

**Developing a Legal Framework which protects and promotes the Sexual and Reproductive rights of children as described in International Law: What can Nigeria learn from South Africa?**

**By**

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## **Declaration by Supervisors**

As the candidate's supervisors we agree to the submission of this thesis.

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## DECLARATION

I -----

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Minister of Health and Others v Treatment Action Campaign and Others (2002) 10 (BCLR) 1033

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## Abbreviations

ACHPR	African Charter on Human People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CEDAW	Convention on the Elimination of Discrimination against Women
CRA	Child Rights Act
CRC	Convention on the Rights of a Child
CTOP	Choice on Termination of Pregnancy Act
GC CESR	General Comments on Covenant on Economic, Social and Cultural Rights
GC CRC	General Comments on the Rights of a Child
HIV/AIDS	Acquired Immune Deficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
MDGs	Millennium Development Goals
OAU	Organisation of African Unity
POA	Programme of Action
RSA	Republic of South Africa
STD's	Sexually Transmitted Disease
STI's	Sexually Transmitted Infections
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/Acquired Immune Deficiency Syndrome
UNFPA	The United Nations Population Fund
UNICEF	United Nations International Children's Emergency Fund
WHO	World Health Organisation
WHO MEC	World Health Organisation Medical Eligibility Criteria

## CHAPTER ONE

### INTRODUCTION

#### 1.0 Background to the Study

The attention given to the sexual and reproductive rights of children in recent times as provided for in several international laws and treaties leave no doubt that the full exercise of these rights is crucial to the development of any nation.<sup>1</sup> Worldwide, it can be seen today that certain behavioural patterns and developmental vulnerabilities in adolescents have created a combination of factors that place them at heightened risks for poor health outcomes.<sup>2</sup>

With an estimated 1.5 billion youths and adolescents in the world today<sup>3</sup> (young people between the ages 10-25 years of age)<sup>4</sup>, it is evident that nearly half of the global population is less than 25 years of age.<sup>5</sup> (This is based on an assumption that adolescents are people aged 10-19).<sup>6</sup> This vulnerable group is more likely to be infected with sexually transmitted diseases (STDs) including HIV/AIDS, and unwanted pregnancies because many of them lack the maturity to make well-informed decisions about their sexual health.<sup>7</sup> In addition to this, 14-15 million women between the ages 15-19 years give birth every year, with many dying from pregnancy-

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<sup>1</sup> C. Shalev 'Rights to Sexual and Reproductive Health- the ICPD and the Convention on the Elimination of All Forms of Discrimination against Women' (1998) available at <http://www.un.org/womenwatch/daw/csw/shalev.htm>, (Accessed on 14<sup>th</sup> April 2017).

<sup>2</sup> L.H Bearinger, R.E Sieving, J. Ferguson, V. Sharma: 'Global Perspectives on the Sexual and Reproductive rights of adolescents' (2007) The Lancet Vol.369: 1220-31 available at [http://www.ttenpregredbridge.co.uk/site/files/pdf/Global\\_perspectives\\_on\\_SH\\_2007\\_pdf](http://www.ttenpregredbridge.co.uk/site/files/pdf/Global_perspectives_on_SH_2007_pdf). (Accessed on 27/3/2017).

<sup>3</sup> UNFPA (2012) Promoting Gender Equality: Frequently asked questions about FGM/C available at <http://www.unfpa.org/gender/practices2.htm> (Accessed on 14th February 2017).

<sup>4</sup>Ibid.

<sup>5</sup> UNFPA (note 3 above).

<sup>6</sup> WHO: The second Decade: Improving adolescent health and development Geneva (2001) available at [http://whqlibdoc.who.int/.../WHO\\_FRH\\_ADH](http://whqlibdoc.who.int/.../WHO_FRH_ADH), (Accessed on 4<sup>th</sup> February 2017).

<sup>7</sup> Bearinger (Note 2 above) 1221.

related complications, including unsafe abortion.<sup>8</sup> Adolescents have basic health needs regardless of their age, cultural background, mental status and these needs include comprehensive information about their bodies and its functions, sex, how to improve safe sex, reproduction, and sexual negotiation.<sup>9</sup> In the absence of information, adolescents make poorly informed decisions that have profoundly negative impacts on their lives in future.<sup>10</sup> Issues relating to sexual and reproductive health cut across the gender divide, but women and girl children are mostly at the receiving end of deficiencies of health services, discrimination and deprivation. Hence, this dissertation focuses on the girl child.<sup>11</sup>

The World Health Organisation (WHO) defined sexual health as:

‘a state of physical, emotional, mental and social well-being related to sexuality and not merely the absence of disease, dysfunction or infirmity’<sup>12</sup>.

Developing this concept, a specialist consultation meeting under the authority of the World Health Organisation (WHO) in January 2002 defined sexual rights as:<sup>13</sup>

Sexual rights embrace human rights that are already recognised in national laws, international human rights documents and other consensus statements. They include the right of all persons, free of coercion, discrimination, and violence to: (1). The highest attainable standard of health, including access to sexual and reproductive health care services (2) Seek, receive and impart information related to sexuality; (3) Sexuality education; (4). Respect for bodily integrity; (5). Choose their partner; (6). Decide to be sexually

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<sup>8</sup> WHO: *Pregnant adolescents: Delivering on global promises of hope*, Geneva (2006) available at <http://whqlibdoc.who.int/publications/2006/9241593784eng.pdf>. (Accessed on 4<sup>th</sup> February 2017).

<sup>9</sup> Bearinger (Note 2 above) 1220.

<sup>10</sup> Ibid.

<sup>11</sup> C.Ngwena & E.Durojaye *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region through Human Rights* (2014) 1.

<sup>12</sup> WHO *Sexual and Reproductive Health Research Priorities for WHO for the period 1998-2003* (1997) 4-5. Available at <http://whqlibdoc.who.int/publications1998>. (Accessed 4<sup>th</sup> April 2017).

<sup>13</sup> These definitions were elaborated as a result of a WHO convened international technical consultation on sexual health in January 2002, and was subsequently revised by a group of experts from around the world and as such is not a WHO official definition, available at [http://www.who.int/reproductive-health/gender/sexual\\_health.html#3](http://www.who.int/reproductive-health/gender/sexual_health.html#3). (Accessed on 14<sup>th</sup> April 2017).

active or not; (7). Consensual sexual relations; (8). Consensual marriage; (9). Decide whether or not, and when to have children; and (10). Pursue a satisfying and pleasurable sex life.<sup>14</sup>

Many laws, treaties and conventions (these will be discussed extensively in this research) provide for the protection of these rights of children, and this places obligations on States to ratify these treaties and conventions, and for those who have ratified them, to ensure that the obligations contained therein are carried out. The responsible exercise of human rights requires that all persons respect the rights of others.<sup>15</sup>

## **1.1 SOUTH AFRICA**

In South Africa today, progress has been made in ensuring the rights of adolescents are protected; however, there still remains much to be done. South Africa's population consists largely of young people, those below 35 years of age, constitute about 77.6 percent of the total population.<sup>16</sup> Of 50 million South Africans, 18.5 percent are between the ages 10-19 while 24 percent are aged 15-24.<sup>17</sup> Statistics show the early sexual debut of South African youths,<sup>18</sup> where about 10.7 percent of youths aged 15-24 years were reported having sex for the first time before the age of 15 years, and when broken down by gender, 16.7 percent males and 5.0 percent females reported having had sex before the age of 15.<sup>19</sup> Statistics also show that over one-third (36.2 percent) of all respondents (adolescents) aged 15 years or older, who were sexually active

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<sup>14</sup> Ibid.

<sup>15</sup> WHO (note 13 above)

<sup>16</sup> UNFPA South Africa: Young People (2013) available at [http://www.countryoffice.unfpa.org/filemanager/files/southafrica/young\\_people\\_march\\_2013\\_fact\\_sheet.pdf](http://www.countryoffice.unfpa.org/filemanager/files/southafrica/young_people_march_2013_fact_sheet.pdf). (Accessed 27th April 2017).

<sup>17</sup> Ibid.

<sup>18</sup> UNFPA South Africa: HIV Preventions (2013), available at <http://www.countryoffice.unfpa.org/southafrica/2013/05/03/6675/hiv/> (Accessed 25<sup>th</sup> April 2017).

<sup>19</sup> Ibid.



during the previous 12 months, indicated they had used a condom when they last had sexual intercourse.<sup>20</sup>

Nevertheless, additional analysis revealed that youths aged 15-24 years had a higher percentage (58.4 percent) of condom use than any other age groups.<sup>21</sup> Research has shown that the prevalence of HIV in South Africa is extremely high, with an estimated 6 million people living with HIV. This is considered the highest number recorded of people living with the HIV/AIDS virus.<sup>22</sup> As of 2011, recent research has shown that Africa constituted twenty-three million of the thirty-three million people living with HIV in the world.<sup>23</sup>

There further exists a knowledge gap about information in preventing HIV/AIDS, as only 30 percent of boys and about 27 percent of girls within the age group of 15-24 years could identify prevention methods to stay sexually healthy and free from HIV, as well as debunking myths about HIV/AIDS.<sup>24</sup> Despite improved living conditions of South African youths since 2005, there still remains a huge gap in their sexual and reproductive health with high rates of adolescent pregnancy being recorded, with over 45 thousand female learners falling pregnant in 2009, resulting in learners dropping out of school early, and only a third really integrate themselves back into the school system, after giving birth.<sup>25</sup>

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<sup>20</sup> WHO (note 12 above).

<sup>21</sup> Ibid.

<sup>22</sup> UNAIDS *Aids Epidemic update* (2010) 7.

Statistics South Africa mid-Year Estimates 2010, available at <http://www.statssa.gov.za/publications/P0302/P03022010.pdf> (Accessed on 16 May 2016). See also the South Africa UNAIDS 2010 Country Progress Report which reported about 400 000 deaths in South Africa in 2009.

<sup>24</sup> Ibid.

<sup>25</sup> UNAIDS (Note 22 above) 8.

An enabling environment is thus needed to promote youth health and well-being.<sup>26</sup> Sexual and reproductive rights exist when people are free to choose and exercise control over their sexuality, and these include children and adolescents.

The sexual and reproductive rights of adolescents in South Africa have undergone some revision in recent times.<sup>27</sup> The Constitution of the Republic of South Africa (1996)<sup>28</sup> in section 28 provides for the rights of children and putting a child's best interest as paramount in everything pertaining to a child. However this does not refer directly to a child's sexual and reproductive rights, but there are other sections that refer to this, like section 12, which provides for the child's rights to bodily and psychological integrity. It also includes the right to decisions concerning reproduction and the ideal requirement of informed consent before medical testing can be done on an adolescent.<sup>29</sup> The full realisation of these rights, devoid of discrimination and violence is firmly entrenched in the Constitution of South Africa and in its obligation to implement international human rights treaties.<sup>30</sup> Laws and legal reform play a very important role in protecting and ensuring that children's rights are fulfilled.<sup>31</sup>

There are more than three pieces of legislation dealing with the sexual and reproductive rights of children. Firstly, the South African Children's Act of 2005<sup>32</sup> provides that from the age of 12, children are entitled to access a range of sexual and reproductive health services, such as

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<sup>26</sup> Ibid.

<sup>27</sup> L. Salona 'Child Savers V Kiddie Libbers': The sexual rights of Adolescents' (2014) 30 *SAJHR* 557.

<sup>28</sup> The Constitution of South Africa (1996) available at <http://www.gov.za/.../CONSTITUTION/constitution-republic-south-africa-1996-1>. (Accessed 12<sup>th</sup> December 2016).

<sup>29</sup> Ibid .Section 12(2)

<sup>30</sup> Ministry of Health Republic of South Africa 'Sexual and Reproductive Health and Right: Fulfilling our Commitments 2011-2021 and beyond'. Available at <http://www.agenda.org.za>. (Accessed on January 20 2017).

<sup>31</sup> Save the Children: 'Legal and Policy Framework to protect the rights of vulnerable children in Southern Africa' (2006) available at <http://www.resourcecenter.savethechildren.se/sites/default/files/document/6575.pdf>. (Accessed on December 14 2016).

<sup>32</sup> Sections 13, 130(2), Sec 134 of Act No.38 of 2005, Children's Act, available at <http://www.justice.gov.za/legislation/acts/2015>. (Accessed on 2<sup>nd</sup> March 2017).

contraceptives, HIV testing/counselling, pregnancy services and the treatment of sexually transmitted infections (STIs). South Africa's Children's Act of 2005 also aims to ensure best practices for children.<sup>33</sup>

Secondly, the Choice on Termination of Pregnancy Act of 1996 (CTOP)<sup>34</sup> gives the girl child autonomy regarding her reproductive health and sexual freedom, the Act provides for the different scenarios under which an adolescent can terminate her pregnancy.<sup>35</sup> The preamble to this Act defines a woman, as 'any female person of any age' (this includes the young female). The Act also provides for the requirement of informed consent of the pregnant adolescent without recourse to parental consent,<sup>36</sup> as well as the confidentiality of the records of the adolescent who wants to terminate her pregnancy.<sup>37</sup>

Thirdly, the Criminal Law Sexual and Offences and Related Matters Amendment Act 32 of 2007,<sup>38</sup> as mentioned above is one of South Africa's legislation's that touches on children's rights relating to their sexuality and sexual freedom. Previously the Sexual and Offences Act 2007<sup>39</sup> criminalised consensual sexual acts between adolescents between ages twelve and sixteen resulting in a disjuncture between the criminal and children's laws. This was hotly debated in South Africa,<sup>40</sup> until recently when the controversial ruling in *The Teddy Bear Clinic for Abused children and RAPCAN and others vs the Minister of Justice and National Director of Public*

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<sup>33</sup> The Children's Act of 2005, available at <http://www.justice.gov.za/legislation/acts/2015>. (Accessed on 2<sup>nd</sup> March 2017).

<sup>34</sup> The Choice on Termination of Pregnancy Act of 1996 (Act No 92 of 1996) available at <http://www.acts.co.za> (Accessed on 3<sup>rd</sup> March 2017).

<sup>35</sup> Section 2 CTOP.

<sup>36</sup> Section 5 CTOP.

<sup>37</sup> Section 7 CTOP.

<sup>38</sup> The Criminal Law Sexual and Offences and Related Matters Amendment Act 32 of 2007, available at <http://www.saps.gov.za/./sexual> offences act. (Accessed 12th March 2017).

<sup>39</sup> Ibid.

<sup>40</sup> South Africa: Child Sex ruling expected, available at <http://www.enca.com>. (Accessed 13<sup>th</sup> May 2017).

*Prosecutions case*<sup>41</sup> found the provisions of Section 15 and 16 of the Sexual Offences Act 2007<sup>42</sup> which criminalised consensual acts between adolescents as invalid, unconstitutional and inconsistent with the South Africa's Constitution.<sup>43</sup>

These domestic legislative instruments will be discussed extensively in this thesis. Though South Africa has undergone some law reforms, there still remains a lot to be done. Adolescents are still having poor health outcomes regarding their sexual and reproductive health.<sup>44</sup>

### **1.1.2 NIGERIA**

In Nigeria today, some steps have been taken to address the sexual and reproductive health of its women and children through the enactment of laws and policies,<sup>45</sup> however, it can emulate some of the progress that South Africa has made in this regard.

One-third of Nigeria's population of 148.1 million are between the ages of 10 and 24<sup>46</sup>. In 2000, a study of sexual behaviour and pregnancy amongst Nigerian youths in the South West<sup>47</sup> showed that 78.8 percent of all respondents admitted being sexually active, with the mean age of their debut of sexual activity being 15 years old, the modal age also 15 years of age and the youngest debuted at 12 years old. About 51 percent had been exposed to more than one sexual partner, while more than one-fifth (21.5 percent) admitted being pregnant before, of which 88.6 percent

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<sup>41</sup> *The Teddy Bear Clinic for abused children and RAPCAN and others V Minister of Justice and National Director of Public Prosecutions case CCT 12/13(2013) ZACC 35.*

<sup>42</sup> UNFPA (note 16 above).

<sup>43</sup> South African Constitution (note 27 above).

<sup>44</sup> Bearinger (note 2 above).

<sup>45</sup> This will be discussed extensively in Chapter 3 of the thesis, See also note 21 above.

<sup>46</sup> Youth Reproductive and Sexual Health in Nigeria; Advocates for youths, available at [www.advocatesforyouth.org/publications/publications-a-z/1450-youth-reproductive-and-sexual-health-in-Nigeria](http://www.advocatesforyouth.org/publications/publications-a-z/1450-youth-reproductive-and-sexual-health-in-Nigeria). (Accessed on 14th April 2017).

<sup>47</sup> Okpani& Okpani conducted a survey of sexual behaviour and pregnancy amongst Nigerian students, it was recorded in A.A.Adegoke 'Sexual behaviour practices of secondary school adolescents in Ibadan Metropolis, Southwest Nigeria' (2013) 21 *IFE Psychologia* 12, 15.

of those pregnancies were terminated by induced abortion, while the others actually delivered the babies. (This report<sup>48</sup> was only carried out in the west, excluding the northern parts of the country, where there is predominantly a high number of child marriage and maternal mortality deaths.<sup>49</sup>

The Constitution of the Federal Republic of Nigeria 1999<sup>50</sup> does not expressly provide for the sexual and reproductive rights of adolescents, but it does guarantee fundamental human rights which is applicable to everyone, and can be invoked to protect the sexual and reproductive rights of adolescents. Some of these rights include the right to life<sup>51</sup>, the right to the dignity of the human person<sup>52</sup>, the right to personal liberty<sup>53</sup>, as well as the right to privacy which is also guaranteed in Section 37 of the Constitution.<sup>54</sup> There is also a provision in Sec 29(4) (a) and (b) which provides for the definition of “full age” being 18 years of age, and that a woman is of “full age when she is married” leaving the possibility of child marriage open. This is quite ambiguous and its relevance to the sexual and reproductive rights of children regarding child marriage will be discussed extensively later in this dissertation. There also exists a key legislation in Nigeria enacted with an aim to address the rights of children, which is the Child Rights Act of 2003.<sup>55</sup> This was a step Nigeria took in domesticating the provisions of the Convention on the

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<sup>48</sup> Ibid.

<sup>49</sup> T.S Braimah ‘Child Marriage in Northern Nigeria: Section 61 of part 1 of the 1999 Constitution and the protection of children against child marriage’. (2014) 14 *AHRLJ* 479.

<sup>50</sup> Constitution of the Federal Republic of Nigeria 1999, available at <http://www.nigeriarights.gov.ng/files/download/43>. (Accessed 17 February 2017).

<sup>51</sup> Section 33 of the Nigerian Constitution.

<sup>52</sup>, Section 34 of the Nigerian Constitution.

<sup>53</sup> Section 35 of the Nigerian Constitution.

<sup>54</sup> Section 37 of the Nigerian Constitution.

<sup>55</sup> The Child Rights Act Of 2003, available at <http://www.nigeriarights.gov.ng/files>. (Accessed on 18 February 2017).

Rights of a Child (CRC),<sup>56</sup> however, this law was passed at the Federal level and can only come into force if enacted at state levels. This poses a great challenge, as of today, only 24 of the nation's 36 states have enacted the Act, leaving the other 12 states, who are yet to do so. Thus, it can't be said that this legislative achievement can afford the desired protection to children that it is supposed to throughout the federation.<sup>57</sup>

The Child Rights Act 2003<sup>58</sup> also, defines the age of a child to be less than 18 and provides for the best interest of that child in every respect. Section 21-23 of The Act provides that marriage contracted with a person under the age of 18 is null and void, and sanctions will apply to such a person who betroths that child. The Criminal Code which is applicable to the Southern part of Nigeria sets the age of sexual debut for girls to be 16<sup>59</sup> and for boys to be 14<sup>60</sup>, thus sexual intercourse by an adult with a girl under the age of 16 is termed statutory rape.

The Child Rights Act does not expressly provide for the sexual and reproductive health needs of children, which in itself is ironic and this leaves the sexual health of adolescents shrouded in secrecy, as statistics mentioned above show that adolescents engage in sexual activity well before they turn 18 years.<sup>61</sup> This leaves them without the right information about reproductive health, a lack of treatment for sexually transmitted diseases and a lack of contraception.

The provision for safe and legal abortion for young women is dangerously ignored in Nigeria as it has highly restrictive abortion laws and this hampers the rights of adolescent girls to make

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<sup>56</sup> Convention on the Rights of the Child 1989, entered into force 2 September 1990, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. (Accessed 15 March 2017).

<sup>57</sup> UNICEF: 'UNICEF urges remaining 12 states in Nigeria to adopt the Child Rights Act' (2017) available at [http://www.unicef.org/Nigeria/media\\_11542.html](http://www.unicef.org/Nigeria/media_11542.html). (Accessed on 13 June 2017).

<sup>58</sup> Child Rights Act (note 53 above).

<sup>59</sup> The Criminal Code Act Cap 77 Laws of the Federation of Nigeria (1990). Section 222 of the Code.

<sup>60</sup> Ibid Section 216.

<sup>61</sup> Okpani (note 47 above).

choices for themselves, especially if they are a victim of rape and incest. In 2008, the Federal Ministry of Health in Nigeria partnered with Action Health to commission an assessment of the national response to young people's sexual and reproductive health in the country<sup>62</sup>. The aim of this assessment was to ensure optimisation of the health of young adolescents. Some of its objectives included reviewing the responses to the sexual and reproductive health of young people, identifying the challenges, and the gaps that exist as barriers to the sexual and reproductive health of young adolescents, providing action plans and solutions that will optimise the sexual and reproductive health of young adolescents.<sup>63</sup>

Despite these steps taken by Nigeria, amongst many others, it is important to note that African countries are still behind in meeting the sexual and reproductive health needs and rights of their adolescents.<sup>64</sup> However, many of these countries have ratified existing international treaties, and yet many of them have not taken measure to domesticate these laws to take effect, which is one of the core problems in Nigeria.<sup>65</sup>

Though South Africa has made some appreciable progress in meeting the sexual and reproductive needs of its young girls, more needs to be done. A study of what Nigeria can learn from this will be the crux of this thesis. Thus, this thesis will critically examine the sexual and reproductive rights of sexuality, sex education, access to contraceptives, and refusal of child marriage mentioned above, their provisions in international law, and what measures the Republic of South Africa and Nigeria have put in place for the successful execution of these provisions in ensuring the protection and promotion of the rights of young female children.

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<sup>62</sup> Assessment Report of the National response to Young People's Sexual and Reproductive Health in Nigeria (2008). Available at <http://www.actionhealthinc.org/publications/docs/as>. (Accessed 5 April 2017).

<sup>63</sup> Ibid.

<sup>64</sup> Ngwena (note 11 above) viii.

<sup>65</sup> Ibid 119

## 1.2 Statement of the Research Problem

With nearly half of the global population being adolescents,<sup>66</sup> adolescent populations are growing very fast in Africa.<sup>67</sup> Many underdeveloped countries in Africa still have high maternal risks with pregnancy and childbirth, as well as the contraction of STIs, mostly HIV/AIDS.<sup>68</sup> Research shows that adolescents engage in risky sexual behaviour mostly due to a lack of interventions such as, appropriate reproductive health information and education,<sup>69</sup> while some factors like cultural practices and beliefs of the people as well as non-domestication of international laws also stand as impediments to the reproductive rights of the girl child.<sup>70</sup>

Despite the existence of both international and regional legislation and policies, aimed at realising the sexual and reproductive rights of children, an extensive gap still exists between policy and actual practice.<sup>71</sup> The issue is how to fill this gap and ensure children's rights are realised and not infringed upon. Furthermore, making sure that countries take meaningful steps to ensure the protection and promotion of these rights. There needs to be more investment in programmes that include sexual and reproductive health care for adolescent girls, especially in Africa as this would undoubtedly yield benefits to the girl child and will enable her to stay

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<sup>66</sup> UNFPA (note 3 above) 1

<sup>67</sup> UNFPA "From childhood to Womanhood: Meeting the sexual and reproductive health needs of Adolescent girls". Available at <http://www.unfpa.org>, (Accessed on 16 April 2017).

<sup>68</sup> Ibid.

<sup>69</sup> S.Madiba & M.Mokgatle 'Students want HIV testing in schools' a formative evaluation of the acceptability of HIV testing and counselling at schools in Gauteng and North West provinces in South Africa'. (2015) 15 *BIO Med Central Public Health*:388.

<sup>70</sup> UNICEF: The Child Rights Act of 2003, available at [http://www.unicef.org/nigeria/children\\_factsheet](http://www.unicef.org/nigeria/children_factsheet). (Accessed on 15 April 2017).

<sup>71</sup> R.P.Petchesky 'From population control to reproductive rights: feminist fault lines' (1995) 3 *Reproductive Health Matters* 152.



healthy and make well- informed decisions about her productivity and choose to have fewer and healthier babies whenever she is ready.<sup>72</sup>

### **1.3. Research questions**

This thesis aims at exploring the following questions:

- i. What are a child's sexual and reproductive rights as set out in international law?
- ii. To what extent has South Africa met international sexual and reproductive rights standards as it relates to the girl child?
- iii. To what extent has Nigeria met its international sexual and reproductive rights standards as it relates to the girl child?
- iv. What can Nigeria learn from South Africa in terms of developing a legal framework for protecting and promoting sexual and reproductive rights of girl children?

### **1.4 Literature Review**

Extensive literature exists on the sexual and reproductive rights of adolescents, from a number of different perspectives, ranging from the derivation of sexual and reproductive rights as a human right and its relevance to the development of the woman and the realisation of these rights in actual practice and not on paper.

Miller examines the term 'sexual rights' and sees the need for a proper definition of it which would be pivotal in ensuring that these rights can be claimed by diverse people around the globe. She posits that sexual rights, must in its definition, encompass the concept of sexuality as being an inherent characteristic of every human being, either male or female, young or old, and across all racial divides, such that human rights norms would not be sectionalised and the claims of

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<sup>72</sup> WHO (note 12 above)

everyone can be reflected.<sup>73</sup> According to Miller, we are made to understand that sexual rights are seen to be encompassing and every human has a right to express their sexuality, this forms the basis for sexual rights autonomy, and it is clearly reflected in international documents like the International Conference on Population and Development.<sup>74</sup> Correa<sup>75</sup> focuses on the concepts of sexual health, sexual rights and reproductive rights, how they relate closely to reproductive health and how these concepts have aided social changes and transformation in recent times.

Several authors have focused on sexual and reproductive rights as an important human right that cannot be ignored. Knudsen<sup>76</sup> focuses on the position of reproductive health of women and adolescent girls in a global context and highlights some African countries. Knudsen also gives a brief history of the evolvement of sexual and reproductive health in South Africa, showing how sexual health problems still exist, due to poor access to health care and inadequate sexual education for young adolescent girls. Knudsen further threw light on some legislation in South Africa<sup>77</sup> that have enhanced reproductive rights and have given young women the right to make sexual choices for themselves. This is a step in the right direction.

Some UN publications<sup>78</sup> have linked the international attention to the sexual and reproductive rights of adolescents to the International Conference on Population and Development<sup>79</sup> held in Cairo in 1994. This conference marked a turning point in fertility, family planning and maternal

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<sup>73</sup> A.M. Miller 'Sexual but not reproductive: 'Exploring the junction and disjunction of sexual and reproductive rights'. (2000) *Health and Human Rights* 4, 71.

<sup>74</sup> The 1994 International Conference on Population and Development (ICPD) available at <http://www.unfpa.org/international-conference-on-population-and-development>, (Accessed on 17 April 2017).

<sup>75</sup> S. Correa 'From reproductive health to sexual rights: Achievements and future challenges' *Reproductive Healthcare matters* (1997) 5(10)*The International Women's Health movement*. 107-116.

<sup>76</sup> L.M Knudsen *Reproductive rights in a global context: South Africa, Uganda, Peru, Denmark, Vietnam, Jordan*(2006)11-27.

<sup>77</sup> Ibid.

<sup>78</sup> UN World population Monitoring:2002, *Reproductive Rights and Reproductive Health*, available at <http://www.un.org/en/development/desa/population/publications/family/reproductive-rights.shtml>. (Accessed 17 April 2017).

<sup>79</sup> Note 74 above.

care issues and programmes, “It also related the definition of reproductive health to encompass all issues akin to the physical, mental and social well-being in all matters relating to the reproductive system, its function and processes”.<sup>80</sup> This will enable an in-depth study and provide data as to the impact of HIV/AIDS and other sexually transmitted diseases (STDs), maternal mortality rates, access to contraceptives, legal abortion, in adolescents and young women.<sup>81</sup>

In the realisation of the sexual and reproductive rights of women and adolescent girls within International Law, Eriksson looks at reproductive freedom for women on the basis of gender equality and a woman’s autonomy being complementary to each other, and also focuses on various theories aimed at improving the application of International law to further the realisation of women’s rights.<sup>82</sup> This concept allows the young female to make choices regarding her body and to choose whether to engage in wholesome sexual activity necessary to her development.

Cook recognises that adolescents are at a critical stage in their development and need the correct sexual and reproductive health information as well as the protection of their confidentiality in accessing health care. She also posits that states should have laws that will not obstruct a mature adolescent from accessing reproductive health care, like abortion without subjecting them to parental consent. According to her, the rights of adolescents should be given the utmost priority, so long as they are mature and can make decisions for themselves, Adolescents should be

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> M.K. Eriksson *Reproductive Freedom: In the context of International Humanitarian Law* (2000) 106.

allowed to request essential health care services that will benefit them, without recourse from parental consent or notice.<sup>83</sup>

Many scholars share the view that sexual and reproductive rights must be realised as part and parcel of human rights, with a large participation from the governments in making sure these provisions in international law are domesticated and put into practice. Durojaye gives an insight into the fact that human rights enshrined in international, national and regional documents often give rights to humans which include the basic fundamental rights to freedom, liberty, non-discrimination and these rights are necessary for a fulfilling life. However, these rights will mean nothing if they cannot be realised and this is the case of sexual and reproductive rights which is mostly ignored or given little attention as a human right, especially in Africa.<sup>84</sup>

Ngwena and Durojaye argue that the fulfilment and protection of the sexual and reproductive rights provided for under various human rights instruments are of no effect if they are not effectively implemented by state governments at the domestic level.<sup>85</sup> The authors attempt to show the junction between reproductive health and sexual health and the African human rights system,<sup>86</sup> with a bid to raise awareness of these rights which have often been marginalised. This thesis will look closely at the government systems in both South Africa and Nigeria to find out the extent to which sexual and reproductive rights are recognised and how robust the legal and policy frameworks in both countries are in the protection of these rights.

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<sup>83</sup> R. Cook, B.M. Dickens 'Recognising adolescents' 'evolving capacities' to exercise choice in reproductive healthcare'(2000) 70 *International Journal of Gynecology & Obstetrics* 13-21

<sup>84</sup> E. Durojaye 'Turning paper promises to reality: National Human Rights Institutions and adolescents' sexual and reproductive rights in Africa (2008) 26/4 *Netherlands Quarterly of Human Rights* 547-578.

<sup>85</sup> C.Ngwena & E. Durojaye *Strengthening the protection of sexual and reproductive health and rights in the African region through Human rights* (2014) 18.

<sup>86</sup> Ibid.

Afulukwe-Eruchalu<sup>87</sup> also argues that although efforts and significant progress has been made globally to reduce maternal deaths, Africa still has the highest numbers of maternal deaths due to the inability of states to provide access to emergency obstetric care for mothers. He is of the opinion that state accountability should be an important litigation tool in the hands of society and human rights organisations all across the African territory. If states have provisions in their constitutions that provide for medical services and the ratification of treaties which guarantee the right to health, then they should not evade their responsibilities and must be held accountable for maternal deaths and maternal mortality problems.<sup>88</sup> This thesis will address state accountability of the Nigerian government in response to the protection of the sexual and reproductive rights of the girl child.

Durojaye's work on the impact of promoting the sexual and reproductive rights in Africa, which include monitoring the right to sexual and reproductive health, access to contraception for adolescents, advancing adolescents sexual health rights through human rights instruments are very crucial to this thesis.<sup>89</sup> He examines<sup>90</sup> the role of the African Committee of Experts on the African Charter on the Rights and Welfare of the Child<sup>91</sup> (the ACE), as well as the African

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<sup>87</sup> O. Afulukwe-Eruchalu 'Accountability for non-fulfillment of Human Rights Obligations: A key strategy for reducing maternal mortality and disability in sub-Saharan Africa' in C. Ngwena & E. Durojaye *Strengthening the protection of sexual and reproductive health and rights in the African region through Human Rights* (2014) 125.

<sup>88</sup> Ibid.

<sup>89</sup> E. Durojaye 'Monitoring the right to health and sexual and reproductive health at the National level: Some considerations for African Governments' (2009) 42 *Comparative and International Law Journal* 227-263, see also E. Durojaye & R. Amollo 'Advancing adolescents sexual health in Africa' (2010) 11 *ESR Review* 3-5, available at <http://reference.sabinet.co.za/document/EJC33356>. (Accessed 10<sup>th</sup> March 2017).

<sup>90</sup> E. Durojaye 'The Potential of the Expert Committee of the African Children's Charter in advancing adolescent sexual health and rights in Africa' (2013) 46 *Comparative and International Law Journal of Southern Africa* 390.

<sup>91</sup> African Charter on the Rights and Welfare of the Child, (Adopted by Organisation of African Unity on 11<sup>th</sup> July, 1990 and entered into force 29<sup>th</sup> November, 1999). Available at <http://www.au.int/acerwc/documents/africancharter-rights-welfare-child>. (Accessed on 3<sup>rd</sup> March 2017)

Commission on Human and People's Rights (ACHPR)<sup>92</sup> in advancing the sexual and reproductive rights of the adolescent girl.<sup>93</sup> This thesis will highlight the extent to which these international treaties have influenced legislations passed by the Government of Nigeria, it will analyse these different laws and their impact on the sexual and reproductive rights of the girl child.

Andorfer and Michael agree that a nation must employ a more comprehensive approach to the reproductive health of women and should drastically reduce obstacles like parental consent, unnecessary counselling, lack of trained medical personnel, and a lack of qualitative sex education when it relates to the choice of abortion as an exercise of a woman's sexual and reproductive right.<sup>94</sup> A WHO article highlights the fact that there is no enabling environment for safe and legal abortion for childbearing women in Africa and estimates that one in seven maternal deaths on the continent of Africa is from unsafe abortion.<sup>95</sup> This dissertation intends to fill the gap in information on how Nigeria's legislation has succeeded or failed in protecting the rights of the girl child to access safe abortion. It will also show the success of South African's government in the forward looking legislations that protect the right to safe termination of pregnancy for the adolescent female.

Ngwena<sup>96</sup> argues that women must have a choice, timing and control over motherhood which is essential to their sense of equality and all round development, and sees highly restrictive laws as

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<sup>92</sup> The African Commission on Human and People's Rights entered into force 21<sup>st</sup> October 1986, available at <http://www.achpr.org>. (Accessed on 3<sup>rd</sup> March 2017)

<sup>93</sup> E. Durojaye 'The African Commission on Human and People's rights and the promotion and protection of sexual and reproductive rights' (2011) 11 *African Human Rights Law Journal* 374.

<sup>94</sup> E. Andorfer & J. Michael *Who Decides? A state by state Review of Abortion and Reproductive rights* (1998) 50.

<sup>95</sup> WHO Safe Abortion: 'Technical and policy guidelines for health systems' (2003) 12.

<sup>96</sup> C. Ngwena 'Access to safe abortion as a human right in the African region: Lessons from an emerging jurisprudence of UN treaty-monitoring bodies' (2013) 29 *SAJHR* 409.

a causative factor to high maternal deaths arising from unsafe abortions.<sup>97</sup> In another article<sup>98</sup> Ngwena employs the appraisal of abortion laws especially the CTOP Act of South Africa against the backdrop of contemporary human rights notions of sexual and reproductive health rights as a human right. He does this by looking closely at human rights international instruments and how they impact on sexual and reproductive health.

Dhai, Moodley and Sullivan argue that despite the enabling environment for safe termination of pregnancy in South Africa, access to safe and legal abortion has been negatively affected by the ignorance of women about their reproductive rights, religious and moral ethics, and lack of medical professionals that are willing to handle abortions.<sup>99</sup> These scholars also posit that moral implications like the debatable nature of the foetus have been a long-standing barrier to enjoying access to safe and legal abortion.<sup>100</sup>

The issue of the need for contraception by adolescents in Africa cannot be overemphasised, Durojaye agrees that access to contraception by adolescents (especially female adolescents) give them very important options to avoid unwanted pregnancies and avoid getting infected with sexually transmitted diseases like HIV/AIDS. It also increases their social, economic and occupational possibilities in the future.<sup>101</sup> Van Rooyen, Strode and Slack in their article on HIV testing for children stressed the importance of ideal HIV counselling and testing (HCT) for children as this will enable early diagnosis of the disease as well as adequate care and management of the disease. The article outlined the legal norms of HCT as: i). Limitation of HIV

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<sup>97</sup> Ibid.

<sup>98</sup> C.Ngwena "Access to legal abortion: Developments in Africa from a reproductive and sexual health rights perspective (2004) 19 *SA Public Law* 328-350.

<sup>99</sup> A.Dhai, J. Moodley & M. O'Sullivan 'Safe termination of Pregnancy and Conscientious Objections' (2003) 28 *Modern Medicine* 40.

<sup>100</sup> A.Dhai, J. Moodley & M.O'Sullivan 'Safe termination of pregnancy: 'An enabling ethical and legal framework' (2002) 12 *Obstetrics and Gynaecology Forum* 18.

<sup>101</sup> E. Durojaye 'Access to contraception for Adolescents in Africa: A human rights challenge' (2011) 44 *CILJSA* 8.

testing to defined circumstances, ii). Consent of the child, iii). Counselling is given and iv). Confidentiality is maintained throughout.<sup>102</sup>

All these norms have the sole aim of promoting the adolescent's sexual and reproductive rights, enabling her to access sexual and reproductive health services whenever she may need it without prejudice.

There exists very little literature on the promotion of the sexual and reproductive rights of adolescents in Nigeria and as such, accounts for the weak enforcement by government to promote these rights; this dissertation will focus extensively on this.

Despite the ratification of international human rights instruments that provide for the best interests of the child and the enactment of the Child Rights Act of 2003 in Nigeria, this Act has not been enacted in all the states of the Federation, especially in the northern states where sharia law is practiced and young girls are given in marriage at ridiculously early ages, leaving these girls in highly vulnerable circumstances.<sup>103</sup> Ladan<sup>104</sup> writes extensively in his review of the existing legal framework for sexual and reproductive rights in Nigeria. He stresses the need for implementation of policies made by the government and the domestication of international agreements relevant to sexual and reproductive rights. In addition, he recommends a constitutional review which will elevate sexual and reproductive rights to the status of fundamental human rights as provided for by the Constitution.<sup>105</sup> Braimah<sup>106</sup> analyses some of

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<sup>102</sup> H.E.Van Rooyen, A.E.Strode, C.M. Slack 'HIV testing of children is not simple for health providers and researchers: Legal and policy framework guidance in South Africa' (2016) 106(5) *South Africa Med Journal* 451-453.

<sup>103</sup> Note 49 above.

<sup>104</sup> M.T.Ladan 'Overview of Reproductive Rights and Health' (2003) 1(7) *Journal of Economic Social and Cultural Rights* 19-45.

<sup>105</sup> Ibid.



the provisions of the international human rights instruments, their limitations and importance of their domestication into laws in Nigeria, with the aim of promoting the sexual and reproductive rights of children in Nigeria.

### **1.5 Scope of the Study**

Notwithstanding the magnitude of work that has been done on the sexual and reproductive rights of young children (especially the female child) and their protection within international law and the steps South Africa has taken to promote these rights, the existing literature shows that less information exists in the legal framework in Nigeria. Little has been written on how Nigeria measures up in their legal responsibilities and how this is benchmarked against international norms. There is also very few studies comparing South Africa and Nigeria's legal responses to the promotion of the sexual and reproductive rights of the girl child. This study intends to focus on these issues and fill up any lacunae which exist in the literature on the sexual and reproductive rights of the girl child.

### **1.6 Limitations to the Study**

This dissertation focused on some sexual and reproductive rights of children and did not exhaust all the rights to be enjoyed and exercised by children.

### **1.7 Research Methodology**

To satisfy the information needs of any study, a suitable research methodology has to be chosen. This thesis is based on a desktop review of the relevant legal materials. Various sources will be

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<sup>106</sup> Braimah T.S “Child Marriage in Northern Nigeria: Section 61 of part 1 of the 1999 Constitution and the protection of children against child marriage”. (2014) 14 AHRLJ 479.

utilised in writing this dissertation. Relevant South African and international sources were used, such as:

- i. Books
- ii. Journal articles
- iii. Case Laws
- iv. International documents
- v. Statutes
- vi. Law reports
- vii. Internet sources
- viii. Local, international newspapers.

