

The Legal Frameworks for the Protection of Women's Reproductive Health Rights in South Africa and Nigeria: Some Comparative Lessons

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Abstract

African governments do not prioritize the protection of women's reproductive health rights, although there are provisions relating to the right to health which incorporate women's reproductive health and autonomy in several international and regional treaties. Many African countries have incorporated some of these international treaties into their domestic legal systems. The different approaches adopted by South Africa and Nigeria in incorporating international treaties into their domestic laws and the clear disparities between the two countries are discussed and compared. The international legal framework for women's reproductive health rights has not been as effective as it should be in the two countries and the reasons for this are discussed. Under the existing legal frameworks in South Africa and Nigeria, women are faced with the challenge of effectively realizing their reproductive health rights. This, in part, is a result of the plural legal systems and cultural practices entrenched in the two countries, and a lack of adequate political representation for women. It is concluded that if international law is to be meaningful and worthwhile in protecting women's reproductive health rights, states must ratify the relevant international treaties and ensure that they are domesticated.

Keywords: women; reproductive health rights; South Africa; Nigeria

1. Introduction

Nigeria and South Africa have signed and ratified some of the international instruments that protect women's reproductive autonomy. This is one of the reasons why the two countries were chosen for comparison. Other reasons include the subordination of women due to cultural factors common in both countries, and their sub-regional economic prowess. Moreover, South Africa and Nigeria have many other things in common. These include that they both have a colonial history in Africa. Although Nigeria became an independent state in 1960, South Africa proceeded from colonialism to apartheid before becoming a democratic state in 1994. Furthermore, like many other African states, South Africa and Nigeria are multicultural societies. Cultural practices embraced by African countries reflect African values that characterize Africans. South Africa has diverse cultural groups and its Constitution recognizes 11 official languages.³ On the other hand, Nigeria comprises about 250 ethnic groups. Moreover, as a result of their antecedents as former British colonies, the two countries have plural legal systems. There are also some noticeable differences between the two countries. One is demographic composition. South Africa, in addition to black (African) citizens, is home to a sizable population of white and Indian people, and some people of mixed race. Nigeria, however, has an overwhelmingly black population. There are also disparate legal traditions, histories and domestic legal frameworks in the two countries. In addition, although the constitutions of the two countries were drafted and adopted at about the same time, some of their contents are quite different.⁴

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³ Section 6(1), Constitution of the Republic of South Africa, 1996.

⁴ South Africa's current Constitution was enacted in 1996 shortly after the apartheid era, while Nigeria's current Constitution was enacted in 1999.

While South Africa's Constitution explicitly recognizes cultural rights and the reproductive health rights of women, for example, the Nigerian Constitution does not. Nigeria and South Africa have signed and ratified some of the international instruments that protect women's reproductive autonomy. Each state has the responsibility to determine the status of an international treaty in its domain, but have adopted different attitudes to the implications and application of the various international treaties on reproductive health rights of women to which they have subscribed.

As a result of the multicultural nature of the two countries and their political antecedents, some factors inhibit the protection of reproductive health rights of women as recognized by international human rights law. Against this backdrop, the various international instruments on the protection of the reproductive health rights of women signed and ratified by Nigeria and South Africa and the level and process of domestication of these treaties and conventions, are discussed. Also discussed are the constitutional and legal frameworks adopted by the two countries for the protection of the reproductive health rights of women, and the factors that limit the realization of these rights in both countries.

2. International treaties on the protection of the reproductive health rights of women

As the world progressed after the Second World War (WWII) it was realized that women may not be able to enjoy their fundamental human rights fully without adequate protection of their reproductive autonomy. Hence, some of the international treaties adopted had a bearing on women's reproductive health rights. The various treaties and their provisions on women's reproductive autonomy are now discussed.

2.1 Universal Declaration of Human Rights (UDHR) 1948

The commitment of world leaders to the protection of human rights was essential to world peace. This was embodied in the Charter of the United Nations.⁵ To give substance to the human rights and fundamental freedoms envisaged in the Charter, the Universal Declaration of Human Rights⁶ was adopted by the UN in 1948. Considering the antecedents and the provisions of the Declaration, at the time of its drafting, reproductive health rights of women were not directly contemplated. However, some provisions support the right of autonomy in relation to an individual's body. For instance, Article 1 states that "all human beings are born free and they are equal in dignity and rights" Hence, no individual is allowed to impose his/her will on another person in a bid to subjugate such an individual. Similarly, Article 2 affirms that no one is superior to another in exercising the various rights and freedoms contained in the Declaration. Article 3 provides for the universal right to life, liberty and security of persons, and accommodates the reproductive health rights of women because the right to life, security and liberty are indispensable in guaranteeing reproductive autonomy. Child bearing and rearing could have an impact on an individual's right to life, and thus an individual must be able to make independent decisions in this regard.

