addressed the importance of women's reproductive health rights to development. Long before this Programme of Action, there was international consensus that demographic-centred policies were required to promote development. ICPD moved away from conventional demographic policies, by extending the concept of family planning from mere population control to sexual and reproductive health rights.<sup>121</sup> The old approach regarded women's reproductive capacity as a tool for population control, which in effect paved the way for development. In contrast, the new approach considers women's reproductive autonomy as a means to achieve sustainable development.<sup>122</sup>

Of particular importance to this study are the provisions of Chapters II and VII of the ICPD Programme of Action. Chapter II focuses on the various principles that establish a clear balance between the recognition of individual human rights, and a nation's right to development. The programme recognises 15 principles that are important in the promotion of women's rights – including gender equality and women's empowerment, and establishing the eradication of sex discrimination as the primary objective of the international community in relation to population and development policies and programmes. The focus of Chapter VII of the Programme of Action is reproductive rights and reproductive health. It defines what comprises reproductive health, reproductive rights, family planning, STDs and HIV prevention, human sexuality and gender relations, and the sexual and reproductive rights of adolescents.

The Beijing Declaration and Platform for Action<sup>123</sup> dealt with various aspects of women's lives in relation to the realisation of their human rights. Section C of the Declaration centres on women and health. It focuses on women's right to enjoy the highest attainable standard of health as vital to their optimal participation in private and social life. The Declaration considers

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<sup>120</sup> Cairo, 1994.

<sup>121</sup> Serra Sippel "ICPD beyond 2014: Moving beyond missed opportunities and compromises in the fulfillment of sexual and reproductive health and rights" (2014) *Global Public Health* 1, 3.

<sup>122</sup> Shalev, note 46 (above) 40.

<sup>123</sup> Held in Beijing from 4 to 15 September 1995.

inequality as an obstacle to the attainment of this right.<sup>124</sup> Poverty and economic dependence, violence, negative attitudes towards women and girls, and women's limited power over their sexual and reproductive lives, are some of the factors that impede the realisation of women's health rights.<sup>125</sup> The Beijing Programme of Action made tremendous progress in the reproductive health rights of women, by amplifying the provisions of the ICPD in Article 97 on women's autonomy. It states that:

... neglect of women's reproductive rights severely limits their opportunities in public and private life, including opportunities for education and economic and political empowerment. The ability of women to control their own fertility forms an important basis for the enjoyment of other rights. Shared responsibility between men and women in matters related to sexual and reproductive behaviour is also essential to improving women's health.

These conventions influenced subsequent treaties on women's reproductive health rights.<sup>126</sup> The right to health recognised by Article 12 of the ICESCR, has been extended to include the right to sexual and reproductive freedom.<sup>127</sup> Similarly, the scope of the CEDAW was broadened to include the new concept of the reproductive health rights of women, as promoted by various international conventions. It states that:

Access to health care including reproductive health is a basic right, and countries are to ensure the removal of all barriers to women's access to health services, including in the area of sexual and reproductive health.<sup>128</sup>

### **3.3 INTERNATIONAL AND REGIONAL TREATIES ON THE PROTECTION OF THE REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN NIGERIA AND SOUTH AFRICA**

Nigeria and South Africa are members of the international community and have signed and ratified some of the international instruments that protect the reproductive health rights of women. Although both countries are democratic states, their attitude to the execution and fulfilment of the various international treaties to which they have both subscribed are poles apart.

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<sup>124</sup> Articles 89 and 90 of the Beijing Declaration and Platform of Action.

<sup>125</sup> Article 92 of the Beijing Declaration and Platform of Action.

<sup>126</sup> The African Union Protocol on Women's Rights 2005, is an example of an instrument that embodied the reproductive health rights of women in accordance with the various international conventions on women's rights.

<sup>127</sup> General Comment No 14 of the UN Committee on Economic, Social and Cultural Rights (2000).

<sup>128</sup> General Recommendation 24 of the United Nations Committee on the Elimination of Discrimination against Women, 1999.

The duty of a state to implement a treaty is entrenched in the international law principle known as *pacta sunt servanda* (agreement must be kept) – which signifies that a state that agrees to the terms of an international treaty must be willing to observe the provisions of the treaty. Nevertheless, states adopt different approaches in fulfilling their international treaty obligations. A state may make the provisions of a treaty part of her constitution, or make the provisions of a treaty superior to her statutory law. Treaties can also be made equal to statutory law or may not be applicable in the country until they are enacted as a law by the legislature.<sup>129</sup>

The approach adopted by a particular state depends on the way in which it classifies a treaty.<sup>130</sup> Thus, despite the international nature of a treaty, its application in a particular state is subject to the legal provisions of the state. According to Oyebode:

More often than not, it is the constitution of a state that provides the guidelines for treaty implementation either by specifying the location of the treaties within the hierarchy of sources of the domestic law or by establishing the relationship between international law and domestic law.<sup>131</sup>

It goes without saying that Nigeria and South Africa's constitutional provisions will determine the status of an international treaty in their domain.

Nigeria has acceded to a number of international and regional instruments that promote the realisation of the reproductive health rights of women. These include the CEDAW (13 June 1985); the International Covenant on Economic, Social and Cultural Rights (29 July 1993); the Convention on the Rights of the Child (19 April 1991); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005). However, this has not translated to improved reproductive rights for the country's women. This is because, in terms of the Nigerian Constitution, treaties signed by the country do not automatically become part of the law – unless they have been incorporated through domestic legislation.<sup>132</sup> This position was

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<sup>129</sup> J.A. Dada "Human rights under the Nigerian Constitution: Issues and problems" (2012) 2(2) *International Journal of Humanities and Social Science* 33, 39.

<sup>130</sup> A. Oyebo *International law and politics: An African perspective* 1st Ed. (2003) 175.

<sup>131</sup> A.B. Oyebo *Treaty making and treaty implementation in Nigeria: An appraisal*, D.Jur. Dissertation, Osgoode Hall Law School, York University, Toronto, Canada, 1988. 286.

<sup>132</sup> E. Egede "Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria" (2007) 51(2) *Journal of African Law* 249, 268-269.

interpreted by the Supreme Court of Nigeria in *General Sani Abacha v Gani Fawehinmi*.<sup>133</sup> The Supreme Court stated *inter alia* that:

An international treaty to which Nigeria is a signatory does not *ipso facto* become a law enforceable as such in Nigeria. Such a treaty would have the force of law and therefore justiciable only if the same has been enacted into law by the National Assembly...

Thus, for any treaty to be enforceable in Nigeria, it must be enacted as law by the legislative arm of the federal government (the National Assembly).<sup>134</sup> Nigeria operates a federal system of government, comprising the federal government at central level and 36 states.<sup>135</sup> The National Assembly comprises two houses, the House of Representatives and the Senate, and legislates for the Federation – while states’ Houses of Assembly legislate for the states.<sup>136</sup> The Constitution divides powers between the national and states’ Houses of Assembly, in terms of exclusive and concurrent legislative lists.<sup>137</sup> It empowers the National Assembly to legislate on issues on the exclusive and concurrent legislative lists,<sup>138</sup> while the states’ Houses of Assembly are only empowered to legislate on issues on the concurrent list, and other matters that are not on both lists. In terms of the domestication of any treaty to which Nigeria has assented – regardless of the nature of the matter – and whether or not it is on the exclusive legislative list, the National Assembly must enact it as a law for the treaty to be enforceable in the country.<sup>139</sup> This aims to ensure that there is uniformity in the Federation’s foreign policy.<sup>140</sup> States’ Houses of Assembly must participate in the domestication of matters that are not on the exclusive legislative list. The Constitution provides that before a Bill for the domestication of a treaty can be assented to by the president, the majority of Houses of Assembly in the country must have ratified the treaty.<sup>141</sup>

It has been argued that this process of domestication of treaties was inherited by Nigeria from Britain.<sup>142</sup> It follows that assent and signing a treaty does not translate into the enjoyment of the

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<sup>133</sup> (2000) FWLR Pt 4 533 at 585-586.

<sup>134</sup> Section 12(1) of the 1999 Constitution.

<sup>135</sup> Sections 2 and 3.

<sup>136</sup> Section 4.

<sup>137</sup> Section 4 of the 1999 Constitution.

<sup>138</sup> Section 4 (2) (3).

<sup>139</sup> Section 12(2).

<sup>140</sup> Oyeboode, note 131 (above) 129.

<sup>141</sup> Section 12(3).

<sup>142</sup> Egede, note 132(above).

rights recognised in such treaties. This requires commitment on the part of the government to follow due process – so that such treaties do not amount to a toothless bull dog. Domestication of an international treaty in Nigeria by the National Assembly may not make much difference if such treaty deals with an issue which is on the concurrent legislative list. This is because, when a treaty of this nature is domesticated by the National Assembly, a state’s House of Assembly must also enact it as a law – in order for it to apply in that particular state. An example is the Child Rights Convention, which was domesticated by the National Assembly and adopted by some states. This is discussed more extensively in a subsequent chapter. It goes without saying, that in Nigeria, there may be disparity in the enjoyment of the various reproductive health rights treaties, even if they are domesticated by the federal government of Nigeria. This is because some state governments may decide not to adopt the domesticated treaty.

Furthermore, when a treaty is domesticated in Nigeria, it does not enjoy primacy over the Constitution. The Nigerian Constitution clearly states that: “The Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria”<sup>143</sup> It goes further by stating that “If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void”. Therefore, notwithstanding the content of an international treaty, its status is equal to the status of domestic legislation in Nigeria. This was clarified by the Supreme Court of Nigeria in *General Sani Abacha v Gani Fawehinmi*.<sup>144</sup> The Court elucidated the status of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act<sup>145</sup> by declaring that:

It is a statute with International flavor. Being so ... if there is a conflict between it and another statute its provisions will prevail over those of other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation ... The Charter possesses “a greater vigour and strength” than any other domestic statute but that is not to say that the Charter is superior to the constitution.

This suggests that some of the provisions of the African Charter may not be enforceable in Nigeria. Having been domesticated, the Charter ought to address the Constitution’s inadequacies

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<sup>143</sup> Section 1(1).

<sup>144</sup> Note 133 (above).

<sup>145</sup> Cap 10 LFN 1990 (Now Cap A9 LFN 2004).

in terms of socio-economic and cultural rights.<sup>146</sup> The African Charter recognises the socio-economic and cultural rights categorised in Chapter two of the Constitution as part of the rights that are not enforceable in the courts by virtue of section 6(6) of the 1999 Constitution. However, these rights are not enforceable in Nigeria, since the Charter's provisions are inconsistent with the provisions of the Constitution.<sup>147</sup> This is the reason for the dearth of cases on the enforcement of the reproductive health rights of women in Nigeria – despite their daily violation at public and private levels.

The realisation of Nigerian women's socio-economic rights, and, more importantly, their reproductive health rights, is thus in effect, a mirage – despite the country having acceded to the various human rights instruments that recognise these rights. Reflecting on the influence of the Constitution in international treaties, one of the Justices of the Supreme Court in *General Sani Abacha v Gani Fawehinmi* stated that:

It is therefore manifest that no matter how beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into law by the National Assembly.<sup>148</sup>

South Africa has also signed and ratified a number of international treaties that promote women's reproductive health rights.<sup>149</sup> The South African Constitution, mandates Parliament to promote and protect human rights.<sup>150</sup> Section 42 notes that the South African Parliament consists of the National Assembly and the National Council of Provinces, and sets out the duties of each body. As in Nigeria, the executive signs and ratifies a treaty – but such treaty will not have the force of law in South Africa unless it has been approved and enacted into law by national legislation.<sup>151</sup> Once Parliament has resolved to approve an international treaty, it must be incorporated into domestic law.<sup>152</sup> In *Glenister v President of the Republic of South Africa and*

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<sup>146</sup> Egede, note 132 (above).

<sup>147</sup> Section 1(1) of the 1999 Constitution.

<sup>148</sup> *Abacha's case*, note per Ejiwumi JSC, 356-357.

<sup>149</sup> The International Covenant on Economic, Social and Cultural Rights, 1966, the Convention on the Elimination of all Forms of Discrimination against Women, and The African Charter on Human and Peoples' Rights – among others.

<sup>150</sup> Section 1(a) of the 1996 Constitution of the Republic of South Africa.

<sup>151</sup> See, generally, Section 231 of the 1996 Constitution on International Agreements.

<sup>152</sup> L. Chenwi "Using international human rights law to promote constitutional rights: The (potential) role of the South African parliament" (2011) 15 *Law, Democracy & Development* 1, 10.

*Others* the Constitutional Court highlighted the various ways in which an international treaty can be domesticated in South Africa, by stating that:

- (a) the provisions of the agreement may be embodied in the text of an Act;
- (b) the agreement may be included as a schedule to a statute; and
- (c) the enabling legislation may authorize the executive to bring the agreement into effect as domestic law by way of a proclamation or notice in the Government Gazette.

Upon incorporation, an international treaty is equal to any other domestic law, and is not superior to it unless it is explicitly elevated by Parliament based on its general application or in the event of any conflict between the treaty and domestic legislation.<sup>153</sup>

From the forgoing discussion, it is evident that the procedures for the domestication of international treaties in Nigeria and South Africa are similar. However, South Africa has demonstrated the political will to incorporate the provisions of most of the treaties on the reproductive health rights of women. The most recent development in South Africa is the ratification of the ICESCR. South Africa has been able to promote the reproductive health rights in various international instruments, because her Constitution accommodates reproductive autonomy. Notwithstanding this, South Africa still expressed some reservations on Article 6(h) of the African women's protocol which confers equality between the man and the wife where nationality of their children is concerned. Nevertheless, the country has adopted the various provisions of the international treaties that promote and protect women's reproductive health rights.

One could argue that one of the motivations for the domestication of international treaties in South Africa is that women are considerably represented in the parliament – unlike in Nigeria. Women have constituted about 40% of the members of parliament in South Africa, whereas in Nigeria women representation is as low as 7%.<sup>154</sup> If there is gender parity in the parliament, women will be able to agitate for the domestication of treaties on women's rights. For example, the Nigerian senate recently threw out a gender equality bill which could have afforded Nigeria the opportunity to domesticate some of the provisions of the United Nations Convention on the Elimination of all Forms of Discrimination against Women and the Protocol to the African

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<sup>153</sup> Chenwi, note 152(above).

<sup>154</sup> Available at: <http://beta.data.worldbank.org>.

Charter on Human and People's Rights on the Rights of Women in Africa. The Bill might have been able to pass, if there had been gender parity in the senate.

In voting for legislators, men vote against women, on the grounds that women are inferior and therefore cannot legislate on their behalf. Women are discriminated against by excluding them from politics through traditional methods based on male-centered interpretation of culture.<sup>155</sup> In some situations, husbands find a way of stopping their wife from participating, due to the belief that a woman's job is to take care of the home and that participating in such activities will hinder her from performing her role as a mother and wife. This is as a result of wrong perception about in politics they are seen and treated as (prostitutes/ wayward) of easy virtues, cultural rebellions among others.<sup>156</sup> Women's lack of participation in legislative processes has a great impact on the enforceability of their reproductive health rights.<sup>157</sup> Men's efforts, if any, to promote these rights will inevitably not be sufficient, because they are not the direct beneficiaries of such rights.

### 3.4 CHAPTER CONCLUSION

This chapter examined the various international and regional instruments for the protection of women's reproductive health rights. Recognition and promotion of women's rights – particularly reproductive health rights – at both international and regional levels have not had a significant impact on the reproductive lives of women. This is because most of the instruments protecting these rights are ineffective. As with the human rights instruments, compliance is through a reporting system which requires states to show the steps and measures taken to comply with a particular instrument. In most cases, states are not transparent in their reports, and the reports lack clarity and precision. This is because a state will not submit a report that paints it in a bad light.<sup>158</sup> In the same vein, some states that are signatories to some of the international human rights instruments, do not submit reports to the treaty monitoring committee. This will obviously

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<sup>155</sup> U.P Nwabunkeonye "Challenges to Women Active Participation in Politics in Nigeria" (2014) 2(7) *Sociology and Anthropology* 284, 287.

<sup>156</sup> *Ibid.*

<sup>157</sup> An example is Gender and Equal opportunity Bill which was presented at the Nigerian Senate for second reading on 15<sup>th</sup> March, 2016. The bill was turned down. One could argue that one of the reasons why the bill could not be passed is because women representation at the senate is extremely low. Only seven out of the 109 senators are women.

<sup>158</sup> Biegon, note 117 (above) 618.

affect the assessment of a particular state's level of compliance as will be analysed in the following chapters with particular reference to Nigeria and South Africa, the focus of the states for this investigation.

The international community is not putting sufficient pressure on states to comply with the provisions of the treaties to which they are party. As noted earlier, the lack of commitment to monitoring compliance with the various treaties is due to several factors. These include financial issues. Given that human rights treaties are not effectively monitored, there is little incentive for ratifying countries to make the costly policy changes that would be necessary to meet their treaty obligations.<sup>159</sup> The inaction of monitoring committees has negatively affected state parties' attitudes to such treaties. Furthermore, it has been argued that enforcing socio-economic rights is costly. Unlike civil and political rights, these types of rights require governments to put facilities in place to ensure that women enjoy and realise their rights. Most of the states that are signatories to these instruments, are not willing to domesticate them. While it is easy for them to accede to these instruments, they lack the political will to put them into effect in their own countries. As noted earlier, this excuse is not tenable in all cases, because some of the rights that are being breached do not require financial commitment. An example is the various rights that are breached in the private sphere – such as domestic violence and marital rape, among others - which may directly or indirectly impact a woman's right to autonomy.

The laws of some countries do not promote the enforcement of international instruments in their domestic courts, unless such instruments are domesticated and form part of their law. South Africa and Nigeria fall into this category. However, various provisions in South Africa's Constitution demonstrate her will to protect the reproductive health rights of women. Apart from protecting the reproductive health rights of individuals, the Constitution also promotes gender equality. One could argue that South African constitutional framework makes it relatively easy to domesticate the various international treaties that promote these rights. However, Nigeria is an example of a country that lacks the political will to domesticate international instruments.<sup>160</sup> This is because her Constitution does not accommodate the protection of these rights. As noted

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<sup>159</sup> Oona A. Hathaway "Do human rights treaties make a difference? (2002) 111(8) *The Yale Law Journal* 1935, 2020.

<sup>160</sup> While Nigeria acceded to the CEDAW and the African Protocol on the Rights of Women, these treaties are yet to be domesticated in this country.

in this chapter – its provisions stand in the way of the domestication of the various instruments that promote these rights.

Most human rights instruments do not allow individuals to directly prosecute infringement of their rights. For instance, Article 5(1) of the African Protocol gives automatic access to only the African Commission, state parties, and African intergovernmental organisations. An individual is only granted access to the court when the state concerned gives permission by accepting the competence of the court at the time of acceding to or ratifying the Protocol or at any time thereafter. It goes without saying that an individual whose rights have been infringed and who is unable to get justice in a domestic court cannot access the African Court on Human and Peoples' Rights to adjudicate such matter, if her country has not accepted the jurisdiction of the court in such cases. This is surprising, as in most cases of a breach of human rights, it is the rights of individuals that are breached.

In the same vein, there is inadequate education on the various reproductive health rights of women. Ignorance has caused some women to either overlook infringement of their rights or they are unable to recognise a breach of their rights. This will lead to continual infringement of the rights of such an individual. Furthermore, even when both men and women are aware of these rights – due to various African cultural beliefs, such rights are easily dismissed and some regard them as a “toothless bull dog”, given that they cannot stand the test of time. These and many other factors discussed in later chapters have greatly affected the realisation of the reproductive health rights of women – despite the various international instruments that protect these rights as will be illustrated in the investigation undertaken in Nigeria and South Africa as discussed in the next two chapters.

## CHAPTER FOUR

### REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN NIGERIA: ANALYSIS OF THE LEGAL AND CULTURAL PERSPECTIVES

#### 4.1 INTRODUCTION

Nigeria is one of the largest countries in Africa - with diverse cultures and more than 250 ethnic groups.<sup>1</sup> Each ethnic group has its own cultural practices and values. While the cultural practices of the various ethnic groups differ, in most cases they limit women in realising their reproductive health rights – reflecting the patriarchal nature of most of the traditional African societies. Patriarchal culture ascribes different roles to men and women.<sup>2</sup> Women are regarded as being subservient to men and play a less significant role in society. Indeed, some cultural beliefs are anchored on the fact that a woman cannot assume leadership positions; such rights are subsumed in their husbands.<sup>3</sup> Consequently, in patriarchal societies, men dominate political activities, and this will invariably have an adverse effect on their disposition, in terms of the promotion of women’s rights.

Nigeria acceded to the various reproductive health rights of women that are recognised by the international community, even though the issue of reproductive health rights is alien to most of the prevailing cultural practices. Despite her accession to all the international and regional instruments promoting the reproductive autonomy of women, women in Nigeria are yet to realise their reproductive health rights – because most of the international instruments on reproductive health rights of women acceded to by Nigeria, have not been implemented. This is coupled with the fact that these rights were not expressly recognised by the Nigerian Constitution. Most of the recognised rights that are closely connected to the reproductive health rights of women, were categorised under non-justiciable rights in Chapter two of the Constitution.

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<sup>1</sup> E. Durojaiye *et al.* “Harmful cultural practices and gender equality in Nigeria” (2014) 12(1) *Gender and Behaviour* 6169.

<sup>2</sup> G.A. Makama “Patriarchy and gender inequality in Nigeria: The way forward” (2013) 9(17) *European Scientific Journal* 115.

<sup>3</sup> Durojaiye *et al.*, note 1 (above).

The aim of this chapter is to look at the various cultural practices related to women's reproductive health rights and the legal framework for protecting these rights in Nigeria. This will be done in a bid to know the level of influence of the various cultural practices on the domestication of the various international instruments relating to the reproductive health rights of women. Consequently, this chapter will look into the history of the reproductive health rights of women in Nigeria, by considering extensively the political history of Nigeria and the position of women in relation to the various rights exercised by them in the different political phases.

In addition to this, the chapter will also consider the various cultural practices that infringe the reproductive health rights of women in Nigeria. Also, the constitutional, legislative and policy framework that was put in place for the protection of the reproductive health rights of women, will be examined. The chapter will conclude by examining the impact of the cultural practices on the reproductive health rights of women in Nigeria – and what can be done to ensure that women realise their reproductive health rights in the face of the prevailing cultural practices.

## **4.2 HISTORY OF REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN NIGERIA**

Reproductive health rights of women form part of fundamental human rights. Initially, this set of rights was not recognised by the international community. This situation changed when the international community acknowledged that women cannot fully enjoy fundamental human rights without specific reference to their reproductive health rights. In line with this, the various international instruments that accentuate the protection of these rights, were enacted.<sup>4</sup> This set of rights was also recognised at regional level.<sup>5</sup> As mentioned earlier, Nigeria has acceded to the international and regional instruments on the reproductive health rights of women.

A former British colony, Nigeria is a pluralist state, in that a particular issue within the same jurisdiction may be regulated by more than one law. English common law was introduced into

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<sup>4</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976; and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Adopted and opened for signature, ratification and accession by the General Assembly Resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981.

<sup>5</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005, expressly affirms reproductive autonomy.

Nigeria through different ordinances that legitimised English laws. One such law is Section 20 of the Supreme Court Ordinance of 1914, which provides that the common law, doctrines of equity, and the statutes of general application that were in force in England, as at 1 January 1900, shall be in force within the jurisdiction of the courts.<sup>6</sup>

Long before colonisation, the native laws and customs of the Nigerian people were applied to regulate their conduct in their respective communities. Despite the introduction of English law, however, native laws and customs were not abolished. These laws were applied on two conditions. First, the native law and custom must not be repugnant to natural justice, equity and good conscience; the repugnancy test is a way of invalidating any custom that is barbaric. This was considered in *Laoye v Oyetunde*<sup>7</sup> and the much-cited *Eshugbayi Eleko v Officer Administering Government of Southern Nigeria*.<sup>8</sup> Neither of these cases expressly named particular customs that are barbaric in nature. It can thus be inferred that any custom that fails to conform to the values of advanced societies is archaic, and, as such, cannot pass the repugnancy test.<sup>9</sup>

A customary law could be considered to be repugnant in various ways; the substantive law itself, or the procedure employed in enforcing it, or the punishment imposed for the breach of such a law could fail the repugnancy test. In these three instances, the particular custom will be regarded as repugnant to natural justice, equity and good conscience. Second, such a native law and custom must not be incompatible – either directly or indirectly or by implication – with any law currently in force.<sup>10</sup> As such, it is insufficient for a custom to pass the repugnancy test; it must also be compatible with other laws already in force. The purpose is to avoid inconsistency as to what constitutes law. Repugnancy doctrine in this sense is a representation of colonial denigration of our customary laws and is a subjection of our laws to foreign standards.

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<sup>6</sup> D. Asiedu-Akrofi “Judicial recognition and adoption of customary law in Nigeria” (1989) 37(3) *American Journal of Comparative Law* 571.

<sup>7</sup> 1944 A.C 170.

<sup>8</sup> 1931 A.C 662.

<sup>9</sup> Asiedu-Akrofi, note 6 (above) 580.

<sup>10</sup> A.E.W. Park *The sources of Nigerian Law* (1963) 77-80.

However, the position of the law with regard to repugnancy clause has changed. In *Moujekwu v Ejikeme*,<sup>11</sup> the court held that repugnancy test ordinarily means offensive, distasteful, inconsistent and contrary. The court further held that in the determination of whether customary law is repugnant to natural justice or incompatible with any written law, the standard is not the principles of English law. In other words, it is not fair to conclude that a custom is repugnant to natural justice, because it is inconsistent or contrary to English law, in the sense of English common law or English statute. On the contrary, the courts must have an inward look by considering Nigerian jurisprudence.

Upon independence on 1 October 1960, the Nigerian Constitution became the supreme law of the land. It provides that any law that is inconsistent with its provisions, is void.<sup>12</sup> It guarantees various fundamental human rights<sup>13</sup> and spells out several governance issues. The Nigerian Constitution accommodates the promotion of cultures that enhance human dignity. According to the Constitution, “The state shall protect, preserve and promote the Nigerian cultures which enhance human dignity...”.<sup>14</sup> By implication, any barbaric culture will not be recognised. However, English common law is still applicable in Nigeria. Section 32(1) and (2) of the Nigeria’s Interpretation Act,<sup>15</sup> state that:

(1) Subject to the provisions of this section and except in so far as other provision is made by any Federal Law, the common Law of England, and the doctrines of equity, together with the statutes of general application that were in force in England on the 1<sup>st</sup> day of January, 1900, shall in so far as they relate to any matter within the legislative competence of the Federal legislature be in force in Nigeria.

(2) Such imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal Law.

(3) For the purpose of facilitating the application of the said imperial laws they shall be read with such formal and verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties, and otherwise as may be necessary to render the same applicable to the circumstances.<sup>16</sup>

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<sup>11</sup>(2000) 5 NWLR Pt 145 at 803.

<sup>12</sup> Section 1, Constitution of the Federation of Nigeria, 1960, and recurring in subsequent constitutions of Nigeria, including the present 1999 Constitution, Section 1 (3).

<sup>13</sup> Chapter Four of 1999 Constitution.

<sup>14</sup> Section 21 (a).

<sup>15</sup> CAP I 23, L.F.N 2004.

<sup>16</sup> *Ibid.*

From the foregoing, it can be seen that the English common law and equity form part of Nigerian law.

The impact of the legal and political history of Nigeria and the subsequent plural legal system on the reproductive health rights of women cannot be over-emphasised. The position of women in relation to the exercise of their rights in the various dispensations will be examined in below.

#### **4.2.1 Women in Pre-Colonial Societies**

The political history of Nigeria can be divided into three phases: the pre-colonial, colonial, and post-colonial eras. During the pre-colonial period, the political structure was purely monarchical. Nigeria was made up of diverse societies and kingdoms in the north, south, east and west. During this period, women participated actively in both the private and public spheres, and were involved in commercial activities which gave them independent access to resources.<sup>17</sup> Economic activities at this period was purely subsistence farming. Division of labour was along gender lines. Women were involved in food processing, mat weaving, and pottery making, and cooking. While men cultivate the land, plant the seeds among others.<sup>18</sup> However, in the northern part of the country, most women were not commercially active due to the Islamic practice of Purdah – which restricted them to the domestic sphere. Nonetheless, some women still had an impact on the socio-political landscape of the region. An example is Queen Amina of Zazzau, who was a soldier and an empire builder. She became the ruler of her city in 1576.<sup>19</sup> It is also on record that the Igala Kingdom – also in the northern part of the country – was founded by a woman.<sup>20</sup>

In the southern part of Nigeria, women played significant roles in the palace administration. The role of the king's wives was noteworthy. In some areas, women's voices were heard through their various organisations. Some women participated alongside men in different wars – notably the Kiriji war. This enabled them to take on greater political responsibilities. Examples include the Iyalode of Egba and the Iyalode of Ibadan.<sup>21</sup> The position of Iyalode is a position of great

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<sup>17</sup> Nawey.net “Analysis of the history, organizations, and challenges of feminism in Nigeria” (2011).

<sup>18</sup> T. O Falola “The Role of Nigerian Women” Available at <https://www.britannica.com> accessed on 3<sup>rd</sup> February, 2017.

<sup>19</sup> Nawey.net, note 17( above).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

privileged and power.<sup>22</sup> Thus, women were not regarded as subordinate to men, but rather as their contemporaries.

In terms of legal status, in pre-colonial Nigeria women were considered to be free adults. Nevertheless, their rights were limited by a number of constraints such as social bottle-necks, child bearing and rearing, and domestic work. These factors limited their participation in the socio-political activities of their respective societies and subordinated them to male authority.<sup>23</sup> While male dominance and female subordination were built into the social systems of some Nigerian ethnic groups, women still played vital roles in their communities.

#### **4.2.1.1 Rights of Women in Pre-Colonial Nigeria**

In pre-colonial Nigeria, women exercised some of their human rights – though in a very limited manner due to the prevailing cultural practices. The various rights that were exercised by women are discussed below.

##### **(a) *The Right to Marry***

Just as contemporary international instruments recognise the right to marry as an inalienable right, women in pre-colonial Nigeria had the right to marry. However, the patriarchal culture did not accord the women absolute rights in this regard. In most societies, girl children were not able to decide whom to marry – and when to marry. Prior to marriage, the girl child was seen as her father's property. Thus, it would be difficult for her to unilaterally decide on her marital status, without the express consent of her father. The prospective groom or his parents had to consult the girl's parents to seek their consent to marry their daughter. After investigating the suitor, the parents would disclose his intentions to their daughter. At this point, the girl child was not expected to refuse to marry the man. The prospective groom's family background was the major criterion in terms of making marriage choices.<sup>24</sup>

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<sup>22</sup> T.O Falola note 18 ( above).

<sup>23</sup> F. Anyogu & C. Arinze “Gender inequality and colonization: Nigeria in legal perspective” (2013) 1(1) *Journal of Constitutional Law* 1, 3.

<sup>24</sup> N.M. Abdulraheem “Rights of women in the pre-colonial and post colonial era: Prospects and challenges”. Available at: <https://unilorin.edu.ng> (accessed on 22 April 2015).

In some cases, parents began to negotiate marriage for their daughter when she was at a tender age. Once the negotiations were complete, the prospective groom was expected to pay bride price to the girl's family. This action signified that the girl child ceased to belong to her father. Marriage was believed to be a means of financial security for a woman. A man was expected to provide not only for the woman – but also for the members of her family throughout her life-time. In return, a woman was expected to stay at home and rear her children. Hence, a woman could not make decisions pertaining to her reproductive health without her husband's consent. The payment of the bride price gave the husband the right to make whatever decisions he liked in relation to the woman's body. In other words, she was regarded as part of his property.<sup>25</sup>

The foregoing discussion shows that, although a woman had the right to marry in pre-colonial Nigerian society – she made no input in the choice of her husband. Rather, this was based on her parents' judgement. Polygamy was a common feature of pre-colonial society. A man could marry as many wives as his financial circumstances permitted.<sup>26</sup> Indeed, a man's wealth was measured by the number of wives he had. It was humiliating for a man to have only one wife, as this indicated that he was not prosperous. Women in polygamous marriages could not resist or complain; in the absence of contraceptives, multiple wives allowed for child spacing.<sup>27</sup> As an acceptable cultural value, women mostly supported their husbands marrying additional wives, as a means to enhance their family and personal status.<sup>28</sup>

### ***(b) Political Rights***

While women were not seen as absolute rulers in pre-colonial Nigeria, some assisted the rulers in regulating women's affairs. African women occupied positions such as queen mothers, princesses, and female chiefs, within communities.<sup>29</sup> In the southern part of Nigeria, women played significant roles in traditional rulers' palaces.<sup>30</sup> Similarly, prior to the advent of Islam and

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<sup>25</sup> Abdulraheem, note 24(above).

<sup>26</sup> *Ibid.*

<sup>27</sup> "Politics and religion, women in pre-colonial Nigeria". Available at: <http://prince.org/msg/105/277655> (accessed on 22 April 2015).

<sup>28</sup> Abdulraheem, note 24(above).

<sup>29</sup> Anyogu & Arinze, note 23 (above).

<sup>30</sup> *Ibid.*

colonialism in northern Nigeria, women played prominent roles in the political affairs of society.<sup>31</sup>

**(c) Economic rights**

The subsistence pre-colonial economy enabled women to participate through trading and production of small-scale items such as palm oil, palm kernel, and other foods. Women also participated in agriculture – planting mainly food crops such as maize, beans, cocoyam, peanuts, okra, tomatoes and other green-leafed vegetables. They were also involved in raising livestock, and making pottery, baskets, mats, jewelry, and material for clothing. These economic activities complemented the income earned by their husbands in their chosen career, and contributed to the maintenance of their homes.<sup>32</sup> Generally, women in pre-colonial Nigeria were able to participate in economic activity without any restrictions. Consequently, some women distinguished themselves in both the economic and political arenas.<sup>33</sup>

**4.2.2 Women in Colonial Nigeria**

The lives of Nigerian women in the era of colonialism were characterized by inactivity. The colonial administration ushered in “European patriarchy”. Europeans considered women subordinate to men<sup>34</sup> and held a stereotyped perception of the roles of women in the domestic and public domains.<sup>35</sup> Colonialism impacted on Nigerian women in different ways – most of which were detrimental to their well-being.<sup>36</sup> The colonial economic system was export-oriented. This gave men more opportunities to excel in economic activities than women. Women were denied access to medium- and long-term loans, which were required for bulk purchases in the colonial economy. Little recognition was given to women’s traditional economic and socio-political status. Hence, women were placed at a great disadvantage economically.<sup>37</sup>

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<sup>31</sup> Anyogu & Arinze, note 23 (above).

<sup>32</sup> “Politics and religion, women in pre-colonial Nigeria”, note 27 (above).

<sup>33</sup> Anyogu & Arinze, note 23 (above) 5.

<sup>34</sup> M. Rojas “Women in colonial Nigeria”. Available at: [www.postcolonialweb.org/Nigeria/colonwom.html](http://www.postcolonialweb.org/Nigeria/colonwom.html)

<sup>35</sup> N. Igbelina-Igbokwe “Contextualizing gender based violence within patriarchy in Nigeria” (2013) 632. Available at: <http://pambazuka.org/en/category/features/87597>.

<sup>36</sup> Anyogu & Arinze, note 23 (above) 5.

<sup>37</sup> M.O. Okome “Domestic, regional, and international protection of Nigerian women against discrimination: Constraints and possibilities” (2002) 6 *African Studies Quarterly* 33.

The new legal structure formed under colonial rule institutionalised the structure of inequality that existed in the pre-colonial period. Most of the legislation passed during this era aimed to control women's sexuality and fertility. Women were not afforded the opportunity to participate in the administration of their societies. This is apparent by the legal system, which restricted women's role in dispensing justice.<sup>38</sup> According to Okome, "These elements of institutionalized male dominance were in no small measure due to Victorians' ideology, in which women were generally restricted from full participation in the public sphere".<sup>39</sup> This was achieved by placing women differently in social, political and economic relations. Men were expected to hold positions of power – while women were restricted to the home front.<sup>40</sup> Colonial rule severely impacted women's reproductive health rights. They could not make a positive contribution to the various policies that affected them, and this entrenched female subordination and thus denied them reproductive autonomy.

#### **4.2.3 Women in Post-Colonial Nigeria**

At independence, recognition and adherence to the tenets of fundamental human rights improved the condition of Nigerian women. The Constitutional Order in Council which heralded Nigeria's independence, included fundamental human rights.<sup>41</sup> Subsequent constitutions also recognised these rights.<sup>42</sup> Furthermore, chapter two of the 1979 and 1999 Constitutions, respectively, contain Fundamental Objectives and Directive Principles of State Policy.<sup>43</sup> This chapter greatly enhanced the protection of fundamental human rights and thus infers the protection of some reproductive health rights of women.<sup>44</sup> However, the recognition of the rights that are closely connected with the reproductive health rights of women under Chapter two of the Constitution, is not in justiciable. This will be discussed expansively later in this chapter.

