

IT IS MY BODY, SO I DECIDE

A MULTIDISCIPLINARY APPROACH TO THE INTERPRETATION OF ARTICLE 14 OF
THE PROTOCOL TO THE AFRICAN CHARTER ON THE RIGHTS OF WOMEN IN AFRICA

LLM Mini Dissertation

By

Elvis Fokala Mukumu

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Prepared under the supervision of

Professor Frans Viljoen

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DECLARATION

I, Elvis Fokala Mukumu, hereby declare that this mini-dissertation is original and has never been presented in the University of Pretoria or any other institution. I also declare that any secondary information used has been duly acknowledged in this mini-dissertation.

Student: Elvis Fokala Mukumu

Signature: -----

Date: -----

Supervisor: Professor Frans Viljoen

Signature: -----

Date: -----

DEDICATION

To all women who have been refused or restricted from the full enjoyment of their sexual and reproductive health rights.

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When I decided to embark on this journey, I knew that it would not come to an end without the help and encouragement from others. To begin with, I would like to express my sincere thanks to the Centre for Human Rights, University of Pretoria for granting me this opportunity.

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ABSTRACT

Although much has been written and discussed on the African Women's Protocol in recent years, a number of misinterpretations and ambiguities remains regarding the source and scope of the specific rights enshrined in this revolutionary Protocol. From a legal perspective, the author singles out the provision of article 14 of the African Women's Protocol (sexual and reproductive health rights) and begins with the tricky issue of identifying four aspects namely non-discrimination, abortion, informed consent and HIV/AIDS which in his opinion are fundamental to the protection and promotion of women's sexual and reproductive health rights. Thereafter, with the help of case law, the author reviews the legal interpretations of these four aspects by some African, American, and Asian courts. At the UN level, decisions of the CEDAW Committee and the Human Rights Council are also reviewed.

Of practical interest, reflecting on the four aspects, the author explores the interpretative approach of different social sciences such as sociology, anthropology and psychology in an attempt to introduce a multidisciplinary approach that could supplement legal interpretation and understanding of women's sexual and reproductive health rights.

LIST OF ACRONYMS AND ABBREVIATIONS

African Women's Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
ACHPR	African Charter on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
ARV	Antiretroviral
AU	African Union
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
FGM	Female Genital Mutilation
GC	General Comment
GR	General Recommendation
HC	High Court
HIV/AIDS	Human Immune Virus / Acquire Immune Deficiency Syndrome
HRC	Human Rights Council
HR Committee	Human Rights Committee
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICPD	International Conference on Population and Development
MTCT	Mother-to-Child Transmission
SCA	Supreme Court of Appeal
SC	Supreme Court
STD	Sexual Transmitted Diseases
TAC	Treatment Action Campaign
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNFPA	United Nations Population Fund
USA	United States of America
WHO	World Health Organization
WWII	World War Two
WCW	World Conference on Women



TABLE OF CONTENTS	
DECLARATION	2
DEDICATION.....	3
ACKNOWLEDGEMENTS	4
ABSTRACT.....	5
LIST OF ACRONYMS AND ABBREVIATIONS	6
CHAPTER 1: INTRODUCTION.....	9
1.1 Background	9
1.2 Problem statement	13
1.3 Research questions.....	13
1.4 Objectives of the study	14
1.5 Limitations of the study	14
1.6 Literature review	15
1.6.1 Non-discrimination	15
1.6.2 Abortion	15
1.6.3 Informed consent.....	16
1.6.4 HIV/AIDS	16
1.7 Significance of the study.....	17
1.8 Methodology	18
1.9 Chapter outline	18
CHAPTER 2: THE AFRICAN WOMEN'S PROTOCOL	19
2.1 Introduction.....	19
2.2 Review of four selected aspects of article 14	20
2.2.1 Non-discrimination	21
2.2.2 Abortion	22
2.2.3 Informed consent.....	23
2.2.4 HIV/AIDS	25
2.3 Conclusion.....	26



CHAPTER 3: LEGAL APPROACH TO THE INTERPRETATION OF SELECTED ASPECTS OF ARTICLE 14.....	27
3.1 Introduction.....	27
3.2 Legal interpretation of selected aspects of article 14.....	28
3.2.1 Non-discrimination	28
3.2.2 Abortion	30
3.2.3 Informed consent.....	33
3.2.4 HIV/AIDS	35
3.3 Conclusion.....	37
CHAPTER 4: MULTIDISCIPLINARY APPROACH TO THE INTERPRETATION OF SELECTED ASPECTS OF ARTICLE 14.....	39
4.1 Introduction.....	39
4.1.1 Definition of disciplines	40
4.1.1.1 Sociology	40
4.1.1.2 Psychology	41
4.1.1.3 Anthropology.....	41
4.2 Multidisciplinary interpretation of selected aspects of article 14	42
4.2.1 Non-discrimination	42
4.2.2 Abortion	45
4.2.3 Informed consent.....	48
4.2.4 HIV/AIDS	50
4.3 Conclusion.....	51
CHAPTER 5: CONCLUSION.....	52
5.1 Brief summary	52
5.2 Conclusions.....	52
BIBLIOGRAPHY	55

CHAPTER 1: INTRODUCTION

1.1 Background

Procreation is considered as one of the most crucial features of the human experience. Reproductive health, therefore, is important as reproduction implies the creation of family, community and thus connects the present to the future.¹ The Programme of Action of the International Conference on Population and Development (ICPD) defines reproductive health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes'.² According to Packer, this means that 'people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so'.³ It also contains the right to be informed, to give informed consent and to have 'access to safe, effective, affordable and acceptable methods of family planning' and other legal methods for the regulation of fertility of one's choice; and 'the right to appropriate health care services that enable women to go safely through pregnancy and childbirth'.⁴

Reproductive freedom ensures that individuals live life with dignity. To interfere with human reproduction is a direct attack on human dignity. In this regard, Packer observes that human desire to live life with dignity, in which life can be enjoyed to the fullest, in good health and with the freedom to develop according to one's desires, is of primordial importance.⁵ Similarly, Eriksson adds that 'women's ability to decide whether, when, if and with whom to have sex, and have children is a fundamental component of their human rights and their human dignity'.⁶ The choice of the number of children and spacing an individual or couple wish to have depends, therefore, solely on that individual or couple and has to be respected.⁷

¹ C Packer, *The Right to Reproductive Choice: A Study in International Law* (1996) 1.

² R Boland, *Promoting Reproductive Rights: A Global Mandate* (1997) 6; see also Department of Economic and Social Information and Policy Analysis (Population Division), *Reproductive Rights and Reproductive Health: A Concise Report* (1996) 1.

³ Packer (n 1 above).

⁴ As above.

⁵ As above.

⁶ M Eriksson, *Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law* (2000) 10.

⁷ Packer (n 1 above).

Women's rights to their reproductive freedom is not new. Its origin is embodied in the oldest and most accepted human rights documents; an example of such is the Universal Declaration of Human Rights (UDHR).⁸ For the first time, governments at the 1994 ICPD in Cairo overtly recognized that reproductive rights are grounded in already existing human rights instruments.⁹ It was also during this conference that representatives of over 180 nations agreed that 'women needed to be empowered to take charge of their reproductive lives, that unsafe abortion is a public health concern, and that forced sterilization has no place in family planning efforts'.¹⁰

The following year, with the decisions and progress made in the recognition of women's right to reproductive freedom at the ICPD conference still fresh in their minds, at the World Conference on Women (WCW) in Beijing, governments undertook to fully assure reproductive rights for all women.¹¹ The outcome of the WCW conference brought significant changes at the United Nations (UN) and regional human rights bodies. For instance, at the African level, women, especially those with disabilities, gained significant legislative protection and promotion of their rights to control their sexual and reproductive health lives.¹² These conferences and the resolutions that resulted from them have set the stage for an influx of legal interpretations that would broaden the scope of women's access to their sexual and reproductive health rights.

It is in this regard that the United Nations Committee on Discrimination against Women (CEDAW Committee) stated that 'women are entitled to decide the number of children and spacing of their children'.¹³ This is because, the Committee notes, women's reproductive responsibilities affects their right 'to education, employment and other activities related to their personal development'. They also 'impose inequitable burdens of work on them, and affect their physical and mental health'.¹⁴

⁸ See generally, art 16(1) of the UDHR.

⁹ E Marshall, *The International Conference on Population and Development (ICPD): What the Programme of Action Really Says*, available at http://www.iwhc.org/index.php?option=com_content&task=view&id=2485&Itemid=824 (accessed 18 July 2010).

¹⁰ As above.

¹¹ Center for Reproductive Rights, *Reproductive Rights Are Human Rights* (2009) 5, available at <http://www.reproductiverights.org/en/feature/repro-rights-are-human-rights> (accessed 16 January 2010).

¹² See generally, the African Women's Protocol (2003).

¹³ CEDAW Committee, General Recommendation (GR) No 21: Equality in Marriage and Family Relations UN Doc. A/49/38 (1994) para 21.

¹⁴ As above.

The right to reproductive health is fundamental to women's health, dignity and equality. Accordingly, the aim of this mini-dissertation is to examine how the provision on the right to sexual and reproductive health in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)¹⁵ can be interpreted from various approaches such as sociology, psychology and anthropology. Crichton observes that a multidisciplinary approach is important because rights, 'as legitimate claims, involve three intersecting dimensions – social, legal and personal'.¹⁶

Notwithstanding, it should be noted that the right to sexual and reproductive health is not the brain child of the African Union (AU) but of several international human right treaties. Examples of such treaties are: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);¹⁷ the Convention on the Rights of the Child (CRC);¹⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR);¹⁹ and the International Covenant of Civil and Political Rights (ICCPR).²⁰ It should also be noted that women's sexual and reproductive health rights are human rights but are not isolated rights. Accordingly, this right includes: the right to life, liberty and security of person, health, including sexual and reproductive health, the right to decide the number and spacing of children. In addition, the right to privacy and the right to be free from sexual and gender based violence are linked to the violation of the sexual and reproductive health right.²¹ The Committee on Economic, Social and Cultural Rights in its General Comment (GC) No 14 on the right to health described these veiled connotations as 'underlying determinants of health'.²²

¹⁵ For a full text of the African Women's Protocol, see generally, http://www.achpr.org/english/_info/women_en.htm (accessed 05 December 2010); see also Centre for Human Rights and University of Peace, *Compendium of Key Human Rights Documents of the African Union* (2005) 38.

¹⁶ J Crichton *et al*, 'Towards Realising Sexual and Reproductive Health Rights in Eastern and Southern Africa: Promoting Rights and Responsibilities beyond the Individual', available at <http://www.realising-rights.org/docs/lancet.pdf> (accessed 21 June 2009).

¹⁷ See generally, art: 10(h), 11(f), 12, 14(2)(b) and 16 of the CEDAW, UN Doc. A/34/46 (1979).

¹⁸ See generally, art 24(2)(d) and (f) of the CRC, UN Doc. A/44/49 (1989).

¹⁹ See generally, art 12 of the ICESCR, UN Doc. A/34/46 (1966).

²⁰ See generally, art 23(2) of the ICCPR, UN Doc. A/6316 (1966).

²¹ N Sadik, '*The Right to Reproductive and Sexual Health*' (1997), available at <http://www.un.org/ecosocdev/geninfo/women/womrepro.htm> (accessed 10 January 2010).

²² ICESCR Committee, UN Doc. E/C.12/2000/4 (2000) para 4.

Besides, the impact and potential of the African Women's Protocol goes well beyond Africa.²³ The treaty affirms reproductive choice and independence as a key human right and contains a number of large-scale firsts. For instance, the African Women's Protocol is the first international human rights instrument to openly articulate a woman's right to abortion in cases where pregnancy results from 'sexual assault, rape, or incest; when continuation of the pregnancy endangers the life or health of the pregnant woman; and in cases of grave fatal defects that are incompatible with life'.²⁴

Though the African Charter on Human and Peoples' Rights (ACHPR) is the principal treaty that provides a legal outline for human rights in Africa, its content on women's rights could be considered to be unproductive and insufficient.²⁵ The ACHPR explicitly identifies and affirms women's rights in three of its provisions.²⁶ First, article 2 provides that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'. Secondly, article 3 of the ACHPR states that 'every individual shall be equal before the law' and 'shall be entitled to equal protection of the law'. Thirdly, article 18(3) requires states parties to 'ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman'. Nonetheless, the African Women's Protocol is premised on the concern that despite the ratification of the ACHPR by states parties,²⁷ women in Africa still continue to be victims of 'discrimination and harmful practices'.²⁸ The African Women's Protocol, which resulted from years of activism by women's rights supporters in Africa, has bolstered the ACHPR obligation to women's equality by adding rights that were missing from the ACHPR and by clarifying governments' obligations with respect to women's rights.²⁹

²³ Center for Reproductive Rights, *The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights* (2006) 3, available at http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_africa.pdf (accessed 21 June 2009).

