

A CRITICAL ANALYSIS OF THE SEXUAL RIGHTS OF OLDER WOMEN IN AFRICA

**A dissertation submitted in partial fulfilment of the requirements of the degree MPhil
(Sexual and Reproductive Rights in Africa)**

By

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PLAGERISM DECLARATION

I declare that this dissertation, 'a critical analysis of the sexual rights of older women in Africa', which I hereby submit for the degree MPhil in Sexual and Reproductive Rights at the Faculty of Law, University of Pretoria, is my own work and has not been previously submitted by me for a degree at this or any other tertiary institution.

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DEDICATION

This dissertation is dedicated to the Great I AM, *Kabiesi* who gave me the strength to run this race and finish it amidst all odds. He deserves all the glory.

ACKNOWLEDGEMENT

When I started this journey in 2018, the journey to graduation seemed insurmountable but with the grace of God and the support of my family and friends, I can truly say it has ended in praise.

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LIST OF ABBREVIATION

African Charter	African Charter on Human and Peoples’ Rights
African Commission	African Commission on Human and Peoples Rights
AU	African Union
CCPR	International Convention on Civil and Political Rights
CEDAW	International Convention for the Elimination of all Forms of Discrimination against Women
CESCR	International Convention on Economic, Social and Cultural Rights
Committee on CEDAW	Committee on the Elimination of Discrimination Against Women
CRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRPD	International Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organisations
EAC	East African Community
FGM	Female Genital Mutilation
GBV	Gender Based Violence
ICPD	International Conference on Population and Development
IGAD	Intergovernmental Authority on Development
Inter-American Convention on Older Persons	Inter-American Convention on Protecting the Human Rights of Older Persons
Maputo Protocol	Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa
MDGs	Millennium Development Goals
MIPAA	Madrid International Plan of Action on Ageing
Older Person’s Protocol	Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa
RECs	Regional Economic Communities
SADC	Southern African Development Cooperation
SRHR	Sexual and Reproductive Health and Rights
Universal Declaration	Universal Declaration of Human rights
VAW	Violence Against Women
WAS	World Association for Sexual Health
WHO	World Health Organisations

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ABSTRACT

Despite the importance of sexuality and sexual rights at every stage of human development and interaction, the relationship between sexuality and aging has been a neglected area of research and policy interventions, most especially within the African context. In addressing this gap, this study explores the sexual rights of older women in Africa from a socio-legal perspective, critically looking at what claims to sexual rights older women have, the historical basis for the invisibility and marginalisation of older women in the sexuality discourse as well as current avenues for the protection and promotion of their sexual rights. Herein, the intersectionality approach is used to explain older women's experience of discrimination with regards to their sexual health and rights which is often exacerbated by attitudes and bias about their age and inferred asexuality. Furthermore, this study extensively reviews the legal framework available for the protection of the sexual rights of older women within international and regional human rights systems with specific emphasis on the African human rights system, identifying the specific challenges to the actualisation of the sexual rights of older women in Africa and proposing ways by which this can be addressed. Ultimately, this study submits that the available legal framework is insufficient for the protection of the sexual rights of older women and would require strengthening for a more holistic sexual rights framework that embodies both freedom from (negative rights) and freedom to (positive rights) with emphasis on the specific needs and vulnerabilities of older women.

Keywords: sexual rights, older women, intersecting discrimination and vulnerabilities, sexual agency, legal frameworks, African human rights system

1. INTRODUCTION

1.1. Background to the Study/ Problem Statement

Sexuality is not a new issue in international human rights discourse.¹ However, it is only in recent times that human rights provisions have been explicitly evoked to address issues of sexuality and sexual rights² in response to the different needs of hitherto marginalised groups.³ Prior to the 1993 Vienna Declaration and Programme of Action,⁴ no international document contained any specific reference to sexuality and even in instances when they did, not a lot of focus was placed on the right to express one's sexual orientation, preference or desire outside the umbrella of reproductive health and rights.⁵

Within the African context, sexual rights remain a contentious and highly politicized issue, with strong dichotomies drawn between what is considered 'good' or 'bad', 'acceptable' or 'unacceptable' expressions of sexuality.⁶ According to Bennett, there has been an 'African-based' reluctance to explore issues of sexualities as part of the debates concerning democracy, justice and equity.⁷ One of the reasons for this reluctance is the unrealistic desire to maintain a 'normative' and 'moralistic' separation of the public and private spheres of life, notwithstanding the central role sexuality plays in every facet of human interaction. Consequently, transgressive sexualities are frowned upon and stigmatised leading to unmet sexual needs.⁸

While these unmet sexual needs are experienced across gender and age divides, older women receive the shorter end of the stick based on intersecting vulnerabilities and discrimination perpetuated against them on the basis of age, sex, gender identity, amongst others.⁹ In many social environments, older women, who are categorized as women over the age of 60,¹⁰

¹ ST Fried 'Bibliography: Sexuality and human rights' (2004) *Health and Human Rights* 273.

² Sexual rights is a term used loosely in reference to the protection of the right to sexual self-determination and sexual liberation. World Health Organization 'Defining sexual health' (2010) http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/ (accessed 28 November 2018).

³ AM Miller 'Human rights and sexuality: Towards articulating a rights framework for claims to sexual rights and freedoms' (1999) *Proceedings of the Annual Meeting of the American Society of International Law* 288.

⁴ Vienna Declaration and Programme for Action Report of the World Conference on Human Rights, UN Doc. A/Conf./157/23, 14-25 June 1993, para 5.

⁵ NI Aniekwu 'The additional protocol to the African Charter on Human and People's Rights: indications of capacity for African municipal systems' (2009) *African Journals Online* 22.

⁶ S Nyanzi 'Unpacking the [govern]mentality of African sexualities' in S Tamale (ed) *African Sexuality: A reader* (2011) 447 & 448.

⁷ J Bennet 'Subversions and resistance: activist initiatives' in S Tamale (n 6) 78.

⁸ Transgressive sexualities can be used as an umbrella term to describe sexualities that do not conform to culturally hegemonic narratives of heterosexuality and, for this reason alone, are culturally stigmatised. C Ngwena *What is Africanness? Contesting nativism in race, culture and sexuality* (2018) 205.

⁹ C Ngwena & E Durojaye 'Strengthening the protection of sexual and reproductive health through human rights in the African Region: An introduction' in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health in the African region through human rights* (2014) 1.

¹⁰ Older persons are those persons aged sixty (60) years and above, as defined by the United Nations (1982) and the AU Policy Framework and Plan of Action on Ageing (2002). Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Older Person's Protocol), adopted January 31 2016.

experience neglect on issues related to their sexual health and sexual wellbeing based on biased and unsubstantiated assumptions about ageing and sexuality.¹¹

Furthermore, older women are also conspicuously absent within the political and academic discourse on sexual rights, as research, policies and laws on sexual rights have predominantly been tied to reproduction. It has therefore become the norm for health interventions that deal with issues such as violence against women, HIV/AIDS prevention or comprehensive sexuality education to be mostly targeted at women of reproductive age and heteronormative gender identity and sexual orientation. Consequently, more case laws and jurisprudence have been developed around these areas, disregarding the sexual rights of older women and failing to address non-stereotypical expressions of sexuality for postmenopausal women.¹² The impact of this exclusion, as argued in this study, is that older women, who in reality are vulnerable to sexual health risks, continue to face multiple layers of discrimination that make their unique needs and vulnerabilities unrecognisable. They are also subjected to sexual violence and other dehumanising harmful practices.¹³ According to Miller, ‘the conflation of sexual rights with reproductive rights has caused sexual rights to be viewed as a subset of reproductive rights’ which has, in turn, erased an array of people of varying ages and non-reproductive sexual practices.¹⁴ This leaves many already marginalized groups such as older women outside the framework of human rights protection in the context of sexual behaviour.¹⁵

This study, therefore, agrees with Miller that persons and practices not traditionally addressed within the human rights framework must be explicitly named and brought within the circle of rights protection.¹⁶ Hence, the rationale of this study is to critically analyse the sexual rights of older women, looking at the barriers to the protection of their rights as well as avenues for the realisation of their sexual rights. This study also seeks to generate new knowledge with regards to the interpretation and application of existing laws to the protection of the sexual rights of older women. Specific sexual rights of older women that will be interrogated vis-à-vis the provisions available within the international and regional human rights framework include the right to non-discrimination, the right to autonomy and bodily integrity on all matters related to their sexuality and body, freedom from all forms of sexually related violence and coercion, the right to the highest attainable standard of health including sexual health, and the right to comprehensive sexuality education that is age appropriate and grounded in a positive approach to sexuality, ageing and older people.¹⁷ Consequently, this

¹¹ S Hinchliff & C Barrett ‘Introduction to the sexual rights of older people’ in C Barrett & S Hinchliff (eds) *Addressing the sexual rights of older people: Theory, policy and practice* (2018) 4.