Articles 12 and 16 of the UDHR also support the reproductive health rights of women. Article 12 deals with the right to privacy, which is vital to reproductive health rights. Reproductive autonomy cannot be achieved when there is interference in relation to an individual's body. Article 16 is quite relevant to reproductive health rights under it, men and women have equal rights in marriage. Thus, just as a man is free to make decisions in relation to his body, so is a woman; nobody has a superior right over the other. The UDHR also forbids any form of coercion into marriage, and, according to the Article, society must help make the union a success. Society can only perform this function through the various laws and norms in place in relation to marriage. Given the preceding provisions of the UDHR, although the protection of the reproductive health rights of women was not intended – some of the rights protected by the Declaration accommodate women's reproductive autonomy.

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

In 1966 two covenants were adopted by the UN General Assembly: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR):

⁵ The Charter was signed at San Francisco on 26 June 1945 at the conclusion of the UN Conference on International Organisation, and came into force on 24 October 1945.

⁶ The Declaration was adopted by Resolution 217A (111) of the UN General Assembly on 10 December 1948. Available at www.un.org/udhr_booklet_en_web

Both came into force in 1976.⁷The ICESCR is a hybrid of the UDHR and it comprises 31 articles, divided into six sections. Although women's reproductive health rights were not considered during its drafting, some of the rights recognized in the Covenant have direct or indirect impact on the reproductive health rights of women. These include the right to: protection of the family; health; and education and culture. Article 10 enjoins state parties to ensure that the "widest ... possible protection and assistance should be accorded to the family". The Covenant regards the family as the most important unit of any society – and it must be protected at all costs. Thus Article 10 forbids marriage by coercion. Article 10(2) centers on the reproductive health rights of women – with emphasis on the rights of pregnant women in the workplace. Article 12 recognizes the right to the enjoyment of the highest attainable standard of physical and mental health and lists the various aspects of health rights and the steps that governments should take to make them effective. The right to health encompasses other rights which are preconditions for its enjoyment, including access to: safe and potable water and adequate sanitation, and health-related education and information including education on sexual and reproductive health.

2.3 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979⁸

This is the first human rights treaty that addresses discrimination against women. Article 1 defines the term "discrimination against women" and covers a wide range of ways in which a woman can be discriminated against. According to the Article, to achieve non-discrimination, men and women must be seen as equal. Their biological differences should not be used to prevent women from enjoying the human rights that men ordinarily enjoy. The Article further disapproves of discrimination – even if it is not purposeful (Shavel, 2000: 46-47). Also recognized is that discrimination can occur in different spheres, private or public. The article does not consider marital status a precondition for the enjoyment of the rights enshrined in the Convention. It affirms that equality does not have any correlation with a woman's personal relationships with men (Shavel, 2000: 47).

Article 2 enjoins state parties to condemn discrimination against women in all its forms and to make every effort to promulgate policies that eliminate such discrimination. This wide-ranging provision outlines the various steps that state parties must take to eliminate discrimination against women. State parties should include the principle of equality in their constitutions and ensure that it is achieved by passing appropriate laws to sanction any act of discrimination against women. States are also enjoined to make an effort to achieve the practical realization of the principle of equality.⁹ The state must adopt legislative and other measures to prohibit discrimination against women.¹⁰ To further ensure the total eradication of discrimination against women, states must also try to ensure the legal protection of women's rights through national tribunals and other public institutions.¹¹ The Article further enjoins state parties to abstain from any act that could amount to discrimination against women, and to ensure that all public authorities and institutions comply with this obligation.¹² Acknowledging that discrimination goes beyond government action or inaction, the Article obliges states to ensure that private individuals, institutions or enterprises do not discriminate against women.¹³

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

Article 16 deals with issues ranging from the right to enter into a marriage, the right to autonomy in the choice of spouse, some rights and responsibilities during marriage and its dissolution, guardianship, adoption, ownership and the acquisition of property.

⁷These Covenants were adopted by Resolutions 2200A (X1) and 2200 (XX1) of the UN General Assembly on 16 December 1976. Available at www.ohchr.org

⁸ Adopted by General Assembly Resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981. Available at www.ohchr.org/Documents/cerd

⁹ Article 2(a) CEDAW.

¹⁰ Article 2(b).

¹¹ Article 2(c).

¹² Article 2(d).

¹³ Article 2(e).

Of particular interest are the equal rights of a couple in decisions relating to the number and spacing of their children, and having access to information, education and the means to enable them to exercise these rights. Article 16 (2) forbids child marriage.

2.4 The African Charter on Human and Peoples' Rights, 1981

The African Charter on Human and Peoples' Rights¹⁴ marked the genesis of the promotion and protection of human rights at the African regional level, and includes 68 articles that focus on different aspects of human and people's rights. The African Charter is unique because its classification of human rights departs from the traditional classification in other treaties where some rights were regarded as first-generation rights and given priority over those that were regarded as second-generation rights.¹⁵ The African Charter considers all human rights as interrelated, essential and universal to all Africans, and does not regard one set of rights as superior to another (Olowu, 2013: 35).