Apart from the constitutional recognition of the reproductive health rights of women, as discussed in earlier chapters, Nigeria has also assented to a number of international and regional

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<sup>38</sup> Okome, note 37 (above)

<sup>39</sup> *Ibid.*

<sup>40</sup> *Idem* 39.

<sup>41</sup> These are contained in Chapter 3 of the 1960 Constitution.

<sup>42</sup> 1963, 1979 and 1999 constitutions of the Federal Republic of Nigeria.

<sup>43</sup> Abdulraheem, note 24 (above).

<sup>44</sup> Chapter 2, 1999 Constitution.

instruments that promote the rights of women. In addition to this, the National Assembly – the legislative arm of the federal government of Nigeria – has enacted some legislation that accentuates the rights of women. The federal nature of the Nigerian government gave room for state governments to legislate on matters that are on the concurrent legislative in the Constitution. Consequently, some of the state Houses of Assembly have also enacted legislation on the rights of women. There are also federal and state policies on the protection of women’s rights.

The cumulative effect of the foregoing recognition of the reproductive health rights of women in the post-colonial era in Nigeria, cannot be over emphasised. The various laws changed the position of women by increasing their participation in the public sphere. Most of the laws are closely connected to reproductive autonomy; hence some women who are aware of their rights in this respect can easily exercise their reproductive autonomy. The post-colonial era is thus one which heralded the promotion of the reproductive autonomy of women in Nigeria.

### **4.3 CULTURAL PRACTICES THAT INFRINGE REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN NIGERIA**

Despite improved recognition of women’s rights in the post-colonial era, this has not translated into reproductive autonomy for women in Nigeria. One of the reasons for this is the various cultural practices that are already entrenched in the various communities. Some of these cultural practices inhibit the exercise of the reproductive health rights of women. Some of these practices are discussed below:

#### **4.3.1 Widowhood Practices**

Widowhood is the loss of a spouse through death. Due to the communal nature of African society, extended families have a say in family matters – especially when a family member dies. Legally, the death of a marital partner brings the marriage relationship to an end. In the case of *Okonkwo v Okagbe & Anor*, the Supreme Court of Nigeria held that “marriage ends whenever

one of the spouses passes away”.<sup>45</sup> However, in some traditional African societies, the death of a marital partner does not terminate the relationship between the families.<sup>46</sup>

When a man dies, his wife or wives begin a mourning period – which varies from one ethnic group to another. Among the Yoruba ethnic group in the south west, and the Binis in the south-south, the mourning period lasts a minimum of three months; other ethnic groups require the widow to mourn her late husband for 12 months.<sup>47</sup> In most African societies, it is believed that the death of a man erodes his wife’s rights and dignity. A popular saying among the Yoruba tribe express this axiom thus: “*oko ni ade ori aya*” – meaning that the aura, glory, dignity and covering of the wife is the husband, which symbolises a crown. The moment the husband dies, the crown is removed, and the wife loses her dignity. This is demonstrated by the dehumanising treatment meted out to widows.

In many parts of Nigeria, women that lose their husbands at an early age are subjected to dehumanising practices to prove that they were not responsible for their untimely death. In cases where the widow was never favoured by her husband’s family – this is seen as an opportunity to vindictively settle scores. The woman is usually the prime suspect and is treated with contempt and disdain.<sup>48</sup> Women submit to these dehumanising practices in order to prove their innocence. This includes shaving their hair, ostracism, and being forced to drink the water that was used to bathe the corpse of the deceased. Resistance to such practices is tantamount to accepting culpability for their husbands’ death. Other practices include forcing the woman to stay indoors for a certain period of time, sleeping on the bare floor, being forbidden to eat certain food, being forced to sleep with the corpse of the deceased, being forced out of the matrimonial home, and being deprived of basic personal hygiene – among others.

Funeral rites differ from one ethnic group to another. The Quas ethnic group in Cross Rivers state has special traditional rites that they observe when their traditional ruler dies. His widows are subjected to the dehumanising cultural practice of being confined to a particular corner of the

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<sup>45</sup> (1994) 9 NWLR (Pt. 368) 301, 346.

<sup>46</sup> A. Emiola *The principles of African customary law* 2<sup>nd</sup> Ed. (2005) 111.

<sup>47</sup> *Ibid.*

<sup>48</sup> O. Gbadamosi *Reproductive health and rights (African perspectives and legal issues in Nigeria)* 1<sup>st</sup> Ed. (2007) 334.

house, without being allowed to observe personal hygiene like bathing and brushing their teeth.<sup>49</sup> Among the Ibo ethnic group in south-eastern Nigeria, widows are subjected to a similar ordeal. The mourning period for a widow ranges from five months to a year.<sup>50</sup> During this period, her head is shaved, she is restricted to wearing black, and she is not allowed to bath for the first seven days. In some cases, she might be forced to drink part of the water used to bathe the corpse of the deceased, in order to prove her innocence in terms of the death of her husband.<sup>51</sup>

The motivations for the widowhood ritual in most of the communities include: fortify the widow from any harm from the spirit of her dead husband; sever the bond between the widow and the deceased by shaving her hair; to cleanse her and release her from the marriage covenant; and to ascertain whether she was pregnant by the deceased, as she is confined at home for a certain period of time.<sup>52</sup> The rituals are also performed to mortify the body of the widow to ensure that she is not involved in sexual relations.<sup>53</sup> These kinds of practices clearly infringe women's human rights generally – and have severe physiological effects.

Furthermore, with the Ibo ethnic group, women are sometimes driven out of the deceased husband's house and the family members inherit his property.<sup>54</sup> In other instances, a woman might be forced into a levirate marriage to a relative of her late husband. In many parts of Africa, widowhood is a time of great pain and anxiety; pain at the loss of a dear husband and breadwinner and anxiety about the unpredictable and harrowing experiences the deceased's family will impose on the widow. Many widowhood rites have lasting negative effects on a woman's physical and mental health and also social well-being.

More importantly, in most cases, such practices violate women's constitutional rights – such as the right to dignity, non-discrimination, and reproductive health rights. Widowhood rites represent an injustice done to women, solely on the basis of their gender and the belief that

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<sup>49</sup> Gbadamosi, note 48 (above) 338.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Idem* 339.

<sup>52</sup> J.O. Aransiola & A. Ige “Widowhood practices among the Yorubas of south west Nigeria: Are there differences in what women experience due to their status” (2010) 8(2) *Gender and Behaviour* 3152, 3514-3515.

<sup>53</sup> E. Durojaye “‘Woman but not human’: Widowhood practices and human rights violations in Nigeria” (2013). Available at: [civilistica.com/a.2.n.3.2013// 1, 8](http://civilistica.com/a.2.n.3.2013//1,8).

<sup>54</sup> *Ibid.*

women are inferior to men.<sup>55</sup> This is tantamount to gender-based violence and discrimination, because men who lose their wives are not subjected to any rites at all. Indeed, when a woman dies, it is believed that her spirit might return at night to share her husband's bed. In view of this, the relatives of the widower will bring another woman to keep him company, in order to fend off the spirit of the dead wife.<sup>56</sup> Widowhood rites violate international and constitutional provisions that prohibit inhumane and degrading treatment as well as the right against discrimination based on gender. When a woman is made to drink water used to wash a corpse, for example, her right to life is infringed upon as this is clearly a health hazard.<sup>57</sup>

### 4.3.2 Levirate/Sororate Marriage

Levirate marriage was part of ancient Hebrew law. The term is coined from the Latin word *levir* which means brother-in-law. This cultural practice maintains a genealogical lineage through a male child.<sup>58</sup> Levirate marriage is common when a man dies without a male child. His widow is expected to make an effort to bear a male child that will continue the deceased's name through one of her brother-in-laws.<sup>59</sup>

Most women submit to levirate marriages for economic reasons. Where the deceased was the family bread-winner, women prefer to remarry within the family in order to protect their share of their late husbands' inheritance. One of the consequences of a forced levirate marriage is that the widow might be coerced into unsafe sexual activities by her new husband. Furthermore, the woman will be expected to bear children in the new marriage irrespective of the number of children she might already have.<sup>60</sup> Levirate marriage is also common among the Esan-speaking

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<sup>55</sup> Durojaiye *et al.*, note 1 (above).

<sup>56</sup> O.M. Adefi "Cultural practices and traditional beliefs as impediments to the enjoyment of women's rights in Nigeria" (2009) 1 *JCLI* 118, 128.

<sup>57</sup> M.I.O. Nwogu "The legal anatomy of cultural widowhood practices in south eastern Nigeria: The need for a panacea" (2015) 3(1) *Global Journal of Politics and Law Research* 79, 84.

<sup>58</sup> Emiola, note 46 (above) 112.

<sup>59</sup> Deuteronomy, Chapter 25, v 5 to 6. *Holman KJV Study Bible* (2012) Holman Bible Publishers.340.

<sup>60</sup> Gbadamosi, note 48 (above) 333.

people of Edo state of Nigeria.<sup>61</sup> However, in contemporary Nigeria, levirate marriage requires a women's consent.<sup>62</sup>

The opposite of levirate marriage is *sororate* marriage where a man marries his late wife's sister or in a situation where the wife is sterile. A *sororate* marriage can be contracted when the wife is still alive – if she is unable to bear children. This system aims to preserve family unity.<sup>63</sup> In African culture, one of the reasons for marriage is procreation – because children are regarded as the greatest assets and benefits of a family. If a woman is sterile, she may prefer her husband to marry her blood sister rather than bring a strange woman into the home. On the part of the husband, this makes good economic sense as he is not expected to pay more bride price. While research has shown that this form of marriage occurs in some Ibo communities, it is rare in Nigeria.<sup>64</sup> Legally, both levirate and *sororate* marriages fall within the prohibited degree of consanguinity; apart from this, in both kinds of marriages, the dowry – a major requirement for a valid customary marriage – is paid only once.<sup>65</sup> Thus, the second union is regarded as an extension of the first, with the transfer of all its requirements. Equally, this practice violates a woman's reproductive autonomy.

### 4.3.3 Dowry/Bride Price

In some African societies, one of the requirements of a valid customary marriage is the payment of the dowry/bride price. In Nigeria, the terms 'dowry' and 'bride price' are used interchangeably – and refer to the consideration for the marriage. Scholars have argued that the use of the word 'dowry' as a consideration for a marriage contract is confusing, as in Europe and other countries it refers to the property which a woman brings to her marriage.<sup>66</sup> In Nigeria, the dowry traditionally consisted of the labour rendered by a man to the parent of the woman he sought to marry. Likewise, the bride price did not depict monetary payment – but rather labour

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<sup>61</sup> P.I. Onekpe *Levirate marriage and wife inheritance: A comparative study* (Unpublished MA thesis, Edo State University, 1993) 46.

<sup>62</sup> A.O. Ezejiofor "Patriarchy, marriage and the rights of widows in Nigeria". Available at: <http://dx.doi.org/10.4314/ujah.v12i1.9> .

<sup>63</sup> Emiola, note 46 (above) 113.

<sup>64</sup> *Idem* 113.

<sup>65</sup> Emiola, note 46 (above) 113.

<sup>66</sup> E.I. Nwogugu *Family law in Nigeria* (1974) 44.

provided by a man to assist the parent of a woman he has shown interest in marrying. Such assistance included farm work, building mud huts, splitting fire wood, fetching water, or collecting palm fruits. In some cases, prospective in-laws may include gifts such as food items and fruits like *kolanuts* and alligator pepper. This is offered by the prospective groom and his family members to show gratitude – in anticipation of the gift of a wife.<sup>67</sup> These services cannot be inferred as the purchase price of a woman.

However, modernisation has changed this practice and labour has become monetised. Industrialisation has resulted in rural-urban migration. Most people no longer live in villages and do not engage in farm work; hence the monetization of some of these activities. The payment of a token amount of money, which is usually decided by the family of the bride, has replaced labour as an acknowledgement of a pending marital relationship between two families.<sup>68</sup> Among the Yorubas, a man and his relatives treat in-laws with the utmost respect and honour. Thus, the payment of a dowry/bride price does not depict purchasing a woman.<sup>69</sup> In some instances, the parents of the bride return the bride price/dowry to the family of the groom – with the proviso that the woman was voluntarily given in recognition of the relationship, rather than sold as a commodity.

In contemporary Yoruba society, gifts such as food items, drinks, palm oil, and a token as the bride price, have replaced traditional labour services. This is fundamental to the validity of a customary marriage in Nigeria. A woman whose family has not received such gifts is not accorded due respect. In some communities, a woman's value is measured by the amount of cash and other items.<sup>70</sup> The gifts elevate the value attached to her as both a person and a wife.<sup>71</sup>

While the Yoruba culture attached less importance to the monetary aspect of the bride price/dowry, in some parts of Yoruba land, the modern- practice is the refund of the bride price during the customary marriage. The motivation for this recent development is the notion that the payment of the bride price connotes buying the bride: “This is a misunderstanding of the legal

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<sup>67</sup> Emiola, note 46 (above) 102-103.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Idem* 102.

<sup>70</sup> Adefi, note 56 (above) 123.

<sup>71</sup> Emiola, note 46 (above) 103.

purpose of ‘bride price’ in African culture”.<sup>72</sup> In some parts of Yoruba land, when the bride’s father returns the token to the groom’s family, he includes a caveat stating that the bride price is refunded because he is giving out his daughter to be married whom he believes is priceless and should be treated as a wife – and is not selling her to the groom. This is because, in some communities, once the bride price has been paid, the woman becomes a mere chattel. In *Omo Ogunkoya v Omo Ogunkoya*,<sup>73</sup> it was found that wives are regarded as chattels.

The situation is different in south-eastern Nigeria, where greater value is placed on the girl child and the marriage ceremony because of the high bride price. Any man that marries a girl from this part of the country will be considered a real man – because such marriage would have depleted his financial resources.<sup>74</sup> When the list of items for the engagement is handed out, a specific bride price is stated as one of the items the prospective groom is expected to bring to the customary marriage. This is done to ensure that he is willing and capable of taking their daughter as his wife. At the customary marriage, the father of the bride, or her guardian, collects the envelope containing the bride price, and ensures that it complies with the demand. Payment of a bride price affects a woman’s dignity. A woman whose husband has spent a fortune to marry her – is under an obligation to reciprocate by bearing as many children as possible. If she fails to do so, she is tagged a failed woman, and this is good grounds to end the marriage.

#### **4.3.4 Polygamy**

Polygamy is the traditional custom of marrying more than one wife at the same time. Due to the plural nature of Nigerian society, two systems of marriages are recognised: statutory and customary. Statutory marriages are based on English law. However, there is no single uniform customary law in Nigeria. Rather, it varies from one ethnic group to another. Customary marriage is based on the native law and custom applicable to the particular ethnic group where the marriage is celebrated. Islamic marriage, which could have been recognised as a third form of marriage, is covered by customary law.<sup>75</sup> Although Muslims are found in almost every part of

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<sup>72</sup> Emiola, note 46 (above) 37.

<sup>73</sup> Unpublished case of the Court of Appeal, Nigeria No, CA/L/46/88, 6.

<sup>74</sup> Adefi, note 56 (above) 123.

<sup>75</sup> H. Baparaï “The customary and statutory law of marriage in Nigeria” (1982) 46 *The Rabel Journal of Comparative and International Private Law* 530.

Nigeria, Islamic law only operates in the northern part of the country. Islamic marriages are conducted in accordance with the precepts of Islam.

Statutory marriage under Nigerian law was inspired by English law, and recognises monogamy. Customary and Islamic forms of marriage are potentially polygamous.<sup>76</sup> Customary law in Nigeria does not frown at a man having two wives at the same time. Likewise, Islamic marriage laws also allow a man who has the financial means to marry more than one wife if he could treat them equally.<sup>77</sup>

In some African societies, polygamy could be influenced by two factors: affluence or family intervention. When some men are wealthy, one of the ways of displaying their wealth is the number of wives and children they have. Consequently, in a bid for social prestige, the wealthy marry more than one wife.<sup>78</sup> On the other hand, family influence and pressure may also encourage polygamy. If the first wife does not bear children – family members could put pressure on the husband to marry a second wife. The value attached to biological children as a measure of the continuity of a dynasty, is responsible for this pressure.<sup>79</sup> In traditional African society, marriage is fully recognised when there is procreation. If a woman is unable to bear children, she is not regarded as a wife and will not be accorded due respect. However, in this kind of situation, before the man can take another wife – it must be proved beyond reasonable doubt that the woman is infertile. Hence, this kind of arrangement is seen as a last resort.<sup>80</sup>

Illness is another factor that often gives rise to polygamy. If a wife has a chronic disease which prevents her from performing her wifely duties – the husband could be advised to marry a second wife. Moreover, if the husband has a high sexual drive, and the wife cannot cope with such demands, he may choose to take a second wife to relieve the first wife. At times, a man who finds his wife troublesome, might decide to take a second wife to spite the first wife.<sup>81</sup>

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<sup>76</sup> Baparai, note 75 (above).

<sup>77</sup> Z. Naik “Why is Polygamy allowed in Islam” Available at [www.islamawareness.net/polygamy/why.html](http://www.islamawareness.net/polygamy/why.html).

<sup>78</sup> A. Nwoye “The practice of interventive polygamy in two regions of Africa: Background, theory and techniques” (2007) 31(4) *Dialectical Anthropology* 383.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> O. Olomola “An appraisal of polygyny and reproductive rights of women in Nigeria” (2013) 5(4) *Journal of Law and Conflict Resolution* 7.

Polygamy degrades women and violates their right to equality. It is, however, an accepted norm in many Nigerian communities for a man to marry more than one wife regardless of the first wife's feelings. However, the same community frowns upon a woman marrying more than one husband.<sup>82</sup> A system that allows a man to marry as many wives as possible puts women's right to life in jeopardy. Husbands that have many wives could easily become infected with HIV/AIDS and other sexually transmitted diseases, if a wife who feels lonely or is denied her sexual rights, turn to other men. If not given urgent and proper medical attention, sexually transmitted diseases can affect the reproductive functioning of those affected.<sup>83</sup>

Polygamy infringes a woman's right to dignity, as she is faced with all kinds of situations which might affect her feelings – particularly sharing her husband. Such women are not at liberty to determine if and when to have sexual relations with their husband. It is difficult for a woman in a polygamous marriage to assert her rights, as she will be afraid of stereotyping and becoming an outcast in the family.<sup>84</sup> Polygamy is practiced in almost every part of Nigeria.

#### **4.3.5 Female Genital Mutilation (FGM)**

Female genital mutilation, also known as female circumcision, is an age-old cultural practice that involves the excision of part or all of the female external genitalia.<sup>85</sup> The name female genital mutilation is adopted and is used widely for all the practices that constitute willful damage to healthy female organs. The practice is called female circumcision in societies that subscribe to this practice.<sup>86</sup> This practice is prevalent in East and West Africa and some countries in the Middle East, Europe, North America and Australia.<sup>87</sup> A particular type of FGM known as *clitoridectomy* was performed on women in cases where it was felt that the woman in question was prone to sexual deviation. The procedure was conducted to correct 'nymphomania' and other disorders thought to be caused by masturbation.<sup>88</sup>

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<sup>82</sup> Adefi, note 56 (above).

<sup>83</sup> L. Mwambene "Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi" (2010) 10 *Africa Human Rights Law Journal* 94.

<sup>84</sup> *Ibid.*

<sup>85</sup> R.J. Cook *et al.* "Female genital cutting (mutilation/circumcision): Ethical and legal dimensions" (2002) 79 *International Journal of Gynecology and Obstetrics* 281.

<sup>86</sup> World Health Organisation (WHO) *Female genital mutilation: Integrating the prevention and the management of health complications into the curricula of nursing and midwifery: A student's manual* (2001) 1, 24.

<sup>87</sup> Gbadamosi, note 48 (above).

<sup>88</sup> Cook *et al.*, note 85 (above).

In view of the value attached to premarital virginity, and also chastity and fidelity during marriage, some ancient African societies adopted FGM as a mechanism to control promiscuity. Depending on the type of FGM procedure used, this might involve the removal of the clitoris which is the organ of female sexual stimulation and pleasure – or the mutilation of some part of the genitalia. These procedures reduce or eliminate the tissue of the outer genitalia.<sup>89</sup> Female genital mutilation is regarded by some mothers as a process of purification, which a girl child must undergo as a pre-condition for motherhood.<sup>90</sup> In some cultures, an uncircumcised girl is considered unclean and it is believed that she can put her prospective husband in danger. In some communities, FGM is regarded as a girl’s initiation into womanhood. It is also believed that the circumcision will protect the young girl from spells and curses.<sup>91</sup> In some countries, FGM is accompanied by elaborate celebrations.

Female genital mutilation is defined by the World Health Organisation as “all procedures that involve partial or total removal of the female external genitalia and/or injury to the female genital organs for cultural or any other non-therapeutic reasons”.<sup>92</sup> According to the World Health Organization, female genital mutilation may be classified into four types. The first type involves the excision of the prepuce (also known as a *clitoridectomy*). This resembles male circumcision as it may include the excision of the clitoris or part of the clitoris. This type of FGM, which is permitted by Islamic law, is the least damaging.<sup>93</sup> The second type is the removal of the prepuce and clitoris – together with partial or total excision of the labia minora.

The third form is the removal of part or all of the external genitalia and stitching/narrowing down the vaginal opening.<sup>94</sup> This is also known as *infibulations/pharaonic* circumcision and is regarded as the most extreme form of FGM – as it has devastating consequences. Finally, a fourth category involves every other injury done to female genitalia, apart from those identified above. It includes pricking, piercing, or incision of the clitoris and/or labia; stretching the clitoris and/or labia; cauterisation by burning the clitoris and surrounding tissues; scraping the vaginal

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<sup>89</sup> Cook *et al.*, note 85 (above).

<sup>90</sup> *Idem* 282.

<sup>91</sup> Gbadamosi, note 48 (above).

<sup>92</sup> World Health Organisation, 1995.

<sup>93</sup> Gbadamosi, note 48 (above).

<sup>94</sup> Cook *et al.*, note 85 (above).

orifice; cutting the vagina; and the introduction of corrosive substances into the vagina to cause bleeding or inserting herbs into the vagina to tighten or narrow it – among others.<sup>95</sup>

The age at which the procedure is performed varies. In some societies, it is done at birth – while in others it is performed between the ages of four and ten. Some societies perform it shortly before marriage, as a rite of passage to womanhood. The World Health Organisation reports that 25% of women in Nigeria have undergone FGM.<sup>96</sup> The type of procedure varies among various communities in the different geo-political zones. The first type of FGM (*clitoridectomy*) is common among the Yoruba people of the south west, while the second type<sup>97</sup>, the removal of the prepuce and clitoris is common in the south-south.<sup>98</sup> The fourth category of FGM which consists of different forms of injury to the female genitalia, is used extensively by the Hausa/Fulani ethnic group in the north.<sup>99</sup>

All the types of FGM highlighted above have health consequences. In most cases, the procedure is conducted in unhygienic premises by birth attendants – who are non-medical professionals – and using unsterilised instruments. The complications might be immediate: the cutting may lead to excessive bleeding which will require urgent medical attention; it might also lead to sepsis, arising from the use of unsterilised instruments. There is a possibility of infection if the genital area becomes contaminated with faeces and urine. Adverse effects on the reproductive life of the girl child later in life are also possible, as well as death if proper attention is not given to the health complications after the procedure.<sup>100</sup>

The complications arising from FGM include repeated urinary tract and chronic pelvic infections. These may cause irreparable damage to the reproductive organs and consequent infertility.<sup>101</sup> Victims of FGM experience difficulties during pregnancy, labour, delivery, and after delivery – due to the anterior incision of the vulva that is needed to facilitate delivery. This

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<sup>95</sup> Cook *et al.*, note 85 (above).

<sup>96</sup> World Health Organisation, 2001.

<sup>97</sup> Gbadamosi, note 48 (above).

<sup>98</sup> The south-south comprises heterogeneous societies with different marital cultural practices.

<sup>99</sup> Gbadamosi, note 48 (above).

<sup>100</sup> Cook *et al.*, note 85 (above) 282.

<sup>101</sup> *Idem* 283.

could lead to prolonged and obstructed labour, and fetal distress or death. Incisions and tears in the perineum could cause postpartum hemorrhage.<sup>102</sup>

Since FGM entails the removal of healthy sexual organs, it has harmful physical and psychological consequences. It violates a number of human rights – including the right to freedom from discrimination, inhuman or degrading treatment, and the right to life – among other rights. The procedure causes bodily harm to the girl child which could be considered a crime. It could also be considered child abuse which violates the provisions of Article 19(1) of the Convention on the Rights of the Child<sup>103</sup> – to which Nigeria is a signatory. It denies women human dignity, which includes their sexuality. Indeed, FGM renders sex in marriage not mutually pleasurable.

#### **4.3.6 Early Forced Marriages**

Marriage is the voluntary union of a man and a woman. It is a system that allows two mature individuals to live together in an orderly manner in society. The system of marriage brings about social re-arrangements, as two individuals from different backgrounds come together to start a new life – thereby departing, although not totally, from their parental unions. In most cases in Nigeria, marriage affects the new bride more than the groom, as she is expected to leave her parents and to start a new life with her husband.

Child marriage, which is also known as early forced marriage, is the practice of coercing, forcing or deceiving a girl child into marriage, at an age when she is considered to be incapable of understanding the nature of marriage.<sup>104</sup> A marriage is considered to be early when a child marries before the age of 18.<sup>105</sup> Such a child is deemed to be too young and immature to make the necessary assessment of the choice of marriage, and subsequently the challenges of marriage. This type of marriage is usually initiated between the parents or guardian of the girl child and the husband. The young bride is either coerced or unduly influenced to contract such a marriage.<sup>106</sup>

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<sup>102</sup> Cook *et al.*, note 85 (above) 282

<sup>103</sup> The United Nations Convention on the Rights of the Child, 1992.

<sup>104</sup> A. Ukwuoma *Child marriage in Nigeria: The health hazards and socio-legal implications* 1<sup>st</sup> Ed. (2014) 10.

<sup>105</sup> J.A. Walker “Early marriage in Africa –Trends, harmful effects and interventions” (2012) 16(2) *African Journal of Reproductive Health* 231.

<sup>106</sup> Ukwuoma, note 104 (above) 10.

In some parts of Nigeria, particularly in the north, young girls that are not yet mature, are given out in marriage. This practice thrives for many reasons. The first is the need to prevent the girl child from having multiple sexual partners – because promiscuity is believed to be disgraceful.<sup>107</sup> Thus, to protect the honour of the family, a girl must be a virgin when she marries.

In the past, in some parts of Nigeria, if a woman was a virgin when she married, a higher bride price was given to her father for raising such a decent bride.<sup>108</sup> It is believed that virginity can only be guaranteed when a girl is young. Consequently, girls aged eight to ten are given in marriage. It is also believed that marriage will prevent promiscuity, as the young wife will be occupied with her wifely duties – leaving no time for mischief.<sup>109</sup>

Men believe that it is better to marry a girl at a tender age, before they are exposed to sexual activities. In addition to this, they feel that young girls are more submissive. The age difference and their lack of social exposure will prevent them from disrespecting their husbands. The stereotypical cultural view of the girl child as a temporary member of her immediate family, also encourages early marriage. Parents are not willing to educate a girl child since she will soon cease to be a member of the family. The ultimate aim is to marry her off, as soon as possible. Furthermore, religious beliefs reinforce such views. While Islam does not set a minimum age for marriage,<sup>110</sup> the general belief and teaching is that no age is too early. Although Islamic teachings permit early marriage, they prohibit sexual relations until both parties reach puberty.<sup>111</sup> However, the age of puberty is relative and depends on an individual girl children's level of physiological development. Thus, Islam allows sexual relations and subsequently reproduction before the age of 18. Of course, it is possible for a girl child to reach puberty without being emotionally mature and psychologically ready for motherhood.

Some parents marry their young daughters off in order to maintain friendship ties. Parents facing economic challenges see marriage as a means of relinquishing their financial responsibilities to

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<sup>107</sup> A. Olatunbosun "Addressing the phenomenon of child marriage in Nigeria" (2001) 9(2) *IFE Psychologia* 159, 160.

<sup>108</sup> O. Bamgbose "Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl" (2015) 10 *U. Miami Int'l & Comp.L.Rev.* 127, 137.

<sup>109</sup> *Ibid.*

<sup>110</sup> Olatunbosun, note 107 (above).

<sup>111</sup> J.N.D. Anderson *Islamic law in the modern world* (1959) 44.

the husband. For such parents, a girl child is seen as a means of enhancing the family's financial status. The payment of bride price/dowry by the prospective groom is in fact more important than her education. Such girls are not enrolled in school because of parents' erroneous belief that their education is of no use to them. In cases where they do attend school, as soon as the parents identify a suitor, the girl child is withdrawn from school and married off.<sup>112</sup>

Statutory marriage in Nigeria is governed by the Marriage Act<sup>113</sup> or the Matrimonial Causes Act. These laws do not define the marriageable age, although it has been argued that sections 11(1) (b) and 18 of the Marriage Act, infer that the age of marriage is 21. Others rely on common law and other laws to argue that 21 years is not the age of marriage.<sup>114</sup> The Nigerian Constitution does not specify a minimum age for marriage – thereby making it difficult to classify a marriage as being too early. However, constitutional standards suggest that adulthood begins at 18 years of age. It is evident from some constitutional provisions that any person who is under the age of 18 is a minor.<sup>115</sup>

Customary marriage is celebrated in accordance with the customs and traditions of any local tribe in Nigeria. Although marriage is an agreement between a man and a woman, customary law does not frown on early marriage – as in some cultures, parents betroth a girl child at birth. Islamic marriage refers to a marriage celebrated by two Muslims in line with the provisions of Sharia law. Islamic law supports child marriage; the Holy Quran recorded that Prophet Mohamed married one of his wives (Aisha) at a tender age.<sup>116</sup> A man is allowed to engage a young girl but the marriage will not be consummated until the girl reaches puberty.

The Convention on the Rights of the Child (1989) sets the age of marriage at 18 years. The National Assembly of Nigeria domesticated this convention as the Child Rights Act, and fixed

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<sup>112</sup> E. Durojaiye *et al.*, note 1 (above).

<sup>113</sup> CAP M6, L.FN 2004.

<sup>114</sup> Ukwuoma, note 104 (above).

<sup>115</sup> Section 35 (1) (d) of the Constitution of the Republic of Nigeria, 1999, which guarantees the right to personal liberty, states that anybody who has not attained the age of 18 years is a minor or a child – hence his or her personal liberty can be deprived for the purposes of his/her education or welfare. Sections 26-29 are explicit on the position of the law concerning persons less than 18 years of age. They cannot participate in election processes and cannot acquire citizenship other than by birth, before the attainment of 18 years.

<sup>116</sup> Anderson, note 111 (above).

the minimum age of marriage at 18 years.<sup>117</sup> However, only 23 of the 36 states in Nigeria have adopted the Child Rights Act. The majority of those that have not adopted the Act are northern states, where early forced marriages are prevalent. In states in north-west Nigeria, the age of marriage could be as low as 14, while in some parts of north-central Nigeria, a girl must marry before her fourth menstruation.<sup>118</sup> Some Northern states like Jigawa – in an attempt to domesticate this Act – made some modifications one of which is determining the age of marriage in relation to puberty and not the age of 18 as specified in the Act.<sup>119</sup> These are not in the best interest of children.

Early/child marriage has negative effects on the girl child. Physiologically and psychologically, her body is not yet ready for motherhood, which is the ultimate expectation of most marriages in Africa. Furthermore, a marriage is not valid unless both the man and the woman give their free, full, informed consent, to enter it. As such, parents should not marry off a girl child without her consent – and such consent must be free and not obtained by force.<sup>120</sup>

Several cases have been decided in Nigeria on the issue of child marriage. In *Ekpenyong Edet v Nyon Essien*,<sup>121</sup> heard in 1932 in southern Nigeria, the issue was the traditional practice of child betrothal, whereby a girl child is betrothed to an adult by her parents. From the moment of betrothal, the intended husband begins to bring gifts to the parents of the girl child – in consideration of future marriage. In the case at hand, on reaching maturity, the girl was not interested in the marriage arrangements made on her behalf. She decided to marry the person of her choice, with whom she had two children. The disappointed aspirant husband then brought an action in a customary court – seeking to retrieve his gifts from the family of the betrothed girl, failing which he asserted an alleged customary “lien” on the two children. The court held that the betrothed girl had the right to withhold her consent and not to marry the husband chosen by her parents, and that the gifts given to the parents did not amount to a dowry to constitute consideration for a valid customary marriage. The Supreme Court upheld the decision of the trial

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<sup>117</sup> The Child Rights Act, 2003.

<sup>118</sup> Cleen Foundation “Rights of the child in Nigeria – Report on the implementation of the Convention on the Rights of the Child by Nigeria”.

<sup>119</sup> Jigawa Child Rights Law, 2008.

<sup>120</sup> Section 3(1) (d) of the Marriage Act, CAP M7 LFN, 2004.

<sup>121</sup> This is an unpublished case that was decided in the Division Court in Calabar, Nigeria, in 1932.

court, by affirming that the consent of the bride-to-be is a precondition for marriage under Benin native law and custom.

In a similar matter on child marriage that came before the Supreme Court of Nigeria in 1972,<sup>122</sup> the petitioner, a surgeon, married the respondent at a marriage registry in Lagos. The husband filed a petition for divorce after discovering that his wife had earlier married one Patrick Omosioghwo Guobadia, under native law and custom. He submitted that his marriage to his wife was conducted when her earlier marriage was still subsisting. In her response to the petition, the wife denied being married under customary law. She argued that Patrick Omosioghwo Guobadia went to her father and paid a dowry without her consent. She stated that she rejected the proposal and that her father immediately filed an action in the Benin Customary Court seeking the dissolution of the marriage. However, the trial judge in the Benin Customary Court dismissed the petition on the grounds that the purported marriage was invalid. The customary court relied on Benin native law, and custom that a daughter could not be married off by her parents without her consent. The court held that payment of a dowry alone does not constitute marriage.

These cases show that a valid marriage requires the consent of both parties. Article 16 of The Convention on the Elimination of All forms of Discrimination Against Women, states that “The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage.”<sup>123</sup> Similarly, the Convention on the Rights of the Child (1989) regards child marriage as a violation of a girl’s right to freely express her views – the right to protection from all forms of abuse, and the right to be protected from harmful traditional practices. Early forced marriage or child marriage is an infringement of the reproductive health rights of the girl child.<sup>124</sup>

Child marriage also has negative reproductive consequences, which include teenage pregnancies, teenage motherhood, and psychological trauma. Because her body is not physiologically ready for motherhood, the young girl might experience recurrent urinary tract infections, sexual dysfunction, chronic pelvic infections, prolonged obstructed labour, and *vesico-vaginal* and

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<sup>122</sup> *Osamwonyi v Osamwonyi*, 1972 All NLR 792.

<sup>123</sup> Adopted and opened for signature, ratification and accession by the General Assembly Resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981. Signed by Nigeria on 23 April 1984, and ratified on 13 June 1985.

<sup>124</sup> The United Nations Conventions on the Rights of the Child.

*recto-vaginal fistulae* (VVF and RVF). This occurs when labour is obstructed because the cervix is not fully developed; the pelvic bones do not allow the easy passage of the child, and consequently, the young girl begins to lose urine uncontrollably from the vagina.<sup>125</sup> This disease is very common in northern Nigeria that has the highest prevalence of girl child marriages. In Jigawa state, 64.1% of girl children are married off at early age, while the figures for Kaduna, Benue, Yobe and Kebbi, are 58.9%, 54.5%, 47.6% and 54.1%, respectively.<sup>126</sup>

Child marriage undermines a number of rights guaranteed by the Convention on the Rights of the Child (1989), which has been domesticated in Nigeria. These rights include the right to education (Article 28). In most cases when a young girl is married off, she is no longer allowed to attend school. She cannot combine her new role as a wife and an expectant mother with education. In fact, in a bid to preserve the marriage – the husband will not allow her to have contact with her usual environment.<sup>127</sup>

The other rights that may be violated by early marriage include the right to be protected from all forms of physical and mental violence, injury or abuse, including sexual abuse (Article 19) – and from all forms of sexual exploitation (Article 34). In child marriage, the young girl might experience physical and mental violence as she is given in marriage against her will, her movement is restricted by her husband, and she is forced to gratify his sexual desires. If she refuses to have sexual relations with her husband, she is likely to be maltreated.

The right not to be separated from one's parents against one's will (Article 9) is undermined by child marriage. Since the marriage arrangement is between the parents and the husband, the young girl is taken away from her parents, and cannot abandon the marriage. If she decides to leave her husband's house, her parents will deny her access to their home. Nigeria has enacted the Child Rights Act to stem the tide of child marriage. Due to the plural legal status of the country, marriage issues fall under the concurrent legislative list under the Nigerian Constitution. The implication is that although the Child Rights Act has been domesticated at the national level, for it to be enforced in individual states it must be promulgated into law by the State House of

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<sup>125</sup> Gbadamosi, note 48 (above) 293.