## **1.8 Outline of chapters**

The dissertation is divided into five chapters. The chapters are as follows:

Chapter One of this dissertation is the introduction to the study. It consists of an overview of the sexual and reproductive rights of children in the countries explored, and their relevance to children. It states the objectives and relevance of the study, and gives an insight into the international framework available for the protection of these rights. This chapter also contains the research questions as well as the methodology of the research.

Chapter Two, focuses on four sexual and reproductive rights to be addressed in this dissertation which includes: the right to sexuality, the right to access contraceptives, the right to sexuality education and the right to say no to child marriage. It takes an extensive look at international standards that set out these sexual and reproductive rights of children as well as regional African

Human Rights instruments on the rights of children. It takes a critical look at the UN standards that are relevant to the sexual and reproductive health of adolescents and discusses its applicability and relevance to the protection of these rights of children. It also studies some non-binding instruments as well as regional human rights instruments that address the sexual and reproductive health rights of children.

Chapter Three, is a comprehensive analysis of the domestic legislations, laws and policy documents that promote the sexual and reproductive rights of children in South Africa. It also shows the extent to which these laws meet international and regional standards in South Africa.

Chapter Four, is a further analysis of the laws and policy documents that protect the sexual and reproductive rights of children in Nigeria. The strength and weaknesses of the legal framework are be analysed showing its conformity or non-conformity to international standards.

Chapter Five will contain the findings of the dissertation. Long term recommendations will be made on the full realisation of the sexual and reproductive rights of children in both countries, suggestions will be made on how the legal framework in South Africa and Nigeria can be reviewed to meet up with international standards, and what Nigeria as a country can learn from the framework of South Africa already in place. A conclusion will then be made.

## CHAPTER TWO

### COMPREHENSIVE AUDIT OF THE INTERNATIONAL STANDARDS THAT DEAL WITH THE SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS OF CHILDREN

#### 2.0 Introduction

In the past, adolescents have been marginalised and viewed as those who are not entitled to exercise a wide variety of rights.<sup>1</sup> However, currently children's rights have gathered momentum and it has been recognised that children have a special status and as such, need special protection. In this vein, international legal standards have been established and national laws will need to safeguard these rights<sup>2</sup>. Thus, the sexual and reproductive rights of adolescents can be protected by international instruments (binding and non-binding) that govern member state parties.

For the purpose of this dissertation, the terms “adolescent female”, “girl-child” and “children” are used interchangeably to refer to children, especially the girl-child between the ages of ten and eighteen.

This chapter discusses the international and regional standards on the sexual and reproductive rights of children. It sets out these international and regional norms, state obligations and the role of national legislation and policies, to meet the needs of children in South Africa and Nigeria.

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<sup>1</sup> 'Children's rights in International law'. Available at <http://www.culturalsurvival.org/ourpublications/csq/article>.(Accessed on 6 April 2017).

<sup>2</sup> Ibid.

The sexual and reproductive rights which will be viewed in the light of these international and regional instruments and how much protection they are given include the right to sexuality, the right to sexuality education, the right to contraceptives, and the right to say no to child marriage. These specific rights will be treated in this dissertation as it is the core of the sexual and reproductive rights of women, it is clearly seen from the definition of ‘sexual rights’ by the expert consultation meeting under the WHO<sup>3</sup>, that everyone has the right to attain the best standard of health care, including reproductive health care services, receiving and imparting information on sexual education, the right to choose their partners and enter into consensual marriages, and the general right to just simply enjoy a pleasurable sexual life. Thus, a comprehensive study on the sexual and reproductive rights mentioned above, will be very relevant to this thesis as opposed to the focus on other rights. These rights and their protection will be discussed throughout this dissertation<sup>4</sup>.

## **2.1 UN standards on the protection of the sexual and reproductive health rights of children**

The following section outlines international instruments that are relevant to the sexual and reproductive health rights of children, these instruments are classified into binding and non-binding documents. The legally binding instruments consist of conventions, treaties, protocols, and statutes while the non-binding documents are made up of declarations, charters, guidelines, though they are termed ‘soft law’, they have a moral force and their guidelines are followed by states and are mostly used by the courts in the process of interpretations of law.<sup>5</sup>

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<sup>3</sup> These definitions were elaborated as a result of a WHO convened international technical consultation on sexual health in January 2002, and was subsequently revised by a group of experts from around the world and as such is not a WHO official definition, available at [http:// www.who.int/reproductive-health/gender/sexual\\_health.html#3](http://www.who.int/reproductive-health/gender/sexual_health.html#3) (Accessed on 14 April 2017).

<sup>4</sup> The human rights based approach which consists of the plans, policies legislations and processes which are anchored in a system of rights and corresponding obligations established by international law will be analysed.

<sup>5</sup> UNHCHR *International Law* 2000 available at <http://www2.ohchr.org/english/law> (Accessed on 10 April 2017).

### **2.1.1 Binding international instruments on the sexual and reproductive rights of children and adolescent females**

South Africa and Nigeria have ratified a vast number of treaties, declarations and resolutions. In international law, treaties and conventions are legally binding instruments, and their objectives and principles are enforceable by the states that ratify them<sup>6</sup>. International law also provides for legal or other mechanisms to hold governments accountable for their actions if there is a violation of human rights as enshrined in these instruments<sup>7</sup>.

Both South Africa and Nigeria are members of the United Nations (UN). South Africa was admitted to the UN on 7 November 1945, while Nigeria was admitted on the 7<sup>th</sup> of October 1960.<sup>8</sup> Both countries as member states are under an obligation to comply with the provisions of any instruments of the UN, once they sign and ratify such a treaty<sup>9</sup>.

In South Africa, application of international law is clearly outlined in Section 231(4) of the 1996 Constitution of South Africa which provides;

Any international agreement becomes law in the Republic when it is enacted into Law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

South African courts are also compelled to review international law when interpreting constitutional rights<sup>10</sup> and this is provided for in Section 39 of the Constitution:

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<sup>6</sup> Children's rights in Wales 'International framework for human rights' available at <http://www.childrensrightswales.org.uk/international-framework> . (Accessed on 13 April 2017).

<sup>7</sup> Ibid.

<sup>8</sup> UN List of member states( 2000) available at [http://www.un.org/List\\_of\\_United\\_Nations\\_member\\_states](http://www.un.org/List_of_United_Nations_member_states) (Accessed 3 March 2015)

<sup>9</sup> Which also include non- binding instruments and declarations which may establish or apply as compulsory, obligations, as these form part of customary international Law.

<sup>10</sup> Section 39 (b) of the 1996 Constitution of the RSA.

‘When interpreting the bill of rights, a court, tribunal or forum, (a)’must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’ and (b) “must consider international law’.

Sec 232 of the 1996 Constitution, also states that;

‘The rules of customary international law are binding on the Republic, unless they are inconsistent with this constitution, or an act of parliament, or form part of the laws of the Republic’.

South Africa employs a dualist approach to the enforcement of international Law at the domestic level, such that the treaty must be incorporated by legislation.<sup>11</sup> At the same time, in the second clause of the above section, self-executing treaty provisions can be automatically enforced and incorporated into the domestic level without any need for legislative action and incorporation.<sup>s</sup>

Nigeria on the other hand, cannot recognise and enforce international treaties at the domestic level, until the treaty is enacted and passed into law at the domestic level, and such provisions of that treaty cannot be said to be binding.<sup>12</sup> Thus, international law cannot be recognised when dealing with national matters. Section 12 of the 1999 Constitution provides that:

‘No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly’.

A case relevant in point is *General Sani Abacha v Gani Fawehinmi*<sup>13</sup>, where the respondent, a legal practitioner was arrested unlawfully and remanded in prison by security operatives of the

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<sup>11</sup> D. Sloss *Treaty Enforcement in domestic courts; A comparative analysis in The Role of Domestic Courts in Treaty Enforcement: A comparative study* (2009) 25.

<sup>12</sup> E.Egede ‘Bringing Human rights home: An examination of the Domestication of Human rights treaties in Nigeria’ (2007) 2 *Journal of African Law* 51- 249.

<sup>13</sup> *General Sanni Abacha v Gani Fawehinmi* (2000) FWLR 4 533-586 ( Domestication of international documents in Nigeria)

state. This was during the military regime in Nigeria. As at the time of his arrest, he had not been charged with any offence. The respondent sought relief and relied on the provisions of Section 31, 32, and 38 of the 1979 Constitution<sup>14</sup> and Articles 4,5,6,12 of the African Charter on Human and People's Rights,<sup>15</sup> stating that his arrest and continuous detention was a violation of his fundamental human rights under these laws, thereby making it unlawful and unconstitutional. The appellant was not satisfied with the decision of the trial court and appealed the decision until the case came before the Supreme Court.<sup>16</sup> The Supreme Court gave its ruling that the African Charter was promulgated as an Act of the National assembly and thus, should maintain its position as an Act, therefore its provisions cannot be superior to the Constitution.<sup>17</sup>

In the application of UN instruments in any country, it is pertinent to note that international law can be interpretive in nature or can be self-executing. In the case of international law being self-executing, it means that, it can be applied directly and enforced by the courts at the domestic level, without prior legislation by Parliament. On the other hand, if the law has an interpretive role, it means that the law cannot be enforced or recognised in that country, unless it is domesticated.<sup>18</sup>

The recent trend in international law places the responsibility on the Government to include provision of affordable and adequate health care, while protecting the right to life of its citizenry,

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<sup>14</sup> Nigerian Constitution 1979. Available at <http://www.lawnigeria.com/CONSTITUTIONHUB/Constitution/1979constitutionofnigeria.html>. (Accessed 20 February 2017).

<sup>15</sup> African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990. Available at <http://www.nigeria-law.org/African%20Charter%20on%20Human%20and%20Peoples'%20Rights.htm> (Accessed 20 February 2017).

<sup>16</sup> *General Sanni Abacha* (Note 13) above.

<sup>17</sup> A.A. Oba 'The African Charter on Human and Peoples' Rights and ouster clauses under the Military Regime in Nigeria : Before and after September 11' (2004) 4 *AHRLJ* 274-287.

<sup>18</sup> UNFPA: The state of the World Population 2003: Making one billion count: Investing in adolescent health rights (2006), available at <http://www.unfpa.org/icpd>. (Accessed on 14th February 2017) 66.



especially women and children, as the right to health is an integral part of the right to life. This can be explained in a situation or instance where a woman or child dies of a disease that could be prevented, it could be said that her right to life has been infringed upon<sup>19</sup>.

Most of these treaties are monitored and enforced by the United Nations, and countries that agree to be bound by them must submit regular reports (mostly every 4-5 years) to show that they are implementing the policies in these treaties<sup>20</sup>.

The following international instruments are relevant to the sexual and reproductive rights of children and are binding in nature, and will be discussed extensively.

### **2.1.2 Convention on the Rights of the Child (CRC) (1990)<sup>21</sup>**

The CRC was adopted and opened for signature and ratification by the General Assembly (GA) Resolution 44/25 of November 1989 and entered into force on 2<sup>nd</sup> September 1990 in accordance with Article 49. <sup>22</sup>The CRC was ratified by Nigeria on 26<sup>th</sup> January 1990 and by South Africa on 16 June 1995.

The CRC is largely recognised as the leading UN instrument dedicated to the protection of the rights of a child, it is the first legally binding international instrument that recognises, affirms

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<sup>19</sup> C. Ngwena “Access to safe abortion as a human right in the African Region: Lessons from an emerging jurisprudence of UN treaty-monitoring bodies” (2013) 29 *SAJHR* 409.

<sup>20</sup> Ibid.

<sup>21</sup> Convention on the Rights of the Child adopted by General Assembly resolution 4/25 of 20<sup>th</sup> December, 1989 and entered into force 2nd September, 1990. Available at [www.ohchr.org/en/professionalinterest/pages/crc.aspx](http://www.ohchr.org/en/professionalinterest/pages/crc.aspx). (Accessed 3 February 2017)

<sup>22</sup> The CRC is binding on both countries.

and asserts the rights of a child<sup>23</sup>.The CRC guarantees a vast number of children’s rights<sup>24</sup> that are relevant in promoting the sexual and reproductive health of children.

The CRC in Article 1 defines a child as every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.<sup>25</sup> The sexual and reproductive rights of the female child and their protection that will be considered in the light of the CRC includes, the right to sexuality, the right to access sexuality education, the right to have access to sexual and reproductive health care, the right to equality and the refusal of child marriage.

Article 17 of the CRC specifically deals with the right of children to have access to information and material from both local and international sources, especially those that pertain to their developmental well-being. Commenting on this, the United Nations Committee on the Rights of the Child, General Comment No. 4 added that some of the information that children should have access to includes information on the ‘use and abuse of tobacco, alcohol and other substances, safe and respectful sexual behaviour, diet and physical activity.’<sup>26</sup>This directly impacts on the right the child has to access sexuality education, which will aid in their development.

The rights to privacy and confidentiality of the adolescent are provided for in Article 12 of the CRC, which stipulates their rights to express their views freely, and with it comes, the related

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<sup>23</sup> UNICEF:20 years of the CRC. Available at <http://www.unicef.org/rightsie/237.htm>. (Accessed on 7 March 2017).

<sup>24</sup> Rights ranging from the right to education, to the right to adequate standard of living suitable for their physical, mental and social development, these and many more rights are guaranteed in the CRC.

<sup>25</sup> The CRC note 21 above)

<sup>26</sup> United Nations Committee on the Rights of the Child, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, adopted at the thirty-third session, 2003. Available at <http://www1.umn.edu/humanrts/crc/crc-generalcomment4.html>. (Accessed 2<sup>nd</sup> March 2017). par.26.

issue of informed consent. The right to the sexuality of an adolescent is hinged on their privacy to access all kinds of information that impacts on their sexuality, their right to contraceptives also includes the right the child has to access safe abortion without any form of discrimination whatsoever and with strict confidentiality and privacy. Generally, this provision is relevant to the full enjoyment of an adolescent's sexual and reproductive rights.<sup>27</sup>

Most of the sections in the CRC affirm the general wellbeing of the child, The Committee on the Rights of a Child issued the General Comment No.4 (GC4) which was adopted at the thirty- third session of the Committee on the Rights of a Child from 19 May to 6 June 2003, to focus on the development of adolescent health within the context of the CRC.<sup>28</sup>

The General Comments are instructive and appropriately interpret relevant international instruments, they are used by international treaty bodies with a view to aiding member state countries clearly understanding the provisions of each international treaty, fulfilling their obligations and thus making it binding on the member states<sup>29</sup>.The General Comments are used by states in the preparation, analysis, and submission of their periodic reports<sup>30</sup>. The GC 4 in this instance is binding on South Africa and Nigeria as both countries ratified the CRC.

The GC4 condemns discrimination against adolescents and enjoins State Parties to “have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (Article 2) related to “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other

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<sup>27</sup> CRC (note 21above) .Article 12.

<sup>28</sup> Note 26 above.

<sup>29</sup> African Commission General Comments on Article 14(1) (d)and ( e) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2012) available at <http://www.achpr.org/news/2012/11/d65>. (Accessed 3 January 2017).

<sup>30</sup> Ibid.

status”<sup>31</sup>. This seeks to protect the adolescent from any form of discrimination or prejudice against them when seeking sexual and reproductive health information and services.

Article 3 of the CRC recommends that the “best interest of a child” should be priority in all actions concerning children undertaken by legislative authorities and administrative bodies. In the Committee’s General Comments 14 which was adopted by the Committee at its sixty-second session which was held from the 14<sup>th</sup> of January to 1 February, 2013<sup>32</sup>, the child’s best interest was explained in great detail. Indeed, it can be said that the concept of a child’s best interest is not modern, as it existed before the Convention and was already spelt out in the Declaration on the Rights of a Child of 1959 (Paragraph 2) and the CEDAW (Article 5(b)and 16, Paragraph 1 (d)<sup>33</sup>, as well as various national and international documents. The ‘best interest of the child principle is so fundamental to the child, as it is aimed at ensuring she benefits from, and enjoys all the rights recognised in the Convention, that are necessary for the total development of the child.<sup>34</sup>

Commenting on Article 3, the right of the child must be guaranteed in all actions and decisions taken concerning children, it also defines, the best interest of the child, to mean, the interests of children, not only as individuals but children, generally as a whole. It further stated, that the State’s obligation to duly consider and implement a child’s best interest is a comprehensive one, as it encompasses all private and public, social welfare institutions, courts of law, administrative

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<sup>31</sup> UN CRC GC4 (note 26 above), Also, these grounds cover adolescents’ sexual orientation and health status. Adolescents who are subject to discrimination are more vulnerable to abuse, other types of violence and exploitation, and their health and development are put at greater risk. They are therefore entitled to special attention and protection from all segments of society.

<sup>32</sup> United Nations Committee on the Rights of the Child, General Comment No.14 on the right of the child to have his or her best interests taken as a primary consideration, adopted at the sixty-second session 2013. Available at <http://www.unhchr.ch/tbs/doc.nsf> (Accessed 13 March 2017).

<sup>33</sup> Ibid.

<sup>34</sup> UN CRC GC14 (note 32 above), The Committee expects states to view the ‘holistic’ development of a child as embracing the child’s physical, mental, spiritual, psychological, moral and social development.

authorities and legislative bodies, involving or concerning children.<sup>35</sup> The committee opined that the ‘best interest principle’ must be flexible and adaptable to suit the needs of the children, and equality amongst them must be upheld. Thus, in matters that affect their sexuality and where decisions need to be made, it should be according to the particular circumstances of the child or group of children, their personal context, situation and needs being taken into consideration, whether individually or as a group of children.

In its comments regarding protection of children from all forms of abuse, neglect, violence, and exploitation,<sup>36</sup> the UN Committee implores state parties to adopt special measures to ensure that adolescents are protected from all forms of neglect, abuse, and violence.<sup>37</sup> Thus, programmes incorporating adolescents that focus on their rights must also be adapted with a means to protect them. This view expounds the provisions of art. 19 of the CRC, as well as art 32-36 and 38 of the CRC.

The sexual and reproductive health rights of ‘being able to receive and impart knowledge on sexuality and sex education’ is provided for in the GC4 which comments extensively on the right to education for adolescents. It explains article 29 of the CRC which provides that education must be directed to the all-round development of the child, to maximise their full potential.

It recognises the fact that the school is the basic learning centre for the development and socialization of any adolescent, stating that: “Education must be aimed at ensuring that no child leaves school without being equipped to face the challenges that he or she can expect to be

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<sup>35</sup> CRC (note 29 above) ( these institutions not only include those relating to the economic, social and cultural rights, ( e.g. care, health, environment, education, leisure and play)but also institutions dealing with civil rights and freedom( e.g. birth registration, protection against all forms of violence) institutions that provide services that are necessary and critical to children’s enjoyment of their rights.

<sup>36</sup> Articles 12, 32-36 & 38 of The CRC (note 21 above)

<sup>37</sup> Ibid.

confronted with in life”.<sup>38</sup> The Committee urges state parties to be in harmony with art. 28 and 29 of the CRC to ensure that quality primary and secondary education is compulsory and accessible to all adolescents,<sup>39</sup> taking necessary steps to prohibit all forms of neglect and abuse in schools and initiating measures and activities that promote healthy behaviour by the inclusion of relevant and salient topics in the school curricula.<sup>40</sup> Basic education gives the adolescent the right foundation on which their healthy development is built.

In addressing the rights of the child to say no to child marriage, the GC4 in Par 20 of its comments recognises the fact that the legal minimum age and actual age of marriage<sup>41</sup> is low in most state Parties, depriving children of basic education and marginalisation of social activities. Children who are below the age of 18 are now considered as adults because they are married, and cannot benefit from the protection that is provided to them by the Convention. The Committee instructs state parties to carry out legislative reforms and increase the minimum age for marriage with and without parental consent to be 18years, for both girls and boys.<sup>42</sup>

The right to access to information, skills development, counselling and sexual and reproductive health services for adolescents cannot be over emphasised. Adequate sexual information for adolescents is a necessity for their healthy development.

The right to sexuality and right to contraceptives of the adolescent is paramount and is protected for in the CRC. While addressing sexual and reproductive health rights, the GC4 elaborated on the rights provided for in articles.3, 17 and 24 of the CRC, urging state parties to provide

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<sup>38</sup> CRC GC 4 (note 26 above).

<sup>39</sup> Articles 28 and 29 of the CRC ( note 21 above)

<sup>40</sup> Ibid.

<sup>41</sup> CRC GC4 (note 26 above).

<sup>42</sup> Ibid.

adolescents with access to sexual and reproductive information,<sup>43</sup> especially about contraceptives, family planning, the dangers of early pregnancy, the risk of contamination of HIV/AIDS and other infectious sexually transmitted diseases (STD's).<sup>44</sup> This information must be put across to the youth, with or without parental consent. State parties are enjoined to incorporate adolescents in the dissemination of information, through various means, which includes religious, community and leadership groups amongst many others. The media must also not be undermined because of their important role in passing out information.

State parties are encouraged to foster sensitisation of adolescent sexuality by providing effective prevention programmes and removing all barriers that marginalise already infected youths, and the need to further educate young girls on the dangers of early pregnancies and the risks involved.<sup>45</sup>

While addressing the right that the child has to contraceptives, state parties are urged to implement programmes that provide adequate family planning and safe abortion when it is not against the law and support for adolescent mothers to continue their education.<sup>46</sup>

The obligations of state parties to adolescents were outlined by the Committee in GC4 with an aim to explaining these duties without any ambiguity, for the effective implementation by State parties. The concept of rights and obligations of institutions and state parties were aptly put by the FIGO study group:<sup>47</sup>

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> CRC GC4 (note 26 above).

<sup>46</sup> Ibid.

<sup>47</sup> R. J. Cook, B. M. Dickens 'The Figo study group on women's sexual and reproductive rights (1999) 67(1) *International Journal of Gynaecology and Obstetrics* 55-61.

A person's interest becomes a right when a duty binds another person or institution to respect that interest, that is, an interest is a right, only in so far as others are bound by related duties. The binding force that creates a duty may be legal when the right is a legal right, or moral when the right is a moral right, and a right may be both legal and moral. A claim to a right prevails over the preference of another bound by a duty to respect the right to disregard it, that is rights "trump" other interests because they bind individuals or institutions to observe the rights.

In view of this, countries assume duties for themselves under various international instruments which they are parties to, to apply the provisions of these laws through their respective national laws and policies<sup>48</sup>. The GC4 enjoins states to create safe environments for adolescents in schools and institutions and to ensure that they have access to information essential for their development<sup>49</sup> to further ensure that health facilities, health services, and counselling are available for adolescents (and this counselling also includes their sexual and reproductive health).

In accordance with articles 24 and 39 of the CRC, the Committee implores states to provide health services that suit the needs of adolescents, paying attention to the availability, accessibility, acceptability, and quality of the health care.<sup>50</sup> A multi-sectorial approach to the advancement and protection of adolescent health would be more effective with international co-operation.<sup>51</sup>

The GC4, no doubt provides a comprehensive outline of the rights of adolescents and the state's obligations. The Committee also provides some guidelines (though it is HIV/Aids and child

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<sup>48</sup> UN CRC GC4 (note 26 above). Par 41.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.



rights specific) in its GC3 (2003)<sup>52</sup> comments, which was the thirty-second session held between the 13<sup>th</sup> to the 31<sup>st</sup> of January 2003, concerning the sexual and reproductive rights of adolescents. Paragraph 20 of the GC3, provides for access to health care for adolescents and the duties of states to ensure that adequate health care facilities to suit their needs are available, such as confidential sexual and reproductive health services, and free or low-cost contraceptive methods<sup>53</sup> amongst others. This is in line with article 24 of the CRC which upholds the right to the highest attainable standard of health.<sup>54</sup>

Though the CRC does not expressly refer to the sexual and reproductive rights of adolescents, the GC3 and GC4 refer to the sexual and reproductive rights of adolescents and can be used to explain the broad provisions of the CRC. They recognise the rights of adolescents and their vulnerability and further set out the duties and obligations of State parties, with the aim of ensuring these rights are protected.

### **2.1.3 The Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW)<sup>55</sup>**

CEDAW was adopted by the UN General Assembly in 1979 and is often described as the international bill of rights for women.<sup>56</sup> It was ratified by Nigeria on 13<sup>th</sup> June 1985 and by South Africa on 15<sup>th</sup> December 1995.

CEDAW is the UN instrument that brought its efforts at codifying international legal standards for women to a climax, thus setting down guidelines for the protection of the rights of women in

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<sup>52</sup> United Nations Committee on the Rights of the Child, General Comment No.3 HIV/AIDS and the Rights of the Child 2003. Available at <http://www.unhcr.ch/tbs/doc.nsf>. (Accessed 4 July 2015)

<sup>53</sup> Ibid.

<sup>54</sup> CRC (note 21 above)

<sup>55</sup> Convention on the Elimination of All forms of Discrimination against Women 1979, entered into force 3 September 1981. Available at <http://www.un.org/womenwatch/daw/cedaw>. (Accessed on 2 March 2017).

<sup>56</sup> Ibid.

the world.<sup>57</sup> It was conceived that the general human rights instruments were failing to protect the rights of women in a comprehensive and detailed way.<sup>58</sup> With the 1960s came a conscientisation of the discrimination against women and the need for equality in the rights of men and women. An outcome of this conscientisation was organisations were being set up to combat the effects of this discrimination.<sup>59</sup>

CEDAW in Article 1 defines 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.".<sup>60</sup>

The definition of discrimination above is comprehensive and it sets out some of the hindrances to the full enjoyment of the sexual and reproductive rights of the female child. The CEDAW mainly focuses on eliminating all forms of discriminatory practices amongst women, to the end that women would fully express themselves and enjoy their fundamental rights and freedoms, that sexual and reproductive rights are part of these fundamental human rights, and though they are not specifically outlined in this treaty, some of its provisions can be applicable to the realisation of these rights.

It aims at ensuring equal enjoyment of rights between men and women by protecting girls and women from any form of discrimination in areas such as education, health, work, marriage and

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<sup>57</sup> CEDAW History, available at <http://www.un.org/womenwatch/daw/cedaw/history/htm>. (Accessed on 3 March 2017).

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> CEDAW (note 55 above).

family life.<sup>61</sup> Some of its provisions which will be subsequently discussed, relate to and can be applied to the sexual and reproductive health and rights of women as it seeks to affirm the reproductive rights of women and the role of tradition and culture in shaping gender roles in the family system. The core focus of CEDAW is to end discrimination in all its ramifications, this, will in turn, enable the adolescent to have full enjoyment of her sexual and reproductive health rights.

Of specific relevance to the sexual and reproductive health rights of female children is Article 12 of the Convention, which frowns at discrimination in every form to ensure equality in rights amongst men and women in accessing health care, especially in relation to family planning. Furthermore, to guarantee adequate health services during pregnancy and childbirth, rendering of free services where necessary. This provision can be applicable to the protection of the right to access contraceptives without any form of discrimination, and the female child's right to sexuality, the adolescent female should be able to express her sexuality and seek a healthy sexual life by accessing sexual and reproductive health facilities.

Article 16 provides for the protection of the rights of women against discrimination in matters relating to marriage and family relations,<sup>62</sup> ensuring the equality of rights amongst men and women on the rights to marriage, and the rights to freely choose a spouse and enter into marriage with one's full consent.<sup>63</sup> Thus, the right to say no to child marriage which discriminates against the girl child is guaranteed in this provision.

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<sup>61</sup> Ibid.

<sup>62</sup> Art 16 CEDAW (note 55 above).

<sup>63</sup> Ibid.

The CEDAW enjoins state parties in Article 2 to condemn discrimination against women in all its forms, and invent policies that eliminate discrimination against women. The state also has the responsibility of ensuring the conformity of public authorities and obligations to meet such obligations<sup>64</sup>. The phrase “in all its forms” includes the right that the female child has to access sexuality education and the right not to be discriminated against it.

It is worth noting the General Recommendation No.24 of the UN committee on the Elimination of Discrimination Against Women<sup>65</sup>. Here, State parties are enjoined to implement policies and legislations that prioritise the health of adolescent girls. Sexual information and education must be made available to adolescent females without any form of discrimination, to ensure general health outcomes.<sup>66</sup>

From the foregoing, the CEDAW seeks to promote some of the sexual and reproductive rights addressed in this thesis with its central focus on ending discriminatory practices

#### **2.1.4 The International Covenant on Civil and Political Rights (1966) (ICCPR)<sup>67</sup>**

The ICCPR entered into force on 23<sup>rd</sup> March 1976. It was ratified by Nigeria on 29<sup>th</sup> July 1993 and by South Africa on 10<sup>th</sup> March 1999.

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<sup>64</sup> Article 2 of CEDAW.

<sup>65</sup> UN Committee on CEDAW. General Recommendation No.24 Women and Health (Article 12) (Twentieth Session) 1999. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)CEDAW+General+recom+](http://www.unhchr.ch/tbs/doc.nsf/(symbol)CEDAW+General+recom+). (Accessed 4 June 2017).

<sup>66</sup> Ibid

<sup>67</sup> International Covenant on Civil and Political Rights, ( ICCPR) adopted by The General Assembly Resolution 2200 (XXI) and entered into force on 23 March 1976 available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. (Accessed February 10 2017).

The ICCPR is not child specific but it contains provisions that are relevant to children. Children are entitled to some fundamental rights and as such should be upheld. It includes their rights to life, protection from all forms of discrimination, protection of their privacy and cruel torture or inhuman and degrading treatment.<sup>68</sup>

Article 2 provides for the recognition of these rights and their obligations by State parties.

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, 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.

Quite pertinent to the sexual and reproductive health rights of the child which is part and parcel of their human rights is the protection from all forms of discrimination and prejudice which

Article 26 provides for:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other statuses.

Article 5 of the ICCPR indicates the scope of application of the ICCPR, while Article 6 aims at protecting the fundamental right to life, for every child and urges State parties to protect these rights of the child in line with Article 24. Every child has an inherent right to life, which is the foundation from which other human rights are exercised.

Another important and crucial provision to the sexual and reproductive health rights of a child is contained in Article 17 which aims at protecting the right to privacy and the prohibition of

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<sup>68</sup> Ibid.

unlawful interference to anyone's family, home or correspondence.<sup>69</sup> This could form the basis for the protection of the sexual rights of the child as relating to her privacy, when accessing health care facilities, (which is a right to her sexuality), freedom to receive and impart sexuality education, and the right to access sexual and reproductive health care facilities, without unlawful interference. Here young female adolescents can exercise their rights without feelings of discrimination and prejudice.<sup>70</sup>

The right to choose one's spouse and to intentionally go into marriage is one of the sexual and reproductive rights that a child has, as opposed to forced marriage, and this is recognised in this article, and as such must be upheld.<sup>71</sup> The ICCPR<sup>72</sup> accentuates the duty of the State, society and family to protect the rights of every child, based on her status as a minor, without any form of discrimination or prejudice against race, colour, origin, sex, language or property, thus every child is entitled to her rights been upheld and protected.<sup>73</sup> Thus, it can be inferred that the sexual and reproductive rights of the girl child are incorporated into these basic human rights and as such are guaranteed under Law.

The ICCPR is a binding international human rights document that is not child specific, it also does not have express provisions that apply to the sexual and reproductive rights of female children, however, some of its provisions can be applied to female children in a limited way.

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<sup>69</sup>Article 17 of the ICCPR

<sup>70</sup> Article 17 of the ICCPR.

<sup>71</sup> Article 23 (3) of the ICCPR.

<sup>72</sup> Article 24 of the ICCPR.

<sup>73</sup>Ibid.

### **2.1.5 International Covenant on Economic, Social and Cultural Rights (1966)<sup>74</sup> (ICESR)**

The ICESR entered into force on the 3rd of January 1976. Nigeria ratified the treaty on 29<sup>th</sup> of July 1993 while South Africa ratified it on the 12<sup>th</sup> of January 2015, and came into force on 12<sup>th</sup> of April, 2015.

The ICESR is applicable to children, but it is not child specific, it contains certain provisions that deal with how the state should protect the economic, social and cultural rights that can be applicable to the child. It includes a right to health, education and an adequate standard of living for all. The ICESR establishes the right to self-determination<sup>75</sup> of all peoples in Article 1.

Article 2 of the ICESR provides for state parties to assume the responsibility of taking steps through international assistance, especially economic and technical assistance with the aim of achieving the provisions of the Covenant by all appropriate means, especially adopting legislative measures. This provision encourages states to guarantee the rights set forth in the ICESR and though it does not relate particularly to the sexual and reproductive health rights of children, there is nowhere in the article or elsewhere that suggests that the sexual and reproductive rights cannot be protected under these rights.

The ICESR in Article 10 enjoins state parties to render social assistance to its citizens. It recommends that marriage must be entered into with free consent by two intending spouses.<sup>76</sup> This provision guarantees the right that children have to say no to child marriage, as child marriage in most cases is without the consent of the female child.

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<sup>74</sup> International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly Resolution 2200A (XXI) and entered into force on 3 January 1976, in accordance with Article 27. Available at [www.ohchr.org/documents/professionalinterest/cesr.pdf](http://www.ohchr.org/documents/professionalinterest/cesr.pdf) (Accessed 1 March 2017).

<sup>75</sup> Article 1 of the ICESR.

<sup>76</sup> Article 10 (1) of the ICESR.

The right to an adequate standard of living<sup>77</sup> is guaranteed and is a right available to everyone; this is provided for in Article 11 and some of the elements of this are adequate food, housing, clothing and “continuous improvement of living”. This is crucial to the sexual and reproductive health needs of children as the fulfilment of these rights are necessary to the developmental processes of any child. Article 12 recommends that “State parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.<sup>78</sup> This is another article that is relevant to the sexual and reproductive health needs and rights of the child as the need for the highest attainable standard of health cannot be overemphasised, thus enabling the girl-child to realise her right to access sexual and reproductive health care.

The protection of the right to the highest standard of health<sup>79</sup> provided for in Article 12 was further buttressed in the Committee’s General Comments 14 (GC14) 2000.<sup>80</sup> The Committee asserts that: “Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity”. The realisation of the right to health may be pursued through numerous, complementary approaches, such as the World Health Organisation (WHO), or the adoption of specific legal instruments.

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<sup>77</sup> Article 11 of the ICESR

<sup>78</sup> Article 12 of the ICESR

<sup>79</sup> Ibid.

<sup>80</sup> UN Committee on Economic, Social and Cultural rights (CESR) *General Comment No 14: The Right to the Highest attainable standard of health* (Art 12 of the Covenant) 11 August 2000. Available at <http://www.refworld.org/docid/453883d0.html>. (Accessed 4 April 2017).



It affirms that the principles of non-discrimination in accessing health care facilities and goods and services are legally enforceable in many national jurisdictions.<sup>81</sup> The right to health is an ‘inclusive right’ that combines a large range of factors that can help lead a healthy life.<sup>82</sup> Discrimination in accessing health care, entails restrictions and marginalisation of specific population groups, and state parties are urged to adopt positive measures that will tailor the needs of these marginalised groups, to assist them with adequate health care.<sup>83</sup>

Quite pertinent to the sexual and reproductive rights of children is elucidated in Paragraph 8 of the GC14 of the CESR where it posits that the right to the highest attainable standard of health includes freedoms and entitlements<sup>84</sup>, and one of the freedoms is “the right to control one’s health and body including sexual and reproductive freedom”<sup>85</sup>, while by contrast, entitlements include:<sup>86</sup>

- a) The right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health;
- b) The right to prevention, treatment, and control of diseases;
- c) Access to essential medicines
- d) Maternal, child and reproductive health;
- e) Equal and timely access to basic health services;
- f) The provision of health- related education and information and

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<sup>81</sup> Ibid.

<sup>82</sup> The Committee on Economic, Social and Cultural rights, call these the underlying determinants of health and these factors include: health-related education and information and gender equality

<sup>83</sup> WHO: *Right to Health* Fact Sheet No.31, available at [http://www.ohchr.org/documents/publications/Facts.\(Accessed 23 April 2017\)](http://www.ohchr.org/documents/publications/Facts.(Accessed%2023%20April%202017).).

<sup>84</sup> UN CESCR GC 14 (note 80 above). Par 8.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid

g) Participation of the population in health-related decision-making at the national and community levels.

This is aimed at guaranteeing a system of adequate health care where everyone is entitled to equal provision and enjoyment of the highest attainable standard of health, without discrimination,<sup>87</sup> as non –discrimination is a key principle in the exercise of human rights, and crucial to the enjoyment of the best attainable health care<sup>88</sup>. This provision empowers the girl child to exercise her right to sexuality, where she can make informed decisions about her sexuality and her rights to contraceptives where she has the choice and access to safely terminate a pregnancy.

The GC 14 recognises that the developmental level of the state parties<sup>89</sup> go a long way in the provision of adequate health facilities, (which includes sexual and reproductive health facilities)<sup>90</sup> its availability and accessibility.

Paragraph 21 is apt as it guarantees the development of comprehensive strategies for promoting women’s rights to health. One of the major objectives would be to lower women’s health risks.

Thus, the true realisation of women’s health as posited by the Committee is the “removal of all barriers interfering with access to health services, education, and information, including sexual and reproductive health”<sup>91</sup>

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<sup>87</sup> E.Durojaye & L.N. Murungi ‘The African Women’s Protocol and Sexual Rights (2014) 18 *International Journal of Human Rights* 881-897

<sup>88</sup> Ibid.

<sup>89</sup> Par 12 of the GC14 CESR.

<sup>90</sup> Par 14 of the GC14 CESR.

<sup>91</sup> Par 21 of the GC 14 CESR.

The Committee asserts that international human rights instruments recognise that children and adolescents have the right to the enjoyment of the highest standard of health and access to facilities for the treatment of illness.<sup>92</sup>

It also does not fail to recognise the need for harmful traditional practices to be abolished that affect the health of children, especially with regards to the girl child, like early marriage and female genital mutilation. Paragraph 23 of the GC 4 CESR further enjoins State parties to provide a safe and supportive environment for adolescents to make decisions affecting their health and to “receive counselling to aid health behaviour choices that they make,”<sup>93</sup> their privacy and confidentiality being of paramount importance and appropriate sexual and reproductive health services. In all policies aimed at attaining the highest possible health standards for adolescents, their best interests must be paramount.

The ICESR guarantees the right to education in Article 13, it agrees that “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms”.<sup>94</sup>

This right is crucial to the sexual and reproductive rights of children and adolescents because it encompasses their rights to receive information about sex education without discrimination and this will enable them to make informed choices, as they move on in life.

The right to health and education have been guaranteed by the ICESR making it a very relevant document to the realisation of the sexual and reproductive health rights of children. The ICESR

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<sup>92</sup>Ibid.

<sup>93</sup> Par 23 of the GC14 CESR.

<sup>94</sup>Article 13 of the ICESR

is instructive and plays an important role in the interpretation of cases that involve children, especially the sexual and reproductive rights of children.

## **2.2 Non-Binding International instruments**

Non-binding instruments are termed ‘soft law’ in international law. Many international conferences have adopted documents that contain salient provisions on children’s rights, though these instruments have no force of law i.e. are not legally binding, but they provide principles and guidelines that the international community follows.<sup>95</sup> Both countries have also ratified a number of international agreements which are both specific to sexual and reproductive rights and non-specific, but are relevant to this area of law as they lay down important general principles. However, they are non-binding in nature.

Despite the non-binding nature of these instruments, they are persuasive in nature and serve as guidelines for the conduct of the State. However, in the absence of them being ratified to gain effect at the domestic level, their provisions are not justiciable<sup>96</sup>.

### **2.2.1 The International Conference on Population and Development (ICPD)<sup>97</sup> 1994**

The International Conference on Population and Development (ICPD) was held in Cairo in September 1994. It was convened by the UN to address major issues pertaining to population. It was its third decennial conference on Population.<sup>98</sup> A new definition of population was advanced

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<sup>95</sup> P. Low ‘Hard Law and ‘Soft Law’ Options for fostering international co-operation’ (2015): *E15 Initiative*. Geneva: *International Centre for Trade and Sustainable Development and World Economic Forum*. Available at <http://www.e15initiative.org/>. Accessed June 5 2017.

<sup>96</sup> Ibid.

<sup>97</sup> The International Conference on Population and Development: Programme of Action adopted in Cairo 1994, available at <http://www.unfpa.org/publications/international-conference-population-and-development-programmeaction>. (Accessed 3rd February 2017).