²⁴ See generally, art 14(2) of the African Women's Protocol.

²⁵ Nonetheless, the ACHPR can be considered rightly so as the catalyst for a better protection of women's rights in Africa and beyond through the adoption of the African Women's Protocol. According to the Center for Reproductive Rights (n 11 above), 'The African Women's Protocol was a timely instrument that was adopted to curtail these challenges'.

²⁶ See generally, art: 2, 3 and 18(3) of the ACHPR.

²⁷ All African Union member states have ratified the ACHPR.

²⁸ See generally, the preamble of the African Women's Protocol.

²⁹ See generally, art 26(1)(2) of the African Women's Protocol.

1.2 Problem statement

The inclusion of sexual and reproductive health rights are, among others, one of the highlights of the African Women's Protocol. The African Women's Protocol is and remains a medium through which fundamental women's rights are protected and promoted. The inclusive appreciative standards and justiciability of these fundamental women's rights as enshrined in the African Women's Protocol makes the right whole and without them, the right remains a statement of legal rhetoric.

Equality of men and women has always been, and still is, one of the core debates of the international human rights system.³⁰ On that account, dignity and human rights of both men and women are as such to be promoted and protected by international and regional human rights frameworks. In Africa, some of the most serious violations of women's rights are committed within the family and are worsened by societal rules and cultural principles.

At the UN level, according to the United Nations High Commissioner for Human Rights (UNHCHR), the latest UN official figures indicate that '529,000 women die every year from pregnancy-related causes'.³¹ In simple terms, the UNHCHR affirms that 'this is one death every minute'.³² Meanwhile, for every maternal death, the UNHCHR adds that an estimated '20 women suffer pregnancy-related injuries and disabilities including in many cases, long term disabilities such as organ prolapses, infertility, obstetric fistula or incontinence, affecting approximately 10 million women annually'.³³

Consequently, the adoption of the African Women's Protocol is a groundbreaking initiative by the AU to take women's rights a step further. Conspicuously among the provisions of the African Women's Protocol, is the right to sexual and reproductive health. The question arises whether the bodies at the African Union (AU) promote and protect the dignity of women's sexual and reproductive health. Moreover, if they do, what method of interpretation is applied to best appreciate the dynamics that surround women's sexual and reproductive health rights?

1.3 Research questions

This study seeks to address two key questions, which are relevant to the discussions:

³⁰ F Leeuwen, 'The Necessity to Include Women in the Human Rights Mainstream' (2007) 25(1) *Netherlands Quarterly of Human Rights* 100.

³¹ N Pillay, *Rights-based Approach to Address Maternal Mortality and Morbidity* (2010) 2.

³² As above.

³³ As above.

- Has the legal interpretation of four cardinal aspects of article 14 of the African Women's Protocol, namely non-discrimination, abortion, informed consent and HIV/AIDS, adequately advanced women's sexual and reproductive health rights?
- To what extent would a multidisciplinary approach enrich the interpretation of these four aspects of article 14?

1.4 Objectives of the study

This study follows from the premise that international as well as regional human rights instruments have placed insufficient emphasis on the reproductive rights of women. The study attempts a review of judicial decisions adopted thus far, and interrogates their aptness in advancing women's sexual and reproductive health rights. Then, the study seeks to introduce a multidisciplinary approach that will best interpret selected aspects of article 14 to enhance its understanding. In particular, the study seeks to:

- Explore the relevant legislative legal guarantees that ensure women's sexual and reproductive health rights;
- Evaluate the limitations of a legalistic interpretation to women's sexual and reproductive health rights; and
- Enhance a better understanding of article 14 of the African Women's Protocol by adopting a multidisciplinary approach, with the focus on sociology, psychology and anthropology.

1.5 Limitations of the study

The protection of women's sexual and reproductive health rights in most African rural communities and cultures is still embryonic. Thus, this study focuses on providing a multidisciplinary approach to the interpretation of only four key legal aspects that surrounds women's sexual and reproductive health rights to enhance a better understanding of article 14. Women's sexual and reproductive health rights will be considered as set out in both regional and international human rights treaties. The inclusion of women's sexual and reproductive health rights in the African Women's Protocol is a great indication of the commitment of the drafters and states parties to the African Women's Protocol to ensure that sexual and reproductive health rights of women are protected and respected.

Geographically, notwithstanding the fact that related international human rights treaties, cases and organs would be consulted, this study seeks to address the issues from an African view. Also, the study will be limited only to three selected disciplines which are sociology, psychology and anthropology. The author's choice of these disciplines is based

on the fact that their core study is central to the development of a human mind and behaviour.

1.6 Literature review

Though much has been written on women's rights in general, the literature focusing on the sexual and reproductive rights of women in Africa is limited from a multidisciplinary point of view. Opinions of other schools of thought on women's sexual and reproductive health rights will be considered as well as the limitations in existing studies. In the paragraphs that follow, I shall separately review literature that relates to the cardinal four aspects considered in this study.

1.6.1 Non-discrimination

Non-discrimination compared to the other four aspects considered in this study is one of the most globally protected and promoted human rights. Even though the literature on non-discrimination especially when related to women is vast, it should be noted that they are purely legalistic and lack the examination of other critical social views that are important to the understanding of this right. Mujuzi, for example, reflects on South Africa's reservations and interpretation of the rights within the African Women's Protocol with extensive focus on discrimination against women.³⁴ In so doing, he places substantial emphasis on the meaning and legal implications of those reservations and interpretative declarations made by South Africa. The same cannot be said of Eriksson who also deals extensively on the aspect of discrimination against women but, to some extent, examines this aspect from a multidisciplinary approach as she analyses women's sexual and reproductive health right.³⁵ Notwithstanding, she fails to analyse discrimination against women from an African view point which this study will address.

1.6.2 Abortion

At the African level, the inclusion of the right to abortion in the African Women's Protocol was a very bold step taken by the AU to promote and protect this right considering that most African states as seen below have completely or partly legislated against abortion. Nonetheless, the literature on abortion in the context of the provisions of the African Women's Protocol is limited. For example, Banda considers the evolution of women's rights in international human rights law and the gender dimension of economic, social and cultural

³⁴ J Mujuzi, 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations' (2008) 12(2) *Law, Democracy & Development* 41.

³⁵ Eriksson (n 6 above).

rights before examining constraints to their enjoyment and enforcement.³⁶ In an attempt to be comprehensive in her analyses, she devotes some time to appreciate the content of the African Women's Protocol. Significantly missing in her work is detailed insights into the provisions of the African Women's Protocol that obliges states parties to protect women's sexual and reproductive health by authorising abortion.

1.6.3 Informed consent

Though not a stand-alone provision in the African Women's Protocol, as discussed in chapter two of this study, it should be noted that the aspect of informed consent is crucial in assessing whether or not a woman's decision to her sexual and reproductive health rights is voluntary and free. In substantiating a woman's right to informed consent, Oder draws upon the provisions of the African Women's Protocol.³⁷ In so doing, she outlines critical provisions of the African Women's Protocol that according to her expose the weaknesses of the ACHPR. Even though she interprets women's right to informed consent when related to their sexual and reproductive health rights, it is worth noting that her analyses are merely legalistic.

1.6.4 HIV/AIDS

HIV/AIDS is in my opinion arguably the most published aspect compared to the other aspects considered in this study. For example, Durojaye draws upon statutes and court decisions from a significant number of cases to provide a wide ranging and current picture of the many challenges women face and the need to ensure equality to accessing HIV/AIDS treatment in Africa.³⁸ Also, the work of Johnson generally addresses the importance for states to legislate in response to the HIV epidemic and how this response is a core element of the global HIV strategy.³⁹ It should be noted that both articles, from a general point of view demonstrate great insights into the understanding and interpretation of the HIV/AIDS pandemic. But, it is indisputable that further investigations and other social sources of interpretation are required to provide clarity and better understanding of the issues that surround the HIV/AIDS pandemic.

³⁶ F Banda, 'Understanding Women's Economic and Social Human Rights' (2006) 12(2) *East African Journal of Peace and Human Rights* 232.

³⁷ J Oder, 'Reclaiming Women's Social and Economic Rights in Africa' (2004) 5(4) *ESR Review* 13.

³⁸ E Durojaye, 'Advancing Gender Equality in Access to HIV Treatment through the Protocol on the Rights of Women in Africa' (2006) 6(1) *African Human Rights Law Journal* 188.

³⁹ R Johnson, 'The Model Law on HIV in Southern Africa: The World Approaches to International Law Insights into a Human Rights-Based Approach' (2009) 9(1) *African Human Rights Law Journal* 129.

Generally, while some authors have concentrated on women's rights in general, others have placed specific interest in women's sexual and reproductive health rights. For example, Packer critically examines the scope and the complex web of rights which surround the right to reproductive choice.⁴⁰ Evans and Murray provide an analytical overview of the ACHPR by bringing together and editing a range of expert collaborators.⁴¹ Though the draft African Women's Protocol is analysed in chapter 1 of the book, its content lacks sufficient information on specific provisions in general and women's sexual and reproductive health rights in particular.

Similarly, Nsibirwa traces the history of the draft African Women's Protocol and later explores some provisions within the draft African Women's Protocol.⁴² Though he mentions women's sexual and reproductive health rights, he failed to place substantial emphasis on its content which this study will address. From a broader angle, Freeman introduces an interdisciplinary approach to the understanding and interpretation of human rights in general during which he makes allusion to other disciplines such as sociology, psychology, and political sciences.⁴³ His book provides an in-depth analysis of how these disciplines can assist the law in best understanding human rights law. Even though he addresses women's rights in chapter 6 of his book, the emphasis on women's sexual and reproductive health rights is limited.

The current study therefore, addresses this issue from an African view point with the aim of suggesting through its multidisciplinary approach an enriching interpretation and understanding of the four key aspects of article 14 of the African Women's Protocol. This is the point where the contribution of this study is crucial as it takes this debate further.

1.7 Significance of the study

A multidisciplinary approach to the interpretation of selected aspects of article 14 will assist legal minds to best appreciate the content of women's sexual and reproductive health rights. Consequently, literature from other disciplines (sociology, psychology and anthropology) related to the understanding of women's sexual and reproductive health will be considered.

⁴⁰ Packer (n 1 above).

⁴¹ M Evans and R Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002).

⁴² M Nsibirwa, 'A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1(1) *African Human Rights Law Journal* 40.

⁴³ M Freeman, *Human Rights: Interdisciplinary Approach* (2002).

Further, a multidisciplinary interpretation will widen the understanding of article 14. It is an undoubted truth that women's sexual and reproductive health rights are very sensitive issues within the African community, especially those communities that practiced or practice female genital mutilation (FGM). The lack of cases being reported or brought to courts may be as a result of the lack of understanding and knowledge of women's sexual and reproductive health rights. This study therefore ultimately aims at introducing a multidisciplinary approach to the interpretation of article 14 in an attempt to widen its interpretation and understanding.

1.8 Methodology

This study is based on a review and analysis of literature that is relevant to the focus of the study. International as well as regional human rights treaties promoting and protecting women's sexual and reproductive health will be relied on for the purposes of interpreting the nature of the obligations that this right stimulates with the assistance of existing judicial decisions. The study will examine each decision considered to ascertain the courts' interpretation to the exclusion of other crucial disciplines such as sociology, psychology and anthropology.

The study will adopt a multidisciplinary perspective (with reference to sociology, anthropology and psychology) in an attempt to provide a wider and multi-faceted interpretation of women's sexual and reproductive health rights as enshrined in the African Women's Protocol.

In responding to the research questions, materials used will be obtained from primary sources (such as human rights treaties and laws on women and judicial decisions) and secondary sources (such as books, journal, articles and internet sources).

1.9 Chapter outline

This study is divided into five chapters including this introductory chapter. The study is further divided into two parts. Part one (chapters 1, 2, 3) deals with the protection and promotion of women's sexual and reproductive health in case law, as well as in regional and international human rights instruments (legalistic part of the study). Part two (chapters 4 and 5) deals with an appraisal of how other disciplines such as sociology, psychology and anthropology would interpret the four aspects of article 14. This thus is the multidisciplinary part of the study. This part also provides analyses of the approach adopted by these disciplines in interpreting legal concepts.

