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SEXUAL HEALTH AND HUMAN RIGHTS IN THE AFRICAN REGION

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EXECUTIVE SUMMARY

1 INTRODUCTION

1.1 The aim of this study is to map jurisprudence emanating from the WHO African region with a focus on jurisprudence that has a direct or indirect bearing on sexual health. Given the vast number of countries that make up the WHO African region, the study does not attempt to capture the jurisprudence of every country in this region. Rather, it focuses on mapping jurisprudence that is *broadly* representative of the WHO African region. In this regard, twelve African countries have been selected. These are: Cameroon, Eritrea, Ethiopia, Kenya, Lesotho, Malawi, Nigeria, South Africa, Tanzania, Uganda, and Zimbabwe. The criteria for selecting these countries are explained in Chapter 1 of this study. The study is not however, solely confined to these countries. The study also draws from countries that are outside the twelve countries for the purposes of illustrating trends or gaps.

1.2 The African region displays a mixed picture regarding the development of sexual health jurisprudence. It has strengths but also weaknesses and many gaps. On the positive side, African countries have generally been ready and willing to ratify United Nations human rights instruments that impact on sexual health, including the Covenant on Civil and Political Right, the Covenant on Economic, Social and Cultural Rights, the Women's Convention and the Children's Convention. Furthermore, the postcolonial period has seen the African region develop its own regional human rights system. Though the system established under the African Charter on Human and Peoples' Rights is the most significant system but there are also promising sub-regional developments.

1.3 The African Charter, which guarantees both civil and well socio-economic rights, including the right to health, has potential to realize sexual rights in a holistic manner. The African Children's Charter and the African Women's Protocol are important additions to the African Charter. The African Women's Protocol, in particular, is highly receptive to the recognition of sexual health as a human right. The relatively recent addition of an African Court of Human Rights to the treaty bodies of the African Charter signals an intention to augment regional human rights protections and so does the transformation of the Organization of African Unity into the African Union.

1.4 Also on the positive side are African domestic constitutions. In the postcolonial period, African jurisdictions have invariably adopted written constitutions as supreme law of the land. African constitutions have generally been inspired by

the Universal Declaration and the Covenant on Civil and Political Rights, and contain Bills of Rights. To this extent, given judicial and political willingness, African constitutions are capable of yielding the type of sexual health rights that are associated with the Universal Declaration and the Covenant on Civil and Political Rights. The adoption of Bills of Rights means that while for the preponderant of African jurisdictions customary law and religious law continue to be sources of law, they are of diminishing legal importance and subordinate to constitutional law norms.

1.5 On the negative side, however, the African region is marked by a general absence of visible development of jurisprudence on sexual health. Though the African region has generally been a diligent and willing party to ratification of United Nations treaties, including the Women's Convention, it has been slow to discharge its treaty obligations, including in adopting appropriate legal protective measures. Even for jurisdictions that follow a monist tradition, ratification is not a reliable indicator of the domestic enforceability of state obligation that are the state has committed itself to. In the absence of domestic laws incorporating state obligation in a ratified instruments, ratified instruments promise much more than they can deliver. The enormous challenges that the African region faces in respect of HIV/AIDS, early/child marriages, sexual violence for example, have not been matched by a commensurate development of responsive jurisprudence.

1.6 Case-law on sexual health at the regional level is generally conspicuous by its absence. The African-Charter treaty bodies have yet to contribute tangibly towards sexual health jurisprudence, not least because communications on issues that have a sexual health dimension have not been forthcoming save for the Sudanese case - *Doebbler v Sudan* – that was decided by the African Commission on Human and Peoples' Rights. Where there is visible domestic jurisprudence, the African region has generally followed a pattern of uneven development with South Africa taking the lead in almost all the major areas of sexual health. The potential of many of the domestic constitutional provisions in protecting and promoting sexual health, including the rights to equality and non-discrimination, has remained dormant and untested. Constitutional rights which guarantee fundamental rights that are consonant with universal human rights protections have tended in many areas to remain as paper rights rather than tangible rights that are fulfilled in practice. Furthermore, in those areas where African jurisdictions have intervened to regulate on matters that bear on sexual health, with a few exceptions, a human rights-based approach has generally not been systematically integrated as to create an enabling domestic legal environment in which the state has a duty to respect, protect and fulfil sexual health.

2 Equality and Non-Discrimination

2.1 There is universal recognition of 'sex' as a ground protected against discrimination in regional human rights instruments as well as in domestic constitutions. However, 'sex' has tended to be understood narrowly as a biological category only but not as social category. Only South Africa is systematically developing jurisprudence that is inspired by gendered understanding of sex. Furthermore, save in the selected area of inheritance, sex and gender have generally not been the subject of litigation before African domestic courts.

2.2 Though customary law stands in conflict with constitutional guarantees of equality on the ground of sex on account of its patriarchal orientation, domestic courts have demonstrated a clear willingness to require customary law to be modified so as to comply with universal guarantees in a constitution. However, the decision of the Supreme Court of Zimbabwe in *Magaya v Magaya* remains an exception to the rule in terms of protecting discriminatory customary law from constitutional reach.

2.3 The discriminatory effects of Shari'ah law have yet to be subjected to constitutional and human rights litigation.

2.4 Only a minority of jurisdictions recognize marital status as a protected ground. An increasing number of jurisdictions recognize HIV status as a protected ground and prohibit compulsory testing. On the whole, African jurisdictions are far from recognizing sexual orientation as a protected ground. Protection of gender identity has generally not come to the fore in African jurisdictions. With the exception of South Africa, there is generally no jurisprudence on gender identity save the requirement to indicate sex or gender in formal documentation such as birth certificates and travel documents. A minority of jurisdictions have instituted legal protection against sexual harassment.

2.5 The decision of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* provides the African Charter-based system as well as domestic jurisdictions with an important benchmark for not only developing laws that respect and promote the right to equality and non-discrimination on the basis of sexual orientation, but also other grounds, including sex, marital status, and gender identity.

3 Penalization of Sexuality and Sexual Activities

3.1 Criminalization of same-sex sexual relations is the general norm in the African region. South Africa is an exception in developing jurisprudence that respects, protects and promotes human rights to same-sex sexuality and sexual activities.

3.3 Ages of consent to sexual activities in the African region generally discriminate on the grounds of sex/gender, age, and sexual orientation. Again South Africa is the exception in developing jurisprudence that is seeks to achieve equality as well as respect, protect and promote sexual autonomy.

3.4 The African region demonstrates serious discrepancies between ages of consent for sexual intercourse and ages for marriage. Customary law and religious law marriages generally recognize marriages of persons whose ages put them below and in conflict with the ages of consent for sexual intercourse.

3.5 An increasing number of African jurisdictions have adopted specific legal instruments to criminalize transmission of HIV. However, the public health utility of the laws is highly debatable.

4 Regulation of Marriage and the Family

4.1 All countries have plural sources governing marriage. With the exception of Zimbabwe which does not make provision for religious laws, marriages in all the countries are governed by civil law statutes, customary law and religious law. Uganda and Malawi are exceptional in having constitutional provisions that directly address marriage.

4.2 There is no uniform minimum age for civil marriage across the African region. For the majority of countries, 18 years is the age for consent to civil law marriage without the consent of the parents. However, Kenya, Malawi, Nigeria, Uganda and South Africa that have retained 21 years. To this extent, these countries do not meet their implied state obligations under the Children's Convention which treats persons that have attained 18 years or more as adults and not children as is implied by statutes that require parental consent for all persons under 21 years of age.

4.3 On average, African countries prescribe discriminatory ages of consent in their civil law statutes, setting a higher age for males and a lower age for females to maintain a gap of two to three years. For marriages under 18 years, civil law invariably requires parental consent. Sixteen years is the average minimum age for marriage with parental consent. Tanzania with 15 years, as the minimum age of marriage for girls, illustrates a minimum age which is below the average age.

4.4 The customary law of African countries does not prescribe a minimum age for marriage. Though customary law requires consent of the parties to the marriage, it creates opportunities for coercion as evidenced by early/child marriages mainly though the practice of parents arranging marriages for their children regardless of their wishes.

4.5 Islamic Shari'ah does not prescribe the minimum age for marriage. Though Islamic Shari'ah marriage law requires the consent of the parties to the marriage, in practice, it creates opportunities for coercion in the same way as customary law.

4.6 African customary laws and Islamic Shar'iah are decidedly patriarchal in orientation. They entrench gender inequality by envisaging a subordinate role for women, including in respect of decision-making about entry into marriage and power relations within marriage.

4.7 Customary and religious laws and practices of African countries create space for coercing children into marriage and facilitating children into becoming sexual partners and mothers at a premature age violate multiple human rights, including the rights to liberty and self-determination, including sexual autonomy, dignity, freedom from inhuman an degrading treatment, health, life, and education. Early/child marriages are responsible for serious health and psychological consequences, including deaths and disability among children.

4.8 African jurisdictions have an obligation to bring the current operation and application of their customary and Islamic Shari'ah laws and practices into line with the obligations that they have assumed under United Nation and regional treaties, including the Women's Convention and the African. Women's Protocol. In particular, Articles 2(f) and 5(a) and 16 of the Women's Convention, and article 2, 5 and 6 of the African Women's Protocol require African countries that have ratified these instruments to take appropriate steps to render customary practices that violate the right to choose whether to marry, and are discriminatory on the grounds of gender as well as patently harmful to physical and mental health.

4.9 Criminalization of adultery especially under Islamic Shari'ah where stoning by death is permitted negates human rights in a stark manner.

5 Violence: Rape

5.1 The majority of African countries still adhere to the traditional formulation of rape which requires vaginal penetration by a penis without the consent of the woman.

5.2 A few jurisdictions have reformed the elements of rape to reflect global developments in the reconceptualization of rape. The broad and gender neutral conceptualization of sexual violence under the Sexual Offences Act of Lesotho

and the Sexual Offences Act of South Africa and to a lesser extent under the Sexual Offences Act of Kenya complement the changing nature of rape law under international criminal law. The same applies to the move away from an emphasis on physical violence as a necessary part of the act of rape to focus, instead, on coercive circumstances.

5.3 Criminalization of marital rape remains the exception rather than the rule in the African region.

5.4 Eritrea is exceptional in retaining its Penal Code immunity against prosecution for rape upon agreement to marry.

5.5 The imposition of state civil liability for failure to prevent sexual violence under South African law in decision of the Constitutional Court of South Africa in *Carmichelle v Minister of Safety and Security and Another* is a new and significant development in the African region.

6 Violence: Trafficking

6.1 The majority of African jurisdictions do not have trafficking specific legislative provisions. Ethiopia, Nigeria, Tanzania and South Africa are exceptions.

6.2 The Palermo Protocol has been influential in guiding the form and substance of Nigerian, Tanzanian and South African trafficking specific legislation.

7 Violence: Domestic/Partner Violence

7.1 There is a conspicuous gap in the adoption of domestic violence-specific laws at the domestic level in the African region. Among the sampled countries only three countries – Malawi, South Africa and Zimbabwe – have domestic violence specific legislation.

7.2 Malawi, South Africa and Zimbabwe have formulated their laws to reflect a progressive approach to regulating domestic violence as primarily gender-based violence. The laws of these three countries protect people who are inside as well as outside of a marital relationship, do not require the use of physical violence as a necessary element of domestic violence, and provide remedies, including the grant of protection orders, in a manner that is intended to respond to the peculiarities of domestic violence. The Malawian, South African and Zimbabwean approaches to domestic violence are cognizant of its gender-violence dimension.

7.3 The establishment of Anti-Domestic Violence Counsellors and the Anti-Domestic Violence Council under Zimbabwean domestic violence law are important innovations in the African region in terms of designing legislation that is intended to deal not only with individual cases of domestic violence but also the eradication of domestic violence at a systemic level.

8 Violence: Female Genital Mutilation

8.1 An increasing number of African countries have female genital specific legislation. However, laws on female genital mutilation follow a predominantly crime and punishment model. They do not impose state duties to educate and raise awareness about the harmful effects of the practice.

8.2 The African Women's Protocol contains a framework for eradicating harmful traditional practices such as female genital mutilation in a manner that goes beyond proscription to include awareness-raising, education, provision of pertinent material support, and protection of those that are at risk of being subjected to the practice.

9 Violence: Virginity Testing

9.1 Virginity testing does not appear to be a widespread phenomenon.

9.2 South Africa and Zimbabwe have legislative provisions that address virginity testing. The South African Children's Act explicitly proscribes it for girls below 16 years and requires informed consent older girls and women. Virginity testing constitutes domestic violence under the Zimbabwean Domestic Violence Act if carried out at the instigation of person who is in a domestic relationship with the girl or woman.

10 Access to Health Services Related to Sex and Sexuality

10.1 The African Charter, the African Children's Charter and the African Women's Protocol on the Rights of Women provide good edifices for the development and implementation of a right to health services for the realization of sexual health at the domestic level. However, domestic constitutions and legislation have generally not followed suit.

10.2 The South African Constitution provides instructive models for respecting, protecting and fulfilling access to health services. Section 27 of the South African Constitution which guarantees everyone a right to health services is modeled after the Convention on Economic, Social and Cultural Rights. Section 27 has been interpreted and applied in a progressive manner by the Constitutional Court of South Africa.

10.3 Though access to contraceptive products and services is promoted by all African countries, there are generally no human rights frameworks to ensure accessibility for women and adolescents.

10.4 The South African Children's Act of 2003 is the only example of a serious attempt to comply with state obligations under the Children's Convention and the African Children's Charter in relation to access to health services by children at the domestic level. It is also the only example of a domestic attempt to clearly address the contraceptive needs of adolescents as well as their needs for HIV-related testing and counseling.

10.5 Termination of pregnancy remains highly criminalized in African jurisdictions. South Africa provides an exception to the rule. The South African Choice on Termination of Pregnancy Act of 1996 constitutes radical reform of abortion in line with the recognition of respect, protection and promotion of sexual and reproductive health as human rights. Ethiopian reform of abortion law is a positive development.

10.6 Jurisprudence on access to health services by immigrants is generally lacking. At the same time, the decision of the South African Constitutional Court in *Khosa and Others v Minister of Social Development and Others* provides the African regional human rights bodies as well as well as domestic jurisdictions with a human rights yardstick on the imperative to extending to immigrants that are permanently resident the social welfare benefits that are granted to citizens.

10.7 Jurisprudence on access to health services by incarcerated persons is generally lacking. However, South Africa has begun to develop positive standards. The right of incarcerated persons to access health care services is explicitly guaranteed under the South African Constitution.

11 Information, Education and Expression Related to Sex and Sexuality

11.1 At a regional level, the African Charter-based treaties, including the African Children's Charter and the African Women's Protocol, require states to discharge their duties in relations to the rights to health by inter alia, taking positive steps to provide information and education that is pertinent to the realization of sexual health.

11.2 The presence of a right to health in a constitution lends itself to an implicit duty upon the state to provide information and education about sexual health as a justiciable duty. Where the duty to provide health services appears as a directive principle in a constitution, it could also be said that a duty to provide information and education about sexual health is implied. The majority of African countries do not recognize health as justiciable discrete right under a

constitution. An increasing number, however, recognize a duty to provide health as a state directive principle.

11.3 Among the sampled countries, the Kenyan and Tanzanian HIV/AIDS Prevention and Control Acts are the best examples in the African region of clear legal duties on the part of the state to provide information and education for the prevention of sexually transmitted infections.

11.4 African obscenity laws are predominantly based on colonial models that recognise very broad and non-transparent discretion of the part of the state and courts to restrict information with the sexual content. Section 36 of the South African Constitution – the limitation clause – provides more transparent and human rights compliant criteria for adjudicating restrictions of the dissemination of information with a sexual content.

12 Sex Work

12.1 Criminalization of sex work is the overwhelmingly favoured approach in the African region.

12.2 Criminalization of sex work has remained oblivious to the human rights of sex workers.

12.3 Criminalization of sex work has failed to develop a synergic relationship with the promotion and protection of public health even in the face of an HIV/AIDS pandemic.

1 INTRODUCTION TO THE STUDY

1.1 Introduction

[1] Chapter 1, the present chapter, is the introduction to the study. It has the following aims and objectives:

- to explain the territorial scope of the study in terms of the countries that comprise the African region;
- to explain the criteria for selecting countries that form the main sample of the African regional study;
- to provide an outline of the African regional human rights systems and their relevance to sexual health-related human rights jurisprudence with a particular reference to the African Charter on Human and Peoples' Rights-based system;
- to acknowledge the place and limitations of regional soft law to mapping regional jurisprudence;
- to acknowledge the place of legal pluralism and conflict of laws in sexual health-related jurisprudence with a particular reference to customary law and religious law;
- to acknowledge the limitations of this study generally; and
- to provide an outline of subsequent chapters of this study.

1.2 Territorial Scope of the World Health Organization's African Region

[2] Africa, and more specifically the African Union,[1] is a geo-political entity that is made up of 53 states, namely: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Republic, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia,

[1] The African Union is established in accordance with the provisions of the Constitutive Act of the African Union of 2000. The African Union replaces the Organization of African Unity: F Viljoen *International Human Rights Law in Africa* (2007) 163-177.

South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

[3] The WHO African region (African region) is the territorial scope of this study. As a region, it represents a portion and not the entirety of African countries. It is made up of 46 countries, namely: Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Uganda, Zambia and Zimbabwe.

1.3 Aims and Objectives

[4] The chief aim of this study is to map jurisprudence emanating from the WHO African region with a focus on jurisprudence that has a direct or indirect bearing on sexual health. Given the vast number of countries that make up the WHO African region, the study does not attempt to capture the jurisprudence of every country in this region. Rather, it focuses on mapping jurisprudence that is *broadly* representative of the WHO African region. In this regard, twelve African countries have been selected. These are:

- Cameroon
- Eritrea
- Ethiopia
- Kenya
- Lesotho
- Malawi
- Nigeria
- South Africa
- Tanzania
- Uganda
- Zimbabwe

1.4 Criteria for Selecting Countries

[4] There are seven main interrelated considerations that have informed the choice of countries constituting the sample, namely: 1) geography; 2) accessibility of language; 3) legal traditions; 4) custom; 5) religion; 6) the availability of local researchers; and 7) the incorporation of human rights standards into domestic law. In part, the selected countries seek to be broadly geographically

representative. Cameroon and Nigeria represent West Africa, Eritrea, Ethiopia, Kenya, Tanzania, and Uganda represent East Africa, Malawi represents Central Africa, and Lesotho, South Africa and Zimbabwe represent Southern Africa. The absence of North Africa and, indeed, the general absence of Francophone countries in the sample is not an oversight, but a consideration that was prompted by the limitation in French language proficiency on the part of the researcher. North African countries generally employ French as their official language. Mapping jurisprudence from primary legal sources is not an exercise that can be competently discharged without the ability to *understand* and *synthesize* legal documents, including legislation and cases, in the language in which they are published.

In respect of legal traditions as a factor influencing, the study's point of departure is that Africa's colonial history is closely tied with the legal systems and cultures of African countries.[2] At the time of independence, African countries largely inherited the legal systems that were in place in the colonizing countries. For example, French colonies inherited the French penal and civil codes to regulate criminal and civil matters, whereas former British colonies inherited the English common law tradition. Although post-colonial reforms aimed at imprinting indigenous ownership on legal culture, and adopting bills of rights to entrench fundamental rights that draw UN international human rights instruments, the influence of colonial jurisprudence remains visible today in virtually all the African countries. One of the considerations for selecting the sample of countries, therefore, has been to include both civil law and common law legal traditions.

However, in seeking to explain colonial legal heritage as a criterion for selecting countries, it is important to highlight an important limitation. Owing to a lack of capacity to access language other than the English language on the part of the researcher, it has not been possible to achieve parity in terms of the colonial heritage representativeness of the sample. Rather, the aim has been to at least ensure that both the civil law tradition and the common law tradition are represented. Among the sample, only Cameroon a partly French and partly British former colony represents the civil law tradition inherited from the French, whereas the rest to the sample represents the common law tradition inherited from the British.

The colonial legal heritage aside, the recognition of customary law and religious law as sources of law are also factors that have informed the choice of the sample. The sample represents countries with plural legal systems in the sense of countries in which legal norms emanating from customary law or religious law run side by side with norms emanating from civil law, common law, statutory

[2] F Viljoen *International Human Rights Law in Africa*, *supra* at 531-538.

law or constitutional law, but with varying status or binding force.[3] Mapping plural legal systems serves to demonstrate the gap, or more significantly, the conflict between human rights norms and norms that are derived from customary law and religious law. It also serves to identify the areas of conflicts of laws and to elicit whether regional or national jurisprudence has developed a capacity for mediating any such conflicts with a view to respecting, protecting and fulfilling sexual health rights. In respect of religious law, Nigeria, in particular, provides a particularly poignant case study to the extent that they represent a jurisdiction in which religious law in the form of Islamic law or Shari'ah is a very visible part of the lives lived by a large part of the Nigerian population.

Another factor that influenced the sample of countries was the availability of local researchers with a sound grounding of the legal developments of the individual country outside of South Africa where the present researcher is located. Researchers with expertise in reproductive and sexual rights as human rights facilitated the mapping exercise by first conducting desktop reviews of pertinent laws in the countries in which they are located.[4] The reviews provided an invaluable starting point in the mapping exercise.

The presence of South Africa among the sample is in order to capture possible best practices from an African country that have been not only a regional, but has also earned recognition as a global leader in the incorporation of human rights standards into domestic law.

But while the twelve countries mentioned above constitute the main sample for mapping jurisprudence in the African region, it does not follow that the study will be confined exclusively to these countries. From time to time, the study also draws from countries that are outside the sample for the purposes of illustrating trends or gaps. Thus, it is useful to think about the twelve countries as the main rather than the sole case-studies that have facilitated the mapping of jurisprudence in the African region.

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[3] Griffiths J 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 24.

[4] With the exception of Dr Daniel Mekonnen, the researchers all successfully completed an LLM Programme specializing in Reproductive and Sexual Health as Human Rights at the University of the Free State, South Africa. Dr Mekonnen was co-ordinator for the LLM Programme from 2006-2008. As per country, the researchers are: **Cameroon**: Sone Munge LLB, LLM; **Ethiopia**: Sinafikesh Mitiku LLB, LLM; **Eritrea** Daniel Mekonnen LLB, LLM LLD; **Kenya**: Annie Mumbi LLB, LLM and MaryFrances Lukera LLB, LLM; **Lesotho**: Mamosebi Pholo LLB, LLM; **Malawi**: Crispine Sibande LLB LLM; **Nigeria**: Ebenezer Durojaye: LLB, LLM; **Tanzania**: Erasmina Massawe LLB, LLM; **Uganda**: Jamil Mujuzi: LLB, LLM, LLD; **Zimbabwe**: Aulline Mabika: LLB, LLM.

1.5 African Regional Human Rights Systems

[6] To understand the scope as well as limitations of the development of jurisprudence that impacts on sexual health in the African region, it is useful to have a sense of the place of regional human rights jurisprudence. This is because, all things being equal, in terms of hierarchy of laws, human rights law that is derived from international treaties is ordinarily at the top of the hierarchy. National constitutions form the second layer and they are followed by laws made by legislatures and decisions of courts. Customary law and religious law ordinarily form the lowest layer of jurisprudence. But of course, these are generalizations. In practice, domestic constitutions prevail over international law.[5] Furthermore, the exact status of customary law or religious law depends on the domestic legal and political cultures and traditions of the individual jurisdiction.

[7] It bears stressing that there is no common or even consistent regional constitutional tradition on the incorporation of international law into domestic law. The constitutions of some African countries follow a monistic approach and treat ratified treaties as domestic law which has a higher status than other domestic laws.[6] Cameroon falls into this group.[7] Other African constitutions adopt a dualistic approach and require the ratified treaty to be specifically incorporated into domestic law before it can acquire the status of domestic law. This is generally the position in the former British colonies that form the larger part of the sample.[8] Others, yet still, follow a hybrid approach and South Africa is a leading example.[9] It also serves well to note that though the labels of monism and dualism are useful for classifying provisions in constitutions that address the relationship between international law and domestic law, they have

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[5] Viljoen *International Human Rights Law in Africa*, *supra* at 529-567.

[6] This is generally the tradition in Francophone countries. Francophone countries have been historically influenced by article 53 of the Constitution of France of 1958 which provides that treaties that have been duly ratified prevail over Acts of Parliament. Examples of provisions of constitutions of Francophone countries following this approach include: article 292 of the Constitution of Burundi; article 292 of the Constitution of Cameroon; and article 132 of the Constitution of Niger. Note that in some Francophone jurisdictions, monism is recognized in the preamble to the constitution in addition to, or in place of, recognition in the substantive provisions of the constitution. See for examples preambles to the constitutions of: Burkina Faso (1991); Chad (1996); Guinea (1990); Niger (1991); Mali (1992); and Togo (1992).

[7] *Ibid*.

[8] This is generally the tradition in Anglophone countries or Commonwealth Africa. See for example section 211(1) of the Constitution of Malawi and section 111B of the Constitution of Zimbabwe of 1979 as amended.

[9] South Africa is an example of a jurisdiction that follows a hybrid approach. Section 231(2) of the Constitution provides that ratified treaties are binding on South Africa. At the same time, section 231(4) of the South African Constitution provides that an international agreement becomes domestic law in South Africa only when it is enacted by domestic legislation, save in the case of a self-executing provision of an agreement.

limited utility to the extent that they do not always capture how domestic courts relate to international law in practice. In this connection, for example, though Francophone countries, such as Cameroon, purport to follow a monistic tradition, provisions of ratified treaties are not necessarily given direct effect.[10]

1.6 African Charter-based human rights system

[8] The jurisprudence emanating from the African Charter on Human and Peoples' Rights (African Charter)[11] and the related treaties and protocols constitutes the most significant regional jurisprudence for the countries that fall under the African region. The relevant treaties, protocols, and legislation are summarized in this section.

[9] The African Charter is the most important human rights instrument of the African Union (and formerly the Organization of African Unity). It has been ratified by all the fifty-three states that comprise the African Union.[12] One of the distinctive features of the African Charter recognizes not just civil and political rights, but also socio-economic rights and collective 'peoples' rights. Provisions of the African Charter that are a potential source of jurisprudence on sexual health include, but are not limited to rights to:

- equality and non-discrimination;[13]
- equality before the law;[14]
- respect for life and integrity of the person;[15]
- human dignity;[16]
- liberty and security of the person;[17]

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[10] Senegal provides an example. Article 98 of the Constitution of Senegal of 2001 provides for monism. However, in *Guengueng and Others v Habré* (2002) AHRLR 183, the *Cour de Cassation* held that provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that Senegal had ratified were not enforceable because the Senegalese legislature had not adopted domestic legislative measures. Kenya follows a dualistic tradition, but in *Mary Rono v Jane Rono and Another*, Civil Appeal 66 of 2002, Court of Appeal of Kenya (2005) the court gave direct effect to ratified provisions of the Convention on the Elimination of All Forms of Discrimination against Women. The *Mary Rono* case is discussed in Chapter 2 of this study.

[11] African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3 REV. 5. Adopted on 27 June 1981, and entered into force on 21 October 1986.

[12] List of countries that have signed, ratified or acceded to the African Charter: http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf (Accessed December 22, 2009).

[13] Article 2 of the African Charter.

[14] Article 3 *ibid*.

[15] Article 4 *ibid*.

[16] Article 5 *ibid*.

[17] Article 6 *ibid*.

- receive information;[18]
- best attainable state of physical and mental health;[19]
- non-discrimination against women and protection of the rights of the woman and the child[20]

[10] The African Charter is supervised by the African Commission on Human and People's Rights and the African Court on Human and Peoples' Rights. The African Commission on Human Rights (the African Commission) was established to promote and protect human rights.[21] Its mandate is, inter alia, to promote and protect human rights and to interpret provisions of the African Charter.[22] As part of its protective function, the African Commission has a quasi-judicial mandate to receive and adjudicate on communications alleging violations of human rights by the state or organs of the state. The communications can be submitted by States Parties, non-governmental organizations or individuals.[23]

[11] The African Court of Human Rights (the African Court) is a newly established court. It was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[24] The jurisdiction of the African Court of Human Rights is to interpret and apply the Charter and any other instruments ratified by Member States.[25] The African Court has contentious jurisdiction as well as advisory jurisdiction.[26] In its contentious jurisdiction, thus far, the African Court has only adjudicated on one case.[27]

[12] A resolution to merge the African Court on Human and Peoples' Rights with the African Court of Justice of the African Union was adopted by the Summit of the

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[18] Article 9 *ibid*.
[19] Article 16 *ibid*.
[20] Article 18 *ibid*.
[21] Article 30 *ibid*.
[22] Article 45 *ibid*.
[23] Articles 47 and 55 *ibid.*
[24] Adopted on 10 June 1998 and entered into force on 25 January 2004.
[25] Article 3 of the Protocol to the Africa Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.
[26] Articles 3 and 4 *ibid*.

[27] In December of 2009, the African Court issued its first ruling in the *Matter of Michelot Yogogombaye v The Republic of Senegal.* In this case, the Court dismissed a petition asking the Court to intervene in legal matter brought against former President of Chad, Habre, in Senegal, where Habre was facing a trial for alleged war crimes and crimes against humanity committed in Chad. The Court dismissed the petition on the ground that Chad has not entered a declaration accepting the Court's jurisdiction to hear individual petitions as required by article 34(6) of the Protocol establishing the Court: <*lawprofessors.typepad.com/.../african-court-on-human-and-peoples-rights-issues-first-decision.html*>.

African Union in July 2004, but the Protocol on the merger of the two courts and Rules of Procedure of the new court have yet to be adopted. The Protocol on the African Court of Justice is not yet in force.

[13] In terms of decided cases, it is important to state that as yet, there is no established jurisprudence on sexual health emanating from the African Commission or the African Court on Human and Peoples' Rights. Though the African Commission has received communications and issued decisions, save for the decision in *Doebbler v Sudan*[28] , which is discussed in this section, no communication or decision has turned directly on sexual health or even women's rights.

Below is an overview of the decisions of the African Commission that have a bearance on sexual health. At best the decisions demonstrate that the African Charters jurisprudence on sexual health is still a nascent stage. All the decisions, with the exception of *Doebbler v Sudan* require generous extrapolation in order to link them with sexual health.

- *Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995). This is a case where the African Commission, inter alia, confirmed that subjecting a political detainee to the following conduct: excessive solitary confinement; shackling within a cell; extremely poor quality of food; and denial of access to medical care, constitutes a violation of article 5 of the African Charter. Article 5 guarantees the right to human dignity and prohibits all forms of torture, cruel, inhuman or degrading treatment. Although the case does not address sexual health, it, nonetheless, illustrates that under the African Charter the right to human dignity and the right not to be subjected to cruel, inhuman or degrading treatment can be understood as expansive concepts that are capable of application to all those situations where a human being is denied basic necessities which could logically include necessities necessary for the realization of sexual health.
- *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003): This was the first inter-state communication to the African Commission. It found that the killings, massacres, rapes, mutilations and the stopping of essential services in hospitals committed by the armed forces of the respondent states whilst they were in occupation of the eastern provinces of the Democratic Republic of Congo constituted not only violations of Part III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 and Protocol 1 of the Geneva Convention, but also violations of several

[28] *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003). Decision of the African Commission on Peoples' and Human Rights.

provisions of the African Charter, including: article 4 which guarantees the right to life and integrity of the person; article 5 which guarantees the right to human dignity; and article 16 which guarantees the right to the best attainable state of physical and mental health. Though the violations found by the Commission include sexual violence, the decision did not specifically focus on sexual violence.

- *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003): As alluded to earlier, this is the only case where the African Commission has adjudicated a matter that has a direct relationship with sexual health. The case was brought before the African Commission by eight students who had been subjected to corporal punishment under the Shari'ah Law-related provision in the Criminal Code of Sudan for acting in a manner considered 'immoral' and comprising of girls kissing, wearing trousers, dancing with men, crossing legs with men, and sitting with and talking with boys. The African Commission held that the application of lashes was contrary to article 5 of the African Charter which guarantees the right to human dignity and inter alia prohibits cruel, inhuman or degrading punishment.

  It is particularly significant that the Commission ordered Sudan to amend its Criminal Code to bring it into line with the country's obligations under the African Charter, thus asserting the supremacy of regional human rights law over domestic law and implicitly condemning, as a human right violation, the proscription and punishment of sexual expression in public spaces under Shari'ah. At the same time, it is significant that the African Commission refrained from questioning directly the human rights legitimacy of Shari'ah. The decision refrained from pronouncing on whether the provision in Sudan's Criminal Code that was based on Shari'ah Law was, itself, a violation of the Charter. The decision confined itself to pronouncing on the inappropriateness of the mode of punishment. While this case emanated from a jurisdiction outside of the WHO African region, namely Sudan, nonetheless, it illustrates a strength as well as a gap or even a weakness in the jurisprudence of the African Charter as it applies to sexual health.
- *Purohit and Another v The Gambia (*2003) AHRLR 96 (ACHPR 2003): The African Commission held that the Lunatics Detention Act of Gambia which authorized the detention of patients on the ground of mental health but did not define who a 'lunatic' was or provide for safeguards in respect of the diagnosis, certification and detention, consent to treatment and review of treatment, constituted, inter alia, a violation of the following provisions of the African Charter: article 2 which guarantees equality; article 5 which guarantees human dignity; and article 16 which guarantees the right to the best attainable state of physical and mental health. Though the case does not address sexual health directly, it is

relevant to the conception of the right to health generally under the African Charter though not to sexual health specifically.

- *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001): The African Commission held that exploitation of oil in a part of Nigeria by oil companies but with no regard to the health and environmental consequences for local communities, constituted, inter alia, a violation of the following provisions of the African Charter: article 4, which guarantees a right to life; and article 16, which guarantees a right to the best attainable state of physical and mental health. Again, this case, like the *Purohit* case, is only relevant to sexual health in an indirect way. The case suggests an awareness, on the part of the African Commission, about the holistic nature of health as a human rights under international human rights jurisprudence, and a willingness to adopt such a holistic approach under the African Charter.

[14] The African Charter on the Rights and Welfare of the Child (African Children's Charter)[29] is supervised by the Committee on the Rights and Welfare of the Child[30] whose mandate is to, inter alia, promote and protect the rights in the Charter and to monitor the implementation of the rights in the Charter.[31] The Committee may receive communications from any person, group, or Non Governmental Organizations. Provisions of the African Children's Charter that have a bearing sexual health include, but are not limited to:

- equality and non-discrimination;[32]
- privacy;[33]
- education;[34]
- best attainable state of physical, mental and spiritual health;[35]
- protection against abuse;[36]
- protection against harmful social and cultural practices;[37]
- protection against sexual exploitation;[38]
- and protection against sale, trafficking and abduction.[39]

The Committee on the Rights and Welfare of the Child has yet to develop its own jurisprudence.

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[29] Adopted on 11 July 1990 and entered into force on 29 November 1999.
[30] Article 32 of the African Children's Charter.
[31] Article 42 *ibid*.
[32] Article 3 *ibid*.
[33] Article 10 *ibid*.
[34] Article 11 *ibid*.
[35] Article 14 *ibid*.
[36] Article 16 *ibid.*
[37] Article 16 *ibid*.
[38] Article 27 *ibid*.
[39] Article 29 *ibid*.

[15] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[40] is a comprehensive regional human rights treaty on women's rights. Thus far, it has been ratified by the following countries: Angola, Benin, Burkina Faso, Cape Verde, Comoros, Democratic Republic of Congo, Djibouti, Ghana, Gambia, Guinea Bissau, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Tanzania, Togo and Zambia.[41]

[16] Provisions of the African Women's Protocol that bear on sexual health include but are not limited to the following provisions:

- article 2 which guarantees equality and non-discrimination;
- article 3 which guarantees human dignity;
- article 4 which guarantees life, and integrity and security of the person;
- article 5 which prohibits harmful traditional practices;
- article 6 which guarantees equality in marriage, including providing for 'free and full consent' to marriage and prescribing 18 years as the minimum age for marriage for women;
- article 11 which guarantees protection in armed conflict, including protection against all forms of violence, rape and other forms of sexual exploitation;
- article 12 which guarantees a right to education and training, including protection from sexual harassment, provision of access to counseling and rehabilitation to women to suffer abuses and sexual harassment; and
- article 14 which guarantees rights to health and reproductive rights, including protection against sexually transmitted infections and a right to abortion in given circumstances.

[17] The Constitutive Act of the African Union[42] is the legal instrument that transformed the Organization of African Unity into the African Union in 2000. The African Union is a political and economic entity. Although the Constitutive Act it does not have direct relevance to sexual health, it is, nonetheless, significant to note that the Act incorporates human rights as one of its foundational principles. One of the objectives of the Act is to promote and protect human and people's rights in accordance with the African Charter and other relevant human rights instruments.[43] Among the foundational principles of

[40] Adopted on 11 July 2003 and entered into force on 25 November 2005.
[41] List of countries that have signed, ratified or acceded to the African Charter as of 30 June 2009: http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf (Accessed December 22, 2009).
[42] Adopted on 11 July 2000 and entered into force on 26 May 2001.
[43] Article 3(h) of the Constitutive Act.

the Act are: promotion of gender equality[44] and respect for democratic principles, human rights, the rule of law and good governance.[45] Although the Act retains the principle of non-interference in another state's domestic affairs that was provided under the Charter of the Organization of African Unity, it does so in a significantly watered down form. Article 4(h) of the Constitutive Act provides that the African Union can interfere to stem serious human rights violations taking the form of war crimes, genocide and crimes against humanity, which, by implication, cover war-related crimes of sexual violence.[46]

1.7 Arab Charter and Organization of Islamic Conference-based systems

[18] Though the African Charter-based system is the most important regional human rights system, it is not the only relevant regional human rights system. Some countries are also part of sub-regional systems. Some members of the African Union are also part of the human rights systems that are established by Arab countries and the Islamic world, namely, the League of Arab States[47] and the Organization of Islamic Conference respectively.[48] Thus, membership of the Arab and Muslim regional organizations effectively gives some African countries membership of two or more regional organizations. Among the sampled countries, Nigeria is a member of the Islamic Conference. This has implications for the development of human rights jurisprudence among the member states. It is, however, beyond the scope of this study to inquire into jurisprudence emanating from the League of Arab States and the Organization of Islamic Conference save to make some general observations about the place of human rights in these organizations and the potential of conflict between jurisprudence emanating from these organizations and that emanating from United Nations and African Charter-based treaties, especially in the sphere of equality and non-discrimination.

[19] The operative human rights instrument for the Arab League of Arab States is the Arab Charter on Human Rights (Arab Charter). The Arab Charter, which was adopted in 1994 by the Council of the Arab League, reaffirms the International Covenant on Civil and Political Rights (Covenant on Civil and Political Rights)

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[44] Article 4(l) *ibid*.

[45] Article 4(m) *ibid*.

[46] According to article 7(1)(g) of the Rome Statute of the International Criminal Court (1998), 'crimes against humanity' include Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

[47] The following African countries are members of the League of Arab States are: Algeria, Comoros, Djibouti, Egypt, Libya, Mauritania, Morocco, Somalia, Sudan and Tunisia.

[48] The following African countries are members of the Organization of Islamic Conference: Algeria, Benin, Burkina Faso, Cameroon, Chad, Comoros, Côte d'Ivoire, Djibouti, Egypt, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Libya, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia and Uganda.

and the International Covenant on Economic Social and Cultural Rights (Covenant on Socio-economic Rights).[49] It emulates the Covenant on Civil and Political Rights and provides inter alia for equality and non-discrimination on the grounds of sex, or other status.[50] The civil and political rights guarantees also include rights to liberty, security of the person[51] and privacy.[52] However, it is less faithful to the Covenant on Socio-economic Rights. It does not contain a guarantee on the right to health, for example. It is significant that in its preamble, though not in its substantive provisions, the Arab Charter appeals to Islamic Shari'ah and other divinely revealed religions as law and religion that informs its foundational principles.

[20] From a perspective of enforcing human rights, the Arab Charter is a weak instrument in that it does not come with institutional machinery for ensuring the development of jurisprudence that could impact on sexual health. In terms of supervision, the Arab Charter differs markedly from other regional human rights treaties. There is no provision for adjudication of human rights violations by an independent judicial or quasi-judicial body. Instead, the Arab Charter establishes a Committee of Experts on Human Rights whose only mandate is to consider reports that are submitted by member states and submit its findings to a Standing Committee on Human Rights.[53]

[21] The Islamic Conference has a looser organizational structure than the Arab Charter in that its main human rights instrument – the Cairo Declaration on Human Rights in Islam (Cairo Declaration)[54] - is not a treaty but a mere declaration. That said, the Cairo Declaration contains provisions that articulate fundamental rights. It contains an equality, human dignity and non-discrimination clause.[55] It inter alia proscribes discrimination on the grounds of 'sex', 'social status' or 'other considerations'.[56] Women are explicitly guaranteed equality and human dignity.[57] At the same time, the Cairo Declaration appears to envisage women's equality and human dignity as qualitatively different from that enjoyed by men. In this respect, the Declaration provides that:

[49] Preamble to the Arab Charter on Human Rights.
[50] *Ibid* article 2.
[51] *Ibid* article 5.
[52] *Ibid* article 17.
[53] *Ibid* article 41.
[54] Proclaimed on 5 August 1990 by the Organization of Islamic Conference of Foreign Ministers, Resolution 49/19-P.
[55] Articles 1(a) of the Cairo Declaration.
[56] *Ibid*.
[57] *Ibid* article 6(a).

> Woman is equal to man in human dignity, and has her own right to enjoy as well as duties to perform; and her own civil and financial independence, and the right to retain her name and lineage.[58]

It is significant that the Cairo Declaration subscribes to the principles of Shari'ah as the operative human rights principles for enjoying rights. It provides that the Declaration is subject to Shari'ah.[59] To this extent, the Declaration harbours conceptions of equality and human rights that provide lesser protection than that the protection under human rights standards emanating from United Nations treaties and the African Charter-based system.

1.8 Sub-regional Economic Communities

[22] Organizations that have been established to facilitate and galvanise economic co-operation at the African sub-regional level should also be regarded as an integral part of the human rights institutional landscape of the African region. Though the ultimate aim of such sub-regional economic organizations has generally been the achievement of economic and political union through activities such as increased trade and financial co-operation, to the extent that the objective of achieving economic development and eradicating poverty impacts on human welfare, the organizations are inextricable linked with human rights. [60] Indeed, some organizations explicitly acknowledge the respect for human rights as one of their foundational principles, and have, over time, adopted protocols and declarations that are committed to protecting and promoting human rights, including promoting gender equality and eradicating discrimination. To this extent, some of the founding treaties can be used to provide a rationale for developing rights-based approaches to economic and political integration that has implications for sexual health.[61]

Ultimately, however, much depends on whether the sub-regional bodies that have the responsibility to implement the treaties and to monitor the accompanying states obligations, are conscious of the human rights implications of the treaties, and have the political or judicial willingness to give human rights obligations a concrete expression. The jurisprudence of the European Union demonstrates that an organization that is primarily established to foster economic and political union can end up making a considerable contribution towards the development of human rights jurisprudence.

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[58] *Ibid*.
[59] Article 24 *ibid*.
[60] F Viljoen 'The Realisation of Human Rights in Africa Through Sub-Regional Institutions' (2001) 7 *African Yearbook of International* Law 186.
[61] *Ibid*.

Though Africa has, at least, fourteen sub-regional economic organizations,[62] the preponderance of the organizations have not intersected with human rights, not least because of lack of objects or operational structures that lend themselves to intersecting with human rights. Two organizations, however, have been the exception to the rule to the extent that their objects incorporate the protection of human rights in an explicit way and their treaty bodies have adjudicated on human rights violations. These are the Economic Community of West African States and the Southern African Development Community.

1.9 Economic Community of West African States

[23] *Economic Community of West African States (West African Community)*: The West African Community was formed in 1975 and revised in 1993. The members are: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania (which withdrew in 2000), Niger, Nigeria, Senegal, Sierra Leone and Togo. Among the fundamental principles of the Treaty of the West African Community are: the recognition, promotion and protection of human rights in accordance with the African Charter;[63] and accountability, economic and social justice and popular participation in development.[64] The Protocol to the West African Community Treaty on Democracy and Good Governance reinforces the protection of human rights in the West African Community region by placing human rights obligations on member states, including an obligation to 'eliminate all forms of discrimination and harmful and degrading practices against women'.[65]

It is significant that, as part of its commitment to human rights protection, in 2001, the West African Community adopted the Declaration on the Fight against Trafficking in Persons.[66] Combating human trafficking, especially of women and children for sexual exploitation, is one of the sexual health challenges facing the

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[62] Viljoen *International Human Rights Law in Africa, supra* note at 488. In terms of regional affiliation, the sub-regional organizations can be listed as: **North Africa**: Arab Maghreb Union (1989); Community of Sahel-Saharan States (1998); Euro-Mediterranean Free Trade Area (1995); **West Africa**: Economic Community of West Africa (1975); West African Economic and Monetary Union (1994); Manu River Union (1973); Liptako-Gourma Authority (1970); West African Monetary Zone (1975); **Central Africa**: Economic Community of Central African States (1983); Economic Community of Great Lake Countries (1976); Central African Economic and Monetary Community (1964); **Eastern and Southern Africa**: Southern African Customs Union (1969); East African Community (1999); Intergovernmental Authority on Development (1996); Common Market for Eastern and Southern Africa (1993); Southern African Development Community (1993); Indian Ocean Commission (1984).

[63] Article 4(g) of the Treaty of ECOWAS.

[64] Article 4(h) *ibid*.

[65] Article 40 of the Protocol to the ECOWAS Treaty on Democracy and Good Governance.

[66] Adopted by ECOWAS at the Twenty-Fifth Ordinary Session of Authority of Heads of States and Government, Dakar, 20-21 December 2001.

West African region on account of growing transnational criminal networks. The Declaration, inter alia, aligns itself with the United Nations Convention against Transnational Organised Crime[67] and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[68] and urges member states that have yet to become signatories or to ratify these instruments to do so.

A cardinal feature that distinguishes the West African Community from most other sub-regional organizations as to render it relevant to the development of human rights jurisprudence is that it has a court that has made rulings that have addressed human rights, albeit, in a very small number of case.[69] The founding treaty of the West African Community establishes a Court of Justice of the Community whose decisions are binding on members states.[70] Though in terms of sexual health-related jurisprudence the Court of Justice of the West African

[67] Preamble to the Declaration on the Fights against Trafficking in Persons; United Nations Convention against Transnational Organised Crime (2000).

[68] Preamble to the Declaration on the Fights against Trafficking in Persons; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000).

[69] *Olajide Afolabi v Nigeria* Suit No ECW/CCJ/APP/01/03 (April 2004). This was the first case to be heard by the ECOWAS Community Court. The Court held that it had no jurisdiction to hear the case as at the time the ECOWAS Treaty did not expressly give locus standi to individuals and appeared to limit it to states. In 2005, through the adoption of a protocol – Supplementary Protocol A/SP.1/01/05 (2005) - the ECOWAS Treaty was amended to allow individuals direct access; *Ugokwe v Nigeria* ECW/CC/APP/02/05 (2005). The Court observed that the inclusion and recognition of the African Charter in article 4 of the ECOWAS Treaty has the effect of incorporating into the ECOWAS Treaty the human rights guaranteed under the African Charter; *Manneh v Gambia* ECW/CCJ/JUD/03/08 (June 5, 2008). The Court held that the detention of a journalist by Gambian authorities constituted serious violations of human rights; *Hadijatou Mani Koraou v Republic of Niger* ECW/CCJ/JUD/06/08, (October 28, 2008). This case is discussed in this section.

[70] Article 15 of ECOWAS Treaty. This is not to suggest that ECOWAS is the only sub-regional organization with a judicial treaty body, but rather it is to highlight that though other treaty bodies have courts, the courts have yet to adjudicate on cases that raise human rights issues. The creation of a judicial treaty body is also shared with the following sub-regional organizations: East African Community (EAC): The EAC was established in 1967 between Kenya, Tanzania and Uganda. It was originally founded in 1967, but collapsed in 1977. The EAC was officially revived on 7 July 2000. Members are Burundi, Kenya, Rwanda, Tanzania and Uganda. The East African Court of Justice is the judicial arm of the Community. The court has original jurisdiction over the interpretation and application of the 1999 Treaty that re-established the EAC and in the future may have other original, appellate, human rights or other jurisdiction upon conclusion of a protocol to realise such extended jurisdiction. It is temporarily based in Arusha, Tanzania; Common Market for Eastern and Southern Africa (COMESA); COMESA has a court that has the jurisdiction to hear disputes arising from the 'interpretation and application of the Treaty: Article 19 of COMESA Treaty; The Southern African Development Community (SADC) has not so much a court, but a tribunal which functions like a court. The SADC Tribunal is discussed in this section.

Community has largely not been active, the decision of the Court in *Hadijatou Mani Koraou v The Republic of Niger*[71] in 2008 signals an important development.

- *Hadijatou Mani Koraou v The Republic of Niger* ECW/CCJ/JUD/06/08 28 October 2008 (ECOWAS Community Court of Justice): In parts of West Africa and North Africa, slavery still exists although it has been legally abolished.[72] This case was brought against Niger by a woman applicant Hadijatou Mani Koraou, who was a citizen of Niger. The applicant had been born into a customary practice of slavery through descent. Her mother was a slave and, by custom, she was treated as a slave by her mother's 'owners'. In 1996, when she was twelve years of age, she was sold by her owner for 240 CFA francs[73] to a 46-year old man, El Hadj Souleymane Naroua (Souleymane) in accordance with the custom of the Haoussa people and under practice called *Wahiya*. According to *Wahiya*, a girl who is sold becomes a slave and concubine of the buyer. She is required to work for the buyer and is obliged to meet his sexual demands at all times. The applicant was subjected to these conditions from the age of twelve. For a period of nine years, the applicant endured forced sexual acts by Souleymane and bore four children. Also during this period, she was frequently subjected to beatings for insubordination by her 'master'. Souleymane was already married to four wives under Islamic law. The applicant served as a *Sadaka* – a 'fifth' wife who could not be legally married to the man under Islamic law but serves as a slave and concubine.

  In 2005, Souleymane gave the applicant a certificate liberating her from slavery. The certificate was signed by the applicant, Souleymane - the 'master' - and the chief who was the village's traditional authority. However, when the applicant attempted to leave, Souleymane prevented her from doing so on the ground that the applicant was his wife. Under the pretext that she was visiting her mother who was ill, the applicant was allowed to leave. Following her escape, the applicant brought an action before a civil and customary seeking to have a freedom recognised. The tribunal ruled in her favour finding that she was never legally married to Souleymane. Souleymane appealed against the decision before the Court of First Instance. He was successful. The applicant then appealed to the final court of appeal – the Judicial Chamber of the Supreme Court. The

[71] *Hadijatou Mani Koraou v Republic of Niger* ECW/CCJ/JUD/06/08, October 28, 2008 (ECOWAS Community Court of Justice).

[72] Traditional Slavery in West Africa <*www.anti-slaverysociety.addr.com/hieroraf.htm*>*Slavery and Slave-like Practices: Report of the Mission to Mauritania*, by Marc Bossuyt, July 2, 1984, to the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities.

[73] As of 23 April 2010, one US dollar is equivalent to 492 CFA francs < *www.exchange-rates.org/Rate/USD/XOF*>.

Supreme Court quashed the decision of the Court of First Instance but only in relation to a procedural matter. The Court did not address the substantive issues relating to custom of selling girls under the customary law of the Haoussa people and the practice of *Wahiya*. The Supreme Court remitted the matter to a lower court.

Whilst the remitted proceedings in the lower courts were in progress, the applicant married someone. Souleymane filed a criminal complaint against her and she was convicted by the Criminal Division of the Court of First Instance for bigamy. She was fined as well as imprisoned. The Criminal Code of Niger, which must be read subject to the recognition of Islamic law which permits bigamy for men, criminalises bigamy. As a response, the applicant filed a criminal complaint againt Souleymane for committing enslavement of another person contrary to article 270(2) and (3) of the Criminal Code of Niger as amended by Law 2003-025 of 22 July 2004. Concurrent to the criminal proceedings, the Supreme Court gave the applicant a right to petition for divorce from Souleymane and ordered her release pending the determination of the divorce proceedings.

Against a backdrop of discontent with the manner in which the legal system of Niger and its courts in particular was largely condoning the practices of slavery and *Wahiya* and failing to vindicate her human rights, in particular the rights to liberty to marry and security of the person, equality and non-discrimination, and human dignity, the applicant brought complaint before the West African Community Court of Justice. She sought a declaration that Niger was in violation of the following articles of the African Charter: article 1 (obligation of state to give effect to the rights guaranteed under the Africa Charter; article 2 (right to non-discrimination, inter alia on the ground of sex; article 3 (right to equality before the law and to equal protection under the law; article 5 (right to human dignity); 6 (right to liberty and security of the person); and article 18(3) (obligation of the state to eliminate all forms of discrimination against women). The applicant also sought financial reparations for the nine years she spent with Souleymane in enslavement and imposed concubinage. The applicant was partially successful. The Court made pronouncements which impact both positively as well as negatively on the development of human rights jurisprudence in an African sub-region.

On the positive side, the following observations can be made:

- In contesting the proceedings before the Court of Justice, Niger argued, inter alia, that proceedings were still pending before the domestic courts and that the applicant has failed to exhaust domestic remedies. The Court

said that while the requirement of exhausting domestic remedies was a recognised principle of subsidiarity in human rights protection, it was a principle that should be applied flexibly.[74] Moreover, it was always open to members of a treaty to waive the requirement. In the case of the West African Community Treaty, there was no such requirement and West African Community members must be taken to have freely consented to its waiver, but subject only the requirements stated in the rules of the Court.[75] The Court said that the principle of exhaustion of remedies could not be used to bring into the proceedings requirements that are more cumbersome than those that are provided in the West African Community Treaty.[76]

- The Court's ruling on the duty to exhausting domestic remedies is a progressive one. For the Court to have conceded the arguments put forward by the state of Niger on exhaustion of domestic remedies would have effectively rendered the applicant hostage to a legal system that was singularly failing to protect the human rights of the applicant and condemn slavery, including sexual slavery. Despite provisions of the Constitution of Niger proclaiming allegiance to the Universal Declaration of Human Rights and the African Charter[77] and expressly guaranteeing equality and non-discrimination on the ground of sex,[78] human dignity,[79] freedom from slavery, cruel, inhuman and degrading treatment,[80] the applicant had, nonetheless, been put through a legal system that adjudicated her claims without giving recognition to her constitutional rights. The Criminal Code that prohibited slavery did not appear to have any impact on the manner in which the courts of Niger were adjudicating the case, not least the absurdity of convicting the applicant for bigamy.
- The Court said that the West African Community Treaty effectively incorporated the human rights guarantees under the African Charter through declaring its adherence to the African Charter in article 4(g) of the Treaty. It is submitted that by treating the human rights guarantees as an effectively a substantive component of the West African Treaty, the Court adopted a progressive approach to human rights protection. It is an approach that encourages aggrieved parties to have recourse to sub-regional human rights protection without the need to also approach

[74] Ibid para 39.
[75] According to Article 10 d. ii of the Supplementary Protocol A/SP.1/01/05 relating to the ECOWAS Court "Access to the Court is, inter alia, open to individuals on application for relief for violation of their human rights providing that the submission of application for which shall: (i) not be anonymous; nor (ii) be made whilst the same matter has been instituted before another International Court for adjudication.
[76] *Hadijatou Mani Koraou v Republic of Niger*, para 45.
[77] Preamble to the Constitution of Niger of 1999.
[78] Article 8 ibid.
[79] Article 10 ibid.
[80] Article 12 ibid.

separately the regional system under the African Charter. All things being equal, sub-regional systems will, in general, be closer to aggrieved parties than the regional system.

- The Court condemned the slavery that had been perpetrated against the applicant.
- The Court found that the applicant had not consented freely to a marriage, and, instead, she had been subjected to slavery through the practices of *Wahiya* and *Sadaka* and in the process she had suffered physical and psychological harm.
- The Court also found that the applicant has been discriminated against on the grounds of gender and social origin.
- The Court held that the Court of First Instance of Niger had failed to condemn the enslavement of the applicant and by its actions and decisions had, instead, had implicitly accepted or tolerated the crime of slavery.

On the negative side, the following observations can be made by way of impressing especially on the gaps the Court demonstrated in its understanding of international human rights as well as inconsistencies in its approach:

- Whilst holding that the human rights of the applicant had been violated, the Court said that the violations were not attributable to the state of Niger and were, instead, only attributable to Souleymane.[81] In holding that only Souleymane was responsible for the violation, the Court singularly failed to avail itself of a now well accepted principle of human rights protection that holds the state accountable for the actions of third parties.[82] Though the 'obligation to protect' seeks to primarily hold the state accountable for violation of human rights by the state directly or by its agents, it is now accepted that where the state fails to take all reasonable measures to prevent, investigate, punish of redress violations of human rights by third parties, the state will be held accountable as if the state or its officials had committed the violations.[83]
- Though the Court observed that the marriage laws of Niger, inter alia, require the consent of the parties for the marriage to be valid and that in this instance, the applicant had not consented, the Court failed to put under more focused and comprehensive human rights scrutiny *Wahiya and Sadaka* as customs that were still practiced in Niger and the degree to which the customs blatantly flout a catalogue of human rights include the liberty to choose when and whom to marry, sexual autonomy and

[81] *Hadijatou Mani Koraou v Republic of Niger*, para 71.

[82] M Scheinin 'Characteristics of Human Rights Norms' in Krause C & Scheinin M International Protection of Human Rights: A Textbook (2009) 19-38 at 28.

[83] Human Rights Committee, General Comment No 31 on the nature of the general legal obligation imposed on State Parties to the Covenant, UN Doc. HRI/GEN/1/Rev.9 (2004);

reproductive autonomy. The fact that the applicant began to be subjected to these customs when she was only twelve years of age deserved a more deliberate inquiry on the part of the Court, not least because of the prevalence of child marriages in many parts of Africa. Child marriages are not merely a violation of liberty and self determination. They also impact adversely on sexual and reproductive health.

- The applicant had argued that her arrest, detention and imprisonment for bigamy following conviction by the Criminal Court of First Instance were arbitrary and unlawful. Whilst holding that the applicant has been enslaved under the customs of *Wahiya* and *Sadaka*, the Court inexplicably found that the applicant had been lawfully arrested and detained and imprisoned in connection with the crime of bigamy. The court said:

  > Detention is arbitrary if it is not founded on any legal basis. In this particular case the applicant's arrest and detention intervened to implement a judicial decision rendered by the criminal court. The decision whether ill-founded or not, constitutes a legal basis that is not for the Court to assess.[84]

1.10 Southern African Development Community

[24] *Southern African Development Community (Southern African Community):* The Southern African Community was formed in 1980 as the Southern African Development Co-ordination Conference. Initially, the Southern African Community was formed as a sub-regional body for reducing economic dependence on economically dominant South Africa. At the time, South Africa was a pariah state on account of its apartheid system of government. The Southern African Development Coordination Conference became the Southern African Development Community in 1993,[85] and its members include countries that are part of the sample of this study. It comprises of 15 countries, namely Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

[25] Though primarily concerned with economic and political integration, the Southern African Community is also concerned with the achievement of uniform protection and promotion of human rights. The Southern Africa Community has shown some signs of being a progressive sub-regional body in terms of the development and/or adoption of human rights instruments that directly or indirectly impact on sexual health. Among the objectives of the Southern African Community Treaty is alleviating poverty, enhancing the standard and quality of

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[84] *Hadijatou Mani Koraou v Republic of Niger*, para 91.

[85] O Osode 'The Southern African Development Community in Legal Historical Perspective' (2003) 28 *Journal for Juridical Science* 1.

life of the people of Southern Africa and supporting the socially disadvantaged.[86] The Treaty seeks to 'evolve common political values, systems and institutions, and to strengthen and consolidate the long-standing historical, social and cultural affinities and links among the people of the region'.[87] The Treaty subscribes to the principle of equality and discrimination against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability.[88] Member States are obliged to take all steps necessary to ensure the uniform application of the Treaty,[89] and to accord this Treaty the force of national law.[90]

[26] Gender equality has received distinct attention in the Southern African Community.[91] Gender equality is the medium through which the Southern African Community, as a sub-regional organization, has intersected with sexual health. In pursuit of gender equality, the Southern African Community has adopted the following declarations and protocol:

- *Gender and Development: A Declaration by Heads of State or Governments of the Southern African Community*: In 1997, to reinforce the commitment to achieving gender equality, the Southern African Community adopted a declaration – Gender and Development: A Declaration by Heads of State or Governments of the Southern African Community (the Declaration on Gender). The Declaration on Gender, which recognises gender equality as a fundamental human right,[92] establishes an enabling policy framework for mainstreaming Gender in Southern African Community activities. It commits Member States to rendering quality reproductive and other health services accessible to women and men.[93] Even more pertinently, the Declaration commits Member States to recognizing, protecting and promoting the reproductive and sexual rights of women and the girl child.[94] It is committed to discharging obligations under the Convention on the Elimination of all forms of Discrimination against Women.[95] Furthermore, the Declaration aligns itself with the consensus reached at

[86] Article 5(1)(a) of the SADC Treaty.
[87] SADC Monitor (1991) 1.
[88] Article 6(2) of the SADC Treaty.
[89] Article 6(4) *ibid*.
[90] Article 6(5) *ibid*.
[91] F Banda 'Going it Alone? SADC Declaration and the Gender Debate' (2002) 2 *Journal of African Law* 259; CG Ngwena 'An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective' (2004) 32(4) *Journal of Law, Medicine & Ethics* 708.
[92] Preamble to the Gender Declaration.
[93] Preamble to the Gender Declaration.
[94] *Ibid*.
[95] *Ibid*.