<sup>126</sup> *Idem* 292.

<sup>127</sup> A.T Simbine & Y.A Aluko “ Implications of Early Marriage on girl's education in Northern Nigeria: Options for policy making” Available at [www.drpcngr.org/attachments/article/67/Simbine\\_Aluko](http://www.drpcngr.org/attachments/article/67/Simbine_Aluko) Consortium paper.

Assembly and assented to by the Governor of the state. However, as noted earlier, only 24 of the 36 states have passed the Child Rights Act into law. The 12 that have yet to do so are mostly northern states: Adamawa, Bauchi, Borno, Enugu, Gombe, Yobe, Kaduna, Kano, Kastina, Kebbi, Sokoto, and Zamfara states.<sup>128</sup>

#### **4.4 CONSTITUTIONAL, LEGISLATIVE AND POLICY FRAMEWORK FOR THE PROTECTION OF THE REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN NIGERIA**

Nigeria has different frameworks for the protection of the reproductive health rights of women. These are contained in both domestic and international instruments ratified by the government. The domestic instruments include certain provisions of the 1999 Constitution of the Federal Republic of Nigeria, the Matrimonial Causes Act, the Marriage Act, the Criminal Code – as well as state legislation on the prohibition of all forms of discrimination against women and the girl child.

##### **4.4.1 Constitutional Framework**

The Nigerian Constitution, which is the fundamental norm in Nigeria, regulates human conduct and issues of governance. Although reproductive autonomy is not explicitly stated in the Constitution, several sections of the Nigerian Constitution accentuate the protection of the reproductive health rights of women. These are contained in chapters two and four of the 1999 Constitution. Section 1(1) affirms the supremacy of the Constitution. Subsection 3 of this section states that any law that is inconsistent with the provisions of the Constitution shall be void. These provisions are germane to the issue of cultural practices and the reproductive health rights of women. Implicitly, any provision of the Constitution that guarantees women’s reproductive health rights, supersedes any other laws.

Chapter two of the Constitution entitled “Fundamental objectives and directive principles of state policy” contains some provisions that are connected to the reproductive health rights of women. According to Section 17 (1), the state’s social order is founded on the ideals of freedom, equality and justice. Subsection (2) notes that, in furtherance of the social order: (a) every citizen shall

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<sup>128</sup> Unicef Nigeria - Fact Sheet - Child Rights Legislation in Nigeria April 2011.

have equality of rights, obligations and opportunities before the law; and (b) the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced.

Subsection (3) states that the state shall direct its policy towards ensuring that: (d) there are adequate medical and health facilities for all persons; (f) children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect; and (h) the evolution and promotion of family life is encouraged. In Section 21 (a), the Constitution provides that “the state shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this chapter”. The various provisions highlighted above are connected with the relationship between various cultural practices and the reproductive health rights of women in Nigeria. According to Section 17(1), there should be no disparity of any kind; all citizens should be treated equally, whether male or female. This suggests that male citizens should not dominate female citizens. This provision was amplified in paragraph 2 (b), by providing that the sanctity of the human person shall be recognised and that human dignity shall be maintained and enhanced. Subsection 3(d) accommodates the issue of reproductive health rights, by making provision for medical and health facilities for all women.

Reproductive health rights cannot be enjoyed in the absence of good medical and health facilities. Section (3)(f) is also of significance on the issue of the reproductive health rights of women, as it aims to protect children and young persons from all forms of exploitation. This would include sexual exploitation which has direct consequences for a woman’s reproductive autonomy. Furthermore, section 17(3)(h) enjoins states to encourage the evolution and promotion of family life. Finally, section 21 provides that the state shall promote Nigerian cultures that enhance human dignity. It follows that any culture that fails to enhance human dignity, is inconsistent with the provisions of the Constitution.

Chapter two of the Nigerian Constitution merely provides for the fundamental objectives of state policy that should guide the state at all levels in policy-making – to ensure social order. Nevertheless, the various rights protected by this chapter are not justiciable. To this end, an

action cannot be taken to the court to enforce compliance with these provisions.<sup>129</sup> If policy-makers choose not to pay attention to these socio-economic issues, citizens cannot compel them to do so. Accordingly, the provisions of this section do not grant legal rights to Nigeria's citizens, and their breach cannot be redressed in court.<sup>130</sup>

The jurisdiction of the court on this matter is rendered null and void by the constitutional provision, which provides that the court "shall not except as otherwise provided by this constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter two of this Constitution".<sup>131</sup>

In contrast, the civil and political rights in chapter four of the Constitution are justiciable. While the various civil and political rights related to women's reproductive health rights are discussed more comprehensively at a later stage, it should be noted that women can enforce the following legal rights – whenever they are breached.

#### ***(a) The Right to Life***

The Nigerian Constitution recognises the right to life. Section 33 states that "Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court...".<sup>132</sup> This right has been described as the fulcrum of all rights from which every other right flows.<sup>133</sup> The constitution provides that any death not arising from the execution of a death sentence, is a violation of the right to life. Nigerian women experience violation of this right on a daily basis as a result of various cultural practices that are inimical to good reproductive health, and that lead to loss of life. Women who are victims of certain cultural

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<sup>129</sup> Section 6(6), 1999 Constitution.

<sup>130</sup> I.N. Aniekwu "Gender and reproductive health: Towards advancing judicial reform in Nigerian law". In: E. Azinge (Ed.), *Judicial reform and transformation in Nigeria* (2012) 428, 430.

<sup>131</sup> Section 6(6)(c), 1999 Constitution.

<sup>132</sup> Constitution of the Republic of Nigeria, 1999.

<sup>133</sup> U.P. Okeke "A case for the enforcement of women's rights as human rights in Nigeria". Available at: <http://www.wunrn.com> (accessed on 14 April 2015).

practices<sup>134</sup> suffer from vesico vaginal fistula, sepsis, postpartum hemorrhage, chronic pelvic and obstetric complications, prolonged and obstructed labour, reproductive tract infections, among others – which may lead to death.

Although the reproductive health rights of women are not expressly protected by the Constitution, the provisions of section 33 can be invoked to seek protection of such right. The reproductive life of a person is germane to their existence. Consequently, its protection is one of the necessary conditions to enjoy the right to life, which the Constitution guarantees.

### ***(b) The Right to Dignity***

Section 34 of the Constitution provides that every individual is entitled to respect for the dignity of his/her person. Thus, no person shall be subjected to torture or to inhuman or degrading treatment.<sup>135</sup> This section further provides that no person shall be held in slavery or servitude. The dignity of a person cannot be divorced from his/her socio-cultural life. Certain cultural practices relating to widowhood impede women's right to dignity. In *Theresa Onwo v Nwafor Oko & 12 Others*,<sup>136</sup> the appellant lost her husband, and in accordance with the custom and tradition of the community, the respondents forced her to shave her head. She was locked up in a room and all her possessions were taken away from her. She applied to the court for leave to sue the respondents in order to enforce her fundamental right to dignity and the right to own property – among other rights. The High Court granted her leave to enforce her rights.

The practices of early forced marriage and FGM are in conflict with the provisions of section 34. These practices are tantamount to inhuman or degrading treatment. In the context of reproductive health rights, dignity entails the right to make decisions regarding one's body without any external influence. Practices that subject women to inhuman or degrading treatment – such as FGM, widowhood practices, and early forced marriages, among others – conflict with this section of the Constitution.

### ***(c) The Right to Personal Liberty***

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<sup>134</sup> Cultural practices such as female genital mutilation, polygamy, and early forced marriages, among others, can impede the right to life.

<sup>135</sup> Section 34, 1999 Constitution.

<sup>136</sup> 1996 6, Nigerian Weekly Law Report, Pt 456, 584.

Section 35 of the Constitution provides for the right to personal liberty and that nobody shall be deprived of that right except in special circumstances that are stated in the Constitution.<sup>137</sup> A widowhood rite that restricts a woman's movement and early forced marriage are, however, in conflict with this provision.

***(d) The Right to Freedom from Discrimination***<sup>138</sup>

A citizen of Nigeria – of a particular community, ethnic group, place of origin, sex, religion, or political opinion – shall not by reason only that he is such a person:

- (a) Be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject; or
- (b) Be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions.

Section 42 of the Constitution provides for freedom from discrimination on a number of grounds, including gender. It is implicit from this section that the Constitution forbids disparity in the application of any law or action to Nigerian citizens. Citizens must be treated equally irrespective of their gender, community, ethnic group, place of origin, religion and political opinions. Consequently, any harmful cultural practice that applies to women in a particular community/ethnic group is not in consonance with this section of the Constitution.

Discrimination is inherent in a patriarchal society like Nigeria due to the culture of male preference – in which parents prefer their sons to their daughters. This makes boys feel superior to girls, and, from childhood, they discriminate against their female counterparts.<sup>139</sup> Upon marriage, the culture regards a woman as inferior to the husband. She is regarded as the

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<sup>137</sup> 1999 Constitution.

<sup>138</sup> Section 42, 1999 Constitution.

<sup>139</sup> Durojaye *et al.*, note 1 (above).

husband's chattel and her rights are subsumed under her husband's rights – meaning that she has no rights of her own.<sup>140</sup>

Several cultural practices in Nigeria encourage discrimination against women. Female genital mutilation discriminates against women on the grounds of gender. This practice denies women mutual sexual satisfaction as a result of the mutilation of their genitals. Widowhood practices also constitute discrimination against women. While women suffer degrading treatment on the loss of their spouse, if a man loses his wife in the same circumstances, he is exempt from such treatment.

Early forced marriage is another cultural practice that discriminates against women. This is simply a case of discrimination on the grounds of gender. A cultural practice that allows a girl child who is not yet mature – both physically and physiologically – to be married off while her male counterpart is allowed to mature and take decisions on whom and when to marry, is discriminatory. Polygamy is also discriminatory.

#### ***(e) The Right to Freedom of Thought, Conscience and Religion***

Section 38 of the Constitution provides that every citizen of Nigeria shall be entitled to freedom of thought, conscience and religion.<sup>141</sup> This includes the freedom to change one's religious beliefs, and the freedom to manifest or propagate one's religion or beliefs in worship, teaching, practice and observance. It is implicit from the foregoing, that nobody should be coerced under any circumstances to believe or participate in any religion – or be forced to obey any tradition that is contrary to their thoughts and conscience. In Nigeria, young girls and women are compelled to obey and follow the precepts of their father and husband on important issues in life. The common belief in Nigerian society is that young girls and women do not have a mind of their own. Hence, they do not have freedom of thought and conscience. They rely on the men in their lives (father or husband) to take decisions for them. Consequently, they are victims of traditional practices that affect them adversely. Forced marriages, FGM and widowhood practices, among others, are examples of practices which women subscribe to against their

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<sup>140</sup> Okeke, note 133 (above).

<sup>141</sup> Section 38, 1999 Constitution.

conscience. In *Theresa Onwo v Nwafor Oko and 12 others*,<sup>142</sup> in which the defendants wanted to subject the appellant to a particular custom against her conscience, the court ruled in her favour, that such an act is against her fundamental human rights.

***(f) The Right to Freedom of Expression and the Press***

Section 39 of the Constitution guarantees the right to freedom of expression.<sup>143</sup> This includes the freedom to hold opinions and to receive and impart ideas and information, without interference. This is not in consonance with traditional practice in Nigeria, which believes that women are to be seen and not heard. Patriarchy has a significant influence on human relationships. Women are forced into marriages and humiliating rituals without their consent.<sup>144</sup> This practice has greatly subdued women and affected their reproductive health rights in Nigeria. There are also other laws and statutes in Nigeria that relate to the reproductive health rights of women.

**4.4.2 National Legislation Giving Effect to the Constitution**

Apart from the constitution which is the *grundnorm* in Nigeria, there are other national legislations that are in place to deal with different subject matters to ensure law and order in the society. In some of these legislations are contained some provisions that are relevant to the reproductive autonomy of women in the Nigerian society in the face of the various cultural practices. A number of these legislations are discussed below:

***(a) Criminal Law***

In Nigeria, criminal law is contained in the Criminal Code<sup>145</sup> which is applied in the southern states – and the Penal Code<sup>146</sup> which is applied in the northern states. Some sections of the criminal law can be employed to protect the reproductive health rights of women against cultural practices that infringe on these rights. The criminal code provides that:

Any person who unlawfully and indecently deals with a girl under the age of sixteen years is guilty of a misdemeanor and is liable to imprisonment for two years with or without caning. If the girl is

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<sup>142</sup> 1996 (6), Nigerian Weekly Law Report, (456) 584.

<sup>143</sup> Section 39, 1999 Constitution.

<sup>144</sup> Okeke, note 133 (above).

<sup>145</sup> CAP C38 LFN, 2004.

<sup>146</sup> Northern States Federal Provisions Act, CAP P3 LFN, 2004.

under the age of thirteen years, he is guilty of a felony and is liable to imprisonment for three years with or without caning<sup>147</sup>

Under this section, to “deal with” includes any act which if done without consent, and would constitute an assault on the woman. The Criminal Code defines an assault as follows:

A person who strikes, touches, or moves or otherwise applies force of any kind to, the person of another, either directly or indirectly, without his consent or with his consent, if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent in such circumstances that the person making an attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person and the act is called assault. The term “applies force” includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatsoever, if applied in such a degree as to cause injury or personal discomfort.<sup>148</sup>

Although this particular section of the Criminal Code is primarily intended for sexual offences such as assault, and rape, among others, it could be invoked to render parents and others that subject a girl child to FGM liable. This practice could be classified as “indecently dealing with a girl”, which is an assault. The various mutilations of the female genitalia are indecent and they cause personal injury and subsequent discomfort to the girl child. There is a similar provision in the Penal Code:

Whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commission of that act shall be punished with imprisonment for a term which may extend to seven years and shall be liable to a fine: Provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or a person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section.<sup>149</sup>

On the issue of consent, the Penal Code goes further – to state that consent given by parents, or a guardian or teacher to an act of gross indecency on behalf of someone below the age of 16, does not constitute consent.<sup>150</sup> The Criminal Code also contains some provisions which could be used to render parents and husbands of child brides criminally liable for “conspiracy to defile”: “Any person who conspires with another to induce any woman or girl, by means of any false pretence or other fraudulent means, to permit any man to have unlawful carnal knowledge of her is guilty of a felony, and is liable to imprisonment for three years...”.<sup>151</sup>

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<sup>147</sup> Section 222 of the Criminal Code Cap C38 LFN 2004.

<sup>148</sup> Section 252.

<sup>149</sup> Section 285 of the Penal Code.

<sup>150</sup> Section 285 of the Penal Code.

<sup>151</sup> Section 227 of the Criminal Code CAP C38 LFN, 2004.

In terms of this section, it is a crime to conspire to induce a young girl to permit a man to have unlawful carnal knowledge of her.<sup>152</sup> The Penal Code has a related provision on the inducement of young girls for illicit intercourse: “Whoever, by any means whatsoever, induces a girl under the age of eighteen years to go from any place or to do an act with the intent that the girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punished with imprisonment which may extend to ten years and shall be liable to a fine”.<sup>153</sup>

Parents or guardians who lure young girls into having sexual relations, and subsequent marriage when they are too immature for such an act, could be held liable under this section of the Criminal Code – for causing or encouraging defilement. Furthermore, a man who decides to marry a young girl by enticing her or by leading her astray through various means could also be held liable. A man who marries a young girl without her consent could be held liable for the offence of rape, which is defined as:

An 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 harm, or by means of false or fraudulent representation as to the nature of the act, or in the case of a married woman, by impersonating her husband...<sup>154</sup>

While the provisions of this section are similar to the Penal Code, the Penal Code is more comprehensive. Section 282 of the Penal Code states that whether a young girl gives her consent or not, if she is under 14 years of age or is of unsound mind – any sexual intercourse with such a girl is considered rape.<sup>155</sup> The application of this statute to the issue of early forced marriages has been limited by many sections of the Criminal Code. To prove the charge of rape, the victim must prove absence of consent – consent obtained by force, duress, or by means of threat or intimidation or fear of harm is not regarded as consent – and evidence of penetration into the vagina. In addition, the victim’s evidence must be corroborated. In most cases, sexual relations take place “in the closet” it is expected to be a private affair. This therefore makes it difficult for a young girl to get a witness to corroborate the commission of the act. Furthermore, since the act is orchestrated and supported by the members of the community, it might be difficult to get

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<sup>152</sup> Section 227 of the Criminal Code CAP C38 LFN, 2004.

<sup>153</sup> Section 275 of the Penal Code.

<sup>154</sup> Section 357 of the Criminal Code.

<sup>155</sup> Section 282 (1)(e) of the Penal Code.

someone to corroborate her evidence. Another defence which the accused person can put up, is that Nigerian law does not recognise rape within marriage. Since she is married to him, he can claim that he has the right to have sexual relations with her.

The position of the law is that all sexual relations between a husband and wife are legal.<sup>156</sup> In *R v Mille*,<sup>157</sup> the court held that upon marriage, a woman is deemed to have given implied consent to sexual intercourse. This consent can only be revoked by an order of a court or a separation agreement. Although this common law position was overruled in *Regina v R*,<sup>158</sup> this is not applicable in Nigeria, because there is no law on spousal rape – even though it can be inferred from the provisions of the Penal Code that if a man has sexual intercourse with his wife who has not attained puberty, such a man is considered to have raped her.<sup>159</sup>

However, in the case of early forced marriage, the child bride can prove that she did not give her consent to such a marriage, and consent is one of the basic requirements for a valid marriage. Where there is no consent, a marriage is null and void.<sup>160</sup> Hence, the offence of rape could be sustained. In relating sexual offences to the cultural practice of early forced marriage, the Criminal Code provides for the offence of abduction. The Code defines abduction as when “Any person who with intent to marry or carnally know a female of any age, or to cause her to be married, or to be carnally known by other person, takes her away, or detains her against her will...”<sup>161</sup>

The Criminal Code gives special consideration to girls who are unmarried and under the age of 16, and provides that whoever takes such a young girl from the custody of her parents or guardian without their consent, is guilty of abduction. It adds that it is immaterial whether or not the girl gave her consent or that the abductor believed that the girl was older than 16. Section 361 of the Criminal Code is therefore considered to be helpful in instituting a criminal charge in matters of forced marriages. According to this section, taking a female of any age away – without her consent – is abduction. However, section 362 focuses on the parents’ consent, and

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<sup>156</sup> Section 6 of the Criminal Code.

<sup>157</sup> 1954 2QB, 282.

<sup>158</sup> 1992, 1 AC 599.

<sup>159</sup> Section 282 of the Penal Code.

<sup>160</sup> *Ekpenyong Edet v Nyon Essien*, note 87 (above); *Osamwonyi v Osamwonyi*, note 88 (above).

<sup>161</sup> Section 361 of the Criminal Code CAP C38 LFN 2004.

early forced marriages are always arranged by parents. Therefore, this section is immaterial to the issue of early forced marriages. In a similar provision, the Penal Code states that “Whoever, in order to gratify the passions of another person, procures, entices, or leads away, even with her consent, a woman or girl for immoral purposes shall be punished...”.<sup>162</sup>

A major constraint to the enforcement of this statute, is the issue of corroboration. The Criminal Code and Nigerian Evidence Act<sup>163</sup> provide that, in proving the commission of offences of this nature, the court cannot only rely on the evidence of the complainant. Such evidence must be corroborated.<sup>164</sup> However, the provisions of the Criminal Code only apply in the southern states of Nigeria. The Penal Code, which is applicable to criminal offences, repealed the application of the Criminal Code in the north.<sup>165</sup> It can thus be argued that the Penal Code ought to have included this provision on sexual offences – as practices such as early forced marriages are common in the northern part of the country.

The Criminal Code recognises the reproductive health rights of women and criminalises bigamy. According to the Code, bigamy refers to a situation where someone who is married under the Marriage Act,<sup>166</sup> contracts another marriage during the subsistence of the earlier marriage. Under this section, the subsequent marriage is regarded as null and void – and the party that contracts such a marriage is guilty of bigamy.<sup>167</sup> Notwithstanding the fact that marriage under the Act is potentially polygamous, due to cultural factors some men still prefer to take more than one wife. In Nigeria, regardless of the law on bigamy, men take as many wives as possible after contracting a marriage under the Act, and women do not see this as a crime. The only case where the offence of bigamy was upheld is in *R v Princewill*.<sup>168</sup> Nigerian women rarely complain about polygamy.

### **(b) *The Marriage Act***<sup>169</sup>

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<sup>162</sup> Section 281 of the Penal Code.

<sup>163</sup> 18 of 2011.

<sup>164</sup> Section 221(2) and 224 of the Criminal code, and Section 179(5) of the Nigerian Evidence Act.

<sup>165</sup> Section 6 of the Penal Code CAP P3 LFN 2004.

<sup>166</sup> CAP M6 LFN, 2004.

<sup>167</sup> Section 370 of the Criminal Code.

<sup>168</sup> (1963) NRNLR, 54.

<sup>169</sup> CAP M6, LFN 2004.

The Marriage Act contains some provisions that protect the reproductive health rights of women. One such provision is in relation to age at marriage. The Act stipulates that the marriageable age is 21 years.<sup>170</sup> Any marriage before this age shall be regarded as null and void. However, section 18 provides that anybody that has not attained the age of 21 years can still contract a valid marriage under the Act – with parental consent. In Nigeria, there was conflict on the question of marriageable age until recently, when the National Assembly adopted the Child Rights Act which sets the age of marriage at 18 years.

**(c) *The Child Rights Act***

The Child Rights Act adopted by the Nigerian National Assembly on 16 July 2003, sets out the rights and responsibilities of every child in Nigeria. Although the Act is an attempt to domesticate the provisions of the United Nations and African Union Conventions on the Rights of a Child – unlike the African Charter Act, it does not expressly state that the Act is the domestication of relevant international and regional treaties.<sup>171</sup> The Act contains 278 sections and 11 schedules covering different aspects of the life of a child, including the rights and responsibilities of a child, offences against the child, and care, protection and supervision of the child, among others. Taking into account the various provisions of the Act which are *in pari materia*, with the provisions of the UN Convention on the Rights of a Child and the African Union Charter on the Rights and Welfare of the Child, the Act gives legal effect to Nigeria's commitment to the rights of a child, which were previously adopted.<sup>172</sup>

Some of the provisions of the Child Rights Act recognise the reproductive health rights of the girl child. Section 10 deals with the issue of discrimination, which is important to the rights of the girl child. Most of the cultural practices that infringe on the fundamental human rights and particularly the reproductive health rights of the girl child, are not applicable to male children who enjoy these rights without any disturbance. The inclusion of this section will also allow girl children across the country to be treated equally – without any form of discrimination. Before the

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<sup>170</sup> Section 18 of the Marriage Act CAP 218 Laws of the Federation of Nigeria, 1990.

<sup>171</sup> E. Egede "Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria" (2007) 51(2) *Journal of African Law* 249, 268-269.

<sup>172</sup> Egede, note 171 (above) Nigeria adopted the UN Convention on the Rights of a Child on 19 April 1991, and the African Charter on the Rights and Welfare of the Child on 23 July 2001.

adoption of the Child Rights Act in Nigeria, girl children were not treated equally, as the law that applies to issues that relate to children, varies from state to state. For example, the age of marriage is not uniform and the definitions of a child vary from one state to another. Furthermore, various cultural practices treat girl children differently.

The Child Rights Act<sup>173</sup> also acknowledges that, irrespective of age, every child is entitled to the dignity of his/her person, and that no child should be demeaned in any way either by means of any form of injury, abuse including sexual, neglect, or maltreatment, or by being exposed to any act that is inhuman or degrading.<sup>174</sup> Cultural practices such as FGM and early forced marriage, among others, impede on the right to dignity of the girl child. Most parents that conspire to subject the girl child to this kind of treatment believe that a girl child of that age does not have any rights of her own – and that they are too young to have self-esteem. It is believed that their right is subsumed in their parents. Consequently, parents subject the girl child to cultural practices that are degrading. For these parents, such girls are too young to be accorded self respect.

In terms of the reproductive health rights of a girl child, the Act provides that “A child shall not be used for the purpose of begging for alms, guiding beggars, prostitution, domestic or sexual labour ...”.<sup>175</sup> Section 31 (1) states that “No person shall have sexual intercourse with a child.” Finally, the Act provides that any person who abuses or exploits a child sexually, is guilty of an offence.<sup>176</sup> These sections are pertinent to the various cultural practices that support child marriage. Irrespective of the fact that a man has paid the bride price of a girl child, in terms of the Act, if she is less than 18 years old – he may not have sexual intercourse with her.

The Child Rights Act aims to provide uniform legislation for the rights and welfare of the Nigerian child. Under the Nigerian Constitution, child rights are on the residual list, which falls under the legislative jurisdiction of state Houses of Assembly. This means that each state must have an equivalent law on children’s rights. As at April, 2011, 24 of the 36 states in Nigeria had adopted Child Rights Acts, mostly in the southern part of the country. Northern states where

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<sup>173</sup> Child Rights Act, 2003.

<sup>174</sup> Section 11.

<sup>175</sup> Section 31(2).

<sup>169</sup> Section 32 of the Child Rights Act, 2003.

child marriage is rampant are not prepared to adopt the Act, because they feel that it is inconsistent with their cultural beliefs.<sup>177</sup>

It is thus clear that the rights of the child are not uniformly protected in Nigeria. Children in states that have adopted the Act have recourse to the law whenever their rights in relation to the Act are breached – but this is not possible for children in states where the law is yet to be adopted.<sup>178</sup> In order to ensure that the purpose for which a law is adopted is not defeated by inaction on the part of states' Houses of Assembly that have not adopted the Act, the provisions of the Constitution can be invoked to enforce the rights of a child. Section 12(2) empowers the National Assembly to make laws not only for the Federation, but also for any part thereof.

In terms of section 12 (3) of the Constitution, before the president assents to such a law, it must have been ratified by the majority of all the Houses of Assembly in the Federation. In addition, section 4(5) provides that an Act domesticating a treaty would prevail over any inconsistent law enacted by a state House of Assembly, which would be void to the extent of its inconsistency.<sup>179</sup> It is assumed that most Houses of Assembly have ratified the Act before the president assented to it. In light of this, instead of waiting for states' Houses of Assembly to legislate on this matter, these constitutional provisions could be invoked to make the Act applicable in states that have no law on child rights.<sup>180</sup>

#### ***(d) Violence Against Persons (Prohibition) Act, 2015***

The Act was enacted to prohibit every form of violence against persons. The scope of the Act is wide, as it covers violence both in private and public life. Equally, it made provision for remedies for the victims of the violence act – and punishment for whoever violates the provisions of the Act. It prohibits and criminalises some of the cultural practices that violate women's reproductive health rights. The Act, in section 3, prohibits coercion in whatever form: most of the victims of cultural practices are coerced into participating in them. In Section 6 it also explicitly prohibits FGM. Equally, the Act prohibits any form of practice depriving someone

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<sup>177</sup> UNICEF Nigeria – Fact Sheet, Child Rights Legislation in Nigeria, April 2011.

<sup>178</sup> Egede, note 171 (above) 272.

<sup>179</sup> *Ibid.*

<sup>180</sup> Egede, note 171 (above) 272.

of his or her liberty.<sup>181</sup> In the same vein, it prohibits forced marriage or isolation from friends and family in section 13.

Emotional, verbal and psychological abuse, widowhood rituals, and harmful traditional practice, are also criminalised by the Act.<sup>182</sup> The Act prescribes a penalty for any act of violence recognised. This Act would have been very effective in curbing harmful traditional norms that inhibit women's reproductive autonomy in Nigeria. However, its scope of application is limited to the Federal Capital Territory.<sup>183</sup> For the laws to be effective in other states of the federation, it would have to be re-enacted by the state assemblies concerned.

#### **4.4.3 State Legislation on the Reproductive Health Rights of Women**

The Constitution of Nigeria empowers states to legislate on issues that are not on the exclusive legislative list. States carry out this function through their various Houses of Assembly. Some states have legislated on various issues relating to cultural practices and their effects on the reproductive health rights of women in a bid to ensure that women enjoy the reproductive health rights recognised by various international and regional treaties to which Nigeria is a signatory. Some state governments have recognised the extent of the damage done by some cultural practices to the realisation of women's basic rights and have enacted laws and policies to surmount the gender discrimination entrenched in Nigerian society by such practices. An example is Ekiti state's Gender-Based Violence (Prohibition) Law of 2001, that recognises that cultural practices such as FGM, and also giving away an under-aged girl in marriage, among other issues, are acts of violence against women.<sup>184</sup> It includes various strategies to control and eliminate gender-based violence in the state.<sup>185</sup>

The Ekiti state government also enacted a policy called "Ekiti State Gender and Development Policy". The goal of the policy is to "mainstream the strategic and practical gender concerns in the development process of the state".<sup>186</sup> Other states have various laws in place to curb the

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<sup>181</sup> Section 10 of the Act.

<sup>182</sup> Sections 14, 15 and 20.

<sup>183</sup> Section 27.

<sup>184</sup> Section 2 (e) of the Ekiti State Gender-Based Violence (Prohibition) Law, 2011.

<sup>185</sup> Sections 3-45 of the Ekiti State Gender-Based Violence (Prohibition) Law, 2011.

<sup>186</sup> Ekiti State Gender and Development Policy, Agenda 8, p. 9.

negative impacts of some cultural practices on the realisation of women's rights.<sup>187</sup> Some states of the Federation have criminalized FGM and prescribed penalties for violators of the laws.<sup>188</sup> In the same vein, some state laws on the fundamental rights of widows.<sup>189</sup> Other states have various laws in place to curb the negative impacts of some cultural practices on the realisation of women's rights.<sup>190</sup> However, when one state legislates on an issue and another state does not see any reason to do so, there will be disparity in the enjoyment of such rights. In terms of women's reproductive health rights, most states in southern Nigeria are disposed to legislate on such issues – while those in the north are much less willing to do so.

#### **4.4.4 Reproductive Health and Population Policies in Nigeria**

Apart from the various pieces of legislation that forbid any infraction of the reproductive health rights of women by prevailing cultural practices in Nigeria, the government has adopted policies relating to the reproductive health rights of women. Reproductive health rights are a subset of the right to health. As noted earlier, the right to health is not expressly recognised as a fundamental human right in Nigeria. The Constitution only recognises the duty of the state to direct its policies to ensure adequate medical and health facilities for all persons, and encourages the evolution and promotion of family life.<sup>191</sup> This particular section alludes to both health and reproductive health rights. The Federal Ministry of Health formulates health policies for the Nigerian health sector. Issues relating to health are on the concurrent legislative list of the Nigerian Constitution. This means that each state is at liberty to decide on its health policies and its way of implementing the national health policy.<sup>192</sup>

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<sup>187</sup> Enugu, Edo, Bayelsa, Delta, Cross-River and Ogun states, among others, have enacted laws on the elimination of FGM. As at April 2011, 24 states had adopted Child Rights Acts. Most of the states that have adopted the Act are from southern Nigeria.

<sup>188</sup> Edo State Female Circumcision and Genital Mutilation Prohibition Law (1999) Cross River State Girl – Child Marriages and Female Circumcision (Prohibition Law) 2000, Rivers State Abolition of Female Circumcision Law (2001) , Ogun State Female Circumcision and Genital Mutilation (Prohibition ) Law 2000, Ekiti State Gender – Based Violence (Prohibition) Law of 2001, among others.

<sup>189</sup> Enugu State Prohibition of Widows and Widowers Fundamental Rights Laws (2001) , Oyo State Widows' Empowerment Law, 2002, Anambra State Malpractices against Widows and Widowers Prohibition Law, 2004 among others.

<sup>190</sup> An example is the Prohibition of Early Marriage Law Kebbi State, Retention in School and against withdrawal of Girls from School Law, Kano State, and Violence against Women Law Lagos State. As at April 2011, 24 states had adopted Child Rights Acts. Most of the states that have adopted the Act are from southern Nigeria.

<sup>191</sup> Section 17(3) (d), 1999 Constitution.

<sup>192</sup> Gbadamosi, note 48 (above).

**(a) *The National Health Policy***

Nigeria's health policy recognises the importance of good health to social and economic development – as well as social justice and national security. It aims to achieve good health for all citizens by the year 2000 and beyond.<sup>193</sup> According to the policy, the level of health envisaged is one in which all Nigerians will achieve socially and economically productive lives.<sup>194</sup> The national health policy emphasises primary health care (PHC). In line with World Health Organization guidelines, PHC encompasses basic treatment, maternal and child health, and family planning services – as well as the prevention and control of infectious diseases and the provision of essential drugs and supplies.<sup>195</sup> In light of this background, it is obvious that PHC does not make comprehensive provision for the reproductive health rights of women; it is limited to maternal and child health, as well as family planning services. This is insufficient to combat the wide range of health concerns of Nigerian women, which impede their reproductive health rights.

**(b) *The National Adolescent Health Policy***

The National Adolescent Health Policy is another national policy germane to the realisation of the reproductive health rights of women. The policy caters for the special status of adolescents and applies to persons aged 10 to 24 years. It aims to address the different areas of the life of an adolescent – such as nutrition, education, career development, and reproductive health, among others. In terms of sexual and reproductive health rights, the policy focuses on preventing unwanted pregnancies and sexually transmitted diseases, because the average age at first intercourse has declined and unprotected sexual intercourse is more prevalent among this age group.<sup>196</sup> However, the policy falls short of recognising the various cultural practices that impede the realisation of the reproductive health rights of young people and adolescents.

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<sup>193</sup> The National Health Policy, 1988, 1998, and revised in 2004.

<sup>194</sup> *Ibid.*

<sup>195</sup> M.T. Ladan “Review of the existing reproductive health policies and legislations in Nigeria”. Available at: [www.gamji.com](http://www.gamji.com).

<sup>196</sup> Federal Ministry of Health, *National Reproductive Health Policy and Strategy to Achieve Quality Reproductive and Sexual Health for all Nigerians*, May 2001.

***(c) The National Strategic Framework for the Elimination of Obstetric Fistula in Nigeria 2011-2015***

In 2002, the Federal Government of Nigeria committed itself to combatting the deadly effects of Obstetric Fistula (OF) – which is abnormal communication between the vagina and bladder as a result of obstructed labour during child birth – on the reproductive health rights of Nigerian women.<sup>197</sup> The government felt that OF should not be treated in isolation, but should be seen as part of the government’s overall efforts to improve women’s sexual and reproductive health rights. Various efforts to combat OF led to the development of the National Strategic Framework for the Eradication of Fistula in Nigeria (2005 to 2010) – which aimed to implement OF interventions, including prevention, treatment and care, as well as rehabilitation and reintegration.<sup>198</sup> During this five-year period, the federal government developed Standards of Practice for doctors and nurses involved in the management of OF. Surveys revealed that 2 000 to 4 000 patients suffering from OF were repaired each year. Despite these efforts, OF persists in Nigeria.<sup>199</sup> Hence, the policy was extended for another five years (2011-2015).

***(d) National Policy on Women***

The national policy on women – adopted in 2001 – covers all issues relating to women. It emphasises the important roles played by women in the family and the community at large, and as the primary health-care provider notes social and cultural aspects of life such as harmful cultural practices, high illiteracy levels, women’s low status, and the neglect of their health. The policy aims to improve women’s status in the community in order to enhance their involvement in community development. It sets out health objectives which centre on encouraging women to participate in health development, supplying information, services and technical advice on women’s health issues and family life, legislation on various issues that relate to maternal health services, and protecting women from VVF, FGM, and other harmful practices. The policy on women is however vague on practices such as FGM; furthermore, while it refers to the

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<sup>197</sup> Federal Ministry of Health, National Strategic Framework for the Elimination of Obstetric Fistula in Nigeria (2011-2015).

<sup>198</sup> *Idem* 13.

<sup>199</sup> *Ibid.*

elimination of harmful traditional practices that affect the health of girls and women, it fails to explicitly state that legislation will be enacted to eliminate such practices.<sup>200</sup>

*(e) National Reproductive Health Policy and Strategy*

In May 2001, the Federal Ministry of Health inaugurated a new policy for the promotion of the reproductive health rights of women. The policy entitled ‘National Reproductive Health Policy and Strategy to Achieve Quality Reproductive and Sexual Health for all Nigerians’, sets the following objectives and targets, among others:

1. Reduce maternal morbidity and mortality due to pregnancy and childbirth by 50%.
2. Reduce prenatal and neonatal morbidity and mortality by 30%.
3. Reduce the level of unwanted pregnancies in all women of reproductive age by 50%.
4. Reduce the incidence and prevalence of sexually transmitted infections, including the transmission of HIV infection.
5. Limit all forms of gender-based violence and other practices harmful to the health of women and children.
6. Reduce gender imbalances in the availability of reproductive health services.
7. Reduce the incidence and prevalence of reproductive cancers and other non-communicable diseases.
8. Increase knowledge of reproductive biology and promote responsible behaviour among adolescents regarding the prevention of unwanted pregnancies and sexually transmitted infections.
9. Reduce gender imbalances in all sexual and reproductive health matters.
10. Reduce the prevalence of infertility and provide adoption services for infertile couples.
11. Reduce the incidence and prevalence of infertility and sexual dysfunction in men and women.
12. Increase the involvement of men in reproductive health issues.
13. Promote research on reproductive health issues.