The focus of the Charter is on promoting general rights. Consequently, its provision for women's rights is grossly inadequate. Although the Charter recognizes the rights of women in Article 18(3), this is ambiguous as it does not define what constitutes discrimination against women in this context, and does not identify international declarations and conventions that uphold the rights of women which the Charter intends to protect.¹⁶ Women's rights can be inferred from the provisions of Articles 2 and 3 which guarantee the unrestricted enjoyment of the rights and freedom recognized and guaranteed in the Charter, as well as equality before the law. The Charter does not provide for the right to consent to marriage or equality in marriage.

2.5 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005

This Protocol came into force in 2005 amidst complaints about the inadequacies of the African Charter's provision on the rights of women. The adoption of this Protocol boosted Africa's image in terms of the promotion and protection of women's rights. It departs from the norms of African patriarchal culture by affirming the reproductive choices and autonomy of women. The Protocol is a milestone in the protection of human rights in Africa – as it is the first human rights instrument where the reproductive rights of women are expressly spelt out. Some of the preceding instruments only guaranteed the right to family planning and women's right to health.¹⁷

Before the Protocol, the right to reproductive autonomy was inferred from the right to dignity, and the right to liberty – among other rights.¹⁸ Article 14 provides for reproductive autonomy and reproductive health; this enables women to control their fertility¹⁹ and decide on the number and spacing of children²⁰ with the contraceptive method of their choice.²¹ The article also gives due consideration to women's sexual rights; the right to self-protection and to be protected against sexually transmitted infections, and the right to family-planning education.²² To further ensure the realization of women's reproductive health rights, the second part of Article 14 focuses on reproductive health services which the state is expected to provide – to assist women exercise their right of autonomy in reproductive matters. Apart from setting out women's rights to make reproductive choices, the Protocol addresses impediments in realizing this right – e.g. violence against women.

By protecting the reproductive autonomy and reproductive health rights of women, the Protocol fills the lacuna created by the African Charter, which supports the promotion of all cultural values – but fails to distinguish between a cultural practice that has a positive influence on women, and one that has a negative impact. The Protocol also prohibits child marriage by setting the age of marriage at 18 years.

¹⁴ Adopted at Nairobi on 26 June 1981 and entered into force on 21 October 1986, in accordance with Article 63. Available at www.achpr.org/achpr/banjul_charter.

¹⁵ Civil and political rights are classified as first-generation rights, while economic, social and cultural rights are classified as second-generation rights.

¹⁶ The Article states: "the state shall ensure the elimination of all discrimination against women and also ensure the protection of the rights of the women... as stipulated in international declarations and conventions".

¹⁷ ICESCR and CEDAW, among others.

¹⁸ Article 14.

¹⁹ Article 14 1(a).

²⁰ Article 14 1(b).

²¹ Article 14 1(c).

²² Article 14 1(f).

3. Domestication of international treaties in South Africa and Nigeria

The relationship between international law and national law (also called municipal law, domestic law or state law) is not clear-cut. Some argue that the two constitute distinct branches of the law which never overlap (Triepel, 1923: 83). This theory – sometimes referred to as the dualist theory – claims that international law and national law “differ so greatly with regard to their sources, contents, and the relationships they govern, that they must represent two separate legal spheres” (Triepel, 1923: 83). That said, others maintain that the international and national legal systems together constitute one legal order within which the national legal system take a subordinate position. This universalistic approach – the monist theory – seems to be more contemporary and more acceptable.

The above opposing schools considered, the incorporation of international law into domestic law is not always easy or possible. Accordingly, the enforcement of international human rights into domestic legal procedures is equally problematic. Some states apply the principle that international norms automatically form part of domestic law – and even have priority over domestic norms. In other states, international law has no guaranteed applicability in their municipal legal systems. In South Africa and Nigeria, for example, before certain international legal principles are binding on domestic courts, they have to be incorporated into the domestic legal system via legislation.

Nigeria and South Africa have signed and ratified some of the international instruments that protect the reproductive health rights of women. However, their attitude to the execution and fulfillment of the various international treaties to which they have both subscribed are poles apart. The duty of a state to implement a treaty is entrenched in the international law principle known as *pacta sunt servanda* (agreement must be kept) – which signifies that a state that agrees to the terms of an international treaty must be willing to observe the provisions of the treaty. Nevertheless, states adopt different approaches in fulfilling their international treaty obligations. A state may make the provisions of a treaty part of their constitution or superior to their statutory law. Treaties can also be made equal to statutory law or may not be applicable until they are enacted into law by the legislature (Dada, 2012: 39). The approach adopted by a particular state depends on the way it classifies a treaty (Oyebode, 2003: 175). Thus, despite the international nature of a treaty, its application in a particular state is subject to the legal provisions of the state.

Nigeria has acceded to some international and regional instruments that are relevant to the realisation of the reproductive health rights of women, including CEDAW (1985); the ICESCR (1993); the Convention on the Rights of the Child (1991); and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2005). However, this has not translated into improved reproductive rights for the country’s women, because, in terms of the Nigerian Constitution, treaties signed by Nigeria do not automatically become part of the law unless they have been incorporated into domestic legislation (Egede, 2007: 268-269). For any treaty to be enforceable in Nigeria, it must be enacted into law by the federal government (National Assembly).²³

Nigeria has a federal system of government comprising the federal government at the central level and 36 states.²⁴ The Constitution divides powers between the national and states’ Houses of Assembly regarding exclusive and concurrent legislative lists.²⁵ It empowers the National Assembly to legislate on issues of the exclusive and concurrent legislative lists²⁶ – while the states are only empowered to legislate on the issue of the concurrent list and other matters that are not on both lists. In terms of the domestication of any treaty to which Nigeria has assented, the National Assembly must enact it as a law for the treaty to be enforceable in the country.²⁷ This aims to ensure that there is uniformity in the federation’s foreign policy (Oyebode, 2003: 129).