CHAPTER 2: THE AFRICAN WOMEN'S PROTOCOL

2.1 Introduction

The African Women's Protocol was adopted during the second session of the AU held in Maputo, Mozambique.⁴⁴ The African Women's Protocol guarantees civil and political as well as economic, social and cultural rights of women. It has been seen, rightly so, as an instrument for advancing specific women's rights such as sexual and reproductive health rights.⁴⁵ It is the first instrument in international human rights law to have substantial provisions on sexual and reproductive health rights.⁴⁶ Also, it is the first instrument in international human rights law that unambiguously recognizes women's reproductive right to 'medical abortion when pregnancy results from rape or incest or when the continuation of pregnancy endangers the health or life of the mother'.⁴⁷

This pioneering Protocol, in another first, calls for the prohibition of FGM,⁴⁸ and 'prohibits the abuse of women in advertising and pornography'.⁴⁹ It also sets forth an extensive range of 'economic and social welfare rights for women'.⁵⁰ The rights of particularly 'vulnerable groups of women, including widows,⁵¹ elderly women,⁵² women with disabilities⁵³ and women in distress',⁵⁴ which includes 'poor women, women from marginalized population groups, and pregnant or nursing women in detention' are specifically recognized. Also, the African Women's Protocol is the first international legally binding human rights instrument that

⁴⁴ For a detailed background on the African Women's Protocol, see Nsibirwa (n 42 above) 40, 41-43.

⁴⁵ Center for Reproductive Rights (n 11 above).

⁴⁶ See generally, art 14 of the African Women's Protocol.

⁴⁷ This marked a highlight in the protection and promotion of women's rights in Africa, creating new rights for women that are internationally accepted. After learning that the cadence of ratification was very slow, Solidarity for African Women's Rights, a coalition of groups across Africa set up a network in April 2004 (Equality Now) that was aimed at lobbying African states in an effort to popularise, domesticate and push for ratification of the protocol. On 26 October 2005, the African Women's Protocol received its 15th ratification, thus, entered into force on 25 November 2005.

⁴⁸ See generally, art 5(b) of the African Women's Protocol.

⁴⁹ See generally, art 13(1)(m) of the African Women's Protocol.

⁵⁰ See generally, art 13 of the African Women's Protocol.

⁵¹ See generally, art 20 of the African Women's Protocol.

⁵² See generally, art 22 of the African Women's Protocol.

⁵³ See generally, art 23 of the African Women's Protocol.

⁵⁴ See generally, art 24 of the African Women's Protocol.

affords a more thorough provision than other international human rights instruments of women's right to sexual and reproductive health and family planning services.⁵⁵

The African Women's Protocol does not only provide women's rights that were not mentioned in the ACHPR, but goes further to delineate specific obligations relating to the rights. However, with the particular interest of this study in mind, understanding article 14 goes beyond the mere reading of its provisions to the ability to clearly identify key aspects that surround women's sexual and reproductive health rights. In my view, central to the understanding of the diversity that surrounds women's sexual and reproductive health rights are: non-discrimination, abortion, informed consent and HIV/AIDS. The lack of recognition in laws and practice of these four aspects could greatly hinder women from the full enjoyment of their rights in general and their sexual and reproductive health rights in particular.

2.2 Review of four selected aspects of article 14

The African Women's Protocol asserts women's rights to reproductive choice and autonomy, and clarifies African states' duties in relation to women's sexual and reproductive health. Currently, international human rights values recognise women's right to 'the highest attainable standard of health' and to equality in 'access to health care services, including those related to family planning'.⁵⁶ Among the current global human rights treaties, a woman's right to family planning is expressly recognised only in CEDAW⁵⁷ and the CRC.⁵⁸ While CEDAW guarantees women's right to 'appropriate services in connection with pregnancy'; to 'decide freely and responsibly on the number and spacing of their children, and to have access to information, education and means to enable them to exercise these rights',⁵⁹ CRC affirms women's right to 'necessary medical assistance and health care' to 'appropriate pre-natal and post-natal health care'; and 'family planning education and services'.⁶⁰

Despite the fact that CEDAW and CRC have in their own way shown some protection of women's sexual and reproductive health right, both instruments failed to identify and address the specific issues that are central to a woman's dignity and sexual and reproductive health rights as the African Women's Protocol has demonstrated. Viljoen observes that the African

⁵⁵ See generally, art 14 of the African Women's Protocol.

⁵⁶ See generally, art: 24(1) of the CRC; 12 of the CEDAW and art 12(1) of the ICESCR.

⁵⁷ See generally, art 16 of the CEDAW.

⁵⁸ See generally, art 24(2)(f) of the CRC.

⁵⁹ See generally, art 16(1)(e) of CEDAW.

⁶⁰ See generally, art 24(2)(d) of the CRC.

Women's Protocol 'provides specificity where ambiguity prevailed'.⁶¹ In the paragraphs that follow, I shall separately examine the four cardinal aspects identified in this study.

2.2.1 Non-discrimination⁶²

Generally, at the continental level, regional bodies have embraced positively the principle of non-discrimination set by the UN.⁶³ At the African level, article 18(3) of the ACHPR obliges member states to eradicate 'every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'.⁶⁴ Similarly, this provision, just like the corresponding provision in CEDAW,⁶⁵ places a responsibility on states to eradicate discrimination against women specifically and not only on the grounds of sex.⁶⁶ Unfortunately, most African states, irrespective of their religious dominance, commonly use the preservation of African culture and tradition as a reason for not passing or amending domestic laws to protect women's rights. These are some of the particular challenges that the African Women's Protocol has addressed.

Keetharuth observes that non-discrimination is a fundamental principle, which runs like a thread throughout the African Women's Protocol.⁶⁷ Impliedly, non-discrimination can, therefore, be considered as the central clause on which the African Women's Protocol should be understood and implemented. Notwithstanding, it is reported that although numerous state parties have committed to the cause and even included provisions of non-discrimination in their various constitutions, women still dominate poverty, illiteracy and unemployment indicators.⁶⁸

⁶¹ F Viljoen, *International Human Rights Law in Africa* (2007) 271.

⁶² For a definition of discrimination, see generally, art 1(f) of the African Women's Protocol.

⁶³ See generally, art: 2 of the Arab Charter on Human Rights (1994), 14 of the European Convention on Human Rights and Fundamental Freedoms (European Convention), 1(i) of the American Convention on Human Rights and 2 of the ACHPR. It should be noted that this principle is identified in the ACHPR with the phrase 'every individual'.

⁶⁴ It should be noted that the ACHPR has been ratified by 52 out of 53 African States.

⁶⁵ See generally, art 2 of the CEDAW.

⁶⁶ Other similarities of such relations could be found in UN Declaration on the Elimination of Violence against Women (1993), the Vienna Declaration (1993) and the Beijing Declaration (1995).

⁶⁷ S Keetharuth, 'Major African Legal Instruments', in A Bösl and J Diescho (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 181.

⁶⁸ Centre for Human Rights, *The Impact of the Protocol on the Right of Women in Africa on Violence against Women in Six Selected Southern African Countries: An Advocacy Tool* (2009) 14.

Regarding the right to inheritance, a widow for the first time in the continent has an equitable right to a share of the property; the African Women's Protocol also adds that women and men shall have equal rights in the inheritance of their parent's property in equitable shares.⁶⁹ Furthermore, article 22 protects elderly women from any discrimination based on their age and article 23 is designed to protect women with disabilities from discrimination based on their disability. Other aspects of non-discrimination in the African Women's Protocol focuses on the 'judicial representation and law enforcement organs',⁷⁰ 'equal participation and representation in the political life and electoral processes of their countries', and equally in the 'development and implementation of the state policies and development programmes'.⁷¹ Women also have the 'right to participate in the promotion and maintenance of peace' in their countries and the continent.⁷²

In addition, the African Women's Protocol compels state parties to 'adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities'. States are also obligated to 'promote equality of access to employment and the right to equal remuneration for jobs of equal value for women and men'.⁷³ Also, states are required to ensure women's right to 'equal access to housing irrespective of their marital status'.⁷⁴ The African Women's Protocol also invites states parties to 'ensure the participation of women at all levels in the determination of cultural policies and in the formulation of cultural practices'.⁷⁵

2.2.2 Abortion⁷⁶

The protection of the right to reproductive freedom has introduced the opportunity to approach the issue of abortion from an interpretative point of view. According to Eriksson, the Vienna Convention on the Law of Treaties (Vienna Convention),⁷⁷ which exposes commonly approved principles of law on the interpretation of treaties, gives a prominent position to the teleological method which holds the view that a 'treaty shall be interpreted in good faith'.⁷⁸

⁶⁹ See generally, art 21 of the African Women's Protocol.

⁷⁰ See generally, art 8 of the African Women's Protocol.

⁷¹ See generally, art 9 of the African Women's Protocol.

⁷² See generally, art 10 of the African Women's Protocol.

⁷³ See generally, art 13 of the African Women's Protocol.

⁷⁴ See generally, art 16 of the African Women's Protocol.

⁷⁵ See generally, art 17 of the African Women's Protocol.

⁷⁶ See generally, art 14(2)(c) of the African Women's Protocol.

⁷⁷ See generally, art 31 of the Vienna Convention.

⁷⁸ Eriksson (n 6 above) 304.

More so, Eriksson adds that the promotion of equality between men and women and the elimination of all forms of discrimination against women, which violates the respect for human dignity, can be identified as the object and purpose of CEDAW.⁷⁹ This principle of protecting and promoting human dignity between men and women can rightly be said to be one of the main goals of the enactment of the African Women's Protocol. When compared with other human rights instruments that protect and promote women's rights, the African Women's Protocol, stands out as the only human rights instrument that took the debate on abortion a step further.⁸⁰

The above pertains to the interpretation of stated rights to equality, non-discrimination, life, liberty, security of the person, and the highest attainable standard of health. The CEDAW and CRC Committees⁸¹ have framed the issue of 'maternal mortality due to unsafe abortion as a violation of women's right to life'.⁸² The CRC Committee, on the other hand, has expressed concern over the impact of 'punitive legislation on maternal mortality rates'.⁸³

2.2.3 Informed consent⁸⁴

Education and information are basic human rights that stand as a gateway to the understanding and enjoyment of other human rights. According to Eriksson, these rights are crucial components of reproductive health, making informed consent and responsible, voluntary, deliberate choices about childbearing and parenting possible.⁸⁵ It is a common truth that women's access to information, gives them power and ability to determine their own futures.

The African Women's Protocol assures women's right to 'family planning education', thus reaffirming the right to family planning unambiguously enshrined in CEDAW and the CRC

⁷⁹ As above.

⁸⁰ Center for Reproductive Rights (n 22 above) 6. Also, see generally, art 14(2)(c) of the African Women's Protocol.

⁸¹ The treaty monitoring bodies that monitors government fulfilment with CEDAW and CRC.

⁸² The CEDAW Committee has commented on the issue of maternal mortality due to unsafe abortion in numerous sets of its Concluding Observations (CO), consistently criticizing restrictive abortion laws and asking states parties to review legislation that makes abortion illegal. See e.g.: CO of the CEDAW Committee: Burundi, UN Doc. A/56/38 (2001) para 61; CO of the CEDAW Committee: Madagascar, UN Doc. A/49/38 (1994) para 244; CO of the CEDAW Committee: Cameroon, UN Doc. A/55/38 (2000) para 60. See also, CEDAW, GR no 24: Women and health, UN Doc. A/54/38 (1999) paras 14-27, in *Compilation of GC and GR adopted by Human Rights Treaty Bodies*, (2003) UN Doc. HRI/GEN/1/Rev.6 271.

⁸³ CEDAW Committee (n 82 above).

⁸⁴ See generally, art 14(1)(g) of the African Women's Protocol.

⁸⁵ Eriksson (n 6 above) 243.

mentioned earlier. On the one hand, CEDAW identifies ‘access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning’ as a key aspect of a woman’s right to equality in education.⁸⁶ On the other hand, the CRC obliges state parties to ‘develop preventive health care, guidance for parents and family planning education and services’.⁸⁷ Elsewhere, provisions in other human rights instruments protecting ‘the right to receive and impart information’ may be interpreted as protecting women’s right to sexual education and information dissemination.⁸⁸

It should be noted that only when women have access to information or knowledge on their rights and precisely on their sexual and reproductive health and the implication that exist in either accepting or rejecting a particular method of family planning, including medical procedures can their consent be classified as free. Pillay observes that ‘there are multiple human rights dimensions to maternal mortality and morbidity, ranging from how this compromises the right to life, to be equal in dignity, to education, to be free to seek, receive and impart information, to enjoy the benefits of scientific progress, to freedom from discrimination and the highest attainable standard of physical and mental health’.⁸⁹

States are obliged under international human rights law to respect, protect and fulfil the human rights related to pregnancy and childbirth. These rights include the state’s obligation to ensure that women access a wide range of sexual and reproductive health care as part of preventing maternal mortality and morbidity.⁹⁰ The position of the UNHCHR goes a long way to reiterate the fact that access to information is a very fundamental aspect that guarantees and guides informed consent from women without discrimination.