¹² AM Miller ‘Sexual but not reproductive: Exploring the junction and disjunction of sexual and reproductive rights’ (2000) *Health and Human Rights* 87.

¹³ I Aboderin ‘Sexual and reproductive health and rights of older men and women: addressing a policy blind spot’ (2014) *Reproductive Health Matters*.

¹⁴ Miller (n 12) 70.

¹⁵ As above.

¹⁶ Miller (n 12) 49.

¹⁷ C Barrett & S Hinchliff ‘Bundle of potential: The sexual rights of older people’ in Barrett & Hinchliff (n 11) 16.

study will revisit states' obligations towards older women under specific international and regional human rights systems with particular focus on the African human rights system.

1.2. Research objective

This study seeks to critically examine the sexual rights of older women in Africa within the framework of the African regional human rights system and states' human rights obligations therein.

1.3. Research questions

This study seeks to answer three key questions:

1. What claims to sexual rights do older women in Africa have?
2. Does the African human rights system provide adequate protection for advancing the sexual rights of older women and what are states' obligations in this regard?
3. What lessons can be learnt from other international and regional human rights system to advance the sexual rights of older women in Africa?

1.4. Methodology

This study draws on existing research and knowledge at national, regional and global level and utilizes a qualitative method to explore the above research questions. The use of qualitative method was selected due to its effectiveness in identifying intangible factors, such as socio-cultural norms, gender roles, economic status whose role in the research may not be readily apparent. In this regard, secondary data will be relied on for this study.

With regards to methodological approach, this study explores the sexual rights of older women by first critically examining the evolution of sexual rights and the visibility of older women within the sexuality discourse. It then goes ahead to identify the international and regional legal frameworks available for advancing the sexual rights of older women. More significantly, it answers the main question of this study by analysing what sexual rights older women in Africa can lay claim to and juxtaposes this with the constraints they face in accessing those rights. This study has done the above analysis relying largely on the intersectionality approach to explain how older women's sexual rights have been promoted or denied within the African human rights system. Intersectionality tends to be associated with qualitative research methods due to the central role it plays in understanding multiple, simultaneous, marginalised experiences and narratives.¹⁸ It is a critical framework that provides 'the mindset

¹⁸ D Atewologun & R Mahalingam 'Intersectionality as a methodological tool in qualitative equality, diversity and inclusion research' in LAE Booysen, R Bendl, & JK Pringle *Handbook of Research Methods in Diversity Management, Equality and Inclusion at Work (2018)* 154.

and language to examine interconnections and interdependencies between social categories and systems'.¹⁹

1.5. Limitations

One of the limitations of this study is its approach. This research was done from a socio-legal perspective and not from a purely legal one due to the background of the author. Nevertheless, this approach makes it easy to examine the law as an integral part of society and culture and also gives a better understanding of the socio-cultural and political underpinnings that have an impact on the sexual rights of older women.

The paucity of data on the sexual rights of older women, specifically centred on Africa is another limitation of this study. Very few studies are focused on the subject matter in the context of Africa in a way that sheds light to the situation from an African Perspective. Hence, this study incorporated literature and data from the global north as was relevant.

Also, whilst this study acknowledges the importance of African Feminism as a theoretical framework relevant to the study of the sexual rights of older women, within its limited scope, this study purposefully chose to limit its analysis to unpacking intersectionality as the framework for examining the different ways in which older women are vulnerable with regards to their sexual health and rights.

1.6. Literature review

According to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),²⁰ all women, regardless of age, have a right to health, which includes their sexual and reproductive health.²¹ Consequently, states are to take all necessary measures to ensure that the sexual and reproductive rights of all women are respected, promoted and protected.²² The reality, however, is different. Older women continue to face discrimination and abuse with regards to their sexual rights based on misconceptions about their sexuality and the importance of sexual health and rights to older women who are commonly viewed as 'asexual'.²³ In many subtle and not so subtle ways, aging and sexual desirability are peddled as mutually exclusive.²⁴ These prejudices conveyed and maintained by society are a form of discrimination that often stops older persons from

¹⁹ Atewologun & Mahalingam (n 18) 152.

²⁰ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), adopted 11 July 2003, OAU Doc AHG/Res.240. Art 14(1).

²¹ Art 14(1) of the Maputo Protocol.

²² Art 14(1) of the Maputo Protocol.

²³ Asexual means someone who does not experience sexual attraction. 'What is Asexuality' <http://www.whatisasexuality.com/intro/> (accessed 30 November 2018).

²⁴ C Rheume & E Mitty 'Sexuality and intimacy in older adults' (2008) *Geriatric Nursing* 345.

engaging in sexual relations based on a real or perceived intolerance over their sexual behaviour.²⁵

Trudel *et al* note that these misconceptions stem from a lack of understanding about the 'normal' physiological changes linked with ageing.²⁶ This challenge becomes more complex when looking at the politics of gender and sexuality. According to Rubin, there are politics within the realm of sexuality, with some types of sex being prioritized and accepted over other forms.²⁷ Tamale lends an African voice to this narrative speaking of the 'instrumentalisation' of sexuality, which is maintained through the nibs of statutory, customary and religious laws that are closely linked to the gender constructions and oppression of women.²⁸ Within these power structures and politics of sexuality, Rubin posits that older women are a disenfranchised group as evidenced by the lack of programming and policy around older women's sexual lives, impeding their recognition as sexual agents, capable of eliciting desire.²⁹ Consequently, it becomes even more difficult for older women who have to navigate the often patriarchal, sexist and ageist structures of society that make it undesirable for older women to talk about their sexual needs and preferences.³⁰ Calasanti calls this 'double jeopardy', where the intersection of ageism with sexism renders older women more vulnerable and neglected'.³¹

Early research carried out in the area of sexuality notes the untruth of these notions and confirms that older women are 'sexual beings' and remain 'sexually active'.³² Rotberg submits that even whilst sexual interest and activities may be on a progressive decline after age 65, many women are still sexually active past their reproductive years.³³ According to Wallace³⁴ and Trudel *et al*, 'a woman, just like a man, can continue to give and receive sexual pleasure all her life'.³⁵ Kangaude also makes reference to 'sexuality as an integral part of a human being's life - young or old, child or adult' and a vital part of human development.³⁶ A woman's sexuality does not inevitably vanish with age but is dependent and influenced by factors such as 'physical health, social taboos, conjugal status, knowledge about sexuality, self-esteem and attitudes towards sexuality'.³⁷ This was echoed by Rheume *et al*, noting that the barriers to sexuality and intimacy especially for older women are more likely to be rooted in notions of

²⁵ G Trudel, L Turgeon & L Piche 'Marital and sexual aspects of old age' (2000) 15 *Sexual and Relationship Therapy* 395.

²⁶ (n 25) 386.

²⁷ GS Rubin 'Thinking sex notes for a radical theory of the politics of sexuality' in *Encyclopaedia of Lesbian, Gay, Bisexual, and Transgender History is America* (2003) 155.

²⁸ S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (n 6) 16.

²⁹ B Cooper & C Crockett 'Gender-based violence and HIV across the life course: adopting a sexual rights framework to include older women' (2015) *Reproductive Health Matters* 59.

³⁰ M Lusti-Narasimhan & JR Beard 'Sexual health in older women' (2013) *Bulletin of the World Health Organization* 1.

³¹ T Calasanti 'Ageism, gravity, and gender: Experiences of aging bodies' (2005) *Ageism New Millennium* 9.

³² EE Steinke & MB Bergen 'Sexuality and aging' (1986) 12 *Journal of Gerontological Nursing* 7.

³³ AR Rotberg 'An introduction of the study of women, aging, and sexuality' (1987) *Physical and Occupational Therapy Association* 5.

³⁴ MW Kazer 'Sexuality and aging in long-term care' (2003) *Nursing Faculty Publications* 57.

³⁵ Trudel, Turgeon & Piche (n 25) 386.

³⁶ G Kangaude 'Adolescent sex and "defilement" in Malawi law and society' (2017) *African Human Rights Law Journal* 544.