<sup>98</sup> C. Alison McIntosh. J.L. Finkle ‘The Cairo Conference on Population and Development: A Paradigm’ (1995) 21 *Population and development Review* 223.

significantly at the ICPD which gave rise and prominence to the reproductive health and rights of women and their empowerment while downplaying the statistical data rationale for population policies.<sup>99</sup>

At the ICPD, the global community affirmed that the general development and well-being of women and girls were hinged on the realisation of their sexual and reproductive health and rights.<sup>100</sup> Importantly, the ICPD viewed the concept of reproductive health as a human right and went beyond the traditional concept of rights to include reproductive health as an ‘enabling tool’ for women’s abilities in a stereotype society where the rights of women have been historically marginalised and excluded.<sup>101</sup> The ICPD linked reproductive health to State obligations to provide the requisite services needed by women and children with the aim of demonstrating positive health outcomes.<sup>102</sup> Though the term sexual health was absorbed under reproductive health, sexual health was recognised and this formed the foundation of a holistic approach to sexual health as a human right. The importance of sexual health was no longer restricted to counselling sessions and the care and treatment of sexually transmitted disease, but significantly, for the importance of sexual health in enhancing better conditions of life and personal relations.<sup>103</sup>

The Programme of Action (POA) was adopted at the ICPD in Cairo 1994 which contained recommendations and principles that State Parties agreed to follow. These guidelines are

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<sup>99</sup> Ibid.

<sup>100</sup> C.Ngwena & E. Durojaye *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region through Human Rights (2014)* 5.

<sup>101</sup> Ibid 18.

<sup>102</sup> Note 100 above.

<sup>103</sup> The ICPD paragraph 7.2

consistent with internationally recognised standards and national laws as well as a respect for religious, ethical and cultural backgrounds of each state party.<sup>104</sup>

Principle 1 of the POA affirms the right to freedom and equality of rights as set forth in the Universal Declaration of Human Rights, without distinction of any kind to race, colour, gender, language, religion, political opinion or other, property, birth or other status.<sup>105</sup> This right is the foundation on which the sexual and reproductive rights are hinged on.

Principle 4 speaks on the rights of gender equality of women and children and the elimination of all forms of violence against women, and the right that women have to control their own fertility.

The right to sexuality is provided for in the POA, and is very instructive. It forms the core principles that the ICPD stands for and has been recognised as pioneering the concept of reproductive and sexual health as a right for women and children.<sup>106</sup>

The ICPD (Programme of Action) while redefining the concept of sexuality, subsumed it under reproductive rights and affirmed that reproductive health implies the ability and rights of everyone to have a satisfying sexual life. It also views the importance of sexual health as a means to improving personal and human relations and the general developmental well-being of any

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<sup>104</sup> United Nations Population Fund (2014): The ICPD Programme of Action, available at <http://www.unfpa.org/publications/international-conference-population-and-development-programme-action>. (Accessed 3 February 2017).

<sup>105</sup> Ibid.

<sup>106</sup> C. Shalev 'Rights to Sexual and Reproductive Health-the ICPD and the Convention on the Elimination of All Forms of Discrimination against Women' (1998) available at <http://www.un.org/womenwatch/daw/csw/shalev.htm>, (Accessed on 14<sup>th</sup> April 2017).

individual.<sup>107</sup> A deeply satisfying sex life and the freedom to have sex forms the right to sexuality of the woman and adolescent female child.

Principle 8 of the ICPD affirms that everyone has the right to the highest attainable standard of physical and mental health.<sup>108</sup> It urges states to ensure that adequate health care, including those related to reproductive health, which includes sexual health and family planning must be made universally accessible to all, with no disparity to gender.

The right to contraceptives is examined in the light of reproduction and fertility services in the ICPDPOA. Countries are urged to provide primary health care services and unrestricted access to reproductive health care for women and children, which includes family planning and pre-and post-natal care.<sup>109</sup> The right to safe abortion is also provided for, including the prevention of abortion and the management and consequences of abortion,<sup>110</sup> counselling services on HIV/AIDS, and treatment of sexually transmitted diseases, must all be readily available for women, especially the adolescent female. Reproductive health care programmes must serve the needs of women and children.

The ICPD urged states to make available innovative programmes, counselling on reproductive health accessible to adolescents which will provide them the requisite information on the exercise of their rights.<sup>111</sup>

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<sup>107</sup> McIntosh (note 98 above), See also, The Holy See expressed a general reservation in this chapter, which is interpreted in the terms of the statement by its representative at the 14<sup>th</sup> plenary meeting on 13<sup>th</sup> September 1994.

<sup>108</sup> Principle 8 of the POA (ICPD) (note 97 above)

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

With respect to the rights of a child to say no to child marriage, the ICPD in Principle 9, provides that marriage must be entered into with the free consent of the intending spouses.<sup>112</sup> Governments of state parties are urged to set a strict minimum legal age of consent,<sup>113</sup> as well as the minimum age of marriage, and in some circumstances, increase the minimum age of marriage where necessary. Governments and NGO's are urged to provide excellent educational services and employment opportunities, as these will contribute to the girl child making smart choices regarding her reproductive health.

The ICPD in its provisions, stresses the importance of state parties to set the minimum legal age for marriage and penalties for violators of the law. It has affirmed sexual and reproductive health as an important part of human health, being in good health is not just the absence of disease or infirmity but also an obligation which is imposed on states to take necessary steps to ensure optimum health care for its citizens.<sup>114</sup>

The adolescents' right to sexuality education is part and parcel of their right to education. Principle 10 of the POA affirms that 'everyone has the right to education, which shall be geared towards the development of human resources, human dignity, and potential with particular attention to the woman and the girl child'.<sup>115</sup> State parties are urged to employ a coordinated approach to communication and the dissemination of information and education, which employ both traditional and non-traditional means that focus on a full range of sexual and reproductive

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<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid, See also Section 13(1) of the ICESR.



health care<sup>116</sup> for adolescents. These may include education on family planning and sexual health.<sup>117</sup>

The ICPD urges countries to ensure women and girls have access to secondary and higher levels of learning, ensuring that pre-existing stereotypes in the school's curriculum are changed and emphasis is placed on the sexual and reproductive health of the girl child.<sup>118</sup> It also stresses that teachers should not shun sexuality education in their schools for the fear that it will contradict with people's personal beliefs, values and comfort zones.<sup>119</sup> Adolescents at their developmental stage, have the tendency to engage in unsafe sexual practices because at this time they are 'finding themselves' regarding their sexual identity,<sup>120</sup> hence, the need for proper and adequate sexual education which will inform the right choices for them.

The adolescent's right to contraceptives and access to sexual and reproductive health care services is protected in the ICPD. Principle 11 is child specific and provides that the highest possible priority should be given to children, and this must be ensured by families and states where the child has the right to the highest standard of health and education,<sup>121</sup> and must be protected by appropriate legislative, administrative and educational measures from all forms of negligent treatment, maltreatment and sexual exploitation.<sup>122</sup>

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<sup>116</sup> Coates, A.L. Hill, P.S. Rushton, Simon, Balen, Julie 'The Holy See on sexual and reproductive health rights: Conservative in position, dynamic in response' (2014) 22 *Reproductive Health Matters* 114-124

<sup>117</sup> Ibid.

<sup>118</sup> ICPD (note 97 above).

<sup>119</sup> C. Beyers 'Sexuality education in South Africa: A socio cultural perspective' (2011) 43 *Acta Academica* 7.

<sup>120</sup> Ibid.

<sup>121</sup> UNFPA: State of the World Population: Making 1 Billion count (2003). Available at [www.unfpa.org/publications/state-world-population-2003](http://www.unfpa.org/publications/state-world-population-2003). (Accessed 18 April 2017)

<sup>122</sup> C.J. Davel ;The African Charter on The Rights and Welfare of the Child,Family law and Children's Rights' (2002) *De Jure* 281-296.

Chapter 7.11 throws more light on the right of the girl child to contraceptives and access to family planning and counselling services that will ensure she is in charge of her reproductive health. The ICPD clearly posits that:

Reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic rights 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.<sup>123</sup>

The ICPD lays down a well-established framework for the rights of women and adolescent girl children which serves as an international guideline for states to follow and practice, so that women and adolescents girl children can exercise and take advantage of their sexual and reproductive health rights. Hence, though the ICPD is not a binding instrument, it is a complete international instrument that protects the sexual and reproductive health rights of women and adolescent girls.

### **2.2.2 ‘Beijing Platform for Action:’ The Beijing Fourth World Conference on Women’ (1995)<sup>124</sup>**

The Beijing Declaration and Platform for Action was adopted at the 16<sup>th</sup> plenary meeting on September 15, 1995, which was held on the fiftieth anniversary of the founding of the UN.

The aim and mission statement of the Beijing Declaration in its Platform for Action (the Platform) is to empower women in different spheres of life. It seeks the advancement of women and the removal of all hindrances to women’s active role in all spheres of public and private life

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<sup>123</sup> ICPD (note 97above).

<sup>124</sup> Fourth world conference on women held in Beijing: ‘Beijing platform for action’, available at <http://www.un.org/womenwatch/daw/beijing>. (Accessed 3 April 2017).

through an equal share in decision making. The Platform affirms that the human rights of women and the girl child are an integral, inalienable component of universal human rights.<sup>125</sup> Hence, the Platform aims at ensuring the advancement and protection of the rights of women throughout their life cycles, to the highest possible standards. The Beijing Platform's success will only thrive if involvement, support, and commitment come from governments, international organisations, and institutions at all levels. It also recognises the relevance of other international consensus documents and their agreements reached. For example, the agreement reached at the World Summit for Children and the ICPD, amongst others. The Platform is not a legally binding document, but instead, it is a set of guidelines for the UN, governments and non-governmental organisations, and it clearly recognises women's rights as human rights.<sup>126</sup>

The empowerment of all women is the agenda of the Platform, and a women's sexual and reproductive health is crucial to her development. Thus, it contains extensive provisions that can be invoked to protect the sexual and reproductive rights of the girl child.

The right to sexuality education is protected for in the Platform, Paragraph 69 stipulates first, that the right to education is a human right and is necessary for achieving goals of development, peace, and equality. It goes on to further state that equality of access to education by women is necessary if they must be agents of change. Curricula and teaching materials should be customised to incorporate the specific needs of women and children, as the lack of sexual and reproductive education has a negative weighty impact on the girl child.<sup>127</sup> Governments are urged to provide non-discriminatory and gender-sensitive school counselling sessions to

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<sup>125</sup>Ibid.

<sup>126</sup>M. Purcell 'Why was the 1995 Beijing Conference for women ground breaking?' (2014) available at <http://www.aauw.org/2014/08/20/1995-beijing>. (Accessed 5 April 2017).

<sup>127</sup>Note 124 above. Paragraph 69.

encourage the girl child.<sup>128</sup> Furthermore, sexual and reproductive health education within formal education programmes regarding women's health issues must be free from all legislative, social and regulatory barriers.

The adolescent's right to sexuality has its background in the existence of the human rights of women throughout their life cycle, and these rights are a fundamental part of universal human rights.<sup>129</sup> The Platform reaffirms that all human rights are universal, indivisible, interrelated and interdependent as expressed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human rights.<sup>130</sup> Though the Platform is a document that stands alone, it builds on consensus agreements, decisions reached and progress at earlier UN conventions/summits.<sup>131</sup>

The full and equal enjoyment of all human rights of women and girls are necessary for the advancement of women and, is, therefore, a priority for governments and the United Nations.<sup>132</sup> Governments, international and non-governmental institutions are to ensure health education and health services are strengthened, devoid of discrimination against young girls. Thus, health programmes must meet the physical needs of girls, especially young and expectant mothers.<sup>133</sup>

Peer education and outreach programmes aimed at strengthening individual and collective efforts to reduce the susceptibility to sexually transmitted diseases, including HIV/AIDS are

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<sup>128</sup> Beijing Conference on Women 1995-What is the Beijing Declaration and Platform. Available at <http://www.womensissues.about.com/od/internationalwomenconferencebeijing>. (Accessed 6 April 2017).

<sup>129</sup> Ibid 89.

<sup>130</sup> UN: Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (1993) Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>. (Accessed 8 April 2017).

<sup>131</sup> Beijing Conference (note 124 above). 90.

<sup>132</sup> Ibid 112

<sup>133</sup> Ibid 115.

encouraged. While addressing forced marriage, the document submits that governments should enact laws and enforce them to ensure that marriage is entered into by the free will and consent of both intending spouses.<sup>134</sup> In addition, laws should be enacted to set the minimum legal age of consent and the minimum age for marriage, and in other circumstances where necessary, the legal age must be increased.<sup>135</sup>

The Platform implies that it commits in its provisions, the right to contraceptives and to have access to sexual and reproductive health care.<sup>136</sup> It recognises the rights of women, which includes girls to make decisions regarding fertility without fear of force or coercion,<sup>137</sup> and to access family planning services.

The Beijing Declaration can be said to be a point of advancement in setting out different steps and goals that countries have agreed and are willing to achieve within set periods of time, however, both the Beijing Declaration and the Programme of Action of the ICPD lack the mechanisms that hold governments legally accountable, as those mechanisms that are legally binding exist in national legislations, constitutions and international human rights treaties.

### **2.3 The Millennium Development Goals (2000) (MDGs)<sup>138</sup>**

The MDGs were adopted in September 2000, at the UN Millennium Summit. South Africa and Nigeria attended the summit with about 189 world leaders representing countries worldwide. It

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<sup>134</sup>Beijing Conference (note 124 above) Paragraph 274(e).

<sup>135</sup>Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup>UN The MDG's – What are they? (2000) available at <http://www.unmillenniumproject.org/goals/index.htm> (Accessed 6 June 2015).

was at the UN headquarters in New York, that the UN Millennium Declaration<sup>139</sup> was adopted which set out the goals that nations will be committed to reduce extreme poverty and to set time-bound targets, with a deadline of 2015.

Of most importance to the sexual and reproductive rights of the girl child is Goal 5 with its target of ensuring universal access to reproductive health.<sup>140</sup> Other child-specific goals are the eradication of extreme poverty and hunger (MDG 1),<sup>141</sup> to achieve universal primary education (MDG 2),<sup>142</sup> and the reduction of child mortality (MDG 4).<sup>143</sup>

Most of the MDGs are directed at children specifically and some of the goals are created with children in mind and their best interests as priority. As of 2015, some goals were already met, while the others remain unfulfilled.

The girl child's right to access to reproductive health, which includes her right to family planning, her right to access contraceptives, and have safe abortions is part of the goals of MDG 5.<sup>144</sup> These goals cannot be said to have been reached, though the South African government and Nigeria in their own way, through extensive policies have aimed at improving reproductive health care, taking into consideration, the socio-economic prevailing conditions that women live in. However, this will be discussed extensively in the following chapters.<sup>145</sup>

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<sup>139</sup>R.O. Sarumi 'The Protection of the rights of children affected by HIV/AIDS in South Africa and Botswana: A critical analysis of the legal and policy responses', PHD Thesis University of Kwazulu-Natal (2013).

<sup>140</sup> MDG's (note 138 above)

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

Despite this progress, a lot still needs to be done to achieve the goals of the MDGs. The MDGs are relevant and important and can be used as measurement yardsticks to monitor nations and their progress in the fight against ills that affect children, especially with regards to their sexual and reproductive health rights.

## **2.4 African Regional Standards on the protection of the sexual and reproductive rights of children**

The African Union (AU) regional standards on the sexual and reproductive rights of children will be discussed in this subheading. The AU regional standards that affect these rights of children can be classified into binding and non-binding instruments. The instruments bound by law (child specific and non-child specific) consist of statutes, treaties, and protocols which outline and seek to protect the sexual and reproductive rights of children in Africa. While the non-binding instruments are made up of declarations, guidelines, and resolutions, they have an obvious positive influence and contain practical guidelines that direct state parties in their conduct.<sup>146</sup>

South Africa and Nigeria are both members of the AU. South Africa joined the AU (which was then the Organisation of African Unity OAU) on 6 June 1994,<sup>147</sup> while Nigeria joined the AU as well, though earlier on 25 May 1963.<sup>148</sup> This implies that both countries are legally bound by any instrument originating from the AU.<sup>149</sup>

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<sup>146</sup> OHCHR *Document from the office of the UN High Commission for Human Rights International Law*. Available at <http://www.ohchr.org/english/law> (Accessed 5 April 2017).

<sup>147</sup> AU Geography of the AU-Art 11 AU (2003) available at [http://www.au.int/en/sites/default/files/PROTOCOL\\_AMMENDMENT\\_CONSTITUTIVE\\_ACTS\\_OF\\_THE\\_AFRICAN\\_UNION.pdf](http://www.au.int/en/sites/default/files/PROTOCOL_AMMENDMENT_CONSTITUTIVE_ACTS_OF_THE_AFRICAN_UNION.pdf) (Accessed 7 April 2017).

<sup>148</sup> List of African Union Member States. Available at <http://www.chartsbin.com/view/1341>. (Accessed 10 April 2017).

<sup>149</sup> R.O.Sarumi (note 139 above) 96.

These regional standards which are legally binding on member states on the sexual and reproductive rights of children and women would be discussed in this section.

#### **2.4.1 The African Charter on Human and Peoples Rights (1981) (ACHPR)<sup>150</sup>**

The ACHPR entered into force on the 21<sup>st</sup> of October, 1986. This Charter has been ratified by Nigeria<sup>151</sup> and South Africa on 22<sup>nd</sup> June 1983 and 9<sup>th</sup> of July, 1996 respectively. The ACHPR is the principal human rights instrument of the AU and its provisions are binding on member states that have ratified it, therefore, South Africa and Nigeria are bound by its provisions. The ACHPR aims to promote human rights by laying down principles that entrench fundamental freedoms, which serves as a foundation for African governments to base their legislations.<sup>152</sup> It is not child specific but it contains provisions that can be applied directly to the protection of the sexual and reproductive rights of children.<sup>153</sup>

These provisions will be viewed in light of these five sexual and reproductive rights, which include the right to sexuality, the right to sexuality education, the right to equality, the right to contraceptives and the right to say no to child marriage.

Article 2 of the Charter provides for the enjoyment of the rights and freedoms guaranteed in the Charter, without any form of discrimination and bias,<sup>154</sup> while Article 3 provides for the equality of every individual before the law and the protection of the law for any individual.<sup>155</sup>

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<sup>150</sup> The African Charter on Human and People's Rights adopted on June 27 1981 in Nairobi and entered into force on October 21, 1986., available at <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-human-and -people's-rights.pdf>. (Accessed 23 March 2017).

<sup>151</sup> Ratification Table:African Charter on Human and Peoples Rights. Available at <http://www.achpr.org/insruments/achpr/ratification>. (Accessed 2 March 2017).

<sup>152</sup> Article 45 of the ACHPR.

<sup>153</sup> R.O Sarumi (note 139 above) 97.

<sup>154</sup> ACHPR (note 150 above) Art.2.

<sup>155</sup> Ibid. Art 3.



Article 4 of the ACHPR provides for the “inviolability” of humans and the entitlement that every human being has with respect to his life and the integrity of his person,<sup>156</sup> as no one should be denied of this right. This provision in its application guarantees the right of every human being including children to the integrity of their person and can be argued to include the right to non- infringement of their sexual and reproductive rights.

Article 5 provides the right that the individual has to his dignity and the acknowledgment of his legal status as a human being.<sup>157</sup> It also prohibits all forms of degradation and exploitation of man, which includes inhuman or degrading punishment. Article 5 is important to the sexual and reproductive rights of children, as any violation of these rights shows a form of degradation of individuals’ dignity.

Article 16 provides that every individual shall have the right to enjoy the best attainable state of physical and mental health and that member states to the Charter shall take the necessary measures to protect and ensure the health of their people.<sup>158</sup> This shows how important a burden is placed on states to make sure its citizens have access to the best healthcare available. African governments are to ensure that women especially have access to good and affordable medicines. The right to access contraceptives is not expressly provided for in the African Charter but can be implied from its provisions in Article 16. Women have a right to determine if they want children or not, and these rights must not be infringed upon as there exists a stereotype of women and young female children to the state of ‘motherhood’ in most developing African countries,

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<sup>156</sup>Ibid Art 4.

<sup>157</sup> ACHPR (note 150 above) Art 5.

<sup>158</sup>Ibid. Art 16

<sup>159</sup>Adolescent girls are made to have children early and have them randomly without enough space between having children by using available contraceptives. Hence, there is a need for governments to ensure that women and adolescent girls have access to all forms of contraceptives that can be obtained at an affordable cost.

The right to say no to child marriage is a sexual and reproductive right that must be protected in the interests of the girl child. Religious and cultural beliefs have hindered the exercise and enjoyment of these rights and has led to the predominance of early child marriage in most developing African countries, and especially in the Northern parts of Nigeria related to this dissertation.<sup>160</sup> In these areas, child marriage is a traditional cultural practice that is heavily influenced by Islam and the right to the highest standard of health provided for in Article 16 is very important coupled with 96

access to medicines for pregnant mothers.<sup>161</sup> A human rights approach to the sexual and reproductive rights of women and adolescent females must be adopted by states.<sup>162</sup> They should be made accountable to meet the basic health needs of women and young adolescents, the reason is that many of these African countries have ratified international agreements, and as such, are bound by their provisions, a non-fulfilment of these provisions would amount to a violation of their commitments under international law<sup>163</sup>

The provision of Article 16 is broad and can be construed to protect the rights that women and young girls should enjoy in both their sexual and reproductive health.

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<sup>159</sup>T. Tuwor& M.A. Sossou ‘Gender Discrimination and Education in West Africa: strategies for maintaining girls in school’ (2008)12 *International Journal of Inclusive Education* 363-379

<sup>160</sup> T.S Braimah ‘Child Marriage in the Northern Nigeria: Section 61 of Part 1 of the 1999 Constitution and the protection of children against child marriage (2014) 14 *AHRLJ* 474.

<sup>161</sup>Ibid.

<sup>162</sup>E. Durojaye ‘The Human Rights Council’s Resolution on Maternal Mortality: Better late than never’ (2010) 10 *AHRLJ* 189-190.

<sup>163</sup> Ibid.

The right to sexuality education is protected in Article 17 which states that every individual shall have the right to education. This is very important as the school<sup>164</sup> is one of the very first places where values are taught and adolescents become aware of their sexuality as they interact with other peers. Learning, therefore gives the foundation where sexual and reproductive health can be taught and this will increase their awareness and help them make informed choices about their health.

#### **2.4.2 The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>165</sup>**

The ACRWC was adopted by the African Union (then the OAU) in 1990 and it entered into force on November 29, 1999, almost a decade after its adoption. It is the first and most comprehensive regional human rights instrument on children's rights.<sup>166</sup> South Africa ratified this charter on the 7<sup>th</sup> of January 2000, while Nigeria ratified it on the 23<sup>rd</sup> of July 2001. It is also known as The African Children's Charter. The ACRWC addresses the sexual and reproductive rights of vulnerable children amongst other rights that must be enjoyed freely by children, which makes it very relevant to this thesis.

The fundamental right to non-discrimination is protected in Article 3 and is reiterated here as it is also contained in diverse international human rights instruments. The rights of the best interest of the child<sup>167</sup> is also provided for, as it states that in all actions concerning the child, undertaken by

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<sup>164</sup> R.O.Sarumi (note 139 above) 98

<sup>165</sup> The African Charter on the Rights and Welfare of the Child, available at [http://www.au.int/en/sites/default/files/charter\\_En\\_AfricanCharter\\_on\\_the\\_Rights\\_and\\_Welfare\\_of\\_the\\_Child\\_AddisAbaba\\_](http://www.au.int/en/sites/default/files/charter_En_AfricanCharter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_). (Accessed 3 February 2017).

<sup>166</sup> E.Durojaye 'The Potential of the Expert Committee of the African's Children's Charter in advancing adolescent sexual health and rights in Africa' (2013) 46 *Comparative and International Law Journal of Southern Africa* 390.

<sup>167</sup> Note 165 above.

any authority or person, the best interest of the child shall be the “primary consideration”,<sup>168</sup> which is the operative word. Article 5 speaks of the right to survival and development of every child, for every child has “an inherent right to life”.

The right to a child’s privacy<sup>169</sup> is very crucial to the full enjoyment of his/her sexual and reproductive rights, as the child must be able to receive information about his sexuality education, and have access to sexual and reproductive health care services with strict regard to his / her privacy. This right to privacy is protected for in the ACRWC.

The right to sexuality education<sup>170</sup> is an important right that every child must enjoy and the ACRWC provides that every child must have the right to education which is the foundation for sexuality education. State parties are enjoined to direct the education of the child to the promotion and development of the child’s talents, mental and physical abilities, and also, importantly, to foster respect for human rights and fundamental freedoms as set out in human rights instruments;<sup>171</sup> the sexual and reproductive rights are included in these human rights and fundamental freedoms.

Article 7 provides the child the right to express himself or herself freely in all matters and this is broad enough to cover any information about sexual health (e.g. access to contraceptives) that will aid adolescents in their sexuality. However, the term ‘subject to restrictions as prescribed by law’ poses a threat to the realisation of these rights, as developing countries that have deep

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<sup>168</sup> Article 4 of the ACRWC.

<sup>169</sup> Article 10 of the ACRWC.

<sup>170</sup> Article 11 of the ACRWC.

<sup>171</sup> Ibid.

religious and cultural norms and values which prohibit pre-marital sex, and rely on this phrase to justify their prohibition of access to sex education.<sup>172</sup>

There should be no form of discrimination against any child, based on circumstances that surround the child, to buttress that point, the ACRWC expressly provides that<sup>173</sup> “children who become pregnant before completing their education shall have an opportunity to continue their education on the basis of their individual ability.”

The right to sexuality is not expressly provided for in the ACRWC but other provisions can be applied in the protection of these rights. Article 14 states the right of a child to health and health services, which protects the right of a child to enjoy the best attainable state of physical, mental and spiritual health; the sexual and reproductive health is also implied from this provision. The Charter urges state parties to undertake to develop preventive health care and family life education, with access to services where sexuality is an important part of the adolescent’s growth and preventive health services must be widely accessible to children which is likely to decrease the prevalence of sexually transmitted infections (STIs) that are often found amongst adolescents. The ACRWC prohibits every form of sexual exploitation<sup>174</sup> and urges states to undertake to protect children from all forms of sexual exploitation and must implement measures to prevent and discourage any child to engage in any inducement, coercion and forced sexual activity. This is important to the healthy development of a child’s sexuality, as the child should be able to make informed choices about their sexuality, when and if they choose to have sex and the right to choose their sexual partners. Article 14 also protects children from sexual abuse which takes many forms and can include prostitution and the use of children in pornography.

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<sup>172</sup>Children’s Rights in Wales (note 6 above) 398.

<sup>173</sup> Art 11(6) of the ACRWC.

<sup>174</sup> Art 27 Of the ACRWC.

States are encouraged to integrate basic health care programmes in their nation's development plans and programmes on sexuality education that expand the knowledge and awareness of children and their sexuality, fall into this category.

Article 14 provides for the right to health and health care services, which plays an important role in determining the child's right to access health care that will aid them in the treatment of their bodies as the way they deem fit with all recourse to privacy.<sup>175</sup> This is a right that is to be enjoyed freely by them. Article 3 provides for the right to non-discrimination on various grounds including religion, political belief, sex, race and 'other status'. This phrase 'other status' can be construed to include 'age',<sup>176</sup> and thus any discrimination on the basis of age will be a clear case of the violation of child's human right.

The right to say no to child marriage is expressly provided for in the ACRWC and sets out clearly the right to the protection against harmful social and cultural practices.<sup>177</sup> Most of these harmful social and cultural practices affect the normal and healthy development of children.<sup>178</sup> It provides for state parties to take all appropriate measures to eliminate those harmful practices that will endanger the health and life of the child, as well as practices that are discriminatory to the child on the grounds of sex.<sup>179</sup>

The issue of child marriage is a harmful practice and is discriminatory to the girl child. Article 21(2) provides that:

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<sup>175</sup> Art 10 of the ACRWC.

<sup>176</sup> The African Children's Charter Committee in its General Comment 20 on Non-discrimination in Economic, Social and Cultural rights, available at <http://www.acercw.org/general> comments. (Accessed 4 April 2017).

<sup>177</sup> Article 21 of the ACRWC.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

Child marriage and the betrothal of girls and boys shall be prohibited and effective action including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.<sup>180</sup>

There is no ambiguity to the issue of child marriage as this provision aptly provides for discrimination and protects the rights of the girl child to a healthy and stable development devoid of harmful practices that threaten her existence.

The right to contraceptives is not expressly provided for in the ACRWC but there are provisions that are applicable to the protection of this right. Article 14 ensures access to health and health care services,<sup>181</sup> and expressly provides for “appropriate health care for expectant and nursing mothers”.<sup>182</sup> Article 21 which protects the child from harmful social practices is also relevant to the protection of this right as the mother is protected from traditional customs like early marriage which forces her to give birth to children immediately at such a very young age, which is detrimental to her health and against her will and consent. Article 3 also provides the right to non-discrimination on various grounds, and the phrase ‘other status’ can be defined to include age, and thus, a child, irrespective of her age, must have access to adequate health care and reproductive health facilities without being discriminated against.

The African Committee of Experts on the Rights and Welfare of the Child (ACE) which was created under article 32 of the ACRWC is assigned with the task of ensuring that there is a realisation and enjoyment of the rights provided for by the ACRWC and the protection and

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<sup>180</sup>Ibid. Article 21(2)

<sup>181</sup>Art 14 ACRWC

<sup>182</sup>Ibid.

promotion of the rights and welfare of the child.<sup>183</sup> It also receives information/communications from state parties as well as individuals on any matter that is covered by the Charter.<sup>184</sup>

Thus, the creation of ACE is an effective mechanism in the African region in the realisation of children's rights. The protective and promotional mandate of ACE as contained in article 42 of the ACRWC is a great tool for holding African governments responsible for their obligations to the ACRWC and other international human rights instruments. A novel case in point which is *The Nubian case*<sup>185</sup> arose when two non-governmental organizations filed a communication before the ACE which is in line with article 44 of the ACRWC, on behalf of the Nubian people, which alleged that the Nubian people suffered human rights violations at the hands of the Kenyan government and their children were denied birth registrations and birth certificates by the Kenyan government. The ACE decided this case on its merits, and in its finding, posited that the Kenyan government had violated certain provisions of the ACRWC, which included, the right to a nationality(article 6), the right to non-discrimination (article 3), the right to education (article11), and the right to health (article 14). This decision showed the progressive and forward movement of the ACE.

The tools put in place by the ACRWC through the ACE, especially by means of individual complaints/communication, is appealing and holds prospects in the promotion of the rights and general welfare of the child of which the sexual and reproductive rights are included.<sup>186</sup>

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<sup>183</sup> Art 42 ACRWC.

<sup>184</sup> Art 44 ACRWC.

<sup>185</sup> *Institute for Human Rights Development (IHRD) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v Government of Kenya Communication No Com/002/2009, delivered on 22 March 2011.*

<sup>186</sup> B.D.Memzur 'The African children's Charter Versus the UN Convention on the Rights of a Child: A zero-sum game?' (2008) 23 *South Africa Public Law* 29.



However, there must be a significant push for the ratification and execution of its provisions throughout Africa.

### **2.4.3 The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (the African Women's Protocol) (2003)<sup>187</sup>**

The African Women's Protocol was adopted by the African Union in 2003. Nigeria ratified this treaty on 16<sup>th</sup> December 2004 while South Africa ratified it on the 17<sup>th</sup> of December 2004.<sup>188</sup> Essentially, its aims and objectives are to abolish all forms of gender-based discrimination and promote gender equality. The Protocol further seeks to address issues peculiar to the African woman that is not covered in other human rights instruments, both regional and international. It can be said that the core guiding philosophy of the Women's Protocol is that 'human rights of women and girls are an inalienable, integral and indivisible part of universal human rights'.<sup>189</sup>

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<sup>187</sup> The Protocol to The African Charter on Human and Peoples Rights on the Rights of Women in Africa ,adopted by the African Union in 2003. available at [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf). (Accessed 3 February 2017).

<sup>188</sup> Ratification Table: Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. Available at <http://www.achpr.org/instruments/women-protocol/ratification/>. (Accessed 5 March 2017).

<sup>189</sup> This is in line with Paragraph 18 of the Vienna Declaration and Programme of Action of the World Conference on Human rights 1993.The World Conference on Human Rights urges Governments, institutions intergovernmental organisations to intensify their efforts for the protection and promotion of human rights of children. See E. Kaniye 'Considering the Protocol on the Rights of Women in Africa' (2006) 36 *Africa Insight* 25,

## Article 1 (f) defines

Discrimination against women as any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by the women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.<sup>190</sup>

Many definitions are given to words used in the Protocol in Article 1 to clear any form of ambiguity, and the definition of ‘women’, means persons of female gender, including girls,<sup>191</sup> which is relevant for the purpose of this thesis as it focuses on the sexual and reproductive rights of children, especially the girl-child. The relevant sexual and reproductive rights of children that have been set out earlier will also be discussed in this section, and the extent to which they are protected under the African Women’s Protocol.

The right to sexuality is protected for in the Women’s Protocol as Article 2 gives a foundation for the elimination of discrimination against women,<sup>192</sup> which includes the girl child. Here states are urged to ensure the concept of equality amongst women and men and include in their constitutions and legislative instruments such principles. A woman must be able to embrace her sexuality without being marginalised or discriminated against. Article 2(b) encourages states to enact and implement legislative or regulatory measures<sup>193</sup> that will curb or prohibit all forms of discrimination against the girl child especially regarding harmful practices that can endanger her health and general well-being. Also to support all local, and international initiatives that are aimed at abolishing all forms of discrimination against women.<sup>194</sup> This can be applicable to the removal of barriers aimed at discrimination at any woman regarding her sexual and reproductive

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<sup>190</sup> African Women’s Protocol (note 187 above) Art. 1

<sup>191</sup> Ibid. Article 2

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid. Article 2(e).

health rights. Article 3 also provides for the protection of the dignity of the girl child which is linked with the full realisation of her sexual and reproductive health rights.

The right to life, integrity and the security of the girl child<sup>195</sup> protected for in Article 4 can also be applicable to the sexual rights of the girl child as Article 4 (2) (a) provides that state parties are to ensure that laws are enforced that prohibit all forms of violence including ‘unwanted or safe sex’, whether the violence happened in public or private<sup>196</sup>. Thus, the girl child has the right to choose when she wants to have sex, her sexual partner and the right to controlled safe sex.

Article 14 is the provision in the Women’s Protocol that expressly provides for the protection of the girl child’s health and reproductive rights.<sup>197</sup> Subsection (1) (d) protects the rights of the child to self-protection in her sexual activity with her partner and the right for her to be protected against sexually transmitted diseases which includes HIV/AIDS.

The right to sexuality education is a prerequisite for the girl child to be aware of her sexuality and know the right steps to take to be sexually safe and make informed decisions regarding her future, and the girl child must not be deprived of a basic education which is the foundation for her acquisition of knowledge of her sexual and reproductive rights.

Article 8 (c) urges States to establish educational and ‘other appropriate structures’<sup>198</sup> that give particular attention to the rights of women , and the sensitisation of everyone to those rights. These ‘other structures’ could be centres for the sensitisation of sexual and reproductive rights

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<sup>195</sup>Ibid. Article 4

<sup>196</sup> Ibid

<sup>197</sup>Ibid. Article 14.

<sup>198</sup> African Women’s Protocol (note 187 above) Article 8.

for young female children, where workshops and seminars are held to give them the knowledge, to teach and counsel them about their sexuality and their reproductive rights as a woman and why it is crucial to their all-round development. These measures can be taken by states so that through public education, information and communication strategies, all forms of harmful cultural and other practices can be brought to the awareness of the public with a view to eliminating such practices.<sup>199</sup> The basic right to education for the girl child is considered in Article 12 where state parties are to take appropriate measures to: ‘eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training’.<sup>200</sup>

Gender sensitisation and human rights education should be integrated into the school curricula, as well as the elimination of stereotypes, in textbooks, syllabi, and media that fosters discrimination against the girl child.<sup>201</sup> The Protocol also goes on to encourage state parties to protect the girl child from any form of sexual abuse and harassment in schools and lays down sanctions for the perpetrators of such crimes.<sup>202</sup>

The right to equality, with regards to a girl child’s sexual and reproductive rights, is guaranteed in the African Women’s Protocol<sup>203</sup> as state parties are urged to include in their constitutions as well as legislative instruments, the principle of equality between girls and boys, and its effective application. It is encouraged that there should be no form of gender division in national policies, and legislations, as women must be incorporated in all spheres of life<sup>204</sup>. This provision aims at

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<sup>199</sup> Ibid. Article 2(2).

<sup>200</sup> Ibid.

<sup>201</sup> Ibid. Article 12(b) (e).

<sup>202</sup> Ibid subsection (c).

<sup>203</sup> Article 2 of the African Women’s Protocol.

<sup>204</sup> Ibid.

guaranteeing the eradication of all forms of discrimination against women, especially related to harmful cultural practices that thrive on the superiority or inferiority of any of the genders or the stereotyping of women and the roles they play in society.<sup>205</sup> The African Women's Protocol protects the girl child and her rights to access adequate medical care, without any form of discrimination. States are urged to provide accessible health care, including information, education and communication programmes for women, especially to those in deprived regions so that all women can benefit accordingly, irrespective of status and wealth.<sup>206</sup> This promotes equality for all women.

Article 8 guarantees equality for all before this law, as all women and men shall have the right to equal protection and benefit from this law.<sup>207</sup> It specifically states that state parties must take appropriate measures to ensure 'the establishment of adequate educational and other appropriate structures with particular attention to women, and to sensitise everyone to the rights of women'.<sup>208</sup> Article 12(e) also urges State parties to ensure that there is gender sensitisation and human rights education is integrated into all levels of education curricula.<sup>209</sup>

The woman's reproductive rights are so crucial to her general well-being, and much responsibility is put on states to provide adequate, affordable and accessible health care services,<sup>210</sup> as well as strengthening and establishing nutrition services for the woman before, during and after her delivery and when she's breastfeeding. The child also has the right to seek adequate medical abortion, in cases of sexual assault, rape and when the continuous pregnancy

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<sup>205</sup> Ibid.

<sup>206</sup> Ibid. Article 14.

<sup>207</sup> Ibid. Article 8

<sup>208</sup> Ibid. Article 8(c).

<sup>209</sup> Ibid. Article 12.

<sup>210</sup> Ibid. Article 14.

poses a risk both to the health and life of the mother or the baby.<sup>211</sup> Article 14 (2) (c) provides that states should: “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus”.<sup>212</sup> This provision seeks to protect the rights of the girl child to have access to safe abortion when she needs it. She has the right to exercise her right to personal autonomy<sup>213</sup> and to choose what she would like to do with her body, the emphasis on safe abortion is in view here.

The girl child or woman should not be discriminated against should she seek safe abortion and this is aptly provided for in Article 2, which prohibits all forms of discrimination against the girl child. The right the child has to her bodily integrity and to make such choices as she deems fit and to the development of her personality,<sup>214</sup> plays a strong role in the enjoyment of her sexual and reproductive health rights.<sup>215</sup>

The right to access contraceptives that a girl child seeks to have is a core part of her reproductive health and rights. Article 14 speaks on the health and reproductive rights of children and explicitly provides thus:

State parties shall ensure that the right to the health of women, including sexual and reproductive health is respected and promoted, and this includes:

- a) the right to control their fertility b) the right to decide whether to have children, the number of children and the spacing of children c) the right to choose any method of contraception; d) the right to self – protection and to be protected against sexually transmitted infections, including HIV/AIDS e) the right to

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<sup>211</sup>Ibid.

<sup>212</sup>Ibid.

<sup>213</sup> J. Slatman ‘Phenomenology of Bodily integrity on disfiguring Breast Cancer. See excerpt from the Department of health, ethics & Society at the Maastricht University, Sweden, available at <http://www.jennyslatman.nl/download/publications/>. (Accessed on 10 March 2017).

<sup>214</sup> Article 3 of the African Women’s Protocol, guarantees the right that every woman has to dignity.

<sup>215</sup>Slatman (note 213 above)

be informed of one's health status and on the health status of one partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices and g) the right to have family planning education.

The right to say no to child marriage is protected and provided for in the African Women's Protocol. The prevalence of child marriage in Africa is largely due to cultural and religious norms and these factors play a huge role in advancing the scourge of child marriage.<sup>216</sup> The Protocol is strongly against such practices and provides for their elimination. Article 5 speaks on the elimination of such harmful practices that negatively affect the rights of women and which are contrary to recognised international standards,<sup>217</sup> and urges states to prohibit these practices by means of legislative measures and backed by sanctions.

