CHAPTER FIVE

REPRODUCTIVE RIGHTS OF WOMEN IN NIGERIA AND SOUTH AFRICA

For man to tell how human life began is hard:
for who himself the beginning knew?

- Milton, Paradise Lost, Book 8. [1]

5.1 INTRODUCTION

Reproductive rights concern those rights which protect the health and well being of both men and women. Reproductive rights are however of more fundamental importance to women than to men. In their narrowest sense, reproductive rights demand respect for women's bodily integrity and decision-making in an environment that is free from fear of abuse, violence and intimidation.[2]

Reproductive rights include access to voluntary, quality reproductive and sexual health information, education and services. Reproductive rights may also be linked to the provision of such social and economic necessities as food, shelter, child-care and education.

This chapter considers the reproductive rights of women in Nigeria and South Africa. Women's reproductive functions have been a major cause of women's oppression. In

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1 Quoted in Williams (1994) 53 *Cambridge Law Journal* 71.

2 O'Sullivan & Bailey (1999) 16-1.

fact, some radical feminists believe that if the reproductive functions of women can be removed then equality can be achieved.[3] Women have long been seen as the object of production and reproduction. This is illustrated by the fact that most Africans marry for reproductive purposes only.

In this chapter, reproductive rights, as a form of human rights, are conceptualised against a broader background. Almost all international human rights instruments recognise the right to good health, which include reproductive health. This chapter considers the importance of reproductive rights. The abortion controversy, the pro-choice and the pro-life positions and the issue of the beginning of human life are also discussed. Some comparative analysis of abortion laws in some domestic systems is also undertaken. The controversy whether the foetus is a constitutional rights bearer is also discussed. Female genital mutilation is discussed, especially its effects on reproductive health. The controversy about female genital mutilation and cultural relativism is also touched upon.

Reproductive rights of women in Nigeria and South Africa are discussed. The position in respect of abortion in both countries is contrasted and female genital mutilation in both jurisdictions is also discussed. Finally a comparison of reproductive rights in both countries is made.

In developing countries,[4] the leading cause of death and disability among women is childbirth.[5] Everyday, more than 1,600 women die from the complications of pregnancy, 1 in every 48 women in all developing countries, and 1 in 16 in Africa. (In North America, the number is 1 in 3,700).[6] And if a child survives birth, it is likely to face a short life of illness and hunger. Today, 150 million children under the age of 5 are gravely malnourished another 260 million suffer from anaemia or other vitamin or mineral deficiencies.[7] In 1998, the World Bank estimated that 11 million children

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3 See *e.g.* Firestone (1971) 224; Burrows (1986) 100; Gordon (1977) Ch 5; Corrin *op. cit.* 47; Squires *op. cit.* 119.

4 Nigeria and South Africa are both classified as developing countries.

5 *Development and Human Rights: The Role of the World Bank* 6.

6 *Ibid.*

7 *Development and Human Rights the role of the World Bank op. cit.* 4.

would die unnecessarily from diseases as simple and treatable as diarrhoea.[8] For those children who do survive, little chance exists for education and opportunity to escape poverty.

Reproductive rights also touches on the right to privacy as the decision to have a child or not is a private matter. The right to privacy is said to be "right to be let alone".[9] At the very least it ensures that certain areas of an individual's life remains free from state interference. The US Supreme Court in *Eisenstadt v Baird*[10] encapsulated this notion:

> If the right to privacy means anything it is the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

The above decision provided unmarried couples with the right to choose to use contraceptives. In *Roe v Wade*[11] the US Supreme Court struck down a Texas law criminalising abortion and interpreted the right to privacy to include a woman's fundamental right to terminate pregnancy. The Court acknowledged the need to strike a balance between the woman's right to privacy and the state's interest in potential human life, and established a framework known as the trimester approach. In terms of this approach, the state's interest in protecting potential life did not become compelling until after the point of viability of the foetus (the third trimester).[12] Only at the point of viability, or in the third trimester of pregnancy, would the interest of the state in protecting potential life be sufficiently compelling to justify the restriction of a woman's right to choose to have an abortion. Even then, said the court the compelling interest of the state in protecting potential life remained subordinate to the woman's life and health.[13]

Women's relationship to their reproductive capacity presents some of the most difficult problems for the law to resolve or even to conceptualise adequately. The entity

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8 *Development and Human Rights op. cit.* 6.

9 Glendon *op. cit.* 36.

10 *Eisenstadt v Baird* 405 US 438 92 Sct 1029 (1972) at 439.

11 *Roe v Wade* 410 US 113 (1973.

12 "Viability" is the point at which a foetus can exist independently outside the uterus.

13 *Roe v Wade supra* at 140.

represented by the symbiotic unity of a woman and her foetus is envisaged repeatedly as a relationship between two separate persons with conflicting rights.

Women's capacity to control reproduction is central to their lives. The ability to plan whether to have children, how many and when, is critical to equality in the workplace, educational plans, political participation indeed, to control over the way in which our lives are spent in general.[14] For these reasons, the availability, effectiveness and accessibility of birth control has played an important role in the history of the women's movement, culminating in the struggle over abortion that has dominated the debate in the recent decades.

5.2 REPRODUCTIVE RIGHTS IN INTERNATIONAL LAW

5.2.1 Abortion in international law

There can be few topics that inspire the passion that is unleashed by the abortion debate.[15] Abortion debate is a battleground between those who advocate "the foetus right to life", and those who support the woman's "right to choose". When taken to their extremes, no consensus can be found between those two points of view and the fight can become a no-win dispute of ideology that fails to consider the complexity of the topic in any given social setting. However, it would seem that the only point of consensus is that it is desirable to reduce the number of unplanned pregnancies and abortions.

There is a growing body of evidence that supports the belief that it is impossible to have a comprehensive family planning programme without legalised abortion being an integral part of it. The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) expressly entitles women to access to family planning services, which are widely recognised to include abortion.[16] Human rights conventions and national Constitution may invoke the right to life, but are often non-

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14 Becker *et al* (1994) 353.

15 Rees (1994) 241.

16 CEDAW Doc. A/34/46 (1990) GA RES 34/18034 UN GA OR SUPP (No. 46) at 103.

specific regarding the unborn.[17] They are more specific when they concern a woman's right to protect her life and health.[18]

Worldwide between 35 and 55 million abortions are carried out each year, nearly half of them done illegally.[19] In such situations, death may reach or exceed 1,000 per 100,000 abortions.[20]

5.2.2 Comparative abortion position in selected domestic jurisdictions

World-wide, the past two decades have seen a liberalisation of abortion laws, reflecting an understanding of the role abortion plays in maternal mortality and morbidity, and a commitment to reproductive rights and gender equality. In this period 65 jurisdictions liberalised their abortion laws, while four restricted theirs.[21] Forty per cent of the world now lives in countries where no specific justification is required to obtain a legal abortion (that is abortion is available on demand). Legal abortion rates vary from 112 abortions per 1,000 women of reproductive age in what was the Soviet Union, to a low 5 per 1,000 in the Netherlands.[22] Mortality rates from legal abortion in developed countries is 0.6 deaths per 100,000 abortions.[23] However, in 25% of the world, abortion is allowed only if the woman's life is endangered, and in extreme cases not even under those circumstances.[24] Translated into real terms, one in four women worldwide does not have access to safe, legal abortions. These women are most likely to come from Africa, Latin America or Muslim Asia, where access to effective contraceptive technology is least available.[25]

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17 Case 2141 Inter-American Commission on Human Rights, OEA/Ser.L/U/115 54 (1980).

18 *Paton v UK* (1980) 3 EHRR 408.

19 Johnston & Hill (1996) 22 *International Family Planning Perspectives* 108.

20 International Planned Parenthood Federation (IPPF) statement on Abortion (March, 1992).

21 Cook (1989) 3 *International Journal Gynae & Obst. Supplement* 61.

22 Henshaw (1990) 16 *International Family Planning Perspectives* 2.

23 *Ibid.*

24 *E.g.* in Chile abortion is absolutely prohibited. It is not even available to save the life of a pregnant woman. Women's Global Network for Reproductive Rights 1998 No. 3 Newsletter 63 at 11.

25 *Ibid.*

Whatever is or is not said by international agencies, there remains one historical and present-day reality: women remain the final determinant of whether or not they will have an abortion. Abortion is an international phenomenon even when women are faced with restrictive laws. The clearest example of this determination by women to pursue their own choice regardless of risk came in Romania. Under Nicolae Ceausescu's rule, contraception was banned and abortion was a crime punishable by death. Despite this, Romania has the highest abortion rate and abortion-related mortality of all the European countries.[26]

Access to abortion and family planning services is determined by four variables: laws, policies; the way they are interpreted and the commitment of public funds to provide services and personal resources, particularly money.[27] International experience shows that control over any of these factors is used by anti-abortionists to limit access to abortion.

5.2.3 When does life begin?

It is important to consider when human life begins? as this is central to the abortion debate. Does life start at conception or at birth? The answer to this question will help in the abortion controversy. "when does life begin?". The debate of when life begin is ancient but is still rumbles on, fuelled by differences of religious opinions and has even surfaced in the European Court of Human Rights (ECHR).[28] English law does not try to answer the question when human life begins, but it gives a clear answer to the question when does human personhood begins. It begins with birth.[29] It has been held that a threat to pregnant women to kill her foetus is not a threat to kill a person.[30] In Canada the right to life conferred by the Charter of Human Rights has been held not to encompass the foetus.[31]

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26 Jacobson (1997) 5.