³⁷ BA Rienzo 'The impact of aging on human sexuality' (1985) 55 *Journal of School Health* 66.

body image, beliefs, and values regarding sexual expression, and lack of knowledge and comfort with their sexuality.³⁸

The invisibility of older women's sexual rights has also been noticed in the global and regional response to violence against women (VAW) and the HIV/AIDS epidemic. According to Cooper and Crockett, entrenched cultural bias against the recognition of female sexuality, coupled with a lack of recognition of older women as sexual agents has led to an exclusion of older women from HIV programming and resourcing, evidenced by paucity of data and lack of investment in age and gender responsive programs.³⁹ Heidari agrees with this analysis, identifying the sexual and reproductive rights of older women with particular reference to VAW and HIV/AIDS as a policy blind spot, often focused on younger adults of reproductive age, primarily seen through the lens of maternal health.⁴⁰

This is worrisome and definitely calls for immediate attention and intervention, given the rapidly aging population and considering that older women aged 60 and above make up more than one-fifth of the global female population.⁴¹ Older women, especially those who are single or widowed, find it extremely challenging to access sexual health services and seek advice on safe sexual practices, putting them at increased risk of contracting HIV/AIDS and other sexually transmitted diseases.⁴² In addition, more often than not, older women are not asked about their sexual activity or encouraged to undergo HIV testing based on biases about their sexuality.⁴³ Hence, their HIV-positive status may go undetected, putting them and others at further health risk and disadvantage.

The response to VAW is very similar with sexual abuse of older women largely discounted and disregarded, based on even worse stereotypes about their sexuality and agency. According to Cooper and Crockett, assumptions that as women age they become less vulnerable and less at risk of sexual and physical assault has driven Gender Based Violence (GBV) research, policies and programs to target younger women with little significance given to the abuse experienced by older women.⁴⁴ In this regard, Heidari notes that there is still a huge gap in research and data on the extent and experience of violence among older women as well as its significance for their sexual and reproductive health.⁴⁵ Older women are said to be at increased risk of being victims of sexual violence because of their socioeconomic dependency and, in some settings, because of gender-based inequities, especially those who are dependent on their families such as the widows, becoming particularly vulnerable to these forms of abuse.

A group conspicuously missing from all the discourses and research on sexual rights, and being even further marginalised within the society are older women of diverse sexual orientation

³⁸ Rheume & Mitty (n 24).

³⁹ Cooper & Crockett (n 29) 58.

⁴⁰ S Heidari 'Sexuality and older people: a neglected issue' (2016) *Reproductive Health Matters* 2.

⁴¹ Cooper & Crockett (n 29) 57.

⁴² As above.

⁴³ Cooper & Crockett (n 29) 56.

⁴⁴ As above.

⁴⁵ Heidari (n 40) 2.

and gender identity - older lesbian, bisexual, transgender and intersex individuals. According to Heidari, this exclusion silences the diverse and distinct sexual rights and needs of older persons whilst mirroring the continuous heteronormative and heterosexist biases in societies.⁴⁶

In this regard, Cooper and Crockett advocate for a sexual rights approach to public health interventions that enshrines the 'right to pleasure, sexual orientation, sexuality, bodily integrity, and gender identity within a human rights framework' and independent from reproduction.⁴⁷ This approach differentiates sexual activity from reproductive capacity and will better serve women past reproductive age who require that their sexual rights be acknowledged by health care providers and policy makers in order to enjoy the highest attainable standard of health and wellbeing. In addition, Heidari suggests an integrated care and multi-disciplinary approach to health services, which incorporates a life course perspective into the global health and development agenda.⁴⁸ This approach, she argues, must be tailored to meet the specific sexual and reproductive health needs of older women and must consider how the needs of older people are affected by gender identity, sexual orientation, disability, race, and other intersectional factors.⁴⁹

Noteworthy, however, is the fact that a lot of the early studies of sexuality and aging were carried out from a medical and health perspective of sexual dysfunction and vulnerability rather than in any specific relation to the sexual rights of older women. Petchesky⁵⁰, Oriell⁵¹ and others made the much-needed link between women's health and sexual rights, noting that the protection for women's health and autonomy are inadequate without recognition of sexual rights, including the right to sexual pleasure. Nonetheless, there is still a huge dearth of literature on the subject matter, most especially in Africa. Studies on sexuality and ageing have mostly been carried out in more developed countries,⁵² pointing perhaps to a lack of interest in the area amongst scholars in developing countries alongside even more cultural nuances about women's rights and sexual rights, in general. Hence, the need to take a critical look at how the African human rights system conceives the sexual rights of older women and to what extent it gives protection to their rights.

⁴⁶ (n 40) 1.

⁴⁷ Cooper & Crockett (n 29).

⁴⁸ Heidari (n 40) 2.

⁴⁹ As above.

⁵⁰ R Petchesky 'Sexual Rights: Inventing a concept, mapping an international practice' in Parker, Barbosa, Aggleton (eds) *Framing the Sexual Subject: The Politics of Gender, Sexuality and Power* (1988).

⁵¹ J Oriell 'Sexual pleasure as a human right: Harmful or helpful to women in the context of HIV/AIDS?' (2005) *Women's Studies International Forum*.

⁵² Lusti - Narasimhan & Beard (n 30).

1.7. Chapter outline

This study is divided into five chapters. Chapter one and two of this study are introductory chapters which expound on the sexual rights of older women and sets the conceptual and theoretical framework required for analyzing the sexual rights of older women in Africa. Chapter two looks at the evolution of sexual rights and the invisibility of older women in the sexuality discourse. It then utilizes the theory of intersectionality to explain how older women's sexual rights have been promoted or denied. Thereafter, chapter three explores in depth the available legal framework for the protection of the sexual rights of older women internationally and regionally, specifically focusing on the African human rights system. This includes an analysis of the provisions of the African Charter on Human and Peoples' Rights,⁵³ Maputo Protocol,⁵⁴ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Protocol on the Rights of Older Person),⁵⁵ regional policy frameworks such as the Southern African Development Cooperation (SADC) Protocol on Gender and Development and other policy frameworks of the African Union (AU).⁵⁶ Chapter four focuses on key sexual rights of older women, shedding light on the marginalization faced by older women in Africa and interrogating the sufficiency of the current legal framework in advancing the sexual rights of older women. Finally, chapter five will conclude by making recommendations.

⁵³ African Charter on Human and Peoples' Rights ('Banjul Charter'), adopted 27 June 1981, CAB/LEG/67/3.

⁵⁴ Maputo Protocol (n 20).

⁵⁵ Older Person's Protocol (n 10).

⁵⁶ Southern African Development Cooperation (SADC) Protocol on Gender and Development, adopted 17 September 2008.

2. CONCEPTUAL FRAMEWORK FOR CRITICALLY ANALYZING THE SEXUAL RIGHTS OF OLDER WOMEN

2.1. Introduction

This chapter examines the evolution of sexual rights and the conceptual framework necessary to analyze the sexual rights of older women. In this regard, an intersectionality approach is used to explain how older women face multiple forms of discrimination with regards to their sexual health and rights. This chapter takes this analysis further by expanding on a conceptual notion of ‘hierarchies of bodies’ – the politics of sexuality to shed light on the marginalization of older women in the sexuality discourse and the impact this exclusion has had on the promotion and protection of their rights.

2.2. Evolution of sexual rights and the invisibility of older women

From a historical perspective, the 1993 World Conference on Human Rights in Vienna⁵⁷ and the International Conference on Population and Development (ICPD) in 1994⁵⁸ marked watershed moments in the recognition of ‘sexual rights’ in the international development arena and within the human rights discourse. The World conference kick started the conversation about sexual rights, though not explicitly named, by addressing a fundamental and widespread challenge that women face to their sexual health and wellbeing that had hitherto been relegated to the private sphere. The Vienna Declaration and Programme of Action, an offshoot of the conference, identified gender-based violence, sexual harassment and sexual exploitation as major issues inhibiting the enjoyment of women’s right, and called on governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts towards its eradication.⁵⁹

The ICPD built on this conversation and became a significant reference point for subsequent discourse and debates on sexuality, sexual health, and sexual rights. It linked the realisation of sexual health with the need to have a pleasurable, satisfying, and safe sexual life and included sexual health as one of the rights to be promoted and protected within the population and development agenda of states.⁶⁰ According to the ICPD Programme of Action, the purpose of sexual health is ‘the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases’.⁶¹ This narrative was an eye-opener, moving notions of sexual rights beyond the boundaries of the ‘violence’ and ‘disease’ models, which focused primarily on responding to issues of public health such as the HIV/AIDS pandemic, the problems of sexual violence and maternal

⁵⁷ n 4, para 5.

⁵⁸ International Conference on Population and Development Programme of Action of the United Nations, UN Doc. A/Conf/171/13, 5-13 September 1994.

⁵⁹ n 4, para 18.

⁶⁰ As above.