Cairo and Beijing Conferences.[96] Complying with the Declaration calls for, inter alia, repealing and reforming policies, laws and practices that still subject women to discrimination in all Southern African Community member states.

- *Prevention and Eradication of Violence Against Women*: In 1998, Southern African Community adopted the Prevention and Eradication of Violence Against Women and Children[97] as an Addendum to the Declaration on Gender (the Addendum). The Addendum recognises violence against women as a violation of fundamental human rights as acknowledged by the Vienna Declaration and Programme of Action of 1993.[98] It conceives violence against women as including sexual violence which occurs in the community in such forms as threats, rape, sexual abuse, sexual harassment and intimidation, trafficking in women and children, forced prostitution, and violence in armed conflict.[99] The Addendum calls for, inter alia, the adoption and implementation of laws to prevent and eradicate all forms of violence against women.[100]
- *Southern African Community Development Protocol on Gender and Development (Southern African Community Protocol on Gender):* A relatively more recent but significant Southern African Community development is the Southern African Community Protocol on Gender and Development of 2008. The Protocol seeks to bring synergy to the various instruments that Southern African countries have agreed upon both regionally and globally. These include the International Conference on Population and Development, the Beijing Declaration and Platform for Action, the Women's Convention, the Millennium Development Goals, the Southern African Community Declaration on Gender and its Addendum and the African Protocol on the Rights of Women in Africa.[101] Effectively the Protocol renders the Declaration on Gender into a binding treaty among Southern African Community member states. Therefore, it is important to treat the Protocol as an instrument with the status of international law that is binding rather than soft law that is not binding.

[27] The main objective of the Southern African Community Protocol on Gender can be summarized as the achievement of substantive equality for women. The Protocol seeks to achieve gender equality and eliminate gender discrimination in

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[96] *Ibid*.
[97] The Prevention and Eradication of Violence Against Women and Children. An Addendum to the 1997 Declaration on Gender and Development. Adopted by the Heads of State of SADC countries at Grand Bay, Mauritius on the 14th of September 1998.
[98] Para 4 *ibid*
[99] Para 5 *ibid*.
[100] Para 9 *ibid*.
[101] Article 3(b) of the SADC Protocol on Gender.

all its manifestations, including gender based violence, through the development and implementation of gender responsive legislation, policies, programmes and projects.[102] The Protocol on Gender defines discrimination holistically in a manner that emulates the Women's Convention and the Protocol on the Rights of Women.[103]

[28] The Southern African Community Protocol on Gender is both a bill of rights as well as a plan of action in that it provides that by 2015, Member States shall have enshrined gender equality in their constitutions and shall ensure that constitutionally guaranteed gender rights are not compromised by any contrary provisions, laws or practices.[104] By 2015 member states are required to have reviewed their legislation and rendered it where necessary consonant with the equality and non-discriminations norms of the Protocol.[105] The objective behind this obligation is both to fill in gaps in human rights protection as well as outlaw existing discriminatory norms that are contrary to gender equality such norms emanating from customary, religious and other laws. The Protocol makes this clear through other provisions that, for example, require member states to recognize the equality of genders under customary law.[106]

[29] The Protocol on Gender has several provisions that impact on sexual and reproductive rights directly or indirectly. The provisions are aimed at complementing rather than detracting from respecting, promoting and protecting sexual and reproductive health as developed in international and regional treaties, and consensus documents. The Protocol defines 'sexual and reproductive rights' in a manner that is aimed at facilitating rather than restricting the respect, protection and fulfillment of sexual health. Under the Protocol sexual and reproductive rights mean the following:

> the universal rights relating to sexuality and reproduction, including the right to sexual autonomy, 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.[107]

[30] Article 9(g) of the Southern African Community Treaty provides for the establishment of a tribunal that has the jurisdiction to interpret the provisions of

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[102] Article 3(a) ibid.

[103] Article 1 of the SADC Protocol on Gender defines discrimination as 'any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, by any person of human rights, and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

[104] Article 4(1) *ibid*.

[105] Article 6(1) *ibid*.

[106] Article 7(a) and (b) *ibid*.

[107] Article 1 *ibid*.

the Treaty and to adjudicate disputes arising under the Treaty between member states, or between member states and individuals.[108] The Tribunal has been established though the adoption of the Southern African Community Protocol on the Tribunal.[109] The decisions of the Tribunal are final and binding on member states.[110] The Tribunal is a judicial body. Its members serve in an independent capacity and are drawn from persons that are eligible for appointment to the highest judicial office in their home country. When interpreting the Treaty, the Protocol on the Tribunal prescribes that the Tribunal must have regard not only to the law derived directly from the Treaty, but also law that emanates from the principles developed under international law.[111]

[31] The tribunal began operating in 2007. The early indication is that the Tribunal is seeking to assert its judicial independence in the protection of human rights even in the face of offending the sensibilities of member states. In *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe*[112] the Tribunal issued a ruling against Zimbabwe on the ground that the state policy of compulsorily acquiring farms owned by white farmers pursuant to section 16B of Amendment No 17 to the Constitution of Zimbabwe was discriminatory on the basis on race. Article 4(c) of the Southern African Community Treaty requires member states to act in accordance with human rights. It is significant that though the Tribunal does not have an express mandate to adjudicate on human rights, it clearly sees the Southern African Community Treaty's commitment to human rights as a window of opportunity for integrating international human rights jurisprudence into Southern African Community jurisprudence. The Tribunal was able to adjudicate on and provide relief to, a claim that could not be entertained by Zimbabwean court because of an ouster clause that was inserted into the Zimbabwean Constitution as an amendment to the Constitution.[113] It is also significant that the Tribunal found the discrimination in question to constitute indirect discrimination notwithstanding that section 16B of Amendment No 17 did not explicitly refer to race. It was clear to the Tribunal that the compulsory acquisitions powers where exercised only in relation to farms owned by white farmers. The *Campbell* case suggests that the Southern African Community Tribunal would be equally amenable to adjudicate favourably on claims alleging sex or gender discrimination arising from the Southern African Community Treaty or the Southern African Protocol on Gender and Development.

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[108] Article 16(1) of the SADC Treaty; Article 15 of the SADC Protocol on the Tribunal.

[109] SADC Protocol on Tribunal and the Rules of Procedure, adopted on 7 August 2000, and entered into force on 18 August 2004 <*www.sadc.int/tribunal*>.

[110] Article 16(5) ibid; Article 24 of SADC Protocol on the Tribunal.

[111] Article 21 of SADC Protocol on Tribunal.

[112] *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* (2008) SADCT 1, Case No 2/2007.

[113] Section 3(a) of Amendment No 17 to the Constitution of Zimbabwe.

1.11 African Regional and Sub-Regional Soft Law

[32] This study is primarily about mapping law that is authoritative in the sense of being a binding legal source. For this reason, it has generally excluded, from the scope of human rights jurisprudence, soft law in the form of non-binding regional sources such as declarations by regional international organizations, or bodies of experts or consensus statements and programmes of action emanating from regional conference resolutions or meetings. However, to the extent that non-binding sources can be useful to the interpretation and application of human rights treaties or may influence future jurisprudential developments, it serves well to note the existence of soft law norms that have a close bearing on sexual health. The following are a summary of the main soft laws:

- *African Platform for Action*:[114] The African Platform for Action is a programme of action for enhancing the rights of women. It addresses, inter alia, women's health, including family planning and HIV/AIDS.[115] Human rights are fundamental to the programme of action.[116]
- *Declaration of the Sixth African Regional Conference on Women: Mid-Term Review of the Implementation of the Dakar and Beijing Platforms of Action*:[117]This Declaration, inter alia, addresses women's health and HIV in particular from a rights-based perspective.
- *Victoria Falls Declaration of Principles for Promoting the Human Rights of Women*:[118] The Declaration emanated from a series of meetings held by judges from Commonwealth countries. The focus is on protecting and promoting the human rights of women.
- *Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (Abuja Declaration)*:[119] The Abuja Declaration emanated from African governments under the auspices of the OAU (Now African Union). HIV/AIDS was declared to be a state of emergency in Africa and governments pledged to devote 15% of their annual budgets to health.[120]
- *Grand Bay (Mauritius) Declaration and Plan of Action (Grand Bay Declaration)*:[121] The focus of the Grand Bay Declaration is promotion and protection of human rights a matter of priority for Africa. The Declaration recognises that respect for human rights indispensable for the maintenance of regional and international peace and security and the

[114] Adopted by the Fifth Conference on Women held at Dakar, 16-23 November 1994.
[115] Para 99 of the African Platform of Action.
[116] Para 54 *ibid*.
[117] 22-26 November 1999, Addis Ababa.
[118] 19-20 August 1994, Victoria Falls, Zimbabwe.
[119] 24-27 April 2002, Abuja, Nigeria.
[120] Para 26 of the Abuja Declaration.
[121] Adopted by the First Organization of African Unity (now African Union) Ministerial Conference on Human Rights held in April 1999 in Grand Bay, Mauritius.

elimination of conflicts, and that it constitutes one of the fundamental bedrocks on which development efforts should be realized. It affirms that affirmation that human rights are universal, indivisible, interdependent and interrelated.[122] Governments are urged to give priority to economic, social and cultural rights as well as civil and political rights.[123] The Declaration recognises the following as core values on which human rights are founded: respect for the sanctity of life and human dignity; tolerance of differences; and the desire for liberty, order, fairness, prosperity and stability.[124] Integrating positive traditional and cultural values of Africa into human rights is seen as useful in transmitting their transmission to future generations.[125] The Declaration calls more effective protection of human rights of women.[126] It urges Member States to work assiduously towards the elimination of discrimination against women and children and the abolition of cultural practices that dehumanize or demean women and children.[127] It calls for the adoption measures to eradicate violence against women and children, child labour, sexual exploitation of children, trafficking.[128]

- *Kigali Declaration*:[129] The Kigali Declaration arises from resolutions of a Ministerial Conference of the African Union. The Declaration reaffirmed the principle that all human rights are universal, indivisible, inter-dependent and inter-related.[130] It urged Member States to accord the same importance to economic, social and cultural rights and civil and political rights and apply at all levels a 'rights-based' approach to policy, planning, implementation and evaluations.[131] It expressed concern about the insufficient protection of the rights of children and women.[132] Member States were urged to promote and protect rights of people living with HIV.[133] The Declaration also urged Members States to incorporate into domestic legislation the African Charter and its protocols, and other major international instruments that they have ratified.[134] It reiterated principle that primary responsibility for the promotion and protection of human

[122] Para 1 of the Grand Bay Declaration.
[123] *Ibid*.
[124] Para 5 *ibid*.
[125] *Ibid*.
[126] Para 6 *ibid*.
[127] *Ibid*.
[128] *Ibid*.
[129] Adopted by the AU Ministerial Conference on Human Rights in Africa in May 2003 in Kigali Rwanda
[130] Para 1 of the Kigali Declaration.
[131] Para 4 *ibid*.
[132] Para 16 *ibid*.
[133] Para 21 *ibid*.
[134] Para 25 *ibid*.

rights rests with Member States and urged them to establish independent human rights institutions.[135]

- *Solemn Declaration on Gender Equality in Africa*:[136] In the Solemn Declaration on Gender Equality in Africa, Member states of the African Union agreed, inter alia, to accelerate the implementation of measures aimed at combating the HIV/AIDS pandemic and effectively implement the Abuja Declaration and the Maputo Declaration on Malaria, HIV/AIDS, Tuberculosis and other related diseases. Member states also agreed to launch campaigns for the prohibition of abuse of girl children as wives and sex slaves.
- *Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights 2007-2010 (Maputo Plan of Action)*:[137] This is a plan for universal access to comprehensive sexual and reproductive health services that was devised and adopted in recognition of the fact that African countries were unlikely to achieve Millennium Development Goals without a significant improvement in the sexual and reproductive health of the people of Africa. The plan follows from the Continental Policy Framework on Sexual and Reproductive Health and Rights which was endorsed by the African Union Heads of State in January 2006. It is a short-term plan built around the following action areas: integrating sexual and reproductive health into Primary Health Care; repositioning family planning; youth-friendly services; unsafe abortion; quality safe motherhood; resource mobilisation; commodity security; and monitoring and evaluation. The key strategies of the Maputo Plan of Action are: integrating STI/HIV/AIDS and sexual and reproductive health programmes; repositioning family planning as an essential part of the attainment of health Millennium Development Goals; addressing sexual and reproductive Health needs of adolescents and youth as a key sexual and reproductive health component; addressing unsafe abortion; delivering quality and affordable services in order to promote safe motherhood, child survival, maternal, newborn and child health; and African and 'South to South' co-operation for the attainment of the Cairo Programme of the International Conference on Population and Development, and the Millennium Development Goals in Africa.
- *New Partnership for Africa's Development Declaration (New Partnership for Africa)*:[138] New Partnership for Africa is a declaration on the development agenda of Africa as a continent that has thus far been poor. Though it is

[135] Para 27 *ibid*.
[136] Adopted by the AU Assembly of Heads of State and Government in May July 2004.
[137] Adopted at the Special Session of the African Union Conference of Ministers of Health, Mozambique, 18-22 September 2006.
[138] NEPAD was adopted at the first meeting of the Heads of States and Government Implementation Committee in Abuja, Nigeria, in October 2001.

anchored in development, New Partnership for Africa also has a distinct affinity with human rights. It recognises that human rights are a necessary condition for sustainable development.[139]

[33] Some regional organizations have also generated soft law some of which has implications for the intersection between human rights and sexual health will be apparent especially from the discussion on the Southern African Community Protocol on Gender.[140]

1.12 Legal Pluralism and Conflict of Laws

[34] In mapping sexual health jurisprudence, account has to be taken of the pluralistic nature of African legal systems and the potential for conflict of laws at the domestic level. In all the countries that comprise the WHO African region, general laws that emanate from the constitution, civil law, criminal code, legislation or common law run side by side with customary or religious laws that may contain contrary legal norms. Customary laws and religious laws enjoy the status of binding sources of law in the vast majority of countries in the African region.

1.13 Customary Laws

[35] Customary law generally refers to norms that are recognized by the domestic legal system as enforceable legal norms that emanate from a particular ethnic group and are recognized and accepted by that group as governing the way of life or cultural practices of that group, especially practices in relating to marriage, divorce, custody and inheritance.[141] For a norm to achieve the status of formal customary law as to be recognized by the domestic legal system, it must generally be capable of being ascertained with reasonable certainty as well as recognition by members of the group to which it applies or purports to apply.[142] The status of customary law as a source of law is recognised in the legislation,[143] in court decisions[144] and even in the constitutions[145] of many African countries.

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[139] Para 71 of NEPAD.

[140] See also: The West African Community's Declaration on the Fights against Trafficking in Persons.

[141] T Bennett *Customary Law in South Africa* Cape Town: Juta (2004).

[142] *Ibid*.

[143] Examples are: Judicature Act of 1967 (Kenya); Local Customary Law (Declaration) of 1963 (Tanzania); Customary Law and Local Courts Act of 1990 (Zimbabwe); Recognition of Customary Law Marriages Act of 1998 (South Africa). In subsequent chapters reference is made to pertinent legislation of the countries that have been surveyed.

[144] In this chapter and in subsequent chapters there are numerous references to customary law-related case law of the countries that have been surveyed.

[145] In this chapter and in subsequent chapters there are references to pertinent constitutional provisions of the countries that have been surveyed.

[36] The assumption is that a customary law norm binds past, present and future members of the ethnic group from which the law emanates. There was a general assumption promoted in early colonial jurisprudence that once a customary law had been established, it remained unchanged. However, in the jurisdictions that have been surveyed, these assumptions no longer apply rigidly in the sense that membership of an ethnic group does not automatically mean that the parties are bound by customary law. Section 3(1) of the Customary Law and Local Courts Act of 1990 of Zimbabwe provides an illustration. It says:

> Subject to this Act and any other enactment, unless the justice of the case otherwise requires-
>
> (a) Customary law shall apply in civil cases where-
> (i) the parties have expressly agreed that it should apply;
> (ii) regard being had to the nature of the case and the surrounding circumstances it appears just and proper that it should apply;
> (b) The general law shall apply in all other cases.

In determining 'surrounding circumstances' the following factors are taken into account:

- mode of life of the parties;
- subject matter of the case;
- the understanding of the parties of the provision of customary law or the general law of Zimbabwe as the case may be which apply to the case;
- the relative closeness of the case and the parties to customary law or the general law of Zimbabwe as the case may be.

The implication is that customary law has diminishing status and that there is an element of choice in being subjected to the jurisdiction of customary law. The implication is also that there is an element of choice available to the parties to litigation. Customary law will not be applied where both parties to the dispute are unwilling to submit to its jurisdiction and agree to be governed by the general law. However, even in jurisdictions where customary law may only apply with the consent of the parties, customary law may be the only realistic option open to the parties. For example, parties who contract a customary marriage wish to submit a separate or divorce to adjudication, have no option than to submit to customary law adjudication of such a marriage. In any event, it must be highlighted that the poor and the illiterate and mostly women will frequently be unable to marshal the financial resources and knowledge to access justice that is dispensed through using general laws such that customary law becomes in practice the only option available. Minor children also fall into the class of persons who are not ordinarily able to negotiate the type of law that should apply, unless there is intervention from outside the family or from the legal system.

In respect of the assumption by colonial authorities, especially, that customary law is fixed, courts have adopted a more flexible view in the postcolonial period. Courts have, on the whole, accepted that customary law is not fossilized and can change with changing social and political conditions. An illustration is the decision of the High Court of Tanzania in *Chiku Lidah v Adam Omari* where the Court said:

> The judicial role of recognising customary law that has by evaluation been modified by the society itself is very important. In the past the High Court has not been instrumental in spearheading this crusade. The courts should be courageous enough to recognize and give effect to such a change.[146]

As part of accepting the changing nature of customary law, some courts have been receptive to incorporating human rights into the body of customary law or at least receptive to interpreting customary law subject to human rights.[147]

[37] Though largely unwritten, in some jurisdictions, customary law has been reduced to writing or incorporated into civil codes.[148] The nature of tribunals that administer customary law depends on the constitutional and political traditions of the individual jurisdiction. In some jurisdictions, customary law is administered by the ordinary courts.[149] In some, it is administered by specially created customary courts[150] and others by traditional authorities.[151]

[38] The institution of customary law as part of jurisprudence in the African state has its origins in the colonial era. Customary laws are generally laws that are perceived as having indigenous as opposed to colonial origins. At the time of colonialization, colonial authorities drew a distinction between general laws or received laws that emanated from the colonial state and would govern all subjects, and laws that emanated from a particular ethnic group and would only apply to members of that group, namely customary law. The general approach was that customary laws only applied to areas that were not governed by general laws, and that its application was confined to civil cases in the realm of the so-called personal laws and not to criminal cases. In virtually all African jurisdictions customary law is subordinate to legislative instrument and can be overridden by parliamentary legislation.

[39] Customary law has survived into the postcolonial period, but with varied status across Africa. Today, the ostensible constitutional rationale for the recognition of customary law in the postcolonial African state is that, a source of law, it serves

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[146] *Chiku Lidah v Adam Omari Civil Appeal* No 34 (1991).
[147] See the discussion in Chapter 2 of the study.
[148] Local Customary Law (Declaration) of 1963 (Tanzania).
[149] Magistrates Court Act of 1963 (Tanzania).
[150] Customary Law and Local Courts Act of 1990 (Zimbabwe).
[151] Administrative Order No 6 of 1998 (Swaziland).

to promote equality by recognizing equalities in different cultures in a plural democracy. In practice, however, customary law has frequently served as a potent instrument for perpetuating gender inequality and discriminatory practices that disadvantage women. For the reason that customary law has generally drawn from patriarchal traditions that countenance gender inequality, it can be surmised that, in general, much of the existing customary law, including customary law that is applicable especially in the field of family law discriminates on the grounds of gender and has negative implications for sexual health, especially to the extent that it denies agency on the part of women.

[40] On the whole, provisions of Bills of Rights in the Constitutions of African countries forming are modeled on international human rights declarations or instruments. At a minimum, African Bills of Rights seek to provide especially guarantees of a civil and political nature that are broadly similar to the guarantees in international human rights instruments, including the right to human dignity, equality, liberty and security of the person. The potential to guarantee maximum protection to sexual health is at its highest where customary or religious laws are rendered ultimately subordinate to the supremacy of constitutional rights and values.

[41] African constitutions, like their counterparts elsewhere, ultimately prescribe that the constitution is the supreme law of the land and that any law that is inconsistent with the constitution shall be void to the extent of the inconsistency.[152] For this reason, as general rule, the supremacy of the bills of rights over customary or religious laws is taken as given notwithstanding that it is not specifically elaborated upon. The following observations of the Court of Appeal of *Botswana in Attorney-General of Botswana v Unity Dow*[153] illustrate the implicit supremacy of the Constitution over customary law:

> Our attention has been drawn to the patrilineal customs and traditions of the Botswana people to show, I believe, that it was proper for Parliament to legislate to preserve or advance such customs and traditions. Customs and tradition have never been static. Even then, they have always yielded to express legislation. Custom and tradition must a fortiori, and from what I have already said about the pre-eminence of the Constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, custom will as far as possible be read so as to conform with the Constitution. But where this is impossible, it is the custom and not the Constitution which must go.

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[152] In respect of the sampled countries, the respective provisions of their constitutions are as follows: **Ethiopia**: article 9(1) of the Constitution of 1987; **Eritrea**: article 2(3) of the Constitution of 1996; **Cameroon**: Preamble to the Constitution; **Kenya**: article 3; **Lesotho**: section 2 of the Constitution of 1993; **Malawi**: section 5 of the Constitution of 1994; **Nigeria**: article 1 of the Constitution of 1999; **South Africa**: section 2 of the Constitution of 1996; **Tanzania**: Constitution of 1977; **Uganda:** article 2 of the Constitution of 1995; and **Zimbabwe**: section 3 of the Constitution of 1979.

[153] *Attorney-General of Botswana v Unity Dow* 1992 LRC (Const) 623. This case is discussed in Chapter 2.

It is significant that the above observations were made by the Court of Appeal regardless of the fact that article 15(4)(c) of the Constitution of Botswana of 1966 protects personal laws in the form of customary laws that relate to areas such as adoption, marriage, burial, and devolution of property upon death from the application of section 15(1) which prohibits laws that are discriminatory.

[42] In some constitutions, the supremacy of the Constitution over customary law is, in addition, expressly provided,[154] thus unambiguously constitutionally resolving any conflict of laws. Section 33 of the Constitution of Uganda is an example. It captures both the duty of the state to protecting the equality and dignity of women and the supremacy of the constitution over customary law. It says, inter alia:

> (1) Women shall be accorded full and equal dignity of the person with men.
>
> (6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited under this Constitution.

[43] The Constitution of Swaziland of 2005 goes further in elaborating on the constitutional principles for subordinating customary law to constitutional values and rights. Section 252 of the Constitution of Swaziland provides that:

> (1) …
> (2) Subject to the provisions of this Constitution, principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.
> (3) The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with the provision of this Constitution or a statute or repugnant to natural justice or morality or to general principles of humanity.

In this way, the rights and values of equality and non-discrimination in African constitutions are rendered amenable to interpretation and application that would be consonant with the approach to interpreting rights to equality in United Nations treaties in human rights instrument that have been ratified by the respective, jurisdiction, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and regional human rights instruments such as the African Charter and the Protocol on the Rights of Women in Africa, subject, of course, to any reservations entered.

[44] In some jurisdictions it is not only constitutional law norms that mediate a potential conflict of laws through subordinating customary laws but also principles derived from common law. Nigeria exemplifies a jurisdiction where

[154] See for example: article 26 of the Constitution of Chad of 1996; Articles 9(1) and 25 of the Constitution of Ethiopia; article 26 of the Constitution of Ghana of 1992; sections 20(1) and 24(2) of the Constitution of Malawi; articles 66, 67 and 162 of the Constitution of Mozambique; sections 21(2) and 33, and the Principle of State Policy XXIV(a) of the Constitution of Uganda.

customary law is subordinate to common law where it is found by the court to be 'repugnant to natural justice, equity and good conscience' (the repugnancy test).[155] *In Mojekwu v Mojekwu*,[156] the Court of Appeal of Nigeria held that a customary law rule that recognized the right of a surviving male relative to inherit the estate of the deceased at the exclusion of closely related female relatives was repugnant to natural justice, equity and good conscience.[157]

[45] In other jurisdictions, and Kenya is an example, parliamentary legislation, also provides authority for the invalidation of customary law, where such law is found to be 'repugnant to justice'. Section 3(2) of the Kenyan Judicature Act says:

> The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

Although this is a legislative rather than a constitutional rule, it nonetheless provides enabling jurisprudence for willing courts to uphold women's equality and non-discrimination rights in those cases where customary laws are discriminatory.

[46] Furthermore, in some of the more recent constitutions, the development of customary law to render it consonant with the constitutional values is expressly required as by the constitution as a positive duty incumbent on the courts that are charged with interpreting and applying law. Section 39(2) of the South African Constitution of 1996 exemplifies this approach when it says:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the bill of rights.

[47] Article 66(2) of the Namibian Constitution anticipates the supremacy of the Constitution when it says:

> Subject to the terms of this Constitution, it shall be competent by Act of Parliament for any part of such common or customary law to be repealed or modified, or for the application thereof to be confined to particular parts of Namibia or for particular periods.

[48] Equally section 10 of the Constitution of Malawi of 1994 enjoins legislatures and the courts to treat the Constitution as ultimately determinative where for example, a rule of customary law is in dispute. It provides that:

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[155] *Mokekwu v Mojekwu* NWLR 283 (1997) (Court of Appeal, Nigeria).

[156] *Ibid*. See also *Nzekwu v Nzekwu* (1989) 2 NWLR 373 (Supreme Court, Nigeria); *Muojekwo and Others v Ekijeme and Others* (2000) 5 NWLR 402 (Court of Appeal, Nigeria).

[157] Section 252 of the Constitution of Swaziland of 2005 has constitutionalised this repugnancy test.

(1) In the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.
(2) In the application and formulation of any Act of Parliament and in the application and development of the common law and customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution.

[49] Some African jurisdictions like Zimbabwe[158] and Kenya[159] are good examples promote a hybrid approach where customary law like all non constitutional laws is subordinate to the constitution, but it is concomitantly protected from the application of the equality and non-discrimination clauses of the constitution. The Zimbabwean Constitution, or at least the interpretation thereof by the Supreme Court of Zimbabwe exemplifies a jurisdiction in the WHO African region that has a constitution that not only recognizes legal pluralism, but even more significant expressly limits the reach of the constitution in customary law.[160] Section 23(1) of the Constitution of Zimbabwe guarantees a right to non-discrimination. Section 23(2) articulates the prohibited grounds as well as what constitutes discrimination on the following way:

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability are prejudiced—

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed , sex, gender, marital status or physical disability of the persons concerned.

However, section 23(3) permits discrimination in areas that have historically been governed by customary law when it says:

(3) Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters—

(a) matters of personal law;

(b) the application of African customary law in any case involving Africans or an African and

[158] Section 23 of the Constitution of Zimbabwe which is discussed in this chapter.
[159] Section 82(4) of the Constitution of Kenya which is discussed in Chapter 2.
[160] See also: article 15(4)(c) of the Constitution of Botswana of 1966; article 33(5)(c) and (d) of the Constitution of Gambia of 1996; article 17(4)(b) of the Constitution of Ghana of 1992; section 82(4) of the Constitution of Kenya of 1992; section 27(4)(d) of the Constitution of Sierra Leone of 1991; and section 23(4)(c) of the Constitution of Zambia of 1991.

one or more persons who are not Africans where such persons have consented to the application of African customary law in that case.

The potential of a clause such as section 23 of the Constitution of Zimbabwe to operate in such a way as to impact negatively on the protection of human rights and equality in particular through granting immunity to customary law from the reach of the equality clause of the constitution can be illustrated by the decision of the Supreme Court of Zimbabwe in *Magaya v Magaya*.

Magaya v Magaya 1999 (1) ZLR 100 (S)

In this case, the plaintiff, a female, challenged the primogeniture rule under Zimbabwean African customary law. The plaintiff's father had died and she sought to inherit his estate. It was held unanimously by the Supreme Court of Zimbabwe that because she was a woman, she did not have a right to inherit her father's property because the customary law of the group to which she belonged determined the eldest son as the rightful heir. Section 23(3) of the Constitution operated to shield customary law from the non-discrimination clause of the Constitution, and by extension any human rights treaties that Zimbabwe had ratified but had not specifically incorporated into domestic law with the intention, inter alia, that they prevail over any inconsistent law.

The approach of the Supreme Court of Zimbabwe in *Magaya* can be contrasted with the approach of the South Africa Courts in *Bhe v The Magistrate, Khayelitsha and Others.*

Bhe v The Magistrate, Khayelitsha and Others 2005 (1) BCLR 1 (CC),

In this case, the plaintiff, a mother of two daughters, brought an action on behalf of her daughters to challenge a primogeniture rule that stood against her daughters inheriting their father's estate. The primogeniture rule had been consolidated into a statutory law.[161] She was successful. It was held that the

[161] Section 23 of the Black Administration Act No 38 of 1927 and section 1(4)(b) the Intestate Succession Act No 81 of 1987.

primogeniture rule was a violation of the right to equality in section 9(3) and the right to human dignity in section 10 of the South African Constitution. As such, the customary law constituted unlawful discrimination inter alia on the ground of gender.

[50] While section 23 of the Constitution of Zimbabwe is capable of resolving conflict between a constitutional norm and customary law norm, it does not tell us how a conflict between two customary law norms is to be resolved in a society where there are diverse customs and there is no agreement among the parties as to which customary law should prevail. Thus, the potential exists for conflict between two customary laws.

1.14 Religious Laws

[51] In the context of this study, religious laws are legal norms that are derived from established religions and are recognised by African jurisdictions as legally binding on followers of that religion. Religious law in the African region essentially takes the form of laws that derive from Christianity, Judaism, Hinduism and Islam. Of these religions, it is Islam that is of significance to the study. Islam presents the most practical opportunities for conflict of laws, including conflict with the equality and non-discrimination human rights precepts under United Nation treaties and the African Charter-based treaties that have implications for vertical and horizontal obligations in respecting, protecting and fulfilling rights pertaining to sexual health.

[52] The approach to religious law depends on the status that each African jurisdiction accords to religious law. It depends on whether religious law has the status of foundational principles underpinning the constitution, or whether religious law has status that is subordinate to the constitutional values and rights.

[53] Islamic jurisprudence is traditionally classified as comprised of four schools of thought – Hanafi, Shafi'i, Maliki and Hanbali schools of thought on the understanding that nothwithstanding similarities, each school has a unique jurisprudence in the theory and practice of Islam. The Maliki school of thought is the one that is predominant in the WHO African region. For this reason, references to Islamic law norms in this study, imply norms derived from the Maliki school of thought.

[54] Shari'ah refers to the entire system of, or the framework for, the dispensation of Islamic law in the public and private lives of Muslims. It includes the laws themselves as well as the institutions for interpreting and applying Islamic law according to the belief and practice Islam as derived from the primary sources, namely – the Qur'an,[162] the Sunnah,[163] ijima[164] and qiyas.[165]

[55] The Maliki school derives from the work of Imam Malik ibn Anas. Two texts in particular are regarded as the principal literal sources for Maliki jurisprudence, namely, the *Al-Muwatta* and the *Al Mudauwanah*.[166]

[56] Islamic laws have the most visible impact in African countries that are part of North Africa.[167] In this region, Islamic religious law has its highest status in Algeria. Under the Constitution of Algeria of 1976, as amended, it is stated that Islam is the religion of the state.[168] The implication of the foundational status that Islam has under the Algerian Constitution is that Algerian laws that have a close relationship with sexual health such as the Algerian Family Code[169] seek in part to be faithful to Shari'ah law rather than secular notions of civil law. As such, they contain many features that are incompatible with provisions in international human rights instruments, including the Women's Convention, especially to the extent that they countenance gender inequality. They necessarily enjoy protection under the constitution except where it can be established that they deviate from the religious tenets of the constitution. An illustration of a religious law that has the implicit sanction of the Algerian constitution is the practice of polygny and family law that generally enshrines gender inequality. The notion of men and guardians over women[170] is a fundamental tenet of Islamic Shar'iah and reflected in the Islamic laws relating to entry into marriage, subsistence of marriage and annulment of marriage

[57] For the purposes of this study, however, the focus will be on the place of Islamic law in Nigeria. Over and above North Africa, Islamic law is also a very visible feature of countries in West Africa, including Nigeria. In recent years, especially,

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[162] Qur'an 45:18, 42:13; 42:21; 5:51.

[163] The Sunnah of Muhammad refers to the words, actions and practices of the Prophet Muhammad.

[164] 'Ijima' refers to the notion of reaching decisions through consensus from the community of Muslims or followers of Islam.

[165] 'Qiyas' refers to reaching decisions through reasoning by analogy.

[166] There are other literal sources that are also considered as main sources, including the following: *Al-Utbiyyah*, *Al-Wadhiba*, and *Al-Mawaziyyah*.

[167] The following countries comprise North Africa according to the UN regional definitions of Africa: Algeria, Egypt, Libya, Morocco, Sudan, Tunisia, Mauritania and Western Sahara. However, a geographical entity North Africa can be larger as to include bordering countries.

[168] Article 2 of the Constitution of Algeria of 1976 as amended; The preamble to the Constitution of Mauritania of 1991 accords Islam a foundational status and article 5 provides that Islam is the religion of the people and the state.

[169] Algerian Family Code of 1984.

[170] Qawama

Islamic Shari'ah has become an important feature of the legal system of states in the northern part of Nigeria and is administered by Shari'ah courts.[171] The well publicised case of *Commissioner of Police of Katsina State v Amina Lawal and Yahaya Mohammed*[172] where Amina Lawal was convicted of the offence of Zina (adultery) and sentenced to death by stoning[173] is an illustration of the application of Shari'ah in a sphere that has implications for sexual health.

[58] In the other West African countries, the recognition of Islamic law is limited to personal laws and does not extend to areas governed by criminal law. The same approach is taken by countries in East and Southern Africa. In any event, in all African regions, save for North Africa, religious law is constitutionally recognised not as part of the religion of the state, but only as part of recognising religious diversity. However, it is not in all countries that one finds equal recognition of the diversity of religious laws. Namibia and Zimbabwe are examples of countries where there is no provision for the recognition of Islamic in any sphere of law, including family law.

[59] Nigeria provides an illustration of both a strong recognition of Islamic law as well as its ultimate subordination to the constitution. In northern parts of Nigeria Shari'ah has been institutionalized and it enjoys higher status than customary law in that it comes with state written legal precepts as well as a system of state courts. At the same time, under section 1 of the Constitution of Nigeria, it is constitutional norms that are supreme over any other contrary legal norms, including religious norms. It also follows that ultimately, the non-discrimination clause in section 42 of the Nigerian Constitution applies to Shari'ah to nullify any contrary provisions. It is significant that under section 10 of the Nigerian Constitution, no state can, therefore, declare Islam as a state religion.

1.15 Limitations of the Study

[60] There are two main limitations in the study. Firstly, as alluded to earlier, for pragmatic language considerations, the study focuses predominantly on Anglophone Africa with Cameroon as lone of exception of a jurisdiction which is both Anglophone and Francophone. The implication in terms of mapping human rights jurisprudence is that the study falls short on mapping norms emanating from, or gaps that exist within, Civil law as opposed to Common law. A second limitation is that while this is a regional rather than a country study, nonetheless,

[171] See for example: Sharia Courts and Related Matters Law No.5 of 2000 of Zamfara State; Sharia State Law No 6 of Sokoto State.
[172] Case No 9/2002 delivered on March20, 2002 (Sharia Court).
[173] The conviction and sentence were quashed on appeal on the ground that the defendant's right to a fair trial had been violated.

the study is dominated by South Africa. As indicated earlier, South Africa was included primarily for the reason that its jurisprudence overwhelmingly provides illustrations of human rights best practices in the African region in almost all the components of the study. The pride of place that South African jurisprudence occupies in terms of human rights compliant jurisprudence is a direct consequence of the fact that in the post-apartheid era, South Africa has been a global leader in developing, through the adoption of a constitution, constitutional interpretation and legislation, progressive jurisprudence that has the capacity to maximally protecting human rights, including rights that impact on sexual health as will be apparent from sexual-orientation-related South African jurisprudence, for example.[174] In contrast, the preponderance of South Africa's counterparts in the African region have largely lagged behind with some jurisdictions even falling far short of incorporating human rights norms into domestic law in spheres that are crucial for the respect, protection and fulfillment of human rights. However, it does not follow that South African necessarily enjoys better sexual health in practice as the realization of sexual health is contingent upon other factors, including effective implementation of jurisprudence that impacts on sexual health.

1.16 Structure of the Study

[61] The study comprises nine chapters. Chapter 1, the present chapter, is the introduction to the study. Chapters 2 to 8 map the jurisprudence of the African region as it pertains to the following topics:

- Non-discrimination (Chapter 2)
- Penalization of sexuality/sexual activities (Chapter 3)
- State regulation of marriage and the family (Chapter 4)
- Violence (Chapter 5)
- Access to health services related to sex and sexuality (Chapter 6)
- Information, education and expression related to sex and sexuality (Chapter 7)
- Sex work (Chapter 8)

Each of the above topics, as indicated in parenthesis, constitutes a separate chapter. However, many of the chapters closely overlap on account of the pervasive relevance of the right to equality and non-discrimination. Chapter 9 is the concluding chapter. It summarises the best practices as well as the gaps. It seeks to pull the findings of the study together with a view to illustrating a regional picture of sexual health jurisprudence together with regional trends, strengths or best practices, and gaps.

[174] South African jurisprudence on sexual orientation is discussed in Chapter 2 and Chapter 3 of this study especially.

1.17 Conclusions

[62] The African Charter on Human and Peoples' Rights and African-Charter based-treaty jurisprudence has implications for sexual health.

[63] Though the provisions of the African Charter are applicable to sexual health in much the same way as counterpart United Nations and regional treaties, save for the decision of the African Commission on Human and Peoples' Rights in *Doebler v Sudan*,[175] there are no decided cases directly impacting on sexual health that emanate from the African Charter-based treaty bodies.

[64] The Protocol to the African Charter on the Rights of Women in Africa has several provisions that directly apply to sexual health. The focus of the Women's Protocol on equality and non-discrimination is cross-cutting. The provisions that address marriage, violence in armed conflict, sexual harassment, health, including reproductive and sexual health are particularly applicable to sexual health.

[65] Sub-regional organizations, including sub-regional economic entities, have a role to play in protecting and promoting sexual health. The decision of the Court of Justice of the West African Community in *Hadijatou Mani Koraou v The Republic of Niger*[176] is a significant development for sexual health jurisprudence. The decision shows both the strengths as well as weakness of a sub-regional court in dealing with sexual slavery.

[66] The decision of the Tribunal of the Southern African Development Community in *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe*[177], though not directly relevant to sexual health, is, nonetheless, significant for demonstrating both the capacity as well as judicial willingness of sub-regional tribunal to protect human rights under a sub-regional treaty that is primary designed to secure sub-regional economic and political integration.

[67] The mapping of sexual health jurisprudence in the African region must take into account the plural nature of African legal systems as systems in which customary laws and religious law also constitute recognized law.

[68] The general approach in the African region in terms of the application of domestic law is that customary laws and religious laws are subordinate to constitutions as well as to statutes that are adopted by the legislature. However, an exception must be made for jurisdictions in which religious law in the form of

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[175] *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003). Decision of the African Commission on Peoples' and Human Rights.

[176] *Hadijatou Mani Koraou v Republic of Niger* ECW/CCJ/JUD/06/08, October 28, 2008 (ECOWAS Community Court of Justice).

[177] *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* (2008) SADCT 1, Case No 2/2007.

Islamic Shar'iah constitutes part of the foundation of the constitution. Algeria and Mauritania fall into this category. In respect of customary law allowance must be made for Zimbabwe which treats its equality and non-discrimination clause as ring-fencing customary law in certain areas such as inheritance.[178]

[178] *Magaya v Magaya* 1999 (1) ZLR 100 (Supreme Court of Zimbabwe).

2 EQUALITY AND NON-DISCRIMINATION

2.1 Introduction

[1] The aim of this chapter is to map jurisprudence in the Africa region that either directly addresses, or has an indirect bearing on, equality and non-discrimination in relation to the following areas:

- Sex
- Marital status
- HIV status
- Sexual orientation
- Gender identity
- Sexual harassment

The chapter maps jurisprudence emanating from regional human rights treaties as well as from domestic laws. In respect of the jurisprudence of regional treaties, the Chapter is confined to African Charter-based treaties and does not extend to sub-regional treaties.

This chapter overlaps with Chapter 1 to the extent that in Chapter 1, equality and non-discrimination norms were introduced, not least in order to explain the pluralistic nature of African legal systems and the conflict of laws that can arise, especially when customary and religious norms are recognised under domestic law.

2.2 Sex as a Protected Ground under African Charter- Based Jurisprudence

[2] When used as a biological or social category, sex or gender intersects with health in multiple ways some of which are more obvious and some of which are less obvious. Providing access to health care services in a way that discriminates against women is an obvious example of the link between sex discrimination and health. If women are denied access to contraceptive advice and services or treatment for sexually transmitted infections their sexual and reproductive health is apt to suffer in terms of unwanted pregnancies, and sexually transmitted infections. Less obvious ways in which sex discrimination intersects with health can take the form of discriminatory access to education, employment, housing,

credit, inheritance and other social goods that have a bearing on socio-economic wellbeing generally. This is because access to health services is one of several determinants of health. It is well established that, over and above genetic inheritance, other determinants of health include income, education, housing, and socio-economic conditions generally.[179] The law can facilitate the promotion of health by combating rather than giving validity to social, economic or cultural factors that constitute barriers to health. Non-discrimination is one of the routes through which law can promote health, including sexual health.

[3] In terms of the legal classification that is generally employed in human rights treaties as well as in domestic law, sex discrimination can classified as *direct* or *indirect*. Discrimination can be *direct* such as where a legislative provision, or more frequently, a policy directive requires only women to obtain the consent of their spouses as a precondition for treatment.[180] In the alternative, discrimination can be more subtle, and consequently, *indirect*, such as where a legislative provision or policy directive routinely requires all persons that are not adults to obtain the consent of their parents as a condition for obtaining access to contraceptive services.[181] Though outwardly neutral as between males and females, such a measure disproportionately adversely impacts on adolescent females. It is females who bear the risk of pregnancy and the burdens of bearing and raising a child. It is also females rather than males that carry the major burden of reproductive disease. Laws or policies that require everyone to pay for health services rendered are another example. They constitute indirect discrimination where women are the gender that is disproportionately under-employed and under-remunerated and thus disproportionately poor or disproportionately burdened with dependants.[182]

[4] Equality and non-discrimination are principles as well as fundamental rights that are contained in the United Nations human rights treaties that have been signed ratified by the majority of African countries. The position on ratification by African countries of major United Nations human rights instruments that have non-discrimination clauses is as follows:

- **Convention on the Elimination of All Forms of Racial Discrimination**: It has been ratified by all African countries except: Angola, Guinea-Bissau, São Tomé and Príncipe;[183]
- **Covenant on Civil and Political Rights**: It has been ratified by all countries except Comoros, Guinea-Bissau, and São Tomé and Príncipe;[184]

[179] RJ Cook *et al Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (2003) at 18-19
[180] Cook *et al ibid* at 197.
[181] *Ibid*.
[182] *Ibid*.
[183] www2.ohchr.org/english
[184] *Ibid*

- **Covenant on Economic, Social and Cultural Rights**: It has been ratified by all countries except: Botswana, Comoros, Mozambique, São Tomé and Príncipe, and South Africa;[185]
- **Women's Convention**: It has been ratified by all countries except: Somalia and Sudan;[186]
- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;** It has been ratified by all countries except Angola, Comoros, Eritrea, Gambia, Guinea-Bissau, Lesotho, Rwanda, São Tomé and Príncipe Seychelles, Sierra Leone, Somalia, Tanzania, and Zimbabwe;[187]
- **Children's Convention**: It has been ratified by all countries except Somalia;[188] and
- **Convention on the Rights of Persons with Disabilities**: The following African countries have ratified this Convention: Algeria, Burkina Faso, Egpyt, Gabon, Guinea, Kenya, Lesotho, Malawi, Mali, Mauritius, Namibia, Morocco, Niger, Rwanda, Seychelles, South Africa, Uganda, and Zambia.[189]

[5] Some African countries have, upon ratification, entered reservations[190] and/or interpretive declarations that convey an intention not to be bound by equality and non-discrimination clauses in some international treaties. In this regard, the following are noteworthy:

- **Covenant on Civil and Political Rights**: Egypt made an interpretive declaration to accept the obligations under the Covenant on Civil and Political Rights subject to also respecting Islamic Shar'iah;[191] In respect of article 23(4) which requires states to guarantee spouses equality in marriage, Algeria made an interpretive declaration to accept the obligation under this article subject to respecting the essential foundation of the Algerian law in respect to marriage.[192]
- **Women's Convention**: Malawi initially entered a reservation to give precedence to domestic customary law over the provision of the Women's Convention where the two are in conflict.[193] This reservation has since

[185] *Ibid*.
[186] *Ibid*.
[187] *Ibid*.
[188] *Ibid*.
[189] http://www.un.org/disabilities/default.asp?id=257.
[190] Article 2 of the Vienna Convention on the Law of the Treaties of 1980.
[191] Viljoen *International Human Rights Law in Africa* (2007) at 102-103.
[192] *Ibid* 103.
[193] *Ibid* 127.

been withdrawn.[194] Upon ratifying the Women's Convention, like Malawi, Lesotho also entered a reservation that was also later to be withdrawn, to give precedence to Lesotho customary law where it is in conflict with the Women's Convention.[195] Algeria, Egypt, Mauritania, Morocco, Niger and Tunisia entered reservations to accept the obligations under the Women's Convention subject to domestic Shar'iah.[196]

[6] According to the Vienna Convention on the Law of Treaties, a reservation should not be incompatible with the objects and purpose of the treaty.[197] The type of reservations that Malawi and Lesotho once entered in order to ring-fence customary law, are illustrations of reservations that would negate the very essence of a universal guarantee of equality and non-discrimination. The same applies to the reservations entered by Algeria, Egypt, Mauritania, Morocco, Niger and Tunisia in order to ring-fence Shar'iah. The right to equality has a foundational status in that it is essential to the enjoyment of equal protections of the guarantees that a human rights instruments provides. For a State to purport to enter a reservation that allows the states to be absolved from discharging human rights obligations in respect of a section of the population such as women on the ground of domestic customary law or religious law that treats women differently and less favourably than men negates the very essence of the universal nature of human rights. If given legal validity such a reservation would effectively constitute giving international validity to a regressive domestication of international human rights. In respect of historically marginalized and disadvantaged groups such as women, such reservations serve to maintain the status quo rather than promote human rights.[198]

[7] The primary objective of the Women's Convention, especially, is to eliminate all forms of discrimination that are sex or gender-based. Reservations that undermine the provisions such as articles 2 and 16 of the Women's Convention that are crucial to sustaining the rationale of the Convention would be regarded as incompatible with the Convention at least by the Committee on the Women's Convention.[199] It would follow, therefore, that the type of reservations entered in order to provide immunity to the patriarchal traditions of customary law and

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[194] *Ibid* 127.
[195] *Ibid* 127.
[196] *Ibid* 128.
[197] Article 19 of the Vienna Convention on the Law of Treaties (1980).
[198] RJ Cook 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (1990) 30 *Virginia Journal of International Law* 643.
[199] Concluding Comments of the Committee on the Elimination of Discrimination against Women: Singapore, UN Doc. CEDAW/C/SGP/CO/3, 10 August 2007, paras 5 and 11.

Shar'iah leave no room for compatibility with the object and purpose of the Women's Convention.[200]

2.3 African Charter on Human and Peoples' Rights

[8] The African Charter, which has been ratified by every African country,[201] explicitly guarantees equality and non-discrimination on the ground of 'sex' as a fundamental right in more than one provision. The main equality and non-discrimination provision is article 2 of the African Charter. It provides that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter 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.[202]

The equality and non-discrimination guarantee in article 2 is supplemented by articles 3 and 18 of the African Charter. Article 3 says:

> 1. Every individual shall be equal before the law.
>
> 2. Every individual shall be entitled to equal protection of the law.

Women are accorded additional equality guarantees by article 18(3) which provides that:

> The State shall ensure the elimination of every distinction against woman and also to ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

[9] As alluded to in Chapter 1, African Charter-based jurisprudence is in many respects at a nascent stage in respect of the adjudication of fundamental rights that bear on sexual health. As yet, there is no jurisprudence from either the African Commission on Human and Peoples' Rights or the African Court on Human and Peoples' Rights on the interpretation and application of 'sex' as a protected ground under the equality and discrimination clauses of the African Charter. Subject to this limitation, it is arguable that the implicit intention of the

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[200] S Cusack & R Cook 'Combating Discrimination Based on Sex and Gender' in C Krause & M Scheinin 'International Protection of Human Rights: A Textbook (2009) 205-226 at 209-210; AE Mayer 'Religious Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: What Do They Really Mean? In CW Howland (ed) Religious Fundamentalisms and the Human Rights of Women (1999) 105-116.

[201] African Commission on Human and Peoples' Rights. Available at <http://www.achpr.org/english/_info/index_ratifications_en.html>

[202] Emphasis added.

African Charter to protect 'sex' expansively as both a biological as well as a gendered category. Article 18(3) of the African Charter appears to support this inference to the extent that the equality and non-discrimination obligation on the state in respect of women extends to the 'elimination of every distinction against woman'.

[10] An intention by the drafters to give a generous interpretation to equality and non-discrimination under the African Charter can also inferred from the fact that article 18(3) implicitly appeals to other international treaties as one of the yardsticks for determining whether the state has complied with its non-discrimination obligations. There is no requirement that such treaties ought to have been ratified by the state against which a communication is brought. Effectively, article 18(3) opens the door for the African Charter treaty bodies to follow the equality jurisprudence of treaties such as the Women's Convention as developed by the Committee on the Women's Convention and as expressed in General Recommendations and Concluding Observations. When interpreting the non-discrimination clause of the Women's Convention, the Committee on the Women's Convention has sought to promote a substantive rather than a merely formal approach to the interpretation and application of sex as a protected ground so as to render the human right to equality and non-discrimination responsive to systemic or structural inequality.[203]

[11] The implicit alignment of the non-discrimination provisions of the African Charter with the non-discrimination provisions of international instruments such as the Universal Declaration, the Covenant on Civil and Political Rights and the Women's Convention is also supported by articles 60 and 61 of the African Charter which recognize other human rights instruments as relevant interpretive guidance for the Charter. Articles 60 and 61 are enabling in that there is no requirement that any such other international treaty must have been ratified by the states before the African Commission. Article 60 says:

> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of Africa Unity (now African Union), the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the present Charter are members.

Article 61 says:

[203] Committee on the Women's Convention, General Recommendation No 25 (2004) UN Doc.HRI/GEN/1/Rev.9 (Vol.II), pp. 365-373, para 4., Article 4, para 1, of the Women's Convention,

> The Commission shall also take into consideration, as subsidiary measures to determine principles of law, other general or specialized international conventions laying down rules expressly recognised by members of the Organization of African Unity (now African Union), African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African states, as well as legal precedents and doctrine.

Article 7 of the Protocol to African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and People's Rights which provides for sources of law from which the African Court must draw from also mandates other international treaties as recognized sources, but with the proviso that they must have been ratified by the states before the Court. Article 7 says:

> The Court shall apply the provisions of the Charter and any other human rights instruments ratified by the states concerned.

[12] The decision of the African Commission in *Legal Resources Foundation v Zambia*[204], though unrelated to sex as a protected ground under the African Charter, supports the view that when asked to determine a claim based on equality and non-discrimination in general, treaty bodies under the African Charter would seek to protect human rights maximally on the understanding that it is a foundational right and that its enjoyment is essential for the enjoyment of other rights under the Charter. The African Commission has said when adjudicating an allegation of state violation of articles 2 and 3 of the Charter:

> The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it, affects the capacity of one to enjoy many other rights.[205]

[13] The practice of the African Commission in using the reporting guidelines under the Women's Convention as, inter alia, the guidelines that states should follow when preparing periodical reports for submission to the African Commission as part of their reporting obligations under the African Charter,[206] also supports the idea of aligning, as much as possible, the African Charter with the Women's Convention when interpreting and applying equality and non-discrimination on the ground of sex.

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[204] 2001 AHRLR 84 (ACHPR 2001) (14th Annual Activity Report). The case concerned a communication brought against Zambia alleging that a provision of the Constitution of Zambia that required a candidate for the Office of the President of Zambia to prove that both parents of the candidate were Zambian citizens by birth or descent was, inter alia, discriminatory contrary to articles 2 and 3 of the African Charter.

[205] *Ibid* para 63.

[206] Viljoen *International Human Rights Law in Africa*, *supra* at 271.

2.4 African Charter on the Rights and Welfare of the Child

[14] Article 3 of the African Children's Charter includes 'sex' as a ground protected against discrimination. In its preamble, African Children's Charter seeks to protect the human rights of children by adhering to and affirming the equality rights of children that are guaranteed under United Nations instruments, in particular, the Convention of the Rights of the Child.

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

[15] The protection of equality and non-discrimination is the central object of the African Women's Protocol. Equality and non-discrimination are highly visible rights and values in the preamble to the Protocol and in its substantive provisions. As is stated in its preamble, the African Women's Protocol was adopted, inter alia, because of concerns 'that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices'.[207]

[16] The African Women's Protocol requires states to eliminate discrimination against women on the grounds of sex as well as gender. Article 2, the main equality and non-discrimination provision provides that:

> 1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:
>
> a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
>
> b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
>
> c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

[207] Preamble to African Women's Protocol.

d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices 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 women and men.

[17] Discrimination is defined in article 1 of the African Women's Protocol in the following manner:

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

The definition of discrimination under the Protocol closely follows its counterpart under the Women's Convention. It envisages substantive equality and not merely formal equality.

[18] To the extent that the right to human dignity is inextricably bound with the right to equality, the following provisions of article 3 of the African Women's Protocol must also be taken into cognizance:

1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights;
2. Every woman shall have the right to respect as a person and to the free development of her personality;
3. States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women;
4. States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

[19] Under article 27 of the African Women's Protocol, the African Court on Human and Peoples' Rights is expressly given the jurisdiction to adjudicate on matters pertaining to the interpretation, and application of the Protocol. However, this provision should not be understood as excluding the jurisdiction of the African Commission to promote and protect the fundamental rights that are guaranteed under the African Charter-based treaties.[208] Thus far, as mentioned in Chapter 1 of this study, there has not been a communication to the African Commission or

[208] Viljoen *International Human Rights Law in Africa*, *supra* at 437-438.

the African Court alleging a violation of the provisions of the Protocol on the Rights of Women.

[20] The African Women's Protocol does not contain provisions recognizing the right of ratifying states to enter reservations. In the absence of such a provision, reservations under the Protocol can be assumed to be governed by the Vienna Convention on the Law of Treaties.[209] It is significant that no ratifying state has entered a reservation against the equality and non-discriminations provisions in article 3 of the Protocol, including states such as Libya that entered reservations in respect of articles 2 and 16(c) and (d) of the Women's Convention on account of the incompatibility between equality and non-discrimination envisaged by the Women's Convention and domestic precepts of Shari'ah.[210]

2.6 Domestication of African Charter in the African Region

[21] The recognition of the African Charter in domestic jurisprudence has tended to be in form only rather than in substance. Several African states expressly invoke the African Charter preambles to constitutions,[211] but rarely going beyond this fact. In general, the African Charter has not impacted on the jurisprudence of domestic states in a manner that is clearly discernible or significant even in countries that follow a monist tradition of incorporating international law. At best, African courts have, on the whole, used the African Charter as an aid to interpretation rather than a source of directly enforceable rights.

[22] The case of *Attorney-General of Botswana v Unity Dow*[212] where the Court of Appeal of Botswana used the African Charter as an aid to constitutional and statutory interpretation, including article 2 of the Charter, main equality clause, is an illustration.

Attorney-General of Botswana v Unity Dow (2001) AHRLR 99 (Court of Appeal of Botswana).

The respondent, Unity Dow, was a citizen of Botswana who had successfully established before the High Court of Botswana that provisions of the Citizenship Act of Botswana of 1984 were discriminatory on the ground of sex and, thus, unconstitutional to the extent that it denied the citizenship of Botswana to two of

[209] Viljoen *International Human Rights Law in Africa*, *ibid* at 273.
[210] Note that Libya is outside the WHO African region and is mentioned here only to highlight the lack of reservation by even states that have instituted Shari'ah.
[211] Examples are the following constitutions: Madagascar (1992); Benin (1990).
[212] *Attorney-General of Botswana v Unity Dow* (2001) AHRLR 99 (Court of Appeal of Botswana). Botswana is not part of the sampled counties and reference to this case is for illustrative purposes.

their children that were born during the currency of their marriage. The state of Botswana was appealing against the decision.

[23] Section 4 of the Citizenship Act provided that:

(1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth-
(a) his father was a citizen of Botswana; or
(b) in the case of a person born out of wedlock, his mother was a citizen of Botswana
(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless her was a citizen at the time of such commencement.

Section 4(1) was a clear implementation of a patrilineal tradition in conferring citizenship. The section permitted different treatment on the basis of sex for the purposes of determining citizenship by birth or descent, in that had the applicant been male, her children would have been entitled to the citizenship of Botswana.

[24] The relevant constitutional provisions were sections 3 and 15 of the Constitution of Botswana of 1996. Section 3 of the Constitution, which inter alia, provided that:

> Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following freedoms, namely….

The relevant provisions of section 15 of the Constitution of Botswana are the following:

(1) Subject to the provisions of subsections 4, 5 and 7 of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
(2) Subject to the provisions of subsections 6, 7 and 8 of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in performance of the functions of any public office or any public authority.
(3) In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinion, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description.
(4) Subsection 1 of this section shall not apply to any law so far as that law makes provision
(a) …
(b) …
(c) with respect of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not; or
(e) whereby persons of any such description as is mentioned in subsection 3 of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to these persons or to persons of any other such description, is reasonably justifiable in a democratic society.

[25] Section 15 is the main equality clause. An interesting aspect to the drafting of section 15(3) is that it does not make explicit reference to 'sex' as a protected ground. Notwithstanding this limitation, the Court unanimously upheld dismissed the appeal and confirmed that provisions of the Citizenship Act that discriminated on the ground of sex were unconstitutional. It said that if the drafters of the Constitution had intended to render section 15 discriminatory on the ground of sex, they would have expressed the intention in clear words, not least because section 3 of the Constitution expressly provides 'sex' as one of the protected grounds. In this connection, Justice Amissah said:

> If the makers of the Constitution had intended that equal treatment of males and females be excepted from the application of subs 15(1) and (2), I feel confident, after examination of these provisions, that they would have adopted one of the express exclusion words that they had used in this very same section and in the sister section referred to. I would expect that, just as section 3 boldly states that every person is entitled to the protection of the law irrespective of sex, in other words giving a guarantee of equal protection, section 15 in some part would also say again, equally expressly, that for the purposes of maintaining the patrilineal structure of society, or whatever reason the framers of the Constitution thought necessary, discriminatory laws or treatment may be passed, or meted to men.

[26] In reaching this conclusion, the Court of Appeal of Botswana took into account the international obligations of Botswana under human rights treaties. The state had objected to international human rights treaties being relied upon to support the claim of Unity Dow. Referring to the African Charter, and in particular the relevance of article 2 of the Charter, the Court said:

> Botswana is a signatory to this charter….Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution…This does not seem to me to be saying that the OAU convention, or by its proper name the African Charter on Human and Peoples' Rights, is binding on Botswana as legislation passed by its Parliament.

The Court said that, as far as possible, it should interpret domestic legislation so as not to conflict with Botswana's obligations under the charter or other international obligations.

[27] Among states that follow a dualist tradition, that in essence means Commonwealth Africa, Nigeria is the only jurisdiction that has expressly incorporated the African Charter.[213] But even in Nigeria, the African Charter has been accorded a status subordinate to the country's constitution by the Nigerian Supreme Court.[214]

[28] The decision of the Court of Appeal of Kenya in *Mary Rono v Jane Rono and Another*, where an international human rights treaty that had been ratified but not incorporated into domestic law by the state was applied as domestic law by the Court is a rare exception to the general approach.

Mary Rono v Jane Rono and Another, Civil Appeal 66 of 2002.

A farmer had died intestate. He was survived by two wives and nine children. Five of the children were sons and four were daughters. A dispute arose as to the allocation of shares of the estate in the form of farm land to the surviving children. Applying both the Kenyan Succession Act and the Marakwet customary law which would have applied to the deceased, the High Court had held that larger shares would be allocated to the sons and smaller shares to the daughters. The High Court's reasoning was that although the Succession Act would have mandated the allocation of equal shares, it was to be read in conjunction with customary law. Sections 32 and 33 of the Succession Act recognised customary law as a component part relevant applicable law.

[29] According to Marakwet customary law, inheritance was governed by Kenyan patrilineal rules. Though sons could inherit, daughters could not. On this understanding, the High Court determined that it would be correct to modify what would have been the outcome had the Succession Act been the only applicable law. It determined that though all the children would be allocated share of the land, daughters would be allocated smaller shares as they would not have been able to inherit the land under customary law. Another reason for allocating smaller shares to daughters was that they were expected to exercise the option of marrying and leaving home in the future, while sons traditionally remained on the inherited land. In support of the claim of the daughters to equal shares, it was contended on appeal to the Court of Appeal that awarded unequal

[213] African Charter on Human and Peoples' Rights Act of Nigeria (1990).
[214] *Abacha v Fawehinmi* (2001) AHRLR 172 (Supreme Court of Nigeria).

shares constituted unfair discrimination on the ground of sex contrary to section 82(1) of the Constitution of Kenya.

