



**SEXUAL VIOLENCE AS A VIOLATION OF SEXUAL AND REPRODUCTIVE
HEALTH RIGHTS: A CASE STUDY OF SOUTH AFRICAN AND NIGERIAN LAW ON
SEXUAL VIOLENCE AGAINST WOMEN.**

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DECLARATION

I, Oyebanke Taiwo Yebisi, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.



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SIGNATURE

15th December, 2016

DATE

SUPERVISOR: Ms V. Balogun

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SIGNATURE

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DATE

DEDICATION

I dedicate this thesis to my family, my loving and ever-supportive parents Dr. & Mrs Tunde and Folake Yebisi, my brothers Bode Yebisi and Boluwatife Yebisi, and my fiancé Oluwademilade Apara. Thank you for your words of encouragement and prayers, financial and moral support all the way. I love you.

This thesis is also dedicated to women and girls who have been sexually violated at one point or the other and those who are in potentially violent relationships who do not have the courage and confidence to voice out.

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ABSTRACT

The right to sexual and reproductive health is a right which finds footing in other rights including that of the right to life and survival, which is necessary for the fulfilment of other human rights such as the right to health; the right to freedom from sexual violence; and the right to freedom from torture, cruel, degrading or inhuman treatment. However, violations of the right to sexual and reproductive health, especially for women, occur in various forms; including that of sexual violence. There are various manifestations of sexual violence, including child marriage, marital rape, sexual abuse of children, female genital mutilation, and virginity testing, among others.

At international and regional levels, various instruments have been adopted through the passing of resolutions and adoption of declarations at conferences and summits for the protection of sexual and reproductive health rights of women and protection from sexual violence. At the national level also, Nations all over the world have enacted various laws and introduced various policies to ensure that the right to sexual and reproductive health is protected and prohibit various forms of sexual violence against women.

This thesis focuses on South African and Nigerian laws on the protection of sexual and reproductive health rights, particularly protection of this right in relation to sexual violence against women. International, regional and sub-regional instruments are used as a framework for the protection of women against sexual violence and the efforts of the selected countries are analysed based on this. This dissertation is based on the following questions:

- a. What legal and regulatory frameworks have been provided by South Africa and Nigeria for the protection of women and girls against child marriage and marital rape?
- b. How do international and regional instruments confront the problem of sexual violence, especially issues such as marital rape and child marriage; and how can this impact on Nigeria?
- c. How can the mechanisms available for the protection of women against sexual violence in South Africa be adopted in Nigeria to prevent and punish acts of sexual violence such as child marriage and marital rape and what adjustments should be made?
- d. What is the impact of practices such as child marriage and marital rape on the promotion and fulfilment of sexual and reproductive health rights in Nigeria?

At the conclusion of the analysis of the various laws and policies in place in the selected countries, reforms and adjustments are proposed for Nigeria, which will ensure better protection of sexual and reproductive health rights, especially with protection from the forms of sexual violence discussed.

TABLE OF CONTENTS

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENT	iv
ABSTRACT	v
TABLE OF CONTENTS	vii
CHAPTER ONE	1
1.1 INTRODUCTION	1
1.1.1 South Africa	3
1.1.2 Nigeria	6
1.2 AIMS AND OBJECTIVES	10
1.3 PROBLEM STATEMENT	10
1.4 RESEARCH QUESTIONS	11
1.5 SIGNIFICANCE AND LIMITATIONS OF RESEARCH	12
1.6 RESEARCH METHODOLOGY	13
1.7 HISTORICAL BACKGROUND OF THE CONCEPT OF SEXUAL AND REPRODUCTIVE HEALTH RIGHTS AND SEXUAL VIOLENCE	14
1.8 DEFINITION OF TERMS	23
1.8.1 Sexual and Reproductive Health Rights	23
1.8.2 Sexual Violence	26
1.8.3 Marital Rape	26
1.8.4 Child Marriage	27
1.8.5 Consent	27
CHAPTER TWO	30

SEXUAL AND REPRODUCTIVE HEALTH RIGHTS, SEXUAL VIOLENCE AND THE PROTECTION OF WOMEN’S RIGHTS	30
2.1. INTRODUCTION.....	30
2.2 INTERNATIONAL RESPONSES	31
2.2.1 Universal Declaration of Human Rights (UDHR) 1948.....	31
2.2.2 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966..	33
2.2.3 International Covenant on Civil and Political Rights (ICCPR), 1966	36
2.2.4 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.	38
2.2.5 Convention on the Rights of the Child (CRC), 1989.....	45
2.2.6 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), 1984.....	48
2.3 OTHER RELEVANT RESPONSES AT THE INTERNATIONAL LEVEL.....	49
2.3.1 International Conference on Population and Development Programme of Action (ICPD-PoA), 1994	50
2.3.2 Vienna Declaration and Programme of Action (VDPA), 1993	51
2.3.3 Beijing Declaration and Platform for Action (BDPFA), 1995	52
2.4 REGIONAL INSTRUMENTS TACKLING SEXUAL VIOLENCE	57
2.4.1 African Charter on Human and People’s Rights (ACHPR), 1981.....	57
2.4.2 African Charter on the Rights and Welfare of the Child (ACRWC), 1990.....	62
2.5 SUB-REGIONAL RESPONSES	64
2.5.1 Southern Africa Development Community (SADC) Treaty, 1992	64
2.5.2 Economic Community of West African States (ECOWAS) Treaty, 1975	68
2.6 CONCLUSION	69

CHAPTER THREE	70
LEGAL AND REGULATORY INSTRUMENTS PROTECTING WOMEN AGAINST SEXUAL VIOLENCE IN SOUTH AFRICA.....	70
3.1 INTRODUCTION.....	70
3.2 THE PROTECTION OF WOMEN AGAINST MARITAL RAPE IN SOUTH AFRICA	71
3.2.1 Case Law on Marital Rape in South Africa	74
3.2.2 Sentencing for Rape.....	77
3.3 CHILD MARRIAGE AND THE CHILDREN’S ACT 38 OF 2005	78
3.3.1 The Right of the Child versus Child Marriage.....	78
3.4 STATE RESPONSE TO SEXUAL VIOLENCE AND PROTECTIVE MEASURES. 84	
3.4.1 Sexual Offences Court (SOC).....	85
3.5 CONCLUSION	87
CHAPTER FOUR.....	88
THE PROTECTION OF WOMEN AND GIRLS AGAINST SEXUAL VIOLENCE IN NIGERIA	88
4.1 INTRODUCTION.....	88
4.2 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (1999 CONSTITUTION).....	90
4.2.1 Chapter II of the 1999 Constitution and Part IV of the 1949 Indian Constitution..	90
4.2.2 Chapter IV of the 1999 Constitution and Sexual Violence.....	92
4.2.3 Status of International and Regional Human Right instruments under the 1999 Constitution.....	94
4.3 THE PROTECTION OF WOMEN UNDER THE CRIMINAL CODE ACT AND PENAL CODE ACT.....	95
4.3.1 The Marital Rape Exemption under the Criminal Code and the Sharia Penal Code	96

4.3.2	Relevant Case Law on Rape in Nigeria	98
4.3.3	Sentencing for Rape under Nigerian Criminal Law	101
4.4	CHILD MARRIAGE AND THE CHILD RIGHTS ACT, 2003	104
4.5	VIOLENCE AGAINST PERSONS (PROHIBITION) ACT, 2015	108
4.6	SEXUAL OFFENCES BILL, 2013	112
4.7	CONCLUSION	114
CHAPTER FIVE		115
CONCLUSION AND RECOMMENDATIONS		115
5.1	INTRODUCTION.....	115
5.2	SUMMARY OF FINDINGS AND RECOMMENDATIONS	116
5.3	CONCLUSION	124
BIBLIOGRAPHY.....		126

CHAPTER ONE

1.1 INTRODUCTION

A woman's right to control her body, including her sexuality and reproduction, is a basic human right and failure to recognise this right allows for practices that cause harm to women and sometimes privilege power and tradition over individual wellbeing.¹

The above quote points out the importance of Sexual and Reproductive Health (SRH) and the dangers imminent in not recognising the right. SRH is a very important aspect of human life and indeed human existence. It is essential to good health and human development.² Certain rights, for example the right to life and survival, the right to health, the right to freedom from torture, cruel, degrading or inhuman treatment and the right to freedom from sexual violence, are also a necessary offspring of this important phenomenon. However, far too many people are denied their right to sexual and reproductive health and experience various forms of violations.³

Sexual and reproductive health rights are based upon rights recognised in international human rights treaties, declarations and other instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴ the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁵ the UN Convention on the Rights of the Child (CRC),⁶ and the International Convention on the Elimination of all Forms of Racial Discrimination.⁷ Research has shown that SRH rights are central in achieving Millennium Development Goals (MDGs) stipulated by the United Nations, of which Nigeria and South

¹Amnesty International USA 'Sexual and Reproductive Health Right' available at www.amnestyusa.org/women accessed on 25th November, 2014.

² Ibid.

³Department for International Development 'Sexual and Reproductive Health and Rights' available at http://www2.ohchr.org/english/issues/development/docs/rights_reproductive_health.pdf accessed on 25th November, 2014.

⁴Adopted by the UN General Assembly resolution 2200A of 16th December, 1966.

⁵Adopted by the UN General Assembly resolution 3180 of 18th December, 1979.

⁶Adopted by UN General Assembly resolution 44/25 of 20th November, 1989.

⁷Adopted by UN General Assembly resolution 2106(XX) of 21st December, 1965.

Africa are member countries.⁸ It is instructive to note that the United Nations adopted the Sustainable Development Goals (SDGs) in a summit held between 25th and 27th September 2015. One of the goals is to ensure universal access to sexual and reproductive health and reproductive rights as agreed in accordance with the Programme of Action of the International Conference on Population and Development (ICPD),⁹ the Beijing Platform for Action¹⁰ and the outcome documents of their review conferences.¹¹ Goal 5 of the SDGs also proposes to eliminate all harmful practices such as early and forced marriage and female genital mutilation.¹²

Sexual and reproductive health are among the most sensitive and controversial issues in international human rights law, but they are also among the most important issues.¹³ To comply with international human rights standards, SRH services have to be available, accessible, acceptable and of good quality.¹⁴ Judicial redress and remedies should also be available for victims of violations of sexual and reproductive health rights. The recognition of these rights has an indispensable role to play in relation to the attainment of the highest level of complete physical and mental health.¹⁵

Some specific rights relevant to SRH are:¹⁶

- Right to the highest attainable standard of health.
- Right to life and survival.
- Right to be free from torture, cruel, inhuman or degrading treatment.

⁸MDGs are eight international development goals that were established following the adoption of the United Nations Millennium Declaration and more than half of these goals have an element of sexual and reproductive rights.

⁹ Programme of Action adopted at the ICPD, Cairo, 5th-13th September, 1994.

¹⁰ Report of the Fourth World Conference on Women Beijing, 4-15 September 1995 available at <http://beijing20.unwomen.org/-/media/Field%20Beijing&20Plus/Attachments/BeijingDeclarationAndPlatformForAction-en.pdf> accessed on 15th August, 2015.

¹¹‘Sustainable Development Goals’ available at <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed on 9th September, 2015.

¹² Ibid.

¹³P Hunt & J Bueno De Mesquita *The Rights to Sexual and Reproductive Health* Essex: Human Rights Centre (2006) available at <http://repository.essex.ac.uk/9718/1/right-sexual-reproductive-health.pdf> accessed on 25th November, 2014.

¹⁴ UNFPA Factsheet on Reproductive Health available at <http://unmis.unmissions.org/Portals/UNMIS/Constitution-making%20Symposium/UNFPA%20fact%20sheet.pdf> accessed on 25th November, 2014.

¹⁵ P Hunt (note 13 above).

¹⁶ Amnesty International, USA (note 1 above).

- Right of women to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.
- Right to freedom from violence against women, including right to be free from sexual violence.

1.1.1 South Africa

The Constitution of the Republic of South Africa, 1996 (1996 Constitution) is more inclined towards the protection and promotion of human rights generally. The 1996 Constitution is founded on core values such as human dignity, the achievement of equality and the advancement of human rights and freedoms.¹⁷ Section 27(1)(a) specifically provides that “everyone has the right to have access to health care services, including reproductive health care.” In *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*,¹⁸ an application was brought by a number of associations and members of civil society groups concerned with the treatment of people with HIV/AIDS and with the prevention of new infections, foremost among them the Treatment Action Campaign (TAC). The applicants contended that the restriction placed on the availability of Nevirapine (a drug used to prevent the vertical transmission of HIV/AIDS from mother to child at birth) was unreasonable when measured against the 1996 Constitution, which commands the State and all its organs to give effect to the rights guaranteed by the Bill of Rights.¹⁹ The Constitutional Court also had the duty of interpreting sections 27 and 28 of the 1996 Constitution with regards to whether the government was obliged or not to implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country. The Court made reference to *Soobramoney v Minister of Health, KwaZulu-Natal*²⁰ and *Government of the Republic of South Africa and Others v Grootboom and Others*.²¹ The court stressed that the obligations imposed in section 27 were subject to the qualifications expressed in section 27(2) which provides that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. The Court noted that sections 27(1)

¹⁷ Section 1(a) 1996 Constitution.

¹⁸ 2002 (5) SA 721 CC.

¹⁹ See Sections 7(2) and 8(1) 1996 Constitution.

²⁰ 1998 (1) SA 765 CC.

²¹ 2001 (1) SA 46 (CC).

and 27(2) had to be read together as defining the scope of the positive rights of all and the corresponding obligations on the state to respect, protect, promote and fulfil such rights. The Court stated that a programme for the realisation of socio-economic rights must be balanced and flexible to make appropriate provision for attention to crisis and to short, medium and long term needs; a programme that excludes a significant segment of society cannot be said to be reasonable. The Court referred to section 28 of the 1996 Constitution with respect to the rights of children. The Court stated that while the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services, it was made clear in *Grootboom* that this does not mean that the State did not incur an obligation to children who are being cared for by their parents or families.

The above cases emphasise the fact that even if sexual and reproductive rights are enforceable, if the services are not available, the right cannot be enjoyed as it cannot be separated from other rights since human rights are interrelated and interdependent.

Section 38 of the 1996 Constitution provides *inter alia* that where a right in the Bill of Rights has been infringed or threatened, a person has the right to approach a competent court and the court may grant appropriate relief, including a declaration of rights. This therefore creates a platform for victims of violations of specific rights covered by the Bill of Rights to seek redress in court.

In a survey conducted in 2009, it was found that even though sexual violence largely goes unreported, the South African Police Service (SAPS) reported that reported cases of sexual violence rose from 66079 in 2003 to 71500 in 2009.²² In a 2014 report, the Institute for Security Studies found that rape and other forms of sexual violence were under-reported due to certain barriers, especially the fear of legal processes, including experiencing rudeness and poor treatment by the police, fear of having to relive the trauma during the investigation and in court.²³ According to the World Health Organisation, sexual violence takes various forms such as rape within marriage or dating relationships; unwanted sexual advances or sexual harassment, including demanding sex in return for favours; sexual abuse of children; forced marriage or

²²R Sigsworth 'An Overview of Sexual Violence in South Africa' Centre for the Study of Violence and Reconciliation (CSRV) November 2009 available at [https://www.issafrica.org/crimehub/uploads/sexualviolenceAnyone can be a rapist.pdf](https://www.issafrica.org/crimehub/uploads/sexualviolenceAnyone%20can%20be%20a%20rapist.pdf) accessed on 25th September, 2015.

²³ L Vetten 'Rape and other forms of sexual violence in South Africa' Institute for Security Studies Policy Brief 72, November 2014 available at <https://www.issafrica.org/uploads/PolBrief72.pdf> accessed on 25th September, 2015.

cohabitation, including the marriage of children; and violent acts against the sexual integrity of women, including female genital mutilation and obligatory inspections for virginity.²⁴ It has been argued that not all forms of *ukuthwala*²⁵ involve children.²⁶ However, the same article revealed that in the first and second quarter of 2009, the media reported that over 20 Eastern Cape girls were forced to drop out of school every month to follow the traditional custom of *ukuthwala*.²⁷

To deal with marital rape in South Africa, the Criminal Law (Sexual Offences and Other Related Matters) Amendment Act of 2007 (Sexual Offences Act, 2007) was enacted to change certain common law provisions and replace some of the provisions of the Sexual Offences Act of 1977. In relation to this research, section 3 of the Sexual Offences Act, 2007 provides that any person who unlawfully commits an act of sexual penetration with another person, without such person's consent is guilty of the offence of rape. Section 56(1) provides further that when an accused person is charged with the offence of rape, it is not a valid defence for a person accused of rape to contend that a marital or other relationship exists or existed between him and the victim of rape. Therefore, cases of marital rape have been covered by the joint reading of sections 3 and 56(1) of the Sexual Offences Act, 2007.

With respect to the rights of the child and child marriage, the Children's Act²⁸ has been put in place to give effect to the rights of children in the Constitution and to ensure that children are protected through various mechanisms.²⁹ Section 12(1) of the Children's Act provides that every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being. Section 12(2) further provides that a child below the minimum age for a valid marriage set by law may not be given out in marriage or engagement; and where such child is above the minimum age, marriage or engagement cannot occur without his or her consent. Section 26 of the Marriage Act 1961 provides that no boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage, except with the written permission of the Minister of Home Affairs or any officer in the public

²⁴ WHO World report on violence and health, 2002 available at http://apps.who.int/iris/bitstream/10665/42495/1/9241545615_eng.pdf accessed on 25th September, 2015.

²⁵ Ukuthwala is a traditional practice in which a man abducts a girl and forcefully takes her to his home, in order to force the girl's family to enter negotiations for the conclusion of customary marriage.

²⁶ L Mwambene & J Sloth-Nielsen 'Benign accommodation? Ukuthwala, 'forced marriage' and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 3-4.

²⁷ Ibid 2.

²⁸ Act 38 of 2005 (with 2007 amendments).

²⁹ Long title to the Children's Act 38 of 2005 after amendment by the Children's Amendment Act 1 of 2007.

service authorised to do so. Thus, the minimum age of marriage set by law, which does not require consent of any government personnel is 15 years for girls. With regards to customary marriages, section 3 of the Recognition of Customary Marriages Act 1998 provides that for a customary marriage to be valid, the prospective spouses must be above the age of 18 years and must both consent to be married to each other under customary law. The Marriage Act sets a lower minimum age of marriage compared to the Recognition of Customary Marriages Act. Since child marriage is primarily a traditional practice in South Africa, particularly in the Eastern Cape, the minimum age of marriage set by the Recognition of Customary Marriages Act which is 18 years may be followed.

The South African Government has also established the Family Violence Child Protection and Sexual Offences (FCS) Unit of the Police Service, *Thuthuzela* Care Centres³⁰ and Sexual Offences Courts for helping victims of sexual violence.³¹

1.1.2 Nigeria

In Nigeria, there is no platform for the enforcement of SRH rights. The Constitution of the Federal Republic of Nigeria, 1999 (1999 Constitution) does not make express provisions for the right to health as a fundamental right.³² Thus, the right is subsumed under other human rights such as right to life, respect for dignity of person, right to personal liberty and right to privacy. Section 17(3)(d) of the 1999 Constitution provides that the State shall direct its policy in ensuring that there are adequate medical and health facilities for all persons. While SRH services can be accommodated in terms of this provision, such services cannot be enforced as the provisions of Chapter Two of the 1999 Constitution (which contains the Fundamental Objectives and Directive Principles of state policy) are not justiciable.³³ Among the various violations of sexual and reproductive rights linked to sexual violence are female genital mutilation (FGM), harmful traditional practices, rape and defilement, forced child marriage, and marital rape. In a

³⁰ The *Thuthuzela* Care Centre is a one-stop centre for women and children who are victims of sexual violence, especially those resulting in HIV/AIDS, with the aim of reducing secondary trauma for victims, improve perpetrator conviction rates and reduce the time for finalizing cases and usually has a Sexual Offences Court nearby (UNICEF “Thuthuzela Care Centres” available at http://www.unicef.org/southafrica/hiv_aids_998.html accessed on 28th September, 2015).

³¹ Vetten (note 23 above).

³² Chapter IV 1999 Constitution.

³³ See Section 6(6)(c) of the 1999 Constitution.

recent study conducted at a tertiary health facility located in a rural community in Northwest Nigeria,³⁴ it was found that the majority of sexual violence cases reported were attempted rape or rape of adults and children.

A 2015 report has shown that the prevalence of forced child marriage varies widely from one region to another in Nigeria, with figures as high as 76% in the North West region and as low as 10% in the South East.³⁵ The practice of child marriage in Northern Nigeria is largely influenced by Islam, a religion which historically has been practiced in the region. Due to the pressure on children to marry young, 8% of Hausa-Fulani girls are married at the age of 15 years, and 78% are married at the age of 18 years.³⁶ According to Ola *et al*, many cases of marital rape are unreported in Nigeria because the burden of proof required to sustain a charge of marital rape in Nigeria is so high that victims rarely succeed in court.³⁷ This is so with the rules of evidence imposed by the courts³⁸ These violations have eaten deep into the Nigerian system and unless drastic measures are taken, the essence of sexual and reproductive rights will continue to be a mirage.

The Nigerian legal system, specifically, the Criminal Code Act (Criminal Code)³⁹ and the Sharia Penal Code Act (Penal Code),⁴⁰ do not recognise that marital rape is a criminal offence. Section 357 of the Criminal Code provides that “any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.” Section 6 of the Criminal

³⁴ AO Ashimi *et al* ‘Reported Sexual Violence among Women and Children seen at the Gynaecological Emergency Unit of a Rural Tertiary Health Facility, Northwest Nigeria’ (2015) 5(1) *Annals of Medical and Health Sciences Research* 26.

³⁵ Girls Not Brides ‘Child Marriage Around the World: Nigeria’ available at <http://www.girlsnotbrides.org/child-marriage/nigeria/> accessed on 9th September, 2015.

³⁶ TS 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 *African Human Rights Law Journal(AHRJ)*475

³⁷ TM Ola & JO Ajayi ‘Values Clarifications in Marital Rape: A Nigerian Situation’ (2013) 9(35) *European Scientific Journal* 294.

³⁸ See *Sambo v The State* [1963] 6 NWLR (pt 300) 399, *Akpanefe v The State* [1969]1 All NLR 420 where the Court held that before the prosecution can secure a conviction of rape, there is need for corroboration of the evidence of the victim. However in *Iko v The State* [2001] 14 NWLR (pt 732) 221, it was stated that the proper direction is that it is not safe to convict on the evidence of the victim alone, except where the Court is satisfied of the guilt of the accused person, though the Court still maintained that corroboration is important.

³⁹ Cap C38, Laws of the Federation of Nigeria, 2004.

⁴⁰ Cap 3-1, Laws of the Federation of Nigeria, 2004.

Code has defined unlawful carnal knowledge to mean “carnal connection which takes place otherwise than between husband and wife.” According to Section 282(1) of the Penal Code, a man is said to commit rape when he has sexual intercourse with a woman against her will; without her consent; with her consent when her consent has been obtained by putting her in fear of death or hurt; with her consent when the man knows that he is not her husband and that her consent is given because she believes he is her husband; or with or without her consent, when she is under fourteen years of age or of unsound mind. Section 282(2) provides that sexual intercourse by a man with his own wife is not rape, if she has attained puberty. It can be inferred from the combined reading of sections 6 and 357 of the Criminal Code and section 282 of the Penal Code, that in Nigeria, a man cannot be found guilty of raping his wife. In addition, a man may not be found guilty of raping a child who has not attained the age of puberty provided that she is his wife because rape is not recognised in the context of marriage.

With respect to the rights of the child and child marriage, section 21 of the Child Rights Act, 2003 provides that “no person under the age of 18 years is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void and of no effect whatsoever.” Section 22 also prohibits betrothal of a child to any person. By virtue of section 23, a person who marries a child, or to whom a child is betrothed, or who promotes the marriage of a child, or who betroths a child, commits an offence and is liable to a fine or imprisonment or to both fine and imprisonment. It is noteworthy that although the Child Rights Act, 2003 prohibits child marriage and betrothal, before it can be enforceable in a State in Nigeria, it has to be enacted under the State’s laws.

Item 61, Part I of the Second Schedule to the 1999 Constitution puts the formation, annulment and dissolution of marriages under Islamic law and Customary Law beyond the powers of the National Assembly. By virtue of section 7(a) of the 1999 Constitution, the House of Assembly of a State has powers to make laws with respect to any matter not included in the Exclusive Legislative list set out in Part 1 of the Second Schedule to the 1999 Constitution. In effect, since child marriages are majorly conducted under Islamic (or Sharia) and Customary Law, for it to be validly prohibited across all States of Nigeria, the House of Assembly of each of the thirty-six States must domesticate the Childs Rights Act, 2003. The major problem with the domestication is the fact that the Supreme Council of Sharia has admonished Northern States not to adopt the

Child Rights Act as it “will demolish the very basis and essence of Sharia and Islamic culture” due to the provisions of equality of male and female children among others.⁴¹ Ogunniran is of the opinion that the solution to this problem is to reconcile the differences in the legal regimes with a view to foster the implementation of the Child Rights Act in the Islamic States.⁴²

In 2001, the Nigerian government, through the Federal Ministry of Health, developed a National Reproductive Health Policy (NRHP) “to provide the necessary guidance and framework for the promotion and implementation of reproductive health programmes and activities. The ultimate aim of this policy is to serve as an effective national platform for strengthening reproductive health activities in Nigeria and facilitating the achievement of relevant global and regional goals in the interest of improved health, well-being, and overall quality of lives of all peoples in Nigeria.”⁴³ The Africa region vision, according to the NRHP, is that within the next twenty-five years, all people of the region should enjoy an improved quality of life through a significant reduction of maternal and neonatal morbidity and mortality, unwanted pregnancy and sexually transmitted infections including mother-to-child transmission of HIV, and through the elimination of harmful practices and sexual violence. Clearly, the elimination of sexual violence within the next twenty-five years is an integral part of the vision formulated by the NRHP. However, the question remains whether the NRHP can stand in the face of the various legal constraints to the protection of reproductive rights, especially with respect to sexual violence.

The broad objective of this research is to critically appraise the extant legal and regulatory framework for the protection of women and girls against sexual violence, being a violation of sexual and reproductive health rights in Nigeria, with South Africa being used to demonstrate best practices. The research focuses on child marriage and marital rape as forms of sexual violence because these are issues that may be easily downplayed in African culture. The high and low points of the various regulatory instruments are highlighted with a view to providing recommendations for law reform and implementation of existing policies in Nigeria. South Africa is used as a model for Nigeria because of its progressive laws that protect women while

⁴¹ I Ogunniran ‘Child Rights Act Versus Sharia Law in Nigeria: Issues, Challenges and Way Forward’ available at <http://www.lawrights.asn.au/files/OGUNNIRAN,%20IYABODE%20full%20paper.pdf> accessed on 16th February, 2016.

⁴² Ibid.

⁴³ Federal Ministry of Health ‘National Reproductive Health Policy and Strategy to achieve quality reproductive and sexual health for all Nigerians’ 2001, Foreword.

Nigeria is still lagging behind.⁴⁴ The research is not limited to the exposition of doctrines, but is enhanced by using empirical results by earlier research and investigations into extant practices in the selected countries. The recommendations at the end of the research are offered in the hope of galvanising and stimulating the promotion and enforcement of SRH rights, with respect to prevention of sexual violence, especially child marriage and marital rape in Nigeria.

1.2 AIMS AND OBJECTIVES

The aims and objectives of this study are as follows:

1. To critically appraise the legal and regulatory framework for the protection of women and girls against forced child marriage and marital rape, (being violations of SRH rights in Nigeria) using South Africa as a model.
2. To examine the relationship and the overlap between SRH rights and some practices which hinder the full enjoyment of these rights such as forced child marriage and marital rape in the selected countries.
3. To examine the impact of international and regional human rights instruments on the laws and policies put in place in the selected countries.
4. To offer solutions on how women and girls can be better protected against child marriage and marital rape in Nigeria.

1.3 PROBLEM STATEMENT

While various laws and policies have been put in place for the protection of women and girls, especially with respect to their sexual and reproductive rights, women and girls still experience sexual violence on a regular basis. Sexual violence includes child marriage, marital rape, rape by strangers, sexual abuse of children, female genital mutilation.⁴⁵ In a survey conducted in 2009, it was found that even though sexual violence was largely unreported, the South African Police

⁴⁴ The fact that marital rape has been outlawed in South Africa makes it a good model for Nigeria. There are other laws which are more progressive, for instance the Choice of Termination of Pregnancy Act 92 of 1996, which places little restriction on the termination of pregnancy, thereby placing validity on the right to decide freely and responsibly, the number and spacing of children, as opposed to other countries which have placed a number of restrictions on termination of pregnancy. Also, the attitude of South African courts with respect to the protection of the rights of women is impressive. For instance in *Bhe and Others v Khayelitsha and Others* (CCT 49/03) [2004] ZACC 17; 20055(1) SA 580 (CC), the court declared unconstitutional the custom of male primogeniture which discriminated against two female children in that they were prevented from inheriting the estate of their deceased father.

⁴⁵Note 24 above.

Service (SAPS) reported that reported cases of sexual violence rose from 66079 in 2003 to 71500 in 2009.⁴⁶ In 2013, the WHO reported that worldwide, almost one third (30%) of all women who had been in a relationship have experienced physical and sexual violence by their intimate partners.⁴⁷ Cases of marital rape and other forms of sexual violence are under-reported in Nigeria because the burden of proof required to sustain the charge is so high that victims rarely succeed in court.⁴⁸ This is not to say that it is not a problem in Nigeria.

To deal with sexual violence in South Africa, the Sexual Offences Act, 2007 and the Children's Act of 2005 were enacted to *inter alia* curb some of the practices. To assist victims of sexual violence, the Government established the Family Violence Child Protection and Sexual Offences (FCS) Unit of the Police Service, *Thuthuzela* Care Centres and Sexual Offences Courts.⁴⁹ While South Africa has gone a long way in implementing its obligations under the various international, regional and sub-regional instruments, there is still a lot to be done in Nigeria. Even though the Child Rights Act, 2003, Criminal Code and Penal Code of Nigeria condemn and prohibit some forms of sexual violence, much work still needs to be done in Nigeria. This is because the concept of sexual violence is wider than what has been provided in the laws, in addition, the laws currently in place to combat sexual violence need serious overhaul in order to meet international best practices.

1.4 RESEARCH QUESTIONS

1. What legal and regulatory frameworks have been provided by South Africa and Nigeria for the protection of women and girls against child marriage and marital rape?
2. How do international and regional instruments confront the problem of sexual violence, especially issues such as marital rape and child marriage, and how can this impact on Nigeria?
3. How can the mechanisms available for the protection of women against sexual violence in South Africa be adopted in Nigeria to prevent and punish acts of sexual violence, such as child marriage and marital rape, and what adjustments should be made?

⁴⁶Note 22 above.

⁴⁷ World Health Organisation report on global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence, 2013.

⁴⁸Ola & Ajayi (note 37 above) 294.

⁴⁹Vetten (note 23 above).

4. What is the impact of practices such as child marriage and marital rape on the promotion and fulfilment of SRH rights in Nigeria?