⁶¹ ICPD (n 58) para 7.2.

mortality.⁶² However, while the ICPD became a veritable tool towards the recognition of sexual rights, it did so under the umbrella of reproductive rights with no specific reference made to freedom of sexual expression, freedom of sexual orientation or other non-heterosexual and non-reproductive sexual activities as part of a broader, far reaching and emancipatory notion of sexual rights.⁶³

This trend with regards to the silencing of certain sexual rights in favour of more widely acceptable and less contentious reproductive rights continued to be evident in the development of international human rights agenda past the mid-1990's into the 20th century. The 1995 Beijing Platform for Action of the Fourth World Conference on Women merely echoed the provisions of the ICPD, staying clear from the fierce debates that had begun with regards to 'sexual rights'.⁶⁴ Almost a decade later, the millennium development goals (MDGs) also stayed silent on issues of sexual and reproductive rights even though SRHR can be directly or indirectly linked to all eight MDGs.⁶⁵ This error was rectified in 2007 amidst much pressure from SRHR advocates to include universal access to reproductive health as a necessary component of achieving Goal 5 - improving maternal health.⁶⁶ Alas, here again sexual rights not directly linked to reproductive rights were largely ignored signalling to countries, donors and the rest of the world that their attention need not be drawn to such issues. In this regard, one can begin to wonder if the increasingly developing capitalist societies of the time had no room to pay attention to the woes of this older age group. Thus, even as sexual rights began to gain traction in recent years, much of the focus continued to remain on violence, violations and protection from disease of persons within the reproductive age bracket, entirely ignoring the sexual needs of older women. Also, while tremendous and commendable gains have been made on issues around sexual orientation and sexual identity, albeit very slowly in Africa, this issue continues to remain an embattled field with older persons also missing from the debate.

Regional trends in this regard are not much different as many African states have been opposed to an all-encompassing sexual right that they fear includes the right to sexual pleasure and freedom to choose one's sexual orientation and gender identity. This is not altogether surprising, given that the sexual rights movements have continually encountered 'a powerful reactionary response in traditionalist movements rallying for conservative family values and religious beliefs'.⁶⁷ Evidently, sexual rights beyond their reproductive value do not fit into a neat conservative and religious mould.

Consequently, the silencing of an all-encompassing, emancipatory approach to sexual rights and the conflation of sexual and reproductive rights has led to the invisibility of an 'array of

⁶² RG Parker 'Sexual rights: Concepts and action' *Health and Human Rights* 34.

⁶³ Parker (n 62) 33.

⁶⁴ Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, UN A/CONF.177/20, 27 October 1995.

⁶⁵ AJ Galati 'Onward to 2030: Sexual and reproductive health and rights in the context of the sustainable development goals' (2015) 18 (4) *Guttmacher Policy Review* 78.

⁶⁶ Galati (n 65) 78.

⁶⁷ J Garcia & R Parker 'From global discourse to local action: the makings of a sexual rights movement?' (2007) *Horizontes Antropológicos* 3.

people of varying ages and non-conforming sexual identities'.⁶⁸ This deduction is apparent in review of the global and regional development trends mentioned above, wherein sexual rights seem to function more as an 'add on' to reproductive rights than to accord any individual a plethora of rights linked to one's sexuality and divorced from reproductive rights. International norms have historically functioned to regulate sexuality by gender, race, age, and other axes of power.⁶⁹ Hence, even more conspicuously missing in the evolving journey towards the recognition of sexual rights are the opportunities for older women to be able to exercise their sexual rights based on an affirmative, positive approach to sexual rights. This omission of older women's sexual rights is surprising, given that the ICPD was not silent about the vulnerability and rights of older women as reflected in paragraphs 6.20 and 6.17 of the ICPD:⁷⁰

6.20. Governments...should strengthen formal and informal support systems and safety nets for elderly people and eliminate all forms of violence and discrimination against elderly people in all countries, paying special attention to the needs of elderly women.

6.17. (b) To develop systems of health care as well as systems of economic and social security in old age, where appropriate, paying special attention to the needs of women.

However, the sexual rights of older women must have fallen off the curb thereafter - outside the framework of human rights protection in the context of sexual behaviour, as evidenced by the lack of attention paid to this category of right bearers (women past their reproductive age) in the sexuality and human rights discourse, international development agenda and international human rights treaties. A critical question therein is 'what led to the erasure of older women from the sexuality discourse?' Later in this chapter, this erasure is explained looking at the concept of 'hierarchy of bodies' wherein certain factors determine whose rights remain on the international agenda and whose rights gets left behind.

⁶⁸ Miller (n 12) 70.

⁶⁹ K Crenshaw 'Demarginalising the interaction of race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory and anti-racist politics' *The University of Chicago Legal Forum* 139.

⁷⁰ ICPD (n 58) para 6.20 & 6.17.

2.3. Conceptualizing sexual rights and defining the framework for the realisation of the sexual rights of older women

2.3.1. How are sexual rights framed?

In analysing the historical development of sexual rights, one can begin to draw a conceptual picture of the multiple dimensions and diverse framing of sexual rights as well as the disputes and politics underlining what rights are covered or not covered, prioritised or not prioritised under its umbrella. In some instances, sexual rights are conceptualised on the basis of protection from violence and often as protection from discrimination on the basis of sexual orientation and gender identity, whilst for many others it is an all-encompassing medley of rights, most of which are not new and have been applied to the area of sexuality. This is the reason Miller and others submit that a ‘political consensus on the term “sexual rights”, although fiercely debated over the past decades, has never been reached as countries’ claims to have radically different understandings (and fears) of what “sexual rights” includes and therefore might bind them to’.⁷¹

Prior to the ICPD, and as an offshoot of some of the worst genocides in history, ‘sexual rights’ as a concept, without being named, evoked the compelling need for states to recognise and act against sexual violence, sexual slavery and forced prostitution.⁷² In this regard, sexuality was placed on the international agenda driven by the politics of violation as opposed to any specific rights claim. However, with the rise of the feminist movement and advocacy by the then burgeoning LGBT movement, sexuality was again confronted in the context of health and the HIV pandemic with agitations towards the recognition of gender-based and sexual orientation discriminations.⁷³ In this regard, ‘sexual rights’ rose to signify, for some, rights claims exclusively by LGBT groups – freedom from discrimination on the basis of perceived or real sexual orientation and gender identity, and to others, the demand for affirmative experiences of sexuality as distinct from protection from violence or exploitation.⁷⁴ This is what precipitated the inclusion of a new dimension to sexual health in the ICPD and the continued agitation for the recognition of a positive and empowering approach to sexual rights thereafter, albeit with varying degrees of success.

According to Parker, ‘the rocky history of attempts to place the question of sexual rights on the agenda of international human rights debate, all too clearly demonstrates that the forces of religious fundamentalism, gender oppression, homophobia, sexual discrimination, and economic exploitation are bound together in a complex partnership that currently functions with ruthless effectiveness both locally and globally’.⁷⁵ The political climate, while receptive to some extent to reproductive rights, was strongly opposed to a *carte blanche* rights claim

⁷¹ AM Miller, E Kismödi, J Cottingham & S Gruskin ‘Sexual rights as human rights: a guide to authoritative sources and principles for applying human rights to sexuality and sexual health’ (2015) *Reproductive Health Matters* 16.

⁷² Miller (n 12) 75.

⁷³ As above.

⁷⁴ Miller (n 12) 75.

⁷⁵ Parker (n 62) 33.

on sexuality. 'Sexual rights' was viewed as a sneaky way of legitimising all sorts of non-heteronormative sexual desires and pleasures that were opposed to their strongly held conservative beliefs and norms.⁷⁶ This biased notion explains why 'sexual rights' as a concept was missing in the text of international agreements and law but was rather subsumed under reproductive rights, setting the stage for the exclusion of older women in the sexuality discourse. In the context of Africa, reaching a consensus on what 'sexual rights' are or entail, as mentioned in the previous section, is even more difficult based on rigid cultural and religious beliefs.⁷⁷ Most African states have been opposed to 'any language that might imply the acceptance of abortion or sexual pleasure, education and services for adolescents, the existence of gays and lesbians and their rights, or any form of family or union other than the traditional heterosexual form'.⁷⁸

Nonetheless, in surmounting the obvious challenges to the explicit recognition of sexual rights, rights advocates began to use the phrase 'sexual rights' broadly to draw attention to and legitimise the ideals that 'sexuality is worthy of rights protection'.⁷⁹ In practice, this conceptualisation of sexual rights reflected the individualised way in which rights related to sexuality have been advanced with certain rights or rights holders gaining more traction than others. For example, certain issues such as sexual violence, bodily autonomy and freedom of reproductive choices, adolescent sexuality, sexual orientation and gender identity have taken centre stage in the highly contested and deeply politicised debates on sexuality, while non-reproductive sexual pleasure and certain categories of people such as older women have been largely ignored. While this shift in agenda setting is a very positive development for sexual rights, in general, as it draws attention to the very real oppression, discrimination and violence suffered by women and sexual minorities worldwide, there remain several gaps to be filled and addressed in order to draw into the circumference of rights protection (without leaving any group out), 'all' whose sexuality have hitherto been marginalised. Such is the conundrum in which the sexual rights of older women find themselves - being an integral part of the life cycle approach to sexuality and sexual rights but also being one of the least recognised aspects of sexuality based on notions that 'sexuality does not apply to older people: as though, based on old age, issues of sexual health, sexual wellbeing, sexual orientation, and gender identity simply do not matter'.⁸⁰

Furthermore, 'sexual rights' have also been used as a compound terminology in reference to an array of existing rights including certain rights covered under reproductive rights. According to the World Health Organisations (WHO) working definition of sexual rights:⁸¹

⁷⁶ Nyanzi (n 6) 487.