[30] The Court of Appeal allowed the appeal. It observed that sex was a protected ground under section 82(1) of the Constitution.[215] The approach of the Court was that section 82(4),[216] which excludes the application of section 82(1) to matters, inter alia, relating to 'devolution of property on death or other matters of personal law' must be understood as weakening the equality guarantee in section 82(1) rather than providing section 82(4) with absolute immunity from an equality inquiry that draws its authority from fundamental law. The Court then proceeded to fill in the gap created by section 82(4) of the Constitution by drawing from equality clauses of international treaties and the Women's Convention in particular. The Court observed that Kenya had ratified the Women's Convention. It said that 'current thinking on the common law theory is that both international customary law and treaty law can be applied by states courts where there is no conflict with existing state law, even in the absence of implementing legislation'. It found that a decision to allocate greater shares to sons did not 'resonate with the noble notions enunciated in our Constitutions and international law'. More specifically, the Court said that such an outcome constituted discrimination contrary to the Women's Convention.

[31] Notwithstanding that the Kenyan Court of Appeal was primarily drawing from the Women's Convention rather than the African Charter in order to invalidate the provisions of the Succession Act, customary law, and more significantly section 82(4) of the Kenyan Constitution, the case illustrates the domestication of international human rights norms even in the face of contrary domestic laws. Though a rare example, the case shows that, given judicial willingness, even in a jurisdictions that follow a dualist tradition, the highest court of the land can pave the way for according human rights the status of fundamental law even when there has not been domestic incorporation by the legislature.

2.7 Sex as a Protected Ground under Domestic Jurisprudence

[32] 'Sex' is a universally protected ground under African Constitutions. In this respect, African constitutions largely emulate the Universal Declaration and the Covenant on Civil and Political Rights. The following equality and non-discrimination clauses are illustrations:

- *Constitution of Cameroon of 1996*
  Preamble to the Constitution of Cameroon

[215] For the text of section 82 – the main equality clause of the Kenyan Constitution, see section 3.3 below.
[216] For the text of section 82(2) see section 3.3 below.

We, people of Cameroon,
Declare that the human person, without distinction as to race, religion, *sex* or belief, possesses inalienable and sacred rights;
Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and The African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto, in particular, to the following principles:
- all persons shall have equal rights and obligations. The State shall provide all its citizens with the conditions necessary for their development;
- the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law;
…
- no person shall be harassed on grounds of his origin, religious, philosophical or political opinions or beliefs, subject to respect for public policy;
…
- the Nation shall protect and promote the family which is the natural foundation of human society. It shall protect women, the young, the elderly and the disabled;
…

- *Constitution of Nigeria of 1999*

Article 15
(1) The motto of the Federal Republic of Nigeria shall be Unity and Faith, Peace and Progress.
(2) Accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.
…..
Article 42
(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-
(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, *sex*, religions or political opinions are not made subject; or
(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.
(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

- *Constitution of Ethiopia of 1987*

Article 25
All persons are equal before the law and are entitled to without discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without distinction on the grounds of race, nation, nationality or other social origin, colour, *sex,* language, religion, political or other opinion, property, birth or other status.

Article 35
1. Women shall, in the enjoyment of rights and protections provided for by this Constitution, have equal right with men.

2. Women have equal rights with men in marriage as prescribed by this Constitution.
3. The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.
4. The State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.
5. (a) Women have the right to maternity leave with full pay. The duration of maternity leave shall be determined by law taking into account the nature of the work, the health of the mother and the well-being of the child and family.
(b) Maternity leave may, in accordance with the provisions of law, include prenatal leave with full pay.
6. Women have the right to full consultation in the formulation of national development policies, the designing and execution of projects, and particularly in the case of projects affecting the interests of women.
7. Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property.
8. Women shall have a right to equality in employment, promotion, pay, and the transfer of pension entitlements.
9. To prevent harm arising from pregnancy and childbirth and in order to safeguard their health, women have the right of access to family planning education, information and capacity.

- *Constitution of Kenya of 1963*

  Section 82

  (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.
  (2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.
  (3) In this section the expression "discriminatory" means affording different treatment to persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or *sex* whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
  (4) Subsection (1) shall not apply to any law that makes provision-
    (a) with respect to persons who are not citizens of Kenya;
    (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
    (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law

with respect to that matter which is applicable in the case of other persons; or

(d) whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to the special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society

- *Constitution of Tanzania of 1977*

Article 12

(1) All human beings are born free, and are all equal.

(2) Every person is entitled to recognition and respect for his dignity.

Article 13

(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.

(2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.

(3) The civic rights, duties and interests of every person and community shall be protected and determined by the courts of law or other state agencies established by or under the law.

(4) No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office,

(5) For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications.

- *Constitution of Uganda of 1995*

Article 21.

(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of *sex*, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(4) Nothing in this article shall prevent Parliament from enacting laws that are necessary for—

(a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or

(b) making such provision as is required or authorised to be made under this Constitution; or

(c) providing for any matter acceptable and demonstrably justified in a free and democratic society.
(5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution.

- *Constitution of Malawi of 1994*

Section 12

This Constitution is founded upon the following underlying principles—
(i) …
(v) As all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.
…

Article 13

Principles of national policy

The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals--

(a) Gender Equality
To obtain gender equality for women with men through--
(i) full participation of women in all spheres of Malawian society on the basis of equality with men;
(ii) the implementation of the principles of non-discrimination and such other measures as may be required; and
(iii) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property

Article 20

(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, *sex*, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.
(2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

Article 24

(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right-
(a) to be accorded the same rights as men in civil law, including equal capacity-
(i) to enter into contracts;
(ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status;
(iii) to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and
(iv) to acquire and retain citizenship and nationality.
(b) on the dissolution of marriage—

(i) to a fair disposition of property that is held jointly with a husband; and
(ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.

(2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as-
(a) sexual abuse, harassment and violence;
(b) discrimination in work, business and public affairs; and
(c) deprivation of property, including property obtained by inheritance.

- *Constitution of South Africa of 1996*

Section 9

(1) Everyone is equal before the law and has equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

- *Constitution of Zimbabwe of 1979*

Section 23 of the Constitution of Zimbabwe is the main equality clause. Section 23 is reproduced in Chapter 1 of this study.

[33] African constitutions are primarily post-colonial creations. Historically, equality and non-discrimination clauses in African constitutions are a consequence of a region in which colonial peoples were the victims of discrimination on the ground of race, and colonial struggles for political and legal emancipation were inspired by the goal of creating an equal society. The tradition amongst most African countries has been to emulate United Nations instruments when drafting bills of rights and to list the group associations or characteristics that have been historically used to disadvantage and marginalize members belonging or ascribed as belonging to such groups, including women. The earliest post-colonial bills of rights were inspired by the Universal Declaration and the Covenant on Civil and Political Rights such as the Constitution of Tanzania. The

newer African constitutions such as the South African and Malawian constitutions have drawn from a wider base such the Covenant on Economic, Social and Cultural Rights and the Women's Convention in providing equality and non-discrimination guarantees.

[34] The preponderance of African constitutions protect the category of 'sex' expressly in a clause that is dedicated to equality and non-discrimination. It is significant that even the two countries in the two WHO African region countries, namely Algeria and Mauritania, in which religious law in the form of Islamic law enjoys the status of being the religion of the state and necessarily provides the basis for conflict of laws with human rights-treaty based jurisprudence on equality, discrimination on the basis of sex is prohibited. 'Sex' is the preferred category rather than gender. Only the Constitutions of Ghana,[217] South Africa and Swaziland[218] use gender in their equality and non-discrimination clauses. Ghana and Swaziland's constitutions only use 'gender' while South Africa is a lone exception is using *both* 'sex' and 'gender' as protected categories. The use of gender as a protected category under the South African Constitution is designed to reflect constitutional consciousness of sex as a biological category and gender as a social category so as to align with an equality clause that envisages substantive equality rather than merely formal equality. As a social category, gender is a more encompassing category for promoting and protecting equality for historically disadvantaged and marginalized groups.

[35] Constitutions that do not refer to 'sex' explicitly are a rare exception to the rule and reflect an antiquated approach to drafting rather than a conscious decision by the drafters to omit sex from protected categories. The Constitution of Tanzania of 1977 is a case in point. Section 13(5) did not include 'sex' until it was amended in 2000. It is significant, however than even before the amendment definition of discrimination in article 13(5) of the Tanzanian Constitution implicitly alluded to sex or gender as a protected category through its allusion to stereotyping of members of certain social groups as conduct falling within the meaning of unlawful discrimination. From the outset, Tanzanian courts proceeded on the assumption that 'sex' was implicitly provided in article 13, as a protected ground under the Tanzanian Constitution.[219] Article 9(f) of the Tanzanian Constitution treats the Universal Declaration of Human Rights as an integral part of its substantive provisions. 'Sex' is a protected ground under

[217] Article 12(2) of the Constitution of Ghana of 1992.

[218] Section 20(2) of the Constitution of Swaziland of 2005.

[219] See also the approach adopted by the Court of Appeal in *Attorney-General of Botswana v Unity Dow* (2001) AHRLR 99 (Court of Appeal of Botswana) when it read 'sex' into section 15 of the Constitution of Botswana which is silent on this ground. This case was discussed earlier in this chapter. The difference, however between the two cases is that the Tanzanian case, the constitution was completely silent, but in the Tswana case, the constitution through silent on sex in section 15 – the main equality clause – at least mentions sex in section 3.

article 7 of the Universal Declaration. The application of 'sex' as an implicitly protected ground under the Tanzanian Constitution is illustrated by the decision of the High Court of Tanzania in *Ephrahim v Pastory*.[220]

Ephrahim v Pastory (1990) LRC 757 (High Court of Tanzania).

A woman had inherited land from her father through a valid will. The land belonged to the clan. As she was getting old and unable to care for herself or to cultivate the land, she sold it to someone who was not a member of the clan that her deceased father and herself belonged under customary law. The plaintiff, who was another member of the clan, sought a declaration from the High Court that the sale was void on the ground that it contravened *Haya* customary law by selling land outside the clan. The relevant customary law was contained in a codified form in section 20 of Laws of Inheritance of the Declaration of Customary Law of 1963, which provided that

> Women can inherit, except for clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership.

The customary law in question clearly treated female and male successors differently. Notwithstanding that 'sex' was not an explicitly protected ground, the Court said that the Bill of Rights of the Tanzanian Constitution incorporated protection of women against discrimination. The Court drew interpretive support not only from the presence of a non-discrimination clause in the Tanzanian Constitution, but equally significant, from the Universal Declaration, The Women's Convention and the African Charter. The Court said:

> …the Universal Declaration of Human Rights (1948) which is part of our Constitution by virtue of Article 9(1)(f) prohibits discrimination based on sex per Article 7. Moreover, Tanzania has ratified the Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on Human and Peoples' Rights which in Article 18(3) prohibits discrimination on account of sex and the International Covenant on Civil and Political Rights which in Article 26 prohibits discrimination based on sex. The principles enunciated in the above named documents are a standard below which any civilized nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.

[220] *Ephrahim v Pastory* (1990) LRC 757 (High Court of Tanzania).

Ephrahim v Pastory not only illustrates a reading in of 'sex' into an equality clause of a constitution that is otherwise silent on the matter, but also the subordination of customary law to constitutional rights and values.

[36] There is a significant body of case law illustrating the protection of 'sex' as a protected ground in the countries that have been sampled. With the exception of South Africa and Uganda, Much of the case law has arisen out of succession or inheritance disputes where a female was seeking to uphold a right to inherit property from a parent or a spouse or dispose inherited property in the face of a contrary customary law norm that is embedded in patriarchy and hence favours males. In the majority of cases, as is exemplified by the decision of the High Court Tanzania in *Ephrahim v Pastory*,[221] African domestic courts have been able to interpret the constitutional right to equality and non-discrimination to invalidate contrary customary law norms and thus uphold the rights of women. The decision of the Supreme Court of Zimbabwe in *Magaya v Magaya*[222] in which the court upheld a primogeniture customary law norm is against the trend of African judicial decision that have sought to reconcile the patriarchal traditions of customary law norms with constitutional rights to equality and non-discrimination.

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[221] (1990) LRC 757 (High Court of Tanzania), *supra*. See also: *Mary Rono v Jane Rono and Another*, Civil Appeal No 66 of 2002 (Court of Appeal of Kenya), *supra*; *Chiku Lidah v Adam Omari*, Civil Appeal No 34 of 1991 (High Court of Tanzania; *Mokekwu v Mojekwu* NWLR 283 (1997) (Court of Appeal, Nigeria). It was held that a customary law norm preventing a wife from inheriting from her deceased husband in order to prioritise inheritance by a male relative inheriting on the ground that the deceased had died without male issue was contrary to the equality provisions of the Nigerian Constitution as well as the Women's Convention. The decision of the Court of Appeal was appealed against in *Mojekwu v Iwuchukwu* (2004) 4 SC (Pt II) 1. In this case, the Supreme Court of Nigeria said that the Court of Appeal has been wrong in finding that the customary law norm was inconsistent with the constitution. However, the Court said that on the facts, the widow was entitled to the property; *Nzekwu v Nzekwu* (1989) 2 NWLR 373 (Supreme Court, Nigeria). It was held that a customary law norm which allowed a son to dispose of property of his deceased father during the lifetime of the deceased's widow was 'repugnant to natural justice, equity and good conscience'; *Muojekwo and Others v Ekijeme and Others* (2000) 5 NWLR 402 (Court of Appeal, Nigeria) where it was held that a custom that prevented grandchildren born of daughters who had not undergone the custom of *nrachi* was contrary to the principles of natural justice and morality. According to the *nrachi* custom, a father may decree for one of his daughters to stay with him but without marrying. The daughter is allowed to have children. In return, the daughter can inherit her father's property on his demise as if she were a man. Moreover, her children may also inherit the property; *Bhe v The Magistrate Khayelitsha and Others* 2005 (1) BCLR 1 (Constitutional Court of South Africa). This case was discussed in Chapter 1 of this study; *Mandizvidza v Chaduka NO and Others* 1999(2) ZLR 375 (Supreme Court of Zimbabwe). It was held that exclusion of a female student from a training college on the ground that she was pregnant constituted unfair discrimination on the ground of sex contrary to section 23(1) of the Constitution of Zimbabwe.

[222] *Magaya v Magaya* 1999 (1) ZLR 100 (Supreme Court of Zimbabwe). This case was discussed in Chapter 1 of this study.

[37] On their own, inheritance or succession cases involving discriminatory customary law norms have a tenuous rather than strong link with sexual health. The cases tell us whether there is fair access to inherited property as between males and females. At best, such information is relevant, in a very general sense, to determining socio-economic wellbeing of men and women which in turn is a determinant of health. At a broad jurisprudential level, however, the cases are useful for demonstrating a trend judicial willingness to subordinate customary law norms to human rights norms.

[38] In many constitutions, there is, in addition to listing 'sex' or 'gender' as a protected category, also an attempt to provide, in the equality and non-discrimination clauses or elsewhere in the constitution, substantive guidance about the content of the equality and non-discrimination that is envisaged for all the protected grounds. In this connection, a number of constitutions provide internal guidance through constitutional provisions that:

- define discrimination and capture the notion of discrimination as unlawful differentiation on the basis on group characteristics that has the effect of either depriving the discriminated group of a benefit that is accorded to others or imposing a burden or disadvantage that is not imposed on others;[223]
- define discrimination to include both direct and indirect discrimination;[224]
- exclude affirmative action measures from the ambit of discriminatory measures;[225]
- provide for both vertical as well as horizontal application of equality and non-discrimination obligations;[226]
- extend protection to other groups that are not explicitly listed;[227]

[223] See for example: section 17(3) of Constitution of Ghana; section 82(3) of the Constitution of Kenya; section 20(3) of Constitution of Swaziland; article 13(5) of the Constitution of Tanzania; article 21(3) of the Constitution of Uganda.

[224] See for example: section 9(4) of the Constitution of South Africa; section 20(4) of the Constitution of Swaziland; article 21(4) of the Constitution of Uganda.

[225] See for example: article 35(3) of the Constitution of Ethiopia; section 9(2) of the Constitution of South Africa; section 20(5) of the Constitution of Swaziland;

[226] Section 9(3) of the South African Constitution applies vertically while section 9(4) applied horizontally. The South African Constitution is alone is providing for horizontal application of non-discrimination duties in its text.

[227] In this regard, the section 9(3) of the South African Constitution prefixes the listed groups with the word 'including'. Some constitutions use phrases such as 'other status' that emulate United Nations human rights treaties. Examples are: article 25 of the Constitution of Ethiopia; article 20(1) of the Constitution of Malawi. The majority of constitutions use phrases such 'social standing' or 'social status' to include other groups: see, for example: article 30 of the Constitution of Algeria; article 17(2) of the Constitution of Ghana; article 4(1) of the Constitution of Lesotho; 20(2) of the Constitution of Swaziland; article 11(2) of the Constitution of Rwanda; article 13(5) of Tanzania; article 21(3) of the Constitution of

- impose on the legislature a positive duty to enact anti-discrimination legislation;[228]
- assert the supremacy of the constitution over customary law and other non-constitutional laws;[229]
- impose a duty on the state to develop all on constitutional laws, including customary laws in line with constitutional values;[230] and
- protect customary and/or personal religious laws from non-discrimination duties.[231]

[39] In general, African jurisdictions have not systematically implemented the equality and non-discrimination norms in their constitutions through the adoption of legislative instruments. South Africa is a lone exception in having comprehensive legislation – the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 and the Employment Equity Act of 1998- that in combination seek to systematically implement the equality imperatives in the domestic constitution in all the major spheres of life.

[40] The South African Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act) seeks not only to implement the equality and non-discrimination in section 9 of the South African Constitution, but also to facilitate further compliance with South Africa's international law obligations including obligations under the Women's Convention.[232] The Equality Act has pervasive application in that it applies to all areas that are not governed by the Employment Equity Act.[233] In terms of best practices for eliminating sex and gender-based discrimination, the Equality Court is a positive development. It contains several provisions that are conducive to the development of a progressive equality jurisprudence, including provisions that:

- impress upon the open rather than closed nature of protected grounds;[234]

Uganda. Constitutions that appear to convey the idea of a closed list of protected groups such as article 42 of the Constitution of Nigeria and 23(1) of the Constitution of Zimbabwe constitute a small minority.

[228] Section 9(4) of the South African Constitution is a lone example in the African region.

[229] Article 2(2) of the Constitution of Uganda.

[230] Section 39 (2) of the South African Constitution says: ' When interpreting any legislation, and when developing the common law or *customary law*, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Emphasis provided.

[231] Section 82(4) of the Constitution of Kenya; section 23 of the Constitution of Zimbabwe.

[232] Section 2 of the Equality Act.

[233] Section 5(2) of the Equality Act. The Employment Equity Act no 55 of 1998 is discussed later in this section.

[234] The protected grounds are listed in section 1(xxii) of the Equality Act which says: ''prohibited grounds'' are—*(a)* race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or *(b)* any other ground where discrimination based on that other ground— (i) causes or perpetuates

- clearly situate equality and non-discrimination in substantive equality;[235]
- provide guidance for the determination of whether the conduct in question constitutes unfair discrimination and in this connection, section 14 of the Equality Act provides inter alia that:

  (1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.
  (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
  (a) The context;
  (b) the factors referred to in subsection (3);
  (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
  (3) The factors referred to in subsection (2)*(b)* include the following:
  (a) Whether the discrimination impairs or is likely to impair human dignity;
  (b) the impact or likely impact of the discrimination on the complainant;
  (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
  (d) the nature and extent of the discrimination;
  (e) whether the discrimination is systemic in nature;
  (f) whether the discrimination has a legitimate purpose;
  (g) whether and to what extent the discrimination achieves its purpose;
  (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
  (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
  (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
  (ii) accommodate diversity.[236]
- provide guidance of the types of practices that constitute discrimination on the ground of gender and include the following:

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systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph *(a)*. The approach to listed grounds under the Equality Act reflects the interpretation of section 9 of the South African Constitution by the Constitutional Court in that it includes listing grounds that are protected expressly as well as implicitly as analogous grounds. It is significant that section (xxii) provides explicit guidance for determining what constitutes an analogous ground. The guidance draws from leading cases on equality such as *Harksen v Lane* 1997 (11) BCLR 1489 (Constitutional Court of South Africa).

[235] There are several provisions that support equality as substantive equality but the most direct support comes from According to section 1(ix) which says: '"equality" includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes'.

[236] The factors that must be taken into account when determining whether discrimination is fair are drawn from the jurisprudence of the Constitutional Court as development in cases such as *Harksen v Lane* 1997 (11) BCLR 1489 (Constitutional Court of South Africa).

(a) gender-based violence;
(b) female genital mutilation;
(c) the system of preventing women from inheriting family property;
(d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
(e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
(f) discrimination on the ground of pregnancy;
(g) limiting women's access to social services or benefits, such as health, education and social security;
(h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
(i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.[237]

- prohibit hate speech and harassment as transgressions that
- create special courts – Equality Courts - for adjudicating equality claims at first instance with a view to making access to courts more accessible;[238]

[41] The South African Employment Equity Act seeks to protect and promote the rights to equality and non-discrimination in employment, inter alia, on the grounds of 'gender' and 'sex'.[239] Like the Equality Act, the Employment Equity Act must be interpreted in accordance with jurisprudence on equality and non-discrimination that has been developed under the Constitution and in accordance with South Africa's international obligations.[240] In practice, this entails applying the equality jurisprudence that has been developed by the Constitutional Court of South Africa.[241]

[42] As alluded to earlier, unlike the position in the majority of African jurisdictions, South African court decisions on sex or gender as a protected ground have addressed areas beyond inheritance rights or property rights generally.[242] In this regard, the Constitutional Court of South Africa has adjudicated on sex and gender discrimination arising out of adoption, prison remission, sex work, and

[237] Section 8 of the Equality Act.
[238] Sections 16-23 of the Equality Act. Every magistrate court and every High Court is designated as an Equality Court: section 16 of the Equality Act.
[239] Section 6(1) of the Employment Equity Act.
[240] Section 3 of the Employment Equity Act.
[241] JL Pretorius *et al Employment Equity Law* (2001) Chapter 2.
[242] The leading inheritance or property cases that have come before the Constitutional Court of South Africa are: *Brink v Kitshoff* 1996 (4) BCLR 441 where it was held that legislation that provided that the proceeds of life insurance policy taken out by a husband in favour of his wife would be available to creditors if the husband died insolvent constituted unfair discrimination on the basis of marital status but not on sex and gender; *Bhe v The Magistrate Khayelitsha and Others* 2005 (1) BCLR 1. This case was discussed in Chapter 1 of this study.

rape. In *Fraser v Children's Court, Pretoria North*,[243] the Court held, in part, that requiring only the consent of the mother of a child born out of wedlock to consent to adoption did not constitute unfair discrimination on the basis of sex or gender. In *President of South African v Hugo*[244] it was held that a presidential decree to remit the sentence of prisoners who were mothers (and not fathers) of children under twelve years of age did not constitute unfair discrimination on the basis on sex and gender. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[245] the Court held in part that the common law crime of sodomy which only criminalized sexual acts between males constituted unfair discrimination on the ground of sex. In *S v Jordan*[246] it was held that legislation that criminalized sex workers, who were predominantly female, but not their clients, who were predominantly male, did not constitute unfair discrimination of the ground of sex and gender. In *Masiya v Director of Public Prosecutions*,[247] it was held, in part, that the common law definition of rape that was gender specific as to assume only women as victims of rape did not constitute unfair discrimination on the grounds of sex and gender.

[43] Of the South African cases on sex and gender discrimination, it is the *National Coalition for Gay and Lesbian Equality v Minister of Justice, Jordan,* and *Masiya* cases that have a closer bearing on the protection and promotion of sexual health. Criminalizing consensual sexual acts between persons of the same sex who have the capacity to consent freely stigmatizes people on the basis on sexual orientation and makes it less likely for gays and lesbians to avail themselves of health services as well as to partake of health promotion activities. Sexual acts that are conducted under a cloud of possible prosecution render subscription to safer sexual practices less likely. Equally, criminalizing sex work is stigmatizing. It has a capacity to alienate sex workers especially from health services and health promotion efforts. Fear of prosecution and conviction make it less likely that sex workers will be ready and willing to request for health services or generally engage in individual and collective efforts for the prevention and treatment of sexually transmitted infections. Criminalizing rape is a way of protecting the physical and psychological integrity of persons whether they are female or male. Coerced sexual acts do not only injure the human rights to dignity and privacy, but are also a potent route for sexually transmitted infections.

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[243] *Fraser v Children's Court, Pretoria North* 1997 (2) BCLR 153 (Constitutional Court of South Africa).
[244] *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (Constitutional Court of South Africa).
[245] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (Constitutional Court of South Africa). This case is further discussed in a later section in this chapter and in Chapter 3 of this study.
[246] *S v Jordan* 2002 (11) BCLR 1117 (Constitutional Court of South Africa). This case is further discussed in Chapter 9 of this study.
[247] *Masiya v Director of Public Prosecutions* 2007 (8) BCLR 827 (Constitutional Court of South Africa). This case is further discussed in Chapter 3 and in Chapter 6 of this study.

[44] As alluded to earlier, over and above South Africa, Uganda is the other exception in terms of African jurisdictions with sex discrimination jurisprudence that goes beyond succession disputes. In this regard, the Constitutional Court of Uganda has two decisions. In the first decision - *Uganda Association of Women Lawyers and Others v The Attorney General*[248] - the Court held that provisions of the Ugandan Divorce Act which treated men and women differently contravened the equality clause - article 21 - of the Constitution of Uganda on the basis of sex and gender.

The provisions in question provided the following in the context of divorce proceedings on the ground of adultery: 1) that a husband need only prove adultery to obtain divorce while a wife must prove aggravated adultery; 2) that a husband must join an alleged adulterer as a co-respondent but a wife is not so required; 3) that a husband may seek damages from a co-respondent but a woman cannot; 4) a husband may be required to pay alimony but a wife cannot be so required; 5) and that where divorce is granted on the basis of the wife's adultery, the court may order the whole or part of the marital property to be provided to the husband but no such provision existed where the divorce is granted on the basis of the husband's adultery.

In holding the provision to be discriminatory, the Court said that equality was a core value under the Constitution of Uganda and that the provisions in question were a colonial vestige that reflect a time when the concept of family was patriarchal and women where subservient to men. The Court highlighted that equality during the subsistence of marriage and its dissolution was protected by the equality clause of the Ugandan Constitution, and furthermore, women's human rights were inalienable and essential to the development of any country.

[45] The other Ugandan case is *Law Advocacy for Women in Uganda v Attorney General*.[249] In this case, the Constitutional Court held that section 154 of the Ugandan Penal Code which treated men and women differently in the definitional elements of adultery was discriminatory on the basis of sex and gender as to contravene, inter alia, article 21 of the Constitution of Uganda. The relevant provision provided that 'any man who has sexual intercourse with any married woman not being his wife commits adultery', while on the other hand it provided that 'any married woman who had sexual intercourse with any man not being her husband commits adultery'. The provision privileged males in that adultery could only be committed if the co-adulterer is a married woman.

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[248] *Uganda Association of Women Lawyers and Others v The Attorney General*, Constitutional Petition No 2 of 2003 (2004) 1 (Constitutional Court of Uganda).

[249] *Law Advocacy for Women in Uganda v Attorney General,* Constitutional Petition Numbers 13/05 and 05/06 (2007) 1 (Constitutional Court of Uganda).

2.8 Marital Status and African Charter-Based Jurisprudence

[46] Article 2 is the general the equality and non-discrimination clause of the African Charter. It does not list 'marital status' explicitly as a protected ground. However, article 2 is drafted in an inclusive manner. It uses the term 'other status' to denote grounds that are not listed but are implicitly protected. Marital status fits comfortably into this implicit category not least because it is a ground that is now clearly protected by United Nations human rights instruments, including the Women's Convention.[250] Furthermore, the listing of 'marital status' in article 1 of the African Women's Protocol in the context of defining what constitutes discrimination, puts the matter beyond doubt that marital status is a protected ground under the equality and non-discrimination provisions of African-Charter-based human rights treaties.

2.9 Marital Status and Domestic Jurisprudence

[47] Generally, constitutions of African countries do not explicitly list 'marital status' as a ground protected against discrimination. Section 9(3) of the South African Constitution is an exception to the rule in listing 'marital status' as one of the protected grounds. At the same time, 'marital status' is a ground that can be assumed to being amenable to being read into equality clauses of African Constitutions, not least because many African Constitutions list protected grounds in an inclusive manner using terms such as 'other status', 'social status', or 'station in life' or their equivalents.[251]

[48] In addition to being an exception in listing marital status as a protected ground under the equality and non-discrimination clause of the constitution, the South African jurisdiction has also taken a lead in developing a judicial test for determining whether a ground that is not listed as a protected ground is, nevertheless, to be regarded as implicitly protected. Section 9(3) of the South African Constitution lists the protected ground inclusively by saying: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, *including* race, gender, sex…' The Constitutional Court of South Africa has said that implicit grounds are 'analogous' grounds. They are those ground that, in terms of the impact on persons and social groups who are the object of discrimination, have an analogous effect. The Court has developed a test for determining unfair discrimination which focuses on the impact of the discriminatory conduct and its capacity to impair human dignity. It has used the same test to determine what constitutes an analogous ground. A ground is

[250] Articles 1 of the Women's Convention.

[251] See for example: article 25 of the Constitution of Ethiopia; article 14 of the Constitution of Eritrea; article 20(1) of the Constitution of Malawi; Article 21(3) of the Constitution of Uganda.

analogous if is it 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner'.[252]

[49] As a consequence of not developing comprehensive equality legislation, on the whole, African jurisdictions do not have parliamentary legislation that protects the right to equality and non-discrimination on the ground on marital status. South Africa is, however, an exception to the rule. Section 6(1) of the Employment Equity Act of 1998 list marital status as a ground protected against unfair discrimination. Likewise, marital status is a listed ground under the Equality Act.[253]

[50] Save for South African decisions, the African region does not command standard-setting decisions on marital status. The following paragraphs will summarize some leading cases on marital status that have been decided by the South African Constitutional Court.

[51] *In Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae*[254] The applicants who were female partners in a same sex relationship wanted to adopt two children. However, they were precluded from doing so by the combined effect of sections 17(a), 17(c and 20(1) of the Child Care Act of 1983[255] and section 1(2) the Guardianship Act of 1993[256] which provide for joint adoption and guardianship of children by married persons only. The reference to married persons in the Acts referred only to marriages recognised by the prevailing common law and legislation between heterosexual partners. The applicants challenged the provisions on the ground they breach the constitutional rights to equality and human dignity. Implicit in their challenge was that the legislation in question, unfairly discriminated on the grounds of marital status. The Constitutional Court unanimously held that the provisions of the Child Care Act and the Guardianship Act were in conflict with the Constitution. The provisions constituted a breach of both the right to equality and the right to human dignity.

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[252] *Harksen v Lane* 1997 (11) BCLR 1489, para 46 (Constitutional Court of South Africa). The test developed from *Harksen v Lane* has been applied in a number of cases. For example, in *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (Constitutional Court of South Africa), the test was applied to find that citizenship which is not a listed ground under section 9(3) of the Constitution, is, nonetheless, a listed. In *Hoffman v South African Airways* 2001 (1) SA 1 (Constitutional Court of South Africa), it was held that HIV status was an analogous ground. The *Hoffman* case is discussed later in this chapter.

[253] Section 1(xxii) of the Promotion of Equality and Prevention of Unfair Discrimination Act.

[254] 2003 (2) SA 198 (Constitutional Court of South Africa).

[255] Act No 74.

[256] Act No 192.

[52] The Court said that in giving effect to section 28(1)(b) of the Constitution which guarantees a child a right to a family or parental care, it is important to recognise that family life can be provided in different ways. Legal conceptions of the family and what constitutes a family should change as social practices and traditions change. Excluding from eligibility as adoptive parents same-sex life partners who are otherwise capable to provide stability, commitment, affection and support to an adopted child defeats the manifests object of section 28(2) of the Constitution which provides that 'a child's best interests are of paramount importance in every matter concerning the child. Moreover, such exclusion constitutes unfair discrimination contrary to section 9(3) of the Constitution. Equally, the exclusion constitutes a breach of the right to human dignity contrary to section 10 of the Constitution.

[53] In *Satchwell v President of the Republic of South Africa and Another*,[257] an employment term or condition that confined a third party benefit to the 'spouse' of an employee and implicitly excluded her lesbian partner was challenged before the Constitutional Court. The applicant, a woman and a judge by profession, had a permanent same-sex relationship. She lived with her partner in the same way that married couples do. The partners acknowledged mutual obligations of support. The applicant's conditions of service were governed, inter alia, by the Judges Remuneration and Conditions of Employment Act of 1989[258] and Regulations[259] pursuant to the Act. She brought an action challenging the constitutional validity of sections 8 and 9 of the Act and Regulations 9(2)(b) and 9(3)(a) of the Regulations.

[54] Section 8 of the Judges Remuneration and Conditions of Employment Act and the pursuant regulations provided for the payment to the 'surviving spouse' of a deceased judge two-thirds of the salary that would have been payable to the judge until the death of the surviving spouse. Section 9 of the Act and the pursuant regulations provided for the payment of a gratuity to the surviving spouse of a deceased judge. The applicant's argument was that excluding a same-sex partner from the benefit constituted unfair discrimination under section 9 of the Constitution.

[55] The Constitutional Court unanimously held that exclusion of permanent same-sex partners constituted a breach of the right to equality under the Constitution. The discrimination was unfair and could not be justified under section 36 of the Constitution. The omission in the Act and Regulations would be remedied by

[257] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1.
[258] Act No 88.
[259] Regulations in respect of Judges, Administrative Recesses, Leave, Transport and Allowance in respect of Transport, Travelling and Subsistence (GNR939, 6 June 1995).

reading after the word 'spouse' 'or 'a partner in a permanent same-sex life partnership in which partners have undertaken reciprocal duties of support'.

[56] *Satchwell* is an illustration of the interpretation of the constitutional right to equality as meaning substantive equality. *Satchwell* underlines the readiness of the Constitutional Court to interpret the right to equality and the proscriptions against discrimination on the ground of sexual orientation in section 9 of the Constitution generously so as to recognise that the heterosexual marriage is not the only type of family institution and that there are alternatives to the traditional concept of family. The decision is an implicit recognition that people may choose alternatives to the traditional family for different reasons and that alternative family institutions are entitled to respect, protection and fulfilment under the Constitution. Marital status should not be an automatic bar to entitlement to third party benefits.

[57] In terms of sexual health, *Satchwell* has a bearing albeit an indirect one. The socio-economic wellbeing of parties in same-sex relationships is as much as part of their sexual health as their physical wellbeing. Denying socio-economic benefits to survivors of same-sex partnerships undermines their socio-economic wellbeing. It is important, however, to appreciate that the reach of *Satchwell* does not extend to domestic partnerships where there is no objective evidence of an undertaking of obligations of mutual support on a permanent basis akin to the undertakings between parties in a conventional marriage. It is important to note that *Satchwell* was decided before the Civil Unions Act of 2006[260] which gives parties in same sex relationships the option to solemnize, through certification, their partnership and, thus, concomitantly evidence an undertaking of mutual obligations. It is submitted that where the parties have availed themselves of the rights under the Civil Unions Act of 2006, then, it will no longer be necessary for courts to first require objective evidence of an undertaking of mutual support before they can extend the benefits that have historically been accorded to heterosexual parties in conjugal relationships.

[58] The principle in *Satchwell* of recognising same-sex partners as family members or dependants is applicable to a wide range of third party employment benefits and not just pension benefits. It applies to medical schemes, insurance, educational benefits and other third party benefits.[261] Furthermore, the principle is not necessarily limited to the employment context but is potentially applicable to other contexts such as provision of social welfare grants.

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[260] Act No 17. Discussed in section 4.5.2 (below).

[261] See for example: *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (High Court of South Africa) on medical schemes; *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (High Court of South Africa) and *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (Supreme Court of Appeal of South Africa) on insurance.

[59] The decision of the Constitutional Court in *Volks v Robinson*,[262] however, stands for a regressive standard. In this case, at first instance, it had been held at a High Court level[263] that a legislative instrument – the Maintenance of Surviving Spouses Act of 1990 – which granted only a surviving 'spouse' but not a partner the right to claim maintenance from the estate of his or her deceased spouse, constituted unfair discrimination on the ground of marital status contrary to section 9(3) of the Constitution. The applicant was a survivor of a permanent relationship which was akin to living as husband and wife She had submitted a claim for maintenance out of her deceased partner's estate, but the claim had been declined on the ground that she was not a 'spouse' as she had not been married to the deceased. She had argued that the Act discriminated against her on the grounds, inter alia, of marital status contrary to section 9(3) of the Constitution. On appeal by the estate, the Constitutional Court, by a majority, reversed the decision and held that it was not unfair discrimination to grant a benefit only to a spouse.

[60] The reasoning of the Constitutional Court in *Volks* was essentially based on validating the legislative intention behind the Maintenance of Surviving Spouses Act rather than subjecting the Act to the equality and non-discrimination tenets of the Constitution. The Court said that while the Act discriminated against unmarried persons, the discrimination was not unfair because the intention of the Act was to benefit only those that had *chosen* to enter into a marriage and not those that had chosen not to enter into a marriage. The underpinning assumption by the Court was that people make choices about marriage and that it is not for the Constitution to impose choices on people who have chosen to cohabit rather than marry. What is missing from the Court's approach is awareness of marriage as a legally privileged institution when juxtaposed with alternative family institutions. Also missing from the Court's approach is awareness of the disparate effect of the Act on women, especially, as they are in a relatively weaker economic position than their male partners and for this reason are also in a relatively weaker position to decide on marriage. The approach of the Court in *Volks* is inconsistent with the Court's own overall approach to substantive equality.[264]

[61] It is important to note that the judges constituting in the minority in *Volks* (Justices Mokgoro, O'Regan and Sachs) were able to incorporate gender into the unfair discrimination analysis to come to a different conclusion. Justices Mokgoro and Justice O'Regan were of the view that differentiation on the basis

[262] *Volks v Robinson* 2005 (5) BCLR 466 (Constitutional Court of South Africa).
[263] *Robinson v Volks* 2004 (6) 288 (High Court of South Africa).
[264] E Bonthuys 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 *Canadian Journal of Women & Law* 1.

of marital status constituted unfair discrimination because the Act treated a relationship that fulfilled the same function as marriage differently and less favourably. The Act failed to take into account that there is gendered division of labour even between cohabitants and that women are vulnerable after the death of their partners whether they are married or cohabiting. Justice Sachs in his dissenting judgment said that marriage was not a mere matter of choice as suggested by the majority, and that the reality in many women's lives is that they cannot freely choose whether to marry or become a cohabitant. According to Justice Sachs, it was for the Constitution to vindicate equality and non-discrimination by transforming the systemic pattern of privileging marriage over other institutions that serve the same social functions.

2.10 HIV Status as a Protected Ground

[62] Discrimination on the ground of HIV status is stigmatizing. It is a deterrent to voluntary testing and counseling as well as access to treatment. HIV is a pandemic in the African region such that discrimination on the ground of HIV status is apt to undermine public health strategies to combat the spread of the infection. Though not explicitly protected against discrimination by current international human rights treaties, it is generally accepted that such discrimination is implicitly prohibited under international human rights instruments through 'reading' into the equality and non-discrimination clauses, HIV status. Treaty bodies of United Nations human rights instruments have from time to time issued General Comments that affirm the right to non-discrimination on the basis of HIV status.[265] Likewise, though African Charter-based instruments do not list HIV in their equality and non-discrimination clauses, HIV can be surmised as implicitly included in 'other status' or its equivalents.

[63] Constitutions of African jurisdictions do not list HIV as a protected ground in their equality and non-discrimination clauses save in one instance – the Constitution of Burundi which lists 'suffering from HIV/AIDS' among the grounds protected against unfair discrimination.[266] As submitted earlier, constitutional provisions ought to generally allow the reading in of protected grounds where the ground is analogous, unless such reading in cannot be sustained by a plausible interpretation of the Constitution. Provisions of Bills of

[265] Committee on Economic, Social and Cultural Rights, General Comment 14 (The Right to the highest Attainable Standard of Health) paras 28-29 (2000); Committee on the Convention on the Rights of the Child, General Comment 3 (HIV/AIDS and the Rights of the Child) (2003) paras 7-9; The Committee in its General Comment 20 on Non-Discrimination in Economic, Social and Cultural Rights E/C.12/GC/20 25 May 2009, especially paras 15, 27 and 33.

[266] Article 22 of the Constitution of Burundi of 2004.

Rights ought to be interpreted to promote rather than to restrict human rights. In this regard, South Africa has taken a lead in the African region in reading in HIV status into its constitution in *Hoffmann v South African Airways*.[267]

[64] The main issue before the Constitutional Court in the *Hoffmann* case was whether refusal by South African Airways to employ Hoffmann as an airline steward on the ground of HIV status constituted unfair discrimination contrary to section 9(3) of the Constitution. As part of adjudication, the Court has to determine whether HIV constituted an analogous ground under section 9(3) as it was not listed. The Court held that HIV was an analogous ground and that the conduct of the airline constituted unfair discrimination contrary to section 9(3) of the Constitution.

[65] In determining whether HIV was an analogous ground, the Court noted that the grounds listed in section 9(3) are inclusive rather than exhaustive. The Court followed the flexible and inclusive approach that it developed in cases such as *Harksen v Lane*[268] to the effect that that the grounds that are listed as prohibited grounds in section 9 are not a closed category, but, instead, illustrations of grounds that have historically been used to perpetrate unfair discrimination. Section 9(3) contemplates other grounds for discrimination that are not explicitly articulated. The crucial consideration is whether the conduct in question amounts to treating a person differently, adversely and with injury to his or her human dignity on the basis of a personal attribute or characteristic. Ultimately the question is whether discriminating on the basis of HIV status means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

[66] As part of its deliberation in *Hoffmann*, the Constitutional Court took into account that the need to eliminate unfair discrimination was not only an obligation

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[267] *Hoffmann v South African Airways* 2001 (1) SA 1 (Constitutional Court of South Africa). For a similar approach outside of the countries that have been surveyed see also *Makuto v State* (2000) 5 LRC 183 (Court of Appeal of Botswana), where the equality and non-discrimination clause in section 15 of the Constitution of Botswana was interpreted as implicitly including protection against discrimination on the grounds of HIV status. Section 15 prohibits discrimination on the basis of 'race, tribe, place or origin, political opinions, colour or creed'. The Court said that the drafters of section 15 did not envisage a closed category of protected grounds. The case concerned an applicant who had been convicted of rape and had been given a more severe sentence for the reason that an HIV test that was performed for the purpose of assessing his possible sentence had revealed that he was positive. The applicant appealed against the sentence on the ground that it constituted unfair discrimination contrary to section 15 of the Constitution. The Court said that section 15 permits justifiable limits to non-discrimination and that if he applicant knew of his HIV status as the time of rape, the limitation and the heavier sentence would be justified. In this instance the Court held that the applicant did not know of his HIV status at the time of rape, and therefore, the limitation and the heavier sentence were not justified. The Court substituted a ten-year prison sentence for a sixteen-year sentence that had been passed by the trial court.

[268] *Harksen v Lane* 1997 (11) BCLR 1489 (Constitutional Court of South Africa).

arising from domestic law but also from international obligations. It observed that South Africa has ratified international agreements with anti-discrimination provisions, including the African Charter, the Women's Convention, the Covenant on Civil and Political Rights, the International Convention of the Elimination of All Forms of Racial Discrimination, the International Labour Organization Convention 111 on Discrimination (Employment and Occupation) Convention. It noted, in particular, that the International Labour Organization's Convention 111 proscribes discrimination such as HIV-related discrimination, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The Constitutional Court noted that South Africa was party to the Southern African Development Community and that in 1997, the Council of Ministers of the Southern African Development Community, had formally adopted an code of conduct on HIV/AIDS and employment – Southern African Development Community Code of Conduct on HIV/AIDS and Employment – which, inter alia, provides that HIV status should not be a factor in job status, promotion or transfer, discourages HIV testing[269] and requires that there should be no compulsory HIV testing in the workplace.[270]

[67] Unlike the approach of the South African Court in Hoffman, the High Court of Nigeria has interpreted the equality and non-discrimination grounds that are listed in article 42 of the Nigerian Constitution narrowly. Article 42 protects citizens of Nigeria from discrimination on the grounds of 'ethnic group, place of origin, sex, religion or political opinion'. In terms of drafting style, the grounds are listed as a closed category rather than an inclusive one. In *Festus Odaife v Attorney General of the Federation and Others*[271] the question arose whether HIV status was implicitly protected against discrimination. The question arose in the context of a challenge by prisoners living with HIV against the refusal by the Nigerian Prison officials to provide medical treatment. It was held that article 42 does not provide protection against HIV-related discrimination as it does not cover discrimination on the grounds of health or disease status. By way of a shortcoming, the High Court interpreted article 42 literally and narrowly, without regard to its purpose, as if article 42 was a parliamentary instrument rather than a provision of Bill of Rights guaranteeing fundamental freedoms.[272]

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[269] Item 4 of Southern African Development Community Code of Conduct on HIV/AIDS and Employment

[270] Item 5 of the Southern African Development Community Code of Conduct on HIV/AIDS and Employment.

[271] *Festus Odaife and others v Attorney General of the Federation and others* 2004) AHRLR 205 (NgHC 2004) High Court of Nigeria.

[272] E Durojaye 'Discrimination based on HIV/AIDS Status: A Comparative Analysis of the Nigerian Court's decision in *Festus Odaife and others v Attorney General of the Federation and others* with other Commonwealth Jurisdictions' (2007) 11 *Law, Democracy ad Development* 133-151.

[68] It is not just in constitutional adjudication but also at a legislative level that South Africa has taken a lead is explicitly providing HIV status as a ground protected against non-discrimination. Section 6(1) of the South African Employment Equity Act prohibits unfair discrimination on the ground, inter alia, of 'HIV status'. Though the South African Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act) does not list HIV status as a protected ground, is it clear that such status falls under the category of an analogous ground under the Act.[273] Like the Constitution, protected grounds under the Equality Act are an open rather than closed category. Grounds that are analogous to listed grounds are protected. An analogous ground under the Equality Act is any other ground where discrimination based on that other ground satisfied any of the following elements — 1) causes or perpetuates systemic disadvantage; or 2) undermines human dignity; or 3) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a listed ground.[274] These elements are derived from the test developed by the Constitutional Court in cases such as *Harksen v Lane*.[275] HIV status, which is the object of intense societal discrimination, readily satisfies any of these elements.

[69] Outside of South Africa, only three of the surveyed African countries – Kenya Tanzania and Zimbabwe - have legislation that offers protection against discrimination on the ground of HIV status. The Kenyan HIV/AIDS Prevention and Control Act of 2006 seeks, inter alia, to 'outlaw discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS'.[276] In pursuit of this objective, the Kenyan Act prohibits discriminatory acts and policies on the basis of HIV status in the following areas: employment,[277] schools,[278] travel and habitation,[279] public office,[280] access to credit and insurance,[281] health sector,[282] and in burial services.[283] Discrimination in these sectors constitutes a criminal offence for which a perpetrator can be

[273] Section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 prohibits unfair discrimination.
[274] Section 1 (xxii) of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.
[275] *Harksen v Lane* 1997 (11) BCLR 1489 (Constitutional Court of South Africa).
[276] Section 3 of the Kenyan HIV/AIDS Prevention and Control Act of 2006.
[277] *Ibid* section 31.
[278] *Ibid* section 32.
[279] *Ibid* section 33.
[280] *Ibid* section 34.
[281] *Ibid* section 35.
[282] *Ibid* section 36.
[283] *Ibid* section 37.

criminally prosecuted.[284] Offences under the Kenyan Prevention and Control Act carry a maximum of two years imprisonment.[285]

[70] In one sense, the Tanzanian HIV/AIDS (Prevention and Control Act) of 2008 mirrors its Kenyan counterpart in prohibiting discriminatory acts and policies on the basis on HIV status.[286] In another sense, it goes beyond its Kenyan counterpart by also prohibiting discrimination on the basis of association with a person living with HIV.[287] It prohibits HIV-related discrimination in the following areas: health care provision by a health care practitioner,[288] entry and participation in institutions,[289] travel and abode,[290] and employment.[291] The Tanzanian Act imposes a maximum sentence of a year in prison for violation of its provisions.[292]

The Zimbabwean Labour Act prohibits discrimination on the basis of HIV status.[293] The Zimbabwean Act applies only to the workplace. Though Malawi has no law that specifically prohibits discrimination on the basis on HIV status, it has a constitutional provision as well as legislative provisions that can be inferred as proscribing HIV-related discrimination. These are: article 31(1) of the Constitution of Malawi, inter alia, guarantees a right to 'fair labour practices'; section 5(1) of the Employment Act which prohibits discrimination in the workplace; and sections 57(1) and (3) of the Employment Act which require reasons for dismissal from employment to be valid.

[71] Outside of the surveyed countries, several other countries have adopted legislation that outlaws HIV-related discrimination. Of particular interest in this respect are a number of West African countries that have adopted HIV-related legislation using more of less the same legislative model.[294] In this respect,

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[284] *Ibid* section 44.
[285] *Ibid* section 43.
[286] Section 28 of the Tanzanian HIV/AIDS (Prevention and Control) Act of 2008.
[287] *Ibid* section 28.
[288] *Ibid* section 29.
[289] *Ibid* section 30. The Act uses 'institutions' generically to include schools and colleges: section 3 of the Act.
[290] *Ibid* section 30.
[291] *Ibid* section 30.
[292] *Ibid* section 32
[293] Section 5(1) of the Labour Act of 1985 as amended (Zimbabwe).
[294] The 'model legislation' largely derives from a model of legislation that was commended to African legislatures at a workshop that was convened in N'Djamena, Chad in 2004, Family Health International, a non-governmental organization. Although the laws exhibit some differences, they all share the same goals, namely: 1) raise awareness about HIV and educate the populace about its modes of transmission and prevention; 2) regulate HIV testing and prohibit compulsory testing subject to certain exceptions; 3) generally promote public health; and 4) protect the human rights of people living with HIV/AIDS, including the rights to equality, non-discrimination, and privacy. The workshop also explains the

Benin[295] and Burkina Faso[296] Guinea[297], Guinea-Bissau,[298] Mali,[299] Niger,[300] Sierra Leone[301] and Togo[302] are examples adopted legislation that prohibits HIV-related discrimination as part of a strategy intended to protect both public health as well as the human rights of people living with HIV.

2.11 Sexual Orientation as a Protected Ground

[72] In the era of the HIV/AIDS pandemic, especially, discrimination on the basis of sexual orientation has a tendency of imposing silence on acknowledging and recognizing the diversity of sexualities, and, in consequence, undermines rather than facilitates access to treatment, HIV counseling and education and prevention strategies. Though existing United Nations human rights instruments do not explicitly protect sexual orientation against unfair discrimination, at least the Human Rights Committee has adopted the approach that sexual orientation is an implicitly protected ground under the non-discrimination clause of the Covenant on Civil and Political Rights as 'other status'.[303] The Committee on Economic, Social and Cultural Rights has clearly said that 'other status' in article 2(1) of the Convention on Economic, Social and Cultural Rights includes 'sexual orientation'.[304] African Charter-based instruments do not protect sexual

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progeny of the Kenyan and Tanzanian HIV/AIDS prevention and control legislation. The 'model laws' draw their orientation from international guidelines and in particular the United Nations General Assembly Declaration of Commitment on HIV/AIDS, GA Res S-26/2 of 27 June 2001. But it does not follow that the manner in which the laws are actually drafted is necessarily human rights compliant: Canadian HIV/AIDS Legal Network *A Human Rights Analysis of N'Djamena Model Legislation on AIDS and HIV-specific Legislation in Benin, Guinea, Guinea-Bissau, Mali, Niger, Sierra Leone and Togo* Canadian HIV/AIDS Legal Network (2007).

[295] Article 18 of Benin's Law 2003-04 of 3 March 2003 which prohibits HIV-related discrimination in accessing sexual and reproductive services.

[296] Article 4 of Burkina Faso's Law 049-2005/AN which prohibits HIV-related discrimination in the exercise of legal rights to housing, education, employment, health and social welfare.

[297] Law on Prevention, Care and Control of HIV/AIDS No 2005-25 of 2005 (Guinea).
Law 2003-04 of 3 March 2003 (Benin).

[298] Framework Law Relating to the Prevention, Treatment, and Control of HIV/AIDS No. 64/2006/QH11 of 29 June 2006 (Guinea Bissau).

[299] Law Establishing Rules Relating to the Prevention, Care, and Control of HIV/AIDS No 06-28 of June 2006 (Mali).

[300] Law Relating to the Prevention, Care, and Control of Human Immunodeficiency Virus (HIV). Law No 2007-08 of 30 April 2007 (Niger).

[301] Prevention and Control of HIV and AIDS Act of 2007 (Sierra Leone).

[302] Law on the Protection of People with Respect to HIV/AIDS No 2005-012 (2005) (Togo).

[303] *Toonen v Australia* Communication Number 488/1992 (31 March 1994), United Nations Human Rights Committee Document No CCPR/C/50/D/488/1992.

[304] The Committee in its General Comment 20 on Non-Discrimination in Economic, Social and Cultural Rights E/C.12/GC/20 25 May 2009, para 32.

orientation explicitly. By way of analogy with the approach adopted by United Nations treaty bodies, it can be argued that 'other status' or its equivalents in African Charter-based instruments.[305]

[73] With one exception – the South African Constitution – African Constitutions do not protect sexual orientation explicitly. In those constitutions where analogous grounds can be 'read in' on account of use of 'other status' or its equivalents, it can be argued that sexual orientation is an implicitly protected ground. The majority of constitutions would seem to allow this save for jurisdictions such as Nigeria where a High Court has interpreted section 42 of the Nigerian Constitution as a closed category of protected grounds that does not permit reading in.[306] At the same time, the general antipathy against recognizing the right to sexual orientation in several African countries that is from time to time expressed at the highest political levels[307] counsels that it would be more prudent not to assume that African domestic courts will be slow to be persuaded to 'read in' sexual orientation. In all countries, with the exception of South Africa, sex between men remains a criminal offence under common law and/or statute inherited from colonial regimes.[308] Homosexuality is an offence regardless of whether it takes place freely and in private between two persons with a capacity to consent. Whilst the official campaigns against HIV/AIDS have not prevented governments from acknowledging the reality of homosexuality, campaigns targeted against gay and lesbian sexuality, and the laws rendering homosexuality a criminal offence convey a different message. The decisions of the Supreme Court of Zimbabwe in *S v Banana*[309], and the Court of Appeal of

[305] R Murray & F Viljoen 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the Africa Commission on Human and Peoples' Rights and the Africa Union' (2007) 29 *Human Rights Quarterly* 86.

[306] *Festus Odaife and others v Attorney General of the Federation and others* 2004) AHRLR 205 (NgHC 2004) High Court of Nigeria.

[307] In countries such as Gambia, Malawi, Namibia, Nigeria, Uganda, and Zimbabwe political leaders have from time to time used strong, if not virulent rhetoric, to disavow the notion of recognizing the right to sexual orientation. CG Ngwena 'Sexuality Rights in Southern Africa with a Particular Reference to South Africa' (2002) 15(2) *SA Public Law* 1 ; E Cameron 'Constitutional Protection of Sexual Orientation and African Conceptions of Humanity' (2001) 118 *South African Law Journal* 642; JD Mujuzi 'Absolute Prohibition of Same-Sex Marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 277; AJGM Sanders 'Homosexuality and the Law: A Gay Revolution in South Africa' (1997) 41 *Journal of African Law* 100; O Phillips 'Discontinuities of Custom in Zimbabwe and South Africa: The Implications for Gendered and Sexual Rights' (2004) 7(2) *Health and Human Rights* 82; EK Quansah 'Same-sex Relationships in Botswana: Current Perspectives and Future Prospects' (2004) 4 *African Human Rights Journal* 201; Murray & Viljoen 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the Africa Commission on Human and Peoples' Rights and the Africa Union', *supra* note; Smith D 'Tutu Leads Fights to Halt Anti-Gay Terror Sweeping Africa' Mail & Guardian' April 4, 2010.

[308] Criminalisation of same-sex is discussed in Chapter 3 of this study.

[309] S v *Banana* 2000 3 SA 885 (Supreme Court of Zimbabwe).

Botswana in *Kanane v The State*,[310] and the constitutional amendment in Uganda to proscribe same-sex marriages are also reasons for suggesting that African countries will be slow to recognize sexual orientation as a protected ground.

[74] The main constitutional issue in *S v Banana* was whether the crime of sodomy - sex between consenting males - should still be criminalized under common law in the light of section 23 of the Zimbabwean Constitution which provides a right not to be unfairly discriminated against, The majority of the Supreme Court led by Justice McNally ruled to maintain the crime. In the opinion of the majority, the Constitution of Zimbabwe and its equality clause did not have the effect of decriminalizing consensual anal intercourse between males regardless of whether it was performed between consenting males in private. According to Justice McNally, Zimbabwe was 'more conservative than liberal' in the matter of sexual behaviour and its social norms and values were not pushing for decriminalization of sodomy.[311] The decriminalisation of sodomy was a matter for Parliament to consider if it so wished rather than one for courts as courts are not accountable to the electorate and thus have no democratic mandate. It would appear that the majority of the Supreme Court failed to appreciate the special role of a constitution in protecting minorities, including sexual minorities. In the end, deference to populist opinion, and perforce populist prejudice, rather than the constitutional imperative to protect minorities held sway in Justice McNally's reasoning.[312]

[75] In *Kanane v The State*[313] the High Court of Botswana held that provisions of the Penal Code of Botswana which criminalized sex between consenting adult males as acts 'against the order of nature' were constitutionally valid and not discriminatory on the ground of sex under sections 3 and 15 of the Constitution of Botswana. Section 3 of the Constitution of Botswana guarantees non-discrimination on the ground of 'gender'. According to the decision of the Court

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[310] *Kanane v The State* Criminal Appeal 9 of 2003 (2003) 2 BLR 67 (Court of Appeal of Botswana).

[311] *Ibid* 933.

[312] The case was decided by a majority of 3:2. The minority led by Justice Gubbay (then Chief Justice) took a generous view of equality. Justice Gubbay said that the retention of the crime of consensual sodomy was not consistent with the values of a democratic society. He based his reasoning on the equality provision in the Zimbabwean Constitution that, inter alia, outlaws unfair discrimination. He drew support from foreign law, including South African constitutional jurisprudence. He also drew support from equality provisions and interpretations thereof and international human rights instruments, including the Covenant on Civil and Political Rights and the European Convention on Human Rights. In Justice McNally's opinion, since anal or oral sexual acts between men and women or consensual sex between women did not constitute an offence, it was arbitrary sexual and gender discrimination to proscribe male-to-male sexual acts. Moreover, whilst a segment of the majority of people who have heterosexual relationships find male-to-male sexual acts morally unacceptable, courts could not be dictated to by the public. Social activists and marginalised members of society were entitled to protection under the Constitution.

[313] *Kanane v The State* 1995 BLR 94 (High Court of Botswana).

of Appeal in *Attorney-General of Botswana v Dow Unity v Dow*,[314] 'sex' is among the grounds protected against discrimination by section 15 of the Constitution notwithstanding that it is not explicitly mentioned. On appeal, the Court of Appeal held that the provisions of the Penal Code in question were not inconsistent with the Constitution.[315] The reasoning of the Court was essentially to endorse what the legislature had enacted and to treat legislation as expressing democratic will. The Court said that that by legislating against 'carnal knowledge of any person against the order of nature' the legislature was clearly signaling that it was against liberalization of the criminalization of same-sex. According to the Court, public sentiment was against such liberalization and there was no evidence to show that public opinion had relented. The Court of Appeal purported to repair the anomaly by extending the offence to cover also acts between men and women.[316] Ironically, the Court of Appeal of Botswana justified extending the common law crime of sodomy to cover acts between men and women, inter alia, on the ground of checking the spread of HIV.

[76] Prior to its amendment, article 31(1) of the Constitution of Uganda provided that that 'men and women of the age of eighteen years and above have the right to marry and to found a family …. ' In 2005, article 31 was amended to the effect that 'marriage between persons of the same sex is prohibited '. The effect of the amendment is to expressly prohibit same-sex marriages. Uganda is the first African country to embark on this course which is a product of political antipathy towards gay and lesbian persons in Uganda.[317] The amendment clearly marks the Ugandan government as opposed reforms to recognise sexual diversity, including homosexuality and lesbianism.[318] Same-sex sexual activity is punishable as an 'unnatural offence' under section 145 of the Ugandan Penal Code Act and carries a maximum penalty of life imprisonment upon conviction.