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<sup>200</sup> Ladan, note 195 (above).

The provisions of the National Reproductive Health Policy and Strategy are all encompassing. They deal with issues relating to the reproductive rights of all Nigerian citizens. The policy takes into cognisance the significance of reproductive health to the enjoyment of the various fundamental human rights of Nigerian citizens. To this end, it highlights the various reproductive challenges and needs of citizens, and strategies on various ways to address these. Above all, it emphasises the need to promote research on reproductive health issues.

***(f) Nigeria's Population Policy***

Nigeria is the most populous country in Africa, with an estimated population of about 179 million, as at 1 July 2014.<sup>201</sup> The country's population policy was developed to curb rapid population growth. The population policy first came into effect in 1988. At this time, the population of Nigeria was below 100 million, with a growth rate of about 3%. However, given population growth, and its consequences for the welfare of the citizens of Nigeria, coupled with its effect on socio-economic development, the Federal Government felt there was a need for a population policy.<sup>202</sup> The goal of the population policy of 1988 was to improve the standard of living, promote health and welfare, reduce population growth, and ensure even distribution of the population. The policy also acknowledged the right of couples and individuals to decide on the number and spacing of their children – and the means to exercise such rights.

Nevertheless, the policy encouraged women to adhere to the four-child limit, while men were only obliged to limit their number of wives and children to what their resources could cater for. The policy set out various objectives aimed at reducing Nigeria's population growth rate. However, it failed to achieve its set objectives for several reasons. Reasons relevant to this study were that the policy disregarded male reproductive motivation<sup>203</sup> and that current concerns in family planning and reproductive health (HIV/AIDS) were not considered. This policy was formulated before the 1994 International Conference for Population and Development, in Cairo. Nigeria's population policy has been revised to take into consideration the objectives of the Cairo Conference. At its Federal Executive Council meeting on 27 January 2004, the Federal

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<sup>201</sup> Worldometers. Available at: [www.worldometers.info/world-population/nigeria-population](http://www.worldometers.info/world-population/nigeria-population).

<sup>202</sup> O. Obono "Cultural diversity and population policy in Nigeria" (2003) 29(1) *Population and Development Review* 103.

<sup>203</sup> O. Adegbola "Population policy implementation in Nigeria, 1988-2003" (2008) 47(1) *Population Review* 56, 57.

Government of Nigeria approved a population policy named “National Policy on Population for Sustainable Development”. This is designed to improve the lives and standard of living of Nigerians, by achieving the following targets:

1. A national population growth rate of not more than 2% by 2015.
2. Check population growth by means of voluntary fertility regulation methods and the availability of modern contraceptives.
3. Reduce infant and maternal mortality rates.

These targets did not fully incorporate the provisions of the Cairo Conference of 1994.<sup>204</sup>

In addition to the above policies, Nigeria has adopted other policies relating to the protection of the reproductive health rights of women. These include the revised National Policy on HIV/AIDS adopted on 10 June 2003; the Maternal and Child Health Policy, 1994; the National Gender Policy, 2007; and the National Policy on the Elimination of FGM, 1998 and 2002. All these policies were adopted by the Federal Government of Nigeria to ensure that women enjoy their reproductive health rights.

However, given the country’s tripartite legal system and the nature of these rights – these policies had to be implemented by all three tiers of government. Consequently, there are geographical disparities in the implementation of these policies, as states or local governments that are not well disposed to such policies may not implement them. While recognising that it is the duty of the state to direct its policies towards these issues, the Constitution does not make provision for the enforcement of policies that seek to further the social order envisaged by the Constitution. In a bid to protect these rights, two or three policies may be directed towards the same issue: hence there is a proliferation of policies in Nigeria.

#### **4.5 CHAPTER CONCLUSION**

As noted earlier, Nigeria is a nation with diverse cultural practices – and the influence of these cultural practices on the reproductive health rights of women cannot be over-emphasised. Cultural practices are so entrenched in the various communities that it is difficult to adopt laws to

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<sup>204</sup> Gbadamosi, note 48 (above).

protect the reproductive health rights of women. Women's rights have been subjugated by these cultural practices. This is the legacy of patriarchy which is evident in the way the society views women. Whether married or not, women are precluded from participating in decision-making processes. Since their levels of representation are very low, issues that relate to women are not taken seriously in the legislative process. This has affected the domestication of various treaties that prohibit cultural practices that impede the reproductive health rights of women in Nigeria.

Furthermore, the country's pluralist legal system has affected the realisation of the reproductive health rights of women. The system creates geographical disparities in the enjoyment of these rights. Women in states that have domesticated a law enacted by the National Assembly at the federal level, will enjoy such rights – whereas women in a neighboring state might not do so. Furthermore, most of the international treaties pertaining to women's reproductive health rights that Nigeria has signed are not applicable, as they have yet to be domesticated as required by the Constitution.

The Nigerian Constitution does not explicitly recognise the reproductive health rights of women because most of the rights that are closely connected with such rights were categorised under non-justiciable rights in chapter two of the Constitution. This is coupled with the fact that the Constitution is not gender sensitive as it did not consider the physiological differences between men and women. However, there are various legal frameworks for the protection of the reproductive health rights of women which have been discussed in this chapter. Women do not enjoy the same rights as men – due to the negative impact of various cultural practices. It is not an easy task to prevail on people to change their culture, which, for them, is a way of life.<sup>205</sup> As noted earlier, when Nigeria adopted her legal system through the introduction of English law, native laws and customs were not abolished – on condition that such laws should not be repugnant to natural justice, equity and good conscience. It follows that in as much as the Nigerian Constitution recognises various cultural practices, such practices must not infringe individuals' fundamental human rights. In considering the constitutionality of customs that discriminate against women in *Alajemba Uke & anor v Albertiro*<sup>206</sup> the Court of Appeal ruled that “Any laws or customs that seek to relegate women to the status of a second-class citizen

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<sup>205</sup> Adefi, note 56 (above).

<sup>206</sup> (2001) 17 WRN 172.

thus depriving them of their invaluable and constitutionally guaranteed rights are laws and customs fit for the garbage and consigned to history (sic)". Thus, while some cultural practices might not have been officially abolished by the Nigerian government, the court recognised that most of these practices impede women's rights.

If women are to fully realise their reproductive health rights in Nigeria, they must be allowed to participate in decision-making processes; the practice of women being seen and not heard must be eradicated. Furthermore, socio-economic rights should be made justiciable in Nigeria. Finally, the various cultural practices that impede the reproductive health rights of women should be abolished or modified – as with payment of bride price which has been modified in some parts of the south west (among the Yoruba), such that it does not impede the reproductive health rights of women. The next chapter will analyse the position of South Africa as this will assist in establishing the necessary variables required for the subsequent processes of comparison.

## CHAPTER FIVE

### REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN SOUTH AFRICA: ANALYSIS OF THE LEGAL AND CULTURAL PERSPECTIVES

#### 5.1 INTRODUCTION

Like some other African countries, South Africa is diverse in culture, and its cultural diversity is informed mostly by its unique political history. South Africa is a product of both colonialism and apartheid, and its citizens are of different racial backgrounds and culture. Thus, South Africa presents a mix of cultural practices that include those of Europeans (whites), Africans (blacks), Asians or Indians, and people of mixed race ('coloureds'). These races have their different cultural ways of life – which reflect their values.

The political history of South Africa – mainly characterised by colonialism and apartheid – has had a grave influence on the cultural practices and reproductive health rights of women. Local African culture was distorted to accommodate apartheid policies – some of which violate women's reproductive health rights. During the apartheid period, international human rights law was viewed with unease in South Africa.<sup>1</sup>

In 1994, South Africa transitioned from apartheid to a democratic state. Since then, the government has made tremendous progress in the promotion and recognition of human rights. It has signed and domesticated some international treaties that promote and protect the reproductive health rights of women. In addition, the domestic legal regime – particularly the Constitution which promotes human rights – is outstanding. Its extant provisions recognise all human rights – without differentiating between political/civil rights or socio-cultural or economic rights. These rights are enforceable.

The South African Constitution recognises cultural rights and the reproductive health rights of women. However, in spite of these robust international and domestic legal frameworks for the

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<sup>1</sup> R.Slye "International law, human rights beneficiaries and South Africa: Some thoughts on the utility of international human rights law" (2001) 2 *CHI.J.INT'L L* 59, 61.

promotion and protection of the reproductive health rights of women, do women in South Africa have reproductive autonomy in the face of cultural practices? This chapter examines the history of reproductive health rights of women in South Africa – and the different political phases. The chapter will also identify the various cultural practices that infringe the reproductive health rights of women in South Africa. It will examine the legal frameworks for the protection of the reproductive health rights of women, and will conclude that there is a gap between the recognition of reproductive health rights of women by the domestic legal regime and the realisation of the rights for the women who are supposed to be the beneficiaries of such rights.

## **5.2 HISTORY OF REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN SOUTH AFRICA**

### **5.2.1 Pre-Colonial Traditional Societies in South Africa**

As mentioned earlier, South Africa is a very racially diverse society, and this has impacted on the realisation of women's reproductive health rights. The pre-colonial traditional society in South Africa consisted mostly of the black ethnic groupings: the Khoekhoe and San, Bantus, Basotho, Bapedi, AmaZulu, Amaxhosa, AmaSwati, Vhavbenda, MaTsonga, and Ama Ndebele.<sup>2</sup> These different ethnic groups, with their different cultural beliefs and ways of life, co-existed during the pre-colonial era. Through interaction they adapted their cultures and languages. The first Europeans to arrive in South Africa were in transit; they barely interacted with the local population. However, they began to settle in South Africa, and the Dutch established a refreshment station at the Capeto cater for the needs of the Europeans who were on their way to India.<sup>3</sup>

Subsequently, the Europeans settled at the Cape and began to interact with the local population; this resulted in marriages between Europeans and the locals.<sup>4</sup> The European settlers were followed by Indian traders the whites influenced South Africans' cultural way of life. Each of the major racial groups (black, Europeans, Indians) had a different cultural orientation that informed

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<sup>2</sup> G.W. Mukundi "Country report of the research project by the International Labour Organisation and the African Commission on Human and People's Rights on the constitutional and legislative protection of the rights of indigenous peoples: South Africa" (2009)8,9.

<sup>3</sup> *Idem*10.

<sup>4</sup> Mukundi, note 2(above).

gender relationships. To this end, the ability of a woman in South Africa – during the pre-colonial era – to exercise reproductive autonomy, depended on the cultural orientation of her racial group. Furthermore, during the pre-colonial era in South Africa women were influential in their respective societies because of their contribution to the economic activities through agricultural production.<sup>5</sup>

## 5.2.2 Colonial and Apartheid Period

The colonial experience in South Africa commenced with the British occupation of the Cape in 1795.<sup>6</sup> The British colonists seized the Cape from the Dutch, who had not imposed their rules or beliefs on the local population. The British colonists introduced their concepts of freedom and equality– and the colonists drove black South Africans from their farmlands and forced them to work on the mines and white-owned farms and factories.<sup>7</sup>

As will be revealed later in this chapter, South Africa’s political history provided a unique experience for the women – compared to other parts of Africa. South Africa graduated from colonialism to apartheid. Apartheid laws violated the human rights of citizens, especially black people.<sup>8</sup> Black and white people were geographically, socially and politically segregated.<sup>9</sup> Racial lines determined the enjoyment of human rights. The whites monopolised power and enjoyed extensive rights- while the coloured and the Indian people enjoyed fewer rights compared to the whites, and black people were deprived of their basic, fundamental human rights.<sup>10</sup> The major concern of the legal system during the period was how to entrench apartheid. For instance, the Population Registration Act<sup>11</sup> classified people according to their racial or ethnic origins. Discrimination was institutionalised in every sphere of society.<sup>12</sup> This had an effect on the culture

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<sup>5</sup> S. Houston “Gender Oppression and Discrimination in South Africa” (2007) 5 *ESSAI* Available at <http://dc.cod.edu/essai/vol.5/iss1/26>, 83.

<sup>7</sup> P.C. Rosenblatt & B.C. Nkosi “South African Zulu widows in a time of poverty and social change” (2007) 31 *Death Studies* 67.

<sup>8</sup> S. Liebenberg “Human development and human rights” (2005) 21 *SAJHR* 1,5.

<sup>9</sup> “Women of the world: Laws and policies affecting their reproductive lives”, note 6 (above) 92.

<sup>10</sup> Liebenberg, note 8 (above).

<sup>11</sup> 30 of 1950.

<sup>12</sup> N. Ntlama “The application of section 8(3) of the Constitution in the development of customary law values in South Africa’s new constitutional dispensation” (2012) 15(1) *PER/PELJ* 24.

of black South Africans. As stated by Maluleke, “Local African culture was oppressed for many years by the white South Africans who found their cultural roots in Western countries.”<sup>13</sup>

Some customary laws that tend to accommodate discrimination were recognised by the apartheid government to enhance control of black South Africans and were used to discriminate against them.<sup>14</sup> This is while some customary laws that are not discriminatory were ignored, corrupted or enlisted in a dishonest way – to justify segregation.<sup>15</sup> The caveat for the recognition of the customary law was that they should not infringe the humanitarian principles of ‘civilised society’. In this context, civilised society was interpreted as ‘white society’.<sup>16</sup> Consequently, customary laws were modified to align with the legal systems of the colonial and apartheid regimes, and codified in line with the colonisers’ perceptions. Thus, contemporary South African culture is a mix of traditional culture and alien culture.<sup>17</sup> The colonisers also manipulated customary practices to grant additional powers to kings and chiefs – in exchange for their support for the apartheid regime.<sup>18</sup> This significantly impacted the lives and rights of South African women. The laws adopted by the colonial regime did not recognise women’s economic and political rights.<sup>19</sup>

The apartheid racial segregation policy led to unequal socio-economic rights. For example, the colour of the people determined the quality of the health-care they received. Some categories of people thus felt superior to others. Categorisation into four groups – Europeans(whites), Africans(blacks), Asians or Indians, and Coloureds (people of mixed race)<sup>20</sup> – invariably resulted in discrimination. Apartheid laws created the homeland system that confined black South Africans

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<sup>13</sup> M.J. Maluleke “Culture, tradition, custom, law and gender equality” (2012) 15(1) *PER/PELJ* 1,2.

<sup>14</sup> Ntlama, note 12 (above).

<sup>15</sup> T. Nhlapho “Indigenous law and gender in South Africa: Taking human rights and cultural diversity seriously” (1995) 13 *Third World Legal Studies* 49.

<sup>16</sup> Maluleke, note 13 (above).

<sup>17</sup> *Ibid.*

<sup>18</sup> Liebenberg, note 8 (above).

<sup>19</sup> Land Settlement Act 12 of 1912, Group Areas Act 41 of 1950, 1952 Pass Law, Population Registration Act 30 of 1950, Prevention of Illegal Squatting Act 52 of 1951 – among others.

<sup>20</sup> K. Inwood & O. Masakure “Poverty and physical well-being among the coloured population in South Africa” (2013) *Economic History of Developing Regions* 56,60.

to certain areas with little or no development, compared to the urban areas that were reserved for whites.<sup>21</sup>

As noted above, racial segregation extended to health-care delivery and this in variably affected women's reproductive health rights. While no specific legislation was adopted to address reproductive health rights, the focus was on maternal and child health-care– with special emphasis on contraceptive services.<sup>22</sup> Women belonging to different racial groups received different levels of health-care. While white women received curative and high-tech hospital-based services, the services offered to black women were primarily aimed at controlling the growth of the black population. Long-term contraceptive injections were provided to black women, while the white women were offered the contraceptive pill.<sup>23</sup> This policy violated women's right to equality and dignity and thus infringed upon their reproductive health rights.<sup>24</sup> While white women with access to contraceptive pills had the autonomy to decide whether to continue or discontinue their use, the black women who received long-term contraceptive injections did not enjoy such freedom.

Apartheid laws also violated some other fundamental human rights. The law that prohibited inter-racial marriage impinged on the right to marry and found a family.<sup>25</sup> This law was at variance with the provisions of the 1948 Universal Declaration of Human Rights (UDHR)– which provides that when a man and woman are of full age, they have the right to marry anyone of their choice and found a family without limitation as to race, nationality, or religion.<sup>26</sup> The law that forbade sexual relations with people from other racial groups violates the citizens' right to

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<sup>21</sup> L. London "Health and human rights: What can ten years of democracy in South Africa tell us?" (2004) 8(1) *Health and Human Rights* 1.

<sup>22</sup> D. Cooper *et al.* "Ten years of democracy in South Africa: Documenting transformation in reproductive health policy and status" (2004) 12 *Reproductive Health Matters* 70.

<sup>23</sup> *Ibid.*

<sup>24</sup> London, note 21 (above).

<sup>25</sup> Prohibition of Mixed Marriages Act 55 of 1949.

<sup>26</sup> Article 16(1) of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948.

freedom of association.<sup>27</sup> It is evident from the above that during the colonial and apartheid periods, the various laws subjected African culture to 'western' culture.<sup>28</sup>

### 5.2.3 The Post-Apartheid Experience

The end of the apartheid rule witnessed development in every area – particularly the promotion of human rights. Women in South Africa at this period resisted negative cultural practices that discriminate against women. This was achieved through Women's National Coalition which ensured that women issues were addressed in the post-apartheid Constitution. As a result of their effort, the constitution is gender sensitive by ensuring women's right, prohibits sex discrimination, and promote women's equality.<sup>29</sup> In the Constitution, human rights were considered fundamental to the transformation of the country.<sup>30</sup> The Constitution explicitly states that the Bill of Rights is the cornerstone of democracy in South Africa.<sup>31</sup> The government abolished a segregation policy and adopted international standards that accommodate the interests of all citizens. Section 9(1) of the 1996 Constitution states that [e]veryone is equal before the law and has the right to equal protection and benefit of the law.<sup>32</sup> The implication of this section is that every citizen should have equal access to health-care services and facilities. The transformation ushered in by the new constitution in terms of the health sector, included the promotion of reproductive health rights.<sup>33</sup>

Many other discriminatory laws were either abolished or modified. One example was the Recognition of Customary Marriages Act.<sup>34</sup> The South African courts have decided on the status of customary marriages. In *Thembisile and Another v Thembisile and Another*,<sup>35</sup> the court held that civil marriages no longer have precedence over customary marriages. Furthermore, in

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<sup>27</sup> Immorality Act 21 of 1950, amended as Act 23 of 1957.

<sup>28</sup> E. Grant "Human rights, cultural diversity and customary law in South Africa" (2006) 50(1) *Journal of African Law* 2.

<sup>29</sup> S. Houston, note 3 (above).

<sup>30</sup> London, note 21 (above) 8.

<sup>31</sup> Section 7, Constitution of the Republic of South Africa, 1996.

<sup>32</sup> *Ibid.*

<sup>33</sup> Section 27(1).

<sup>34</sup> 120 of 1998.

<sup>35</sup> (2002) 2 SA 209 (T).

*Moseneke and Others v Master of the High Court*,<sup>36</sup> Section 23 (7) of the Black Administration Act,<sup>37</sup> which segregated the administration of intestate deceased estates, was declared invalid and unconstitutional. In conformity with the declarations of the Vienna Conference on the protection of human rights in the face of cultural diversity,<sup>38</sup> South African's Constitution accommodates the promotion of various cultural practices that are in linewith the promotion of human rights.

The cultural rights recognised by the South African Constitution accord with the provisions of some of the international instruments on the right to culture. The UDHR, which forms the foundation of most human rights instruments, provides that “Everyone as a member of society... is entitled to the realization...of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.<sup>39</sup>

This Article guarantees socio-economic and cultural rights of every member of the society, but subject to the fact that the rights must be necessary for the dignity and free development of the personality of such an individual. In the same vein, the UDHR further supports cultural rights, by stating that “Everyone has the right to participate freely in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”,<sup>40</sup>

The declarations in articles 22 and 27 of the UDHR are profound on the recognition of cultural rights. Cultural rights are to be recognised to enhance the personal development of individuals in their various societies. Furthermore, Article 27 of the ICCPR took into consideration the right to the culture of a minority ethnic group, in a culturally diversified country like South Africa. It provides that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their culture, to profess and practice their religion, or to use their own language.

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<sup>36</sup> (2001) 2 SA 18 (CC).

<sup>37</sup> 38 of 1927.

<sup>38</sup> Para 5, Vienna Declaration and Programme of Action, United Nations General Assembly, UN Doc. A/CONF./157/23, 12 July 1993.

<sup>39</sup> Article 22, Universal Declaration of Human Rights (UDHR),1948.

<sup>40</sup> Article 27, UDHR.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also protects cultural rights.<sup>41</sup> South Africa signed this treaty in 1994 and ratified it in 2015. However, it asserted before the ratification of the treaty – that its Bill of Rights goes beyond all the rights enshrined in ICESCR.<sup>42</sup> The court referred to ICESCR in *Government of the Republic of South Africa and Others v Grootboom and Others*.<sup>43</sup> In interpreting the meaning of “progressive realisation”, the Constitutional Court alluded to the fact that some of the provisions on socio-economic rights in the Constitution originated from the ICESCR. This case was decided before the ratification of the treaty in South Africa. To this end, it could be argued that South Africa demonstrated her willingness to comply with the provisions of the ICESCR – long before its ratification.

In line with the provisions of most international treaties that recognised cultural rights, various cultural practices are accommodated to the extent of their conformity to the Constitution; hence, they should not be given precedence over the Constitution. The South African Constitution is hailed as one of the most progressive in the world – because of its universalist conception of human rights.<sup>44</sup> In addition to its provisions on the promotion of women’s rights in the face of various cultural practices, South Africa has adopted various legislative and policy frameworks to protect these rights. These frameworks are considered to have exceeded the provisions of some of the international and regional instruments. However, while South Africa has acceded to some international and regional treaties on the promotion of women’s rights,<sup>45</sup> there is a gap in the

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<sup>41</sup> Article 15, ICESCR, 1966.

<sup>42</sup> Statement of Minister of Foreign Affairs at 10<sup>th</sup> Session of the Human Rights Council, 3 April 2009. Available at: <http://www.polity.org.za/article/sa-dlamini-zuma-statement-by-the-minister-of-foreign-affairs-at-the-10th-session-of-the-human-rights-council-04032009-2009-03-04>.

<sup>43</sup> (2001) (1) SA 46 CC.

<sup>44</sup> Grant, note 28 (above) 3.

<sup>45</sup> International Covenant on Civil and Political Rights, 999 UNTS 171, (ICCPR), ratified by South Africa on 10 March 1999; Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW), 1249, UNTS 13, ratified by South Africa on 14 January 1996; International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD) 660 UNTS 195, ratified by South Africa on 9 January 1999; UN Convention on the Rights of the Child, 1989, (CRC) 1577 UNTS 3, ratified by South Africa on 16 July 1995; and the following regional instruments: Africa Charter on Human and Peoples’ Rights 1981, OAU Doc, CAB/LEG/67/3 Rev. 5, ratified by South Africa on 9 July 1996; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003, ratified by South Africa on 16 March 2004; and the African Charter on the Rights and Welfare of the Child, 1990, OAU Doc, CAB/LEG/24.9/49, ratified by South Africa on 7 January 2000.

implementation of these frameworks. South African women are yet to realise fully their reproductive health rights – due to various cultural practices in their communities.

### **5.3 CULTURAL PRACTICES THAT INFRINGE ON THE REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN SOUTH AFRICA**

As mentioned earlier, South Africa has diverse cultural groupings. Each ethnic group has its culture that reflects its values that distinguish it from other groups. Despite this distinct way of life, there are similarities between the values held by these groups. However, some of the cultural practices embraced by these cultural groupings infringe some of the legally recognised rights, particularly the reproductive health rights of women in the societies in which they are practised. This section explores some of the cultural practices that infringe on the reproductive health rights of women in South Africa.

#### **5.3.1 Widowhood Rituals**

Widowhood rituals form part of the rites performed by a widow after the death of her husband. In some ethnic groups in South Africa, this ritual is one of the ways in which the woman's affection for the departed is publicly re-enacted through the mourning process that still considers the widow as being married to the deceased.<sup>46</sup> The loss of a husband is a great agony - as the body of the widow becomes both the object and subject of mourning. Widowhood rituals are practiced by the Zulu, Xhosa, Tswana, and Southern and Northern Sotho ethnic groups.<sup>47</sup> While these groups have different cultural affiliations, the experiences of widows are similar.

Traditionally, the Zulus – who belong to one of the prominent tribes in South Africa – consider the death of a member of the family as a form of contamination, and funeral rituals are undertaken to cleanse the living members of the deceased's family.<sup>48</sup> In the same vein, the mourning period affords the bereaved the opportunity to adjust to the loss. Daily routines are suspended.<sup>49</sup> Furthermore, “the rituals of mourning and burial function as rites of passage for the

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<sup>46</sup> M.Ramphela “Political widowhood in South Africa: The embodiment of ambiguity” (1996)125(1) *Daedalus*Social Suffering 99.

<sup>47</sup> E. Kotze *et al.* “Women ... Mourn and men carry on”: African women storying mourning practices: A South African example” (2012) 36 *Death Studies*742, 744-745.

<sup>48</sup> Rosenblatt &Nkosi, note 7 (above) 69.

<sup>49</sup> T.W. Bennett*Customary law in South Africa*1<sup>st</sup> Ed. (2004)332.

deceased, because, on death, the spirit begins a journey from the world of the living to that of the ancestors”.<sup>50</sup> While all members of the family of the deceased are expected to undergo mourning practices known as *ukuzila*, the widow’s *ukuzila* is more extensive than any other member of the family. She is expected to mourn the deceased for at least one year.<sup>51</sup>

The widow’s mourning period starts with sitting in the bedroom, covered with a blanket, while sympathisers visit to express their condolences. She is expected to stay indoors except if she needs to use the bathroom.<sup>52</sup> She must remain seated and call for assistance if she needs anything. The furniture is removed— except for a mattress and mat on which the widow sits.<sup>53</sup> The widow’s face is covered, and she is expected to avoid eye contact with the sympathisers who come for condolence visits. The widow, clothed in black attire, shaves her hair and conducts herself in a sorrowful manner. The sitting phase ends immediately the deceased is buried. However, the widow continues to mourn beyond the confines of her home, and is expected to demonstrate her grief everywhere she finds herself. Black attire easily denotes a widow in the public sphere, and she is avoided. In the Zulu culture, widowhood symbolises bad luck. When using public transport, she sits at the back so as not to infect other passengers with her bad luck. Her black clothes denote that she is impure – and not approachable for sexual relations.<sup>54</sup>

During the mourning period, a Zulu widow cannot attend wedding ceremonies.<sup>55</sup> After a year of mourning, the widow’s in-laws organise a ceremony (*ukubuyisa* in Xhosa and Zulu) to cleanse her, and she can live a normal life again. At this ceremony, the spirit of the dead is laid to rest and is thus united with the ancestors.<sup>56</sup> However, because bereavement and mourning practices are challenging for women in contemporary South Africa, the mourning rituals have been modified to strike a balance between tradition and human rights.<sup>57</sup>

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<sup>50</sup> Bennett, note 49(above).

<sup>51</sup> Rosenblatt & Nkosi, note 7 (above) 79.

<sup>52</sup> *Ibid.*

<sup>53</sup> Kotze *et al.*, note 47 (above) 753.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Bennett, note 49 (above).

<sup>57</sup> Kotze *et al.*, note 47 (above) 752.

### 5.3.2 Female Genital Mutilation (FGM)

Female genital mutilation is one of the cultural practices that impair women's reproductive health rights in South Africa. The practice involves physical disfigurement or modification of the female genitals. The World Health Organisation classified FGM into four types.<sup>58</sup> Some authors argue that this practice is alien to the ancient South African customs.<sup>59</sup> T.W. Bennett also noted that "There is no evidence to show that it is an authentic tradition in any of the cultures of this country."<sup>60</sup> It is believed that it was introduced by foreign immigrants and is prevalent in the Eastern Cape and KwaZulu-Natal.<sup>61</sup> There is evidence to show that FGM is practised in South Africa. Nadassen provides proof that FGM exists as part of the cultural practices of some ethnic groups in South Africa. She establishes that the female initiation practices conducted at circumcision schools to induct young girls (immediately when they reach puberty) into womanhood, include FGM.<sup>62</sup>

Although the primary purpose of the initiation is to train a young girl in how to cope with the challenges of marriage, part of the process of the initiation involves the mutilation of the female genital organs. The initiation process – though not uniform in all ethnic groups – always involves some tampering with the female genital organs. The processes include: cutting off the tip of clitoris, insertion of a substance into the vagina to widen the vagina (butternut shell, corn cob, bottle), and removal of the clitoris. It could also include: slitting the labia, pulling out the labia to get it extended or enlarged, and pulling out of the clitoris, among other practices.<sup>63</sup> The practice of FGM in South Africa was validated by the fact that women presenting with symptoms of

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<sup>58</sup> The various types of female genital mutilation are discussed extensively in chapter four.

<sup>59</sup> J.C. Mubangizi "A South African perspective on the clash between culture and human rights, with particular reference to gender- related cultural practices and traditions (2012) 13(3) *Journal of International Women's Studies* 33,36.

<sup>60</sup> Bennett, note 49 (above) 304.

<sup>61</sup> Mubangizi, note 59 (above) 36.

<sup>62</sup> K.K. Nadassen *A sociological investigation into female genital mutilation, including possible human rights violation and the South African context* (Unpublished PhD thesis, University of KwaZulu-Natal, 2000) 162.

<sup>63</sup> *Idem* 158-205. An initiate may undergo one or more of the types of mutilation itemised above. The form of mutilation depends on the ethnic group of the initiate. Initiation practices are observed by the following ethnic groups in South Africa: Sotho, Tswana, Bapedi, Shangaan – among others.

complications arising as a result of FGM – are seen with an increasing frequency in South Africa.<sup>64</sup>

However, contrary to the reason adduced for indulging in FGM by some countries – that FGM is conducted to curb the sexual desires of young ladies in order to preserve their chastity – FGM performed on young girls in South Africa during the initiation processes usually drive the young ladies into sexual activities. Most will want to experience what they were taught at the initiation school. In some of the circumcision schools, older men do violate the initiates to confirm whether the ladies understood and complied with the initiation process – and if the initiation/circumcision was properly done.<sup>65</sup>

It could be inferred from the evidence of Nadassen, that the FGM practised in South Africa could be categorised as clitoridectomy (removal of the prepuce and a tiny part of the clitoris). Introcision is another form of mutilation that could be deduced from the initiation process (cutting of the vagina to enlarge the vaginal opening, inserting substances into the vagina for enlargement, stretching of the clitoris and/or labia to make them longer, among other things). Inserting objects into the vagina to enlarge it constitutes a variation of introcision, as identified by the World Health Organisation.<sup>66</sup> The modification /mutilation of the female genital organs at the initiation – are done to bring more pleasure to male sexual partners during intercourse.<sup>67</sup> Women are subjected to various excruciating painful procedures – and the end result is not beneficial to them.

It is disheartening to note that usually women are not opposed to this cultural practice. Nadassen points out that mothers usually put forward their daughters for circumcision. She also highlighted the roles played by the mother and aunt of the initiate, in the process of the initiation. In the same vein, among the Sothos and Tswanas, the mother or aunt of the prospective groom must examine the prospective bride to ensure that her labia is extended – before she will be allowed to marry

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<sup>64</sup> M.Mswela “Cultural practices and HIV in South Africa: A legal perspective”(2009) 12(4) *PER*172,189.

<sup>65</sup> Nadassen, note 62 (above).

<sup>66</sup> *Ibid.*

<sup>67</sup> O. Shisana & L.C. Simbayi “Nelson Mandela/HSRC Study of HIV/Aids, South African National HIV Prevalence, Behavioral Risk and Mass media Household Survey” (2002)4.

their son.<sup>68</sup> Mothers subject their daughters to the practice for societal acceptance. For instance, in Mpumalanga, according to Nadassen, men may not marry an uncircumcised girl.<sup>69</sup>

As noted in chapter four, FGM poses some health risks that may have immediate, intermediate and long-term consequences. The immediate consequences include: excruciating pain, shock, hemorrhage, transmission of infections, septicemia (blood poisoning), acute urine retention, and death, among other things.<sup>70</sup> The intermediate consequences are: delayed healing, pelvic infection, painful intercourse, dysmenorrhea (painful menstruation) and urinary tract infection, among others.<sup>71</sup> The long-term consequences of FGM include: infertility caused by the infection of the ovaries and fallopian tubes. The bladder may be infected and this may result in incontinence and various problems associated with child delivery – such as prolonged labour, fistulas, loss of sexual enjoyment, and even death of the victim.<sup>72</sup>

Female genital mutilation infringes some reproductive health rights of women. It affects the right of women to their sexuality and their independent decision-making about their bodies. The alteration/modification of the female genital organs is done mostly to curtail the sexual desires of a lady – so that she can remain chaste. And, when married, it is done to ensure that the husband is satisfied during sexual intercourse. The practice could be said, in this regard, to be dehumanising as the interest of the victim is not taken into consideration. The body of the victim is modified to promote the pleasure of another person. This practice reduces the female genital organs to being sexual and reproductive implements. As a result of the harm done to the reproductive organs of the victims of FGM, it could be argued that FGM can deny the victim the right of reproduction.

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<sup>68</sup> Nadassen, note 62(above).

<sup>69</sup> *Ibid.*

<sup>70</sup> K. Nadassen “A profile of female genital mutilation and human rights: Towards outlawing the practice” (2000). Available at: [sabinet.co.za/webx/access/journal\\_archive/10231757](http://sabinet.co.za/webx/access/journal_archive/10231757).

<sup>71</sup> *Idem* 178.

<sup>72</sup> Nadassen, note 70(above) 178-180.

### 5.3.3 Polygamy

Polygamy refers to a situation where a man marries more than one wife. This desire could be informed by several factors: the need to satisfy male sexual urges, especially as a result of the taboo on post-partum sex that precludes a man from having sexual intercourse with his wife during lactation.<sup>73</sup> Having more than one wife means that a man's sexual needs can be met—without having extra-marital affairs. Another reason for polygamy is the value attached to procreation, and more importantly, the need for an heir (male child). Childlessness or a woman's inability to produce a male child could prompt a man to marry an additional wife. While not regarded as one of the motivations for polygamy in ancient African society, today affluence is one of the reasons why people marry more than one wife. Infidelity is regarded as the inspiration for affluent polygamy.<sup>74</sup>

In ancient Zulu culture, the first wife had to agree to her husband marrying another wife.<sup>75</sup> In contemporary South Africa, some traditionalists subscribe to this practice – as a way of preserving their culture.<sup>76</sup> In ancient times, polygamy was regarded as the ideal social organisation and men aspired to have a polygamous home.<sup>77</sup> However, this was not always possible in the Nineteenth Century and later, as imperialism, and subsequently apartheid, had a devastating effect on the family structure. Apartheid policies such as the Land Settlement Act<sup>78</sup> and the Group Areas Act<sup>79</sup> deprived black South Africans of the right to own land. South African men who were originally farmers and hunters – were forced to travel far from home in

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<sup>73</sup> Mswela, note 64 (above) 180.

<sup>74</sup> *Idem* 181.

<sup>75</sup> Nhlapo, note 15 (above) 68.

<sup>76</sup> S. Gustafsson & S. Worku “Marriage markets and single motherhood in South Africa” (2006). Available at: <http://www.tinbergen.nl> 1, 5.

<sup>77</sup> P. Delius & C. Glaser “The myths of polygamy: A history of extra-marital and multi partnership sex in South Africa” (2004) 50 *South African Historical Journal* 84, 85.

<sup>78</sup> 12 of 1912.

<sup>79</sup> 36 of 1966.

search of work. Families were separated.<sup>80</sup>In the same vein, the 1952 Pass Law Act<sup>81</sup> forbade people who were not employed, from staying in an urban area.<sup>82</sup>

Thus, when one spouse found work in the town and the other, in most cases the wife, did not – she would remain in the rural areas and the husband would visit her when he was able to do so. This had devastating effects on the family structure, as men often entered into new relationships, not necessarily marriage, in the town, and abandoned their families back home. African marriage systems and values that require a husband and wife or wives to live together, were significantly affected. Living apart encourages promiscuity – that invariably impacts on women’s reproductive health rights.

Furthermore, apartheid laws did not recognise customary marriages. Women in such marriages were regarded as minors and could thus not own property without the help of their male guardians. This encouraged the subjugation of women as they had no say concerning their husband’s property in the event of divorce or death.<sup>83</sup>It is for this reason that, during the apartheid era, some African women rejected marriage and preferred to raise their children on their own.<sup>84</sup>

Apart from the devastating effects of colonial and apartheid policies on the institution of marriage, the financial obligations attached to a customary marriage have not encouraged polygamy. Payment of *lobola* (bride price), which is one of the considerations for a valid customary marriage, is a huge financial commitment– to the extent that some men prefer to have a sexual partner with no formal marriage relationship. The children of such relationships are born out of wedlock. This is prevalent because society does not frown upon this practice. A higher

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<sup>80</sup> C. Albertyn“Contesting democracy: HIV/AIDS and the achievement of gender equality in South Africa” (2003) 29(3) *Feminist Studies*595,597.