⁷⁷ As above.

⁷⁸ LD Mattar 'Legal recognition of sexual rights – A comparative analysis with reproductive rights (2008) *International Journal on Human Rights* 70.

⁷⁹ Miller (n 12) 76.

⁸⁰ S Hinchliff & C Barrett 'Introduction to the sexual rights of older people' in Barrett & Hinchliff (n 11) 1.

⁸¹ WHO (n 2) 1.

Sexual rights embrace certain human rights that are already recognized in international and regional human rights documents and other consensus documents and in national laws. Rights critical to the realization of sexual health include:

the rights to equality and non-discrimination
the right to be free from torture or to cruel, inhumane or degrading treatment or punishment
the right to privacy
the rights to the highest attainable standard of health (including sexual health) and social security
the right to marry and to found a family and enter into marriage with the free and full consent of the intending spouses, and to equality in and at the dissolution of marriage
the right to decide the number and spacing of one's children
the rights to information, as well as education
the rights to freedom of opinion and expression, and
the right to an effective remedy for violations of fundamental rights.
The responsible exercise of human rights requires that all persons respect the rights of others.

The application of existing human rights to sexuality and sexual health constitute sexual rights. Sexual rights protect all people's rights to fulfil and express their sexuality and enjoy sexual health, with due regard for the rights of others and within a framework of protection against discrimination.

This definition by WHO has become one of the most popular definitions of sexual rights, grouping together under its protection an array of rights that have an impact on the enjoyment of one's sexuality and sexual health. Such rights include the right to health, protection from violence, right to bodily integrity and autonomy, access to sexuality education, rights to privacy and rights to non-discrimination, amongst other rights. According to Miller, the plurality of the phrase 'sexual rights' implies that more than one right is needed to address sexuality.⁸² It also implies that more than one category of rights (civil and political, economic, social, and cultural) will be required in order to safeguard the enjoyment or expression of sexuality.⁸³ For example, respect for the sexual rights of older women will require that older women not be discriminated against on the basis of their sex and age. It will also require, in the same vein, that their rights to express their sexuality and right to privacy be respected whilst also ensuring that health care facilities and legal redress are made available and accessible for older women should they require them.

This conceptualisation of sexual rights as a medley of rights was also buttressed by the declaration of sexual rights of the World Association for Sexual Health (WAS),⁸⁴ which emphasized that the promotion of human rights, such as the right to privacy, right to self-

⁸² Miller (n 12) 76.

⁸³ As above.

⁸⁴ World Association for Sexual Health (WAS) *Sexual health for the millennium: A declaration and technical document* (2008) 2&3.

determination, non-discrimination, access to comprehensive information about sexuality and quality sexual health care is essential to achieving sexual health and sexual well-being. The rights covered under sexual rights were further expanded under this declaration to include (in addition to all the rights covered by WHO):⁸⁵

The right to life, liberty, and security of the person.

The right to autonomy and bodily integrity.

The right to be free from all forms of violence and coercion.

The right to the highest attainable standard of health, including sexual health; with the possibility of having pleasurable, satisfying, and safe sexual experiences.

The right to enjoy the benefits of scientific progress and its application.

The right to education and the right to comprehensive sexuality education.

The right to freedom of association and peaceful assembly.

The right to participation in public and political life.

The positive aspect of this broad conceptualisation of sexual rights and the language of ‘sexual rights as human rights’ is in its ability to encompass many aspects of sexuality that affect populations with differing ages and identities. However, while these definitions have gained traction all around the world, there is very little evidence of its application to older persons.⁸⁶ The reality is that human rights norms and rights claims are often politicised and tend to be applied in ways that reflect the claims of specifically situated groups or individuals.⁸⁷ According to Miller, ‘activists have not always had the luxury of connecting across sectors or the political will ...to engage with the concept of sexuality as a characteristic of all human beings- female and male, old and young, straight and gay, across all countries, cultures, and religions’.⁸⁸

Nevertheless, the aforementioned categorisation of ‘sexual rights’, as espoused upon by WHO and explained in more details by WAS in the Declaration of Sexual Rights provides a veritable yardstick for exploring the sexual rights of marginalised group. Hence, the subsequent section will draw on this definition of sexual rights as a medley of rights already enshrined in international treaties and national laws to define the parameters within which the concept of older women as sexual right holders is analysed.

⁸⁵ n 84, 1.

⁸⁶ C Barrett & S Hinchliff ‘Bundle of potential: The sexual rights of older people’ in Barrett & Hinchliff (n 11) 15.

⁸⁷ Miller (n 12) 72.

⁸⁸ As above.

2.3.2. Exploring the ‘intersectionality’ approach in understanding the sexual rights of older women

In sorting through the maze that is ‘sexual rights’, this paper has relied upon the expanded definition of sexual rights by WHO and WAS. However, in order to aid the exploring of sexual rights as it specifically relates to the subject matter of ‘older women’, this section will draw on ‘the intersectionality’ approach linked intricately with theories of Black and African feminism, to explore ways in which the interaction between sex and age, amongst other socio-cultural and economic factors, can multiply the vulnerability of older women and become a stumbling block to their sexual health and wellbeing.

The intersectionality ‘theory’ or ‘approach’ lends itself to this analysis of the sexual rights of older women given its fluid nature and ability to encompass within its theoretical and analytical framework, the diverse and often multiple points of vulnerability and discrimination that older women face in accessing a predominantly age neutral and often gender-blind categorization of sexual rights. The failure of recognizing older women as sexual rights holders means that they ultimately fall under the unprotected margins of the law. Alternatively, when not completely omitted, their sexual needs are subsumed under the broad category of women, in general, with no consideration to their unique vulnerabilities. Hence, since non-reproductive sexual desires and rights take the back seat in the discourse on sexuality and sexual health, older women continue to experience stigmatisation and neglect with regards to their sexuality and sexual health.

Intersectionality, as defined by Davis and adopted for this paper, ‘refers to the interaction between gender, race, and other categories of difference in individual lives, social practices, institutional arrangements, and cultural ideologies and the outcomes of these interactions in terms of power’.⁸⁹ It was first created by Crenshaw as a critique to the dominant feminist and anti-racist discourse, which she argued did not take into consideration the ‘multidimensionality of black women’s experiences’, analysing the discrimination they face from a single-sided axis of race or sex that belies their lived realities as ‘black women’.⁹⁰ Her writing mainly focused on the intersection between race and gender as a basis for understanding the discrimination faced by women of colour and seeking redress for such intersection within the law in a way that fought against feminist hierarchy, hegemony, and exclusivity.

Nonetheless, these thoughts did not develop spontaneously, as within the period, feminism (western feminism) had come under fire for its universalist assumptions and theorizing about ‘all’ women and their experiences of gender inequality, male subjugation and domination through the biased and paternalistic lens of one group of women (white women). This excluded to the ire of black feminist scholars such as Mohanty, the worldview, narratives and

⁸⁹ Kathy Davis ‘Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful’ 9(1) *Feminist Theory* 68.

⁹⁰ Crenshaw (n 69) 139.

experiences of black and non-western women.⁹¹ Mohanty argues that western feminism is too quick to portray women in the South as 'victims' and to perceive all women as oppressed and as the subjects of power.⁹² Similarly, for Fennel and Arnot, the impact of a universalised feminist theory is the invisibility and erosion of the 'diversity of experiences of women within formerly colonised and historically marginalised societies alongside their struggles, negotiations and resistance to different forms of patriarchal oppressions and domination'.⁹³

Not surprisingly, therefore, is that intersectionality became a crucial aspect of contemporary feminist theories with its attempts to address and propose a Band-Aid for some of the most divergent and significant gaps in the feminist discourse - the acknowledgement of differences among women, without dismantling feminism itself.⁹⁴ Beyond the feminist discourse, it also widely embraced, as an important theoretical tool for tackling the issue of difference and diversity across different disciplines, theoretical perspectives and political persuasions.⁹⁵ In this regard, McCall posits that it is the 'most important contribution that women's studies, in conjunction with related fields has made so far'.⁹⁶ Nevertheless, it is important to note that conceptualising what intersectionality entails and where its boundaries or framework lie has been challenging. Davies underlines this in her analysis of intersectionality as a buzz word, noting the confusion and conceptual difficulty in thinking of intersectionality either as a crossroad where different identities converge or as different sides or angles of divergence, or as a dynamic process which is constantly evolving.⁹⁷ It also becomes unclear whether or not intersectionality should be limited to understanding individual experiences, to theorizing identity, or whether it should be taken as a property of social structures and cultural discourses.⁹⁸

However, it is its fluid nature that makes it possible to lend its application to theorising about the sexual rights of older women. According to Crenshaw,⁹⁹

Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination or both.