[77] South Africa has blazed the global trail by being the first country to provide for protection against discrimination on the ground of 'sexual orientation' in its Constitution.[319] The South African Employment Equity Act[320] and the Equality Act[321] follow suit by listing 'sexual orientation' as a ground protected against unfair discrimination. Over and above explicit protection in the Constitution and in legislative instruments, the Constitutional Court has affirmed that sexual

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[314] Attorney-General of Botswana v Unity Dow 1992 LRC (Const) 623.
[315] *Kanane v The State* Criminal Appeal 9 of 2003 (2003) 2 BLR 67 (Court of Appeal of Botswana).
[316] *Kanane v The State*, Criminal Appeal 9 of 2003 (2003) 2 BLR 67 (Court of Appeal of Botswana); KN Bojosi 'An Opportunity Missed for Gay Rights in Botswana: *Utjiwa Kanane v The State* (2004) 20 *South African Journal on Human Rights* 466.
[317] Mujuzi 'Absolute Prohibition of Same-Sex Marriages in Uganda' , *supra*.
[318] *Ibid*.
[319] Section 9(3) of the South African Constitution.
[320] Section 6(1) of the Employment Equity Act of 1998.
[321] Section 1(xxii) of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

orientation is a protected status in several cases. The leading case in this regard is *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*.[322]

[78] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*[323] the Constitutional Court adjudicated on sexual orientation as a protected ground in the context of determining whether the common law of sodomy constituted unfair discrimination against men who have sex with men. The applicant, the National Coalition for Gay and Lesbian Equality, a voluntary association of gay, lesbian, bisexual and transgendered people in South Africa, and the South African Human Rights Commission brought an action seeking a declaration that section 20A of the Sexual Offences Act of 1957[324] which criminalized a sexual act between men is inconsistent with the Constitution of South Africa to the extent that it only criminalises sexual acts between men but not between women.

[79] The Constitutional Court unanimously held that the common law crime of sodomy was inconsistent with the Constitution and by implication all statutory offences that were built around the premise of sodomy as a common law crime were necessarily inconsistent with the Constitution, and, thus, invalid, including section 20A of the Sexual Offences Act. The Court found that the crime of sodomy constituted a violation of the rights to equality, human dignity and privacy.

[80] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* was primarily decided through the interpretation and application of the constitutional right to equality. In finding a violation of the right to equality, the Court applied the test for determining unfair discrimination that it had developed in *Harksen v Lane*[325] (the *Harksen v Lane* test) and other cases.[326] The focus of the *Harksen v Lane* test is on determining the *impact* of the discriminatory policy, law or practice on the individual and the group to which the individual belongs.

[81] In determining the impact on the crime of sodomy over gay people, the Court said that such a crime served to reinforce already existing societal prejudices

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[322] 1999 1 SA 6 (Constitutional Court of South Africa).

[323] *Ibid.*

[324] Act No 23.

[325] 1997 (11) BCLR 1489 (CC).

[326] Cases in which the Constitutional Court has developed its test for determining unfair discrimination include: *Brink v Kitshoff* NO 1996 (6) BCLR 752 (Constitutional Court of South Africa); *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (Constitutional Court of South Africa); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (Constitutional Court of South Africa); *Larbi-Odam and Others v MEC for Education (North-West Province) and Another* 1997 (12) BCLR 1655 (Constitutional Court of South Africa); *Pretoria City Council v Walker* 1998 (3) BCLR 257 (Constitutional Court of South Africa).

against people of sexual orientation that was different from heterosexual orientation. The crime stigmatizes gay men and encourages discrimination against them in many sectors of socio-economic life. The adverse consequences of criminalizing consensual sex between men were rendered more serious because gays and lesbians are a political minority and cannot easily marshal political power to secure favourable legislation for themselves. In the result, gay men live insecure and vulnerable lives because of their sexuality as the legal system treats them as criminals.

[82] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*, the Court was emphatic that, other than societal prejudice, and an argument for the enforcement of the private moral views of the community, there was no justification for criminalizing consensual sex between men. Prejudice cannot qualify as a legitimate purpose. Equally, the religious view which holds that sexual relationships are for the purpose of procreation could not be a legitimate purpose for the purposes of justifying limitation of freedom, not least because there are also religious views that do not share this view.[327] In short, the crime of sodomy constituted a severe limitation of a gay man's right to equality in sexual orientation.

[83] The Court also said that the right to equality was not the only constitutional right that was adversely impacted upon by the crime of sodomy. The right to equality intertwines with the right to human dignity guaranteed by section 10 of the Constitution. Human dignity requires acknowledging every person is of equal value and equal worth. According to the Court, the crime of sodomy punishes gay men for conduct that is part of their experience as human beings and does not harm a third party. Punishing people for what they are is profoundly disrespectful of the human personality and is a violation of human dignity. Such punishment degrades and devalues gay men in society. It is a palpable invasion of their dignity and a breach of section 10 of the Constitution.

[84] Equally, the Court said that the crime of sodomy was a violation of the right to privacy contrary to section 14 of the Constitution. Sodomy constitutes a manifest invasion of a constitutional right that is intended to protect the inner sanctum of a person. Respecting the right to privacy requires us to recognise that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nature human relationships without interference from the outside community. The expression of sexuality is a core part of the sphere of private intimacy. A crime that punishes the expression of sexuality that is consensual and does not harm another person constitutes a breach of privacy.

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[327] On this point the Court drew from *S v H* 1995 (1) SA 120 (High Court of South Africa); *S v K* 1997 (9) BCLR 1283 (High Court of South Africa). These are cases where at High Court level, it was held that after the coming into operation of the Interim Constitution of the Republic of South Africa, the common law crime of sodomy constituted a breach of the constitutional right to equality.

[85] In reaching its conclusion that the crime of sodomy was unconstitutional, the Constitutional Court of South Africa also considered international law and foreign decisions. It drew support, inter alia, from the decisions of the European Court of Human Rights[328], the United Nations Human Rights Committee,[329] and the Supreme Court of Canada[330] on the adverse impact of the crime of sodomy on the respect, protection and fulfillment of fundamental rights. The Court found that no justification could be mustered to retain the crime of sodomy under section 36 of the Constitution as there was no rational basis for it.

[86] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* is the first case in which the Constitutional Court, as the highest appellate court in constitutional matters authoritatively determined that the common law crime of sodomy was inconsistent with the constitutional right to equality. It is significant that the Court determined the case on the basis that the right to equality was the fundamental right that was preeminently implicated, but with the right to human dignity serving as an attendant right. According to the Court, the answer to the issue of unfair discrimination raised was not to achieve parity in discrimination by also outlawing sex between women as well, but to acknowledge that erotic expression was part of being human whether it be in relation to heterosexual expression or homosexual expression. In this way, the Court, without marginalizing the relevance of the right to privacy, highlighted the importance of relying on equality, and more specifically, substantive equality, as a more enduring and more encompassing fundamental right for promoting the right to sexuality self-determination of a group that has been historically stigmatized and marginalized. Simply basing the decision on the right to privacy might have the inadvertent effect of treating sexualities that are different from heterosexuality as sexualities that are acknowledged but should be hidden from the public sphere.

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[328] *Dudgeon v United Kingdom* (1982) 4 EHHR 149; *Norris v Republic of Ireland* (1991) 13 EHRR 186. In two cases, the European Court on Human Rights held that the sodomy laws of Northern Ireland and the Republic of Ireland, respectively, constituted a breach of article 8 of the European Convention on Human Rights guaranteeing the right to privacy.

[329] *Toonen v Australia* Communication Number 488/1992 (31 March 1994) UN Human Rights Committee Document No CCPR/C/50/D/488/1992. In this case, the Human Rights Committee held that a Tasmanian law criminalizing sex between men was a violation of the right to privacy under article 17 of the International Covenant on Civil and Political Rights which Australia had ratified.

[330] *Egan v Canada* (1995) 29 CRR (2d) 79. In this case, the Supreme Court of Canada held that though not listed, sexual orientation was an analogous ground under section 15 of the Canadian Charter of Rights and Fundamental Freedoms, and thus discrimination on the basis of sexual orientation constituted unfair discrimination, unless it could be justified under section 1 of the Charter; *Vriend v Alberta* [1998] 1 SCR 493, where the Supreme Court of Canada held that sexual orientation was a protected analogous ground under the Individual Rights Protection Act of Alberta and that its exclusion created differential treatment which has the effect of denying equal protection on the ground of sexual orientation.

[87] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* is important for acknowledging unapologetically that at an erotic level, same-sex is part of the human variation in the domain of sexuality and sexual expression. The rapport between the Courts decision and international human rights is obvious. Not only did the Court draw from progressive decisions of human rights courts and tribunals, but even more significant, it went beyond the terrain reached by such courts and tribunals by placing the right to equality at the centre. It follows from *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* that the duty to respect, protection and fulfillment of sexual health is a duty that is not only owed to those of a heterosexual persuasion. The duty is also owed, in equal measure, to people of different sexualities who engage consensual acts that do not harm others.

[88] By categorically vindicating the right of an individual to self-determination regarding their sexuality primarily on the basis on equality and human dignity rather than the right to privacy, the case established a human right standard that is higher than that established be the European Court on Human Rights[331] and the United Nations Human Rights Committee.[332] The manner in which the Constitutional Court approached the constitutional right to privacy was also significant in that the Court explicitly recognized that respecting the right to privacy of gay men means recognizing that sex between men is intimate that it is part of the nurturing of relationships between gay men.[333]

[89] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* has paved the way for fundamental reforms that have been instituted in a diverse range of socio-economic spheres in South Africa with a view to ending

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[331] In the following cases, for example, the European Court on Human Rights based its decisions that domestic laws which criminalized consensual sex between men constituted human rights violations solely on the basis of article 8 of the European Convention which guarantees the right to privacy: *Dudgeon v United Kingdom* (1982) 4 EHHR 149; *Norris v Republic of Ireland* (1991) 13 EHRR 186; *Modinos v Cyprus* (1993) ECHR 19.

[332] In *Toonen v Australia* Communication Number 488/1992 (31 March 1994) UN Human Rights Committee Document No CCPR/C/50/D/488/1992 the United Nations Human Rights Committee based its finding that a provision of a Tasmanian Penal Code that criminalized consensual sex between men primarily on the basis of the right to privacy in article 17 of the International Covenant on Civil and Political Rights. At the same time, however, it is important to note that the Committee attempted to base its decision on wider grounds. At least, the Committee was amenable to framing the issue in terms of violation of the right to 'sexual orientation' thus render the issue and equality one. The Committee said that for the purposes of determining a violation under article 26 of the Covenant, the phrase 'other status', is to be taken as including 'sexual orientation'. The Committee also said that the reference to 'sex' in article 2(1) of the Covenant is to be taken to include 'sexual orientation': I Saiz 'Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN' (2004) 7(2) *Health and Human Rights* 49.

[333] W Le Roux 'Sex Work, the Right to Occupational Freedom and the Constitutional Politics of Recognition' (2003) 120 *South African Law Journal* 452, 462.

legally sanctified heterosexual hegemony. The decision has been applied in subsequent cases to outlaw discrimination against gay and lesbian people in the spheres that impact on sexual health albeit indirectly, including the spheres of immigration,[334] third party employment-related benefits,[335] third party insurance liability,[336] adoption,[337] assisted reproduction and birth certification,[338] recognition of civil unions and marriages,[339] succession,[340] and age for legal consent to sexual intercourse.[341] The decision has also paved the way for legislative reforms.

[90] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* is the first case by an African appellate court to recognize that persons of the same-sex and not just heterosexuals have a fundamental right to engage in sex and that the state has a duty to respect, protect and fulfil that right. On account of its pioneering status, the case has been instrumental in facilitating advocacy about the sexual health of men who have sex with men in African countries beyond the borders of South Africa. In the era of the HIV/AIDS pandemic, the criminalization of same-sex between men imposes a silence on

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[334] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2002 (2) SA 772 (Constitutional Court of South Africa).

[335] *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (High Court of South Africa). In this case, an employment-related medical scheme which extended benefits to 'dependants' but excluded from the definition of dependants a person in a same-sex relationship with the employee was, successfully challenged before the High Court on the ground that it constituted a violation of the right to equality and constituted unfair discrimination on the basis of sexual orientation under section 9 of the Constitution; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (Constitutional Court of South Africa).

[336] *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (High Court of South Africa). This case, which was decided a High Court stands for the proposition that, where an insurance policy excludes liability to a member of the policy holder's family normally resident with him', it necessarily includes within its exclusionary ambit a same sex partner of the policy holder who has shared a home with the policy holder in manner resembling that of husband and wife, and that such an interpretation accords with section 9 of the Constitution; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (Supreme Court of Appeal of South Africa). In this case, the Supreme Court of Appeal of South Africa held that a same-sex partner in a permanent relationship was in a similar position to spouse in a marriage where a partner dies having undertaken a contractual duty to support the surviving partner. Where the partner is wrongfully killed, the surviving same-sex partner is entitled to claim from the perpetrator of the wrongful act, damages for loss of that support.

[337] *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (Constitutional Court of South Africa).

[338] *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (Constitutional Court of South Africa).

[339] *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (2006) 1 SA 524 (Constitutional Court of South Africa).

[340] *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 89 (Constitutional Court of South Africa).

[341] *Geldenhuys v The State* (2008) ZACC 21 (Supreme Court of Appeal of South Africa).

acknowledging and recognizing the diversity of sexualities, and, in consequence, undermines rather than facilitates HIV education and prevention strategies.

[91] As the first case to declare as unconstitutional the common law crime of sodomy on the African continent, *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* provides the African region with an invaluable human rights benchmark. It provides the organs of the African Charter on Human and People's Rights, in particular the African Commission on Human and People's Rights and the African Court on Human and Peoples Rights with a thoroughly reasoned and human rights suffused African decision to drawn on when faced with a communication seeking to vindicate the right to sexual orientation. Equally, it provides African domestic courts with a persuasive authority drawn from the African region. With the exception of South Africa, African countries have generally maintained colonial laws that criminalised consensual same-sex. Paradoxically, the human rights recognition of same-sex relationships has been resisted on the claim that it is an imposition foreign to Africa.[342]

2.12 Gender Identity as a Protected Ground

[92] There is very little by way of direct jurisprudence on gender identity in the African region. At the level of the African Charter and African Charter-based instruments, even though there are no direct provisions that specifically addresses discrimination on the basis of gender identity, it can be inferred that gender identity an implied category under 'sex' or 'other status' in article 2 of the African Charter and in the non-discrimination provisions under the African Children's Charter and the African Women's Protocol.

[93] Equally, there is very little jurisprudence that has specifically addressed gender identity in the African region at the domestic level with South Africa and Uganda being the exceptions under the sample of countries studied. However, in similar vein, it can be argued that the categories or 'sex' or 'gender' or 'other status' and their equivalents in equality and non-discrimination clauses of African constitutions, permit reading in gender identity.

[94] The connection that African jurisdictions have thus far made with gender identity is rudimentary. It is essentially through legal requirements to register births and indicate the sex of the child as either male or female and in legal documents such as identity documents as travel documents such as passports that require the holder's gender to be identified as either male or female using primary sexual characteristics in the form of genitalia at birth.

[342] CF Stychin 'Same-sex Sexualities and the Globalisation of Human Rights Discourse' (2004) 49 *McGill Law Journal* 951.

[95] South Africa provides an exception to the rule at two levels – a constitutional level, and a legislative level. In the light of the expansive approach of the South African Constitution on equality and non-discrimination, it can be surmised that gender identity is protected as ground implicit in 'gender' or 'sex' or as an analogous ground. Though not the same as sexual orientation, gender identity shares parallels with sexual orientation in terms of the rationale for guaranteeing protection against unfair discrimination. The constitutional rationale for upholding equality on the basis of sexual orientation that was discussed earlier in the leading case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*[343] applies with appropriate modification to gender identity.

[96] More specifically, South Africa has specific legislation that addresses gender identity. The Alteration of Sex Description and Sex Status Act was adopted in 2003 to regulate aspects of gender identity, especially, alteration of gender identity. The Act confers a right on persons belonging to any of the three following categories to apply to the Director-General of the National Department of Home Affairs to have their sex description altered on their birth certificate:

- persons whose sex characteristics have been altered by surgical or medical treatment
- persons whose sex characteristics have been altered by evolvement through natural development
- persons who are intersexed[344]

The Alteration of Sex Description and Sex Status Act provides definitions of the operative concepts. Sexual characteristics are defined very broadly to mean not only 'primary' or 'secondary' sexual characteristics, but also 'gender' characteristics.[345] Primary characteristics refer to the genitalia at birth, while secondary characteristics mean characteristics that are dependent upon the hormonal constitution of the individual.[346] Gender characteristics mean the ways in which a person expresses his or her social identity as a member of particular sex through the style of dressing, wearing of prosthesis or other means.[347] Intersex refers to a person whose 'congenital sexual differentiation is atypical' and it does not matter in what proportions.[348]

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[343] 1999 1 SA 6 (Constitutional Court of South Africa).
[344] Section 2(1) of the Alteration of Sex Description and Sex Status Act.
[345] Section 1*ibid*.
[346] *Ibid*.
[347] *Ibid*.
[348] *Ibid*.

It is significant that under the Alteration of Sex Description and Sex Status Act alteration of gender identity is not contingent upon gender surgery that is designed to modify primary sex characteristics. Under section 2(1) of the Act, gender reassignment through medical treatment or through natural evolvement, are alternatives to surgery in terms of eligibility. Also it is significant that the Act envisages a role for other health care practitioners and not just doctors in the documentation that is required for meeting the eligibility requirements. In respect of a person applying to alter a sex description following alteration of sex characteristics by surgical or medical treatment the application must be accompanied by a report prepared by a medical practitioner who carried out the treatment.[349] In respect of an application where or sexual characteristics have been altered by gender reassignment, the application must be supported by a report prepared by a medical practitioner other than the one who carries out the any treatment.[350] In respect of an application on the ground of intersex, there must be two reports. One of the reports must be from a medical practitioner corroborating that the applicant is intersexed, and the other must be from a psychologist or social worker corroborating that the applicant is living and has lived in the gender role corresponding to the intersex for a period of at least two years.[351] For the purposes of the Act, a medical practitioner is a person providing health services in terms of laws that govern the provision of allied, nursing, pharmaceutical, dental and mental health care.[352]

[97] Ugandan law permits a limited scope for sex alteration. Under the Ugandan Birth and Death Registration Act, there is a duty to register the birth of a child, including the 'sex' of the child within three months of the birth of the child. However, prior to the attainment of 21 years, a parent or guardian can apply to the Registrar General to change of the child, providing that the child 'after being registered, either through an operation or otherwise, changes from a female to a male or from a male to a female and the change is certified by a medical doctor'.[353]

2.13 Sexual Harassment

[98] Sexual harassment can cause severe psychological distress and embarrassment to its victims. It is intimidating and can compel the victim surrender to the harassment. When harassment is resisted in a context where the perpetrator has power over the victim, it can lead to loss of employment and employment benefits.

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[349] Section 2(b) *ibid*.
[350] Section 2(c) *ibid*.
[351] Section 2(d) *ibid*.
[352] Section 1 *ibid*.
[353] Section 14 of the Ugandan Birth and Registration Act.

[99] Though sexual harassment is a form of discrimination under the Women's Convention, African jurisprudence is generally characterized by the absence rather than presence of specific legal protections against sexual harassment.

[100] In terms of African-Charter based treaties, to the extent that the African Women's Protocol emulates the Women's Convention in its antidiscrimination clause[354] as well as specifically protects women against 'all forms of violence including sexual and verbal'[355] it can be surmised that sexual harassment is within the contemplated prohibited conduct. At a sub-regional level, the Protocol on Gender and Development of the Southern African Development Community sets 2015 as the year by which member states are required to have enacted laws prohibiting sexual harassment.[356]

[101] Malawi is the only example of an African country with a constitutional provision that is explicitly directed at protecting persons from sexual harassment. Section 24(2)(a) of the Malawian Constitution prohibits sexual harassment and enjoins the legislature to adopt legislation to combat, inter alia, sexual harassment. It provides that:

> (2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as-
> (a) sexual abuse, harassment and violence;

[102] But despite a clear mandate and even injunction in the Constitution to legislate against sexual harassment, Malawi does not yet have legislation that directly addresses sexual harassment.[357] Though the Malawian Employment Act, inter alia, prohibits discrimination on the ground of sex, there is yet no case in which sex discrimination has been interpreted to include sexual harassment.[358] Sexual harassment is a particular challenge for women as workers in the workplace and as learners in the education sector.[359]

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[354] Articles 1(f) and 2 of the African Women's Protocol

[355] Article 3(4) of the African Women's Protocol.

[356] Section 22(1) of the Protocol on Gender and Development of the Southern African Development Community.

[357] C Ng'ong'la 'Recent Labour Law Reforms in Malawi' (2002) 46 *Journal of African Law* 167; HM Kayani 'The Challenge of Studying Sexual Harassment in Higher Education: An Experience from the University of Malawi's Chancellor's College' (2009) 2 *Journal of International Women's Studies* 83.

[358] O Nyamulani *The Need for Express Proscription of Sexual Harassment in the Workplace* Unpublished, Bachelor of Law (Honors) Degree dissertation, University of Malawi, Chancellor College (2006). Cited in Kayani *ibid* at 88.

[359] Kayani ibid.

[103] South Africa, Kenya Tanzania and Zimbabwe aside, sexual harassment is not regulated by harassment-specific legislation in the countries that were surveyed, therefore, pointing to a conspicuous gap in human rights protection. In the majority of African countries the only legal protection against sexual harassment is when the nature of the harassment can be conflated with existing common law crimes such as sexual assault or crimen inuria or constitutes conduct that warrants invoking domestic violence legislation. As alluded to earlier, members of the Southern African Development Community are required to have adopted sexual harassment-specific legislation by 2015.

[104] In respect of South African jurisprudence, at a constitutional level, sexual harassment can be understood as implicitly prohibited by section 10 of the Constitution which recognizes the right to human dignity. At a legislative level, section 6(3) of the Employment Equity Act provides that harassment of an employee constitutes unfair discrimination. The Equality Act, which provides that no person can be subjected to harassment.[360] Furthermore, the Equality Act defines harassment as

> 'unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to—
> *(a)* sex, gender or sexual orientation; or
> *(b)* a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group implicitly includes sexual harassment in its ambit.[361]

[105] Harassment is a significant concern in the employment sector. The South African Department of Labour has published a Code of Good Practice on the Handling of Sexual Harassment Cases.[362] The Code of Good Practice provides, inter alia, that:

> **3. Definition of sexual harassment**
>
> (1) Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.
>
> (2) Sexual attention becomes sexual harassment if:
>
> (a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
> (b) The recipient has made it clear that the behaviour is considered offensive; and/or
> (c) The perpetrator should have known that the behaviour is regarded as unacceptable.
>
> **4. Forms of sexual harassment**

[360] Section 11 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.
[361] Section 1 (xiii) of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.
[362] Code of Good Practice on the Handling of Sexual Harassment Cases (1995). Published as an annexure to the Labour Relations Act No 66 of 1995.

(1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:

(a) Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.
(b) Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.
(c) Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.
(d) Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.

(2) Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases

[106] The South African Code of Practice encapsulates the approach of South African Courts to sexual harassment. It broadly reflects the development of the law on sexual harassment in other jurisdictions such as the United States. It treats harassment as conduct that can take place in an environment where the perpetrator hold power over the victim, or in a hostile workplace environment, between colleagues. Though not constituting law, the Code of Practice must be taken into account by the court when dealing with harassment.[363] Sexual harassment is frequently litigated in South Africa attesting, in part, to its prevalence in the workplace and in part to an enabling legal environment.[364]

[107] The Sexual Offences of Kenya regulated sexual harassment. Section 23(1) of the Sexual Offences Act provides that:

(1) Any person, who being in a position of authority, or holding a public office, who persistently makes any sexual advances or requests which he or she knows, or has reasonable grounds to know, are unwelcome, is guilty of the offence of sexual harassment and shall be liable to imprisonment for a term of not less than three years or to a fine of not less than one hundred thousand shillings or to both.
(2) It shall be necessary to prove in a charge of sexual harassment that-
(a) the submission or rejection by the person to whom advances or requests are made is intended to be used as basis of employment or of a decision relevant to the career of the alleged victim or of a service due to a member of the public in the case of a public officer;

[363] Section 3(c) of the South African Employment Equity Act.
[364] For case law see, for example: *J v M Ltd* (1989) 10 ILJ 755 (Industrial Court of South Africa); *Ntsabo v Real Security CC* (2004) 1 BCLR 58 (Labour Court of South Africa); *Grobler v Naspers Bpk & Another* (2004) 5 BLLR 455 (Labour Court of South Africa).

(b) such advances or requests have the effect of interfering with the alleged victim's work or educational performance or creating an offensive working or learning environment for the alleged victim or denial of a service due to the member of the public from a public office

[108] It is apparent, however, that the scope of sexual harassment under the Sexual Offences Act is narrow as it only covers instances where the perpetrator holds power over the victim. Sexual harassment is also addressed by the Kenyan Public Health Act[365] and the Kenyan Employment Act.[366] Section 21 of the Public Health Act prohibits a public health officer from 'sexually harassing' a fellow offer or a member of the public. Section 6 of the Employment Act says:

'an employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express: promise of preferential treatment in employment; threat of detrimental treatment in employment; or threat about the present or future employment status of the employee; uses language whether written or spoken of a sexual nature; uses visual material of a sexual nature; or shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.'[367]

[109] The Tanzanian Sexual Offences (Special Provisions) Act of 1998[368] criminalizes sexual harassment. It prohibits conduct that causes 'sexual annoyance or harassment' or intentionally insults the 'modesty of any woman'. Though Tanzanian law does not elaborate on the elements of harassment or command case law that interprets the criminal provision, it is apparent that Tanzanian law has a wider application than its Kenyan counterpart to the extent that it is not limited to perpetrator who is in a position of power or authority. In terms of a gap, the Act conveys the impression that it is only women that are sexually harassed through its reference to 'modesty of any woman'. Also, use of such terminology may paradoxically be understood as licensing the harassment of women who according to the perceptions of men have no modesty to protect such as where women dress in attire that men regard as immodest.

[110] The Zimbabwean Labour Relations Act of 1985 as amended prohibits sexual harassment in the workplace. Section 8 of the Act provides that any employer who 'engages in unwelcome sexually-determined behavior towards an employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks, or displaying pornographic materials in

[365] Public Health Act (Kenya).
[366] Employment Act of 2007 (Kenya).
[367] Section 6 of the Employment Act.
[368] Section 138 of the Sexual Offences (Special Provisions) Act of 1998 (Tanzania)

the workplaces. The scope of Zimbabwean law on harassment is even narrower than its Kenyan counterpart in that it only applies to the workplace.

2.14 CONCLUSIONS

[111] African jurisdictions take their lead from United Nations instruments in guaranteeing rights to equality and non-discrimination in their constitutions.

[112] Ratified United Nations treaties do not automatically acquire the status of law that is higher in status than a domestic constitution in African jurisdictions even in jurisdictions that purportedly follow a monistic approach to the incorporation of international treaties into domestic law. Ultimately, it is the domestic constitution that has the highest status. The approach of the Court of Appeal in Kenya in *Mary Rono v Jane Rono and Another*[369] is atypical in treating a ratified instrument – the Women's Convention – as law that is incorporated into domestic law and has higher status than domestic law, notwithstanding that lack of express incorporation and legislative intention to the effect by the Kenyan legislature.

[113] United Nations treaties are generally recognized as useful aids to constitutional and legislative interpretation.

[114] 'Sex' is a universally protected ground in African jurisdictions, and gender can generally be read into 'sex'.

[115] Though protection of 'sex' exists at a constitutional level, African jurisdictions generally lack legislative provisions that are designed to implement constitutional equality and non-discrimination. South Africa provides benchmarks in adopting comprehensive legislation that is designed to protect constitutional equality and non-discrimination.

[116] Only a minority of jurisdictions recognize marital status as a protected ground. Though the Constitutional Court of South Africa has progressive human rights jurisprudence on marital status cases such as *Volks v Robinson*[370] show that marriage remains a privileged institution.

[117] Some but not all jurisdictions specifically recognize HIV status as ground protected against discrimination. The decision of the Constitutional Court of South Africa in *Hoffmann v South African Airways*[371] provides the African region

[369] *Mary Rono v Jane Rono and Another*, Civil Appeal No 66 of 2002 (Court of Appeal of Kenya),
[370] *Volks v Robinson* 2005 (5) BCLR 466 (Constitutional Court of South Africa).
[371] *Hoffmann v South African Airways* 2001 (1) SA 1 (Constitutional Court of South Africa).

with an invaluable precedent for reading in analogous grounds, including HIV status, in equality and non-discrimination clauses of domestic constitutions.

[118] African jurisdictions are far from recognizing sexual orientation as a protected ground, and, indeed, in many jurisdictions there if official antipathy towards such recognition.

[119] The jurisprudence on gender identity hardly proceeds beyond legal requirements to indicate gender or sex as male or female on birth certificates and other documents such as identity documents and travel documents.

[120] The preponderance of countries do not provide legislative protection against sexual harassment. Also, in those jurisdictions that have legislative provisions for sexual harassment, it is only South Africa that has developed a code of conduct by way of providing guidance to the workplace.

[121] Relatively speaking, in virtually all the areas of non-discrimination that were considered, South Africa commands the best human rights practices.

[122] The decision of the Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*[372] provides the African region with an invaluable human rights decision and benchmark for not only developing laws that respect and promote the right to equality and non-discrimination on the basis of sexual orientation, but also other grounds, including sex, marital status, and gender identity.

[123] The established trend is that whilst customary law is recognised as law, it has diminishing status. It is subordinate to constitutional norms as well as parliamentary legislation. Among the surveyed countries, Zimbabwe is an exception in having a decision – *Magaya v Magaya*[373] – that interprets customary law in a manner denies women the constitutional guarantee of equality and non-discrimination.

[372] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1999 (1) SA 6 (Constitutional Court of South Africa).
[373] *Magaya v Magaya* 1999 (1) ZLR 100 (Supreme Court of Zimbabwe).

3 PENALIZATION OF SEXUALITY AND SEXUAL ACTIVITIES

3.1 Introduction

[1] This chapter maps jurisprudence in the Africa region in respect of the penal regulation of sexuality and sexual activities. The focus is on the following areas:

- Criminalization of consensual same-sex activities
- Ages of consent for sexual activities
- Criminalization of sex outside marriage
- Incest
- Criminalization of HIV transmission

3.2 Criminalization of Same-Sex

[2] This chapter overlaps substantially with Chapter 2. Penalization of same-sex activities is often a sign of a legal environment in which the right to sexual orientation has no adequate constitutional protection.

[3] Criminalization of same-sex activities in private between persons who have capacity to consent to the acts has its origins in religious and/or moral censure of homosexuality, especially, and the valourization of heterosexual norms, including heterosexual sex.

[4] Historically, the criminalization of homosexuality in the African region is essentially a colonial bequest. At time of independence, virtually all the African jurisdictions inherited statutes, mainly, in the form of penal codes that proscribed and punished sex between persons of the same sex. Colonial jurisprudence on same-sex was an importation that sought to reflect the law in the colonizing countries. There is evidence confirming that homosexuality among consenting persons was practiced in the African region in precolonial times.[374]

[5] There is no record of customary law norms that penalized consensual sex between persons of the same sex. However, despite the lack of evidence about the criminalization of same-sex activities under customary law, ironically, in *Kanane v The State*,[375] the High Court of Botswana interpreted the absence of

[374] F Viljoen *International Human Rights Law in Africa* (2007) 597; KN Bojosi 'An Opportunity Missed for Gay Rights in Botswana: *Utjiwa Kanane v The State* (2004) 20 *South African Journal on Human Rights* 466, 469; BD Adam 'Age, Structure and Sexuality: Reflections on the Anthropological Evidence on Homosexual Relations' (1985) 11 *Journal of Homosexuality* 3.

[375] *Kanane v The State* (1995) BLR 94 (High Court of Botswana). This case is discussed in KN Bojosi 'An Opportunity Missed for Gay Rights in Botswana: *Utjiwa Kanane v The State* (2004) 20 *South African Journal*

penalization of same sex activities under African customary law as evidence that such activities are not indigenous to Africa. The Court said that same-sex activities offend African morality, were introduced by white people from the West as part of a colonial importation, and ought to be penalized in African settings. In the course of deliberating on whether penalization of sex between men constituted unfair discrimination on the ground of sex and gender under the Constitution of Botswana, Justice Mwaikasu said:

> …offences like 'unnatural offence' or sodomy' or bestiality', though among offences under many African Penal Codes introduced during colonial times, are generally uncommon among indigenous African societies. They are the types of offences that have their origin and are predominant practices among White societies in the West and migratory White communities from here. That is why, in Africa, unlike in a country like Botswana, we find this more pronounced in countries like South Africa and Zimbabwe where White settlers have imported their influence in planting such practices.[376]

[6] Initially, colonial criminal provisions were directed at punishing male perpetrators or only sexual activities between males, the underlying censured conduct being anal penetration by a penis. In practice, however, the provisions have been used by law enforcement agencies to punish both males and females whether the acts be homosexual or lesbian. In the post-colonial era, some jurisdictions, like Botswana, have taken steps to reform the law but only to 'level down' by clearly indicating that the offences net both males and females.[377] Prior to its amendment, section 164 of the Penal Code of Botswana said:

> Any person who-
>
> (a) has carnal knowledge of any person against the order of nature;
> (b) has carnal knowledge of an animal; or
> (c) permits a male person to have carnal knowledge of him or her against the order of nature
>
> is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.[378]

The Penal Code (Amendment) Act of 1998 reformed section 164 by leveling it down so that the perpetrator can be male or female. It substituted 'any other', for male.

Prior to its amendment section 167 of the Botswana Penal Code said:

> Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with

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on Human Rights 466, 468-469; Quansah EK 'Same-Sex Relationships in Botswana: Current Perspectives and Future Prospects' (2004) 4 *African Human Rights Law Journal* 201.

[376] *Kanane v The State* BLR 94 (High Court of Botswana); Bojosi *ibid* 468-469; Quansah *ibid* 205.

[377] *Kanane v The State* Criminal Appeal 9 of 2003 (2003) 2 BLR 67 (Court of Appeal of Botswana). This case was discussed in Chapter 2 of this study.

[378] For statutes that implicitly anticipate anal penetration by a male see also: Section 162 of the Penal Code of Kenya

him, or attempts to procure the commission of any such act by any male person with himself or another male person, whether in public or in private, is guilty of an offence.

The Penal Code (Amendment) Act of 1998 'levelled down' section 167 by deleting 'male'.

[7] Some statutes use simple language to denote the prohibited language such as section 347 of the Penal Code of Cameroon. It says that 'whoever has sexual relations with a person of the same sex shall be punished…'. It is left to the court to interpret what constitutes 'sexual relations' with a person of the same sex.

[8] The majority of statutes, however, tend to use language that has its origins in colonial jurisprudence and is intended to convey moral censure. The prohibited conduct is described as an offence 'against the order of nature' or an 'unnatural' sex', leaving it to the courts to read in homosexual or lesbian sexual acts. An example is section 145 of the Penal Code Uganda says: 'any person who-(a) has carnal knowledge of any person against the order of nature; …or (c) permits a male person to have carnal knowledge with him or her against the order of nature, commits an offence and is liable to imprisonment for life'.[379] The criminalization of sex between males tends to be found alongside provisions that criminalize bestiality. Section 153 of the Penal Code of Malawi is an example. It says: 'Any person who (a) has carnal knowledge of any person against order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of the felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment'.

[9] Some jurisdictions use language that conflates a homosexual act with indecency or gross indecency. Article 600(1) of the Penal Code of Eritrea is an example. It prohibits and punishes 'whosoever performs with another person of the same sex an act corresponding to the sexual act, or any other indecent act'.[380] Section 156 of the Penal Code of Malawi describes criminalized activities between males that fall short of 'carnal knowledge' (which is criminalized by section 153) as 'indecent assault'. It says: 'any male person who with, whether in public or in private commits any act of indecency assault with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years with or without corporal punishment.'

[379] See also: section 164 of the Penal Code of Botswana; section 153 of the Penal Code of Malawi; Section 154 of the Sexual Offences Special Provisions Act of Tanzania; Section 162 of the Penal Code of Kenya.
[380] See also Article 629 of the Criminal Code of Ethiopia; Section 217 of the Criminal Code of Nigeria.

[10] Some penal statutes like section 20A of the South African Sexual Offences Act of 1957, which has since been repealed following the decision of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*,[381] have only a male offender in mind.[382] Section 20A, inter alia, provided that 'a male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence'.

[11] In Chapter 2 of this study, the following were noted;

- that non-recognition of sexual orientation, and of necessity, same-sex, is not conducive to the protection of public health to the extent that it is apt to exclude or alienate persons with different sexualities other than heterosexuality from accessing health services and from strategies to prevent the spread of sexually transmitted infections;
- that the African Charter-based system, does not yet command jurisprudence that directly relates to criminalization of same-sex activities;
- that given judicial willingness, same-sex, as an integral part of sexual orientation, is implicitly protected against discrimination in equality and non-discrimination clauses that envisage an open rather than closed list of protected grounds; and
- that the strong official political antipathy towards homosexuality that currently prevails in several African countries militates against liberal reforms to the detriment of creating synergy between human rights and public health.

[12] In the discussion on the decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*[383] in Chapter 2 of this study, it was noted that discrimination on the ground of sexual orientation constitutes a most serious erosion of personhood as it goes to core of denying human dignity. The following human rights are infringed as a result of non-recognition of sexual orientation:

- right to equality and non-discrimination
- right to privacy
- right to human dignity
- right to family life

Penalization of same-sex has far-reaching effects. Penalisation can be used to prohibit not just same-sex activities, but also to deny a person access to health

[381] 1999 (1) SA 6 (Constitutional Court of South Africa).
[382] See also section 217 of the Criminal Code of Nigeria which confines itself to a male perpetrator; See also section 73 of the Zimbabwean Criminal Law (Codification and Reform) Act of 2004.
[383] 1999 (1) SA 6 (Constitutional Court of South Africa).

care services, employment, or education. In such contexts, the human rights to heath, work, education and information are also adversely impacted upon.

[13] As alluded to in Chapter 2 of this study, only one African country – South Africa – has taken steps to reform the law so as to decriminalize sex between males. South Africa decriminalized same-sex sexual activities in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*[384] through a judicial ruling rendering common law and statutory same-sex offences unconstitutional.[385]

3.3 Penalization of Ages of Consent for Sexual Activities

[14] The age of consent for sexual activities, and in particular sexual intercourse, is the subject of regulation by every African country. The state has a legitimate interest in regulating the age of consent for sexual activities to protect young persons from sexual exploitation, abuse and sexual violence not least rape. Rape is clearly criminalized for the purposes of protecting the physical and psychological integrity of an unwanted intrusion and is outside the scope of this section. The focus in this section is on sexual activities falling outside of conventional rape.

[15] African laws, like their counterparts, in other regions regulate sexual activities by, inter alia, prescribing the age of consent for sexual activities that do not necessarily involve violence for protective reasons. Engaging in sexual activities has physical and psychological health implications some of which are positive and some of which are negative. On the positive side is that sexual activities are part of how human beings express their personhood, realize their sexual identities and self-determination generally. On the negative side, sexual activities are clearly harmful to persons that have not reached a stage of physical and psychological maturity that allows them not only to understand what is involved in sexual activities, but also the implications thereof so as to be in a position to decide whether to engage in sexual activities.

[16] The state has a legitimate interest in prescribing differential ages for engaging in sexual intercourse in order to protect the best interests of those that are not in a position to understand what is involved in sexual intercourse or to deal with the risks inherent in sexual intercourse, including sexually transmitted infections and pregnancy. At the same time, the state must concede that ultimately, when

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[384] 1999 (1) SA 6 (Constitutional Court of South Africa).

[385] The decriminalization of same sex and the recognition of the right to sexual orientation in the South African Constitution have not always translated into human rights protection for some gay men and women on account of deep-seated societal homophobia. There have been reported incidences of 'corrective rape' or 'curative rape' as well as murder of women who have 'come out' as lesbians: NR Bucher 'Law Failing Lesbians on "Corrective Rape". Available at http://ipsnews.net.news.asp?idnews=48279.

dealing with young persons, it is not so much an arbitrary chronological age that is determinative but developmental maturity.[386] Any prescribed age for competence to consent to sexual intercourse that assumes that all persons that have not reached a prescribed age of majority and ignores the evolving capacities of the child will affront the rights to equality, non-discrimination and human dignity of children.[387] Equally, prescribing differential ages for sexual consent as between males and females constitutes a violation of the rights to equality and non-discrimination.[388] The same would apply to prescribing differential age for heterosexual and non-heterosexual activities.[389] Any prescribed ages for consent should reflect the evolving capacities of children and young persons and not assume that maturity begins at eighteen years.[390]

[17] The picture among the surveyed countries is that of ages of consent to sexual intercourse that are discriminatory of the grounds of age, sex or gender, and sexual orientation. Many jurisdictions describe the offence as defilement and others as statutory rape. Consent is not a defence to defilement. Only South Africa has taken judicial as well as legislative steps to render the ages for consent to sexual intercourse human rights compliant.

[18] A number of countries prescribe expressly or by implication 18 years as the age for consent for sexual intercourse. The Eritrean Penal Code prescribes eighteen years as the age of consent for sexual intercourse through the route of punishing a person who has sexual intercourse with a person below eighteen years.[391] Ethiopian Criminal Code adopts the same approach.[392] However, in terms of punishment, a distinction is made between having sexual intercourse with a person below thirteen years of age and person between thirteen and eighteen years. The former fetches a more severe sentence. Cameroon prescribes differential ages for sexual intercourse through the route of regulating the ages for marriage. The Ethiopian Criminal Code prescribes fifteen years for females and eighteen years for males[393] as the ages of marriage. Section 346 of the Code renders sexual intercourse with persons below these ages a criminal offence.

[19] Tanzanian law, which prescribes eighteen years as the age of consent, appears to prescribe the age of consent for females only. The Tanzanian Sexual Offences

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[386] Committee on the Rights of the Child General Comment 4 on Adolescent Health and Development (2003), para 2.
[387] I*bid* para 6.
[388] *Ibid.*
[389] *Ibid.*
[390] Article 5 of the Convention on the Rights of the Child; Committee on the Rights of the Child General Comment 4, (Adolescent Health) para 9.
[391] Article 595 of the Penal Code of Eritrea.
[392] Sections 620(2) and 627 of the Criminal Code of Ethiopia.
[393] Section 52(1) of the Penal Code of Cameroon.

Special Provisions Act of 1998[394] makes it an offence for a male person to have sexual intercourse with a female below eighteen years of age. The same position used to apply in Uganda under section 129 of the Ugandan Penal Code which also prescribes eighteen as the age of consent. However, in 2007, Uganda amended its Penal Code to accommodate both sexes as potential perpetrators and potential victims, and thus render the age of consent sex or gender neutral.

[20] In countries that prescribe eighteen years as the age of consent, the tendency is, nonetheless, to prescribe a differentiated regime for punishing offenders taking into account the age of the victim. In this respect, section 8 of the Kenyan Sexual Offences Act of 2006 is broadly representative of the approach in African jurisdictions. Section 8 says:

> **8.**(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

[21] In terms of jurisdictions that prescribe ages of consent below eighteen years, the Nigerian Criminal Code prescribes differential ages of consent that are below 18 years. The age for girls is sixteen[395] while it is fourteen for boys.[396] Under the Zimbabwean Criminal Law (Codification and Reform) Act of 2004, sixteen years is the competent age.[397] The Sexual Offences Act of Lesotho prescribes fifteen as the age of consent for both boys and girls.[398] The Penal Code of Malawi prescribes thirteen years as the age of consent for girls.[399]

[22] While one of the purposes of a prescribed age of consent is to protect young persons from sexual exploitation and abuse, some jurisdictions allow for exceptions that undermine this purpose. Cameroon is a case in point. Section 296 of the Penal Code of Cameroon absolves the offence of having sexual intercourse or an indecent act if the perpetrator and victim agree to marry.

[23] Over and above discriminating on the ground of sex, by prescribing different ages of consent for males and females, a feature of African domestic laws with the exception of South Africa, is that they not prescribe, at all, an age of consent

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[394] Section 130 (2) (e) Sexual Offences Special Provisions Act of 1998 (Tanzania). The section provides an exception where the girl is aged fifteen and is married.
[395] Section 222 of the Criminal Code (Nigeria).
[396] Section 216 of the Criminal Code (Nigeria).
[397] Section 70 of the Criminal Law (Codification and Reform) Act of 2004 (Zimbabwe).
[398] Sexual Offences Act of 2003 (Lesotho).
[399] Section 138(1) of the Penal Code (Malawi).

for same-sex activities for the reason that such activities are, in the first place, criminalized, regardless of age. South Africa has reformed its law judicially and through legislation to ensure parity of ages as between heterosexual and same-sex activities.

[24] South African judicial reform of age of consent came through *Geldenhuys v The State* where the Supreme Court of Appeal of South Africa was asked to determine the constitutional validity of different ages of consent for consensual sex for homosexual and heterosexual sex.[400] The appellant, an adult male, had been convicted by the Regional Court[401] on several counts of indecently assaulting a male complainant. The acts constituting indecent assault, consisting of mutual masturbation and anal penetration, occurred on different occasions when the complainant was under 19 years of age. Some of the counts arose out of acts that occurred when the complainant was at least under 16 years of age and others when he was over 16 years of age. The conviction arose out of charges brought under the Sexual Offences Act of 1957.[402] Section 14 the Sexual Offences Act criminalised sexual intercourse and other sexual acts of one person whether male or female with another where latter is under the age of 16 years if they are a female or under the age of 19 years if they are male. The offence is committed notwithstanding consent on the part of the complainant. The section provides as follows:

> (1) Any male person who-
> (a) has or attempts to have sexual unlawful carnal intercourse with a girl under the age of 16 years; or
> (b) commits or attempts to commit with such girl or with a boy under the age of 19 years an immoral or indecent act; or
> (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act, shall be guilty of an offence.
> (2) …
> (3) Any male person who –
> (a) has or attempts to have sexual unlawful carnal intercourse with a boy under the age of 16 years; or
> (b) commits or attempts to commit with such a girl or with a girl under the age of 19 years an immoral or indecent act; or
> (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act, shall be guilty of an offence.

[400] *Geldenhuys v The State* 2008 ZACC 21 (Supreme Court of Appeal of South Africa). Note that while the discussion of this case in this section is intended to illustrate jurisprudence on the regulation of consensual sexual activities, the case also illustrates the regulation of sexual activities that the law regards as criminal notwithstanding apparent consent on the part of the minor.

[401] Regional Courts are Magistrates Courts in South Africa. They are lower courts of first instance that deal with the more serious offences. As such, they deal with the preponderance of criminal court cases.

[402] Act No 23.

[25] The appellant appealed against the conviction and sentence on the ground, inter alia, that sections 14(1) and (3) were invalid to the extent that they differentiated between same-sex and heterosexual conduct and, thus, constituted unfair discrimination contrary to section 9(3) of the Constitution.

[26] It was held unanimously by the Supreme Court of Appeal that section 14 constituted unfair discrimination on the ground of sexual orientation, and was, therefore, a violation of the appellant's right to equality under section 9(3) of the Constitution. The Court severed from section 14 words that drew a distinction between same-sex and heterosexual conduct, and read into it other words with a view to setting a uniform complainant age of consent of 16 years for both same-sex and heterosexual activities. The conviction for sexual activities when the complainant was below 16 years of age was upheld whilst the convictions when he was over 16 years of age was set aside.

[27] Section 9(3) of the Constitution prohibits discrimination inter alia, on the grounds of gender, sex and sexual orientation. Drawing a distinction between the 'legal age of consent' for heterosexual activities and same sex activities the Act constitutes unfair discrimination. There was no justification for setting different ages of legal consent for same-sex and heterosexual sexual acts. In reaching its decision, the Court took into account that the broader governmental purpose behind section 14 was legitimate. It was legitimate to protect children against exploitative sexual conduct, not least in South Africa where sexual exploitation of children is a serious and growing problem.

[28] When reaching its conclusion in *Geldenhuys*, the Court took cognizance of South Africa's constitutional and international law obligations in this respect. Article 34 of the Convention on the Rights of the Child[403] and article 17 of the African Charter on the Rights and Welfare of the Child[404] which were ratified by South Africa on 16 June 1995, and 7 January 2000 respectively, enjoin States Parties to protect children from all forms of sexual exploitation and abuse. At the same time, the Court found that there was no justification for drawing a distinction between same-sex and heterosexual conduct in proscribing as well as punishing unlawful sexual conduct. Citing *National Coalition for Gay & Lesbian Equality v Minister of Justice*,[405] the Court underlined the importance of treating same-sex and heterosexual conduct equally and not perpetuating the historical marginalization and disadvantage of gays and lesbians.

[29] In fixing the age of legal consent to sexual intercourse and other sexual activities, the Supreme Court of Appeal was primarily guided by a parallel process of legal

[403] Adopted and opened for signature on 20 November 1989, entered into force on 2 September 1990.
[404] Adopted and opened for signature on 20 November 1989, entered into force on 2 September 1990.
[404] Adopted and opened for signature on 11 July 1990, entered into force on 29 November 1999.
[405] 1999 (1) SA 6.

reform that had been taking place in the country. In 2007, following a process of research and consultation by the South African Law Commission,[406] the South African Parliament had passed the Criminal Law (Sexual Offences and Related Matters) Act.[407] Sections 15 and 16 of this Act repeal section 14 of the Sexual Offences Act of 1957 and set 16 years as the uniform age of consent for all consensual sexual activities. The Supreme Court of Appeal also took judicial notice of the fact that the majority of countries outside South Africa had set a uniform average age of 16 years as the age of consent for same-sex and heterosexual Acts.[408]

[30] The *Geldenhuys* case is a positive contribution towards promotion of sexual health as a human right. It seeks to reconcile the imperative of recognizing that children are a group that is vulnerable and thus ought to be protected from sexual exploitation with a concomitant recognition that some children are in fact capable of making autonomous decisions about their sexuality and expressing their sexuality in sexual activities. In this sense, the decision is in line with the principle of the evolving capacities of a child that is contained in article 5 of the Convention on the Rights of the Child. Furthermore, the decision is significant for reinforcing the imperative of recognizing the equality of diverse sexualities and the undesirability of perpetuating the marginalization and stigmatization of gay and lesbian sexuality.

[31] At a more general level, *Geldenhuys* demonstrates clear willingness by a South African appellate court to develop common law in line with the spirit and objects of the Constitution. The decision of the Supreme Court of Appeal in *Geldenhuys* has been consolidated by a provision of the Criminal Law (Sexual Offences and Related Matters) Amendment Act which puts the rule laid down by the case on an express statutory footing and repeals section 14 of the Sexual Offences Act.

[32] In terms of statutory reform of age of consent, Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007[409] makes it an offence for a person to commit an act of sexual penetration with a 'child', that is a person who is at least twelve years but has not yet attained sixteen years. Consent on the part of the child is irrelevant. This is not an entirely new offence as statutory rape was recognized before the Act. What the new Act does, however, as alluded to earlier in the discussion on the *Geldenhuys* case is to remove the discriminatory anomaly in the provision of different ages for male

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[406] South African Law Commission *Sexual Offences Against Children* Issue Paper 10 (Project 108) Pretoria: South African Law Commission (1997); South African Law Commission *Sexual Offences: Substantive Law* Discussion Paper 85 (Project 107) Pretoria: South African Law Commission (1999).

[407] Act No 32.

[408] *Geldenhuys v The State* para 61.

[409] The broader purview of this Act is discussed in section 5.2 below.

and female victims. Sixteen years is now the age of consent to sexual intercourse for both boys and girls.

3.4 Criminalization of Incest

[33] State regulation of sexual activities in the African region, includes the regulation of incest. All African countries have laws that prohibit incest. Although the laws vary in their scope in terms of the persons they include in the prohibited category of relationships, they generally cast a wide rather than restricted net of prohibited relationships. The laws may conflate incest with prohibited relationships in marriage. An example is article 621 of the Eritrean Penal Code which prohibits consensual sex between persons who by law are not allowed to marry.

[34] The prohibited relationships for incest generally net in persons that are related in consanguinity, affinity and adoption. Section 20(1) of the Kenyan Sexual Offences Act is an example. It says:

> **20.** (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

The section applies in a like manner to a female perpetrator. Under the Kenyan Sexual Offences Act a 'brother and sister' includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.[410] The provisions of Zimbabwean law are even wider in terms of the prohibited degree of relationships. Under the Zimbabwean Criminal Law (Codification and Reform) Act of 2004, prohibited relationships include second degree relationships.[411]

3.5 Criminalization of HIV Transmission

[35] The domestic principles of criminal law in all the African countries that have been surveyed that were extant when the HIV epidemic first manifested have, with appropriate modification, always been amenable to punishing deliberate transmission of HIV by one person to another either through the interpretation and application of common law or the penal code. A person who deliberately causes another to contract a serious diseases through the transmission of HIV can conceivably be prosecuted in all the surveyed countries for attempted murder,

[410] Section 22 of the Sexual Offences Act of 2006 (Kenya).
[411] Section 75 of the Zimbabwean Criminal Law (Codification and Reform) Act of 2004.

and, of course, murder where the person dies as a result of the infection.[412] Where the transmission is done recklessly, not caring whether HIV will be transmitted to another person, culpable homicide would be an appropriate charge. Also, assault with intent to cause grievous bodily harm is an option.[413] In this respect, African jurisdictions are unexceptional and not different from their counterparts elsewhere.

[36] But notwithstanding that criminal law offences already in existence at the time that the pandemic took root were amenable to rendering deliberate or reckless transmission of HIV a criminal offence, several African countries have over the years been persuaded to pass new laws that are specifically directed at HIV. Deterrence, retribution, prevention and rehabilitation have been advanced as the penological justifications. The underlying deterrent rationale is that creating a specific offence would serve to protect health and life by impressing upon potential perpetrators the importance of avoiding conduct that injures others for fear of punishment by the state. By punishing the offender, criminal law expresses societies abhorrence of the selfish motives of those that knowingly or reckless expose others to a life-threatening infection and sends a message that such conduct cannot be indulged in with impunity. Punishing the offender allows the victim and society to feel that justice has been done and that the state is discharging its duty to protect its citizens from harmful conduct. From a human rights perspective, the state has a duty to respect, protect and fulfil the realizations of human rights including the rights to health and life. All things being equal, the duty of the state to protect human rights justifies, or even mandates, the creation of specific offences to deter and punish and rehabilitate perpetrators of deliberate or reckless transmission of HIV.

[37] Being the epicenter of the HIV pandemic, the African region has a compelling need to explore all effective means of checking the spread of HIV including criminal law measures. Evidence in some settings that some males were deliberately transmitting HIV through consensual sex and/or rape in order 'not to suffer and die alone' gave impetus to creating special offences to regulate HIV, and so did reports that some males were raping young girls in the belief that sexual intercourse with a virgin would cure them of HIV.[414]

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[412] JM Burchell & J Milton *Principles of Criminal Law* (2005)

[413] *Ibid*.

[414] S Leclerc-Madlala 'Crime in an Epidemic: The Case of Rape and AIDS' (1996) 9 *Acta Criminologica* 31; S Leclerc-Madlala 'Infect One, Infect All: Zulu Youth Response to the AIDS Epidemic in South Africa' (1997) 17 *Medical Anthropology* 363; M Earl-Taylor 'HIV/AIDS, the stats, the virgin cure and infant rape' (2002) *Science in Africa*. Available at www.scienceinafrica.co.za/2002/april/virgin.htm; Population Council Sexual and Gender Based Violence in Africa: A Literature Review (2008) § 1.4; JC Kim, LJ Martin & L Denny 'Rape and HIV Post-exposure Prophylaxis: Addressing the Dual Epidemics in South Africa' (2003) 11 *Reproductive Health Matters* 101.

[38] The other side of the argument is that criminalization of HIV as a routine response to HIV, is counterproductive as it raises more problems than it solves. Criminalization has no proven efficacy and has a tendency to undermine public health in that it creates an environment that promotes the further stigmatization of HIV/AIDS and the violation of human rights of people living with HIV/AIDS.[415] A focus on criminalization of HIV creates an impression of doing something about the HIV pandemic but without making any significant public health impact. The argument is not that criminal law has no role to play, but that it is highly questionable whether adding HIV-specific offences to the traditional repertoire of criminal law offences would be conducive to promoting public health. A focus on criminalization is unlikely to complement a strategy of encouraging voluntary uptake HIV testing and counseling. Fear of prosecution is apt to alienate people from accessing health care services. Special criminalization, it has been argued, detracts from public health as it is apt to accentuate HIV-related stigma and discrimination. It is apt to encourage the breach rather than the protection of human rights generally.

[39] The South African Law Commission considered whether it would be desirable to recommend the creation of a new HIV-related offence over and above the existing common law and come to the view that:[416]

- criminal law is not the best way of combating the spread of the epidemic;
- the HIV pandemic is a public health issue and that non-coercive measures stand the best chance of reducing the spread of the pandemic through voluntary modification of behaviour;
- individuals who deliberately or recklessly infect others can, and indeed, should be punished by law using existing criminal law principles, that it is questionable whether creating a new offence adds anything of substance to existing applicable offences other than clarifying the criminal nature of deliberate or reckless transmission of HIV; and
- that exceptionally the creation of a new offence may be justified where existing laws prove inadequate may be warranted

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[415] Z Lazzarini, S Bray & Burris 'Evaluating the Impact of Criminal Laws on HIV Risk Behaviour' (2002) 30 Journal of Law, Medicine & Ethics 239; E Cameron, S Burris & M Clayton 'HIV is a Virus, not a Crime: Ten Reasons against Criminal Statues and Criminal Prosecutions' (2008) 11 *Journal of International AIDS Society* 1; Klitzman R, Exner TE, Correale J, Kirshenbaum SB, Remien RH, Ehrhardt AA, and Rotheram-Borus, M.J. 'Naming Names: Perceptions of Name-Based Reporting, Partner Notification and Criminalisation of Non-Disclosure Among People Living with HIV' (2004) 1 *Sexuality Research and Social Policy* 38R Klitzman et al 'Naming Names: Perceptions of Name-Based Reporting, Partner Notification and Criminalisation of Non-Disclosure Among People Living with HIV' (2004) 1 *Sexuality Research and Social Policy* 38.

[416] South African Law Commission Discussion Paper No 80. *Aspects of Law Relating to AIDS: The Need for Statutory Offence Aimed at Harmful HIV-related Behaviour* Pretoria: South African Law Commission (1998)

[40] The challenge with special criminalization is that prosecuting HIV transmission poses insuperable challenges including problems of proving causation and protecting privacy. The long incubation period of the virus and the latent period where the victims shows no symptoms of disease militates against detecting and punishing HIV transmission timely. The majority of HIV transmission in the African region takes place though consensual sex. Prosecuting, at a large scale, 'bedroom' offences where violence was not used is notoriously difficult and is unlikely to be a good investment for public resources that could otherwise be used for preventive strategies.

[41] Criminalizing HIV transmission inevitably raises the question of whether, over and above sexual transmission, peri-natal transmission should also be criminalized. There are also questions of the constitutionality of singling out HIV for differential and onerous treatment. In a region where women where gender inequality is pronounced and poverty is highly feminized, women are frequently at the receiving end of HIV transmission. Adopting special measures to criminalize HIV transmission has the potential to accentuate gender discrimination and domestic violence as it is women rather than men who will be seen as HIV vectors by partners, families and communities.

[42] The African countries that were surveyed show a mixed picture in terms of criminalization. The majority of countries have not been persuaded to pass new legislation in response to the epidemic. Eritrea, Ethiopia, Lesotho, Malawi, Nigeria, Uganda,[417] and South Africa fall into this group. A minority – Kenya,[418] Tanzania,[419] and Zimbabwe[420] - have adopted HIV-specific laws that criminalize sexual transmission of HIV.[421] In this respect, the sample is not representative of a continent where 60% of countries are reported to have adopted legislation to specifically criminalize HIV transmission.[422]

[43] There is no way of measuring whether criminalization of HIV has led to behavior modification in Kenya, Tanzania and Zimbabwe. There are no studies that have

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[417] Uganda's has proposed to criminalize HIV transmission. It has before its parliament a bill – the HIV/AIDS Prevention and Control Bill of 2009. Clause 39 of the Bill makes it an offence to 'attempt to transmit HIV to another person'. Clause 41 criminalizes 'willful' transmission of HIV and prescribes a maximum sentence of life imprisonment. Available at <www.hrw.org/.../comments-uganda-s-parliamentary-committee-hivaids-and-related-matters-about-hivaids>.

[418] Section 26 of the Sexual Offences Act of Kenya (2006), and section 24 of the HIV and AIDS Prevention and Control Act of Kenya of (2006).

[419] HIV/AIDS (Prevention and Control Act) of Tanzania (2008).

[420] Section 79 of the Zimbabwean Criminal Law (Codification and Reform) Act of 2004

[421] See also: Law 049-2005AN of Burkina Faso providing that failure to use a condom may constitute the existing offence of culpable homicide if death occurs, and making deliberate transmission of HIV during sexual intercourse through failure to take necessary precautions a criminal offence.

[422] Canadian *HIV/AIDS Legal Network 'A Human Rights Analysis of the N'djamena model legislation on AIDS and HIV specific legislation in Benin, Guinea, Guinea Bissau, Mali, Niger, Sierra Leone and Togo'* (2007).

been conducted to ascertain whether introduction of HIV-specific laws has a deterrent effect. Also, with the exception of Zimbabwe, there are no reported cases of the HIV-specific laws or any other laws being used by law enforcement authorities to arrest and prosecute alleged perpetrators.[423]

[44] The Zimbabwean case concerns a 26-year-old woman who was arrested in 2007 and charged with 'deliberately infecting another person' with HIV under section 79 of the Zimbabwean Criminal Law (Codification and Reform) Act of 2004.[424] The woman was a person living with HIV and was receiving antiretroviral therapy. She was arrested and charged for having unprotected sex with her lover. Her lover was a male who, upon being tested, was found to be HIV-negative. The woman was convicted, nonetheless, and sentenced to a suspended prison term of five years. Section 79 says:

> **79 Deliberate transmission of HIV**
> (1) Any person who-
> (a) knowing that he or she is infected with HIV; or
> (b) realising that there is a real risk or possibility that he or she is infected with HIV;
> intentionally does anything or permits the doing of anything which he or she knows will infect, or does anything which he or she realises involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV, whether or not he or she is married to that other person, and shall be liable to imprisonment for a period not exceeding twenty years.
> (2) It shall be a defence to a charge under subsection (1) for the accused to prove that the other person concerned—
> (a) knew that the accused was infected with HIV; and
> (b) consented to the act in question, appreciating the nature of HIV and the possibility of becoming infected with it.