A closer examination of the provisions of the African Women’s Protocol indicates that just like non-discrimination, the need for a woman’s informed consent is a fundamental principle that runs through the African Women’s Protocol.⁹¹ For women to be considered to have consented, they must be fully informed on what consent is needed especially when it concerns her sexual and reproductive health rights.

⁸⁶ See generally, art 10(h) of the CEDAW.

⁸⁷ See generally, art 24(2)(f) of the CRC.

⁸⁸ See generally, art 9(1) of the ACHPR, art 13(1) of the CRC, art 10(j) of the European Convention and art 13(1) of the American Convention on Human Rights.

⁸⁹ Pillay (n 31 above) 2.

⁹⁰ As above.

⁹¹ See for example, art: 4(2)(h), 6(a) and 14(1)1 of the African Women’s Protocol.

2.2.4 HIV/AIDS⁹²

It is impressive to notice societal change of attitude towards HIV/AIDS therapy and realities of HIV/AIDS treatment in most developing countries. Binagwaho observes that between 2001 and 2006, the number of people on antiretrovirals (ARV) in low and middle income countries increased almost sevenfold, from 240,000 to about 2 million.⁹³ In 2003, only 100,000 Africans, a mere 2% of those in need of life-saving ARV treatment were receiving treatment but, by 2007, this figure multiplied a dozen times.⁹⁴ Though the fast growing spread of HIV/AIDS is alarming, Eriksson observes that non-discrimination in regard to voluntary decision-making is critical in cases of pregnant women with HIV/AIDS.⁹⁵ Therefore, mandatory abortion or sterilization for HIV-infected women would be a violation of their human rights to found a family and the right to family planning as well as of her right to dignity and integrity.⁹⁶

One of the landmark provisions of the African Women's Protocol is the relationship it specifically addresses between women's rights and HIV/AIDS, and to recognize protection from HIV/AIDS as a key aspect of women's sexual and reproductive rights. In addition to guaranteeing women's right to protection from sexually transmitted diseases (STDs), including HIV/AIDS, the African Women's Protocol guarantees 'women's right to adequate, affordable, and accessible health services'.⁹⁷ It also makes mention of a state's duty 'to protect girls and women from practices and situations that increase their risk of infection, such as child marriage, wartime sexual violence, and FGM'.⁹⁸

Remarkably, HIV/AIDS is not explicitly expressed in any other international or regional human rights instrument. However, existing global human rights standards on the right to equality, to the highest attainable standard of health, and to life have all been interpreted to indirectly guarantee women's rights in relation to HIV/AIDS. For example, the CEDAW Committee has acknowledged that inequality and discrimination against girls and women play a role in making women more vulnerable to HIV infection.⁹⁹ Even though the African

⁹² See generally, art 14(1)(c), (d) and (e) of the African Women's Protocol.

⁹³ A Binagwaho, 'The Right of Children in Developing Countries to be Born and Live HIV-free' (2008) 10(1) *Health and Human Rights Journal* 149.

⁹⁴ As above.

⁹⁵ Eriksson (n 6 above) 259.

⁹⁶ As above.

⁹⁷ See generally, art 14(1)(d) and (2)(a) of the African Women's Protocol.

⁹⁸ See generally, art: 5, 6, and 11 of the African Women's Protocol.

⁹⁹ CEDAW Committee, GR no 24 (n 82 above) para 18.

Women's Protocol is unique in that it has expressly articulated the standards governing women's rights and states duties in relation to the HIV/AIDS pandemic, its provision on HIV/AIDS is ambiguous especially as it fails to address the root causes that expose women to contracting HIV/AIDS such as poverty and cultural beliefs.

2.3 Conclusion

The African Women's Protocol extensively promotes human rights protections to better replicate and integrate women's experiences. Its significance lies in its affirmation of women's sexual and reproductive health rights as human rights, its articulation of women's rights within an African regional context, and in the legal and moral pressure it exerts over governments and policymakers responsible for its implementation.¹⁰⁰

In terms of substantive rights, from a general point of view, the African Women's Protocol may be referred to as far-reaching especially as it places emphasis on the necessity for the legalisation of abortion. It is therefore no doubt that the African Women's Protocol has been considered revolutionary possibly because it defies deep-rooted African traditional, societal and religious practices such as FGM and widow inheritance. Though its ratification quota of 15 African countries has been met, a region-wide inclusive ratification by the remaining African countries in the near future seems doubtful.¹⁰¹

¹⁰⁰ See generally, art 26(1) of the African Women's Protocol.

¹⁰¹ List of Countries which have ratified the African Women's Protocol are: Angola, Benin, Burkina Faso, Cape Verde, Comoros, Djibouti, Democratic Republic of Congo, Gambia, Ghana, Guinea-Bissau, Libya, Lesotho, Liberia, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Tanzania, Togo, Uganda, Zambia and Zimbabwe.

CHAPTER 3: LEGAL APPROACH TO THE INTERPRETATION OF SELECTED ASPECTS OF ARTICLE 14

3.1 Introduction

Although the African Women's Protocol, as seen above, has been applauded for its effort in promoting and protecting women's rights at the African level, some schools of thought hold the view that the provisions of the African Women's Protocol are limited, overambitious and fall short of addressing the specific challenges faced by women, specifically towards the four aspects identified in this study. Viljoen for example argues that the African Women's Protocol suffers from 'inelegant and unfortunate drafting deficiencies'.¹⁰²

Traditionally, international human rights law has not been successfully conceptualized or applied to address violations of women's rights.¹⁰³ According to Eriksson, women most often are the ones whose human rights are being abused.¹⁰⁴ It was not until after the 1979 UN General Assembly's adoption of CEDAW that women's rights were explicitly guaranteed in a legally binding instrument. It was this groundbreaking document that placed women's rights at the centre of international human rights discourse that women's human rights finally emerged and were given force under international human rights law.¹⁰⁵

Notwithstanding, Cabal observes that reproductive health was relegated to the fields of population and development, and notions of reproductive rights as human rights were non-existent.¹⁰⁶ Consequently, violations of women's human rights and their sexual and reproductive health rights in particular, in the context of their families, workplace and communities at-large were disregarded as human rights violations.

As a remedy, consensus documents that emerged from UN World Conferences, held in Cairo and Beijing, placed women's sexual and reproductive rights squarely within the human rights framework, and considered these rights logically inclusive within the right to health.¹⁰⁷ Cabal, citing Schuler, observes that this thoughtful change stemmed from the emerging

¹⁰² Viljoen (n 61 above) 272.

¹⁰³ L Cabal *et al*, 'Reframing the Right to Health: Legal Advocacy to Advance Women's Reproductive Rights' in A Clapham and M Robinson (eds), *Realizing the Right to Health* (2009) 120, available at http://www.swisshumanrightsbook.com/SHRB/.../07_453_Cabal_Gher.pdf (accessed 12 February 2010).

¹⁰⁴ Eriksson (n 6 above) 3.

¹⁰⁵ As above.

¹⁰⁶ Cabal (n 103 above) 120.

¹⁰⁷ Cabal (n 103 above) 121.

international consensus that ‘reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents’.¹⁰⁸ These rights rest on the recognition of the ‘basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health’.¹⁰⁹ Since Cairo, there has been a strong movement to give meaning to and enforce Cairo’s understanding of reproductive rights, leading to an expanded body of norms and jurisprudence that have extended human rights interpretations and affirmed the notion that reproductive decision-making and access to reproductive health care services are protected by existing human rights laws.¹¹⁰

In the paragraphs that follow, I will attempt, from a legal point of view, to provide insights obtained from a legal approach to the understanding of the four key aspects of article 14, elaborated in chapter 2 of this study. The debate in this chapter largely deals with the analysis of case law and statutes with explicit prominence on women’s sexual and reproductive health rights as enshrined in the African Women’s Protocol.

3.2 Legal interpretation of selected aspects of article 14

Interpreting legal provisions contextually is crucial to the understanding of what is specifically required by a particular provision. The interpretation of the African Women’s Protocol according to its article 27 lies with the African Court on Human and Peoples’ Rights (African Court).¹¹¹ Notwithstanding, it should be noted that the African Commission has interpretative powers over the provisions of the African Women’s Protocol by virtue of the fact that the African Women’s Protocol is a Protocol to the ACPHR.¹¹² I will now examine separately the four key aspects identified in this study from a legal interpretative approach.

3.2.1 Non-discrimination

As discussed in chapter 2 of this study, non-discrimination could be referred to as the *spine* of every aspect of women’s human rights in general and women’s sexual and reproductive health rights in particular. In fact, profound societal discrimination of women greatly shapes

¹⁰⁸ As above.

¹⁰⁹ See generally, Programme of Action of the ICPD, Cairo UN Doc. A/CONF.171/13/Rev.1 (1994) para 7.3.

¹¹⁰ Center for Reproductive Rights, *Bringing Rights to Bear: An Analysis of the Work of U.N. Treaty Monitoring Bodies on Reproductive and Sexual Rights* (2008).

¹¹¹ The African Court on Human and Peoples’ Rights was established on the 25 January 2004.

¹¹² See generally, art 45(3) of the ACPHR which gives absolute powers to the African Commission to interpret human rights law at the continental level.

their physical behaviour.¹¹³ Leeuwen observes that it is a fact that women, unlike men, have specific human rights that need to be promoted and protected.¹¹⁴ It should be noted that some of the differences that exist between men and women are cultural and biologically bound.

According to the ICESCR Committee, in its General Comment (GC) no 16, many women experience different forms of discrimination due to the intersection of 'sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage'.¹¹⁵ At the African level, most women are denied equal access and the enjoyment of their rights. In most cases, it is as a result of the insignificant status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. For example, in the Nigerian case of *Mojekwu v Iwuchukwu*,¹¹⁶ (*Mojekwu's* case) the Supreme Court (SC) held that the *Lli-Ekpe* custom which openly prohibited women from inheriting property is repugnant to natural justice, equity and good conscience and went on to grant the widow (respondent) the right to inherit her late husband's property. In arriving at its decision, the SC relied on the human rights guarantees of the Nigerian Constitution and international human rights instruments such as CEDAW in decoding stringent customary practices that prohibited women from inheriting property.¹¹⁷ The decision of the SC of Nigeria highlights the on going need for positive advocacy and legal reform to guarantee that national courts continue progressing towards promoting and protecting women's right to property inheritance and distribution.

The increasing reliance of courts in Africa on national, regional, and international human rights protections as a medium for promoting and respecting women's rights without clearly addressing the root customary causes of women's rights violations, may to some extent, cause a rift among custodians of African tradition. It is worth mentioning that the *Mojekwu* case was not the first on the continent but, after this case several others followed and took the debate further. For example, South African courts have handed down several similar

¹¹³ F Leeuwen, *Women's Rights are Human Rights: The Practice of the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights*, (2010) 36.

¹¹⁴ Leeuwen (n 113 above) 101.

¹¹⁵ ICESCR Committee, GC no 16 UN Doc. E/C.12/2005/4 (2005) para 5.

¹¹⁶ *Mojekwu v Iwuchukwu* 2004 (4) Nigeria SC 1.

¹¹⁷ See generally, pages 1 and 2 of the summary of *Mojekwu's Case*. Available at http://www.law.utoronto.ca/documents/reprohealth/LG028-9_Nigeria-Mojekwu_cases.pdf (accessed 18 November 2010).

decisions that protect women whose marriages were not recognized under statutory law and who would have been prohibited from inheriting from their spouses on the grounds that their marriage was customary bound.¹¹⁸

Gender based discrimination, among others, is one of the utmost threats to women's rights, health and lives globally. Currently, non-discrimination along with sexual and reproductive health rights is guaranteed in most international and regional human rights instruments, and in many national laws. According to the ICESCR Committee, 'substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are, *prima facie* gender-neutral'.¹¹⁹ In realising article 3 of the African Women's Protocol therefore, States parties and national courts should take into account that such laws, policies and practice may fail to consider or even propagate discrimination between women and men because they failed to take into account existing economic, social and cultural inequalities experienced by women in particular. Nevertheless, the legal equality realised for women based on these decisions may not automatically result in concrete equality.

3.2.2 Abortion

Generally, issues of abortion have always and still are in some areas in Africa considered as a taboo.¹²⁰ As a result, the legalisation of abortion in domestic laws has been very problematic. However, there have been some tremendous shifts in the legalisation of abortion in most African countries towards liberalisation of national laws. South Africa stands out as one of the first African countries that have not only legalised abortion in its Constitution, but has gone a step further to enact other laws that protect, promote and regulate legal abortion.¹²¹ The preamble of the Choice on Termination of Pregnancy Act states unambiguously that 'the decision to have children is fundamental to women's physical, psychological and social health' and that 'universal access to health care services includes family planning, contraception, termination of pregnancy, as well as sexuality

¹¹⁸ See, e.g. *Gumede v President of the Republic of South Africa*; 2008 (3) SA 152 (CC), *Hassam v Jacobs* 2009 (11) BCLR 1148 (CC) and *Bhe v Khayelitsha Magistrate* 2004 (1) SA 580 (CC).