Article 6 provides for the rights of women and children regarding marriage. The equality of women and men in marriage is key and they must freely enjoy these equal rights in marriage, Article 6(a) provides that "no marriage shall take place without the free and full consent of both parties; and (b) sets the minimum age of marriage for women to be 18 years of age."<sup>218</sup>

This provision has unequivocally set the minimum age for marriage to be 18 years, and as such, any marriage contracted below that age for children is considered null and void and of no effect and is a clear violation of recognised international standards.<sup>219</sup>

## **2.5 Conclusion**

Sex, sexuality, and reproduction are essential to human experience and development.<sup>220</sup> It is clearer than ever that the autonomy of women must be taken into consideration in their decisions,

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<sup>216</sup> Braimah (note 160 above).

<sup>217</sup> African Women's Protocol (note 187 above) Article 5.

<sup>218</sup> Ibid. Article 6

<sup>219</sup> Article 5 of the African Women's Protocol.

free of force or coercion, whether or not to be sexually active, the right to choose whether or when to become pregnant and have children and whether or not to marry.<sup>221</sup> This is fundamental to their well-being and thus, the sexual and reproductive rights of the female child must not be overlooked, disregarded or violated. However, in the assessment of the international human rights instruments that exist to protect these rights and how much progress or impact has been achieved is a key question.

Sexual and reproductive rights of children in international law can be clearly defined and grouped into these comprehensive rights as outlined in the Programme of Action of the ICPD:<sup>222</sup>

- i. Voluntary, informed, and affordable family planning services;
- ii. Pre-natal care, safe motherhood services, assisted childbirth from a trained attendant (e.g. a physician or midwife), and comprehensive infant health care;
- iii. Prevention and treatment of sexually transmitted infections (STIs) including HIV/AIDS and cervical cancer;
- iv. Prevention and treatment of violence against women and girls, including torture;
- v. Safe and accessible post-abortion care and where legal, access to safe abortion services; and
- vi. Sexual health information, education, and counselling, to enhance personal relationships and quality of life.

There exists other human rights documents made up of international law and global consensus documents which contribute to the Programme of Action of the ICPD where, together they form

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<sup>220</sup> J. Todd-Gher 'Policing bodies, punishing lives: The African Women's Protocol as a tool for resistance of illegitimate criminalization of women's sexualities and reproduction' (2014) 14 *AHRLJ* 736.

<sup>221</sup> Amnesty International: 'Realizing Sexual and Reproductive rights: A Human Rights framework. Available at <http://www.amnesty.ca/sites/default/files/act>. (Accessed 24 May 2017).

<sup>222</sup> Alice M. Miller "Sexual but not reproductive: Exploring the junction and disjunction of sexual and reproductive rights. (2000) *Health and Human Rights* 4, 71.



the basis of the rights to sexual and reproductive health care.<sup>223</sup> These instruments have been studied in this chapter.

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<sup>223</sup> Amnesty International USA: 'Sexual and Reproductive Rights' available at <http://www.amnestyusa.org/pdfs/SexualReproductive>. (Accessed on 24 April 2017).

## CHAPTER THREE

### LEGISLATIVE FRAMEWORK FOR THE SEXUAL AND REPRODUCTIVE RIGHTS OF CHILDREN IN SOUTH AFRICA

#### 3.0 Introduction

Africa today has a large population of adolescents who are developing into adults,<sup>1</sup> Adolescence is a very important and sensitive time, as it is where the sexuality of children is developed and thus, they need unwavering support to assist them as they make the transition from childhood into adulthood.<sup>2</sup> The fulfilment of sexual and reproductive rights of women and children is linked to state obligations, based on their commitment to international standards and treaties to protect and promote these rights which will in turn, yield to favourable health development.<sup>3</sup> A closer look at the legal and policy framework of the sexual and reproductive rights of adolescents, especially the girl child in South Africa, will be the focus in this chapter. An analysis of how these legal and policy frameworks meet the international standards as set out in treaties and documents will also be examined. The sexual and reproductive rights to be treated will be the right to sexuality, the right to sexuality education, the right to access contraceptives and the right to say no to child marriage.

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<sup>1</sup> G.Kangaude & T. Banda 'Sexual Health and Rights of Adolescents: A Dialogue with Sub-Saharan Africa in' C. Ngwena & E.Durojaye '*Strengthening the Protection of sexual and reproductive health and rights in the African region through Human rights*' (2014) 261.

<sup>2</sup> Ibid.

<sup>3</sup> C. Ngwena & E. Durojaye *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region through Human Rights* (2014) 1.

### 3.1 Application of international law in South Africa

In South Africa, application of international law is clearly outlined in Sec 231(4) of the 1996 Constitution of South Africa which provides:

Any international agreement becomes law in the Republic when it is enacted into Law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an act of Parliament.<sup>4</sup>

South African courts, on interpreting constitutional rights, consider international laws. Section 39 provides this:

When interpreting the bill of rights, a court, tribunal or forum, (a) "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom" and (b) must consider international law.<sup>5</sup>

Sec 232 of the 1996 Constitution, also states that;

The rules of customary international law are binding on the Republic, unless they are inconsistent with this constitution, or an act of parliament, or form part of the law of the Republic.<sup>6</sup>

From the above provisions, South Africa employs a somewhat dualist approach to the enforcement of international law at the domestic level, such that the treaty must be incorporated by legislation<sup>7</sup> and at the same time, in the second clause of the above section, self-executing treaty provisions can be automatically enforced and incorporated at a domestic level without any

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<sup>4</sup> Section 231 of The South African Government *Constitution of South Africa 1996* available at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf> (Accessed on 4 March 2017).

<sup>5</sup> Ibid. Section 39.

<sup>6</sup> Ibid. Section 232

<sup>7</sup> D. Sloss Treaty Enforcement in domestic courts; A comparative analysis in D. Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A comparative study* (2009) 25.

need for legislative action and incorporation.<sup>8</sup> With this approach, domestic courts play an important role in the enforcement of treaties.

### **3.1.1 The Constitution of the Republic of South Africa, 1996<sup>9</sup>**

The Constitution of the Republic of South Africa was approved by the Constitutional Court (CC) on the 4<sup>th</sup> of December 1996 and came into force on 4<sup>th</sup> of February 1997.<sup>10</sup> It is the sovereign law of the Republic, and no other law, government action or policy can take its place or supersede it. Furthermore, any law that is inconsistent with its provisions is invalid and all the obligations contained therein must be fulfilled.<sup>11</sup>

Chapter 2 of the Constitution contains the Bill of Rights. This is the cornerstone of democracy in South Africa. The Bill of Rights guarantees the rights of all people in the country and affirms democratic tenets of equality, dignity, and freedom.<sup>12</sup>

Section 28 of the Constitution specifically provides for the rights of children. Its provisions are as follows:

- (1) Every child has the right
  - (a) To a name and a nationality from birth;
  - (b) To family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) To basic nutrition, shelter, basic health care services and social services;
  - (d) To be protected from maltreatment, neglect, abuse or degradation;

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<sup>8</sup> Ibid.

<sup>9</sup> The South African Government *Constitution of South Africa 1996* available at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf> (Accessed on 4 March 2017).

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

- (e) To be protected from exploitative labour practices;
- (f) Not to be required or permitted to perform work or provide services that –
  - (i) are inappropriate for a person that child’s age
  - (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral and social development;
- (g ) Not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under Sections 12 and 35, the child may be detained for only the shortest appropriate period of time, and has the right to be-
  - (i) kept separately from detained persons over the age of 18 years; and
  - (ii) treated in a manner, and kept in conditions, that take account of the child’s age.
- (h) To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial justice would otherwise result; and
  - (1) Not to be used directly in armed conflict, and to be protected in times of armed conflict, and to be protected in times of armed conflict
  - (2) A child’s best interests are of paramount importance in every matter concerning the child
  - (3) In this section, ‘child’ means a person under the age of 18 years.<sup>13</sup>

Section 28 contains socio-economic, civil and political rights of children. The section also guarantees the ‘best interest of the child principle’,<sup>14</sup> Providing that a ‘child’s best interests are of paramount importance in every matter concerning the child’,<sup>15</sup> this can be said to include the child’s sexual and reproductive health, which is of primary importance and aids the child’s all round development. Scholars have suggested that this is a core foundation for legislative reforms ensuring that the child’s interests are primarily of importance in law making, so as to eliminate discriminatory provisions in matters that pertain to children.<sup>16</sup>

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<sup>13</sup> Ibid. Section 28

<sup>14</sup> Ibid.

<sup>15</sup> S.S.Ali, S. Goonesekere, E.G. Mendez,R.Rios-Kohn *Protecting the world’s children: Impact of the Convention on the Rights of a Child in Diverse Legal Systems (2007) 19.*

<sup>16</sup> Ibid.

Other provisions of the Constitution relevant to the sexual and reproductive rights of children include Section 29 which guarantees the right to basic education.<sup>17</sup> While viewing education from a rights-based perspective, education can be seen to be a tool that can help individuals make informed decisions about their sexuality, as comprehensive sexuality education can be prescribed into schools' curriculum to adequately inform children.<sup>18</sup> A school is also an ideal setting where children can receive sexuality education from organisations, and they can have access to counselling regarding their sexual health. In school, informal platforms also enable the youth to discuss sensitive issues that relate to their sexuality. Like early marriage and the spread of STI's, it is with this information that young children, especially the girl child, can view the appropriateness of these practices in relation to their own lifestyle choices, helping them make informed decisions relevant to their development and happiness.<sup>19</sup>

Section 27 of the Constitution also guarantees the rights to everyone to access health care, as well as the right not to be refused medical treatment.<sup>20</sup> The right to access health care for children has seen some implementation by the courts as a leading constitutional case in point is *The Minister of Health and Others v Treatment Action Campaign and Others (TAC)*,<sup>21</sup> which saw a breach of Section 27 (1) and Section 28 (1)(c) of the Constitution. The court ruled in favour of the TAC and ordered that antiretroviral drugs be made available to pregnant mothers who were HIV positive so as to benefit their children.

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<sup>17</sup> Section 29 of the Constitution of South Africa 1996.

<sup>18</sup> H.K. Altinyelken & J. Olthoff 'Education and Sexual and Reproductive Health and Rights' (2014) *The Amsterdam Institute for Social Science Research (AISSR)* 5.

<sup>19</sup> *Ibid* 6.

<sup>20</sup> Section 27 (3) of the 1996 Constitution.

<sup>21</sup> *The Minister of Health and Others v Treatment Action Campaign and Others (TAC)* 2002 10 (BCLR) 1033 (Constitutional Court).

The right to bodily integrity and reproductive health care is guaranteed by section 12 (2), which also means the right to autonomy, where an individual can make decisions concerning their body and sexuality free of discrimination. However, this right is not provided in any human rights document as it is linked intrinsically to the right to privacy, security, and liberty which guarantees an individual's right to make choices about their sexuality.<sup>22</sup>

In conclusion, the provisions of Section 14 guarantees the right to privacy which provides that everyone has the right to privacy, which includes the right not to have (d) the privacy of their communications infringed, this is relevant to the sexual health of, as their needs for sexual and reproductive health information and services can be met as discreetly as possible.<sup>23</sup>

### **3.1.2 The extent to which the Constitution meets the international and regional standards that address the sexual and reproductive rights and health of the girl child**

The Constitution is the supreme law of the Republic, and the obligations imposed by it must be fulfilled.<sup>24</sup> This is the foundation for the protection of children's rights, which include their sexual and reproductive rights. From the foregoing provisions, it is clear that the Constitution was drafted with a clear intention to protect the rights of children, and this is a strength in South Africa's legal framework. These sexual and reproductive rights will be examined below.

(a) **The right to sexuality:** The Constitution of South Africa does not explicitly provide for this right, however, according to its constitutional law, the right to the expression of one's

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<sup>22</sup> E.Durojaye & R.Amollo 'Advancing Adolescent Sexual Health rights in Africa' (2010) 11 *Economic and Social Rights in South Africa Review* 4.

<sup>23</sup>Section 14 of the 1996 Constitution.

<sup>24</sup> The Preamble to the *Constitution of South Africa 1996* available at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf> (Accessed on 4 March 2017).

sexuality flows from and is derived from other rights to privacy, dignity and bodily integrity.<sup>25</sup> In his argument, Ngwena asserts that sexual rights are linked to various provisions contained in the Bill of Rights, which includes the right to equality, the right to sexual orientation, non-discrimination, human dignity, and the right to reproductive decision making, among other rights.<sup>26</sup>

Regarding sexuality, the right to privacy which is guaranteed by the Constitution<sup>27</sup> is the right that the individual has to make decisions regarding their sexuality free from interference from anyone and the state.<sup>28</sup> Ngwena also posits that sexual rights are linked to various provisions contained in the Bill of Rights, which includes the right to equality, the right to sexual orientation, non-discrimination, human dignity, and the right to reproductive decision making, among other rights.<sup>29</sup> To show the relevance of the right to privacy regarding sexual health matters under the South African Constitution, the Constitutional Court in the case of *National Coalition of Gay and Lesbian Equality v The Minister of Justice*<sup>30</sup> stated:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

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<sup>25</sup> *National Coalition for Gay and Lesbian Equality V Minister of Justice* 1999 (1) SA 6 (CC) (hereinafter referred to as National Coalition.) para 32.

<sup>26</sup> C. Ngwena; Sexuality Rights as Human Rights in Southern Africa with particular reference to South Africa' (2002) 17 *SA Public Law* 2, 3.

<sup>27</sup> South Africa Constitution (note 9 above) Section 14.

<sup>28</sup> S.Y.Lai & R.E.Ralph 'Female Sexual Autonomy and Human Rights' (1995) 8 *Harvard Human Rights* 233.

<sup>29</sup> Ngwena (Note 26 above)

<sup>30</sup> *National Coalition* 1999 (1) SA 6 (CC) at para 32. (Note 25 above)



Thus, it will be a breach of the adolescent's right to privacy and the undermining of their right to sexuality and sexual autonomy, if they cannot access sexual and reproductive treatment and services.<sup>31</sup>

Early sexual debut in South Africa begins at 12, and children have the right to consensual sex, amongst themselves,<sup>32</sup> sexual decisions and prevention of pregnancies amongst youths at this age are very challenging, as they might seem a bit frightened, confused and ashamed to openly discuss sex<sup>33</sup>.

However, it is important that youths are taught early enough about their sexuality because during adolescence, they make decisions 'in the moment' without considering future consequences of their sexual actions. Youths begin to discover themselves sexually and thus, their ability to plan or think abstractly regarding sex is just being established.<sup>34</sup>

Sexual rights as a stand-alone right in international law cannot be said to have any authoritative force,<sup>35</sup> in past times, sexuality and reproduction were viewed in terms of medicine and not law.<sup>36</sup> Rights to sexuality contained in sexual health are evolving and beginning to gain some recognition in international law, and according to Petchesky, it is the 'newest kid on the block'.<sup>37</sup>

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<sup>31</sup> E. Durojaye 'Children and Adolescents' Access to Reproductive and Sexual Health Care' in I.O. Iyioha & R.N. Nwabueze (ed) *Comparative Health Law and Policy: Critical Perspectives on Nigerian and Global Health Law (2015)* 163.

<sup>32</sup> UNFPA South Africa: HIV Preventions, available at <http://www.countryoffice.unfpa.org/southafrica/2013/05/03/6675/hiv/> (Accessed 25 April 2017).

<sup>33</sup> Lai (note 28 above).

<sup>34</sup> Ibid.

<sup>35</sup> S. Lutchman 'Child savers V Kiddie Libbers: The Sexual Rights of Adolescents' (2014) 30 SAJHR 557.

<sup>36</sup> M.Roseman & A.Miller 'Normalizing Sex and its Discontents: Establishing Sexual Rights in International Law' (2011) 34 *Harvard J of Law and Gender* 313,328; E. Durojaye 'Realizing Access to Sexual Health Information

Rights to sexuality for adolescents has been mentioned just once in international law by the WHO report in 2002, which describes sexual rights to include:

Human rights already recognised in national laws, international and human rights documents and other consensus statements. It includes the rights of all persons to obtain the highest attainable standard of sexual health, to seek, to receive and impart information related to sexuality, to sexuality education, respect for bodily integrity, to choose their partner, to decide to be sexually active or not among other things.<sup>38</sup>

Durojaye proposes that the very salient nature of this definition as the individual's right to engage in any form of sexual activity that she desires in a safe and enjoyable manner.<sup>39</sup> Roseman and Miller assert that the above statement of the WHO is seen as 'soft law' and non-binding in international law.<sup>40</sup> In developing African countries, the issue of sexuality is still spoken in hush tones, hence, the reason for ignorant adolescents who do not know anything about their sexuality or body integrity.

Durojaye also affirms that in the African region, lack of adequate health facilities as well as ingrained socio-cultural factors hinder the access which adolescents should have in receiving information on their sexuality and reproduction.<sup>41</sup>

**(b) Right to sexuality education,**

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and Services for Adolescents through the Protocol to the African Charter on the Rights of Women' (2009) 16 *Washington & Lee J of Civil Rights and Social Justice* 135, 143.

<sup>37</sup> E. Durojaye, V. Balogun 'The African Commission on Human and People's Rights and the promotion and protection of sexual and reproductive rights' (2011) 11 *African Human Rights Law Journal* 374.

<sup>38</sup> WHO Defining sexual health, Report of a technical consultation on sexual health (2002) Sexual health Document series available at [http://www.who.int/reproductivehealth/publications/sexual\\_health/defining\\_sexual\\_health.pdf](http://www.who.int/reproductivehealth/publications/sexual_health/defining_sexual_health.pdf). (Accessed 16<sup>th</sup> April 2017)

<sup>39</sup> E. Durojaye 'Realising Access to Sexual Health Information and Services for Adolescents through the Protocol to the African Charter on the Rights of Women' (2009) 16 *Washington & Lee J of Civil Rights and Social Justice* 135, 143.

<sup>40</sup> M. Roseman & A. Miller (Note 36 above)

<sup>41</sup> E. Durojaye 'Realising Access to Sexual Health Information and services for adolescents through the Protocol to The African Charter on the Rights of Women (2009) 16 *Washington & Lee J of Civil Rights and Social Justice*. 135-172

This right stems from the right to education for children, and this is guaranteed in Section 28 and 29 of the CRC. The right to education is also guaranteed in the Universal Declaration of Human Rights.<sup>42</sup>

The CRC recognises the importance of the media and their role in disseminating wholesome information aimed at promoting the child's well-being. The child's right to sexuality education is further guaranteed in this provision.<sup>43</sup> The General comments of the CRC, most particularly GC3<sup>44</sup> and GC5<sup>45</sup> clearly set out the right to sexuality information education. The GC 3 deals with information for HIV prevention and raising awareness, while the GC 5 of the CRC affirms the committee's stance in good knowledge of human rights by children and its incorporation into the school's curriculum at all levels.<sup>46</sup>

The South African constitution guarantees the right to basic education for everyone,<sup>47</sup> but it does not guarantee the right to sexuality education. The framework provides for compulsory school attendance for learners that are within the ages of 7-15 years and entrusting an obligation on parents to ensure that their children and wards attend school.<sup>48</sup> This constitutes a gap in

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<sup>42</sup> See Article 26 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly at its 3<sup>rd</sup> Session on 10 December 1948 in Paris. Available at <http://www.un.org/en/universal-declaration-human-rights>. (Accessed 5 June 2017).

<sup>43</sup> Article 17 of The Children's Act of 2005. This Act was promulgated on 8 April 2006 and came into force on 1 July 2007. . Available at <http://www.justice.gov.za/legislation/acts/2005.childrensact.pdf>. (Accessed 23 March 2017).

<sup>44</sup> Committee on the Rights of the Child 32<sup>nd</sup> session 13-31 January 2003 'GC3' 'HIV/AIDS and the Rights of the Child' .available at [http://www.unicef.org/aids/files/UNHCHR\\_HIV\\_and\\_children\\_rights\\_2003.pdf](http://www.unicef.org/aids/files/UNHCHR_HIV_and_children_rights_2003.pdf). (Accessed 24 April 2017).

<sup>45</sup> Committee on the Rights of the Child 34<sup>th</sup> session 19 September -3 October 2003 ' GC5' 'General measures of implementation of the convention on the rights of the child (Articles 4, 42, 44 para.6) available at <http://www.un.org/kg/en/post-2015/article/document-of-the-convention-on-the-rights-of-the-child-eng> (Accessed 21 April 2017)

<sup>46</sup> Ibid.

<sup>47</sup> South Africa Constitution (note 9 above) Section 29.

<sup>48</sup> Sec 3 of the Government of South Africa *The South African Schools Act No 84 of 1996* available at <http://www.cindi.org.za/files/Policy-Framework-For-OVC-Final.pdf>. (Accessed on 13 March 2017).

meeting international standards, however, South Africa has made up for that gap by including this right in its Children's Act.

(c) **Right to access contraceptives**

South Africa as a country does not have express provisions in its constitution that give children the right to access contraceptives but it guarantees the right to health under Section 27(1)<sup>49</sup> and this includes the right to seek reproductive health care, thus, access to contraception can be implied from this section. These socio-economic rights are justiciable and entrenched in South Africa's Bill of Rights. Section 7 (2) even provides that the State must respect, promote and fulfil the rights in the Bill of Rights.<sup>50</sup> This implies that citizens can hold the government accountable to their constitutional duties.<sup>51</sup> However, the courts have held that there should be a 'reasonableness' test in adjudicating in matters that hinge on enforcing the socio-economic rights of citizens.<sup>52</sup> Section 28<sup>53</sup> provides specifically for the right of a child to access basic health care facilities. This is implied and can be interpreted to mean that female children can access reproductive health care services, which includes access to contraception. Thus, it will be trite to say that section 28 of the Constitution only guarantees a child's right to basic health care and expressly does not provide for children's rights to access contraceptives.

This right to basic health is guaranteed in a number of international instruments, like the Committee on the Elimination of Discrimination against Women (CEDAW) in Articles 2 and

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<sup>49</sup> South Africa's Constitution.(note 9 above) Section 27(1).

<sup>50</sup> Ibid Section 7.

<sup>51</sup> The Constitution provides for Sec 7(2) in its Bill of Rights

<sup>52</sup> See *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT 11/00) (2000) ZACC 19.

<sup>53</sup> Section 28 of The Constitution of South Africa 1996.

12<sup>54</sup> which condemns discrimination against women in all its forms. And Although CEDAW refers to the female gender as ‘woman’, the provisions of CEDAW were created to assist girls to claim their rights at all stages of their lives, from when they are born, to when they are little girls, their adolescence, adulthood and right up to their old age.<sup>55</sup>

Both the International Covenant on Civil and Political Rights (ICCPR)<sup>56</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESR)<sup>57</sup> protect the rights an individual has to privacy when accessing health care and recognises the rights that every individual has to enjoy the highest attainable standard of health, respectively. The UN Committee on Economic, Social and Cultural Rights (CESR) GC14<sup>58</sup> also, emphasizes this right to enjoy the highest standard of health. It affirmed that “health is a fundamental human right indispensable for the exercise of other human rights”.<sup>59</sup> This enables adolescents’ access to health care facilities, which includes contraceptives in a private and confidential manner with no form of discrimination whatsoever.<sup>60</sup> The CRC<sup>61</sup> alongside its GC4<sup>62</sup> emphasise adolescent access to sexual and reproductive information, especially about contraceptives, family planning, the dangers of early pregnancy, the risk of infection from HIV/AIDS and other sexually transmitted diseases.

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<sup>54</sup> CEDAW available at <http://www.un.org/womenwatch/daw/cedaw>. (Accessed on 2 March 2017).

<sup>55</sup> UNICEF: CEDAW In Brief for Adolescents. Policy and Practice (June 2011) available at [http://www.unicef.org/gender/files/CEDAW\\_In\\_Brief\\_For\\_Adolescents-Web-Version.pdf](http://www.unicef.org/gender/files/CEDAW_In_Brief_For_Adolescents-Web-Version.pdf). (Accessed 22 January 2017).

<sup>56</sup> Article 17 of the ICCPR, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. (Accessed 10 February 2017).

<sup>57</sup> Article 12 of the ICESR, available at [www.ohchr.org/documents/professionalinterest/cesr.pdf](http://www.ohchr.org/documents/professionalinterest/cesr.pdf) (Accessed 1 March 2017).

<sup>58</sup> UN Committee on Economic, Social and Cultural rights (CESR) *General Comment No 14: The Right to the Highest attainable standard of health* (Art 12 of the Covenant) 11 August 2000, available at <http://www.refworld.org/docid/453883d0.html>. (Accessed 4 March 2017).

<sup>59</sup> Ibid.

<sup>60</sup> WHO: *Right to Health*. Fact sheet No. 31, available at <http://www.ohchr.org/documents/publications/Facts>. (Accessed 23 June 2017).

<sup>61</sup> Article 12 of The CRC available at [www.ohchr.org/en/professionalinterest/pages/crc.aspx](http://www.ohchr.org/en/professionalinterest/pages/crc.aspx). (Accessed 3 February 2017).

Though there is no express provision for adolescents to access contraceptives in terms of international law, these international documents mentioned above have provisions that are broad and from which it can be inferred that adolescents can exercise their rights to access health care which includes contraceptives.

Regionally, The African Women's Protocol<sup>63</sup> expressly provides for the rights of women to access contraceptives and to choose any method of contraception, while the ACRWC condemns discrimination against the girl child to access health care services.<sup>64</sup> South Africa may have provisions in its constitution that protect children's rights, but they are not exhaustive enough to include their sexual and reproductive rights.

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<sup>62</sup> UN *CRC GC4* (2003) available at <http://www1.umn.edu/humanrts/crc/crc-generalcomment4.html>. (Accessed 2<sup>nd</sup> May 2017).

<sup>63</sup> Article 14 of The African Women's Protocol, available at [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf). (Accessed 3 February 2017).

<sup>64</sup> Articles 3 and 14 of The African Charter on the Rights and Welfare of the Child, available at [http://www.au.int/en/sites/default/files/charter\\_En\\_African\\_Charter\\_on\\_the\\_Rights\\_and\\_Welfare\\_of\\_the\\_Child\\_AddisAbaba\\_](http://www.au.int/en/sites/default/files/charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_). (Accessed 3 February 2017).

**(d) Right to say no to child marriage**

This is provided for either expressly or indirectly in many international instruments as they contain the standard of protection on the right to say no to child marriage.<sup>65</sup> The issue of early marriage can be defined as the marriage of a child, a boy or girl who has not attained the age of 18. The age of 18 is benchmarked as set down by the CRC<sup>66</sup> however, this age has been contested, that a standard age cannot be set as the age of marriage because the definition of a child means different things in various societies, based on their economic, social and cultural realities.<sup>67</sup> The CRC sets the age of a child to be anyone under the age of 18 years<sup>68</sup>, and thus prohibits state parties from giving validity to marriages to persons that have not yet attained their own majority.<sup>69</sup> The CRC enjoins state parties to carry out legal reforms and raise the legal minimum age for marriage to 18 years, with or without parental consent for both boys and girls.<sup>70</sup>

Regionally the ACRWC<sup>71</sup> expressly prohibits child marriage and the betrothal of girls and boys, and sets the minimum age for marriage to be 18 years and that all marriages must be compulsorily registered in an official registry. The African Women's Protocol speaks about the elimination of harmful practices and culture that affect the rights of women, and invariably the

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<sup>65</sup> Article 1 of the CEDAW available at <http://www.un.org/womenwatch/daw/cedaw>. (Accessed on 2 March 2017).

<sup>65</sup> Article 10 of the ICESR, available at [www.ohchr.org/documents/professionalinterest/cesr.pdf](http://www.ohchr.org/documents/professionalinterest/cesr.pdf) (Accessed 1 March 2017).

<sup>66</sup> Article 16(2) of the CRC 1989. available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. (Accessed 2 March 2017)

<sup>67</sup> A. Atsenuwa 'Promoting sexual and reproductive rights through legislative interventions: A case study of Child Rights legislation and early marriage in Nigeria and Ethiopia' In C. Ngwena & E. Durojaye (ed) *Strengthening the Protection of sexual and reproductive health and rights in the African Region through Human Rights (2014)* 36.

<sup>68</sup> Article 1 of the CRC.

<sup>69</sup> V. Mtshali 'Forced Child Marriage practiced under the pretext of customary marriage in South Africa' (2014) 15 *South Africa Journal of Child Abuse Research* 51.

<sup>70</sup> Ibid.

<sup>71</sup> Article 21 of the ACRWC.

girl child negatively and is contrary to international standards.<sup>72</sup> It also sets the minimum age for marriage to be 18 years.<sup>73</sup>

In South Africa, Section 28 of its Constitution does not expressly prohibit child marriage, however, it affirms the protection of the rights of children from any form of abuse and degradation,<sup>74</sup> because every child has the right to her physical and mental health as well as educational, social and spiritual development. Child marriage is a form of abuse and hampers the development of the girl child. In addition, Section 28 provides for ‘the best interest of a child to be of paramount importance in all matters concerning the child’.<sup>75</sup>

South Africa’s Bill of Rights does not expressly provide for the prohibition of child marriage and this can be seen as a weakness, as this is the supreme law of the land. The issue of child marriage is clearly not in the girl child’s best interest as it will hinder her development in all ramifications and cause grave health issues for her.<sup>76</sup>

### **3.1.3 The Children’s Act of 2005<sup>77</sup>**

The Children’s Act sets out guidelines pertaining to the care and protection of children as well as stating parental responsibilities and state obligations to the children.<sup>78</sup>

The Act recognises that protective measures are necessary to ensure the health of children and includes a number of specific sexual and reproductive rights for children.<sup>79</sup>

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<sup>72</sup>Article 5 of The African Women’s Protocol, available at [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf) 9 (Accessed 3 March 2017).

<sup>73</sup> Ibid Article 6.

<sup>74</sup> Section 28 (1) (d) of the 1996 Constitution.

<sup>75</sup>South Africa’s Constitution (note 9 above) Section 28 (2).

<sup>76</sup>V. Mtshali ‘Forced Child Marriage practiced under the pretext of customary marriage in South Africa’ (2014) 15 *South Africa Journal of Child Abuse Research* 51.

<sup>77</sup> Note 43 above.

<sup>78</sup> Ibid.



The Children's Act protects the rights of children and they are defined as being below the age of 18, so it is correct to say adulthood begins at 18 years of age.<sup>80</sup> The objective of the Act is clearly outlined in Section 2 which places a responsibility on the state and families to provide services and care with the aim to protect the rights of children,<sup>81</sup> and these are clearly in line with the Constitution. It also recognises several international human rights instruments that deal with the protection of the rights of a child. There exist some sexual and reproductive rights that are guaranteed by the Children's Act, and they include the following:

**i. The right to say no to child marriage**

Section 12 of the Children's Act guarantees the child's right to make decisions on whether to engage or to refrain from cultural, social and religious norms and the right not to be subjected to these practices that are detrimental to his or her well-being. This section spells out these practices that are detrimental to the well-being of the child and these are crucial and have a direct impact on the sexual and reproductive health and rights of children, especially the girl child.

Some of the practices that it forbids which is specific to the female child include child marriage and virginity testing. However, some cultural practices of forced marriage still exist in South Africa, like the "*ukuganisela*" in Zululand, and the "*go thiba difate*" as practiced in Sepedi,<sup>82</sup> these practices appear to be in line with customary marriage because the family group heads of both parties to the marriage give their consent to their daughters to be married off, without

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid. Section 17.

<sup>81</sup> Ibid. Section 2.

<sup>82</sup> V.Mtshali 'Forced Child Marriage practiced under the pretext of customary marriage in South Africa' (2014) 15 *South Africa Journal of Child Abuse Research* 51.

necessarily informing them or seeking their consent in the marriage.<sup>83</sup> This is an outright violation of their rights and in total contravention of international standards. This cultural practice of “*ukuganisela*” is also in conflict with the Recognition of Customary Marriages Act 120 of 1998<sup>84</sup>(RCMA) and its requirements. It provides that (a) the prospective spouses (i) must be above 18 years and (ii) must both give consent to each other under customary law and (b) the marriage must be negotiated or entered into or celebrated in accordance with customary law.<sup>85</sup>

Despite the reality that forced marriages still happen in remote and poor societies in South Africa, the Children’s Act has provisions that empower adolescent females by giving them equal rights and prohibiting inequality and discrimination. The minimum age for marriage and engagement as required by law is set out here<sup>86</sup> and this is in line with Article 16 (2) of CEDAW which prohibits underage marriage, and is clear on the minimum age for marriage, which is 18. The issue of consent is also emphasised related to all marriages above the minimum age.<sup>87</sup>

## **ii. Right to sexuality education**

Section 13 of the Children’s Act provides and guarantees the right of every child to access information on health care regarding their sexuality and reproduction, this is crucial to the sexual and reproductive health rights of the girl child. This right includes information that the child can receive related to the type of disease and necessary treatment that he or she has.

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<sup>83</sup> Ibid.

<sup>84</sup> The RCMA of 1998 came into operation in 2000, and it validates and gives legal recognition to customary marriages. Section 2(2) of the RCMA provides that any customary marriage entered into after the commencement of the Act and adheres to the requirements of the Act, is by all means and for all purposes a marriage. Note 49 above.

<sup>85</sup> Ibid.

<sup>86</sup> Section 12 The Children’s Act.

<sup>87</sup> Ibid. Consent is the determining factor for a valid marriage. Section 12 of the Children’s Act prescribes that even if the child is above the minimum age, her consent must be obtained, before a marriage can be valid.

Confidentiality is also guaranteed to the child regarding her health status; the exception to this will be only if maintaining that confidentiality is not in the best interests of the child.<sup>88</sup> The section also provides that all information related to health care given to children must be relevant to the child's situation and must be given in a manner that the child can fully understand.

Sections 129-142 forms part of the protective measures pertaining to the health of children, where a child can consent to her own medical treatment if the child is over the age of 12, possesses maturity and has sufficient mental capacity to comprehend the benefits, risks, social and other implications of the treatment.<sup>89</sup> This section gives the child autonomy to make decisions regarding her sexual and reproductive health. It is therefore important that effective services be made available for these youths and these health services must be unbiased and centred around youth-oriented locations, schools, clinics and communities.<sup>90</sup> The health care service providers have to be youth focused and will not tolerate any kind of discrimination against them despite their status or health condition. This free and non-judgmental attitude on the part of the service providers will go a long way in boosting the confidence of young adolescents and they can receive treatment for sexually transmitted infections (STI's) and enjoy a healthy sexual life.<sup>91</sup> Once adolescents are given the freedom to seek sexual health care in a non-judgmental atmosphere, they will make better informed decisions about their sexual health.

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<sup>88</sup> A. Barrat ' The best interest of the child: where is the child's voice? In S. Burman (ed) *The Fate of the Child : Legal decisions on children in the new South Africa*' (2003)141,151-56

<sup>89</sup> Section 129 of The Children's Act.

<sup>90</sup> Ibid at 175.

<sup>91</sup> Ibid.

### iii. The right to access contraceptives

Section 134 of the Act prohibits anyone from refusing to provide condoms to a child over the age of 12 when such condoms are provided for or distributed free of charge.<sup>92</sup> It also provides for contraceptives other than condoms to be given to a child upon request of the child without the consent of the parent or caregiver,<sup>93</sup> so long as the child is at least 12 years of age, medical advice has been given to the child, and in the particular case, medical examinations are done on the child to determine whether there exists any medical reasons why a specific or particular contraceptive should not be provided to the child.<sup>94</sup>

The child is also guaranteed confidentiality when she obtains condoms, contraceptive or contraceptive advice. This provision constitutes a strength in South Africa's sexual and reproductive framework.

The access to contraceptives is in line with the sexual and reproductive right to access health care as it advocates for reproductive autonomy and freedom. It is ideal if parental consent is obtained regarding approval and involvement of contraceptive use. However, it has been observed that adolescents, especially females, have long since engaged in sexual activities that their parents knew nothing about, since in many South African homes, sex is not talked about<sup>95</sup> Often times, adolescents engage in risky sexual behaviour due to lack of understanding or knowledge about the potential risks.<sup>96</sup>

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<sup>92</sup> Children's Act (note 43 above). Section 134.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> B. Goldblatt & K.S. Mc Lean *Women's Social and economic rights: Development in South Africa* (ed) (2011) 67.

<sup>96</sup> L.E. Widdice, J.L. Cornell, W. Liang, B.L. Halpern-Felsher 'Having sex and condom use: Potential risks and benefits reported by young sexually inexperienced adolescents' (2006) 39 *Journal of Adolescent Health* 592.

In addition, children have the right to control their own body which is in line with the right to bodily integrity,<sup>97</sup> meaning they can seek medical care with regards to their health, as the need arises while maintaining strict confidentiality.

#### **iv. HIV testing**

Section 130 (1) focuses on HIV testing and sets out the conditions where a child can undergo HIV testing, the best interest of the child must also be put into consideration before consent can be obtained for the test. Section 132 also stresses the best interest of a child to be taken into consideration as well as his or her consent before that child can be tested for HIV.

A child can consent to HIV testing independently at the age of 12, but for other forms of medical testing, children must be 12 years old and possess ‘sufficient maturity’.<sup>98</sup> The Children’s Act strikes a distinction between HIV testing and all other forms of medical treatment.

The Act also provides that in the course of HIV testing of children, mature ones must be counselled to access their developmental capacity to understand the benefits, risks, and implications of the test<sup>99</sup> and for those who are not mature, it is important that their caregivers and parents aid in the counselling process.<sup>100</sup>

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<sup>97</sup> B.J.Hill ‘Constituting Children’s Bodily Integrity’ (2015) 64 *Duke Law Journal* 1295. Available at <http://www.nih.gov/pubmed/26016017>. (Accessed 10 April 2017).

<sup>98</sup> Another difference is that the child can consent to HIV testing below the age of 12, but cannot do so for other medical treatment, the Act does not stipulate when medical testing can be done without consent, and the best interest principle of the child is also not stated, but however it states this for HIV testing.

<sup>99</sup> Section 132 (2)(a) of The Children’s Act 2005.

<sup>100</sup> Section 132 (2)(b) of The Children’s Act 2005.

### **3.1.4 The extent to which the Children’s Act meets the international and regional standards that address the sexual and reproductive rights and health of the girl child**

#### **(a) The right to say no to child marriage**

This is protected for in section 12 of the South African’s Children’s Act<sup>101</sup>. It guarantees the right the child has to choose whether to engage in any social, cultural or religious practice and also the right not to be subjected to any of these practices that are harmful and detrimental to their well- being. Child marriage is included in some of these harmful cultural and religious practices and it is directed mostly at the girl child.<sup>102</sup> The strength of the framework in South Africa is that the Bill of Rights and Constitution as well as the Children’s Act expressly provides for the protection of children against harmful practices that are detrimental to their well-being.<sup>103</sup> The Children’s Act states the minimum age for marriage, which is 18 years<sup>104</sup> and this is in line with international standards.<sup>105</sup> The Act also puts the condition for marriage to be between two consenting parties and this is in line with international human rights instruments.<sup>106</sup> The Children’s Act, in Section 106(4) (c) also provides for child protection agencies and services to undertake investigations and assessments, in cases of child neglect, abuse, and abandonment.<sup>107</sup>

Despite the reality that forced marriages still happen in remote and poor societies in South Africa, the country’s Bill of Rights and other legislations empower women by giving them equal

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<sup>101</sup> Section 12 of The Children’s Act of 2005

<sup>102</sup> Ibid.

<sup>103</sup> Section 7 of the South African Constitution provides for the protection of the rights of all people in the country(which definitely includes children) and affirms democratic values of human dignity, equality, and freedom.

<sup>104</sup> See note 91 above.

<sup>105</sup> Article 16(2) of CEDAW prohibits underage marriage.

<sup>106</sup> Article 10 of the ICESR, affirms that marriage between two parties must be with their full consent, as opposed to forced marriage between two parties devoid of consent from one or both parties.

<sup>107</sup> Section 106((4) of The Children’s Act of 2005 available at <http://www.justice.gov.za/legislation/acts/2005.childrensact.pdf>. (Accessed 23 March 2017). This Act was promulgated on 8 April 2006 and came into force on 1 July 2007.

rights and prohibiting inequality and discrimination. This shows the strength of the framework in South Africa and the fact that it is going in the right direction in its goal of strengthening the sexual and reproductive rights of children. Adolescents have the right to choose who to marry and when to marry as this applies especially to the girl child, whom in most societies in Africa marriage is thrust upon them at a tender age, putting them at risk for sexually transmitted diseases, maternal and child morbidity and mortality alongside serious childbirth complications and defects.<sup>108</sup> Child marriage in developing countries mainly stem from cultural and religious beliefs<sup>109</sup> which is deeply rooted in communities.