27 Jacobson *op.cit. 6.*

28 William (1994) 53 *Cambridge Law Journal* 531 71.

29 *Tait* (1990) 1 QB 290

30 *Ibid.*

31 *Borowski v AG of Canada* (1987) 4 WWR 385, *Trembley v Dougle* (1989) 2 SCR 530

Medical parlance distinguished between the embryo, up to 8 weeks gestation (by which time it is sufficiently developed to be unmistakably human) and the foetus which it then becomes however, this distinction has no legal significance and legal writings do not generally adopt it. To have a right to life, the child must be completely extruded and must breathe.[32] There is no precise 'moment' of conception - fertilisation is a process, not a moment[33] In *Christian Lawyers Association of South Africa & others v Minister of Health and others*[34] the South African Court was faced with the question whether the foetus is a constitutional bearer of the right to life protected under the South African Constitution.[35] The court found that the right to life protected under the Constitution does not extend to the foetus. This is discussed in greater details below.[36]

The Catholic Church infers indirect support for its position on the sanctity of unborn human life from biblical passages such as Luke's account of the annunciation, John the Baptist's heralding of the unborn Christ by stirring for joy in his mother's womb, and Yahweh's calling and appointing prophet to his service long before his birth.[37]

During the fourth and fifth centuries church fathers began to make distinctions about when abortion would be allowed based on the age of the foetus. The biological theories of Aristotle formed the basis for canonical distinctions between "formed" and "unformed" foetuses, formation generally thought to occur around the fortieth day of gestation[38]

According to this view, only late abortions are punishable by the same penalty as applied to homicide. These distinctions are relied upon by early church fathers such as Augustus, Jerome and later Thomas Acquinas to explain their theory of "ensoulment". According to Acquinas' calculation, the embryo was infused with a human soul and therefore "alive" after 40 days for a male embryo and after 80 days for a female

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32 *C v S* (1988) QB 135

33 Per McCreath J in the case of *Christian Lawyers Association of South Africa & others v Minister of Health & others* 1998 (4) SA 1113 (T).

34 *Supra.*

35 S. 10 Act 108 of 1996.

36 See section 5.4 below.

37 Respect Life Manual (Washington DC National Conference of Catholic Bishops) 1983. See also the *Holy Bible* King James Version: Jeremiah 1:5 and Isaiah 49:5.

embryo. Because the foetus did not have a soul at conception, the early church fathers reasoned, that abortion prior to ensoulment could not be considered as heinous a crime as abortion following ensoulment.[39] The theory of ensoulment is arbitrary for there is no way of determining the sex of the embryo in the womb without medical testing or scanning and even this is not foolproof.

The above controversy shows that religion cannot assist in the quest to determine how human life begins.

5.2.4 Is the foetus a constitutional bearer of rights?

At Common law, legal subjectivity begins at birth. According to the *nasciturus* fiction, a foetus, if subsequently born alive, is deemed to have all the rights of a child, where this is to its advantage. This fiction is used to overcome the absence of legal personality of a foetus and to confer upon the foetus particular rights in limited circumstances.[40] It has been held that the protection provided by the *nasciturus* fiction does not extend to upholding the right to life of the foetus.[41]
The fact that the foetus is not a person at Common law does not foreclose the issue of legal personality of a foetus as a Constitutional matter.

In *Roe v Wade*[42] it was held that the use of the word "person" in the Fourteenth Amendment to the US Constitution, which provides that the states shall not "deprive any person of life ... without due process of law", did not include the unborn.[43] In Canada it was held that the abortion provisions of the Criminal Code are an unconstitutional violation of a woman's section 7 right to fundamental justice.[44]

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38 *Ibid.*

39 Nelson (1988) 34.

40 *Pinchin & Another NO v Santam Insurance Co Ltd* (1963) 2 SA 254 (W at 260.

41 *Christian League of* South *Africa v Rall* 1981 (2) SA 821 (O and *G v Superintendent Grote Schuur Hospital & Others* 1993 (2) SA 225 (C.

42 *Roe v Wade* 410 US 113 (1973 at 158, 93 Sct 705 (1973).

43 *Ibid.* per Blackmun J.

44 *R v Morgenthaler* (1988) 44 DLR 385

In contrast, German courts have tackled abortion primarily with reference to the right to life,[45] which provides that "everyone shall have the right to life and to the inviolability of his person". The supreme value accorded to the right to life in the German Constitution should be understood as a reaction to German history. A recent decision of the German Constitutional Court[46] involved a challenge to federal abortion legislation on the basis that "it did not meet the minimum standard which the Constitution had set for the protection of unborn life, six of the eight judges held that: [47] the state had a primary duty to protect human life, even before birth. This duty, which began at conception, related to every individual life and included a duty also to protect the unborn child against the mother.

The majority conceded that this duty to protect the foetus might clash with the pregnant woman's right to protection of her human dignity, bodily integrity and the development of her personality. Nevertheless, they maintained that there are minimum standards of protection for the foetus. The state always had to meet these standards, even if they clashed with the rights of the pregnant women. The minority did not deny that the foetus required Constitutional based protection, they emphasised, however that because Pregnancy involves the pregnant woman from beginning to end; it was not appropriate to set up in conflict the position of the woman and that of the foetus. Therefore, in the early stages of pregnancy the pregnant woman had to be fully involved in all decisions relating to the pregnancy. Only an advanced foetus should be protected by the state by means of the criminal law.[48] The German decision can be interpreted as an attempt to protect the interest of the state in potential human life.

There are good reasons to allow a state to prohibit abortion after viability. At about that point, foetal brain development is sufficient to feel pain, which indicates that the foetus has protectable interests of its own.

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45 Article 2(2) German Basic Constitution.

46 *Decision of the Federal Constitutional Court* of 28 May 1993 BVerfGE A III JZ 310.

47 *Ibid* 311.

48 *Ibid* 311 – 312.

5.2.5 Female genital mutilation

Female genital mutilation (FGM) is the term used to refer to the removal of part, or all, of the female genitalia. The most severe form is infibulation, also known as pharaonic circumcision.[49] An estimated 15% of all mutilations in Africa are infibulations. The procedure consists of clitoridectomy (where all, or part of, the clitoris is removed), excision (removal of all or part of, the labia minora), and cutting of the labia majora to create raw surfaces, which are then stitched or held together in order to form a cover over the vagina when they heal. A small hole is left to allow urine and menstrual blood to escape. In some less conventional forms of infibulation, less tissue is removed and a larger opening is left.[50]

The vast majority (85%)[51] of genital mutilations performed in Africa consist of clitoridectomy or excision. The least radical procedure consists of the removal of the clitoral hood. In some traditions a ceremony is held, but no mutilation of the genitals occurs.[52] The ritual may include holding a knife next to the genitals, pricking the clitoris, and cutting some pubic hair or light scarification in the genital or upper thigh area.

5.2.5.1 The procedures followed

The type of mutilation practiced, the age at which it is carried out, and the way in which it is done vary according to a variety of factors, including the woman or girl's ethnic group, what country they are living in, whether in a rural or urban area and their socio-economic provenance.[53]

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49 Lightfoot-Klein (1989) 26 *The Journal of Sex Research* 375.

50 *Ibid.*

51 Vaasher (1979) 71.

52 *E.g.* the circumcision school held for girls in some parts of South Africa, but no FGM is performed.

53 Labuschagne (1998) 13 *SAPR/PL* 277.

The procedure is carried out at a variety of ages, ranging from shortly after birth to some time during the first pregnancy, but most commonly occurs between the ages of four and eight. Where FGM is carried out as part of an initiation ceremony, as is the case in societies in eastern, central and western Africa,[54] it is more likely to be carried out on all the girls in the community who belong to a particular age group.

Sometimes a trained midwife will be available to give a local anaesthetic. In some cultures, girls will be told to sit beforehand in cold water, to numb the area and reduce the likelihood of bleeding.[55] More commonly, however, no steps are taken to reduce the pain. The girl is immobilised, held, usually by older women, with her legs open. Mutilation may be carried our using broken glass, a tin lid, scissors, a razor blade or some other cutting instrument. When infibulation takes place, thorns or stitches may be used to hold the two sides of the labia majora together and the legs may be bound together for up to 40 days. Antiseptic powder may be applied, or, more usually, pastes - containing herbs, milk, eggs, ashes or dung - which are believed to facilitate healing. The girl may be taken to a specially designated place to recover where, if the mutilation has been carried out as part of an initiation ceremony, traditional teaching is imparted. For the very rich, a qualified doctor in hospital under local or general anaesthetic may perform the mutilation procedure.[56]

5.2.5.2 The physical and psychological effects of FGM

5.2.5.2.1 Physical effects

The effects of genital mutilation can lead to death. At the time the mutilation is carried out, shock, haemorrhage and damage to the organs surrounding the clitoris and labia can occur. Afterwards urine may be retained and serious infection may develop. Use of the same instrument on several girls without sterilisation can cause the spread of HIV and AIDS

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54 See generally Jomo Kenyatta (1979).