However, for matters not on the exclusive legislative list, state Houses of Assembly must participate in the process of domestication. The Constitution provides that before a Bill for the domestication of a treaty can be assented to by the president, the majority of Houses of Assembly in the country must have ratified the treaty.²⁸ It follows that assent to and signing a treaty does not translate to enjoyment of the rights recognized in such a treaty. There has to be a commitment on the part of the government to follow due process so that such a treaty does not amount to a toothless bulldog. Domestication of an international treaty by the National Assembly may make little

²³ Section 12(1) of the Nigerian Constitution.

²⁴ Sections 2 and 3.

²⁵ Ibid.

²⁶ Section 4 (2) (3).

²⁷ Section 12(2).

²⁸ Section 12(3).

difference if such a treaty deals with an issue which is on the concurrent legislative list. This is because, when the National Assembly domesticates a treaty of this nature, a state's House of Assembly must also enact it as a law – for it to apply in that particular state. An example is the Convention on the Rights of the Child, which has been domesticated by the National Assembly through the Child's Rights Act (2003) and adopted by some states. Under the Nigerian Constitution, child rights are on the residual list which falls under the legislative jurisdiction of state Houses of Assembly. This means that each state must have an equivalent law on children's rights. Presently, only 24 of the 36 states (mostly in southern Nigeria) have adopted the Child Rights Act. Northern states where child marriage is rampant are not prepared to adopt the Act because they feel it is inconsistent with their cultural beliefs.²⁹ Thus in Nigeria there may be a disparity in the enjoyment of the various reproductive health rights even if they are domesticated by the federal government – because some state governments may decide not to adopt the appropriate statute. Furthermore, when a treaty is domesticated in Nigeria, it does not enjoy primacy over the Constitution. This suggests that some of the provisions of the African Charter may not be enforceable in Nigeria.

The African Charter recognizes the socio-economic and cultural rights laid out in Chapter two of the Constitution. However, by virtue of section 6(6) these rights are not enforceable in Nigeria as the Charter's provisions are inconsistent with the provisions of the Constitution.³⁰ In addition, unlike South Africa, the Nigerian Constitution does not explicitly recognize the protection of the reproductive health rights of women. This is the reason for the dearth of cases on the enforcement of the reproductive health rights of women in Nigeria – despite their daily violation at public and private levels.

South Africa has also signed and ratified some international treaties that promote women's reproductive health rights.³¹ As in Nigeria, the executive signs and ratifies a treaty, but such treaty will not have the force of law in South Africa unless it has been approved and enacted into law by national legislation.³² Once Parliament has resolved to approve an international treaty – it must be incorporated into domestic law. In *Glenister v President of the Republic of South Africa*³³ the Constitutional Court highlighted the various ways in which an international treaty can be domesticated in South Africa.

Upon incorporation, an international treaty is equal to any other domestic law and is not superior to it, unless Parliament explicitly elevates it based on its general application or in the event of any conflict between the treaty and domestic legislation.³⁴ The Constitution states that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”³⁵ The South African Constitution recognizes the usefulness of international law and the various treaties in its domain. Accordingly, South Africa has promoted reproductive health rights in various international instruments because its Constitution accommodates reproductive autonomy: the country has adopted the various provisions of the international treaties that promote and protect women's reproductive health rights. However, despite both countries being signatories to international treaties on the reproductive health rights of women, Nigeria and South Africa have adopted different legal frameworks for the protection of these rights.

4. The constitutional and legislative framework

South Africa's Constitution has been hailed as one of the most progressive in the world, because it accommodates a wide range of rights, including the reproductive health rights of women. Section 12 (2) provides for “the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction; to security in and control over their body; and not to be subjected to medical and scientific experiments without their informed consent. The Constitution also recognizes the right to reproductive health by guaranteeing the right to health-care services that include reproductive health-care.”³⁶

²⁹ UNICEF Nigeria, Fact Sheet, Child Rights Legislation in Nigeria, April 2011.

³⁰ Section 1(1) of the Nigerian Constitution.

³¹ See, *inter alia*: International Covenant on Economic, Social and Cultural Rights, 1966; Convention on the Elimination of all Forms of Discrimination against Women; African Charter on Human and Peoples' Rights.

³² See, generally, Section 231 of the 1996 Constitution on International Agreements.

³³ 2011 (3) SA 347 (CC).

³⁴ *Ibid*.

³⁵ Section 233 of the Constitution of the Republic of South Africa.

³⁶ Section 27 (1).