<sup>81</sup> 67 of 1952.

<sup>82</sup> V. Hosegood *et al.*“Dispensing with marriage: Marital and partnership trends in rural KwaZulu-Natal, South Africa2000-2006” (2009) 20 *Demographic Research*279, 281.

<sup>83</sup> This situation changed following the promulgation of the Recognition of Customary Marriage Act, 1998. Unless the couple signs an ante-nuptial contract, the marital property in customary marriage now automatically becomes the property of the couple.

<sup>84</sup> Gustafsson &Worku, note 76(above) 3.

value is placed on bearing a child – than on marriage. When a man impregnates a woman that he is not married to, he has two options: he may decide to marry her or pay damages to her family.<sup>85</sup>

Posel *et al.* have noted that “marriage rates in South Africa, particularly among [the] young[black] Africans are very low and have declined further during the post-apartheid period.”<sup>86</sup>This has been linked to the huge bride price that is the consideration for a valid customary marriage.<sup>87</sup>Polygamy is not a thriving cultural practice in South Africa – due to the reasons cited above. Some traditionalists subscribe to this practice as a way of preserving their culture.<sup>88</sup>

Affluence is another reason that influences some men to practice polygamy. Many young men cannot afford *lobola*, leaving the door open for rich and older men who have the financial capacity to marry more than one wife.<sup>89</sup>Polygamy also existed among the chiefs– because they had the financial capability to sustain this practice.<sup>90</sup>While the Recognition of Customary Marriages Act<sup>91</sup> recognises polygamy, it requires that before a man marries an additional wife, he has to apply to the court for an order approving a written contract that sets out the future matrimonial property system.<sup>92</sup> It follows, therefore, that under the Act, a man cannot take an additional wife, at will. The man seeking an additional wife has to notify his family of his intention and guarantee an assurance that the new marriage will not inflict any economic hardship. This will deter men who are not financially capable of polygamy – to desist from such marriages.

The adverse effect of polygamy on the reproductive health rights of women, cannot be underestimated. It affects the women’s right to dignity, especially where a husband marries another woman because his wife is infertile. In the same vein, it affects women’s right to reproductive autonomy – as the conditions and timing of sex are defined by the husband’s multiple sexual partners. Polygamy can also render a woman susceptible to sexually transmitted

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<sup>85</sup> V. Hosegood *et al.*, note 82(above) 5.

<sup>86</sup> D. Posel *et al.* “Is marriage a dying institution in South Africa? Exploring changes in marriage in the context of *ilobolo* payments” (2011) 25(1) *Agenda: Empowering Women for Gender Equity*102.

<sup>87</sup> *Ibid.*

<sup>88</sup> Gustafsson & Worku, note 76 (above) 5.

<sup>89</sup> Posel *et al.*, note 86(above) 106-107.

<sup>90</sup> Delius & Glaser, note 77(above) 85.

<sup>91</sup> 120 of 1998.

<sup>92</sup> Section 2(3) of the Recognition of Customary Marriages Act.

diseases – including HIV – because she cannot control the sexual encounters between her husband and his other sexual partners.

#### 5.3.4 Early and Forced Marriages

An early and forced marriage occurs where the consent of the bride, which is a pre-condition to a valid customary marriage, is not obtained, or is obtained under undue influence of either the parents or guardian, or the prospective groom. Marriages would be regarded as early where the bride is under the age of 18.<sup>93</sup> All early marriages are forced marriages because the young bride at the time of the marriage is incapable of taking decisions in that regard. Her decision to marry at that age must have been influenced by her parents/guardian or the intending husband. However, not all forced marriages are necessarily early marriages. A forced marriage may occur when a woman who is mature enough to marry is coerced into a marriage without her consent. One particular version of this marriage, is known as *Ukuthwala* in some ethnic groups in South Africa.

The word *Ukuthwala* means “to carry” in Xhosa.<sup>94</sup> In ancient times, a man declared his intention to marry a young girl through *Ukuthwala*. It is a form of abduction of a young woman by the prospective husband and his friends. It usually occurs when the prospective husband envisages that the prospective in-laws and bride may reject his marriage proposal. It thus represents a bid to compel both the young woman and her family to accept the proposal. In ancient times, this practice was condoned because it targeted women of marriageable age– and the purpose was not for sexual exploitation.<sup>95</sup>

When a young woman was abducted by the prospective groom, he kept her in a secured place and visited her family to inform them that he had abducted her and intended to marry her. As punishment for the abduction – the groom was required to pay a certain number of cattle. Marriage arrangements followed. If the two families could not reach a compromise on the marriage arrangements, the abducted woman was returned to her parents, while her abductor and

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<sup>93</sup> Article 21(2) of the African Charter on the Rights and Welfare of the Child, 1990; Article 19 of the Convention on the Rights of the Child, 1989; and Article 6 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003.

<sup>94</sup> Mubangizi, note 59(above) 39.

<sup>95</sup> Maluleke, note 13 (above) 11.

his family paid damages. If the families were able to agree on the terms and conditions for the marriage, the customary marriage went ahead.<sup>96</sup> This form of marriage could be regarded as forced marriage. This is because the consent of the young woman who had been abducted, was not sought.

Today, the practice of *ukuthwala* has been distorted. In contemporary times, it could involve kidnapping, rape and forced marriage of young girls to men, who are old enough to be their grandfathers.<sup>97</sup> In *Jezile v S and Others* the court took judicial notice of a public debate on the practice of *ukwuthwala* that “its current practice is regarded as an abuse of traditional custom and a cloak for the commission of violent acts of assault, abduction, rape, of not only women but children as young as eleven years by older men”<sup>98</sup> To this end, *ukwuthwala* in contemporary times could be a combination of abduction and early and forced marriage. This form of marriage violates women’s reproductive health rights, because it infringes on a woman’s right to consent to such a relationship.

Furthermore, when consent is granted, it may be under duress or undue influence. Apart from the issue of consent, abducting a minor for the purpose of marriage may have grave consequences for her health; she may not be physiologically ready for sexual relations. Given that she is not sufficiently matured to give birth; she might incur *vesicovaginal fistulae* while giving birth. She could also be susceptible to HIV and other sexually transmitted diseases if she is coerced into a sexual relationship with a man whose health status is unknown. Furthermore, marriage carries responsibilities that are beyond a young girl’s capacity.

The expected result of marriage in most African society is procreation: the young bride will be burdened with child bearing and rearing, and also home keeping. Early marriage will also adversely affect her social development. The abducted girl might be removed from school; this will affect her level of exposure and her ability to make the right decisions about her reproductive autonomy.<sup>99</sup> The age difference between the abducted girl and her abductor means

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<sup>96</sup> Mubangizi, note 59(above).

<sup>95</sup> *Ibid* .

<sup>98</sup>(2015) ZAWCHC 31, High Court Case No. A 127/2014 (High Court of South Africa) Western Cape Division, Cape Town, Paragraph 56.

<sup>99</sup> Maluleke, note 13 (above).

that such a relationship involves subjugation. It may also involve rape that amounts to sexual exploitation.

### 5.3.5 Levirate and Sororate Unions (*Ukungena*)

In South Africa, levirate and sororate unions are mainly prevalent in KwaZulu-Natal and the Eastern Cape provinces. A levirate marriage occurs when a widow is compelled to marry a member of her late husband's family. The widow is given a few sticks to choose from – with each representing a man in the family. The stick she chooses will determine who her new husband is.<sup>100</sup> This cultural practice is based on the fact that, in some parts of Africa, marriage represents more than the relationship between husband and wife, and also extends to the spouses' families. Thus, the death of a marriage partner does not end the relationship between the partner and his/her spouse's family. The widow/widower is regarded as a member of the family, and the customary marriage can only be terminated if the widow's family refunds the bride wealth (*lobola*) paid by the deceased husband and his family.<sup>101</sup>

In ancient times, this practice was used to ensure the continuation of the dynasty of a particular member of the family. It also ensured that a wife fulfilled her obligation to bear children.<sup>102</sup> Consequently, a widow of childbearing age who was childless, or who had no male child, was required to marry a relative of her late husband. The children from the union of the widow and her husband's relative were regarded as the children of the deceased. This was referred to as "raising the seed of the deceased man".<sup>103</sup> However, in contemporary times, the purpose of levirate marriages has changed. Families coerce the widow into such a relationship for economic reasons. If the woman refuses to marry a family member – she ceases to be a member of the family and is dispossessed of her husband's property.<sup>104</sup>

This form of marriage violates women's fundamental human rights, particularly their reproductive health rights, for several reasons. First, the marriage lacks consent, which is one of

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<sup>100</sup> Maluleke, note 13 (above).

<sup>101</sup> Mswela, note 64(above) 184.

<sup>102</sup> *Ibid.*

<sup>103</sup> A.F. Steyn & C.M. Rip "The changing urban Bantu family" (1968)30(3) *Journal of Marriage and Family*499,506.

<sup>104</sup> Maluleke, note 13 (above).

the basic requirements of a valid marriage. In most cases, the woman is either coerced into the union due to the threat of economic loss (her husband's property) – if she rejects such a marriage. Secondly, a levirate marriage infringes on a woman's right to dignity, because she is considered the property of the deceased, to be inherited.

A sororate union is the opposite of a levirate marriage; it is also related to procreation. This type of marriage occurs among some South African cultural groups– except certain Xhosa speaking groups.<sup>105</sup> Bennett notes that “...traditionally, a woman's child-bearing potential was thought to be her most important attribute.”<sup>106</sup> Sororate unions are regarded as the last resort when the wife is infertile or dies before the birth of a child.<sup>107</sup> The wife's family will give the husband her sister or one of her relatives to bear the child. The children of this union are regarded as the children of the childless wife.<sup>108</sup> Even in cases where the deceased wife had borne children, the husband could bring her sister to help raise the children.<sup>109</sup> While the first wife's consent is desirable, it is not essential. The union is not a new marriage, but an extension of the first marriage; hence, the husband is not required to pay *lobola* for the subsequent union. Sororate unions are an alternative to the refund of the *lobola*. If the bride's family fails to compensate either for her death or infertility by substituting her sister – the husband can demand that the *lobola* is refunded.<sup>110</sup>

This type of marriage cannot be regarded as a valid customary marriage, because the bride price, which is the consideration that must be furnished for a customary marriage to be valid, is absent. However, it is an infringement on the reproductive health rights of women – particularly the right to privacy, because it extends the decision to reproduce beyond the couple. In the same vein, such an arrangement might affect the right to dignity of the first wife, as she is assisted in performing her role. The new wife's right to reproductive autonomy can also be infringed upon as she may not be interested in such a relationship – but may be coerced or unduly influenced by her relatives.

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<sup>105</sup> Bennett, note 49 (above).

<sup>106</sup> *Ibid.*

<sup>107</sup> Steyn & Rip, note 103 (above).

<sup>108</sup> *Ibid.*

<sup>109</sup> Bennett, note 47 (above) 355.

<sup>110</sup> *Idem* 355.

### 5.3.6 Bride Price/Bride Wealth

Bride price or bride wealth is the consideration (goods/money) that is given by the groom's family to the bride's family in a customary marriage. Each of the diverse cultural groups in South Africa has different names for bride wealth. In Zulu, it is known as *lobola*, while the Xhosa equivalent is *ikhazi*, the Tswana *bogadi*, the Southern Sotho *bohali*, the Tsonga *lovono* and the Venda *thaka*.<sup>111</sup> For this study, the term *lobola* is employed— because it is more widely used in South Africa.

*Lobola* is defined as “cattle or other property which, in consideration of an intended customary or civil marriage, the intended husband, his parent or guardian or other person agrees to deliver to the parent or guardian of the intended wife.”<sup>112</sup> *Lobola* has also been described as “property in cash or kind ... which a prospective husband or the head of his family undertakes to give the head of the prospective wife's family in consideration for a customary marriage.”<sup>113</sup>

Thus, *lobola* consists of a significant gift in the form of money or cattle from the groom and his family – to the father of the bride.<sup>114</sup> *Lobola* need not be paid in full as long as there is agreement that *lobola* will be paid.<sup>115</sup> In *Maloba v Dube* the court held that “It is trite African customary law that there is no rigid custom governing the time stipulation within which *lobola* has to be fully paid. What is sacrosanct is the undertaking to pay the agreed *lobola*...”<sup>116</sup> The bride's family reciprocates this gesture with feasting and a show of great hospitality (*umaho*). Because customary marriage transcends the relationship between the husband and the wife, the two families are always involved in the marriage negotiations. The prospective groom's parents, particularly his father/guardian, negotiate with the prospective wife's parents/guardian. The bride's father has the authority to prevent or delay the marriage by refusing the bridewealth – or he may accept a more attractive bridewealth from another suitor.<sup>117</sup> The negotiations between the

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<sup>111</sup> Bennett, note 49 (above) 220-242.

<sup>112</sup> Section 1(1) of the Codes of Zulu Law.

<sup>113</sup> Section 1(iv) of the Recognition of Customary Marriages Act 120 of 1998.

<sup>114</sup> A. Meyer-Weitz *et al.* “The socio-cultural contexts of sexually transmitted diseases in South Africa: Implications for education programmes” (1998) 10(2) *AIDS Care: Psychological and Socio-Medical Aspects of AIDS/HIV* 35, 41.

<sup>115</sup> *Southon v Moropane* (14295/10) (2012) ZAWCHC 31 Para 82

<sup>116</sup> *Maloba v Dube* (2008) ZAGHPHC 434 at Para 24

<sup>117</sup> T.W. Bennett *Human rights and African customary law* (1999) 116.

parents of the prospective couple culminate in their consent to the marriage. Customarily, a woman is regarded as a ‘perpetual minor’ – and hence is not permitted to interfere in marriage arrangements.<sup>118</sup>

However, in *Mabena v Letsoalo*, it was held that an independent adult bridegroom does not require his parents’ consent to a customary marriage.<sup>119</sup> He can negotiate and pay *lobola* and conclude marriage arrangements. The court held that although it is customarily the bride’s father/guardian’s duty to negotiate and receive *lobola* and consent to the customary marriage, there are instances where mothers can perform this role;<sup>120</sup> there are many instances where a mother is the head of the family. In such a situation, she can act as the bride’s guardian and negotiate and receive *lobola* as evidence of her consent to the marriage.<sup>121</sup>

The effect of *lobola* on the marriage contract is that the husband and his family take ownership of the bride, and any offspring of the marriage.<sup>122</sup> This is because payment of *lobola* can be interpreted by men as a licence to take authority over the bride’s body.<sup>123</sup> The payment of *lobola* is regarded as a neutral medium in which a woman’s reproductive ability is exchanged.<sup>124</sup> Consequently, she does not have a say as to the number of children she will have during the marriage.<sup>125</sup> Thus, payment of *lobola* represents a consideration in anticipation of what the wife is going to produce, and the value (regarding the number of children) she is going to add to the family.<sup>126</sup>

Payment of *lobola* is a well-recognised customary practice among black South Africans – and one of the requirements of a valid customary marriage. Children whose fathers have not paid *lobola* are regarded as illegitimate. Consequently, couples still abide by the practice, even if they have contracted civil marriages.<sup>127</sup> Black South African men consider the payment of *lobola* as their “cultural duty”; it gives them a sense of pride, as it proves that they can financially support

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<sup>118</sup> Bennett note 117 (above)

<sup>119</sup> (1998) 2 SA 1068 (T).

<sup>120</sup> *Ibid.*

<sup>121</sup> *Mabena v Letsoalo*, note 114 (above).

<sup>122</sup> *Ibid.*

<sup>123</sup> Abertyn, note 78(above).

<sup>124</sup> Bennett, note 49 (above) 222.

<sup>125</sup> Meyer, note 114(above).

<sup>126</sup> Gustafsson & Worku, note 76(above).

<sup>127</sup> Gustafsson & Worku, note 76(above).

their new home. However, current trends relating to *lobola* have made it an obstacle to marriage. Some scholars have disputed that *lobola* amounts to a bride price.<sup>128</sup> In traditional black South African society, *lobola* was paid in cattle that symbolised reproduction. Furthermore, the payment of cattle created a bond between the two families. This is evident in the fact that *lobola* was paid in instalments – with the first installment expected to be paid before the marriage and the rest after the birth of a child.<sup>129</sup> It is believed that this would create a relationship between the two families which transcends the death of either partner to the marriage.

Payment of *lobola* also helps to stabilise the marriage, as the husband may lose his *lobola* if he ill-treats his wife. In the same vein, the bride considers the payment of *lobola* by her husband as a sign of commitment and love. It proves her worth, and gives her a sense of pride – both within her immediate family and the community at large. The status of the bride's father in the community determines the number of cattle to be paid by the prospective groom. The bride's personal virtue (her virginity) and her educational status also determine the amount to be paid.<sup>130</sup>

However, in contemporary South Africa, *lobola* has been commercialised. Cattle have been replaced with money and gifts.<sup>131</sup> Cattle have acquired a new value that is measurable in cash and imported goods. Furthermore, due to its economic value, there is a constant increase of *lobola*.<sup>132</sup> It is now regarded as a form of compensation to the bride's family, for what they spent on their daughter before marriage. This may suggest that the parents are selling their daughter – thereby violating her reproductive health rights.<sup>133</sup> The woman's right to dignity may also be violated, as the husband may consider the wife to be a commodity that he purchased, and which must yield interest through procreation. In this type of situation, it may be difficult for the woman to exercise reproductive autonomy.

### **5.3.7 Virginity Testing**

In some traditional South African societies, one of the most valued virtues of a woman is sexual chastity. Women are expected to remain virgins until they marry. *Umhlanga* is a traditional

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<sup>128</sup> Posel *et al.*, note 86(above) 106-109.

<sup>129</sup> *Ibid.*

<sup>130</sup> Bennett, note 49 (above) 226.

<sup>131</sup> Steyn & Rip, note 103 (above) 508.

<sup>132</sup> Bennett, note 49 (above) 223.

<sup>133</sup> Steyn & Rip, note 103 (above).

ceremony in South Africa that celebrates virginity. This is common in KwaZulu-Natal and the Eastern Cape; it takes the form of a reed dance. Participants must be certified virgins.<sup>134</sup> Their genitalia are examined to determine if they are chaste. This exercise is carried out by older women who are referred to as *abahloli*.<sup>135</sup> The examination is based on the erroneous belief that a woman's hymen can only be torn as a result of sexual intercourse. The ceremony reflects the age-old Zulu cultural tradition that does not condone premarital sexual affairs. It is believed that it would restrain young girls from engaging in sexual intercourse, and prevent the spread of various sexually transmitted diseases – including HIV and teenage pregnancies.<sup>136</sup>

Virginity testing among the Zulu and Xhosa people of South Africa dates back to the Nineteenth Century. It was usually done on the request of the local chief, at his homestead, by an elderly local woman usually appointed by him. Mothers and grandmothers also conduct this test on their daughters, to ensure that they are chaste. The test is significant because a woman that is a virgin commands a higher bride wealth. While virginity testing was abandoned by many in modern times, it has regained popularity due to the scourge of HIV/AIDS. Youth are vulnerable to HIV/AIDS: virginity testing enables parents to exercise some form of control over their children and to prevent pre-marital sexual affairs.<sup>137</sup> When people confront new challenges, they tend to look to the past for solutions. Leclerc-Madlala notes that “At such times, old traditions and customary practices take on new meanings and are conferred with high prestige value through their association with an idealized past and a well-defined moral order.”<sup>138</sup>

Among the Zulu people, the celebration of virginity forms part of a three-day ritual appeasement to *nomkhubulwana* – a Zulu goddess that epitomises “female principle, immortal virgin, mother and protector of all Zulu girls and source of growth and creation”. The activities include the celebratory sowing of seed in a designated garden for the deity. This must be done by a virgin. Consequently, young girls are tested to ensure that the task is performed by the right person.

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<sup>134</sup> Vincent “Virginity testing in South Africa: Re-traditioning the postcolony” (2006) January-February *Culture, Health and Sexuality* 17.

<sup>135</sup> Scorgie “Virginity testing and the politics of sexual responsibility: Implications for AIDS Intervention (2002) 61(1) *African Studies* 55.

<sup>136</sup> Maluleke, note 123(above).

<sup>137</sup> Scorgie, note 135(above) 61, 62.

<sup>138</sup> S. Leclerc-Madlala “Protecting girlhood? Virginity revivals in the era of AIDS” (2003) 56 *Agenda: Empowering women for gender equity* 16.

Aside from ceremonial purposes, virginity tests may be conducted on girls when they gather at the home of an *umhololi*. Some communities also conduct monthly testing at their community halls and sports grounds.<sup>139</sup>

However, the tests are conducted by non-medical personnel, in an unhygienic manner. The young women are lined up, and the women conducting the test spread a mat on the grass – on which the young women lie on their backs. They part their legs and are examined by the *umhololi*. In some cases, the *umhololi* may use her hand to part the labia, to confirm virginity. This is done to establish whether the hymen is still intact (covered by a piece of flesh); this piece of flesh is called *umhulumbi* in Zulu. When a young lady passes the test, she is cheered and congratulated by the observers of the event. In some cases, confirmed virgins are given a certificate and a sticker – or a smear of white clay on their forehead as visible evidence that they passed the test. Apart from certificates, the names of the young women and the result, as well as the date of the test, are recorded. Photographs and video recordings of those who passed the test are taken for safe keeping. Those who do not pass the test are required to wait for the *umhololi* for counseling. The purpose of the counseling for a young lady that failed the virginity testing, is to determine how she was deflowered; whether it was consensual or not and to advise her to abstain from pre-marital sex.<sup>140</sup>

To ensure that young women remain virgins, they are organised into groups of *izintombi* (virgins) and are engaged in activities that keep them busy. They regularly meet either to practice dance steps, engage in bead making, or be educated on how to abstain from pre-marital sex. This motivates some girls to submit to the virginity test, as many aspire to become members of these groups.<sup>141</sup> Although the purpose of this cultural practice is to ensure that young women abstain from pre-marital sex, it has been distorted in some ways, and may not achieve the intended purpose. There have been cases where young women who passed the test were found to be pregnant a few months later. This calls into question the effectiveness and accuracy of the test.<sup>142</sup> It has also been alleged that money changes hands for the awarding of

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<sup>139</sup> Scorgie, note 135(above) 57.

<sup>140</sup> *Idem* 58.

<sup>141</sup> *Idem* 57

<sup>142</sup> Scorgie, note 135(above) 70.

certificates.<sup>143</sup> Furthermore, since the women that conduct the test are not trained medical personnel, their judgment may not be accurate. Young women that are not virgins have also found ways to make the testers believe that their hymens are still intact. These methods include inserting toothpaste or a piece of white lace dipped in tomato sauce, into their vaginas.<sup>144</sup>

Virginity testing violates women's fundamental human rights. Asking a woman to lie down on the grass to examine her genitalia in public infringes her right to privacy and bodily integrity. Furthermore, public declaration of a woman's sexual status violates her right to privacy. According to Mubangizi, the right to privacy and bodily integrity are closely connected to the right to dignity. Thus, a breach of the right to privacy and bodily integrity is a breach of the right to dignity.<sup>145</sup> Not only is virginity testing demeaning, but those that do not pass the examination are embarrassed by the outcome, and this will negatively affect their self-esteem.

Virginity testing can also inhibit the health of the participants. The procedures used and the fact that the testers are not trained medical personnel, can affect the health of both the tested and the testers. This is because they could contact some diseases through the process. Furthermore, some young women insert foreign items into their vaginas to create the impression that they are still intact. It goes without saying that they could contract infections, including HIV/AIDS, which, if not properly treated – can adversely affect their reproductive organs and may lead to death. Virginity testing could thus constitute an infringement of the right to life.

Virginity testing is a form of indirect discrimination due to its inherent gender bias. The onus of sexual chastity is placed only on the woman. Meanwhile, men are at liberty to deflower some women before marrying a virgin. Virginity testing also violates women's right of autonomy to deal with their body. Some women subject themselves to the test due to coercion/undue influence on the part of parents and friends– who usually are some of the observers of the event.

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<sup>143</sup> Leclerc-Madlala, note 138(above) 19.

<sup>144</sup> *Idem*21.

<sup>145</sup> Mubangizi, note 59(above).

## **5.4 LEGAL FRAMEWORK FOR THE PROTECTION OF THE REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN SOUTH AFRICA**

As mentioned earlier, South Africa has exhibited a positive attitude towards the protection of the reproductive health rights of women. The country has ratified and domesticated international instruments that protect women's reproductive autonomy. This is coupled with the fact that the South African Constitution explicitly recognises reproductive health rights. In addition, other laws have been adopted that allude to the protection of these rights. This section examines the legal frameworks for the protection of women's reproductive autonomy in South Africa.

### **5.4.1 Constitutional Framework**

South Africa's Constitution is hailed as one of the most progressive constitutions in the world due to the wide range of rights that it provides for – including those protected by international instruments.<sup>146</sup> The rights recognised by the Constitution are of equal value – with none being accorded more importance than others. All the rights recognised in the Bill of Rights are enforceable in court. Of particular significance is South Africa's protection of socio-economic and cultural rights – even before the ratification of the ICESCR. Indeed, during the debate on the ratification of ICESCR, it was stated that the protection of rights offered in the Constitution went far beyond the treaty.<sup>147</sup>

As a democratic state, South Africa values the life of its citizens by recognising their various rights. The Constitution states that the Bill of Rights is a “cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom”.<sup>148</sup> The Constitution also notes that it is “the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”<sup>149</sup> In addition to the explicit recognition of the reproductive health rights of women, the Constitution recognises some other rights that allude to female reproductive

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<sup>146</sup> Mubangizi, note 59(above) 34.

<sup>147</sup> N. Dlamini-Zuma, statement by Minister of Foreign Affairs at 10<sup>th</sup> Session of Human Rights Council, 3 April 2009. Available at: <http://www.polity.org.za/article/sa-dlamini-zuma-statement-by-the-minister-of-foreign-affairs-at-the-10th-session-of-the-human-rights-council-04032009-2009-03-04>.

<sup>148</sup> Section 7(1) of the 1996 Constitution.

<sup>149</sup> Section 2.

autonomy – and that could be regarded as impliedly protecting these rights. Some of the rights are discussed below:

**(a) Equality**

The right to equality is the first right recognised in the Bill of Rights.<sup>150</sup> It is one of the basic values on which the South African democracy is founded.<sup>151</sup> In acknowledging the inequality experienced during the colonial and apartheid eras in South Africa, equality was considered one of the principles required to redress past injustices, and to uphold democracy. According to Langa, DCJ in *Nonkululeko Letta Bhe v Magistrate Khayelitsha*:

The rights to equality and dignity are of the most valuable rights in an open and democratic state. They assume special importance in South Africa because of our history of inequality and hurtful discrimination on grounds that include race and gender.<sup>152</sup>

It goes without saying that equality adds value to human existence, because it enhances co-existence. It enables individuals to recognise that other people are equal to them – thus outlawing discrimination. According to the Constitution, everyone is equal before the law. Equality includes full and equal enjoyment of all rights and freedoms. Furthermore, the Constitution provides that there should be no discrimination: “against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”.<sup>153</sup> This section is of importance to black South African women, because of racial discrimination perpetrated during the colonial and apartheid eras.<sup>154</sup> They were most disadvantaged by racial segregation policies.

Various cultural practices compounded such inequality. Most cultural practices were based on the superiority of the male gender.<sup>155</sup> A girl child/woman does not enjoy the same status as her

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<sup>150</sup> Section 9.

<sup>151</sup> Section 1(a).

<sup>152</sup> (2004) ZACC17 CC49/03.

<sup>153</sup> Section 9(3) of the 1996 Constitution.

<sup>154</sup> P.E. Andrews “From gender apartheid to non-sexism: The pursuit of women’s rights in South Africa” (2001) *North Carolina Journal of International Law and Commercial Regulation* 1.

<sup>155</sup> K. Bentley “Women’s human rights & feminisation of poverty in South Africa” (2004) 31(100) *Review of African Political Economy* 247,248.

male counterparts. The African woman in South Africa was marginalised both at home and in the public sphere. Unequal status is the source of discrimination against women.<sup>156</sup>Section 9(3) of the Constitution was adopted to protect disadvantaged groups from the various factors that prevent them from being equal to other citizens. According to SachsJ in *Minister of Finance and Another v Van Heerden*,“... it gives clear constitutional authorization for pro-active measures to be taken to protect or advance persons disadvantaged because of ethnicity, social origin, sexual orientation, age, disability, religion culture and other factors...”<sup>157</sup>

It should be noted that the Constitution acknowledges that the patriarchal nature of the African society contributes to women’s unequal status in South Africa. Hence, culture was included in section 9(3), as one of the grounds against which people may not be discriminated. Some cultural practices in South Africa discriminate against women and infringe on their reproductive health rights. Apart from being one of the fundamental and core values of the South African democracy, the equality principle is expected to be a standard to test all laws for constitutional consonance.<sup>158</sup>In line with this, Mokgoro J referred to section 9(2) as “... an instrument of transformation and creation of a truly equal society ...”<sup>159</sup>It follows that cultural practices that are not in consonance with the equality principle are invalid in the Republic of South Africa. Consequently, women can seek redress in a court of law whenever a cultural practice could infringe on their right to equality.<sup>160</sup>

### ***(b)Human dignity***

Section 10 of the 1996 Constitution provides that “Everyone has inherent dignity and the right to have their dignity respected and protected.”<sup>161</sup>As with the right to equality, dignity is one of the founding values of the South African democracy. The right to dignity re-emphasises common humanity.<sup>162</sup>When human beings see themselves as equal to others, they will accord them the

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<sup>156</sup> Bentley, note 155(above) .

<sup>157</sup> Para 141 *Minister of Finance and Another v Van Heerden* (2004).

<sup>158</sup> *Idem*, para 22.

<sup>159</sup> *Minister of Finance and Another v Van Heerden* para 87.

<sup>160</sup> Section 2 of the 1996 Constitution.

<sup>161</sup> Section 10.

<sup>162</sup> E. Grant “Dignity and equality”(2007) 7(2) *Human Rights Law Review*299, 311.

required respect and dignity. The political history of South Africa deprived the majority of the black South Africans of a dignified way of life. Mokgoro J noted in her ruling that:

...Apartheid was not merely a system that entrenched political power and socio-economic privilege in the hands of a minority nor did it only deprive the majority of the right to self actualization and to control their own destinies. It targeted them for oppression and suppression. Not only did apartheid degrade its citizens, it also systematically dehumanized them, striking at the core of their humanity...<sup>163</sup>

The significance of the right to dignity is apparent – as it is mentioned several times in the Constitution.<sup>164</sup> According to Chaskalson J, “As an abstract value common to the core values of our constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony...”.<sup>165</sup> The right to equality and dignity are closely linked: human dignity underpins the right to equality. The crux of the matter is that all human beings should be treated the same: “...inasmuch as every person possesses human dignity in equal measure, everyone must be treated as equally worthy of respect”.<sup>166</sup>

According to Ngcobo, J:

... Equality as enshrined in our Constitution does not tolerate distinctions that treat other people as ‘second class citizens’ that demean them, that treat them as less capable for no good reason or that otherwise offend fundamental human dignity...<sup>167</sup>

The purpose of the rights to equality and human dignity, is to ensure that human beings are treated as humans. Apart from the link between the right to dignity and the right to equality, the right to dignity is connected to all other rights. It was noted in *S v Makwanyane* that:

Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are expected to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in... [the Bill of Rights]<sup>168</sup>

Such a judicial pronouncement could be used to interpret other human rights.<sup>169</sup>

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<sup>163</sup> *Minister of Finance and Another v Van Heerden* (2004), para 71.

<sup>164</sup> Sections 1, 7, 36(7), 39(8).

<sup>165</sup> A. Chaskalson “Human dignity as a foundational value of our constitutional order” (2000) 16 *SAJHR* 193,204.

<sup>166</sup> I. Currie & J. De Waal *The bill of rights handbook*(2013) 252.

<sup>167</sup> *Minister of Finance and Another v Van Heerden* (2004), para 116.

<sup>168</sup> 1995 (3) SA 391 (CC) 144.

<sup>169</sup> Currie & De Waal, note 166(above) 253.

Dignity is an innate right. Every human being has some inherent value and worth.<sup>170</sup> According to Grant, “[r]espect for human dignity requires that persons should not be demeaned or treated as if they have no value”.<sup>171</sup> Human beings are expected to relate to each other as having intrinsic values.<sup>172</sup> In this sense, human dignity is relational. It means that one’s self-worth, personal development, and well-being, depend on how one is valued by others and society at large.<sup>173</sup> Thus, the constitutional protection of the right to dignity places an obligation on every individual to acknowledge the value and worth of other people in society.<sup>174</sup>

Human dignity could be demeaned either physically or psychologically.<sup>175</sup> Any action that undermines a person’s self-esteem is an infraction of their right to dignity. Various apartheid policies devalued women, and some African cultural practices are not practised in a dignified way. Virginity testing, FGM, levirate and sororate marriages, and forced marriages, are not dignifying. The individual value and worth of women that are victims of these cultural practices are adversely affected. This invariably infringes on their reproductive autonomy. Such practices undermine their self-worth and diminish their capacity to exercise their right to autonomy.

### *(c) Life*

The right to life is one of the most important rights in the Bill of Rights.<sup>176</sup> This was affirmed by the Constitutional Court in *S v Makwanyane*, where the Court stated that the right to life is one of the rights which constitute the source of other rights in the Bill of Rights, and it must thus be valued above all other rights.<sup>177</sup> This is because, without life, an individual cannot enjoy all the other rights enshrined in the Constitution.

The court provided a comprehensive definition of what the right to life entails:

the right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But

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<sup>170</sup> Grant, note 162(above).

<sup>171</sup> *Idem* 312.

<sup>172</sup> Liebenberg, note 8 (above).

<sup>173</sup> *Ibid.*

<sup>174</sup> Currie & De Waal, note 166(above) 251.

<sup>175</sup> Grant, note 162(above) 311.

<sup>176</sup> Section 11 of the 1996 Constitution.

<sup>177</sup> 1995 (6) BCLR 665.

the right to life was included in the constitution not simply to enshrine the right to existence. It is not life as a mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the center of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognized and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.<sup>178</sup>

However, despite the recognition of the right to life in the Constitution, there are some cultural practices in South Africa that violate the right to life. Practices such as widowhood rituals, FGM, and virginity testing, among others, do not treat human beings with dignity and may substantially diminish human life. Given that the bodies of the victims are subjected to demeaning practices and also in the course of observing such cultural practices – women’s health may be affected. This could damage their reproductive organs and may eventually lead to death.

***(d) Freedom and security of the person***

The Constitution recognises some practices that might deprive an individual of his or her right to freedom and security.<sup>179</sup> Of significance to this study is section 12(1) (e), which protects a person against being treated or punished in a cruel, inhuman or degrading manner. Some cultural practices in South Africa violate this section of the Constitution. Young girls and women are treated in a cruel, inhuman and degrading way by widowhood practices, FGM, virginity testing, levirate/sororate marriages, and early/forced marriages – among others. In the same vein, the Constitution extends its provision on freedom and security of the person from the normal traditional scope of arbitrary detention and torture, to accommodate reproductive autonomy.<sup>180</sup> It is apparent from this section that reproductive autonomy is of utmost importance, as the Constitution explicitly guarantees the right of control over one’s body.<sup>181</sup> According to the Constitution:

Everyone has the right to bodily and psychological integrity, which includes the right-

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.<sup>182</sup>

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<sup>178</sup> *S v Makwanyane*, note 174 (above) 326-327.

<sup>179</sup> Section 12 of the 1996 Constitution.

<sup>180</sup> J. Sarkin “The drafting of South Africa’s final constitution from a human-rights perspective” (1999) 47(1)*The American Journal of Comparative Law*67, 80-81.

<sup>181</sup> Currie & De Waal, note 166(above) 286.

<sup>182</sup> Section 12(2), 1996 Constitution.

This section is prefaced by the statement that lack of security of the person can adversely affect either physical or psychological integrity.

It follows that both men and women should be able to make independent decisions concerning their right to reproduction. Furthermore, section 12(2)(b) extends the right to bodily and psychological integrity – to include the right to security. It could be argued that the purpose of this section is to promote gender equality.<sup>183</sup> The Constitution does not allow any other person apart from the owner of the body to have the right to control his or her body. Thus, parents, husbands or the community where a girl or woman lives, do not have the right to exercise control over her reproduction – or the way she uses her body. Given that the provisions of the Constitution supersede any other law or practice, various cultural practices that subject a girl/woman's body to the control of another human being/community, are inconsistent with the provisions of the Constitution, and should, therefore, be regarded as null and void.