¹¹⁹ ICESCR Committee, (n 115 above) para 8.

¹²⁰ For a list of countries which have legislated against abortion, see Guttmacher Institute, *Facts on Abortion and Unintended Pregnancy in Africa* (2009) 2, available at http://www.guttmacher.org/pubs/IB_AWW-Africa.pdf (accessed 25 August 2010).

¹²¹ See generally, the Choice on Termination of Pregnancy Act 92 of 1996.

education and counselling programmes and services'.¹²² This is groundbreaking legislation, in South Africa more so because prior to the Act, abortion was illegal in South Africa.

At the international level, in the decision in the United State of America (USA) landmark case of *Roe v Wade*,¹²³ the SC held that the constitutional right to privacy¹²⁴ extends to a woman's decision to have an abortion. Recognising state laws, the SC then sought to provide a balance of the right to abortion against the state's two legitimate interests for regulating abortions: protecting prenatal life and protecting the mother's health. Conscious of the fact that these state interests become stronger over the course of a pregnancy, the SC then proceeded to suggest a balancing test by binding state regulation of abortion to the mother's current trimester of pregnancy:

'In the first trimester, the state's two interests in regulating abortions are at their weakest, and so the state cannot restrict a woman's right to an abortion in any way.

In the second trimester, there is an increase in the risks that an abortion poses to maternal health, and so the state may regulate the abortion procedure only in ways that are reasonably related to maternal health.

In the third trimester, there is an increase in viability rates and a corresponding greater state interest in prenatal life, and so the state can choose to restrict or proscribe abortion as it sees fit ...'¹²⁵

The decision in *Roe's case* led to a trend of cases in other continents and at the UN level. It should be noted that prior to *Roe's case*, the UN monitoring bodies related to human rights had not decided on issues relating to abortion in particular and to women's sexual and reproductive health in general. In its landmark case, *KL v Peru*, similar to the standards set by article 14 of the African Women's Protocol, the Human Rights Committee (HR Committee) established that denying access to a therapeutic abortion infringes basic

¹²² See generally, the Preamble of the Choice on Termination of Pregnancy Act 92 of 1996.

¹²³ *Roe v Wade* 1973 (410) U.S. 113, available at <http://www.caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=410&invol=113> (accessed 12 July 2010).

¹²⁴ It should be noted that the right to privacy is not expressly articulated in the USA Constitution. As a result, the Court had to find justifications to its reference. It stated: 'This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy ... Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved'.

¹²⁵ *Roe's case* (n 123 above) section XI.

women's rights, including their rights: 'to life, to health, to privacy and to freedom from cruel, inhuman and degrading treatment'.¹²⁶ Also, the CEDAW Committee has on several occasions' classified unsafe abortion, resulting in maternal mortality, as a 'violation of the right to life'.¹²⁷

In a similar case, the Constitutional Court (CC) of Columbia identified the violation of the right to health as a violation of women's sexual and reproductive health rights.¹²⁸ The CC confirmed that 'constitutional rights and obligations must be interpreted in harmony with international human rights treaties to which Colombia is a state party and thus, international human rights treaties limit legislators' discretion, to some extent, over criminal matters'.¹²⁹ Examining the Colombian constitutional law obligations, the CC stated that while the right to health 'is not expressly found in the Constitution as a fundamental right', it becomes fundamental when it is 'in close relation to the right to life'.¹³⁰

In a nutshell, the decision in *Roe's* case and its 'influence' in other courts gave effect and expanded the rights to privacy, health and life to include women's sexual and reproductive health rights. The African Women's Protocol also promotes and protects these rights. Of significance, is the spirit in which article 14 links these rights with the legitimate requirement of medical abortion. As a matter of fact, Oder observes that this in turn implies that states parties to the African Women's Protocol who have already codified the right to health in their domestic laws should 'increase their budgetary distribution to the health sector to enable

¹²⁶ HR Committee, Communication no 1153/2003, CCPR/C/85/D/1153/2003 (2005) para 3.2(b).

¹²⁷ See for example, CEDAW Committee UN Doc. A/54/38 (1999) para 56.

¹²⁸ This decision has been described by the Women's Link Worldwide as 'a unique case that overturned' Columbia's criminal abortion ban in 2006. The petition before the CC argued that Colombia's Constitution required exceptions to the abortion embargo to protect women's fundamental rights to life, health, privacy, and dignity. It further argued that Colombia's refusal to permit abortion to save a woman's life, or protect her health, or in cases of rape or foetal impairment, was a 'refusal to concur with commonly accepted norms that recognize minimum protection to women's basic human rights'. See generally, *Sentencia C-355/06*, CC of Colombia (2006). Women's Link Worldwide (ed) 355/2006: (2007). Available at <http://www.womenslinkworldwide.org> (accessed 31 May 2010).

¹²⁹ *Sentencia* (n 128 above) para 8.4.

¹³⁰ See generally, art 86 of the Colombian Constitution which states that '... any individual whose fundamental rights are threatened or breached can request any judge to protect these rights. Also, art 49 protects the right to health, which belongs to the chapter that recognizes economic, social and cultural rights in Colombia's Constitution'. From these two articles therefore, it would be right to hold that reproductive health is not considered as a justiciable right by itself in Columbia. Nevertheless, the CC of Colombia has determined that there are other rights, generally the ones addressed as social rights that 'can be protected by a constitutional tribunal when they have a close connection with fundamental rights, as the right to life or dignity'.

them to provide adequate, affordable and accessible health care'.¹³¹ Accordingly, women will have access to quality services, obtain the necessary knowledge for reproductive health in general and abortion in particular and make informed decisions in this regard.¹³²

3.2.3 Informed consent

Informed consent is a very central aspect in law in general and women's human rights in particular. According to Eriksson, informed consent is a 'long recognised basic right for all individuals'.¹³³ Relating informed consent to women's sexual and reproductive health, the CEDAW Committee contends that informed consent is based on a 'realistic and participatory approach aimed at making accessible information and services to couples to prevent unwanted pregnancies that are too closely spaced, too early or too late'.¹³⁴

At the African level, obtaining women's informed consent regarding their reproductive health is very rare. In typical African homes where a man is considered the main decider, women are only informed by their husbands of his 'final' decision. However, Eriksson observes that there is a 'gradual move away' from this notion and that some women now know at least some contraceptive methods and where to obtain them.¹³⁵

Informed consent contextually is a very broad term especially when relating to women's sexual and reproductive health. As illustrated below, while some courts have attended to aspects of lack of informed consent that resulted in wrongful birth, others have attended to aspects of same that resulted in sterilization. At the African level, there is a gradual influx of cases on the lack of informed consent relating to women's sexual and reproductive health in local courts. For example, three cases brought before the Windhoek High Court (HC) in Namibia are currently pending decision. In all three cases, the plaintiffs (sterilized women) are suing the defendant (Namibian Ministry of Health) for forced sterilization based on their HIV/AIDS status.¹³⁶

¹³¹ Oder (n 37 above) 15.

¹³² As above.

¹³³ Eriksson (n 6 above) 244.

¹³⁴ See generally, CEDAW Committee, UN Doc. E/CN.6/1996/CRP.2 (1996) 71.

¹³⁵ Eriksson (n 6 above) 245.

¹³⁶ Available at <http://www.awid.org/eng/Issues-and-Analysis/Issues-and-Analysis/Landmark-Trials-Begin-in-Namibia> (accessed 20 June 2010). It should be noted that Namibia acceded to the African Women's Protocol on 11 August 2004. It would be very interesting to know how this matter will be decided and how the African Court will approach the case should it be brought before the Court on appeal.

Elsewhere, in 2008, the South African SC of Appeal handed down a controversial decision in *Stewart v Botha*.¹³⁷ In that case, the plaintiffs (husband and wife) brought an appeal before the SC of Appeal on the grounds that the medical practitioner and an obstetrician they consulted before the birth of their son (Brian) failed to inform them of any abnormality suffered by their child. As a result, Brian was born with severe congenital defects. The issue before the SC of Appeal was based on the fact that though professionals, 'the medical doctors failed to inform the plaintiff of her foetus' severe defects which could have resulted in the termination of the pregnancy on the plaintiffs consent'.¹³⁸ Surprisingly, the appeal was dismissed based on the fact that the SC of Appeal failed to establish the issue of whether 'the child would have been better off had he not been born'. Also, the SC of Appeal's decision required the legislature to address the issue of the legal duty of professionals who negligently fail to inform prospective parents of the congenital defects of their foetuses.

Unlike the decision arrived at in *Roe's* case, the decision in *Stewart's* case is a cause for concern. More so, because South African courts have over the years gained enormous reputation for their willingness to develop the law to improve women's rights protection as was the case in the *TAC* case¹³⁹ and many others. It could also be said that the SC of Appeal rejected a great opportunity to develop the right to be informed and to provide an informed consent guaranteed by the South African Constitution¹⁴⁰ to relate to women's sexual and reproductive health. Eriksson adds that the right of a woman to make a choice on issues relating to procreation is a right that falls within her right to privacy.¹⁴¹ The plaintiff was denied this right.

At the UN level, most international human rights instruments and bodies have adopted a consistent standard explicitly stating that lack of consent constitutes a severe violation of human rights, especially the right to choose whether to have children or not and the spacing of children. For example, the CEDAW Committee in expanding on the meaning of forced abortion in the *AS* case¹⁴² dwelled extensively on the aspect of informed consent. The CEDAW Committee stated that 'by failing to obtain the plaintiff's full and informed consent to

¹³⁷ *Stewart v Botha* (2008) SA SC of Appeal 84, available at <http://www.saflii.org/za/cases/ZASCA/2008/84.html> (accessed 10 August 2010).

¹³⁸ *Stewart v Botha* (n 137 above) para 19.

¹³⁹ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

¹⁴⁰ See generally, section 32(b) of the South African Constitution 1996.

¹⁴¹ Eriksson (n 6 above) 351.

¹⁴² *A. S v Hungary*, CEDAW Committee, Communication No. 4/2004, and UN Doc. CEDAW/C/36/D/4/2004 (2006) para 11.4.

be sterilized', Mrs. Szijarto was 'permanently deprived of her natural reproductive capacity'.¹⁴³ Also, the ICESCR General Comment no 14 expanded on the right to health by stating that, 'it includes the right to control ones body and to be free from any interference, such as the right to be free from torture, non-consensual medical treatment and experimentation'.¹⁴⁴ Though informed consent is not expressly mentioned, non-consensual medical treatment could be interpreted as lack of informed consent.

Stewart's case illustrates the sensitive nature of legal issues relating to the psychological effects caused by lack of substantial information and consent. While one who negligently fails to provide critical information to a pregnant woman to enable her make an informed choice on whether to keep or abort her pregnancy should be held accountable, it should be noted that informed consent as articulated in the African Women's Protocol, is very crucial in ascertaining the full enjoyment of a woman's sexual and reproductive health right.

As the African Women's Protocol rightly puts it, women's right to sexual and reproductive health includes: 'the right to decide whether to have children, the number of children and the spacing of children'.¹⁴⁵ In South Africa, this right is guaranteed by the Choice on Termination of Pregnancy Act, which specifies when a pregnancy can be legally terminated. At the time of decision on the *Stewart's* case, South Africa had ratified the African Women's Protocol¹⁴⁶ and had at its disposal several human rights instruments that codified the aspect of informed consent. Yet, the SC of Appeal failed to consider all these instruments in arriving at its decision.

3.2.4 HIV/AIDS

The HIV/AIDS pandemic is one of the greatest challenges confronting most countries in Africa. This is still the case in countries such as Botswana, Lesotho, Swaziland and South Africa.¹⁴⁷ In recent years, some African states have developed prevention schemes to respond to the rapid growth of the pandemic.¹⁴⁸ For instance, the South African government adopted nevirapine as their drug of choice to prevent Mother-To-Child Transmission (MTCT)

¹⁴³ As above.

¹⁴⁴ See generally, ICECSR Committee GC no 14, para 8.

¹⁴⁵ See generally, art 14(b) of the African Women's Protocol.

¹⁴⁶ South Africa ratified the African Women's Protocol on 17 December 2004.

¹⁴⁷ For a full detail of countries greatly affected by this pandemic, go to <http://www.avert.org/hiv-aids.htm> (accessed 25 August 2010).