[45] The conviction under the Zimbabwean Act was on the basis that, notwithstanding that there was no evidence that she actually transmitted HIV, nonetheless, the woman's conduct in having sex with her lover without taking

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[423] In respect of South Africa there is a civil rather than criminal case - *Venter v Nel* 1997 4 SA 1014 (High Court of South Africa). The case was brought before a High Court by the plaintiff in delict (or the tort of negligence) to claim for damages for negligently transmitting to her HIV during sexual intercourse. The court granted the plaintiff damages civil damages on the ground that the defendant had infected her with HIV during sexual intercourse. This was an undefended claim in which the defendant knew several years before meeting the plaintiff that he was living with HIV. The defendant became aware of his HIV status following an insurance application-related test. The court awarded damages for future medical expenses as well as for the possibility of a reduction in life expectancy, psychological stress, contumely and pain and suffering. The Court said that this was a case which called for 'extremely high damages': *Ibid* at 1016J - 1017 D-E. In assessing the damages, the court took into account the stress and inevitable fear of the unknown, the feelings of helplessness and hopelessness, the adverse effects on her sex life, psychological and social suffering, and the adverse effects that HIV had on her generally

[424] This is an unreported case which is discussed by Cameron *et al* in E Cameron, S Burris & M Clayton 'HIV is a Virus, not a Crime: Ten Reasons against Criminal Statues and Criminal Prosecutions' (2008) 11 *Journal of International AIDS Society* 1.

precautions or disclosing her status to her lover fell within the prohibited conduct. The Act punishes not just intentional conduct, but also doing 'anything' that the defendant knows 'involves a real risk or possibility of infecting another person with HIV'.[425] Also, it is not a requirement that the defendant must be HIV-positive. It is sufficient that the defendant knows there is a 'real risk or possibility' that he or she has HIV.[426] If the defendant was, in fact, HIV-positive, the Act provides a defence of consent. It is a defence that the other person knew about the defendant's HIV status and consented.[427] A conviction under the Zimbabwean Act carries a maximum of twenty years in prison.

[46] The purview of the Zimbabwean Act is extremely wide. Whilst the charge under the Act is one of 'deliberate' transmission of HIV, the Act in practice punishes not only reckless but also, more worryingly behavior that is negligent or even below the threshold for negligence. A mere 'possibility' of infecting the other person is sufficient to constitute the offence. In this respect the Act uses criminal law to do the work that is normally done by delict or the tort of negligence. But even more disconcerting, punishing for a 'mere possibility' of transmitting HIV lowers the threshold of criminal liability to a standard that is even lower than its delict or tort of negligence counterpart. Using criminal law in this manner renders it a blunt instrument that is apt to engender contempt for the law as well as repression. It is anomalous that the Act also punishes a person who is not carrying the HIV on the ground that there is a possibility that the person might have HIV. In this respect, the Act creates a crime of 'fear and possibility' and not of 'effect and consequence'.[428] An offence is committed even if the defendant has no HIV or there is no transmission of HIV. By implication, the Zimbabwean Act also criminalizes mother-to-child transmission or the possibility thereof, where the mother knew that she had HIV or feared that she may have HIV.[429] While informed consent is a defence where the defendant was a person living with HIV, the defence does not apply to an HIV-negative defendant.

[47] The Kenyan and Tanzanian laws on criminalization of HIV transmission are similar in one respect. Both countries have an HIV/AIDS Prevention Control Act that has broadly the same objectives. The Kenyan Act was passed in 2006[430] while the Tanzanian Act was passed in 2008.[431] Criminalization of HIV under these Acts is part of a broader HIV/AIDS strategy. Over and above criminalizing HIV

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[425] Section 79(1)(b) of the Zimbabwean Criminal Law (Codification and Reform) Act of 2004.
[426] *Ibid*.
[427] *Ibid* section 2(b) of the Zimbabwean Criminal Law (Codification and Reform) Act.
[428] Cameron *et al*, 'HIV is a Virus, not a Crime: Ten Reasons against Criminal Statues and Criminal Prosecutions' *supra* at 2.
[429] *Ibid*.
[430] HIV/AIDS Prevention and Control Act of 2006 of Kenya.
[431] HIV/AIDS (Prevention and Control Act of 2008 of Tanzania.

transmission, the Acts seek to: 1) raise awareness about HIV and educate the populace about its modes of transmission and prevention; 2) regulate HIV testing and prohibit compulsory testing subject to certain exceptions; 3) generally promote public health; and 4) protect the human rights of people living with HIV/AIDS, including the rights to equality, non-discrimination, and privacy.[432]

[48] In respect of the criminalization provisions, section 24 of the Kenyan HIV/AIDS Prevention Act says:

> **24. Prevention of transmission**
> (1) A person who is and is aware of being infected with HIV or is carrying and is aware of carrying the HIV virus shall-
> (a) Take all reasonable measures and precautions to prevent the transmission of HIV to others; and
> (b) Inform, in advance, any sexual contact or person with whom needles are shared of that fact.
> (2) A person who is and is aware of being infected with HIV or who is carrying and is aware of carrying HIV shall not, knowingly and recklessly, place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected.
> (3) A person who contravenes the provisions of subsections (1) or (2) commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

Section 47 of The Tanzanian HIV/AIDS (Prevention and Control Act says:

> Any person who intentionally transmits HIV to another person commits an offence and shall on conviction be liable to imprisonment to a term not less than five years and not exceeding ten years.

[49] In addition to special HIV/AIDS legislation, Kenya criminalises HIV in the Sexual Offences Act. Section 26 of the Kenyan Sexual Offences Act provides that:

> **26.** (1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know -
> (a) will infect another person with HIV or any other life threatening sexually transmitted disease;
> (b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;
> (c) will infect another person with any other sexually transmitted disease,
> shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less than fifteen years but which may be for life.

[50] To a large extent, section 24 of the Kenyan HIV/AIDS Prevention and Control Act and section 26 of the Kenyan Sexual Offences Act are regulating the same conduct – transmission of HIV and yet punish the prohibited conduct differently.

[432] Section 3 of the Kenyan Act; Preamble to the Tanzanian Act.

The maximum prison term under the HIV/AIDS Prevention and Control Act is five years while it is a minimum of fifteen years imprisonment and a maximum of life under the Sexual Offences Act. It would be an anomaly to have two different statutes regulating the same conduct unless, according to a common law rule of statutory interpretation, provisions of a latter statute are implicitly taken to supplant the provisions of the earlier statute. To the extent that section 46 of the HIV/AIDS Prevention Act provides that 'where the provisions of this Act or any regulations made hereunder are inconsistent with the provisions of any other written law, the provision of this Act' or of such regulations shall prevail' it can be inferred that provisions of the Sexual Offences Act are subject to those of the HIV/AIDS Prevention and Control Act. Though the statutes were adopted in the same year, the HIV/AIDS Prevention and Control Act was adopted later in time.[433]

[51] The legislative intention behind the Kenyan Sexual Offences Act and the HIV/AIDS Prevention and Control Act is not quite the same. The intention behind these acts is to punish not just intentional transmission, but also negligent transmission. Failure to take reasonable measures to prevent HIV transmission constitutes a crime under both Acts. Unlike the Zimbabwean Act, under Kenyan laws, the defendant is someone who actually knows of their HIV status. Also, in terms of the minimum threshold for the offence is higher than the Zimbabwean Act. The act or omission of the defendant must at least satisfy the standard of delict or the tort of negligence. The defendant must have known or, at least, ought reasonably to have known that their conduct will lead to transmission of HIV. Another difference is that under the Kenyan HIV/AIDS Prevention and Control Act, in addition to failure to take reasonable measures, the defendant is liable for failure to 'inform, in advance, of any sexual contact' his or her HIV status. Requiring a person to disclose their status in advance of 'any sexual contact' means sexual activities that are regulated go well beyond vaginal or anal intercourse to include kissing of a sexual nature. The Act does not recognize, at least on the face of it, circumstances that may render it difficult for a defendant to have disclosed their status such as wives who oblige their husbands' sexual intercourse, but do not disclose their status for fear of domestic violence

[52] In terms of similarities, like the Zimbabwean Act, the Kenyan Acts also implicitly include in their scope mother-to-child transmission. Another similarity is that they create crimes of 'possibility' and not merely crimes of 'effect and consequence'.[434] It is not an element of the offence that the defendant transmitted

[433] The numbering of Kenyan statues indicates a chronological order. The Sexual Offences Act is Act No 3 while the HIV/AIDS Prevention Control Act is Act No 14.

[434] Cameron *et al* 'HIV is a Virus, not a Crime: Ten Reasons against Criminal Statues and Criminal Prosecutions' *supra* at 2.

HIV to another person as doing something that is likely to result in transmission if sufficient.[435]

[53] Section 47 of the Tanzanian HIV/AIDS (Prevention and Control Act, on the other hand, is different from both its counterparts provisions in the Kenyan and Zimbabwean laws in that it creates a crime of effect and consequence rather than possibility. Furthermore, it punishes only deliberate transmission and this certainly excluded negligent transmission.

[54] It is apparent that criminal liability under the Kenyan and Zimbabwean laws is couched in very wide terms. In this respect, Kenya and Zimbabwe have followed the approach of several West African countries that have adopted laws the so-called 'model legislation on HIV/AIDS' that, inter alia, criminalize HIV transmission using permissive rather than restrictive language as part of a purportedly comprehensive or holistic legal response the endemic nature of HIV in Africa.[436] Examples from Benin, Niger and Sierra Leone can be given.[437] In Benin, it is a crime for any person who knows that they are HIV positive to engage in 'unprotected sexual relations' without disclosing their status.[438] The offence does not require actual transmission of HIV or an intention to transmit HIV. Niger makes it an offence to 'willingly expose another person to the risk of infection with the AIDS virus'.[439] It is not necessary to actually transmit HIV as exposure is sufficient.

[55] Under article 21(1) of the Prevention and Control of HIV and AIDS Act of Sierra Leone, a person who is HIV-positive and is aware of their status 'must take all reasonable measures and precautions to prevent transmission of HIV to others, and in the case of pregnant mothers, the foetus'.[440] In addition, person who is HIV positive and is aware of this fact, must 'inform, in advance of any sexual contact or person with whom needles are shared' of their HIV status. Under article 21(2) of the same law, a person who is HIV-positive and is aware of the fact, 'must not knowingly or recklessly place another person (and in the case of a

[435] Section 26(b) of the Sexual Offences Act of Kenya,

[436] As explained in Chapter 2 of this study, the model legislation largely derives from a model of legislation that was commended to African legislatures at a workshop that was convened in N'Djamena, Chad in 2004.

[437] See also Guinea's Law on Prevention, Care and Control of HIV/AIDS No 2005-25 of 2005; Guinea Bissau's Framework Law Relating to the Prevention, Treatment, and Control of HIV/AIDS (2006); Mali's Law Establishing Rules Relating to the Prevention, Care, and Control of HIV/AIDS No 06-28 of June 2006; Togo's Law on the Protection of People with Respect to HIV/AIDS No 2005-012 (2005).

[438] Article 27 of Benin's Law on Prevention, Care and Control of HIV/AIDS. Law No 2005-31 of 5 April, 2006.

[439] Article 39 of Niger's Law Relating to the Prevention, Care, and Control of Human Immunodeficiency Virus (HIV). Law No 2007-08 of 30 April 2007.

[440] Article 21(1) of The Prevention and Control of HIV and AIDS Act of 2007 (Sierra Leone).

pregnant woman, the foetus) at risk of becoming infected with HIV. Article 21(2) provides a defence of informed consent. Articles 21(1) and (2) of the Sierra Leonean law are similar to section 24 of the Kenyan HIV/AIDS Prevention and Control Act save in one respect. The only difference is that Sierra Leonean law spells out that mother-to child is also included in the prohibited conduct.

[56] Criminalization of HIV transmission in HIV-specific legislation has also been conceived with a view to protecting people from transmission in the context of receiving blood products and health care provision. The common law and the civil law introduced to African countries through colonialization has historically imposed civil ability that is applicable, for example, to instances where a health care provider or a manufacturer of a blood product negligently causes HIV to be transmitted to a patient.[441] Where transmission is done intentionally or recklessly, the conduct constitutes both a civil wrong as well as a criminal wrong. However, notwithstanding that such a civil wrong and a criminal wrong is already recognized under existing laws, some African countries have, nonetheless, adopted legislation to specifically address criminal liability for HIV transmission by service providers. The advent of the HIV pandemic has spurred some countries to pass HIV-legislation spelling out liability for HIV transmission in the course of service provision.

[57] Among the sampled countries, Kenya and Tanzania have HIV–specific legislation for punishing service providers. Under section 12 of the Kenyan HIV/AIDS Prevention and Control Act 'a person who, in the course of his professional practice, knowingly or negligently causes another to be infected with HIV through unsafe or unsanitary practices or procedures' commits an offence. Under section 48 of the Tanzanian HIV/AIDS (Prevention and Control) Act, it is an offence to cause the transmission of HIV through 'intentionally breaching provisions relating to safe procedures and practices. But while the penalties under both Acts are not particularly severe and certainly not higher than what would be imposed by ordinary civil and criminal liability, the creation of the offences arguably serves the purpose of reinforcing the importance of adhering to safe procedures in order to protect patients from the danger of infection.

[58] Responses to the HIV pandemic are also reflected in sentencing procedures. African courts treat HIV as an aggravating factor when sentencing for offences such as rape and indecent assault. Most countries have been able to use existing sentencing procedures to treat HIV as an aggravating factor and thus a factor that warrants a more severe sentence. Others jurisdictions, however, have introduced HIV-specific sentencing provisions. Zimbabwe is a case in point.

[441] J Burchell *Principles of Delict* Cape Town: Juta (1993).

Section 80 of the Zimbabwean Criminal Law (Codification and Reform) Act of 2004 says:

80 Sentence for certain crimes where accused is infected with HIV
(1) Where a person is convicted of—
(a) rape; or
(b) aggravated indecent assault; or
(c) sexual intercourse or performing an indecent act with a young person, involving any penetration of any part of his or her or another person's body that incurs a risk of transmission of HIV;
and it is proved that, at the time of the commission of the crime, the convicted person was infected with HIV, whether or not he or she was aware of his or her infection, he or she shall be sentenced to imprisonment for a period of not less than ten years.

The issue of sentencing offenders that were HIV positive at the time that they committed offences may raise issues of equality and non-discrimination if HIV is treated differently from other conditions that pose the same risk to the victim

3.6 CONCLUSIONS

[59] Criminalization of consensual same-sex relationships is the norm in the African region. Though criminalisation of same-sex activities is a colonial bequest, it has been retained by all African countries with the exception of South Africa. Such criminalization remains a source of violation of the rights to equality, human dignity, health, privacy, information, freedom of expression, education and other related human rights.

[60] South Africa explicitly protects the right to non-discrimination on the ground of sexual orientation in the Bill of Rights of its Constitution. Furthermore, its Constitutional Court, which has judicially repealed the criminalization of same-sex activities, provides important human rights benchmarks on non-discrimination and sexual orientation for the African region given political and judicial willingness.

[61] Criminalization of same-sex activities has an adverse impact on the promotion and protection of sexual health, not least in a region which is the epicenter of the HIV/AIDS epidemic.

[62] In respect of the regulation of ages of consent to sexual activities, the prevailing picture in the African region is one of prescribed ages of consent to sexual intercourse that are discriminatory of the grounds of age, sex or gender, and sexual orientation as to fail to meet human rights muster.

[63] There are serious inconsistencies between ages of consent for sexual intercourse for the purposes of preferring criminal changes for a defendant who has sex with

minor who has not attained the statutory age of consent and laws, mostly customary and religious laws that recognize the capacity of a person below that statutory age to marry and by implication partake of marital sex.

[64] South Africa provides important human rights benchmarks in rendering ages of consent responsive to the eradication of discrimination based on age, sex and sexual orientation. The decision of the Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others,*[442] is the benchmark on sexual orientation generally. The decision of the South African Supreme Court of Appeal in *Geldenhuys v The State* 2008 ZACC 21[443], and the reform of ages of consent by the Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 are useful benchmarks for the African region in the specific area of reforming ages of consent for young persons.

[65] Regulating sexual activities between persons that are closely related is particularly important where the relationship gives rise to opportunities for sexually abusing a person who by reason of young age is in a position of dependency and is unable to protect himself or herself from the other party. In this way, incest laws reinforce other laws that protect the young and vulnerably for forced or exploitative sexual access. However, in respect of persons that are otherwise able to decide on whether to engage in sexual activities, including second degree relatives in the category of prohibited relationships as does the Zimbabwean Criminal Law Reform Act of 2004 says more about protecting the institution of custom and tradition than protecting the vulnerable.

[66] While several African jurisdictions have in recent years been persuaded to adopt laws that specifically criminalize HIV transmission, the jurisdictions already had in place laws that could be used for the same purpose notwithstanding they were not HIV-specific. There is no evidence that the HIV-specific laws are being actively enforced or that they are making a difference by way of providing protection that would otherwise be unavailable under the ordinary laws that impose criminal and civil liability for intentional, reckless or negligent conduct that injures another person and causes them suffering and loss.

[67] HIV-specific laws that criminalize HIV transmission are generally drafted very broadly in terms of conduct that constitutes the offence as to raise questions of the constitutional validity of many such laws.

[68] African courts treat HIV as an aggravating factor during sentencing.

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[442] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1999 (1) SA 6 (Constitutional Court of South Africa).

[443] *Geldenhuys v The State* 2008 ZACC 21 (Supreme Court of Appeal of South Africa).

4 REGULATION OF MARRIAGE AND THE FAMILY

4.1 Introduction

[1] Regulation of marriage has important connections with sexual health and human rights, not least in the African region where some customary laws or customary practices, religious laws and non-observance of the legally prescribed age of marriage condone marriages have adverse implications. The plural nature of African legal systems means that laws that require marriage to be a free and voluntary union between parties who are sufficiently mature to consent to marriage, and to be monogamous and to be an equal partnership, are juxtaposed with customary laws, religious laws, and legally as well as socially condoned social practices that depart from these premises. Early/child marriages, customary and religious laws and practices that sanction lack of autonomous decision-making when entering into marriage, gender inequality, and polygny are the main human rights and sexual health concerns in the African region.

[2] This chapter maps jurisprudence in the African region in respect of the regulation of marriage and the family with a particular focus on three main issues, namely,

- consent to marriage with particular reference to early marriage
- polygny
- discrimination on the ground of sex with particular reference to the requirement that the parties to a marriage be a male and a female
- adultery
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4.2 International Human Rights Law, Consent and Age for Marriage

[3] The notion of marriage as a voluntary union is well established under international human rights law. Several United Nations instruments recognize the validity of a marriage on the premises that it is a union between parties that are of a sufficiently mature age to enter into marriage,[444] and are in a position to choose to enter into the marriage freely and voluntarily, without coercion.[445]

[444] Article 16 of the Universal Declaration; article 23 of the Covenant on Civil and Political Rights; article 16(1) of the Convention on the Rights of Persons with Disabilities.

[445] Article 16(2) of the Universal Declaration; article 23(4) of the Covenant on Civil and Political Rights; article 10 of the Covenant on Economic, Social and Cultural Rights; article 16(1)(b) of the Women's

United Nations instruments do not countenance the idea of third parties such as parents or guardians imposing their will and coercing their children into marriage.[446] The Women's Convention expressly says that the betrothal and marriage of a child has no legal effect.[447]

[4] However, there are some gaps in international human rights law. United Nations instruments do not expressly provide for a numerical age for marriage, save for the state obligation to set a minimum age for marriage,[448] and recommendations by treaty bodies that eighteen years be the minimum age.[449] The Children's Convention does not expressly address the human rights of married children save by way of inference in the duty incumbent upon states to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children.[450]

4.3 Regional Human Rights Law, Consent and Age for Marriage

[5] The African Charter does not speak directly to capacity to marry, or the age consent to marriage.[451] The African Children's Charter speaks implicitly to customary practices that require children, especially girls, to be married off early when it says that 'states shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular those customs and practices prejudicial to the health or life of the child and those customs and practices discriminatory to the child on the ground of sex or other status'.[452] The African Children's Charter speaks directly to marriage and capacity to marry when it says 'Child marriage and betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age

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Convention; Committee on the Elimination of Discrimination Against Women *General Recommendation 21: Equality in Marriage and Family Relations* (1994) para 16; article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages General Assembly resolution 1763 A (XVII) adopted on 7 November 1962, and entered into force on 9 December 1964.

[446] Human Rights Committee *General Comment 28: Equality of Rights Between Men and Women* (2000) para 28; Committee on the Elimination of Discrimination Against Women General Recommendation 21: *Equality in Marriage and Family Relations* para 38;

[447] Section 16(2) of the Women's Convention.

[448] Section 16(2) of the Women's Convention.

[449] Committee on the Elimination of Discrimination Against Women *General Recommendation 21: Equality in Marriage and Family Relations* para 36; Committee on the Rights of the Child *General Comment 4 Adolescent Health in the Context of the Convention on the Rights of the Child* para 20

[450] Article 24(3) of the Children's Convention.

[451]. The closest that the African Charter gets to marriage is article 18(1) which says that: 'The family shall be the natural unity and basis of society. It shall be protected by the state which shall take care of its physical and moral health'. Of course, other provisions of the African Charter, including the right to equality (articles 2, 3 and 18(3)), integrity (article 4), human dignity (article 5), and health (article 16) are also applicable to practices or earl/child marriages and coerced marriages.

[452] Article 21(1) of the African Children's Charter.

of marriage to be eighteen years and make registration of all marriages in an official registry compulsory'.[453]

[6] The African Women's Protocol addresses choice in marriage and capacity to marry in respect of children both implicitly as well as directly. Provisions of the African Women's Protocol that enjoin states to: eliminate all forms of discrimination against women, including practices that endanger the health and well-being of women;[454] respect the dignity of the woman and the free development of her personality; ensure the woman's protection from all forms of violence, including sexual violence;[455] and to eliminate practices that adversely affect the human rights of women contrary to recognised international standards,[456] readily apply to customary and religious practices that deny choice in marriage and compel young children, especially, girls to become spouses. The African Women's Protocol also speaks directly to marriage and capacity to marry when it provides, inter alia, that 'no marriage shall take place without the free and full consent of both parties'.[457] Furthermore, the African Women's Protocol also goes beyond its United Nations counterparts by providing that 'the minimum age for marriage shall be 18 years'.[458]

[7] In terms of jurisprudence emanating from a regional human rights court or tribunal, there are no decided cases by either the African Commission on Human and People's Rights or the African Court of Human Rights. There is, however, a case decided by a sub-regional court - *Hadijatou Mani Koraou v The Republic of Niger*[459] This case was discussed more fully in Chapter 1 of this study. It will be recalled that the Court of Justice of the West African Community held, inter alia, that the applicant had not consented freely to a marriage, and, instead, had been subjected to slavery through the customary practices of *Wahiya* and *Sadaka* and that, in the process, suffered physical and psychological harm and violations of human rights. In response to the applicant's argument that she was not legally married to Souleymane, a domestic court had ruled that 'the marriage of a free man with a slave woman is lawful if he cannot not afford to marry a free woman and he fears to fall into fornication'.[460] The Court of Justice of the West African Community found that the domestic court had erred and failed to protect the human rights of the applicant by not condemning slavery and not ordering the prosecution of Souleymane for perpetrating slavery.

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[453] Article 21(2*) ibid*.
[454] Article 2(1)(b) of the African Women's Protocol.
[455] Article 3 *ibid*.
[456] Article 5 *ibid*.
[457] Article 6(a) *ibid*.
[458] Article 6(b) *ibid*.
[459] *Hadijatou Mani Koraou v Republic of Niger* ECW/CCJ/JUD/06/08, October 28, 2008 (ECOWAS Community Court of Justice).
[460] *Ibid* para 83.

[8] Though in *Hadijatou Mani Koraou v The Republic of Niger* the applicant had based her case, in part, on the argument that her right to enter a marriage freely and voluntarily, the judgment was a missed opportunity as was highlighted in Chapter 1 of this study. The Court missed an opportunity to address child marriages generally. Furthermore, the Court missed an opportunity to link a coerced child marriage with sexual and reproductive health. At the age of 12, the applicant has been coerced into a sexual relationship with a 46 year old man. She bore four children from the forced union.

4.4 Domestic Law, Consent and Age for Marriage

[9] A distinctive feature of African marriage laws is that statutory rules for marriage run side by side with customary and religious rules. In most jurisdictions, one can choose to contract a civil marriage under civil law or a customary marriage under customary law, or a religious marriage under religious law. Marriage requirements, rights within marriage, and the dissolution of marriage are accordingly governed according to the law under which the marriage was contracted. In theory, parties are free to choose whether to marry under civil laws or under customary or religious laws. In practice, however, the entrenchment of gender inequality in the African region, determines that, generally, it is men who make the choice. Other factors also determine choice in the type of law governing marriage, including geographical location, and education. Rural-based communities and those with little or no education are more likely to opt for customary law marriages than their urban, better educated and better economically provided counterparts.

[10] The legal age for civil marriages is prescribed in all the jurisdictions that were surveyed. In respect of customary law and religious law there is generally no prescribed age. Eighteen years is the age at which the majority of African jurisdictions recognize capacity of a person to enter into a civil marriage on his or her own accord without requiring the consent of parents or a legal guardian. Kenyan[461], Malawian,[462] Nigerian[463] and Ugandan,[464] and South African[465] statutes are exceptional in prescribing 21 years as the minimum age when a person can marry on the basis of their own consent.[466] However, statutes that retain 21 years as the age of consent are better understood as a relics of colonial

[461] Section 19 of the Marriage Ordinance of 1962 (Kenya).
[462] Marriage Act (Malawi).
[463] Section 18 of the Marriage Act (Nigeria).
[464] Section 17 of the Marriage Act (Uganda).
[465] Marriage Act (South Africa).
[466] Section 18 of the Marriage Act of 1914 (Nigeria).

legislation which sought to reflect the then prevailing age of majority in the colonising countries. They are less to do with deliberate legislative efforts to be more protective by maintaining an age that is higher than the prevailing global norm.

[11] Typically, the ages of consent to marriage are stipulated in parliamentary marriage or family law statutes or civil codes that govern civil marriages.[467] In addition, a minority of countries address marriage in their constitutions. The Ethiopian, Malawian and Ugandan constitutions directly address marriage. Without specifying the age, the Constitution of Ethiopia requires 'free and full consent'.[468] In addition, the Ethiopian Constitution mandates the recognition of marriages conducted under customary law and religious law.[469] Over and above providing that marriage must be entered into freely,[470] the Malawian Constitution prescribes ages of consent. It provides that a person who is over 18 years can enter into a marriage on their own accord.[471] Furthermore, the Malawian Constitution explicitly recognizes marriages by persons who have not attained 18 years. It provides that persons between the ages of 15 and 18 years can marry, with the consent of parents or guardians.[472] The Constitution of Malawi also implicitly recognizes marriages by persons below 15 years, or at least does not rule them out by providing that 'the state shall actually discourage' a person of such an age from entering into a marriage.[473]

[12] The Ugandan Constitution, like its Ethiopian and Malawian counterparts, requires 'free consent' as a requirement for the validity of a marriage. However, it departs from its counterparts by prescribing a one fixed age. It provides that a 'man' and a 'woman' are entitled to marry '*only* if they are each of the age of eighteen years and above'.[474] The implicit proscription of same-sex marriages aside, the Ugandan Constitution does not appear to countenance any exception to the prescribed age of 18 years.

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[467] **Cameroon**: Civil Code and Civil Status Ordinance: **Ethiopia**: Civil Code (Ethiopia); **Eritrea**: Transitional Civil Code (Eritrea); **Kenya**: Marriage Act; African Christian Marriage and Divorce Act; Mohammedan Marriage and Divorce and Succession Act; Hindu Marriage Act; **Malawi**: Marriage Act of 1902; **Nigeria**: Marriage Act of 1914, Child's Rights Act of 2003; **South Africa**: Marriage Act of 1961, Recognition of Customary Marriages Act of 1998; **Tanzania:** Marriage Act of 1971: **Uganda**: Marriage Act ; Marriages of Africans Marriage Act; Hindu Marriage and Divorce Act of; **Zimbabwe**: Marriage Act; Customary Marriages Act.

[467] Section 19 of the Marriage Ordinance of 1962 (Kenya).

[468] Section 34(2) of the Constitution of Ethiopia.

[469] Section 34(4) *ibid.*

[470] Section 22(4) of the Constitution of Malawi.

[471] Sections 22(6) *ibid*.

[472] Section 22(7) *ibid*.

[473] Section 22(8) *ibid*. Emphasis provided.

[474] Article 31 of the Constitution of Uganda.

[13] Different ages of consent as well as third party consent to marriages of persons below 18 years are recognized by all jurisdictions either expressly in civil law statutes or through the recognition of the validity of marriages conducted under customary law and religious law. By way of examples only, the Cameroonian Civil Status Registration Ordinance provides different minimum ages for marriage – 18 years for males and 15 for females.[475] In the case of a person below 18 years, the consent of parents is recognized.[476] The position in Ethiopia varies from region to region as regions have jurisdictions to enact family codes. Before the reform of the Family Code, the ages for consent to marriage were 18 for males and 15 for girls. Under the reformed laws of Ethiopian regional family codes, 18 years is the predominant minimum age for both males and females, but permission can be given by the Ministry of Justice to permit the marriage of a person who has attained 16 years.

[14] The Tanzanian Marriage Act[477] prescribes 18 years for males and 15 for girls as the ages of consent. The Tanzanian Marriage Act must be read side by side the Penal Code which provides that a person of African or Asiatic descent may marry or permit the marriage of a girl under the age of 12 years, providing there is no intention to consummate the marriage before the girl is 12 years old.[478] The Tanzanian Marriage Act also recognizes marriages contracted under customary, Hindu and Islamic laws.

[15] Though the Kenyan Marriage Act prescribes 21 years as the age of consent on one's accord, it simultaneously prescribes 16 years as the minimum age for marriage and requires the consent of a legal guardian where the person has attained 16 and is below 21 years. The Kenyan Marriage Act does not affect marriages that are contracted under African customary law.[479] Kenyan customary, law like African customary laws generally, does not provide for a minimum age of consent save the practice among certain communities of requiring girls to have menstruated prior to marriage as a sign of showing sufficient maturity to marry. Kenya also has legislation for regulating Islamic marriages - the Mohammedan Marriage and Divorce and Succession Act.[480] This Act does not expressly provide for an age of consent. Hindu marriages are governed by the Hindu Marriage Act.[481]

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[475] Section 52(1) of Civil Status Ordinance (Cameroon). The President of the Republic may grant an exception to this rule.
[476] *Ibid*.
[477] Marriage Act of 1971 (Tanzania).
[478] Section 138(6) of the Penal Code (Tanzania).
[479] Section 37 of the Marriage Act of 1962 (Kenya).
[480] Mohammedan Marriage and Divorce and Succession Act (Kenya).
[481] Hindu Marriage Act (Kenya).

[16] On the one hand, the Ugandan Constitution appears to only recognize 18 years as the minimum age for marriage.[482] On the other hand, Uganda has parliamentary legislation that cannot stand side by side with its Constitution which prescribes 18 years as the minimum age. Uganda recognizes customary law marriages under the Marriage of Africans Marriage Act,[483] and Hindu marriages under the Hindu Marriage and Divorce Act.[484] Consent to marriage by a person below 21 years can be given by parents under the Marriage of Africans Marriage Act. The Hindu Marriage and Divorce Act prescribes 18 years for males and 16 years for females as the minimum ages for entering into marriage.

[17] Zimbabwean law only provides for marriages under civil law[485] and under African customary law.[486] Zimbabwe differs from all the other jurisdictions in the sample in that it does not make any provision for religious marriages notwithstanding that it has sections of the population that practice marriages under Islamic law. For marriages under civil law, females under 16 years and males under 18 years require the consent of their parents to enter into a marriage.[487] Customary law does not prescribe a minimum age for marriage but where the female is below 18 years, it requires parental consent and an agreement to pay bridewealth.[488]

[18] Like most of its African counterparts, Nigerian domestic law recognises civil marriages, customary marriages and religious marriages. In respect of civil and customary marriages, Nigeria is unremarkable in the sense that it mirrors much of the law of the other African jurisdictions. What is distinctive, however, about Nigeria is the predominance of religious marriages under Islamic Shari'ah in majority of the northern states of Nigeria. Islamic Shari'ah in Nigeria subscribes to the Maliki school of thought.[489]

[19] All schools of Islamic jurisprudence do not countenance the notion of forced marriage. A marriage is a contract between two parties - *mithaq* - that freely consent to it. According to the Qu'ran a widowcannot be compelled to marry and neither can a child. Indeed, where consent has not been obtained, the coerced party is given power to annul the marriage.[490] Under the Maliki jurisprudence, which is followed by the northern Nigerian states, mutual consent is a

[482] Article 31(1) of the Constitution of Uganda
[483] Marriage of Africans Act (Uganda).
[484] Hindu Marriage and Divorce Act (Uganda).
[485] Marriage Act (Zimbabwe).
[486] Customary Marriages Act (Zimbabwe).
[487] Sections 20 and 22 of the Marriage Act (Zimbabwe).
[488] Sections 4 and 7 of the Customary Marriages Act (Zimbabwe).
[489] See discussion in Chapter 1 of this study.
[490] *Ibid.*

requirement for entry into marriage.[491] The recognition of mutual consent of the parties to a proposed marriage in Islamic law co-exists with recognition of the right of fathers or legal guardians of the bride and the groom to conclude a valid marriage on behalf of their charges. However, the bride and groom retain the right to repudiate the arrangement. In *Karimatu Yakubu v Alhaji Paiko*[492] it was held by a Sharia Court that a marriage conducted on behalf of a teenage girl without her consent constituted a violation of the rights to liberty and dignity under the Nigerian Constitution. It was against the principles of Shari'ah Law for a father to compel her daughter to marry against her wishes. The Sharia Court highlighted that under Shari'ah, consent of a girl to her marriage is not only desirable, but it is also indispensable.

[20] The practice, though not the theory, of Shari'ah in Nigeria creates opportunities for early/child marriages in the same way as customary law. The recognition of the father as a legal guardian who can enter into a marriage on behalf of her daughter especially creates sufficient room for coercing young girls into marriage. The fact that Islamic law does not prescribe the age of consent to marriage, and recognizes the practice betrothal girls maximizes the risk. The general understanding under Islamic jurisprudence is that marriage takes place when the girl is sufficiently mature to engage in sexual intercourse.

4.5 Inconsistencies between Age of Consent to Marriage and Age of Consent to Sexual Intercourse.

[21] All African jurisdictions have laws whose provisions on age of consent to marriage do not complement ages of consent to sexual intercourse under criminal law provisions. The laws of Nigeria and Tanzania serve as illustrations.

[22] The Nigerian Marriage Act, which prescribes 21 as the age consent to marriage,[493] without parental consent co-exists with a criminal code that prescribes the ages of consent to sexual intercourse for girls and boys as 16 and 14 years respectively,[494] as well as customary and religious law marriages where there is no prescribed minimum age of consent to marriage.

[23] The Tanzanian Marriage Act prescribes 18 years and 15 years for males and females respectively as the ages of consent to enter into a marriage. This is seemingly in conflict with the Penal Code which raises the bar for consent to sexual intercourse. Section 130(2)(e) of the Penal Code as amended by the Sexual

[491] *Karimotu Yakubu v Alhaji Paiko* (1985) CA/K/80s/85 Court of Appeal of Kaduna State.
[492] Unreported suit no Appeal no CA/K80s/85 (Sharia Court of Appeal).
[493] Marriage Act (Nigeria)
[494] Sections 216 and 218 of the Criminal Code (Nigeria).

Offences Act of 1998, prescribes 18 years as the minimum age for consent to sexual intercourse.[495] However the very same provision provides an exception where the woman is married to the man and they have not separated.[496] Furthermore, section 138(6) of the Tanzanian Penal Code provides that a person of African or Asiatic descent may marry or permit the marriage of a girl under the age of 12 years, providing there is no intention to consummate the marriage before the girl is 12 years old.[497] There is also Tanzanian customary law which does not prescribe a minimum age for marriage. But to the extent that customary law can be impliedly modified by a legislative instrument, 12 years can be assumed to be the minimum age for sexual intercourse. Thus there is a significant difference between 12 as the age at which marriage can be consummated, and 18 as the prescribed age of consent to sexual intercourse. It is not clear why girls that are in a marriage deserve less protection for their sexual health than their unmarried counterparts. The implicit premise is that marriage provides better protection for the sexual health of children has been disabused.

4.6 Sexual Health and Early/Child Marriages

[24] Child marriages particularly for girls well below the age of 18 raise serious human rights as well as health issues. Marriage of one too young to understand what is entailed in marriage is inherently oppressive and exploitative. It is a coercive marriage that is built around expectations of subordination and subservience. Such marriages are widely practised in poor rural communities in many parts of Africa.[498] They usually operate by vesting parents, the father in particular, with a proprietary right over a child. The parental right is used to impose marriage on a child who is either not in a position to decide about marriage on account of immaturity or is unwilling to marry, but is expected to be subordinate to parental will and to play a subservient role once married. Such marriages treat children as ends or objects rather than subjects that possess human rights. Child marriages negate, in a fundamental way, the responsibility of parents to use parental rights only for the purposes of discharging parental duties to protect and promote the best interests of the child.

[25] By disregarding notion of exercise of choice in the child, child marriages have adverse implications for the rights to self-determination and human dignity. Child marriages also constitute discrimination not only on the ground of age, but also on the ground of sex and gender as they disproportionately and adversely

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[495] Section 130(2)(e) of the Penal Code (Tanzania) as amended by the Sexual Offences Act (Tanzania).
[496] *Ibid.*
[497] Section 138(6) of the Penal Code (Tanzania).
[498] United Nations Population Fund *Child Marriage Fact Sheet* New York: United Nations Population Fund (2005). Available at < www.unfpa.org/swp/.../factsheets/facts_child_marriage.htm >

affect girl children. They are a form of gender stereotyping.[499] Coercing a girl child against her wishes to marry also implicates the rights to be inhuman and degrading treatment and the right to health.

[26] The adverse psychological and physical health implications of child marriages include early or premature exposure to marital and procreative sex.[500] The obstetric fistula is the most documented adverse effect of early pregnancies that are linked to child marriages. Early exposure to sexually transmitted infections is also one of the risks inherent in child marriages. Girl children are particularly vulnerable to sexual abuse and rape within 'marriage', the psychological trauma of premature motherhood, and domestic violence generally.[501] A child mother has a higher mortality and morbidity rate than their adult counterparts. Child 'spouses' are less able than their adult counterparts to negotiate sex, or exercise choice in relations to decisions affecting their sexual and reproductive health, including access to health care services for contraception and the treatment of sexually transmitted infections. Beyond adverse health implications, child marriages also act as impediment to prospects for education, acquisition of skills and employment.

4.7 Consent and Widows: Leviratic Marriages

[27] In the African region, the issue of consent also arises in respect of leviratic marriages that are also described as widow inheritance.[502] Leviratic marriages draw from a customary law practices in many parts of Africa where a surviving widow, whether a child or an adult, like a chattel, is 'inherited' by a relative (often the brother) of the deceased spouse so that she become his spouse.[503]

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[499] RJ Cook & S Cusack Gender Stereotyping: Transnational and Legal Perspectives (2010) 81-82.

[500] United Nations Children's Fund 'Early Marriage' Innocenti Digest 7. Florence: Innocenti Research Centre, United Nations Children's Fund. Available at < www.unicef-irc.org/publications/pdf/digest7e.pdf >; Bruce J & Clark S 'The Implications of Early Marriage for HIV/AIDS Policy' New York: Populations Council. Available at < www.fhi.org/NR/rdonlyres/.../YL15e.pdf >.

[501] S Kishor & K Johnson *Profiling Domestic Violence - A Multi-Country Study* Calverton: ORC Macro (2004); E Krug, L Dalhberg, J Mercy, A Zwi & R Lozano (eds) World Report on Violence and Health Geneva: World Health Organization (2002). World Health Organization WHO Multi-country Study on Women's Health and Domestic Violence against Women Geneva: World Health Organization (2005).

[502] F Banda *Women. Law and Human Rights: An African Perspective* (2005) 119.

[503] Ewelukwa, UU 'Colonialism, Gender, Customary Justice: Widows in African Societies' (2002) 24 *Human Rights Quarterly* 424 (2002)' JL Rakstad et al 'The Progress of Tanzanian Women in the Law: Women in Legal Education, Legal Employment, and Legal Reform' (2000) *California Review of Law and Women's Studies* 95; J Bond 'Women's Rights Within the Family' in J Bond (ed) *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania* Durham: Carolina Academic Press (2005) 181-189 at 186-187; B Sam 'Discrimination in the Tradition Marriage and Divorce System in Ghana: Looking at the Problem from a Human Rights Perspective' in Bond (ed) supra 205-217 at 208; Immigration and Refugee Board of Canada 'Nigeria: Levirate Marriage Practices Among the Yoruba, Igbo and Hausa-Fulani;

Though a dying practice, leviratic marriage is still practised in some parts of Africa.[504]

[28] A leviratic marriage operates under the assumption that the widow is part of the estate of the deceased and that the widow can, therefore, be inherited by a male member of the deceased family ostensibly for the purpose of protecting her own welfare as well as that of her children. Being a woman, it is assumed that, on her own, she would not be able to command the resources to meet material needs attendant in widowhood. Though the right of the widow to refuse the offer of a leviratic marriage is recognized under customary law, in practice, however, woman may consent to leviratic marriages on account of the coercive circumstances that usually surround a leviratic marriage offers. Leviratic marriage offers are made immediately following bereavement and under a cloud of customary practices that deny the widow access to the deceased husband's estate unless the widow agrees to the marriage. For rural-based widows that were highly dependent their husbands and have no realistic alternative resources, including places of abode, fear of becoming destitute and being ostracized by the deceased's husband's family operate as the major coercive factors.

[29] Leviratic marriages deny liberty and self determination. They are discriminatory on the ground of sex and gender and subject women to inhuman and degrading treatment. By coercing a widow into a marital union, a leviratic marriage denies sexual autonomy. In the era of the HIV pandemic, leviratic marriages constitute a serious threat to health and life. They have been implicated as a significant HIV vector.[505] In this way they violate the human rights enshrined in the major United Nations human rights instruments, including the Universal Declaration, the Conventions on Civil and Political Rights and the Women's Convention.

[30] Equally, leviratic marriages violate African Charter-based human rights guarantees. The African Women's Protocol has provisions that protect the human rights of widows, and implicitly condemn leviratic marriages. In this connection Article 20 of the African Women's Protocol says:

Consequences for a Man or Woman who Refuses to Participate: Availability of State Protection' (2006). Available at <http://www.unhcr.org/refworld/topic,463af2212,469f2db72,45f1478811,0.html>. The discussion of leviratic marriages in this section excludes leviratic marriages that are only symbolic and do not entail entering into marital relations with the deceased's male relative, but rather merely provide the widow and her children with a male relative who is charged with supporting them materially.

[504] Immigration and Refugee Board of Canada 'Nigeria: Levirate Marriage Practices Among the Yoruba, Igbo and Hausa-Fulani; Consequences for a Man or Woman who Refuses to Participate: Availability of State Protection' (2006). Available at <http://www.unhcr.org/refworld/topic,463af2212,469f2db72,45f1478811,0.html>.

[505] *Ibid*.

States parties shall take appropriate legal measures to ensure that widows enjoy all human rights through implementation of the following provisions
(a) that widows are not subjected to inhuman, humiliating or degrading treatment;
(b) that a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and welfare of the children;
(c) that widows shall have the right to remarry, and in that event to marry the person of her choice.

[31] At a domestic level, leviratic marriages that deny the widow choice would be inconsistent with the domestic laws of all the African countries. However, the surveyed countries, with the exception of Nigeria, have not adopted specific laws to impress upon the right of the widow to exercise choice and to outlaw coercive leviratic marriage. Nigeria proscribes forced leviratic marriages but only in respect of some states. Enugu State's Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law provides that 'no person for whatever purpose or reason shall compel a widow/widower … to be remarried by a relative of the late husband/wife.[506]

[32] Zimbabwe is the only jurisdiction that specifically recognizes leviratic marriage under customary law, but providing, as with other customary marriages, it is non-coercive.[507]

4.8 Polygny

[33] Civil marriages can only be monogamous as marrying more than one spouse constituting the offence of bigamy in all the African countries. In contrast, customary laws and Islamic Shari'ah permit polygny. Customary law does not prescribe the number of wives whereas Islamic Shari'ah prescribes a maximum of four. Countries in the African region permit polygny through recognition of African customary law or Islamic Shari'ah. The only instance of a proscription against polygny is Rwanda where it is constitutionally provided that 'only monogamous marriages shall be recognized within the conditions and forms prescribed by law'.[508]

[34] Polygynous marriages in the African region are built on patriarchy and gender inequality that, in turn, is embedded in customary law and Islamic law. To the extent that the husband has multiple sexual partners, polygynous marriages are not conducive the protection and promotion of sexual health, not least in a region that is the epicentre of HIV/AIDS.

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[506] Section 4 of the Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law of Enugu State, Nigeria (2001). See also: Widows' Empowerment Law of 2002 (Edo State); Malpractices against Widows and Widowers (Prohibition) Law of 2004 (Anambra State); Inhuman Treatment of Widows (Prohibition) Law 2004 (Edo State).
[507] Section 3(1) of the Customary Marriages Act (Zimbabwe)
[508] Article 25 of the Constitution of Rwanda of 1991.

[35] The Women's Convention requires equality between the parties to a marriage and the elimination of practices that perpetuate gender inequality. The Committee on the Women's Convention has said that polygynous marriages have serious emotional and financial consequences for the women and their dependants and 'ought to be discouraged and prohibited' and that they violate article 5(a) of the Women's Convention, especially. [509]

[36] The African Charter does not address marriage or polygny directly. The African Women's Protocol addresses marriage, including polygyny. Like the Women's Convention, it, inter alia, enjoins states to guarantee women equal rights in marriage.[510] In the specific instance of polygyny, it enjoins the state to take measures to ensure that 'monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous relationships are promoted and protected'.[511] Drafters of the African Women's Protocol originally proposed to proscribe polygny.[512] The proposal was dropped in the face of opposition by some of the countries in which polygny under Islamic law is institutionalized.[513]

[37] The African Women's Protocol's position on polygny is a contradiction in terms. It is a position that not only contradicts the position taken by the Committee on the Women's Convention.[514] It also contradicts the African Women's Protocol's own equality and non-discrimination provisions. The definition of discrimination in article 1 of the African Women's Protocol, as suggested in Chapter 2 of this study, envisages substantive equality in much the same away as its counterpart under the Women's Convention. Article 3 of the Convention calls for the elimination of all forms of discrimination against women including social and cultural patterns that are based on the notion of subordinating one sex or gender to the other and a stereotyped role for women. The institutionalization of polgyny is an instance of patriarchy and the subordination of women. It is a system that perpetuates of inequality for women in marriage.

4.9 Marriage and Sexual Orientation under Domestic Law

[38] With the exception of South Africa, African domestic laws recognize heterosexual marriages only. This requirement is expressed in domestic legislation governing civil marriages which use the formula of describing marriage as 'a union between a man and a woman' or its equivalent.

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[509] Committee on the Elimination of Discrimination against Women *General Recommendation 21: Equality in Marriage and Family Relations* (1994), para 14.
[510] Article 6 of African Women's Protocol.
[511] Article 6(c) *ibid*.
[512] Banda *Women, Law and Human Rights* supra 71-76.
[513] *Ibid*.
[514] Committee on the Women's Convention *General Recommendation 21: Equality in Marriage and Family Relations*, para 14.

Heterosexual marriages are also privileged by customary and religious laws. African Constitutions are generally silent about the sex or gender requirements of marriage. Among the jurisdictions that were surveyed, Uganda is an exception to the rule in addressing sex or gender requirements of marriage. The Ugandan Constitution provides that 'marriage between persons of the same sex is prohibited'.[515] The proscription against same-sex marriages in the Ugandan Constitution came as an amendment to the Constitution as part of a wave of official opposition against any demands to decriminalize same-sex activities.[516] Prior to its amendment, article 31(1) of the Constitution of Uganda provided that 'men and women of the age of eighteen years and above have the right to marry and to found a family …. ' This provision could be interpreted to recognize the rights of heterosexual as well as same-sex couples. The amendment removes the ambiguity.

[39] In *Minister of Home Affairs and Another v Fourie and Others* (the *Fourie* Case)*; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*; *Lesbian and Gay Project and Others v Minister of Home Affairs and Others* (the *Equality Project* Case)[517] the Constitutional Court of South Africa was asked to determine the constitutionality of the definitional exclusion of same sex marriage in the statutory and common law of South Africa in a consolidated appeal. In the Fourie case, the applicants were two women who were same-sex partners. For more than a decade they had lived together and set up a home. They had undertaken mutual obligations of support. They wanted to obtain formal public recognition and registration of their relationship, but were precluded from doing so by the common law definition of marriage.

[40] The common law definition of marriage in South Africa provided that marriage is 'a union of one man with one woman, to the exclusion, while it lasts, of all others'.[518] Common law is not self-enforcing. For a marriage to be solemnized, a marriage rite had to be performed under the Marriages Act of 1961.[519] Section 30(1) of the Marriage Act only accommodates the solemnization of a marriage where the parties are seeking to be 'husband' and 'wife'. The argument of the applicants in the *Fourie* case was that the common law definition of marriage and section 30(1) of the Marriage Act constituted unfair discrimination and were,

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[515] Section 31(1) of the Constitution of Uganda; JD Mujuzi 'Absolute Prohibition of Same-Sex Marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 277.

[516] Mujuzi *ibid.*

[517] *Minister of Home Affairs and Another v Fourie and Others* (the *Fourie* Case)*; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*; *Lesbian and Gay Project and Others v Minister of Home Affairs and Others* (the *Equality Project* Case2006 (3) BCLR 335 (Constitutional Court of South Africa).

[518] *See for example*: *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 (Transvaal Supreme Court, South Africa); *Hyde V Hyde and Woodmansee* 1866 LR 1 P (Court of Probate and Divorce, England); *Seedat's Executors v Master (Natal)* 1917 AD 302 (Appellate Division of South Africa); *Ismail v Ismail* 1983 (1) SA 1006 (High Court of South Africa).

[519] Act No 25.

therefore, invalid under the Constitution. The applicants in the *Equality Project* case brought an application seeking a declaration that the common law definition of marriage and the wording of section 30(1) of the Marriage Act were unconstitutional and that the formulation of both laws had to be amended to incorporate couples in same-sex relationships. The applicants relied on the constitutional rights to equality, human dignity and privacy.

[41] The Constitutional Court unanimously held that the common law definition of marriage and the section 30(1) were unconstitutional. They were contrary to the constitutional rights to equality and human dignity as they made no provision for couples in same-sex relationships to partake of the status, entitlements, and responsibilities accorded by the law to heterosexual couples.

[42] In the *Fourie* case, the Court made an order declaring the common law definition of marriage to be invalid but suspended the declaration for twelve months to allow Parliament to correct common law. In the *Equality Project* case, the Court made a similar order as in the *Fourie* case as well as an order declaring section 30(1) of the Marriage Act of 1961 invalid and suspended the order for twelve months to allow Parliament time to remedy the omission in the Act.

[43] The decision of the Constitutional Court in the two cases represents a consistent application of the Courts approach to interpreting and applying section 9 of the Constitution as meaning substantive equality. The decision is in line with the equality jurisprudence of the Court as laid down in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*[520] other leading cases on equality. Substantive equality is a form of equality that focuses on lived out experience and not abstract categories. It puts a premium on human dignity, building an inclusive society, respecting difference, and putting an end to the social experiences of castelike existence. Substantive equality does not countenance social and religious views against gays and lesbians as a justification for discrimination. In an open and democratic society, as contemplated by the Constitution, there has to be a mutually respectful co-existence between the secular and the sacred. According to the Court, the exclusion of same-sex couples from the benefits and responsibilities of marriage was not a small and tangential inconvenience but had harsh consequences. It signifies that the capacity of same-sex couples for love, commitment and accepting responsibilities was inherently less worthy of regard than that of heterosexual couples and results in severe material deprivation for gay and lesbian couples.

[520] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1999 (1) SA 6 (Constitutional Court of South Africa).

[44] In reaching its conclusion, the Constitutional Court considered international law, including a decision of the United Nations Human Rights Committee – *Joslin v New Zealand*.[521] In this case, the Human Rights Committee held that a New Zealand law denying marriage licences to same sex couples did not violate the Covenant on Civil and Political Rights. Article 23 of the Convention on Civil and Political Rights recognises the family as the natural and fundamental group unit in society guarantees its protection.[522] Furthermore, it guarantees the 'right of men and women of marriageable age to marry and found a family'.[523] The Human Rights Committee said that the obligation of States Parties was to 'recognise as marriage only the union between a man and a woman wishing to be married to each other'. The South African Constitutional Court distinguished *Joslin v New Zealand* on a number of grounds but most importantly on the ground that unlike the Convention on Civil and Political Rights, the South African Constitution explicitly provides for a right not to be discriminated against on the ground of *sexual orientation*, which the Human Rights Committee in *Joslin* found to lack support from a literal reading of the provisions of article 23 of the ICCPR. Furthermore, the Court said that under the South African Constitution, there is a presumption that discrimination on the basis of a listed ground such as sexual orientation is unfair.[524]

[45] The Court said that it would constitute a perverse reading of the Constitution to rely upon principles in an international human rights treaty such as the Convention on Civil and Political Rights in order to take away rights that are guaranteed in a domestic constitution. In this sense, the case shows that while South Africa takes a lead from international human rights jurisprudence, it may depart from such jurisprudence where the jurisprudence provides for human rights guarantees that are less than the guarantees in the South African Constitution. International human rights norms arising from a treaty provide a persuasive framework for understanding and interpreting provisions of the South African Constitution but do not constitute binding law except where an Act of Parliament or other form of national legislation has incorporated the norms into domestic law.

[46] The *Fourie* and the *Equality Project* cases along with parallel proposals of the South African Law Commission[525] to give legal recognition domestic partnership

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[521] *Joslin v New Zealand* (Communication No 902/1999) 17 July 2002 (Human Rights Committee

[522] Article 23(1) of the Convention on Civil and Political Rights.

[523] Article 23(2) *ibid*.

[524] See the discussion in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1999 (1) SA 6 (Constitutional Court of South Africa) in Chapter 2 of this study.

[525] South Africa Law Reform Commission *Domestic Partnerships* Discussion Paper 104 (Project 118) Pretoria: South African Law Reform Commission (2003); South African Law Reform Commission *Summary of Report on Domestic Partnerships* (Project 118) Pretoria: South African Law Reform Commission (2006).

of gay and lesbian couples, paved the way for the passing by the South African Parliament of the Civil Union Act of 2006.[526]

[47] In essence, the Civil Union Act provides for the institution of civil union to remedy the historical exclusion of same-sex couples from recognition of formal unions. A civil union is a voluntary union between two persons who are at least 18 years which is solemnized and registered as either *marriage* or a *civil partnership*.[527] The rights and duties that obtain to couples under the Marriage Act which regulates the solemnization and registration of heterosexual marriages attach to civil unions.[528] The Act provides for a right to conscientious to allow marriage officers who object to civil unions not be compelled to partake of their solemnization and thus protect their right to freedom of conscience under section 15 of the Constitution.[529]

[48] The Civil Union Act is significant for providing an administrative machinery for implementing the decision of the Constitutional Court in the *Fourie* case) and the *Equality Project*). The Civil Union Act adds South Africa to a steadily growing number of jurisdictions that recognize formally recognize marriages or unions between couples of the same sex. From a sexual health perspective, the Act constitutes a holistic recognition of the right to sexual health of couples of the same sex.

[49] The cumulative effect of the decisions of the Constitutional Court in the *Fourie* and the *Equality Project* cases and the Civil Union Act of 2006 is to open access more clearly to gay and lesbian couples to socio–economic benefits arising from rights that have been historically only open to heterosexuals couples, including rights to inheritance, medical insurance coverage, adoption, wrongful death claims, spousal benefits, bereavement leave, tax advantages and rights attendant to divorce.

4.10 Adultery

[50] Adultery has implications for sexual health to the extent that criminalization of adultery is a limitation of the sexual autonomy of a person who can otherwise make decision about sexual activities. Furthermore, in the instance of Islamic Shari'ah, adultery has more serious consequences as it can attract a sentence of death for adultery. Treating women differently from men in divorce cases where adultery is in issue constitutes unfair discrimination.

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[526] Act No 17.
[527] Section 1 of the Civil Union Act (South Africa).
[528] Section 13 i*bid*.
[529] Section 6 *ibid*.

[51] Islamic Shari'ah aside, criminalization of adultery is a rarity in the postcolonial African state. Among the countries surveyed, Cameroon is an exception to the rule. Section 361 of the Cameroonian Penal Codes criminalizes adultery for both husband and wife. A husband commits the offence only if he 'habitually' commits adultery whereas a wife need only commit adultery once.[530] Clearly, Cameroonian law is discriminatory on the ground of sex.

[52] As discussed in Chapter 2 of this study, prior to judicial reform, Ugandan divorce law discriminated against women in divorce cases where adultery was in issue. In *Uganda Association of Women Lawyers and Others v The Attorney General*[531] the Constitutional Court of Uganda held that provisions of the Ugandan Divorce Act which treated men and women differently contravened the equality clause - article 21 - of the Constitution of Uganda on the basis of sex and gender. The provisions in question required more by way of proof from a wife where she alleged the husband's adultery that was the case where the husband was alleging the wife's adultery. Also, the provisions conferred on the husband only a right to claim damages from the co-respondent. In holding the provision to be discriminatory, the Court said that equality was a core value under the Constitution of Uganda and that the provisions in question were a colonial vestige that reflect a time when the concept of family was patriarchal and women where subservient to men.

[53] In *Law Advocacy for Women in Uganda v Attorney General*,[532] the Constitutional Court of Uganda held that section 154 of the Ugandan Penal Code which treated men and women differently in the definitional elements of adultery was discriminatory on the basis of sex and gender as to contravene, inter alia, article 21 of the Constitution of Uganda. The relevant provision provided that 'any man who has sexual intercourse with any married woman not being his wife commits adultery', while on the other hand it provided that 'any married woman who had sexual intercourse with any man not being her husband commits adultery'. The provision privileged males in that adultery could only be committed if the co-adulterer was a married woman.

[54] Under Shari'ah, as practised by states in the northern part of Nigeria, adultery – Zina[533] - is an offence which is punishable by death with stoning. The sentence of death for adultery has been passed in a number of cases though it has never been carried out. Two examples can be given. In *Commissioner of Police Sokoto v*

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[530] Section 361 of the Penal Code (Cameroon).

[531] *Uganda Association of Women Lawyers and Others v The Attorney General*, Constitutional Petition No 2 of 2003 (2004) 1 (Constitutional Court of Uganda).

[532] *Law Advocacy for Women in Uganda v Attorney General,* Constitutional Petition Numbers 13/05 and 05/06 (2007) 1 (Constitutional Court of Uganda).

[533] Zina includes adultery which is punishable by death with stoning and fornication which attracts whipping.

Safiyyatu Husseini[534] an alleged adulterer (a woman) and her alleged co-adulterer (a man) where charged with committing Zina. While the man was acquitted for lack of evidence, the woman was convicted and sentenced to death by stoning by Upper Sharia Court.[535] On appeal, the conviction was quashed on technical grounds. In *Commissioner of Police Katsina State v Amina Lawal and Yahaya Mohammed*,[536] an alleged adulterer and her alleged co-adulterer were charged with Zina. The woman was acquitted and sentenced to death by stoning while the man was acquitted on the ground that he had denied the offence on oath and and that there was no evidence. The woman's conviction was quashed on appeal on the ground that her right to a fair trial had been infringed.

[55] The institutionalization of Shari'ah, in particular, the fact that Sharia Courts can impose punishments that from constitutional and human rights perspectives are unwarranted, discriminatory, degrading, retributive or disproportionate calls into question whether the Nigerian state is discharging its duty to respect, protect and fulfil the human rights of women under United Nations instruments such as the Women's Convention and regional instruments the African Women's Protocol that Nigeria has ratified.

4.11 CONCLUSIONS

[56] All countries have plural sources governing marriage. With the exception of Zimbabwe which does not make provision for religious laws, marriages in all the countries are governed by civil law statutes, customary law and religious law but with the Constitution as an implied ultimate source. Uganda and Malawi are exceptional in having constitutional provisions that directly address marriage.

[57] There is no uniform minimum age for civil marriage. For the majority of countries, 18 is the age for consent to civil law marriage without the consent of the parents. However, Kenya, Malawi, Nigeria, Uganda and South Africa that have retained 21 years, and to this extent, do not meet their implied state obligations under the Children's Convention which treats persons that have attained 18 years or more as adults and not children as is implied by statutes that require parental consent for all persons under 21 years of age.