#### ***(e) Freedom of religion, belief and opinion***

Section 15 of the Constitution deals with the right to freedom of religion or belief. It emphasises religious tolerance. Of importance to this study is section 15(3), which allows for the legal recognition of customary marriages. However, the section concludes with the caveat that such recognition must be consistent with the provisions of the Constitution. It has been noted in this study that customary marriages are potentially polygamous in nature. This could impair the enjoyment of the fundamental values enshrined in the Constitution, including human dignity, equity, and freedom. The incompatibility between customary marriages and the Bill of Rights was addressed in legislation<sup>184</sup> that is discussed later in this chapter.

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<sup>183</sup> Sarkin, note 180(above) 80. This position is informed by the need to redress the effect of the patriarchal nature of African societies and its antecedents (various harmful cultural practices) – as well as apartheid policies that subjugated women in terms of making decisions in relation to their bodies.

<sup>184</sup> Recognition of Customary Marriages Act 120 of 1998.

*(f) Freedom of association*

Section 18 of the Constitution provides that “[e]veryone has the right to freedom of association”. This is an all-encompassing right as it “makes good the promise of a variety of other rights and freedoms.”<sup>185</sup> It enables individuals to exercise relatively undisturbed control over various relationships and practices that are important to their self-realisation.<sup>186</sup> The enjoyment of the other rights in the Bill of Rights depends on an individuals’ ability to control their association. Association embraces some relationships that are beyond the scope of this study. Only the relationships that are related to the topic under consideration are considered here: cultural and sexual association.

Section 18 guarantees the right of individuals to belong to any cultural association of their choice. It follows that an individual cannot be coerced into a cultural association against his/her will. In the same vein, where an individual has subscribed to the membership of a cultural association and their activities violate the individual’s convictions – such an individual can also exercise his/her right of freedom of association by dissociating from such an association. Thus, a member of a cultural community that is dissatisfied with their activities can dissociate from such a cultural association.

To this end, a woman can dissociate herself from any community/association where she feels that the values upheld by such community could affect her reproductive health rights negatively. A woman from a society which practices female initiation which includes FGM could easily rely on this section of the Constitution by ceasing to associate with individuals who can encourage her to participate in such initiation. In the same vein, as discussed earlier, some women in South Africa – in a bid to sustain virginity testing – formed social groups in which young ladies are expected to be members. A lady may easily decline to participate in such social groups in her society since their activities might affect her reproductive autonomy. Regarding sexual association, section 18 protects individuals from interference either from the state (through its laws),<sup>187</sup> or from the community and their parents (through various cultural practices such as

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<sup>185</sup> Currie & De Waal, note (166) 397.

<sup>186</sup> *Idem* 398.

<sup>187</sup> As noted earlier in this chapter, during apartheid the Prohibition of Mixed Marriages Act, 1949, was enacted to prevent individuals from exercising their freedom of association with regard to marriage.

*ukuthwala*, and sororate and levirate unions). It means that an individual is at liberty to make decisions on who to relate with, and, by extension, who to marry.

**(g) Health**

Section 27 of the Constitution is one of the sections that seeks to redress the country's antecedents on injustices and inequalities in the health sector caused by the various apartheid health policies. This section considers health as a fundamental human right that must be enjoyed by all South Africans. This is one of the ways in which the South African Constitution differs from those of other countries. Whereas the rights protected in this section are regarded as non-enforceable by some countries due to their financial implications, under the South African Constitution, the state is required to make continued efforts— within her resources — to ensure that these rights are realised.<sup>188</sup>

Consequently, the South African Constitution recognises health-care services as an inalienable right, and this includes reproductive health care.<sup>189</sup> This is necessary because reproductive health care was one of the areas in which apartheid policies discriminated against black people. As noted earlier in this chapter, the method of contraception used by a woman was based on her racial affiliation. As a result, some South African (mostly black) women didn't enjoy reproductive autonomy in this regard — because they were not at liberty to determine the method of contraception suitable for them. The decision on the type of contraceptive to be used by a woman was mostly taken on her behalf by the health worker attending to her, or by her employer— as some employers subjected some women to the use of a particular type of contraceptive as a condition precedent for employment.<sup>190</sup> This could come in the form of coercion, as the consent of the concerned woman is not obtained. Most of the family-planning methods introduced to the black women at the time were either a long-term method (injection Depo-Provera) or sterilisation, which is irreversible.

Section 27 empowers women to exercise their rights, and their consent in assessing health-care services is necessary. The section extends health-care services to reproductive health-care.

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<sup>188</sup> Section 27 (2), 1996 Constitution.

<sup>189</sup> Section 27 (1) (a).

<sup>190</sup> N. Mkhwanazi “Twenty years of democracy and the politics of reproduction in South Africa” (2014) 12(3-4) *African Identities* 326, 329.

Reproductive health-care goes beyond medical treatment. It encompasses providing people with information about their reproductive life. It has been noted that “health rights are services provided by the government to control and treat illness and stress and to promote the well-being of communities.”<sup>191</sup> In promoting the well-being of a particular community, health-care services would take into cognisance the particular health need of such a community, that could include sexual education.

When health-care services include sexual education as envisaged by this section of the Constitution, women’s decision-making capacities will be enhanced. Subsequently, they will be able to take decisions on participating in the various cultural practices that may affect their reproductive life. These include virginity testing and initiation ceremonies, among others.

#### ***(h) Children’s rights***

Section 28 of the Constitution sets out a wide range of rights that protect children— in addition to the other rights set out in the Bill of Rights. Every child in South Africa enjoys the same protections as set out in the Bill of Rights— except the right to vote and hold public office.<sup>192</sup> This aims to ensure that every child is accorded his or her dignity and is not treated as an extension of their parents.<sup>193</sup> Protection of the child forms part of the duty of parents. This is especially important when the child is still young and lacks the mental and physical capacity to take decisions and protect him/herself. However, in discharging this duty – parents must consider the constitutional rights of their children such that there is a balance between the child’s need for autonomy and protection. Where parents’ decisions are not in the best interests of the child, the state can intervene by invoking the provisions of this section of the Constitution.<sup>194</sup> For example, parents should not use their children to further their cultural beliefs. Children must be treated as individuals who are distinct from their parents.

Section 28(1)(d) provides that “[e]very child has the right to be protected from maltreatment, neglect, abuse or degradation.” Initiation ceremonies practised by some ethnic groups in South

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<sup>191</sup> D. McQuid-Mason *et al. Crimes against women and children: A medico-legal guide* (2012).

<sup>192</sup> Currie & De Waal, note 161 (above) 599.

<sup>193</sup> *Idem* 601.

<sup>194</sup> *Idem* 602.

Africa – as noted earlier in this chapter – constitute maltreatment and abuse. In a similar vein, virginity testing and early/forced marriage could constitute maltreatment and abuse if the child concerned is under the age of 18. Parents usually involve their children in these cultural practices to satisfy their own cultural pursuits, and this amounts to a violation of this section of the Constitution. Engaging a girl child in these cultural practices might affect her reproductive organs, and this effect may extend to her reproductive autonomy later in her life.

*(i) Culture*

Customary law was recognised during the apartheid era to the extent that it was used to further the interests of the apartheid regime. Its recognition was sparked by certain social and political problems– and not because it was considered a right of Africans.<sup>195</sup> The state decided which customary law was to be recognised and the extent of such recognition by the interests of the state.

The new constitutional dispensation ushered in a new approach to culture. According to the Constitution:

Everyone has the right to use the language and participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.<sup>196</sup>

The implication of this section of the Constitution is that a person has the right to engage in the cultural life of his/her choice. Thus, the right to culture is a personal right. However, recognition of this right is not absolute. It must be exercised in consonance with the provisions of the Bill of Rights. The Constitution also recognizes the collective nature of cultural practices, by stating that:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
  - (a) to enjoy their culture, practice their religion, and use their language; and
  - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bills of Rights.<sup>197</sup>

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<sup>195</sup> Bennett, note 117(above) 19.

<sup>196</sup> Section 30, 1996 Constitution.

<sup>197</sup> Section 31.

Section 31 underpins the provisions of section 30, because cultural life is collective or communal in nature and cannot be exercised in isolation. Section 31 “allows individuals to maintain collectively and assert their special identity.”<sup>198</sup> Culture is one of the unique ways of identifying a community, because individuals in that particular community share the same values that have become their way of life – and could be regarded as their culture.

In *Christian Education South Africa v Minister of Education*,<sup>199</sup> the Constitutional Court held that a group could be considered a community when it associated on the basis of language, culture and religion. Section 31 gives an individual the right to demand admission into a cultural group and to enjoy the activities of the group. It could be inferred from this section that an individual who belongs to a cultural group and does not enjoy the activities of such a group – can also opt out.

The rights in sections 30 and 31 of the Constitution are not absolute: the provisions conclude with the caveat that the rights should not be exercised in any manner that is inconsistent with the provisions of the Bill of Rights. The purpose of this caveat is to ensure that communities do not promote practices that impair constitutionally guaranteed rights. Apart from the caveat in these two sections, the right to culture is further limited by Section 36 (1) of the Constitution that provides that:

- (1)The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a)the nature of the right;
  - (b)the importance of the purpose of the limitation;
  - (c)the nature and extent of the limitation;
  - (d)the relation between the limitation and its purpose; and
  - (e)the restrictive means to achieve the purpose.

Thus, cultural practices must agree with the fundamental values of human dignity, equality, and freedom, upheld in the Constitution. Any practice that contravenes these values is invalid. Also, sections 211 and 212 recognise traditional leadership subject to the provisions of the Constitution. Traditional leaders advocate the continuance of virginity testing. King Goodwill

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<sup>198</sup> Bennett, note 112 (above) 24.

<sup>199</sup> 1999 (4) SA 1092 (SE).

Zwelithini, while at a reed dance where virginity testing is celebrated, stated that “there are changes and development in life, but that does not mean people have to change their culture.”<sup>200</sup>

Although the Constitution recognises the cultural rights of individuals, such rights must be exercised in consonance with the provisions of the Constitution. Cultural practices such as widowhood rituals, female genital mutilation, polygamy, early and forced marriages, levirate and sororate unions and virginity testing – which are practised in some communities in South Africa violate the reproductive health rights of women as recognised in the Constitution. It goes without saying that these practices are not recognised by the Constitution, as they are not in consonance with its provisions.

#### ***(j) State institutions supporting constitutional democracy***

To give effect to the provisions of the Constitution, six state institutions were created to support constitutional democracy.<sup>201</sup> Among these institutions – that could help in promoting reproductive health rights – are the South African Human Rights Commission (HRC). The HRC is saddled with the promotion of respect for human rights, protection of human rights and to monitor complete Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities, the Commission for Gender Equality (CGE), these are independent institutions whose duties are set out in the Constitution. The primary objects of these institutions are the promotion of respect for human rights, monitoring the observance of human rights, and protecting women’s reproductive health rights from being impaired by harmful cultural practices.

### **5.4.2 Relevant Legislations**

#### ***(a) The Children’s Act***<sup>202</sup>

The Children’s Act was enacted to give effect to the rights of children enshrined in the Constitution. It sets out principles for the care and protection of the child and defines parents’

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<sup>200</sup> K. Brulliard “Zulus eagerly defy ban on virginity test”. Available at: [www.washingtonpost.com/wp-dyn/content/article/2008/09/25/AR2008092504625.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/09/25/AR2008092504625.html).

<sup>201</sup> Chapter 9, 1996 Constitution.

<sup>202</sup> 38 of 2005.

responsibilities and rights.<sup>203</sup>To ensure that these rights are enforced, the Act established the Children's Court to adjudicate on matters addressed by the Act. The Children's Act explicitly prohibits children from being subjected to cultural practices that are harmful to their well-being.<sup>204</sup>It prohibits early/forced marriages as well as FGM and virginity testing– for children under the age of 16.<sup>205</sup>However, it allows virginity testing for girls over the age of 16 – subject to it being conducted in the manner prescribed by the Act.<sup>206</sup>Thus, the Children's Act protects children from cultural exploitation by their parents in fulfilling their cultural beliefs. Some of these children are subjected to these practices against their wish. FGM, virginity testing and early forced marriages which are prohibited by this Act, are part of the cultural practices embraced by some ethnic groups in South Africa. Apart from the fact that these cultural practices violate the fundamental human rights of the victims, it might also affect their reproductive autonomy when they are married.

***(b) The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)***<sup>207</sup>

Section 9 of the Constitution guarantees the right to equality. The focus of this section is the violation of this right by the state – except for Section 9(4) which briefly mentions the duty of private actors to ensure that they do not discriminate unfairly. The provision empowers the state to enact any legislation that prohibits unfair discrimination.

PEPUDA was enacted in 2000 to enhance further the promotion of equality. The preamble to the Act sets out the various factors that entrenched inequality in South Africa – including colonialism, apartheid, and patriarchy. Section 5(1) states that the state and all persons are bound to ensure that equality is realised in South Africa. The various provisions of the Act are enforceable by a special court known as the Equality Court. PEPUDA forbids all forms of unfair discrimination in the private and public spheres. Section 8 prohibits unfair discrimination on the grounds of gender; it outlines various acts that could constitute discrimination by gender. Of importance to this study is Section 8(b) that prohibits FGM. Furthermore, Section 8(d) prohibits

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<sup>203</sup> Chapters 2 and 3.

<sup>204</sup> Section 12 (1).

<sup>205</sup> Section 12(2) (3) (4).

<sup>206</sup> Section 12(5)(6)(7).

<sup>207</sup> 4 of 2000.

“any practice, including traditional, customary...which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child.” It goes without saying that practices such as virginity testing, forced marriages, polygamy, and levirate and sororate unions are regarded as discriminatory in terms of this Act. The Act empowers South African women to challenge any cultural practice that discriminates against them and impairs their reproductive autonomy.

**(c) *The Criminal Law (Sexual Offences and Related Matters) Amendment Act*<sup>208</sup>**

This Act protects the girl child from sexual exploitation. Sections 15-18 prohibit sexual relationships with girls who are underage. Sex with a girl under the age of 12 is rape, while sexual relations with a girl under the age of 16 are regarded as a sexual offence. The Act also prohibits sexual exploitation of children by their parents or other people. It follows that abduction and kidnapping of young girls (*ukuthwala*) and subsequent rape by the abductor contravenes this Act. In the same vein – as noted earlier in this chapter – during initiation ceremonies in some ethnic groups, old men violate young initiates under the guise of establishing whether the initiation was properly done, and this amounts to sexual exploitation. These cultural practices will invariably have a negative impact on the reproductive health rights of the victim. The primary purpose of this Act is to ensure that whoever exploits a young girl sexually is in fact prosecuted.

**(d) *The Recognition of Customary Marriages Act (RCMA)*<sup>209</sup>**

This Act contains some provisions that protect the rights of women in the face of various cultural practices. It recognizes consent to marriage as an essential ingredient of a valid customary marriage. Both the bride and the bridegroom must consent to the marriage, and they must be older than 18.<sup>210</sup> Thus, customary marriages conducted in furtherance of cultural practices such as levirate and sororate unions – as well as forced marriages – are invalid. The Act also guarantees a women’s right to equality with her husband in a customary marriage.<sup>211</sup> A woman has full legal

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<sup>208</sup> 32 of 2007 (Sexual Offences Act).

<sup>209</sup> 120 of 1998.

<sup>210</sup> Section 3.

<sup>211</sup> Section 6.

capacity and should not be treated as a minor. She should be able to exercise her reproductive autonomy without any hindrance. In the same vein, the Act offers protection to women in customary marriages, by requiring a husband who intends to take an additional wife to apply to the court for a contract to regulate future matrimonial property.<sup>212</sup> This will enhance the economic powers of women in polygamous marriages.

## 5.5 CHAPTER CONCLUSION

This chapter explored South Africa's political history and its impact on cultural practices and women's reproductive health rights. Various cultural practices that could impair the realisation of these reproductive health rights were also considered. Furthermore, the chapter examined the constitutional and legislative frameworks for the protection of the reproductive health rights of South African women. While the frameworks that promote women's reproductive autonomy forbid inequality and women's subordination in all spheres – some women in South Africa have yet to be emancipated from the various cultural practices that infringe their reproductive autonomy and health rights. These practices are so entrenched in certain societies, that women themselves sometimes contribute to their furtherance. For example, women subject their daughters to virginity testing, claiming that they belong to them and are not rented from the government.<sup>213</sup> In the same vein, some women and girls have protested against the prohibition of virginity testing.<sup>214</sup>

Furthermore, some women in South Africa have yet to realise their reproductive health rights. Despite the fact that special courts have been established to adjudicate on matters of this nature, few cases have been brought to challenge women's subjection to the various practices that impair their right to autonomy. Thus, while South Africa has outstanding constitutional and legislative frameworks relating to women's rights, these laws can only be effective when women are aware of their rights and become conscious of the fact that some cultural practices infringe these rights and are, indeed, dangerous to their health.

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<sup>212</sup> Section 7(6).

<sup>213</sup> Vincent, note 134 (above) 18.

<sup>214</sup> Scorgie, note 135 (above) 55.

It is evident from the discussion in Chapter four and this present chapter that there is a notable difference in the approach of Nigeria and South Africa to the protection of women's reproductive health right. Furthermore, though both countries are culturally diverse and practice some of the cultural practices explored in this study, the motive and medium of the practices seem to be different in the two countries. The next chapter will focus on comparative analysis and lessons on cultural practices and legal framework on reproductive health rights of women in Nigeria and South Africa.

## CHAPTER SIX

### CULTURAL PRACTICES AND LEGAL FRAMEWORK ON REPRODUCTIVE HEALTH RIGHTS OF WOMEN IN NIGERIA AND SOUTH AFRICA: COMPARATIVE ANALYSIS AND LESSONS

#### 6.1 INTRODUCTION

South Africa and Nigeria are two African countries with many things in common. The first is that they are both products of colonial invasion. Although, Nigeria got her independence and became an independent state in 1960, South Africa's experience is different – as it proceeded from colonialism to apartheid, before becoming a democratic state in 1994. Given that cultural diversity is one of the characteristics of most African states, South Africa and Nigeria are multicultural states.

The cultural practices embraced by African countries reflect African values. The African values serve as the bond that distinguishes Africans from other races of the world. South Africa has diverse cultural groups as evident from the South African Constitution that recognises 11 official languages.<sup>1</sup> On the other hand, as noted in chapter four, Nigeria comprises about 250 ethnic groups. Moreover, as a result of their antecedents as former British colonies, the two countries experienced the limitation of their indigenous law by a colonial repugnancy clause – that had a grave consequence for their cultural values.<sup>2</sup>

Despite these unique similarities between the two countries, there are some noticeable differences. One is the population composition. South Africa is one of the unique African states, which, in addition to black (African) citizens, is home to a sizable population of white and Indian people, and some inhabitants of mixed race – while Nigeria is an overwhelmingly black African country.

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<sup>1</sup> Section 6(1) of the Constitution of the Republic of South Africa, 1996.

<sup>2</sup> E.A. Taiwo “Repugnancy clause and its impact on customary law: Comparing the South Africa and Nigeria positions – some lessons for Nigeria” (2009) 34(1) *Journal of Juridical Science* 89, 94.

The constitutions in operation in the two countries were drafted and adopted at about the same time. However, the contents of the constitutions of the two countries are quite different.<sup>3</sup> While South Africa's constitution jettisoned the repugnancy test and explicitly recognises cultural rights and the reproductive health rights of women, the Nigerian Constitution is yet to abolish the repugnancy test and does not recognise both cultural and reproductive health rights of women as a human right.

Nigeria and South Africa have signed and ratified some of the international instruments that protect women's reproductive autonomy. It is trite law that each state has the responsibility to determine the status of an international treaty in her domain. Although both countries are democratic states and have similar constitutional procedures for the domestication of international treaties, they have adopted different attitudes to the execution of the various international treaties on the reproductive health rights of women, to which they have subscribed. As a result, of the multicultural nature of the two countries and their political antecedents, there are some cultural practices that inhibit the reproductive health rights of women – as recognised by international human rights. Against this backdrop, this chapter presents a comparative analysis of the cultural practices that impede the realisation of the reproductive health rights of women in South Africa and Nigeria.

In a comparative way, this chapter briefly considers the various international instruments on the protection of the reproductive health rights of women, signed and ratified by these two countries, and the level and process of domestication of these treaties and conventions. It also discusses the constitutional and legal frameworks that have been adopted by the two countries for the protection of the reproductive health rights of women. Also considered is the influence of cultural practices on the protection of these rights. The chapter concludes by highlighting the various lessons that the two countries can learn from each other on the protection of the reproductive health rights of women - in the face of the various cultural practices that tend to impair the realisation of these rights.

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<sup>3</sup> South Africa's constitution was enacted in 1996 shortly after the apartheid era – while Nigeria enacted her latest constitution in 1999.

## 6.2 CULTURAL RIGHTS IN SOUTH AFRICA AND NIGERIA

As noted earlier, South Africa and Nigeria are democratic, multicultural states. Both of their constitutions hold cultural diversity in high esteem. Cultural diversity is in line with the United Nations General Assembly Resolution on Human Rights and Cultural Diversity, which recognises cultural diversity and the pursuit of cultural development by all peoples and nations as a source of mutual enrichment for humankind.<sup>4</sup> This resolution promotes cultural pluralism, contributing to a broader exchange of knowledge and understanding and advancing the application and enjoyment of universally accepted human rights throughout the world. It calls on all states to recognise and promote respect for cultural diversity, and to advance peace, development and universally accepted human rights. It also urged states to make efforts to ensure that their political and legal systems reflect the cultural diversity in their societies.<sup>5</sup>

In line with the fore-mentioned resolution of the United Nations General Assembly, Section 6(1) of the South African Constitution accommodates cultural diversity by recognising various indigenous languages. Section 6(2) obliges the state to “take practical and positive measures to elevate the status and advance the use of these languages”.<sup>6</sup> The other subsections of section 6 accentuate the need to recognise and use these languages equitably. This is because language is one of the important characteristics of culture. In the same vein, the South African Constitution promotes freedom of association.<sup>7</sup> This promotes cultural pluralism, as South African citizens are at liberty to be members of any cultural group. The Constitution goes further to state that “Everyone has the right to use the language and participate in the cultural life of their choice ...”.<sup>8</sup> This is one of the sections that distinguishes the South African Constitution from those of other countries like Nigeria. Cultural rights in those countries are classified under fundamental objectives and directive principles – whereas in South Africa they are recognised as rights that are enforceable in the courts.

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<sup>4</sup> United Nations General Assembly Resolution A/RES/56/156.

<sup>5</sup> *Ibid.*

<sup>6</sup> Section 6(2), Constitution of the Republic of South Africa, 1996.

<sup>7</sup> Section 18.

<sup>8</sup> Section 30.

Culture is communal in nature as it can only be enjoyed when it is practised with other members of the cultural community. Hence, the South African Constitution accommodates cultural, religious and linguistic communities.<sup>9</sup> To promote such diversity, the Constitution provided for the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.<sup>10</sup> However, the recognition of cultural rights in South Africa is not absolute. The Constitution recognises this right only in so far as it is exercised in consonance with the provisions of the Bill of Rights.<sup>11</sup>

Nigeria's constitution also recognises cultural diversity. It encourages the formation of associations across ethnic, linguistic, religious or other barriers.<sup>12</sup> It further accentuates cultural pluralism by stating that the state shall foster a feeling of belonging among the different people of the country.<sup>13</sup> The recognition of cultural diversity is affirmed by stating that "the state shall protect, preserve and promote the Nigerian cultures that enhance human dignity ... and encourage the development of technological and scientific studies that enhance cultural values".<sup>14</sup> However, the provisions of this section are subject to the condition, that such cultures enhance human dignity.

The Constitution recognises cultural rights under the section on fundamental objectives and directive principles of state policy. Rights recognised under this section of the Constitution are not enforceable in Nigerian courts. The Constitution states that:

the judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter 11 of this Constitution.<sup>15</sup>

Thus, the Constitution's recognition of the right to culture is merely a policy guide. It is included in the hopes that it will guide the Nigerian government to direct its policies towards the promotion and preservation of Nigerian cultures - so that they do not become extinct. One could

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<sup>9</sup> Section 31.

<sup>10</sup> Sections 185 and 186.

<sup>11</sup> Sections 30 and 31.

<sup>12</sup> Section 15(3) (d) of the Constitution of the Federal Republic of Nigeria, 1999.

<sup>13</sup> Section 15(4).

<sup>14</sup> Section 21.

<sup>15</sup> Section 6 (6) (c).

argue that given the provisions of this section, the intention is not to redress any infraction of the cultural rights of an individual.

### **6.3 CULTURAL PRACTICES THAT VIOLATE REPRODUCTIVE HEALTH RIGHTS OF WOMEN: COMPARISONS BETWEEN SOUTH AFRICA AND NIGERIA**

Although the constitutions of the two countries accommodate cultural diversity, some of the cultural practices impede the realisation of the reproductive health rights of women. In a comparative way, this section discusses a range of cultural practices that inhibit women from exercising their reproductive health rights in South Africa and Nigeria:

#### **6.3.1 Widowhood rituals**

Widows' rituals are part of burial rites in most African cultures. As seen in the previous two chapters, the rituals consist of a series of activities that widows are subjected to on the demise of their spouse. This ritual is embraced by black Africans in South Africa and almost all parts of Nigeria – especially in the south. The loss of a husband is an agony for the widow, as she will experience emotional and psychological trauma. The agony of the widow is compounded by the traditional rituals she is subjected to as part of the burial rites for her deceased husband. As noted by Ezejiofor, “every woman whose husband dies is expected to adhere strictly to the unwritten ordinances and rituals of widowhood that are argued to be imposed by culture and tradition.”<sup>16</sup>

The mourning pattern for widows in South Africa is similar to that of Nigeria. They are subjected to some dehumanising practices such as being confined to their home, wearing black clothes and shaving their heads, and being deprived of personal hygiene – among others. Some of the reasons adduced for performing the rituals in the two countries, are quite similar. In South Africa, the rituals are observed ostensibly to cleanse the widow as she is presumed, according to the culture, to have been contaminated by the death of her husband.<sup>17</sup> The rituals are also observed to give room for the widow to adjust to her loss. Likewise, in Nigeria, widowhood

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<sup>16</sup> A.O. Ezejiofor “Patriarchy, marriage and the rights of widows in Nigeria”. Available at: <http://dx.doi.org/10.4314/ujah.v12i1.9>.

<sup>17</sup> P.C. Rosenblatt & B.C. Nkosi “South African Zulu widows in a time of poverty and social change” (2007) 31 *Death Studies* 67.

rituals are observed to cleanse the widow and to release her from the marriage covenant with the deceased. After the rituals, the widow is free to remarry.<sup>18</sup>

The purposes of some of the rituals seem to be different in the two countries. Certain rituals are performed in some parts of South Africa to re-enact the bond between the deceased and his widow – as their marriage is still deemed to subsist culturally in spite of the death of the husband.<sup>19</sup> On the other hand, in Nigeria, a ritual such as shaving of the hair of the widow in some communities, is done to sever the bond between the deceased and the widow. Apart from giving the widow the opportunity to adjust to her loss, confining the widow at home is also done to ascertain whether she was pregnant from the deceased. Widows' rituals are also observed in some communities in Nigeria to 'fortify' the widow from any harm from the spirit of the dead.<sup>20</sup> They are also observed to mortify the body of the widow and to test her endurance during the period of the mourning.<sup>21</sup> It is also believed that the rituals will deter women from seeking to hasten their husband's demise – or antagonising their in-laws.<sup>22</sup>

One could argue that some of these practices are not of any benefit to either the deceased husband or his family. Furthermore, many of these practices have lasting negative effects on the reproductive health rights of women, as they violate their right to autonomy over their bodies. This practice represents an injustice that is done solely to women – and could thus be regarded as gender-based violence, because men who lose their wives are not subjected to any rites. South African women are also becoming more conscious of their rights and are objecting to being subjected to these humiliating practices. Mourning practices have been modified in some areas in South Africa without any negative consequences – contrary to the predictions of those who preach strict adherence to such practices.<sup>23</sup>

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<sup>18</sup> J.O. Aransiola & A. Ige "Widowhood practices among the Yorubas of south west Nigeria: Are there differences in what women experience due to their status" (2010) 8(2) *Gender and Behaviour* 3152, 3514-3515.

<sup>19</sup> M. Ramphele "Political widowhood in South Africa: The embodiment of ambiguity" (1996) 125(1) *Deadalus Social Suffering* 99.

<sup>20</sup> Aransiola & Ige, note 18 (above).

<sup>21</sup> E. Durojaye "'Woman but not human': Widowhood practices and human rights violations in Nigeria" (2013), Available at: [civilistica.com/a.2.n.3.2013//1,8](http://civilistica.com/a.2.n.3.2013//1,8).

<sup>22</sup> A.U. Iwobi "No cause for merriment: The position of widows under Nigerian law" (2008) 20(1) *Canadian Journal of Women and the Law* 37, 56.

<sup>23</sup> E. Kotze *et al.* "Women ... mourn and men carry on: African women storying mourning practices: A South African example" (2012) 36(8) *Death Studies* 742-766. The case of a woman who objected to facing the wall or

Likewise, in some Yoruba communities in south west Nigeria, widows' rituals are changing due to the wave of feminism that has increased awareness of the impact of some of these rituals on the fundamental human rights of the victims. Women in some communities are no longer subjected to these practices. They mourn their husbands in the way they desire – mainly by restricting their movements and wearing dark clothes.

In the past, widows in Yoruba land usually wore black cloth during the mourning period. Due to the changing trends, black clothing is no longer mandatory for the mourning rituals. Widows could wear dull colours like navy, grey, among others. In addition to the change in the dressing pattern of widows, the processes of the rituals have been modified – mainly towards the religious inclination of the widows. Consequently, they are no longer subjected to any processes that are dehumanising.<sup>24</sup> However, in some parts of Nigeria, particularly the south east, the rules of the rituals are still adhered to strictly – despite the increasing awareness of the negative impact of some of these rituals on the fundamental human rights of the victims. It is saddening that women do participate in the enforcement of some of these rituals.<sup>25</sup>

### **6.3.2 Early/Forced Marriages**

Marriage is a voluntary union between a man and a woman. For that reason, one of the requirements of a valid marriage is consent. In early and forced marriages, the consent of the bride is immaterial. Early marriage refers to the practice of coercing, forcing or deceiving a young girl into marriage, at an age when she is considered to be incapable of understanding the nature of marriage.<sup>26</sup> According to the Convention on the Rights of a Child<sup>27</sup> to which Nigeria and South Africa are signatories – the age of marriage is 18 years.

Forced marriages occur when a woman does not consent to the marriage, regardless of her age. Instead, she is coerced into the marriage against her will. The woman may not be psychologically prepared for marriage to the man in question. Without the free, full or informed

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sitting on a mattress to mourn the loss of her children, was discussed. A woman also rejected the cutting of her hair.

<sup>24</sup> Aransiola & Ige, note 18 (above) 3160.

<sup>25</sup> M.I.O. Nwogu “The legal anatomy of cultural widowhood practices in south eastern Nigeria: The need for a panacea” (2015) 3(1) *Global Journal of Politics and Law Research* 79, 81.

<sup>26</sup> A. Ukwuoma *Child marriage in Nigeria: The health hazards and socio-legal implications* 1st Ed. (2014) 10.

<sup>27</sup> The United Nations Convention on the Rights of the Child, 1992.

consent of both the man and woman – a marriage is invalid. While not all forced marriages are necessarily early marriages, all early marriages are forced as they lack the consent of the young brides – who, at the time of marriage, are incapable of understanding the nature of marriage.

Early marriages are usually initiated by the parents or guardian of the girl child and the prospective husband. After an agreement has been reached, the young girl will either be coerced or unduly influenced to consent to a marriage contract. Early marriages are thriving in Nigeria – particularly in the northern region. Various reasons have been put forward for this practice, including chastity, economic imperatives, and the stereotypical view of the girl child as a temporary member of the family.<sup>28</sup> This practice also thrives in northern Nigeria due to the religion affiliations which form part of their customary law. Islamic law operates as the customary law. Islamic teachings do not frown on child marriage.

The general belief and teachings of Islamic law, are that no age is too early for marriage, although sexual relations should be delayed until both parties reach puberty.<sup>29</sup> It goes without saying that the age of puberty is relative – as it depends on the individual’s physiological development. Thus, it could be argued that Islam allows sexual relations and subsequent reproduction before the age of 18. Puberty does not, however, signify the emotional or psychological maturity required for motherhood. Early/child marriages have negative effects on the girl child. Physiologically and psychologically, her body is not yet ready for motherhood that is the ultimate expectation of most marriages in Africa.

Islamic religious belief informed the response of the northern states to the domestication of the Convention on the Rights of the Child (1989) – which sets the minimum age of marriage at 18. All the states that have yet to domesticate this Convention – which has been enacted as law by the Nigerian National Assembly – are northern states. Some cases have been decided in Nigeria on the issue of child marriage, and, in all cases, the courts have ruled for the girl child.<sup>30</sup>

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<sup>28</sup> A. Olatunbosun “Addressing the phenomenon of child marriage in Nigeria” (2001) 9(2) *IFE Psychologia* 159, 160.

<sup>29</sup> J.N.D. Anderson *Islamic law in the modern world* (1959) 44.

<sup>30</sup> *Ekpenyong Edet v Nyon Essien* (unpublished case that was decided in the Division Court in Calabar, Nigeria, in 1932), and *Osamwonyi v Osamwonyi*, 1972 All NLR 792 [see details of these cases in chapter four].

Early marriage is not a common cultural practice in South Africa. One could argue that the reason for this is the huge financial obligation (payment of lobola) which is one of the considerations for a valid customary marriage. The common practice in South Africa is for young girls to have children out of wedlock – unlike in Nigeria where the motivation for the child marriage is the bride price. Nigerian men are disposed to paying the bride price for the young bride, because it is not as high as in South Africa.

However, forced marriage is a common cultural practice in some ethnic groups in South Africa. As mentioned in previous chapters, such marriages – which are known as *Ukuthwala* – involve the abduction of a young girl by her prospective husband, with the intention of compelling her and her family to accept his marriage proposal. In earlier times, no sexual intercourse would take place until after the marriage.<sup>31</sup> This practice has been distorted further by the fact it may now be a combination of early and forced marriage. Young girls who are not sufficiently mature to marry are abducted by older men. There is no such cultural practice as *ukuthwala* in Nigeria. Women, young or old, are not abducted for the purpose of marriage.

As mentioned earlier, early/forced marriages violate women’s reproductive health rights, because the woman does not consent to the marriage. If an under-aged girl is forced into a marriage, this may lead to reproduction and her body may not be ready for motherhood. Consequently, she may experience health problems.

### **6.3.3 Levirate and Sororate Unions**

Levirate marriage occurs when a woman, who has lost her husband, marries one of the deceased husband’s relatives. As noted earlier levirate marriage was part of ancient Hebrew law. As noted in chapters four and five, the motive for levirate marriage has changed in contemporary times. The motivation for this type of marriage is now for economic reasons and the marriage proposal is made irrespective of the number of children the widow had with the deceased, or whether he had a male heir.

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<sup>31</sup> M.J. Maluleke “Culture, tradition, custom, law and gender equality” (2012) 15(1) *PER/PELJ* 1.

This cultural practice exists in both South Africa and Nigeria. In South Africa, levirate marriage (*Ukungena*) is common in KwaZulu-Natal and the Eastern Cape provinces. The consent of the widow is not required – as she is not at liberty to choose which relative she will marry. As confirmed by Maluleke “... the widow is required to choose a husband without knowing who she is choosing because she is given a few sticks to choose from and the stick she chooses will determine who the husband is.”<sup>32</sup> Should she refuse, she ceases to be a member of the family, and is dispossessed of all her husband’s property.<sup>33</sup>

In Nigeria, levirate marriages are common among the Esan-speaking people of Edo state<sup>34</sup> and in some parts of south west Nigeria. However, among the Yoruba ethnic group, levirate marriage requires the woman’s consent. As noted by Ezejiofor, “nowadays, sometimes, if the man had no children or only one kid before his death, his relatives sometimes plead for the widow to consider marrying any man of her choice from amongst them”.<sup>35</sup> It is evident from the foregoing that the trend of imposing a man on the widow and compelling her to marry him has changed in Nigeria. This is in contrast with the situation in the communities where levirate marriages are practised in South Africa. Women in such communities are forced into levirate marriage in spite of the Recognition of Customary Marriages Act,<sup>36</sup> which requires consent as one of the preconditions for a valid customary marriage.

In contemporary times, most levirate marriages lack consent – which is one of the essential ingredients of a valid marriage. It thus violates the fundamental right of a woman to be able to determine who she will marry. In the same vein, a woman’s right to dignity is infringed by this type of marriage – which considers a woman as part of the property of the deceased, and which must be inherited. The widow might also be coerced into unsafe sexual activities by her new husband. Furthermore, she may be expected to bear children in the new marriage – irrespective

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<sup>32</sup> Maluleke, note 31 (above).

<sup>33</sup> *Ibid.*

<sup>34</sup> P.I. Onekpe *Levirate marriage and wife inheritance: A comparative study* (Unpublished MA Thesis, Edo State University, 1993) 46.