¹⁴⁸ The main problem with these good initiatives from African governments is their method of implementation as will be seen subsequently is based on its implementation.

of HIV/AIDS. The pandemic in South Africa claims, yearly, more than one million people.¹⁴⁹ 'More than 150 children are born with HIV daily; MTCT is the most common source of HIV virus in children'.¹⁵⁰ The vulnerability of women in particular to the pandemic, is a direct outcome of a number of issues, among others, 'physiological susceptibility, gender-based violence, early marriage, and low economic status'.¹⁵¹

With the high prevalence of HIV in Africa, most national courts are increasingly struggling with whether and how a person, especially pregnant women infected with HIV, should be protected in certain circumstances. This, in my view is justifiable because most African states lack or have little legislation that protects HIV/AIDS infected persons. Consequently, courts are bound to read-in words in existing legislation that are some how related to the pandemic or its effects. For instance, the *TAC* case¹⁵² disputed the reasonableness of the MTCT prevention programme in South Africa. In that case, the central issue raised was based on the limited approach adopted by the South African government in the distribution of nevirapine only to pilot sites. The South African CC in its decision advised the government to rethink its approach and make nevirapine available in both private and public hospitals.¹⁵³ Also, the South African CC 'ordered the government to plan an effective and comprehensive national programme to prevent MTCT'.¹⁵⁴

In arriving at its decision, the South African CC expanded on the right to health to include women's rights to sexual and reproductive health duly protected in the South African Constitution.¹⁵⁵ Even though the South African CC did not make any reference to the African Women's Protocol, its decision among others to order the government to plan an effective and comprehensive national programme to prevent MTCT falls in line with the spirit of article

¹⁴⁹ According to HIV/AIDS statistics in South Africa, based on a wide range of data, including the household and antenatal studies, UNAIDS/WHO in July 2008 published an estimate of '18.1% prevalence in those aged 15-49 years old at the end of 2007. Their high and low estimates are 15.4% and 20.9% respectively'. According to their own estimate of total population (which is another contentious issue), 'this implies that around 5.7 million South Africans were living with HIV at the end of 2007, including 280,000 children under 15 years old', available at <http://www.avert.org/safricastats.htm> (accessed 29 May 2010).

¹⁵⁰ As above.

¹⁵¹ Center for Reproductive Rights *et al*, *Legal Grounds Reproductive and Sexual Rights in African Commonwealth Courts* (2010) Vol II 82.

¹⁵² *TAC* case (n 139 above). At the African level, this case stands out as the first case to be brought in court on issues of HIV/AIDS related to Women's sexual and reproductive health right.

¹⁵³ *TAC* case (n 139 above) para 135.

¹⁵⁴ *TAC* case (n 139 above) para 135(3)(d).

¹⁵⁵ See generally, section 27(1)(a) of the South African Constitution 1996.

14(2)(a) of the African Women's Protocol which requires states to take all appropriate measures to provide 'adequate, affordable and accessible health services...'.¹⁵⁶

It is worth mentioning that the ruling of the South African CC in the *TAC* case was and still is a landmark victory to all pregnant women who are HIV positive and children who could be infected in the course of giving birth. The decision in the *TAC* case upholds not only women's right to health but places a particular emphasis on their sexual and reproductive health in relation to HIV/AIDS. Also, it is worth mentioning that the South African CC transcended the mere mentioning of the provisions of section 27 of the South African Constitution as it did in the *Soobramoney's* case,¹⁵⁶ and expanded on its content and the state's obligation under section 27.

In a nutshell, even though a different school of thought might be satisfied with the provision of the African Women's Protocol on HIV/AIDS and its requirement for disclosure of one's health status and on the health status of one's partner, Viljoen holds that the provision is 'ambiguous and should not form the basis for the erosion of rights'.¹⁵⁷ While I agree with Viljoen, in my view the ambiguity that exists in this provision may be based on the legal connotation embedded in the doctrine of disclosure. The adoption of a multidisciplinary approach in its interpretation might be the remedy of clearing such ambiguity.

3.3 Conclusion

An in-depth evaluation of the cases studied above and the decisions arrived at by the various courts, the CEDAW Committee and the HR Committee demonstrates that women's sexual and reproductive health rights can be promoted and protected. This can be done through altering strategies and regardless of whether the underlying source of law contains an unambiguous right to health, or through making the linkage between one's health status and a combination of human rights, as reflected by the Colombian CC in its landmark case settlement. More so, the intention of all the courts is one, changing human behaviour while promoting and protecting women's sexual and reproductive health right from a societal perspective. Cabal, observes that in the end, it is the synergy between human rights that makes the dynamic advancement of the human right to health possible.¹⁵⁸

While some schools of thought may hold that the decisions and the combination of human rights approaches adopted by some courts above is apt and falls in line with the intention of

¹⁵⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

¹⁵⁷ Viljoen (n 61 above) 272-273.

¹⁵⁸ L Cabal *et al*, (n 103 above) 134.

the African Women's Protocol towards promoting and protecting women's rights, others will consider the decisions as limited and lacking clear reasons why, where and when such violations take place. The ambiguities raised by the latter school of thought have not been adequately cleared by legal interpretation as seen above. Nonetheless, the employment of the interpretative opinions of other social sciences such as sociology, anthropology and psychology is required to provide that supplement needed in clearing such ambiguity and facilitating the understanding of article 14 of the African Women's Protocol.

CHAPTER 4: MULTIDISCIPLINARY APPROACH TO THE INTERPRETATION OF SELECTED ASPECTS OF ARTICLE 14

4.1 Introduction

The promotion and protection of women's sexual and reproductive health rights is a cornerstone of their development, family and society at large. As captured above, sexual and reproductive health rights were first conceptualized at the celebrated ICPD in 1994.¹⁵⁹ According to the then Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, 'this conference portrayed sexual and reproductive health as fundamental to individuals, couples, families, the social and economic development of communities and nations'.¹⁶⁰ Hunt added that 'the conceptualization of sexual and reproductive health rights at the ICPD indicated a "move away" from the inclusion of reproductive health rights into population studies and established human rights as a crucial role player in the complete enjoyment and understanding of this right'.¹⁶¹

A misleading interpretation of sexual and reproductive health rights might show insufficient respect for the different cultures of the world. A concise example here will be a glance at a typical African scenario in which a man's strength and influence in the society in which he lives depends on the number of children he has, which impacts negatively on a woman's sexual and reproductive health rights. The inclusion in methods of interpretation of human rights, particularly sexual and reproductive health, of other disciplines such as sociology, psychology and anthropology should in my view be the right interpretation that will supplement legal interpretation and assist courts and legal minds to best interpret and understand women's sexual and reproductive health right.

Dugard, quoting article 31 of the Vienna Convention, outlines three main juridical interpretations to treaties and statutes which are: the textual, teleological and the intentions of the parties.¹⁶² While textual interpretation, also known as the golden rule of interpretation, places emphasis on the literal and grammatical meaning of the words provided for by a treaty, teleological interpretation refers to the purpose and object of the treaty to be

¹⁵⁹ Marshall (n 9 above).

¹⁶⁰ P Hunt, Special Rapporteur, (2004) UN Economic and Social Council, UN Doc. E/CN.4/2004/49 para 5.

¹⁶¹ As above.

¹⁶² J Dugard, *International Law: A South African Perspective* (2000) 338. Dugard also specifies that these methods of interpretation have no hierarchical order. Any applies when necessary.

interpreted and the ‘intentions of the parties’ approach requires a vivid understanding of the parties’ intention or presumed intention.¹⁶³

In this regard, article 14 of the African Women’s Protocol will be given a more concise interpretation by analysing and understanding each key word of the provision. This interpretation is definitely understood by legal minds but might be difficult to be understood by a lay person. This approach therefore only tells the reader or the victim how to behave or claim the rights provided under article 14 of the African Women’s Protocol but it fails to address the practicality of the right to sexual and reproductive health rights, which is relevant in understanding the context of the right.¹⁶⁴

Logically speaking, a legalistic interpretation of human rights will not speak to the challenges an ordinary person will encounter or fight for in life. There is therefore a range of social behaviours involving human rights that cannot be best interpreted by law, but can best suit and require the interpretation of other schools of thought.

In chapter 3 of this study, legal interpretation as seen in court’s interpretation of laws in an ‘inclusive manner’, in my view, goes a long way to ascertain the fact that at that point in time, the law was short of providing contextual interpretation to existing laws. Though existing literature has not reviewed any case whereby the courts have extensively interpreted laws from a multidisciplinary approach, this chapter is aimed at dissecting the practicality of legal provisions from a multidisciplinary approach.

4.1.1 Definition of disciplines

4.1.1.1 Sociology

Sociology basically is the study of the society; it aims at examining and understanding how society shapes human behaviours. Briefly put, Cragun defines sociology as ‘the study of human social life’.¹⁶⁵ He also contends that sociology has many sub-branches which range

¹⁶³ See generally, art 31 of the Vienna Convention.

¹⁶⁴ In the context of equality, for instance, the CEDAW Committee is of the view that ‘a purely formal legal or programmatic approach is not sufficient to achieve women’s de facto equality to men...it is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between men and women must be taken into account ...’ See Banda, (n 36 above) 232, 235-236.

¹⁶⁵ T Cragun *et al*, *Introduction to Sociology* (2006) 7.

from the analysis of conversations to the understanding of how the world works through its development of theories.¹⁶⁶

According to Cotterrell, socio-legal studies are often perceived as unable to give insight into the nature of legal ideas or elucidate questions about legal doctrines.¹⁶⁷ Quoting Milken, Cotterrell believes that the concept that law has its own 'truth', its own 'way', of perceiving the world, 'has been consistently used to deny the fact that sociological perspectives have any special claim to provide to the understanding of law as a doctrine'.¹⁶⁸

4.1.1.2 Psychology

It should be noted that there are several definitions of psychology. My preferred definition based on the fact that it fits this study, is that by Webb, in which she states that psychology is the 'scientific study of people, the mind and behaviour'.¹⁶⁹ It is both a thriving academic discipline and a vital professional practice.¹⁷⁰ Psychology and the social sciences study the human condition with the goal of understanding and even predicting the singular and collective behaviours of human beings.¹⁷¹

4.1.1.3 Anthropology

According to Cloak, anthropology is the study of culture and the human condition, past, present, and future.¹⁷² Cloak adds that anthropology is composed of four closely interrelated fields: biological or physical anthropology, which simply put tries to understand the human being as a living organism; socio-cultural anthropology, which involves field studies comparing or recording any number of social or cultural patterns; linguistic anthropology, which focuses on language, including its history and many complex branches; and lastly, archaeology, which seeks to exhume artefacts, bones, and other clues to shed light on how people lived in past cultures.¹⁷³

¹⁶⁶ As above.

¹⁶⁷ R Cotterrell, 'Why must Legal ideas be Interpreted Sociologically' (1998) 25 *Journal Law and Society* 171.

¹⁶⁸ As above.

¹⁶⁹ D Webb, *What is Psychology*, available at <http://www.ezinearticles.com/?What-is-Psychology?&id=1041115> (accessed 21 July 2010).

¹⁷⁰ As above.

¹⁷¹ P Kinderman, *Psychological Perspectives on Human Rights and British Psychological Society Policy: Psychology & Human Rights Programme and Proceedings* (2005) 3.

¹⁷² F Cloak, 'What Is Anthropology' (1968) 51(5) *The High School Journal* 195-202 available at <http://www.jstor.org/stable/40366435> (accessed 2 August 2010).

¹⁷³ As above.

4.2 Multidisciplinary interpretation of selected aspects of article 14

The adoption of a multidisciplinary approach in interpreting law, in my view, has a far-reaching effect on society and women in particular. Over the years, the UN has always encouraged legal interpretation to adopt a human rights based approach in understanding certain legal provisions. Recently, the UNHCHR has elaborated on the need to adopt a human rights based approach to better understand women's sexual and reproductive health rights.¹⁷⁴ Based on its importance, I think it is time for the UN to start calling for a multidisciplinary approach to be adopted in the interpretation of laws, especially those relating to women's sexual and reproductive health.¹⁷⁵

4.2.1 Non-discrimination

Non-discrimination, as already stated in chapter 2 of this study, is a fundamental aspect in strengthening women's rights in general and their sexual and reproductive rights in particular. At the African level, in article 2 of the ACHPR, non-discrimination is listed as the first substantive right, before the right to life. Compared to other international human rights instruments, the ACHPR lists the same prohibited grounds as the ICCPR, although instead of 'property' the ACHPR prohibits discrimination on the ground of 'fortune'. According to the ICESCR Committee, the prohibited grounds for discrimination provided for in other international human rights instruments and echoed in article 2 of the ACHPR are not exhaustive. Consequently, other grounds may be added.¹⁷⁶

Despite this evolution and the fortification of this right in the African Women's Protocol, women are still discriminated against either based on their gender, or their health. The question that could be posed is: Are African states doing enough to completely eradicate this social ill? Fortunately, it could be held that while some African states have and are still doing their best to ensure the complete eradication of discrimination against women, others are doing very little to ensure this right. For instance, South Africa promotes and protects non-discrimination in its Constitution¹⁷⁷ and the Promotion of Equality and Prevention of Unfair Discrimination Act.¹⁷⁸ On the other hand, countries such as Cameroon, though non-discrimination is protected in the Constitution,¹⁷⁹ still has a complex legal system comprising

¹⁷⁴ Pillay (n 31 above).