1.5 SIGNIFICANCE AND LIMITATIONS OF RESEARCH

The importance of the enforcement of the prohibition of sexual violence and related offences as violations of reproductive health rights cannot be overemphasised. However, violations of these rights occur on a daily basis, leaving the victims with various forms of trauma and injury.⁵⁰ Mubangizi argues that the Bill of Rights in the 1996 South African Constitution has several provisions relating to the protection of sexual and reproductive rights of women, but the right to culture which allows for traditional and cultural practices which violate sexual and reproductive rights of women undermines the provision.⁵¹

The research will contribute to discourse on the subject of sexual and reproductive health rights and sexual violence in Nigeria. There is currently a gap in the legal and regulatory framework for the protection of women and girls from child marriage and marital rape in Nigeria. It is therefore essential that objective, established and functional law and regulations be put in place to eviscerate the practices. Towards achieving this goal, this research analyses the various legal and regulatory frameworks that have been put in place to protect women and girls from sexual violence in South Africa and Nigeria, especially forced child marriage and marital rape; and suggests reforms for Nigeria in order to bridge the gap between the laws and policies as theory and the actual enjoyment of the provisions of the law in practice. Lessons which Nigeria may learn from South Africa in terms of the mechanisms in place will also be highlighted. A legal framework for Nigeria will be formulated through the works of advocates against sexual violence which will enhance the education of women to the existence of their rights and assist them to seek redress in courts in case of violations.

The major limitation to this research work is that field work and gathering of empirical evidence from victims of sexual violence may be daunting because of possible reluctance of victims to come forward to provide information for fear of stigmatization or reprisal.

⁵⁰ United Nations Development Fund for Women 'Ending Violence Against Women and Girls Literature Review and Annotated Bibliography' UNIFEM Pacific, August, 2010 available at <http://www.unicef.org/pacificislands/evaw.pdf> accessed on 24th February, 2016.

⁵¹ JC Mubangizi 'An Assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women In South Africa' (2015) 16(3) *Journal of International Women's studies* 158.

1.6 RESEARCH METHODOLOGY

This research adopts a doctrinal legal research method. Under this approach, there is a systematic analysis of the rules governing particular legal concepts, followed by an examination of the relationship between the rules, identification of areas of difficulty and recommendation for future developments.⁵² Materials are selected and analysed on the basis of authority and hierarchy.

The research is therefore based on primary authorities, namely legislation, treaties, regulations and official reports. Secondary sources, such as textbooks, peer-reviewed articles in journals, verifiable newspapers and internet sources are also included. Bearing in mind that sexual and reproductive health has a relationship with other non-law subjects, reference is made to materials from other academic fields, targeted toward answering the research questions.

The methodology is qualitative. This method of investigation seeks to answer the relevant question through gathering of evidence in order to produce findings that were not pre-determined. It aims to gain insight into a given research problem from the perspective of the local population it involves by answering the “why” or “how” questions.

The research therefore utilises analysis of documents and materials derived from primary and secondary sources. The methodology adopted is particularly appropriate for this research and in congruence with the purpose of the research, which aims at critically appraising the legal framework for the protection of women against sexual violence in South African and Nigeria. This means the research is mainly analytical and involves:

- i. Literature review
- ii. Analysis of the law
- iii. Content analysis: examining legislation, cases, international instrument and policy documents
- iv. Discourse analysis: making a critique of what the law is in order to propose reform.

⁵²I Dobinson & F Johns ‘Qualitative Legal Research’ available at <https://books.google.co.za/books?hl=en&lr=&id=5fiqBgAAQBAJ&oi=fnd&pg=PA16&dq=doctrinal+legal+research+h+method+johns&ots=efcxVOXq47&sig=o46fLMPgDCUtsmlz2sYt7UpSVkc#v=onepage&q=doctrinal%20legal%20research%20method%20johns&f=false> accessed on 5th October, 2015.

1.7 HISTORICAL BACKGROUND OF THE CONCEPT OF SEXUAL AND REPRODUCTIVE HEALTH RIGHTS AND SEXUAL VIOLENCE

Over the years, various scholars have conducted research on sexual and reproductive health rights and sexual violence internationally.⁵³

On the history and evolution of health as a human right, Birn⁵⁴ states that it is historically misleading to cite the Universal Declaration of Human Rights (UDHR)⁵⁵ as the start of worldwide health and human rights efforts as struggles for emancipation from slavery, feudalism, and workplace exploitation date back thousands of years. Birn, however points out that the UDHR's adoption, by proclamation, at the United Nations (UN) General Assembly in 1948 established a platform for the universal recognition of health as a human right. Article 25 of the UDHR specifically provides as follows:

1. *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*
2. *Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.*

Birn submits that the right to health may be successfully deployed when enforceable legal instruments (domestic constitutions or ratified international human rights treaties) combined with effective and willing judiciaries, are bolstered by social justice movements, political parties representative of worker and peasant interests, and political systems that do not privilege elites

⁵³ See for example RJ Cook, BM Dickens & MF Fathalla *Reproductive Health and Human Rights* New York: Oxford University Press (2003) 8; O Gbadamosi *Reproductive Health and Rights (African Perspectives and Legal Issues in Nigeria)* Benin City: Ethiope Publishing Corporation (2007) 57; and E Durojaye 'Monitoring the right to health and sexual and reproductive health at the national level: some considerations for African governments' (2009) 2(2) *Comparative and International Law Journal of Southern Africa* 227-263.

⁵⁴AE Birn 'Health and Human Rights: Historical Perspectives and Political Challenges' (2008) 29 *Journal of Public Health Policy* 32-33.

⁵⁵ Adopted by the United Nations (UN) General Assembly resolution 217A (111) of 10th December, 1948.

over majority interests.⁵⁶ Tarantola examines the emergence of human rights and the rise of health under international and national laws.⁵⁷ She suggests that the 1978 Alma-Ata Conference (International Conference on primary health care organised by the WHO) brought together state and (for the first time) non-state actors, not including commercial entities, to reset the international health agenda. The Conference strongly reaffirmed that health was a fundamental human right and that the attainment of the highest possible level of health is an important world-wide social goal whose realization requires the action of many other social and economic sectors, in addition to the health sector.⁵⁸ Okpalaobi *et al* submit that the Tehran Declaration of 1968 marked the first legal document to mention reproductive right as a subset of human rights.⁵⁹ The Conference recognised the fact that couples have a basic human right to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect.⁶⁰ Other conferences followed which culminated in the International Conference on Population and Development (ICPD) 1994 and the Fourth World Conference on Women in Beijing in 1995.⁶¹ The above works provide a background to the recognition of SRH rights as a human right and establish links between the right to health and SRH rights. However, specific violations of SRH rights were not discussed in the works as they dwelt more on history and emergence of SRH rights. In addition to tracing the historical development of SRH rights, this research will go further by looking at sexual violence as a form of violation of SRH rights.

Miller submits that while the term "sexual rights" is of relatively recent origin, the linkage of sexuality with human rights has a long and somewhat contradictory history.⁶² Due to the cycle of UN-hosted world conferences, most countries have moved towards articulating sexuality as a

⁵⁶Birn (note 54 above) 35.

⁵⁷D Tarantola 'A Perspective on History of Health and Human Rights: From the Cold War to the Gold War' (2008) 29 *Journal of Public Health Policy* 42-53.

⁵⁸ Declaration of Alma-Ata International Conference on Primary Health Care, Alma-Ata, USSR 6-12 September 1978.

⁵⁹ B Okpalaobi & H Onyi-Ogelle 'Global Trends towards the Reproductive Health Right of Nigerian Women: The Health Promotion Perspective' (2011) 2(6) *JETERAPS* 418-425.

⁶⁰ Paragraph 3, Resolution XVIII Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968.

⁶¹ Report of the Fourth World Conference on Women Beijing, 4-15 September 1995 available at

<http://beijing20.unwomen.org/-/media/Field%20Beijing&20Plus/Attachments/BeijingDeclarationAndPlatformForAction-en.pdf> accessed on 15th August, 2015.

⁶²A.M Miller 'Sexual but Not Reproductive: Exploring the Junction and Dysjunction of Sexual and Reproductive Rights' (2000) 4(2) *Health and Human Rights*, 76-77.

subject worthy of rights standards. On the relationship between sexual and reproductive rights, Miller argued that:

*There are two possible relationships between sexual and reproductive rights. One option is to consider them as intersecting sets of rights (that is, as a set of rights or concerns common to both sexual and reproductive realms) in a universe of civil, cultural, economic, social, or political rights. The second option is to posit that the two realms of sexual behaviour and reproductive behaviour may be linked or left disconnected. In this view, states have an obligation to create the conditions necessary for women and men to exercise meaningful choices as to whether to link sexuality with reproduction.*⁶³

The above quote establishes a link between sexual and reproductive rights. Gbadamosi goes further by stating that while reproductive health recognises the capacity to enjoy a satisfactory sexual life without coercion and the freedom to decide when and how frequently to engage in sexual activities, sexual health is the integration of the emotional, intellectual and social aspects of a sexual being in ways that are positively enriching and enhance personality, communication and love.⁶⁴ In effect, this implies that both sexual health rights and reproductive health rights are interwoven concepts and there is no clear cut distinction between them. Miller and Gbadamosi established an important link between sexual and reproductive rights. However, specific sexual violence issues linked to the selected countries were not addressed.

According to Cook *et al*, reproductive health is not just a major health issue; it is also a development issue, and a human rights issue.⁶⁵ They argue that the concept of reproductive health offers a comprehensive and integrated approach to health needs related to reproduction, putting women at the centre of the process; it recognises, respects and responds to the needs of men and not only to those of women. It is instructive to note that even though reproductive

⁶³Ibid 88.

⁶⁴O Gbadamosi *Reproductive Health and Rights (African Perspectives and Legal Issues in Nigeria)* Benin City: Ethiope Publishing Corporation (2007) 6-7.

⁶⁵ RJ Cook, BM Dickens & MF Fathalla *Reproductive Health and Human Rights* New York: Oxford University Press (2003) 8.

health services should be available for both men and women, Cook *et al* recognise the fact that it is more critical for women. The health needs of women were grouped into four major categories:

*First, women have specific health needs related to their sexual and reproductive function, collectively expressed in the reproductive health package. Second, women have an elaborate reproductive system that is vulnerable to dysfunction or disease, even before it functions or after it ceases to function. Third, women are subject to the same diseases of other body systems that can affect men, but their disease patterns often differ from those of men because of women's genetic constitution, hormonal environment, gender-evolved lifestyle behaviour. Diseases of other body systems, or their treatments may also interact with conditions of the reproductive system or function. Fourth, because women are women, they are subject to social dysfunctions that impact on their physical, mental or social health.*⁶⁶

This work projects the reason for the focus on the sexual and reproductive health rights of women. Despite the fact that women share the same health challenges as men, they still have certain distinct reproductive health issues that make them vulnerable to diseases, due to their genetic body constitution and subjection to social dysfunctions that affect their mental and social health. Therefore, it is imperative to protect women from violations of their sexual and reproductive health rights. This has necessitated the need to look at SRH rights and how violations can be prevented.

Cook and Dickens, in another work, consider how laws can be developed in order to improve protection of reproductive and sexual health, and how laws can be applied to facilitate rather than obstruct the availability of reproductive and sexual health services.⁶⁷ They address legal principles governing relations between providers of health services in general and of reproductive and sexual health services in particular, and intended recipients of those services. They explore how human rights found in national constitutions and laws, regional and international treaties have been and can be more effectively applied to protect and promote

⁶⁶Ibid 17

⁶⁷ R Cook & B Dickens *Considerations for Formulating Reproductive Health Laws* 2ed Geneva: World Health Organisation Occasional Paper (2000).

reproductive and sexual health. Cook and Dickens submit that reproductive health goals and values must be pursued with a realistic assessment of how laws that are used to pursue them are likely to operate in practice, for example, to protect intended spouses against their partners' HIV infection, several jurisdictions conditioned the grant of marriage licenses on couples' exchange of HIV test results.⁶⁸ International attitude towards family planning and contraception, maternal mortality and morbidity, abortion, female genital mutilation and multiple forms of violence against women were examined. Cook and Dickens note that though legal systems provide the means of enforcement for the rights in theory, they are not operative in practice due to reasons such as lack of discipline of officials in charge of implementation, and the individual's lack of knowledge of relevant legal entitlements. They recommend various approaches to the enforcement of reproductive health rights at the national level, such as the regulatory and disciplinary approach, legislative approach, criminal law approach, and civil (non-criminal) law approach. In effect, apart from laws and policies for enforcement, health care service providers should imbibe the culture of discipline and their activities should be regulated at the national level. However, the cultural settings of countries also have an effect on the efficacy of any approach to be adopted by such countries.

Durojaye examines the relevance of using human rights indicators to monitor a state's obligations with regard to the right to health including sexual and reproductive rights in Africa.⁶⁹ The data and percentage of sexual and reproductive ill-health in African countries is analysed, with reference to Nigeria and South Africa, among others. Durojaye notes that although the constitutions of most African countries do not explicitly recognise the right to health as a justiciable right, most of these countries have ratified numerous international and regional human rights instruments, including the African Charter on Human and Peoples' Rights⁷⁰ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)⁷¹ guaranteeing the right to health. The question remains how this right can be enforced and what are the perceived limitations.

⁶⁸Ibid 7.

⁶⁹Durojaye (note 53 above) 227-263.

⁷⁰ Adopted by the Organisation of African Unity (OAU) on 27th June, 1981 and entered into force 21st October, 1986.

⁷¹ Adopted by the African Union on 11th July, 2003 and entered into force 25th November, 2005.

Balogun and Durojaye examine the activities of the African Commission with regard to the advancement of sexual and reproductive health and rights in Africa.⁷² The promotional and protective mandates of the African Commission are discussed with a view to ascertaining whether the Commission has given attention to addressing the sexual and reproductive health challenges facing the region. They note that the application of human rights to contentious and emerging issues, such as sexual and reproductive health, may sometimes prove challenging because under international law, the right to health has often been criticised for being vague and insufficiently defined or ascertainable such that its enforceability is difficult which has in turn led to reluctance to recognise or enforce this right at the national level. It was stated that significant success cannot be achieved when most African leaders have failed (and are still failing) to implement the Women's Protocol and relevant provisions of CEDAW, particularly as regards meeting the sexual and reproductive health and rights of women irrespective of their socio-economic, cultural or religious backgrounds. This forms a very important foundation for this research, because attitudes and African cultural beliefs obstruct the enforcement of sexual and reproductive health rights and promotes various harmful practices. This research will also place more focus on SRH violations, especially sexual violence.

Ngwena, *et al* also conducted research on the subject of sexual and reproductive health with an article titled 'Human rights advances in women's reproductive health in Africa.'⁷³ The article examines the significance of the provisions of the General Comment 2, recently adopted by the African Commission on Human and Peoples' Rights to interpret provisions of Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol) in terms of promoting the objects of the Protocol and in particular promoting the sexual and reproductive health and rights of women. Essentially, Article 14 of the Protocol enjoins member states to ensure that the right to health of women, including sexual and reproductive health, is respected and promoted. It is an established fact that unless member states undertake the necessary legislative reforms towards domesticating the relevant provisions, such rights cannot be fully enjoyed.

⁷² V Balogun & E Durojaye 'The African Commission on Human and Peoples' Rights and the Promotion and Protection of Sexual and Reproductive Rights' (2011) 11(2) *African Human Rights Law Journal* 368-395.

⁷³ CG Ngwena *et al* 'Human rights advances for women's reproductive health in Africa' (2015) 129(2) *International Journal of Gynaecology and Obstetrics* 184-187.

Ladan identified some sexual and reproductive health variants such as family planning and services, abortion, sexually transmitted diseases including HIV/AIDS, premature and early marriage (otherwise called ‘child marriage’), safe motherhood comprising pre-natal care, safe delivery, obstetric care, safe sex and gender equality, sexual dysfunction in women e.g. infertility, female genital mutilation, marital rape, other sexual violence against women and reproductive health problems associated with menopause.⁷⁴ These are very important issues which determine whether sexual and reproductive health rights can be enjoyed by all. Flowing from this, Gbadamosi submits that forced child marriage is an infringement on the sexual and reproductive rights of females (especially the right to bodily integrity and privacy) as it is usually arranged against the free will of the girl when she is coerced into the exploitable situation.⁷⁵ He notes further that the negative reproductive consequences of child marriage include high levels of teenage pregnancies, teenage motherhood, psychological trauma, recurrent urinary tract infection, sexual dysfunction, chronic pelvic infection, prolonged obstructed labour, vesico-vaginal and recto-vaginal fistulae (VVF and RVF), physical, emotional and sexual abuses. Maswikwa *et al* agree with this and posit that a substantial body of evidence from Sub-Saharan Africa reveals clear associations between child marriage and various adverse maternal and child health outcomes, such as adolescent child bearing.⁷⁶

According to a UNICEF report, child marriage is most common in South Asia and sub-Saharan Africa, and 10 countries with the highest rates are found in these two regions.⁷⁷ In Mauritania and Nigeria, more than half of adolescent girls aged 15 to 19 who are currently married have husbands who are 10 or more years older than they are. On the possibility of a decline of child marriage, it was stated that in Africa, Nigeria is expected to have the largest absolute number of child brides.⁷⁸ The country has seen a decline in child marriage of about 1 percent per year over the past three decades and since there is always an increase in population, there will be more child brides.⁷⁹ To ensure that there is a higher rate of decline, it is necessary to implement strict

⁷⁴MT Ladan ‘Overview of Reproductive Rights and Health’ (2003) 1(7) *Journal of Economic , Social and Cultural Rights* 20.

⁷⁵Gbadamosi (note 64 above) 290.

⁷⁶B Maswikwa *et al* ‘Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from Sub-Saharan Africa’ (2015) 41(2) *International Perspectives on Sexual and Reproductive Health* 59.

⁷⁷UNICEF Report ‘Ending Child Marriage: Progress and Prospects’ 2013 available at http://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf accessed on 20th August, 2015.

⁷⁸Ibid.

⁷⁹Ibid.

laws and enforcement mechanisms to put an end to child marriage. The Girls Not Brides Initiative identifies various forms of child marriage such as *telefa* which is practiced in Ethiopia; *ukuthwala* which is practiced in South Africa; and *trokosi* which is practiced in Ghana, Benin and Togo.⁸⁰ Mwambene and Sloth-Nielsen argue that there are various forms of *ukuthwala* and not all of them constitute violations of women's and children's rights.⁸¹ Warner submits that child marriage may be a form of trafficking in girls. She argues that it is difficult not to view child marriage as essentially the sale of human beings too young to make an informed choice in the matter.⁸² She argues further that the issue of child marriage is further complicated by laws protecting traditional customary or religious practices, under the guise of freedom of religion, which makes prohibition and regulation complex.⁸³ The Girls Not Brides Initiative suggests that governments should develop national action plans to end child marriage, especially through the empowerment of the girl child; mobilisation of families and communities as agents of change; provision of adequate health, education, justice and other services; and the provision of an enabling legal and policy framework. Clearly, forced child marriage is a very serious issue in Nigeria, as seen from the above works. Child marriage is a regular occurrence and impacts greatly on reproductive health. This research will try to offer solutions using the existing framework in South Africa and propose reforms for Nigeria, where necessary.

Bergen argues that rape in marriage is an extremely prevalent form of sexual violence, particularly in consideration of the fact that women who are involved in physically abusive relationships may be especially vulnerable to rape by their partners.⁸⁴ She defines marital rape as any unwanted intercourse or penetration (vaginal, anal or oral) obtained by force, or when the wife is unable to consent. In her work, Bergen gives a brief legal history of marital rape, a discussion of the occurrence of marital rape, types of marital rape, a summary of the effects of marital rape and an analysis of practitioners' interventions with marital rape survivors. She notes that marital rape occurs in all types of marriages regardless of age, social class, race or ethnicity,

⁸⁰Girls Not Brides 'Ending child marriage in Africa' available at <http://www.girlsnotbrides.org/wp-content/uploads/2015/02/Child-marriage-in-Africa-A-brief-by-Girls-Not-Brides.pdf> accessed on 20th August, 2015.

⁸¹Mwambene & Sloth-Nielsen (note 26 above) 7.

⁸²E Warner 'Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls' (2004) 12(2) *Journal of Gender, Social Policy & the Law* 235.

⁸³Ibid at 236.

⁸⁴R.K. Bergen 'Marital Rape' (1999) 10 *National Electronic Network on Violence Against Women* 1 available at <http://www.hawaii.edu/hivandaids/Marital%20Rape.pdf> accessed on 24th August, 2015.

which makes it necessary for advocates who are involved in trying to end violence against women to see marital rape as a form of rape and of domestic violence in order to assist survivors.

Ola and Ajayi note that marital rape includes sexual intercourse, anal or oral sex, forced sexual behaviour and other sexual activities that are considered by the victims as degrading, humiliating, painful and unwanted.⁸⁵ Chika argues that prior to the recognition of marital rape as a criminal offence, it was widely believed that a man could not rape his wife.⁸⁶ According to Chika, the Common Law in force in North America and the British Commonwealth strongly encouraged this view because of the biblical teaching of St Paul in 1 Corinthians 7:4-5 which provides that “the wife hath not power of her own body, but the husband: and likewise also the husband hath not power of his own body, but the wife. Defraud ye not one the other, except it be with consent for a time, that ye may give yourselves to fasting and prayer; and come together again, that Satan tempt you not for your incontinency.”⁸⁷ Chika notes that this view changed with the decision of the House of Lords in *R v R*⁸⁸ where a man was found guilty of raping his wife.

Bergen identifies some short and long term effects of marital rape as injuries to the vaginal and anal areas, lacerations, soreness, bruising, torn muscles, fatigue and vomiting, broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence, vaginal stretching, miscarriages, stillbirths, bladder infections, infertility, potential contraction of sexually transmitted diseases including HIV, post-traumatic stress disorder, and severe psychological consequences.⁸⁹ Hancox argues that marital rape causes more lasting effects than rape by strangers because it includes not only physical violation, but also violation of trust between husband and wife.⁹⁰ Hancox notes that marital rape and sexual violence inflicted on women by their husbands is condoned by the women because of fear of the police, lengthy court processes and their financial dependence on their husbands.⁹¹

⁸⁵Ola & Ajayi (note 37 above) 294.

⁸⁶IS Chika ‘Legalization of marital rape in Nigeria: a gross violation of women’s health and reproductive rights’ (2011) 33(1) *Journal of Social Welfare & Family Law* 41.

⁸⁷*Ibid* 41-42.

⁸⁸[1992] 1 AC 599.

⁸⁹Bergen (note 84 above) 4.

⁹⁰G Hancox ‘Marital Rape in South Africa: Enough is Enough’ available at <http://www.osisa.org/buwa/south-africa/marital-rape-south-africa> accessed on 21st August, 2015.

⁹¹*Ibid*.

Ouattara *et al* have attempted to establish a link between child marriage and marital rape. It was stated that although most African countries have ratified international and regional treaties on human rights, customs and traditional practices continue to subordinate women and girls.⁹² Ouattara *et al* argue that child marriage is a serious danger for girls and sometimes leads to rape within marriage.⁹³ It was further argued that child marriage leaves girl brides highly vulnerable to sexual violence in marriage, sexual intercourse before the onset of menstruation, early and very painful sex, forced sexual activity, among others.⁹⁴ They stress that comparing “a girl’s attainment of puberty with a husband’s licence to seek and force sex upon her denies each girl control over whether, when and with whom she has sexual relations,”⁹⁵ thereby violating her sexual and reproductive health rights.

It is instructive to note that South Africa has criminalised marital rape by virtue of the provisions of section 56 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.⁹⁶ However, the Nigerian Criminal Code and Penal Code do not recognise the issue of marital rape and therefore exclude it. This research discusses the specific laws in South Africa and Nigeria and how the existing framework in South Africa can be employed to foster better protection of women and girls against child marriage and marital rape in Nigeria.

1.8 DEFINITION OF TERMS

1.8.1 Sexual and Reproductive Health Rights

Various definitions have been offered for the concept of sexual and reproductive health and the rights attached to them. Reproductive health was defined to include sexual health at the International Conference on Population and Development (ICPD) as follows:

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health

⁹²M Ouattara *et al* ‘Forced Marriage, Forced Sex: The Perils of Childhood for Girls’ (1998) 6(3) *Gender and Development* 28.

⁹³Ibid 30.

⁹⁴Ibid 31.

⁹⁵Ibid 32.

⁹⁶See *S v Myamvu* [2005] 1 All SA 35 (SCA) where a man was convicted for raping his wife and *Modise v State* (113/06) [2007] ZANWHC 73 where a man was convicted for attempting to rape his wife.

therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the rights of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive healthcare is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.⁹⁷

A working group for the World Health Organization (WHO)⁹⁸ defined sexual health as:

A state of physical, emotional, mental, and social wellbeing in relation to sexuality; it is not merely the absence of diseases, dysfunction, or infirmity. Sexual health needs a positive and respectful approach to sexuality and sexual relationships, and the possibility of having pleasurable and safe sexual experiences that are free of coercion, discrimination, and violence. For sexual health to be attained and maintained, the sexual rights of all individuals must be respected, protected, and satisfied.

Sexual rights were also defined as embracing:

⁹⁷Paragraph 7.2, Programme of Action adopted at the International Conference on Population & Development (ICPD), Cairo, 5th-13th September, 1994.

⁹⁸“Defining Sexual Health” Report of a technical consultation on sexual health 28-31 January 2002, Geneva World Health Organisation 2006 available at www.who.int/reproductivehealth/publications/sexual_health/defining_sexual_health.pdf accessed on 15th August, 2015.

Human rights that are already recognized 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:

- *The highest attainable standard of sexual health, including access to sexual and reproductive health care services;*
- *Seek, receive and impart information related to sexuality;*
- *Sexuality education;*
- *Respect for bodily integrity;*
- *Choose their partner;*
- *Decide to be sexually active or not;*
- *Consensual sexual relations;*
- *Consensual marriage;*
- *Decide whether or not, and when, to have children; and*
- *Pursue a satisfying, safe and pleasurable sexual life.*

*The responsible exercise of human rights requires that all persons respect the rights of others.*⁹⁹

Reproductive rights are defined in the ICPD Programme of Action paragraph 7.3, as embracing:

*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 right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.*¹⁰⁰

⁹⁹ Ibid.

¹⁰⁰ Paragraph 7.3 Programme of Action adopted at the ICPD, Cairo, 5th-13th September, 1994.

The above definition was also adopted at the Beijing Women's Conference.¹⁰¹ Except in certain instances of in vitro fertilization (IVF) and artificial insemination,¹⁰² human reproduction requires some form of sexual activity; linking sexual rights with reproductive rights is inevitable.

1.8.2 Sexual Violence

Before defining sexual violence, it is imperative to define "violence". WHO defines "violence" as "the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation."¹⁰³ According to Dahlberg and Krug, the use of "physical force or power" in the definition expands the nature of acts of violence to include threats and intimidation, neglect and all forms of sexual, physical and psychological abuse.¹⁰⁴

Sexual violence has also been defined as "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work."¹⁰⁵ It can be inferred from this definition that activities which threaten the sexuality of a person may constitute sexual violence. Marital rape and child marriage constitute forms of sexual violence.

1.8.3 Marital Rape

Given that marital rape is a form of rape, it is pertinent to define "rape". The definition of "rape" varies according to the legal systems of various countries. However, due to the scope of this research, emphasis will be placed on the definitions adopted in South Africa and Nigeria. In South Africa, section 3 of the Sexual Offences Act, 2007 provides that any person who unlawfully commits an act of sexual penetration with another person, without such person's consent, is guilty of the offence of rape. In Nigeria, the combined reading of sections 6 and 357

¹⁰¹ United Nations Report of the Fourth World Conference on Women, Beijing, 4th-15th September, 1995.

¹⁰²V Shenoy 'Artificial Insemination and In Vitro Fertilization and Challenges caused to the legal system' available at http://www.legalserviceindia.com/articles/art_ins.htm accessed on 15th August, 2015.

¹⁰³WHO 'Violence' available at <http://www.who.int/topics/violence/en/> accessed on 25th November, 2015.

¹⁰⁴ L Dahlberg & E Krug 'Violence- a global public health problem' in EG Krug *et al* (ed) *World report on violence and health* Geneva: WHO (2002) 5.

¹⁰⁵Note 24 above.

of the Criminal Code Act is to the effect that any person who has unlawful carnal connection, other than that which is between husband and wife, with a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.

Marital rape, otherwise called “spousal rape” or “rape in marriage” is simply defined as any unwanted intercourse or penetration (vaginal, anal or oral) obtained by force, or when the wife is unable to consent.¹⁰⁶ While section 56 of the Sexual Offences Act, 2007 is to the effect that marital rape is a recognised crime in South Africa, section 6 and 357 of the Criminal Code and Section 282(2) of the Penal Code point to the fact that marital rape is not a recognised crime in Nigeria.

1.8.4 Child Marriage

Child marriage may be defined as a marriage in which one or both of the spouses are below the age of 18 years. UNICEF defined child marriage as a formal or informal union before the age of 18 years, which is a reality for both boys and girls, especially girls.¹⁰⁷ It is mostly influenced by traditional, cultural and religious beliefs which have been passed from one generation to another.

1.8.5 Consent

Consent may be defined as “agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person; legally effective assent.”¹⁰⁸ It is clear from the above definition that consent must be voluntary, it must be given by a competent person and it must be an agreement or approval to an act or purpose. Under most legal systems, including Nigeria and South Africa, persons under the age of 18 are regarded as legal minors, which make them incapable under law, of acting independently without the help of their parents or

¹⁰⁶Bergen (note 84 above) 1.

¹⁰⁷UNICEF ‘Child Marriage’ available at http://www.unicef.org/protection/57929_58008.html accessed on 16th November, 2015.

¹⁰⁸“Consent” *Black’s Law Dictionary* 8th ed. 2004. Print.

guardians.¹⁰⁹ Strode *et al* however point out that due to the recognition of the evolving capacity which children possess, South African legislators have passed laws that allow children to make certain decisions independently.¹¹⁰ An example of such law is the Marriage Act 1961 which allows persons below the age of 18 years to get married, provided that the consent of the Minister is obtained.¹¹¹

Consent may be express or implied. Express consent is defined as “consent that is clearly and unmistakably stated,” while implied consent is “consent inferred from one’s conduct rather than from one’s direct expression.”¹¹² In terms of sexual violence against women and girls, the issue of consent is somewhat controversial and complicated because in certain countries women and girls are seen to have given implied consent to certain forms of violence when they get married.¹¹³ Powell identifies circumstances in which a person may not be said to freely agree to an act in terms of sexual contact, to include:

- a) *The person submits because of force or the fear of force to that person or someone else;*
- b) *The person submits because of the fear of harm of any type to that person or someone else*
- c) *The person submits because she or he is unlawfully detained*
- d) *The person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;*
- e) *The person is incapable of understanding the sexual nature of the act;*

¹⁰⁹Section 1 of the Children’s Act of SA and Section 277 of the Child Rights Act of Nigeria. See also Strode *et al* ‘Child Consent in South African Law: Implications for researchers, service providers and policy makers’ (2010) 100 (4) *South African Medical Journal* 249.