55 *Ibid.*

56 *Ibid.*

More commonly, the chronic infections, intermittent bleeding, abscesses and small benign tumours of the nerve which can result from clitoridectomy and excision cause discomfort and extreme pain. Infibulation can have even more serious long-term effects: chronic urinary tract infections, stones in the bladder and urethra, kidney damage, reproductive tract infections, resulting from obstructed menstrual flow, pelvic infections, infertility, excessive scar tissue, keloids (raise, irregularly shaped, progressively enlarging scars) and dermoid cysts.[57]

First sexual intercourse can only take place after gradual and painful dilation of the opening left after mutilation. In some cases, cutting is necessary before intercourse can take place. In one study carried out in Sudan, 15% of women interviewed reported that cutting was necessary before penetration could be achieved.[58] Unskillful cutting carried out by their husbands seriously damages some new wives. A possible additional problem resulting from all types of FGM is that lasting damage to the genital area can increase the risk of HIV transmission during intercourse.

During childbirth, existing scar tissue on excised women may tear. Infibulated women, whose genitals have been tightly closed, have to be cut to allow the baby to emerge. If no attendant is present to do this, perennial tears or obstructed labour can occur. After giving birth, women are often reinfibulated to make them "tight" for their husbands. The constant cutting and restitching of a woman's genitals with each birth can result in tough scar tissue in the genital area.[59]

The secrecy surrounding FGM, and the protection of those who carry it out, make collecting data about complications resulting from mutilation difficult. When problems do occur these are rarely attributed to the person who performed the mutilation. They are more likely to be blamed on the girl's alleged "promiscuity" or the fact that sacrifices or rituals are not carried out properly by the parents. Most information is collected retrospectively, often a long time after the event. This means that one has to rely on the accuracy of the woman's memory, her own assessment of the severity of any resulting complications, and her perception of whether any health problems are associated with mutilation.

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57 Lightfoot-Klein (1989) 26 *The Journal of Sex Research 375.*

58 Lightfoot-Klein (1989) *op. cit.* 385.

5.2.5.2.2 Effects on sexuality

Genital mutilation can make first intercourse an ordeal for women. It can be extremely painful, and even dangerous.[60] If the women has to be cut open; for some women, intercourse remain painful. Even where this is not the case, the importance of the clitoris in experiencing sexual pleasure and orgasm suggests that mutilation involving partial or complete clitoridectomy would adversely affect sexual fulfilment. Clinical considerations and the majority of studies on women's enjoyment of sex suggest that genital mutilation does impair a woman's enjoyment. However, one study found that 90% of the infibulated women interviewed reported experiencing orgasm.[61] The mechanism involved in sexual enjoyment and orgasm are still not fully understood, but it is thought that compensatory processes, some of them psychological, may mitigate some of the effects of removal of the clitoris and other sensitive parts of the genitals.

5.2.5.2.3 Psychological effects

The psychological effects of FGM are more difficult to investigate scientifically than the physical ones. A small number of clinical cases of psychological illness related to genital mutilation have been reported.[62] Despite the lack of scientific evidence, personal accounts of mutilation reveal feelings of anxiety, terror, humiliation and betrayal, all of which would be likely to have long-term negative effects. Some research suggest that the shock and trauma of the operation may contribute to the behaviour described as "calmer", and "docile", considered positive in societies that practice female genital mutilation.[63]

Festivities, presents and special attention at the time of mutilation may mitigate some of the trauma experienced, but the most important psychological effect on a woman who has survived is the feeling that she is acceptable to her society, having upheld the traditions of her culture and made herself eligible for marriage, often the only role

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59 Lightfoot-Klein *op. cit.* 376.

60 *Ibid.*

61 *Ibid.*

62 Baasher (1979) 71.

63 *Ibid.*

available to her. It is possible that a woman who did not undergo genital mutilation could suffer psychological problems as a result of rejection by the society. Where the FGM-practicing community is in a minority, women are thought to be particularly vulnerable to psychological problems, caught as they are between the social norms of their own community and those of the majority culture.

5.2.5.3 Why female genital mutilation is practised

(a) Cultural identity

Custom and tradition are by far the most frequently cited reasons for FGM. Along with other physical or behavioural characteristics, FGM defines who is in the group. This is the most obvious where mutilation is carried out as part of the initiation into adulthood. An Egyptian woman who was interviewed about FGM has this to say: "... of course I should have my young daughters circumcised exactly as their parents, grandparents and sisters are circumcised. This is our custom."[64]

Jomo Kenyatta, the late President of Kenya, argued that FGM was inherent in the initiation which is in itself an essential part of being Kikuyu, to such an extent that "abolition ... will destroy the tribal system".[65] A study in Sierra Leone reported a similar feeling about the social and political cohesion promoted by the ... and ... secret societies, who carry out initiation, mutilations and teaching.[66]

Many people in FGM-practising societies, especially traditional rural communities, regard FGM as so normal that they cannot imagine a woman who has not undergone mutilation.[67] Others are quoted as saying that only outsiders or foreigners are not genitally mutilated. A girl cannot be considered an adult in an FGM-practising society unless she has undergone FGM.

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64 Assaad (1980) 2 *Studies in Family Planning* 3.

65 Kenyatta (1979) 68.

66 Labuscagne *op.cit.* 287.

67 Kenyatta *op. cit.* 70.

A woman in Kenya, a defender of FGM has this to say: "Circumcision makes women clean, promotes virginity and chastity and guards young girls from sexual frustration by deadening their sexual appetite".[68]

(b) Gender identity

FGM is often deemed necessary in order for a girl to be considered a complete woman, and the practice marks the divergence for the sexes in terms of their future roles in life and marriage. The removal of the clitoris and labia 'viewed by some as the "male parts" of a woman's body' is thought to enhance the girl's femininity, often synonymous with docility and obedience. It is possible that the trauma of mutilation may have this effect on a girl's personality. If mutilation is part of an initiation rite, then it is accompanied by explicit teaching about the woman's role in her society.

(c) Control of women's sexuality and reproductive functions

In many societies, an important reason given for FGM is the belief that it reduces a woman's desire for sex, therefore reducing the chance of sex outside marriage (for the woman). The ability of unmutilated women to be faithful through their own choice is doubted. In many FGM-practising societies, it is extremely difficult, if not impossible, for a woman to marry if she has not undergone mutilation. In the case of infibulation, a woman is "sewn up" and "opened" only for her husband. Societies that practice infibulation are strongly patriarchal. Preventing women from indulging in "illegitimate" sex, and protecting them from unwilling sexual relations, are vital because the honour of the whole family is seen to be dependent on it. Infibulation does not however, provide a guarantee against "illegitimate sex", as a woman can be "opened" and "closed" again.

In some cultures, enhancement of the man's sexual pleasure is a reason cited for mutilation. Anecdotal accounts, however, suggest that men prefer unmutilated women as sexual partners.

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[68] Katumba (1990) 47.

5.2.5.4 Cultural relativism and female genital mutilation[69]

Those who are in favour of FGM continue to insist that the culture of the people practising FGM should be respected and that it is wrong to use Western ideas to evaluate FGM. It is against this background that cultural relativism is discussed in this section.

Since the advent of the global impetus to respect and protect the rights of the individual, legal systems in many societies have continuously been confronted with the problem of the rational and legitimate accommodation of conflicting cultural practices within the confines of a human rights dispensation. Against this background, those in support of FGM argue that it is part of an intricate and complex cultural system, and that to eliminate it would be to impose foreign values that might result in disruption of a delicate cultural balance. This is the essence of cultural relativism.[70]

The strict cultural relativists view the world in relative terms.[71] According to the cultural relativists, Western human rights culture is wholly alien and at times in direct opposition to cultural norms of other places. They thus strongly oppose any attempts to influence their cultures as a direct attack upon their cultural identity. It is within this group of cultural relativists where the greatest opposition to Western attempts to explore both the legality and perceived morality of FGM lies. Jomo Kenyatta, a pan-African leader and anthropologist, was an early opponent of Western influence to be an extension of colonialism and therefore an indirect form of socio-political oppression. Strict cultural relativists in Africa still find Kenyatta's anthropological defence of FGM influential.[72]

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69 For the opinion of the author on Female Genital Mutilation see page 211 below.

70 Slack (1988) *Human Rights Quaterly* 437 at 462; Beukes (1997) 22 *SAYIL* 85.

71 Schooley (1994) *Cumberland LR* 679; Breitung (1996) *Emory International LR* 657. See also Donnelly (1984) 6 *Human Rights Quaterly* 400.

72 Brennan (1989) *Law and Inequality* 367 at 368: "Cultural relativists criticise the current international human rights system because, it search for potential human rights violations, it looks at cultural practices which have been condoned for centuries by the societies which engage in them".

> The real argument lies not in the defence of the surgical operation, but in the understanding that this operation is still regarded as the very essence of an institution, which has enormous education, social, moral and religious implications, quite apart from the operation itself. Therefore the abolition of the surgical element in this customs means to the K(g)kikuyu the abolition of the whole institution The real anthropological study, therefore is to show that clitoridectomy, like Jewish circumcision, mere bodily mutilation, which, however, is regarded as the *condition sine qua non* of the whole teaching of tribal law, religion and morality.