¹⁷⁵ See for example Eriksson (n 6 above) 10. In which he states: 'reproductive freedom is not about having legal options only, but also economic and social means that will enhance one's choice to reproductive rights'.

¹⁷⁶ See generally, ICESCR Committee, GC no 20, UN Doc. E/C. 12/GC/20 (2009) para 15.

¹⁷⁷ See generally, section 9 of the South African 1996 Constitution.

¹⁷⁸ See generally, the Promotion of Equality and Prevention of Unfair Discrimination Act no 4 of 2000.

¹⁷⁹ See generally, the preamble of the Constitution of Cameroon.

a mix of 'Napoleonic code' and common law as well as customary and written law that hinder the full enjoyment of this right by women especially.¹⁸⁰

Despite the fact that some countries have legislated the aspect of discrimination especially against women, discrimination still exists within some African cultural practices. This aspect (discrimination) is so entrenched that it is difficult to ascertain or speculate when, if at all, such practices will be discrimination free. The question that quickly comes to mind here is: Is the practice of culture evil and discriminatory, that it fails to protect its women? Merry argues that culture is not evil, and that the negativity attached to culture is perceived to be based on the conclusion drawn from some negative human behaviour.¹⁸¹ Based on this, and the pressure most human rights instruments exert on member states to completely eradicate gender-based discrimination, whose duty is it then to ensure that such cultural practices are not promoted: That of the courts or the state? According to Cook, it is the duty of the state to ensure the complete elimination of not only statutory discrimination, but that of individuals as well.¹⁸²

In such an environment where law fails to codify and put in place institutional mechanisms to ensure the complete protection and promotion of non-discrimination in general, the society and individuals who enjoy the violation of this right, especially against women, take advantage. Freeman, quoting Turner, states that the institutionalization of human rights, from a sociological view point is an important aspect of the 'social process of globalization' which initiates human rights to be viewed in social terms as a 'global ideology'.¹⁸³ Freeman then adds that the social institutionalization of human rights protects vulnerable human beings.¹⁸⁴ A glaring example here will be the South African experience in which the government has not only codified discrimination as seen in chapter 3 of this study, but has put in place institutional mechanisms such as an Equality Court, Parliamentary Committees, Human Rights Commission and a Gender Commission, to fully promote this right. While many may agree with this sociological perspective of enhancing law, the question remains: Does social institutionalization of human rights in general and discrimination against women in particular suffice? To an extent, this social requirement surpasses mere institutionalization and

¹⁸⁰Social Institute and Gender Index, Gender equality and social institutions in Cameroon. Available at <http://www.genderindex.org/country/Cameroon> (accessed 11 August 2010).

¹⁸¹ S Merry, 'Human Rights Law and the Demonization of Culture and Anthropology Along the Way' (2003) 26(1) *PoLAR* 55, 56-57.

¹⁸² R Cook *et al*, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (2003) vi.

¹⁸³ Freeman (n 43 above) 83.

¹⁸⁴ As above.

requires the psychological strength of those employed at the institutions to implement their mandate without discrimination or fear.

Besides, Cotterrell refers to the sociology of laws as a 'transdisciplinary enterprise and aspiration to broaden understanding of law as a social phenomenon'.¹⁸⁵ Emphasis must be placed on the need for interpreting law from its 'social context', Freeman argues, and adopting a 'social-scientific research method of recognizing that many traditional jurisprudential questions are empirical in nature and not just conceptual'.¹⁸⁶ In this light, therefore, the interpretation and understanding of the aspect of non-discrimination should adopt a sociological method of understanding through which legal minds will now interpret law from a calculated 'extension' in carefully specified directions of a diverse social world in legal terms.¹⁸⁷

From a psychological point of view, Kinderman observes that psychological needs such as self-esteem and respect from others must be met before a person can achieve their full potential in life.¹⁸⁸ In the context of discrimination, especially in cases where a woman has been deprived of her right to give birth due to her health status, this psychological need is non-existent and leads to a gross violation of human rights. In such circumstance, Freeman admits that 'sympathy' from other human beings is the psychological concept that relates to such human rights violations and not the act of forced sterilization or abortion itself.¹⁸⁹ This concept, Freeman contends, affects human beings, mostly when they are closely related to the offended.¹⁹⁰

Moreover, experimental psychology has proven beyond doubt that most human beings are likely to obey the rules of someone in authority even if it means compromising their own morale values.¹⁹¹ From the above, acts of discrimination could be influenced by the human effect of sympathy. It is most likely for a man to discriminate against a woman who is not his close relation than against one who is a close relation because of the psychological effect of sympathy. Psychology therefore encourages the understanding of non-discrimination from

¹⁸⁵ Cotterrell (n 167 above) 171-187.

¹⁸⁶ M Freeman, 'Law and Sociology' (2005) 8 *Current Legal Issues* 2.

¹⁸⁷ As above.

¹⁸⁸ Kinderman (n 171 above).

¹⁸⁹ Freeman (n 43 above) 90.

¹⁹⁰ As above.

¹⁹¹ Freeman (n 43 above) 91.

the angle of this natural human behaviour. As a result, 'sympathy inhibits human rights violations, while limited sympathy may enable them occur'.¹⁹²

The sympathetic approach adopted by psychology may differ if related to the diverse cultures that exist and in most cases shape human behaviours in the world. Discrimination towards women in particular, is a deep-rooted practice that existed and still exists across borders.¹⁹³ For instance, most African cultures discriminate against African women in areas such as inheritance, marriage and divorce. The approach and intensity of such practice of discrimination, Okin highlights, differs according to the different cultures within a particular country.¹⁹⁴ The question most anthropologists have been asking is: How accurate is the globalization of culture under human rights? Kaime quoting Pearce and Kang highlights that 'to be human is to have been enculturated to some specific culture whose characteristics have been internalised'.¹⁹⁵ Consequently, it could be said that the basis of this assertion of globalisation of human rights is often generated from the very fact of being human based on the views drawn from various principles of natural law, morality, philosophy or anthropology.¹⁹⁶ In this regard, therefore, anthropological suggestions to the understanding of legal principles in general and article 14 of the African Women's Protocol in particular requires an investigation and assertion of whether such discriminatory practices as seen in the *Mojekwu's case* are morally accepted.

4.2.2 Abortion

Similar to discrimination against women, abortion could be referred to as key to women's rights that relate to health, life, privacy, self-determination and procreation. As captured in chapter 2 of this study, most maternal deaths in Africa are caused by poor and unsafe abortion practices.¹⁹⁷ It is estimated that 92% of women of child bearing age in Africa live in countries with restrictive abortions laws.¹⁹⁸ Apart from South Africa, Tunisia and Cape Verde,

¹⁹² As above.

¹⁹³ S Okin, *Is Multiculturalism Bad for Women?* (1999) 9-10.

¹⁹⁴ As above.

¹⁹⁵ T Kaime, *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (2009) 32.

¹⁹⁶ N Pityana, 'The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) 219.

¹⁹⁷ Pillay (n 31 above).

¹⁹⁸ Guttmacher Institute (n 120 above) 1.

who have legalised abortion without limitation as to reason,¹⁹⁹ other African countries have either partly²⁰⁰ or completely²⁰¹ prohibited abortion.

Some of the reasons for such a slow admittance of the need for legalised abortion may be due to lack of adequate knowledge of the advantages that encompass the full enjoyment of this right. It is clear from the provision on abortion in the African Women's Protocol that the denial of an abortion that puts at risk a woman's physical and mental health can be deemed a violation of her fundamental right to be free from cruel, inhuman and degrading treatment.²⁰² In an attempt to expand on the interpretation of abortion, the subsequent paragraphs will consider its interpretation from a multidisciplinary approach.

The sociological interpretation of abortion as a legal term may coerce the understanding of abortion. However, it would be appropriate to understand abortion by examining the sociological thinking of those who adopted the African Women's Protocol. Also, the sociological interpretative approach to abortion will be determined by an investigation of societal social effects that surround a woman and her family should she undergo forced abortion, be refused or be forced due to restrictive laws to carry out unsafe abortion. According to Freeman, sociological requirement is needed 'because law is a key social phenomenon that must be understood, analysed and discussed, which could not begin nor be carried far without conceptual analyses'.²⁰³

Moreover, the socio-legal institutionalization of human rights captured under non-discrimination above is required to strengthen the full enjoyment of the rights to abortion, choice, and child rearing. Notwithstanding, Freeman, citing Howard, contends that a 'structural approach to the sociology of human rights does not exclude the role of culture'.²⁰⁴

¹⁹⁹ As above.

²⁰⁰ Côte d'Ivoire, Kenya, Libya, Malawi, Mali, Nigeria, Sudan, Tanzania, Uganda, Benin, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Guinea, Morocco, Mozambique, Niger, Rwanda, Togo, Zimbabwe, Algeria, Botswana, Gambia, Ghana, Liberia, Namibia, Seychelles, Sierra Leone, Swaziland, Zambia.

²⁰¹ Angola, Central African Republic, Congo (Brazzaville), Democratic Republic of the Congo, Egypt, Gabon, Guinea-Bissau, Lesotho, Madagascar, Mauritania, Mauritius, São Tomé and Príncipe, Senegal, Somalia. It should be noted that six of these countries have ratified the African Women's Protocol. These are: Angola (30 August 2007), Democratic Republic of the Congo (09 June 2008), Guinea-Bissau (19 June 2008), Lesotho (26 October 2004), Mauritania (21 September 2005) and Senegal (27 December 2004).

²⁰² See generally, art 14(2)(c) of the African Women's Protocol.

²⁰³ Freeman (n 186 above) 5.

²⁰⁴ Freeman (n 43 above) 86.

Cloak adds that culture is central to the study of anthropology.²⁰⁵ Culture, therefore, is a very crucial aspect that forms an essential element in the life of every human being. This is because, Echi notes, 'it helps to create and identify the social norms people conform to'.²⁰⁶ But then, in most instances especially on the African continent, culture highly discriminates against women.

According to Freeman, the fact that anthropologists see law as one type of cultural system implies that 'the anthropological conceptions of human rights are likely to differ from legal conceptions'.²⁰⁷ The resistance against abortion, though considered a cultural practice, differs among different cultures in Africa. For example, in Cameroon, the practice of aborting a pregnancy differs from clan to clan. While the law may consider the need and importance of legalising abortion from a legal viewpoint, anthropology, Freeman admits can help the course of law by making clear the relationship between 'international human rights law and particular cultures'.²⁰⁸

Such cultural practices that prohibit abortion in cases where, for instance, the child was conceived through rape and incest or the continuation of the pregnancy may cause severe health problems to the woman may leave the woman with lasting psychological stress that might impair her reasoning. The non-legalisation of abortion therefore, could be out of step with widely accepted norms that recognise minimum safeguards to protect women's basic human rights.²⁰⁹ Worst is the fact that women's vulnerability to depression and psychological disorder is amplified by social, economic and cultural factors beyond their control.²¹⁰

As a matter of fact, the response to whether abortion should be legalised or not within the African context in particular, is so critical that it would be essential to examine the psychological effects that may accrue from a particular situation. It is clear from the trend adopted in this study that the legalisation of abortion would inflict little or no psychological consequences on the mother as compared to unsafe abortion or prohibited abortion. Also,

²⁰⁵ Cloak (n 172 above).

²⁰⁶ A Echi, *Cultural Practices that Discriminate against Women* available at <http://www.helium.com/items/1881328-women-and-culture> (accessed 27 August 2010).

²⁰⁷ Freeman (n 43 above) 93.

²⁰⁸ As above.

²⁰⁹ *Sentencia* (n 128 above).

²¹⁰ World Health Organisation (WHO) and United Nations Population Fund (UNFPA), *Mental Health Aspects of Women's Reproductive Health: A Global Review of the Literature* (2009) 18.

the legalisation of abortion may greatly reduce the effects of stigmatisation that has always been suffered by women who choose to have an abortion.²¹¹

4.2.3 Informed consent

The reality is that one cannot be said to have given informed consent if he or she has not been given sufficient information. Information entails understanding what informed consent is needed for. In the *AS* case examined above, this was not the case and as a result, consent was considered as being absent since the complainant was not well informed. According to Eriksson, the right to give informed consent especially when related to reproductive health rights falls within the concept of the right to privacy recognised in several international human rights instruments.²¹²

Moreover, at the UN level, article 12 of CEDAW asserts that state parties must ‘take all appropriate measures ... in the field of health care in order to ensure ... access to health care services, including those related to family planning’. In interpreting this provision, the CEDAW Committee established that provision of services must guarantee women’s dignity and informed consent.²¹³

To what extent then would a multidisciplinary interpretative approach expand the understanding of this legal aspect broadly recognized in most international human rights instruments? From a sociological point of view, Freeman, citing Cotterrell, argues that sociology ‘offers insights into legal thinking, and can transform legal ideas by re-interpreting them’.²¹⁴ Legal thinking in this aspect considers how law has been and can be enforced. In an attempt to limit this, it would be necessary to consider that while law regulates the society, sociology assists legal interpretation by providing legal minds with what society really is.