In addition to the explicit recognition of the reproductive health rights of women, the Constitution recognizes some rights that allude to these rights, including the right to: equality, human dignity, life, freedom and security of the person, freedom of religion, belief and opinion, freedom of association, and children's rights.³⁷ The recognition of all these rights is an added advantage to South African women – as their rights to reproductive autonomy are enhanced. Furthermore, South Africa's Constitution provides for the establishment of state institutions to support democracy. These institutions are set up to ensure that the provisions of the Constitution are enforced and thus make a difference in the lives of South Africans. Some of these institutions are expected to ensure the efficacy of the various provisions of the Constitution affirming women's reproductive autonomy.³⁸

In contrast, the Nigerian Constitution does not explicitly recognize the reproductive health rights of women. Recognition of these rights could be inferred from the provisions of Section 17 where the state is enjoined to direct its policy toward the provision of adequate medical and health facilities for all persons. The section also forbids the exploitation and neglect of children and young persons and mentions the need for the state to ensure the evolution and promotion of family life.³⁹ However, the various rights recognized under this section are not enforceable in Nigerian courts and are merely a guide for policy-makers.⁴⁰ The reproductive health rights of women in Nigeria can also be inferred through the recognition of fundamental human rights connected to such rights– such as the right to life, dignity, personal liberty, private and family life, freedom from discrimination, and the right to freedom of thought, conscience, and religion.⁴¹ Consequently, when a woman's right to autonomy in respect of reproduction is breached in Nigeria, she could link such right to any of the recognized fundamental human rights in order to enforce it.

In addition to South Africa's adherence to comprehensive international and constitutional frameworks on the protection of the reproductive health rights of women, in the face of various cultural practices, national legislation seeks to further protect women to ensure there will be no *lacuna* under which a particular culture can hide to impede the realization of these rights. The legislation includes the Children's Act,⁴² the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),⁴³ the Criminal Law (Sexual Offences and Related Matters) Act,⁴⁴ and the Recognition of Customary Marriages Act.⁴⁵

As in South Africa, Nigeria has adopted national legislation in addition to the provisions of the Constitution that could be employed to protect the reproductive health rights of women. It includes criminal law that could be used to prosecute penal infractions of women's right to autonomy – e.g. the Criminal Code,⁴⁶ the Penal Code,⁴⁷ the Marriage Act,⁴⁸ and the Child Rights Act.⁴⁹

6. Cultural rights in South Africa and Nigeria

Section 6(1) of the South African Constitution accommodates cultural diversity by recognising various indigenous languages. Section 6(2) obliges the state to “take practical and positive measures to elevate the status and advance the use of these languages”.⁵⁰ The other subsections of section 6 accentuate the need to recognize and use these languages equitably, because language is one of the important characteristics of culture. In the same vein, the South African Constitution promotes freedom of association.⁵¹ This promotes cultural pluralism as South African citizens are at liberty to be members of any cultural group.

³⁷ See Bill of Rights of the South African Constitution.

³⁸ See, generally, Chapter 9 of South African Constitution.

³⁹ Section 17(3)(d) (f) &(h) of the Nigerian Constitution.

⁴⁰ Section 6(6) (c).

⁴¹ See, generally, Chapter 4.

⁴² 35 of 2005.

⁴³ 4 of 2000.

⁴⁴ 32 of 2007.

⁴⁵ 120 of 1998.

⁴⁶ CAPC38 LFN, 2004.

⁴⁷ CAP P3 LFN, 2004.

⁴⁸ CAP M6 LFN, 2004.

⁴⁹ CRA 2003.

⁵⁰ Section 6(2) of the South African Constitution.

⁵¹ Section 18.

The Constitution goes further to state that “Everyone has the right to use the language and participate in the cultural life of their choice...”⁵²This is one of the sections that distinguish the South African Constitution from those of other countries like Nigeria. Cultural rights in those countries are classified under fundamental objectives and directive principles – whereas in South Africa they are recognized as rights that are enforceable in the courts.

Culture is communal in nature as it can only be enjoyed when it is practiced with other members of the cultural community. Hence, the South African Constitution accommodates cultural, religious and linguistic communities.⁵³To promote such diversity, the Constitution provided for the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.⁵⁴ However, the recognition of cultural rights in South Africa is not absolute. The Constitution recognizes this right only in so far as it is exercised in consonance with the provisions of the Bill of Rights.⁵⁵

Nigeria’s Constitution also recognizes cultural diversity and encourages the formation of associations across ethnic, linguistic, religious or other barriers.⁵⁶ It further accentuates cultural pluralism by stating that the state shall foster a feeling of belonging among the different people of the country.⁵⁷Therecognition of cultural diversity is affirmed by stating that “the state shall protect, preserve and promote the Nigerian cultures that enhance human dignity...”⁵⁸However, the provisions of this section are subject to the condition that such cultures enhance human dignity. The Constitution recognizes cultural rights under the section on fundamental objectives and directive principles of state policy. Rights recognized under this section are not enforceable in Nigerian courts. Thus, the Constitution’s recognition of the right to culture is merely a policy guide. It is included in the hope that it will guide the Nigerian government to direct its policies towards the promotion and preservation of Nigerian cultures so that they do not become extinct. One could argue that given the provisions of this section, the intention is not to redress any infraction of the cultural rights of an individual, but merely to promote them.