¹¹⁰Strode *et al* (note 109 above) 249.

¹¹¹Section 5(3) of the Choice of Termination of Pregnancy Act 92 of 1996 also allows a minor to take a decision to terminate a pregnancy where the minor decides not to consult her parents, guardian, family members or friends, provided she is advised to do so. Also, by virtue of Section 129(2) of the Children’s Act, a child may consent to his or her own medical treatment, provided he or she is above the age of 12 years, is mature enough and has the mental capacity to understand and appreciate the implications of the treatment.

¹¹²Strode *et al* (note 109 above) 249.

¹¹³Section 6 of the Criminal Code defines unlawful carnal knowledge as carnal connection which takes place otherwise than between husband and wife. The purport of this section is that once a woman is married, the issue of rape is out of the question. See generally *R v Roberts* [1966] Criminal Law Reports 188 cited in EO Ekhatior ‘Women and the Law in Nigeria: A Reappraisal’ (2015) 16(2) *Journal of International Women’s Studies* 288 and *R v Mille* [1954] 2 QB 282, where the Court held that there is implied consent to intercourse when a woman gives her consent to marriage.

- f) *The person is mistaken about the nature of the act or the identity of the person;*
- g) *The person mistakenly believes that the act is for medical or hygienic purposes.*¹¹⁴

In effect, where it can be shown that consent was based on any of the above, it is vitiated. Consent may also be raised as a defence to certain crimes. For example, where a person is charged with the offence of rape, the consent of the victim may be raised as a defence.¹¹⁵

There is also the concept of “informed consent” which is often used in medical and legal parlance. It is defined as “a person’s agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives.”¹¹⁶

Various legal instruments, both at the international and regional levels, have tried to tackle the problem of sexual violence against women, especially child marriage and marital rape, through the recognition and promotion of sexual and reproductive health rights; advocating gender equality; elimination of discriminatory practices and other harmful cultural practices; and so on. The next chapter will provide a detailed discussion of various international, regional and sub-regional instruments dealing with sexual and reproductive health rights and sexual violence.

¹¹⁴ A Powell *Sex, Power and Consent* New York: Cambridge University Press (2010) 90.

¹¹⁵ See generally J Burchell *Principles of Criminal Law* Claremont: Juta (2013) 205-206.

¹¹⁶ *Black’s Law Dictionary* (note 108 above).

CHAPTER TWO

SEXUAL AND REPRODUCTIVE HEALTH RIGHTS, SEXUAL VIOLENCE AND THE PROTECTION OF WOMEN'S RIGHTS

2.1. INTRODUCTION

In the previous chapter, the link between sexual violence against women and sexual and reproductive health (SRH) rights was established. The fact that sexual violence constitutes a gross violation of SRH rights was also established. Over the years, international, regional and sub-regional organisations have adopted various instruments relating to sexual violence and SRH rights. This has been done through passing resolutions and adoption of declarations at various conferences and summits. The treaties and other instruments provide a standard which may be adopted by national legislation for the protection of SRH rights.¹

In the international context, health was first recognised as a human right by the Universal Declaration of Human Rights (UDHR);² a more comprehensive expression of this right was given in Article 12 of the Covenant on Economic, Social and Cultural Rights (ICESCR),³ and the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW).⁴ The concept evolved as a result of various women's movements and actions of Non-Governmental Organisations (NGOs) advocating for the recognition of the right to sexual and reproductive health.⁵ Respect for the rights of women (especially pertaining to the right to life, human dignity and respect for bodily integrity) was advocated at the 1975 World Conference of the International Women's Year⁶ which was the first women's conference organised by the United Nations.⁷

¹ Kenya National Commission on Human Rights 'Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality' available at http://www.knchr.org/portals/0/reports/reproductive_health_report.pdf accessed on 25th September, 2015.

² Adopted by the United Nations (UN) General Assembly resolution 217A (111) of 10th December, 1948.

³ Adopted by the UN General Assembly resolution 2200A of 16th December, 1966.

⁴ Adopted by the UN General Assembly resolution 3180 of 18th December, 1979.

⁵ E Durojaye & LN Murungi 'The African Women's Protocol and sexual rights' (2014) 18(7-8) *International Journal of Human Rights* 882.

⁶ Report of the World Conference of the International Women's Year, Mexico City 19th June-2nd July, 1975 available at

According to Cook *et al*, the 1994 UN Conference on Population and Development, held in Cairo, and the 1995 Fourth UN World Conference on Women, held in Beijing, led to the recognition that the protection of sexual and reproductive health is a matter of social justice, and that the realisation of such health could be addressed through the improved application of human rights contained in existing national constitutions and regional and international human rights treaties.⁸ The enjoyment of sexual and reproductive health rights is dependent on the implementation of other rights such as the right to life, right to be free from sexual violence, right to liberty and security, and right to be free from torture, cruel or inhuman treatment, among others.⁹

This chapter will examine some of the key international, regional and sub-regional instruments on SRH rights, paying close attention to the provisions relating to sexual violence against women and girls. The general comments and recommendations provided by the various committees in charge of monitoring the implementation of the instruments will also be discussed.

2.2 INTERNATIONAL RESPONSES

2.2.1 Universal Declaration of Human Rights (UDHR) 1948

The UDHR is the starting point for the recognition of human rights in the modern society. It is the foundation for the recognition and codification of human rights among international and national laws. According to Mann *et al*, the UDHR is the cornerstone document for modern human rights.¹⁰ The UDHR was adopted and proclaimed by the United Nations (UN) General Assembly resolution 217 A (111) of 10 December 1948. It came into existence as a result of the international experience and atrocities committed during the Second World War, and the decision of world leaders to complement the UN Charter with a road map to guarantee the rights

<http://www.un.org/womenwatch/daw/beijing/otherconferences/Mexico/Mexico%20conference%20report%20optimized.pdf> accessed on 15th August, 2015.

⁷Wikipedia 'International Women's Year' available at

https://en.wikipedia.org/wiki/International_Women%27s_Year accessed 15th August, 2015.

⁸ RJ Cook, BM Dickens & MF Fathalla *Reproductive Health and Human Rights* New York: Oxford University Press (2003) 148-149. See also C Zampas & J Todd-Gher 'Abortion and the European Convention on Human Rights: A lens for abortion advocacy in Africa' in C Ngwenya and E Durojaye (ed) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 82.

⁹I Merali 'Advancing women's reproductive and sexual health rights: using the International Human Rights system' (2000) 10(5) *Development in Practice* 613.

¹⁰ JM Mann *et al Health and Human Right* New York: Routledge (1999) 2.

of every individual everywhere.¹¹ The UDHR incorporates civil and political rights, and social, economic and cultural rights.¹² From the preamble, the UDHR stressed that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Although SRH rights are not specifically mentioned in the UDHR, they can be subsumed under various provisions. Article 1 stipulates that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. This provision buttresses the fact that everyone is equal and should be accorded equal treatment irrespective of gender. In effect, both men and women are equal and there should be no discrimination in whatever form. By virtue of Article 5, no one shall be subjected to torture or to cruel, inhuman or degrading treatment punishment. One of the most important tenets of SRH rights is the respect for dignity of the person, which precludes anyone from torture in whatever form, including domestic and sexual violence, and mutilation of body parts.

There is also an important provision on marriage in the UDHR. Article 16(1) provides that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Article 16(2) further provides that marriage shall be entered into only with the free and full consent of the intending spouses. Although the UDHR does not provide a specific definition of ‘full age’, recourse can be had to subsequent instruments, especially the Convention on the Rights of the Child, 1989. In effect, the UDHR prohibits child marriage, especially since it occurs without consent.

Article 25 deals with the right to health. Article 25(1) provides that everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security

¹¹United Nations ‘History of the Document’ available at <http://www.un.org/en/documents/udhr/history.shtml> accessed 3rd September, 2015.

¹² Article 22 of the UDHR provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his or her control. In effect, the right to health has a number of variables, including food, clothing, housing and medical care and necessary social services. The listed variables have a direct impact on the health of an individual. Article 25(2) further provides that motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. This provision recognizes the fact that due to the delicate nature of women, especially mothers, and children, they have to be given special care and attention.

While the provisions of Article 25 are laudable, there are no mechanisms for enforcement or effects of default in the UDHR. However, the UDHR is relevant because it has served as a model for provisions on human rights in national constitutions. It has laid a solid foundation for international and regional human rights treaties and conventions, especially with regards to the right to health.

The major limitation of the UDHR is its reliance on other international instruments for enforcement as there is no specific effect of breach. In addition, it is not legally binding, as it is at best persuasive. However, it is reproduced in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), with some additional provisions, to give the provisions of the UDHR the force of law at an international level, culminating in the formation of the International Bill of Rights.

2.2.2 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

International protection of economic, social and cultural rights became an issue from the moment the UDHR was adopted.¹³ In its preamble, the ICESCR makes reference to the UN Charter and the UDHR, specifically the fact that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Thus, the foundation of the ICESCR can be traced to the UN Charter and the UDHR. It reflects the commitments adopted after World War II to promote social progress and

¹³Christian Curtis *Commentary on the Optional Protocol to the ICESCR* Inter-American Institute of Human Rights/International Commission of Jurists: Geneva (2008) 16.

better standards of life, reaffirming faith in human rights and employing international machinery to that end.¹⁴

Article 1(2) makes it clear that there should be no discrimination in the exercise of the rights in the ICESCR, as it provides that the States Parties undertake to guarantee that the rights enunciated will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This is also emphasised in Article 3, which provides that State Parties undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the covenant. This means that equality is a very important element in the ICESCR. The latter part of Article 10(1) is to the effect that marriage must be entered into with the free consent of the intending spouses. Thus, there should be no form of force or coercion, as is the case of child marriage.

Article 12 recognises the right of everyone to “the enjoyment of the highest attainable standard of physical and mental health.” States Parties are therefore required to adopt measures to ensure the full realisation of the right to health, especially through the reduction of infant mortality; improvement of environmental and industrial hygiene; prevention, treatment and control of epidemic, endemic, occupational and other diseases; among others.¹⁵ According to Vesa, Article 12 could be interpreted to impose a duty on State Parties to protect women’s physical and mental health and provide domestic remedies when their health is in danger, for example, due to sexual violence.¹⁶ General Comment No. 14 (GC14)¹⁷ gives a better understanding and interpretation of Article 12 of the ICESCR. Paragraph 3 of GC 14 emphasises the fact that the right to health shares a symbiotic relationship with other human rights contained in the International Bill of Rights, including the rights to human dignity, life, non-discrimination, equality, privacy and the prohibition against torture, among others. According to Paragraph 8, the right to health contains both freedoms and entitlements. The right to control one’s health and body, including sexual and

¹⁴International Network for Economic, Social and Cultural Rights ‘Section 5: Background Information on ICESCR’ available at <https://www.escr-net.org/docs/i/425251> accessed on 4th September 2015.

¹⁵See Article 12, ICESCR.

¹⁶A Vesa ‘International and Regional Standards for Protecting Victims of Domestic Violence’ (2004) 12(2) *Journal of Gender, Social Policy & the Law* 324.

¹⁷Committee on Economic Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) adopted at the twenty-second session of the CESCR on 11th August, 2000 (contained in Document E/C.12/2000/4).

reproductive freedom, and the right to be free from interference, such as the right to be free from torture; are listed as the freedoms while the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health is listed as the entitlements.

On the issue of discrimination against women, the CESCR suggests that it can be eliminated through the development and implementation of a comprehensive national strategy for promoting women's right to health throughout their life span.¹⁸ According to the CESCR, the main purpose of the strategy should be "reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence." The importance of undertaking "preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights" is also stressed.

Under Paragraph 35, States are under the obligation to "ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence". Gender-based expressions of violence may include other forms of cultural practices which endanger the life and health of women. The right to health is said to be violated when State Parties fail to take all measures to prevent infringement of the right, including failure to protect women against violence or to prosecute perpetrators and the failure to discourage the continued observance of harmful traditional medical or cultural practices.¹⁹

The ICESCR has also set up a mode of monitoring the implementation of the rights set out. Article 16 stipulates that State Parties undertake to submit reports on the measures which they have adopted and the progress made in achieving the observance of the rights. The report goes from the Secretary-General of the UN to the Economic and Social Council (ECOSOC) for consideration. It also provides guidelines on how the report should be compiled and the

¹⁸ Ibid Paragraph 21.

¹⁹ Ibid Paragraph 51.

procedure for analysis of the report.²⁰ The ECOSOC established the Committee on Economic, Social and Cultural Rights (CESCR) comprising of 18 independent experts, by Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions in Part IV of the ICESCR.²¹

The Optional Protocol to the ICESCR (OP-ICESCR),²² further analyses how the functions of the CESCR are performed; i.e. the procedures for ensuring that the rights enunciated in the ICESCR have international protection and are enforced in member states. For instance, Article 2 of the OP-ICESCR provides that where there is a violation of any of the economic, social and cultural rights set forth in the ICESCR, victims may forward such complaints, in the form of communications, to the CESCR, provided they are under the jurisdiction of a State Party. In effect, the CESCR will only act on complaints brought by individuals under the jurisdiction of a State Party. In addition, by virtue of Article 3, the complaints will not be considered unless the CESCR has ascertained that all available domestic remedies have been exhausted. After the CESCR has admitted a complaint, the State Party concerned will be notified confidentially and forward a response to the complaint within six months,²³ friendly settlement is thereafter encouraged.²⁴

The ICESCR is important because it creates a legally binding international agreement in respect of economic, social and cultural rights, unlike the UDHR. It provides the most comprehensive article on the right to health in international human rights law.²⁵

2.2.3 International Covenant on Civil and Political Rights (ICCPR), 1966²⁶

The ICCPR, as the title implies, basically provides for civil and political rights. However, rights relating to sexual violence and sexual and reproductive health rights can be placed under some of its provisions. Vesa stated that human rights, such as the right to life, the right to be free from torture and the right to be free from gender discrimination; are directly related to violence against

²⁰ See Articles 17-22 of the ICESCR 1966.

²¹ United Nations Human Rights 'Committee on Economic, Social and Cultural Rights' available at <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> accessed on 11th September, 2015.

²² Adopted by General Assembly resolution A/RES/63/117, on 10th December, 2008.

²³ Article 6 OP-ICESCR.

²⁴ Article 7 OP-ICESCR.

²⁵ Cook *et al* (note 8 above).

²⁶ Adopted by General Assembly resolution 2200A (XXI) of 16th December 1966, and entered into force 23rd March, 1976.

women.²⁷ Accordingly, the Preamble to the ICCPR states that the rights contained are derived from the inherent dignity of the human person. One of the tenets of sexual and reproductive health rights is the recognition of the dignity of the human person. By virtue of Article 3, State Parties are to ensure equality of men and women in the enjoyment of the rights set out. Thus, there should be no discrimination whatsoever.

Article 6 recognises the inherent right to life of every human being and requires State Parties to protect the right by taking measures to eliminate acts which threaten the right. In *Kontrova v Slovakia*²⁸ the applicant had previously lodged criminal complaints against her husband for assault and threats to kill her and their children. The complaint was later withdrawn with the help of the police. The husband later killed himself and the two children. At the European Court of Human Rights, the applicant claimed that the police failed to take adequate steps to protect the lives of her children, bearing in mind the abusive and threatening behaviour of the husband. The Court held that there had been a violation of the right to life as the police (being officers of the State) were obliged to register the applicant's criminal complaint, launch a criminal investigation and criminal proceedings against the applicant's husband; among other necessary steps.

Article 7 prohibits the subjection of a person to torture, cruel, inhuman or degrading treatment or punishment. It has been argued that marital rape is a form of torture against women.²⁹ In *Eremia and Others v the Republic of Moldova*,³⁰ the applicant alleged that the State (through the relevant authorities) failed to protect her and her children from the violent and abusive behaviour of her husband, thereby violating their right to be free from inhuman and degrading treatment. The European Court of Human Rights held that there had been a violation of the right to be free from inhuman and degrading treatment. The Court also held that the authorities' attitude amounted to condoning violence and had been discriminatory towards the applicant being a woman.

Article 9 recognises the right of everyone to liberty and security. The right to liberty and security of the person is one of the strongest defences of individual integrity in the reproductive and

²⁷Vesa (note 16 above) 320.

²⁸ Application no. 7510/04 Judgment of 31st May, 2007. See also *Kilic v Turkey* (application no. 63034/11, judgment of 31st September, 2013) and *Civek v Turkey* (application no. 55355/11, judgment of 23rd February, 2016).

²⁹R Coomaraswamy & LM Kols 'Violence Against Women' in KD Askin & DM Koenig (eds) 1 *Women and International Human Rights Law* (1999) 186.

³⁰ Application no. 3564/11, judgment of 28th May, 2013. See also the United States case of *Jessica Lenahan (Gonzales) et al* (report no. 80/11 judgment of 21st July, 2011).

sexual health care context.³¹ By virtue of Article 23(3), “no marriage shall be entered into without the free and full consent of the intending spouses.” Thus, child marriage, which is often conducted without the consent of the girl involved, is prohibited. Article 28 establishes the Human Rights Committee (HRC) to monitor the implementation of the rights set out in the ICCPR. The HRC also receives complaints from individuals whose rights have been violated. Thus, where there are violations of the rights of women and girls, such acts may be reported to the HRC. It has been argued that despite the fact that the ICCPR guarantees the right to “effective legal protection, high standards of proof, strict evidentiary requirements and unresponsiveness on the part of police are all obstacles” faced by victims of violence.³²

2.2.4 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.

CEDAW may be regarded as the most applicable international human rights treaty in terms of the rights of women.³³ This is because it integrates the provisions of the UDHR, ICESCR and the ICCPR relating to the rights of women.³⁴ It is the main document which addresses the rights of women to be free from all forms of discrimination.³⁵ By virtue of CEDAW, the Committee on the Elimination of Discrimination Against Women (hereafter CEDAW Committee) has also been set up to monitor the implementation of the rights set out in State Parties. In line with this, the Optional Protocol to CEDAW (OP-CEDAW) was adopted by General Assembly resolution A/54/4 of 6th October, 1999, which is similar to the OP-ICESCR in terms of analysis of how the functions of the CEDAW Committee (with respect to monitoring implementation of rights) are carried out. Where a right is violated, a victim may forward complaints to the Committee based on similar conditions in the OP-ICESCR. This has made it possible for victims of violations to come under the umbrella of CEDAW for enforcement of their rights.

In the preamble to CEDAW, it was stressed that discrimination against women constitutes a violation of the principles of “equality of rights and respect for human dignity”, impedes

³¹ R Cook ‘Women’s Health and Human Rights’ available at <http://info.worldbank.org/etools/docs/library/48440/m1s5cook.pdf> accessed on 29th October, 2015.

³²Vesa(note 16 above) 321.

³³Merali (note 9 above) 611.

³⁴Ibid.

³⁵P Goldberg & N Kelly ‘International Human Rights and Violence Against Women’ (1993) 6 *Harvard Human Rights Journal* 197.

“participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of the women in the service of their countries and humanity.” 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.” This definition encompasses enjoyment of all classes of human rights, including the right to sexual and reproductive health, as a subset of the right to health. Article 2 (b)-(c) enjoins State Parties to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; to establish legal protection of the rights of women on an equal basis with men; and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination. This emphasises the fact that where there are effective enforcement policies, there will be a high level of protection of the rights of women and discrimination is at best, relegated.

Article 5(a) provides that State Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and woman. Coomaraswamy and Kols argue that without strong state measures, it is doubtful that religious and cultural practices constituting violence against women will be eliminated.³⁶ In effect, discriminatory cultural practices such as child marriage, female genital mutilation and other forms of domestic violence should be curtailed by State Parties. The right to equal access to health care facilities for all women, including those in confinement, is stated in Article 12. Article 12(1) enjoins State Parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. In addition, State Parties should ensure appropriate services in connection to pregnancy, confinement and

³⁶Coomaraswamy & Kols (note 29 above) 180.

post-natal periods, free services and adequate information during pregnancy and lactation.³⁷ Article 12 imposes a strong obligation on State Parties to ensure that SRH services are adequately provided to all women, irrespective of status. According to the CEDAW Committee, this implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations.³⁸ They must also put in place a system which ensures effective judicial action. Failure to do so will constitute a violation of article 12.

Vesa argues that a woman who is a victim of domestic (or sexual) violence, whose health is in danger and who cannot receive adequate medical attention, can seek protection under CEDAW by holding her state of citizenship responsible for not implementing legislation or other measures that would have prevented her partner from physically abusing her, for failing to investigate and punish her partner who has committed domestic violence and for not providing the appropriate avenues to access health care.³⁹ States are also required to ensure the enactment of and effective enforcement of laws and the formulation of policies, including health care protocols and hospital procedures to address violence against women and abuse of girl children (including female genital mutilation and marriage of girl children) and the provision of appropriate health services because gender-based violence is a critical health issue for women.⁴⁰ The CEDAW Committee notes that female genital mutilation and other harmful traditional practices have serious health and other consequences for women.⁴¹ State Parties are enjoined to take appropriate and effective measures with a view to eradicating the practice.⁴²

Article 16 puts equal rights in marriage in the proper perspective, highlighting some elements of SRH rights. Article 16(1)(a)-(b) enjoins State Parties to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular to ensure that marriage is entered on a basis of equal rights of men and women to

³⁷ Article 12(2) CEDAW 1979.

³⁸ UN Committee on the Elimination of Discrimination Against Women, General Recommendations No. 24: Women and Health, twentieth session, 1999.

³⁹ Vesa (note 16 above) 328.

⁴⁰ Note 36.

⁴¹ UN Committee on the Elimination of Discrimination Against Women, General Recommendations No. 14: Female circumcision, ninth session, 1990.

⁴² Ibid.

freely choose a spouse and to enter into marriage only with free and full consent. In its General Recommendations No. 21 of 1991, the CEDAW Committee stated as follows:

*A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties' reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman's marriage to be arranged for payment or preferment and in others women's poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based for example on woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced at law.*⁴³

The right of a couple to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights is expressed in Article 16(1)(e). This provision does not exclude the condition of equality, as the basis of CEDAW is equality of the rights of both men and women. In effect, both the husband and the wife can exercise the right to determine the number and spacing of their children. This is contrary to the belief in African society that the husband is the head of the home and must take decisions on all matters relating to the home. Since pregnancy and motherhood may have physical and mental effects on a woman, she should be party to the decision of the number and spacing of her children.

A very important aspect of Article 16 is the provision on child betrothal and marriage, and the necessity for legislative actions to stop the practice. Article 16(2) provides that the betrothal and the marriage of a child shall have no legal effect; and that all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory. To prevent health hazards such as obstetric fistula, in the form of vesico-vaginal fistula or recto-vaginal fistula, child marriage must be completely phased out. The CEDAW Committee stated that due to the amount of responsibility people

⁴³ UN Committee on the Elimination of Discrimination Against Women, General Recommendations No. 21: Equality in Marriage and Family Relations, adopted at the thirteenth session, 1994.

assume when they marry, marriage should not be permitted before they have attained full maturity and capacity to act.⁴⁴

In Paragraph 23 of the General Recommendation 19, the CEDAW Committee notes as follow:

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

The CEDAW Committee recommends that State Parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity.⁴⁵ Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention. This has been termed the “due diligence obligation” under international law.⁴⁶ The United Nations Office on Drugs and Crimes states that “States are required to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women whether those actions are perpetrated by the State or by private persons.”⁴⁷ Thus, when a violation occurs, a State Party may be held responsible for failing to uphold its obligations to eliminate cultural and traditional practices promoting the treatment of women as less than men. In *X and Y v Georgia*,⁴⁸ a mother and her daughter (both applicants), alleged that the State failed in its duty to prevent, investigate and punish prolonged physical violence, and sexual and psychological abuse suffered at the hands of their former husband and

⁴⁴ Ibid

⁴⁵ UN Committee on the Elimination of Discrimination Against Women, General Recommendations No. 19: Violence against Women’ adopted at the eleventh session, 1992, 24.

⁴⁶ United Nations Office on Drugs and Crimes *Handbook on effective prosecution responses to violence against women and girls* Criminal Justice Handbook series, New York: United Nations (2014) 23.

⁴⁷ Ibid.

⁴⁸ Communication no. 24/2009, available at <http://ehrac.org.uk/news/first-ever-international-decision-on-domestic-violence-in-georgia-highlights-serious-shortcomings-in-state-response/> accessed on 19th April, 2016.

father. While the marriage between the first applicant and the husband subsisted, the man sexually abused the children and subjected them to other forms of abuse. He was reported to the police a number of times but they never investigated nor prosecuted the man. The CEDAW Committee found that the State breached its obligation under Articles 2 and 5 of CEDAW and the CEDAW Committee's General Recommendation No. 19 on violence against women. The CEDAW Committee thereafter called on the Georgian government to provide adequate financial compensation to the applicants.

On 20th December, 1993, the Declaration on the Elimination of Violence against Women (hereafter DEVW) was proclaimed by General Assembly Resolution 48/104. It was born out of a struggle of various women groups advocating for the recognition of women's rights as human rights.⁴⁹ Article 2(a) defines violence against women as "physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation." It has been argued that violence against women is a major hindrance to the fulfilment and enjoyment of human rights of women throughout the world.⁵⁰ In effect, societal ills such as marital rape, female genital mutilation, and similar acts constitute violence against women and also form a serious constraint to the enjoyment of reproductive rights of women. Article 3 stresses that women are entitled to equal enjoyment and protection of all human rights such as the "right to life; the right to equality; the right to liberty and security of person; the right to equal protection under the law; the right to be free from all forms of discrimination; the right to the highest standard attainable of physical and mental health; the right to just and favourable conditions of work; the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment."

Article 4 encourages States that have not ratified CEDAW to do so and to condemn violence against women, especially in respect of customs, traditions and religious considerations which have been invoked to avoid their obligations. Although the DEVW is the first international

⁴⁹Coomaraswamy & Kols (note 29 above) 178.

⁵⁰Ibid.

human rights instrument to address intimate violence directly, it is not a legally enforceable treaty and only has the effect of aiding better understanding of, and complementing CEDAW.⁵¹

In its 29th Session, the Human Rights Council (HRC) defined violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women of any age and girls, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life, and the economic and social harm caused by such violence”.⁵² While this definition incorporates the DEVM, it is expanded to include threats of infringement of women’s right to liberty. The HRC recognises that domestic violence, including intimate partner violence, remains the most prevalent form of violence affecting women of all social strata across the world, and emphasises that such violence is a violation, abuse or impairment of the enjoyment of their human rights and, as such, is unacceptable.⁵³ States are urged to “strongly condemn all forms of violence against women and girls, and to refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination, including harmful practices, such as child, early and forced marriage and female genital mutilation, as set out in the Declaration on the Elimination of Violence against Women”.⁵⁴

The HRC recommends that States should undertake steps for the prevention of abuses of all human rights of women and girls, especially the abolition of harmful cultural practices, abolition of discriminatory legislation, and raising awareness on the unacceptability of all forms of violence against women.⁵⁵ States are also called upon to adopt and implement legislation prohibiting all forms of violence and ensure women and girls have unimpeded access to justice, effective legal assistance and information on their rights, without discrimination.⁵⁶ In *Opuz v Turkey*,⁵⁷ the applicant, a victim of domestic violence, instituted proceedings against the Turkish government for failing in its obligation to protect her and her mother from abuse inflicted by her husband. The European Court of Human Rights held that the Turkish government violated the

⁵¹Goldberg and Kelly (note 35 above) 201.

⁵² UN General Assembly, Human Rights Council, twenty-ninth session, agenda item 3: Accelerating efforts to eliminate all forms of violence against women: eliminating domestic violence, A/HRC/29/L.16/Rev.1, 2015.

⁵³ Ibid.

⁵⁴ Note 52 above, paragraph 5.

⁵⁵ Note 52 above, paragraph 8(b).

⁵⁶ Note 52 above, paragraph 9.

⁵⁷ Application no. 33401/02, judgment of 9th June, 2009.

right to life, freedom from discrimination and freedom from torture and inhuman treatment. This case has been termed “Europe’s landmark judgment on violence against women”.⁵⁸

The importance of CEDAW cannot be overemphasised, especially since it has been referenced in most treaties and declarations advocating the protection of women and girls. However if a State party fails to ratify and domesticate CEDAW, its benefits remain on paper and have no effect whatsoever.

2.2.5 Convention on the Rights of the Child (CRC), 1989⁵⁹

The notion of protection of children has always been necessary and the fact that the general human rights treaties were insufficient to cater for children indicates the importance of the welfare of children. The CRC was adopted by the UN after the need arose for a binding international legal document for the protection of children. The Preamble to the CRC recognises the importance of the rights of the child and emphasises the need to “extend particular care to the child as has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20th November 1959 and recognised in the UDHR, in the ICCPR (in particular in articles 23 and 24), in the ICESCR (in particular in article 10) and in the statutes and relevant instruments of specialised agencies and international organizations concerned with the welfare of children.”⁶⁰ A Committee on the Rights of the Child (CRC Committee) was also established to monitor the obligations set out in the CRC.⁶¹

Article 1 of the CRC 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”. By this definition, where a national law stipulates a lower age for the attainment of majority, e.g. where the age is set at sixteen years, then sixteen years will apply and a child will be defined as any human being below the age of sixteen. Article 2(2) of the CRC enjoins State Parties to take appropriate measures to ensure that the child is protected against all forms of discrimination or punishment

⁵⁸ T Abdel-Monem ‘Opuz v. Turkey: Europe’s Landmark Judgment on Violence against Women’ (2009) 17(1) *Human Rights Brief* 29.

⁵⁹ Adopted by UN General Assembly resolution 44/2 of 20th November, 1989 and entered into force 2nd September, 1990.

⁶⁰ Preamble to the Convention on the Rights of the Child, 1989.

⁶¹ Article 43 of the CRC.

on the basis of expressed opinions or beliefs of the child's parents, family members or guardians. Thus traditional beliefs should not undermine the rights of the child.

Article 4 imposes an obligation on State Parties to undertake appropriate legislative, administrative, and other measures for the implementation of the rights of the child. Article 6 recognises that every child has the right to life and State Parties are to ensure that acts which violate or threaten the survival and development of a child are prevented. Article 24 places a duty on State Parties to recognise the right of the child to the enjoyment of the highest attainable standard of health; to endeavour to implement appropriate measures to diminish infant and child mortality; provide medical assistance; and abolish traditional practices prejudicial to the health of children. Child marriage sometimes affects the health of young girls as it may lead to early child birth. Early child birth often leads to higher risks of complications and reproductive health problems for young girls.⁶²

According to the CRC Committee, "all policies affecting children's health should be grounded in a broad approach to gender equality that ensures young women's enjoyment of all human rights including the recognition of equal rights related to sexual and reproductive health and the elimination of all forms of sexual and gender-based violence".⁶³ Children's right to health contains a set of freedoms and entitlements, including the right to control one's health and body and sexual and reproductive freedom to make responsible choices.⁶⁴ The CRC Committee notes that children require information and education on all aspects of health, including sexual and reproductive health education, which entails self-awareness and knowledge about the body, sexual health and well being, responsible sexual behaviour, sufficient knowledge regarding reproductive health and prevention of gender-based violence. This shows the interrelation of the right to health with other human rights.