Notwithstanding the shortcomings of the strict cultural relativist's viewpoints, the validity of some of their concerns regarding the conflict between culture and human rights has been substantiated as early as 1947. In a submission to the UN Commission on Human Rights, the American Anthropological Association raised concerns about the pending Universal Declaration of Human Rights in 1947, thus:[73]

> Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of any one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.

Some authors dispute the existence of this class of cultural relativist, and argue that there is a negligible distinction between modern cultural relativism and universalism. Moderate cultural relativists believe that international law must approach human rights with sensitivity when dealing with the various cultures, although they also believe that some universal principles are possible.[74]

Most scholars adopt universalist approach when dealing with human rights.[75] The essence of universalism is embodied in the following quotation:

> The very term human rights indicates both their nature and their source: they are the rights that one has simply because one is human. they are held by all human beings, irrespective of any rights or duties one may (or may not) have as citizens, members of families, workers, or parts of any public or private organisation or association. In the language of the 1948 declaration, they are universal rights.[76]

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73 Labuscagne *op. cit. 286.*

74 Schooley *op. cit.* 682.

75 *Ibid.*

76 Schooley *op. cit.* at 691.

feminists) feel that feminism tend to adopt an imperialist tone or to exclude the voices of African women entirely. They also state that:[83]

> It seems more appropriate that African American feminists work with Africans and other peoples of the African diaspora to reclaim, place in context, and critically analyse human rights issues that affect them, rather than remain silent, especially in those issues that carry extra baggage with regard to race, ethnicity, or gender.

Communitarianists believe that a cross-cultural dialogue is vital as a foundation for approaching FGM, they accept the cultural relativism" argument that humans are bound by culture, but unlike cultural relativists, they believe that universal standards are possible and necessary.[84] There are various arguments surrounding cultural relativism. It seems to involve the pride of those who practice FGM against the pride of those trying to eradicate it. On the other hand, there are also those who proclaim that man has the right to live in terms of his own traditions, even where the standards of behaviour are in conflict with the human rights which are so protected by the West. Yet critics from Western countries are continuously being accused of 'racism"[85] for trying to eradicate FGM, and for being insensitive towards cultural difference:[86]

> Critic from Western countries are constantly being intimidated by accusations of 'racism', to the point of misnaming, non-naming and not seeing these sado-rituals. The accusations of 'racism' may not come from ignorance, but they serve only the interests of males, not of woman [It] is in the interest of woman of all races to see African genital mutilation in the context of planetary patriarchy of which it is but one manifestation.

It seems to be that during these electric conflicts the tragedies surrounding FGM are regarded as of lesser importance.

5.3 REPRODUCTIVE RIGHTS IN NIGERIA

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83 Lewis *op. cit.* 37.

84 Labuschagne *op. cit.* 298.

85 Funder (1993) *Transnational Law and Contemporary Problems* 418 at 440.

86 Daly (1978) 154 quoted in Funder *op. cit.* 440.

The provision of health services in Nigeria is contained in Chapter Two of the Constitution as a fundamental objective of state's principles. It is not a justiciable right. Reproductive rights are not mentioned anywhere in the Nigerian Constitution.

Maternal mortality in Nigeria is one of the highest in the world. Maternal mortality in Nigeria is estimated at 1,000 maternal deaths per 100,000 live births.[87] According to the UNICEF zonal programme officer in Nigeria, an estimated 1,000 to 1,500 women die for every 100,000 deliveries.[88] It is further estimated that out of 585,000 women who die from pregnancy and childbirth related complications annually, 10 per cent or about 60,000 of them are from Nigeria.[89]

The state of health care services in Nigeria is appalling. Most of the government hospitals have turned to mere dispensary centres. Instances abound in Nigeria where women are dying just because they do not have money to pay.[90] In rural areas the disaster of maternal mortality is expanding more quickly for want of basic necessities of modern life. Mass poverty, gross inequalities, un-booked emergencies and illiteracy have been pinpointed as the reasons for the high maternal mortality rate in Nigeria.[91]

Most women do not have access to antenatal care due to cultural, financial, social, transportation, telecommunication barriers and most importantly illiteracy.

Poverty is rife in Nigeria. The amount of the annual budget that goes to health care is less than 5 per cent of the total budget.[92] The amount used to service debt in Nigeria is nine times the health budget.[93] Defence continues to account for about 20 per cent of

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87 UN Development Programme (UNDP), *Human Development Report*, 1996, New York: Oxford University Press, 1996 154-155; World Health Organisation Geneva: WHO, (1998) 8. See also Harrison (1999) also available on the internet (www.hsph.harvard.edu/ajrh/abstracts.comment.htm) accessed on 28 August 2000.

88 Harrison *op. cit.*

89 *Ibid.*

90 Harrison *op. cit.*

91 Harrison *op. cit.*

92 According to *Africa Recovery On Line* (A United Nations Publication only about 4.5 percent of the Nigeria's budget is spent on health (www.un.org/ecosocdev/geninfoafrec/vol13no1/health.htm) accessed on 9 October 2000.

93 *Ibid.*

the budget.[94] Most women interviewed in Nigeria said that they would rather die than give birth through caesarean sections, because according to them only women who are bewitched give birth by caesarean section as all women are naturally endowed to be able to give birth normally. Caesarean sections are very expensive in Nigeria. An average caesarean section cost about N35, 000 (approximately US$350) in a country where the GDP is about US$250. Due to the fact that most women cannot afford this huge sum of money, they usually opt for normal deliveries, which cost on average about US$5.

The insistence of giving birth by natural means even when this is not possible can be attributable to the high cost of giving birth by caesarean section and also to superstitions.

The maternal mortality rate is a manifestation of gross under-development. Its reduction requires societal transformation. Efforts to eliminate the conditions that create maternal mortality must be intensified. Expert prioritisation of the action plans and their implementation and careful avoidance of misappropriation are essential.

Pregnant women who are working in the formal sectors are entitled to three months paid maternity leave.[95] The three months leave is usually six weeks before delivery of the child and six weeks after delivery of the child. All employers both private and public give the three months maternity leave. Some employers only give maternity leave where the concerned employee has worked for not less than one calendar year.

Prior to 1987 unmarried women are not entitled to maternity leave irrespective of the length of service.[96] Fortunately this position has been changed.[97] Women returning from maternity leave are allowed to close one hour earlier in order to nurse the baby, this is usually for a period of three months.

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94 An estimated fifteen billion Naira is spent to maintain 80,000 man army. Available on the internet (www.emeagwali.com/interviews/ningerian/constitution/ll.htm/) accessed on 9 October 2000. The Unites States of America puts Nigeria's annual military budget at US$300 million. Available on the internet (www.af.mil/news) accessed on 9 October 2000.

95 Labour Act Cap 198 LFN 1990.

96 This position was changed by the military government of General Ibrahim Babangida.

97 By Military fiat in 1987. (No Decree or Law to that effect).

5.3.1 Abortion in Nigeria

Abortion is illegal in Nigeria and carries a heavy jail sentence (up to 14 years imprisonment) unless it is performed to save the life of the pregnant woman.[98] Nevertheless a large number of clandestine abortions regularly continue to be carried out often with dire consequences to the lives and health of the women involved.

The law relating to abortion in Nigeria is to be found in the Criminal Code. Abortion is not a constitutional matter. Abortion is a criminal offence in Nigeria.[99] It is an offence to unlawfully procure anything for anyone, knowing that is to be used unlawfully to procure an abortion[100] and the offence is punishable with three years imprisonment. Attempt to procure an abortion is also a criminal offence punishable with 14 years imprisonment.[101] If a pregnant woman attempts to induce abortion, she is liable to 7 years imprisonment if convicted.[102]

Although abortion is illegal in Nigeria except to save the life of the woman, thousands of women resort to abortion each year. Each year, Nigerian women obtain approximately 610,000 abortions, a rate of 25 abortions per 1,000 women aged 15-44.[103] The rate is much lower in the poor, rural regions of Northern Nigerian than in the more economically developed Southern regions. Abortion rates are higher in the Southern regions of Nigeria than in the North. This difference is to be expected in view of the higher levels of urbanisation, education and economic development in the South. These factors generally lead to a desire for smaller families, to delays in the age at marriage and to higher levels of premarital sexual activity, all resulting in unintended pregnancies.[104] As urbanisation and modernisation continue, it is likely that the level of

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98 S. 297 Criminal Code Cap 77 LFN 1990.

99 S. 297 Criminal Code Cap 77 LFN 1990.

100 S. 230 Criminal Code.

101 S. 229 Criminal Code.

102 S. 228 Criminal Code.

103 Henshaw (1990) 16 *International Family Planning Perspecitive* 2. Also Available on the internet (www.agi-usa.org.pubs.journals/2415698.htm) accessed on 10 April 2000.

104 Henshaw *et al op. cit.*

unplanned pregnancy and abortion will increase. A large numbers of abortions are carried out in Nigeria under both safe and unsafe conditions.