Citing Waters, Freeman argues that a sociological theory of human rights should take a ‘social-constructionist approach that treats the universality of human rights as itself a social construction’.²¹⁵ On this view, the sociological interpretation and understanding of the legal

²¹¹ A Kumar *et al*, ‘Conceptualising Abortion Stigma’, (2009) *Culture, Health and Sexuality* 2-5.

²¹² Eriksson (n 6 above) 251. Also, see generally, art 17(1) of the ICCPR.

²¹³ See generally, CEDAW Committee, GR no 24 (n 82 above) in which the CEDAW Committee confirms that, ‘acceptable services are those that are delivered in a way that ensures that a woman gives her full informed consent ...’.

²¹⁴ Freeman (n 186 above) 3.

²¹⁵ As above.

requirement of informed consent relating to women's sexual and reproductive health may be examined in the social context in which the violation is committed. More so, 'human rights violations occur at the sub-state, social level'.²¹⁶

The social level therefore implies considerable evaluation of the various cultures that exist on the African continent. In most cases, a woman's consent is almost non-existent. For instance, in the northwest of Cameroon, a woman is not allowed to speak in a man's gathering, not to talk of disagreeing with decisions made in such gathering.²¹⁷ According to Okin, the control of women by men is the principal aim on which most cultures are designed.²¹⁸ From the look of things, the aspect of lack of informed consent seems deep-rooted in most African cultures. The question that could be asked is: What can anthropology bring forth to best understand this right and may be bridge the gaps that exist within our communities? Freeman, citing Schirmir and Stoll, holds that 'anthropology can help make human rights interventions more effective by providing them with deeper understanding of their cultural, social and political context'.²¹⁹

The importance of informed consent as a mechanism to promote and protect women's sexual and reproductive health right cannot be overstated. According to Rosenfeld, several judicial decisions as well as the ethical principles of psychologist places great emphasis on the psychological importance of patient autonomy as a recommended principle to medical decision making.²²⁰ Even though it could be said that psychologists can be highly involved in the informed consent process, based on their study of the human mind, Rosenfeld contends that the role of psychologists is central in 'determining whether the patient is competent to make a treatment decision'.²²¹ For instance, while the law from a general perspective regards all human adults as competent unless proven otherwise, it would be the duty of a psychologist to determine otherwise especially when the 'burden of demonstrating competence may shift as a practical matter if not a legal one'.²²²

²¹⁶ Freeman (n 43 above) 85.

²¹⁷ The author hails from the northwest of Cameroon and has first hand information on this issue.

²¹⁸ Okin (n 193 above) 13.

²¹⁹ Freeman (n 43 above) 94.

²²⁰ B Rosenfeld, 'The Psychology of Competence and Informed Consent' (2002) *Fordham Urban Law Journal*, available at <http://www.questia.com/googleScholar.qst?docId=5000634841> (accessed 30 August 2010).

²²¹ As above.

²²² As above.

4.2.4 HIV/AIDS²²³

Similar to discrimination against women, abortion, and lack of informed consent and the stigma on women, it is an established fact that the stigma and social exclusion suffered by women living with HIV/AIDS 'impede their access to adequate treatment and other healthcare services, reduce the quality of their lives, and often result in the violation of their human rights'.²²⁴ The violations of these human rights are mostly evident within the healthcare institutions especially when potential mothers are seeking maternal healthcare services. Also, non-consensual HIV-testing, inadequate counselling, and lack of respect for confidentiality violate the rights to health, dignity, life, equality and non-discrimination, privacy and informed consent..²²⁵

Sociologically, HIV/AIDS in the context of this study will not be appropriately interpreted without examining its social causes because in my view social effects such as stigma and prejudice towards women are critical. Fife observes that stigma 'is a complex phenomenon expressed both subtly and overtly, and it is subjectively experienced in multiple ways that are partially dependent upon the nature of the stigmatizing condition and the social circumstances of the individual'.²²⁶ While the root causes of HIV/AIDS are multiple, in many cases, it may be argued that its stigma is propelled by structures of unequal access to power and resources that have infiltrated social structures.

The psychological approach to stigma, Deacon observes, implies that it is partly or completely a problem of 'individual ignorance'.²²⁷ The psychological concept that is highly relevant to the understanding of HIV/AIDS is shame. Human beings suffer more when they internalize shame and feel rejected especially when it is related to HIV/AIDS. Women with HIV/AIDS, for example, suffer more from stigmatisation because they internalise shame and fall apart from the rest of the members of the community.²²⁸ While internalised shame

²²³ For example, another field that could be of assistance here is the field of medical ethics which could facilitate the understanding of the relevance of disclosing another's status to his or her partner. Even though this is important, it should be noted that this study focuses mainly on the interpretative approach of sociology, anthropology and psychology.

²²⁴ Center for Reproductive Rights *et al*, *Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Courts* (2010) Vol II 91.

²²⁵ As above.

²²⁶ B Fife and E Wright, 'The Dimensionality of Stigma: A Comparison of Its Impact on the Self of Persons with HIV/AIDS and Cancer' (2000) 41(1) *Journal of Health and Social Behaviour* 51, available at <http://www.jstor.org/stable/2676360.pdf?acceptedTc=true> (accessed 31 August 2010).

²²⁷ H Deacon *et al*, *Understanding HIV/AIDS Stigma: A Theoretical and Methodological Analysis* (2005) viii.

²²⁸ B Fife and E Wright (n 226 above) 56.

therefore may accelerate human rights violations and social stigmatisation, limiting shame may reduce them.

The biological characteristics of HIV/AIDS could determine, to an extent, the rate at which it spreads, but, Ainsworth notes, 'human behaviour plays a critical role in transmission'.²²⁹ In this regard, issues such as gender relations and the different cultures that exist within African societies towards sexual behaviours are both crucial and require, to some degree, the attention of anthropologists before conclusions are made. The imparting of knowledge about the risk that surrounds HIV/AIDS is not enough and will do little to translate into changes in sexual behaviours. Moreover, Ramin recommends that HIV/AIDS 'educational programmes need to take account of traditional beliefs and value systems, as well as popular mythologies that circulate' within a particular community.²³⁰ Such programs from an anthropological perspective will provide a better insight and develop the basis for 'culturally sensitive and culturally appropriate community based HIV/AIDS prevention programmes'.²³¹

4.3 Conclusion

To conclude, it will be appropriate for a medical or legal community to adopt the contributions of these disciplines and their approach towards the four aspects discussed in this study. In my view, the law with respect to women's human rights in general and their sexual and reproductive health rights in particular, should be as free and clear from any ambiguity as possible in order to be fair to women.

The three disciplines adopted above, have in their different understanding of the four aspects demonstrated what may be lacking in legal interpretations. For example, the need to study different cultures that 'regulate' human behaviour and that explain why human behaviour differs from one community to another is very critical. It is an established fact that the violations of human rights in general and women's rights in particular are triggered by human behaviours and beliefs in a given society. Thus, the understanding of these four aspects to the exclusion of insights from other disciplines, especially those considered above, would expose the limitations of legalistic interpretations and make human rights law look superficial.

²²⁹ M Ainsworth, *Setting Government Priorities in Preventing HIV/AIDS* (1998) 18, available at <http://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/ainswort.pdf> (accessed 1 September 2010).

²³⁰ B Ramin, 'Anthropology Speaks to Medicine: The Case of HIV/AIDS in Africa' (2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2323482/> (accessed 1 September 2010).

²³¹ R Parker, *Sexuality, Culture and Power in HIV/AIDS Research* (2001) 168, available at <http://www.annualreviews.org> (accessed 1 September 2010).

CHAPTER 5: CONCLUSION

5.1 Brief summary

It is imperative to note that this study is structured to respond to two fundamental questions. Firstly, has the legal interpretation of four cardinal aspects of article 14 of the African Women's Protocol, namely non-discrimination, abortion, informed consent and HIV/AIDS, adequately advanced women's sexual and reproductive health rights? Secondly, to what extent would a multidisciplinary approach to the four aspects enrich the interpretation of article 14? This chapter therefore provides a brief summary of what has been discussed in the previous chapters and general conclusions. The chapter also assesses the extent to which this study has answered the research questions.

Reproductive rights embody definite human rights that are already documented in national, regional and international human rights documents and other consensus documents. These rights are premised on the respect of the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to accomplish the highest standard of sexual and reproductive health.²³² It also includes the right to make decisions concerning reproduction free of discrimination, duress and violence, as expressed in the African Women's Protocol.²³³

In this spirit, women's sexual and reproductive health, the WHO argues, 'needs to be considered comprehensively with due consideration to the critical contribution of social and contextual factors'.²³⁴ It could also be said that this study is designed to broaden and to re-affirm this spectrum of interpreting legal aspects by adopting a multidisciplinary approach as demonstrated in chapter 4 above.

5.2 Conclusions

Protecting and promoting women's sexual and reproductive health could go a long way to providing lasting solutions to several human rights violations faced by women on a daily basis. For this to be achieved, besides the inclusion of such human rights in national, regional and international legal instruments, legal minds must consider other social sciences, for instance sociology, anthropology and psychology, as intimately necessary to enhance

²³² WHO and UNFPA (n 210 above) 5.

²³³ See generally, art 14 of the African Women's Protocol.

²³⁴ WHO and UNFPA (n 210 above) ix.

legal interpretation and understanding. Moreover, sexual and reproductive health rights as indicated in the cases studied in chapter 3 of this study encompass a combination of other rights. For instance, WHO states that sexual and reproductive health rights include amongst others, the rights to privacy, life, informed choice, education, health and non-discrimination.²³⁵

From an interpretative view point, this study identified four critical human rights aspects that may guide the interpretation and understanding of this right. According to the author, these aspects (non-discrimination, abortion, informed consent and HIV/AIDS) are central to women's sexual and reproductive health rights and could be labelled as potential 'barriers'. Therefore, understanding them widely helps in breaking down these 'barriers'.

To address the root causes and understanding of these potential 'barriers', this study adopted a multidisciplinary approach, through which insights from other disciplines than the strictly legal were considered. From a synopsis of the rapid evolution of women's rights, one could hold the view that treaty monitoring bodies have over the past years laid emphasis on the interpretations and jurisprudence regarding women's human rights. As a result, it has led to a marked development in recognition of the right to health, particularly as it relates to women's reproductive health. Against this background, and concurring with the decision in the *AS* case, for sexual and reproductive health rights to be best understood and implemented, there is a need for this right to be interpreted by making linkages to other human rights and other social sciences.

This study demonstrates in chapter 4 that a combination of rights only does not suffice in clarifying the ambiguity that surrounds women's sexual and reproductive health rights. The study also emphasizes that it would be more appropriate when interpreting laws not to look only at the efforts of legal instrumentality and its intention to bring change but to consider the ways in which issues, people and problems evolve. Chapter 3 clearly indicates, based on the cases reviewed, that the legalistic interpretations adopted by the various courts have not adequately advanced these four critical aspects of women's rights to their sexual and reproductive health. It is in the spirit of closing this gap, therefore, that chapter 4 is structured to assess and appreciate the perspectives of other social sciences regarding these four aspects, in an attempt to supplement legal interpretation and uncover deeper layers of meaning.

²³⁵ WHO and UNFPA (n 210 above) 5.

The adoption of a multidisciplinary interpretative approach of law has long-lasting and crucial benefits that cannot be compared. For example, anthropology may have a special contribution to make by facilitating the understanding of these aspects of women's sexual and reproductive health rights, for it can link the concept of human rights to the cultural understandings of different people from different cultural backgrounds. Moreover, a multidisciplinary approach promotes the understanding of aspects of non-discrimination, abortion, informed consent and HIV/AIDS in a wider context by addressing the specific needs of people which are relevant to the full enjoyment of women's sexual and reproductive health rights. In fact, this study has shown that uncovering deep-rooted cultural and social norms that discriminate against women can be achieved if the interpretation of other disciplines such as sociology is considered.

Besides, the consideration of other disciplines in the interpretation of law in general and women's rights in particular, takes nothing away from the particular intention of a legal provision but supplements its meaning and clarifies its intention. Even though the contributions of other disciplines cannot be measured quantitatively, it will be correct to assert that the adoption of a multidisciplinary approach to the interpretation of women's rights, in particular, will enrich its understanding to a very large extent.

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