In terms of Article 37, States Parties are to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment. According to Coomaraswamy and Kols, "incest, female genital mutilation, child marriage, the sale of children by their parents for prostitution or bonded labour, and other harmful traditional practices continue to plague girl-

⁶²Merali (note 9 above) 610.

⁶³UN Committee on the Rights of the Child, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health.

⁶⁴Ibid.

children into their adolescence” and constitute torture and inhuman treatment against children.⁶⁵ Thus, action must be taken by State Parties to eliminate such vices.

According to the CEDAW and CRC Committee, State Parties should “establish legal structures to ensure that harmful practices are promptly, impartially and independently investigated, that there is effective law enforcement and that effective remedies are provided to those who have been harmed by such practices”.⁶⁶ The CEDAW and CRC Committee however note that the enactment of legislation alone is not enough to combat harmful practices and suggest that legislation must be supplemented with a comprehensive set of measures to facilitate its implementation and enforcement, such as modes of monitoring and evaluation of results achieved through legislations.⁶⁷ This is also emphasised by the CEDAW Committee under GC 14. Paragraph 22 enjoins State Parties to adopt adequate measures to eliminate harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation, among others.

Though the CRC does not expressly mention child marriage, other instruments supplementing the CRC have mentioned it. The HRC recognises that early/forced marriage is a harmful practice that violates and abuses human rights and prevents individuals from living their lives free from all forms of violence; and has adverse consequences for the enjoyment of human rights, such as the right to education and the right to the highest attainable standard of health, including sexual and reproductive health.⁶⁸ The Council notes as follows:

Child, early and forced marriage constitutes a serious threat to multiple aspects of the physical and psychological health of women and girls, including but not limited to their sexual and reproductive health, significantly increasing the risk of early, frequent and unintended pregnancy, maternal and newborn mortality and morbidity, obstetric fistula and sexually transmitted infections, including HIV/AIDS, as well as increasing vulnerability to all forms of violence, and every

⁶⁵Coomaraswamy and Kols (note 29) 186.

⁶⁶ UN Committee on the Elimination of Discrimination Against Women and UN Committee on the Rights of the Child: Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No.18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C//GC/31-CRC/C/GC/18, 2014, Paragraph 12.

⁶⁷ Ibid, Paragraph 40.

⁶⁸ UN General Assembly, Human Rights Council, twenty-ninth session, agenda item 3: strengthening efforts to prevent and eliminate child, early and forced marriage, A/HRC/29/L.15, 2015.

*girl and woman at risk of or affected by these practices must have equal access to quality services such as education, counselling, shelter and other social services, psychological, sexual and reproductive health-care services and medical care.*⁶⁹

The HRC urges State Parties to enforce laws and policies aimed at preventing child marriage and ensure that marriage is entered into only with the informed, free and full consent of the intending spouses and that men and women have equal rights in all matters pertaining to marriage.⁷⁰ Free and full consent connotes total and complete approval, devoid of any form of coercion or undue pressure. The HRC further requires State Parties to promote and protect the human rights of all women and girls, including their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence; and to adopt laws, policies and programmes that promote enjoyment of all human rights, including reproductive rights.⁷¹ Government through the provision of safe shelters, counselling, and organising empowerment programmes can help to support women and girls who have been made to go through child marriage.⁷² This is a very important provision as the obligation is not limited to putting an end to the act, but also requires support to be given to women and girls who have been subjected to child marriages.

The provisions of the CRC and the supplementing general comments provided are indeed essential for women and girls. It is therefore important for State Parties to ensure the implementation of the rights in the CRC, in order to reduce the susceptibility of women and girls to violations.

2.2.6 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), 1984.⁷³

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), provides a complete bar against any form of torture, or other cruel, inhuman or degrading treatment. Accordingly, Article 1 defines torture as:

⁶⁹Ibid, Preamble.

⁷⁰ Ibid, Paragraph 3.

⁷¹Note 52 above Paragraph 12.

⁷² Note 52 above, paragraph 18.

⁷³Adopted by General Assembly resolution 39/46 of 10th December, 1984 and entered into force 26th June, 1987.

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This definition can be said to incorporate various forms of violence, including domestic violence and sexual violence.⁷⁴ Copelon stresses that sexual abuse of women by their partners constitutes one of the most dangerous forms of gender-based violence and must be understood as torture.⁷⁵ Article 2(1) imposes an obligation on State Parties to take “effective, administrative, judicial or other measures to prevent acts of torture in any territory” controlled by them. Thus States Parties are expected to abolish acts which may constitute torture.

The above treaties have provided a good framework for the protection of women and girls from acts of sexual violence, especially child marriage and marital rape. State Parties should therefore take the necessary steps to implement them.

2.3 OTHER RELEVANT RESPONSES AT THE INTERNATIONAL LEVEL

Other relevant international documents are the Programme of Action adopted at the International Conference on Population and Development (ICPD), Fourth Women’s Conference (Beijing Conference) and the Vienna Conference. According to Merali, the ICPD, the Beijing Conference and then Vienna Conference “provided important opportunities to recognise the abuses that women have suffered through denials of reproductive health, physical integrity, and social justice, and to characterise such abuses as violations of particular human rights”.⁷⁶

⁷⁴Vesa (note 16 above) 333-334.

⁷⁵ R Copelon “Recognizing the Egregious in the Everyday: Domestic Violence as Torture” (1993-1994) 25 *Columbia Human Rights Law Review* 295.

⁷⁶Merali (note above 9) 611.

2.3.1 International Conference on Population and Development Programme of Action (ICPD-PoA), 1994⁷⁷

At the International Conference on Population and Development, 1994, the international community (representing 179 governments), reached consensus on three quantitative goals to be achieved by 2015, namely the reduction of infant, child and maternal mortality; the provision of universal access to education, particularly for girls; and the provision of universal access to a full range of reproductive health services, including family planning.⁷⁸

Chapter Seven of the ICPD-PoA highlights the discussions on reproductive rights and reproductive health. According to Paragraph 7.3, reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents, and other consensus documents, especially those relating to “the right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health”, including making “decisions concerning reproduction free of discrimination, coercion and violence.” The ICPD agreed that the promotion of the responsible exercise of these rights for all people should be the fundamental basis for government.

Various factors are responsible for reproductive ill-health such as “inadequate levels of knowledge about human sexuality and inappropriate or poor-quality reproductive health information and services; negative attitudes towards women and girls, discriminatory social practices; and the limited power many women and girls have over their sexual and reproductive rights”.⁷⁹ At the ICPD, it was agreed that all countries should strive to make reproductive health accessible to all individuals through the primary health-care system no later than 2015.⁸⁰ Accordingly, primary health care should include family-planning counselling; treatment of reproductive tract infections, sexually transmitted diseases and other reproductive health conditions; and the active discouragement of harmful practices, such as female genital

⁷⁷ ICPD-PoA adopted at the International Conference on Population and Development, Cairo, 5th-13th September, 1994.

⁷⁸ ICPD Programme of Action Foreword.

⁷⁹ Paragraph 7.3 ICPD-PoA.

⁸⁰ Paragraph 7.6 ICPD-PoA.

mutilation.⁸¹ Governments should endeavour to facilitate family-planning programmes in order to enable couples and individuals decide freely and responsibly the number and spacing of their children; and to have the information and means to do so; and to ensure informed choices and make available a full range of safe and effective methods.⁸² The element of freedom is very important to the enjoyment of this right and thus precludes governments from stipulating the number of children per family through legislation and policies.

Government efforts should also be targeted towards prevention, detection and treatment of sexually transmitted diseases (STDs), including HIV/AIDS and other reproductive tract infections.⁸³ Governments and the international community should strive to reduce the incidence of transmission of HIV/AIDS. This may be achieved through information, education and counselling for responsible sexual behaviour, supply of high-quality condoms and provision of anti-retroviral drugs for already infected individuals.⁸⁴ Governments and communities should take steps to stop the practice of female genital mutilation and other harmful practices; especially through strong community outreach programmes, education and counselling about its impact on girls' and women's health, and appropriate treatment and rehabilitation for women and girls' who have suffered through the practice.⁸⁵ The ICPD-PoA does not consider some forms of sexual violence such as child marriage and marital rape as factors hindering the enjoyment of SRH rights. This is so because there is no specific provision dealing with child marriage and marital rape as forms of sexual violence.

2.3.2 Vienna Declaration and Programme of Action (VDPA), 1993⁸⁶

At the Vienna World Conference in 1993, all human rights were recognised as “universal, indivisible and interdependent and interrelated”.⁸⁷ In essence, human rights share a symbiotic relationship and must be treated on a basis of equality and fairness. In the same vein, Paragraph 1.18 of the VDPA provides that the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights and as such, all forms of

⁸¹ Ibid.

⁸² Paragraph 7.12 ICPD-PoA.

⁸³ Paragraph 7.30 ICPD-PoA.

⁸⁴ Paragraph 7.32-7.33 ICPD-PoA.

⁸⁵ Paragraph 7.40 ICPD-PoA.

⁸⁶ VDPA adopted by the World Conference on Human Rights in Vienna on 25th June, 1993.

⁸⁷ Ibid, Paragraph 1.5.

discrimination should be eradicated. Governments, institutions, intergovernmental and nongovernmental organisations are also urged to intensify their efforts for the protection and promotion of the human rights of women and the girl-child.⁸⁸ Promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached.⁸⁹

Religion or cultural beliefs or practices should not impede the protection and promotion of human rights. In Paragraph 2.38, the World Conference stressed the importance of eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. In effect, the right to culture and religion should not be used as an excuse to violate the rights of women. Women's rights to enjoyment of the highest standard of physical and mental health were reiterated at the World Conference, making reference to other instruments such as the CEDAW and the Proclamation of Tehran of 1968.⁹⁰ The Conference urged States to repeal existing laws and regulations and remove customs and practices which discriminate against and cause harm to the girl-child.⁹¹ The fact that culture is recognised as an instrument of violence against women is important. Once nations adhere to their obligations under the VDPA, the incidence of violence against women may reduce drastically.

2.3.3 Beijing Declaration and Platform for Action (BDPFA), 1995⁹²

The Fourth World Conference on Women was convened by the UN in Beijing with the aim of advancing the goals of equality, development and peace for all women everywhere in the interest of all humanity.⁹³ The BDPFA upholds the CEDAW, CRC and other conventions and conferences advocating the promotion and protection of the rights of girls and women. Accordingly, Paragraph 89 of the BDPFA recognises that the right to the enjoyment of the highest attainable standard of physical and mental health is essential to a woman's life and well-being, and her ability to participate in all areas of public and private life.

⁸⁸Note 86 above, Paragraph 1.18.

⁸⁹Ibid.

⁹⁰Note 86 above, Paragraph 2.41.

⁹¹Note 86 above, Paragraph 2.49.

⁹²BDPFA adopted at the Fourth World Conference on Women, 27th October, 1995.

⁹³BDPFA, Preamble.

The major cause of ill-health among women is identified as inequality, both between men and women, and among women in different geographical regions, social classes and indigenous ethnic groups.⁹⁴ Certain factors such as poverty and economic dependence, violence, negative attitudes towards women and girls, racial and other forms of discrimination, and the limited power of many women over their sexual and reproductive lives, have an adverse impact on the health of women generally.⁹⁵ In addition, the subjection of girls to early marriage (due to son preference), pregnancy, childbearing and harmful cultural practices such as female genital mutilation, pose grave health risks.⁹⁶ Motherhood at a very young age often gives rise to complications during pregnancy and delivery, and a risk of maternal death that is much greater than average.⁹⁷ Physical and mental trauma suffered as a result of sexual and gender-based violence, such as physical abuse and sexual exploitation, also affects the health of women and may be more serious when proper medical care is not available.⁹⁸

Paragraph 96 provides that “the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence”. Due to the inadequacy of reproductive health services, women face health risks, especially relating to unsafe abortions, pregnancy and childbirth complications, which in turn result in high rates of maternal mortality and morbidity. The BDPFA proposes that reproductive health problems can be solved through improved access to adequate health-care services, including safe and effective family planning methods and emergency obstetric care; recognising the right of women and men to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice; and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.⁹⁹

The BDPFA highlights certain actions to be taken by governments, international bodies and non-governmental organisations to promote and protect the rights of girls and women. These include:

⁹⁴ BDPFA, Paragraph 89.

⁹⁵ BDPFA, Paragraph 92.

⁹⁶ BDPFA, Paragraph 93.

⁹⁷ BDPFA, Paragraph 268.

⁹⁸ BDPFA, Paragraph 99.

⁹⁹ BDPFA, Paragraph 97.

- Protection and promotion of the rights of women through the incorporation in national legislation, for example, reviewing existing legislation, as well as policies, where necessary to reflect a commitment to the health of women and girls, and implement gender-sensitive health programmes that address the needs of women and girls throughout their lives.¹⁰⁰
- Enacting and enforcing laws to ensure that marriage is only entered into with free and full consent of intending spouses, as well as enforcing laws concerning the minimum legal age of consent, and the minimum age for marriage.¹⁰¹
- Prioritising educational programmes that emphasise the “elimination of harmful attitudes and practices, including female genital mutilation, son preference (which results in female infanticide and prenatal sex selection), early marriage (including child marriage), violence against women, sexual exploitation, and sexual abuse (which at times is conducive to infection with HIV/AIDS and other sexually transmitted diseases)”.¹⁰²
- Provision of affordable health-care facilities for prevention of the spread of HIV/AIDS and other sexually transmitted diseases and treatment for already affected couples and individuals.¹⁰³
- Promotion of research on the impact of gender inequality, with respect to reproductive tract infections and injuries, domestic violence, HIV/AIDS and other sexually transmitted diseases, with women at the forefront of such research work.¹⁰⁴
- Promoting and facilitating research on safe and affordable methods and technologies for the sexual and reproductive health of women and men, paying close attention to natural family planning methods.¹⁰⁵

Paragraph 112 identifies violence against women as an obstacle to the achievement of the objectives of equality, development and peace, which were the major objectives of the Platform. Violence encompasses, among other things, “physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices

¹⁰⁰BDPFA, Paragraph 106(b)-(c).

¹⁰¹BDPFA, Paragraph 274(e).

¹⁰²BDPFA, Paragraph 107(a).

¹⁰³BDPFA, Paragraph 108(m).

¹⁰⁴BDPFA, Paragraph 109(c)-(d).

¹⁰⁵BDPFA, Paragraph 109(i)

harmful to women, non-spousal violence and violence related to exploitation”.¹⁰⁶ Accordingly, Governments should refrain from engaging in violence against women and should exercise due diligence to prevent, investigate, and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons; and custom, tradition or religious consideration should not be used as an excuse to encourage and perpetrate violence against women.¹⁰⁷ Women should be informed of their rights, and those who have been subjected to violence should have adequate access to justice, and just and effective remedies for the harm suffered.¹⁰⁸

Another very important recommendation offered by the BDPFA is that governments should “create or strengthen institutional mechanisms so that women and girls can report acts of violence against them in a safe and confidential environment, free from the fear of penalties or retaliation, and file charges”.¹⁰⁹ The elements of safety and confidentiality are essential requirements to the protection of women. Once women are certain of these conditions, they are more confident to report acts of violence to which they have been subjected. Governments should provide affordable medical care, psychological and other counselling services for victims of violence as well as well-funded shelters and other means of assistance for easy rehabilitation of victims.¹¹⁰

The negative impact of violence on the health of women was reiterated in the Outcome Document¹¹¹. It provides that “States have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the State or by private persons, and provide protection to victims”.¹¹² This provision sums up the duties of States in respect of acts of violence, including sexual violence. It also stresses that all forms of violence against women have grave impact on their health, including their sexual and reproductive health.¹¹³ However, women continue to be victims of various forms of violence because efforts

¹⁰⁶BDPFA, Paragraph 113.

¹⁰⁷BDPFA, Paragraph 124(a)-(b).

¹⁰⁸BDPFA, Paragraph 124(h).

¹⁰⁹BDPFA, Paragraph 124(l).

¹¹⁰BDPFA, Paragraph 125(a).

¹¹¹ UN General Assembly Resolution adopted at the twenty-third special session, ‘Further actions and initiatives to implement the Beijing Declaration and Platform for Action’ 16th November, 2000 available at <https://www.un.org/womenwatch/daw/followup/ress233e.pdf> accessed on 7th October, 2015.

¹¹² Ibid paragraph 13.

¹¹³ Ibid.

to eliminate such can only be achieved through a better understanding of the root causes of violence against women and girls.¹¹⁴

Other factors responsible for the continued perpetration of violence against women and girls, identified in the Outcome document are lack of comprehensive programmes dealing with perpetrators, inadequate data on violence, discriminatory socio-cultural attitudes, treatment of sexual violence in marriage as private matters, insufficient awareness of domestic violence, and inadequate prevention strategies among others.¹¹⁵ Governments are required to “treat all forms of violence against women and girls of all ages as a criminal offence punishable by law, including violence based on all forms of discrimination and establish legislation and/or strengthen appropriate mechanisms to handle criminal matters relating to all forms of domestic violence, including marital rape and sexual abuse of women and girls, and ensure that such cases are brought to justice swiftly”.¹¹⁶ Governments should develop and effectively implement law, and other measures, such as policies and educational programmes, to eliminate harmful cultural practices, including early and forced marriage as this hinders women from enjoying their rights.¹¹⁷ International and regional organisations are also required to assist governments to perform their obligations.¹¹⁸

In a 2015 report by the UN on the implementation of the BDPFA,¹¹⁹ it was stated that 35% of women worldwide have experienced “sexual intimate partner violence or non-partner sexual violence in their lifetime”. It was further stated that “ensuring the implementation of strong and comprehensive legal and policy frameworks which address all forms of violence against women in all countries remains an urgent priority, along with adequate resourcing for implementation, long term strategies to prevent violence against women and ensuring accessibility and high quality services for survivors”.¹²⁰ In effect, although the BDPFA was adopted twenty years before the report, prevention of violence against women and girls remains a top priority for Member States. Some Member States have taken steps to strengthen legal and policy frameworks

¹¹⁴ Ibid, paragraph 14.

¹¹⁵ Ibid.

¹¹⁶ Ibid paragraph 69(c) and (d).

¹¹⁷ Ibid paragraph 69(e).

¹¹⁸ Ibid paragraph 96.

¹¹⁹ UN Women ‘Summary Report: The Beijing Declaration and Platform for Action Turns 20’ available at http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/sg%20report_synthesis-en_web.pdf accessed on 23rd September, 2015.

¹²⁰ Ibid.

to address violence through law reforms, better implementation strategies and improved access to justice for victims.¹²¹

Although the commitments made in the consensus documents are not legally binding, they set an international standard for governments in terms of their obligations to protect and promote the rights of women.

2.4 REGIONAL INSTRUMENTS TACKLING SEXUAL VIOLENCE

2.4.1 African Charter on Human and People's Rights (ACHPR), 1981¹²²

The adoption of the ACHPR marked the beginning of a new era in terms of recognition, protection and promotion of human rights in Africa.¹²³ As the UDHR is to the United Nations Charter, the ACHPR is a follow up to the Charter of the Organisation of African Unity (now African Union) and makes specific provisions relating to human rights.¹²⁴ The provisions of the ACHPR are in line with the provisions of the ICESCR and ICCPR. The fact that the ACHPR combines relevant provisions of the ICCPR and the ICESCR is one of its exclusive qualities.¹²⁵ Article 1 imposes a duty on Member States to “recognise the rights, duties and freedoms” provided in the Charter and to “adopt legislative or other measures to give effect to them”. Accordingly, Article 2 provides that “every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter (ACHPR) without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.” This provision clearly forbids discrimination against women and girls, especially with the inclusion of sex (gender).

Article 4 guarantees the right to life and integrity of a person. Article 5 of the ACHPR prohibits all forms of exploitation and degradation of man, especially “slavery, slave trade, torture, cruel,

¹²¹Ibid.

¹²² Adopted by the Organisation of African Unity (OAU) on 27th June, 1981 and entered into force 21st October, 1986.

¹²³ Office of the United Nations High Commissioner for Human Rights ‘The Major Regional Human Rights Instruments and the Mechanisms for their Implementation’ available at <http://www.ohchr.org/Documents/Publications/training9chapter3en.pdf> accessed on 15th October, 2015.

¹²⁴ See Preamble to the ACHPR.

¹²⁵ VO Nmehielle ‘Development of the African Human Rights System in the Last Decade’ (2004) 11(3) *Human Rights Brief* 6 available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1368&context=hrbrief> accessed on 15th September, 2015.

inhuman or degrading punishment and treatment”. It has been established that sexual abuse of women by their partners constitutes one of the most dangerous forms of gender-based violence and must be understood as torture.¹²⁶ Article 16 guarantees the right to the enjoyment of the best attainable state of physical and mental health and requires States to take necessary steps to protect the health of their citizens. Sexual and reproductive health may fall under this provision and victims of violations may seek redress in terms of it. In terms of the rights of women and children, Article 18(3) places an obligation on States to ensure the elimination of every form of discrimination against women and to ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. Discrimination and gender inequality often encourage violence against women and the ACHPR articulates issues of gender inequalities in various provisions.¹²⁷

Article 30 establishes the African Commission on Human and Peoples’ Rights (ACHPR Commission) to promote the rights set out in the ACHPR and monitor implementation in States. In *Social and Economic Rights Action Centre (SERAC) and another v Nigeria*,¹²⁸ a communication was forwarded to the ACHPR Commission, alleging violations of the right to life and the right to health (among others) through environmental degradation by the Nigerian government. After considering the arguments in the communication, the ACHPR Commission found that Nigeria violated the rights stipulated in the ACHPR.

Similarly, in *Purohit v The Gambia*,¹²⁹ the ACHPR Commission stressed the importance of Article 2 of the ACHPR which prohibits discrimination in all its forms and held that the right must be respected in all circumstances in order for anyone to enjoy all the other rights as set out. With regard to the right to health, the ACHPR Commission held that the enjoyment of the right to health is vital to all aspects of a person’s life and well-being, and crucial to the realisation of all the other fundamental human rights and freedoms, including the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind. The Commission thereafter upheld the right to mental health and urged the Republic of Gambia to provide adequate medical and material care for persons suffering from mental health problems in

¹²⁶Copelon (note 75 above).

¹²⁷Vesa (note 16 above) 357.

¹²⁸ (2001) AHRLR 60 (ACHPR 2001).

¹²⁹ (2003) AHRLR 96 (ACHPR 2003). See also *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) where the ACHPR Commission upheld a detainee’s right to health.

the territory of The Gambia. This decision may also be applicable to sexual and reproductive health rights because it forms an important component of the right to health.

The ACHPR failed to make adequate provisions for the rights of women. According to Harrington, Article 2 may be criticised on the grounds that “it fails to give sufficient weight to women’s rights because sexual discrimination is placed in the middle of a long list of other grounds on which distinctions are not permitted. Given the extremely serious discrimination that women suffer in Africa, it might be thought that a separate article specifically on women would have been more appropriate to give the rights of women the weight that they need and deserve”.¹³⁰

In addition, Articles 3-14, which focus on civil and political rights, do not make specific mention of women.¹³¹ It has also been argued that a major shortcoming of the ACHPR is that it contains various clauses (“claw-back” clauses) which limit the enjoyment of the rights guaranteed and subject them to domestic laws.¹³² Such clauses include “subject to law and order”, “within the law”, except for reasons previously laid down by law”, among others. For instance, the right to liberty and security of person is limited by reasons and conditions previously laid down by law.¹³³ The ACHPR also lacks adequate provisions protecting women’s rights.¹³⁴ The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa was thereafter adopted to provide for the rights of women.

2.4.1.1 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Women’s Protocol), 2003¹³⁵

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Women’s Protocol) was adopted to elaborate on the ACHPR in respect of the rights of women in Africa. It is important to note that under the Women’s Protocol, women are defined to

¹³⁰ J Harrington ‘The African Commission on Human and Peoples’ Rights’ in KD Askin & DM Koenig (eds) 2 *Women and International Human Rights Law* (2000) 457.

¹³¹ *Ibid.*

¹³² SB Keetharuth ‘Major African legal instruments’ available at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/7_Keetharuth.pdf accessed on 15th October, 2015.

¹³³ See Article 6 ACHPR.

¹³⁴ Durojaye & Murungi (note 5 above) 886.

¹³⁵ Adopted by the African Union on 11th July, 2003 and entered into force 25th November, 2005.

include girls.¹³⁶ According to Durojaye and Murungi,¹³⁷ it “supplements the ACHPR and compliments the CEDAW on matters relating to the protection and recognition of women’s rights.”

Article 1 provides definitions to important terms, including discrimination against women, harmful practices and violence against women. Violence against women is defined as “all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war”. Thus, acts of sexual violence and other related acts constitute violence against women. Harmful practices are also defined as “all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity”. Practices such as marital rape and child marriage may conveniently come under this definition as they negatively affect the fundamental rights of women, especially the right to life and the right to health.

Various provisions in the Women’s Protocol impose obligations on State Parties to take all necessary measures to combat sexual violence against women. For instance, in Article 2(1), State Parties are required to fight against all forms of discrimination against women through “appropriate legislative, institutional and other measures”, through incorporating principles of equality between men and women in their national constitutions, and implementing legislative and regulatory measures to prohibit harmful practices which jeopardise the general well-being of women, among others. State Parties are also required to “adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of every woman from all forms of violence, particularly sexual and verbal violence.”¹³⁸

Article 4 mandates State Parties to take “appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public and to adopt measures to prevent violence”. Causes

¹³⁶Article 1(k) Women’s Protocol.

¹³⁷Durojaye & Murungi (note above 5) 885.

¹³⁸Article 3(4) Women’s Protocol.

of violence should also be identified in order to take appropriate steps for eradication, punishment of perpetrators of violence, and the establishment of rehabilitation services for victims of violence.¹³⁹ Coomaraswamy and Kols argue that legislation has essential “normative value” in its capacity to inform the victims and perpetrators of violence, as well as the general public that violence is a serious offence which will not be condoned.¹⁴⁰ State Parties are required to ban all forms of harmful practices which have a negative impact on the human rights of women through the creation of awareness programmes and support for victims of harmful practices, including “legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting”.¹⁴¹ Article 5(d) calls on State Parties to take necessary measures to protect women “who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance”. The right in Article 5(d) may also be construed to include protection from sexual violence.

With regard to marriage, Article 6 provides that “State Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage”. Necessary legislative measures should be put in place to ensure that “no marriage shall take place without the free and full consent of both parties” and “the minimum age of marriage for women shall be 18 years”.¹⁴² In the previous chapter, it was stated that child marriage often occurs when a girl is below the age of 18 years and without her consent.¹⁴³ The express wording of Article 6 is to the effect that marriage should be entered into freely and at the attainment of the age of majority.

On the right to health, Article 14 requires State Parties to “ensure that the right to health of women, including sexual and reproductive health is respected and promoted”, including “the right to control their fertility” and “the right to decide whether to have children, the number of children and the spacing of children”. It has been argued that one of the causes of marital rape is the husband’s drive to exert sexual dominance over his wife and to infringe on her freedom of choice.¹⁴⁴ Thus, the inability of a woman to decide freely on matters pertaining to her sexuality is

¹³⁹ Article 4 Women’s Protocol.

¹⁴⁰ R Coomaraswamy and LM Kols (note 28 above) 189.

¹⁴¹ Article 5(a)&(c) Women’s Protocol.

¹⁴² Article 6(a)-(b) Women’s Protocol.

¹⁴³ See Historical Background of the Concept of Sexual and Reproductive Health Rights and Sexual Violence, Chapter 1 pages 20-21.

¹⁴⁴ IH Frieze ‘Investigating the Causes and Consequences of Marital Rape’ (1983) 8(3) *Women and Violence* 535-536.

an infringement of the right to health guaranteed by the Women's Protocol. The General Comment No 2 on the Women's Protocol views the provisions of Article 14(a) and (b) in the context of abortion and safe contraception; and how State and non-State actors tend to control the rights of women in respect of reproductive health. The provision cannot be limited to only those issues as it has a wider context and can be spread over a wide range of issues, including sexual violence.

Paragraph 46 of the General Comment provides that "State Parties should provide a legal and social environment that is conducive to the exercise by women of their sexual and reproductive rights". Laws and policies should be revisited and amended where necessary. Article 14(1)(d) is also to the effect that the right of women to "self-protection and to be protected against sexually transmitted infections, including HIV/AIDS" should be guaranteed by State Parties. It has been argued that discriminatory practices against women, harmful practices and violence against women are the reasons for the prevalence of HIV/AIDS in Africa.¹⁴⁵

While the rights guaranteed in the Women's Protocol are praiseworthy, women can only enjoy such rights when there is proper implementation of the rights at national level by State Parties. As of 2014, the Women's Protocol had been ratified by about two-thirds of the 54 African Union members, however, it remained undomesticated by all of them.¹⁴⁶

2.4.2 African Charter on the Rights and Welfare of the Child (ACRWC), 1990¹⁴⁷

The African Charter on the Rights and Welfare of the Child (ACRWC) is similar to the CRC in that it was adopted to specifically protect and promote the rights of children as the ACHPR did not adequately provide for the rights of children.¹⁴⁸ In its Preamble, the ACRWC reaffirms the principles in the CRC and other international instruments related to the protection of children. It has been argued that the adoption of the ACRWC became necessary because the CRC did not

¹⁴⁵Durojaye & Murungi (note above 5) 888.

¹⁴⁶Durojaye & Murungi (note above 5) 893.

¹⁴⁷ Adopted by Organisation of African Unity on 11th July, 1990 and entered into force 29th November, 1999.

¹⁴⁸ Nmehielle (note 125 above) 7.

adequately cover the peculiar nature of African children.¹⁴⁹ Children's rights are not only put in the legal perspective, but also in the cultural perspective.¹⁵⁰

Both the CRC and the ACRWC are based on the core values of the best interests of the child,¹⁵¹ and non-discrimination of the child. Article 1(1) imposes an obligation on Member States to recognise the rights, duties and freedoms preserved in the ACRWC and to undertake necessary steps in accordance with their constitutional obligations to adopt and give effect to its provisions. Member States are also expected to discourage "any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations" set out in the ACRWC. This is a good starting point for the ACRWC as it recognises harmful practices that hinder enjoyment of the rights as laid down. Article 2 defines a child as "every human being below the age of 18 years". While the ACRWC provides a clear and strict definition of the age of a child, the CRC places some conditions such as the attainment of the age of majority at an early age.¹⁵² It has been argued that this condition includes a situation where a person below the age of 18 participates in armed conflict.¹⁵³ The absence of proper birth registration mechanisms often makes it difficult to determine the age of a person.¹⁵⁴

Article 5 recognises the right of every child to life and imposes an obligation on Member States to protect this right. Under this provision, nothing should threaten the survival and development of the child. Regarding the right to health, Article 14 recognises the right of the child to "enjoy the best attainable state of physical, mental and spiritual health". Thus activities which have the potential of hampering the enjoyment of this right should be discouraged by Member States.

Article 16 requires State Parties to "take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment". Article 21 lays more emphasis on the protection against harmful social and cultural practices. Article 21(1)

¹⁴⁹Ibid.