⁹¹ C McEwan 'Postcolonialism, feminism and development: intersections and dilemmas' (2001) 1(2) *Progress in Development Studies* 97.

⁹² CT Mohanty 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (2007) *Boundary 2* 338.

⁹³ B Chilisa & G Ntseaneb 'Resisting dominant discourses: implications of indigenous, African feminist theory and methods for gender and education research' (2010) 22 (6) *Gender and Education* 618. S Fennel & M Arnot 'Decentralizing hegemonic gender theory: the implications for educational research' (2009) RECOUP Working Paper no. 21, 7.

⁹⁴ Davis (n 89) 68.

⁹⁵ As above.

⁹⁶ L McCall 'The complexity of intersectionality' (2005) 30(3) *Signs* 1771.

⁹⁷ Davis (n 89) 68.

⁹⁸ As above.

⁹⁹ Crenshaw (n 69) 149.

Hence, taking a cue from Crenshaw but pushing the definition of intersectionality beyond the limitations of ‘race’ and ‘gender’ as defined above by Davis, one can submit that older women are increasingly vulnerable to sexual ill health and sexual rights abuses in ways that are both similar to and distinct from the experiences of older black men and other black women below the sixty (60) age bracket. This is not solely because of their sex or their age, which are limitations in themselves but because of the interaction between sex and age compounded by other factors such as disability, socio-economic status amongst others. This study seeks to highlight those points of intersection that can make older women experience double or even multiple forms of discrimination - the combined effects of laws and practices that discriminate against older women and deny them their sexual rights on the basis of sex, age, class, and other factors. However, as critics of the intersectionality approach have highlighted, one must stay clear from the assumptions that these are the only forms of intersections and discriminations faced by older women.¹⁰⁰ There is an acknowledgement in this study of the limitations posed by utilising the intersectionality approach, which includes the risk of creating another category of a marginalised group to the exclusion of others, which may hitherto not have been named, hence, replicating the aforementioned criticism about sexual rights of different identity groups being treated in silos rather than a holistic approach to advancing sexual rights in practice, and not merely on paper.

2.4. The marginalisation of older women in the sexuality discourse

In understanding the marginalization of older women in Africa with regards to their sexuality, this paper introduces the conceptual notion of ‘hierarchy of bodies’. This, simply put, is the politics behind the sexuality discourse that determines who and what category of persons are considered important and receive crucial policy interventions with regards to their sexual health and wellbeing. This hierarchy is very capitalist in nature and often regulates sexuality along very distinct paradigms, reproductive and non-reproductive, good or bad sex. Herein, there are better protection measures for the expression of pleasure and desire for certain groups of people than others, depending on whether or not they are engaged in good or bad sex or are within the productive age bracket or not.

According to Lottes, there is a systemic process of evaluating different types of sexual relationships and sexual practices.¹⁰¹ These rankings impact on the design and implementation of sexual health policies and justify those in need of special attention. Hence, from a societal perspective, you are higher up the rights ladder if you engage in reproductive sex than if you are engaging in non-reproductive sex. This is evidenced by the clampdown on same-sex relationships and non-heteronormative sexual activities such as sex work in many African societies, and, also, by the stigmatization experienced by older women who are commonly viewed to be asexual and are only permitted to even discuss sex within the confines of long-standing marital relationships. In Nyanzi’s view, beyond the legal instruments and social policies that outlaw certain sexual practices and sexual behaviours, these subtle notions

¹⁰⁰ Davis (n 89) 68.

¹⁰¹ IL Lottes ‘Sexual rights: Meanings, controversies, and sexual health promotion’ (2013) *Journal of Sex Research* 373.

of good sex and bad sex also police how people allow themselves or others to have meaningful sexual encounters.¹⁰²

Rubin very adequately buttresses this point about ‘hierarchy of bodies’ in her analysis of good versus bad sex.¹⁰³ She posits that societies appraise sex acts according to a hierarchical system of sexual value wherein what is considered good sex is at the top of the value chain deserving of ‘respectability, legality, social and physical mobility, institutional support, and material benefits’ and bad sex otherwise treated with disregard and disdain.¹⁰⁴ According to Rubin analysis,¹⁰⁵

sexuality that is ‘good’, ‘normal’, and ‘natural’ should ideally be heterosexual, marital, monogamous, reproductive, and non-commercial. It should be coupled, relational, within the same generation, and occur at home. It should not involve pornography, fetish objects, sex toys of any sort, or roles other than male and female. Any sex that violates these rules is ‘bad’, ‘abnormal’, or ‘unnatural’. Bad sex may be homosexual, unmarried, promiscuous, non-procreative, or commercial.

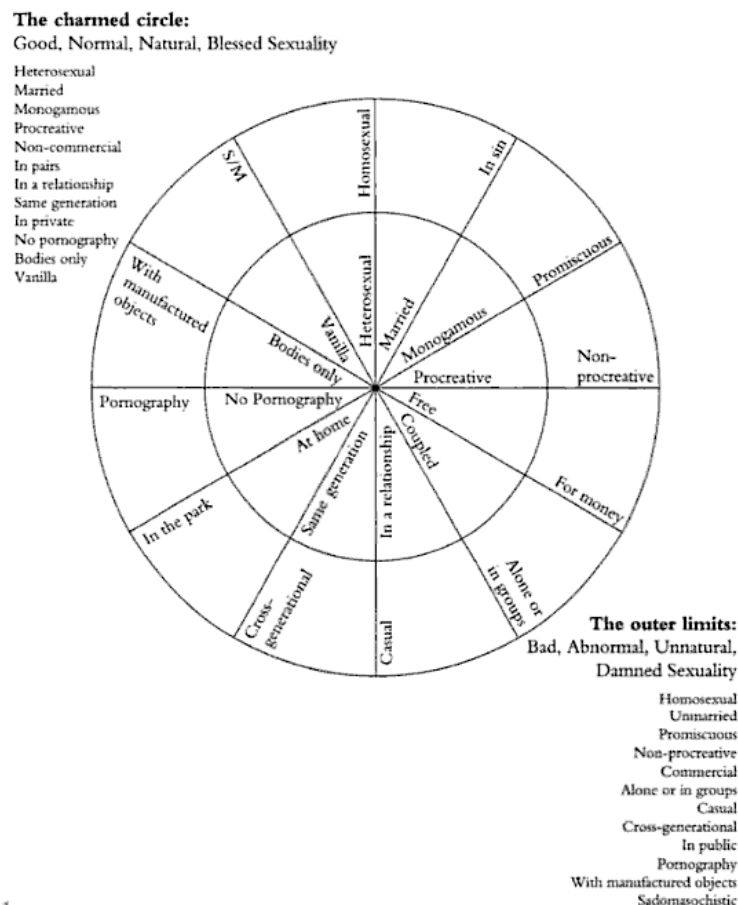


FIGURE 1. The sex hierarchy: the charmed circle vs. the outer limits

¹⁰² Nyanzi (n 6) 478.

¹⁰³ GS Rubin ‘Thinking sex: Notes for a radical theory of the politics of sexuality’ in CS Vance (eds) *Pleasure and danger: Exploring female sexuality* (1984) 279.

¹⁰⁴ As above.

¹⁰⁵ Rubin (n 103) 280.

Within the above set parameters, one can readily see how older women's sexual rights can be eroded with a definite ban on several of the avenues wherein older women can assert their rights to sexual pleasure given that they are more likely to engage in non-procreative sex than reproductive sex; be widowed rather than coupled and have unmarried rather than married sex. Not surprisingly, therefore, older women are rarely the focus of interventions when it comes to the provision of sexual and reproductive health services, either based on notions of good versus bad sex, which legitimizes and promotes the sexual wellbeing of women of reproductive ages over those past their reproductive age or a more extreme cost benefit analysis wherein older persons are neglected based on their perceived non-reproductive capacities and abilities. Other intersecting factors that have a bearing on this hierarchy may include race, age, marital status, disability, availability of resources, access to information (rural and urban divide), amongst others.

2.5. Chapter Conclusion

While it's been established that sexual rights are human rights, it still remains the 'newest kid on the block', fighting for recognition amidst deeply entrenched traditional and often patriarchal notions of sexuality. These biases, which are often reflected in discrimination of women on the basis of age and gender, lead to the marginalisation of older women in the sexuality discourse and ultimately translates into sexual ill health and the denial of the sexual right of older women.