<sup>35</sup> Ezejiofor, note 16 (above) 152.

<sup>36</sup> 120 of 1998.

of the number of children she already has.<sup>37</sup> In this respect, levirate marriage is an infraction on the reproductive health rights of women.

As noted in Chapters four and five, sororate marriage is the opposite of levirate marriage. This is a form of marriage in which a man marries the sister of his late wife – or in a situation where his wife is sterile. This form of marriage is rare in Nigeria, although research has shown traces of it among some Ibo communities.<sup>38</sup> However, in South Africa, sororate marriages occur in most cultures – except certain Xhosa speaking groups.<sup>39</sup> Sororate marriage violates women’s reproductive health rights, as, in most cases, women are compelled to enter into the marriage. Furthermore, such marriages infringe the right to privacy of the spouse, as it extends reproductive decisions beyond the couple. In the same vein, it might affect the right to dignity of the first wife – as she is assisted in performing her role. The new wife’s right to reproductive autonomy could also be infringed, as she may not be interested in such an arrangement. Legally, both levirate and sororate marriages fall within the prohibited degree of consanguinity. Moreover, dowry, a major requirement for a valid customary marriage, is paid only once.<sup>40</sup>

#### **6.3.4 Dowry/Bride Price**

As mentioned earlier, in most African societies, one of the requirements of a valid customary marriage is the payment of a dowry/bride price. In Nigeria, the terms ‘dowry’ and ‘bride price’ are used interchangeably – and refer to the consideration for the marriage. In Nigeria, the dowry traditionally consisted of the labour services rendered by a man to the parent of the woman he sought to marry. Likewise, bride price does not depict a monetary payment, but rather labour services provided by the prospective husband to assist the parent of a woman he has shown interest in marrying. This includes farm work, building mud huts, splitting firewood, fetching water, or collecting palm fruits. In some cases, the prospective in-laws may include gifts such as food items and fruits like *kola nuts* and alligator pepper. This is done by the prospective groom

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<sup>37</sup> O. Gbadamosi *Reproductive health and rights (African perspective and legal issues in Nigeria)* 1<sup>st</sup> Ed. (2007) 333.

<sup>38</sup> A. Emiola *The Principles of African Customary Law* 2<sup>nd</sup> Ed (2005) 113.

<sup>39</sup> T.W. Bennett *Customary law in South Africa* 1<sup>st</sup> Ed. (2004) 332.

<sup>40</sup> Emiola, note 38 (above) 113.

and his family members, in order to show gratitude in anticipation of the gift of a wife.<sup>41</sup> These services cannot be inferred as the purchase price of a woman.

However, modernisation has changed this cultural practice, and labour services have become monetised. Industrialisation has led to rural-urban migration. Most people no longer live in villages and do not engage in farm work. Payment of a token amount of money, usually decided by the family of the bride, has replaced labour services as an acknowledgment of a pending marital relationship between the two families. Among the Yoruba, a man and his relatives treat their in-laws with the utmost respect and honour. Thus, the payment of a dowry/bride price does not depict purchasing a woman.<sup>42</sup> In some instances, the parents of the bride return the bride price/dowry to the family of the groom, as a sign that the woman was voluntarily given as a mark of a relationship rather than being sold as a commodity.

In contemporary Yoruba culture, gifts such as food items, drinks, palm oil, and a token bride price, have replaced traditional labour services. The gifts are fundamental to the validity of a customary marriage in Nigeria. A woman whose family has not received such gifts is not accorded respect. In some communities, the value of the woman is measured by the quantity of cash and other items.<sup>43</sup> These gifts elevate the value attached to her – both as a person and a wife.<sup>44</sup>

While Yoruba culture traditionally attached less importance to the monetary aspect of the bride price/dowry, today, in some parts of Yoruba land, the father of the bride refunds the bride price during the customary marriage. This is due to the notion that payment of a bride price connotes ‘buying’ the bride. “This is a misunderstanding of the legal purpose of ‘bride price’ in African culture.”<sup>45</sup> In fact, when the bride’s father is returning the token to the groom’s family, he will tell the groom’s relatives that we are returning this token to you because we are not selling our daughter to you. We are giving her out to be married as a wife.

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<sup>41</sup> Emiola, note 38 (above) 102-103.

<sup>42</sup> *Ibid* 102.

<sup>43</sup> O.M. Adefi “Cultural practices and traditional beliefs as impediments to the enjoyment of women’s rights in Nigeria” (2009) 1 *JCLI* 118, 123.

<sup>44</sup> Emiola, note 38 (above) 103.

<sup>45</sup> *Idem* 37.

Likewise, in South Africa, the bride price is known as *lobola*, and, as in Nigeria, in ancient South African society, marriage arrangements were made by the relatives of the groom.<sup>46</sup> *Lobola* has been described as “property in cash or kind ... which a prospective husband or the head of his family undertakes to give the head of the prospective wife’s family in consideration of a customary marriage.” In ancient times, *lobola* was given to the family of the bride as a sign of appreciation to her parents,<sup>47</sup> and was paid in cattle. However, in contemporary South Africa, *lobola* has been commercialised; cattle have been replaced with money and gifts. It is now regarded as a form of compensation to the bride’s parents, for what they spent on her before the marriage; this suggests that the parents are ‘selling’ their daughter.<sup>48</sup> .

It is implicit from the foregoing that both in South Africa and Nigeria, the trend of payment of bride price with either labour services, gifts like cattle, yam, and food items among others, was replaced with money because of the wave of modernisation and industrialisation. Some Yoruba communities in south west Nigeria have realised that the payment of bride price could constitute a violation of the reproductive health rights of woman. If a man regards his wife as being a commodity that he bought and is part of his property, the woman loses her right to dignity, privacy and family life, among other rights – which will invariably impact on her reproductive rights. As a result, they are reverting to the old practice of taking gifts from the prospective in-laws, just as a mark of their relationship.

### **6.3.5 Polygamy**

Polygamy is the traditional custom of having more than one wife at the same time. The desire to have more than one wife could be informed by factors discussed in chapters four and five. Nigerian as a plural state recognises both statutory and customary marriages. Customary marriages are potentially polygamous in nature. Consequently, polygamy is practiced in almost all the ethnic groups in Nigeria. However, polygamy is not currently popular in the eastern part

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<sup>46</sup> A.F Steyn & M. Rip “The Changing Urban Bantu Family” (1968) 30(3) *Journal of Marriage and Family* 499, 507-508.

<sup>47</sup> *Ibid* 507.

<sup>48</sup> *Idem* 507-508.

of the country due to the influence of religion (Christianity) – which preaches one man one wife.<sup>49</sup>

In South Africa, polygamy is recognised by the Recognition of Customary Marriages Act.<sup>50</sup> However, the Act does not allow a man to take an additional wife at will. Under section 2(3), an application has to be made to a court for an order approving a written contract that sets out the future matrimonial property system.<sup>51</sup> The importance of this section is that the family of the man making the application, is notified of his intention; it also seeks to ensure that the groom’s family is not subjected to economic hardship as a result of the marriage.

Unlike Nigeria, polygamy is not a thriving practice in South Africa. Various reasons have been put forward for this. The first is that the practice was abandoned during colonial and apartheid times. The policies of the time did not permit a man to have more than one wife at the same time.<sup>52</sup> Furthermore, the financial obligations attached to a customary marriage have not encouraged polygamy. For a customary marriage to be valid, the bride price must be paid, and this is a huge financial commitment. However, despite its challenges, in a bid to preserve their culture, some traditionalists still subscribe to this practice<sup>53</sup>

As noted in the previous chapters, polygamy could infringe on the fundamental human rights of a woman – particularly her reproductive health rights. It could also impede a woman’s right to dignity.

### **6.3.6 Female Genital Mutilation (FGM)**

Female genital mutilation is defined by the World Health Organisation (WHO) as “all procedures that involve partial or total removal of the external female genitalia and injury to the female genital organs for cultural or any other therapeutic reasons.”<sup>54</sup>

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<sup>49</sup> E.O. Egboh “Polygamy in Iboland (south-eastern Nigeria) with special reference to polygamy practice among Christian Ibos” (1972) 22(3) *Civilisations* 431, 435.

<sup>50</sup> 120 of 1998.

<sup>51</sup> Section 2(3) of the Recognition of Customary Marriages Act.

<sup>52</sup> Land Settlement Act 12 of 1912, the Groups Act 36 of 1966, and the 1962 Pass Law Act – among others.

<sup>53</sup> S. Gustafsson & S. Worku “Marriage markets and single motherhood in South Africa” (2006). Available at: <http://www.tinbergen.nl> 1, 5.

<sup>54</sup> World Health Organisation, 1995.

It is evident from discussions in chapters four and five, that FGM exists as part of the cultural practices in both South Africa and Nigeria. However, the motive for the practice and the time the procedure is conducted on the girls, is not the same. While FGM is conducted by most ethnic groups in Nigeria to curb the sexual desires of young ladies, in order to preserve their chastity, FGM is performed on young girls in South Africa to initiate them into womanhood. However, the experience of the young girls during the initiation processes usually drives the ladies into sexual activities. Most of the ladies will want to experience what they have been taught.

Moreover, in some of the circumcision schools, older men do violate the initiates to confirm whether the ladies understood and complied with the initiation process and to determine if the initiation/circumcision were properly done.<sup>55</sup> Furthermore, while FGM is performed on girls, in most cases shortly after their birth in Nigeria, FGM in South Africa is a form of rite of passage into womanhood – and is performed before the young girl reaches puberty or shortly afterwards.

Since FGM entails the removal of healthy sexual organs, it has harmful physical and psychological consequences. It violates some human rights – including the right to freedom from discrimination, torture, inhuman or degrading treatment, and the right to life, among other rights. The procedure causes bodily harm to the girl child, which could be considered a crime. It could also be considered child abuse that violates the provisions of Article 19(1) of the Convention on the Rights of the Child<sup>56</sup> – to which Nigeria and South Africa are signatories. It also denies women human dignity, which includes their sexuality. Indeed, FGM renders sex in marriage not mutually pleasurable.

### **6.3.7 VirginitY Testing**

Chastity is one of the most treasured values expected of a bride. VirginitY testing, as discussed in chapter five, entails the examination of the genitalia of a lady to determine if she is chaste.<sup>57</sup> The examination is based on the erroneous belief that a woman’s hymen can only be torn, as a result of sexual intercourse. The practice of virginitY testing does not exist in Nigeria. Instead, parents

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<sup>55</sup>K.K Nadassen *A Sociological Investigation into Female Genital Mutilation, Including Possible Human Rights Violations and the South African Context* (Unpublished PhD Thesis, University of KwaZulu- Natal, 2000).

<sup>56</sup> The United Nations Convention on the Rights of the Child, 1992.

<sup>57</sup> F. Scorgie “VirginitY testing and the politics of sexual responsibility: Implications for AIDS intervention (2002) 61(1) *African Studies* 55.

inculcate in their daughters the cultural value of remaining a virgin until marriage – from childhood. Young girls are not required to undergo any test to prove their chastity or to encourage them to abstain from pre-marital sex.

#### **6.4 THE ROLE OF INTERNATIONAL LAW**

Nigeria and South Africa are members of the international community and have signed and ratified some of the international instruments that protect the reproductive health rights of women. These include the Convention on the Elimination of all Forms of Discrimination against Women, the International Covenant on Economic, Social, and Cultural Rights, the Convention on the Rights of the Child, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. However, ratification of treaties may not make any difference if due process is not followed by the ratifying state to make the provisions of the treaty applicable domestically.<sup>58</sup>

Since it is the responsibility of states to determine how treaties to which they have subscribed are to be applied domestically, the content of their constitutions should define the process of the domestication of a treaty. This considered, the extent to which treaties can be enforced and are enforced varies from one country to another.<sup>59</sup> South Africa and Nigeria are democratic states that operate under a dualist system, which means that a ratified international treaty must be domesticated before it can apply in the state.<sup>60</sup> These countries have demonstrated divergent attitudes towards the domestication of the various treaties on the reproductive health rights of women that they have ratified.

South Africa has responded positively to the domestication of the international treaties relevant to the reproductive health rights of women. It could be argued that this is because South Africa's Constitution accommodates the use of international law in its interpretation. "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with

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<sup>58</sup> See Chapter three for details on approaches in fulfilling international treaty obligations.

<sup>59</sup> C. Nwapi "International treaties in Nigeria and Canadian Courts" (2011) 19 *Afr. J. Int'l & Comp. L.* 38, 39.

<sup>60</sup> See Section 231(4) of South Africa's '1996 Constitution' and Section 12(1) of Nigeria's '1999 Constitution'.

international law.”<sup>61</sup> This provision of the Constitution demonstrates South Africa’s willingness to adopt international law whenever the need arises. In the same vein, the South African Constitution explicitly recognises customary international law.<sup>62</sup> Furthermore, reproductive autonomy is also recognised in the Constitution.<sup>63</sup> Therefore, it is easier for South Africa to domesticate international treaties that advance women’s reproductive autonomy.

In contrast, the Nigerian Constitution does not explicitly recognise the use of international law in interpreting legislation. This is evident in the dearth of cases where Nigerian courts had recourse to international law to resolve domestic legal issues.<sup>64</sup> As noted by Nwapi, “Nigerian courts have not been at their best when faced with invitations to apply international law.”<sup>65</sup> Thus, it is more difficult for Nigeria to adopt international human rights law when the need arises. In *General Sani Abacha v Gani Fawehinmi*, the Supreme Court stated, *inter alia*, that:

Unincorporated treaties cannot change any aspect of Nigerian Law, even though Nigeria is a party to those treaties. Indeed, unincorporated treaties have no effect upon the rights and duties of citizens either at common law or statute law. They may however indirectly affect the rightful expectation by the citizens that governmental acts affecting them would observe the terms of the unincorporated treaties.<sup>66</sup>

Given this fact, a treaty cannot operate in Nigeria unless it is domesticated. Furthermore, when a treaty is domesticated, it does not enjoy primacy over the Constitution. The Nigerian Constitution clearly states that: “The Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria”<sup>67</sup> It goes further to state that: “If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void”. Notwithstanding the content of an international treaty, its status is equal to that of domestic legislation. As a result, if a treaty recognises the reproductive health rights of women and the Constitution does not, the position of the Nigerian Constitution on the reproductive health rights of women shall prevail. Apart from the Convention on the Rights of Child – which alludes to

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<sup>61</sup> Section 233 of South Africa’s ‘1996 Constitution’.

<sup>62</sup> Section 232.

<sup>63</sup> Section 12(2) and Section 27.

<sup>64</sup> Nwapi, note 59 (above) 59.

<sup>65</sup> *Idem* 60.

<sup>66</sup> (2000) FWLR Pt 4 533 at 585-586.

<sup>67</sup> Section 1(1).

reproductive autonomy – Nigeria has not domesticated any international treaty on women’s reproductive health rights.

In conclusion, while South Africa and Nigeria have the same approach to the domestication of international treaties, South Africa has demonstrated the political will to domesticate the various international treaties on the reproductive health rights of women. The most recent development in South Africa is the ratification of ICESCR. Thus, it could be argued that the provisions of the Constitution play an important part in influencing a country’s compliance with her obligations under an international treaty. Recognition of the reproductive health rights of women in South Africa’s Constitution and other provisions on the application of international law, inform South Africa’s compliance with her obligations regarding the reproductive health rights of women.

## **6.5 ROLE OF THE CONSTITUTION AND NATIONAL LEGISLATION**

Apart from being signatories to international treaties on the reproductive health rights of women, Nigeria and South Africa have adopted different legal frameworks for the protection of these rights in the face of various cultural practices. This section presents a comparative analysis of the constitutional and legal frameworks on reproductive health rights of women, in both South Africa and Nigeria.

### **6.5.1 Constitutional Framework**

South Africa’s Constitution has been hailed as one of the most progressive in the world because it accommodates a wide range of rights – including the reproductive health rights of women. Section 12 (2) states:

- Everyone has the right to bodily and psychological integrity, which includes the right
- a. To make decisions concerning reproduction;
  - b. To security in and control over their body; and
  - c. Not to be subjected to medical and scientific experiments without their informed consent.

The Constitution also recognises the right to reproductive health by guaranteeing the right to health-care services that include reproductive health care.<sup>68</sup>

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<sup>68</sup> Section 27 (1) of South Africa’s ‘1996 Constitution’.

In addition to the explicit recognition of the reproductive health rights of women, the Constitution recognises some rights that allude to these rights. They include the right to equality, human dignity, life, freedom and security of the person, freedom of religion, belief and opinion, freedom of association, and children's rights.<sup>69</sup> The recognition of all these rights is an added advantage to South African women – as their rights to reproductive autonomy are enhanced. Furthermore, South Africa's Constitution provides for the establishment of state institutions to support democracy. These institutions are set up to ensure that the provisions of the Constitution are enforced, and thus make a difference in the lives of South Africans. Some of these institutions are expected to ensure the efficacy of the various provisions of the Constitution, which affirm women's reproductive autonomy.<sup>70</sup>

In contrast, as noted in chapter four, the Nigerian Constitution does not explicitly recognise the reproductive health rights of women. Recognition of these rights could be inferred from the provisions of Section 17, where the state is enjoined to direct its policy towards the provision of adequate medical and health facilities for all persons. The section also forbids the exploitation and neglect of children and young persons, and touches on the need for the state to ensure the evolution and promotion of family life.<sup>71</sup> However, the various rights recognised under this section are not enforceable in Nigerian courts – and this section is merely a guide for policy-makers.<sup>72</sup>

The reproductive health rights of women can be inferred through the recognition of fundamental human rights that are connected to such rights – such as the right to life, dignity, personal liberty, private and family life, freedom from discrimination, and the right to freedom of thought, conscience, and religion.<sup>73</sup> Consequently, when a woman's right to autonomy in respect of reproduction is breached in Nigeria, she could link such a right to any of the recognised fundamental human rights to enforce her right in this regard.

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<sup>69</sup> See Bill of Rights of the South African Constitution.

<sup>70</sup> See, generally, Chapter 9 of the South Africa Constitution.

<sup>71</sup> Sections 17(3)(d) (f) & (h) of Nigeria's '1999 Constitution'.

<sup>72</sup> Section 6(6) (c).

<sup>73</sup> See, generally, Chapter Four of the Nigerian Constitution – on Fundamental Human Rights.

### 6.5.2 National Legislation

In addition to South Africa's adherence to comprehensive international and constitutional frameworks on the protection of the reproductive health rights of women – in the face of various cultural practices, national legislation seeks to further protect women in order to ensure that there will be no *lacuna* under which a particular culture can hide or impede the realisation of these rights. The legislation includes the Children's Act,<sup>74</sup> the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),<sup>75</sup> criminal law (Sexual Offences and Related Matters Amendment Act),<sup>76</sup> and the Recognition of Customary Marriages Act.<sup>77</sup>

Nigeria has also adopted national legislation in addition to the provisions of the Constitution that could be employed to protect the reproductive health rights of women. It includes criminal law that could be used to prosecute penal infractions of women's right to autonomy – for example, the Criminal Code,<sup>78</sup> the Penal Code,<sup>79</sup> the Marriage Act,<sup>80</sup> and the Child Rights Act.<sup>81</sup>

## 6.6. COMPARATIVE LESSONS

While South Africa and Nigeria are both multicultural African countries, South Africa has a greater mix of different race groups. The two countries have adopted different frameworks for the protection of both cultural rights and reproductive health rights. Unlike Nigeria, South Africa has improved recognition and promotion of the reproductive health rights of women. One could argue that given that reproductive autonomy is alien to African culture, South Africa's improved promotion is informed by the presence of Western values. Different races hold different values, and view the world differently. However, women in South Africa – especially black women – have been unable to realise their reproductive health rights, despite the country's adoption of international and domestic frameworks on the reproductive health rights of women.

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<sup>74</sup> 35 of 2005.

<sup>75</sup> 4 of 2000.

<sup>76</sup> 32 of 2007.

<sup>77</sup> 120 of 1998.

<sup>78</sup> CAPC38 LFN, 2004.

<sup>79</sup> CAP P3 LFN, 2004.

<sup>80</sup> CAP M6 LFN, 2004.

<sup>81</sup> CRA, 2003.

One of the main reasons is that the concept of reproductive autonomy is not familiar to some African cultures. Human rights have been viewed by African societies as a Western concept. The average black South African woman believes and practises various cultural practices, notwithstanding their health consequences. Consequently, black South African women have opposed the prohibition of some cultural practices that tend to impair women's reproductive autonomy.<sup>82</sup> In addition, some of the cultural practices like FGM and virginity testing, among others, that inhibit the realisation of the reproductive health rights of women, are enforced by women themselves.

Likewise, in Nigeria, although the United Nations Convention on the Rights of the Child was domesticated by the Nigerian National Assembly in 2003, it is yet to be domesticated in some states – particularly northern states.<sup>83</sup> This is because people from this part of the country adhere strictly to Islamic customary law that allows child marriage. A senator of the Federal Republic of Nigeria who should know better, vehemently supported child marriage which has been outlawed by the National Assembly – stating that “maturity has little to do with age and to him, child marriage is marriage of a girl who has not reached the age of puberty”.<sup>84</sup> The same senator married a 13-year old.<sup>85</sup> Supporters of child marriage in this part of Nigeria argue that it concurs with Islamic customary law. Hence, child marriage is still thriving in some northern states, despite the fact that the Child Rights Act prohibits it.

In the same vein, some women – in a bid to preserve their culture – support and enforce some of the cultural practices that may impair the realisation of the reproductive health rights of women. As revealed in Chapter four, mothers subject their daughters to FGM and women play some roles in enforcing widows' rituals – among others. The influence of cultural practices on the reproductive health rights of women is also evident in Nigeria, as women are not allowed culturally to take part in decision-making processes. As a result, it is difficult for women to agitate for the domestication of treaties that promotes their reproductive health rights.

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<sup>82</sup> F. Scorgie “Virginity testing and the politics of sexual responsibility: Implications for AIDS intervention” (2002) 61(1) *African Studies* 55.

<sup>83</sup> “UNICEF urges state governments to domesticate Child Rights Act”. Available at: [www.ngrguardiannews.com/2015/05/unicef-urges-state-govts-to-domesticate-child-rights-act](http://www.ngrguardiannews.com/2015/05/unicef-urges-state-govts-to-domesticate-child-rights-act).

<sup>84</sup> “Child marriage in Nigeria: The senate to the rescue?” Available at: [thelawyerschronicle.com/child-marriage-in-nigeria-the-sanate-to-the-rescue](http://thelawyerschronicle.com/child-marriage-in-nigeria-the-sanate-to-the-rescue).

<sup>85</sup> *Ibid.*

South Africa and Nigeria are signatories to international treaties on the protection of the reproductive health rights of women. Furthermore, their constitutional procedures for the domestication of international treaties are the same. This study found that recognition of women's reproductive autonomy in South Africa's Constitution informed South Africa's compliance status. Nigeria has struggled to comply with some of the international treaties on reproductive health rights. However, there is a wide gap between the various rights of South African women (especially black women) stated on paper – and their opportunity to realise them.

To this end, the reproductive health rights of women recognised by international human rights law have not made much difference to the lives of women in both South Africa and Nigeria. The various cultural practices embraced in these countries are the clog in the wheels of realisation of these rights.

South Africa can learn from the modification of the practice of payment of bride price in some parts of south west Nigeria, where the monetary aspect is of little significance to the customary marriage. Reverting to the old culture of paying *lobola* in cattle would add value to women and protect their reproductive rights more than monetisation. Furthermore, like some communities in Nigeria, widows should be at liberty to determine if they want to remarry and the choice of who to marry. Likewise, sororate marriages could also be discouraged if less importance were attached to the bride price as, if a woman is sterile, the husband will not seek to recoup the bride price by bringing in her sister. Virginity testing, as a way of inculcating sexual chastity in a girl, should be discarded. As in Nigeria, young girls could be educated on how to avoid premarital affairs and maintain sexual chastity without being subjected to such testing.

Nigeria can also learn some lessons from South Africa. First, the Nigerian Constitution should be amended to accommodate explicitly reproductive autonomy. As in South Africa, all human rights recognised in the Constitution should be enforceable. Placing some of the rights within the ambit of the fundamental objectives in Chapter two is not in the best interests of Nigerians – as the rights in this section of the Constitution are not enforceable. The Nigerian government should also demonstrate political will, as in South Africa, to domesticate the various ratified treaties on the reproductive health rights of women. In the same vein, Nigeria can learn from South Africa by enacting legislation that regulates customary marriages – like the Recognition of Customary

Marriages Act – such that men do not resort to taking an additional wife without the knowledge of their existing wife.

## 6.7 CHAPTER CONCLUSION

This chapter explored cultural practices and the reproductive health rights of women in South Africa and Nigeria. It is evident from the comparison that, while both countries are multicultural, the motive and mode of practice of these cultural practices are not the same in the two countries. Moreover, some of the cultural practices embraced could impede the realisation of the reproductive health rights of women.

It can be concluded that, despite the various frameworks for the protection of women's reproductive health, women in South Africa and Nigeria have yet to enjoy fully their right to autonomy in respect of reproduction – due to continued adherence to various cultural practices that subjugate women. While the cultural values of a particular society could have an enduring influence on the perceptions of such a society about some issues – like society itself, cultural values are not static but change in response to internal or external pressure.<sup>86</sup> Ibhawoh notes that individuals may embrace change in culture after being exposed to new ideas. Such individuals could initiate change in dominant cultural values.<sup>87</sup>

The notion that human rights are alien to African society and that their principles can only be followed by abandoning traditional African values and embracing Western ones, is patently absurd. Traditional African cultures could be modified to accommodate reproductive health rights in such a way that women's needs are given priority in cultural practices. An example is the modification of widowhood practices in South Africa and some parts of Nigeria. Where it is not possible to accommodate a particular cultural practice without impairing the reproductive health rights of women, such a practice should be abolished.

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<sup>86</sup> B. Ibhawoh “Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African states” (2000) 22 *Human Rights Quarterly* 838.

<sup>87</sup> *Idem* 840-842.

Finally, to fully enjoy these rights, whenever there is a conflict between the various cultural practices and women's reproductive health rights – in line with international norms and standards on the protection of women's rights, women's reproductive health rights should take precedence.

## **CHAPTER SEVEN**

### **RECOMMENDATIONS AND CONCLUSION**

#### **7.1 INTRODUCTION**

The study focused on a comparative examination of the various reproductive health rights of women as entrenched in international and regional treaties – and set out to identify the various cultural practices impinging on these rights in South Africa and Nigeria. Aside from this, the study also sought to examine the extent of the conflict between these practices and the enforcement of the reproductive health rights of women in the two countries. It also sought to identify the various factors responsible for the prevalence of cultural practices hindering the reproductive health rights of women in South Africa and Nigeria. In essence, the study sought to examine the extent to which cultural practices have affected the commitment of the governments of the two countries to implement the instruments on the reproductive health rights – in line with international standards.

The study noted that South Africa and Nigeria are characterised by cultural diversity. The two countries have assented to some international instruments on the protection of the reproductive health rights of women, but they have different frameworks aimed at the protection of the reproductive health rights of women. The notable difference in the approach of the two countries to the promotion and protection of the reproductive health rights of women, is that South Africa has a more developed constitutional approach channeled towards the protection of women's reproductive autonomy.

Despite the different legal frameworks adopted by the two countries in terms of protecting the rights of women, both countries are faced with the problem of reconciling women's reproductive health rights and harmful cultural practices. The impact of these practices on women's reproductive autonomy cannot be over-emphasised as they stand as one of the primary barriers to the realisation of women's fundamental human rights. Against this background, the study sought to provide answers to the following questions:

- What are the reproductive health rights of women recognised by international treaties, regional treaties, and other international consensus documents?
- What are the international or regional human rights instruments and consensus documents in relation to reproductive health rights of women that have been ratified and signed by South Africa and Nigeria?
- What are the contents of the constitutions, legislation and government policies on reproductive health rights of women in South Africa and Nigeria?
- In what ways have cultural practices in the two countries impeded the enforcement of these provisions?
- Why does Nigeria fail to demonstrate the political will to domesticate these international instruments on the reproductive health rights of women?

Other questions answered include whether South Africa actually recognises reproductive health rights of women as a composite of their fundamental human rights – in line with international human rights norms the country has domesticated. And, if so, why are there still contradictions in the implementation of these rights and cultural practices? In comparing the laws of these two countries on reproductive health rights of women – are there lessons the two countries can learn from each other? This chapter seeks to summarise the study and make specific recommendations on what could be done in both countries to eliminate the various harmful traditional practices impinging on the realisation of women’s reproductive health rights.

## **7.2 FINDINGS, CONCLUSIONS/CHALLENGES**

A study on the cultural practices and reproductive health rights of women in South Africa and Nigeria is imperative – because women are vulnerable to harmful reproductive practices. There are some cultural practices in South Africa and Nigeria which inhibit the reproductive health of women. The study adopted a desktop research methodology to gain a robust understanding of cultural practices and the reproductive health rights of women in both countries. The study comprises seven chapters. The opening chapter discussed preliminary issues about cultural

practices and the reproductive health rights of women. These include the historical background to the concept of reproductive health rights, African culture, and the reproductive health rights of women. The chapter also discussed the aims and objectives of the study, the key research questions, the research methodology employed, and the various cultural practices that impede the realisation of the reproductive health rights of women.

The study reviewed existing literature on cultural practices and the reproductive health rights of women in South Africa and Nigeria. Most of the literature reviewed dealt with the issues of cultural practices and women's reproductive health rights. Many of the studies focused on cultural practices without considering their impact on the reproductive health rights of women. Some of the literature that examined women's reproductive health rights did not consider the impact of cultural practices on the realisation of these rights. Much of the literature that compared the level of realisation of women's reproductive health rights across countries is very broad in scope and does not provide the details of the extent of the realisation of these rights. Furthermore, none of the studies compared the interplay of cultural practices and the realisation of women's reproductive health rights in South Africa with Nigeria.

The study considered the various international and regional instruments for the protection of women's reproductive health rights. It found that the recognition and promotion of women's rights – particularly in relation to reproduction – at both international and regional levels, has not had a significant impact on the reproductive lives of women. This is because most of the instruments protecting these rights are ineffective. As with human rights instruments, compliance is through a reporting system which requires states to show the steps and measures taken to comply with a particular instrument. In most cases, states are not transparent in their reports and they lack clarity and precision.

The study also found that the international community lacks the capacity to put sufficient pressure on states to comply with the provisions of the treaties to which they are party. In a similar vein, the study noted that enforcing socio-economic rights is costly. Unlike civil and political rights, these types of rights require governments to put facilities in place to ensure compliance. Most of the states that are signatories to these instruments are not willing to

domesticate such laws. While it is easy for them to accede to these instruments, they lack the political will to make them effective in their respective countries.

The study further revealed that the laws of some countries do not promote the enforcement of international instruments in their domestic courts – unless such instruments are domesticated. South Africa and Nigeria fall into this category. However, various provisions of the South African Constitution demonstrate the will to protect the reproductive health rights of women. Apart from protecting these rights, the Constitution also promotes gender equality. It goes without saying that this constitutional framework makes it relatively easy to domesticate the various international treaties that promote the rights.

In contrast, Nigeria lacks the political capacity to domesticate international instruments. This is because the cultural practices of some of the ethnic groups in Nigeria are not disposed to these rights – and the Constitution does not accommodate the protection of these rights. The study confirms that its provisions impede the domestication of the various instruments that promote these rights. Usually, women do not participate in the legislative processes where decisions are taken on the domestication of laws. In voting for legislators, men vote against women on the grounds that women are inferior and therefore cannot legislate on their behalf. In some situations, husbands find ways of constraining their wives from participation – due to the belief that a woman’s responsibility is located within the confines of the home. The belief is that participating in such endeavours would hinder them from performing their role as mothers and wives. Women’s lack of participation in legislative processes has a great impact on the enforceability of their reproductive health rights. Men’s efforts, if any – to promote these rights – are insufficient because they are not the direct beneficiaries of such rights.

Furthermore, most human rights instruments do not allow individuals to directly prosecute infringement of their particular rights. For instance, Article 5(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, gives automatic access to only the African Commission, state parties and African inter-governmental organisations. An individual is only granted access to the court when the state concerned gives permission by accepting the competence of the court at the time of acceding to or ratifying the Protocol, or at any time thereafter. Thus, an individual whose rights have been infringed and is

unable to get justice in a domestic court cannot access the African Court on Human and Peoples' Rights to adjudicate such a matter, if her country has not accepted the jurisdiction of the court in such cases.

In the same vein, there is inadequate education on the various reproductive health rights of women. Ignorance has caused some women to either overlook infringement of their rights – or they do not recognise a breach of their rights. The study found that this will lead to continual infringement of the rights of such individuals. Furthermore, even when both men and women are aware of these rights, due to various African cultural beliefs - such rights are easily dismissed and disregarded.

The study further considered cultural practices and the reproductive health rights of women in Nigeria. It noted that Nigeria is a nation with diverse cultural practices and traditional norms. The cultural practices are so entrenched in the various communities, that it is difficult to adopt laws to protect the reproductive health rights of women. Women's rights have been subjugated by these cultural value systems. As a result, whether married or not, women are precluded from participating in decision-making processes. This has greatly affected women's participation in politics. Since their levels of representation are very low, issues that relate to women are not taken seriously in the legislative process. This has affected the domestication of various treaties that prohibit cultural practices that impede the reproductive health rights of women in the country.

Furthermore, the study found that the country's pluralist legal system has affected the realisation of the reproductive health rights of women. The system creates geographical disparities in the realisation of these rights. Women in states that have domesticated relevant international laws at the federal level, will enjoy such rights – while those in states that refused such domestication will be denied such rights. The study further revealed that most of the international treaties pertaining to women's reproductive health rights that Nigeria have signed, are not applicable because they have yet to be domesticated as required by the Constitution.

The 1999 Constitution of Nigeria does not explicitly recognise the reproductive health rights of women because such rights are categorised under non-justiciable rights in chapter two of the

Constitution. The study further discovered that the Constitution is not gender sensitive, as it does not consider the physiological differences between men and women.

The study also explored South Africa's political history and its impact on cultural practices and women's reproductive health rights. It also considered the various cultural practices that could impair the realisation of the reproductive health rights of women in South Africa. Furthermore, it examined the constitutional and legislative frameworks for the protection of the reproductive health rights of women in South Africa. The study found that South Africa has an outstanding constitutional and legislative framework for the protection of the reproductive health rights of women. However, while the legal framework that promotes women's reproductive autonomy forbids inequality and women's subordination in all spheres – some women in South Africa have yet to be emancipated from the various cultural practices that infringe on their reproductive independence and health rights.

These practices are so entrenched in society that women themselves sometimes contribute to their furtherance. For example, women subject their daughters to virginity testing – claiming that their daughters belong to them and are not 'owned' by the government. Some women and girls have protested against the prohibition of virginity testing, and they play prominent roles in the initiation process which is a form of Female Genital Mutilation (FGM).<sup>1</sup> Equally, despite the establishment of special courts to adjudicate on matters of this nature, few cases have been brought to challenge women's subjection to the various practices that impair their right to autonomy. This is because they are not aware of their rights or that some cultural norms could infringe these rights and are, indeed, dangerous to their health.

A comparative analysis of cultural practices and the reproductive health rights of women in South Africa and Nigeria, was undertaken. A brief historical background to cultural practices and the reproductive health rights of women in these countries, and the various cultural practices that could inhibit women's reproductive health rights, were examined. The international legal framework for the protection of the reproductive health rights of women in South Africa and Nigeria, and the constitutional and legal framework for the defence of these rights in the two countries, were also discussed. The influence of cultural practices on the reproductive health

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<sup>1</sup> See chapter four.

rights of women in these two countries was explored. Both countries are culturally diverse and have adopted different frameworks aimed at protecting the reproductive health rights of women. It is evident from the study that the approach of the two countries to the promotion and protection of the reproductive health rights of women, differs. Most of the cultural practices discussed in this study are practiced in South Africa and Nigeria. However, as found in the study, the motive and manifestation of some of the cultural practices differs.

The study has achieved its aims of examining the various reproductive health rights of women as entrenched in international and regional treaties, and identified the various cultural practices impinging on these rights in South Africa and Nigeria. It also examined the extent of the conflict between these practices and the enforcement of the reproductive health rights of women in the two countries, and has determined the extent of the influence of the cultural practices on the commitment of the two countries to the implementation of the international instruments on the protection of women's autonomy. This was achieved by providing answers to the research questions raised – in line with the objectives of the study. The first research question was whether the reproductive health rights of women were recognised by international treaties, regional treaties, and other international consensus documents.

Chapter three provided answers to this research question. As stated in the chapter, the various international instruments and consensus documents recognised the reproductive health rights of women. They are the right to life,<sup>2</sup> the right to dignity,<sup>3</sup> the right to equality,<sup>4</sup> the right to privacy,<sup>5</sup> the right to marry and found a family,<sup>6</sup> the right to equal rights in marriage,<sup>7</sup> the right to free and full consent to marriage,<sup>8</sup> the right to freely enjoy scientific advancement,<sup>9</sup> the right to protection of the family,<sup>10</sup> the right to health,<sup>11</sup> the right to education and human development,<sup>12</sup> the right to

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<sup>2</sup> Article 3 UDHR.