[58] On average, African countries prescribe discriminatory ages of consent in their civil law statutes, setting a higher age for males and a lower age for females to maintain a gap of two to three years. For marriages under 18 years, civil law

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[534] *Commissioner of Police Sokoto v Safiyyatu Husseini* Case No USC/GW/CR/F1/10/01, delivered on 9 October 2001 (Upper Sharia Court of Sokoto State, Nigeria).

[535] *Lawal Kurami v The State* Upper Sharia Court of Appeal of Sokot State, Nigeria).

[536] *Commissioner of Police Katsina State v Amina Lawal and Yahaya Mohammed* Case No 9/2002, delivered on 20 March 2003 Sharia Court of Katsian State, Nigeria).

invariably requires parental consent. Sixteen years is the average minimum age for marriage with parental consent. Tanzania with 15 years of age as the age of consent for girls, illustrates a minimum age which is below the average age.

[59] The customary law of African countries does not prescribe a minimum age for marriage. Though customary law requires consent of the parties to the marriage, it creates opportunities for coercion as evidenced by early/child marriages mainly though the practice of parents arranging marriages for their children regardless of their wishes.

[59] Islamic Shari'ah does not prescribe the minimum age for marriage. Though Islamic Shari'ah marriage law requires the consent of the parties to the marriage, it creates opportunities for coercion in the same way as customary law.

[60] African customary laws and Islamic Shari'ah of countries in the region are decidedly patriarchal in orientation. They entrench gender inequality by envisaging a subordinate role for women, including in respect of decision-making about entry into marriage and power relations within marriage.

[61] Customary and religious laws and practices of African countries create space for coercing children into marriage and facilitating children into becoming sexual partners and mothers at a premature age violate multiple human rights, including the rights to liberty and self-determination, including sexual autonomy, dignity, freedom from inhuman an degrading treatment, health, life, and education. Early/child marriages are responsible for serious health and psychological consequences, including deaths and disability among children.

[62] African jurisdictions have an obligation to bring the current operation and application of their customary and Islamic Shar'iah laws and practices into line with the obligations that they have assumed under United Nation and regional treaties, including the Women's Convention and the African. Women's Protocol. In particular, Articles 2(f) and 5(a) and 16 of the Women's Convention, and article 2, 5 and 6 of the African Women's Protocol require African countries that have ratified these instruments to take appropriate steps to render customary practices that violate the right to choose whether to marry, and are discriminatory on the grounds of gender as well as patently harmful to physical and mental health.

[63] Criminalization of adultery especially under Islamic Shar'iah where stoning by death is permitted negates human rights is a stark manner.

5 VIOLENCE: SEXUAL VIOLENCE AND GENDER-BASED VIOLENCE

5.1 INTRODUCTION

[1] This chapter maps African domestic jurisprudence relating to violence that impacts on sexual health against the backdrop of expansive understandings of the notion of violence. In this chapter, the concept of violence which has an adverse impact on sexual health is employed expansively in order to maximally promote the respect of human rights and sexual health. This chapter covers the following areas:

- rape
- trafficking
- domestic violence
- female genital mutilation/cutting
- virginity testing

[2] Using violence to procure a secure act or coerce a person into sexual acts violates the rights to bodily and psychological integrity, self-determination and human dignity in the most blatant manner. Sexual violence is a major cause of illness, disability and death. Those who survive rape and other forms of sexual coercion may suffer both immediate and long-term adverse effects that include: lacerations and abrasions of tissue, including vaginal, bladder and rectal tissue, fistulas, fractures, abdominal and thoracic injuries, chronic pain syndrome, gastrointestinal disorders, irritable bowel syndrome, ocular damage, and permanent disability.[537] The sexual and reproductive effects of rape and other forms of sexual coercion can be sexually transmitted infections, including HIV, sexual dysfunction, unwanted pregnancy, unsafe abortion, pelvic inflammatory disease, miscarriage and low-birth weight.[538] The mental trauma of being coerced into sex can result in a range of psychological outcomes that include: depression and anxiety, eating and sleeping disorders, drug and alcohol abuse,

[537] E Krug, L Dalhberg, J Mercy, A Zwi and R Lozano (eds) *World Report on Violence and Health* (2002) Geneva: World Health Organization; World Health Organization WHO Multi-country Study on Women's Health and Violence Against Women: Summary Report of Initial Results of Prevalence, Health Outcomes and Women's Responses Geneva: World Health Organization (2005); United Nations In-depth Study on All Forms of Violence Against Women: Report of the Secretary-General, UN Doc A/61/122/Add.1 (2006).

[538] *Ibid*.

phobias, low self-esteem, post-traumatic stress disorder and self-destructing behavior, including a lesser likelihood of practising safer sex.[539]

[3] Though the overwhelming victims and/or survivors of sexual violence are females, nonetheless, sexual violence is experienced across genders. Sexual violence is experienced by all ages.

[4] Domestic jurisprudence on sexual violence needs to be sufficiently responsive to the reality of Africa as a region with one of the highest global prevalence of some of the most extreme forms of sexual violence, including use of sexual violence as a 'weapon of war'.[540] In the last two decades or more, Africa has been overrepresented in the occurrence widespread levels of sexual violence against civilian populations in conflict areas.[541] Government armies, rebel armies, mercenary armies, militias and other armed groups have been the main perpetrators. Conflict areas in Burundi, Republic of Congo, Central African Republic, Chad, Côte d'Ivoire, Democratic Republic of Congo, Ethiopia, Liberia, Nigeria, Rwanda, Sierra Leone, Somalia, Sudan and Uganda have been the main sites of widespread sexual violence.[542] It is not only rape and sexual molestations that have been committed in conflict areas, but also other forms of sexual violence such as abductions for sexually slavery, mutilation of urogenital organs.[543]

[5] It is not just in countries with conflict situations that African civilian populations have experienced widespread sexual violence. Such violence has also occurred in countries in non-conflict situations during moments of political violence. In the aftermath of the disputed presidential elections in 2008 in Kenya, and during the run up to, as well as in aftermath of, the disputed elections in Zimbabwe in 2008, there have been reports of sexual violence perpetrated by government security forces, the police and militia on the civilian population as reprisal for political affiliation.[544]

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[539] R Campbell & T Sefl 'The Impact of Rape on Women's Sexual Health Risk Behaviours' (2004) 23 *Health Psychology* 67.

[540] Amnesty *International Rape as a Tool of War: A Fact Sheet* (2005).

[541] EJ Wood 'Variation in Sexual Violence During War' (2006) 34 *Politics & Society* 307.

[542] A Arieff *Sexual Violence in African Conflicts* Congressional Research Service Report for Congress (2009). Available on <www.crs.gov>.

[543] Harvard Humanitarian Initiative *Characterising Sexual Violence in the Democractic Republic of the Congo* (2009).

[544] **Kenya**: Kenya Human Rights Commission *Violating the Vote: A Report of the 2007 General Elections* (2008); Kenya Human Rights Commission *Final Report from Kenya's Commission of Inquiry into Post-Election Violence* (2008) 252-260; **Zimbabwe**: IRIN 'Zimbabwe: Focus on Rape as Political Weapon' (2003); AIDS Free World Electing to Rape: Sexual Terror in Mugabe's Zimbabwe (2009).

5.2 SEXUAL VIOLENCE: REGIONAL FRAMEWORK

[6] The provisions of the African Charter do not directly address sexual violence. At the same time, the fundamental rights guaranteed by the African Charter have equal application to sexual violence. The rights relating to respect for integrity of the person;[545] human dignity and freedom from all forms of exploitation and degradation, inter alia, through slavery, cruel, inhuman or degrading treatment;[546] liberty and security of the person,[547] implicitly prohibit violence to the person.

[7] The African Children's Charter has provisions that directly address sexual violence. Article 16 of the Children's Charter guarantees the child protection against child abuse including 'sexual abuse'.[548] Article 27 of the Children's Charter enjoins states to protect the child from 'all forms of sexual exploitation and sexual abuse'.[549] Furthermore, the state is enjoined to take measures to prevent 'the inducement, coercion or encouragement of a child to engage in any sexual activity', 'the use of children in prostitution or other sexual practices' and 'the use of children in pornographic activities, performances and materials'.[550] Child trafficking for sexual exploitation is implicitly addressed by article 29 of the Children's Charter which enjoins states to take measures to prevent the 'abduction, sale of, or traffic in children for any purpose or in any form'.[551]

[8] Customary practices that directly or indirectly coerce children into becoming spouses or any domestic laws that recognize the capacity of children to enter into a marriage with or without parental consent but at a time that they are not sufficiently mature to engage in sexual intercourse or to negotiate sex are a form of sanctioning sexual violence that is in conflict with several provisions of the Children's Charter, including the following:

- article 5 which guarantees the child a right to survival, protection and development;
- article 21 which requires states to eliminate social and customary practices that impact adversely on the welfare, dignity, normal growth, development of the child including the child's health.

[9] The African Women's Protocol addresses sexual violence both implicitly as well as explicitly. The rights to equality,[552] dignity[553] and integrity and security of the

[545] Article 4 of the African Charter.
[546] Article 5 *ibid*.
[547] Article 6 *ibid*.
[548] Article 16(1) *ibid.*
[549] Article 27(1) of the African Children's Charter.
[550] Article 27(1)(a), (b), and (c) *ibid.*
[551] Article 29(a).
[552] Article 2 of the African Women's Protocol.

person[554] are implicitly applicable to sexual violence. Article 4 which guarantees the right to life, integrity and security of the person, specifically enjoins states parties to adopt laws that prohibit 'all forms of violence against women, including unwanted or forced sex whether the violence takes place in private or in public'.[555] Article 4 effectively requires African jurisdictions to criminalize all types of sexual violence perpetrated by husbands, including rape, and in the process remove any historical immunities granted to husbands. Article 5, which prohibits harmful practices which negatively affect women, implicitly condemns customary practices that allow early/child marriages that consign children to marriages in which they cannot negotiate sex and face real prospects of coerced sexual activities by their spouses. Article 11 guarantees women protection against sexual violence in armed conflict situations. States are, inter alia, enjoined to comply with the rules of international humanitarian law[556] and to protect women against all forms of violence, rape, and other forms of sexual exploitation.[557] Articles 22 and 23 guarantee elderly women[558] and women with disabilities,[559] respectively, the right to be protected against violence, including sexual abuse.

5.3 Rape: Elements of the Crime

[10] Rape is a crime in all the African countries. At the same time, there are differences in the definitional elements of rape, evidentiary and procedural requirements for prosecuting rape, and immunities that are recognized against a charge of rape.

[11] The majority of African laws conceive rape in its historical heterosexual form as bequeathed by colonial laws. Rape is conceived as unlawful sexual intercourse with a woman without her consent which involves vaginal penetration by a penis. According to this approach, rape can only be committed by a male against a female. Furthermore, rape can only be committed if the penis, or part thereof, penetrates the vagina. This is the approach adopted under the rape laws of Cameroon, Ethiopia, Eritrea, Malawi, Nigeria, Tanzania, and Uganda, for example.[560] The following formulation of rape law under the Criminal Code of

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[553] Article 3 *ibid*.
[554] Article 4 *ibid*.
[555] Article 4(2)(a) of the African Women's Protocol.
[556] Article 11(1) *ibid.*
[557] Article 11(3) *ibid*.
[558] Article 22(b) *ibid*.
[559] Article 23(b) *ibid*.
[560] **Cameroon**: section 296 of the Penal Code; **Ethiopia**: article 620; **Eritrea**: section 589 of the Penal Code; **Malawi**: section 132 of the Penal Code; **Nigeria**: section 357 of the Criminal Code; **Tanzania**: section 130 of the Penal Code as amended by the Sexual Offences Act of 1998; and **Uganda**: section 123 of the Penal Code. Note, however that in the case of rape of minors below the age of consent to sexual intercourse, Uganda's law has changed. Uganda extends rape to cover 'penetration of the vagina, mouth or anus,

the southern part of Nigeria is representative of jurisdictions that explicitly require the perpetrator to be male and the victim a female.

> 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 called rape.

[12] A minority of African jurisdictions, however, have begun to move away from the traditional formulation of the elements of rape. Among the sampled countries, the laws of Zimbabwe, Kenya, Lesotho, and South Africa represent the changing nature of rape laws in the African region.[561] The Zimbabwean Criminal Law (Codification and Reform) Act of 2004 extends the elements of rape to cover anal penetration of a woman by a penis.

> (1) If a male person knowingly has sexual intercourse or *anal sexual intercourse with a female person* and, at the time of the intercourse-
> (a) the female person has not consented to it; and
> (b) he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it;
> he shall be guilty of rape and liable to imprisonment for life or any shorter period. [562]

[13] Under Kenyan law, the perpetrator and the victim can be male or female. Furthermore, rape is not confined to vaginal penetration. It suffices that there is penetration. At the same time, penetration must be by a genital organ. The relevant section of the Kenyan Sexual Offences Act says:

> **3.**(1) A person commits the offence termed rape if -
> (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
> (b) the other person does not consent to the penetration; or
> (c) the consent is obtained by force or by means of threats or intimidation of any kind.[563]

However in substance, the provision will be difficult to apply to cases other than penetration by a penis as the Act does not cover penetration by other parts of the body or by objects. Penetration under the Sexual Offences Act means 'the partial or complete insertion of the genital organs of a person into the genital organs of

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however slight of any person by a sexual organ', but only in respect of statutory rape which is described the crime of defilement where a person had sexual intercourse with a person below the age of consent: Section 129(7)(a) of the Penal Code (Uganda).

[561] Outside the sampled countries, Namibia has reformed its it rape law substantially: Combating of Rape Act of 200 (2000).

[562] Section 65(1) of the Criminal Law (Codification and Reform) Act of 2004 (Zimbabwe). Emphasis provided.

[563] Section 3 of the Sexual Offences Act of 2006 (Kenya).

another person'.[564] Penetration of a genital organ by a part of a body, other than by a genital organ, constitutes sexual assault under the Sexual Offences Act.[565]

[15] Lesotho has moved away from the traditional formulation of rape through the Sexual Offences Act of 2003 which, inter alia, reforms the common law of rape that was bequeathed to Lesotho by the United Kingdom. The Sexual Offences Act abandons many of the legal tenets of rape as to amount to substantial reform of rape law. The Act abandons altogether use of the term 'rape' in favour of 'unlawful sexual act'. It moves away from putting a spotlight on 'consent' to putting the spotlight on 'coercive circumstances'.

[16] Under the Sexual Offences Act of Lesotho, a 'sexual act' is prima facie unlawful if it takes place in any coercive circumstances.'[566] A 'sexual act' is defined as 'direct or indirect contact with the anus, penis, buttocks, thighs or vagina of a person or any other part of the body of another person', 'exposure or display of the genital organs of one person to another', 'the insertion of any part of the body of a person or any part of the body of an animal, or any object into the vagina or anus or another person', or 'cunnilingus, fellatio or any other form of genital stimulation'. The import of the definitional construction of a sexual act in relation to the traditional formulation of rape is that it is designed to capture different manifestations of sexual violence and not just coerced vaginal intercourse. Also, it is a genderless act on the part of the perpetrator and a genderless coerced experience on the part of the victim.

[17] Under the Sexual Offences Act of Lesotho, coercive circumstances include but are not limited to: explicit and implicit use of physical or psychological force or threats thereof;[567] a complainant who is below 12 years,[568] or is unlawfully detained[569] or is affected by a physical or mental disability, alcohol or sleep to such an extent that he or she is incapable to understanding the nature of a sexual act or communicating unwillingness to submit to the act;[570] fraudulent misrepresentation;[571] and failure to disclose a sexually transmitted disease which the perpetrator is aware of or ought to be aware of.[572]

[18] Historically, South African received common law, like its African counterparts has defined rape as intentional and unlawful sexual intercourse with a woman

[564] Section 2 *ibid*.
[565] Section 5 *ibid*.
[566] Section 3(1) of the Sexual Offences Act (Lesotho).
[567] Section 2(a), (b) and (c) ibid.
[568] Section 2(d) ibid.
[569] Section 2(e) ibid.
[570] Section 2(f) ibid.
[571] Section 2(g) and (h) ibid.
[572] Section 2(i) ibid.

without her consent involving penetration of a vagina by a penis.[573] In recent years, however, not least on account of feminist challenges,[574] the law relating to rape has been evolving, in part, to discard the patriarchal assumptions underpinning the traditional formulation of the crime of rape, and, in part, to vindicate more fully the rights to human dignity and equality that are violated by types of sexual violence that are visited not only upon women, but also their male counterparts by perpetrators of sexual violence. Current South African jurisprudence on rape is part of the evolution in the definitional reconstruction of rape. The decision of the Constitutional Court in *Masiya v Director of Public Prosecution and Others*,[575] and the passing by Parliament of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 mark judicial reform and statutory reform respectively.

[19] The appellant, a 40-year-old male, had been convicted of rape by a Magistrate Court. The complainant was a nine-year-old girl. The complainant had been penetrated by the appellant's penis through her anus. Purporting to exercise the jurisdiction of a court under sections 8(3) and 39(2) of the Constitution, the Magistrate Court had, prior to convicting the appellant, considered whether the common law definition of rape which confined rape to non-consensual penetration of a vagina by a penis should be extended to cover anal penetration of a female as well as a male. Section 8(3) of the Constitution says:

> When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
>
> (a) in order to give effect to a right in the Bill of Rights, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right;
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

Section 39(2) says:

> When interpreting any legislation, and when developing common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights

[20] From the complainant's side, the case implicated her constitutional rights to: human dignity;[576] equality;[577] freedom and security of the person;[578] and children

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[573] *Masiya v Director of Public Prosecution and Others* 2007 (11) BCLR 827 para 26; *S v Ncanywa* 1992 (2) SA (High Court of South Africa).
[574] *Masiya v Director of Public Prosecution and Others* para 26.
[575] *Masiya v Director of Public Prosecution and Others* 2007 (11) BCLR 827 (Constitutional Court of South Africa).
[576] Section 10 of the Constitution.
[577] Section 9 *ibid*.
[578] Section 14 *ibid*.

rights[579] under the Constitution. From the appellant's side, the case implicated his right to a fair trial under section 35(3) of the Constitution. The Magistrate Court decided that the common law definition of rape was insufficient to protect the fundamental rights of the complainant and, therefore, should be extended to cover 'acts of non-consensual sexual penetration of the male sexual organ into the vagina or anus of another person'. According to the court, the common law definition of rape was archaic and discriminatory, and yet a violation of an individual's constitutional rights through non-consensual anal penetration was no less serious and no less humiliating than non-consensual penetration though a vagina. It was part of the court's reasoning that common law rape carried a heavier sentence than common law indecent assault which the appellant contended was the appropriate offence as common law rape did not recognize as rape anal penetration. The appellant relied on the principle of legality and the right to a fair trial under section 35(3) of the Constitution. The relevant provisions of section 35(3) says:

> Every accused person has a right to a fair trial, which includes the right-
>
> …
>
> (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time that it was committed or omitted;
>
> …
>
> (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing

[21] The Magistrate Court did not accept the legality argument. Instead, it found that the principle of legality and appellant's right to a fair trial under section 35(3) of the Constitution had not been violated mainly for the following reasons: that non-consensual anal penetration was manifestly an immoral act that was already recognized by law as a crime, albeit, as indecent assault rather than rape; that the appellant could have foreseen retroactive punishment as he knew that his conduct constituted a crime; that non-consensual anal penetration was already recognized by some jurisdictions as rape; and that societal interest in convicting punishing the appellant of a more serious offence than indecent assault was a weightier consideration that the appellant's right to a fair trial.

[22] After convicting the appellant, the Magistrate Court referred the matter to the High Court for sentencing pursuant to section 52 of the Criminal Law Amendment Act of 1997. The High Court confirmed the conviction. Furthermore, the High Court issued an order to the effect that: the common law definition of rape is unconstitutional for the reasons given by the magistrate court; that the

[579] Section 28 *ibid*.

definition of rape should extend in the manner advanced by the magistrate court; and that certain provisions of Criminal Procedure Act of 1977, and Criminal Law amendment Act of 1997 were invalid for inconsistency with the Constitution to the extent that they adhered to the traditional definitional construction of rape and were gender-specific rather than gender neutral. The order of invalidity was referred to the Constitutional Court for confirmation.

[23] In *Masiya*, the main issue before the Constitutional Court was whether the common law definition of rape was unconstitutional to the extent that it excludes anal penetration and was gender-specific. The attendant issues were whether the provisions of Criminal Procedure Act and the Criminal Law Amendment were invalid for inconsistency with the Constitution to the extent that they are gender-specific, and whether the appellant's right to a fair trial had been violated. It was held that the common law definition of rape was insufficient to protect the fundamental rights of the complainant and should, therefore, be extended to cover non-consensual anal penetration of a female by a *male*. The Court declined to confirm the declaration of invalidity to the extent that the invalidity is based on gender-specificity. It was held that the newly developed definition of rape would be applied prospectively and not retrospectively.

[24] In a minority judgment, Justice Langa disagreed with the majority in confining the extension of common law rape to instances only where the victims were women and said that the new offence should gender-neutral and so as to cover anal penetration of males as well. Adopting this inclusive approach would give full effect to the constitutional values of dignity, equality and freedom, including bodily autonomy.

[25] The Court said that section 39(2) of the Constitution conferred on courts power to develop common law incrementally to render it consistent with the Bill of Rights. At the same time, according to the doctrine of the separation of powers, the major responsibility for law reform lay with the legislature such that the power of the courts in this regard should be used sparingly. According to the majority of the Court, the question of extending the definition to cover anal penetration of males would, however, be left to the legislature. In this regard, the Court took into account that, at a systemic level, women were the preponderance of victims of non-consensual sexual penetration perpetrated by males, and that a process of reforming the law relating to rape to cover male victims was already underway through, inter alia, the Sexual Offences Bill.[580]

[26] *Masiya* shows that given judicial awareness and willingness, the patriarchal and gender biases that have historically shaped the criminalization of sexual offences can be redressed incrementally by the courts using the Bill of Rights, and, of

[580] Sexual Offences Bill B50-2003. The Bill culminated into the Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 which is discussed below.

necessity, international human rights standards, as the yardstick. Section 39(2) of the Constitution is an important enabling instrument in this regard. However, the refusal by the majority of the Court to extend rape to anal penetration of males was a regressive application of constitutional equality. It shows a reluctance or inability by the Court to apply the right to equality consistently in part as a result of gender stereotyping. It shows reluctance or inability by the majority to appreciate, as the minority of the Court does, that men are also raped because of the gendered nature of rape. The refusal by the majority to extend rape to cover male victims also shows that in some cases, courts adopt a restrictive and selective view of the doctrine of separation of powers, and refrain from partaking of what they see as usurping the prerogatives of the legislature so as to leave the initiatives for major reforms to the legislature, but at the cost of protecting human rights.

[27] The ruling in *Masiya* has been superseded by the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 (Sexual Offences Act) which is discussed below. The conduct of the appellant now constitutes rape under section 3 of the Sexual Offences Act of 2007.

[28] The South African Sexual Offences Act of 2007 amends laws relating to sexual offences in a comprehensive manner, including the law relating to rape at both a substantive as well as procedural level. The Act was preceded by recommendations of the South African Law Reform Commission relating to substantive as well as procedural aspects of sexual offences.[581] The reasons for the reform of sexual offences are captured in the preamble to the Act. In essence, the reasons are:

- to respond to the prevalence of sexual offences which has now become a 'deep-seated dysfunctionality' of South African society;
- to take into cognizance that women and children are particularly vulnerable to sexual offences and to be sexually exploited, inter alia, in prostitution;
- to remove discriminatory anomalies between common law and legislation uniform in its treatment of sexual offences so as to render them uniform;
- to comply with South Africa's international obligations under international law, including the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child which protect women and children against abuse and violence; and
- to render common law and legislation on sexual offences compliant with the country's Constitution which, inter alia, guarantees the rights to equality,

[581] South African Law *Commission Sexual Offences: The Substantive Law* Project 107 (1999) Pretoria: South African Law Commission; South African Law Commission *Sexual Offences: Process and Procedure* Project 107 Pretoria: South African Law Commission (2002); South African Law Commission *Sexual Offences Against Children* Project 108 Pretoria: South African Law Commission (1997).

human dignity, privacy and freedom from security of the person, and the rights of children.

[29] The South African Sexual Offences Act is a comprehensive piece of legislation comprising seventy-two sections. Nearly all the provisions of statute speak directly to sexual offences at a substantive and/or procedural level. Because sexual offences have an obvious link with sexual health, it would be impracticable to discuss the entirety of the provisions. The following discussion, therefore, focuses only on those provisions that introduce significant reforms to the law.

[30] Section 3 of the Act defines rape in the following terms:

> 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'

This new definition changes the law of rape in three main ways. First, rape can now be committed by a male or female or any other gender variation. Thus, the crime or rape is now gender or sex neutral in terms of who might be the perpetrator and who might be the victim. Secondly, sexual penetration is defined generously to cover not only acts of penetration into a vagina, but also into any other part of the body of another person. Furthermore, penetration can be a genital organ or other object.[582] Thirdly, the Sexual Offences Act redefines consent by attempting to capture, more fully, the circumstances in which consent may be absent.

[31] According to the Sexual Offences Act, consent means a 'voluntary or uncoerced agreement'.[583] The Act lists the following circumstances as 'inclusive' of the circumstances in which submission to a sexual act will not be voluntary or uncoerced:

> (a) where submission or subjection to a sexual act is a result of force or intimidation or a result of a threat of harm to the victim or another person or threat of harm to his or her property or the property of another;
> (b) where submission or subjection to a sexual act takes place in context of abuse of power or authority by the perpetrator such that the victim is inhibited from indicating unwillingness or resistance to the sexual act;
> (c) where the sexual act is committed under false pretences or by fraudulent means; and

[582] According to section 1 of the Act, 'sexual penetration' means penetration by: (a) the genital organs of one person or into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person.

[583] Section 1(2) of the Sexual Offences Act.

(d) where the victim is under the law not recognized as capable of appreciating the nature of the sexual act, including where the victim is at the time of the sexual act-
  (i) asleep
  (ii) unconscious
  (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that the victims consciousness is adversely affected;
  (iv) a child below the age of 12 years; or
  (v) a person who is mentally disabled.

[32] The list of situations that indicate lack of consent to sexual penetration under the South African Sexual Offences Act is intended to take away the focus on use of physical force as the only evidence of conduct constituting rape. Non-physical threats, or inducements or manipulation also suffice as conduct constituting rape. In this way, the South African Act is a departure some of the traditional formulations of rape that convey the notion of use of physical force or threats thereof as essential requirements of rape. Among the sampled countries, Eritrea and Ethiopia have rape laws that define the means of procuring rape restrictively as to promote the use of violence or absolute inability to resist rape as essential elements of the crime of rape. Article 589 of the Eritrean Penal Code formulates part of the actus reus of rape in terms of compelling a woman to submit to sexual intercourse through 'use of violence or grave intimidation, or after rendering her unconscious or, incapable of resistance'.[584] Requiring grave intimation or incapacity to resists on the part of the victim is obviously generous to the perpetrator and unduly restrictive of the human rights of the victims.

5.4 Husband's Immunity against Prosecution

[33] Historically, in all African jurisdictions, colonial rape laws granted immunity to husbands against prosecution for raping their wives based on the legal fiction of treating marriage as implied consent to sexual intercourse. In the post-colonial era, the norm has been to retain the immunity. In some statutes, the husband's immunity can readily be inferred from the definitional elements of the crime. Section 589 of the Eritrean Code says:

(1) Whoever compels a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance, is punishable with rigorous imprisonment…[585]

Section 130(2)(a) of the Tanzanian Sexual Offences Act says:

[584] Ethiopia.
[585] See also section 620(1) of the Ethiopian Penal Code.

A male person commits the offence of rape if he has sexual intercourse with a girl or woman under circumstances falling under any of the following descriptions:
(a) not being his wife, or being his wife who is separated from him, without consenting to it at the time of the sexual intercourse;

Only a handful of jurisdictions have reformed their laws to remove the immunity. Among the sampled countries, it is only South Africa, Lesotho and Zimbabwe that have reformed the husband's immunity. Tanzania has modified the immunity but only very slightly. The definitional elements of the crime of rape under section 130 of the Tanzanian Sexual Offences Act include a victim/survivor of the rape who is 'separated' from the man.[586] Outside the sampled countries, it is only Namibia that has removed the husband's immunity in the African region. [587]

[32] While in South Africa the husband's immunity from prosecution for rape has been taken away completely, [588] in Zimbabwe the removal of the immunity has come with a procedural qualification. In Lesotho the removal of the husband's immunity has come with substantial substantive qualifications as to amount only to nominal reform.

[33] Section 68 of the Zimbabwean Criminal Law (Codification and Reform) Act of 2004 provides that 'it shall not be a defence to a charge of rape, aggravated indecent assault or indecent assault that the female person was the spouse of the accused person at the time of any sexual intercourse or other act that forms the subject of the charge'. In *H v H* the High Court of Zimbabwe said that 'the fiction of consent and even irrevocable consent by a wife to sexual intercourse with her husband has no foundation at law'.[589] The removal of the immunity is qualified by a restriction on the powers of law enforcement officers to bring a prosecution. Where a spouse is charged with 'rape' or 'aggravated indecent assault'[590] assault' or 'indecent assault'[591] of a spouse, the Attorney-General must authorize the prosecution.[592] It seems anomalous to circumscribe the power to bring a prosecution through a requirement that the approval of the Attorney-General be first sought given that other offences of violence do not have such a requirement.

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[586] Section 130(2)(a) of the Sexual Offences Act (Tanzania).
[587] Section 2(1) of the Combating of Rape Act of 2000 (Namibia).
[588] Section 5 of the Prevention of Family Violence Act of 1993.
[589] *H v H* 1999 (2) ZLR 358 (High Court of Zimbabwe).
[590] In relation to a husband perpetrator, aggravated indecent assault would be comprises any act other than sexual intercourse or anal sexual intercourse, involving the penetration of any part of the wife's body or his own body: section 66(1)(a)(i) of the Criminal Law (Codification and Reform) Act (Zimbabwe).
[591] Indecent assault would be any act involving physical contact that would be regarded by a reasonable person to be an indecent act, other than sexual intercourse or anal sexual intercourse or other act involving the penetration of any part of the wife's body or of his own body: section 67(1)(a)(i) ibid.
[592] Section 68(a) of the Criminal Law (Codification and Reform) Act (Zimbabwe).

Such differentiation constitutes unequal protection under the law and indirect discrimination against women.

[34] Lesotho criminalizes marital rape but subject to a significant qualification. Section 3(3) of the Sexual Offences Act says:

> Marriage or any other relationship shall not be a defence against a charge under this Act where it is shown that:
> (a) the complainant spouse or partner was sick;
> (b) the accused or partner had or was reasonably suspected to have sexually transmissible disease or other life threatening disease;
> (c) violence or threats were used to engage in a sexual act;
> (d) there is a judicial order of restraint in respect of the accused;
> (e) the spouses or partners are separated by an order of Court;
> (f) one of the spouses had deserted.

It is doubtful whether the removal of the husband's immunity under the Sexual Offences Act of Lesotho amounts to meaningful reform to the extent that the law still recognizes the exception where the wife is *not* 'sick'. By not recognizing as rape coerced sexual intercourse with a wife who is not sick providing the other listed exceptions do not apply, the Act risks unwittingly promoting the idea that husbands are entitled to sexual access for as long as they do not use blunt violence. The Act implicitly puts on onus on a wife who complains of rape to prove that she was 'sick'. The crime of an unlawful sexual act requires mens rea, the complainant would also have to prove that the husband knew that she was 'sick' or was reckless as to whether she was 'sick'. Another failing in the protection that the Act purports to give is the use of the concept of being 'sick'. The Act does not provide a criterion for determining what falls within the meaning of 'sick'.

5.5 Rape Immunity Based on Agreement to Marry

[35] In some parts of Africa, there are customary practices that still condone the abduction and rape a girl if the perpetrator and the victim 'agree' to marry. Ethiopia has been cited as a country where some regions recognize a cultural practice where a girl, often a very young girl who is barely pubescent, is abducted by a group of young men and then surrendered to be raped the 'prospective groom' for the purpose of ultimately extending a marriage proposal.[593] The abducted girl may or may not know the 'groom' for whom she is being abducted. Following the abduction and rape, the abducting parties then apologize to the family of the abducted girl, and at the same time offer marriage

[593] Ethiopia: Abduction and Rape—Law Reform and the Case of Woineshet Zebene Negash. Available at www.equalitynow.org/english/actions/action_2203_en.html; CAA Packer *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in Sub-Saharan Africa* (2002) 42.

and if accepted concludes the matter. While the breaches of the human rights of the person who is abducted and the implausibility of contracting a marriage freely on the part of the victim are all too apparent, nonetheless, the Penal Code of Ethiopia used to give legal validity to such a customary practice by granting the perpetrator immunity against prosecution. [594] But the Ethiopian Penal Code was reformed in 2004, to inter alia, remove the immunity. Among the sampled countries, Eritrea is the only jurisdiction where such immunity still obtains. Article 599 of the Eritrean Penal Code says:

> Where the victim of rape, indecent assault and seduction or abuse of her state of distress and dependence upon another freely contracts a marriage with the offender, and where such marriage is not declared null and void, no prosecution shall follow.
>
> Where proceedings have already taken place and have resulted in a conviction, the sentence shall terminate forthwith.

5.6 Rape: Evidentiary Requirements

[36] The historical judicial practice in many African countries when hearing a case in which male is facing charges of sexual violence against female, has been to warn about the dangers of convicting on the testimony of the female alone where the evidence is not corroborated. Nigeria law requires corroboration. In *Upahar v State*[595] it was held by the Court of Appeal that to prove the offence of rape, the prosecution must establish corroborating evidence.

[37] In *S v J*,[596] the Supreme Court of Appeal of South Africa discarded the requirement of corroboration in a case where a defendant was charged and eventually convicted of attempted rape. The Court observed that the rule was based on an ancient assumption that women are habitually inclined to lie about being raped. Rejecting the cautionary rule as a rule of law, Justice Olivier said:

> In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

A similar approach was adopted by the Court of Appeal of Kenya in *Mukungu v Republic.* [597] The Court held the requirement for corroboration in sexual offences affecting adult women and girls as was unconstitutional to the extent that it

[594] Sections 558 and 599 of the old Penal Code of Ethiopia.
[595] *Upahar v State* (2003) FWLR 1513 (Court of Appeal of Nigeria, Jos Division)
[596] S v J 1998 (4) BCLR 424 (Supreme Court of Appeal of South Africa)
[597] *Mukungu v Republic* (2003) 2 EA

discriminated against females contrary to section 82 - the equality clause – of the Kenyan Constitution. The Court said:

> We think that the time has come to correct what we believe is a position which the courts have hitherto taken without proper basis, if any basis existed for treating female witnesses differently in sexual cases, such basis cannot properly be justified presently.

In this way, the Kenyan Court of Appeal repealed the cautionary rule bequeathed by the common law received from the United Kingdom. Tanzania has also followed suit. Section 27(7) of the Tanzanian Sexual Offences Act says;

> Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the of the credibility of the evidence of the child of tender years, or as case may be the victim of sexual offence, on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceeding, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.

The Supreme Court of Zimbabwe confirmed the repeal of the cautionary rule in *Banana v State*.[598]

5.7 State civil liability for failure to take steps to prevent sexual violence

[38] This section considers jurisprudential developments in the area of delict (or the tort of negligence) that have implications impact on sexual health through protection from sexual violence. In terms of the African region, this is a new development that is still limited to South Africa. The jurisprudence revolves around imposing on the state a positive duty to take steps to protect the public from violence including sexual violence as part of the state's duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights' of the South African Constitution.[599] This connection the section will consider the leading case on state liability in negligence - *Carmichelle v Minister of Safety and Security and Another*.[600]

[39] In *Carmichelle* the Constitutional Court laid down the proposition of law that under section 39(2) of the Constitution, courts have a mandatory duty to develop common law so as to render it consonant with the spirit, purport and objects of the Constitution, including where appropriate developing the law of delict (or the tort of negligence) so as to positive duty on the state to take reasonable steps to protect individuals from violence whether it be sexual violence or other types of violence. Section 39(2) says: 'When interpreting any legislation, and when

[598] S v *Banana* 2000 3 SA 885 (Supreme Court of Zimbabwe).
[599] Section 7(2) of the Constitution.
[600] 2001 (4) SA 938 (Constitutional Court of South Africa).

developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

[40] The appellant Carmichelle, a woman, had been viciously attacked and injured by Coetzee. Coetzee had been convicted of attempted murder and sentenced to twelve and half years in prison for the crime. The appellant brought a civil action against the Minister of Safety and Security and the Minister of Justice and Constitutional Development. Both ministers of state share responsibility for the South African Police Service (SAPS) and are vicariously liable for its delictual wrongs.

[41] Coetzee had a history of sexual problems from an early age to the extent that when he was ten years of age, his mother had tried to seek help. When he was twenty, he was convicted of indecent assault on a twenty five-year-old woman. He had broken into a house and indecently assaulted the victim. He was sentenced to eighteen months in prison. Less than six months later, he attempted to rape and murder Eurona. When he appeared in court to answer charges in relation to the attack on Eurona, a police sergeant informed the prosecutor that there was no reason to deny Coetzee bail. The prosecutor did not place before magistrate information about his previous conviction. Coetzee was unconditionally released and warned to appear again.

[42] Someone who knew about Coetzee went to speak to a police officer warning him that she did not think that Coetzee should be out on the streets. At some stage, Coetzee was interviewed by a police officer. Coetzee said that he did not know what he was doing when he attacked Eurona. He could not control himself and that when he saw a girl in a bathing suit, he would go home and masturbate. He said that the attack on Eurona had just happened. The police office referred him to a psychiatrist.

[43] While awaiting trial for the attack on Eurona, Coetzee had been seen snooping around a house. He had been reported to the police, but the police said there were powerless to act. Coetzee brutally attacked the appellant, Carmichelle, who was in a house. Following Coetzee's conviction for this crime, Carmichelle brought an action against the Minister of Safety and Security and the Minister of Justice and Security. The basis of the action was that the SAPS and public prosecutors, who were acting in the scope of their duty, had negligently failed to protect Carmichelle when they negligently failed to take steps to prevent Coetzee from causing her harm. She claimed that they had information establishing that Coetzee was a danger to the public. They had information about Coetzee's sexual problems, previous conviction and yet they failed to prevent him from being unconditionally released when he was awaiting trial for the attack on Eurona.

[44] The case was first heard in the High Court were the appellant was unsuccessful. She appealed to the Supreme Court of Appeal where she lost again. The High Court and the Supreme Court of Appeal had said that the police officer and the prosecutor respectively did not owe Carmichelle a duty of care. In reaching this conclusion neither court had considered the provisions of the Constitution. Both the High Court and the Supreme Court of Appeal had been solely guided by common law precedents on the duty of care in delict. The precedents had essentially laid down that the existence of a duty of care under delict was a matter of law that was dependent on a number of interacting factors, and that, ultimately, the issue was one of reasonableness with reference to the legal perceptions or convictions of the community as assessed by the courts.[601] A balance has to be weighed between the interests of the parties and the conflicting interests of the community. The Supreme Court of Appeal said that, in this instance, it was not reasonable to expect the respondents to have taken positive measures to prevent the harm.

[45] Carmichelle appealed to the Constitutional Court. As part of supporting her claim, she relied on the Constitution. At the time that the action arose, it was the Interim Constitution that applied.[602] She invoked the Interim Constitution in three main areas. Firstly, she argued that the state had a duty to ensure that she enjoyed her constitutional rights including, the rights to equality,[603] life,[604] human dignity,[605] freedom and security of the person,[606] privacy[607] and freedom of movement.[608] Secondly, she relied on provisions of the Constitution that govern the powers and functions of the police service. Section 215 of the Interim Constitution provided that the powers and functions of the police service shall be: (a) the prevention of crime; (b) the investigation of any offence or alleged offence; (c) the maintenance of law and order; and (d) the preservation of the

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[601] In *Carmichelle*, the Constitutional Court referred to the following cases the common law precedents: *Minister van Polisie v Ewels* 1975 (3) SA 590 (Appellate Division, now Supreme Court of Appeal of South Africa); *Minister of Law and Order v Kadir* 1995 (1) SA (Appellate Division, now Supreme Court of Appeal of South Africa); *Knop v Johannesburg City Council* 1995 (2) SA 1 (Appellate Division, now Supreme Court of Appeal of South Africa); *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) 355 (Appellate Division, now Supreme Court of Appeal of South Africa).

[602] Note, however, that the case was decided on the basis that in so far as the constitutional provisions that were applicable to the appeal, there was no material differences between the Interim Constitution and the Final Constitution and that the latter would apply as the principle of non-retrospectivity had no relevance: *Carmichelle v Minister of Safety and Security and Another* para 15.

[603] Section 8 of the Interim Constitution (now section 9 of the Constitution).

[604] Section 9 of the Interim Constitution (now section 11 of the Constitution).

[605] Section 10 of the Interim Constitution (still section 10 of the Constitution).

[606] Section 11 of the Interim Constitution (now section 13 of the Constitution).

[607] Section 13 of the Interim Constitution (now section 14 of the Constitution).

[608] Section 21 of the Constitution.

internal security of the Republic.[609] Her argument was that the police had failed to discharge this constitutional duty. Finally, the appellant relied on section 35(3) of the Interim Constitution (now section 39(2) of the Constitution) which requires courts to develop common law, including the law of delict, with due regard to the 'spirit purport and objects of the Bill of Rights'. Her argument was that the court should depart from the common law precedents where the precedents were not consonant with the Constitution or were insufficient to vindicate her constitutional rights.

[46] The Court unanimously held that under section 39(2) of the Constitution, courts have a duty to develop common law, including the law of delict, and that where the law deviates from the Constitution courts must develop common law so as to remedy the deviation. There is no reason in principle why a prosecutor who has reliable information, for example, about an accused person who is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the Court.[610] However, liability in this case will, ultimately, depend on the facts of the case to be determined by the trial court. The matter would be remitted to the High Court for that court to continue with the trial and determine whether in the light of the duty of the court under section 39(2) of the Constitution, and the facts of the case as found by the trial court, there was a positive duty on the respondents to take reasonable steps to prevent harm to the appellant.

[47] The Court emphasized that the section 39(2) of the Constitution imposes a duty and should not be understood as conferring a discretionary power. However, in exercising their duty, courts have to bear in mind that on account of the constitutional separation of powers in a democracy, it is the legislature and not the courts that should be the 'major engine of law reform'.[611]

[48] The Court said that the import of section 39(2) was to be understood in the context of a constitution that is not merely a formal document for regulating power, but instead embodies an 'objective normative value system'.[612] In this regard, the Court drew a parallel with the German Federal Constitution to highlight the fact that the Constitution constitutes a radical break with the past and that its values are pervasive as to permeate all areas of law, including the law of delict that has been historically conceived as private law under the South African legal system.

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[609] The powers and functions of the police service are now contained in section 205 of the Constitution and the Police Act of 1995.

[610] *Carmichelle v Minister of Safety and Security and Another* para 74.

[611] *Ibid* para 36

[612] *Ibid* para 54.

[49] The Court observed that the duty to develop common law so as to render it consistent with the Bill of Rights does not only emanate from section 39, but is reinforced by other provisions in the Constitution. The states obligation under section 7(2) of the Constitution 'to respect, protect, promote and fulfil the rights in the Bill of Rights', is relevant when considering the obligations on the police and the prosecutors. When considering the powers of the courts to develop common law regard must also be had to section 173 of the Constitution confers power on the higher courts, namely the Constitutional Court, the Supreme Court of Appeal and the High Courts, an inherent power to develop common law taking into account the interests of justice. Section 8(1) of the Constitution makes the Bill of Rights binding on all organs of the state, including the judicial organ is another relevant provision, and so is item 2, Schedule 6 of the Constitution provides, inter alia, that all law that was in force when the Constitution took effect continues in force subject to consistency with the Constitution.

[50] In reaching its conclusion, the Court drew support from international law and foreign law that has reformed the approach of granting common law immunity to state organs as a matter of law. In this regard, the Court found the case of *Osman v United Kingdom*[613] persuasive. In that case, the European Court of Human Rights said that article 2(1), which guarantees the right to life should not only be understood as a negative right that prevents adverse state interference with the right to life. The right to life may imply, in well defined circumstances, a positive obligation on the state to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The Court also cited with approval *Z and Others v United Kingdom.*[614] In that case, the European Court of Human Rights held that according the immunity approach when determining the liability of state organ effectively precluded the claimants from having appropriate means of obtaining a determination of allegations against a local authority, and thus nullified the right to an effect remedy under domestic law which is guaranteed by article 13 of the European Convention on Human Rights. The Court was of the view that removing state immunity would not have a 'chilling effect' on institutions that have a duty to serve the public as the test of proportionality and the requirements of foreseability and proximity would serve to establish the limits of the delictual liability of public officials.

[51] While impressing on the duty of the courts to develop common law, the Court concomitantly highlighted that it is the legislature rather than the judiciary that should take the major initiative in law reform. This is on account of the

[613] 29 EHHR 245.
[614] (2001) 10 BHRC 384.

constitutional norm of separation of powers in a democracy.[615] Section 39(2) envisages not so much overzealous judicial reform, but, instead, incremental judicial reform that is necessary to keep common law in line with the Constitution.

[52] In reaching its conclusion, it is also significant that the Court took cognizance of the importance of protecting the public, especially women from sexual violence as a human rights imperative when developing common law under section 39(2) was not lost to the Court. The Court noted that when considering the constitutional and statutory obligations of police services in the context of vindicating the rights to human dignity, and freedom of security, protecting women from sexual violence was particularly important, not least because sexual violence goes to the core of women's subordination in society.[616] Furthermore, the Court was not oblivious to the relevance of South Africa's obligations to protect women from gender-based violence to the constitutional and statutory duties of the police.[617] In this regard, the Court made reference to the Convention on the Elimination of All Forms of Discrimination against Women that South Africa has ratified and the General Recommendation 19 on Violence Against Women.[618]

[53] The imposition of a duty on the state to take positive measures to protect individuals and the public from violence, in addition to merely punishing criminal violent conduct, resonates more faithfully with the guarantees of protection of human dignity, and freedom and security of the person under the South African Constitution which are central to protecting individuals from sexual violence. The *Carmichelle* decision shows that South Africa has a constitution that is enabling insofar as facilitating a mechanism for judicial reform of common law norms that are apt to lag behind international human rights norms. The onus to reform law should not be left to the mercy of the legislature alone. The proposition of law in *Carmichelle* has been applied in cases, some of which directly impact on protection of women from sexual violence.[619]

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[615] In support of this proposition the court cited its own dictum in *Du Plessis v De Klerk* 1996 (3) SA 850 (Constitutional Court of South Africa) 173 para 61, which in turn drew from a decision of the Supreme Court of Canada – *R v Salituro* (1992) 8 CRR (2d) (Supreme Court of Canada).

[616] *Carmichelle v Minister of Safety and Security and Another* para 62.

[617] H Combrinck 'Positive State Duties to Protect Women from Violence: Recent South African Developments' (1998) 20 *Human Rights Quarterly* 666.

[618] Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation 19, Violence Against Women (1992).

[619] A positive duty to act has been applied in the following cases: *Minister of Safety and Security v Hamilton* 2001 (3) 50 (Supreme Court of Appeal of South Africa); *Minister of Safety v Security v Van Duivenboden* 2002 (6) SA 431 (Supreme Court of Appeal of South Africa); *Van Eden v Minister of Safety and Security* (2003) 1 SA 389 (Supreme Court of Appeal of South Africa; *Minister of Safety and Security v Carmichelle* 2004 (3) SA

5.8 Trafficking for Sexual Exploitation: Regional framework

[54] As a region, Africa has significant levels of human trafficking activity. Demand for sexual exploitation and cheap labour are the main factors that drive human trafficking in the African region. West Africa and Central Africa are the African regions with the highest incidence of human trafficking. Poverty, gender inequalities, and violence are factors which render women and children, especially, particularly vulnerable to trafficking. Generally, children are trafficked more than women. The Committee on the African Children's Charter has identified combating child trafficking as one of areas to be prioritized under the African Children's Charter.[620]

[55] Some customary practices could also be regarded as implicating human trafficking to the extent that they involve the movement of people in a context of economic and sexual exploitation.[621] In the more rural parts of Ghana and Togo there is a customary practice of families giving away young girls to traditional priests as wives in return for the priests' undertaking to protect the families against evil spirits.[622] The practice is a form of religious bondage where a young girl is taken away from home by her family and given away as sacrifice to atone for wrongdoing, such as murder, committed by members of the girl's family. Girls that are bonded may be as young as ten years. They are subjected to long hours of labour without pay. In addition, they are subjected to rape and other coerced sexual conduct by the 'priests'. The bondage may last for a fixed number of years or even a lifetime, depending on the seriousness of the wrongdoing.

[56] A number of the provisions of the African Children's Charter are readily applicable to trafficking that is perpetrated for the purposes of economic and sexual exploitation. Articles 15(1) of the Children's Charter prohibits all forms of 'economic exploitation' while section 27 prohibits all forms of 'sexual exploitation' and the 'use of children in prostitution'. Article 29(1) of the

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305 (Supreme Court of South Africa); *NK v Minister of Safety and Security* 2005 (6) SA 419 (Constitutional Court of South Africa.

620 First session of the Committee on the African Children's Charter (2002). In its Concluding Recommendations on Nigeria, the Committee on the Rights and Welfare of the African Childe highlighted the need to combat the continued prevalence of child trafficking and the consequent sexual and economic exploitation of children: Concluding Recommendations by the African Committee Of Experts on The Rights And Welfare of the Child (Acerwc) on the Nigeria Report On The Status of Implementation of The African Charter on the Rights and Welfare of the Child (2002) para 11 . Available at <http://www.africa-union.org/root/ar/index/Nigeria.pdf>

621 UNICEF Trafficking in Human Beings, especially Women and Children in Africa (2003) 6.

622 HA Gbedemah ' Trokosi: Twentieth Century Female Bondage – A Ghanaian Case Study' in J Bond (ed) *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania* (2005) 83-95; Packer *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in Sub-Saharan Africa supra* at 31.

Children's Charter, specifically, prohibits the 'sale or trafficking' of children by any person, including parents or legal guardians. Article 4 of the African Women's Protocol, which guarantees the right to life, integrity and security of the person, requires, inter alia, the state to take measures 'to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk'.

[57] At a sub-regional level, the Economic Community of West African States has called attention to trafficking though the adoption of the Declaration and Plan of Action Against Trafficking of 2001. As alluded to in Chapter 1 of this study, The Declaration inter alia aligns itself with the United Nations Convention against Transnational Organised Crime[623] and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[624] and urges member states that have yet to become signatories or to ratify these instruments to do so. The Plan of Action calls for measures to combat trafficking, including, criminalization, creation of a unit to coordinate with national authorities to raise awareness about trafficking and to protect and support victims. At a treaty level, the Convention on Mutual Assistance in Criminal Matters of 1992 and the Convention on Extradition of 1994 are useful adjuncts in cross-border cooperation in the investigation, arrest and prosecution of trafficking offenders.

[58] Another significant sub-regional development in combating human trafficking, is the Protocol on Gender and Development of the Southern African Economic Community which has provisions that directly address state obligations on trafficking. The most important provision is article 5 of the Protocol which enjoins state to develop and implement a holistic framework for combating trafficking, and not merely stop at enacting anti-trafficking legislation.[625] Article 5 requires states parties to have instituted the following by 2015:

(a) specific legislation for preventing human trafficking and provide holistic services to survivors;

(b) mechanisms for allowing law enforcement authorities and institutions to eradicate national, regional and international trafficking networks;

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[623] Preamble to the Declaration on the Fights against Trafficking in Persons; United Nations Convention against Transnational Organised Crime (2000).

[624] Preamble to the Declaration on the Fights against Trafficking in Persons; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000).

[625] Note also article 11(d) of the Protocol on Gender and Development which enjoins states to adopt laws, policies and programmes for ensuring the development and protection of the girl child through, inter alia, 'protecting girls from economic exploitation, *trafficking* and all forms of violence including sexual abuse'. Emphasis added.

(c) harmonized data collection mechanisms to improve data collection and reporting on the types and modes of trafficking to ensure effective programming and monitoring;

(d) bilateral and multilateral agreements to run joint actions against human trafficking among countries or origin, transit and destination; and

(e) capacity building, awareness raising and sensitization campaigns on human trafficking

5.9 Trafficking for Sexual Exploitation: Domestic laws

[59] Among the sampled countries, Ethiopia, Kenya, Nigeria, Tanzania, and South Africa have legislative provisions that are human trafficking-specific.[626] In the other countries, trafficking for sexual exploitation is addressed mainly in criminal legislation that punishes sex work and the sexual exploitation of children.

[60] Nigerian, Tanzanian, and South African laws on trafficking draw from international developments, and in particular, from the Palermo Protocol. The Anti-Trafficking in Persons Act of Tanzania was adopted in 2008. It appeals to the Convention Against Organized Crime and the Palermo Protocol as the benchmarks for constructing legislative protection against all aspects of trafficking. The Act is not limited to trafficking for sexual exploitation. Instead, it is more holistic as to include trafficking for economic exploitation, adoption and participation in armed conflict. A person commits an offence of trafficking if that person:

(a) recruits, transports, transfers, habours, provides or receives a person by any means, including those done under the pretext of domestic or overseas employment, training or apprenticeship, for the purposes of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary service or debt bondage;
(b) introduces or matches a person to a foreign national for marriage for the purpose of acquiring, buying, offering, selling or trading the person in order that the person be engaged in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary service or debt bondage;
(c) offers or contracts a marriage, real or simulated, for the purpose of acquiring, buying, offering, selling or trading the person in order that the person be engaged in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary service or debt bondage;
(d) undertakes or organizes sex tourism or sexual exploitation;

[626] An increasing number of countries outside the sampled countries have adopted antitrafficking laws, including: Morocco, Mali, Senegal and Burkina Faso.

(e) maintains or hires a person to engage in prostitution or pornography;
(f) adopts or facilitates the adoption of persons for the purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary service or debt bondage;
(g) recruits, hires, adopts, transports or abducts- (i) a person, by means of threat or the use of force, fraud, deceit, violence, coercion or intimidation for the purpose of removal or sale of organs of the person; or (ii) a child or a disabled person for the purposes of engaging the child or disabled person in armed activities.[627]

The Tanzanian Act contains provisions for rescuing, rehabilitating and assisting victims, including assisted repatriation.[628]

[61] In South Africa, law that directly addresses human trafficking is to be found in two pieces of legislation - Children's Act of 2005 and the Sexual Offences Act of 2007. The Children's Act incorporates the Palermo Protocol expressly by going beyond merely stating that one of its purposes is to give effect to the UN Protocol.[629] The Act says that: 'The UN Protocol to Prevent Trafficking in Persons is in force in the Republic of South Africa and its provisions are law in the Republic, subject to the provisions of this Act'.[630] Effectively, therefore, the Palermo Protocol, as it relates to the protection of children (but not adults) against trafficking, has direct effect under South African domestic law. The legal protection of children from trafficking is intended to comply faithfully with the obligations of States Parries under the Palermo Protocol. Over and above annexing the Palermo Protocol as a schedule to the Act, the Act does the following by way of rendering South Africa compliant with its international law obligations:

- prohibits trafficking by natural or juristic persons[631]
- prohibits behaviour that facilitates trafficking[632]
- requires the state to assist victims of trafficking[633]
- provides for suspension of parental rights where there is reason to believe that a parent has trafficked the child or facilitated trafficking[634]
- imposes a positive duty of referral where certain personnel working in the sphere of immigration, social welfare, and health come into contact with a victim of trafficking[635]

[627] Section 4(1) of the Anti-Trafficking in Persons Act (Tanzania).
[628] Section 17-24 *ibid*.
[629] Section 281 of the Children's Act (South Africa).
[630] Section 282 *ibid*.
[631] Section 284 *ibid.*
[632] Section 285 *ibid*.
[633] Section 286 *ibid*.
[634] Section 287 *ibid.*

- requires the decision to repatriate a trafficked child to take into account the possibility of further harm following repatriation[636]
- requires due assistance to be rendered to trafficked child who is to be repatriated, including financial assistance[637]
- provides for the recognition as domestic crime, a trafficking crime committed outside South Africa by a citizen or permanent resident of South Africa.[638]

[62] The South African Sexual Offences Act of 2007 addresses trafficking, but only in relation to trafficking for sexual exploitation. Section 70(1) of the Sexual Offences Act says that the provisions of the Act relating to trafficking are transitional pending adoption of legislation in compliance with Palermo Protocol. The Act criminalizes trafficking for sexual exploitation using standards that are adopted from the Palermo Protocol. A bill on human trafficking and not just trafficking for sexual exploitation is currently before Parliament.

[63] The Nigerian Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of 2005 prohibits human traffic for exploitation. Section 50 of the Nigerian Trafficking in Persons Act, which derives from article 3 of the Palermo Protocol, defines trafficking as including:

> …all acts and attempted acts involved in the recruitment, transportation within or across Nigerian borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion or debt bondage for the purpose of placing or holding the person whether for or not in involuntary servitude (domestic, sexual or reproductive) in force or bonded labour, or in slavery-like conditions.

[64] The definition of trafficking under the Nigerian Trafficking in Persons Act is intended to capture the particular types of intranational as well as international trafficking that take place in Nigeria. Nigeria is a major source, transit and destination for trafficked persons, with women and children as the most trafficked persons.[639] While sexual exploitation is the main reason for international trafficking, a holistic response to trafficking must also seek to combat trafficking for economic exploitation within the country's borders, especially in the domestic, farm, mining and illegal drugs sectors as sexual exploitation and economic exploitation often co-exist.

[65] The Nigerian Act establishes a National Agency for Prohibition of Traffic in Persons. This Agency is charged with various functions that are intended to implement and render the Act effective, including: enforcing and administering the Act, through inter alia, investigating and prosecuting offenders; co-operating

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[635] Sections 288 and 289 *ibid*.
[636] Section 290 *ibid*.
[637] Section 290 of the Act.
[638] Section 291 of the Act.
[639] United States Department of States Report of 2001

and coordinating with other domestic and foreign agencies; and rehabilitation of trafficked persons. In 2009, the Agency reported that it had investigated 209 trafficking offences, prosecuted 37 cases, and achieved convictions in 19 cases for sexual exploitation and four for economic exploitation.[640] The prison sentences imposed ranged from 6 months to 40 years. In 2008, the Agency identified 887 victims/survivors of trafficking resulting in the majority of the victims/survivors being rescued by the following entities: National Agency; Immigration Service; National Police; Civil Defence Corps; Federal Road Safety; State Security Service; and Nigerian Embassy.[641] The Agency has been active in providing shelter and counseling to victims/survivors. It has also convened forums to raise public awareness about trafficking. [642]

[66] Though Kenya does not have a statute that is dedicated to trafficking, its Sexual Offences Act of 2003 has provisions that are trafficking-specific. Section 13 of the Sexual Offence Act criminalizes domestic as well as cross-border trafficking of children for sexual exploitation. Section 13(a) criminalizes making or organizing travel arrangements in relation to the sexual exploitation of a child in Kenya or outside the country's borders. Section 13(b) criminalizes supplying, recruiting, transferring, harbouring, or receiving a child for sexual exploitation. Article 14 makes it an offence to make arrangements that facilitate others to travel with the intention to commit sexual offences against children. Section 15 criminalizes facilitating sexual exploitation of children through activities such as facilitating sex work, keeping a brothel where children are sexually exploited and using children in sexually exploitative exhibitions.

[67] Article 18 of the Ethiopian Constitution, which guarantees a right to protection against cruel, inhuman or degrading treatment or punishment, includes a provision which says 'Trafficking in human beings for whatever purposes is prohibited'. The Ethiopian Constitution is the only example of a constitution that makes a specific guarantee against human trafficking. Otherwise, trafficking for sexual exploitation is governed by the provisions of the Ethiopian Criminal Code. Article 596 explicitly forbids human 'trafficking' whatever reason. Article 597 specifically prohibits trafficking in 'women and children' generally while article 635 prohibits the trafficking of' women and minors' for sexual exploitation. Article 634 of the Criminal Code, which criminalizes making a living out of sexual exploitation of others, is applicable to trafficking for sexual exploitation.

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[640] United States Department of State Trafficking in Persons Report 2009-Nigeria (2009). Available at <http://www.unhr.org/refworld/docid/4a42149d2d.html>

[641] *Ibid*.

[642] *Ibid*.