**(b) Right to sexuality education**

As mentioned above, this right is provided for in section 13 of the Children's Act which provides for the right that the child has to access information regarding their sexuality and reproduction. This shows a strength in South Africa's framework as it plays an important role in addressing the sexuality of youths and reduces the spread of sexually transmitted infections (STI's) and HIV.<sup>110</sup> This is achieved as information about sex education is disseminated amongst the youth at schools across the country. However, there exists many societal beliefs about sex and sexuality, and as such, teachers face the challenge of educating their students freely about such private issues like sex in a public domain such as the classroom, as against the traditional beliefs, morals and societal norms of the communities.<sup>111</sup> This is akin to rural and urban areas alike, and according to Beyers,<sup>112</sup> effective sex education must be taken seriously as these cultural beliefs and norms

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<sup>108</sup> A. Olatubosun: 'Addressing the Phenomenon of Child Marriage in Nigeria (2001) 2 *Ife Psychol* 162.

<sup>109</sup> Besides these factors, other factors come into play as the cause of child marriage which include collapse of educational system, ignorance, cost of education, lack of seriousness of the girls, as well as household poverty all contribute to handing out of child brides by their parents or wards.

<sup>110</sup> C. Beyers 'Sexuality Education in South Africa: a socio-cultural perspective' (2011) 43 *Acta Academica* 193.

<sup>111</sup> M. Khau 'Our culture does not allow that': Exploring the challenges of sexuality education in rural communities (2012) 30 *Perspectives in Education* 64.

<sup>112</sup> Beyers (note 113 above) 195.

affect all classes of people, but especially the youth and it plays a major role in their understanding of it.

Sex education is so pertinent to the adolescent, especially the girl child and can prevent unwanted sexual and health challenges. With respect to the African continent, a report from the WHO<sup>113</sup> states that almost 45 million unwanted pregnancies end in abortion every year, and more than 40% of these women are in between the age of 15 to 24 years and these abortions are mostly carried out in unsafe conditions which have negative consequences such as the loss of fertility and sometimes even the loss of life. In South Africa, demographics show that adolescent fertility rate (childbirth at age 15-19) was 65 births per every 1,000 women,<sup>114</sup> while a survey showed that women said they had a pregnancy when they were adolescents.<sup>115</sup>

In South Africa, all children have equal access to education, even those who are poor or who may be infected with STIs like HIV/AIDS as these children can now attend school without any form of discrimination.<sup>116</sup> Furthermore, if the parents of the children can prove to the government that they cannot afford school fees, the learners will be exempted from paying fees, so admission will not be refused solely because the parent of the learner cannot afford school fees.<sup>117</sup> There is also flexibility as children can be exempted from school when they are ill. The effect of this is that every child has the opportunity to go to school and learn, without any form of discrimination, and to be imparted with information regarding their sexuality as well.

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<sup>113</sup> World Health Organisation (WHO) Reproductive Health Strategy to accelerate progress towards the attainment of international development goals and targets (2004) 7.

<sup>114</sup> T.A. Moultrie & I.M. Timaeus 'The South African Fertility Decline: Evidence from two censuses and a Demographic and Health Survey (2003) 57(3) Population Studies (Cambridge) 265-283.

<sup>115</sup> Department of Health; Pretoria, South African Department of Health 2008. The 2003 South African Demographic & Health Survey

<sup>116</sup> The School Health Policy and Implementation Programme, available at [www.rmchsa.org](http://www.rmchsa.org). (Accessed 21 February 2017).

<sup>117</sup> Ibid.



Also, the formulation of policies on sex education in schools in South Africa constitutes a strength in the framework for sexual and reproductive rights. The National Policy on HIV/AIDS for learners and educators in Public Schools 1999,<sup>118</sup> is a pertinent policy that was developed to tackle the widespread epidemic of HIV/AIDS in South Africa, as learners and educators form part of the population of schools and institutions.

It emphasises the point that these learners and students must not be discriminated against in relation to admission into institutions, attendance at school and disclosure of HIV status, even when there has been voluntary disclosure of HIV status; such information must be treated with confidentiality.<sup>119</sup> The concept of inclusive education which takes into cognisance the impact of the spread of HIV/AIDS, recognises the importance of sexual rights for adolescent learners.<sup>120</sup> The South African Schools Act of 1996 also guarantees compulsory education for learners between the ages of 7-15 devoid of any form of discrimination.<sup>121</sup> The framework on the right to sexuality education in South Africa can be said to meet the international standards outlined in this thesis.

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<sup>118</sup> National Policy on HIV and AIDS 1999, available at [http://www.ilo.org/wcmsp5/groups/public\\_aids/documents/legaldocument/wcms\\_125634.pdf](http://www.ilo.org/wcmsp5/groups/public_aids/documents/legaldocument/wcms_125634.pdf). (Accessed 4 May 2017).

<sup>119</sup> Ibid.

<sup>120</sup> Ibid Preamble to the National Policy on HIV and AIDS.

<sup>121</sup> The Government of South Africa: *The South African Schools Act No 84 of 1996* available at <http://www.cindi.org.za/files/Policy-Framework-For-OVC-Final.pdf>. (Accessed on 13 March 2017).

**(c) Right to access contraceptives**

As examined above, this right is provided for in Section 134<sup>122</sup> and it affirms the right the child has to access contraceptives and prohibits anyone from refusing to offer condoms to a child above the age of 12, when those condoms are available or distributed free of charge.<sup>123</sup>

It also protects a child's right to privacy when seeking contraception and contraceptive advice.<sup>124</sup>

These provisions have been considered very liberal in its approach and have contributed to a strong framework for access to termination of pregnancy services.<sup>125</sup> The Act also set South Africa apart and has achieved some laudable results regarding termination of pregnancies,<sup>126</sup> as there has been a substantial decline in termination of pregnancy maternal mortality rates.<sup>127</sup> 2011 recorded more lawful termination of pregnancies at 77780. This was a great increase as opposed to the figures in 1997.<sup>128</sup> It is clear to see that progress has been made in South Africa regarding access to contraceptive health.

Also policies implemented by the South African government's Department of Health<sup>129</sup> were updated to replace the then existing policies made over a decade ago<sup>130</sup> as they were revised to

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<sup>122</sup> The Children's Act 2005 (note 43 above) Section 134.

<sup>123</sup> Ibid. Section 134(1)(b)

<sup>124</sup> Ibid Section 134 (3).

<sup>125</sup> Republic of South Africa Department of Health: National Contraception and fertility planning and service delivery guidelines: A companion to the national contraception clinical guidelines (2012) available at [http://www.partners-popdev.org/wp-content/upload/National\\_contraception\\_family\\_planning\\_policy.pdf](http://www.partners-popdev.org/wp-content/upload/National_contraception_family_planning_policy.pdf). (Accessed 21 March 2017).

<sup>126</sup> Ibid.

<sup>127</sup> R. Jewekes & H. Rees 'Dramatic Decline in Abortion Mortality Due to The Choice On Termination Of Pregnancy Act (2005) 95 *SAMJ* 250.

<sup>128</sup> The Health System Trust reported this, available at <http://www.indicators.hst.org.za/healthstats/47/data>>. (Accessed 17 May 2017).

<sup>129</sup> Existing policies, such as The Republic of South Africa Department of Health: National Contraception and fertility planning and service delivery guidelines: A companion to the national contraception clinical guidelines (2012),

expand in scope and to include both the prevention of pregnancy (contraception), and the planning of pregnancy (conception), increase in access to female condoms, the promotion and increased access to emergency contraception pills as well as the incremental expansion of non-clinical settings as outlets for the provision of contraception.<sup>131</sup> The policies also makes provision for knowledge and patterns of contraceptive use, which is of immense value and importance to adolescents.<sup>132</sup> Thus, it recognises and takes into cognisance that contraceptives should be rendered to anyone that requires it<sup>133</sup> based on the provisions of the Constitution of South Africa<sup>134</sup> and any other rights based related instrument<sup>135</sup>

The strength of South Africa's legal framework in protecting the rights of a child to access contraceptives is evidenced in their comprehensive and forward-looking legislations and contraception policies.<sup>136</sup>

However, despite the general awareness of contraception, most adolescents still do not use contraception such as condoms during sexual activity, showing that even though there exists some general fundamental knowledge on contraception, it does not equate to having a deep understanding of the use of it.<sup>137</sup>

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<sup>130</sup> Republic of South Africa Department of Health: National Contraception Policy guidelines (2001) and National contraception service delivery guidelines (2003).

<sup>131</sup> Ibid 9.

<sup>132</sup> Ibid 17.

<sup>133</sup> Note 132 above.

<sup>134</sup> Section 28 of the Constitution of South Africa provides to equal access to health care for children which includes contraception.

<sup>135</sup> Section 134 of The Children's Act of South Africa guarantees the right that children have to access contraceptives freely.

<sup>136</sup> A.J Hoopes, V. Chandra-Mouli, P. Steyn, T. Shilubane, M. Pleaner 'An analysis of Adolescent Content in South Africa's Contraception Policy using a Human rights Framework'(2015) 57 *Journal of Adolescent Health* 617. Available at <http://www.sciencedirect.com/science/article>. (Accessed 23 May 2016).

<sup>137</sup> Ibid 618.

### 3.1.5 The Choice on Termination of Pregnancy <sup>138</sup>

South Africa enacted the Choice on Termination of Pregnancy Act on the 11<sup>th</sup> of December 1996, hereafter referred to as ‘The Choice Act’, which gives every woman, regardless of age or marital status, the right to access safe termination of her pregnancy<sup>139</sup> upon her request during the first 12 weeks of pregnancy and in some certain cases, up until the first 20 weeks of pregnancy.<sup>140</sup> The Choice Act was a crucial tool for the advancement of women’s rights and it showed recognition of the reproductive rights of women in South Africa’s first democratically elected parliament.<sup>141</sup> The Choice Act was a welcome development to replace the 1975 Abortion and Sterilisation Act which was failing to give women the services they desired, due to its restrictive provisions, especially for black women in the Apartheid era.<sup>142</sup> As found in many other countries, abortion is a sensitive issue<sup>143</sup> and, the morality of termination of pregnancies still stands as one of the most pressing and ethically contested issues today.<sup>144</sup>

The Choice Act clearly sets out the conditions under which a woman’s pregnancy can be terminated upon her request<sup>145</sup> as this is in line with the provisions of the Constitution which provides that “everyone has a right to bodily and psychological integrity, which includes the

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<sup>138</sup> The Choice on Termination of Pregnancy Act 92 of 1996 was commenced on 1 February 1997 (hereafter referred to as The Choice Act) available at <http://www.acts.co.za>. (Accessed 12 March 2017).

<sup>139</sup> Section 2(1) of the Choice Act, it also provides for termination of the pregnancy after 20 weeks of gestation, if a medical practitioner consults with another medical practitioner or registered midwife that the risks involved with the continuous stay of the baby in the womb far outweigh the benefits to the mother and baby.

<sup>140</sup> Ibid.

<sup>141</sup> S. Guttmacher, F. Kapadia, J. Te Water Naude, H.de Pinho ‘Abortion Reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act’ (1998) 24 *International Family planning perspectives*. Available at <http://www.guttmacher.org/pubs/journals/2419198.html>. (Accessed 13 April 2017).

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> A.Dhai, J. Moodley, M. O’Sullivan ‘Safe Termination of Pregnancy- an enabling ethical and legal framework’ (2002) 12 *Obstetrics and Gynaecology forum* 16.

<sup>145</sup> Section 2 of the Choice Act.

right to make decisions concerning reproduction.<sup>146</sup> The Constitution also provides that “everyone has the right to have access to health care services, including reproductive health care”.<sup>147</sup> This provision recognises reproductive rights in the constitution and is trite that these rights apply to pregnant women. Section 2(2) of the Choice Act also sets out clearly who can terminate a pregnancy:

The termination of a pregnancy may only be carried out by a medical practitioner, except for a pregnancy referred to in subsection (1):

(a) which may also be carried out by a registered midwife who has completed the prescribed training course.<sup>148</sup>

This is broad in its application as the termination of a pregnancy during the first twelve weeks of gestation is not limited to be carried out by medical practitioners alone, but well- trained midwives can also perform it, this increases access that women and children have to abortion services.

Section 5 provides for the termination of the pregnancy to take place only with the informed consent of the pregnant woman, and no consent other than that of the pregnant woman is required for the termination of the pregnancy<sup>149</sup>. In the case of a pregnant minor, Section 5 (3) provides:

In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is

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<sup>146</sup> Section 12 (2) (a) of the 1996 Constitution of South Africa.

<sup>147</sup> Section 27(1)(a) of the 1996 Constitution of South Africa.

<sup>148</sup> Section 2 Choice Act (note 148 above).

<sup>149</sup> Section 5(2) of The Choice Act 1996.

terminated: Provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them.<sup>150</sup>

This section is broad in its scope as it also provides for mentally unstable women or those in a state of continuous unconsciousness to have access to terminate their pregnancies, during the first 12 weeks of the gestation period or from the 13th up to and including the 20th week, and sets out the grounds upon which this can take place.<sup>151</sup>

The consent that is required for the termination of pregnancy is given by the woman and this provision is emphasised in Section 5 (2), thus, no additional consent from anyone other than the woman in question is needed before the termination of her pregnancy.

Since the consent of the woman is given top priority, and a woman is described as a female of any age,<sup>152</sup> this includes the girl child and that implies that she can exercise her rights to access termination of pregnancy freely as she needs it. However, the adolescent has the right to terminate a pregnancy that is as a result of rape or incest after the 20<sup>th</sup> week of pregnancy, and surprisingly this is not provided for in the Choice Act. A heavy burden is thus placed on women who have made their decisions to terminate a pregnancy later in the third trimester where pregnancy was a result of rape and incest.<sup>153</sup>

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<sup>150</sup>Ibid.

<sup>151</sup> Section 5 (4) (a) (b) of The Choice Act.1996.

<sup>152</sup> Definition of terms in 'Preamble' to The Choice Act 1996.

<sup>153</sup> DJ. MacQuoid- Mason 'Are there restrictive provisions of Sections 2(1) (c) and 5(5) of The Choice on Termination of Pregnancy Act 92 of 1996 (2006) *Journal of Juridical Science* 121.

According to Ngwena<sup>154</sup> reproductive health in the context of abortion must aspire towards a comprehensive reproductive health framework, and not just take a holistic approach or merely repeal laws that criminalise abortion. He is of the opinion that where abortion is allowed under domestic laws, then every woman has the right to the fulfilment of that law, and as such national authorities should make sure that the right to abortion is not merely written on paper, but a right that can be expressed for every woman in every place across the nation.<sup>155</sup>

### **3.1.6 The extent to which The Choice Act meets the international and regional standards that address the sexual and reproductive rights of the girl child**

The Act guarantees the right every woman has regardless of age and status, which includes adolescents, to access safe termination of her pregnancy upon her request in the first twelve weeks of pregnancy and in some cases up until the 20 weeks of pregnancy.<sup>156</sup>

Though The Choice on Termination of Pregnancy Act makes reference to the ‘woman’, its provisions apply to the girl child, as a ‘minor’ is defined in the Act meaning any ‘female person that is under the age of 18 years’.<sup>157</sup> This is in line with international agreements like the ICPD which provides for the right to safe abortion, management and consequences of abortion<sup>158</sup>. The CTOP also meets the standard of African regional instruments like the African Women’s Protocol which provides for the right to safe medical abortion for the adolescent,<sup>159</sup> encapsulates

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<sup>154</sup> C. Ngwena ‘Access to Legal Abortion: Developments in Africa from a reproductive and sexual health rights perspective’ 2004) 19 *South Africa Public Law* 331.

<sup>155</sup> Ibid.

<sup>156</sup> Section 2(1) of The Choice on Termination of Pregnancy Act 1996.

<sup>157</sup> Ibid.

<sup>158</sup> The ICPD held in Cairo 1994, available at <http://www.unfpa.org/publications/international-conference-population-and-development-programme-action>. (Accessed 3 February 2017).

<sup>159</sup> Article 14 (2) of the African Women’s Protocol.

her inherent right to personal autonomy and the freedom to choose what she would like to do with her body.<sup>160</sup>

### **3.2 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000<sup>161</sup>**

This Act was enacted to prevent and prohibit unfair discrimination and harassment. Furthermore, to promote equality and eliminate unfair discrimination, to prevent and prohibit hate speech and to provide for any other connecting matter.<sup>162</sup> South Africa continues to address these conditions as the Constitution upholds the rights to human dignity, freedom, equality and social justice. Section 8 of the Act clearly stipulates prohibition of unfair discrimination on the ground of gender,<sup>163</sup> and is as follows:

Subject to Section 6, no person may unfairly discriminate against any person on the ground of gender, including-

- a) gender-based violence
- b) female genital mutilation
- c) the system of preventing women from inheriting family property;
- d) any practice including traditional, customary or religious practice, 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;
- e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
- f) discrimination on the grounds of pregnancy;
- g) limiting women's access to social services or benefits, such as health, education or social security;

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<sup>160</sup>E.Durojaye & R.Amollo 'Advancing Adolescent Sexual Health rights in Africa' (2010) 11 *Economic and Social Rights in South Africa Review* 4.

<sup>161</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Available at <http://www.justice.gov.za/legislation/acts/2000>. (Accessed on 12th January 2017).

<sup>162</sup> Ibid. The Preamble to the Act.

<sup>163</sup> Ibid. Section 8.



- h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
  - a. systemic inequality of access to opportunities by women as a result of the sexual division of labour.

It is evident from the provision that the girl child and her rights to equality are guaranteed, as she should not be denied services based on her gender. The term ‘services’ is broad, as it is used in this context and can be said to include sexual and reproductive health care services. Also the dignity and well-being of the girl child<sup>164</sup> is expressly stated and guaranteed, as there is an outright prohibition of any practice, be it traditional, cultural or religious that impairs her inherent dignity and undermines her rights to equality.<sup>165</sup>

### **3.2.1 The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007<sup>166</sup>**

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No.32 of 2007) is also referred to as the Sexual Offences Act. This is an Act of the Parliament of South Africa that reformed the Law relating to sexual offences<sup>167</sup> and expanded the definitions of statutory crimes, like rape and indecent sexual assault.<sup>168</sup> The Act also provides for the victims of

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<sup>164</sup>Article 2 of CEDAW available at <http://www.un.org/womenwatch/daw/cedaw>. (Accessed on 2 March 2017).

<sup>165</sup>Ibid.

<sup>166</sup>The Criminal Law Sexual and Offences and Related Matters Amendment Act 32 of 2007, available at <http://www.saps.gov.za/./sexual> offences Act (Accessed 12 March 2017).

<sup>167</sup>W. Louw ‘Sexual Offences in South Africa’ (2013) Helen Suzman Foundation Resource Centre. Available at <http://www.hsf.org.za/resource-centre/hsf-briefs/sexual-offences-in-south-africa>. (Accessed 14 April 2017): Wikipedia, available at [http://en.m.wikipedia.org/./Criminal\\_Law\\_Sexual\\_Offences-and\\_related\\_matters\\_amendment\\_act](http://en.m.wikipedia.org/./Criminal_Law_Sexual_Offences-and_related_matters_amendment_act) (Accessed 15 March 2017).

<sup>168</sup>The Sexual and Offences Act (note 169 above) Sections 3 and 5.

sexual offences to have services available to them regarding their sexual health<sup>169</sup>, and created a national register for sex offenders.<sup>170</sup> In the definition section of the Sexual Offences Act which is in Chapter 1, the meaning of a child was defined, and it is pertinent to note, as this thesis focuses on the sexual and reproductive rights of children. Section 1 (1) (a) provides for the definition of a child under the age of 18 years;<sup>171</sup> he or she is a person 12 years or older but under the age of 16 years (this is in relation to Section 15 and 16 of the Act.

Section 15 and 16 criminalized consensual sexual penetration and sexual violation between children respectively, when these sections are read with the child defined in the Act in Section 1(1) (a) and (b), it will mean that section 15 and 16 concerns itself with the ‘sexual penetration’ and the consensual ‘sexual violation’ of a child in the age group of 12-15 years, and so sets the age of consent to be 16 years, this also means that if an adult has consensual ‘sexual penetration’ or ‘sexual violation’ with a child within the age group of 12-15, it will amount to an offence, under these sections.

Section 15 and 16 also went further to criminalise a wide range of consensual sexual activities between children of a certain age,<sup>172</sup> which include; a) a child aged between 16 and 18 years of age (that is a child of the age of 16 or 17 years) and a child aged 12 to 15 or; two children aged 12 to 15 years.

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<sup>169</sup> Ibid at Section 28.

<sup>170</sup> Ibid at Section 50(1) (a) (i) and 50 (2) (a) (i).

<sup>171</sup> Ibid. Section 1.

<sup>172</sup> Ibid.

It was on the grounds that the application was made as to the unconstitutional nature of these provisions, as it was a breach of the fundamental rights of children if consensual acts between them were criminalised<sup>173</sup>. This application was made in the landmark case of *The Teddy Bear Clinic for Abused Children and RAPCAN and others v Minister of Justice and the National Director of Public Prosecutions*<sup>174</sup>, the court found the provisions of Section 15 and 16 of the Sexual Offences Act 2007<sup>175</sup> which criminalised consensual acts between adolescents as invalid, unconstitutional and inconsistent within South Africa's Constitution.<sup>176</sup>

The outcome of the *Teddy Bear Clinic* case is very significant as it changed the outlook of sexual activity amongst children and has recognised its existence, which is good for their sexual and reproductive human rights as well as public health in society. It also addresses the issue of reporting consensual underage sex to the authorities.<sup>177</sup>

Another case, worthy of note is *J v The National Director of Public Prosecutions and Others*.<sup>178</sup> Here there was an automatic inclusion of the particulars of people who happened to be children when they committed the sexual offences in the National Register for Sex offenders, as

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<sup>173</sup> After much deliberations and submissions, Parliament has opted in June 2015 to decriminalize consensual sexual activity between children from ages 12-15. S.E. Duff 'Consent, Rights and the regulation of Childhood and Adolescent Sexuality in South Africa' (2015) *Wits Institute for Social and Economic Research*, available at <http://www.wiser.wits.ac.za>. (Accessed 2 January 2017).

<sup>174</sup> *The Teddy Bear Clinic for Abused children and RAPCAN and others V Minister of Justice and National Director of Public Prosecutions case CCT 12/13(2013) ZACC 35.*

<sup>175</sup> The Sexual and Offences Act (note 169 above) Section 15 and 16.

<sup>176</sup> The Constitution of South Africa (1996) available at <http://www.gov.za/constitution/constitution>. Accessed on 15<sup>th</sup> April 2017).

<sup>177</sup> Ibid.

<sup>178</sup> *J v The National Director of Public Prosecutions and Others (2014) ZACC 13.*

prescribed by the Sexual Offences Act<sup>179</sup> this was termed to be contrary to the best interest of a child principle and therefore, not reasonable or valid in a democratic society.<sup>180</sup>

The Sexual Offences Act 2007<sup>181</sup> was amended in line with the judgment of the Constitutional Court in *The Teddy Bear Case*.<sup>182</sup> It is now the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2015<sup>183</sup> and has included provisions that substitute Section 15 and 16 of the old Act which was contested.

The impact of these provisions in the amended Act of 2015 is that sexual behaviour between children or adolescents aged 12- 15 is decriminalised, and adolescents that are between the ages of 16-17 years of age that have consensual sex with children that are under the age of consent are protected from prosecution, so long as there is not more than a two-year age gap between them. This is the position today.<sup>184</sup> Children's sexual rights are evolving slowly and as defined by the 2002 WHO<sup>185</sup> report, a sexual right is not a stand-alone right and does not yet have authoritative force in international law.<sup>186</sup>

### **3.2.2 The extent to which The Sexual Offences Act meets the international and regional standards that address the sexual and reproductive rights and health of the girl child**

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<sup>179</sup> The Sexual and Offences Act (Note 169 above) Section 42.

<sup>180</sup> Act No 5 of 2015: Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 2015, Available at <http://www.gov.za/sites/www.gov.za/files/38977>. (Accessed 14th March 2017).

<sup>181</sup> The Sexual and Offences Act (note 153 above).

<sup>182</sup> Teddy Bear case (note 177 above).

<sup>183</sup> Criminal Law Sexual Offences and Related Matters Amendment Act 2015 (note 183 above)

<sup>184</sup> Ibid.

<sup>185</sup> WHO 'Defining Sexual Health, 'Report of a Technical Consultation on Sexual Health'(2002)28-31 *Sexual health Document series*, available at [http://www.who.int/reproductivehealth/publications/sexual\\_health/defining\\_sexual\\_health.pdf](http://www.who.int/reproductivehealth/publications/sexual_health/defining_sexual_health.pdf). (Accessed on 12 February 2017).

<sup>186</sup> L.Salona 'Child Savers V Kiddie Libbers': The sexual rights of Adolescents' (2014) 30 *SAJHR* 557.

This Act of Parliament of South Africa that reformed the Law relating to sex offences,<sup>187</sup> is a progressive development in South Africa's framework on protecting the sexual rights of adolescents. The reformed law<sup>188</sup> which came into existence in 2015 was amended in line with the judgment of the Constitutional Court in *The Teddy Bear Case*.<sup>189</sup> It is instructive regarding the child's right to sexuality in South Africa and makes the framework progressive.

There is a connection of a person's sexual rights to a person's right to both dignity and privacy.<sup>190</sup> This follows that an infringement on the right to one's privacy will automatically hinder the right to dignity<sup>191</sup>. These rights form the basis for sexual rights as Ngwena has argued.<sup>192</sup>

Though the legislation (The Sexual Offences Act 2007) was drafted with the aim of preventing adolescents from engaging in consensual sexual activities early, so as not to stall their development and improve healthy sexual outcomes, the question has now arisen as to whether these impugned provisions could really prevent these risks.<sup>193</sup> With relation to sexual rights, the constitutional court in its analysis of the impugned provisions and its effect on the infringement of the right to dignity, recognises that criminalising consensual sexual activity that is otherwise developmentally normative can reduce one's inner self-worth and dignity.<sup>194</sup> Khampepe J is clear on the fact that the judgment constrains itself with the constricted issue on the constitutionality of

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<sup>187</sup> W. Louw 'Sexual Offences in South Africa' (2013) Helen Suzman Foundation Resource Centre. Available at <http://www.hsf.org.za/resource-centre/hsf-briefs/sexual-offences-in-south-africa>. (Accessed 14 March 2017) Wikipedia, available at [http://en.m.wikipedia.org/./Criminal\\_Law\\_Sexual\\_Offences-and\\_related\\_matters\\_amendment\\_act](http://en.m.wikipedia.org/./Criminal_Law_Sexual_Offences-and_related_matters_amendment_act) (Accessed 15 March 2017).

<sup>188</sup> It is now the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2015.

<sup>189</sup> *The Teddy Bear Clinic for abused children and RAPCAN and others V Minister of Justice and National Director of Public Prosecutions case CCT 12/13(2013) ZACC 35.*

<sup>190</sup> Ibid para 64.

<sup>191</sup> Ibid.

<sup>192</sup> C. Ngwena; Sexuality Rights as Human Rights in Southern Africa with particular reference to South Africa' (2002) 17 SA Public Law 2, 3.

<sup>193</sup> *The Teddy Bear case* above para 87

<sup>194</sup> Ibid para 55.

criminalising adolescent conduct, and will not concern itself on the morality or the correctness of adolescent sexual activities.<sup>195</sup> A salient point recognised by the Court is that, it is part of the adolescent's experience to engage in consensual sexual activities, because it is part of their development.<sup>196</sup>

This is a great step for South Africa, and constitutes a strength in its legal framework, because it has recognised the need for the girl child to express her sexuality and engage in consensual healthy sexual relations. This has a profound bearing on the way, schools, parents, and caregivers will address the issue,<sup>197</sup> and this is in line with the ICPD which redefined the concept of sexuality by recognising a healthy and satisfying sex life as being a component of the sexual rights of females and adolescent girls.<sup>198</sup> This in itself is invaluable to the general development of the adolescent and an expression of her fundamental freedom. The Act also recognises the provisions in the African Women's Protocol<sup>199</sup>, which encourages the right of the girl child to embrace her sexuality without discrimination and marginalisation.

Sexuality is part and parcel of growing up and a knowledge of adolescent development is crucial, as it aids different approaches to supporting youths in the prevention of unplanned pregnancies.<sup>200</sup>

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<sup>195</sup> Ibid para 3.

<sup>196</sup> Ibid.

<sup>197</sup> D.J McQuoid- Mason 'Decriminalisation of consensual sexual conduct between children : what should doctors do regarding the reporting of sexual offences under the Sexual Offences Act until the Constitutional Court confirms the judgment of the Teddy Bear Clinic case'(2013) 6 *South African Journal of Bioethics and Law* 10-12

<sup>198</sup> The ICPD held in Cairo 1994, available at <http://www.unfpa.org/publications/international-conference-population-and-development-programme-action>. (Accessed on 3 February 2017).

<sup>199</sup> Art 2 of the African Women's Protocol.

<sup>200</sup> L.B. Hartman, E. Monasterio, L.Y. Hwang 'Adolescent Contraception: Review and Guidance for Paediatric Clinics' (2012) *Curr Probl Pediatr Adolesc Health Care* 222.

### **3.2.3 The South African Schools Act No 84 of 1996<sup>201</sup>**

This Act was established to provide uniformity in schools, administration, governance, and funding. Thus, schools are made to comply with national regulations regarding funding and organisation of systems.<sup>202</sup> The important feature of this Act is compulsory education for all learners between the ages of 7-15 years and learners are not to be exempted from school except in certain circumstances.<sup>203</sup> This provision enunciates the right to education for adolescents, despite their sexual status, for instance, a child living with HIV/AIDS should not be exempted from school, on any basis. The Act also provides for exemption of learner's school fees in some certain circumstances.<sup>204</sup>

### **3.3 National Education Policy Act No 27 of 1996<sup>205</sup>**

This Act is responsible for monitoring educational institutions in South Africa. It does not deal explicitly with the sexual and reproductive rights of adolescents, but certain provisions can be argued to protect these rights. For instance, Section 4 can be applied to children living with HIV/AIDS, the Government is enjoined in this provision to formulate policies that will aid in the advancement of the protection of the fundamental rights of these children as provided and guaranteed in Chapter 2 of the Constitution, and also in terms of other international conventions and treaties that Parliament has ratified. This provision seeks to protect people within the educational institutions from any form of discrimination whatsoever on any grounds.

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<sup>201</sup> Government of South Africa *The South African Schools Act No 84 of 1996* available at <http://www.cindi.org.za/files/Policy-Framework-For-OVC-Final.pdf>. (Accessed on 13 March 2017).

<sup>202</sup> R. O. Sarumi. 'The Protection of the rights of children affected by HIV/AIDS in South Africa and Botswana. A critical Analysis of the legal and policy responses'. (PHD Thesis, University of Kwazulu-Natal (2013) 161.

<sup>203</sup> Chapter 2 Section 3 of the South African Schools Act provides for compulsory attendance for all school learners, Section 4 on the other hand provides for exemption of learners from the compulsory attendance rule, which is compulsorily in the best interest of the learner.

<sup>204</sup> Section 40 of the South African Schools Act.

<sup>205</sup> Government of South Africa *National Educational Policy Act No 27 of 1996* available at <http://www.info.gov.za/acts/1996/a27-96pdf>. (Accessed 5 April 2017).

### **3.3.1 National Policy on HIV and AIDS education 1995**

In 1995, South Africa's Department of Education, together with its Department of Health and Welfare started to develop the National Policy on HIV and AIDS education, which was in response to the epidemic of HIV/AIDS, with an aim to implement the life skills curriculum in schools.<sup>206</sup> The policy stood as a guide for schools to set as a foundation for which specific programmes could be initiated and implemented across schools and institutions all around South Africa.<sup>207</sup> Also in 1995, South Africa ratified the UN Convention on the Rights of a Child,<sup>208</sup> which also led to the compulsory inclusion of sexuality education in all government schools which commenced from 1 January 1996. Sexuality education also became firmly ingrained in the Life Orientation learning subject area offered to Grade 10-12 learners in their curriculum.<sup>209</sup> Reproductive health became a mandatory part of the curriculum,<sup>210</sup> and the aim was to foster self-esteem, and self-worth which promotes sexual responsibility amongst youths.<sup>211</sup>

### **3.3.2 School Health Policy and Implementation Guidelines of 2011<sup>212</sup>**

Another policy worth noting is the School Health Policy and Implementation Guidelines of 2011. The goal of this policy is to contribute to the improvement of the general state of health of school-going children, so as to minimise health barriers to learning.<sup>213</sup> The policy in its

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<sup>206</sup> L. Thaver 'Sexual and HIV/AIDS education in South African secondary schools'(2012) Open Society Initiative for Southern Africa. Available at [www.osisa.org/buwa/south-africa/sexual-and-hiv-aids-education-southafrican-secondary-schools](http://www.osisa.org/buwa/south-africa/sexual-and-hiv-aids-education-southafrican-secondary-schools). (Accessed on 20 April 2017).

<sup>207</sup> Ibid.

<sup>208</sup> The provisions of the CRC is binding on South Africa.

<sup>209</sup> M. Naidoo 'An evaluation of the Sexuality Education Programme being implemented in South African Schools', (P.H.D Community Psychology, University of Zulu land, 2006), available at [www.uzspace.uzulu.ac.za](http://www.uzspace.uzulu.ac.za). (Accessed 21 February 2017).

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> The School Health Policy and Implementation Programme, available at [www.rmchsa.org](http://www.rmchsa.org). (Accessed 21 February 2017).

<sup>213</sup> Ibid.



documented findings reported a survey of sexual activity and behaviour amongst learners and found that ‘just less than 40 percent (37.5%) of learners had reported having sex, while 12.6% of them have had their first sexual encounter before the age of fourteen.’<sup>214</sup>

### **3.3.3 National Contraception and Fertility Planning Policy and Service Delivery Guidelines (2012)**<sup>215</sup>

This policy is a companion to The National Contraception Clinical Guidelines of 2012<sup>216</sup>.

This policy document is aimed at reprioritising contraception and fertility planning in South Africa,<sup>217</sup> it is a revised policy and was developed against the background of the HIV epidemic in South Africa.<sup>218</sup> In this revised policy, the prevention of pregnancy (contraception) and plans for a healthy pregnancy (conception) are embraced. The policy recognises challenges that adolescents face when trying to access contraceptive services, which include inaccurate ideas about contraception, judgmental attitudes of health caregivers, peer pressure to be sexually active and sexual coercion.<sup>219</sup> The Policy thus aims at providing quality contraceptive health services, stimulating community awareness of contraceptives, putting integration into practice as well as evidence-guided planning

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<sup>214</sup> Naidoo (note 212 above).

<sup>215</sup> Department of Health: *National Contraception and fertility planning and service delivery guidelines: A companion to the national contraception clinical guidelines* (2012) available at [http://www.partners-popdev.org/wp-content/upload/National\\_contraception\\_family\\_planning\\_policy.pdf](http://www.partners-popdev.org/wp-content/upload/National_contraception_family_planning_policy.pdf). (Accessed on 21 March 2017).

<sup>216</sup> *National Contraception Clinical Guidelines: A companion to the National Contraception and Fertility Planning and service delivery guidelines* (212) available at [http://www.gov.za/sites/www.gov.za/files/contraception\\_clinical\\_Guidelines\\_28Jan2013-2.pdf](http://www.gov.za/sites/www.gov.za/files/contraception_clinical_Guidelines_28Jan2013-2.pdf). (Accessed 15 May 2017).

<sup>217</sup> Ibid.

<sup>218</sup> C.A. Varga Sexual decision-making and negotiation in the midst of Aids: Youth in Kwazulu-Natal, South Africa (1997) 7 *Health Transition Review* 45-67. About one-third of young South African women are HIV positive, while two-thirds, though negative are at the risk of HIV infection.

<sup>219</sup> Department of Health (note 219 above) 18.

and provision.<sup>220</sup> All these steps are aimed at ensuring that access to contraceptives by whoever needs it, at any time will not be hindered.

### **3.3.4 National Contraception Clinical Guidelines (2012)<sup>221</sup>.**

This Policy is a companion to the National Contraception and Fertility Planning Policy and Service Delivery Guidelines (2012).<sup>222</sup> The Clinical Guidelines are based on the World Health Organization Medical Eligibility Criteria (WHO, MEC),<sup>223</sup> this is based on the suitability of the type of contraception, in the presence of specific factors including medical conditions. This is to ensure that women are not denied the contraceptive of their choice and at the same time limiting health risks. The use of contraceptives for adolescents is recognised and it asserts that no medical reason exists for the denial of contraceptives to adolescents based on young age alone, but other non-medical factors need to be taken into consideration before administering contraceptives to young people.<sup>224</sup> It also stresses the use of emergency contraception since sex most times with young people is spontaneous,<sup>225</sup> it encourages the use of condoms, as well as counselling on the proper and consistent use of condoms as it is very effective in the prevention of STI's, and HIV when used correctly, and it is also an optimal contraceptive means against pregnancy.

The policy also emphasises the need to sensitise young people, especially the girl child on abstinence, which is avoidance of sex, this offers complete protection against pregnancy, STIs,

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<sup>220</sup> Ibid

<sup>221</sup> Department of Health (note 219 above).

<sup>222</sup> Department of Health (note 219 above).

<sup>223</sup> WHO Medical Eligibility Criteria for contraceptive use 4<sup>th</sup> Edition (2009), Geneva: World Health Organization 2010.

<sup>224</sup> Department of Health (note 219 above) 59.

<sup>225</sup> Ibid.

and HIV. However, this should not prevent providing them with information on accessing the contraceptives, especially condoms and emergency contraception.<sup>226</sup>

### **3.4 The extent to which the policy framework meets the international and regional standards that address the sexual and reproductive rights of the girl child**

The importance of sexual education taught in schools in South Africa cannot be overemphasised, as it forms the basic element and foundation on which sexual and reproductive health and rights awareness rests on.<sup>227</sup> For example, HIV awareness and prevention programmes are introduced at school, to ensure that young people's needs are supported through these school-based sexuality education programmes.<sup>228</sup> Also policies implemented by the South African government such as the National Contraception and Fertility Planning Policy & Service Delivery Guidelines (2012) (PSD)<sup>229</sup> as well as the National Contraception Clinical Guidelines (2012)<sup>230</sup> show the efforts that South Africa has made to meet the standards set out in regional documents like The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (the African Women's Protocol), which expressly provide for the girl child's right to access contraceptives.<sup>231</sup>

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<sup>226</sup> Ibid.

<sup>227</sup> D.A Francis 'Sexuality Education in South Africa: Three essential questions' (2010) 3 *International Journal of Educational Development*. 314-319.

<sup>228</sup> Ibid.

<sup>229</sup> Existing policies, such as The Republic of South Africa Department of Health: National Contraception and fertility planning and service delivery guidelines: A companion to the national contraception clinical guidelines (2012).

<sup>230</sup> Republic of South Africa Department of Health: National Contraception Clinical guidelines: A companion to the national contraception and fertility planning policy and service delivery guidelines (2012).

<sup>231</sup> Article 14 of the African Women's Protocol is explicit in its provisions which gives the adolescent female the right to her sexual and reproductive health.

The strength of South Africa's legal framework in protecting the sexual and reproductive rights of the girl child is evidenced in their comprehensive and forward-looking policies.<sup>232</sup>

### 3.5 Conclusion

The legal and policy framework in operation in South Africa has been set out above, and the extent of their compliance with international norms and standards in the protection of the sexual and reproductive rights of adolescents.

It is clear that South Africa has taken steps to educate its youth and create awareness of sexual health amongst adolescents, due to its enactment of children friendly legislation through the Children's Act. This Act seeks to enshrine the best interest of the child standard<sup>233</sup> in all matters that concern the child.<sup>234</sup> This is also in line with the provisions of the CRC,<sup>235</sup> as well as provisions that protect the girl child's rights to her sexual and reproductive health, ranging from access to adequate health care to the right to sexuality and the choice of reproduction.<sup>236</sup> There is also the strong standpoint of the Bill of Rights enshrined in its constitution, thus affirming the rights that every individual must enjoy free from discrimination or oppression. This is in line with numerous international treaties and agreements as outlined above.<sup>237</sup>

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<sup>232</sup> A.J Hoopes, V. Chandra-Mouli, P. Steyn, T. Shilubane, M. Pleaner 'An analysis of Adolescent Content in South Africa's Contraception Policy using a Human rights Framework'(2015) 57 *Journal of Adolescent Health* 617. Available at <http://www.sciencedirect.com/science/article>. (Accessed 23 May 2016).

<sup>233</sup> Barrat (note 88 above).

<sup>234</sup> The Children's Act Section 7.

<sup>235</sup> Article 3 of the CRC.

<sup>236</sup> Ibid Sections 12, 13,134.

<sup>237</sup> The ideals as set forth in the CRC, CEDAW, ICESR, ICCPR, The ACHPR. The Maputo Protocol, and other non-binding instruments such as the ICPD and the Beijing Declaration, all enshrine equality of rights for the female gender without fear of discrimination.