<sup>3</sup> Article 1.

<sup>4</sup> Article 2 UDHR, Article 1 CEDAW.

<sup>5</sup> Article 12 UDHR.

<sup>6</sup> Article 16 UDHR, Article 16 CEDAW.

<sup>7</sup> Article 16 UDHR, Article 16 CEDAW.

<sup>8</sup> Article 16 UDHR, Article 16 CEDAW.

<sup>9</sup> Article 27 UDHR.

<sup>10</sup> Article 16 UDHR, Article 10 ICESCR.

<sup>11</sup> Article 12 ICESCR.

<sup>12</sup> Articles 13 and 14 ICESCR, Article 16 CEDAW.

equal access to health-care facilities including family planning,<sup>13</sup> and the right to adequate nutrition during pregnancy and lactation and medical care where necessary.<sup>14</sup> Also recognised are equal rights of couples in decision relating to the number and spacing of their children,<sup>15</sup> the right to control their fertility<sup>16</sup> and the right to self-protection and to be protected against sexually transmitted infections – including HIV/AIDS.<sup>17</sup>

The second research question was on international or regional human rights instruments and consensus documents, in relation to reproductive health rights of women that have been ratified and signed by South Africa and Nigeria. The study noted that South Africa and Nigeria have signed and ratified some of these international instruments that protect the reproductive health rights of women. These include: the UDHR, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the International Covenant on Economic, Social, and Cultural Rights, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>18</sup>

On the contents of the constitutions, legislation and government policies on reproductive health rights of women in South Africa and Nigeria, the study found that the two countries have adopted different approaches to the protection of the reproductive health rights of women. They have different legal frameworks for the protection of the reproductive health rights of women. South Africa's Constitution accommodates the reproductive health rights of women. Section 12(2) states:

Everyone has the right to bodily and psychological integrity, which includes the right

- a. To make decisions concerning reproduction;
- b. To security in and control over their body; and
- c. Not to be subjected to medical and scientific experiments without their informed consent.

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<sup>13</sup> Article 12 CEDAW, Article 14 (1) (c) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005.

<sup>14</sup> Article 12 CEDAW.

<sup>15</sup> Article 16 CEDAW, Article 14 (1) (b) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005.

<sup>16</sup> Article 14 (1) (a) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005.

<sup>17</sup> Article 14 (1) (f).

<sup>18</sup> All these instruments have been discussed in chapter three.

Similarly, section 27(1) of the Constitution recognises the right to reproductive health – by guaranteeing the right to health-care services that include reproductive health-care.

The South African Constitution also recognises some rights that promote women’s reproductive autonomy. These include the right to equality, human dignity, life, freedom and security of the person, freedom of religion, belief and opinion, freedom of association, and children’s rights. In addition to this, there are other national statutes that further protect women’s reproductive health rights. They include: the Children’s Act,<sup>19</sup> the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),<sup>20</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Recognition of Customary Marriages Act.<sup>21</sup>

The Children’s Act, among other things, prohibits children from being subjected to cultural practices that are inimical to their wellbeing. In line with this, the Act prohibits early/forced marriages, FGM and virginity testing – for children under the age of 16. Similarly, PEPUDA contains provisions that prohibit gender discrimination and FGM. The Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>22</sup> contains provisions that protect the girl child from sexual exploitation. The Recognition of Customary Marriages Act<sup>23</sup> accentuates women’s liberty to determine who to marry as an essential ingredient of marriage.<sup>24</sup>

The study discovered that, unlike South Africa, Nigeria’s Constitution does not explicitly recognise the reproductive health rights of women. Section 17(3)(d) only recognises the duty of the state to direct its policies towards the provision of adequate medical and health facilities for all persons.<sup>25</sup> These provisions, according to section 6(6) (c), are only a policy guide and are not enforceable in a court of law. Thus, in Nigeria, women can only protect the infringement of their reproductive health rights through some recognised rights in the Constitution which are closely linked to reproductive health rights– and whose breach could have a negative impact on

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<sup>19</sup> 38 of 2005.

<sup>20</sup> 4 of 2000.

<sup>21</sup> 120 of 1998.

<sup>22</sup> 32 of 2007.

<sup>23</sup> 120 of 1998.

<sup>24</sup> The South African legal framework for the protection of women’s reproductive autonomy was discussed in chapter five.

<sup>25</sup> These are contained in the Fundamental Objectives and Directive Principles of State Policy, under the Nigerian Constitution

women's reproductive autonomy. They are the rights to life, dignity, personal liberty, private and family life, freedom from discrimination, and the right to freedom of thought, conscience, and religion.

Equally, there is national legislation that tends to protect the reproductive health rights of women in Nigeria. The Nigerian Criminal law (Criminal Code and Penal Code) prohibits sexual exploitation of young girls, FGM, early forced marriage, and bigamy. The Marriage Act<sup>26</sup> prohibits early forced marriage by setting the age of marriage at 21 years. The provisions of the Child Rights Act<sup>27</sup> impliedly protect a girl child from early forced marriages and FGM. There are also some government policies aimed at protecting women's reproductive autonomy.<sup>28</sup> The most recent legislative development in Nigeria is the Violence against Persons Prohibition Act, 2015,<sup>29</sup> which prohibits harmful cultural practices which might inhibit the realisation of women's fundamental human rights. The only shortfall of this Act is that its application is limited to the Federal Capital Territory. Other states of the Federation are expected to adopt the Act or enact similar law that prohibits harmful traditional practices.

Cultural practices influence the enforcement of the various provisions on the reproductive health rights of women – in both South Africa and Nigeria. Although women experience erosion of their reproductive autonomy through the various cultural practices, this is usually not challenged in court. This is evidenced by the dearth of cases on the infraction of women's reproductive autonomy.

The study noted that rather than challenge the harmful cultural practices, women play a major role in enforcing some of them. In South Africa, some black women vehemently opposed the abolition of some cultural practices that inhibit the realisation of their reproductive health rights.<sup>30</sup> The study established that the influence of a cultural practice became potent – because the concept of women's reproductive autonomy is alien to most African communities. As a result, notwithstanding their health consequences, most of the cultural practices are observed as a demand of tradition, and are practiced as a way of sustaining some of the African cultures.

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<sup>26</sup> Cap M6,LFN 2004.

<sup>27</sup> 26 of 2013.

<sup>28</sup> See chapter 4.

<sup>29</sup> VAPP Act 2015.

<sup>30</sup> See chapter four and chapter five, section three.

Another finding of the study is the influence of patriarchy in enforcing reproductive health rights of women. Women are culturally trained not to see themselves as equal to men. Consequently, they do not oppose some of the practices that discriminate against them. In the same vein, the domestication of international human rights norms has also been limited by the low representation of women in the legislature. Consequently, it is difficult to agitate for the domestication of such treaties – as men might not see the need for such laws, as they are not the direct beneficiaries.

The study answered the question on the political will to domesticate international instruments on reproductive health rights of women. The study ascertained that there is a gap between the formal recognition of these rights and actual implementation. This is because Nigeria has acceded to these instruments without making efforts to domesticate them, and, in line with the Nigerian Constitution, such instruments are not enforceable unless they are domesticated. Although South Africa has domesticated these instruments, the level of implementation is low.

South Africa recognises the reproductive health rights of women as a composite of the fundamental human rights of women. A woman cannot enjoy her fundamental human rights without exercising her reproductive autonomy – which is extremely important to the realisation of the fundamental human rights of women. Hence, the South African Constitution contains some provisions on the promotion of the reproductive health rights of women.<sup>31</sup> However, in spite of this constitutional recognition, women's reproductive autonomy is alien to some of the racial groups in South Africa. Some of the contents of some of the treaties on women's reproductive autonomy contradict the cultural beliefs of some of the racial groups. This therefore has made it difficult to implement some of the treaties on women's reproductive autonomy.

The study reiterated that Nigeria has failed to demonstrate the political will in terms of domesticating the various treaties on the reproductive health rights of women. Unlike South Africa that is heterogeneous in terms of racial composition, Nigeria is a purely homogenous society. As a result, the contents of most of the treaties on reproductive health rights of women are alien to most of the major ethnic groups in Nigeria, and this may affect the continuation of

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<sup>31</sup> See sections 12 and 27 of the Constitution.

some of the cultural practices. Hence, the level of agitation for the domestication of the international instruments, remains very low.

Aside from the above, the study also found that the pluralist legal system in Nigeria inhibits the domestication of the various international treaties on women's reproductive health rights. Health-care falls under the concurrent legislative list. Consequently, when treaties on the reproductive health rights of women are domesticated or statutes are enacted by the National Assembly (Federal level), they do not operate automatically in all the states of the federation. Such treaties and statutes must be domesticated at state level. States are at liberty to domesticate the treaties, adopt the statutes, or ignore them.<sup>32</sup> This is evident in the case of domestication of the Child Rights Act. While states in southern Nigeria have domesticated this law, most of their northern counterparts are yet to do so. The study discovered that the reason for non-domestication of this Act in most of these states, is because of the adherence of northern states to Islamic customary law – which recognises child marriages. Equally, the Nigerian Constitution does not explicitly recognise the reproductive health rights of women. This has made it difficult to adopt the various treaties on the reproductive health rights of women.

### **7.3 RECOMMENDATIONS**

Many women in South Africa and Nigeria are enslaved by the various cultural practices that are harmful to their reproductive health. Some of the cultural practices that inhibit women's reproductive autonomy, and the legal frameworks for the protection of the reproductive health rights of women in both countries, have been explored in this study. The study has revealed that women in both countries are yet to fully enjoy their reproductive health – due to the impact of the entrenched traditional and cultural norms. Hence, this section seeks to put forward the various strategies that could be employed to improve women's status in these two culturally diversified countries. To effect the needed change, an all-encompassing approach must be embraced.

Regarding the various cultural practices, the study recommends that the following could help in ensuring the realisation of women's reproductive autonomy in the two countries. The first is

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<sup>32</sup> See chapter three, section 3.

modification of widowhood rituals. As noted in the study, in some parts of south west Nigeria and also South Africa, widows mourn their husbands in a dignified way without inhibiting their reproductive autonomy. Therefore, widowhood rituals should be modified in other parts of Nigeria – in such a way that widows would still mourn for their loss in a way that is not inimical to their health.

This study discovered that early/forced marriages still thrive in some parts of South Africa and Nigeria.<sup>33</sup> It is pertinent to create awareness of the adverse effects of early forced marriages on the health of victims. Most parents that marry off their young girls are unaware of the threat that such marriages portend to the health of their children. In the same vein, young men who still practice *ukwuthwala* in South Africa need to be enlightened on the imperative of the consent of the woman to marriage. When a woman is coerced to marry a man, her reproductive health rights are impaired. Therefore, this customary practice should be modified by ensuring that the woman's consent is obtained for such a relationship.

In most African societies – including South Africa and Nigeria – one of the requirements of a valid customary marriage is the payment of a dowry/bride price. In contemporary times, the practice has been distorted and is now monetised/commercialised. As a result, it has lost its initial purpose of acting as a bond between the two families, and is now regarded as compensation for the expenses incurred in raising the bride. In some parts of Yoruba land in southwest Nigeria, the father of the bride refunds the bride price during the customary marriage. This is due to the notion that payment of a bride price connotes buying the bride. When the bride's father is returning the token to the groom's family, he will tell the groom's relative that “we are returning this token because we are not selling our daughter to you. We are giving her out to be married as a wife”. This is to demonstrate that the bride is voluntarily given as a mark of a relationship – rather than sold as a commodity. South Africa, as well as other ethnic groups in Nigeria, should learn from this example, where the monetary aspect is of little significance to the customary marriage. Reverting to the old culture of the payment of *lobola* with cattle, would also add value to a woman and protect her reproductive rights more than monetisation.

Polygamy is one of the cultural practices that infringe the reproductive health rights of women in South Africa and Nigeria. The study noted that polygamy is not a thriving cultural practice in South Africa due to the country's political history. Although it is not thriving in South Africa, the country has made efforts to curtail the practice. The provisions of the Recognition of Customary Marriages Act<sup>34</sup> require that before a man marries an additional wife, he has to apply to the court for an order approving a written contract that sets out the future matrimonial property system.<sup>35</sup> It follows from this provision, that a man cannot take an additional wife at will. The importance of this section is that it notifies the family of the applicant of the man's intention to take an additional wife – and it also seeks to ensure that the applicant's family are not subjected to economic hardship as a result of the marriage. This will deter men who are not financially capable of managing a polygamous family, from contracting such marriages. Although the purpose of this law is not necessarily to enhance women's reproductive autonomy, it could reduce the incidence of polygamous marriages in the society. Nigeria should learn from South Africa in this respect, by enacting laws to regulate customary marriages.

The study found that FGM is a common practice in South Africa and Nigeria. Both countries have ratified the Convention on the Rights of the Child, which prohibits FGM. Other legal frameworks also protect the girl child/woman from FGM. It was noted that some states in Nigeria have yet to domesticate the Child Rights Act that prohibits FGM. In such states, it is difficult to enforce the rights of the child in this regard. Even the states that have domesticated the Child Rights Act do not have the necessary facilities in place for implementation. It is instructive that each state in the Nigerian Federation should be mandated to domesticate the Child Rights Act – and put the necessary mechanisms in place for its implementation and compliance.

Virginity testing is another cultural practice that infringes on the reproductive health rights of women. As noted in the study, the initial purpose of the practice was to ensure that women did not indulge in premarital sex. The study revealed that virginity testing is not practiced in Nigeria. It is recommended that given the adverse effects of this practice on the rights of women, this

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<sup>34</sup> 120 of 1998.

<sup>35</sup> Section 7(6).

practice should be abolished in South Africa. As in Nigeria, sexual chastity could be promoted by advising girls of the dangers of premarital sex – without subjecting them to virginity testing.

Considering that these practices are so firmly established in the various communities where they are practised and might be difficult to modify them, cultural practices that inhibit women's reproductive health rights should be criminalised. Reprimanding the perpetrators and stating that the practices are not only forbidden but that there is punishment attached to engaging in them, would deter other members of the community from subjecting women to such practices. It has been argued that “criminal law serves as a means of communicating a new accepted norm that is backed by state support with the goal to promote social change.”<sup>36</sup> Holding perpetrators criminally liable would be one way of promoting such a social change.

Some cultural practices may substantially diminish human life. Practices such as widowhood rituals, FGM, virginity testing, payment of bride price and abduction of women, could hamper the right to life of the victims. These practices should be criminalised so that women are protected from the violation of their rights through the observation of the traditional norms. There should be strict penalties for perpetrators of the cultural practices that inhibit women's reproductive autonomy. Whoever assists in committing the crime should be regarded as an accomplice and should be made to face the same penalty as the perpetrator. A number of countries have passed criminal law provisions that make FGM an offence. Presently, 26 African countries – including South Africa and Nigeria – have legislation prohibiting FGM.<sup>37</sup> To stop forced marriages, they could be made a criminal offence – for which the abductor and his accomplice would be punished.<sup>38</sup>

Equally, in a situation where it is believed that the payment of bride price could impair the realisation of the reproductive health rights of the bride, legislation could be enacted to prohibit the giving and taking of dowry. There are precedents for this. In order to prohibit discrimination against women, the 1980 Dowry Prohibition Act was passed in Bangladesh. The Act prescribes penalties for giving, taking dowry, and demanding dowry – and renders an agreement for giving

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<sup>36</sup> “FGM – Importance of criminalising FGM in the legal justice system & effective enforcement”. Women's UNReportingNetwork, 9 April 2016. Available at: [www.wunrn.com](http://www.wunrn.com).

<sup>37</sup> “FGM – Importance of criminalising FGM in the legal justice system & effective enforcement”, note 36(above)

<sup>38</sup> Bangladesh enacted the Oppression of Women and Children (Special Provisions) Act, 1995. In section 9 it prohibits abduction of women and prescribes a penalty for the offence.

and taking dowry void. Nigeria has criminalised harmful traditional practices by the Violence against Persons (Prohibition) Act, 2015. The Act is only in operation in the Federal Capital Territory, as it awaits re-enactment in other states of the federation because the rights protected by the Act are placed on the concurrent legislative list. Other states of the federation should re-enact this statute to form part of their state laws so that whoever subjects a woman to harmful traditional practices is prosecuted. South Africa could learn from this – and criminalise harmful traditional norms.

Criminalisation of entrenched cultural practices has its limitations; laws alone may be insufficient. To ensure that women realise their reproductive autonomy, the communities where these norms are being practiced must be engaged. There must be emphasis on community engagement – with a view to change the traditional norms. The traditional leaders and opinion makers in the various communities must be engaged and educated on the negative consequences of the practices, and the need to review them in line with international human rights standards.

There must be public enlightenment campaigns which provide comprehensive and friendly information about the law and the harmful traditional practices that inhibit women's rights. This will limit the misinformation relating to the law and eradicate any stigma women may face when speaking out against the harmful practices in their communities. Similarly, education on the harmful effects of the practices should be encouraged at home and in schools to boys and girls – as part of their socialisation process. This will sensitise both sexes to respect and treat each other with respect and dignity, and also as equals.

In addition to this men must also be active participants in the struggle to realise the reproductive health rights of women. This is because as noted in the study, men are active agents in entrenching most of these cultural practices. Although, men are not homogenous category, some men are making efforts to ensure that they resist and change the attitude of their respective societies on the various discriminatory practices. An example is the Men as Partners Program in South Africa.

Public awareness of the various rights of women is a pre-condition to the effectiveness of the laws. When women are fully aware of the consequences of the traditional norms on their

reproductive health and what they stand to benefit if their rights are protected, they are empowered to claim their rights whenever they are breached. The wheels of justice can only start turning when cases of infringement of rights through harmful traditional norms are reported to the appropriate authorities.

The courts must be vigilant to ensure the protection of the reproductive rights. One of the ways to ensure justice is to grant accelerated hearing to matters of this nature – to ensure that the victim gets justice within the shortest possible time. There is a dearth of cases on infringement of reproductive rights; one of the reasons is the cost of litigation. Legal practitioners in cases of this nature should be encouraged to provide *pro bono* services. Where the violations of such reproductive rights occasion injury, the victim should be entitled to compensation in monetary terms and public apology, rehabilitation or other suitable entitlements from the appropriate person or authority. The Violence against Persons Prohibition Act, 2015<sup>39</sup> is an example of legislation that makes provision for compensation to the victim of harmful practices. The Act criminalises inflicting physical injury on another. Injuries are inflicted on the victims of FGM. Apart from the penalties for inflicting injury on another person, the Act in section 2 empowers the court to award compensation to the victim – as it may deem fit in the circumstance. The Act provides that “ Every victim is entitled to receive necessary materials, comprehensive medical, psychological, social and legal assistance through governmental agencies and/or non governmental agencies providing such assistance”<sup>40</sup> Furthermore, it provides that “victims are entitled to a rehabilitation and re-integration programme of the state to enable victims to acquire, where applicable and necessary, pre-requisite skill in any vocation of the victim’s choice and also necessary in formal education or access to micro credit facilities”<sup>41</sup>Regarding the legal framework, it has been noted that Nigeria and South Africa have ratified some international treaties on the reproductive health rights of women. The study found that both countries have a dualist approach to the domestication of treaties. This requires the ratifying country to subject the ratified treaty to legislation in its domain. While South Africa has made the best use of the dualist approach by subjecting ratified international treaties on the reproductive health rights of women, to domestication by national legislation, in Nigeria the various international treaties

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<sup>39</sup> VAPP Act,2015.

<sup>40</sup> Section 38(1) (a).

<sup>41</sup> Section 38 (1) (c ).

relating to these rights have not been domesticated – despite agitation from within and outside the country.

Given the sensitive nature of the human rights protected by these treaties – particularly the reproductive health rights of women – Nigeria should modify her treaty implementation approach and adopt the monist approach in which ratified treaties operate automatically in a ratifying state upon ratification. Nigeria has the responsibility to respect and honour her treaty obligations and to ensure that ratified treaties make a difference in the lives of the women for whose benefit they were ratified.

It is further recommended that women’s reproductive rights should be included in the exclusive legislative list in Nigeria – so that once the National Assembly enacts a law, it becomes operative in all the states. Subjecting it to further legislation by states’ legislatures hinders its implementation. States exercise their rights to either domesticate or not, and sometimes they modify the laws in a bid to accommodate their cultural beliefs. Hence, there is a disparity in the application of the law. An example is the Child Rights Act<sup>42</sup> which has been domesticated in some states in Nigeria – while some states are less concerned about its domestication. Equally, the Violence against Persons Prohibition Act, 2015<sup>43</sup> only operates in the Federal Capital Territory. No state of the federation has re-enacted it.

The international community should improve its monitoring procedures to ensure that states are made accountable to fulfill their obligations under the various treaties. As noted in the study, each international treaty has a monitoring body that is obliged to ensure that the laws, policies and practices of state parties are in consonance with the provisions of the treaties. State parties are expected to report to the monitoring committee on their efforts to comply with the provisions of the treaty. The observations of the monitoring committees, in the past, have been very helpful. They have compelled states parties to direct their laws and policies to align with the provisions of the treaties.

Individuals whose rights under the treaties have been infringed and could not get redress in their domestic courts, should be allowed to lodge their complaints at the regional and international

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<sup>42</sup> 26 of 2013.

<sup>43</sup> VAAP Act, 2015.

tribunals or committees – without recourse to their states for declarations. Successful complaints in this regard could influence the state governments to reform their laws to ensure that that state parties fulfill their commitment and that the provisions of the treaties are implemented. This mechanism was used by a woman in Peru who was denied access to legal abortion.<sup>44</sup> In that case, K.L – who was 17 years old – got pregnant and she was informed that she was carrying an anencephalic foetus. Her obstetrician explained that with the foetal abnormality, the baby would die shortly after birth. Due to the risk to K.L's health, he advised her to terminate the pregnancy. She was refused an abortion on the ground that under Art. 120 of the Criminal Code, abortions are unlawful where at birth the child would likely suffer physical or mental defects. However, under Art. 119, therapeutic abortion was permitted where the life of the pregnant woman was at risk or the pregnancy risked permanent damage to her health. Nevertheless, she was compelled to carry the pregnancy to term. When the baby was born, the baby was deformed. K.L was forced to breastfeed the baby, but it died four days after delivery. K.L suffered from serious depression as a result.<sup>45</sup>

With the help of several NGOs, K.L submitted a complaint to the UN Human Rights Committee alleging the refusal to authorise a therapeutic abortion violated her right to life, right to private life, protection against cruel and inhuman treatment, the special protection of her rights as a minor, and violated her right to non-discrimination. The committee in this case relied on the International Covenant on Civil and Political Rights to which K.L's country is a party. It held that the woman's experience was a violation of the right to freedom from cruel, inhumane and degrading treatment. The Peruvian government was ordered to pay reparations to the woman and to adopt the necessary regulations to guarantee access to legal abortion. K.L received reparations from Peru in 2015.<sup>46</sup>

The European Court of Human Rights found that rape and ill treatment of a 17 year-old woman of Kurdish ethnicity by Turkish government security forces, while she was in detention,

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<sup>44</sup> *K.L v Peru*, United Nations Human Rights Committee, Communication No. 1153/2003, 22 November 2005. Available at: [www.crin.org](http://www.crin.org).

<sup>45</sup> *K.L v Peru*, note 44(above).

<sup>46</sup> *Idem*.

constituted torture, and inhuman and degrading treatment.<sup>47</sup> The European Commission of Human Rights also considered a complaint alleging a state's violation of the right to life of a woman who had died in child-birth.<sup>48</sup> Although the Commission ruled against the complainant on technical grounds, it took the opportunity to emphasise that the right to life in the European Commission has to be interpreted not only to require states to take steps to prevent intentional killing, but also to take necessary measures to protect life against unintentional loss.<sup>49</sup> It is implicit from the foregoing, that women could use the regional/international tribunals to prosecute the inhibition of their reproductive rights, if the barriers to accessing these tribunals are removed.

On the constitutional framework, the study discovered notable comparative differences in the constitutional provisions of South Africa and Nigeria on cultural practices and the reproductive health rights of women. The first is that the South Africa Constitution recognises that all human rights are enforceable. However, by virtue of section 4 of the Nigerian Constitution, only civil and political rights are enforceable. While economic, social and cultural rights are recognised in chapter two as fundamental objectives, they are not enforceable in court. Thus, bringing an action to enforce the reproductive health rights of women in Nigeria, is a difficult task. They could only be enforced indirectly by relating the right breached with one or more of the recognised fundamental rights. For example, female genital mutilation, and widowhood practices could be related to the right to be free from inhuman and degrading treatment, the right to liberty and security of the person, and the right to life. Similarly, a woman could protect her rights from being inhibited by the various harmful traditional practices, by invoking her right to equality and non-discrimination.

The Nigerian Constitution should be amended to recognise explicitly the reproductive health rights of women. It is further recommended that Nigeria should learn from South Africa by establishing state institutions to support constitutional democracy. This would enhance the promotion and protection of the reproductive health rights of women. The Constitution must be

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<sup>47</sup> Inter-American Commission of Human Rights, Report of the Situation of Human Rights in Haiti (Washington DC. IACHR 1995 OEA/Ser/L/VII.88 Doc.1093-7).

<sup>48</sup> *Ibid.*

<sup>49</sup> *Tavares v France* (1991) European Commission on Human Rights, Application No 16593/90 (09/12/91).

gender sensitive and proffer solutions to the critical issues of gender equality, harmful cultural practices, and age of marriage – among other things.

In line with the African Union Resolutions that call for gender parity in parliamentary seats in Africa,<sup>50</sup> to which some African states including South Africa have responded positively, because the number of women in the parliament in South Africa is about 40%,<sup>51</sup> Nigeria should make efforts to implement the resolution so that women become actively involved in the legislative processes. This would enable them to agitate for the domestication of international treaties on women's reproductive autonomy and for domestic legislation that is gender sensitive.

In the same vein, there is need for gender integration into all government policies and programmes – for the protection and promotion of the reproductive health rights of women. The Nigerian government should make efforts to reform the relevant legislation and policies to accommodate women's reproductive autonomy. The Gender and Equal Opportunity Bill which could have accentuated gender parity, was turned down recently at the Nigerian Senate.<sup>52</sup> Women's equal access to full participation in decision-making processes at all levels will promote gender equality and empower women to control their sexual and reproductive lives and become agents of social change.

The governments of South Africa and Nigeria should establish voluntary counseling and testing centres that will handle complaints and provide guidance and counseling on the abuse of reproductive rights through the various harmful practices. This will help the victims of the practices to come forward to seek redress – and to go for medical treatment, where necessary.

Considering the nature of the rights being violated by the harmful cultural practices, the efforts of the governments may be insufficient to combat the scourge. NGOs could complement government efforts to record significant success on the protection of the reproductive health rights of women. The first strategic area in which the NGOs need to complement governments'

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<sup>50</sup> Article 4(1) of the Constitutive Act of the African Union, Resolution of the AU at the Inaugural Session of the AU Assembly of Heads of State and Government in July 2002, Durban, South Africa; and the Solemn Declaration on Gender Equality in Africa (SDGEA) adopted at the Assembly of Heads of State and Government of the African Union, in Addis-Ababa, Ethiopia, in July 2004.

<sup>51</sup> "Which countries have the most women in the parliament" World Economic Forum. Available at: [www.weforum.org](http://www.weforum.org).

<sup>52</sup> The Bill was presented for second reading by Senator Abiodun Olujimi on 15<sup>th</sup> March, 2016.

effort – is in the area of ensuring state compliance with the provisions of international treaties. This could be done through the provision of shadow/alternate reports on the state’s compliance status.

The reports of the NGOs will assist the monitoring committees to determine the veracity of the reports submitted by a state party. They could also prevail on the treaty monitoring committee to ensure that domestic legislation of the state party aligns with human rights provisions. They could also help the poor and vulnerable women to champion their cause in a number of ways – such as pressurising government towards ensuring justice for all women, drawing government attention to the scourge of harmful cultural practices, sensitising women on the need to fight for their rights, and rendering free legal representations for the victims of harmful traditional practices. NGO efforts in ensuring the realisation of rights protected by international treaties, was brought to bear in *Vishaka v State of Rajasthan*.<sup>53</sup> In this case, a social worker was gang raped in a village in Rajasthan (India) during her course of employment. The petitioners bringing the action were various social activists and NGOs. The Supreme Court of India applied the CEDAW Committee’s General Recommendation No. 19 on Violence against Women to set the guidelines and requirements for processing sexual harassment complaints by both private and public employers in India.

NGOs could also help with increasing the awareness of the harmful cultural practices, by adopting various strategies such as research, conferences, workshops, seminars, and campaigns on how such practices inhibit women’s reproductive autonomy. They could also sponsor legislation for the elimination of the discriminating practices. Government could benefit from the versatility of the NGOs to articulate its policies and programmes – by providing initiatives on helping to increase the awareness of the reproductive health rights of women through information, education and communication. NGOs could also help to develop and integrate into the educational curriculum a gender-sensitive approach that addresses the harmful perceptions of gender roles in young persons, and eradicate societal norms that encourage the harmful cultural norms.

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<sup>53</sup> (1997) 6 SCC 241.

## 7.4 CHAPTER CONCLUSION

This study identified the impact of cultural practices on the reproductive health rights of women in South Africa and Nigeria. It established that there are some practices that inhibit the realisation of women's reproductive autonomy in both countries. As with other African countries, both countries encourage cultural diversity. However, according to their constitutions, traditional norms must align with the provisions of the Constitution. Any cultural norm that fails to satisfy this condition will not be recognised.

The study noted that the inadequacy of the initial fundamental human rights instruments motivates the international community to adopt fundamental human rights instruments which accommodate women's reproductive character. South Africa and Nigeria are both signatories to some of these treaties. The recognition and promotion of women's rights – particularly reproductive health rights – at both international and regional levels, has not had a significant difference on the reproductive lives of women. A number of impediments to the efficiency of the international treaties were identified among. These include: an inefficient compliance reporting system, the passive nature of the international community to compliance, finance, the inability of individuals to prosecute the infringements of their rights, cultural influence, and the mode of domestication of treaties in respective countries.

It is evident from the study that South Africa and Nigeria operate the dualist approach – which requires a treaty to be enacted as a law before it can operate in their domain. With regard to domestication of international instrument, South Africa has domesticated the various treaties on the protection of women's reproductive autonomy. South Africa's constitutional framework, which explicitly recognises these rights as enforceable, makes the domestication relatively easy. As argued in the study, South Africa's heterogeneous racial composition has greatly influenced its promotion and protection of these rights.

In contrast, although Nigeria has acceded to a number of treaties on women's reproductive health rights, this has not translated to improved reproductive rights for the country's women. According to the Nigerian Constitution – for a treaty to be enforceable, it must be enacted into law by the National Assembly. This shows that domestication of treaties requires commitment on the part of the government. The government must put the necessary machinery in place for the

protection of these rights. The government of Nigeria has, however, failed to meet this requirement. Similarly, the Nigerian Constitution does not accommodate the protection of socio-economic rights.

The Nigerian Constitution further stands in the way of reproductive autonomy, by placing rights in this respect under the concurrent legislative list. Both the federal and state governments could act concurrently on matters under the concurrent list. This encourages geographical disparity in the enjoyment of the rights – because some Acts enacted by the National Assembly are not automatically in operation in other states of the federation. Each state is under a duty to re-enact such laws for it to be effective in the state concerned. It is apparent in the study that the states in southern Nigeria could easily domesticate the Child Rights Act, while the northern states are struggling with its domestication because it is not in consonance with their traditional values. In a recent development in the Nigerian National Assembly, the influence of cultural practices on the domestication of international treaties came to bare. A senator sponsored a bill tagged the “Gender and Equal Opportunity Bill”. The bill accommodates some of the rights recognised in the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). The bill was vehemently opposed on the ground that it is not compatible with Nigerian culture and religious beliefs.<sup>54</sup>

Similarly, Nigerian women do not participate in the legislative processes where decisions are taken on the domestication of laws. The numbers of women in the legislative houses are very low, because of the patriarchal bias that suggests that women are not capable of making vital decisions. Consequently, there is no local legislation on the protection of women’s reproductive health rights – although, as noted in the study, these rights can be enforced by relating them with other recognised rights. Ignorance and abject poverty have not allowed victims of these cultural practices to seek redress for the infringement of their rights. Instead of challenging the inhibition of their rights, they are complacent. Another challenge to the realisation of women’s rights in Nigeria, is the high cost of litigation and unnecessary delays in the prosecution of cases.

In contrast, the number of women in the legislative houses in South Africa is quite encouraging.

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<sup>54</sup>See note 52 above.

Consequently, South Africa has a more developed legal framework for the protection of women's reproductive autonomy. As a result, reproductive health rights of women are enforceable in South Africa.

The study has made several recommendations. One of the ways to mitigate/eradicate the influence of various dehumanising cultural practices on the reproductive health rights of women, is the promotion of human rights education. There is a need to educate women on their basic rights – as well as the dangers and risks of the various cultural practices and their effects on their reproductive health rights. When women are well informed in this regard, they will be more likely to not participate in practices that infringe on their rights. In the same vein, they will be able to challenge any step taken by a third party – in the name of cultural practice that might impair their reproductive autonomy.

Since most of these cultural practices emanate from men, as a result of a patriarchal society, men also need to be educated that such practices often impair women's health. Men need to be made aware that many of these practices are outdated. For instance, in some parts of Nigeria, one of the reasons for confining a woman to the house for a certain period after the death of her husband, is to determine whether she is pregnant by the deceased. A pregnancy test is a simpler and less humiliating experience. Furthermore, men should be educated on the need to support their wives and children to realise their reproductive autonomy and should not subject them to dehumanising practices in the guise of preserving their cultures.

In the same vein, embracing the international treaties on the protection of these rights, does not mean that all the cultural practices should be jettisoned. Some of the cultural practices could be modified and practised in a more dignifying manner, since both countries' constitutions allow cultural practices to the extent that they do not infringe on the rights recognised in the constitution. The various human rights provisions – particularly the reproductive health rights of women – should be given priority over and above cultural practices. And where it seems impossible to modify a particular tradition, such should be abolished. This would go a long way in filling the huge gap between existing reproductive health rights and the daily experiences of women.

Non domestication of the treaties on the reproductive health rights of women in Nigeria is not desirable. Although the nature of the rights protected by the treaties is alien to some cultural groups, domestication of these instruments would make a positive impact in the reproductive lives of the women. The Nigerian government should be able to take the necessary steps to fulfill its international obligations. It is not enough to assent to a treaty; effort must be made to ensure that it is domesticated– so that it can be enforceable.

Enforceability of socio-economic rights is extremely important to the realisation of women's reproductive autonomy. Socio-economic rights could be made enforceable in Nigeria. As noted in the study, Chapter Two of Nigeria's 1999 Constitution is similar to India's Constitution. India has, in a number of decisions, expanded socio-economic rights in the Constitution by linking them with some civil and political rights which *are* enforceable in Indian Courts. Otherwise, Nigeria should explicitly amend its Constitution to accommodate these rights.

This study concludes on the note that women play a prominent role in the economic development of any nation. As a result, efforts must be made to ensure that they are not enslaved by the various cultural practices that could inhibit their reproductive health rights. The Nigerian government must demonstrate commitment to domesticate the various treaties on the reproductive health rights – to which Nigeria has assented. In addition to this, Nigeria and South Africa should embrace human rights education to enlighten both men and women on the need to protect these rights. Finally, to fully enjoy these rights, whenever there is a conflict between the various cultural practices and women's reproductive health rights – in line with international norms and standards on the protection of women's rights, women's reproductive health rights should take precedence.

## **INTERNATIONAL CONVENTIONS, TREATIES AND OTHER RELEVANT INSTRUMENTS**

African Charter on Human and Peoples Rights (1981)

Beijing Declaration Platform for Action (1995)

Cairo Programme of Action (1994)

Constitutive Act of the African Union, Resolution of the AU at the Inaugural Session of the AU Assembly of Heads of State and Government in July 2002, Durban, South Africa

Final Act of the Teheran Conference on Human Rights, 1968

General Recommendation 24 of the United Nations Committee on the Elimination of Discrimination against Women, 1999

General Comment No 14, of the UN Committee on Economic, Social and Cultural Rights (2000)

International Covenant on Civil and Political Right (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

Protocol on the Rights of Women in Africa (2003)

UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)

United Nations General Assembly Resolution on population growth and economic development  
Article 2211/XX1, General Assembly Resolution of 17 December 1966.

United Nations General Assembly Resolution A/RES/56/156

United Nations Convention on the Rights of the Child, 1992

Universal Declaration of Human Rights (1948)

Solemn Declaration on Gender Equality in Africa (SDGEA) adopted at the Assembly of Heads of State and Government of the African Union, in Addis-Ababa, Ethiopia, in July 2004.

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