In Nigeria, as in all parts of the world, women experience pregnancies that are unplanned. Some of these women seek to terminate their pregnancies by safe, medical methods if possible, but often by whatever means that is available. Women seek abortion to avoid premarital births and to control family size. Another reason for the high incidence of abortion is the traditional need of spacing births to protect infant health and also to adhere to the social norm that lactating women should abstain from intercourse while breastfeeding.[105]

Due to the fact that abortion is criminalised in Nigeria, non-physicians, mainly pharmacists, paramedics, nurses and midwives, perform most abortions. These procedures result in an enormous number of complications requiring treatment by physicians and hospitals, as well as many that do not receive needed treatment. A large proportion of these complications are presumably caused by non-physicians' use of dilation and curettage, a method likely to cause injury and infection if not performed properly or under sanitary conditions.[106]

There is need to provide family planning services for unmarried women and for adolescents. Sex education should be taught in all Nigerian schools. Nigeria is a conservative society, but it is obvious that more and more women are having illegal abortions. Research also finds out that sexual activity among the unmarried may be increasing.[107]

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105 United Nations (UN), *Abortion Policies: A Global Review*, Volume II, New York; UN, 1993, 177; Centre for Reproductive Law and Policy (CRLP) and International Federation of Women Lawyers (Kenya Chapter), *Women of the World; Laws and Policies Affecting Their Reproductive Lives, Anglophone Africa*, New York CRLP 1997, 81-82

106 Henshaw *et al op. cit.*

107 AGI. Into a New World: *Young Women's Sexual and Reproductive Lives*, New York: AGI, 1998 10-12.

Abortion complication is responsible for 72 per cent of all deaths among girls below the age of 19.[108] Nigeria has the highest incidence of teenage pregnancies in the world [109] this is due to fact that girls especially in the North are forced into early marriages. 50 per cent of all women who die as a result of pregnancy related complications are teenagers.[110]

It is suggested that a reform of the abortion laws in Nigeria should be undertaken, so that abortion is de-criminalised.[111] Several steps could also be taken to reduce the number of women who suffer medical complications from abortion. Women should be made aware of the health consequences of delaying their decision to seek an abortion and of the importance of seeking an abortion early in their pregnancy. Barriers to obtaining safe abortion by a trained provider could be reduced by publicising the availability of abortion and by making abortion available at low cost in more facilities, including public hospitals and clinics. More training in the safest methods could be provided to physicians and others who perform abortions, and more physicians could be encouraged to offer abortion services.

In 1981 the Nigerian Society for Gynaecology and Obstetrics sponsored a *Termination of Pregnancy Bill* in the House of Representatives.[112] The Bill was closely modelled on the *English Abortion Act of 1967*. It provided for abortion on the recommendation of two registered medical practitioners where the continuance of the pregnancy "involved risk to the life of a pregnant woman, or of injury to her physical or mental health or any existing children of her family greater than if the pregnancy are terminated".[113] As an additional ground the Bill also provided for abortion where "there is a substantial risk that if the child are born it would suffer physical and mental abnormalities as to be seriously handicapped".[114] The Bill further provided that abortion could only be carried out in health centers, clinics or maternity homes approved by law or the Ministry of

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108 Raufu (1999) available on the internet (www.earthtimes.org/mar/population_growingmaternalmar27_00.htm) access on 29 July 2000.

109 *Ibid.*

110 Raufu *op. cit.*

111 Okagbue *op.cit.*; Henshaw *op. cit.*; Raufu *op. cit.*

112 At that time Nigeria was under civilian rule. A bi-cameral legislature existed under an American styled presidential Constitution. The house of Representatives was the lower house.

113 Section 1(1)(a) of the proposed Bill.

Health.[115] A conscientious objection clause absolved any doctor from liability for refusal to participate in treatment authorised by the Bill if such treatment violated his faith, religion or creed. In all such cases, however, the burden of proof of conscientious objection rested on the objector.[116]

While suffering from exceedingly unskillful drafting the *Termination of Pregnancy Bill* did attempt to introduce some useful reforms into the law of abortion in Nigeria.[117] Unfortunately, although the indications are that the proposed reforms are widely welcomed,[118] small but articulate and influential pressure groups consisting of mainly of religious leaders and conservative women's societies ranged themselves against it. The first of these groups felt that abortion was tantamount to murder while the second felt that a liberalisation of the law would lead to an increase in sexual promiscuity and a decline in moral standards. They successfully lobbied against the Bill and the House of Representatives failed to pass it.

In 1991 reform of the abortion laws was proposed by the Federal Ministry of Health but was never enacted. The Nigerian Medical Association has also endorsed reform.[119] The proposed reform suffered the same fate as the *Termination of Pregnancy Bill of 1991*. It was never passed into law.

The Constitution as it exists now cannot be used to justify the legalisation of Abortion in Nigeria. The right to bodily and psychological integrity including the right to make decisions concerning reproduction are not recognised. The Constitution is in the

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114 Section 1(1)(b) of the proposed Bill.

115 Section 1(2) of the proposed Bill.

116 Section 1(3) of the proposed Bill.

117 See Adi (1982) *Nigerian Current Law Review* 191-204; see also Okagbue (1990) 2 *Afri. J. Intl & Comp. L* 582.

118 A *Punch Newspaper* opinion poll conducted in March 1981 in Lagos State showed that 45 per cent of the people randomly selected across religious lines said they supported legalised abortion. the anti-abortion lobby was 33 per cent while 22 per cent of the respondents had no opinion one way or the other, see the *Sunday Punch* newpaper 29 March, 1981. See also Akingba (1972) 89-92.

119 Nigerian Medical Association (NMA), Decision of the NMA delegates meeting on Friday, 8 December 1995. Reformation of the 'abortion law' in Nigeria: (1996) 1 *Nigerian Medical Journal* 47-48

process of being amended, it is hoped that the amended Constitution will recognise this right.

5.3.2 Female genital mutilation in Nigeria

According to research conducted and response from people interviewed, the incidence of female genital mutilation in Nigeria is decreasing.[120] Some areas still carry out female genital mutilation during periods of initiations into womanhood. The people of Kwara and Kogi states in Northern Nigeria still practice female genital mutilation as a rite of passage into adulthood. In Akwa Ibom and Cross Rivers States, female genital mutilation is still carried out as part of marriage rites. In the Calabar area of Cross Rivers State women who are about to get married are kept in the "fattening room". This is a place where they are taught how to be good wives and good mothers, how to cook and how to look after the home. The women are circumcised during this period. The Cross River State Governor has signed a bill into law, which outlaws early marriage and female circumcision.[121] The Governor advised parents to shun the practice. Anyone who contravenes the statute will pay a fine of between one thousand and ten thousand Naira or three years imprisonment.[122]

The most common forms of female genital mutilation in Nigeria where it is practiced are clitoridectomy and excision. Most women interviewed in Nigeria are reluctant to discuss female genital mutilation insisting that the practice is obsolete and no longer exist. My own investigation however shows that it is still being carried out.

In Northern Nigeria, there is a traditional cut usually given to girls below the age of 13 in preparation for marriage. The cut is referred to as '*zurzur*' cut. The cut consists of the cutting of the anterior and rarely posterior aspects of the vagina by means of a razor blade or knife often unsterilised.[123] This is to widen the vagina and prepare the young girl for sexual intercourse, which is an incidence of marriage. The cut is also performed

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120 Beast of Burden – A study of Women's Legal Status & Reproductive Health Rights in Nigeria CLO, 1998.

121 *Punch Newspaper* Wednesday 2 August 2000 24.

122 Edo State (a state in mid-western Nigeria) has also ban female genital mutilation. Available on the internet (www.odili.net) acceessed on 22 August 2000.

123 Tahzib (1985) 75 – 80.

with the hope of letting out the so-called 'bad blood' from the woman's body.[124] This practice causes haemorrhage, which endangers the woman's health. There is also the belief that '*gishiri*' cuts help in relieving obstructed labour. Occasionally the husband of the young girl did the cutting himself to widen the introitus when he could not penetrate her. "Gishiri" cut is also referred to as "salt cut" (that is, when translated) was meant to make sex easier and sweater for the man.[125] Sometimes, the bladder is accidentally cut, resulting in *Vesico Vaginal Fistulae* (VVF).[126]

It should be noted that in Nigeria, people with VVF are often discriminated against. The people who directly and indirectly contributed to their predicament reject them. These are the parents who gave them out in marriage and the husbands who had sexual intercourse with them and got them pregnant at such a tender age. Rejected by both husband and parents, VVF patients often resort to begging for their livelihood.[127] According to Dr. Kees Waaldijk, the Dutch consultant surgeon in charge of Kano and Katsina VVF clinics, the estimated rate of VVF incidence in Nigeria is 1 per 1,000 deliveries. The estimated prevalence is approximately 150,000 to 200,000 cases in the country with about 70 per cent of the cases seen in the Northern part of the Nigeria.[128] Currently a bill is before the Federal House of Representatives (Nigerian lower house of Parliament) aimed at stopping female genital mutilation.[129] The Bill was sponsored by a female member of the House of Representatives. The bill seeks to put a stop to female circumcision. Explaining her motive, the member said: " I am sponsoring the bill on female circumcision because I am a woman. I know the psychological battering circumcision has done". She stated further that:[130]

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124 Onadeko (1987) 10.