Its numerous policies as outlined above are also on the priority list of the government to be revisited and updated to ensure that it is in line with international standards on the sexual and reproductive rights of adolescents.<sup>238</sup>

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<sup>238</sup> National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019 (2015) 5  
Available at [http://www.dsd.gov.za/index2.php?option=com\\_docman&task=doc\\_view&gid=578&itemid=39](http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=578&itemid=39).  
(Accessed 19 April 2017).

## CHAPTER FOUR

### THE LEGAL FRAMEWORK FOR THE SEXUAL AND REPRODUCTIVE RIGHTS OF CHILDREN IN NIGERIA

#### 4.0 Introduction

According to a survey taken in 2009,<sup>1</sup> Nigeria had a population of 140 million people with adolescents constituting about 20% or one-fifth of the total population. This means that more of the adult population received the right information about their sexual and reproductive health. About two-fifths of unwanted teenage pregnancies in Nigeria end up in abortions, and they are carried out by untrained medical personnel in very unsafe environments which leads to the majority of the complications in abortions that occur frequently in Nigerian hospitals.<sup>2</sup>

Reproductive health is hardly spoken about in Nigerian homes and can even be considered taboo; this leaves the girl child uninformed and then she begins to turn to friends and the media for information about her sexuality, sometimes, this information can be misleading.<sup>3</sup>

In this chapter the legal and policy framework for the sexual and reproductive rights of the girl child in Nigeria would be looked at critically. The sexual and reproductive rights to be analysed are the right to sexuality, the right to sexuality education, the rights to access contraceptives and the right to say no to child marriage.

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<sup>1</sup> N. Ameh, A.G Adesiyun, C. Ozed-Williams, A. O Ojabo S. Avidime H. Umar-Sullyman, A.I.Yusuf, E, N Enobun, A.Muazu 'Reproductive Health in Nigeria' (2009) 22 *Journal of Pediatric and Adolescent Gynaecology* 372.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

## **4.1 Application of international law in Nigeria**

Nigeria employs the dualist approach, in the enforcement of international treaties.<sup>4</sup> Under this approach, international treaties have to be enacted first by the national assembly for them to be enforceable in Nigeria. This makes international law directly unenforceable when dealing with national matters until it is enacted into domestic laws.

### **4.1.1. Ratification of international instruments in Nigeria**

Despite the lack of a comprehensive legal framework for the sexual and reproductive rights of children in Nigeria, it ratified the Convention on the Rights of a Child (CRC) on 16th April 1991, and also signed and ratified The African Charter on the Rights and Welfare of the Child on 12<sup>th</sup> of July 2001 with these actions culminating in the emergence of the Child Rights Act (CRA), as Nigeria took big steps to domesticate both instruments.<sup>5</sup>

However, the prevalence of Sharia law in the northern states has continued to defy all that these domestic and international laws stand for. In this vein, the highest law of the country which is the Constitution will be examined. The provisions of the Constitution are binding and supersede any other existing law in the country.

Section 4 of the Constitution<sup>6</sup> provides for the legislative powers of the country which is vested in the National Assembly, which consists of the Senate and the House of Representatives.

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<sup>4</sup>D. Sloss 'Treaty Enforcement in Domestic Courts' A Comparative Analysis (2009) 5.

<sup>5</sup> T.S.Braimah 'Child Marriage in Northern Nigeria Section 61 of Part 1 of the 1999 Constitution and the protection of children against child marriage' (2014)14 *AHR LJ* 475.

<sup>6</sup>Section 4 of the The Nigerian Constitution 1999, available at <http://www.icnl.org/research/library/files/Nigeria/constitution2.pdf>. (Accessed 4<sup>th</sup> January 2017).

Section 4(4) provides for the powers that the National Assembly has to make laws with respect to:

- (a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto.

Section 4(7) provides for the powers the State House of Assembly has to make laws on:

- (a) any matter not included in the Executive legislative list set out in Part 1 of the Second Schedule to this Constitution.
- (b) any matter included in the Concurrent legislative list set out in the First Column of Part II of the 2<sup>nd</sup> Schedule to this Constitution to the extent prescribed in the second column opposite thereto;

These provisions show the division of powers between the National and State house of Assembly, in terms of exclusive and concurrent legislative list.

#### **4.1.2 The Constitution of the Federal Republic of Nigeria, 1999<sup>7</sup>**

The Constitution of Nigeria is the Supreme Law of the Land, and its provisions are binding on its citizens.<sup>8</sup>The supremacy of Nigeria's constitution is its authority over every law in the land.

Section 1(3)<sup>9</sup> provides:

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.

The Constitution protects the human rights of Nigerians and divides these rights into civil and political rights, which are contained in Chapter IV of the Constitution<sup>10</sup> and socio-economic rights which are also contained in Chapter II of the Constitution.<sup>11</sup>

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<sup>7</sup> The Nigerian Constitution 1999, available at <http://www.icnl.org/research/library/files/Nigeria/constitution2.pdf>. (Accessed 4<sup>th</sup> January 2017).

<sup>8</sup> Ibid. Chapter 1(1)Part 1.

<sup>9</sup> Ibid. Section 1(3)

<sup>10</sup> Chapter IV of the 1999 Constitution comprises of Sections 33-46.



The civil and political rights are justiciable, while the socio-economic rights are not justiciable but are known as Fundamental Objectives and Directive Principles of State Policy.<sup>12</sup>

In Nigeria, the concept of legal pluralism exists,<sup>13</sup> where the laws that preside over the indigenous people are recognised and exist alongside the prevailing law in the land, and in this case, it is the received English Common law legal system.<sup>14</sup> The Customary law is an example of the laws of the indigenous people in Nigeria. Nigeria has many ethnic groups with their own type of unwritten laws that govern the conduct of the people.<sup>15</sup> Sharia law also exists in the Nigeria legal system and it is predominantly in the north, it derives its principles from Islam and its laws are written and defined clearly.<sup>16</sup> However, some provisions of these laws mentioned above often conflict with the provisions of the Constitution. For example, while the Constitution may guarantee the protection of equal rights for women on one hand, cultural practices under customary laws like underage marriage can still thrive. However, Customary Law in its application in Nigeria is subject to a repugnancy test, this test demands that for the customary law to be applied, it must not be contrary to natural justice, equity and good conscience.<sup>17</sup>

It is important to note that the Constitution does not have express provisions that protect the rights of children, but Chapter IV provides for the fundamental rights of citizens of the country, which are justiciable and can be adduced to protect the sexual and reproductive rights of

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<sup>11</sup> Chapter II of the Constitution comprises of Sections 13-24.

<sup>12</sup> F. O. Dada 'The justice ability and Enforceability of Women's Rights in Nigeria' XII *Global Journal of Human – Social Science* 51.

<sup>13</sup> J.Lokulo-Sodipe, O.Akintola, C. Adebamowo 'Legal Basis for Research Ethics Governance in Nigeria' (2014) *Western Bio-Ethics* . Available at <http://www.elearning.tree.org/mod/page/view.php?id=142>.. Accessed 12 June 2017.

<sup>14</sup> Ibid. Nigeria was a former colony of England and we inherited their legal systems.

<sup>15</sup> Note 12 above.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

children. However, though these rights are guaranteed by the Constitution, there still continues to exist some religious and cultural practices that undermine women, and the exercise of their fundamental rights.<sup>18</sup> Chapter IV of the 1999 Constitution consists of sections 33- 46. Section 33 (1)<sup>19</sup> guarantees the right to life which can be construed to guarantee the right to health, for all citizens, especially women and children regarding their sexual and reproductive health, thus giving them opportunities to access contraceptives when they need it. Governments must, therefore, take adequate measures to provide health facilities for their women and children,<sup>20</sup> and where women and children die from preventable diseases, it can be said that their right to life has been breached.<sup>21</sup>

Section 37 provides for the right to Private and Family Life.<sup>22</sup> This provision of the Constitution guarantees the privacy of homes, their conversations, and correspondences. The privacy of people must be respected and this includes being able to keep confidential all information regarding their sexual and reproductive health, it could be information about a person's HIV status or HIV testing, as a loss of confidentiality of information regarding one's HIV status can lead to stigma and discrimination.<sup>23</sup> The right to family life also includes the right for people to have a family and so compulsory pre-marital HIV testing as mandated by churches is an infringement on the right to privacy of those living with HIV/AIDS.<sup>24</sup>

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<sup>18</sup> E.Durojaye, B. Okeke, A. Adebajo 'Harmful Practices and Gender Equality in Nigeria' (2014) 12 *Ife Centre for Psychological Studies/Services*.6169-6181.

<sup>19</sup> Section 33 (chapter IV) of the 1999 Constitution.

<sup>20</sup> The White Paper on Review of Existing Reproductive Health Policies and Legislations in Nigeria (20<sup>th</sup> April 2006).

<sup>21</sup> A. Haruna An Analysis of The Legal and Institutional Framework for the realization of the right to health in Nigeria PHD Thesis, Ahmadu Bello University,2015) 93; .

<sup>22</sup> Section 37 Of the 1999 Constitution.

<sup>23</sup> M.T.Ladan 'Review of existing Reproductive Health Policies and Legislations in Nigeria' (2006), available at <http://www.gamji.com/article5000/NEWS5997.htm>. (Accessed 4<sup>th</sup> March 2017).

<sup>24</sup> Ibid.

Section 39 of the Constitution provides for the Right to Freedom of Expression and the Press<sup>25</sup>. “Everyone shall be entitled to freedom of expression including freedom to hold an opinion and to receive and impart ideas and information without interference’.<sup>26</sup>

Everyone has the right to receive, and impart information, which includes sexual and reproductive health information that is necessary for their general well-being. It also includes the right to receive HIV-related information necessary for prevention and care. The government is obliged to educate and inform the populace of relevant information on the reproductive and sexual health of individuals.

However, Section 42 of the Constitution is a pertinent provision that prohibits discriminatory practices against individuals on stated grounds. The word ‘gender’ is not used here as a ground for discrimination, but the word ‘sex’ is used and this can be interpreted to protect women from discriminatory practices. Thus, any harmful cultural practice such as forced and compulsory marriage for adolescent girls, is a violation of the provisions of Section 42 of the Constitution.<sup>27</sup>

The importance of reading Section 42 together with Section 1 cannot be undermined, as Section 1 (3) provides: 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. The meaning of this is that any harmful practice, whether cultural or religious that discriminates against women would be said to be in violation of the provisions of Section 42 of the Constitution.

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<sup>25</sup> Section 39 of the 1999 Constitution.

<sup>26</sup> Ibid.

<sup>27</sup> Nigerian Constitution (note 7 above).

In the context of sexuality rights, a person living with HIV/AIDS must not be discriminated against or unfairly treated, especially with respect to marriage or employment as these forms of discrimination are wrong and must be dissuaded, so that people living with HIV/AIDS will have the access that will help them thrive and live well, in spite of the disease. A combination of these provisions when read together can be construed to provide an enabling environment for sexual and reproductive rights of adolescents, however, there still remains a gap as the Constitution does not have any provision that addresses children's rights specifically. This in itself is a lacuna, being that the constitution is supreme and is the highest law of the land which other legislations are subject to. This would prove disadvantageous in the advocacy of children's rights.

#### **4.1.3 The extent to which Nigeria's Constitution meets the international and regional standards that address the sexual and reproductive rights of female children**

In Nigeria, like every other country, the constitution is the supreme law and its provisions supersede any act, law or policy in the nation.

The Constitution does not contain any provisions which expressly provides for rights of children, however, some of the provisions of the constitution can be interpreted to address children's rights.

(a) **The right to sexuality**

Section 37 of the Constitution which guarantees the right to privacy of citizens, their homes and correspondence can be argued to guarantee a child's right to sexuality. In most cultures, on the African continent, learning about sex is learning about guilt as adolescents are not allowed sexual freedom, and as such a girl having sexual relations is considered forbidden.<sup>28</sup> Adolescent sexuality is a highly contested subject, and as such, it is debatable as there is a preconceived notion that adolescents are not capable of making the right choices related to their sexuality. The autonomy of an individual as well as the right the adolescent has to non-discrimination should be a guiding factor in issues that relate to their sexuality.<sup>29</sup>

Durojaye, argues that a combination of rights, which include the right to autonomy, the right to privacy, the right to security, liberty and dignity form the bedrock from which an individual can make choices regarding their sexuality.<sup>30</sup> Though the wording used in Section 37 does not include women and girls, however, it can be interpreted to protect the sexual autonomy of girls by guaranteeing their right to privacy.

(b) **Right to sexuality education.**

The Constitution does not provide for this right, this is a weakness in the Nigerian legal framework, as there is no provision that clearly spells out children's rights. However, it

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> E. Durojaye, R. Amollo 'Advancing adolescents' sexual health rights in Africa' (2010) 11 *ESR Review* 3.

provides for the right to education<sup>31</sup> for all, and this is the starting point for sexuality education for children.

Section 39 of the 1999 Constitution provides that everyone shall be entitled to freedom of expression, including the freedom to hold opinions and to receive and impart ideas and information without interference.<sup>32</sup> Though it is not child specific or sexual and reproductive right specific, it can be interpreted to mean that everyone including the girl child has the right to receive information and education about their sexuality, without interference.

#### **4.1.4 The Nigerian Children's Right Act 2003<sup>33</sup> (CRA)**

Following Nigeria's commitment to domesticate the CRC in 1993 the bill for the Child Rights Act was passed, but it was only promulgated into law 10 years after in the month of July 2003.<sup>34</sup> However, the CRA is not enforceable in all the states of the country as of 2016, only 24 states had passed it into law.<sup>35</sup> This is as a result of the fact that Nigeria has thirty-six states that are sovereign in nature and equal to each other,<sup>36</sup> and each state operates its own laws as stipulated by the Constitution, and so the Child Rights Act cannot bind any state that has not enacted it into law, as well as the fact that no violations of children's rights can be prosecuted in

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<sup>31</sup> Section 18 of the 1999 Constitution, this right to education falls under the socio-economic rights guaranteed by the Constitution called Fundamental Objectives and Directive principles of State Policy, and they are non-justiciable.

<sup>32</sup> Section 7 of the Constitution of the Federal Republic of Nigeria, available at <http://www.justice.gov.ng>. (Accessed 4 January 2017).

<sup>33</sup> An Act to provide and protect the Nigerian Child and other related matters, available at <http://www.nigeriarights.gov.ng/files/download/40> (Accessed 6th April 2017).

<sup>34</sup> O.S. Akinwumi 'Legal impediments on the practical implementation of the Child Right Act 2003' (2009) 37 *International Journal of Legal Information* 385-396 391.

<sup>35</sup> UNICEF: 'UNICEF urges remaining 12 states in Nigeria to adopt the Child Rights Act' (2017) available at [http://www.unicef.org/Nigeria/media\\_11542.html](http://www.unicef.org/Nigeria/media_11542.html). (Accessed on 13 June 2017).

<sup>36</sup> Section 37 of the Nigerian Constitution 1999.

such states where the CRA has not been enacted.<sup>37</sup> This constitutes a weakness in itself, as some harmful practices which the CRA prohibits, are prevalent in some parts of Nigeria, like Northern Nigeria and dormant in some other parts of the country.

The CRA does not expressly provide for the sexual and reproductive rights of children but instead has broad provisions. This in itself is a weakness, as the name of the Act suggests that its provisions concern children and should encompass to a large extent all matters that concern children. Despite these, the provisions of the CRA are instructive regarding children. Section 1 speaks of the ‘best interest principle’ and this must be paramount in all matters that concern children. The CRA has provisions that are relevant to the sexual and reproductive health and rights of adolescents include:

**i. Right to access contraceptives**

Section 13 (1)<sup>38</sup> of the CRA provides: ‘Every child is entitled to enjoy the best attainable state of physical, mental and spiritual health.’<sup>39</sup> The implication of this section is that the child’s physical health is paramount to their well- being, which comprises of their sexual health, as well as their reproductive health. Therefore, it could be argued that no child should be discriminated against, when they seek information on health services that pertains to their sexual health, including access to contraceptives. The onus also rests on higher authorities, when it comes to attaining the best state of health for the adolescent, as Subsection 2 provides that:

Every Government, Parent, Guardian, Institution, service, agency or organization or body responsible for the care of a child shall endeavour to provide for the child the best attainable state of health.

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<sup>37</sup> Akinwumi (note 34 above).

<sup>38</sup> Section 13 of The CRA 2003.

<sup>39</sup> Ibid.

## **ii. Right to Sexuality Education**

The CRA does not contain any express provisions on sex education, but section 15<sup>40</sup> of the CRA guarantees the right that every Nigerian child has to education. It can be said to be the foundation for sex education.

## **iii. Right to say no to child marriage**

Sections 21-23 of the CRA guarantees the prohibition of child marriage, the prohibition of child betrothal, and the punishment for child marriage and betrothal. It is probably the only Act in Nigeria that guarantees this right which the child has to say no to child marriage.

Section 21 nullifies marriages with a child under the age of 18, while Section 22 also prohibits parents or guardians from betrothing their children under the age 18 and considers such betrothal as void. In addition, section 23 prescribes the punishment<sup>41</sup> for anyone who marries a child or promotes the marriage of a child.

Since child marriage is heavily influenced by Islam in Nigeria,<sup>42</sup> and there is a possibility of a clash between the law and religion in matters concerning the child, the best interest of a child principle must be followed and adhered to strictly, as children should be protected until they are wise enough to make mature decisions concerning their sexual and reproductive health and the emotional, psychological and mental well-being of the child must be considered. Also, the right

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<sup>40</sup> Section 15 of the CRA 2003.

<sup>41</sup> A fine of N500, 000 or imprisonment for a term of five years or to both fine and imprisonment.

<sup>42</sup> T.S Braimah 'Child Marriage in the Northern Nigeria: Section 61 of Part 1 of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *AHRLJ* 474.



to freedom of religion is limited by section 45 (1) which provides that nothing shall invalidate any law that is reasonably justifiable in a democratic society:

- (a) in the interest of defence, public safety, public order, public morality or public health or; (b) for the purpose of protecting the rights and freedoms or other persons.<sup>43</sup>

Thus, it is safe to say that the practice of religion should not be used as a defence for child marriage as it greatly hampers children's rights. Early marriage is a great responsibility as the girl child is not psychologically and physiologically ready for marriage and childbearing.<sup>44</sup>

#### **iv. HIV testing**

The CRA does not expressly provide for HIV testing, but it contains provisions that imply and sets the standards for any kind of scientific sampling and the consent that is required for children. This is provided for in Section 64.<sup>45</sup> Section 64(2) sets 16 as the age that consent must be obtained from the child, and will suffice as appropriate consent. Section 64(3) provides for any child under the age of 16 who needs to have scientific samples taken from him/her and it is stated that the consent of his/her care giver must be obtained for this.<sup>46</sup>

#### **4.1.5 The extent to which the CRA meets international and regional standards that address the sexual and reproductive rights of the girl child**

The CRA is the act that was enacted to address children's rights, however, sadly it does not address core sexual and reproductive rights of children, especially the girl child. This is a major

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<sup>43</sup> Child Rights Act (note 30 above). Section 45.

<sup>44</sup> J. A Walker 'Early Marriage in Africa – Trends, Harmful Effects and Interventions' (2012) 16(2) *African Journal of Reproductive Health* 231.

<sup>45</sup> Section 64 of the CRA 2003.

<sup>46</sup> Section 64(3) of the CRA 2003.

weakness as the Act fails to recognise that adolescents are evolving and consideration has to be taken regarding their sexual and reproductive rights, the Children's Act ought to be a charter for children in Nigeria, with the aim of protecting their rights. Sadly, this is not the case.

**(a) The right to sexuality:** The CRA does not provide for the age of sexual debut and the right of the girl child to access information or contraception that will enable her to make the right choices regarding her sexuality and sexual health. Thus, there exists a weakness in the framework. There is also no provision in the framework that expressly empowers the girl child to address her sexuality by having access to contraception or otherwise, without feeling a form of discrimination, this is important, as the Nigerian system has deep-rooted cultural and religious beliefs that depict the woman as a man's property that should be seen and not heard.<sup>47</sup>

**(b) Right to sexuality education**

The CRA does not expressly provide for the right to sexuality education for adolescents, however, it guarantees the right that a child has to free, universal and basic education. It can be implied that the right the child has to receive information regarding their sexuality flows from this right. Parents are enjoined in this provision to ensure that their children and wards attend primary school and junior secondary education.<sup>48</sup>

The deficiency in the framework in Nigeria, concerning the protection of the right to education is that it is docile in the protection of the sexual and reproductive rights of children, because there is no significance attached to it by the educational system. Furthermore, there is no national

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<sup>47</sup> Note 42 above.

<sup>48</sup> Section 15(2) of the CRA.

curriculum on sexual and reproductive health taught in schools. In addition, though the Constitution provides for freedom to impart and receive information freely, it does not however, make any reference to receiving information on sexuality education for all, especially adolescents. Though this weakness exists, the right to free basic primary education that the Constitution and the Child Rights Act shows that Nigeria is taking steps to actualise these rights in consonance with international law standards.

**(c) Right to access contraceptive**

In Nigeria, there is no right to access contraceptives by the girl child guaranteed in the Constitution as well as the Child's Rights Act.

There seems to be a focus on the use of contraceptives by married couples and the girl child is not taken into consideration. Furthermore, most government health institutions have contraceptives available, but adolescents will find it difficult to access them due to lack of confidentiality and the judgmental attitude of the service providers.<sup>49</sup>

According to Arowojolu 'Unfortunately, the use of contraceptives among Nigerian youths is poor due to the fear of side effects and the negative cultural attitude of parents/guardians to contraceptive use'. There is also a lack of youth-focused centers established in institutions that cater for the sexual and reproductive health of adolescents.<sup>50</sup>

It would have been an ideal situation if adolescents could access contraceptives at a certain age, but the patriarchal society of Nigeria often impedes the adolescent from knowledge about their

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<sup>49</sup> M.T. Ladan 'Review of existing reproductive health policies and legislations in Nigeria' (2006). Available at <http://www.gamji.com/article5000/NEWS5997.htm>. (Accessed 12 June 2017).

<sup>50</sup> A.O. Arowojolu et al 'Sexuality, contraceptive choice and AIDS awareness amongst Nigerian undergraduates' (2002) 6 *African Journal of Reproductive Health* 60-70.

sexuality and how to prevent pregnancies and STI's, sex education is considered taboo and the matter is seldom talked about in families. This undermines the importance of parents and guardians as the primary educators on the sexuality of their children and wards.<sup>51</sup> Other factors like religion constitute a barrier for adolescents' right to access contraception, in the northern parts of Nigeria. Sharia Law is dominant and adolescent girls are prohibited from engaging in sexual activities before they are married as well as seeking information relating to her sexuality<sup>52</sup>

Christianity as practiced mainly in the southern parts of Nigeria also frowns at sexual activity amongst adolescents before marriage, so a girl who might be seeking a contraceptive for her health benefit will be judged as promiscuous and irresponsible.<sup>53</sup> These beliefs stifle non-procreative pleasurable sex, as well as masturbation and oral sex amongst adolescents, as they are thought to be sinful and unacceptable.<sup>54</sup> Some of these negative societal values undermine the sexuality of the woman and the girl child.<sup>55</sup>

Moreover, it is pertinent to note that Nigeria, as a former British colony, has retained Common law legislation that date back to January 1, 1900,<sup>56</sup> so when viewing the context of minor's consent to treatment in Nigeria which includes contraceptive means, the societal values, and norms as well as the rule of reception make the Common law rule the accepted general rule in Nigeria. This rule of Common Law provides that minors cannot give valid consent to medical treatment until they attain the age of majority as they are deemed to be incompetent to give

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<sup>51</sup> E. Durojaye 'Children and Adolescents' Access to Reproductive and Sexual Health Care' in I.O. Iyioha & R.N .Nwabueze (ed) '*Comparative Health Law and Policy: Critical Perspectives on Nigerian and Global Health Law (2015)*' 153.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Note 51 above 153.

<sup>55</sup> A.A. Apomfo 'When We Speak, Women Listen: Gender Socialisation and Young Adolescents Attitudes to Sexual and Reproductive Issues' (2001) *5 African Journal On Reproductive Health* 198.

<sup>56</sup> Note 51 above 154.

consent that is independent of their parents and guardians.<sup>57</sup> This will greatly impede and hinder the access that adolescents have to contraceptives as they might be termed too immature to access contraceptive services.<sup>58</sup>

The issue of adolescent consent to sexual health treatment was addressed in the British case of *Gillick vs West Norfolk and Wisbech Health Authority and Department of Health and Social Security*.<sup>59</sup> Here, the claimant sought a declaration stating that it was unlawful for a doctor to prescribe contraceptives to a girl under the age of 16 without the knowledge and consent of her parents; her declaration was refused and the Court held that it does not see any reason why a boy or girl who is below the age of 16 cannot give effective medical consent to receive medical treatment, provided that the minor is capable of understanding that which is proposed, and he or she has sufficient intelligence to make his or her own decisions. Although this decision is not binding on Nigerian courts, it is persuasive and can be heavily relied upon when deciding similar cases.

However, it is unlikely it will hold sway because it has been argued that due to the socio-cultural values and norms in Nigeria which cannot be out-rightly overlooked, it may become necessary for parents to know about some of the medical treatments that their children or wards received, and so this must be reflected in legislations or policies to be drafted so that parents can give their full emotional support and children won't have unrestrained liberty to make ill-informed

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> *Gillick v West Norfolk and Wisbech Health Authority and Department of Health and Social Security* (1986) 1 AC 112 House of Lords.

decisions.<sup>60</sup> This socio-cultural norms can be said to stifle children's rights in this regard because of the inclusion of parental guidance in decision making.

Ngwena supports the view in *The Gillick case* and asserts that the consent a child gives regarding his or her competence when receiving medical treatment should be based on fact and this depends on the child's ability to understand the nature and importance of the treatment that is being sought, this view reflects recent discussions on children's rights to act in certain capacities without recourse to their parent's knowledge or consent.<sup>61</sup>

**(d) Right to say no to child marriage,** In Nigeria, the legal framework regarding child marriage is not devoid of complexities. The right to say no to child marriage is a sexual and reproductive right that must be protected in the interests of the girl child. It is important to note that religious and cultural beliefs have hindered the exercise and enjoyment of these rights and has led to the predominance of early child marriage in most developing African countries, and related to this thesis, especially in the northern parts of Nigeria. In these parts, child marriage is a traditional cultural practice that is heavily influenced by Islam.<sup>62</sup> Statistics show that by age 15, 48 percent of the hausa-fulani girls are already married, while 78 percent are already married by age 18.<sup>63</sup>

In Islam, there is no age bracket that defines what childhood is,<sup>64</sup> as one can be said to have attained maturity by the display of certain characteristics which include breasts on the chest, the

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<sup>60</sup> Note 51 above 163.

<sup>61</sup> C. Ngwena 'Health Care Decision-Making and the Competent Minor: The Limit of Self-Determination' (1996) *Acta Juridica* 132, 140.

<sup>62</sup> Braimah (Note 42 above)

<sup>63</sup> United Nations Population Fund 'Early Marriage in Nigeria'. Available at <http://www.nigeria.unfpa.org/nigerianchild.html> (Accessed 15 March 2017).

<sup>64</sup> Ibid.

appearance of pubic hair and the onset of menstruation. Nigeria is a pluralist state.<sup>65</sup> It employs judicial precedents as a former British Colony, but it also gets its law from Sharia law, customary laws, and legislations. With these multiple sources, there exists some implications for women's rights.<sup>66</sup>The Constitution<sup>67</sup> protects the right to freedom, equality, and justice and it also recognises the sanctity of the human person and the enhancement of human dignity.

The promulgation of the Child Rights Act (CRA) in 2003, showed signs that Nigeria intended to domesticate the Convention on the Rights of the Child.<sup>68</sup> Braimah<sup>69</sup> described the CRA as having a bark and no teeth, as the CRA has been implemented in some states of the Federation, while some states that have not domesticated the CRA and are at liberty to do what they please regarding the sexual and reproductive rights of children.<sup>70</sup>

The CRA prohibits the marriage and betrothal of children and expressly provides for this in Section 21, setting the age for a valid contractual marriage to anyone to be 18 years or older, and any marriage contracted with anyone below this age is null and void and of no effect whatsoever.<sup>71</sup> Section 22 also stipulates the sanctions that apply to anyone that engages in such a practice. However, some weakness exists in the CRA impeding in the realisation of the sexual and reproductive health needs of children in Nigeria.

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<sup>65</sup> This describes a situation where the subject matter or issue is regulated by multiple laws, norms, or forums that co-exist within the same jurisdiction.

<sup>66</sup> E.Durojaye 'The African Commission on Human and People's rights and the promotion and protection of sexual and reproductive rights' (2011) 11 *AHRLJ*374.

<sup>67</sup> Section 17 of the Constitution of the Federal Republic of Nigeria 1999.

<sup>68</sup> Durojaye (note 66 above).

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

<sup>70</sup> *Ibid.*

<sup>71</sup> Part III Section 21 of the CRA.

**a. The CRA was not enacted into all the thirty-six states of Nigeria.**

The CRA, when passed, was not automatically enacted into law in all the 36 states of the federation of Nigeria. It had to be passed into law in each state, for it to carry the full weight of being enforceable and having the capacity to protect the rights of children.<sup>72</sup> Since the CRA was passed in 2003, 12 states<sup>73</sup> are yet to enact it into law, what this means is that children's rights will not be protected in these states regarding forced child marriage and if child marriage occurs it will not be an offence in these states.<sup>74</sup> Apart from the state of Enugu, the other 11 states that have not enacted the CRA into their state laws are in the northern part of Nigeria, and it is not surprising as these states are heavily influenced by cultural practices and Islam, and they have adopted the Penal code which has its foundation in Sharia law.<sup>75</sup> The CRA and its provisions conflict with Islam and Sharia Law, regarding the minimum age set by the CRA for marriage and betrothal of children which is 18 years, and a child is anyone under 18 years as set by the CRA. In Islam, there is no set age for the determination of maturity and childhood maturity is determined by puberty and its signs which are menstruation, the growth of breasts and pubic hair.<sup>76</sup> The state of Jigawa which is a northern state in Nigeria that enacted the CRA did not adopt the age of 18 years to be the age of maturity, as set by the CRA, but determined adulthood by the signs of the onset of puberty.<sup>77</sup> The age requirement for a child which is 18 as regulated by law in the CRA is a determinant as to why the CRA has not been passed into law in these northern states.<sup>78</sup>

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<sup>72</sup>Braimah (note 42 above).

<sup>73</sup> Enugu, Kaduna, Kano, Sokoto, Kebbi, Borno, Yobe, Gombe, Adamawa, Bauchi, Katsina and Zamfara.

<sup>74</sup> Braimah (note 42 above).

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Jigawa Child Rights Law 2008.

<sup>78</sup> Sec 21 CRA.



A case in point is Ahmed Yerima, who was a serving Governor of Zamfara state in Nigeria between 1999-2007. He got married to his chauffer's daughter, a 13- year- old Egyptian girl, and although this marriage caused a lot of uproar as it was in direct contravention of Section 21 of the CRA,<sup>79</sup> Yerima justified it on religious grounds saying that the Prophet Mohammed (SAW) married a girl, Aisha at nine years, and therefore, his actions were in line with his Islamic religion and he could not be convicted. The sitting Attorney General at that time ruled in his favour that, the marriage was under Islamic law and the girl in question was an Egyptian and was brought into the country by her parents to be married off to him, and so, the CRA is not applicable to her.<sup>80</sup> This decision was not a favourable one in the eyes of activists, as it could be said that a religious practice seeks to override the legislation of the land. This is not an ideal situation and it highlights a huge weakness in the framework relating to child marriage in Nigeria.

The provisions of the Constitution, under Second Schedule Part 1 Item 61, states that:

The formation, annulment, and dissolution of marriages other than marriages under Islamic Law and customary law including matrimonial causes relating thereto.

Since customary laws and Sharia laws exist alongside the common law in Nigeria, the Federal Government cannot interfere with Islamic or customary law marriages.<sup>81</sup> Thus, where a child marriage is conducted under Islamic or customary law and is a direct violation of the CRA, it can still be a valid marriage and the parties will not be prosecuted, because they can hide under the constitutional backing of Part 1,Section 61 of the 1999 Constitution, as any interference from

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<sup>79</sup> The perpetrator of child marriage was liable to a fine of N500,000 or imprisonment for a term of five years or to both fine and imprisonment

<sup>80</sup> Braimah (note 42 above)

<sup>81</sup> Ibid.

the Federal Government regarding the marriage will be in contravention of this provision and the Constitution is the supreme law of the land and its provisions override any legislation. This was the case with Ahmad Yerima, hence he could not be prosecuted.<sup>82</sup> The CRA is made useless by this constitutional provision and this constitutes a weakness in the framework.

Also since customary laws and Sharia laws operate alongside the Common laws in Nigeria, another weakness is the conflict that CRA has with sharia law which is operative in most of the northern states of Nigeria regarding religion because while the CRA tries to outlaw child marriage which is a part of Islamic beliefs, it then goes on to violate the right of freedom, thought and religion which is provided for in Section 38(1) of the 1999 Constitution, which provides thus:

Every person shall be entitled to freedom of thought, conscience, and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice, and observance.s

However, in situations where law and religion are placed against the well-being of the child, the best interest of the child must be taken into consideration in all matters that affect the child. Moreover, Section 38 (1) of the Constitution regarding religion is not absolute as Section 45 (1) states that:

Nothing in section 38 will invalidate any law that is reasonably justifiable in a democratic society

(a) in the interest of defense, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedom or other persons.

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<sup>82</sup> Ibid.

Thus, child marriage as part of Islam is a harmful practice that affects the child psychologically and physically, hindering her development and an outright violation of her sexual and reproductive rights.

The practice of Sharia law in the northern states and their non-acceptance of the provisions of the CRA as well as their refusal to adopt and enact the CRA into law in their states, constitutes a huge weakness in the realisation of the sexual and reproductive rights of children in the region. The state of Jigawa, being a northern state enacted the CRA as the Child Rights Law, and though this seemed like a laudable step in the right direction regarding child marriage, the stipulated age of 18 years as stated by the CRA as a determination for marriage was substituted by “puberty”, as this seemed right with the cultural practices of the people.<sup>83</sup> Thus, the issue of child marriage is reflected and is ingrained in the beliefs of the people as they will rather marry off their children and go to jail, or face any other sanction the Child Rights Law prescribes, than having a grandchild born out of wedlock. Thus, the Jigawa CRL still does not meet the need for the sexual and reproductive rights of the girl child in northern Nigeria. The domestication of the CRA attempts at prohibiting forced child marriage, but it is also being stifled by constitutional and religious hiccups, thus constituting a weakness in the realisation of the child’s sexual and reproductive health needs in Nigeria.

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<sup>83</sup> The Secretary of Jigawa state Judicial Reform Commission who reviewed the Law stated that they substituted the original age of 18 as the age of marriage with “puberty”, as it was the acceptable stance with the people of Jigawa state. Women Living under Muslim Laws (WLUML) Nigeria: Early Marriage leads to socio-economic woes’ available at <http://www.wluml.org/node/4904>. (Accessed 14 March 2017).

#### **4.2 The Criminal Code Act CAP 77 Laws of the Federation of Nigeria (1990) and the Penal Code Law No18 of 1959**

The Criminal Code Act is applicable in the southern part of Nigeria. It prescribes offences and punishments for criminal offenders in the southern part of the country while the Penal Code Act is applicable in the northern part of the country.

The Criminal Code Act provides for the age at which a girl can consent to sexual intercourse which is at 16 years old<sup>84</sup> whereas for the boy, it is at the age of 14.<sup>85</sup> Thus, Section 222 of the Act provides that if an adult has sexual intercourse with a girl under 16, it is regarded as a crime, mostly referred to as statutory rape.<sup>86</sup>

Section 222 of the Act aims at protecting the adolescent from sexual exploitation and abuse, therefore, with respect to the child's right to sexuality, it can be construed that sexual debut really begins at 16 years for a girl, as the Law sets that age considering the fact that the young girl is mature enough to make decisions regarding her sexuality.

The Penal code on the other hand, does not provide for the sexual awareness and rights of adolescents, especially the girl child, but in Section 216 provides for unlawful termination of pregnancy.<sup>87</sup> This provision can be interpreted to mean that safe abortion can be carried out if the mother's life and health are at risk. However, if that is not the case, and the life of the mother is not threatened, the Penal code prescribes punishment for the pregnant female in the form of

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<sup>84</sup> Criminal Code Act Cap 77 Laws of the Federation of Nigeria (1990) Section 222 of the Code.

<sup>85</sup> Ibid Sec 216.

<sup>86</sup> Section 222 of The Criminal Code prescribes a punishment of imprisonment of two years, with or without caning for anyone who indecently deals with a girl under age 16.

<sup>87</sup> Section 216 of the Penal Code Act.

imprisonment and the person who carried out the act of abortion, liable to a number of years of imprisonment.<sup>88</sup> This Law is anti-developmental in nature and is at variance with fundamental human rights and freedom that exist in international treaties and agreements of which are binding on Nigeria.<sup>89</sup>

#### **4.2.1 The extent to which the Criminal Code and the Penal Code meet the international and regional standards that address the sexual and reproductive rights of the girl child**

Sexual debut for adolescents in Nigeria is set at 16 for girls and 14 for boys.<sup>90</sup> This age differs and it goes to show the patriarchal nature of Nigerian society, as it seems that it is only traditional for a boy to be sexually active earlier, while girls ought to be reserved and not have sex until they are much older.

The Criminal Code Act of 1990 which is the Act that is applicable to criminal offences in the southern parts of the country, prohibits any form of sexual exploitation with a girl below the age of 16 years and lists sanctions for offenders.<sup>91</sup>

Thus, it can be inferred from the Act that any sexual activity with children under the age of sixteen is considered an offence and punishable by the State. Here the Act makes no reference to adolescents within a particular age bracket who agree to consensual sex among themselves, because at that age it is inevitable and it is an integral process of nature which must happen

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<sup>88</sup> Imprisonment for a period not more than seven years, while the one who carried out the act, will face imprisonment of not more than three years in jail. , provided for in Section 216 of the Penal Code.

<sup>89</sup> These treaties were discussed above in Chapter 2.

<sup>90</sup> Section 222 and 216 of The Criminal Code Act Cap 77 Laws of the Federation of Nigeria (1990)

<sup>91</sup> Section 218-222 of The Criminal Code LFN 1990

someday, and therefore must not be criminalized.<sup>92</sup> This is considered a weakness in the Nigerian framework as there is no place for consensual sexual relations between adolescents. This is not in line with international treaties and agreements, as well as regional instruments that seek to protect a child's sexual and reproductive rights. The punishment prescribed by the Penal Code to a woman who commits a safe abortion on grounds other than preservation of her life,<sup>93</sup> is against the fundamental freedoms enshrined in international agreements discussed in this thesis.<sup>94</sup> Nigeria has no place for laws that protect an adolescent's right to safe termination of her pregnancy, and this has adverse implications on the youth in Nigeria as unsafe abortions will still continue to occur nonetheless.<sup>95</sup> This is a major weakness in the legal framework of Nigeria.

#### **4.2.2 National Reproductive Health Policy and Strategy to Achieve Quality Reproductive and Sexual Health for all Nigerians (2001)<sup>96</sup>**

The ICPD which was held in Cairo, Egypt in 1994, shed light on the need to address the sexual and reproductive health needs of women and girl children. Nigeria as a country embraced the reproductive health concept and took steps to ensure that the targets of the ICPD are met, in the interest of the reproductive health and well-being of the citizens. This policy document is an example of the commitment of the country to optimise reproductive health care.<sup>97</sup> Responsibility is placed on the government to ensure that primary health care is available for all, as well as

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<sup>92</sup> Criminal Code Act Cap 77 Laws of the Federation of Nigeria (1990) Section 222 of the Code.

<sup>93</sup> Section 216 of the Penal Code.

<sup>94</sup> The CEDAW provides for condemnation of discrimination against women in all its ramifications in Article 2. The African Women's Protocol in Article 2 provides that a woman should not be discriminated against because she desires to terminate her pregnancy.

<sup>95</sup> F. Okonofua 'Preventing Unsafe abortion in Nigeria' (1997) 1 *African Journal of Reproductive Health* 25-36.

<sup>96</sup> Govt. of Nigeria *National Reproductive Health Policy and Strategy to Achieve Quality Reproductive and Sexual Health for all Nigerians* Available at <http://www.youth-policy.com/policies/Nigeria> (Accessed 5 April 2017).