Consequently, in dismantling notions of good versus bad sex, special attention must be given to intersecting vulnerabilities and discrimination, including those experienced by older women with disabilities, older women in prison, older sex workers, widows, older women belonging to a sexual minority group, those living with HIV/AIDs as well as older women in rural areas and areas of conflict, all of whom often experience multi-sectored discrimination and have sexual rights that continue to be inhibited.¹⁰⁶

In this regard, the subsequent chapter will review more extensively, the international and regional human rights system, highlighting tangibly, the way in which sexual rights of older women have been addressed or not addressed within the available legal framework based on the conceptual notions of sexual rights discussed in this chapter.

¹⁰⁶ Committee on the Elimination of Discrimination Against Women, General recommendation 27 on older women and protection of their human rights CEDAW/C/GC/27, 16 December 2010 para 32.

3. LEGAL FRAMEWORK AVAILABLE FOR PROTECTING THE SEXUAL RIGHTS OF OLDER WOMEN

3.1. Introduction

This chapter explores the regional and international human rights legal frameworks available for the protection of the sexual rights of older women. This includes an analysis of the applicable instruments within the African human rights system -the African Charter on Human and Peoples' Rights (African Charter),¹⁰⁷ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),¹⁰⁸ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Older Person's Protocol);¹⁰⁹ the UN International human rights system and the Inter-American human rights system amongst other sub-regional policy frameworks. The questions to be addressed in this review of the available legal frameworks include: are the sexual rights of older women explicitly mentioned under the umbrella of these instruments or treaties; are the other constitutive components of sexual rights as defined by World Health Organisation (WHO) and the World Association for Sexual Health (WAS) available under these instruments; and do these instruments as well as their interpretative documents such as general comments, enhance the inclusion of older women and their sexual rights?

3.2. The African Charter and sexual rights of older women

The African charter was a welcome development in Africa as it laid down the grounds upon which the individual and collective rights of all persons under its jurisdiction were to be protected, taking into consideration Africa's specific regional context. Under the African Charter, there are no specific references made to the 'sexual rights of older women', neither is there any mention of 'sexual rights' as a category of rights or 'older women' as a vulnerable group or independent rights bearer. However, the Charter is not completely silent on the key issues that are important for the realisation of the sexual rights of older women. One such issue is the right to non-discrimination as articulated in article (18)3.¹¹⁰

Herein, the rights of 'every woman' to be free of 'all' forms of discrimination are highlighted without particular attention given to intersecting or compounded vulnerabilities faced by special groups of women such as older women, women living with disabilities or gender non-conforming women.

In addition, whilst the Charter did not exclude older persons in article 18(4), it only acknowledged their 'physical' and 'moral' needs.¹¹¹

¹⁰⁷ African Charter (n 53).

¹⁰⁸ Maputo Protocol (n 20).

¹⁰⁹ Older Person's Protocol (n 10).

¹¹⁰ African Charter (n 53) art 18(3).

¹¹¹ African Charter (n 53) art 18(4).

This silence on sexual needs, inadvertently adds to the narrative that older persons are not sexual beings or perhaps just reemphasizes the point that sexuality and sexual health had hitherto, not been prioritised in the human rights discourse.

The right to health in article 16(1) was also referred to strictly from a physical and mental health perspective.

Every individual shall have the right to enjoy the best attainable state of physical and mental health.¹¹²

Consequently, in as much as the African charter addressed some provisions fundamental to the attainment and enjoyment of sexual rights and also acknowledged the physical and moral needs of older person, sexual rights as a function of the right to a pleasurable, satisfying and safe sexual life was conspicuously missing. Intersecting forms of discrimination and vulnerabilities that are experienced specifically by older women were also not addressed as a form of violation.

Taking some of these challenges into consideration, the African Commission, in the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African charter, subsequently addressed some of the criticisms of the African Charter.¹¹³ Herein, states are tasked to promote and protect the sexual and reproductive rights of women as a purposeful interpretation of article 16 of the African Charter on the right to health, based on the life cycle approach to health and without discrimination on the basis of race, sex, gender, sexual orientation, age amongst others.¹¹⁴ The principles and guidelines also compel states to recognise and 'take steps to combat intersectional discrimination based on a combination of (but not limited to) the following grounds: sex/gender...sexuality, age, disability, marital...and/or other status'.¹¹⁵ Also addressed is the need for the protection of the 'sexual rights' of women, particularly against harmful traditional and cultural practices that predisposes them to HIV/AIDS, and other related infectious diseases.¹¹⁶ Under these guidelines, 'the elderly' are explicitly identified as a vulnerable group with provisions made for educating older women on the health-related aspects of menopause.¹¹⁷ Consequently, if this non-legally binding set of principles and guidelines is read and utilised within national courts alongside the African Charter as was intended, the sexual rights of older women will be more clearly pronounced and justiciable.

¹¹² African Charter (n 53) art 16(1).

¹¹³ African Commission on Human and Peoples' Rights 'Principles and guidelines on the implementation of economic, social and cultural rights in the African charter on human and peoples' rights', adopted October 24 2011.

¹¹⁴ n 113, 31.

¹¹⁵ n 113, 16.

¹¹⁶ n 113, 30.

¹¹⁷ n 113, 32.

3.3. The Maputo Protocol and the sexual rights of older women

The Maputo Protocol is a ground-breaking Protocol in many respects. One of it being that it addresses head-on the issue of sexual and reproductive health for women in a manner previously missing under the African Charter and in most other international human rights instruments. While the Maputo Protocol does not expressly mention ‘the sexual rights of older women’ in a way that combats the negative stereotypes about older women and sexuality, the Protocol does give room for advancing the sexual rights of ‘all’ women and also expressly identifies older women as a vulnerable group in need of protection from sexual violence, HIV/Aids amongst other rights guaranteed under the Protocol.

Highlighted in the Maputo Protocol and particularly relevant to the sexual rights of older women are the right to be free from discrimination,¹¹⁸ the right to dignity,¹¹⁹ freedom from violence,¹²⁰ access to justice and equal protection before the law,¹²¹ right to health,¹²² including sexual and reproductive health amongst others.

More specifically, Article 2(1) and 2 (1)(b) of the Maputo Protocol compels state parties to take every necessary measure to end all forms of discrimination against women, especially those harmful practices that have a negative impact on the health and wellbeing of ‘all’ women.¹²³

Another provision of note under the Maputo Protocol is the right to sexual and reproductive health. Article 14 of the Maputo Protocol makes provision for the highest attainable standard of health care for ‘all’ women including their sexual and reproductive health. While one is tempted to take this provision at face value to mean that states have an obligation under the Maputo Protocol to cater for the sexual health and wellbeing of women including older women, the language and content of the entire article 14 seems to be more largely skewed towards the promotion and protection of women’s reproductive rights.¹²⁴

In General Comment 1, the African Commission on Human and Peoples Rights (African Commission) expounds on article 14 (1) (d) and (e), noting that the right to self- protection, to be protected from HIV and AIDS and to be informed of one’s status and the status of one’s partner is applicable to older women.¹²⁵ Quite commendably, the African Commission also recognised multiple forms of discrimination including those based on age and sex amongst others and the way that any of these forms of discrimination could individually or collectively prevent women from realising their right to self-protection and to be protected.¹²⁶ Thus,

¹¹⁸ Maputo Protocol (n 20) art 2.

¹¹⁹ n 20, art 3.

¹²⁰ n 20, arts 3&4.

¹²¹ n 20, art 8.

¹²² n 20, art 14.

¹²³ n 20, art 2 (1)(b)

¹²⁴ n 20, art 14 (1) (a)(b)(c)(d)(e)(f)(g).

¹²⁵ General Comments 1 on article 14(1)(d) and (e) of Maputo Protocol, adopted 6 November 2012 para15.

¹²⁶ n 125, para 4.

policies and programmes must take into account the varying specificities of different groups of women in the context of sexual and reproductive health¹²⁷.

Article 22 of the Maputo Protocol focused squarely on older women, which in itself is a welcome departure from CEDAW and previous international human rights treaties, indicating the recognition of older women as a vulnerable group in Africa in need of protection. According to article 22, state parties are obliged to:¹²⁸

- a) provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;
- b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

Similar to the other provisions, clearly missing in article 22 is any direct reference to older women's unmet sexual needs or rights in a manner that holistically promotes older women's agency with regards to their sexual health and wellbeing. Article 22 (a) draws attention to older women's 'physical', 'economic' and 'social needs' but omits reference to their sexual needs distinct from protection from violence as indicated in article 22(b).¹²⁹ However, this does not attempt to undermine the importance of article 22 (b) in addressing a very serious concern (sexual abuse) that inhibits older women's sexual health and wellbeing. Read alongside articles 3 and 4 on the right to dignity and protection of women from all forms of violence, including sexual violence and article 3 on the protection of women from harmful practices, the Maputo Protocol does provide a crucial starting point for redress with regards to the sexual rights of older women.