¹⁵⁰A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and welfare of the Child' (2002) 2 *African Human Rights Law Journal* (11-32) 16.

¹⁵¹Article 3 of the CRC and Article 2 of the ACRWC are to the effect that the best interest of the child must be considered before taking any action in relation to the child.

¹⁵²See Article 1 of the CRC.

¹⁵³Lloyd (note 150 above) 20.

¹⁵⁴Ibid.

requires State Parties to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child”. This should be done by eliminating customs and practices that are injurious to the health or life of the child and discriminatory to the child on grounds of gender or other status. Thus, Article 21(2) requires State Parties to take all measures, including legislative action, to prohibit child marriage and betrothal; and to set the minimum age of marriage at 18 years. This is an express bar against child or forced marriages. However, the requirement of consent is still missing from the provision.

Article 32 establishes the African Committee of Experts on the Rights and Welfare of the Child, which has the responsibility of promoting and protecting the rights and welfare of the African child. By virtue of Article 44, complaints of infringements of any of the rights contained in the ACRWC may be forwarded to the Committee. However, it has been argued that financial constraints may constitute an obstacle to reporting infringements and the institution of proceedings for the enforcement of the rights.¹⁵⁵

2.5 SUB-REGIONAL RESPONSES

2.5.1 Southern Africa Development Community (SADC) Treaty, 1992¹⁵⁶

The Southern Africa Development Community (SADC) Treaty establishes the SADC and provides the objectives and functions of various committees set up by the treaty and the general administration of the SADC. It was adopted to *inter alia* ensure “the progress and well-being of the people of Southern Africa”.¹⁵⁷ According to Article 5(1)(k), one of the objectives of the SADC is to “mainstream gender in the process of community building”.

Under Article 6(2), the SADC and Member States pledge to eliminate discrimination against any person on ground of “gender, religion, political views, race, ethnic origin, culture, ill-health, or disability”. The requirement of non-discrimination against women falls under the reference to gender.

¹⁵⁵Ibid 28.

¹⁵⁶ Adopted by the Heads of States of Countries in Southern Africa on 17th August, 1992 and entered into force 30th September, 1993.

¹⁵⁷SADC Treaty Preamble.

Due to the inadequacy of the SADC Treaty with respect to the protection of women generally, various instruments have been adopted to cater for this, including the Declaration on Gender and Development, the Protocol on Gender and Development, and the Protocol on Health.

2.5.1.1 SADC DECLARATION ON GENDER AND DEVELOPMENT, 1997¹⁵⁸

The SADC Declaration on Gender and Development was introduced because of the need to expand on Article 6(2) of the SADC Treaty relating to the prohibition of discrimination on the basis of gender.¹⁵⁹ It was reiterated that gender equality is a fundamental human right. In Paragraph H(iii) of the Preamble, Member States pledge to repeal and reform all laws and social practices which tend to subject women to discrimination, and to enact gender sensitive laws, protect and promote the human rights of women and children, including the sexual and reproductive rights of women and girls, and to take urgent measures to prevent violence against women and children.¹⁶⁰

To complement the Declaration, an Addendum was introduced in 1998 on the Prevention and Eradication of Violence Against Women and Children.¹⁶¹ In the Addendum, it was stressed that violence against women and children “includes physical and sexual violence, as well as economic, psychological and emotional abuse occurring in the family, in such forms as threats, intimidation, battery, sexual abuse of children, economic deprivation, marital rape, femicide, female genital mutilation, and traditional practices harmful to women”.¹⁶² It was resolved that laws should be enacted to make various forms of violence against women clearly defined crimes and appropriate measures, including the imposition of penalties, punishment and other enforcement mechanisms should be put in place to prevent and eradicate violence against women and children.¹⁶³ Sexual violence is specifically mentioned as a form of violence against women which requires urgent attention by Member States, as women and girls face the threat of sexual violence on a regular basis.

¹⁵⁸Adopted by the SADC Summit in Malawi on 8th September, 1997.

¹⁵⁹Preamble, SADC Declaration on Gender and Development.

¹⁶⁰Paragraph H(iv),(vii)-(ix) Preamble to the SADC Declaration on Gender and Development

¹⁶¹Adopted at the SADC Conference on Prevention of Violence Against Women in Durban, South Africa, on 5th to 8th March, 1998.

¹⁶²Paragraph 5(a) Addendum to the SADC Declaration on Gender and Development, 1998.

¹⁶³ Ibid Paragraph 8.

In addition, Member States are expected to promote the “eradication of elements in traditional norms and religious beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women and children”.¹⁶⁴ The issue of child marriage can easily be accommodated under this provision. The Addendum considers victims of violence and provides that Member States should ensure “accessible, effective and responsive police, prosecutorial, health, social welfare, and other services” and establish “specialised units to redress cases of violence against women and children”.¹⁶⁵

It is instructive to note that as laudable as the Declaration on Gender and Development and its Addendum seem, it is unfortunate that the provisions are not enforceable and merely have a persuasive effect on Member States. This gave rise to the need for a Protocol on Gender and Development, to give the Declaration binding force.

2.5.1.2 SADC Protocol on Gender and Development, 2008¹⁶⁶

As noted earlier, the Protocol on Gender and Development was adopted because of the need to complement the SADC Treaty and to mainstream gender issues for community building.¹⁶⁷ In its Preamble, the Protocol makes reference to other human rights instruments such as the CRC, BDPFA and the SADC Declaration on Gender and Development (1997) and its Addendum on the Prevention and Eradication of Violence Against Women and Children (1998), among others, and reminds Member States of their commitment to ensure the elimination of all forms of gender inequalities.

Article 1 defines a “child” as every human being below the age of 18. This is in tandem with the definition provided in other human rights instruments considered above. Gender mainstreaming is also defined as “the process of identifying gender gaps and making women’s, men’s, girls’ and boys’ concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programmes in all spheres so that they benefit equally”. In effect, gender streaming (which is the major focus of the Protocol) is the development and implementation of policies suitable for all people, irrespective of their gender.

¹⁶⁴ Ibid Paragraph 13.

¹⁶⁵ Ibid Paragraph 17.

¹⁶⁶ Signed by the SADC on 17th August, 2008 and entered into force 22nd February, 2013.

¹⁶⁷ See Preamble to the SADC Protocol on Gender and Development.

Sexual and reproductive rights are defined in Article 1 as “the universal human rights relating to sexuality and reproduction, sexual integrity and safety of the person, the right to sexual privacy, the right to make free and responsible reproductive choices, the right to sexual information based on scientific enquiry, and the right to sexual and reproductive health care”. The Protocol set the year 2015 for the implementation of the rights set out.

Article 4(2) requires State Parties to “implement legislative and other measures to eliminate all practices which negatively affect the fundamental rights of women, men, girls and boys, such as their right to life, health, dignity, education and physical integrity”. Sexual violence constitutes an infringement of basic rights, such as the rights to freedom from torture, dignity, security, physical integrity and health. Thus, State Parties are expected to establish measures to eliminate and prevent practices which threaten these rights.

Regarding marriage, Article 8(1) mandates State Parties to endorse appropriate measures, including legislation, to ensure that women and men enjoy equal rights in marriage. The age of marriage is set at 18 years and above, with the requirement of free and full consent of both parties.¹⁶⁸

The Protocol makes special provision for the protection of the girl-child in Article 11. State Parties are obliged to eliminate all forms of discrimination against the girl-child, ensure that girls enjoy the same rights as boys, and are protected from harmful cultural practices in accordance with the CRC and the ACRWC, protect girls from all forms of violence and ensure the enjoyment of sexual and reproductive health rights of girls.¹⁶⁹ Article 20(1)(b) places an obligation on State Parties to “ensure that perpetrators of gender-based violence, including domestic violence, rape, femicide, sexual harassment, female genital mutilation and all other forms of gender-based violence are tried by a court of competent jurisdiction”. State Parties are also expected to take measures to discourage traditional practices which encourage the continuance of gender-based violence and to eliminate them.¹⁷⁰

¹⁶⁸ Article 8(2)(a)-(b) SADC Protocol on Gender and Development.

¹⁶⁹ Article 11(1)(a)&(c)-(e) SADC Protocol on Gender and Development.

¹⁷⁰ Ibid Article 21(1).

The provisions of the SADC Protocol on Gender and Development provide a good framework for the promotion and protection of women's rights in Southern Africa. However, the promotion and enjoyment of such rights is in the hands of the State Parties.

2.5.2 Economic Community of West African States (ECOWAS) Treaty, 1975¹⁷¹

The Economic Community of West African States (ECOWAS) Treaty was adopted by West African States for the purpose of establishing the Economic Community of West African States. The treaty basically sets out the aims, objectives and guiding principles on the relationship between countries within the community, the functionality and general administration of ECOWAS. There is no reference to human rights or its recognition under the treaty. In 1993, the ECOWAS Treaty was amended with the adoption of the ECOWAS Revised Treaty.¹⁷² Under the Fundamental Principles set out in Article 4, the State Parties pledge to recognise, promote and protect human and peoples' rights in accordance with the provisions of the ACHPR.

In *Social-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*,¹⁷³ a complaint was brought before the Court of Justice of the ECOWAS on violations of the right to health, the right to adequate standard of living, and rights to economic and social development of the people of Niger Delta by the Federal Republic of Nigeria. On hearing the arguments of both sides, the Court held that Nigeria had violated the rights set out in the ACHPR and ordered Nigeria to take effective measures to ensure restoration of the environment of the Niger Delta. This case indicates that the obligations placed on Member States to ensure the protection of human rights is taken seriously.

Article 63 sets out the obligations of Member States in respect of women. Under the provision, Member States are required to “formulate, harmonise, co-ordinate and establish appropriate policies and mechanisms for the enhancement of the economic, social and cultural conditions of women”. In line with this, the ECOWAS Gender Development Centre (EGDC) was established by ECOWAS Decision A/DEC.16/01.03 to create an environment which is receptive to gender

¹⁷¹ Adopted by 15 West African States in Lagos on 28th May, 1975 and entered into force 20th June, 1975.

¹⁷² Adopted by Member States of the ECOWAS in Lagos on 24th July, 1993.

¹⁷³ ECW/CCJ/APP/08/09 available at

http://www.chr.up.ac.za/images/files/documents/africancases/institution/ecowas/ecowas_serap_federal_republic_nigeria_2012.pdf accessed on 20th April, 2016.

mainstreaming.¹⁷⁴ In January 2015, the ECOWAS Ministers responsible for gender issues adopted a Draft Supplementary Act on Equality of Rights between Women and Men for Sustainable Development within the ECOWAS Region which was forwarded to the Council of Ministers and the Member States of ECOWAS for consideration.¹⁷⁵

Clearly, the SADC has done more work with regards to the enforcement of women's rights than the ECOWAS. However, with the adoption of the Supplementary Act on Equality of Rights between Women and Men for Sustainable Development by ECOWAS, women may be better protected.

2.6 CONCLUSION

From the foregoing, it is clear that international, regional and sub-regional organisations have through various conventions and conferences adopted instruments to protect women and girls against sexual violence. In the next chapter, the laws and policies available in South Africa in relation to child marriage and marital rape will be discussed.

¹⁷⁴ EGDC History available at <http://dummy.ccdg.ecowas.int/about-egdc/history/> accessed on 4th November, 2015.

¹⁷⁵ Directorate of Communication 'Regional Ministers Adopt ECOWAS Text on Gender Equality' available at <http://news.ecowas.int/presseshow.php?nb=014&lang=en&annee=2015> accessed on 4th November, 2015.

CHAPTER THREE

LEGAL AND REGULATORY INSTRUMENTS PROTECTING WOMEN AGAINST SEXUAL VIOLENCE IN SOUTH AFRICA

3.1 INTRODUCTION

In the previous chapter, various international, regional and sub-regional instruments adopted to fight sexual violence (especially child marriage and marital rape) were discussed. However, the question remains how these instruments have impacted on member-states to develop municipal laws to deal with the problem. The South African Government has put a lot of effort into the protection of women generally. According to Mubangizi, the Bill of Rights in the South African Constitution has several provisions that relate to the protection of sexual and reproductive rights of women, but the Constitution also provides for the right to culture, which allows for traditional and cultural practices, some of which violate certain human rights norms including the sexual and reproductive rights of women, thereby leading to sexual violence in some cases.¹ However, the Constitution also provides that the right to culture should not be exercised in a manner that is inconsistent with other rights. This means that culture cannot be used to violate the rights stipulated in the Constitution.²

In South Africa, marital rape and child marriage are addressed by various laws including the Constitution of the Republic of South Africa 1996, the Domestic Violence Act,³ the Children's Act⁴ and the Criminal Law (Sexual Offences and Other Related Matters) Amendment Act⁵. The South African government has also established various mechanisms to protect victims of sexual violence, such as the *Thuthuzela* Care Centres (TCCs), the Sexual Offences Court, and the

¹ JC Mubangizi 'An Assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women in South Africa' (2015) 16(3) *Journal of International Women's Studies* 158.

² The courts have in certain instances declared customs which violate human rights as unconstitutional. For example, in *Bhe and Others v Khayelitsha and Others* (CCT 49/03) [2004] ZACC 17; 2005(1) SA 580 (CC) the court declared unconstitutional the custom of male primogeniture which discriminated against two female children in that they were prevented from inheriting the estate of their deceased father. Article 29(7) of the African Charter also places a duty on individuals to preserve and strengthen positive African values in his or her relations with others. Thus, cultural practices which have negative effects on others should be stopped.

³ Act of 1998.

⁴ Act of 2005.

⁵ Act of 2007.

Family Violence, Child Protection and Sexual Offences (FCS) Unit of the South African Police Service (SAPS). This chapter focuses on the Criminal Law (Sexual Offences and Other Related Matters) Amendment Act and Children's Act in relation to child marriage and marital rape, and the activities of the Sexual Offences Court.

3.2 THE PROTECTION OF WOMEN AGAINST MARITAL RAPE IN SOUTH AFRICA

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (SOA) was born out of a review conducted by the South African Law Reform Commission (SALRC) to investigate cases of sexual offences, as directed by the Minister of Justice and Constitutional Development.⁶ The SALRC recommendations resulted in the establishment of an expert project committee to draft the Sexual Offences Bill.⁷ According to Reddi, the limited scope of application of the Domestic Violence Act (DVA)⁸ and the ineffectiveness of the remedies provided, especially with respect to prosecuting and punishing perpetrators of sexual violence led the SALRC to propose the SOA.⁹ The SOA was passed “to comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute”.¹⁰ Put differently, it was passed in order to “develop efficient and effective legal provisions for the reporting, management, investigation and prosecution of sexual offences, in order to protect the rights of victims as well as ensure the fair trial of persons (including children) suspected accused and convicted of committing a sexual offence”.¹¹ The SOA is properly guided by the obligations

⁶R Fuller ‘Bureaucracy versus Democratisation: The Promulgation of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill’ available at <http://www.csvr.org.za/wits/papers/papfull.pdf> accessed on 16th February, 2016.

⁷ Ibid.

⁸ Act 116 of 1998. According to its Preamble, the DVA was enacted to “afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act (DVA) and thereby to convey that the State is committed to the elimination of domestic violence.” It is primarily a procedural law, that is, it lays down the procedure for institution of proceedings for protection orders against perpetrators of domestic violence. Protective mechanisms for victims of domestic violence are also set out. By virtue of Sections 4 and 5 of the DVA, a victim of domestic violence may bring an application for protection order before the court and the hearing of such application must be expedited by the court. Thus a victim may institute proceedings against a perpetrator and also apply for protection order to stop the perpetrator from continuing the act of violence.

⁹ M Reddi ‘Violence against women: Tears or triumph for women in South Africa’ in SV Hoctor & PJ Schwikkard (ed) *The exemplary scholar Essays in honour of John Milton* Cape Town: Juta (2007) 70.

¹⁰ See the long title to the SOA.

¹¹ Fuller (note 6 above).

placed on the Republic of South Africa by various international legal instruments such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979 and the Convention on the Rights of the Child (CRC), 1989 and the Bill of Rights provided in the 1996 Constitution.¹²

Regarding rape, section 3 of the SOA provides that “any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.” Under section 1, sexual penetration includes “any act which causes penetration to any extent whatsoever by the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or the genital organs of an animal, into or beyond the mouth of another person”. This definition incorporates a variety of acts of sexual penetration (including penetration with various objects) as opposed to the common law definition which covers only the insertion of the penis of a man into the vagina of a woman.¹³

Section 1(2) defines ‘consent’ as “voluntary or uncoerced agreement”. Circumstances in respect of which a person “does not voluntarily or without coercion agree to an act of sexual penetration” include the use of force or intimidation, a threat of harm, abuse of power or authority, false pretences, or where the complainant is incapable of appreciating the nature of the sexual act (that is, where at the time of the commission of the sexual act, the complainant is asleep, unconscious, in an altered state of consciousness, a child below the age of 12 years or a mentally disabled person).¹⁴ Therefore, a child below the age of 12 years is incapable of consenting to any sexual act and those who engage in sexual intercourse with such child are guilty of rape under this section even where they claim consent was obtained.¹⁵

¹² See SOA, Preamble. There are a number of sections in the 1996 Constitution which share a link with sexual violence. For example, section 12 guarantees the right to freedom and security of a person, especially the right to be free from all forms of violence from either public or private sources; torture and cruel, inhuman or degrading treatment. Section 12(2) further protects the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction, and control over one’s body. In effect, acts which violate a person’s body, especially non-consensual sexual acts, contravene this section.

¹³J Burchell *Principles of Criminal Law* 4ed Claremont: Juta (2013) 595.

¹⁴Section 1(3) of the SOA.

¹⁵ It is important to note that by virtue of Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2015, a person who commits an act of sexual penetration with a child who is 12 years or older but

The SOA provides that whenever an accused person is charged with the offence of rape, it is not a valid defence to contend that a marital or other relationship exists or existed between him or her and the complainant.¹⁶ In effect, once there is a charge of rape, marriage cannot be used as a defence.

It is trite that before an accused person can be convicted of a crime, the *actus reus* (the physical act of the crime) and the *mens rea* (mental intent to commit the crime) must be proved.¹⁷ Accordingly, apart from proving that the accused person committed the physical act of rape, he must also have a guilty mind. Burchell, quoting the court in *R v K*,¹⁸ stated that “the accused must intend unlawfully to sexually penetrate the complainant, knowing or at least foreseeing that the complainant has not consented to the act of penetration.”¹⁹ Thus, for a charge of marital rape to be sustained, there be the physical act of penetration and the accused person must have intended to have sexual intercourse without the victim’s consent.

Victims of sexual offences who fail to report within a specific time frame are also protected by the SOA. Section 59 prohibits the courts from drawing adverse inferences merely from the length of any delay between the alleged commission of such offence and the reporting thereof. This provision is laudable in that some victims of sexual violence may not want to come forward due to the psychological impact of the violation or for fear of being victimised or ostracised, but may later change their minds. In addition, with regards to evaluation of evidence, section 60 prohibits the courts from treating the evidence of a complainant with caution due to the nature of the offence. This implies that where the court finds a victim to be a credible witness, the court may not treat the testimony of such witness with caution. Thus, the need for corroboration of the

under the age of 16 years is, despite the consent of the child, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless, at the time of the commission of the act, the perpetrator was 12 years of age or older but under the age of 16 years or either 16 or 17 years and the age difference between the two of them is not more than two years. This amendment was necessitated by the ruling of the Constitutional Court in *Teddy Bear Clinic for Abused Children and Others v the Minister of Justice and Constitutional Development and Others* [2013] ZA CC 35 regarding sexual acts between consenting adolescents. This section still protects children, especially those who are forced into early marriages with persons old enough to be their fathers or grandfathers. It may also be linked to the sections covering rape and especially marital rape. A girl who is below the age of 16 years is incapable of consenting to sexual intercourse.

¹⁶ Section 5 of the Prevention of Family Violence Act of 1993 abolished the common law position that a man cannot be found guilty of raping his wife. This section has however been replaced by sections 3 and 56(1) of the SOA.

¹⁷ Legal Services Commission of Australia ‘Elements of a Criminal Offence’ available at <http://www.lawhandbook.sa.gov.au/ch12s03.php> accessed on 18th February, 2016.

¹⁸ (1958) 3 SA 420 (A) 421.

¹⁹ Burchell (note 13 above) 609. See also J Burchell & J Milton *Cases & Materials on Criminal Law* 3 ed Juta: Cape Town (2007) 679.

evidence of the victim has been eliminated. Reddi submits that the abolition of this procedural requirement, that is corroboration in cases of a sexual nature, may result in an increase in the conviction rates of crimes such as rape.²⁰

Regarding the testimony of a child, the Criminal Procedure Act²¹ (CPA) allows a child to give his or her testimony with the assistance of an intermediary. Section 170A(1) provides that if it appears to the court that a child (a person under the age of 18 years) will be exposed to undue mental stress or suffering if he or she testifies in court, the court may appoint a competent person as an intermediary in order to enable the child to give his or her evidence through that intermediary. Thus, where a child victim is not able to give evidence in open court, he or she can do so through an intermediary. The intermediary also explains the language of the court to the child.

3.2.1 Case Law on Marital Rape in South Africa

Various cases exemplify how South African courts have reacted to charges of rape where the complainant and the accused persons are married. In *S v Mvamvu*,²² the Regional Court convicted the accused on two counts of rape, one count of abduction and one count of assault. The complainant and accused person were, at the time of the incident, married under customary law. In the evidence adduced, it was discovered that prior to the rape occurrences, the complainant had left the accused person to stay with her brother and assumed that the marriage had ended. The accused on the other hand assumed the marriage was still subsisting because the *lobola*²³ which he paid at the time of marrying the complainant had not been returned. The accused abducted the complainant on their way back from a Magistrate Court and forcefully took her to his house, where he raped her on six different occasions. She eventually managed to escape. On another occasion, the accused went to visit the complainant in her brother's house and when her brother went out, the accused forcefully dragged the complainant to a nearby bush where he raped her twice. He also assaulted her. The High Court confirmed the conviction given by the Regional Court and sentenced the accused to 5 years and 3 years imprisonment on the two

²⁰ Reddi (note 9 above) 71.

²¹ Act 51 of 1977.

²² 2005 (1) SACR 54 (SCA).

²³ Section 1 of the Recognition of Customary Marriages Act 120 of 1998 defines *lobola* as “the property in cash or in kind... which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.” In effect, it may also be called the bride-price.

counts of rape, and 3 years and 3 months imprisonment respectively, for the abduction and the assault. The sentences were to run concurrently. The State, being dissatisfied with the sentence, appealed to the Supreme Court. The Appellate Court stated that the sentences imposed for the rape counts were inappropriate and based on misdirections. The court however agreed that there were substantial and compelling circumstances justifying the imposition of a lesser sentence. The compelling circumstances were stated to be the fact that the accused person and the complainant were husband and wife who had lived together for a number of years before the rapes occurred and the fact that there was no evidence that the complainant suffered any “lasting psychological trauma”, as only minor injuries were suffered. The court found that the main aim of the rape was to “subjugate the complainant to his will and to persuade her to return to him”. The sentence imposed by the High Court was set aside and replaced with 10 year imprisonment each, on the two rape counts, and 3 years and 3 months respectively for the counts of abduction and assault.

In *Moipolai v The State*,²⁴ the appellant and complainant, though not married, had been lovers for approximately seven years prior to the alleged rape incidence and had two children together. The complainant was also eight months pregnant at the time of the incident. In the course of trial, the appellant contended that he could not have raped the complainant because she was the mother of his children. This was interpreted to mean that “the nature of their relationship is such that it renders their intercourse incapable of being legally categorised as rape”. The appellant challenged both the conviction and the sentence which was an effective 10 year imprisonment. The Appellate Court stated that certain mitigating factors which should have been considered by the trial court before imposing the sentence were the fact that the appellant was a first offender and the fact that the appellant and the complainant were not strangers, as they were virtually husband and wife. This was also the stand of the court in the *Mvamvu* case. The Magistrate relied on the words of Corbet JA in *S v N*²⁵ and stated that “the shock and affront to dignity suffered by the rape victim would ordinarily be less in the case where the rapist is a person well-known to the victim and someone moving in the same social milieu as the victim”. This was the rationale behind issuing a lesser sentence. The Appellate Court set aside the sentence of the trial court and sentenced the appellant to 10 years imprisonment, and half of the term suspended for a period of

²⁴(CA 53/2004) [2004] ZANWHC 19.

²⁵ 1988 (3) SA 450 (A) at 465 H-I.

five years provided that the appellant was not convicted of the offence of rape or indecent assault or an attempt to commit either of the offences.

In *Modise v The State*²⁶, a charge of attempted rape was brought against the appellant. The appellant and complainant were husband and wife, although as at the date of the alleged attempted rape, divorce proceedings were already pending. For a period of one year prior to the incident, the couple did not enjoy conjugal rights together; neither did they share the same bedroom. On the night of the alleged incident, the appellant who had prior to that time moved to his parental home, came to the matrimonial home and decided to sleep in the wife's bedroom. In the middle of the night, he attempted to rape her. The evidence of the complainant was corroborated by a neighbour. The Regional Court convicted the appellant of the offence of attempted rape and sentenced him to five years imprisonment. The appellant was dissatisfied with the judgment of the court and thereafter appealed. The Appellate Court upheld the conviction, but set aside the sentence of the Regional Court. A distinction was made between the circumstances of the offence of rape in the case of *Mvamvu* and the instant case. Thus, the court found that as opposed to the case of *Mvamvu*, minimum force was resorted to in order to subdue the complainant's resistance. The court also referred to the case of *Moipolai* and stated that the relationship between the appellant and the complainant (that is, the relationship of husband and wife) must be considered by a trial court when exercising its discretion. The Appellate Court concluded that an effective term of imprisonment was inappropriate and thereafter substituted the sentence of the lower court for a five year sentence, suspended for three years provided the appellant was not convicted of rape, attempted rape or indecent assault during the period of suspension.

From the above cases, it is clear that South African Courts take issues of rape within marriage seriously and the fact that such marriage may not be used as an excuse during trial is also highlighted. It however important to note that while these cases were decided before the commencement of the SOA, the position of the courts on rape cases still remain the same. For instance, in *Jezile v State*,²⁷ the fact that the appellant was married to the complainant did not deter the Court from upholding the rape conviction of the appellant.

²⁶[2007] ZANWHC 73.

²⁷2015 (2) SACR 2 (WCC); 2016 (2) SA 62.

3.2.2 Sentencing for Rape

The guiding principle for sentencing is that “punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances”.²⁸ On the issue of sentencing for rape, it is important to note that by the combined reading of section 51(1) and Part I and III of the Schedule 2 of the Criminal Law Amendment Act,²⁹ the minimum sentence on conviction for rape is 10 years imprisonment, while the maximum is life imprisonment, except where as in section 51(3)(a), the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. Circumstances which do not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence include the complainant’s previous sexual history; an apparent lack of physical injury to the complainant; an accused person’s cultural or religious beliefs about rape; or any relationship between the accused person and the complainant prior to the offence being committed.³⁰ In effect, marriage or other similar relationship between the accused person and the complainant is not reason enough to impose a lesser sentence, where the guilt of the accused person has been established.

In *S v Malgas*,³¹ the court, while analysing the concept of ‘substantial and compelling circumstances,’ stated that the legislature deliberately left the courts to decide what situations fall within the concept, thereby requiring them to “regard the prescribed sentences as being *generally appropriate* for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so”. Thus in the case of *Moipolai*, where the Magistrate merely said “instead of giving you 15 years I will give you 10 years. I just hope it will do you good because going home will not help you, you are just useless at home,” the Appellate Court rightly found that the statement did not reflect compelling and substantial circumstances to impose a lesser sentence. In the case of *Mvamvu*, the fact that the accused person believed that he was still married to the complainant at the time of the commission of the offence was a compelling and substantial circumstance to issue a lesser

²⁸See *S v Rabie* 1975 (4) SA 855 (A) 862G. See also JJ Joubert *et al Criminal Procedure Handbook* 11 ed Claremont: Juta (2014) 326.

²⁹ Act of 10 of 1997.

³⁰Section 51 (3)(Aa) of the Criminal Law Amendment Act 105 of 1997.

³¹2001 (3) All SA 220.

sentence. The court therefore departed from the requirements of the law in that marriage was classified as a substantial and compelling reason to issue a lesser sentence.

Another factor common to the cases discussed above is that of the use of suspended sentence. Under section 297(4) of the CPA, “where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years” based on certain conditions stipulated in section 297(1)(a)(i) of the CPA. The courts therefore have the discretion to impose suspended sentences for a maximum of five years in rape cases. Joubert *et al* submit that suspended sentences serve as an “individual deterrent to the offender as it hangs like a sword over his head.”³² This may be the rationale for issuing suspended sentence in the cases discussed above.

3.3 CHILD MARRIAGE AND THE CHILDREN’S ACT 38 OF 2005

The Children’s Act (CA) was enacted “to give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children” among others.³³ In the Preamble to the CA, reference is made to the provisions of the UDHR, CRC, and ACRWC among others which may imply that the Act follows the precepts laid by the international and regional instruments relating to the protection of children. Accordingly, one of the objects of the Act is to give effect to the constitutional rights of children, including protection from maltreatment, neglect, abuse or degradation, and to give effect to the obligations concerning the well-being of children in terms of binding international instruments.³⁴

3.3.1 The Right of the Child versus Child Marriage

Various issues threaten the rights of children, including harmful cultural practices. This is more so in terms of the constitutional provision regarding the right to culture.³⁵ Section 12 of the CA

³²Joubert *et al* (note 28 above) 353.

³³See the long title to CA in Pendlex (attached after amendment by the Children’s Amendment Act 41 of 2007).

³⁴See Section 2(b)(i)&(c) of the CA.

³⁵ The right to culture, which is mostly used as a covering for harmful practices that often lead to sexual violence against women and children, is provided in Section 30 of the 1996 Constitution. The section further provides that the rights should be exercised in a manner consistent with the provisions of the Bill of Rights. Early/forced marriage, marital rape and other forms of sexual violence against women are often grouped under harmful cultural practices. Harmful cultural practices are acts motivated by culture and tradition that have harmful or destructive consequences

provides that “every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being”. A form of child marriage practiced in some parts of South Africa is *ukuthwala*. With the provision of section 12 of the CA, the question which readily comes to mind is whether the practice of *ukuthwala* is detrimental to the well-being of a child? Although the practice was initially targeted at girls of marriageable age, the practice has now been used as a veil to cover up acts of child marriage and sexual abuse. According to Mwanbene and Sloth-Nielsen,³⁶ *ukuthwala* is a preliminary procedure to a customary marriage whereby a woman is abducted by her suitor to commence the marriage process (or the abduction of a woman as a preliminary to a customary marriage). Mubangizi argues that child marriage is closely related to *ukuthwala*.³⁷ Various forms of *ukuthwala* were identified, the one which constitutes a violation of human rights is explained as follows:

*In this form of ukuthwala, there is no initial consent from either the girl or her parents or guardian. Under this form, a girl is taken to the family home of the young man by force. Emissaries are then sent to her family to open marriage negotiations. The family of the girl may refuse negotiations, in which case a beast is payable and the girl is taken back to her family. In addition, in its most abusive form, the forced abduction can expose the girl to rape by her ‘husband’ and to actual or threatened violence in order to keep her in the relationship. In this form of ukuthwala, we see that the bride is unwilling and therefore the intended marriage would, arguably, be a forced marriage. Other human rights violations are obvious, including the infringement of freedom and security of the person, violation of bodily integrity, dignity and various provisions which prohibit forms of slavery, to name a few.*³⁸

and include acts such as female genital mutilation, child marriage, and breast ironing. See generally M Kouyate ‘Harmful Traditional Practices Against Women and Legislation’ expert paper presented at the United Nations Conference Centre Addis Ababa, Ethiopia 25 to 28 May 2009, available at http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Morissan_da%20Kouyate_.pdf accessed on 22nd February, 2016.