7. Factors that limit the realization of women’s reproductive health rights in South Africa and Nigeria

7.1 Cultural practices

Despite the constitutional protection of cultural rights, several cultural practices in South Africa and Nigeria inhibit the enjoyment of reproductive health rights of women. They are the main reason why international legal frameworks for women’s rights in those countries have not been as effective as they should be. They include but are not limited to, widowhood practices; early/forced marriages; levirate and sororate unions; payment of bride price; female genital mutilation; and virginity testing. Brief overviews of only selected practices are attempted here. Widowhood practices are one example of harmful cultural practices. The communal nature of African societies allows extended families to interfere in family matters especially when it comes to the death of a family member.

Legally, the death of a marital partner brings the marriage to an end. In *Okonkwo v Okagbe & Anor*⁵⁹ the Supreme Court of Nigeria held that “marriage ends whenever one of the spouses passes away”.⁶⁰However, in some traditional African societies the death of a marital partner does not terminate the relationship between families (Emiola, 2005: 111). In the Zulu culture of South Africa, a widow is deemed to continue being married to her deceased husband, and she is expected to honor him and her in-laws by mourning the deceased (Rosenblatt & Nkosi, 2007: 39).

In Nigeria, when a man dies his wife or wives begin a mourning period. This period varies from one ethnic group to another. Among the Yoruba in the south-west and the Binis in the south, mourning lasts for three months; some of the other ethnic groups require a widow to mourn her late husband for 12 months (Emiola, 2005: 111). Other practices include forcing the woman to stay indoors for a certain period of time, sleeping on the bare floor, being forbidden to eat certain food, being forced to sleep with the corpse of the deceased, being forced out of the

⁵² Section 30.

⁵³ Section 31.

⁵⁴ Sections 185 and 186.

⁵⁵ Sections 30 and 31.

⁵⁶ Section 15(3) (d) of the Nigerian Constitution.

⁵⁷ Section 15(4).

⁵⁸ Section 21.

⁵⁹ (1994) 9 NWLR (Pt. 368) 301.

⁶⁰ Ibid. at 346.

matrimonial home, and being deprived of basic personal hygiene. The mourning pattern in South Africa is similar to that of Nigeria, but varies from one community to another. Among the Zulu tribe, the widow's mourning period is known as *Ukuzila* and is expected to last for a year. As in Nigeria, widows wear black clothes and shave their heads, and are expected to be in a sombre for the entire period – and must limit their relationships with other members of the community so as not to 'infect' them with their bad luck (Kotze et al., 2012: 754-755). Once the mourning period has passed, the widow must undergo cleansing rituals to neutralize the bad luck brought about by the death of her spouse (Kotze et al., 2012: 754-755).

The above practices have negative effects on the reproductive health rights of women, as they hinder their right to bodily autonomy. Women are now becoming more conscious of their rights in this respect, and are objecting to being subjected to these humiliating practices. In some parts of south-west Nigeria, women are no longer subjected to most of these practices; they mourn their husband in the way they desire, mainly by restricting their movement and wearing dark clothes, but are not subjected to any dehumanising process. Likewise in South Africa, mourning practices have been modified in some areas; some people have objected and have suffered no negative consequences, contrary to the predictions of those who preach strict adherence to such practices (Kotze et al., 2012: 754-755).

Early/forced marriages are another example of harmful cultural practices. One of the requirements of a valid marriage is consent. However, some cultural practices do not regard the consent of the bride as a precondition for marriage. In Nigeria, particularly in the north, this practice takes the form of child marriage, and refers to the practice of coercing, forcing or deceiving a young girl into marriage at an age when she is considered to be incapable of understanding the nature of marriage (Ukwuoma, 2014: 10). Many reasons have been put forward for this practice – including chastity, economic reasons and the stereotypical view of the girl child as a temporary member of the family (Olatunbosun, 2001: 60). An early marriage has negative effects on the girl child. Physiologically and psychologically her body is not yet ready for motherhood. Furthermore, a marriage is invalid without the free, full or informed consent of both the man and woman.

In South Africa, forced marriages known as *Ukuthwala* are a form of abduction of a young girl by her prospective husband– with the intention of compelling her and her family to accept his marriage proposal. It was condoned in ancient times when men made such moves towards women of marriageable age who ordinarily may have objected to their advances. At that time, the culprit would be made to pay cattle to the father or guardian of the abducted girl/woman. However, this practice has been distorted in modern times. The abducted woman is raped or the abductor may have consensual intercourse with the young girl, as against the old practice where the abductor would not make any sexual moves until after the marriage (Maluleke, 2012: 11). Early/forced marriages violate women's reproductive health rights as they do not give their consent or are forced into doing so as a result of false pretences, which is sexual exploitation. Levirate and sororate unions are another example of cultural practices that are a threat to the enjoyment of women's reproductive health rights in South Africa and Nigeria. A levirate marriage occurs when a woman who has lost her husband is forced to marry one of his relatives. Such marriages are common among the Esan-speaking people of Edo State of Nigeria and in some parts of south-west Nigeria.