5.10 DOMESTIC/PARTNER VIOLENCE

[68] Under the Solemn Declaration on Gender Equality in Africa, African states undertook inter alia, to 'reinforce legal mechanisms that will protect women at the national level and end impunity of crimes committed against women'.[643] As part of guaranteeing women the right to life, integrity and security of the person, the African Women's Protocol enjoins states to enact and enforce laws to prohibit all forms of violence against women whether the violence takes place in private or in the public realm.[644] It is not just laws that prohibit violence that must be adopted but also laws and 'other measures' that 'prevent' violence. The African Women's Protocol enjoins states to 'adopt such other legislative, administrative, social, and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women'.[645] At a sub-regional level, the Gender and Development Protocol of the Southern African Development Community requires states parties to adopt legislation prohibiting all forms of gender-based violence by 2015.[646]

[69] The African region has endemic levels of domestic violence. However, domestic violence-specific laws are the exception rather than the rule. The predominant approach is to use conventional criminal laws, including laws on assault and causing grievous bodily harm, to regulate domestic violence. Among the sample, Cameroon, Ethiopia, Eritrea, Kenya, Lesotho, Nigeria (at the federal level and in the majority of states), Tanzania, and Uganda do not have domestic violence-specific legislation. South Africa, Zimbabwe and Malawi are the exceptions in the sampled countries.[647]

[70] South Africa first adopted the Prevention of Family Violence Act of 1993 as its specific legal response to domestic violence. The majority, though not all the domestic violence provisions of the 1993 Act, have now been superseded by the Domestic Violence Act of 1998. The 1998 Act regulates domestic violence cognizant of the country's obligations under international law and the Constitution. It defines domestic violence in a manner that offers greater protection than would be derived from conventional criminal law statutes that can only be invoked where there is use or threat of physical violence. Domestic violence means 'physical abuse; sexual abuse; emotional, verbal and

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[643] Solemn Declaration on Gender Equality in Africa (2004) para 4.
[644] Article 4(2)(a) of the African Women's Protocol.
[645] Article 4(2)(b) *ibid*.
[646] Article 20(1)(a) of the Gender and Development Protocol of the Southern African Community.
[647] Outside of the sampled countries, the following countries have domestic violence specific legislation: Botswana: Domestic Violence Act of 2007; Ghana: Domestic Violence Act of 2007; Madagascar: Act to Punish Violence Against Women of 2000; Mauritius: Protection from Domestic Violence Act of 1991; Namibia: Combating of Domestic Violence Act of 2003; Sierra Leone: Domestic Violence Act of ***.

psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into the complainant's residence without consent, where the parties do not share the same residence; or any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.[648]

[71] The parties against whom a complainant is protected are widely defined under South African law. The complainant is protected from domestic violence that is perpetrated by a person with whom they are in a 'domestic relationship'. According to the Domestic Violence Act, a domestic relationship means a relationship between a complainant and a respondent in any of the following ways:

- they are or were married to each other, including marriage according to any law, custom or religion;
- they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- they are family members related by consanguinity, affinity or adoption;
- they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- they share or recently !shared the same residence.[649]

[72] Protection under the South African Domestic Violence Act can take a number of routes. A police officer, who is at the scene of an incident of domestic violence, *must* render such assistance as may be required by the circumstances, including assisting or making arrangements for suitable shelter and obtaining medical attention, and lodging a criminal complaint.[650] A police officer may arrest without warrant a respondent he or she reasonably suspects of having committed an offence containing an element of violence against the complainant.[651]

[73] Protection orders are the centerpiece of the Domestic Violence Act. The complainant may apply to the court for a protection order.[652] The application may be lodged on the complainant's behalf by any other person, including a police officer, counsellor, health service provider, social worker or teacher.[653] The application can be brought outside of the ordinary court hours if it is

[648] Section 1(viii) of the Domestic Violence Act (South Africa).
[649] Section 1(vii) *ibid*.
[650] Section 2 *ibid*.
[651] Section 3 *ibid*.
[652] Section 4(1) *ibid*.
[653] Section 4(3) *ibid*.

necessary to protect the complainant from immediate harm.[654] If the court is satisfied that there is prima facie evidence of domestic violence, it must issue an interim protection order.[655]

[74] The court's powers in respect of a protection order are wide. The court may prohibit the respondent from:

(a) from committing any act of domestic violence;
(b) enlisting the help of another person to commit any such act;
(c) entering a residence shared by the complainant and the respondent: Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;
(d) entering a specified part of such a shared residence;
(e) entering the complainant's residence;
(f) entering the complainant's place of employment;
(g) preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in subparagraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or
(h) committing any other act as specified in the protection order.

The court has many other powers that are pertinent to protecting the complainant, including power to order the following: the arrest of the respondent;[656] seizure of any weapon under the control of the respondent;[657] a police officer to accompany the complainant to a specified place to assist with collection of personal property;[658] and respondent to discharge rent, mortgage payment and emergency monetary relief having regard to the needs of the respondent.[659] Where a warrant of arrest in the event of breaching a protection order has been issued, the complainant may hand the warrant of arrest to any police officer together with an affidavit stating that the respondent has breached the order. Contravening an order under the Act renders the respondent liable to imprisonment for maximum period of five years.[660]

[75] The architecture of the Zimbabwean Domestic Violence Act of 2006 has many features that are in common with its South African counterpart, but also features that different. The Zimbabwean Act formulates the relationship that renders one a potential respondent[661] in the same way as the South African Act conceives a domestic relationship. Section 3 of the Zimbabwean Act[662] defines domestic violence in substantially the same way as the South African Act. At the same

[654] Section 4(5) *ibid*.
[655] Section 5(2) *ibid*.
[656] Section 8(1) *ibid.*
[657] Section 7(2) *ibid.*
[658] Section 7(3) *ibid*.
[659] Section 7 (4) *ibid*.
[660] Section 17 *ibid*.
[661] Section 2(1) of the Domestic Violence Act (Zimbabwe).
[662] Section 3 *ibid.*

time, the Zimbabwean Act is different from the South African Act in sensitizing domestic violence legislation to harmful and abusive cultural practices. In this connection, section 3(1) of the Zimbabwean Act includes within the ambit of domestic violence 'cultural or customary rites or practices that discriminate against or degrade women' including: forced virginity testing; female genital mutilation; pledging of women or girls for purposes of appeasing spirits; forced marriage; child marriage; forced wife inheritance; and sexual intercourse between fathers-in-law and newly married daughters-in-law.[663] The powers of police officers in relation to rendering assistance as well as arrest are similar to the South African Act. The same applies to the powers of the court in relation to a protection order.

[76] By way of a substantial departure from the South African Act, the Zimbabwean Domestic Violence Act establishes administrative structures that are intended to promote the efficacy of the Act as well as the systemic eradication of domestic level in Zimbabwean society. In this connection, the Zimbabwean Act establishes Anti-Domestic Violence Counselors[664] and an Anti-Domestic Violence Council.[665]

[77] Anti-Domestic Violence Counsellors are conceived as panels comprising of social welfare officers, members or employees of voluntary non-governmental organizations concerned with the welfare of victims of domestic violence and community leaders that are established under the Domestic Violence Act to carry out the following functions:

(a) advising, counselling and mediating the solution of any problems in personal relationships that are likely to lead or have led to the use of domestic violence;
(b) carrying out, upon the instruction of a court, investigations in relation to the financial status of complainants and respondents;
(c) carrying out investigations and making arrangements for the accommodation of the complainants prior to the issue of an interim protection order or protection order;
(d) making immediate arrangements for the medical or other examination of a child where there is a reasonable suspicion that he or she is a complainant;
(e) providing counselling to complainants and respondents;
(f) performing any other function which the Minister may assign to him or her for the purposes of this Act.[666]

An anti-domestic violence counsellor may, in carrying out his or her duties, seek the assistance of any police officer.[667]

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[663] Section 3(1)(l) *ibid.*
[664] Section 15 *ibid.*
[665] Section 16 *ibid.*
[666] Section 15(2) *ibid.*

[78] The Anti-Domestic Violence Council is an multi-sectoral body comprising of members that are nominated by the following: each of the ministries responsible for justice, gender and women's affairs, health and welfare of the child, social welfare generally, and education; police; churches; non-governmental organizations concerned with domestic violence; and any other pertinent bodies or organizations. The functions of the Council are to:

(a) keep under constant review the problem of domestic violence in Zimbabwe;
(b) take all steps to disseminate information and increase the awareness of the public on issues of domestic violence;
(c) promote research into the problem of domestic violence;
(d) promote the provision of services necessary to deal with all aspects of domestic violence and monitor their effectiveness;
(e) monitor the application and enforcement of this Act and any other law relevant to issues of domestic violence;
(f) promote the establishment of safe-houses for the purpose of sheltering the victims of domestic violence, including their children and dependants, pending the outcome of court proceedings under this Act;
(g) to promote the provision of support services for complainants where the respondent who was the source of support for the complainant and her or his dependants has been imprisoned;
(h) do anything necessary for the effective implementation of this Act.

The Council is required to submit an annual report to the responsible Minister. The report may make recommendations to the Minister for the better implementation of the Domestic Violence Act.[668]

In 2006, Malawi adopted the Protection from (Prevention of) Domestic Violence Act.[669] Like its South African and Zimbabwean counterparts, the Malawian Act's implicit point of departure is that domestic violence is gender-based violence that disproportionately adversely impacts on women.[670] The Act defines the concept of domestic violence as well as the parties that are subject to its protective as well as sanctioning categories in much the same way as its South African counterparts. Domestic violence is defined as 'arising out of physical, sexual, emotional or psychological, social, economic of financial abuse committed by a person against another person within a domestic relationship'.[671] The remedies it provides, including protection orders, are also similar

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[667] Section 15(3) *ibid*.
[668] Section 16(9) *ibid*.
[669] Protection from (Prevention of) Domestic Violence Act (Malawi).
[670] Section 3 *ibid*.
[671] Section 2 *ibid*.

5.11 Female Genital Mutilation: Prevalence and Adverse Effects

[79] Any attempt to address female genital mutilation in the African region must contend with the fact that, notwithstanding growing international consensus to use 'female genital mutilation' in preference to terms such as 'female genital cutting', or even 'female circumcision' or 'female genital surgeries', it remains a culturally contested term. Use of the term female genital mutilation in this section is not intended overlook the merits of those that contest its use, nor to malign as barbaric African cultures that are associated with its practice. Rather, it is intended to highlight the severity of the adverse health effects, including sexual effects, as well as the human rights violations that flow from it. It is not insignificant that the African Women's Protocol uses the 'female genital mutilation' in a provision that proscribes the practice in the African region.[672]

[80] Unless qualified, use of the term female genital mutilation in this section refers to the three main types, namely: Type 1 which entails excision of the prepuce with or without excision of part or all of the clitoris; Type 2 which entails excision of the prepuce and clitoris together with partial or total excision of the labia minora, with or without excision of the labia majora; and Type 3 which entails narrowing of the vaginal orifice with the creation of a covering seal by cutting and appositioning the labia minora and/or the labia major, with or without excision of the clitoris (infibulation).[673]

[81] As a region, Africa is overrepresented in the global incidence of female genital mutilation with 28 countries practicing it.[674] The incidence varies per country, and within each country there are also regional variations. Among the sampled countries, female genital mutilation has a cultural presence in Cameroon, Ethiopia, Eritrea, Kenya, Nigeria, Tanzania, and Uganda. The prevalence of female genital mutilation among girls and women between 15 and 49 years is high in Eritrea (88.7%) and Ethiopia (74.3%). Kenya occupies a more or less middle position with 32.2% prevalence. Nigeria (19%) and Tanzania (14.6%) are

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[672] Article 5(b) of the African Women's Protocol.

[673] World Health Organization *Eliminating Female Genital Mutilation* (2008) at 4. Note that the World Health Organization has also classified as Type 4 practices other practices that involve manipulation other harmful non-therapeutic procedures to the female genitalia such as pricking, piercing, incising, scrapping and cauterization: World Health Organization *ibid* at 4. Such practices, however, fall outside the scope of female genital mutilation in this section.

[674] The estimated prevalence of female genital mutilation in girls and women between 15 and 49 years in members of the African Union where it is practised is as follows: Benin 16.8%; Burkina Faso 72.5%; Cameroon 1.4%; Central African Republic 25.7%; Chad 44.9%; Côte d'Ivoire 41.7%; Djibouti 93.1%; Egypt 95.8%; Eritrea 88.7%; Ethiopia 74.3%; Gambia 78.3%; Ghana 3.8%; Guinea 95.6%; Gunea Bissau 44.5%' Kenya 32.2%; Liberia 45%; Mali 91.6%; Mauritania 71.3%; Niger 2.2%; Nigeria 19%; Senegal 28.2%; Sierra Leone 94%; Somalia 97.9%; Sudan (the northern part) 90%; Togo 5.8%; Uganda 0.6%; Tanzania 14.6%.

at the lower end of the scale, but, nonetheless, still exhibiting substantial levels of female genital mutilation. Cameroon (1.4%) and Uganda (0.6%) have the least prevalence. It does not follow, of course, that the practice is absent in the other countries as migration can export the practice to countries that have not historically practised it. Indeed, migration explains why countries that have not historically practised female genital mutilation also need to institute legal human rights responses, especially if they are a country of destination for immigrants that practice female genital mutilation.

[82] Cultures that practice female genital mutilation justify it on many social grounds.[675] Perhaps the strongest reasons are that female genital mutilation is a rite of passage marking the coming of age of a girl and rendering her marriageable in the future. A girl who is not circumcised can become an outcast. She will be unmarriageable as men belonging to that culture will refuse either to marry or pay dowry for a woman who has not gone through female genital mutilation. In some cultures, female genital mutilation is also conflated with religion and understood to be a religious requirement that is divinely sanctioned.[676]

[83] The adverse health effects of female genital mutilation have been well documented and are substantial. The procedure has both immediate as well as long-term adverse effects. The adverse effects depend on the nature of the procedure and the conditions under which it is performed. The more invasive the procedure, the more severe are the adverse effects. As can be expected, Type 3 exacts the most severe adverse effects on account of being the most invasive type of female genital mutilation. Also, the tendency to perform female genital mutilation under unhygienic conditions using crude instruments exacerbates the adverse effects of a procedure that is already harmful on its own. In terms of immediate adverse effects, the procedure can cause haemorrhage, infection of the cut tissue and adjacent tissue, infection of the entire body (septicaemia). These effects can be followed by pelvic infection, abscesses and hardening of scarred tissue. Long-term complications are closure of the vagina opening due to scarring, infertility due to pelvic infections, painful menstruation and painful micturation (difficulty in passing urine). Female genital mutilation can also complicate labour leading to prolonged and obstructed labour, which in turn can

[675] Corrine Packer treats the reasons given for female genital mutilations as falling into four main categories: 1) health and hygiene such as a belief that female genital mutilation is necessary for female genital hygiene and that a woman who had not undergone the practice is considered as dirty and polluted; 2) physical necessity such as a belief that the practice improves genital aesthetics, improves male sexual performance and preserves virginity before marriage; 3) social necessity where female genital mutilation is a rite of passage without which a girl is unmarriageable or not easily marriageable within the culture; and 4) religious necessity among communities that believe that the practice is divinely sanctioned: Packer *supra* at 20-22.

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cause prolapsed and vaginal fistulae. The sexual adverse effects are painful intercourse due to narrowing of the vagina as a result of scarring, lack of or difficulty in having an orgasm, and anxiety or fear of sexual intercourse.

5.12 Female Genital Mutilation: Regional Framework

[84] Female genital mutilation is a procedure that is performed on girls and women only. It is accompanied by extreme pain. For the preponderance of girls and women who undergo the procedure, they are not asked to choose, or are too young to choose. Instead, they are subjected to the procedure often through use of physical force or through fear of family or cultural sanctions if they do not undergo the procedure. The effects of the procedure and the complications that may ensue are injurious to health, including sexual health. Against this backdrop, at a regional level, the procedures for procuring female genital mutilation and its physical and psychological effects implicate violations of the rights to equality and non-discrimination,[677] human dignity,[678] liberty and security of the person[679] and health[680] under the African Charter.

[85] Equally, female genital mutilation implicates provisions of the African Children's Charter. The practice detracts from the rights guaranteed to children in relation to equality and non-discrimination,[681] and health.[682] Article 21 which enjoins states 'to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child' is particularly apposite. Article 21 of the Children's Charter specifically requires states to eliminate customs and practices that are prejudicial to the health or life of the child[683] and are discriminatory on the ground of sex or other status.[684]

[86] The African Women's Protocol is the first international treaty to prohibit female genital mutilation explicitly. Article 5, which is a progeny of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, and the Women's Unit of the African Union,[685] prohibits all forms of

[677] Articles 2, 3, and 18(3) of the African Charter.
[678] Article 5 *ibid*.
[679] Article 6 *ibid*
[680] Article 16 *ibid*.
[681] Article 3 of the African Children's Charter.
[682] Article 14 *ibid*.
[683] Article 21(1) (a) *ibid*.
[684] Article 21(1)(b) *ibid*.
[685] The provisions of the African Women's Protocol on harmful practices are largely derived from the work and recommendations of a non-governmental organization – the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children – which jointly drafted with the Women's Unit of the then Organization of African Unity a draft Convention on the Elimination of All

harmful practices against women, requires states to take to eliminate 'all forms of female genital mutilation'.[686] The significance of article 5 does not only lie in the explicit proscription of female genital mutilation but also in the implicit realization that mere legal proscription alone would not be a sufficient or effective response. Article 5 goes beyond imposing the duty to proscribe female genital mutilation by also calling upon the state to: create public awareness in all sectors of society regarding harmful practices, including through formal and informal education and outreach programmes;[687] provide necessary support to victims of harmful practices through basic services such as health services, legal support, emotional and psychological counseling, and vocational support to make them self-supporting;[688] and protection of women who are at risk of being subjected to harmful practices.[689]

It is also significant that article 5 prohibits the medicalization of female genital mutilation.[690] It this way, article 5 is implicitly cognizant of the fact that the human rights violations in female genital mutilation go far beyond protection of physical health. Rendering the procedure safer through medicalization merely reduces or mitigates the burden of the adverse physical health effects of female genital mutilation. Medicalization does not eliminate the other human rights violations that go beyond concern for immediate physical health.

[87] At a sub-regional level, the Southern African Development Community prohibits female genital mutilation through its Gender and Development Protocol. Article 20 of the Protocol conceives female genital mutilation as a form of gender-based violence. States parties are required to adopt legislation prohibiting all forms of gender-based violence including female genital mutilation by 2015 and to ensure that perpetrators are brought before the courts.[691]

5.13 Female Genital Mutilation: Domestic law

[88] At the domestic level, female genital mutilation implicates violation of provisions of domestic constitutions apply even if they are not female genital mutilation-specific, including the rights to equality and non-discrimination human dignity, liberty and security of the person, health and freedom from cruel, inhuman and degrading treatment. In addition, some constitutions have provisions that, by

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Forms of Harmful Practices Affecting the Fundamental Human Rights of Women and Girls (2000): Banda *Women, Law and Human Rights supra* 224.

[686] Article 5(b) of the African Women's Protocol.

[687] Article 5(a) *ibid*.

[688] Article 5(c) *ibid*.

[689] Article 5(d) ibid.

[690] Article 5(b) *ibid*.

[691] Article 5 of the Southern African Community Protocol on Gender and Development (2008).

way of inference, are even more readily applicable to female genital mutilation. In this regard, article 35(4) of the Constitution of Ethiopia provides that 'The State shall enforce the rights of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.' Article 33(6) of the Constitution of Uganda prohibits 'laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status.'[692]

[89] Furthermore, in the absence of female genital mutilation-specific legislation, criminal provisions that proscribe assault and causing grievous bodily harm, which are part of the criminal law of all the African jurisdictions should also be regarded as applicable to the jurisprudence on female genital mutilation. Provisions in laws that protect children from harm generally are also applicable to female genital mutilation.

[90] Among the sampled countries, Eritrea, Ethiopia, Kenya, South Africa and Tanzania have specifically proscribed female genital mutilation.[693] Eritrea has criminalized female genital mutilation through the adoption of the Female Circumcision Abolition Proclamation of 2007. However, the legal proscription is predicated on a crime and punishment model. It is not accompanied by imposition of duties on the state to fulfil especially the implicated human rights through a holistic approach to the eradication of female genital mutilation. For example, the proscription does not come with duties to educate, raise awareness and involve democratic institutions, civil society in particular in the eradication of the practice.[694]

[91] Ethiopian legislation criminalizes female genital mutilation under the categories of 'female circumcision' and 'infibulation'**.** Article 565 of the Ethiopian Criminal Code proscribes female circumcision (a less severe form of female genital mutilation) and imposes a 3 months imprisonment or a fine. Article 566 of the

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[692] Female genital mutilation was specifically identified during the constitutional law making process as one of the targets for constitutional proscription: Report of the Uganda Constitutional Commission (1992) para 7. See also article 26(2) of the Constitution of Ghana which prohibits 'all customary practices which dehumanize or are injurious to the physical and mental well-being of a person'.

[693] Outside of the sampled countries the following countries has passed laws prohibiting female genital mutilation: **Burkina Faso**: Law No 43/96/ADP of 13 November 1996; **Chad**: Law No/6/PR/2002 on the promotion of Reproductive Health (2002); **Djibouti**: Article 333 of the Penal Code of 1995; **Egypt**: Order No 261 of the Minister of Health and Population of July 1996 and 2008; **Ghana**: Criminal Code (Amendment) Act of 1994 inserting section 69A into the Criminal Code of 1960; **Guinea**: Decree No D/96/205/PRG/SGG of 5 December 1996; **Côte d'Ivoire**: Law No 98-757 of 23 December 1998; **Madagascar**: Decree No 98-945 of 4 December 1998; **Mauritania**: Ordinance No 2005-015 (2005); **Niger**: Law No 2003-025; **Senegal;** Law No 99-05 of 29 January 1999 amending article 2 of the Penal Code; **Togo:** Law No 98-016 (1998).

[694] DR Mekonnen 'The Abolition of Female Circumcision in Eritrea: Inadequacies of New Legislation' (2007) 7 *African Human Rights Law Journal* 389.

Criminal Code proscribes 'infibulation' carries a prison sentence of up to ten years if the injury to health is severe. Female genital mutilation is also implicitly punishable under article 567 of the Criminal Code as a procedure which 'inflicts upon another bodily or mental impairment through a harmful practice known for its inhumanity ascertained to be harmful by the medical profession'. The Ethiopian Criminal Code follows a crime and punishment approach.

[92] Kenyan legislation follows a crime and punishment approach as well as a child protection approach. Kenya began with a Presidential Decree banning female genital mutilation in 1982. This was followed by parliamentary legislation. Sections 14 and 119(1)(h) of the Kenyan Children Act of 2001 address female genital mutilation as part of provisions that are designed to protect children from harmful traditional practices. Section 14 provides that 'no person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to affect the child's life, health, social welfare, dignity or psychological development'. Section 119(1)(h) defines a child who is in need of care and protection for the purposes of invoking child safety protection orders as including a female child who is subjected or is likely to be subjected to female circumcision. There are no reported cases, however, of offenders who have been convicted or children who have been offered protection. Furthermore, the law only explicitly protects children and not adults against female genital mutilation.

[93] Though South Africa is a non-prevalent country, it is an immigration destination for many African countries where female genital mutilation is practised. Article 8(b) of the Equality Act lists 'female genital mutilation' as a gender-based practice that constitutes unfair discrimination under the Act. Section 12 of the Children's Act which protects children from being subjected to harmful social, cultural and religious practices, prohibits 'genital mutilation or the circumcision of girls'.[695]

[94] In Tanzania, female genital mutilation is proscribed by section 21 of the Sexual Offences Act. It is an offence of 'cruelty to children' which is punishable with up to 15 years imprisonment for any person with custody of a child to cause them to undergo female genital mutilation which causes them injury and suffering. The Act only protects persons that are below 18 years. A few arrests have been made and prosecutions are rare under this provision.[696]

[95] Nigeria which has a female genital mutilation prevalence rate of 19% does not have federal legislation that directly addresses female genital mutilation. At the

[695] Section 12(3) of the Children's Act (South Africa).
[696] Legal and Human Rights Center *Tanzania Human Rights Report with Zanzibar Chapter* (2006) at 59.

same time, Nigeria has federal policy – National Policy on Female Genital Mutilation of 2000 - which treats female genital mutilation as gender-based violence and a violation of human rights. Also, some states have state legislation that proscribes female genital mutilation.[697]

[96] Though Zimbabwe does not have a female genital mutilation-specific statute, nonetheless, subjecting a person to female genital mutilation is explicitly recognized as domestic violence under the Zimbabwean Domestic Violence Act of 2006.[698]

5.14 Virginity Testing

[97] Virginity testing has been practised on pubescent girls among some cultures to police virginity as a way of ensuring and rewarding chastity before marriage. In some communities, virginity testing has been advanced as an incentive for girls to practice abstinence in the wake of the HIV pandemic. Virginity testing is gender-based violence. Subjecting young girls to virginity testing violates their right to: freedom from degrading treatment; human dignity; security of the person; and privacy under regional as well as domestic constitutions. The practice also violates rights to equality as it is only practised on girls. The South African Children's Act proscribes 'virginity testing girls under the age of 16.[699] Virginity testing of girls above 16 years requires their consent pre-test counseling and protection of privacy and confidentiality.[700] The marking of the body of a girl who has undergone virginity testing is prohibited.[701] The Zimbabwean Domestic Violence Act lists 'virginity testing' as an act of domestic violence.[702]

5.15 Conclusions on rape

[98] The majority of African countries still adhere to the traditional formulation of rape which requires vaginal penetration by a penis.

[99] The broad and gender neutral conceptualization of sexual violence under the Sexual Offences Act of Lesotho and the Sexual Offences Act of South Africa and to a lesser extent under the Sexual Offences Act of Kenya complement the

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[697] **Edo State**: Female Circumcision/Genital Mutilation (Prohibition) Law of 1999; **Cross River State**: Girl-Child Marriages and Female Circumcision (Prohibition) Law of (2000); **Ogun State**: Female Circumcision and Genital Mutilation Prohibition Act of 2000; **Rivers State**: Female Circumcision (Prohibition) Law of 2001. **Ebonyi State**: Abolition of Harmful Traditional Practices against Women and Children Law (2001).

[698] Section 3(1)(l) of the Domestic Violence Act (Zimbabwe).

[699] Section 12(4) of the Children's Act (South Africa).

[700] Sections 12 (5) and 12(6) *ibid*.

[701] Section 12(7) of the Act *ibid*.

[702] Section 3(1)(l) of the Domestic Violence Act (Zimbabwe).

changing nature of rape law under international criminal law.[703] The same applies to the move away from an emphasis on physical violence as a necessary part of the actus reus of rape to focus, instead, on coercive circumstances.

[100] Criminalization of marital rape remains the exception rather than the rule in the African region.

[101] Eritrea is exceptional in retaining its Penal Code immunity against prosecution for rape upon agreement to marry.

[102] The imposition of state civil liability for failure to prevent sexual violence under South African law in *Carmichelle v Minister of Safety and Security and Another*,[704] is a new and significant development in the African region.

5.16 Conclusions on Trafficking

[103] The majority of African jurisdictions do not have trafficking specific legislative provisions. Ethiopia, Nigeria, Tanzania and South Africa are exceptions.

[104] The Palermo Protocol has been influential in guiding the form and substance of Nigerian, Tanzanian and South African trafficking-specific legislation.

5.17 Conclusions on Domestic/Partner Violence

[105] There is a conspicuous gap in the adoption of domestic violence-specific laws at the domestic level in the African region. Among the sampled countries only three countries – Malawi, South Africa and Zimbabwe – have domestic violence specific legislation.

[106] Malawi, South Africa and Zimbabwe have formulated their laws to reflect a progressive approach to regulating domestic violence as primarily gender-based violence. The laws of these three countries protect people who are inside as well as outside of a marital relationship, do not require the use of physical violence as a necessary element of domestic violence, and provide remedies, including the grant of protection orders, in a manner that is intended to respond to the peculiarities of domestic violence. The Malawian, South African and Zimbabwean approaches domestic violence are cognizant of its gender-violence dimension

[107] The establishment of Anti-Domestic Violence Counsellors and the Anti-Domestic Violence Council are important innovations in the African region in terms of

[703] Articles 7(1)(g) 1 and 8(2)(e) (vi) 1 of the Rome Statute for the International Criminal Court;*Prosecutor v Ayekesu* Case ICTR-96-4-T para 597 (1998) (International Criminal Tribunal for Rwanda); *Prosecutor v Furundzija* Case No ICTY-95-17/1 para 174 (1998) (International Criminal Tribunal for Yugoslavia)

[704] 2001 (4) SA 938 (Constitutional Court of South Africa).

designing legislation that is intended to deal not only with individual cases of domestic violence but the eradication of domestic violence at a systemic level.

5.18 Conclusions on Female Genital Mutilation

[108] An increasing number of African countries have female genital specific legislation. However, laws on female genital mutilation follow a predominantly crime and punishment model. They do not impose state duties to educate and raise awareness about the harmful effects of the practice.

[109] The African Women's Protocol contains a framework for eradicating harmful traditional practices such as female genital mutilation in a manner that goes beyond proscription to include awareness raising, education, provision of pertinent material support, and protection of those that are at risk of being subjected to the practice[705].

5.19 Conclusions on Virginity Testing

[110] Virginity testing does not appear to be a widespread phenomenon.

[111] South Africa and Zimbabwe have legislative provisions that address virginity testing. The South African Children's Act explicitly proscribes it for girls below 16 years and requires informed consent older girls and women. Virginity testing constitutes domestic violence under the Zimbabwean Domestic Violence Act if carried out at the instigation of person who is in a domestic relationship with the girl or woman

[705] Article 5 of the African Women's Protocol.

6 ACCESS TO HEALTH SERVICES RELATED TO SEX AND SEXUALITY

6.1 Introduction

[1] Access to health services is an important variable in the realization of sexual health. Lack of access to condoms undermines prevention of the spread of sexually transmitted infections, especially in a region such as the African region where HIV is endemic. Lack of access to contraception diminishes choice in decision making about sexual activities and can lead to unwanted pregnancies. The criminalization of abortion impacts negatively on sexual autonomy to the extent that it has the practical effect of equating sex with procreation and denying the reality of the recreational dimension to sex. Laws or policies that exclude certain social groups from access to health care services on the basis of status such as HIV status or sexual orientation constitute violations of the rights to equality and non-discrimination, health and human dignity.

[2] When determining the extent to which domestic health services are human rights compliant, the cardinal benchmark must be *accessibility* in all its manifestations. Health services must be available according to need. General Comment 12 of the Covenant on Economic, Social and Cultural Rights[706] and General Recommendation 24 of Committee on the Women's Convention[707] have contributed immensely to the elucidation of accessibility as a necessary element of the right to health. Accessibility must mean health services that are non-discriminatory and attuned to the needs of a class that has been historically disadvantaged. It means services that are available, and are accessible physically, economically, and in terms of being known by social groups and persons who need them (information accessibility). Equally, accessibility means services that are rendered using methods and practices that are safe and ethically acceptable to those who need them.

6.2 African Charter-based Framework

[3] Article 16 of the African Charter guarantees the right to the 'best attainable state

[706] Committee on Economic, Social and Cultural Rights *General Comment 14: The Rights to the Highest Attainable Standard of Health* E/C.12.2000/4 (2000).
[707] Committee on the Women's Convention General Recommendation 24 on Women and Health UN GAOR Doc.No. A.54/38/Rev.1.

physical and mental health'.[708] The African Children's Charter guarantees the right to health to children along substantively similar terms as the African Charter, albeit, with some of the state obligations spelt out more elaborately, including the need to develop and implement primary health care services that are accessible to all children.[709] Though, as yet, no cases that directly impact on access to health services related to sex and sexuality have emanated from the treaty bodies of the African Charter, it is important to note that in two communications,[710] the African Commission has embraced an expansive approach to the right to health akin to the approach that has been adopted by the Committee on Economic, Social and Cultural Rights.

[4] In *Purohit and Another v The Gambia* the Commission said:

> Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all other fundamental human rights and freedoms. The right includes the right to health facilities, access to goods and services to be guaranteed without discrimination of any kind.[711]

In language reminiscent of that employed by the Committee on Economic, Social and Cultural Rights when interpreting the right to health,[712] the African Commission said that regardless of domestic economic constraints, it would 'read into article 16 the obligation on part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of available resources, to ensure that the right to health is fully realised in all aspects without discrimination of any kind'.[713]

[5] In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[714], the African Commission found that, among other human rights violations, exploitation of oil by a partly owned oil company without regard to the adverse environmental health constituted breaches of the right to health and the right to a healthy environment guaranteed by articles 16 and 24 respectively of the African Charter. In reaching its conclusion, the African Commission drew, in part, from the expansive interpretation of socio-economic rights under the Covenant on

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[708] Article 16(1) of the African Charter.
[709] Article 14 of the African Children's Charter.
[710] *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003). *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) ACHLR 60 (15TH Annual Activity Report) (*SERAC* case). These cases were introduced in Chapter 1 of this study.
[711] *Purohit and Another v The Gambia* para 80.
[712] Committee on Economic, Social and Cultural Rights *General Comment 14: The Rights to the Highest Attainable Standard of Health* E/C.12.2000/4 (2000), para 30;
[713] *Ibid* para 84.
[714] *SERAC* case.

Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights.

[6] The African Women's Protocol has provisions that guarantee respect, protection and promotion of health services for women, including, perforce, services related to sex and sexuality. The state obligation to eliminate all forms of discrimination in article 2 of the African Women's Protocol extends, by implication, to health services. Article 14 of the African Women's Protocol speaks directly to access to health services in relation to sexual activities as well as sexuality when it enjoins the state to 'ensure that the right to health of women, *including sexual and reproductive health* is respected and promoted.[715] In this connection, the attendant obligations include respecting, protecting and promoting the rights to: control fertility; decide whether to have children, the number of children and spacing of children; choose any method of contraception; self-protection from sexually transmitted infections, including HIV; know about the status of one's partner particularly if affected by sexually transmitted infection; and to have family planning education.[716]

[7] The African Women's Protocol also speaks directly to abortion. Article 14(2)(c) of the Protocol enjoins states to adopt appropriate measures "to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." By squarely addressing abortion, Article 14 breaks new ground in international human rights law in that it constitutes the very first time that an explicit state obligation to permit abortion has appeared in a treaty. By imposing upon states a duty to permit abortion on the prescribed grounds, Article 14 necessarily inscribes into the substantive provisions of an international treaty a corresponding woman's right to abortion.

[8] As part of impressing upon universal accessibility of health services, the African Women's Protocol enjoins states 'to take appropriate measures to provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas'.[717] In a region such as Sub-Saharan Africa where education and literacy levels among women are generally very low, the state has a duty to take reasonable steps to provide women with a fair opportunity of knowing about their corresponding rights and how to exercise them through endeavors such as targeted human rights awareness campaign and reproductive health education.

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[715] Article 14(1) of the African Women's Protocol. Emphasis provided.
[716] Article 1(a)-(e) *ibid*.
[717] Article 14(2)(a) *ibid*.

[9] Whilst health care facilities may not be immediately realizable in their entirety on account of constraints in available resources, it is accepted under African Commission jurisprudence that, as part of progressive realization, fulfilling a right means, at a minimum, taking concrete and targeted steps towards the realization of the right, including expending resources.[718] By providing in Article 26(2), especially, that 'States Parties undertake to adopt all necessary measures and in particular shall provide budgetary resources for the *full and effective implementation* of the rights herein recognized'[719] the African Women's Protocol implies that the right sexual health takes the form of a socio-economic right. In this way, the African Women's Protocol develops synergy with the approach of the African Commission to the interpretation and application of the right to health under article 16 of the African Charter.

6.3 Domestic Law

[10] At a domestic level, access to health services related to sex and sexuality in the African region tends to be governed by non legislative administrative directives and policy. Countries that have constitutional provisions and legislation that addresses access to health are the exception to the rule. Also, litigation relating to access to health services has generally not been pursued in the African region with the result that court decisions on access to health services are still few and far between.

[11] South Africa represents the only jurisdiction where there have been significant developments in jurisprudence relating to access to health services. The South African Constitution has several provisions that bear on access to health services. The more direct provisions are: the right to an environment that is not harmful to one's health or well-being;[720] the right of access to health care services, including reproductive health care;[721] the right not to be refused emergency medical treatment;[722] the right of every child to basic nutrition, shelter, basic health care services and social services;[723] and the right of an incarcerated person to adequate accommodation, nutrition, reading material and medical treatment.[724]

[718] *SERAC* case para 47; *Purohit and Another v The Gambia* paras 80, 83.
[719] Emphasis provided.
[720] Section 24 of the South African Constitution.
[721] Sections 27(1) and (2) *ibid*.
[722] Section 27(3) *ibid*.
[723] Section 28(1)(c) *ibid*.
[724] Section 35(2)(e) *ibid*.

[12] *Minister of Health and Others v Treatment Campaign and Others*[725] concerns applicants who challenged the decision of the South African government to confine the dispensation of nevirapine to 18 pilot sites only (two in each the country's nine provinces) for the purpose of prevention of mother-to-child transmission of HIV. Before the High Court, the main argument of the applicants was that the government's failure to provide universal access to antiretroviral therapy in the public health sector to prevent mother-to-child transmission of HIV, constituted a series of breaches of provisions of the Constitution. Principally, the applicants relied on section 27 which says:[726]

> 1. Everyone has the right to have access to
> (a) health care services, including reproductive health care
> …
>
> 2. The state must take reasonable and other measures, within its available resources, to achieve a progressive realisation of each of these rights.
> 3. No one may be refused emergency medical treatment.

[13] The applicants were successful before the High Court. Justice Botha held that the government's nevirapine programmme fell short of a reasonable measure to realize the right of access to health care under section 27. An order was granted requiring the state to make nevirapine universally available in the public sector. The court also ordered the state to plan and implement forthwith a comprehensive national program to prevent mother-to-child transmission of HIV. Government appealed against the decision to the Constitutional Court.

[14] Applying the principles it had formulated in *Government of the Republic of South Africa and Others v Grootboom and Others*[727] for the determination of socio-economic rights, the Constitutional Court held that while government was better placed than the courts to formulate and implement policy on HIV, including measures for prevention of mother-to-child transmission, it had, nonetheless,

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[725] *Minister of Health and Others v Treatment Campaign and Others* 2002 (10) BCLR 1033 (Constitutional Court of South Africa).

[726] The other provisions of the Constitution that were allegedly contravened were: 7(2) which enjoins the state to respect, protect, promote and fulfil the rights in the Bill of Rights; section 10 which guarantees everyone a right to human dignity; section 12(2)(a) which guarantees everyone a right to bodily and psychological integrity, including the right to make decisions about reproduction; section 27 which guarantees everyone a right of access to health services, including reproductive health care; section 28(1)(c) which, *inter alia*, guarantees a child a right to basic health care; section 195 which, *inter alia*, requires that public administration must be governed by democratic values enshrined in the Constitution and that a high standard of professional ethics must be promoted and maintained; and section 237 which provides that all constitutional obligations must be performed diligently and without delay.

[727] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (Constitutional Court of South Africa).

failed to adopt a reasonable measure to achieve the progressive realization of the right of access to health care services in accordance with section 27(2) read with section 27(1).[728] The policy of confining nevirapine to the 18 pilot sites was unreasonable in that it was too rigid.[729] It denied mothers and babies born outside the pilot sites the opportunity of receiving a life-saving drug that could be administered within the available resources of the state.

[15] The finding that government had violated the right of access to health care under section 27 was inevitable for a number of reasons. Nevirapine had been recommended for prevention of mother to child transmission without qualification by an international health authority – the World Health Organization.[730] The state's own licensing authority – the Medicines Control Council - had registered nevirapine for prevention of mother to child transmission.[731] Thus, the state's arguments for confining nevirapine to the pilot sites for safety reasons were not convincing. The pilot sites only covered 10% of the population of women who access antenatal care at public health facilities leaving the larger majority of women (90%) uncatered for in a country where HIV/AIDS is endemic. According to the principles that were formulated in *Grootboom*, a programme that leaves out a significant section of the community cannot pass constitutional muster unless the cost of the program is not within the available resources of the state. In this case the Court found that nevirapine was easy to administer. The cost of each treatment -less than 2US$ - was patently within the means of the state not least because the budget for HIV/AIDS had been substantially augmented.

[16] It is instructive that in *Minister of Health and Others* the Constitutional Court also said that it would have reached the same conclusion had the matter been determined according to the state's obligation under section 28 of the Constitution. The section, *inter alia*, guarantees every child a right to "basic health services".[732] In the Court's view, the provision of nevirapine to prevent transmission of HIV could be considered as "essential" to the child.[733] The needs of the children were "most urgent".[734] The right conferred on children by section 28 had been imperilled by the state's rigid and inflexible policy which excluded children outside the pilot sites from having access to nevirapine.[735] Moreover, the

[728] *Minister of Health and Others v Treatment Campaign and Others* 2002 (10) BCLR 1033 (Constitutional Court of South Africa).para 80.
[729] *Ibid*.
[730] *Ibid* para 12.
[731] *Ibid*.
[732] Section 28(1)(c) of the South African Constitution.
[733] *Minister of Health and Others v Treatment Action Campaign and Others* para 78.
[734] *Ibid* para 78
[735] *Ibid* para 78.

children concerned were, on the whole, born to mothers who were indigent and reliant on public health sector facilities as private care was beyond their means.[736]

[17] The Constitutional Court upheld the decision of the High Court but modified the order. It ordered the state forthwith to:[737]

(a) remove the restrictions that prevent nevirapine from being made available for the purpose of prevention of mother-to-child transmission at public health facilities outside the pilot sites;
(b) permit, facilitate and expedite use of nevirapine for prevention of mother-to-child transmission at public health facilities when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility nevirapine is medically indicated, and if necessary, the mother concerned has been appropriately tested and counseled; and to
(c) make provision if necessary for training of counsellors for counselling for prevention of mother-to-child transmission outside the pilot sites.

[18] Unlike the *Grootboom* case, *Minister of Health and Others* was decided without explicit recourse to international law. This is regrettable. While invoking relevant international law would not have altered the outcome of the case, it would have, nonetheless, provided the Court with a template for not only reinforcing its reasoning, but also explicitly mapping out the parameters of the normative content of section 27. Equally, given that women and children were at the centre of *Minister of Health and Others*, it is unfortunate that the Court did not consider deriving any assistance from the Women's Convention and the Children's Convention as part of reinforcing the principle that to meet substantive reasonableness under section 27, that access to health care services must be sensitive to the needs of groups that are most vulnerable sections of society.

[19] In *Minister of Health and Others* the Constitutional Court followed its own decision in *Grootboom* in refusing to endorse the notion of a minimum core obligation as a "self-standing independent positive right".[738] The Court reiterated the "reasonableness" approach as the Court's preferred approach. The notion of a minimum core is at best relevant to determining reasonableness.[739] The Court said that socio-economic rights could not be interpreted as conferring on everyone a right to demand a minimum core service or good from the state.[740]

[20] Among the countries surveyed South Africa is the only jurisdiction where a right to health is constitutionally guaranteed. Though the Ethiopian, Malawian and

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[736] *Ibid* para 79.
[737] *Ibid* para 135.
[738] *Minister of Health and Others v Treatment Action Campaign and Others* para 39.
[739] *Ibid* para 34.
[740] *Ibid*.

Nigerian constitution make reference to the provision of health care services, they only do so in the context of directive state principles rather than the imposition of state duty with a corresponding individual right that is justiciable.[741] The decision of a Federal High Court of Nigeria in *Festus Odaife v Attorney General of the Federation and Others*[742] that was discussed in Chapter 2, in part, stands for the proposition that access to health services has not been judicially interpreted as a constitutional right. In response to a claim by prisoners seeking to challenge refusal to provide HIV treatment, it was held that the equality clause of the Nigerian Constitution – article 42 - does not provide protection against HIV-related discrimination as it does not cover discrimination on the grounds of health or disease status.

[21] With specific references to contraceptive services, the general position is that access is impliedly permitted as there are generally no laws prohibiting access to contraception in the majority of countries. Licensing requirement of medicinal products aside, access to contraception is governed more by policies on family planning than by legislation for most countries. Without exception, all countries have reproductive and HIV/AIDS policies that promote the use by, and supply of contraception and condoms to, the public.[743] But whilst policies generally promote universal access without unfair discrimination for adult women, the actual practices are discriminatory on the basis of both age and marital status.[744] Unmarried minors, especially, are not catered for in the majority of African countries.

[22] Some countries have legislation that specifically addresses contraception and HIV/AIDS. Cameroon uses legislation to permit sale of contraceptives by pharmacies.[745] Kenya[746] and Tanzania[747] have legislation that prohibits HIV-

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[741] Article 41 (3) and (4) of the Constitution of Ethiopia; Section 13(c) of the Constitution of Malawi; Section 30(2)(b) of the Constitution of Tanzania; Article 17(3)(d) of the Constitution of Nigeria.

[742] *Festus Odaife and others v Attorney General of the Federation and others (*2004) AHRLR 205 (NgHC 2004) (Federal High Court of Nigeria).

[743] For example: **Ethiopia**: Health Policy of Transitional Government of Ethiopia (1993); **Kenya**: National Population Policy for Sustainable Development (2000); National Reproductive Health Policy (2007); Family Planning Guidelines (2005); Adolescent Reproductive Health and Development Policy (2000) National HIV/AIDS Strategic Policy; **Lesotho:** National AIDS Policy; **Malawi**: Reproductive Health Policy (2002); Reproductive Health Strategic Plan; National AIDS Policy; **Nigeria**: National Policy on HIV/AIDS (); National Policy on Health and Development of Adolescents and Young People in Nigeria (2007); South Africa: Operational Plan for Comprehensive HIV/AIDS Care, Management and Treatment for South Africa (2003). **Tanzania**: National Population Policy (2006); Uganda: National Adolescent Health Policy for Uganda (2004); **Zimbabwe**: National HIV/AIDS Policy; National HIV/AIDS Strategic Plan (2006).

[744] Centre for Reproductive Rights & Child and Law Foundation *State of Denial: Adolescent Reproductive Rights in Zimbabwe* (2002).

[745] National Policy on Family Planning Act of 1980 (Cameroon).

[746] Section 19 of the HIV/AIDS Prevention and Control Act of 2006 (Kenya).

[747] Sections 19 and 24 of the HIV/AIDS (Prevention and Control Act of 2008) (Tanzania)

related discrimination, including discrimination in respect of access to health services. In this connection for, example, section 19 of the Kenyan HIV/AIDS Prevention and Control Act says:

> (1) Every health institution, whether public or private, and every health management organization or medical insurance provider shall facilitate access to healthcare services to persons with HIV without discrimination on the basis of HIV status.
> (2) The Government shall, to the maximum of its available resources, take the steps necessary to ensure the access to essential healthcare services, including the access to essential medicines at affordable prices by persons with HIV or AIDS and those exposed to the risk of HIV infection.

[22] South Africa has legislation that is intended to implement the constitutional right to access health care services. The South African National Health Act[748] subscribes to constitutional objects, including the universal provision of access to health care and the deployment of state resources to this effect in accordance with section 27 of the Constitution.[749] It requires the state to ensure the universal provision of 'essential health services which must include primary health care services'. It puts on a statutory footing, free health care services for pregnant and lactating women and children below the age of six who are not members or beneficiaries of medical schemes, and all persons who are not members of medical schemes.[750] The object is that those who cannot access the private sector (that is approximately 80% of the population), should be guaranteed access to the public health sector. The Act is comprehensive in the sense that it is not only aimed at the organization and governance of health care services, but also at assuring quality and delivery of services within an institutional framework that recognizes the respect for human rights.

6.4 Access to Health Services by Children

[23] Laws relating to age of consent to medical and surgical treatment have implications for sexual health. Laws that discriminate on the ground of age impact adversely on the sexual health of minors. Individual decisions to take responsibility for the prevention of sexually transmitted infections and unwanted pregnancies cannot be realized when adolescents who are sexually active are not, as a matter of course, recognized under the law as competent to consent to treatment on their own. Domestic laws that equate minority status with incompetence to consent to treatment unless there is parental consent or approval, violate the human rights of children, including the rights to equality, human dignity and privacy. The obligation to respect, protect and fulfil the rights of the child under the Children's Convention and, perforce under the African Children's Charter, requires the state to develop and implement programmes that ensure access to sexual and reproductive health services, including access to

[748] National Health Act of 2003 (South Africa).
[749] Preamble to the National Health Act *ibid*.
[750] Section 4 *ibid.*

contraception and other sexual health services, for adolescents on the basis of the evolving capacities of the child rather than chronological age.[751]

[24] In the majority of African countries there are no specific laws the age consent as to provide clear guidance to providers of health care who are apt to regard the age of majority as also age of consent to the detriment of the sexual health of minors and adolescents, especially. South Africa is an exception in having a statute – the Children's Act of 2003 – that has specific provisions governing consent of children to treatment.

[25] The South African Children's Act is a major reform of common law and legislation. Its scope is very wide and extends to children, many of the protections that are found under international law. The Act reforms both common law and legislation with a view to complying with state obligations under the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Act clarifies that the age of majority for general purposes is 18 years[752] and rather than 21 as was the position under the Age of Majority Act of 1972.[753] It brings South African legislation is line with the age of majority prescribed under the Constitution as well as under international human rights instruments. The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child prescribe 18 as the age of majority.[754]

[26] Section 129 of the South African Children's Act regulates consent to health care related procedures. It provides that:

- a child who is over 12 years and is of 'sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment' may consent to their own 'medical treatment' or that of their child;[755]
- a child who is over 12 years and is of 'sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the 'surgical operation' and is 'duly assisted' by a parent or guardian may consent to their own surgical operation or that of their child;[756]

The import of section 129 is to attempt to implement the principle of the evolving capacities of the child as the criterion to determine competence to treatment but with 12 years provided as a threshold for determining a boundary between children in respect of which the law irrebuttably presumes

[751] Committee on the Right of the Child, Adolescents Health and Development in the context of the Convention on the Right of the Child , General Comment No 4 CRC/GC/2003/4 (2003).
[752] Section 17 of the Act.
[753] Section 1 of Act No 57.
[754] Articles 1 and 2 respectively.
[755] Section 129(2) of the Children's Act (South Africa).
[756] Section 129(3) *ibid*.

incompetence – those below 12 years – and children – those that are at least 12 years – in respect of which the law recognizes competence if they are sufficiently mature to understand the medical treatment in question. In respect of surgical treatment, the Act is more restrictive of the autonomy of the minor in that, even if the minor is at least 12 years and has capacity to understand the nature and consequences of the surgical procedure, there must be 'duly assisted' by a parent or guardian.

[27] Section 129 of the South African Children's Act goes on to provide for consent by the parent, guardian or care giver where the above conditions are not met.[757] In cases where the treatment is necessary to preserve the life of the child or to save the child from serious or lasting danger, section 129 makes provision for consent by the medical superintendent of a hospital of a person in charge of a hospital.[758] Furthermore there are provisions for consent to be granted by the Minister of Health where consent has been unreasonably refused by a parent or guardian or the child or for a number of reasons, if is impracticable to obtain consent from the parent or guardian.[759] In similar circumstances, the courts may also consent.[760] Section 129(1) preserves the operation of the consent procedures that are prescribed under section 5(2) of the Choice on termination of Pregnancy Act.[761]

[28] Section 130 of the South African Children's Act regulates consent to HIV testing: In essence, it provides that:

- a child who is 12 years of age or older may consent to HIV testing[762]
- a child under 12 years and is of sufficient maturity to understand the benefits, risks and social implications of HIV testing may consent to such a test[763]
- in circumstances where either of the above conditions are not met, section 130 provides for consent by a parent or care giver, an official in a government department, an organization that has been designated as a child protection organization or a superintendent or person in charge of a hospital. Where consent is unreasonable withheld or the child, or the parent or care giver is incapable of giving consent, there are provisions consent to be given by the court.[764]

[757] Sections 129(4) and 5 *ibid*.
[758] Section 129(6) *ibid*.
[759] Section 129(7) *ibid*.
[760] Section 129(9) *ibid*.
[761] The significance of section 5(2) of the Choice on Termination of Pregnancy Act is discussed later in this chapter.
[762] Section 130(2)(a)(i) of the Children's Act (South Africa).
[763] Section 130(2)(a)(ii) *ibid*.
[764] Section 130(2)(b)-(e) *ibid.*

The requirement to obtain consent does not apply where the HIV test is necessary to establish that a health worker or another third party may have contracted HIV due to contact with the bodily substance from the child.[765] Section 132 of the Act provides that testing must be preceded and followed by counseling.

[29] Section 133 of the Children's Act regulates confidentiality of the HIV status of a child. Where the child is 12 years or order and is of sufficient maturity to understand the benefits, risks and social implications of such disclosure, information that the child is HIV positive can only be disclosed with that child's consent.[766] Where these conditions are not met, parents or parties in loco parentis may consent.[767] As with consent to HIV testing, there is provision for consent to disclose to be given by a superintendent or a court.[768] The duty of confidentiality under section 133 is not absolute but may give way to legal requirements requiring disclosure.[769]

[30] Section 134 of the Children's Act regulates access to contraceptive services and condoms and recognizes 12 years as the age for competence to access condoms. It provides that:

> (1) No person may refuse-
> (e) to sell condoms to a child over the age of 12 years
> (f) to provide a child over the age of 12 years with condoms where such condoms are provided or distributed free of charge.
> (2) Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or care-giver of the child if-
> (a) the child is at least 12 years of age;
> (b) Proper medical advice is given to the child; and
> (c) a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.
> (3) A child who obtains condoms, contraceptives or contraceptive advice in terms of this Act is entitled to confidentiality …

6.5 Access to Health Services for the Termination of Pregnancy

[31] Generally, African abortion laws favour criminalization rather than decriminalization of abortion. Historically, a feature common to all colonial abortion laws is that they all criminalized abortion and were all replicas of laws

[765] Section 130(1)(b) *ibid*.
[766] Section 133(2)(a) *ibid*.
[767] Sections 133(2)(b) *ibid*.
[768] Section 133(2)(d) *ibid*.
[769] Section 133(1)(a), (b) and (c) *ibid*.

in the metropolises.[770] The ostensible rationale for criminalizing abortion was that it served to protect the spiritual values inherent in unborn life. For the greater part of the twentieth century, colonially inspired laws that criminalize abortion save where it is procured to save the life of the pregnant woman have been the defining characteristic of African abortion laws. In recent years, however, some countries have begun to move away from a paradigm that is highly restrictive of abortion to a paradigm that treats abortion as part of the realization of sexual and reproductive health. Among the countries that have been surveyed, the majority have maintained colonially spawned laws. Only South Africa and Ethiopia have reformed their laws to liberalize access to abortion.

[32] Under Eritrean law, abortion is legal if continuing with the pregnancy would cause grave or permanent danger to the life or health of the pregnant woman.[771] Rape and incest are also permitted grounds.[772] Cameroonian,[773] and Zimbabwean laws on abortion are similar to Eritrean law.[774] The penal codes of Cameroon,[775] Malawi,[776] Kenya,[777] Nigeria,[778] Tanzania[779] and Uganda[780] are all highly restrictive of abortion and generally impose severe sentences upon conviction. Section 150 of the Tanzanian Penal Code is an example: It says: 'any person who, with intent to procure miscarriage of a woman, whether she is or is not with child by causing her to take any poison or other noxious thing or uses any force of any kind or uses any other means is guilty of the offence and is liable to imprisonment for fourteen years.' The abortions laws of Kenya, Malawi, Nigeria, Tanzania and Uganda appear to countenance saving the life of the pregnant mother as the only permissible ground for abortion.[781] The abortion of Lesotho is unwritten. It takes the form of common law that was inherited from English common law as it was understood in respect of the Offences Against the Person Act of 1861 and before British abortion law was reformed by the Abortion

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[770] CG Ngwena 'Access to Abortion: Legal Development in African from a Reproductive and Sexuality Rights Perspective' (2004) 19(2) *SA Public Law* 328.
[771] Article 528 of the Penal Code (Eritrea).
[772] Article 534 *ibid*.
[773] Section 337 and 339 of the Penal Code (Cameroon).
[774] Termination of Pregnancy Act of 1977 (Zimbabwe).
[775] Section 337 and 339 of the Penal Code (Cameroon). Note that that incest is not an explicitly recognized ground under the Cameroonian Penal Code.
[776] Section 149, 150, 151 and 243 of the Penal Code (Malawi).
[777] Section 240 of the Penal Code (Kenya).
[778] Section 228 of the Criminal Code (Nigeria).
[779] Section 150 of the Penal Code.
[780] Sections 141-143 of the Penal Code (Uganda).
[781] Section 243 of the Penal Code of Malawi and section 240 of the Penal Code of Kenya explicitly recognize a therapeutic intervention to save the life of the pregnant woman as a defence.

Act of 1967.[782] Under English common law as clarified in *R v Bourne*,[783] abortion is permitted if it is intended to save the life of the pregnant woman or preserve her health.

[33] In 1996, South Africa reformed the abortions provisions of the Abortion and Sterilization Act of 1975 and replaced with the Choice on Termination of Pregnancy Act.[784] The Choice on Termination of Pregnancy Act constitutes radical reform of abortion law. The Act seeks to render abortion a fundamental right of every woman. The transformative premises underpinning the 1996 Act, as can be inferred especially from the preamble to the Act, are that abortion services should cease to be the object of restrictive and inaccessible law, but instead, become an integral part of universally accessible reproductive health services which the state has a duty to provide within an environment that recognizes and respects women's agency. A commitment to provide every woman with a right to decide whether to have an early, safe and legal termination of pregnancy is explicitly articulated in the preamble as part of the philosophy animating the Act.

[34] In terms of its substantive provisions, the Choice on Termination of Pregnancy Act allows abortion on request in the first twelve weeks of pregnancy.[785] From the thirteenth to the twentieth week, the Act recognizes socio-economic grounds as one of the grounds for abortion and does not seek to impose burdensome certification requirements.[786] Particularly significant in a developing world context where doctors are generally scarce, is the fact that the Act does not confer a monopoly on doctors to perform abortion procedures. In the first trimester, where abortion is available on request, midwives and nurses who have undergone a prescribed training can, on their own, also perform abortions.[787] In a developing world setting in which doctors are highly scarce, insisting that doctors be the only health care professionals who can determine eligibility for abortion or perform abortion is a sure way of ensuring that safe abortion services are not accessible to the 90 percent or more of women who rely on the public health sector for services.

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[782] CG Ngwena 'An Appraisal of Abortions Laws in Southern Africa from a Reproductive Health Rights Perspective' (2004) 32 *Journal of Law, Medicine and Ethics* 708 at 710-713.

[783] *R v Bourne* 1 Kings Bench 687 (Central Criminal Court, London).

[784] Choice on Termination of Pregnancy Act of 1996 (South Africa).

[785] Section 2(1) of the Choice on Termination of Pregnancy Act (South Africa).

[786] Section 2(2) as amended by section 1 of the Choice on Termination of Pregnancy Act of 2008. In terms of mid-level providers, the 1996 Act only recognized 'registered midwives'. The amendment of the 1996 in 2008 added 'registered nurses'.

[787] Section 2(2) ibid and

[35] The South African Choice on Termination of Pregnancy Act also recognizes the capacity of a minor to consent to abortion on her own without the consent or consultation of the parent or guardian.[788] Where a minor is seeking termination, there is an obligation on the practitioner or midwife to advise the minor to consult with a parent, guardian or family member.[789] However, the minor may choose to do otherwise. Neither parental consultation nor parental consent is a precondition. The recognition of the capacity of the minor to consent to abortion on her own under the Act, constitutes a recognition of the evolving capacities of the child as envisaged by the Children's Convention. Some pregnant minors may be living away from home and others may have suffered abuse at the hands of their own parents or guardians, or may simply be too afraid to involve parents. Making parental consent or consultation a precondition might serve only to deny the service to a class that needs it most.

[36] The constitutionality of the Choice on Termination of Pregnancy Act has been tested in two cases at a High Court level.[790] In *Christian Lawyers' Association of South Africa v Minister of Health* (1998),[791] the plaintiffs sought an order to declare the Choice on Termination of Pregnancy Act void under the Constitution. They argued that human life begins at conception and abortion terminates such life. Furthermore, they argued that section 11 of the Constitution which guarantees 'everyone' a right to life, also applies to a foetus from the moment of conception. The corollary was that a foetus was a bearer of constitutional rights and that the Act was thus repugnant to section 11 of the Constitution because it permits the killing of human life. The court found for the respondents. It held that a foetus does not have legal persona and that the term 'everyone' in section 11 did not cover a foetus. The court said that accepting the plaintiff's argument would impact negatively on the achievement of substantive equality for women. It said that the provisions granting women abortion under the Choice on Termination of Pregnancy Act were supported by provisions of the Constitution guaranteeing women rights to: equality,[792] human dignity,[793] bodily and psychological integrity, which includes the right to make decisions concerning reproduction and the right to security in and control over her body[794] privacy,[795] freedom of

[788] Section 5(3) ibid.
[789] Ibid.
[790] *Christian Lawyers' Association of South Africa v Minister of Health* 1998 (11) BCLR 1434 (High Court of South Africa); *Christian Lawyers' Association v Minister of Health* 2004 (10) BCLR 1086 (High Court of South Africa).
[791] *Christian Lawyers' Association of South Africa v Minister of Health* 1998 (11) BCLR 1434 (High Court of South Africa).
[792] Section 9 of the South African Constitution.
[793] Section 10 *ibid*.
[794] Section 12 *ibid*.
[795] Section 14 *ibid*.

religion, belief and opinion[796] and health care services, including reproductive health services.[797]

[37] In *Christian Lawyers' Association v Minister of Health* (2004)[798] the validity of the Choice on Termination of Pregnancy Act was challenged on the ground that section 5(3) of the Act was unconstitutional to the extent that it recognized the capacity of a minor to consent to abortion without the prior consent and approval of a parent. It was argued that such recognition was an infringement of the constitutional right of every child to family care or parental care,[799] and to be protected from maltreatment, neglect, abuse or degradation.[800] The challenge was unsuccessful. It was held that the right to consent without parental consent only applied to children who were sufficiently mature to grant informed consent. The court also said that the right of a minor who is sufficiently mature to grant informed consent to an abortion on her own was supported by the constitutional right to bodily and psychological integrity which includes the right to make decisions concerning reproduction,[801] and the right to control over one's body.[802]

[38] In 2005, Ethiopia amended its Criminal Code of 1957, which hitherto only permitted abortion where the woman's 'life' or 'health' were in 'grave danger'. The old law has been associated with high incidence of unsafe abortion related mortality and morbidity. The revised Penal Code has substantially liberalised the grounds for abortion. Under the new law, abortion is permitted on the following grounds: rape or incest; risk to the life or health of the pregnant woman; risk to foetal health; physical or mental disability that renders the pregnant woman unable to raise the child; or minority status that renders the pregnant minor physically or mentally unable to raise the child.[803] While falling short of explicitly permitting abortion on request, the grounds are, nonetheless, sufficiently wide as to facilitate an enabling rather than disabling environment for the provision of access of abortion services to pregnant women who need them.