³⁶L Mwanbene & J Sloth-Nielsen ‘Benign accommodation? Ukuthwala, ‘forced marriage’ and the South African Children’s Act’ (2011) 11 *African Human Rights Law Journal* 3-4.

³⁷Mubangizi (note 1 above) 160.

³⁸Mwanbene & Sloth-Nielsen (note 36 above) 7.

Van der Watts argues that this form of *ukuthwala* represents a shift from a traditional practice to a form of abuse and violation of human rights but conceded that the traditional form and intent of *ukuthwala* adheres to the Bill of Rights where the act is consensual (that is, consent of the abducted girl).³⁹ This concession may be not be completely correct as a child below the age of 12 years is not capable of consent by virtue of section 1(3) of the SOA. From the discussion on the practice of *ukuthwala*, there is no gainsaying the fact that abduction and violence of any kind is detrimental to the health and general well-being of a child, which is the bed rock of section 12(1) of the CA. Not only is *ukuthwala* a violation of the CA, it may also be a violation of the SOA which was discussed earlier.⁴⁰ Child marriage (which sometimes leads to early motherhood) is detrimental to the well-being of a child as it sometimes leads to varying degrees of reproductive problems, such as vesico-vaginal and recto-vaginal fistula, vaginal stretching, miscarriages, infertility and so on.⁴¹ A vaginal fistula is an abnormal opening between the vaginal and another part of the body, which mostly develops during labour and birth when the infant's head descends into the maternal pelvis and cannot pass through, usually because the woman's pelvis is too small or poorly developed.⁴² A vaginal fistula that opens into the urinary tract is vesico-vaginal fistula, while the one that opens into the rectum is called recto-vaginal fistula.⁴³ Vaginal fistula is common with young mothers because their organs, especially their pelvises, are not fully developed to accommodate a baby, which increases the risk of obstructed labour.⁴⁴

³⁹M Van der Watts 'Contextualizing the practice of Ukuthwala within South Africa' (2012) 13(1) *Child Abuse Research: A South African Journal* 12-13. See also *Nkupeni v Nomungunya* 1936 NAC (C&O) 77 where the court stated that the practice of *ukuthwala* should not be used 'as a cloak for forcing unwelcome attentions on a patently unwilling girl.'

⁴⁰ Though it has been argued that sexual intercourse does not occur until the marriage negotiations are concluded, where there is no consent after marriage, it becomes marital rape and by virtue of section 56(1) of the SOA, marriage cannot be raised as a defence in a charge of rape. See D McQuoid-Mason 'The practice of "Ukuthwala"', the Constitution and the Criminal Law (Sexual Offences and Related Matters) Amendment Act: notes' (2009) 30(3) *Obiter* 719-720.

⁴¹See Historical Background of the Concept of Sexual and Reproductive Health Rights and Sexual Violence in Chapter one, page 20.

⁴² See Roger Smith 'Netter's Obstetrics & Gynecology' available at https://www.clinicalkey.com/service/content/pdf/watermarked/3-s2.0-B9781416056829500901.pdf?locale=en_US accessed on 12th April 2016, and Fistula Care 'Obstetric Fistula-Definition, Causes and Contributing Factors, and Impact on Affected Women' available at http://www.intrahealth.org/files/media/fistula-orientations-for-health-workers-and-community-members/Module_6_Obstetric_fistula_causes_and_factors_Fistula_Care.pdf accessed on 12th April, 2016.

⁴³ Webmd 'Vaginal Fistula-Topic Overview' available at <http://www.webmd.com/women/tc/vaginal-fistula-topic-overview> accessed on 12th April, 2016.

⁴⁴ Wikipedia 'Obstetric Fistula' available at https://en.wikipedia.org/wiki/Obstetric_fistula accessed on 12th April, 2016.

Section 12(2) of the CA is to the effect that a child below the minimum age of marriage should not be given out in marriage or engagement, and a child above the minimum age should not be given out in marriage or engagement without his or her consent. This presupposes the requirement of consent before a child is given out in marriage. Mwanbene *et al* argues that this provision does not include *ukuthwala* because a girl who is *thwala'd* is not given out in marriage but taken and thus the practice was targeted at enabling early marriages.⁴⁵ It was done to start negotiations and the woman, in most cases “plays along”. However, where *ukuthwala* involves children, it is covered by Section 12(2) because it may be a preliminary process to child marriage.

With regard to the minimum age of marriage, as the CA does not prescribe the minimum age of marriage, recourse may be made to the Marriage Act, 1961 (MA) and Recognition of Customary Marriages Act 1998 (RCMA). Section 26 of the MA provides that no boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the written permission of the Minister of Home Affairs or any officer in the public service authorised to do so. Thus, the minimum age of marriage set by law, which will not require consent of any government personnel is 15 years for girls. With regards to customary marriages, section 3 of the RCMA provides that in order for a customary marriage to be valid, the prospective spouses must be above the age of 18 years and must both consent to be married to each other under customary law. The MA sets a lower minimum age of marriage compared to the RCMA. Since child marriage is mainly a traditional practice in South Africa, the minimum age of marriage set by the RCMA, which is 18 years, should thus be followed. This is supported by section 17 of the CA which fixes the age of majority at 18 years. In effect, every person below the age of 18 years is a child and in terms of customary law, a child may not contract a valid marriage. However, it has been argued that the fact that the CA does not go as far as setting a minimum age for marriage implies that South Africa has not met its obligation in terms of the CRC and the African Charter.⁴⁶

It is important to note that apart from being a violation of the CA, *ukuthwala* has various constitutional implications, including that of gender inequality. This is because the woman or girl

⁴⁵Mwambene & Sloth-Nielsen (note 36 above) 18.

⁴⁶D Kassin and P Mahery ‘Special Child Protective Measures in the Children’s Act’ in T Boezaart (ed) *Child Law in South Africa* Claremont: Juta (2009)196.

child involved is not given equal rights as the man to decide who to marry. Section 9 of the 1996 Constitution guarantees the right to equality and provides *inter alia* that equality includes the full and equal enjoyment of all rights and freedoms. The international and regional instruments considered in the previous chapter advocate consent of intending spouses at the commencement of marriage. As stated by Mwanbene and Sloth-Nielsen, free and full consent stipulated by international standards cannot be achieved where one of the parties is not mature enough to make informed decisions.⁴⁷

Maluleke argues that abduction, which forms an essential component of *ukuthwala*, may also constitute a violation of the SOA.⁴⁸ Abduction is defined as “unlawfully taking a minor out of the control of his or her custodian with the intention of enabling someone to marry or have sexual intercourse with that minor (a person under 18 years)”.⁴⁹ Abduction is different from kidnapping in that while abduction is solely for the purpose of marriage or sexual intercourse; kidnapping involves unlawfully taking of a person, whether minor or adult, for a wide range of purposes. Van der Watts also reports that in April 2011, three men in Lusikisiki in the Eastern Cape, were sentenced by the Lusikisiki Regional Magistrate’s Court to a total of 16 years imprisonment for kidnapping a 15 year old girl.⁵⁰ The suitor, who was the first accused person, was sentenced to 10 years imprisonment, of which five years were suspended on condition that he did not commit the same offence again. The other accused persons were each sentenced to three years imprisonment because they assisted the first accused. The provisions relating to abduction and human trafficking in the SOA have been replaced by the Prevention and Combating of Trafficking in Persons Act⁵¹(PCTPA).⁵² Section 284(1) prohibits child trafficking. Section 305(8) provides that anyone who is convicted of child trafficking is, in addition to a

⁴⁷Ibid 11.

⁴⁸ J Maluleke ‘Ukuthwala (let’s protect our children)’ available at http://www.justice.gov.za/docs/articles/2009_ukuthwala-kidnapping-girls.html accessed on 22nd February, 2016.

⁴⁹Burchell (note 13 above) 650.

⁵⁰ Van der Watts (note 39 above) 23.

⁵¹ Act 7 of 2013.

⁵² Section 4(2)(b) of the PCTPA provides that “any person who concludes a forced marriage with another person for the purpose of the exploitation of that child or other person in any form or manner, is guilty of an offence (the offence of trafficking in persons).” Section 1 defines forced marriage as “a marriage concluded without the consent of each of the parties to the marriage.” Also, by virtue of section 11(1)(a), it is no defence to a charge of trafficking that a person having control or authority over a child who is a victim of trafficking has consented to the intended exploitation. Thus, in situations where a girl is forced into marriage, the fact that her parents consented to it does not absorb the man of criminal liability. Thus, the practice of *ukuthwala* in its present form constitutes a crime under the PCTPA and a person found guilty is liable to a fine or a term of imprisonment for life, or both. See section 13(b) of the PCTPA.

sentence for any other offence of which he or she may be convicted, liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.

Various cases exemplify how the courts react to suits based on the form of *ukuthwala* that involve child marriage. In *R v Sita*,⁵³ a case decided before the 1996 Constitution, a 14 year old girl was abducted by a man under the guise of the *ukuthwala* custom. The court stated *inter alia* that the offence of abduction occurs when the girl is taken from the possession of her parents or guardians without their consent. In effect, where a girl is taken with the consent of her parents or guardians but without her consent, the offence of abduction has not been committed. However, the court maintained the view that *ukuthwala* cannot be used as a defence for rape. The court stated as follows: “under the custom of ‘*twala*’ the girl can be taken and intercourse had with her even though she actually and *bona fide* resists that intercourse and it is obvious that the law would not allow the custom to be pleaded as a defence to rape and say that the custom overrides the lack of consent.” The Magistrate’s decision that *ukuthwala* was a defence to the abduction was therefore set aside and the case remitted for hearing. It is instructive to note that in the light of this decision, a girl whose parents consent to her being *twala’d* may not be able to lodge criminal complaints for abduction.

There is a departure from the above in the case of *Jezile v State* which is a combination of both child marriage and marital rape. In that case, a 14 year old girl (the complainant) was given out in marriage to the appellant, who was 28 at the time, after he had paid the sum of R8000 to her grandmother and male relatives as *lobola*. The appellant later took her to Cape Town (the alleged marriage occurred in Eastern Cape) after she ran away from the marital home a number of times. The complainant alleged that sexual intercourse took place between them on seven different occasions within the space of a few days, all of which were against her will. She also alleged that he inflicted a wound on her leg when she refused to have sexual intercourse with him. The complainant was also locked in the house for a couple of days while the appellant went about his normal routine of seeking employment. The complainant reported the matter to the police after she fled from the appellant. The complainant told the police that she did not want to be married to the appellant and that she wanted to return to school. The appellant was charged for human trafficking, rape, and assault.

⁵³1954 (4) SA 20 (E). See also Burchell and Milton (note 19 above).

At the trial court, the appellant's defence was based on the concept of consent, that is, the complainant agreed to have sexual intercourse with him and to also follow him to Cape Town. The evidence of the complainant, corroborated by her mother and an expert witness, was admitted by the trial court. The appellant was thereafter convicted. The trial court considered the involvement of the grandmother and male relatives of the complainant as a substantial and compelling circumstance justifying the imposition of a lesser sentence. At the Appellate Court, the appellant raised the custom of *ukuthwala* as a defence. Relevant state institutions, organisations and experts were invited to apply to assist the court as *amicus curiae* on specific issues of customary marriages and *ukuthwala*.

The court made reference to the provisions of various legal instruments which have been discussed earlier. Prominent among these is Section 3(1) of the RCMA which lists three requirements to validate customary marriages, namely: the prospective spouses must both be above the age of 18 years; they must both consent to be married to each other under customary law; and the marriage must be negotiated and entered into or celebrated in accordance with customary law. The *amici* agreed that the appellant's conduct was an aberrant form of *ukuthwala* and described the practice as a "most severe and impermissible violation of women and children's most basic rights to dignity, equality, life, freedom, security of person and freedom from slavery". The court thereafter upheld the conviction and sentences issued by the trial court on the counts of rape and trafficking. The decision of the court in this case is highly laudable because it has given effect to the provisions of the SOA, the CA and the PCTPA relating to child marriage, rape and trafficking.

3.4 STATE RESPONSE TO SEXUAL VIOLENCE AND PROTECTIVE MEASURES

Over the years, the government of South Africa has seen sexual violence as a major problem and has put certain mechanisms in place to ameliorate the impact on victims. These mechanisms include the Sexual Offences and Community Affairs (SOCA) Unit,⁵⁴ the Sexual Offences Court,

⁵⁴ The SOCA Unit was established in 1999 by the National Prosecuting Authority (NPA) for the purpose of eliminating all forms of gender-based violence against women and children through the establishment of an effective unit which strives to reduce the victimisation of women and children by enhancing the capacity to prosecute sexual offences and domestic violence cases. In other words, it was created to strengthen the government's agenda of eradicating sexual violence, particularly against women and children. The SOCA Unit consists of four sections, namely: the sexual offences section, the domestic violence section, the maintenance section and the child justice

the *Thuthuzela* Care Centres (TTC)⁵⁵ and the Family Violence, Child Protection and Sexual Offences (FCS) Unit⁵⁶ among others. This section focuses on the Sexual Offences Court. Due to the fact that both child marriage and marital rape have been discussed in a criminal context, it is essential to discuss the SOC as it is in charge of prosecuting sexual violence cases.

3.4.1 Sexual Offences Court (SOC)

SOCs deal specifically with sexual offences and consist of specialised prosecutors, social workers, investigating officers, magistrates and health professionals. The SOC was initiated by the Attorney-General of the Western Cape at the Wynberg Regional Court in Cape Town in 1993.⁵⁷ It was created “to reduce the insensitive treatment of victims in the criminal justice system by following a victim-centred approach; to adopt a coordinated and integrated approach among the various role-players who deal with sexual offences; and to improve the investigation and prosecution, as well as the reporting and conviction rates in sexual offences cases”.⁵⁸

According to Kruger and Reyneke, the SOC created in Wynberg was different from general regional courts because a victim-centred approach was followed even before the trial commenced.⁵⁹ Once a report was made to the police, a multidisciplinary team rendered services to the victim; and a social worker from the then Department of Welfare was appointed as a full-time, victim-support services co-ordinator, who arranged for intermediaries and appropriate

section. See National Prosecuting Authority of South Africa ‘Maintenance Sexual Offences and Community Affairs (SOCA) Unit’ available at <https://www.npa.gov.za/?q=node/51> accessed on 11th February, 2016.

⁵⁵ The TTC was created by the SOCA Unit to be a one-stop facility aimed at reducing secondary victimisation of rape and domestic violence victims, improve conviction rates and reduce the cycle for finalisation of cases. The TTC is a one-stop facility in the sense that victims of rape and other forms of sexual violence receive necessary medical care and shelter, meet social workers who provide counselling and police officer and skilled prosecutors who conduct investigations and help bring perpetrators of sexual violence to justice. See *Thuthuzela Care Centre Brochure* released by the National Prosecuting Authority South Africa in 2009, available at https://www.npa.gov.za/sites/default/files/resources/public_awareness/TCC_brochure_august_2009.pdf accessed on 11th February, 2016

⁵⁶ The FCS was created in 1995 by the SAPS to deal with crimes relating to family violence, children protection and sexual violence. The Unit has specialised police officers who have been trained to receive crimes in the relevant field.

⁵⁷ Department of Justice and Constitutional Development Report on the re-establishment of sexual offences courts by the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (August 2013) 17 available at <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf> accessed on 26th February, 2016.

⁵⁸ *Ibid.*

⁵⁹ HB Kruger & JM Reyneke ‘Sexual Offences Courts in South Africa: Quo vadis?’ (2008) 33(2) *Journal for Juridical Science* 38.

services and the counselling of victims.⁶⁰ Though the SOC was located in the Magistrate Court building, it was located on a separate floor to prevent face-to-face contact of the accused person with the general public or the victims who waited to testify, two prosecutors were also allocated to each case for better efficiency.⁶¹

Other facilities provided at the Wynberg Court include private waiting rooms for victims and a closed-circuit television (CCTV) which enabled victims to testify in a separate room, while the court officials monitored in the courtroom through a television monitor.⁶² The SOC was evaluated in 1997 and it was found to be “partially successful in establishing integration and teamwork among different role-players dealing with sexual offences, in reducing victim trauma and in improving reporting and conviction rates”.⁶³ It was also suggested that there should be a continuous specialised training for all court personnel to improve the prosecution and adjudication of sexual offence cases and the provision of district surgeons available on a 24 hour basis to avoid delays in forensic examinations.⁶⁴

The NPA thereafter established the National Sexual Offences Court Task Team in 1998 to facilitate the creation of SOCs in all regional court districts in the country. The SOCA Unit developed a Blueprint for Sexual Offences Courts in 2002 after it identified the lack of official guidelines to run the SOC as one of the shortcomings of the Wynberg Court Model. The Blueprint requirements include “special courts with appropriate facilities, 2 prosecutors per court, experienced magistrates, victim assistant services, counselling services, administrative support, case managers, intermediaries and legal aid attorneys”.⁶⁵ With the SOCs, there was “an increase in conviction rates and a decrease in turnaround time from the date of report to the police to the finalisation of the case.”⁶⁶ However, due to inadequate personnel, and unavailability of facilities and equipments to follow the blueprint stipulated by the SOCA Unit, the SOCs

⁶⁰Ibid.

⁶¹ Ibid.

⁶² Ibid 39.

⁶³ Note 57 above 18.

⁶⁴ Ibid.

⁶⁵ Kruger (note 59 above) 43.

⁶⁶ Note 57 above 23.

operated more like the regular courts, and soon became regular courts where other matters unrelated to sexual offences were heard.⁶⁷

In 2013, the Department of Justice and Constitutional Development committed itself to the establishment of 57 Sexual Offences Courts throughout South Africa.⁶⁸ On 23 August 2013, the first SOC was opened in Butterworth in the Eastern Cape.⁶⁹

The SOC is a good innovation as it affords victims safety and confidentiality, which they may not receive at the regular courts. In addition, the specialised staff and equipment makes it a necessity for protecting victims of sexual violence and reducing secondary trauma.

3.5 CONCLUSION

From the foregoing, it is clear that South Africa has gone a long way in performing its obligations under the various international, regional and sub regional instruments relating to sexual violence and has also put in place various measures for the protection of girls and women against child marriage and marital rape. Perpetrators of these acts of violence are also brought to justice by the provisions of the law. Although there may be some challenges with implementation, the South African framework remains a good example for other countries, especially Nigeria. In the next chapter, the extent of the problem in Nigeria and the framework in place for the protection of women against sexual violence, particularly child marriage and marital rape, will be discussed.

⁶⁷ Ibid 24-25.

⁶⁸ Nomfundo Manyathi-Jele 'Justice Department on target with establishment of sexual offences courts' available at <http://www.derebus.org.za/justice-department-target-establishment-sexual-offences-courts/> accessed on 26th February, 2016.

⁶⁹ Ibid.

CHAPTER FOUR

THE PROTECTION OF WOMEN AND GIRLS AGAINST SEXUAL VIOLENCE IN NIGERIA

4.1 INTRODUCTION

In the previous chapter, the framework for the protection of women against sexual violence, particularly marital rape and child marriage, in South Africa was discussed. It was established that South Africa has implemented concrete actions in fulfilling its obligations under the various international, regional and sub regional instruments set out in Chapter Two. This provides a model for other African countries, and in particular Nigeria.

The laws and policies for the protection of sexual and reproductive rights of Nigerian women and girls can be found in various statutes, service rules and regulations, case laws, general orders, customary law, the Constitution and ratified international treaties and conventions.¹ Ekhaton argues that in Nigeria, women face challenges and discrimination under various laws.² Laws have less effect on women as community norms and interpersonal peer pressures have greater influence than legislation.³ An average Nigerian woman is largely influenced by her environment and culture, and this shapes her attitude and world view. Ekhaton argues that Nigerian society is inherently patriarchal because of the influence of the various religions and customs in many parts of Nigeria where women are seen as the ‘weaker sex’ and discriminatory practices by men are condoned.⁴ Nigeria is a country in which women are still treated as chattels or property.⁵

The Nigerian legal system is pluralist in the sense that customary law operates in the South while Islamic Law, otherwise called Sharia Law operates in the North. While the National Assembly

¹O Gbadamosi *Reproductive Health and Rights (African Perspectives and Legal Issues in Nigeria)* Benin City: Ethiope Publishing Corporation (2007) 54.

²EO Ekhaton ‘Women and the Law in Nigeria; A Reappraisal’ (2015) 16(2) *Journal of International Women’s Studies* 285.

³A Ige ‘Women and the Right to Health in Nigeria: The Intersections’ (2012) 5(2) *British Journal of Arts and Social Sciences* 181.

⁴Ekhaton (note 2 above) 285.

⁵Ige (note 3 above) 185.

makes laws for the entire Federation on matters in the Exclusive List in the 1999 Constitution,⁶ the Houses of Assembly of each State make laws on matters in the Concurrent List.⁷ It is against this background that the laws operating at the Federal level and the North and South with respect to child marriage and marital rape will be discussed. This chapter will focus on how Nigeria has fulfilled its obligations under the international, regional and sub-regional instruments discussed in Chapter Two of this work, in relation to protection of women and children from sexual violence, particularly child marriage and marital rape.

In 2001, the Nigerian government through the Federal Ministry of Health developed a National Reproductive Health Policy (NRHP) “to provide the necessary guidance and framework for the promotion and implementation of reproductive health programmes and activities. The ultimate aim of this policy is to serve as an effective national platform for strengthening reproductive health activities in Nigeria and facilitating the achievement of relevant global and regional goals in the interest of improved health, well-being, and overall quality of lives of all peoples in Nigeria”.⁸ The Africa region vision, according to the NRHP, is that within the next twenty-five years, (starting from 2001), all people of the region should enjoy an improved quality of life through a significant reduction of maternal and neonatal morbidity and mortality; unwanted pregnancy and sexually transmitted infections including mother to child transmission of HIV; and through the elimination of harmful practices and sexual violence. Clearly, the elimination of sexual violence within the next twenty-five years, from 2001, is an integral part of the vision formulated by the NRHP. However, the question remains whether the NRHP can stand in the face of the number of legal constraints to the protection of reproductive rights, especially with respect to sexual violence. Various statutes which protect women from sexual violence in Nigeria and the various constraints which they present will be discussed in the subsequent sections.

⁶ Some matters in the Exclusive List include aviation, arms and ammunitions, bankruptcy, insurance, and the formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto. See Part I of the Second Schedule to the 1999 Constitution.

⁷ Matters in the Concurrent List are matters not included in the Exclusive List.

⁸Federal Ministry of Health ‘National Reproductive Health Policy and Strategy to achieve quality reproductive and sexual health for all Nigerians’ 2001, Foreword.

4.2 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (1999 CONSTITUTION)

Before examining some rights infringed by sexual violence, it is pertinent to understand the state of economic, social and cultural rights in the 1999 Constitution. In this section, the provisions of Chapter II of the 1999 Constitution, which contains the Directive Principles and its similarities with the 1949 Indian Constitution, will be discussed. In addition, the various rights enshrined in Chapter IV of the 1999 Constitution and the position of international and regional instruments in terms of the Constitution will be discussed.

4.2.1 Chapter II of the 1999 Constitution and Part IV of the 1949 Indian Constitution

4.2.1.1 Chapter II of the 1999 Constitution

Chapter II provides for Directive Principles for certain economic, social and cultural rights, including the right to health, which forms the bedrock for the recognition of sexual and reproductive health rights. However section 6(6)(c) provides that the provisions of Chapter II are not enforceable in any court in Nigeria. Ibe argues that it is not necessarily true that the provisions of section 6(6)(c) makes economic, social and cultural rights unenforceable.⁹ His argument is based on the case of *Okogie and Others v Attorney-General of Lagos State*¹⁰ where questions relating to provision of educational services were referred to the Court. The court held that “no court has jurisdiction to pronounce on any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles (that is Chapter II of the Constitution).” Ibe is of the opinion that the fact that the court pronounced on this matter demonstrates that judicial action is possible on matters arising out of Chapter II violations.¹¹

This argument may not be tenable because there is no point in approaching a court on a matter when the court will hold that it has no jurisdiction over the matter. From the decision of the court in *Okogie*, the court only has powers to interpret the general provisions of the chapter and not to

⁹S Ibe ‘Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities’ (2010) 10(12) *African Human Rights Law Journal* 2010.

¹⁰(1981) 2 NCLR 350.

¹¹Ibe (note 9 above) 202.

compel States to perform the responsibilities stipulated under the chapter.¹² However, as rightly argued by Ibe, where the legislature, in accordance with Item 60(a) of the Exclusive Legislative List, enacts any specific law to promote and enforce the observance of chapter II, it becomes enforceable in court.

4.2.1.2 Part IV of the 1949 Indian Constitution

Chapter II of the 1999 Constitution owes its origin to the Directive Principles of State Policy enshrined in Part IV of the 1949 Constitution of India (1949 Constitution).¹³ Article 37 of the 1949 Constitution is to the effect that the provisions in Part IV which contains the Directive principles are not enforceable by any court, but the principles stipulated are nevertheless fundamental in the governance of the country and the State has the duty to apply the principles set out in making laws. This provision bears some resemblance to Section 6(6)(c) of the 1999 Constitution on the justiciability of the Directives Principles in Nigeria.

In *State of Madras v Srimathi Champakam*,¹⁴ the Indian court held that the Directive Principles cannot override the provisions found in Part III of the 1949 Constitution (which sets out the Fundamental Rights) but must conform and be regarded as subsidiary to the Fundamental Rights. This is clearly in consonance with the situation in Nigeria. However, the Indian judiciary, through several cases, have expanded the Fundamental Rights that are justiciable to include the economic, social and cultural rights which form the basis of the Directive Principles.¹⁵

In *State of Kerala v NM Thomas*¹⁶, the Indian court held that the Directive Principles “constitute the stairs to climb the high edifice of a socialistic State and the fundamental rights are the means through which one can reach the top of the edifice”. In effect, the Fundamental Rights and Directive Principles go hand-in-hand and ensure better living for all citizens of a state. The Court held further that “where there is no apparent inconsistency between the Directive Principles

¹² This is contrary to the South African position, especially looking at the case of *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* where the Court compelled the State to act on its responsibilities stipulated in the 1996 Constitution. (See Section 1.1 of Chapter one).

¹³ Ibe (note 9 above) 203.

¹⁴ 1951 SCR 525.

¹⁵ See for example the case of *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 2 SCR 516 where the Supreme Court of India stated that the right to health is part of parcel of the right to life and should be interpreted as such and *Parmanand Katara v Union of India & Ors* 1989 (3) 997.

¹⁶ 1976 SCR (1) 906. See also *Minerva Mills & Ors v Union of India & Ors* 1981 SCR (1) 206.

contained in Part IV and the Fundamental Rights mentioned in Part III, there is no difficulty in putting a harmonious construction which advances the object of the Constitution". This case emphasises the position of Indian courts on the complementary nature of Fundamental Rights and Directive Principles. This position was also stressed in *Unni Krishnan JP & Ors v State of Andhra Pradesh & Ors*¹⁷ where the court stated that fundamental rights must be construed in the light of the Directive Principles. As both Nigeria and India are members of the Commonwealth of Nations, the stance taken by Indian Courts is worth emulating in Nigeria.

4.2.2 Chapter IV of the 1999 Constitution and Sexual Violence

Protection against sexual violence can be linked to various fundamental rights in Chapter IV of the 1999 Constitution. Section 33 provides that every person has a right to life, and no one shall be deprived intentionally of his right to life. Therefore, acts of sexual violence which threaten the lives of women and girls represent a potential infringement of the right to life. Section 34(1)(a) provides that every individual is entitled to respect for the dignity of his person and shall not be subjected to torture, inhuman or degrading treatment. Section 37 guarantees the right to privacy of citizens to their homes, correspondence, telephone conversations and telegraphic communications. This section recognises the importance of individual privacy and protects it. Sexually violent acts, especially child marriage and marital rape, do not recognise the privacy of individual citizens.

The rights guaranteed in the 1999 Constitution are often hindered or undermined by the right to freedom of religion which is also guaranteed by the Constitution. Section 38(1) provides that "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." While the Bill of Rights in the South African Constitution¹⁸ provides that the right to religion or culture should not be exercised in a manner inconsistent with other rights, there is no such provision in Section 38(1) of the 1999 Constitution in Nigeria. However, in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*,¹⁹ the Supreme Court per

¹⁷ 1993 SCR (1) 594.

¹⁸ See Section 30 of the Constitution of the Republic of South Africa, 1996.

¹⁹ (2001) 7 NWLR (Pt 711) 206, 2002 AHRLR 159.

Ayoola JSC stated that “the right to freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to religious belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy”. In effect, while the entire citizenry enjoys freedom of religion, the dictates of a selected religion should not be exercised to infringe or violate the rights of other people, especially women and girls.

On the enforcement of the fundamental rights stipulated in Chapter IV of the 1999 Constitution, Section 46(1) provides that any person who alleges that any of his or her rights has been, is being or is likely to be violated in any state in relation to him may apply to a High Court in that state for redress. The Fundamental Rights (Enforcement Procedure) Rules, 2009 (FREP Rules), which were created as a guide for applications brought to the court for the enforcement of rights enshrined in Chapter IV, requires Courts to “proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented”.²⁰ The FREP Rules place a duty on the Nigerian Courts to expansively and purposely interpret and apply the Constitution, especially Chapter IV and the African Charter, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.²¹

Apart from the victims, application for the enforcement of fundamental rights may be brought by human rights activists, advocates or groups, non-governmental organisations, among others.²² Thus, the issue of *locus standi* is no longer an obstacle. Also, the victim does not have to be present in court. Another innovation of the FREP Rules is the fact that applications cannot be statute-barred.²³ Okogbule identifies some challenges with the enforcement of the rights including illiteracy (persons in rural areas, particularly women and girls are not aware that these rights exist); undue delay in the administration of justice (this may be due to the poor attitude of

²⁰Preamble to the FREP Rules, 2009.

²¹Ibid.

²²Ibid.

²³Order III FREP Rules.

police officers and judicial officers to victims); and the high cost of litigation.²⁴ In addition, lack of proper infrastructure in place for the care of victims pending the determination of the application, (for example, issuance of protection orders and establishment of care centres as in South Africa), may be another problem hindering victims from seeking redress in court.