However, among the Yoruba, a levirate marriage requires the woman's consent. In South Africa, *Ukungena* is common in the KwaZulu-Natal and Eastern Cape provinces. Women are compelled to marry a member of their late husband's family, if they want to inherit his property. Many women thus submit to levirate marriage for economic reasons. One of the consequences of a forced levirate marriage is that the widow might be coerced into unsafe sexual activities by her new husband. Furthermore, she will be expected to bear children in the new marriage – irrespective of the number of children she might already have (Gbadamosi, 2007: 334). The opposite of a levirate marriage is a *sororate* marriage. This is a form of marriage where a man marries the sister of his late wife or in a situation where his wife is sterile. The aim is to preserve the unity of the family (Emiola, 2005: 113). In African culture, one of the primary reasons for marriage is procreation – because children are regarded as the greatest assets and benefits of a family. Where a woman is sterile, she will prefer her husband to marry her blood sister rather than a strange woman. This makes economic sense as the husband is not expected to pay bride price. This form of marriage is rare in Nigeria, although there are traces of it among some Ibo communities (Gbadamosi, 2007: 334).

Legally, both *levirate* and *sororate* marriages fall within the prohibited degree of consanguinity; moreover, dowry, a major requirement for a valid customary marriage, is paid only once (Ibid). Thus, the second union is regarded as an extension of the first, with the transfer of all its requirements. This form of marriage violates women's reproductive health rights, as usually women are compelled to enter into the marriage.

In most African societies, one of the requirements of a valid customary marriage is the payment of dowry/bride price. In Nigeria, the terms ‘dowry’ and ‘bride price’ are used interchangeably and refer to the consideration for the marriage. In Nigeria, the dowry traditionally consisted of labor services rendered by a man to the parent of the woman he sought to marry. Modernization has changed this cultural practice and labor services have however become monetized.

In South Africa, bride price is known as *lobola*. It is given to the family of the bride as a sign of appreciation to her parents (Steyn & Rip, 1968: 507). Previously, *lobola* was paid in cattle. Payment of *lobola* helps to stabilize the marriage as the husband may lose his *lobola* if he ill-treats his wife. However, in contemporary South Africa, *lobola* has been commercialized; cattle have been replaced with money and gifts (Ibid). It is now regarded as a form of compensation to the bride’s parents for what they spent on her before the marriage. This has greatly affected the institution of marriage in South Africa, because unlike in ancient times, the man is solely responsible for the payment of *lobola*, which he may not be able to afford. The payment of the bride price in traditional marriages could constitute a violation of the reproductive health rights of woman, because, if a man regards his wife as a commodity that he bought and that is part of his property, she loses her right to dignity, privacy and family life, among other rights, and which will invariably impact on her reproductive rights.

Other harmful practices include virginity testing and female genital mutilation (FGM).FGM is practiced in some communities for social acceptance. According to Nadassen, in the Mpumalanga Province of South Africa, men may not marry an uncircumcised girl. Among the Sothos and Tswana, the mother or aunt of the prospective groom must examine the prospective bride to ensure that her labia are extended, before she could be allowed to marry their son. Moreover in some Nigerian and South African communities a young girl is expected to be chaste as pre-marital sex is believed to be disgraceful; to protect the honor of the family a girl must be a virgin when she marries (Olatunbosun). Hence the prevalence of the cultural practice of virginity testing – particularly in some parts of South Africa. In the past, in some parts of Nigeria, if a woman was a virgin when she married, a special gift was given to her father for raising such a bride. The average black South African woman believes and practices various cultural practices–notwithstanding their health consequences. Consequently, some black South African women have opposed the prohibition of some cultural practices that tend to impair women’s reproductive autonomy. In a recent development in the Nigerian National Assembly, the influence of cultural practices on the thinking of law-makers came to bare. The Gender and Equal Opportunity Bill which was meant to accommodate some of the rights recognized in the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa and CEDAW, was vehemently opposed because it was not compatible with Nigerian culture and religious beliefs.⁶¹

Cultural practices also influence the enforcement of the various provisions on the reproductive health rights of women in South Africa and Nigeria. Although women experience the invasion of their reproductive autonomy through the various cultural practices, these usually are not challenged in court.

6.2 Legal systems and socio-cultural dynamics

The historical antecedents of Nigeria and South Africa have greatly influenced their legal systems. In Nigeria, before colonization, native laws and customs of the Nigerian people were applied to regulate their conduct in their respective communities. Despite the introduction of English law through colonialism, native laws and customs were not abolished. Upon Nigeria’s independence in 1960, the Constitution accommodated both the received English law⁶² and customary law.⁶³Equally, in South Africa, customary law was in operation before the advent of colonialism and the subsequent apartheid era. Upon becoming a democratic state in 1994, South Africa’s Constitution accommodated customary law as part of the law of the country.⁶⁴ While South Africa and Nigeria are both multicultural countries, South Africa has a greater mix of different race groups. The two countries have adopted different frameworks for the protection of both cultural rights and reproductive health rights. Unlike Nigeria, South Africa has improved recognition and promotion of the reproductive health rights of women. One could argue that as reproductive autonomy is alien to African culture, South Africa’s improved promotion of those rights is informed by western values. Different races hold different values and view the world differently.