125 *Unequal Rights op. cit. 38.*

126 VVF means Vesico Vaginal Fistulae, lack of control of the bladder or RVF Recto-Vaginal Fistulae, if the rectum is also affected.

127 *Unequal Rights op.cit.* 42.

128 Sambo (1994) 10.

129 Circumcision of Women (Prohibition) Bill; See also Ekanem E: *Stopping circumsision: The issue at stake.* Available on the internet (www.nigeriaworld.co./letters/2000/may/051.htm) accessed on 10 May 2000.

130 Available on the internet (www. nigeriaworld.co./letters/2000/may/051.htm) accessed on 10 May 2000.

> Six months ago, the wife of my security aide delivered a baby girl. without my knowledge they took the baby somewhere only to rush and call me and I carried a small baby who is supposed to be a bundle of joy, the small baby with the nappy bleeding. Before I could rush the baby to the hospital, some few poles away, the baby gave up. Simply because of what? Circumcision.

Most women do not want to talk openly about this issue. Yet they are suffering in silence. They will watch in silence their daughters' lives endangered and bodies mutilated. It serves no purpose except for the argument that girls who are not circumcised tend to be promiscuous. The main object of FGM is to control women's sexuality.

In Nigeria, some of the people interviewed stated that the culture of the people must be respected and that it is wrong to use Western ideas of civilization to conclude that FGM is bad. This raises the issue of cultural relativism and universality of human rights.[131] The writer is of the opinion that cultural relativism cannot be used to justify a human rights infringement. FGM violates a number of internationally recognized human rights viz the right to dignity, privacy, life (as research has shown that death could occur as a result of excessive bleeding) and most especially the right not to be tortured.

Female genital mutilation is now being recognised as a persecution. In the case of *In re Oluloru*[132] a Nigerian Emanuel Oluloru first entered the USA in 1980 as a non-immigrant student. He married an American citizen, and the Immigration and Naturalisation Service (INS) granted his application to become a permanent resident alien. In August 1986, he returned to Nigeria and married Lydia, while still married to his American wife. In September 1986, Lydia Oluloru returned to the USA with Emanuel on a non-immigrant visitor visa. They are divorced in 1993 after Emanuel was arrested for raping Lydia. Emanuel subsequently informed the INS of Lydia's illegal status. Lydia Oluloru also argued that women experience oppression because of their gender in patriarchal societies and that their children suffer because of this persecution.

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131 See the section on FGM above where cultural relativism and FGM is discussed.

132 *In re Oluloru* A72/147/491 (Wash EOIR Immgr Ct) 23 March 1994.

On 23 March 1994 Immigration Judge Kendall Warren suspended Lydia Oluloru' deportation because the risk of ritual FGM in Nigeria posed an extreme hardship for her young US-born daughters.[133]

It is hoped that this Circumcision of Women (Prohibition) Bill would eventually be passed thereby criminalising female genital mutilation. There is also a need to embark on an enlightenment campaigns whereby people are educated on the dangers inherent in female genital mutilation.[134]

5.4 REPRODUCTIVE RIGHTS IN SOUTH AFRICA

The right to reproductive choice is a constitutional right in South Africa. The Constitution of South Africa[135] recognises the right to freedom and security of the person. Section 12 (2) of the Constitution provides as follows:

> Everyone has the right to bodily and psychological integrity, which includes the right:
>
> (a) to make decisions concerning reproduction;
>
> (b) to security and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments.

Section 27(1)(a) of the South African Constitution provides that:

> Everyone has the right to have access to health care services including reproductive health care.

Reproductive rights is recognised in the South African Constitution. Maternity benefits are governed by three laws in South Africa.[136] Pregnant women are entitled to four months maternity leave.[137] Maternity leaves are not fully paid in South Africa.[138]

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133 See Rudloff (1995) *St Mary's LJ* 877 at 897.

134 Female genital mutilation is discussed extensively in the first part of this Chapter.

135 Act 108 of 1996.

136 Basic Conditions of Employment Act 75 of 1997; Labour Relations Act 66 of 1995 and Unemployment Insurance Act 30 of 1966.

137 S. 25 Basic Conditions of Employment Act 75 of 1997.

138 On maternity benefits, See generally Bolani (1999) 249; Moffat (1999) 75.

The Labour Relations Act provides that the dismissal of an employee on account of her pregnancy, intended pregnancy or any other reason related to her pregnancy is automatically unfair.[139] However, in the case of *Woolworths (Pty) Ltd v Whitehead*[140] the Labour Appeal Court held that it is not unfair for employers to reject work applications for senior positions from women because they are pregnant.

In the case, Whitehead a human resources expert applied for and was allegedly offered a permanent position at Woolworths (Pty) Ltd as a "Human Resources Generalist". Subsequently, on discovering that Whitehead was pregnant, the company withdrew the offer of permanent appointment and instead offered her a fixed-term contract of five months. Whitehead argued that the withdrawal of the offer was a breach of contract, which amounted to unfair dismissal in terms of the Labour Relations Act.[141] Whitehead further argued that she had been unfairly discriminated against on grounds of her pregnancy. Whilst the respondent did not dispute that there was discrimination, it argued that it did not unfairly discriminated against the applicant on an arbitrary ground. This was due to the fact that the position applied for had an inherent requirement of uninterrupted job continuity.

Whitehead applied to the Labour Court. The labour court found for Whitehead[142] and held that the fact that the company was prepared to offer Whitehead a fixed-term contract meant that she was fully and properly qualified for the position, except for the fact that she was pregnant. The judge concluded that the applicant had been unfairly discriminated against and found in her favour.[143] The decision of the Labour Court was reversed on appeal by the Labour Appeal Court. Wills JA, delivering the main judgment, overturned the decision of the labour court that the appellant had unfairly discriminated against Whitehead on an arbitray ground. He found that the position applied for did indeed require continuity for an uninterrupted period of at least twelve months. The Labour Appeal Court held that there was nothing arbitrary in the employer

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139 S. 187(1)(e)Labour Relations Act 66 of 1995. See also S. 9(3) and (4) of the Constitution of the Republic of South Africa Act 108 of 1996, and S.6(1) of the Employment Equity Act 55 of 1998, which prohibit unfair discrimination on the ground of pregnancy.

140 *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC.

141 S. 186 (a) and S. 187 (1)(e) Labour Relations Act 66 of 1995.

142 *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC.

143 *Ibid.* para 37.

taking into account the applicant's pregnancy in deciding whether or not to offer her a contract of permanent employment. "To hold that an employer cannot take into account a prospective employee's pregnancy would be widely regarded as being so economically irrational as to be fundamentally harmful to our society."[144] The economy would not survive protection of women in the respondent's position. "When it comes to executive positions of critical importance, the consequences go beyond imposing a burden on employers. They impact negatively on the cpacity of the economy, as a whole, to grow and, in doing so, its capacity to create new jobs."[145] The court stated further that: [146]

> To find that the pregnancy of a prospective employee cannot be taken into account in deciding whether or not to offer her employment may seem to be fair to prospective employees, but it would certainly be unfair to employers and society as a whole and by reason of the damaging consequences of such a finding upon society as a whole, ultimately unfair to prospecite employees as well.

The decision of the Labour Appeal Court has been criticised[147] and justly so. The Director of the Women's Legal Centre[148] said that "the judgment discriminates against women in terms of their unique capacity to be mothers, and passes judgment on the way in which women strike a balance in their life between working and raising a child". In a newspaper editorial, it was argued that the decision ran "counter to the constitutional guarantee that all workers are entitled to fair labour practices and are protected from indirect discrimination on the gounds of gender".[149]

It is submitted that the judge erred by not making use of the Constitutional Court extensive jurisprudence on equality and unfair discrimination.[150] The Labour Appeal

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144 *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC para. 136.

145 *Ibid.* para 147.

146 *Ibid.* para 149.

147 Mubangizi (2000) 16 *SAJHR* 690; "Bosses Mustn't Have Babies" *Mail & Guardian* 7-13 April, 2000; "Pregnant with Injustice" *Sunday Times* 9 April 2000. Jagwanth "Why should women have to choose" *Mail & Guardian* 14-20 April 2000.

148 O'Sullivan who made submission to the court as amicus curiae.

149 *Sunday Times* 9 April 2000.

150 See Chapter 3 above.

Court did not interprete the Labour Relations Act in lights of the provisions of the 1996 Constitution. The judge chose to base his analysis of whether discrimination was unfair on the commercial interests of the eemployer. He chose to make use of the "well-developed" jurisprudence in the field of tax law".[151] The dissenting judgment of Conradie JA is preferred. He stated that pregnancy is not an illness.[152]

Entitlement to the payment of maternity benefits arises under the Unemployment Insurance Act,[153] section 37 of the Act provides that a female contributor to the Unemployment Insurance Fund who is unemployed may be paid benefits in respect of her pregnancy and confinement for a period not exceeding twenty-six weeks from the date on which she is deemed to have become unemployed, whether or not she is capable of and available for work.[154] In terms of the Act, a female contributor is deemed to be unemployed if in respect of the period of twenty-six weeks, she receives from her employer less than one-third of her normal earnings.[155]

No payment of benefits may be made unless the application is made before the date of birth or within a period of fifty-two weeks from that date. A contributor is also not entitled to maternity benefits unless she was in employment as a contributor or otherwise for at least thirteen weeks during the fifty-two weeks immediately preceding the expected date of her confinement or the date of birth as the case may be.[156] The Unemployment Insurance Act also provides for the payment of adoption benefits. A female contributor (who is deemed to be unemployed) may be paid adoption benefits for a period of up to twenty-six weeks commencing on the date of application to a Children's Court in terms of the Child Care Act,[157] in respect of the adoption of a child (who at the time of the application was under the age of two years). No payment of adoption benefits may be made before the Children's Court issues the adoption order.