4.2.3 Status of International and Regional Human Right instruments under the 1999 Constitution

The status of treaties in Nigeria is covered by Section 12 of the 1999 Constitution. Section 12(1) provides that no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. This implies domestication by enacting the treaty into the municipal laws of the Federation. Nigeria is a signatory to most of the instruments discussed in Chapter Two. These instruments, especially the treaties, are legally binding and require State Parties to implement them, thereby ensuring protection, promotion and fulfilment of the rights.

The Supreme Court affirmed the constitutional requirement of domestication in *Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v Medical and Health Workers Union of Nigeria*²⁵ where it held, *inter alia*, that in so far as a convention has not been enacted into law by the National Assembly, it has no force of law in Nigeria and cannot be enforced. Ige argues that the fact that some of the treaties have not been enacted in accordance with Section 12 does not enable Nigeria to evade its responsibilities.²⁶ Article 27 of the Vienna Convention on the Law of Treaties²⁷ provides that “a party may not invoke the provisions of its internal law as justification for failure to perform its treaty.” Nigeria is clearly in breach of this provision by using Section 12 as a justification for not performing its obligations under the treaties which have not been domesticated.

²⁴NS Okogbule ‘Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects’ (2005) 3(2) *International Journal on Human Rights* 99, 105 available at http://www.scielo.br/pdf/sur/v2n3/en_a07v02n3.pdf accessed on 14th March, 2016.

²⁵ (2008) 1 FWLR Pt 410. See also *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228 where the Supreme Court, per Ogunbare JSC stated that “before its enactment into law by National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts.”

²⁶Ige (note 3 above) 182-183.

²⁷ Adopted by the United Nations General Assembly on 23rd May, 1969 and came into force on 27th January, 1980.

The position of treaties that have been passed by the National Assembly is however clear. In *Abacha v Fawehinmi*,²⁸ the Supreme Court stated that where a treaty is enacted into law by the National Assembly, it becomes binding and Nigerian courts must give effect to it as with all other laws falling within the judicial power of the courts. The court held further that since domesticated treaties have international flavour, they are superior to other domestic statutes, except the Constitution and they can also be repealed by an Act of the National Assembly.

The African Charter has been ratified by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.²⁹ The Preamble recognises the African Charter and states that as from the commencement of the Act, the provisions of the African Charter on Human and Peoples' Rights shall have the force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria. Thus, all the obligations of states in the Charter are enforceable in Nigeria. However, the social, economic and cultural rights stipulated in the African Charter would have been enforceable if not for the pronouncement of the Supreme Court in *Abacha v Fawehinmi*³⁰, where it was stated that the 1999 Constitution is superior to all domesticated treaties, including the African Charter.

Therefore, since the 1999 Constitution makes only rights provided in Chapter IV enforceable, social, economic and cultural rights provided in Chapter II and the African Charter will not be enforceable in Nigerian courts.³¹ Thus, where a person seeks to enforce the right to health provided in the African Charter for instance, the court may decline jurisdiction because of the superiority of the Constitution.

4.3 THE PROTECTION OF WOMEN UNDER THE CRIMINAL CODE ACT AND PENAL CODE ACT

As noted earlier, Nigeria operates a pluralist system and for criminal law, the Penal Code Act³² (Sharia Penal Code), which is based on Sharia Law, operates in the North, while the Criminal

²⁸ Note 25 above.

²⁹ CAP A9 Laws of the Federation of Nigeria, 2004.

³⁰ Note 25 above.

³¹ E Nwache 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria' (2010) 10 *African Human Rights Law Journal* 512.

³² Cap 3-1, Laws of the Federation of Nigeria, 2004.

Code Act³³ (Criminal Code) operates in the South and the other parts of the country. This section will discuss the marital rape exemption under the Criminal Code and Penal Code, as well as relevant case law on rape and sentencing for rape under Nigerian criminal law.

4.3.1 The Marital Rape Exemption under the Criminal Code and the Sharia Penal Code

The Criminal Code and the Sharia Penal Code provide the marital rape exemption. Section 357 of the Criminal Code provides that “any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of an offence which is called rape”. Section 6 of the Criminal Code defines unlawful carnal knowledge to mean “carnal connection which takes place otherwise than between husband and wife”. Ekhaton submits that the basis for this law can be traced to the cultural and religious antecedents of Nigerian society.³⁴ It has been argued that a man may be found guilty of raping his wife if the marriage has been dissolved or if a competent court has made a separation order containing a clause that the wife is no longer bound to cohabit with the husband.³⁵

According to Section 282(1) of the Sharia Penal Code, a man is said to commit rape when he has sexual intercourse with a woman against her will, without her consent, with her consent when her consent has been obtained by putting her in fear of death or hurt (e.g. duress), with her consent when the man knows that he is not her husband and that her consent is given because she believes he is her husband, or with or without her consent, when she is under fourteen years of age or of unsound mind. Section 282(2) provides that sexual intercourse by a man with his wife is not rape, if she has attained puberty.³⁶ This is also accentuated with the provision on wife battery in the Sharia Penal Code. Section 55(1)(d) provides that nothing is an offence which does not amount to the infliction of grievous hurt by a husband for the purpose of correcting his wife,

³³Cap C38, Laws of the Federation of Nigeria, 2004.

³⁴Ekhaton (note 2 above) 288.

³⁵ Okonkwo & Naish *Criminal Law in Nigeria* (2 ed) Ibadan: Spectrum Books Limited (2008) 272.

³⁶Puberty is defined as the age at which a young person is physically capable of sexual reproduction, mostly between the ages of 9 and 13 for girls. See Matlin *The Psychology of Women* 7ed Orlando: Harcourt College Publishers (2012) 109-110.

such husband and wife being subject to any customary law in which the correction is recognised as lawful. This implies that a husband is allowed to “hit” his wife for the purpose of “correcting” her, provided he does not inflict grievous hurt on her. The concept of “grievous hurt” is defined in Section 241 to include “emasculatation, permanent deprivation of the sight of an eye, of the hearing of an ear or the power of speech; deprivation of any member or joint; destruction or permanent impairing of the powers of any member or joint; permanent disfiguration of the head or face; fracture or dislocation of a bone or tooth; any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuits.” Section 55(1)(d) is clearly a violation of the right to human dignity, bodily integrity and the right to be free from degrading or inhuman treatment enshrined in the 1999 Constitution and is therefore unconstitutional. This section may also be used to cover acts of sexual violence including marital rape. Ekhaton argues that it is a typical example of “state sanctioned brutality against women”.³⁷ Ige submits that it is proof of the complicity of the state in compounding women’s health problems.³⁸ The provision indicates that husbands who are perpetrators of violence are protected by the State. This means that the basis for approaching the court for enforcement of the rights of the women with respect to human dignity, and freedom from subjection to torture or inhuman treatment has been misplaced. This provision may also be grounded in customary law because after the payment of the bride price, the wife becomes the property of the husband and he “owns” her just as he owns other items of property.³⁹ He also “reserves the right to discipline her, including having sexual intercourse with her any time he desires”.⁴⁰ Therefore, a woman has little or no say when she is raped in marriage.

It can be inferred from the combined reading of sections 6 and 357 of the Criminal Code and section 282 of the Sharia Penal Code that in Nigeria, unwanted sexual intercourse between a husband and wife cannot be termed unlawful. In addition, by reading the sections, it is clear that rape is only committed upon penetration of the female genitalia by the male penis.⁴¹ This is unlike the law in other jurisdictions, particularly South Africa, which recognises the use of other body parts or objects to penetrate the genitalia, mouth or anus.

³⁷Ekhaton (note 2 above) 289.

³⁸ Ige (note 3 above) 183.

³⁹OC Obidimma & AE Obidimma ‘Spousal Rape in Nigeria: An Aberration’ (2015) 13 *International Journal of African and Asian Studies* 176.

⁴⁰ Ige (note 3 above) 183.

⁴¹Obidimma & Obidimma (note 39 above) 174.

4.3.2 Relevant Case Law on Rape in Nigeria

Corroboration is a major variable which determines the success or otherwise of rape proceedings. It has been argued that it is difficult to secure a conviction in rape cases where the evidence of the victim is not corroborated by other testimony.⁴² The Nigerian Courts have taken differing approaches to the issue. In *Ogunbayo v The State*,⁴³ the appellant was charged and convicted for the offence of rape of a thirteen year old girl. After the alleged rape, the complainant stated that she reported the rape to her father who made an attempt to confront the appellant. On seeing her father, the appellant was said to have run away. The complainant stated further that her father beat her up and thereafter took her to the police station where he reported the incident. The trial court sentenced the appellant to seven years imprisonment with an option of fine. The appellant, being dissatisfied with the decision of both the trial court and the Court of Appeal, appealed to the Supreme Court. The crux of the appeal was that there was no proper corroboration of the evidence of the complainant. On the issue of corroboration, the Court stated that although it is desirable in rape cases, it is the trial Judge who decides whether a particular evidence should be corroborated. The court defined corroboration as “evidence tending to confirm, support and strengthen, other evidence sought to be corroborated”. The court made reference to the case of *Reekie v The Queen*⁴⁴ where it was stated as follows:

In the cases of a sexual character it is eminently desirable that the evidence of the complainant should be strengthened by other evidence implicating the accused person in some material particular. It is true that there is nothing in law to prevent the Court from convicting on the corroborated evidence of the complainant, but it is an established rule that the presiding Judge must direct himself and the assessors in such a case on the desirability of there being corroboration of the complainant's evidence.

In his concurrent judgment, Niki Tobi JSC stated that “there are two dimensions to the issue of corroboration as decided by the courts. First, the courts hold that rape is not an offence in which

⁴² OA Olatunji ‘Penetration, Corroboration and Non-consent: Examining the Nigerian Law of Rape and Addressing Its Shortcomings’ (2012) 8 *University of Ilorin Law Journal (UILJ)* 91.

⁴³ (2007) 8 NWLR (Pt. 1035) 157.

⁴⁴(1954) 14 WACA 501.

corroboration is required by law and procedure. But the court should warn itself of the danger of convicting an accused on rape charges in uncorroborated evidence. Second, an accused person cannot be convicted unless the evidence of the prosecutrix is corroborated.”⁴⁵ Niki Tobi JSC however identified the difficulty in securing corroboration for rape cases because the offence is usually committed in private; and the complainant may not want to attract the public with cries for assistance when the act is committed. He also stated that the evidence of the prosecutrix’s father was sufficient corroboration, without the evidence of the medical doctor.

It may be inferred from the above that the fact that there is no specific law stating that there must be corroboration of the evidence of a prosecutrix to convict an accused person of the offence of rape does not mean that corroboration will not be necessary for conviction.⁴⁶ Olatunji argues that where an accused person is convicted on the uncorroborated testimony of a victim, such conviction may be quashed on appeal on the basis of technicalities.⁴⁷ The Court thereafter found that the evidence of the complainant was adequately corroborated by her father and the medical doctor who examined her after the incident. In all, the court dismissed the appeal and upheld the decision of the trial court and the Court of Appeal.

In the *Ogunbayo* case, much emphasis was placed on the evidence of the medical doctor who examined her. The question which this case brings to mind is what happens to a rape victim who does not go to the hospital immediately after the incident due to the trauma experienced and fear of being ostracised or disbelieved. In addition, the medical doctor in his evidence stated that the lacerations observed in the vagina of the complainant could have been caused by the insertion of any object. This emphasises another issue in the Criminal Code with respect to lack of recognition of the potential insertion of other objects into the vagina of a victim.⁴⁸

⁴⁵Niki Tobi JSC supported this assertion by referring to the decision of the Court in *The State v Ogwudiegwe* (1968) NMLR 117 for the first dimension and *Akpanefe v The State* (1969) 1 All NLR 420, *Sambo v The State* (1993) 6 NWLR (Pt. 300) 399 for the second dimension.

⁴⁶ See AN Nwazuoke ‘A Critical Appraisal of the Violence Against Persons (Prohibition) Act, 2015’ (2016) 47 *Journal of Law, Policy and Globalization* 70, where the author stated that corroboration, though not a requirement of law is a rule of practice which is usually needed to secure conviction in rape cases.

⁴⁷Olatunji (note 42 above) 91.

⁴⁸ A distinction may be drawn between the Nigerian Criminal Code and the Criminal Law (Sexual Offences and Other Related Matters Act) of South Africa. While the former does not recognise the insertion of other objects apart from the penis into the vagina as rape, Section 1 of the latter has a wider definition of rape to include insertion of any body part or object into the *genitalia*, anus or mouth of the victim.

Another issue that arises from the *Ogunbayo* case is the fact that the complainant was beaten by her father after the rape incident. The complainant must have been in considerable pain after she was raped. Notwithstanding this, her father still beat her before taking her to the police station. It may be presumed that the father felt that the rape was as much her fault as the appellant's.

On the elements for the offence of rape, the Court stated that the essential element for the offence of rape is penetration and sexual interference is deemed complete, upon proof of penetration of the penis into the vagina. Thus, as stated earlier, insertion of objects into the *genitalia* does not amount to rape.

In *Posu & Anor v The State*⁴⁹ the appellants were charged with two counts of conspiracy to commit rape and rape. The appellants were convicted and sentenced to one year and three years imprisonment respectively for conspiracy to commit rape and rape. They appealed to the Supreme Court. The court made reference to *Ogunbayo v The State* and held that the most important element of the offence of rape is penetration. The evidence of the person who witnessed the incident and the medical practitioner who examined the complainant was sufficient to convict the appellants. In his concurring judgment, Adekeye JSC highlighted the elements the prosecution must prove on a charge of rape as follows:

- a) *That the accused had sexual intercourse with the prosecutrix (complainant).*
- b) *That the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation.*
- c) *That the prosecutrix was not the wife of the accused.*
- d) *That the accused had the mens rea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not.*
- e) *That there was penetration.*

On the issue of corroboration, he stated as follows:

⁴⁹ (2011) 2 NWLR (Pt. 988) 382.

Evidence of corroboration of the evidence of the victim in a rape case is not required as a matter of law; it is now a well-established practice by the courts in Nigeria. The nature of the corroboration must depend on the peculiar facts of each case. Where rape is denied by the accused, the evidence of corroboration that the court must look for is for instance -

(a) Medical evidence showing injury to the private part or to other parts of her body which may have been occasioned in a struggle,

(b) Semen stains on her clothes or the clothes of the accused or on the place where the offence is alleged to have been committed.

The above buttresses the fact that corroboration, though difficult to obtain in certain instances, is necessary to secure conviction in rape cases.

4.3.3 Sentencing for Rape under Nigerian Criminal Law

In terms of Section 358 of the Criminal Code, any person who commits the offence of rape is liable to imprisonment for life, with or without whipping. Under the Sharia Penal Code, section 283 provides that anyone found guilty of rape is liable to imprisonment for life. Adekeye JSC, while commenting on the propriety of the sentence imposed in *Posu & Anor v The State* stated that “the offence of rape is by every standard a grave offence which often leaves the victim traumatised and dehumanised. A light sentence as in the case of the appellants must never be imposed. This may have the unsavoury effect of turning rape into a past-time by our flippant youths”. Rhodes-Vivour JSC, in the same case, also stated that since the respondents did not file a cross appeal to challenge the sentence, nothing could be done to review the sentence.

Over the years, the judiciary has attempted to improve the sentence imposed on accused persons found guilty of rape. In *Musa v The State*⁵⁰, the appellant was charged with the rape of a five year-old girl in Kano State (Northern Nigeria). In her evidence, the complainant stated that the accused held her hand and took her to a room and removed her underwear. She testified further that he climbed on top of her and he put something and mucus in her private part and that as he was putting the mucus she felt pain. The trial court, after considering the evidence before it, convicted the appellant and sentenced him to 14 year imprisonment. Being dissatisfied with the

⁵⁰ (2013) All FWLR (Pt. 692) 1688.

decision of both the trial court and the Court of Appeal, he appealed to the Supreme Court. The Court cited the case of *Posu & Anor v The State*⁵¹ with regards to the elements of the offence of rape and affirmed the decision of both the trial court and the Court of Appeal. In a concurring judgment, Fabiyi JSC stated that the sentence imposed by the trial court “will serve as deterrence to other aspiring rapists in the appellant’s vicinity”.

However, the Court seemed to digress from the approach of the *Musa* case in *Popoola v The State*⁵² where the appellant was charged with the rape of a secondary school girl. According to the facts adduced from evidence, the complainant was urinating on the school farm when the appellant accosted her and threatened to report her to the school authority. The appellant thereafter dragged her further into the farm and raped her before fleeing the scene of the incident. The incident was reported to the School Vice-Principal, who took the complainant to the hospital and reported the matter to the police. At the trial, the appellant pleaded insanity. At the end of trial, the trial judge sentenced him to 5-year imprisonment with hard labour. The appellant appealed to the Court of Appeal and then the Supreme Court. On the necessity of medical evidence for rape convictions, the court stated *inter alia* that once an accused person denies the allegation of rape, the court is encouraged to look for a medical report showing injury to the private part of the complainant or any other part of her body. In addition, where there is a confessional statement and such is found to be direct, cogent and positive, the need for a medical report may be dispensed with. Given the above statement, the question arises is that where there is no medical evidence and the accused denies the allegation, does the prosecution fail? This may not necessarily be so because the court also stated that “each case must be considered on its own peculiar facts and circumstances as it is not the law that once there is a denial without medical report, the prosecution fails”. This implies that corroborative evidence may be obtained from other sources. On the whole, the decision of the trial court and the Court of Appeal was upheld. The court however expressed displeasure on the lenient sentence imposed by the trial court. Ngwuta JSC in his concurring judgment noted that “the severity of punishment for rape, with particular reference to statutory variety, should rank next to capital punishment”.

⁵¹ Note 49 above.

⁵² (2014) All FWLR (Pt. 715) 200.

From the above cases, it is clear that perpetrators of rape in Nigeria are prosecuted. However, certain married women, (including child brides) also go through the ordeal of rape. Unfortunately, the law does not recognise marital rape. Ekhaton argues that a major obstacle in rape cases in Nigeria is the rules of evidence which the victims are made to endure in court.⁵³ Fortunately, section 234 of the Evidence Act 2011 has provided better protection for victims who are cross-examined in Court. It provides that “where a person is prosecuted for rape or attempt to commit rape or indecent assault, except with leave of the court, no evidence shall be adduced, and, except with the leave, no question in cross-examination shall be asked by or on behalf of the defendant, about any sexual experience of the complainant with any person other than the defendant”. This is an important improvement to the former Evidence Act which allowed the defence to adduce evidence relating to the victim’s sexual connection to other men or her generally immoral character.⁵⁴

Obidimma and Obidimma argue further that victims of marital rape may hesitate to report for some reasons, including the lack of a cause of action, since it is not a recognised crime in Nigeria, inability to leave the relationship, and fear of the perpetrator’s revenge.⁵⁵ According to Bunting,⁵⁶ religious community leaders in Nigeria “tell their constituents that it is an Islamic duty to marry out their daughters before puberty so as to ensure that no shame can be brought upon their homes”. Further, according to Bunting, the Sharia Penal Code, through the marital rape exemption, “exonerates rapists and use the institution of marriage to legitimise violence against women, in particular young women, who are objects of sexual violence”.⁵⁷

It is important to note that in order to prove the offence of rape under the Sharia Penal Code, Ekhaton explains that “a confession of four witnesses is essential, otherwise, the victim could be liable to defamation where a confession cannot be procured from the offender.”⁵⁸ Ekhaton explains further that where the required number of witnesses is absent, the victim could also be prosecuted for the offence of rape.⁵⁹ In this regard, married offenders are liable to being stoned to

⁵³Ekhaton (note 2 above) 287.

⁵⁴ See Section 211 of the Evidence Act, Cap E14 Laws of the Federation of Nigeria, 2004.

⁵⁵ Obidimma & Obidimma (note 39 above) 173.

⁵⁶A Bunting ‘Child Marriage’ in KD Askin & DM Koenig (ed) 2 *Women and International Human Rights Law* (2000) 682.

⁵⁷ Ibid.

⁵⁸Ekhaton (note 2 above) 288.

⁵⁹Ibid.

death when found guilty, while unmarried offenders are liable to a term of imprisonment for one year and caning with lashes up to a maximum of one hundred.⁶⁰ This implies that where a victim (who is subject to the Penal Code) takes the bold step of lodging criminal complaints against her husband for rape, it is highly probable that she will be stoned to death. This is clearly a gross violation of the fundamental rights enshrined in Chapter IV of the 1999 Constitution, particularly the right to life, the right to dignity of human person, the right to freedom from discrimination, among others. It is therefore necessary that the courts declare this section unconstitutional.⁶¹

4.4 CHILD MARRIAGE AND THE CHILD RIGHTS ACT, 2003⁶²

The Child Rights Act (hereafter called CRA) represents the domestication of the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).⁶³ Prior to the enactment of the CRA, various issues were raised, including the fact that since it is based on the CRC and the ACRWC, it would introduce values and norms foreign to the diverse societies in Nigeria.⁶⁴ It has been noted that the CRA, to a large extent replicates the provisions of the CRC and the ACRWC.⁶⁵ Section 1 provides that the best interest of the child must be the primary consideration in every action concerning the child. This is the bedrock of the provisions of the CRA. Section 277 defines a child as a person under the age of 18 years. Section 277 also defines the age of majority as the age at which a person attains the age of 18 years. Thus, for the purposes of the CRA, a child in every respect is a person below 18 years. The CRA recognises all the fundamental rights provided in Chapter IV of the 1999 Constitution

⁶⁰Ibid.

⁶¹ Challenging the constitutionality of the modes of punishment under the Sharia Penal Code may be tricky because victims of such punishments may be too intimidated to bring an appeal to courts. See ON Ogbu 'Punishments in Islamic Criminal Law as Antithetical to Human Dignity: The Nigerian Experience' (2005) 9(2) *International Journal of Human Rights* 182. However with the introduction of the FREP Rules, human rights activists and non-governmental organizations may institute proceeding on their behalf.

⁶² The Act is available at http://www.unicef.org/nigeria/ng_publications_Childs_Right_Act_2003.pdf accessed on 11th August, 2015.

⁶³ This is so because the CRA is essentially based on the best interest of the child principle which is found in both the CRC and the ACRWC.

⁶⁴ E Egede 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria' (2007) 51(2) *Journal of African Law* 268 available at <http://orca.cf.ac.uk/14418/1/Egede%202007.pdf> accessed on 10th March, 2016.

⁶⁵ Ibid 269.

and makes it applicable to children.⁶⁶ Thus, in addition to the rights discussed above, children have specific rights enshrined in the CRA.

Section 21 of the CRA provides that “no person under the age of 18 years is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void and of no effect whatsoever”. Section 22 also prohibits betrothal of a child to any person. By virtue of section 23, a person who marries a child, or to whom a child is betrothed, or who promotes the marriage of a child, or who betroths a child, commits an offence and is liable to a fine or imprisonment or to both fine and imprisonment. Bazza makes a distinction between early marriage and forced marriage.⁶⁷ He argues that in Nigeria, early marriage occurs in the form of child betrothal, which involves marrying out a girl child immediately after she is born; while forced marriage, otherwise referred to as “induced marriage” is marrying out a girl against her wish.⁶⁸ Whether it is early marriage or forced marriage, the position of the CRA remains the same.

It is instructive to note that matters relating to children are not in the Exclusive Legislative list, containing matters over which the National Assembly may legislate. Thus, even though the CRA prohibits child marriage and betrothal, before it can be enforceable in a State in Nigeria, it has to be enacted under the State’s laws. Item 61, Part I of the Second Schedule to the 1999 Constitution puts the formation, annulment and dissolution of marriages under Islamic Law and Customary Law, beyond the powers of the National Assembly. Under section 7(a) of the 1999 Constitution, the House of Assembly of a State has powers to make laws with respect to any matter not included in the Exclusive Legislative list set out in Part 1 of the Second Schedule to the 1999 Constitution. In effect, since child marriages are primarily conducted under Islamic and Customary Law, for it to be validly prohibited across all States of Nigeria, the House of Assembly of each of the thirty-six States must domesticate the Childs Rights Act, 2003. Egede notes that there has been a strong opposition to the re-enactment of the CRA in some Houses of Assembly, particularly in the Northern part of Nigeria as it is their view that the CRA is contrary to their beliefs and cultural values.⁶⁹ This is presumably because once a person marries a person

⁶⁶ Section 3(1) of the CRA.

⁶⁷ HI Bazza ‘Domestic Violence and Women’s Rights in Nigeria’ (2009) 4(2) *Societies Without Borders* 179.

⁶⁸ Ibid.

⁶⁹ Egede (note 64 above) 271.

who is below 18, the marriage is presumed to make her an adult, the husband is permitted to do whatever he likes; and whatever transpires in the marriage is seen as consensual.

Section 12(2) of the 1999 Constitution allows the National Assembly to make laws for the Federation, or any part of it, in respect of matters not included in the Exclusive Legislative list. This implies that the National Assembly may make laws regulating matters such as Islamic and customary marriages which fall under the concurrent list. The downside of this provision is that such a law cannot be enacted unless it is ratified by a majority of all Houses of Assembly in the Federation.⁷⁰ Thus, the provisions of the Child Rights Act can only be made enforceable in States in Nigeria if the majority of all Houses of Assembly ratify it.

Of the 36 States in Nigeria, only 12 States have not re-enacted the CRA.⁷¹ Jigawa State is the only Northern State which has re-enacted the CRA in Nigeria. The Jigawa State Child Rights Law, 2006 (hereafter CRL) is essentially a replication of the CRA, except for certain modifications. For instance, section 2 of the CRL defines a child as a person under the age of puberty. The age of puberty is defined as the age at which a person is physically and physiologically capable of consummating marriage.⁷² Thus, it is immaterial whether a girl has attained the age of 18 years or not. Section 21(1) also provides that no person under the age of puberty is capable of contracting a valid marriage, and that a marriage so contracted is null and void, and of no effect whatsoever. Where the question of puberty is an issue, the court is to determine such according to the circumstances of each case.⁷³ In effect, the CRL will not be contravened if a child who has attained the age of puberty is given out in marriage. As noted earlier, puberty is defined as “the age at which a young person is physically capable of sexual reproduction, mostly between the ages of 9 and 13 for girls”.⁷⁴ This age also marks the beginning of menstruation⁷⁵ and the development of the reproductive organs of a girl.⁷⁶ Menstruation is

⁷⁰Section 12(3) of the 1999 Constitution.

⁷¹ The 12 states that are yet to pass the Act into Law are: Enugu, Kaduna, Kano, Sokoto, Kebbi, Borno, Yobe, Gombe, Adamawa, Bauchi, Katsina, and Zamfara. See <http://www.punchng.com/feature/the-law-you/constitution-amendment-child-rights-and-the-rest-of-us/> accessed on 29th September, 2015. See also 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 and E Durojaye (ed) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 295.

⁷²Section 2 of the CRL.

⁷³Section 21(2) CRL.

⁷⁴Matlin (note 36 above) 109-110.

⁷⁵Menstruation is “the process in a woman of discharging blood and other material from the lining of the uterus at intervals of about one lunar month from puberty until the menopause, except during pregnancy.” See ‘Menstruation’

mostly heralded by various psychological reactions, including depression, irritability, anxiety, among others.⁷⁷ At the commencement of puberty, a girl just begins to discover herself. Certainly, it is wrong for such a girl to take on the responsibility for catering for a household, along with performing conjugal duties expected of a married woman.

It may be implied from the above that in terms of the CRL of Jigawa State, a nine year old girl who is most likely going through puberty and general self-discovery, may be given out in marriage without contravening the law. Ogunniran posits that apart from the fact that early marriage hinders the education and self-development of girls, the health implications of such marriages are worrisome.⁷⁸

Regarding marriage and consent, the Marriage Act⁷⁹ does not make consent of the intending partners a condition for a valid marriage. Section 18 merely provides that if either party to a marriage is under 21 years of age, the consent of the father (or where he is absent, the consent of the mother or guardian) must be obtained before a marriage can be validly contracted. However, section 3(1)(d) and (e) of the Matrimonial Causes Act⁸⁰ provide that a marriage is void where the consent of one of the parties is not a real consent because it was obtained by duress, fraud or where either of the parties is not of marriageable age. Since both Acts fail to provide a minimum age of marriage, recourse may be had to the definition provided in the CRA, namely 18 years.

Armstrong argues that forcing a girl who is under the age of 18 years who is incapable of giving free or informed consent, into marriage and thereby denying her the liberty to leave the union in exercise of her will amounts to slavery and servitude which is contrary to the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015.⁸¹ Section 13(1) prohibits all acts of human trafficking. Section 13(2) goes further by stating the actions which may amount to

available at https://www.google.co.za/search?sourceid=chrome-psyapi2&ion=1&ie=UTF-8&q=what+is+menstruation&oq=what+is+menstr&rlz=1C1VSNC_enNG573NG575&aqs=chrome.1.69i57j0i5.104.99j0j7&bav=on.2%2Cor.&biw=1366&bih=628&dpr=1&expnd=1&rct=j&brd=1458731699073000 accessed on 23rd March, 2016.

⁷⁶Matlin (note 36 above) 110-111.

⁷⁷Ibid 113.

⁷⁸ I Ogunniran 'Child Rights Act Versus Sharia Law in Nigeria: Issues, Challenges and Way forward' available at <http://www.lawrights.asn.au/files/OGUNNIRAN,%20IYABODE%20full%20paper.pdf> accessed on 18th September, 2015.

⁷⁹ Cap M6 LFN 2004.

⁸⁰ Cap M7 LFN 2004.

⁸¹ U Armstrong *Child Marriage in Nigeria: The Health Hazards and Socio-Legal Implications* USA: Lulu Press Inc (2014) 126.

trafficking. Section 13(2) provides that any person who recruits, transports, transfers, harbours or receives another person by means of threat or use of force or other forms of coercion; abduction, fraud, deception, abuse of power or of a position of vulnerability; or giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation of that person is guilty of an offence and is liable on conviction to imprisonment for a term of not less than two years and to a fine.

Section 13(4)(b) also provides that “the recruitment, transportation, transfer, harbouring or receipt of child for the purpose of exploitation, shall be considered trafficking in persons even if this does not involve any of the means set forth in the definition of trafficking in persons”. This provision may be interpreted to cover child abduction for the purpose of forced marriage. A very recent case of abduction which is currently a subject of adjudication before the Federal High Court sitting in Yenagoa, a city in Bayelsa State of Nigeria, is that of Yunusa Dahiru, a 27 year old man who allegedly abducted, and forcefully married Ese Oruru, a 14-year old girl after he had her converted to Islam.⁸² According to newspaper reports,⁸³ Ese, originally from Bayelsa State in the southern part of Nigeria, was abducted in August 2015 by Yunusa and taken to Kano State, in the northern part of the country where she was forcibly converted to Islam and renamed ‘Aisha’. After her release, she was found to be five months pregnant. Yunusa was thereafter arraigned on a five count charge of abduction, child trafficking, illicit sex, sexual exploitation and unlawful carnal knowledge contrary to certain provisions of the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015 and the Criminal Code.