<sup>97</sup> Ibid.

being prioritised in the allocation of the nation's resources.<sup>98</sup> It was also posited that health care services should be equitably distributed in the country so that people who need it the most, especially in the rural areas, are not left out or marginalised. In the exact wordings of the policy:

The overall goal of the Reproductive Health Policy shall be to create an enabling environment for appropriate action, and provide the necessary impetus and guidance to national and local initiatives in all areas of reproductive health.<sup>99</sup>

Some of the objectives and targets of the policy that touches on the sexual and reproductive rights of children between the periods of 2001-2006 include reducing the level of unwanted pregnancies in all women of reproductive age by 50%<sup>100</sup> and the decrease in the incidence and prevalence of sexually transmitted infection including the transmission of HIV infection.<sup>101</sup> The policy also aims to limit all forms of gender-based violence and other practices that are harmful to the health of women and children.<sup>102</sup> In addition, the policy aims to reduce gender imbalances in the availability of reproductive health services,<sup>103</sup> as well as promoting responsible behaviours of adolescents regarding unwanted pregnancy and sexually transmitted infections.<sup>104</sup> Other targets of the policy include<sup>105</sup> reducing the prevalence of infertility and providing adoption services for infertile couples.<sup>106</sup> This policy document generally exhausts most of the core sexual and reproductive health issues and aims at ensuring they are realised for the citizenry in Nigeria.

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<sup>98</sup> Ibid 4.

<sup>99</sup> Ibid Sec 3.1.

<sup>100</sup> Ibid Sec 3.2.3.

<sup>101</sup> Ibid Sec 3.2.4.

<sup>102</sup> Ibid Sec 3.2.5.

<sup>103</sup> Ibid Sec 3.2.6.

<sup>104</sup> Ibid Sec 3.2.8.

<sup>105</sup> Ibid Sec 3.2.9.

<sup>106</sup> Ibid Sec 3.2.10.

### **4.2.3 National Gender Policy (2006)<sup>107</sup>**

The National Gender policy originated from the Federal Ministry of Women Affairs and Social development which serves as the medium through which the health and development of Nigerian women are actualised. It is also the vehicle that has the task of ensuring the protection, survival and healthy development of children into adulthood.<sup>108</sup>

The goal of the National Gender Policy is to foster a society free of discrimination and the promotion of the exercise and enjoyment of fundamental human rights and also to ensure the empowerment of women which can be achieved by harnessing and developing their capabilities. It also aims at making sure that the society is gender responsive. This instrument seeks to promote gender equality by eliminating all social, cultural and religious practices that are detrimental<sup>109</sup> to the girl child, and setting up laws in place that penalise offenders and perpetrators of discriminatory practices.

### **4.2.4 National Policy on the Health and Development of Adolescents and Young people in Nigeria (2007)<sup>110</sup>**

As the need to address the health needs of adolescents and young people became global, Nigeria also took steps to ensure the empowerment of their youth, because it is clear that when adolescent health needs are given the utmost importance, it benefits them and also the entire

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<sup>107</sup> National Gender Policy (2006) Available at [http://www.aacoalition.org/national\\_policy\\_women.htm](http://www.aacoalition.org/national_policy_women.htm). (Accessed 4 March 2017).

<sup>108</sup> Ibid.

<sup>109</sup> This is similar to the provisions of Section 21(1) of The African Children's Charter. Available at [http://www.au.int/en/sites/default/files/charter\\_En\\_AfricanCharter\\_on\\_the\\_Rights\\_and\\_Welfare\\_of\\_the\\_Child\\_AddisAbaba\\_](http://www.au.int/en/sites/default/files/charter_En_AfricanCharter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_). (Accessed 3 February 2017).

<sup>110</sup> National Policy on the Health and Development of Adolescents and Young People in Nigeria 2007, available at <http://www.health.gov.ng/doc/policy.pdf>. (Accessed 3 March 2017).



society.<sup>111</sup> It further makes these young people productive and stable as they transition from adolescents to adults. The evidence of this commitment to the country was in the development of the National Adolescent Health Policy 1995, where adolescent health needs were given paramount importance.

This revised policy is in the spirit of the 1995 National Adolescent Health Policy and in line with the WHO's definitions of young people<sup>112</sup> which is between the ages of 10 and 24. This Policy has also taken into consideration various international and national developmental frameworks that address the sexual and reproductive needs and rights of young people. This instrument aims to strengthen the national health system so that efficient, affordable and quality services are made available for the citizens,<sup>113</sup> including adolescents.

The National Policy on Health further recognises the need for an enabling environment where the rights of adolescents are not marginalised but upheld, giving them the capacity for self-determination, awareness, and self-actualisation. The government of Nigeria in its commitment to the actualisation of this policy affirms its readiness to formulate policies and strategies that will aid the development of young people and adequately address their sexual and reproductive health needs.<sup>114</sup>

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<sup>111</sup> Ibid.

<sup>112</sup> UNFPA available at <http://www.unfpa.org/emergencies/manual/8.htm>. (Accessed 5<sup>th</sup> March 2017).

<sup>113</sup> National Policy on the Health and development of Adolescents and Young people in Nigeria (note 64 above).

<sup>114</sup> Ibid.

#### **4.2.5 National Youth Policy of the Federal Republic of Nigeria (2009)<sup>115</sup>**

The National Youth Policy 2009 was a review of the National Youth Policy of 2001. The policy represents the commitment that Nigeria as a country has taken to the development of its youth and recognises the challenges faced by the youth and lays down implementation plans, programmes and policies that will aid the youth to overcome these challenges and sufficiently develop.<sup>116</sup> The policy focuses on priority target groups, like the girl child, and provides for the introduction of sexual and reproductive health information to be taught in schools for the benefit of the female child. It also seeks to achieve promoting programmes aimed at ending gender-based discrimination, as well as programmes that address the sexual and reproductive health problems that women face in general.

#### **4.3. National Health Policy (2004)<sup>117</sup>**

Nigeria's National Health Policy's objective is to strengthen the national health system by providing comprehensive health services that will improve the health status of Nigerians in line with the Millennium Development Goals (MDGs).<sup>118</sup> It further spells out some of its objectives which are to ensure an enabling environment for reproductive health knowledge to thrive, and to promote responsible behaviour amongst adolescents so as to limit the incidence of unwanted pregnancies and the spread of STI's. The protection from early pregnancies is clearly part and parcel of the child's right to access contraceptives. Other objectives of the policy include

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<sup>115</sup> National Youth Policy 2009, available at [http://www.planipolis.iepp.unesco.org/upload/youth/Nigeria/Nigeria\\_Youth\\_Policy.pdf](http://www.planipolis.iepp.unesco.org/upload/youth/Nigeria/Nigeria_Youth_Policy.pdf). (Accessed 14<sup>th</sup> April 2017).

<sup>116</sup> The Preamble to the National Youth Policy 2.

<sup>117</sup> Nigeria's National Health Policy 2004 available at <http://www.cheld.org/wp-content/uploads/2012/04/>. (Accessed 14<sup>th</sup> April 2017).

<sup>118</sup> Ibid Chapter 3.

increasing access to reproductive healthcare for females and the girl child and to reduce maternal morbidity due to pregnancy and childbirth by 50%.<sup>119</sup> The policy focuses on adolescents with the aim of providing comprehensive health care services, health information, and inclusion of sexual and reproductive health into schools curricula.

#### **4.3.1 National Strategic Framework for the Elimination of Obstetric Fistula in Nigeria (2011-2015)<sup>120</sup>**

Obstetric Fistula (OF) particularly Vesico Vagina Fistula (VVF) is a health condition that exists in the developing world.<sup>121</sup> In Nigeria, it is estimated that between 400,000 to 800,000 women are living with it and 20,000 more women develop obstetric fistula every year.<sup>122</sup> Obstetric Fistula is a prevalent reproductive health condition for women in Nigeria, especially the poor and illiterate people that live in rural areas, and have no access to reproductive health information or quality medical services<sup>123</sup>. It occurs as a result of tissue damage that is caused by an obstruction, during childbirth and causes continuous leakage of urine and faeces through the vagina.<sup>124</sup> There is always an attendant smell, and the patient suffers a lot of psychological, mental trauma and ill health.<sup>125</sup> Complications with the pregnancy and delivery are the main causes of obstetric fistula,<sup>126</sup> as well as extreme socio-cultural norms that are detrimental to the health of women.<sup>127</sup> The government of Nigeria saw the need for obstetric fistula to be urgently addressed since 2002, and to generally improve the sexual and reproductive health of women. This is especially true for adolescent girls as they are the most susceptible to obstructions during delivery, due to the fact

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<sup>119</sup> Ibid 37.

<sup>120</sup> National Strategic Framework for the Elimination of Obstetric Fistula in Nigeria (2011-2015), available at <http://www.fistulacare.org/pages/da/files/5/5.4/Nigeria>.

<sup>121</sup> N.M.Nour 'Obstetric Fistula: Living with incontinence and shame' (2008) 1(4) *Rev Obstet Gynecol*193.

<sup>122</sup> Ibid

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

that their pelvises are not yet fully developed to push a baby out. This policy document aims at providing strategies and solutions to prevent obstetric fistula amongst women. Some of the strategies laid out include delayed marriage amongst adolescent females as this is a major challenge for young girls in the northern part of the country whose socio-cultural norms and religious beliefs have a great influence on them. Furthermore, extending services such as family planning and providing access to affordable quality maternal health care are encouraged in this policy document.

#### **4.3.2 National HIV/AIDS Prevention Plan (2014-2015) (NPP3)<sup>128</sup>**

The NPP3 is a plan that was implemented to track the prevention of new HIV infections. It derives its success from previous prevention plans such as the National Prevention Plan (2010-2012) which ensured that the requisite data and evidence for the prevention of HIV was generated.<sup>129</sup> The NPP of 2010-2012 further built on the National Prevention Plan of 2007-2009 which focused on the organisation of approaches and mechanisms towards the prevention of HIV programmes.<sup>130</sup> The NPP3 has as part of its focus, HIV Counselling and Testing (HCT), and the prevention of HIV transmission.<sup>131</sup> The purpose of the plan is to implement HIV/AIDS prevention programmes and strategies that will decrease the spread of HIV/AIDS amongst the citizens of Nigeria. Decreasing the spread of HIV/AIDS as a sexually transmitted disease amongst adolescents is crucial as it impacts directly on their sexual health needs and in guaranteeing their development and survival.

#### **4.4 The extent to which the policy framework meets the international and regional standards that address the sexual and reproductive rights of the girl child**

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<sup>128</sup> National HIV/AIDS Prevention Plan 2014-2015, available at <http://www.sbcccch.naca.gov.ng/sites/default/files>. (Accessed 14 April 2017).

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

Public policies are policies made by the government with the aim of offering solutions to existing problems in the society.<sup>132</sup> It is the duty of the government to implement these policies and ensure that they are targeted at the beneficiaries. The policy documents mentioned above provide a fairly strong framework to support the girl child's right to access contraceptives in Nigeria as this is in line with international agreements and treaties.

These policies focus on Nigeria's commitment to providing accessible and affordable healthcare, as well as sensitising the youth to their sexual and reproductive health and rights. They are also in line with the CRC which is the Charter of the Rights of Children. The policies have the aim of fulfilling the provisions of the UN GC4<sup>133</sup> which provides a comprehensive list of adolescent's rights and state obligations in ensuring that children below the age of 18 are free to enjoy all the rights as set forth by the CRC without any form of discrimination.<sup>134</sup>

The policies are further in line with international documents such as the CEDAW which condemns discrimination against women and all its ramifications,<sup>135</sup> the ICCPR, which also provides for equality of all persons before the law,<sup>136</sup> the ICESR which recommends to state parties to recognise everybody's rights to an attainable standard of physical and mental health,<sup>137</sup> and the international non-binding agreements like the ICPD which enjoins states to ensure their

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<sup>132</sup> S.E. Obamwonyi, S. Aibieyi 'Public Policy Failures in Nigeria: Pathway to Under development'(2014) 4 *IITSE* 36-43. Available at <http://www.iiste.org/journals>. (Accessed 18 June 2017).

<sup>133</sup> UN CRC GC 14 (2013), available at <http://www.unhcr.ch/tbs/doc.nsf> (Accessed on 13 March 2017).

<sup>134</sup> Ibid.

<sup>135</sup> CEDAW available at <http://www.un.org/womenwatch/daw/cedaw>. (Accessed on 2 March 2015)

<sup>136</sup> ICCPR, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. (Accessed on 10 February 2015).

<sup>137</sup> ICESR, available at [www.ohchr.org/documents/professionalinterest/cesr.pdf](http://www.ohchr.org/documents/professionalinterest/cesr.pdf) (Accessed on 1 March 2017)

obligations are met regarding women and adolescent's sexual and reproductive health.<sup>138</sup> The policies further seek to fulfill the provisions of the African Women's Protocol which gives a comprehensive framework for an adolescent's sexual and reproductive health and rights, and the obligations of the states to fulfill them,<sup>139</sup> this is also provided for in the ACRWC<sup>140</sup>.

From the foregoing discussion, Nigeria is looking forward in its policy making, as it aims to establish policies that protect the girl child's sexual and reproductive health. Whether these policies will see the light of day or will be implemented depends on the seriousness of the government to effect changes in Nigerian society. Most times, a lack of continuity from government, parochial interests by stakeholders in the country,<sup>141</sup> and a poor framework for the policies limit the effectiveness of the policies from achieving their goal.

#### **4.5 Conclusion**

Adolescents' sexual and reproductive rights are protected for by various regional and international human rights instruments which provide and guarantee basic fundamental human rights<sup>142</sup> that are capable of promoting the sexual health of adolescents.

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<sup>138</sup>The ICPD held in Cairo 1994, available at <http://www.unfpa.org/publications/international-conference-population-and-development-programme-action>. (Accessed on 3rd February 2017).

<sup>139</sup>The African Women's Protocol, available at [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf). (Accessed on 3 February 2017).

<sup>140</sup>The African Charter on the Rights and Welfare of the Child, available at [http://www.au.int/en/sites/default/files/charter\\_En\\_AfricanCharter\\_on\\_the\\_Rights\\_and\\_Welfare\\_of\\_the\\_Child\\_AddisAbaba\\_](http://www.au.int/en/sites/default/files/charter_En_AfricanCharter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_). (Accessed on 3 February 2017).

<sup>141</sup>Often times, in developing countries, stakeholders in governments push for policies to be made and implemented with the aim to make it self-limiting from the start so as to accumulate the public funds allocated to the implementation of these policies..

<sup>142</sup>A. Atsenuwa 'Promoting sexual and reproductive rights through legislative interventions: A case study of Child rights Legislation and early marriage in Nigeria and Ethiopia In C. Ngwena & E.Durojaye 'Strengthening the Protection of sexual and reproductive health and rights in the African region through Human rights' (2014) 279.

Nigeria has a commitment under international law to ensure effective protection, promotion, and fulfillment of human rights, and they can achieve this by enacting legislations that will adapt the norms and principles expounded in various international instruments and treaties.<sup>143</sup>

Since the scope of sexual and reproductive rights is broad, it will be progressive for governments to have legislation that address a wide range of sexual and reproductive related issues like safe abortion services, the availability of sexual and reproductive health care services, sexuality education access to contraception information and the issue of child marriage.

These aspects of sexual and reproductive health must not be neglected by decision makers in governments as sexual and reproductive rights spans across the core features of economic, social and environmental development. Girls who are afforded these rights grow up having a better chance at life, education, and adding value to the economy.

Nigeria as a country has not done enough to ensure that the rights of children, especially the girl child are taken into consideration or given priority. The absence of provisions that protect adolescent's sexual and reproductive rights in the Children's Act speaks volumes. Furthermore, the Constitution which is the supreme law of the land has no provisions that protect children's rights.

The Nigerian government must therefore continue to be pro-active in the advancement of sexual and reproductive rights of adolescents.<sup>144</sup>

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<sup>143</sup> Ibid.

<sup>144</sup> E. Durojaye, R. Amollo 'Advancing adolescents' sexual health rights in Africa' (2010) 11 *ESR Review*. 3-5

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATION

#### 5.1 Introduction

This thesis has established the fact that Africa still bears the weight of sexual and reproductive ill-health in the world.<sup>145</sup> While this may be a staggering thought considering the fact that Africa is only one-tenth of the world's population, surveys carried out show that sixty-eight percent of people living with HIV/AIDS are in Africa.<sup>146</sup> South Africa has one of the highest HIV incidence rates in the world.<sup>147</sup>

The ICPD of 1994 opened the world's eyes to the sexual and reproductive health of adolescents.<sup>148</sup> This, alongside many other international binding and non-binding agreements, as well as regional documents discussed earlier in this dissertation, have stressed the importance of equality and non-discrimination in the dissemination of information on sexual and reproductive health for adolescents.<sup>149</sup> This dissertation has further emphasised the need for member states to

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<sup>145</sup> E. Durojaye 'Access to Contraception for Adolescents in Africa: A human rights challenge' (2011) 44 *Comparative and International Law Journal of Southern Africa* 2.

<sup>146</sup> UNAIDS Global AIDS Epidemic Report (2010).

<sup>147</sup> Statistics South Africa mid-Year Estimates 2010, available at <http://www.statssa.gov.za/publications/P0302/P03022010.pdf> (Accessed on 16 May 2016). See also the South Africa UNAIDS 2010 Country Progress Report which reported about 400 000 deaths in South Africa in 2009.

<sup>148</sup> D. Braeken, N.Otoo-Oyortey, G. Serour 'Access to Sexual and Reproductive health care: Adolescents and young people' (2007) 98 *International Journal of Gynaecology & Obstetrics* 172.

<sup>149</sup> E. Durojaye's 'Access to Contraception for Adolescents in Africa: A human rights challenge' (2011) 44 *Comparative and International Law Journal of Southern Africa* 26.



prioritise and remove any impediment to the realisation of the rights to sexual and reproductive health.

It is clear that African governments must identify the health needs and rights of their adolescents and provide an enabling atmosphere for the realisation of these rights<sup>150</sup> as adolescents are the leaders of tomorrow, and if their health needs are sidelined it will definitely have an impact on society as a whole.<sup>151</sup>

South Africa has achieved some appreciable progress in its legal and policy framework to protect the sexual and reproductive rights of the girl child. Nigeria on the other hand, is lagging behind South Africa in the protection of the sexual and reproductive health rights of the girl child.<sup>152</sup> Despite the steps taken by both countries, there is a need for attendant legal reforms to be implemented, especially in Nigeria. This dissertation has shown that there still remains a lot to be done in the development of Nigeria's legal and policy framework to adequately protect the sexual and reproductive rights of children.

## **5.2 Concluding comments on the legal and policy framework that protects the sexual and reproductive rights of children in South Africa and Nigeria**

This chapter revisits the research questions described in Chapter One and extensive conclusions will be made, as well as recommendations for the legal and policy reforms in both countries. The research questions that were asked and addressed in this dissertation were;<sup>153</sup>

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<sup>150</sup> Durojaye (Note 1 above).

<sup>151</sup> Ibid 29.

<sup>152</sup> These laws and policy framework have been analysed in the previous chapters.

<sup>153</sup> See 1.2 of Chapter 1.

1. What are a child's sexual and reproductive rights as set out in international law?
2. To what extent has South Africa met international sexual and reproductive rights standards?
3. To what extent has Nigeria met international sexual and reproductive rights standards?
4. What can Nigeria learn from South Africa in terms of developing a legal framework for protecting and promoting sexual and reproductive rights of children? This will be answered in the concluding comments of this dissertation. Based on these questions, the following conclusions can be drawn.

### 5.2.1 What are a child's sexual and reproductive rights as set out in international law?

Chapter Two clearly stated that children's rights have gathered momentum and gained so much relevance in international law, and as such, international legal standards have been established to safeguard these rights. This is clearly evidenced by the vast number of international instruments (binding and non-binding that govern member state parties).<sup>154</sup>

It is worth highlighting some of the different children's rights emanating from international law. They include:

**Table 5**

<b>Rights</b>	<b>Binding international instruments</b>	<b>Non-binding international instruments</b>	<b>Binding regional instruments</b>
Right to life	ICCPR, CRC		ACHPR, African Protocol, ACRWC, Women's
Right to access affordable	CRC (GENERAL	ICPD, Beijing	ACHPR, ACRWC,

<sup>154</sup>See Chapter 2 Section 2.0.

health care, as well as sexual and reproductive health care	COMMENTS), ICESR	Declaration, MDGs	African Women's Protocol
Right to access contraceptives	CRC (GENERAL COMMENTS)	ICPD, Beijing Declaration, MDGs	ACHPR, African Women's Protocol
Right to safe termination of pregnancy		ICPD, MDGs	African Women's Protocol
Right to say no to child marriage		ICPD, Beijing Declaration	ACHPR, ACRWC, African Women's Protocol
Right to consent to HIV testing			
Right to privacy	CRC, ICCPR		ACRWC
Right to access information, including sexual and reproductive information	CRC (GENERAL COMMENTS)	ICPD, Beijing Declaration	ACHPR, ACRWC, African Women's Protocol
Right to Education	ICESR, CRC	ICPD, Beijing Declaration	ACHPR, ACRWC, African Women's Protocol
Right to non-discrimination	CEDAW, ICCPR, ICESR	ICPD, Beijing Declaration, MDGs	ACHPR, ACRWC, African Women's Protocol

The above table aptly classifies these rights that adolescents can enjoy, especially, their sexual and reproductive rights, as well as the international treaty or document that protect these rights.

However, the sexual and reproductive rights of the girl child which is the focus of this dissertation include the rights to sexuality, the right to sexuality education, the right to access contraceptives, and the right to say no to child marriage.

Full attention should be given to the promotion of mutually respectful and equitable gender relations and in particular, to meet the educational and service needs of adolescent females to enable them to positively deal with their sexuality.<sup>155</sup> Their sexuality is a key factor in their development.

This dissertation affirms the relevance of the CRC and its General Comments to the sexual and reproductive rights of children and sets out in some of the sexual and reproductive rights of children.

The CRC is a comprehensive document that addresses the rights of children and it guarantees the social, cultural, civil, economic and political rights of children. The CRCs General Comments 3 and 4 deal specifically with state obligations and the degree to which they owe the protection of rights to children and adolescents. General Comments 3 deals with HIV/AIDS and the rights of a child. It further addresses gender-based discrimination associated with taboos and judgmental attitudes towards sexually active girls, and this in turn, hinders their access to preventive measures or other services.<sup>156</sup> Finally, General Comments 4 addresses adolescent health and advancement in the context of the CRC.<sup>157</sup>

The CRC might not be sexual and reproductive right specific, but it offers a comprehensive framework that can be a tool to protect the rights of children in general.

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<sup>155</sup> Braeken *et al* (note 4 above 173).

<sup>156</sup> GC 3 of the CRC 3.

<sup>157</sup> GC 4 of the CRC.

The existence of other international binding and non-binding instruments, as described in the table above, though not sexual and reproductive health specific are relevant to inferring the protection of the sexual and reproductive rights of children<sup>158</sup>.

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<sup>158</sup>This was discussed in Chapter 2.

### **5.2.2 Regional documents contain provisions that protect the sexual and reproductive rights of adolescents.**

This dissertation concludes that apart from the UN's international instruments, some African regional and sub-regional standards are instrumental to the protection of the sexual and reproductive health rights of children, especially the girl child.<sup>159</sup> The binding instruments include the ACRWC<sup>160</sup> and the ACHPR.<sup>161</sup>

Of particular relevance, is the African Women's Protocol,<sup>162</sup> which is the African regional document that provides specifically for the sexual and reproductive rights of the girl child. Article 2 of the African Women's Protocol guarantees the elimination of discrimination against women and this includes the girl child, while Article 14 specifically provides for the protection of the girl child's health and reproductive rights. It touches on the protection of the adolescent girl's rights to self-protection in her sexual activity with her partner, as well as ensuring access to safe abortion when necessary.

From the foregoing discussion, it is important to mention that international law which has been applied in some of the African standards, has been termed a 'toothless bulldog which can only bark and not bite'<sup>163</sup> however, it is certain that when these instruments are upheld and used as a

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<sup>159</sup> This was discussed extensively in Chapter 2.

<sup>160</sup> The African Charter on the Rights and Welfare of the Child, available at [http://www.au.int/en/sites/default/files/charter\\_En\\_AfricanCharter\\_on\\_the\\_Rights\\_and\\_Welfare\\_of\\_the\\_Child\\_AddisAbaba\\_](http://www.au.int/en/sites/default/files/charter_En_AfricanCharter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_). (Accessed on 3 February 2017).

<sup>161</sup> The ACHPR, available at <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-human-and-people's-rights.pdf>. (Accessed on 23 March 2017).

<sup>162</sup> The African Women's Protocol, available at [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf). (Accessed on 3 February 2017).

<sup>163</sup> The African Commission has been described as 'a toothless bulldog that only barks but cannot bite' because its decisions are not binding on state parties (N. Udombana J 2000) in T.F Yerima 'Comparative Evaluation of the Challenges of African Regional Human Rights Courts' (2007) 4 *Journal of Politics and Law* 120.

benchmark for national legislations, they can ensure that the sexual and reproductive rights of children are adequately protected.

In answering the second research question related to what extent South Africa has met its international sexual and reproductive rights standards, this dissertation submits that:

### **5.3 To what extent has South Africa met its international sexual and reproductive rights standards?**

The legal and policy framework of South Africa has made major progress in meeting the international sexual and reproductive rights standards.

Chapter Four identifies the extent to which South Africa has met its international sexual and reproductive rights standards. The conclusion of this thesis indicates the core strengths of the framework to include the following:

- i. Children's rights are guaranteed in the Constitution: The Constitution is the supreme law of the Republic, and the obligations imposed by it must be fulfilled.<sup>164</sup> This is the foundation for the protection of the rights of children, which includes the protection of their sexual and reproductive rights.
- ii. The Children's Act addresses some key sexual and reproductive rights. It acts as the bridge between child care protection laws in South Africa to the Bill of Rights and International

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<sup>164</sup> The Preamble to the Constitution; Section 2 of the Constitution.

Law.<sup>165</sup> It guarantees equality for the child as an individual, as no child should be subjected to discrimination on any ground.<sup>166</sup> The best interest of a child is given priority in this Act, which is in line with Section 28 of The Constitution of South Africa.

iii. The Children's Act also provides legal standards on the right to say no to child marriage, empowering the girl child to refuse harmful cultural or religious practices that are detrimental to her well-being.<sup>167</sup> It emphasises access to adequate information on health care, regarding their sexuality and reproduction,<sup>168</sup> as well as children's autonomy to make decisions regarding their sexual and reproductive health.<sup>169</sup> It also lays down standards for access to contraceptives, as no child must be denied access to contraceptives, including condoms from age 12 and above.<sup>170</sup> The child must also be guaranteed confidentiality when he or she obtains contraceptives or contraceptive advice.<sup>171</sup> This reduction in the age of accessing contraceptives like condoms fosters HIV prevention. The Act also has in it specific provisions that address HIV/AIDS,<sup>172</sup> and also the right to confidentiality of the child concerning his HIV status.<sup>173</sup>

iv. The socio-economic rights of children are justiciable and guaranteed in the Constitution, and it is pertinent to note that the right to health, which sexual and reproductive health fall under, is guaranteed in the Constitution under Section 27 (1),<sup>174</sup> and it includes the right to seek reproductive health care. As a socio-economic right, it is justiciable and entrenched in South

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<sup>165</sup> P. Proudlock & L. Jamieson ' Guide to The Children's Act no 38 of 2005', available at <http://www.ngopulse.org/press-release/guide-childrens-act-no-38-2005>. (Accessed 14 March 2017).

<sup>166</sup> Section 6 of The Children's Act.

<sup>167</sup> Section 12 of The Children's Act.

<sup>168</sup> Section 13 of The Children's Act.

<sup>169</sup> Section 129 of The Children's Act.

<sup>170</sup> Section 134 of The Children's Act.

<sup>171</sup> Section 134 (3) of The Children's Act.

<sup>172</sup> Section 130-134 of The Children's Act.

<sup>173</sup> Section 133 of The Children's Act.

<sup>174</sup> Section 27(1) of South Africa's 1996 Constitution.



Africa's Bill of Rights.<sup>175</sup> Furthermore, the right to social assistance is guaranteed by the Constitution,<sup>176</sup> and the fulfilment of these rights aids in the sexual development of adolescent females. When a child is able to access the basic amenities that she is entitled to, which includes health care, it forms the basis of seeking sexual and reproductive health information.

- v. South Africa's legal framework and policy guidelines on access to contraception for young females are comprehensive and forward-looking. The South African legal framework has provisions that grant access to contraceptives and contraceptive advice for young females from the age of 12.<sup>177</sup> South Africa's contraception policy was also revised in 2012<sup>178</sup> in the form of two documents which are the National Contraception and Fertility Planning Policy and Service Delivery (PSD),<sup>179</sup> and the complementary National Contraception Clinical Guidelines,<sup>180</sup> which was an updated version of existing contraception policies made a decade ago to address adolescent contraception needs. These guidelines addressed the need for free access to contraception, all while providing quality contraceptive health services without any form of discrimination. The documents further seek to stimulate community awareness on the need and importance of contraceptives for safe sex, prevention of pregnancies and sexually transmitted diseases and infections like HIV and other STI's.

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<sup>175</sup> Section 7 (2) of South Africa's 1996 Constitution.

<sup>176</sup> Section 27, 28, 29 of the Constitution.

<sup>177</sup> Section 134 of The Children's Act No 38 of 2005.

<sup>178</sup> A.J Hoopes, V. Chandra-Mouli, P. Steyn, T. Shilubane, M. Pleaner 'An Analysis of Adolescent Content in South Africa's Contraception Policy using a Human Rights Framework.' (2015) 57 *Journal of Adolescent Health* 618.

<sup>179</sup> This was discussed in Chapter 3, Section 3.85.

<sup>180</sup> This was discussed in Chapter 3, Section 3.8.6.

**vi. The right of a female child to terminate a pregnancy is adequately provided for in The Choice on Termination of Pregnancy Act**

The framework enables the rights of female children to terminate their pregnancies, so long as they give their consent<sup>181</sup> and ensure that only the consent of the female is necessary even if she chooses to refuse to inform her parents or guardians.<sup>182</sup>

**vii. The right of children to consent to HIV testing is provided for in the Children's Act**

Children have a right to consent to HIV testing from the age of 12 and this is provided for in the Children's Act, so long as it is in the best interests of the child.<sup>183</sup> However, if that child is below the age of 12, sufficient maturity must be shown by the child, clearly exhibiting that the child is aware of the benefits and risks of such tests.<sup>184</sup> Children can further consent independently to medical treatment from the age of 14,<sup>185</sup> but will need consent from a parent or guardian if they are below the age of 14.<sup>186</sup>

**viii. Children's rights to sexuality are progressive and achievable as the sections that criminalised the rights to consensual healthy sex amongst adolescents in The Criminal Law (Sexual Offences and Related Matters) Amendment Act has been expunged.**

Section 15 and 16 of the Act once criminalised consensual sexual relations between adolescents, between the ages of 12 and 17, except in the celebrated *Teddy Bear case*.<sup>187</sup> The Constitutional Court held that those sections were invalid, inconsistent and unconstitutional as it did not fall in

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<sup>181</sup> Section 5 (2) of the Choice on Termination of Pregnancy Act 92 of 1996.

<sup>182</sup> Ibid Section 5(3).

<sup>183</sup> A.Barrat 'The best interest of the child: Where is the child's voice?' In S. Borman (ed) *The fate of the child: Legal decisions in children in the new South Africa* (2003) 141,151-56.

<sup>184</sup> Section 130 of The Children's Act No 38 Of 2005.

<sup>185</sup> Section 39 of The Children's Act.

<sup>186</sup> Ibid.

<sup>187</sup> *The Teddy Bear Clinic for Abused children and RAPCAN and others V Minister of Justice and National Director of Public Prosecutions case CCT 12/13(2013) ZACC 35.*

line with the provisions of the Constitution.<sup>188</sup> The Act was then amended to The Criminal Law (Sexual Offences and Related Matters Amendments Act Amendment Act 2015). The impact of the amended Act is that former sections 15 and 16 that criminalised consensual sex between adolescents have been taken out and substituted, stating the present position today, that consensual sex between adolescents is allowed and adolescents that are between the ages of 16-17 can have sex with a younger child, so long as the age gap between them is not more than two years, and such an adolescent will not be penalised or prosecuted for it. This step that the South African government took is progressive, because it recognises children's right to express themselves in a healthy sexual way and it also advances public health as children would be eager to seek for information on living healthy sexual lives with their choice of partners.

South Africa's policy framework as discussed earlier in Chapter 3 is progressive and enviable as it spans across education and school guidelines, policies on HIV/AIDS and its transmission, sexual and reproductive health as well as guidelines for contraceptive use, these policies address the sexual and reproductive rights of the adolescent female and can be said to be well rounded in scope.

In answering the third research questions, as to what extent has Nigeria met its international standards on the sexual and reproductive rights of children, this dissertation submits that:

#### **5.4 To what extent has Nigeria met its international sexual and reproductive rights standard?**

Nigeria's legal and policy framework is developing and requires extensive legal reforms.

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<sup>188</sup> The Constitution of South Africa (1996) available at <http://www.gov.za/.../CONSTITUTION/constitution-republic-south-africa-1996-1>. (Accessed 12<sup>th</sup> December 2016).

**i. The Nigerian Constitution contains provisions that guarantee the protection of the fundamental human rights of its citizens.**

These provisions are found in Chapter IV of the Constitution. These rights are civil and political and are justiciable.<sup>189</sup> They can be argued to protect the sexual and reproductive rights of children and they can, when read together, be said to guarantee the right to health for its citizens.<sup>190</sup> They include the right to dignity of human person,<sup>191</sup> the right to personal liberty,<sup>192</sup> the right to life<sup>193</sup> and the right to a private and family life.<sup>194</sup> Furthermore, according to Dada<sup>195</sup>, the socio-economic rights guaranteed in Chapter Two (though, not justiciable) can be argued to foster children's rights, as it can be explained that if right conditions are in place for children's development, then the sexual and reproductive rights can also thrive.

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<sup>189</sup>Chapter IV of the 1999 Constitution comprises of Sections 33-46.

<sup>190</sup> The White Paper on Review of Existing Reproductive Health Policies and Legislations in Nigeria (20<sup>th</sup> April 2006).

<sup>191</sup> Section 34 of the 1999 Constitution.

<sup>192</sup> Section 35 of the 1999 Constitution.

<sup>193</sup> Section 33 of the 1999 Constitution.

<sup>194</sup> Section 37 of the 1999 Constitution.

<sup>195</sup> F.O. Dada 'The justice ability and Enforceability of Women's Rights in Nigeria' XII *Global Journal of Human – Social Science* 51.

**ii. The domestication of the Children’s Rights Act 2003 in Nigeria, was as a result of the ratification of the CRC.**

The CRA in Section 1 affirms the ‘best interest of a child’ principle in every matter that relates to the child. This is in line with the provisions of Article 3 of the CRC.<sup>196</sup> The CRA also contains provisions that enshrine the right to be free from discrimination for every child,<sup>197</sup> the right to the dignity of every child,<sup>198</sup> the right to health and health services,<sup>199</sup> and the prohibition of child marriage and betrothal.<sup>200</sup> These provisions are further in line with international standards.<sup>201</sup>

**iii. Existing policies in the Framework on health and gender show the readiness to protect the sexual and reproductive health of women and children.**

The establishment of existing policies, laws and institutions in Nigeria as identified by this dissertation, show that the right to health of its citizens cannot be overlooked, especially with respect to adolescents.<sup>202</sup>

In answering the fourth research question on what can Nigeria learn from South Africa in developing a legal framework for the sexual and reproductive rights of children, this thesis concluded that:

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<sup>196</sup> See Section 3.1.4.

<sup>197</sup> Section 10 of the CRA.

<sup>198</sup> Section 11 of the CRA.

<sup>199</sup> Section 13 of the CRA.

<sup>200</sup> Section 21 and 22 of the CRA.

<sup>201</sup> These provisions in the CRA comply with International and regional instruments like the CEDAW, the CRC, the ICESR, the ICCPR and the ACRWC.

<sup>202</sup> See Section 3.2.3. These policies were discussed extensively, in Section 3-3 (2).

## 5.5 Recommendations

The numerous international standards that protect the rights of children have recognised the innocence of childhood and seek to ensure that every child is given an equal opportunity in life, irrespective of their social, cultural or economic background.<sup>203</sup> Particularly, the CRC and its GCs serve as a model which national legislations and policies can follow, as they clearly spell out the rights of children, their vulnerabilities and pose obligations on states to implement policies and strategies to aid in their all- round development.<sup>204</sup> The new dawn in the development of human rights in Africa was motioned by the African Women's Protocol of 2003, which clearly addressed the sexual and reproductive rights of women and the girl child.<sup>205</sup>

The framework in Nigeria needs more to be done to ensure that the protection of the rights of the girl child, particularly, that the sexual and reproductive rights are integrated into the existing framework. South Africa, on the other hand, has advanced its legal and policy framework<sup>206</sup> on the sexual and reproductive rights of children, to meet with international standards, although this cannot be said to be absolute.

Nigeria as a country has lessons to learn from South Africa's progressive framework as Nigerian female adolescents cannot be said to have adequate protection of their sexual and reproductive rights, even with the existing legal and policy framework today. There still remains an unmet need for contraception, a lack of awareness of sexual and reproductive health and rights, a need for the sensitisation of fundamental human rights to be exercised and enjoyed by everyone and

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<sup>203</sup> L. Hey-Young *Legally recognising child-headed households through a rights-based approach: the case of South Africa* PHD thesis University of Pretoria (2011) 261.

<sup>204</sup> R.O. Sarumi: *The protection of the rights of children affected by HIV/AIDS in South Africa and Botswana: A critical analysis of the legal and policy responses* PHD thesis University of Kwa-Zulu Natal (2013) 272.

<sup>205</sup> C. Ngwena & E. Durojaye *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region through Human Rights* (2014) 1.

<sup>206</sup> Sarumi (note 60 above).

the need to access affordable health care. In the same vein, the following recommendations are needed:

### **5.5.1 Amendments to the Constitution of Nigeria.**

- i. There is a need for the inclusion of broad children and gender specific provisions in the Constitution that guarantee basic rights that children can enjoy as this will serve as a platform for other legislations and policies to address the ills and discrimination regarding the sexual and reproductive health of children.
- ii. The inclusion of setting the age for marriage for women to be 18 years in the Constitution, will make every other religious or traditional practice that advocates child marriage to be null and void and incompatible with the provisions of the constitution, as the constitution is the supreme law of the country.

### **5.5.2 There is need for the CRA to be enforceable in all the states of the Federation<sup>207</sup>**

The CRA was enacted into law in Nigeria in 2003 with the aim of upholding the ideals of the CRC. However, this was only enacted after 10 years, when the Child Rights Bill was passed in 1993. Sequel to its enactment in 2003 as of 2014, only 26 states have passed it into law.<sup>208</sup> Since Nigeria runs a federal system of government, each state is autonomous in nature, and so, until the CRA is enacted in each state, it is not binding in those states.<sup>209</sup> Hence, no court can prosecute on any matters that relate to violation of children's rights if that state has not enacted the CRA. This shows a lack of uniformity in the protection of children's rights all over the country, and as such,

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<sup>207</sup> This was discussed in Chapter 4.

<sup>208</sup> T. Chindah 'Nigeria's Child Rights Act: Ratification, implementation and domestication' (2016), available at <http://www.nigerianpilot.com/nigerias-child-rights-act-ratification-implementation-and-domestication> (Accessed 15<sup>th</sup> April 2017).

<sup>209</sup> T.S Braimah 'Child Marriage in Northern Nigeria Section 61 of Part 1 of the 1999 Constitution and the protection of children against child marriage' (2014)14 *AHRLJ*475.

must be corrected.<sup>210</sup> There is a pressing need for the functional execution of the domestication of the CRA in all the states of Nigeria.

### **5.5.3 Amend the Child's Right Act of Nigeria (CRA).**

- i. The CRA which is the legislation that addresses children's rights should be more sexual and reproductive health specific, special attention must be given to the sexual development of adolescent girls and information and education about their sexual health should be paramount in the CRA with sections must be included to protect these rights.
- ii. The CRA should be amended to include provisions that recognise the sexuality of the girl child and their need to access to contraception, as well as contraceptive information for their benefit without any form of discrimination whatsoever. The CRA is supposed to be a form of the Children's Charter in Nigeria, and so the sexual and reproductive rights of children is a huge part of their lives and cannot be ignored in such an important legislation in the legal framework of Nigeria.
- iii. The adoption of 18 years as the age of majority for marriage prescribed by the CRA must be enshrined in every legislation in the country that deals with children and marriage.<sup>211</sup>  
No other legislation must set the age for marriage to be different from the CRA.<sup>212</sup>

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<sup>210</sup> Ibid.