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151 *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC at para 11.

152 *Ibid* para 43.

153 Act 30 of 1966.

154 S. 37 *ibid.*

155 S. 37(6) Unemployment Insurance Act 30 of 1966.

156 The Unemployment Insurance Board may, however, authorise the payment of benefits to a contributor who was in employment for less than thirteen weeks if she was employed in connection with ionising radiation at any time during a period of thrity-nine weeks before the expected date of confinement or the date of birth.

157 Act 74 of 1983.

The other requirements relating to thirteen weeks employment and receiving less than one third of normal earnings apply to adoption benefits as well.[158]

Maternity benefits are payable at the rate of 45 per cent of the normal earnings at which the contributor was last employed as a contributor. The benefits payable may not exceed one week's benefits for each completed cycle of six weeks' employment as a contributor on or after 30 July 1962. This arrangement is referred to colloquially as "the employee as credits".[159]

5.4.1 Abortion in South Africa

A woman's decision to have children is fundamental to her physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy as well as sexuality education counselling programmes and services. It is generally believed that reproductive rights include access to abortion.[160]

Abortion is not specifically mentioned in the South African Constitution,[161] but several of the rights entrenched in the Bill of Rights[162] are relevant to the question of whether, and in what circumstances, a woman has a constitutionally protected right to an abortion. These rights include the rights to life, privacy, religious freedom, security of the person and equality.

Abortion is legalised in South Africa from 1996. The applicable law is the Choice on Termination of Pregnancy Act.[163] (Act). The Preamble to the Choice on Termination of Pregnancy Act recognises the values of human dignity, the achievement of equality, security of the person, non-racism and non-sexism. It further recognises that the decision to have children is fundamental to women's physical and psychological social

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158 S. 34 Unemployment Insurance Act 30 of 1966.

159 Bolani *op.cit.* 249.

160 See generally Cook & Fathalla (1996) 22 *International Family Planning Perspectives* 115; Carlota (1995) 44 *American University Law Review* 1145-55.

161 Act 108 of 1996.

162 Chapter 2 Act 108 of 1996

163 92 of 1996.

health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy as well as sexuality education and counseling programmes and services.

The Choice on Termination of Pregnancy Act repealed the restrictive and inaccessible provisions of the Abortion and Sterilisation Act, [164] and promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs.

Under the Act, a woman has a choice to have an abortion in the first 12 weeks of pregnancy merely by requesting it.[165] From the 13th up to and including the 20th week of the gestation period, termination of pregnancy is restricted. It can only be done if a medical practitioner in consultation with the pregnant woman is of the opinion that the continued pregnancy poses a risk of injury to the woman's physical or mental health, risk of physical or mental abnormality to the foetus, the pregnancy resulted from rape or incest or that the continued pregnancy would significantly affect the social or economic circumstances of the woman.[166]

Pregnancy may also be terminated from the 20th week of the gestation period, but only if a medical practitioner, after consultation with another medical practitioner, or a registered mid-wife, is of the opinion that the continued pregnancy would endanger the woman's life, would result in a severe malformation of the foetus, or would pose the risk of injury to the foetus.[167]

The Act also makes provision for a non-mandatory and non-directive counselling before and after the termination.[168] Section 5 of the Act makes provision for consent of the pregnant woman and that no other consent except that of the pregnant woman is required.[169] The implication of this provision is that a pregnant woman does not require

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164 Act 2 of 1975.

165 S. 2(1)(a) Choice on Termination of Pregnancy Act 92 of 1996.

166 S. 2(1)(b) Choice on Termination of Pregnancy Act 92 of 1996.

167 S. 2(1)(c) (i), (ii) & (iii) Act 92 of 1996.

168 S. 4 Act 92 of 1996.

169 S. 5(2) Act 92 of 1996.

the consent of her spouse before abortion, although a minor may be advised to consult her parents, guardian, family members or friends, but termination of the pregnancy shall not be denied because such minor chooses not to consult them.[170] This section gives effect to section 12(2) of the Constitution,[171] which recognises the right to bodily and psychological integrity.

Section 5 of the Act gives effect to the right to make reproductive decisions and security and control of the body. The Act also criminalises abortions performed by persons who are not medical practitioners or registered midwives[172] and any person who prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy[173] by providing for the payment of a fine or imprisonment for a period not exceeding 10 years on conviction.

The Act does not make provision for conscientious objectors, that is persons who may not want to perform abortions on religious grounds but it is hoped that in practice such persons would be excused from performing an abortion. The Act is also commendable as it provides that the identity of a person who has an abortion shall remain confidential at all times unless the person chooses to disclose the information.[174]

In spite of the provisions of the Act, abortion is still not readily available. Some of the women interviewed stated that in government hospitals, abortions are not readily available on request. The respondents stated that there is usually a waiting period of almost three months by which time the pregnancy is much advanced. The respondents stated further that they have to resort to private facilities, which are usually very expensive, and some opt to have abortions at surgeries, which are not well equipped for the facilities.

Van Oosten has criticised the use of the expression "promotes reproductive rights" in the Act is both ironic and redundant as what is promoted in the Act is the right not to

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170 S. 5(3) Act 92 of 1996.

171 Act 108 of 1996.

172 S. 10(1)(a) Choice on Termination of Pregnancy Act 92 of 1996.

173 S. 10(1)(d) Act 92 of 1996.

174 S. 7(3) and 7(5) Act 92 of 1996.

reproduce.[175] He further drew a parallel between consent to abort and consent to have other forms of medical operation. The Act guarantees the right of minors to have abortion without the consent of their parents whereas in other forms of medical operations consent of parents is required in case of a minor.[176] The doing away with parental consent in cases of minors may not be a legislative oversight as stated by Van Oosten, rather it may be due to the need to strengthen the right to physical integrity and privacy guaranteed by the Constitution.

This writer supports the position of the Act as this will help to prevent teenage pregnancies and the ensuing circumstances. If parents are to be involved in the decision whether to have an abortion or not, most minors would not be able to avail themselves of the benefits of the Act.

Van Oosten stated further that the Act is a form of contraception, since according to him contraception and pregnancy are mutually exclusive.[177] He stated that contraception means no pregnancy and pregnancy means no contraception. This statement is not true as it is possible to be pregnant while using contraceptives. No method of contraception is foolproof. There are always failure rates. Failed contraception is not the same thing as no contraception.

The Act has also been criticised as a form of population control.[178] Although it is possible for population to be reduced as a result of abortion, it is submitted that this is not the main objective of the Act.

The constitutionality of the Act[179] was tested in the case of *Christian Lawyers Association of South Africa and Others v Minister of Health and Others.*[180] In this case, the plaintiffs sought an order of the Court declaring the Act to be unconstitutional and striking it down in its entirety. The plaintiffs contended that section 11 of the

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175 Van Oosten (1999) 116 *SALJ* 60.

176 Van Oosten *op. cit.* 64.

177 Van Oosten *op. cit.* 68.

178 Van Oosten *op. cit.* 63.

179 92 of 1996.

180 *Christian Lawyers Association of South Africa & Others v Minister of Health & Others* 1998 (4) SA 1113 (T.

Constitution of the Republic of South Africa[181] which provides that "everyone has the right to life", applied also to unborn children from the moment of conception or alternatively that a foetus was entitled to protection under the Constitution generally. The Court held that the provision of section 11 of the Constitution does not apply to a foetus as the foetus is not 'everyone" or "every person".[182] The Court stated further that the answer to the question whether a foetus is a person did not depend on medical or scientific evidence as to when the life of a human being commenced and the subsequent development of the foetus up to the date of birth, nor was it the function of the Court to decide the issue on religious or philosophical grounds. The issue was a legal one to be decided on the proper legal interpretation of section 11 of the Constitution.[183]

The Court stated further that the question was not whether the *conceptus* was human but whether it should be given the same legal protection as everyone else.[184] It was stated further that the Constitution contained no express provision affording the foetus legal personality or protection and section 12(2) of the Constitution provided specifically that everyone had the right to make decisions concerning reproduction and to security in and control over their bodies without anywhere qualifying a woman's rights in this regard in order to protect the foetus.[185]

The judge was of the opinion that if the drafters of the Constitution wished to protect the foetus, they would have done so in section 28 of the Constitution,[186] which specifically protected the rights of the child, yet there are clear indications that the safeguards in section 28 did not extend to protect the foetus. A child was defined as a person under the age of 18 years. Age commenced at birth and a foetus was not a 'child' of any 'age'. If section 28 did not include the foetus within the ambit of its protection, then it could hardly be said that the other provisions of the Bill of Rights, including section 11 are intended to do so.[187] The judge stated further that to include the foetus in the meaning of 'everyone' in section 11 would ascribe to it a meaning different

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181 Act 108 of 1996.