⁶¹ For details see: www.bbc.com/new/world-africa.

⁶² Sections 32(1) and (2) of the Nigerian Interpretation Act, CAP I 23 LFN 2004.

⁶³ Section 21(a) of the 1999 Nigerian Constitution.

⁶⁴ Sections 30 and 31 of the 1996 South African Constitution.

Nigeria has failed to demonstrate the political will in domesticating the various treaties on the reproductive health rights of women. Unlike South Africa that is heterogeneous in terms of racial composition, Nigeria is a homogenous society. As a result, the contents of most treaties on reproductive health rights of women are alien to most of the major ethnic groups in Nigeria, and this may affect the continuation of some cultural practices. Thus, agitation for domestication of the international instruments remains very low.

Some women in South Africa and Nigeria have been unable to realize their reproductive health rights despite the country's adoption of international and domestic frameworks on the reproductive health rights of women. One of the main reasons is that the concept of reproductive autonomy is not familiar to some African cultures. Human rights have been viewed by African societies as a Western concept. Notwithstanding the prohibition of cultural practices that are not in consonance with the provisions of the Constitution, some cultural practices that impede women's reproductive autonomy are still thriving in various communities in Nigeria and South Africa. The cultural practices are so entrenched that it is difficult to adopt laws to protect the reproductive health rights of women.

6.3 Political representation

Lack of adequate political representation is one of the reasons why reproductive health rights of women recognized by international human rights law have not made much difference to the lives of women in South Africa and Nigeria. This is because gender parity in the legislative houses is essential for the agitation and promotion of women's reproductive autonomy. African women usually do not participate in the legislative processes where decisions are taken on domestication of laws, because of institutionalized male dominance in most African societies which restricts women from full participation in the public sphere (Okome, 2002: 33). Men are expected to hold positions of power while women are restricted to the home front (Okome, 2002: 39). Women cannot make a positive contribution to the various policies that affect them. This entrenches female subordination and denies them reproductive autonomy.

In line with the above, the African Union (AU) has called for gender parity in parliamentary seats.⁶⁵ Some African states like Rwanda and South Africa have responded positively, because the numbers of women in their parliaments are quite high. Nigeria is yet to heed the AU's call. Women's equal access to full participation in decision-making processes at all levels would promote gender equality and empower women to control their sexual and reproductive lives and become agents of social change.

7. Conclusion

From the foregoing discussion, it is evident that women in South Africa and Nigeria are yet to fully enjoy their reproductive health rights. Both countries have a dualist approach to the domestication of treaties which requires the ratifying country to subject the ratified treaty to legislation in its domain. While South Africa has made the best use of this approach by subjecting ratified international treaties on the reproductive health rights of women to domestication by national legislation, in Nigeria the various international treaties relating to these rights have not been domesticated – despite agitation from within and outside the country. Given the sensitive nature of human rights protected by these treaties, particularly the reproductive health rights of women, Nigeria should modify her treaty implementation approach and adopt the monist approach, in which ratified treaties operate automatically in a ratifying state upon ratification. Nigeria has the responsibility to respect and honor its treaty obligations and ensure that ratified treaties make a difference in the lives of the women for whose benefit they were ratified.

There are several reasons why the international legal framework for women's reproductive health rights has not been as effective as it should be – but less so in South Africa than Nigeria. It has especially been seen that some cultural practices in both countries impede the realization of women's reproductive autonomy. There should be public enlightenment campaigns which provide comprehensive and accessible information about the law and the harmful traditional practices that inhibit women's rights. This will limit the misinformation relating to the law and eradicate any stigma women may face when speaking out against the harmful practices in their communities. Similarly, education on the harmful effects of the practices should be encouraged at home and in schools for boys and girls as part of their socialization process.

⁶⁵ Article 4(1) of the Constitutive Act of the African Union; Resolution of the AU at Inaugural Session of AU Assembly of Heads of State and Government in July 2002 in Durban South Africa; Solemn Declaration on Gender Equality in Africa (SDGEA) adopted at Assembly of Heads of State and Government of AU in Addis-Ababa, Ethiopia, in July 2004.

This will sensitize both sexes to respect and treat each other with respect and dignity, and as equals. Public awareness of the various rights of women is a precondition to the effectiveness of the laws that affect them. When women are fully aware of the consequences of the cultural practice on their reproductive health, and what they stand to benefit if their rights are protected, they are empowered to claim their rights whenever they are breached.

Nigeria should emulate South Africa on gender parity in parliament, so that women can be actively involved in the legislative processes. This would enable them to agitate for the domestication of international treaties on women's reproductive autonomy, and for domestic legislation that is gender sensitive. It is not enough to ratify international treaties; states must make a concerted effort to ensure that their legal frameworks accommodate the domestication of these treaties – so that women can enjoy reproductive autonomy.

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