<sup>211</sup> Section 21 of The Child Rights Act of Nigeria sets 18 as the age of majority for marriage and thus no person under the age of 18 is capable of contracting a valid marriage. Legislation such as the Children and Young Persons Act of 1943, The Marriage Act and the Matrimonial Causes Act 1990 need to be amended to reflect the adoption of 18 years as the age of majority.

<sup>68</sup> Cap M6 Laws of the Federation of Nigeria (LFN) 2004 although the law does not have express provisions on this, but there has been a consensus amongst some scholars that certain provisions in the law preclude it to be so, setting the ages at 16 and 21 for marriage. A. Oyajobi" Better protection for women and children under the law in A. Kalu & Y. Osinbajo (eds) women and children under Nigerian law (1989).



#### **5.5.4 There should be an increase in budgetary allocation to the health and education sectors.**

The government needs to ensure the provision of the resources needed for adequate, accessible and affordable health care services. This is characterized by the provision of high-quality equipment to all healthcare services providers, trained medical personnel and medicines sold at subsidised rates for adolescent females particularly, in the many rural areas in Nigeria, where the standard of living is low.

Young girls should be taught about their sexual health in schools and at structured youth friendly centres. There has to be a consistent awareness and dissemination of information by the government to adolescents on their sexual and reproductive health. They further need to be made aware of the existence of the CRA which was established to uphold their rights. The government must also ensure that it goes beyond just making policies, but that these policies must see the light of day and be implemented. This will enable adolescents to become more aware of themselves and their sexual and reproductive health.

#### **5.5.5 The need for a provision on the legislation of safe abortion in the legislative framework of Nigeria**

This dissertation shows the need for a legal framework on the sexual and reproductive rights for the girl child in Nigeria which includes the enactment of laws and policies that provide for the safe termination of their pregnancies. This will be in line with various international treaties and agreements. As previously discussed in this dissertation, Nigeria is very stringent on the provision of abortion for adolescents, and this is inhibiting their access to healthcare and

development as different cases of unsafe abortions still occur in sub-standard hospitals all across the country.

Nigeria needs to be holistic in their approach and not use the guise of religion to hamper adolescents' right to terminate their pregnancies on good grounds other than a threat to the life of the mother. Adolescents must have unhindered access to contraceptives and adequate health care as provided for by the government, and the provision of safe abortion clinics for adolescent females is also important to their sexual and reproductive health. This should be done without discrimination to the pregnant adolescent, and in confidentiality and privacy.

Thus a general and continuous sensitisation of the fundamental freedoms and rights as contained in international agreements that are binding on Nigeria as a member state must be created amongst the youths.

However, Africa seems to be a continent that is lagging behind related to meeting the sexual and reproductive health ideals of its women and children. This is evidenced by the high prevalence of HIV/AIDS, sexually transmitted infections (STI's), high infant mortality rates, high rates of unsafe abortions, as well as many other sexual and reproductive issues that still persists.<sup>213</sup> Durojaye and Balogun while considering the issue of access to health care in African Charter, suggest that Article 16 of The African Charter has been, and is often rendered meaningless for

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<sup>213</sup> Ngwena (note 61 above 2).

many Africans especially women and children.<sup>214</sup> They also welcome the progressive stance of the African Commission in relation to the accessibility of medicines.<sup>215</sup>

In using the CRC and its General Comments as a standard, it is clear that some of these sexual and reproductive rights are adequately guaranteed in both the legal and policy frameworks of both countries, while some rights are not protected at all.

This dissertation therefore submits, that it is visible that the sexual and reproductive rights of children are not yet in line with the international standards laid down for the realisation of the sexual and reproductive health rights of children. This places an urgent need for both countries to bring these rights in accordance with international norms so that these rights guarantee all the developmental needs of children.

There is therefore no opposing the fact that there is a need to ensure that there is an enabling atmosphere to ensure the protection, promotion and realisation of the sexual and reproductive rights of the girl child. The right atmosphere and all efforts should also facilitate the realisation of the rights without shame, prejudice or fear of condemnation. Africa must rise up to ensure that this is a reality, not only on paper, but in reality.

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<sup>214</sup> E. Durojaye & V. Balogun ‘The African Commission on Human and People’s Rights and the Promotion and Protection of sexual and reproductive rights (2011) 11 African Human Rights Law Journal .380.

<sup>215</sup> Ibid

## Appendix

### 1. Books

Ali, S. S. Goonesekere. S, Mendez .E.G, Rios-Kohn.R, *Protecting the world's Children: Impact of the Convention on the Rights of a Child in Diverse Legal Systems* Cambridge University Press (2007).

Andorfer, E & J. Michael, *Who Decides? A state by state Review of Abortion and Reproductive rights* (1998).

Brand, D. & Heyns. C, *Socio-Economic Rights in South Africa* Cambridge University Press (2005)

Eriksson, M.K, *Reproductive Freedom: In the context of International Human Rights and Humanitarian Law* Nijuhoff Publishers The Hague (2000).

Goldblatt, B. & Mc Lean K.S, *Women's Social and Economic Rights; Development in South Africa* Juta and Company Ltd (2011).

Iyioha I.O, Nwabueze R.N, *Comparative Law and Policy: Critical Perspectives on Nigerian and Global Health* Ashgate (2015).

Knudsen. L.M *Reproductive rights in a global context: South Africa, Uganda, Peru, Denmark, Vietnam*, Jordan Vanderbilt University Press (2006).

Ngwena C & Durojaye E. *Strengthening the Protection of Sexual and Reproductive health and rights in the African region through Human rights* Pretoria University Law Press (2014)

Sloss D. *Treaty Enforcement in domestic courts: A Comparative analysis in the role of Domestic Courts in Treaty Enforcement: A Comparative Study* Cambridge University Press (2009)

Viljoen F. *Model Legislation and regional Integration Theory and Practice of Model legislation pertaining to HIV in the SADCed* VerLoren Van Themaat Centre for International Law University of South Africa (2008)

### 2. Chapters in Books

Afulukwe-Eruchalu O. 'Accountability for non-fulfillment of Human Rights Obligations; A key Strategy for reducing maternal mortality and disability in Sub-Saharan Africa in Ngwena C & Durojaye .E *Strengthening the Protection of Sexual and Reproductive health and rights in the African region through Human rights* Pretoria University Law Press (PULP) (2014)

Atsenuwa A. Promoting Sexual and Reproductive rights through legislative interventions: A case study of Child rights legislation and early marriage in Nigeria and Ethiopia in Ngwena C & Durojaye E. *Strengthening the Protection of Sexual and Reproductive health and rights in the African region through Human rights* Pretoria University Law Press (PULP) (2014).

Barrat .A. The best interest of the child: where is the child's voice? in Burman S. *The fate of the child: Legal decisions on children in the new South Africa* Juta Law Publishing (2003)

Brookman-Amisshah E. & Kachika T. Reducing abortion related maternal mortality in Africa:Progress in implementing the objectives of the Maputo Plan of Action on Sexual and Reproductive Rights in Ngwena C & Durojaye E. *Strengthening the Protection of Sexual and Reproductive health and rights in the African region through Human rights* Pretoria University Law Press (PULP) (2014).

Durojaye E. Children and Adolescents 'Access to Reproductive and Sexual Health care' in Iyioha I.O, Nwabueze R.N *Comparative Law and Policy: Critical Perspectives on Nigerian and Global Health* Ashgate (2015).

Kangaude G.& Banda T. Sexual Health and Rights of Adolescents; A Dialogue with Sub Saharan Africa In Ngwena C & Durojaye E. *Strengthening the Protection of Sexual and Reproductive health and rights in the African region through Human rights* Pretoria University Law Press (PULP) (2014).

Ngwena C. & Cook R.J Rights concerning Health in Brand D. & Henys C. 'Socio-Economic rights in South Africa Cambridge University Press (2005).

Oyajobi A." Better protection for women and children under the law in A. Kalu & Y.Osinbajo *Women and children under Nigerian law* (1989).

### **3. Journals**

Adegoke A.A 'Sexual Behaviour practices of Secondary school adolescents in Ibadan Metropolis South West Nigeria' (2013) 21 *IFE Psycholog IA* 12.

Akinwunmi O.S 'Legal Impediments on the Practical Implementation of the Child Rights Act 2003' (2009) 37 *International Journal of Legal Information* 385-396.

Alison .C McIntosh, .Finkle J.L 'The Cairo Conference on Population and Development: A Paradigm' (1995) 21 *Population and development Review* 223.

Altinyelken H.K & Olthoff J 'Education and Sexual and Reproductive Health and Rights' (2014) *The Amsterdam Institute for Social Science Research (AISSR)* 5.

Ameh N, Adesiyun A.G, Ozed-Williams C, , Ojabo A.O, Avidime S, Umar-Sullyman H, Yusuf A.I,Apomfo A.A 'When We Speak, Women Listen : Gender Socialisation and Young

Adolescents Attitudes to Sexual and Reproductive Issues' (2001) 5 *African Journal On Reproductive Health* 198.

Arowojolu A.O et al 'Sexuality, contraceptive choice and AIDS awareness amongst Nigerian undergraduates' (2002) 6 *African Journal of Reproductive Health* 60-70.

Enobun E.N, Muazu A. 'Reproductive Health in Nigeria' (2009) 22 *Journal of Pediatric and Adolescents Gynecology* 372.

Bearinger L.H, Sieving R.E, Ferguson J, Sharma V. 'Global perspectives on the sexual and reproductive rights of adolescents' (2007) Vol 369 *The Lancet* 1220-31

Beyers.C 'Sexuality education in South Africa: A socio cultural perspective" (2011) 43 *Acta Academica* 7.

Braeken D, Otoo-Oyortey N, Serour G 'Access to Sexual and Reproductive Health care: Adolescents and Young People' (2007) 98 *International Journal of Gynecology and Obstetrics* 173.

Braimah T.S "Child Marriage in Northern Nigeria: Section 61 of part 1 of the 1999 Constitution and the protection of children against child marriage". (2014) 14 *AHRLJ* 479.

Cook R.J, Dickens B.M 'The Figo study group on women's sexual and reproductive rights (1999) 67(1) *International Journal of Gynecology and Obstetrics* 55-61.

Correa S. 'From Reproductive health to Sexual Rights: Achievements and Future Challenges Reproductive Health Care matters (1997) 5(10) *The International Women's Health Movement* 107-116.

Dada F.O 'The justice ability and Enforceability of Women's Rights in Nigeria' XII *Global Journal of Human Social Science* 51.

Davel C.J 'The African Charter on the Rights and Welfare of the Child, Family Law and Children's Rights (2002) *De Jure* 281-296.

Dhai. A, Moodley J&O'Sullivan .M 'Safe termination of Pregnancy and conscientious Objections' (2003) 28 *Modern Medicine* 40.

Dhai,A Moodley .J &O'Sullivan. M 'Safe termination of pregnancy: An enabling ethical and legal framework'(2002) 12 *Obstetrics and Gynaecology Forum* 18.

Durojaye. E "Access to contraception for Adolescents in Africa: A human rights challenge (2011) 44 *CILJSA* 8.

Durojaye. E &. Amollo. R "Advancing adolescents sexual health in Africa (2010) 11

Durojaye E. & Murungi L.N ‘The African Women’s Protocol and Sexual Rights (2014) 18 *International Journal of Human Rights* 881-897.

Durojaye E, Okeke B, Adebajo A ‘Harmful Practices and Gender Equality in Nigeria’ (2014) 12 *Ife Centre for Psychological Studies/Services*.

Durojaye. E “Monitoring the right to health and sexual and reproductive health at the National level: Some considerations for African Governments (2009) 42 *Comparative and International Law Journal* 227-263.

Durojaye E ‘Realizing Access to Sexual Health Information and Services for Adolescents through the Protocol to the African Charter on the Rights of Women’ (2009) 16 *Washington & Lee J of Civil Rights and Social Justice* 135, 143.

Durojaye E, Balogun V. ‘The African Commission on Human and People’s Rights and the promotion and protection of sexual and reproductive rights’ (2011) 11 *African Human Rights Law Journal* 374.

Durojaye. E ‘The Human Rights Council’s Resolution on Maternal Mortality: Better late than never’ (2010) 10 *AHRLJ* 189-190.

Durojaye. E “The Potential of the Expert Committee of the African Children’s Charter in advancing adolescent sexual health and rights in Africa(2013) 46 *Comparative and International Law Journal of Southern Africa* 390.

Durojaye E. ‘Turning Paper Promises to reality: National human rights Institutions and adolescents’ sexual and reproductive rights in Africa’ (2008) 26/4 *Netherlands Quarterly of Human Rights* 547-578.

Edege E. ‘Bringing Human rights home: An examination of the Domestication of Human rights treaties in Nigeria’ (2007) 2 *Journal of African Law* 51- 249.

Francis, D.A ‘Sexuality Education in South Africa: Three essential questions’ (2010) 3 *International Journal of Educational Development*.

Guttmacher,F, Kapadia, J, Water Naude T, De Pinho H ‘Abortion Reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act’ (1998) 24 *International Family planning perspectives*.

Hartman L.B, Monasterio E, Hwang L.Y ‘Adolescent Contraception: Review and Guidance for Pediatric Clinics’ (2012) *Curr Probl Pediatr Adolesc Health Care* 222.

Hill B.J ‘Constituting Children’s Bodily Integrity’ (2015) 64 *Duke Law Journal* 1295.

Hoopes A.J, Chandra-Mouli V, Steyn P, Shilubane T, Pleaner M 'An analysis of Adolescent Content in South Africa's Contraception Policy using a Human Rights Framework (2015) *The Journal of Adolescent Health* 617-23

Africa's Contraception Policy using a Human rights Framework' (2015) 57 *Journal of Adolescent Health* 617.

Jewekes R & Rees H 'Dramatic Decline in Abortion Mortality Due to The Choice On Termination Of Pregnancy Act (2005) 95 *SAMJ* 250.

Kaniye E. 'Considering the Protocol on the Rights of Women in Africa' (2006) 36 *Africa Insight* 25.

Khau M 'Our culture does not allow that': Exploring the challenges of sexuality education in rural communities (2012) 30 *Perspectives in Education* 64.

Ladan. M.T 'Overview of Reproductive Rights and Health' (2003) 1(7) *Journal of Economic Social and Cultural Rights* 19-45.

Lai S.Y & Ralph R.E 'Female Sexual Autonomy and Human Rights' (1995) 8 *Harvard Human Rights* 233.

Low P. 'Hard Law and 'Soft Law' Options for fostering international co-operation: *International Centre for Trade and Sustainable Development (ICTSD)* (2015).

Lutchman S 'Child savers V Kiddie Libbers: The Sexual Rights of Adolescents' (2014) 30 *SAJHR* 557.

MacQuoid- Mason D.J 'Are there restrictive provisions of Sections 2(1) (c) and 5(5) of The Choice on Termination of Pregnancy Act 92 of 1996 (2006) *Journal for Juridical Science* 121.

MacQuoid –Mason D.J 'Decriminalisation of consensual sexual conduct between children: What should Doctors do regarding the reporting of sexual offences under The Sexual Offences Act until the Constitutional Court confirms the judgment of The Teddy Bear Clinic case (2013) 6 *South African Journal of Bio-Ethics and Law* 10-12.

Madiba S. & Mokgatte M ' Students want HIV testing in Schools' A formative evaluation of the acceptability of the acceptability of HIV testing and Counselling at Schools in Gauteng and North West Provinces in South Africa (2015) *Biomed Central Public Health* 388.

Memzur B.D 'The African children's Charter Versus the UN Convention on the Rights of a Child: A zero-sum game?' (2008) 23 *South Africa Public Law* 29.

Miller A.M 'Sexual but not Reproductive: Exploring the junction and disjunction of Sexual and Reproductive rights' (2000) 4 (2) *Health Human Rights* 68-109.



Moultrie T.A & Timaeus I.M 'The South African Fertility Decline: Evidence from two censuses and a Demographic and Health Survey (2003) 57(3) *Population Studies* (Cambridge) 265-283.

Mtshali V. 'Forced Child Marriage practiced under the pretext of customary marriage in South Africa' (2014) 15 *South Africa Journal of Child Abuse Research* 51.

Ngwena C 'Access to legal abortion: Developments in Africa from a reproductive and sexual health rights perspective' (2004) 19 *SA Public Law* 328-350.

Ngwena C 'Access to safe abortion as a human right in the African region: Lessons from an emerging jurisprudence of UN treaty-monitoring bodies' (2013) 29 *SAJHR* 409.

Ngwena, C 'Health Care Decision-Making and the Competent Minor: The Limit of Self Determination' (1996) *Acta Juridica* 132, 140.

Ngwena C ; Sexuality Rights as Human Rights in Southern Africa with particular reference to South Africa(2002) 17 *SA Public Law* 2, 3.

Nour M.N 'Obstetric Fistula: Living with incontinence and shame' (2008) 1(4) *Rev Obstet Gynecol* 193.

Oba A.A 'The African Charter on Human and Peoples' Rights and ouster clauses under the Military Regime in Nigeria: Before and after September 11' (2004) 4 *AHRLJ* 274-287

Okonofua F. 'Preventing Unsafe Abortion in Nigeria (1997) 1 *African Journal of Reproductive Health* 25-36.s

Olatubosun A: 'Addressing the Phenomenom of Child Marriage in Nigeria (2001) 2 *Ife Psychologia* 162.

Petchesky R.P 'From population control to reproductive rights: feminist fault lines' (1995) 3 *Reproductive Health Matters* 152.

Roseman M & Miller A 'Normalizing Sex and its Discontents: Establishing Sexual Rights in International Law' (2011) 34 *Harvard J of Law and Gender* 313,328.

Salona L 'Child Savers V Kiddie Libbers': The sexual rights of Adolescents' (2014) 30 *SAJHR* 557.

Strode A, Toohey J, Slack C, Bhanjee S 'Reporting underage consensual sex after the Teddy Bear Case: A different perspective (2013) 5 *South African Journal of Bio-Ethics and Law*.

Todd-Gher J. 'Policing bodies, punishing lives: The African Women's Protocol as a tool for resistance of illegitimate criminalization of women's sexualities and reproduction' (2014) 14 *AHRLJ* 736.

Tuwor. T & Sossou M.A 'Gender Discrimination and education in West Africa: strategies for maintaining girls in school' (2008) 12 *International Journal of Inclusive Education* 363-379.

Van Rooyen H.E, Strode E.A, Slack C.M 'HIV testing of children is not simple for health providers and researchers: Legal and policy framework guidance in South Africa (2016) 106(5) *South Africa Med Journal* 451-453.

Walker J.A 'Early Marriage in Africa – Trends, Harmful Effects and Interventions' (2012) 16(2) *African Journal of Reproductive Health* 231.

Widdice L.E, Cornell J.L, Liang W, Halpern-Felsher B.L 'Having sex and condom use: Potential risks and benefits reported by young sexually inexperienced adolescents' (2006) 39 *Journal of Adolescent Health* 592

Yerima T.F 'Comparative Evaluation of the Challenges of African Regional Human Rights Courts' (2007) 4 *Journal of Politics and Law* 120

#### **4. PHD Thesis and Master Dissertation**

Haruna A. An analysis of the Legal and Institutional Framework for the realisation of the right to health in Nigeria PHD Thesis Ahmadu Bello University (2015).

Hey-Young L. Legally recognising Child-headed households through a rights based approach: The case of South Africa PHD Thesis University of Pretoria (2011).

Naidoo .M An Evaluation of the Sexuality Education Programme being implemented in South African Schools PHD Thesis University of Zulu Land (2006).

Sarumi R.O The Protection of the rights of children affected by HIV/AIDS in South Africa and Botswana: A critical analysis of the legal and policy responses, PHD Thesis University of Kwazulu-Natal (2013).

#### **5. Publications of Organisations and Research Institutes**

Low. P Hard Law and Soft Law: Options for fostering international Co-operation: International Centre for Trade and Sustainable development (ICTSD) (2015 available at <http://www.e15initiative.org>).

Shalev C. Rights to Sexual and Reproductive Health. The ICPD and the Convention on the elimination of all forms of discrimination against women. Indian Society for the study of Reproduction and Fertility and the UNDP/UNFPA/WHO/World Bank Special Programme of Research, Development and Research training in Human Reproduction (1998).

The White Paper on Review of Existing Reproductive Health Policies and Legislations in Nigeria (20<sup>th</sup> April 2006).

## **6. International Instruments**

Convention on the Elimination of all forms of Discrimination against Women adopted on 18 December, 1979 and entered into force 3 September 1981.

Convention on the Rights of the Child adopted by the General Assembly resolution 20 November 1989, and entered into force 2 September 1990.

General Comments on The Rights of The Child.

International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16 December 1966 and came into force 23 March 1976.

International Covenant on Economic, Social and Cultural rights adopted by the UN General Assembly on 16 December 1966, and entered into force on 3 January 1976.

General Comments Covenant on Economic, Social and Cultural Rights.

Millennium Development Goals (MDGS) (2000).

The African Charter on Human and People's Rights adopted by the OAU on 27 June 1981, and came into force 21 October 1986.

## **7. Websites**

African Commission General Comments on Article 14(1) (d) and ( e) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2012) available at <http://www.achpr.org/news/2012/11/d65>. (Accessed 3 January 2017).

ACHPR, available at <http://www.achpr.org>. (Accessed on 3 March 2017).

African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990. Available at <http://www.nigeria-law.org/African%20Charter%20on%20Human%20and%20Peoples'%20Rights.htm> (Accessed 20 February 2017).

African Charter on the Rights and Welfare of the Child, available at <http://www.au.int/acerwc/documents/african-charter-rights-welfare-child>. (Accessed 10<sup>th</sup> March 2017).

African Commission General Comments on Article 14(1) (d) and ( e) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2012) available at <http://www.achpr.org/news/2012/11/d65>. (Accessed 3 July 2017)

Amnesty International: ‘Realizing Sexual and Reproductive rights: A Human Rights framework available at <http://www.amnesty.ca/sites/default/files/act>. (Accessed 24 May 2017).

Amnesty International USA: ‘Sexual and Reproductive Rights’ available at <http://www.amnestyusa.org/pdfs/SexualReproductive>. (Accessed on 24 April 2017).

Beijing Conference on Women 1995-What is the Beijing Declaration and Platform. Available at <http://www.womensissues.about.com/od/internationalwomenconferencebeijing>. (Accessed 6 April 2017).

CEDAW available at <http://www.un.org/womenwatch/daw/cedaw>. (Accessed on March 2 2017).

CEDAW History available at <http://www.un.org/womenwatch/daw/cedaw/history/htm>. (Accessed 3 March 2017).

Children’s rights in International law’ Available at <http://www.culturalsurvival.org/ourpublications/csq/article> .(Accessed on 6 June 2017).

Children’s rights in Wales ‘International framework for human rights’ available at <http://www.childrensrighthswales.org.uk/international-framework> . (Accessed on 3rd April 2017).

CRC available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> .Entered into force 2 September 1990. (Accessed 15<sup>th</sup> March 2017).

Choice on Termination of Pregnancy Act 1996 available at <http://www.acts.co.za>. (Accessed 12 March 2017).

Committee on the Rights of the Child 32<sup>nd</sup> session 13-31 January 2003 ‘GC3’ ‘HIV/AIDS and the Rights of the child’ .Available at [http://www.unicef.org/aids/files/UNHCHR\\_HIV\\_and\\_children\\_rights\\_2003.pdf](http://www.unicef.org/aids/files/UNHCHR_HIV_and_children_rights_2003.pdf). (Accessed 24April 2017).

Committee on the Rights of the Child 34<sup>th</sup> session 19 September -3 October 2003 ‘GC5’ ‘General measures of implementation of the convention on the rights of the child (Articles 4, 42, 44 para.6) available at <http://www.un.org/kg/en/post-2015/article/document-of-the-convention-on-the-rights-of-the-child-eng>(Accessed 21 April 2017)

Duff S.E ‘Consent, Rights and the regulation of Childhood and Adolescent Sexuality in South Africa’ (2015)

Wits Institute for Social and Economic Research .available at <http://www.wiser.wits.ac.za>.( Accessed 2<sup>nd</sup>January 2017).

Fourth world conference on women held in Beijing: ‘Beijing platform for action’, available at <http://www.un.org/womenwatch/daw/beijing>. (Accessed 3 March 2017).

Government of South Africa National Educational Policy Act No 27 of 1996 available at <http://www.info.gov.za/acts/1996/a27-96pdf>. (Accessed 5<sup>th</sup> of April 2017).

Government of South Africa The South African Schools Act No 84 of 1996 available at <http://www.cindi.org.za/files/Policy-Framework-For-OVC-Final.pdf>. (Accessed 13<sup>th</sup> March 2017).

ICCPR, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. (Accessed 10 February 2017).

ICESR, available at [www.ohchr.org/documents/professionalinterest/cesr.pdf](http://www.ohchr.org/documents/professionalinterest/cesr.pdf) (Accessed 1 March 2017).

IPPF: Sexual and reproductive health and rights –A crucial agenda for the post 2015 framework (2014) available at [http://www.ippf.org/sites/default/files/report\\_for\\_web.pdf](http://www.ippf.org/sites/default/files/report_for_web.pdf). (Accessed 7 April 2017).

Ladan M.T ‘Review of existing Reproductive Health Policies and Legislations in Nigeria’ (2006), available at <http://www.gamji.com/article5000/NEWS5997.htm>. (Accessed 4 March 2017).

Lokulo-Sodipe J, Akintola. O, Adebamowo .C ‘Legal Basis for Research ethics Governance in Nigeria’ (2014) available at <http://www.elearning.trree.org/mod/page/view.php?id=142>.

Louw W ‘Sexual Offences in South Africa’ (2013) Helen Suzman Foundation Resource Centre. Available at <http://www.hsf.org.za/resource-centre/hsf-briefs/sexual-offences-in-south-africa>. (Accessed 14 April 2017).

Ministry of Health Republic of South Africa ‘Sexual and Reproductive Health and Right: Fulfilling our Commitments 2011-2021 and beyond’. Available at <http://www.agenda.org.za>. (Accessed on January 20 2017).

National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019 (2015) 5 Available at [http://www.dsd.gov.za/index2.php?option=com\\_docman&task=doc\\_view&gid=578&itemid=39](http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=578&itemid=39). (Accessed 19 April 2017).

National Contraception Clinical Guidelines (2012) Available at [http://www.gov.za/sites/www.gov.za/files/contraception\\_clinical\\_Guidelines\\_-28\\_jan\\_2013-2.pdf](http://www.gov.za/sites/www.gov.za/files/contraception_clinical_Guidelines_-28_jan_2013-2.pdf). (Accessed 4 January 2017)

National Gender Policy.(2006) Available at [http://www.aacoalition.org/national\\_policy\\_women.htm](http://www.aacoalition.org/national_policy_women.htm). (Accessed 4<sup>th</sup> March 2017).

Wikipedia, available at [http://en.m.wikipedia.org/./Criminal\\_Law\\_Sexual\\_Offences-and\\_related\\_matters\\_amendment\\_act](http://en.m.wikipedia.org/./Criminal_Law_Sexual_Offences-and_related_matters_amendment_act) (Accessed 15 March 2017).

National HIV/AIDS Prevention Plan 2014-2015, available at <http://www.sbcccch.naca.gov.ng/sites/default/files>. (Accessed 14<sup>th</sup> April 2017).

National Policy on the Health and Development of Adolescents and Young People in Nigeria 2007, available at <http://www.health.gov.ng/doc/policy.pdf>. (Accessed 3<sup>rd</sup> March 2017).

National Policy on HIV and AIDS 1999, available at [http://www.ilo.org/wcmsp5/groups/public\\_aids/documents/legaldocument/wcms\\_125634.pdf](http://www.ilo.org/wcmsp5/groups/public_aids/documents/legaldocument/wcms_125634.pdf). (Accessed 4 May 2017).

National Strategic Framework for the Elimination of Obstetric Fistula in Nigeria (2011-2015), available at <http://www.fistulacare.org/pages/da/files/5/5.4/Nigeria>

National Youth Policy 2009, available at [http://www.planipolis.iepp.unesco.org/upload/youth/Nigeria/Nigeria\\_Youth\\_Policy.pdf](http://www.planipolis.iepp.unesco.org/upload/youth/Nigeria/Nigeria_Youth_Policy.pdf). (Accessed 14<sup>th</sup> April 2017).

Nigerian Constitution 1979. Available at <http://www.lawnigeria.com/CONSTITUTIONHUB/Constitution/1979constitutionofnigeria.html>. (Accessed 20 February 2017)

Nigeria's National Health Policy 2004 available at <http://www.cheld.org/wp-content/uploads/2012/04> (Accessed 14<sup>th</sup> April 2017).

Obamwonyi.S .E, Aibieyi.S, 'Public Policy Failures in Nigeria: Pathway to Underdevelopment (2014) Available at <http://www.iiste.org/journals>. (Accessed 14 September 2017)

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Available at <http://www.justice.gov.za/legislation/acts/2000>. (Accessed on 12th January 2017).

Proudlock P & Jamieson L 'Guide to The Children's Act no 38 of 2005', available at <http://www.ngopulse.org/press-release/guide-childrens-act-no-38-2005>. (Accessed 14 April 2017).

Purcell.M 'Why was the 1995 Beijing Conference for women ground breaking?' (2014) available at <http://www.aauw.org/2014/08/20/1995-beijing>. (Accessed 5 April 2017).

Ratification Table: African Charter on Human and Peoples Rights. Available at <http://www.achpr.org/instruments/achpr/ratification>. (Accessed 2nd March 2017).

Republic of South Africa Department of Health: National Contraception and fertility planning and service delivery guidelines: A companion to the national contraception clinical guidelines (2012) available at [http://www.partners-popdev.org/wp-content/upload/National\\_contraception\\_family\\_planning\\_policy.pdf](http://www.partners-popdev.org/wp-content/upload/National_contraception_family_planning_policy.pdf). (Accessed 21 March 2017).

Republic of South Africa Department of Health: National Contraception Clinical guidelines: A companion to the national contraception and fertility planning policy and service delivery guidelines (2012) available at [http://www.gov.za/sites/files/contraception\\_clinical\\_guidelines\\_28jan2013.pdf](http://www.gov.za/sites/files/contraception_clinical_guidelines_28jan2013.pdf). (Accessed 4 March 2017).

Save the Children: 'Legal and Policy Framework to protect the rights of vulnerable children in Southern Africa' (2006) available at <http://www.resourcecenter.savethechildren.se/sites/default/files/document/6575.pdf>. (Accessed on December 14 2016).

Sections 13, 130(2), Sec 134 of The Children's Act 2005, available at <http://www.justice.gov.za/legislation/acts/2015>. (Accessed on 2<sup>nd</sup> March 2017).

Slatman. J 'Phenomenology of Bodily integrity on disfiguring Breast Cancer. See excerpt from the Department of health, ethics & Society at the Maastricht University. Sweden, available at <http://www.jennyslatman.nl/download/publications/>. (Accessed on 10 March 2017).

South Africa Child Sex ruling expected available at <http://www.enca.com> (Accessed 13 May 2017).

Thaver L 'Sexual and HIV/AIDS education in South African secondary schools' (2012) Open Society Initiative for Southern Africa. Available at [www.osisa.org/buwa/south-africa/sexual-and-hivaids-education-southafrican-secondary-schools](http://www.osisa.org/buwa/south-africa/sexual-and-hivaids-education-southafrican-secondary-schools). Accessed 20/12/2015.

The Children's Act of South Africa 2005, available at <http://www.justice.gov.za/legislation/acts/2015>. Accessed on 2<sup>nd</sup> March 2017).

The Child Rights Act Of 2003, available at <http://www.nigeriarights.gov.ng/files>. (Accessed on 18th of February 2017).

The Choice on Termination of Pregnancy Act of 1996 (Act No 92 of 1996) available at <http://www.acts.co.za> (Accessed on 3<sup>rd</sup> March 2017).

The Constitution of South Africa (1996) available at <http://www.gov.za/.../CONSTITUTION/constitution-republic-south-africa-1996-1>. (Accessed 12<sup>th</sup> January 2017).

The CRC available at [www.ohchr.org/en/professionalinterest/pages/crc.aspx](http://www.ohchr.org/en/professionalinterest/pages/crc.aspx). (Accessed 12 February 2017).

The Criminal Law Sexual and Offences and Related Matters Amendment Act 32 of 2007, available at <http://www.saps.gov.za/./sexual> offences act. (Accessed 12th March 2017).

The Health System Trust reported this, available at <http://www.indicators.hst.org.za/healthstats/47/data>>.

(Accessed 17 May 2017).

The Nigerian Constitution 1999, available at <http://www.nigeriarights.gov.ng/files/download/43>. (Accessed 17th of February 2017).

The ICPD held in Cairo 1994, available at <http://www.unfpa.org/publications/international-conference-population-and-development-programme-action>. (Accessed 3 February 2017).

The School Health Policy and Implementation Programme, available at [www.rmchsa.org](http://www.rmchsa.org). (Accessed 21 February 2017).

UN Committee on CEDAW. General Recommendation No.24 Women and Health (Article 12) (Twentieth Session) 1999. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)CEDAW+General+recom+](http://www.unhchr.ch/tbs/doc.nsf/(symbol)CEDAW+General+recom+). (Accessed 4 June 2017).

UN Committee on Economic, Social and Cultural rights (CESR) *General Comment No 14: The Right to the Highest attainable standard of health* (Art 12 of the Covenant) 11 August 2000. Available at <http://www.refworld.org/docid/453883d0.html>. (Accessed 4 June 2017).

UN CRC GC3 (2003), available at <http://www.unhchr.ch/tbs/doc.nsf>. (Accessed 4 March 2017).

UN CRC GC4 (2003) available at <http://www1.umn.edu/humanrts/crc/crc-generalcomment4.html>. (Accessed 2 March 2017).

UN CRC GC 14 (2013), available at <http://www.unhchr.ch/tbs/doc.nsf> (Accessed 13 June 2017).

UN: Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights (1993), available at <http://www.ohchr.org/EN/Professionalinterest/Pages/Vienna.aspx>. (Accessed 14 April 2017).

UNHCHR International Law 2000, available at <http://www2.ohchr.org/english/law> (Accessed on 3<sup>rd</sup> April 2017).

UN List of member states (2000) available at [http://www.un.org/List\\_of\\_United\\_Nations\\_member\\_states](http://www.un.org/List_of_United_Nations_member_states) (Accessed 3 March 2015)

UN *The MDGs – What are they?* (2000) available at <http://www.unmillenniumproject.org/goals/index.htm> (Accessed 6 June 2015).

UN World Population Monitoring: 2002 Reproductive Rights and Sexual Health, Available at <http://www.un.org/en/development/desa/population/publications/family/reproductive-rights.shtml>. (Accessed 17 April 2017).



UNFPA: From Childhood to Womanhood: Meeting the sexual and reproductive health needs of adolescent girls' available at <http://www.unfpa.org>. (Accessed 16 April 2017).

UNFPA (2012) Promoting Gender Equality: Frequently asked questions about FGM/C available at <http://www.unfpa.org/gender/practices2.htm> (Accessed on 14th February 2017).

UNFPA; South Africa: HIV Preventions available at <http://www.countryoffice.unfpa.org/southafrica/2013/05/03/6675/hiv>. (Accessed 25 April 2017).

UNFPA; The State of the world population 2003; Making one billion count: Investing in adolescent health rights UNFPA (2006) available at <http://www.unfpa.org/icpd>. (Accessed 14 March 2017).

UNFPA South Africa: Young People (2013), available at [http://www.countryoffice.unfpa.org/filemanager/files/southafrica/young\\_people\\_march\\_2013\\_fact\\_sheet.pdf](http://www.countryoffice.unfpa.org/filemanager/files/southafrica/young_people_march_2013_fact_sheet.pdf). (Accessed 12 March 2017).

UNHCHR International Law 2000 available at <http://www2.ohchr.org/english/law> (Accessed on 3 June 2015.)

UNICEF: CEDAW In Brief for Adolescents. Policy and Practice (June 2011) available at [http://www.unicef.org/gender/files/CEDAW\\_In\\_Brief\\_For\\_Adolescents-Web-Version.pdf](http://www.unicef.org/gender/files/CEDAW_In_Brief_For_Adolescents-Web-Version.pdf). (Accessed 22 January 2017).

UNICEF: Child Rights and Participation (2007) available at [http://www.unicef.org/Nigeria/children\\_1938.html](http://www.unicef.org/Nigeria/children_1938.html). (Accessed 13 March 2017).

UNICEF: The Child Rights Act of 2003 available at [http://www.unicef.org/nigeria/children\\_factsheet](http://www.unicef.org/nigeria/children_factsheet). (Accessed 15 April 2017).

UNICEF: 20 years of the CRC. Available at <http://www.unicef.org/rightsie/237.htm>. (Accessed on 7 May 2017).

UNICEF-23 states pass Child Rights Act in Nigeria, available at <http://www.today.ng/news/nigeria/124161/23-states-pass-child-rights-nigeria-unicef>. (Accessed 15<sup>th</sup> April 2017).

United Nations Population Fund 'Early Marriage in Nigeria'. Available at <http://www.nigeria.unfpa.org/nigerianchild.html> (Accessed 15 March 2017).

United Nations Population Fund (2014): The ICPD programme of action, available at <http://www.unfpa.org/publications/international-conference-population-and-development-programme-action>. (Accessed 23 May 2017).

WHO ‘Defining Sexual Health, ‘Report of a Technical Consultation on Sexual Health’ (2002)28-31 Sexual health Document series, available at [http://www.who.int/reproductivehealth/publications/sexual\\_health/defining\\_sexual\\_health.pdf](http://www.who.int/reproductivehealth/publications/sexual_health/defining_sexual_health.pdf). (Accessed 12<sup>th</sup> February 2017).

WHO International Consultation on Sexual health, January (2002) available at <http://www.who.int/reproductive-health/gender/sexual-health.htm#3>. (Accessed 14April 2017).

WHO Pregnant Adolescents: Delivering on global promises of Hope, Geneva (2000) available at <http://www.who.int/publications/2006/9241593784-eng.pdf>. (Accessed 4April 2017).

WHO: *Right to Health* .Fact sheet No. 31, available at <http://www.ohchr.org/documents/publications/Facts>. (Accessed 23 May 2017).

WHO Safe Abortion: Technical and policy guidelines for health systems (2003)12.

WHO: Sexual and reproductive health research Priorities for WHO for the period 1998-2003(1997) available at <http://whqlibdoc.who.int/publications1998>. (Accessed 4 April 2017).

WHO: Sexual and Reproductive Health August 18,2014 which marked the 500 day milestone until the target date to achieve the MDGs . Available at <http://www.who.int/reproductivehealth/topics/mdgs/en>. (Accessed 24April 2017).

WHO: The second decades: Improving Adolescent health and development, Geneva (2001) available at [http://whqlibdoc.who.int/...who\\_frh\\_adh](http://whqlibdoc.who.int/...who_frh_adh). (Accessed 4May 2017).

Women Living under Muslim Laws (WLUML) Nigeria: Early Marriage leads to socio-economic woes’ available at <http://www.wluml.org/node/4904>. (Accessed 14 March 2017).

Youth Reproductive and sexual health in Nigeria: Advocates for youths, available at <http://www.advocatesforyouth.org/publications/publications-a-z/1450-youth-reproductive-and-sexual-health-in-nigeria>. (Accessed 14 April 2017).

## **8. Reports**

Assessment Report of National response to young People’s Sexual and reproductive health in Nigeria.

## **9. Nigeria Instruments**

Child Rights Act 2003

Criminal Code Act Cap 77 Laws of the Federation of Nigeria (1990)

National Gender Policy (2006)

National Health Policy (2004)

National HIV/AIDS Prevention Plan (2014-2015) (NPP3)

National Policy on the Health and Development of Adolescents and Young people in Nigeria (2007)

National Reproductive Health Policy and Strategy to Achieve Quality Reproductive and Sexual Health for all Nigerians (2001)

National Strategic Framework for the Elimination of Obstetric Fistula in Nigeria (2011-2015)

National Youth Policy of the Federal Republic of Nigeria (2009)  
The Nigerian Constitution (1999)

The Penal Code Law of No18 1959

#### **10. South Africa's Instruments**

Children's Act of 2005 (Act No38 of 2005)

Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 (Sexual Offences Act)

National Contraception Clinical Guidelines (2012)

National Contraception and Fertility Planning Policy and Service Delivery Guidelines (2012)

National Education Policy Act No 27 of 1996

National Policy on HIV and AIDS Education 1995

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

School Health Policy and Implementation Guidelines of 2011

The Choice on Termination of Pregnancy Act of 1996 (Act No 92 of 1996)

The Constitution of the Republic of South Africa, 1996

The South African Schools Act No 84 of 1996