4.5 VIOLENCE AGAINST PERSONS (PROHIBITION) ACT, 2015⁸⁴

The Violence Against Persons (Prohibition) Act (VAPPA) was enacted for the purpose of eliminating violence in private and public life, prohibiting all forms of violence against persons, and providing maximum protection and effective remedies for victims and punishment of

⁸² Wikipedia ‘Kidnapping of Ese Oruru’ available at https://en.wikipedia.org/wiki/Kidnapping_of_Ese_Oruru accessed on 28th March, 2016. See also A Umukoro ‘Ese: Police arraign Yunusa for abduction’ available at <http://www.punchng.com/ese-police-arraign-yunusa-for-abduction/> accessed on 28th March, 2016.

⁸³ See S Ejembi & T Bamgbose report in the Punch Newspaper on 3rd March, 2016 titled ‘Shocking child abduction, forceful marriage cases’ available at <http://www.punchng.com/shocking-child-abduction-forceful-marriage-cases/> accessed on 28th March, 2016 and O Nwakanma’s report in the Vanguard Newspaper on 6th March, 2016 titled ‘Ese Oruru: Living in two countries’ available at <http://www.vanguardngr.com/2016/03/ese-oruru-living-in-two-countries/> accessed on 28th March, 2016.

⁸⁴ The Act is available at <http://www.refworld.org/docid/556d5eb14.html> accessed on 26th April, 2016.

offenders.⁸⁵ Under the VAPPA, violence is defined as “any act or attempted act, which causes or may cause any person physical, sexual, psychological, verbal, emotional or economic harm whether this occurs in private or public life, in peace time and in conflict situations”.⁸⁶ Therefore, child marriage and marital rape fall under this section since they are forms of sexual violence.

By virtue of Section 1, a person is said to have committed the offence of rape if he or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or any other instrument; the other person does not consent to the penetration; or the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or addictive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse. This definition represents a departure from the traditional definition of rape provided in the Criminal Code which only recognises the rape of a woman by a man. Under this definition, not only is it possible for men to be raped, the offence also includes situations where other parts of the body, particularly the mouth or anus are penetrated with other objects apart from the parts of the body of the perpetrator.

Section 1(2) prescribes a sentence of imprisonment for life for the offence of rape, except where the offender is less than 14 years in which case he or she will be liable to a maximum of 14 years imprisonment. There is also a minimum sentence of 12 years imprisonment without an option of fine. Under section 1(3), the court is required to award compensation to the victim based on the circumstances of each case. This solves the problem of sentencing of offenders, identified by a number of Justices of the Supreme Court including Adekeye JSC and Rhodes-Vivour JSC in *Posu & Anor v The State*.⁸⁷ Although the provisions relating to rape have been improved, the VAPPA does not cover marital rape.

Section 19 covers spousal battery and makes the perpetrator liable on conviction to a term of imprisonment not exceeding 3 years or to a fine or to both imprisonment and fine. Spousal battery is defined as “the intentional and unlawful use of force or violence upon a person,

⁸⁵ See the long title to VAPPA.

⁸⁶ Section 46 of VAPPA.

⁸⁷ Note 49 above.

including the unlawful touching, beating or striking of another person against his or her will with the intention of causing bodily harm to that person”.⁸⁸

In terms of addressing harmful traditional practices, section 20(1) provides that a person who carries out harmful traditional practices on another person commits an offence and is liable on conviction to a term of imprisonment not exceeding 4 years or to a fine or to both fine and imprisonment. According to section 20(3), a person who incites or aids the commission of the offence is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine or to both fine and imprisonment. Section 46 defines harmful traditional practices as “all traditional behaviour, attitudes or practices, which negatively affect the fundamental rights of women, girls, or any person and includes harmful widowhood practices, denial of inheritance or succession rights, female genital mutilation or female circumcision, forced marriage and forced isolation from family and friends”. It has been previously established that forced child marriage is a harmful cultural practice which has various detrimental consequences.

A victim of violence may apply to the High Court for a protection order and if granted, it is effective throughout Nigeria, without a time limit or prescription.⁸⁹ Section 29(1) requires the court to consider applications for protection orders as soon as is reasonably possible. This implies expedited hearing of applications. In terms of section 29(2), if the Court is satisfied that there is *prima facie* evidence that the respondent to an application is committing, has committed, or that there is imminent likelihood that he may commit an act of domestic violence, the Court shall issue an interim protection order against the respondent, notwithstanding the fact that he has not been given notice of the proceedings. The interim protection order will thereafter be served on the respondent, requiring him to show cause on a return date, why a protection order should not be issued against him.⁹⁰ Where an interim order is not issued, the application and other accompanying documents will be served on the respondent, specifying a date for him to appear in court to show cause why a protection order should not be issued against him.⁹¹ If the respondent fails to appear on a return date and the court is satisfied that proper service was effected on him and the application contains a *prima facie* evidence that the respondent has

⁸⁸ Section 46 of the VAPPA.

⁸⁹ Section 28 Ibid.

⁹⁰ Section 29(3) Ibid.

⁹¹ Section 29(5) Ibid.

committed, is committing or that there is an imminent likelihood that he may commit an act of domestic violence, the court shall issue a protection order.⁹² If the respondent appears on the return date, the matter is to be decided on a balance of probabilities after the court has heard both sides.⁹³ By virtue of section 38(3), members of the public are excluded from the proceedings. Section 39(1) prohibits the publication of any information which may reveal the identity of the parties to the proceedings.

Section 32(1) of the VPPA imposes a duty on police officers to assist victims of violence to file complaints regarding violence, provide or arrange safe transport for victims to alternative residence or shelters, or the nearest hospital or medical facility where treatment of injuries is necessary; explain to the victim about his or her rights to protection and other remedies available, and the right to lodge criminal complaints against the perpetrator.

The VAPPA bears a number of similarities with the Domestic Violence Act⁹⁴ (DVA) of South Africa especially with respect to application for protection orders and the procedure for applying for protection orders. However, while the South African DVA is primarily a procedural law, the VAPPA defines certain acts of violence and prescribes punishment for the acts.

It is important to note that only the High Court of the Federal Capital Territory of Abuja is empowered to hear and grant any application brought under the VAPPA.⁹⁵ However, the VAPPA may be applied in other States of the Federation after it has been re-enacted by the Houses of Assembly of each State. Nwazuoke argues that the National Assembly could have conveniently vested jurisdiction over the provisions of the VAPPA in the Federal High Court under Section 251 of the 1999 Constitution as this would have made it applicable throughout Nigeria.⁹⁶

The VAPPA is definitely a welcome legislative development especially as it provides better protection of women and assistance for victims of violence. It has been stated that it will “bring succour and effective remedies to millions of victims who have suffered in silence without

⁹²Section 30(1) Ibid.

⁹³ Section 30(4) Ibid.

⁹⁴ Act 116 of 1998.

⁹⁵ Section 27 Ibid.

⁹⁶ Nwazuoke (note 46 above) 73.

recourse to justice or rehabilitative-psycho-social support for their recovery and reintegration”.⁹⁷ As positive as the VAPPA seems to be, it still does not cover the germane issue of marital rape in Nigeria. The issue of implementation is matter of concern. It has been stated that the implementation of the VAPPA is at the heart of what is necessary to reduce violence in Nigeria.⁹⁸ The fact that States have to re-enact the VAPPA is however a major barrier to the implementation of this law across the country.

4.6 SEXUAL OFFENCES BILL, 2013⁹⁹

The Sexual Offences Bill, 2013, though awaiting presidential assent, was passed by the National Assembly for the purpose of making provision for sexual offences, their definition, prevention and the protection of all persons from harm, and unlawful sexual acts, among others.¹⁰⁰ The Bill has also redefined rape to include the rape of both male and female. Section 2(1) provides that “a person commits the offence called rape if (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; (b) the other does not consent to the penetration; or (c) the consent is obtained by force or by means of threats or intimidation of any kind”. While the VAPPA recognises penetration of the mouth and anus, this provision is absent in the Bill. Section 43(1) defines an intentional and unlawful act as an act committed in any coercive circumstance; under false pretences or by fraudulent means; or in respect of a person who is incapable of appreciating the nature of an act which causes the offence. Penetration is defined in Section 50 as partial or complete insertion of the genital organs of a person into the genital organs of another person. This buttresses the position of the Court in *Posu & Anor v The State*¹⁰¹ where it was stated that penetration does not have to be complete to constitute rape.

On the issue of sentencing, Section 2(3) of the Bill provides that a person found guilty of the offence of rape is liable on conviction to imprisonment for life. The Bill also recognises

⁹⁷ Women’s Aid Collective (WACOL) ‘Violence Against Persons (Prohibition) Act, 2015, Nigeria Synopsis’ available at http://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/ls_088vapp_act_2015_nigeria_synopsis.pdf accessed on 26th April, 2016.

⁹⁸ C Anarado ‘Why Nigeria’s new Violence Against Persons (Prohibition) Act is only the beginning’ available at <http://venturesafrica.com/why-nigerias-new-violence-against-persons-prohibition-act-is-only-the-beginning/> accessed on 26th April, 2016. See also EI Mbadugha ‘Intimate partner violence and sexual violence against women: any end in sight’ (2016) 5(1) *International Journal of Medicine and Biomedical Research* 15.

⁹⁹ Bill available at <http://www.nassnig.org/document/download/1347> accessed on 15th October, 2015.

¹⁰⁰ See the long title to the Sexual Offences Bill, 2013.

¹⁰¹ Note 49 above.

attempted rape, and prescribes a term of imprisonment of not less than ten years for anyone convicted of the offence.¹⁰²

Under Section 4(1)(a)(ii) of the Bill, penetration of the genital organs of a person with an object manipulated by another person, except where such penetration is carried out for proper and professional hygienic or medical purposes, renders the offender guilty of sexual assault. The Bill does not recognise the penetration of the genitals with other objects as rape but rather as sexual assault. Such action may carry a lesser sentence as the Bill provides that a person found guilty may, on conviction, be sentenced to a term of not less than 10 years which may be extended to life imprisonment.

According to Section 7 of the Bill, a person who commits an act which causes penetration of a child who is below the age of 18 years is guilty of defilement and shall, upon conviction, be sentenced to imprisonment for life. Persons who engage in child marriage may be prosecuted under this section and marriage may not be raised as a defence.

The issue of consent is covered by Section 42 of the Bill which provides that a person is said to have consented to an act “if he or she agrees by choice, and has the freedom and capacity to make that choice”. This implies that for a person to validly consent to an act, there must be absence of coercion and the person must be in a position of being capable of consenting. The acts which may vitiate consent are set out in section 44(2) to include violence or threat of violence against the complainant or another person to secure consent; unlawful detention of the complainant at the time of the commission of the act; unconscious state of the complainant at the time of commission of the act, among others. This is another provision which is absent in the Criminal Code and the VAPPA.

Another innovation of the Sexual Offences Bill is that of witness protection, particularly of vulnerable witnesses. Section 31 (1) provides that in criminal proceedings involving the commission of a sexual offence, a court may declare a witness to be a vulnerable witness if such witness is the alleged victim of the sexual offence, a child or a person with mental disabilities. Section 31(2) provides that a court is empowered to declare any witness, other than the accused, as vulnerable, if in the court’s opinion he or she is likely to be vulnerable on account of age;

¹⁰²Section 3 of the Bill.

intellectual, psychological or physical impairment; trauma; cultural differences; the possibility of intimidation; race; religion; language; the relationship of the witness to any party to the proceedings; the nature of the subject matter of the evidence; or any other factor which the court considers relevant. Once a witness is declared vulnerable, such witness may be allowed to give evidence through an intermediary or under the protective cover of a witness protection box.¹⁰³ The court may also conduct the proceedings in private or prohibit the publication of any document which may expose the identity of the victim.¹⁰⁴

The Sexual Offences Bill is a positive development for protection against sexual violence, especially with respect to the protection of vulnerable witnesses, particularly children and other victims. In its current form, the Sexual Offences Bill is expected to replace existing laws on sexual offences throughout the country. However, the benefits cannot be enjoyed until the Bill is given presidential assent and made enforceable throughout Nigeria.

4.7 CONCLUSION

From the foregoing, it is clear that even though Nigeria has made some efforts with enacting laws to protect women and girls, the laws have certain inherent impediments which hinder their effectiveness. The fact that certain laws need to be re-enacted by the Houses of Assembly of various States of the Federation hinder the enjoyment of the protection which the laws offer. In addition, Nigeria is yet to fulfil its obligations under the various human rights instruments, particularly with the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), among others.

Thus the last chapter will suggest recommendations for better protection of women and provide a general conclusion to the research.

¹⁰³Section 31(4) of the Sexual Offences Bill.

¹⁰⁴ Ibid.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This work has examined the laws and policies existing in Nigeria for the protection of women and girls against sexual violence, particularly child marriage and marital rape, which are violations of sexual and reproductive health rights, and uses South Africa as a model for best practices. Chapter One presented the general introduction to the research and the historical background of the concept of sexual and reproductive health rights and sexual violence. It highlighted the aims and objectives of the research, the problem statement, research questions, significance and limitations of research, research methodology and definition of relevant terms including sexual and reproductive health rights, sexual violence, marital rape, child marriage and consent.

Chapter Two discussed key international, regional and sub regional instruments tackling sexual violence against women. The general comments and recommendations provided by the various committees in charge of monitoring the implementation of the instruments were also discussed. The obligations of State parties to the various instruments were highlighted. The chapter represents a general framework for the recognition and protection of women from sexual violence.

Chapter Three evaluated various South African laws protecting women and girls from child marriage and marital rape, especially the Criminal Law (Sexual Offences and Other Related Matters) Amendment Act and the Children's Act. Measures put in place for the rehabilitation of victims and state responses, especially the activities of the Sexual Offences Court, were discussed in the chapter.

Chapter Four examined the Nigerian situation with respect to sexual violence. The chapter focused on the methodology of the Nigerian legal system to protect women from sexual violence through the various laws in place. The status of international and regional human rights instruments in Nigeria was discussed, particularly in relation to the 1999 Constitution. In

addition, the position of economic, social and cultural rights which falls under Chapter II of the 1999 Constitution were discussed, juxtaposing these with the Directive Principles enshrined in the 1949 Constitution of India and the methodology used by the Indian judiciary to interpret the provisions.

The current chapter will summarise the research work, making particular reference to how the research questions have been answered.

5.2 SUMMARY OF FINDINGS AND RECOMMENDATIONS

The research questions that were addressed in this dissertation are:¹

1. What legal and regulatory frameworks have been provided by South Africa and Nigeria for the protection of women and girls against child marriage and marital rape?
2. How do international and regional instruments confront the problem of sexual violence, especially issues such as marital rape and child marriage and how can this impact Nigeria?
3. How can the mechanisms available for the protection of women against sexual violence in South Africa be adopted in Nigeria to prevent and punish acts of sexual violence such as child marriage and marital rape and what adjustments should be made?
4. What is the impact of practices such as child marriage and marital rape on the promotion and fulfilment of SRH rights in Nigeria?

5.2.1 What legal and regulatory frameworks have been provided by South Africa and Nigeria for the protection of women and girls against child marriage and marital rape?

The answer to this question can be gleaned from chapters three and four of this thesis. In South Africa, specific laws dealing with sexual violence, especially child marriage and marital rape include the Constitution of the Republic of South Africa 1996; the Domestic Violence Act 116 of 1998; the Children's Act 38 of 2005; and the Criminal Law (Sexual Offences and Other Related Matters) Amendment Act of 2007. The Courts have also interpreted and applied these laws in a

¹ See Section 1.4 of Chapter 1.

number of cases including *S v Mvumvu*,² *Moipolai v The State*,³ *Modise v The State*,⁴ *Jezile v State*,⁵ among others, for the benefit of victims of sexual violence.

The government of South Africa has also put in place various mechanisms to minimise the impact of sexual violence on victims. Some established government bodies include the Sexual Offences and Community Affairs (SOCA) Unit; the *Thuthuzela* Care Centres (TTCs); the Sexual Offences Court (SOC); and the Family Violence, Child Protection and Sexual Offences Unit (FCS). The SOC was considered because child marriage and marital rape were discussed in a criminal context. The SOC is a court which deals specifically with sexual offences; and in addition to regular court officials, counsellors are also attached to the court for the benefit of the victims. From the laws and decided cases considered, it was observed that marital rape and child marriage, which usually takes the form of *ukuthwala*, have been prohibited and offenders who are reported are brought to justice. There is also a minimum sentence clause for rape cases.

In Nigeria, certain laws relevant to sexual violence are the Constitution of the Federal Republic of Nigeria, 1999; the Criminal Code Act⁶ (which operates in the South and other parts of Nigeria); the Penal Code Act⁷ (which operates in the North); Child Rights Act, 2003;⁸ Violence Against Persons (Prohibition) Act, 2015;⁹ and Sexual Offences Bill, 2013.¹⁰ From the laws considered, it was observed that marital rape is not recognised in Nigeria as both the Criminal Code and the Penal Code specifically state that sexual intercourse between husband and wife is not rape.

With regard to rape, the cases considered include *Ogunbayo v The State*,¹¹ *Posu & Anor v The State*,¹² *Musa v The State*,¹³ and *Popoola v The State*.¹⁴ It was found that although it is not

²2005 (1) SACR 54 (SCA).

³(CA 53/2004) [2004] ZANWHC 19.

⁴[2007] ZANWHC 73.

⁵2015 (2) SACR 2 (WCC); 2016 (2) SA 62.

⁶Cap C38, Laws of the Federation of Nigeria, 2004.

⁷Cap 3-1, Laws of the Federation of Nigeria, 2004.

⁸The Act is available at http://www.unicef.org/nigeria/ng_publications_Childs_Right_Act_2003.pdf accessed on 11th August, 2015.

⁹The Act is available at <http://www.refworld.org/docid/556d5eb14.html> accessed on 26th April, 2016.

¹⁰Bill available at <http://www.nassnig.org/document/download/1347> accessed on 15th October, 2015.

¹¹(2007) 8 NWLR (Pt. 1035) 157.

¹²(2011) 2 NWLR (Pt. 988) 382 at 415.

¹³(2013) All FWLR (Pt. 692) 1688.

¹⁴(2014) All FWLR (Pt. 715) 200.

stipulated in any law that corroboration of a victim's testimony is necessary to secure a conviction in rape cases, as a matter of practice, corroboration is necessary. Where the evidence of a victim of rape is not corroborated, the chance of succeeding in court is minimal. The elements of the offence of rape were also identified to include sexual intercourse with the complainant; sexual intercourse without consent or consent obtained by fraud, force, impersonation or deceit; prosecutrix was not the wife of the accused person; the accused person intended to have sexual intercourse without the consent of the prosecutrix; and there was penetration. Another issue identified in the cases is that of the sentencing of offenders, which varied from 14 years imprisonment to as low as 5 years.

Regarding child marriage (which primarily occurs in Northern Nigeria), it was found that while the Child Rights Act prohibits marriage of persons below the age of 18 years, this provision may not be enforceable in Nigerian States which have not re-enacted the Child Rights Act. It was also noted that of all the Northern States, only Jigawa State has re-enacted the Act but included some modifications, especially with the provision which allows a girl to marry once she has attained the age of puberty.

It is clear that although Nigeria has made some efforts to eliminate sexual violence, especially with the introduction of the Violence Against Persons (Prohibition) Act, 2015, the requirement of re-enactment of these laws hinders the effectiveness and enjoyment. The criminality of marital rape is also not covered by any law in Nigeria.

5.2.2 How do international and regional instruments confront the problem of sexual violence, especially issues such as marital rape and child marriage and how can this impact Nigeria?

This question is answered in Chapter Two of this thesis. International instruments which share a link with sexual violence, especially child marriage and marital rape, include the Universal Declaration of Human Rights (UDHR) 1948; the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; the International Covenant on Civil and Political Rights (ICCPR), 1966; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979; the Convention on the Rights of the Child (CRC), 1989; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), 1984.

Consensus documents including the International Conference on Population and Development Programme of Action (ICPD-PoA); Vienna Declaration and Programme of Action (VDPA); Beijing Declaration and Platform for Action (BDPFA) were also considered.

Under the various instruments considered, State Parties, and in this instance South Africa and Nigeria, are obliged to adopt appropriate legislative and other measures to ensure that discrimination against women is prohibited and to establish legal protection of the rights of women on an equal basis with men.¹⁵ Cultural and customary practices which are based on superiority of men over women; and acts which promote violence against women should be eliminated by State parties. For instance, Article 16 of CEDAW requires State Parties to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular to ensure that marriage is entered on a basis of the equal right of men and women to freely choose a spouse and to enter into marriage only with free and full consent. States are also enjoined to take all necessary actions to prohibit child marriage and betrothal. According to the CEDAW Committee, a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being.¹⁶ It is clear that child marriage (which is primarily conducted without the consent of the girl involved) is strongly prohibited at the international scene.

On the issue of violence against women, the Human Rights Council (HRC) recognises that domestic violence, including intimate partner violence, remains the most prevalent form of violence affecting women of all social strata across the world, and emphasises that such violence is a violation, abuse or impairment of the enjoyment of their human rights and, as such, is unacceptable.¹⁷ States are therefore urged to condemn all forms of violence against women and girls; and to refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.¹⁸

The provisions above were re-echoed in the regional instruments considered, particularly the African Charter on Human and People's Rights (ACHPR), 1981 and its Protocol on the Rights of

¹⁵ See Chapter Two.

¹⁶ UN Committee on the Elimination of Discrimination against Women, General Recommendations No. 21: Equality in Marriage and Family Relations, adopted at the thirteenth session, 1994.

¹⁷ UN General Assembly, Human Rights Council, twenty-ninth session, agenda item 3: Accelerating efforts to eliminate all forms of violence against women: eliminating domestic violence, A/HRC/29/L.16/Rev.1, 2015.

¹⁸ Ibid, paragraph 5.

Women in Africa; and the African Charter on the Rights and Welfare of the Child (ACRWC), 1990. At the sub-regional level, the Southern Africa Development Community (SADC) Treaty and its Protocol on Gender and Development; and the Economic Community of West African States (ECOWAS) Treaty, 1975 were considered. It was observed that the sub-regional instruments rely heavily on the international and regional instruments considered.

It was found that it is not enough to ratify the instruments. State Parties must put adequate mechanisms in place for the enjoyment of rights. Through such measures, the citizenry of State Parties will feel the beneficial impact of the international instruments in their day to day lives.

5.2.3 What is the impact of practices such as child marriage and marital rape on the promotion and fulfilment of SRH rights in Nigeria?

The answer to this question may be gathered from Chapter One of this dissertation, where a link was established between sexual violence and SRH rights. It was found that SRH is a very important aspect of human life and may be linked to other rights including the right to life; the right to health; the right to be free from torture, cruel, inhuman or degrading treatment; and that denial of this right may result in various forms of violations, including sexual violence.

It was observed that sexual violence, especially child marriage and marital rape, have various negative consequences including reproductive health, psychological and emotional consequences.¹⁹ Some reproductive health consequences identified include obstetric fistula, chronic pelvic infection, sexual dysfunction, recurrent urinary tract infections, prolonged obstructed labour, vaginal stretching, miscarriages, and infertility, among others.²⁰

In Nigeria, a 2015 report revealed that the prevalence of forced child marriage varied widely from one region to another, with figures as high as 76% in the North West region and as low as 10% in the South East.²¹ In another study conducted at a tertiary health facility located in a rural

¹⁹ Section 1.7 of Chapter One.

²⁰ Ibid.

²¹ Girls Not Brides 'Child Marriage Around the World: Nigeria' available at <http://www.girlsnotbrides.org/child-marriage/nigeria/> accessed on 9th September, 2015.

community in northwest Nigeria, it was found that the majority of sexual violence cases often reported were attempted rape or rape in adults and children.²²

The statistics above represent the level of prevalence of sexual violence in Nigeria and as noted earlier, sexual violence has a negative impact on the enjoyment of SRH rights.

5.2.4 How can the mechanisms available for the protection of women against sexual violence in South Africa be adopted in Nigeria to prevent and punish acts of sexual violence such as child marriage and marital rape and what adjustments should be made?

This question represents the crux of this chapter, as recommendations will be put forward as an answer to the question.

5.2.4.1 Implementation of the existing laws and policies

It is necessary to properly implement the recently enacted Violence Against Persons Prohibition Act. It is important to state at this point that the Act should be made applicable throughout Nigeria, without the need for re-enactment in each State of the Federation. The Act is currently only applicable in the Federal Capital Territory, Abuja by virtue of Section 27. For the entire populace to enjoy the protection which the Act provides, it must be applicable throughout Nigeria. In addition, there may be a need for some structural adjustments with respect to the 1999 Constitution. For example, matters relating to crimes against women and the general welfare of children should be put in the Exclusive Legislative List. Through such initiatives, once the National Assembly enacts laws in that regard, it will have direct applicability in all the States of the Federation without the need for passage in the Houses of Assembly of each State. The 1999 Constitution should also define the age of a child and make other laws subject to this definition. The laws regarding age of marriage should be properly enforced and there should be uniformity as it can help to ensure that young women are of sufficient age and maturity to be able to voluntarily consent to marriage, in order to avoid the physical, psychological and the various health risks attached to early marriage and early child bearing. It has been argued that it

²² AO Ashimi *et al* 'Reported Sexual Violence among Women and Children seen at the Gynaecological Emergency Unit of a Rural Tertiary Health Facility, Northwest Nigeria' (2015) 5(1) *Annals of Medical and Health Sciences Research* 26.

is possible to outlaw child marriage in the Northern part of Nigeria, as Egypt (which is essentially an Islamic country) has outlawed the practice.²³

Regarding the Sexual Offences Bill, the president should give his assent and it should be made enforceable throughout Nigeria. In its current form, the Bill is to replace all other Acts which punish sexual offences. The National Assembly should follow through on this.

Regarding the enforcement of economic, social and cultural rights, especially the right to health, the approach adopted by the Indian Judiciary whereby directive principles are seen as complementary to fundamental rights, may be adopted in Nigeria. Alternatively, the directive principles may be made enforceable in Nigerian Courts. In this way, States may be held accountable for their actions.

5.2.4.2 Establishment of Sexual Offences Court in Nigeria

This is a crucial lesson that Nigeria can learn from South Africa. Using the Wynberg Model,²⁴ the SOC should be created as this will enhance easier access for victims of sexual violence and ensure speedier determination of cases. Guidelines may be formulated for the smooth and effective running of the courts. These could be in the form of the Rules of Court which is available for regular courts. The Blueprint created by the SOCA Unit may be adopted for this purpose.

It is important to state that creation of such courts is not enough as the government must ensure that the courts are properly funded and resourced, available and easily accessible to the general populace. The courts should also be equipped with qualified personnel and training programmes should be organised for these personnel. Where SOCs are created, it is perceived that prosecution of sexual offenders will be more effective and victims are better protected. This is because in most cases, the victims do not have to face the perpetrators, and the issue of stigmatisation is reduced as the proceedings are held in private. This will encourage victims to report cases of violation. It is important that matters are heard as a matter of urgency and the hearing process is expedited. In addition, the identity of the victims should not be released to the press.

²³ I Ogunniran 'Child Rights Act Versus Sharia Law in Nigeria: Issues, Challenges and Way forward' available at <http://www.lawrights.asn.au/files/OGUNNIRAN,%20IYABODE%20full%20paper.pdf> accessed on 18th September, 2015.

²⁴ See section 3.4.1 of Chapter three.

If Nigeria were to establish the SOCs, a task team, resembling the one created by the National Prosecuting Authority (NPA) of South Africa may be introduced to facilitate its creation. This team would include persons whose area of specialty is sexual violence and who can garner the required personnel and facilities. The Federal Ministry of Justice may also anchor the development of these courts or designate the duties to the Ministry of Justice of each State.

5.2.4.3 Review of the Nigerian Criminal Law

It is essential to revisit the marital rape exemption covered by the Criminal Code and the Sharia Penal Code. There is no need to pretend that marital rape does not occur even though it is largely unreported due to the reasons highlighted previously.²⁵ A clause should be included in the Criminal and Penal Code which suggest that the marriage of a perpetrator to the victim of rape may not be raised as a defence in a charge of rape.²⁶ In this, women may be more willing to come out to report cases, where they are assured of confidentiality and exercise of discretion by police officers. It is also important to repeal section 55(1)(d) of the Sharia Penal Code because it allows husbands to batter their wives for the purpose of correcting them, provided that the husbands don't inflict grievous hurt on their wives. This section is unconstitutional as it violates a number of women's rights including the right to bodily integrity and human dignity guaranteed in the 1999 Constitution.

There is need to revisit the sentencing provision to include a minimum sentence requirement. The problem of sentencing in rape cases was identified by a number of judges in *Posu & Anor v The State*.²⁷ Through the combined reading of section 51(1) and Part I and III of the Schedule 2 of the Criminal Law Amendment Act,²⁸ the minimum sentence on conviction for rape in South Africa is 10 years imprisonment, while the maximum is life imprisonment, except where, as in Section 51(3)(a), the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. Circumstances which do not constitute "substantial" and "compelling" and thus justifying the imposition of a lesser sentence, include the

²⁵ See Section 1.1.2 of Chapter One.

²⁶ See for example Section 56(1) of the Criminal Law (Sexual Offences and Other Related Matters) Act, 2007 (a South African Act) which provides that when an accused person is charged with the offence of rape, it is not a valid defence for a person accused of rape to contend that a marital or other relationship exists or existed between him and the victim of rape.

²⁷ Note 12 above.

²⁸ Act 10 of 1997

complainant's previous sexual history; an apparent lack of physical injury to the complainant; an accused person's cultural or religious beliefs about rape; or any relationship between the accused person and the complainant prior to the offence being committed.²⁹ The provision regarding sentence may be emulated in Nigeria.

5.2.4.4 Creating awareness and organising educational programmes for the entire populace

Due to the continued prevalence of child marriage and marital rape in some parts of Nigeria, it may be necessary to organise awareness and educational programmes for the entire populace on the impropriety of all forms of violence against women.³⁰ In addition, women should be enlightened on the available laws and mechanisms which the government has created. For instance, women should be informed of the fact that they can seek protection orders under the Violence Against Persons Prohibition Act when they face threats of violence, before a situation becomes untenable.

The government of Nigeria and perhaps civil society groups, including Non-Governmental Organisations (NGOs) have to assume the responsibility of providing shelters, counselling and organising empowerment programmes for victims of sexual violence.

5.3 CONCLUSION

Reflecting on the research questions which were raised in the first chapter of this dissertation, this chapter has presented a summary of findings and recommendations. The laws and policies protecting women against sexual violence in Nigeria and South Africa have been discussed. International and regional instruments were also used to measure the extent of the mechanisms available for protection.

From the foregoing, it is clear that it is essential to put mechanisms in place to protect women's sexual and reproductive health rights and prevent various violations, especially sexual violence.

²⁹Section 51 (3)(Aa) of the Criminal Law Amendment Act 105 of 1997.

³⁰ At the Fourth World Conference on Women held in Beijing, it was suggested that States should prioritise educational programmes that emphasise the "elimination of harmful attitudes and practices, including female genital mutilation, son preference (which results in female infanticide and prenatal sex selection), early marriage, including child marriage, violence against women, sexual exploitation, sexual abuse, which at times is conducive to infection with HIV/AIDS and other sexually transmitted diseases." See Paragraph 107(a) of the Beijing Declaration and Platform for Action.

The South African attitude to protection from sexual violence is worth emulating, especially in Nigeria. With the recommendations proposed, women will be better protected from sexual violence.

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