182 At paras 1117F-G and 1118A/B-C.

183 At para 1118C-D.

184 At para 118 C-D.

185 At 1121.

186 S. 28 provides for children's rights.

187 At 1122.

from that which it bore everywhere else in the Bill of Rights, something that was clearly untenable.

The Court further held that several anomalies would ensue if section 11 are to be interpreted as affording constitutional protection to the life of a foetus.[188] The life of the foetus would enjoy the same protection as that of its mother, and abortion would be constitutionally prohibited even though the pregnancy constituted a serious threat to the life of the mother.[189] The prohibition would apply even if the pregnancy resulted from rape or incest, or if there was a likelihood that, if born, the child would suffer from severe physical or mental abnormality. In addition, the termination of a woman's pregnancy would, despite the provisions of the Abortion and Sterilisation Act,[190] constitute not the crime of abortion but that of murder. The drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves clearly. The Court therefore held that the foetus is not a legal *persona* under the Constitution. The judge concluded that to extend Constitutional protection to the foetus would impinge on the protection for women's rights afforded by a number of sections of the Constitution.[191]

The decision of the judge not to extend the right to life to the foetus is in line with international trends. International law clearly does not support the argument that the human foetus is a constitutional subject. The question on the status of the foetus is a moral issue clearly in law a person that does not exist does not have any right.[192]

The writer agrees with the submission of the judge that a foetus is not a person and therefore is not a constitutional bearer of rights. Abortion therefore would not be unconstitutional.

5.4.2 Female genital mutilation in South Africa

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188 *Ibid.*

189 At 1122.

190 2 of 1975.

191 At 1123B/C.

192 See further Slabbert (1999) 32 *CILSA* 336.

Investigation conducted shows that female genital mutilation is at present almost extinct in South Africa, though it is being practiced among the Tsonga people of the Northern Province. Most people, spoken to from this area, deny the fact that the practice still persists. Some maintain that only circumcision school is still being done. This is a school where young girls attend to learn about their roles as women and future roles as wives and mothers. It will however be examined whether female genital mutilation would be constitutional in South Africa, even if it is still practiced.

Female genital mutilation would violate the following rights provided for in the Constitution of South Africa:[193] children's rights, the right to freedom and security of the person, the right to life and the right to culture.

Female genital mutilation would breach the children's right provision of the Constitution.[194] Female genital mutilation involves an intentional use of physical force, which results in bodily injury. Most of the girls who undergo this procedure are usually girls under the age of eighteen years and would therefore be regarded as children (and incapable of giving informed consent to the procedure).

Female genital mutilation poses significant health risks, which jeopardises the child's health and safety in addition to subjecting the child to excruciating pain. It may also be argued that circumcision is done on male children. The difference is in the custom of the people. Circumcision for boys is practiced by a large members of the society. In fact in some parts of South Africa, an uncircumcised man is considered not fit to marry.[195]

Female genital mutilation would also infringe on the right to freedom and security of the person. Section 12(1) prohibits all forms of physical, mental and emotional torture as well as cruel, inhuman or degrading punishment. Both clitoridectomies and infibulation are very painful and thus cruel.[196] In most cases, female genital mutilation is carried out without anesthesia, and with blunt, unsterile instruments. The pain lasts for weeks and, with infibulation, recurs throughout life – with menstruation, intercourse

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193 Act 108 of 1996.

194 S. 28 of Act 108 of 1996.

195 See Chapter 8 below.

196 Kellner (1993) *Jnl of Juvenile Law* 118 at 125.

and childbirth. Female genital mutilation imposes terrible physical suffering on young girls and often results in lifelong medical problems. The clitoris contains specialised sensory tissue concentrated in a rich neurovascular area of a few centimetres.[197] The removal of even a small amount of this tissue is dangerous and can have irreversible physical effects.

5.5 A COMPARISON OF REPRODUCTIVE RIGHTS OF WOMEN IN NIGERIA AND SOUTH AFRICA

Reproductive rights are not specifically mentioned in the Nigerian Constitution. The South African Constitution,[198] provides for the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.[199]

In Nigeria, maternity leave is for three months, but in South Africa maternity leave is for four months. Maternity leave in Nigeria is fully paid. The employee receives full salary and emoluments. However, in South Africa, maternity leave is not fully paid. Maternity benefits are only paid if the employee contributes to an Unemployment Insurance Fund and even then she only receives 45 per cent of her salary. The unemployment benefits are paid only if the employee receives less than one-third of her normal earnings from her employer. If she receives more than one-third of her normal earnings from her employer, no unemployment benefits are paid, even if she is a contributor and meets all the other conditions.

In South Africa, adoption benefits are also paid under the Unemployment Insurance Fund. In Nigeria, there are no adoption benefits. In both countries only pregnant women who are employed are entitled to some form of financial benefits. Pregnant women in informal sectors are not entitled to any maternity benefits.

South Africa offers free medical and dental care to pregnant women.[200] Childbirths in government hospitals are generally affordable irrespective of the birth method.

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197 Hughes (1995) *Jnl of Law and Policy* 323 at 329.

198 Act 108 of 1996.

199 S. 12(2)(a) Act 108 of 1996.

200 See CEDAW Report *op. cit.*

It is being suggested that a system should be put in place where people who are not employed should also be entitled to some financial assistance from the state.

Reproductive rights are widely recognised to include abortion. The word abortion is not mentioned in the Constitutions of the two countries. South Africa however has a law dealing with choice on termination of pregnancy.[201] Presently Nigeria does not have any law regulating abortion (apart from the fact that it is criminalised under the Criminal Code). In the past attempts are made[202] to have a law enacted aimed at legalising abortion. The Bill was never passed, so abortion remains illegal in Nigeria except for the limited cases of saving the life of the pregnant woman.

The right to private and family life recognised in the Nigerian Constitution does not cover right to physical and psychological integrity and reproductive choices are not recognised in the Constitution. Abortion is a criminal offence in Nigeria. Family planning is however readily available. Family planning does not include abortion in spite of the worldwide belief that family planning includes the right to have an abortion. Abortion to save the life of the mother is however permitted. Abortion is also permitted if the foetus is malformed.

Despite the fact that abortion is not recognised in Nigeria, many women resort to illegal abortions.[203] It is being proposed that abortion is legalised in Nigeria to save several lives lost yearly through illegal abortion. One main obstacle that may stand in the enactment of abortion law in Nigeria is the conservative North with strict Islamic law. Abortion should however be legalised to enable women who want abortion to have access to it. Government in Nigeria should also improve the state of health care services in Nigeria including reproductive health. Caesarian operations should be available at affordable prices. Women particularly those in rural areas should be educated that Caesarian birth might at times be the only way of saving the lives of both mother and child and that this does not mean that the women who have Caesarean births are bewitched or weak.

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201 Act 92 of 1996.

202 In 1981 and 1991.

The Constitutions of Nigeria and South Africa do not mention female genital mutilation specifically. The Constitutions of both countries however prohibit torture, inhuman or degrading treatment.[204] Female genital mutilation is not common in South Africa. The practice is almost extinct.[205] Female genital mutilation is practiced in Nigeria. Research shows that the incidence of female genital mutilation in Nigeria is presently low. This may be as a result of the efforts of the various NGOs and mass education of the people on the health dangers inherent in the practice. It is not totally eradicated in Nigeria but the practice is now being shrouded in secrecy.

A bill is presently before the National Assembly in Nigeria aimed at prohibiting female genital mutilation in the whole of Nigeria.[206] Two state governments have banned the practice.[207] It is hoped that the other states where female genital mutilation is being practiced would follow suit. However, it should be noted that FGM could not be legislated out. Legislation would only drive the practice underground. What is required is mass education of the people on the dangers posed by the practice.

As stated earlier, female genital mutilation is almost extinct in South Africa, virginity test is however still being practiced. This is a practice where girls are tested for their virginity. The essence of this is to prevent girls from losing their virginity before marriage, as this would enhance the amount of dowry payable on marriage. While it is commendable to urge girls not to engage in premarital sex, the practice however violates a number of constitutional rights. It violates the right to equality.[208] The test is only carried out on girls giving the impression that it is right for boys to indulge in premarital sex. Virginity test also violates the right to freedom and security of the person.[209] Virginity tests also pose a great danger to health.[210] There is also a link between HIV/AIDS and virginity tests. Some people living with HIV/AIDS are raping

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203 Henshaw *op.cit.*

204 S. 33 1999 Constitution of the Federal Republic of Nigeria; See also Ss. 10 and 12(1)(d) of the South African Constitution Act 108 of 1996.

205 Schapera (1982) 70.

206 Circumcision of Women (Prohibition) Bill.

207 Edo and Cross Rivers States. (Female circumcision is prevalent in these two states).

208 S. 9 Act 108 of 1996.

209 S. 12 Act 108 of 1996.

210 See Chapter 8 below.

girls confirmed as virgins, as they have been told by native doctors that sleeping with virgins cures HIV/AIDS.

South Africa has better legal protection of reproductive rights than Nigeria. Abortion should be legalised in Nigeria and efforts should be intensified to ban female genital mutilation in Nigeria. The Nigerian government should also improve the state of health services including reproductive health care.