6.6 Access to Health Services by Non-citizens

[39] Though not addressing access to health services directly, the decision of the Constitutional Court of South Africa in *Khosa and Others v Minister of Social*

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[796] Section 15 *ibid*.
[797] Section 27 *ibid*.
[798] *Christian Lawyers' Association of South Africa v Minister of Health* 2004 (10) BCLR 1086 (High Court of South Africa).
[799] Section 28(1)(b) of the South African Constitution.
[800] Section 28(1)(d) ibid.
[801] Section 12(2)(a) of the South African Constitution.
[802] Section 12(2)(b) *ibid*.
[803] Article 551 of the Penal Code (Ethiopia).

Development and Others[804] is a valuable precedent for determining entitlement to health services by non-citizens. Immigrant populations can be disadvantaged and marginalized by laws and policies that make access to health services contingent upon citizenship. Limiting provision of health services to citizens may be seen by domestic authorities as a rational way of managing finite and constrained resources. At the same time, excluding non-citizens from access to health services may constitute unfair discrimination. Furthermore, it can undermine public health in areas such as HIV/AIDS. The success of HIV preventative strategies crucially depends on the collective responsibility of and co-operation by, citizens and non-citizens alike.

[40] *Khosa* concerns an application brought by applicants who had immigrated to South Africa, from Mozambique, were permanent residents,[805] but not citizens, of South Africa under South African law. They had been denied access to social assistance by way of social grants for the elderly under the Social Assistance Act of 1992,[806] and child–support grants and_care-dependency grants under the Welfare Laws Amendment Act of 1997.[807] Both Acts reserved the grants for South African citizens only. Apart from not meeting the citizenship requirement under the Acts, the applicants were destitute people and met the means test under the Acts. They challenged the constitutionality of the Acts mainly on ground that it was inconsistent with the state's obligation under section 27(1)(c) to provide social security to 'everyone'. Section 27 says, inter alia:

> (1) Everyone has the right to have access to —
>
> . . .
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

[41] The applicants also contended that the exclusion of permanent residents constituted a violation of the rights to equality (section 9), human dignity (section 10), and life (section 11), and the rights guaranteed to children under section 28 of the Constitution. The main issues before the Constitution court were: 1) whether the word 'everyone' in section 27 of the Constitution, includes permanent residents; 2) whether it was reasonable to confine everyone only to South African citizens; and 3) whether excluding permanent residents under the challenged Acts constituted unfair discrimination.

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[804] *Khosa and Others and Minister of Social Development and Others* 2004 (6) SA 505.

[805] Permanent residence status was acquired under the Aliens Control Act No 96 of 1991 (South Africa).

[806] Social Assistance Act No 59 of 1992 (South Africa).

[807] Welfare Laws Amendment Act No 106 (South Africa).

[42] The Constitutional Court held unanimously that excluding permanent residents was inconsistent with section 27 of the Constitution and constituted, inter alia, unfair discrimination and that the impugned legislation was, therefore unconstitutional. By way of a remedy, the words 'permanent resident' would be read in after the word 'citizen' in the impugned legislation.

[43] In the main, the Constitutional Court resolved the case by applying the *Harksen v Lane* test[808] for determining unfair discrimination and finding violations of the rights to equality and human dignity. The focus on the Court's inquiry was on the impact of the discrimination in the applicants. The Court found that excluding destitute permanent residents from accessing social security benefits impacted on permanent residents in an adverse and serious manner, and could not be justified. Permanent residents when juxtaposed with citizens were a vulnerable minority with little political capital. Excluding permanent residents from social security benefits sent the message that they were inferior and less worthy members of society. It consigned members of the community who had no means of supporting themselves to relationships of dependency upon families and cast them in the role of supplicants. The court indicated that there might be circumstances where it would be justifiable to limit the right of access of non-citizens to social security, such as where, on account of scarcity of resources, exclusion is temporary and an incident of the progressive realization of a socio-economic right. However, the Court said this was not such an instance as the state's argument was that non-citizens had no legitimate claim to social security.[809]

[44] It was also part of the reasoning of the Court in *Khosa* that the right of access to social security was a socio-economic right and that socio-economic rights are as fundamental and as important as the other rights in the Bill of Rights and that any criterion that is chosen by government to exclude or limit them must be consistent with the Bill of Rights. Excluding non-citizens irrespective of their immigration status was over-inclusive as it failed to draw a distinction between those who had become part of the society and made their homes in South Africa, such as permanent residents and those who had not done so.

[45] *Khosa and Others* has implications not only for access to social security but also access to other socio-economic rights guaranteed to 'everyone' by the Constitution, including access to health care services. It is the first case to examine the intersection between equality and universal access to socio-economic rights. The term 'everyone' connotes universality and the state must have sufficiently good reasons for excluding immigrants or any other social group from such services. In this regard, *Khosa and Others* cannot be understood

[808] *Harksen v Lane* 1997 (11) BCLR 1489 (Constitutional Court of South Africa). This test was discussed in Chapter 2 of this study.
[809] *Khosa and Others* para 50.

as only extending to permanent residents. Other categories of immigrants and other groups that are vulnerable to political and economic marginalization are to be regarded as included unless the state can come up with sufficiently good reasons why it would be reasonable to exclude them.

6.7 Access to Health Services by Incarcerated Persons

[46] Incarceration renders incarcerated persons vulnerable to barriers to access to health services. The fact of being compulsorily confined to one location means that incarcerated persons reliant upon the incarcerating authority for access to health care services. Prisoners cannot easily exercise choice about when to access health services or what type of services to obtain. Laws, policies and practices that are oblivious to the reality of the sexual needs of those that are incarcerated, create opportunities for undermining sexual health. The fact of incarceration does not diminish sexual needs. Sexual activities do take place in correctional facilities. Incarcerated persons have the same need of protecting themselves from sexually transmitted infections as their counterparts that are not incarcerated. Failure to supply condoms to prisoners makes correctional facilities not only high risk environments for the prisoners, but also the bridgehead for the transmission of disease to communities.

[47] Among the surveyed countries, it is only South Africa which has begun to develop jurisprudence relating to access to treatment for those that are incarcerated. The South African Constitution has provisions that address incarcerated person directly in respect of health services. Section 35(2)(e) of the South African Constitution guarantees an incarcerated person a right to receive 'adequate medical treatment' at state expense. Section 35(f) (iv) guarantees an incarcerated person a right to be visited and examined by a medical practitioner of his or her choice. These provisions have been litigated albeit at the level of the High Court only.

[48] The issue that arose in *B and Others v Minister of Correctional Services and Others*[810] was whether refusal by the Department of Correctional Services to pay for the cost of antiretroviral therapy for four prisoners who were HIV-positive was a breach of the right to receive "adequate medical treatment" under section 35(2)(e). The Court held that in respect to prisoners for whom antiretoviral therapy had been medically prescribed, there had been a breach. The Department of Correctional Services had pleaded lack of resources, but had failed to submit convincing supporting evidence. The Department failed to persuade the court that the treatment in question would be unaffordable.

[810] *B and Others v Minister of Correctional Services and Others* (1997) (12) BCLR 1696 (High Court of South Africa).

[49] In *EN and Others v The Government of South Africa and others*,[811] 15 prisoners living with HIV/AIDS sought to compel correctional authorities to provide them with antiretroviral therapy. The prisoners relied on section 27 and section 35(2)(e) of the Constitution. It was held by the High Court that the state was in breach of sections 27 and 35. The court ordered the prison authorities to provide the treatment forthwith so as to save life.

[50] In *S v Vanqa,*[812] the applicant was successful in persuading the court that his constitutional right under violation of section 35(2) (e) of the Constitution had been violated. The applicant suffered from asthma. While incarcerated awaiting trial, he suffered serious asthma attacks. The prison authorities neither provided him with medical care nor permitted him to use medicines that had been brought for him by his family. The court held that failure by the prison authorities to provide the applicant with necessary treatment and preventing him from using medicines brought for him constituted a most serious breach of section 35(2)(e). The court ordered that the applicant be released on bail.

[51] *S v Mpofana*[813] concerns a claim brought under section 35(f)(iv) of the Constitution. An applicant for bail successfully argued before a High Court that he had been wrongly denied access to a medical practitioner of his choice whilst in state incarceration. By way of a remedy, the court said that the state had the option of providing the applicant with access to medical treatment, or in the alternative desisting, from denying the applicant from exercising choice about accessing health care.

[52] In the case of *Festus Odaife v Attorney General of the Federation and Others,*[814] (that was discussed earlier) while the Federal High Court of Nigeria held that HIV was not status protected against discrimination under article 42 of the Nigerian Constitution, the Court found that failure to provide treatment for opportunistic infection constituted a breach of section 8 of the Prison Act which enjoins prison authorities to render necessary treatment to prisoners. The Court also said that denial of treatment constituted a breach of article 16(2) of the African Charter which enjoins states to 'take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.[815]

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[811] *EN and Others v The Government of South Africa and Others*, Unreported case No 4567/06 (2006).
[812] *S v Vanqa* 2000 (2) SACR 37 (High Court of South Africa).
[813] *S v Mpofana* 1998 (1) SACR 40 (High Court of South Africa).
[814] *Festus Odaife and others v Attorney General of the Federation and others* (2004) AHRLR 205 (NgHC 2004) (Federal High Court of Nigeria).
[815] Nigeria has incorporated the African Charter into domestic law. However, the recognition of Nigeria's obligations under the African Charter in respect of article 16(2) appears to be selective to the extent that the same Federal High Court could not interpret and apply the protection guaranteed under the African Charter as extending to non-discrimination on the ground of HIV status.

[53] Among the surveyed countries, South Africa is the only jurisdiction that which has adopted policy to supply condoms to prisoners.[816] In an unreported case – *W and Others v Minister of Correctional Services*,[817] a High Court ordered the Department of Correctional Services to supply condoms to prisoners as part of a broader order relating to the obligations of Department towards prisoners.

6.8 CONCLUSIONS

[54] The African Charter, the African Children's Charter and the African Women's Protocol on the Rights of Women provide good edifices for the development and implementation of a right to health services for the realization of sexual health at the domestic level. However, domestic constitutions and legislation have generally not followed suit.

[55] The South African Constitution provides instructive models for respecting, protecting and promoting access to health services. Section 27 of the South African Constitution which guarantees everyone a right to health services is modeled after the Convention on Economic, Social and Cultural Rights. Section 27 has been interpreted and applied in a progressive manner by the Constitutional Court of South Africa.

[56] Though access to contraceptive products and services is promoted by all African countries, there are generally no human rights frameworks to ensure accessibility for women and adolescents.

[57] The South African Children's Act of 2003 is the only example of a serious attempt to comply with state obligations under the Children's Convention and the African Children's Charter in relation to access to health services by children at the domestic level. It is also the only example of a domestic attempt to clearly address the contraceptive needs of adolescents as well as their needs for HIV-related testing and counseling.

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[816] Department of Correctional Services *Management Strategy: AIDS in Prison. Provision of Condoms to the Prison Population* (2002) section 6. However, the policy of supplying condoms to prisoners does not in practice translate into accessibility in all its manifestation as envisaged by General Comment 14 of the Committee on Economic, Social and Cultural Rights: The Rights *General Comment 14: The Rights to the Highest Attainable Standard of Health* E/C.12.2000/4 (2000). Condoms are not always available or distributed with lubricants. Condoms are distributed in common areas that are within easy sight of wardens and other prisoners: KC Goyer, Saloojee Y, Richter M and Hardy C on behalf of the AIDS Law Project and the Treatment Action Campaign *HIV/AIDS in Prison: Treatment, Intervention, and Reform: A Submission to the Jali Commission* (2004) 32-33. Available at < www.informaworld.com/index/M124N7M661788V04.pdf >.

[817] *W and Others v Minister of Correctional Services* Case No 2434/96

[58] Termination of pregnancy remains highly criminalized in African jurisdictions. South Africa provides an exception to the rule. The South African Choice on Termination of Pregnancy Act constitutes radical reform of abortion in line with the recognition of respect, protection and promotion of sexual and reproductive health as human rights. Ethiopian reform of abortion law is a positive development.

[59] Jurisprudence on access to health services by immigrants is generally lacking. However, the decision of the Constitutional Court of South African *in Khosa and Others* provides a progressive way forward when dealing with entitlements of persons who, though not citizens, are, nonetheless, legally resident in the country.

[60] Jurisprudence on access to health services by incarcerated persons is generally lacking. However, South Africa has begun to develop positive standards. The right of incarcerated persons to access health care services is explicitly guaranteed under the South African Constitution.

7 INFORMATION, EDUCATION AND EXPRFESSION RELATED TO SEX AND SEXUALITY

7.1 Introduction

[1] This chapter summarizes the jurisprudence on information, education and expression related to sex and sexuality. The underpinning premises are that information, education and expression about sex and sexuality impact on the realization of sexual health as well as human rights.

[2] Access to information and education about sexually transmitted infection is essential for individual empowerment. Individuals cannot meaningfully exercise choice and take responsibility for their sexual health if they are denied facts about how to prevent the spread of sexually transmitted infections through sexual intercourse. The African region has pandemic levels of HIV. At a societal level, the implementation of effective HIV preventative strategies depends on dissemination of, and access to, HIV-related information. Knowledge about sex and sexuality is essential for empowering individuals to exercise choice in relation to becoming sexually active. Information on contraception empowers choices about whether to become pregnant.

[3] For children, especially, access to age appropriate information and education about sex and sexually is necessary for survival and development. Information about sex and sexuality is not acquired naturally by all children as part of growing up. Skills for coping with situations that undermine sexual health such as sexual abuse or exploitation do not come naturally to children. Gender inequality renders girls in particular particularly vulnerable to HIV and pregnancy. Adolescents with little or no education have little or no understanding of sexuality and reproductive functions.

[4] In African society generally, open discussions about sex and sexuality are generally shunned. Though parents are primary care-givers and are usually able to provide a safe and supportive environment for the growth and development of their children, there are also many parents who are disinclined towards discussing sex and sexuality with their children. It is essential to supplement the information given by parents or lack of it, in secondary institutions and schools in particular.

[5] The school has immense significance as place for learning not only about literacy and numeracy but also about development and socialization, including sex and

sexuality.[818] Education must seek to be responsive to the academic as well physical and emotional development of the child.[819] Equipping the child with skills that empower him or her to make personal decisions that maximize health and minimize health risks is in the best interests of the child. While children must be protected from information that is harmful to them, equally, they have a right to age-appropriate information that promotes health and development and the practice of safe behaviour.[820] Adolescents have an equal need for information about contraception, the risk of early pregnancy, and sexually transmitted diseases.[821]

[6] It is not just schools that ought to play a role in educating adolescents about health and sexuality. Non-governmental organizations, youth organizations, and civil society generally have a role to play not least because not all adolescents remain in school.

[7] Without access to information and education that is pertinent to the realization of sexual health, the rights to health, information and education, especially, are prima facie violated.

7.2 Regional Framework

[8] The African Charter intersects with information, education and expression pertaining to sexual health through the rights to: receive information;[822] express and disseminate information;[823] health,[824] and education.[825] The African Children's Charter guarantees the right to expression,[826] education[827] and health.[828] Unlike the Convention on the Rights of the Child,[829] the African Children's Charter does not contain a free standing right to information provision. At the same time, as part of the realization of the right to health, article 14 of the African Children's Charter imposes a duty upon the state to 'ensure that all sectors of society, in particular parents, children, community leaders and workers are informed and supported in the basic knowledge of child health.'[830] In this way, the African Children's Charter guarantees children a right to

[818] Committee on the Rights of the Child General Comment No 4 Adolescent Health and Developments in the Context of the Convention on the Rights of the Child para 17.
[819] *Ibid*.
[820] Para 26 *ibid*.
[821] Para 28 *ibid*.
[822] Article 9(1) of the African Charter.
[823] Article 9(2) *ibid*.
[824] Article 16 *ibid*.
[825] Article 17 *ibid*.
[826] Article 7 of the African Children's Charter.
[827] Article 11 *ibid*.
[828] Article 14 *ibid*.
[829] Article 17 of the Convention on the Rights of the Child.
[830] Article 14(2)(h) of the African Children's Charter.

information that is relevant to the protection and promotion of their sexual health not just as a negative right that requires non-interference on the part of the state, but more significantly, as a socio-economic right that imposes a positive duty on the state. The pandemic levels of HIV in the African region accentuate the import of the duty to provide information about sexual health.

[9] A number of provisions of the African Women's Protocol support the right to information and education about sexual health. Article 5, which prohibits harmful traditional practices, requires the state to take legislative and other measures, including the 'creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes'.[831] It follows, for example, that a state party in which female genital mutilation and early marriage are prevalent has a duty to raise awareness about the harmful effects of such practices. Article 12, which guarantees women a right to education and training, is implicitly applicable to sexual health. Article 14 guarantees women the right to health, including 'sexual and reproductive health'.[832] This scope of the right to sexual and reproductive health includes the right of women to: control their fertility;[833] decide whether to have children, the number of children and the spacing of children;[834] choose any method of contraception;[835] and protection against sexually transmitted infections.[836]As part of discharging the obligations attendant to the right to sexual and reproductive health, states are requires to provide, inter alia, educations and communication programmes to women.[837]

7.3 Domestic Laws: Information and expression

[10] The constitutions of the sampled countries have provisions that can be relied upon to enforce the respect, protect and fulfil the right to information, education and expression about sexual health. The right to information is found in virtually all the constitutions of the sampled countries but as a negative right and in tandem with, or as an integral part of, the right to freedom of expression. For example, section 20(1) of the Constitution of Zimbabwe provides that 'no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence'. An equivalent of this provision is found in all the constitutions of the sampled

[831] Article 5(a) of the African Women's Protocol.
[832] Article 14(1) of the African Women's Protocol.
[833] Article 14(1)(a) *ibid*.
[834] Article 14(1)(b) *ibid*.
[835] Article 14(1)(c).
[836] Article 14(1)(d).
[837] Article 14(2)(a).

countries.[838] When posited in this manner, the rights to information and expression do not ordinarily impose a positive duty upon the state to make information available for the realization of sexual health. Rather they serve to restrain the state from undue interference with the exercise of a right.

[11] In two countries among the sample – Uganda and South Africa - the right to information also serves to recognize a fundamental right to require the state to provide, upon request, information that it possesses where that information is necessary for the exercise of a right. Article 41(1) of the Constitution of Uganda guarantees a right of access to information in the possession of the state. South Africa has legislation that implements the constitutional guarantee of a right to receive and impart information in section 32 of the South African Constitution. The legislation recognizes a right of access to information in the possession of the state and provides an administrative regime for the exercise of this right.[839]

[12] Constitutions invariably render the rights information and expression subject to limitation. Obscenity or censorship laws are among the instruments that are used by all countries to regulate at a legislative level such limitation. The laws are historically a colonial bequest and they use the notions of 'obscenity, 'indecency' or 'tendency to corrupt or deprave morals' to denote that which is prohibited.[840] In this connection, section 166 of the Ugandan Penal Code says, for example:

> Any person who—
> (a) for the purpose of or by way of trade or for the purpose of distribution or public exhibition, makes, produces or has in his or her possession any one or more *obscene* writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects, or any other object tending to *corrupt morals*;
> (b) for any of the purposes above-mentioned imports, conveys or exports, or causes to be imported, conveyed or exported, any such matters or things, or in any manner puts any of them in circulation;
> (c) carries on or takes part in any business, whether public or private, concerned with any such matters or things, or deals in any such matters or things in any manner, or distributes any of them, or exhibits any of them publicly or makes a business of lending any of them;
> (d) advertises or makes known by any means with a view to assisting the circulation of, or traffic in, any such matters or things, that a person is engaged in any of the acts referred to in this section, or advertises or makes known how, or from whom, any such matters or things can be procured either directly or indirectly; or

[838] See also: Eritrea: article 19; Ethiopia: article 29(2); Cameroon: Preamble to the Constitution; Kenya:: articles 70(b) and 79(1) ; Lesotho: article 14; Nigeria: article 39; Tanzania: article 18; Uganda: articles 29 and 41; South Africa: article 16.
[839] Promotion of Access to Information Act of 2000 (South Africa).
[840] Ethiopia: Article 640(2) of the Criminal Code; Uganda: Article 166 of the Penal Code: Zimbabwe: Censorships and Entertainments Control Act.

(e) publicly exhibits any *indecent* show or performance or any show or performance tending to corrupt *morals*, commits a misdemeanour and is liable to imprisonment for two years or to a fine of two thousand shillings.[841]

In terms of case law among the sample, Zimbabwe and South Africa provide the illustrations of the application of censorship law as a limitation in relation to sexual health. In *Gays and Lesbians of Zimbabwe v The Chairman of the Board of Censors and the Minister of Home Affairs*[842] the High Court of Zimbabwe set aside an order issued by the Board of Censors prohibiting the Gays and Lesbians Association of Zimbabwe from mounting an exhibit or display at an international book fair purported using powers under section 17(1) of the Zimbabwean Censorship and Entertainments Control Act.

[13] Section 17(1) of the Zimbabwean Act gives the Censorship Board the power to prohibit 'the public exhibition or intended exhibition of any publication on the ground that that 'it is likely to be associated with breaches of the peace, disorderly or immoral behaviour or abuses relating to the consumption of alcohol or drugs'. Section 17 is part of an Act that prohibits a publication that is 'undesirable'. A publication is undesirable if it is 'indecent or obscene or is offensive or harmful to public morals or is likely to be contrary to public health'.[843] Indecent or obscene means having a 'tendency to deprave or corrupt the minds of persons who are likely to be exposed to the effect or influence thereof'.[844] However, the court did not consider this provisions as it was able to set aside the order of the Censorship Board without considering the content of what was to be displayed at the book fair. The High Court held that the order issued by the Censorship Board was deficient as it did not specify precisely what it was prohibiting. The order sought to prevent the Gays and Lesbians Association of Zimbabwe from mounting a display but without in fact indicating the nature of the thing that would have been displayed. In essence, the Board did not know what was to be displayed. Furthermore, the order referred to what it sought to prohibit as 'a stand or exhibiting' without drawing a distinctions between these two concepts.

[14] The right to freedom of expression guaranteed by section 16 of the South African Constitution has been litigated in South Africa in the context of distribution of pornographic material. Prior to the 1996, pornography was regulated by the Indecent or Obscene Photographic Matter Act of 1967 and the Publications Act of 1974. The Acts used a Christian moral perspective to determine what was indecent or obscene. Section 1 of the Publications Act expressly provided that: 'In

[841] Section 166 of the Penal Code (Uganda). Emphasis added.
[842] *Gays and Lesbians of Zimbabwe v The Chairman of the Board of Censors and the Minister of Home Affairs* HC6492/96 (High Court of Zimbabwe).
[843] Section 11 of the Censorship and Entertainments Control Act (Zimbabwe).
[844] Section 27 *ibid*.

the application of this Act the constant endeavour of the population of the Republic of South Africa to uphold a Christian view of life shall be recognized'. The Indecent or Obscene Photographic Matter Act and the Publications Act have now been supplanted by the Film and Publications Act of 1996. The Films and Publications Act proceeds on the premise that prohibiting the possession and dissemination of pornography are prima facie a violation of the rights to privacy and expression, respectively, unless it can be justified under the Constitution. The Act also proceeds on the premise that women and children are vulnerably to harm and sexual violence and exploitation through distribution of pornography. In this connection, the Act prohibits possession of visual display of children under the age of 18 participating in, engaging in or assisting in sexual conduct or lewd display of nudity. The section also prohibits distribution of the same, as well as visual displays of explicit violent sexual conduct and explicit sexual conduct which degrades a person and which constitutes incitement to cause harm. The prohibitions do not apply, however, to bona fide scientific, documentary, literary or artistic publications.[845]

[15] The Constitutional Court of South Africa applies a proportionality test when determining challenges to laws and practices that limits the right to freedom of expression. The proportionality test is mandated by the limitation clause of the South African Constitution – section 36 - which prescribes to courts specific criteria to apply when adjudicating the limitation of a fundamental right. Section 36 says:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
>
> a. the nature of the right;
> b. the importance of the purpose of the limitation;
> c. the nature and extent of the limitation;
> d. the relation between the limitation and its purpose; and
> e. less restrictive means to achieve the purpose.

[16] The implication of section 36 is that right cannot be limited merely because there is a competing interest such as protecting the welfare of society. Rights can only be limited if the competing interests are important or compelling enough as to outweigh the interest in respecting the individual right that is being limited. In *De Reuck v Director of Public Prosecutions*,[846] the applicant challenged the constitutionality of a prohibition under the Films and Publications Act to create, produce, import or possess child pornography. The Court said that a ban as unconstitutional unless it could be justified. The Court observed that the ban was

[845] Sections 28 and 30 of the Films and Publications Act of 1996.

[846] *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (Constitutional Court of South Africa)

not absolute and that the Act contained a procedure for permitting the applicant to avail themselves of the exceptions under the Act. It further observed that the right to expression was an important part of the democratic process as it, inter alia, facilitated respect for the moral agency of the individual and the search for truth. At the same time, it is not an absolute right. It has to be balanced against countervailing important interests, including protecting the dignity of children, eradicating a market for visual images that are made from sexually exploiting and abusing children and preventing the likelihood of the images being used to exploit children. In this case the harm to the children outweighed the applicant's right expression.

7.4 Health Information and Education: The Right to Health

[17] As alluded to earlier, the realization of the right to health necessarily imposes on the state an obligation to inform and educate the populace about health in appropriate ways. Among the sampled countries South Africa and Ethiopia provide for substantive rights to health. South Africa does so in the context of a constitution which has provisions recognizing the rights to: access to health services including reproductive health services for everyone;[847] basic health services for children;[848] and treatment for those incarcerated by the state.[849] The right to make decisions concerning reproduction in section 12(2(a) of the Constitution necessarily implies a duty upon the date to fulfil this right through inter alia, provisions of information, including information about pregnancy, contraception and sexually transmitted infections.

[18] The duties incumbent upon the state in respect of health under the South African Constitution are implemented through the National Health Act of 2003. According to section 12 of the National Health Act, the national department and every provincial department, district health council and municipality must ensure that appropriate, adequate and comprehensive information is disseminated on the health services for which they are responsible. The right to education guaranteed by section 29 of the South African Constitution supports a positive duty to provide information about health.

[19] The Ethiopian Constitution is explicit about the duty to provide information pertinent to family planning. Article 35(9) of the Ethiopian Constitution says that as part of preventing harm from pregnancy and childbirth, women have a 'right of access to family planning education, information and capacity'. Lesotho,[850]

[847] Section 27 of the Constitution
[848] Section 28(1)(c) *ibid.*
[849] Section 35(2)(e) *ibid*.
[850] Articles 27 and 28 of the Constitution of Lesotho are state directive principles on health and education respectively.

Nigeria[851] and Uganda[852] have state directive principles that whilst not necessarily founding justiciable right to health and/or education could, nonetheless, be interpreted as supporting a state duty to provide information and/or educate about health The Constitution of Uganda also guarantees a substantive right to education.[853]

[20] Kenya, Tanzania and South Africa have legislative provisions that require the state to provide information about health. The Kenyan HIV/AIDS Control and Prevention Act of 2006 seeks, inter alia, to: promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS; protect the human rights of persons living with HIV/AIDS; ensuring the provision of basic health care and social services for persons; to promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission.[854] The Act makes the promotion of awareness and education about HIV/AIDS a centerpiece of the strategy against HIV/AIDS.[855] The Act charges he state with and its organs and agencies with the duty to secure these objectives. The health and educations sectors are crucial delivery sites. The Act promotes voluntary counseling and testing as part of education about HIV/AIDS.[856] The Tanzanian HIV/AIDS (Prevention and Control) Act of 2008, which has similar objectives to its Kenyan counterpart, adopts the same approach to the promotion of awareness and educations about HIV/AIDS.

[21] At a policy level, African jurisdictions have generally adopted policies on raising awareness about HIV/AIDS.[857] African jurisdictions have also generally adopted policies lifeskills education as a strategy for educating children about HIV/AIDS.[858] All the African countries have policies to 'family planning' information and services but with same having services for the youth as well.[859]

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[851] Articles 17 and 18 of the Constitution of Nigeria contain state directive principles on health and education respectively.

[852] Articles XVIII and XX of the Constitution of Uganda contain state directive principles on education and health respectively.

[853] Article 30 of the Constitution of Uganda.

[854] Article 4 of the HIV/AIDS Prevention and Control Act (Kenya).

[855] Sections 4-7 *ibid*.

[856] Sections 13-19 *ibid*.

[857] **Ethiopia** ; **Eritrea** ; **Cameroon** ; **Kenya:** Kenya National HIV/AIDS Strategic Plan ; **Malawi**: **Lesotho**: National AIDS Policy; **Nigeria** National Policy on HIV/AIDS ; **Tanzania** ; ; **South Africa**: ; **Uganda** ; **Zimbabwe**: Zimbabwe National HIV/AIDS Plan; National Behaviour Change Strategy.

[858] **Ethiopia** ; **Eritrea** ; **Cameroon** ; **Kenya** ; **Malawi**: **Lesotho**: National School Health Policy (?2002); **Nigeria** National Family Life and HIV Education for Junior and Secondary Schools (2003); **Tanzania**; **South Africa**: National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Schools (1999); **Uganda** ; **Zimbabwe**.

[859] **Ethiopia** ; **Eritrea** ; **Cameroon** ; **Kenya:** National Policy on Gender and Development (2000); National Policy for Sustainable Development; **Malawi**: National Health Policy (2008); Malawi Reproductive Health

The majority of countries, however, have tended to proceed on the basis that such services are for married couples and/or adults only, discriminating on the basis on marital status and age.

7.5 Conclusions

[22] At a regional level, the African Charter-based treaties, including the African Children's Charter and the African Women's Protocol, require states to discharge their duties in relations to the rights to health by inter alia, taking positive steps to provide information and education that is pertinent to the realization of sexual health.

[23] The presence of a right to health in a constitution lends itself to an implicit duty upon the state to provide information and education about sexual health as a justiciable duty. Where the duty to provide health services appears as a directive principle in a constitution, it could also be said that a duty to provide information and education about sexual health is implied. The majority of African countries do not recognize health as justiciable discrete right under a constitution. An increasing number, however, recognize a duty to provide health as a state directive principle.

[24] Among the sampled countries, the Kenyan and Tanzanian HIV/AIDS Prevention and Control Acts are the best examples in the African region of clear legal duties on the part of the state to provide information and education for the prevention of sexually transmitted infections.

[25] African obscenity laws are predominantly based on colonial models promoted very broad and non-transparent discretion of the part of the state and courts to restrict information with the sexual content. Section 36 of the South African Constitution – the limitation clause – provides more transparent and human rights compliant criteria for adjudicating restrictions of the dissemination of information with a sexual content.

Policy (2002); **Lesotho**: National Reproductive Health Policy; National Adolescence Health Policy; **Nigeria**: National Reproductive Health Policy; National Policy on Health and Development of adolescents and Young People in Nigeria (2007); Tanzania: National Population Policy (2006); ; **South Africa**; **Uganda**: National Policy Guidelines and Service Standards for Reproductive Health Services (2001); National Adolescent Health Policy ; **Zimbabwe**.

8 SEX WORK

8.1 Introduction

[1] The offering of sex for reward and activities surrounding sex work are generally criminalized in African countries. From a public health perspective, criminalization of sex work is not conducive to putting sex workers within the reach of strategies to prevent the spread of sexually transmitted infections. Fear of arrest, prosecution and imprisonment deters sex workers from accessing health care services. The police practices of using possession of condoms as evidence to support criminal charges in relation to sex work, is a deterrent against using condoms in sex work and renders sex work a high risk activity and a bridgehead for transmission of HIV and other sexually transmitted infections to the community.

In the era of the HIV/AIDS pandemic in the African region especially, criminalization of sex work and the attendant stigmatization of sex workers undermines HIV/AIDS policy that are built around mobilizing communities and individuals, including sex workers, to becoming active participants in checking the spread of the pandemic, though inter alia, early treatment of sexually transmitted infections and knowing one's HIV status. The HIV/AIDS policies of all countries in the African region expressly acknowledge the vital importance of preventing the spread of sexually transmitted infection through sex work.

[2] Criminalization of sex work creates opportunities for blackmail and violence, including rape that may be perpetrated against sex work workers by clients, pimps, and even law enforcement officers. Crimes perpetrated against workers are unlikely to be reported by the victims to law enforcement agencies for fear of secondary victimization.

[3] From a human rights perspective, criminalization of sex work implicates several human rights violations, but mostly, the rights to health, self-determination, human dignity, privacy and equality. Criminalization of sex work that results in deterring sex workers from taking measures to render sex safer through using condoms as well as coming forward for treatment for sexually transmitted infections and voluntary counseling and testing for HIV detracts from the duty of the state to fulfil the right to health. Preventing a person from taking up sex work is prima facie an infringement of their right to liberty and self-determination. Of course, the state has a compelling interest in regulating sex work in order to ensure that it is carried out in a manner that does not pose a significant risk to sex workers and the public. However, criminal regulations that

achieve a contrary effect least serve this interest and call, instead, for regulation of sex work that promotes public health and is least restrictive of the choice to become a sex worker.

[4] Given the intimate nature of sex, privacy is an issue in criminalizing sex work. Collecting evidence to support a sex work-related charges often involves bedroom snooping and interfering with the privacy of the sex workers and their clients. Laws that provide that the offence of offering sex for reward can only be committed by females implicate equality and non-discrimination. The same would apply where both females and males are implicated but in practice only one sex or gender (usually women) are prosecuted. A rule, policy or practice that is facially neutral but impacts disproportionately and adversely on a particular group that is otherwise entitled to equal protection from discrimination, is an instance of indirect discrimination. It is women who bear the brunt of criminal prosecution for sex work.

8.2 Domestic Regulation of Sex Work

[5] The predominant pattern of regulating sex work among the surveyed countries is one of criminalizing soliciting for sex, living off earnings from prosecution keeping a brothel, procuring another person for sex work and coercing another person into sex. Often the laws purport not to criminalize sex work per se, but activities surrounding it. But the non-criminalization of the actual sex work in many instances tends to be only technical as sex work can hardly be conducted without infringing at least one of the surrounding acts that is prohibited. Since all laws criminalize living off the earnings from sex work, it cannot be said that in substance sex work itself is not criminalized.

[6] Zimbabwean law does not criminalize sex work per se but activities around sex work. Section 81 of the Criminal Law (Codification and Reform) Act of Zimbabwe renders it an offence to 'publicly' solicit someone for the purpose of 'prostitution'.[860] Soliciting in a public place is defined broadly to mean soliciting in 'any place to which the public, or any section of the public, have access'.[861] It also includes soliciting though 'publication in any printed or electronic medium' that is intended for the public.[862] A person who facilitates prostitution such as by keeping a brothel or demands from the 'prostitute' a reward in return for facilitating 'prostitution' commits an offence.[863] It is also an offence to procure another for the purpose of prostitution.

[860] Criminal Law (Codification and Reform) Act of 2004 (Zimbabwe)
[861] Section 81(1)(a) *ibid*.
[862] Section 81(1)(b) *ibid*.
[863] Section 82 *ibid.*

[7] Like Zimbabwe, Kenya criminalizes the activities around sex work but not sex work itself. Its Penal Code renders it an offence for a male person to live off the earnings of 'prostitution' and to 'persistently solicit' for prostitution.[864] It is an offence for a male person to facilitate prostitution. A female person who lives of the earnings of prostitution or facilitates prostitution commits an offence.[865] Under the Kenyan Sexual Offences Act, it is an offence to procure children for the purposes of prostitution or to facilitate child 'prostitution'.[866]

[8] Malawi criminalizes coercing a person into 'prostitution',[867] facilitating prostitution,[868] and living off the earnings of prostitution.[869] In *Republic v Kadzakumanja*,[870] the High Court of Malawi said that section 13 of the Penal Code, which criminalizes living off the earnings of prostitution, is certainly violated when one person lives off the earnings of another that are derived from prostitution. At the same time the Court left open the question whether it is an offence for sex worker to live on her own earnings. In practice, however, law enforcement officers treat sex workers as offenders.[871] The Court said this was a 'moot point'.[872] The laws of Eritrea,[873] Cameroon,[874] Lesotho,[875] Nigeria,[876] South Africa,[877] Tanzania,[878] and Uganda[879] all criminalize sex work and/or the activities around sex work.

[9] With the exception of South African law, the constitutional validity of laws that criminalize sex work have not been challenged in the domestic courts. In *Jordan and Others v The State*,[880] the Constitutional Court of South Africa was asked to determine the constitutional validity of criminalization of sex work. The appellants, who had been convicted by a Magistrate Court under the South

[864] Section 153 of the Penal Code (Kenya).
[865] Section 154 *ibid*.
[866] Section 15 of the Sexual Offences Act of 2006 (Kenya).
[867] Section 143 of the Penal Code (Malawi).
[868] Section 147 *ibid*.
[869] Section 146 *ibid*.
[870] *Republic v Kadzakumanja* Malawi Law Report Vol. 9, pp. 343-345 (1980).
[871] Government of Malawi Combined Second, Third, Fourth and Fifth Periodic Report of States Parties to the CEDAW Committee CEDAW/C/MW1/2-5 (2004).
[872] *Ibid*.
[873] Section 604 of the Penal Code (Eritrea).
[874] Sections 294(1) and 294(2), of the Penal Code (Eritrea).
[875] Common law and section 10 of the Sexual Offences Act of 2003 (Lesotho).
[876] Sections 255A and 255B of the Criminal Code (Nigeria). The code is applicable in the southern part of Nigeria.
[877] Sections 2, 3 and 20 of the Sexual Offences Act of 1957 (South Africa).
[878] Sections 139(a), 145, 146, 147, and 148 of the Sexual Offences (Special Provision) Act of 1998 (Tanzania).
[879] Sections 131(1)(b), 131(1)(b), 136, 137 and 139 of the Penal Code (Uganda).
[880] In *Jordan and Others v The State* 2002 (6) SA 642 (Constitutional Court of South Africa).

African Sexual Offences Act of 1957 (as amended),[881] were challenging the validity of the Act under the Constitution. Section 20(1)(aA) makes it an offence for any person who has sex for reward. Sections 2 and 3 of the Act render brothel keeping an offence. They had appealed to the High Court and partially succeeded. It had been held by the High Court that the section which criminalised sex for reward was unconstitutional but not the section that criminalised keeping a brothel.[882] High Court's reasons were: that section 20 of the Act constituted unfair discrimination to the extent that it made a distinction between the person seeking commercial sex and the person providing commercial sex (customer and merchants distinction); that section 20 was also discriminatory to the extent that it made a distinction between a person who received money for sex and another who received a benefit in kind such as a paid holiday; that criminalising brothel keeping was a legitimate response to the commercial exploitation of 'prostitutes' and trafficking of human beings. The matter was brought before the Constitutional Court in part to seek confirmation of the declaration of invalidity of a section of an Act, and in part as an appeal against a conviction under the brothel provisions. The case proceeded on the basis that the relevant constitution was the Interim Constitution rather than the Final Constitution.[883]

[10] The main issue was whether section 2, 3 and 20(1)(Aa) of the Sexual Offences Act were a violation of the right to: equality;[884] human dignity;[885] freedom and security of the person;[886] privacy;[887] and economic activity,[888] and thus unconstitutional.

[11] The Constitutional Court held by a majority of 6 to 5 that the provisions of the Sexual Offences Act in issue did not violate the rights to equality, human dignity, freedom and security of the person, privacy and economic activity and that the appeal must fail.

[12] In terms of the reasoning, the majority of the Court said that impugned sections did not discriminate on the grounds of gender/sex as both male prostitutes and female prostitutes were within the mischief that the Act sought to suppress. The Act did not amount to indirect discrimination as it is legitimate to strike at the

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[881] Act No 23.
[882] *S v Jordan and Others* 2002 (1) SA 797 (High Court of South Africa).
[883] It is important that this had a bearing only in determining the relevant Constitution when the facts of the case arose and that there are no substantive differences between the Interim Constitution and the Final Constitution in terms of the constitutional provisions that were in issue.
[884] Section 8 of the Interim Constitution.
[885] Section 10 of the Interim Constitution.
[886] Section 11 of the Interim Constitution.
[887] Section 13 of the Interim Constitution.
[888] Section 26(1) and (2) of the Interim Constitution.

merchant as the merchant is likely to be a repeat offender much more than the customer. In any event, at common law the customer was also an offender by virtue of participating in a prohibited act. Furthermore, even if there the Act was discriminatory, the discrimination was not unfair. According to the Court, the purpose of the Act is an important and legitimate one. Outlawing commercial sex can be justified on a variety of grounds. Commercial sex breeds other crimes, leads to social ills such as exploitation of women and children, trafficking in children, spread of sexually transmitted infections. If there is stigma for the prostitute, it is a result of social attitudes and not the law. By engaging in commercial sex work, prostitutes knowingly accept the risk of being stigmatized, vulnerable and the lowering of their human dignity. The Court said that gender discrimination does not exist simply because there are more female prostitutes than male prostitutes. The fact that only prostitutes are prosecuted and customers are not is a failure of the system to apply the law in a fair manner. On the right to economic activity, majority said that the limitation was justifiable as it was rationally connected with the purpose of the legislation.

[13] On privacy, the majority said that the limitation was also justified, and distinguished *Jordan* from *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* where the crime of sodomy had been the subject of constitutional challenge. In the latter case, the Court said that the crime intruded into the sphere of private intimacy and autonomy which allows us to establish and nurture relationships without interference from outside and as such it adversely impacted on the sexuality of gay people. In this instance, however, it was a case of regulating a crime that the public was invited to engage in private. Privacy was at the periphery and not at the core of the case.

[14] The minority was of the opinion that criminalization of commercial sex was unconstitutional because it was discriminatory, but agreed with the majority the provisions dealing with criminalization of keeping a brothel were constitutional. In support of the finding that section 20 was constituted unfair discrimination, the minority said that it was generally accepted that section 20 was intended to punish only the merchant and that there had not been a single case of prosecution of a customer. Although the section appeared to be neutral its effects were not neutral. Prostitutes are overwhelmingly female and the patrons overwhelmingly male. Criminalizing only the conduct of prostitutes and not patrons is indirectly discriminatory. It tends to reinforce a pattern of sexual stereotyping and gender inequality. Even if it is accepted that at common law the customer is an accomplice, nonetheless the effects of section 20 are discriminatory. The fact that the prostitute is the principal is stigmatizing as they are seen as the primary offender. The minority took cognizance of the fact that, historically, the female prostitute has been the social outcast, with the male patron accepted or ignored. The male patron returns to respectability after the encounter. Prostitutes are social outcasts and a vulnerable group. While they

undermine their dignity by using their bodies, many are involved in commercial sex because they do not have alternatives. The minority said that in determining what is fair, we cannot look at prostitution in isolation from social standing. The minority concluded that section 20 constituted unfair discrimination of an indirect kind. As part of their deliberation on the manner in which section 20 stigmatizes only women and not their male clients, the minority said this:

> In the present case, the stigma is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality. To the extent therefore that prostitutes are directly criminally liable in terms of section 20(1)(aA) while customers, if liable at all, are only indirectly criminally liable as accomplices or co-conspirators, the harmful social prejudices against women are reflected and reinforced. Although the difference may on its face appear to be a difference of form, it is in our view a difference of substance that stems from, and perpetuates gender stereotypes in, a manner which causes discrimination. The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak. Such discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women. [889]

On human dignity, freedom of the person, privacy and freedom to engage in economic activity, the minority did not differ from the majority.

[14] *Jordan* is a case where the country's highest court, despite differing views on the unfair discrimination issue, was agreed that commercial sex work was a social ill that should be criminalized. If ever there was a case for decriminalization, the Constitutional Court made it clear that this was a matter for the legislature rather than the courts to consider.

[15] *Jordan* is a regressive decision from the standpoint of developing a consistent and enabling approach to equality under section 9 of the South African Constitution. The decision is an inconsistent application of the *Harksen v Lane* test[890] that the Constitutional Court has developed to determine unfair discrimination. It sanctions unequal treatment between those that sell sex and those that buy sex. It refuses to accept that the burden of criminalization of commercial sex is borne by women. The failure by the majority to appreciate even if a statutory provision is intended to be neutral it nonetheless constitutes unfair discrimination if in its application it produces a systematic picture of gender inequality. At the same time, the dissenting judgment on the unfair discrimination point is a progressive one.

[16] *Jordan* equally represents a selective approach to the recognition of human dignity under the South African Constitution. The decision represents a judicial stigmatization and a harmful judicial stereotype of the female sex worker in

[889] *Jordan* para 65.
[890] *Harksen v Lane* 1997 (11) BCLR 1489 (Constitutional Court of South Africa).

particular as someone who is so morally flawed as to inherently divest herself of fundamental rights, including rights to equality, human dignity and occupational freedom, such that she can never achieve social recognition under the law. It stands in direct contrast to the non-stereotypical and emancipatory jurisprudence of the Constitutional Court in same-sex cases.

[17] To the extent that the Court was reluctant to be involved in debates about decriminalization of sex work, the decision did not create any room for considering a framework for protecting and promoting the rights of commercial workers, including the right to health. By the same token, the decision did not leave room for imagining a framework for protecting public health. In a country that has one of the world's highest prevalence of HIV, *Jordan* does not impact positively on HIV prevention.[891]

8.3 Conclusions

[18] Criminalization of sex work is the overwhelmingly favoured approach in the African region.

[19] Criminalization of sex work has remained oblivious to the human rights of sex workers.

[20] Criminalization of sex work has failed to develop a synergic relationship with the promotion and protection of public health even in the face of an HIV/AIDS pandemic.

[891] E Bonthuys 'Women's Sexuality in the South African Constitutional Court' (2006) 14 *Feminist Legal Studies* 391.

9 CONCLUDING CHAPTER

9.1 Introduction

[1] The African region displays a mixed picture regarding the development of sexual health jurisprudence. It has strengths but also weaknesses and many gaps. On the positive side, African countries have generally been ready and willing to ratify United Nations human rights instruments that impact on sexual health, including the Covenant on Civil and Political Right, the Covenant on Economic, Social and Cultural Rights, the Women's Convention and the Children's Convention. Furthermore, the postcolonial period has seen the African region develop its own regional human rights system. Though the system established under the African Charter on Human and Peoples' Rights is the most significant system but there are also promising sub-regional developments.

[2] The African Charter, which guarantees both civil and well socio-economic rights, including the right to health, has potential to realize sexual rights in a holistic manner. The African Children's Charter and the African Women's Protocol are important additions to the African Charter. The African Women's Protocol, in particular, is highly receptive to the recognition of sexual health as a human right. The relatively recent addition of an African Court of Human Rights to the treaty bodies of the African Charter signals an intention to augment regional human rights protections and so does the transformation of the Organization of African Unity into the African Union.

[3] Also on the positive side are African domestic constitutions. In the postcolonial period, African jurisdictions have invariably adopted written constitutions as supreme law of the land. African constitutions have generally been inspired by the Universal Declaration and the Covenant on Civil and Political Rights, and contain Bills of Rights. To this extent, given judicial and political willingness, African constitutions are capable of yielding the type of sexual health rights that are associated with the Universal Declaration and the Covenant on Civil and Political Rights. The adoption of Bills of Rights means that while for the preponderant of African jurisdictions customary law and religious law continue to be sources of law, they are of diminishing legal importance and subordinate to constitutional law norms.

[4] On the negative side, however, the African region is marked by a general absence of visible development of jurisprudence on sexual health. Though the African region has generally been a diligent and willing party to ratification of United Nations treaties, including the Women's Convention, it has been slow to

discharge its treaty obligations, including in adopting appropriate legal protective measures. Even for jurisdictions that follow a monist tradition, ratification is not a reliable indicator of the domestic enforceability of state obligation that are the state has committed itself to. In the absence of domestic laws incorporating state obligation in a ratified instruments, ratified instruments promise much more than they can deliver. The enormous challenges that the African region faces in respect of HIV/AIDS, early/child marriages, sexual violence for example, have not been matched by a commensurate development of responsive jurisprudence.

[5] Case-law on sexual health at the regional level is generally conspicuous by its absence. The African-Charter treaty bodies have yet to contribute tangibly towards sexual health jurisprudence, not least because communications on issues that have a sexual health dimension have not been forthcoming save for the Sudanese case - *Doebbler v Sudan*.[892] Where there is visible domestic jurisprudence, the African region has generally followed a pattern of uneven development with South Africa taking the lead in almost all the major areas of sexual health. The potential of many of the domestic constitutional provisions in protecting and promoting sexual health, including the rights to equality and non-discrimination, has remained dormant and untested. Constitutional rights which guarantee fundamental rights that are consonant with universal human rights protections have tended in many areas to remain as paper rights rather than tangible rights that are fulfilled in practice. Furthermore, in those areas where African jurisdictions have intervened to regulate on matters that bear on sexual health, with a few exceptions, a human rights-based approach has generally not been systematically integrated as to create an enabling domestic legal environment in which the state has a duty to respect, protect and fulfil sexual health.

9.2 Equality and Non-Discrimination

[6] There is universal recognition of 'sex' as a ground protected against discrimination in regional human rights instruments as well as in domestic constitutions. However, 'sex' has tended to be understood narrowly as a biological category only but not as social category. Only South Africa is systematically developing jurisprudence that is inspired by gendered understanding of sex. Furthermore, save in the selected area of inheritance, sex and gender have generally not been the subject of litigation before African domestic courts.

[7] Though customary law stands in conflict with constitutional guarantees of equality on the ground of sex on account of its patriarchal orientation, domestic

[892] *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003). Decision of the African Commission on Peoples' and Human Rights.

courts have demonstrated a clear willingness to require customary law to be modified so as to comply with universal guarantees in a constitution. However, the decision of the Supreme Court of Zimbabwe in *Magaya v Magaya*[893] remains an exception to the rule in terms of protecting discriminatory customary law from constitutional reach.

[8] The discriminatory effects of Shari'ah law have yet to be subjected to constitutional and human rights litigation.

[9] Only a minority of jurisdictions recognize marital status as a protected ground. An increasing number of jurisdictions recognize HIV status as a protected ground and prohibit compulsory testing. On the whole, African jurisdictions are far from recognizing sexual orientation as a protected ground. Protection of gender identity has generally not come to the fore in African jurisdictions. With the exception of South Africa, there is generally no jurisprudence on gender identity save the requirement to indicate sex or gender in formal documentation such as birth certificates and travel documents. A minority of jurisdictions have instituted legal protection against sexual harassment.

[10] The decision of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*[894] provides the African Charter-based system as well as domestic jurisdictions with an important benchmark for not only developing laws that respect and promote the right to equality and non-discrimination on the basis of sexual orientation, but also other grounds, including sex, marital status, and gender identity.

9.3 Penalization of Sexuality and Sexual Activities

[11] Criminalization of same-sex sexual relations is the general norm in the African region. South Africa is an exception in developing jurisprudence that respects, protects and promotes human rights to same-sex sexuality and sexual activities.

[12] Ages of consent to sexual activities in the African region generally discriminate on the grounds of sex/gender, age, and sexual orientation. Again South Africa is the exception in developing jurisprudence that is seeks to achieve equality as well as respect, protect and promote sexual autonomy.

[13] The African region demonstrates serious discrepancies between ages of consent for sexual intercourse and ages for marriage. Customary law and religious law

[893] *Magaya v Magaya* 1999 (1) ZLR 100 (Supreme Court of Zimbabwe).
[894] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1999 (1) SA 6 (Constitutional Court of South Africa).

marriages generally recognize marriages of persons whose ages put them below and in conflict with the ages of consent for sexual intercourse.

[14] An increasing number of African jurisdictions have adopted specific legal instruments to criminalize transmission of HIV. However, the public health utility of the laws is highly debatable.

9.4 Regulation of Marriage and the Family

[15] All countries have plural sources governing marriage. With the exception of Zimbabwe which does not make provision for religious laws, marriages in all the countries are governed by civil law statutes, customary law and religious law. Uganda and Malawi are exceptional in having constitutional provisions that directly address marriage.

[16] There is no uniform minimum age for civil marriage across the African region. For the majority of countries, 18 years is the age for consent to civil law marriage without the consent of the parents. However, Kenya, Malawi, Nigeria, Uganda and South Africa that have retained 21 years. To this extent, these countries do not meet their implied state obligations under the Children's Convention which treats persons that have attained 18 years or more as adults and not children as is implied by statutes that require parental consent for all persons under 21 years of age.

[17] On average, African countries prescribe discriminatory ages of consent in their civil law statutes, setting a higher age for males and a lower age for females to maintain a gap of two to three years. For marriages under 18 years, civil law invariably requires parental consent. Sixteen years is the average minimum age for marriage with parental consent. Tanzania with 15 years, as the minimum age of marriage for girls, illustrates a minimum age which is below the average age.

[18] The customary law of African countries does not prescribe a minimum age for marriage. Though customary law requires consent of the parties to the marriage, it creates opportunities for coercion as evidenced by early/child marriages mainly though the practice of parents arranging marriages for their children regardless of their wishes.

[19] Islamic Shari'ah does not prescribe the minimum age for marriage. Though Islamic Shari'ah marriage law requires the consent of the parties to the marriage, in practice, it creates opportunities for coercion in the same way as customary law.

[20] African customary laws and Islamic Shar'iah are decidedly patriarchal in orientation. They entrench gender inequality by envisaging a subordinate role for women, including in respect of decision-making about entry into marriage and power relations within marriage.

[21] Customary and religious laws and practices of African countries create space for coercing children into marriage and facilitating children into becoming sexual partners and mothers at a premature age violate multiple human rights, including the rights to liberty and self-determination, including sexual autonomy, dignity, freedom from inhuman an degrading treatment, health, life, and education. Early/child marriages are responsible for serious health and psychological consequences, including deaths and disability among children.

[22] African jurisdictions have an obligation to bring the current operation and application of their customary and Islamic Shari'ah laws and practices into line with the obligations that they have assumed under United Nation and regional treaties, including the Women's Convention and the African. Women's Protocol. In particular, Articles 2(f) and 5(a) and 16 of the Women's Convention, and article 2, 5 and 6 of the African Women's Protocol require African countries that have ratified these instruments to take appropriate steps to render customary practices that violate the right to choose whether to marry, and are discriminatory on the grounds of gender as well as patently harmful to physical and mental health.

[23] Criminalization of adultery especially under Islamic Shari'ah where stoning by death is permitted negates human rights in a stark manner.

9.5 Violence: Rape

[23] The majority of African countries still adhere to the traditional formulation of rape which requires vaginal penetration by a penis without the consent of the woman.

[24] A few jurisdictions have reformed the elements of rape to reflect global developments in the reconceptualization of rape. The broad and gender neutral conceptualization of sexual violence under the Sexual Offences Act of Lesotho and the Sexual Offences Act of South Africa and to a lesser extent under the Sexual Offences Act of Kenya complement the changing nature of rape law under international criminal law.[895] The same applies to the move away from an

[895] Articles 7(1)(g) 1 and 8(2)(e) (vi) 1 of the Rome Statute for the International Criminal Court;*Prosecutory v Ayekesu* Case ICTR-96-4-T para 597 (1998) (International Criminal Tribunal for Rwanda); *Prosecutor v Furundzija* Case No ICTY-95-17/1 para 174 (1998) (International Criminal Tribunal for Yugoslavia)

emphasis on physical violence as a necessary part of the actus reus of rape to focus, instead, on coercive circumstances.

[25] Criminalization of marital rape remains the exception rather than the rule in the African region.

[26] Eritrea is exceptional in retaining its Penal Code immunity against prosecution for rape upon agreement to marry.

[27] The imposition of state civil liability for failure to prevent sexual violence under South African law in *Carmichelle v Minister of Safety and Security and Another*,[896] is a new and significant development in the African region.

9.6 Violence: Trafficking

[28] The majority of African jurisdictions do not have trafficking specific legislative provisions. Ethiopia, Nigeria, Tanzania and South Africa are exceptions.

[29] The Palermo Protocol has been influential in guiding the form and substance of Nigerian, Tanzanian and South African trafficking specific legislation.

9.7 Violence: Domestic/Partner Violence

[30] There is a conspicuous gap in the adoption of domestic violence-specific laws at the domestic level in the African region. Among the sampled countries only three countries – Malawi, South Africa and Zimbabwe – have domestic violence specific legislation.

[31] Malawi, South Africa and Zimbabwe have formulated their laws to reflect a progressive approach to regulating domestic violence as primarily gender-based violence. The laws of these three countries protect people who are inside as well as outside of a marital relationship, do not require the use of physical violence as a necessary element of domestic violence, and provide remedies, including the grant of protection orders, in a manner that is intended to respond to the peculiarities of domestic violence. The Malawian, South African and Zimbabwean approaches to domestic violence are cognizant of its gender-violence dimension.

[32] The establishment of Anti-Domestic Violence Counsellors and the Anti-Domestic Violence Council under Zimbabwean domestic violence law are important

[896] 2001 (4) SA 938 (Constitutional Court of South Africa).

innovations in the African region in terms of designing legislation that is intended to deal not only with individual cases of domestic violence but also the eradication of domestic violence at a systemic level.

9.8 Violence: Female Genital Mutilation

[33] An increasing number of African countries have female genital specific legislation. However, laws on female genital mutilation follow a predominantly crime and punishment model. They do not impose state duties to educate and raise awareness about the harmful effects of the practice.

[33] The African Women's Protocol contains a framework for eradicating harmful traditional practices such as female genital mutilation in a manner that goes beyond proscription to include awareness-raising, education, provision of pertinent material support, and protection of those that are at risk of being subjected to the practice.[897]

9.9 Violence: Virginity Testing

[34] Virginity testing does not appear to be a widespread phenomenon.

[35] South Africa and Zimbabwe have legislative provisions that address virginity testing. The South African Children's Act explicitly proscribes it for girls below 16 years and requires informed consent older girls and women. Virginity testing constitutes domestic violence under the Zimbabwean Domestic Violence Act if carried out at the instigation of person who is in a domestic relationship with the girl or woman.

9.10 Access to Health Services Related to Sex and Sexuality

[36] The African Charter, the African Children's Charter and the African Women's Protocol on the Rights of Women provide good edifices for the development and implementation of a right to health services for the realization of sexual health at the domestic level. However, domestic constitutions and legislation have generally not followed suit.

[37] The South African Constitution provides instructive models for respecting, protecting and fulfilling access to health services. Section 27 of the South African Constitution which guarantees everyone a right to health services is modeled after the Convention on Economic, Social and Cultural Rights. Section 27 has been interpreted and applied in a progressive manner by the Constitutional Court of South Africa.

[897] Article 5 of the African Women's Protocol.

[38] Though access to contraceptive products and services is promoted by all African countries, there are generally no human rights frameworks to ensure accessibility for women and adolescents.

[39] The South African Children's Act of 2003 is the only example of a serious attempt to comply with state obligations under the Children's Convention and the African Children's Charter in relation to access to health services by children at the domestic level. It is also the only example of a domestic attempt to clearly address the contraceptive needs of adolescents as well as their needs for HIV-related testing and counseling.

[40] Termination of pregnancy remains highly criminalized in African jurisdictions. South Africa provides an exception to the rule. The South African Choice on Termination of Pregnancy Act constitutes radical reform of abortion in line with the recognition of respect, protection and promotion of sexual and reproductive health as human rights. Ethiopian reform of abortion law is a positive development.

[41] Jurisprudence on access to health services by immigrants is generally lacking. At the same time, the decision of the South African Constitutional Court in *Khosa and Others v Minister of Social Development and Others*[898] provides the African regional human rights bodies as well as well as domestic jurisdictions with a human rights yardstick on the imperative to extending to immigrants that are permanently resident the social welfare benefits that are granted to citizens.

[42] Jurisprudence on access to health services by incarcerated persons is generally lacking. However, South Africa has begun to develop positive standards. The right of incarcerated persons to access health care services is explicitly guaranteed under the South African Constitution.

9.11 Information, Education and Expression Related to Sex and Sexuality

[43] At a regional level, the African Charter-based treaties, including the African Children's Charter and the African Women's Protocol, require states to discharge their duties in relations to the rights to health by inter alia, taking positive steps to provide information and education that is pertinent to the realization of sexual health.

[44] The presence of a right to health in a constitution lends itself to an implicit duty upon the state to provide information and education about sexual health as a justiciable duty. Where the duty to provide health services appears as a directive principle in a constitution, it could also be said that a duty to provide

[898] *Khosa and Others and Minister of Social Development and Others* 2004 (6) SA 505.

information and education about sexual health is implied. The majority of African countries do not recognize health as justiciable discrete right under a constitution. An increasing number, however, recognize a duty to provide health as a state directive principle.

[45] Among the sampled countries, the Kenyan and Tanzanian HIV/AIDS Prevention and Control Acts are the best examples in the African region of clear legal duties on the part of the state to provide information and education for the prevention of sexually transmitted infections.

[46] African obscenity laws are predominantly based on colonial models that recognise very broad and non-transparent discretion of the part of the state and courts to restrict information with the sexual content. Section 36 of the South African Constitution – the limitation clause – provides more transparent and human rights compliant criteria for adjudicating restrictions of the dissemination of information with a sexual content.

9.12 Sex Work

[47] Criminalization of sex work is the overwhelmingly favoured approach in the African region.

[48] Criminalization of sex work has remained oblivious to the human rights of sex workers.

[49] Criminalization of sex work has failed to develop a synergic relationship with the promotion and protection of public health even in the face of an HIV/AIDS pandemic.

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