Unfortunately, despite the provisions of the Maputo Protocol and the opportunities therein for the advancement of the sexual rights of older women, there is still a huge gap with the implementation of the Protocol at the national and domestic level. Not all member states that have ratified the Protocol have domesticated its progressive provisions, popularised it or taken concrete steps towards its implementation, as evidenced by the limited use and reference to the Maputo Protocol in domestic courts.¹³⁰

¹²⁷ n 125, para 43.

¹²⁸ Maputo Protocol (n 20) art 22.

¹²⁹ n 20, art 22(a).

¹³⁰ E Durojaye & LN Murungi 'The African Women's Protocol and sexual rights' (2014) *The international Journal of Human Rights* 893.

3.4. The Older Person's Protocol and the Sexual Rights of Older Women

The Older Person's Protocol was adopted by the African Union in 2016 but has only been ratified by one state party as of August 2019.¹³¹ Hence, the Protocol which requires 15 ratifications by member states to come into force is still 'unenforceable'. This unfortunately speaks to the level of importance placed on the rights of older persons in Africa and across the world. Nevertheless, an analysis of the Older Person's Protocol will assist in a holistic picture of the legal framework 'available' under the African human rights system for the advancement of the sexual rights of older women.

While the Older Person's Protocol does not explicitly provide for 'sexual rights' as an independent, self-actualising and affirmative right, major provisions of the protocol are critical to the enjoyment of the sexual rights of older women and can provide the much-needed framework, foundation and opportunity upon which older women are able to exercise their sexual rights free from discrimination and violence. Also, the reference made to article 22 of the Maputo Protocol in the preamble of the Older Persons' Protocol makes it possible to read this protocol in light of the progressive provisions of Maputo Protocol taking into consideration the need for special protection of the rights of older women including their sexual and reproductive health and rights.¹³²

On the issue of discrimination, according to article 3 of the Older Person's Protocol, state parties must:

Prohibit all forms of discrimination against older persons and encourage the elimination of social and cultural stereotypes which marginalise Older Persons.¹³³

'All forms' of discrimination against older persons can be interpreted to include discrimination on the basis of sex and age. Hence, by implication, ones' sexual rights must not be inhibited by old age, sex, gender identity or sexual orientation. The protocol also recognises the socio-cultural stereotypes and prejudices that keep older persons, particularly older women from being able to fully enjoy their rights. This, in principle, can stand as an important tool to empower disadvantaged and marginalised groups such as older women, who suffer the combined effect of sexism and ageism to legitimately assert their interests.

Article 8 and 9 of the Older Person's Protocol particularly identifies older women as a vulnerable group and urges states to take every necessary measure to ensure their protection from harmful practices, violence, sexual abuse and discrimination¹³⁴ - all of which have a negative impact on the welfare, health, life and dignity of older women.

¹³¹ Lesotho is the only state party that has ratified the Protocol. African Commission on Human and Peoples' Rights 'OAU/AU Treaties, Conventions, Protocols & Charters' <https://au.int/sites/default/files/treaties/36438-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES'%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20OLDER%20PERSONS.pdf> (accessed 21 September, 2019).

¹³² Older Person's Protocol (n 10) Preamble.

¹³³ n 10, art 3.

¹³⁴ Older Person's Protocol (n 10) arts 8 & 9.

Furthermore, article 10(3) of the Older Person's Protocol compels the state party to 'ensure the provision of preferential treatment in service delivery'.¹³⁵ Article 15 also makes it necessary for states to 'facilitate access to health services and medical insurance cover for Older Persons within available resources'.¹³⁶ These articles as they apply to older women's sexual rights should include accessibility, affordability and availability of sexual and reproductive health services and the prioritisation of older women in service delivery where possible. Unfortunately, however, a claw back clause in article 15 'within available resources' that hinges the provision of health care services for older persons on the availability of resources, may mean the 'legitimate' failure of the government to provide access to sexual health services for older women based on the ill-used and misused narrative of lack of adequate resources and the 'progressive' realisation of the right to health.¹³⁷

Other provisions of the Older Persons' Protocol that have a bearing on the sexual rights of older women include article 4 on access to justice and equal protection which is necessary since older women are less likely to be taken seriously and attended to in cases of sexual violence, abuse or discrimination.¹³⁸ Accessibility and a push for substantive equality in this regard will be key, taking into consideration the physical limitations and mobility constraints that are often experienced by older persons as well as other intersecting factors of sex, age, socio-economic status amongst others, that may limit access to justice for older women.

3.5. The African Union Sub-Regional Frameworks and the Sexual Rights of Older Women

The AU recognises eight (8) regional economic communities (RECs) blocs as vehicles to drive economic integration and development across the different regions. However, they have gradually branched into the human rights field, contributing greatly to human rights standard setting in the region. Consequently, with particular focus on efforts to promote women's rights and gender equality across the region, it will be beneficial to see how the regional blocs have incorporated or addressed the sexual rights of older women within the various gender policies, declarations and plans of action. In this regard, the following 3 RECs that have frameworks for promoting gender equality and the sexual and reproductive rights of women within their region will be highlighted.

¹³⁵ n 10, art 10 (3).

¹³⁶ n 10, art 15.

¹³⁷ South African Human Rights Commission 'Right to Health Care'

'https://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_4.pdf (accessed 20 September 2019) 95.

¹³⁸ Older Person's Protocol (n 10) art 4.

3.5.1. The Southern African Development Community (SADC) Protocol on Gender and Development (2008)

SADC is the only AU recognised REC with a legally binding omnibus instrument for achieving gender equality in the form of the SADC Protocol on Gender and Development.¹³⁹ The SADC protocol on gender and development makes provision for the respect, protection and promotion of the sexual and reproductive rights of women and girls. According to article 26, 'States Parties shall, by 2015, ...develop and implement policies and programmes to address the mental, sexual and reproductive health needs of women and men'.¹⁴⁰

In addition, it also includes other fundamental provisions necessary for safeguarding the 'sexual rights' of 'all' women, which includes the elimination of harmful practices that have a negative impact on the rights of women to life, health, dignity, education and physical integrity;¹⁴¹ ending all forms of discrimination against women;¹⁴² protecting women from gender based violence, including sexual related offences,¹⁴³ and providing equal access to information, education, services and facilities on sexual and reproductive health and rights,¹⁴⁴ including HIV and AIDS prevention, care and treatment.¹⁴⁵

However, while the SADC protocol on gender and development recognises other categories of women and their specific vulnerability (girls, women living with disability, widows), it failed to recognise older women as rights bearers with distinct challenges that hinder the actualisation of their sexual rights. The missing reference to older women in its entirety except when covertly subsumed under 'widowhood', is surprising given that the Addendum to the 1997 Declaration on Gender and Development recognised older women as a vulnerable group in need of protection from sexual abuse and gender based violence.¹⁴⁶ This reference to older women as a vulnerable group had been missing from the initial SADC Declaration on Gender and Development,¹⁴⁷ was thereafter mentioned in the addendum to the declaration but is nevertheless conspicuously missing again from the SADC Protocol on gender and development. This shows the lack of consistency with integrating older persons into the human rights discourse, most especially in the area of sexuality. This is again evidenced by the SADC protocol on Health, wherein the rights of older persons were only addressed in relation to the prevention and management of chronic diseases and conditions of older persons and not within the context of access to sexual and reproductive health care services.¹⁴⁸

¹³⁹ SADC Gender Protocol Alliance 'Post 2015 Gender Agenda' <https://genderlinks.org.za/what-we-do/sadc-gender-protocol/the-sadc-gender-protocol/post-2015-gender-agenda/> (accessed 4 August 2019) 1.

¹⁴⁰ SADC protocol on gender and development (n 56) art 26.

¹⁴¹ n 56, arts 4 & 21(1).

¹⁴² n 56, arts 3 & 6.

¹⁴³ n 56, arts 20, 21, 23 & 24.

¹⁴⁴ n 56, art 11.

¹⁴⁵ n 56, arts 23 & 27.

¹⁴⁶ An Addendum to the 1997 Declaration on Gender and Development, adopted 14 September 1998, para 9.

¹⁴⁷ The Declaration is the precursor to the SADC Protocol on Gender and Development. The Declaration on Gender and Development, adopted 8 September 1997.

¹⁴⁸ SADC Protocol on Health, adopted 18 August 1999, art 14.

3.5.2. The East African Community Gender and Community Development Framework (2006)

The East African Community's (EAC) gender and development framework addresses two critical aspects of the sexual rights of women; the right to health, including prevention and care of HIV/AIDs and freedom from all forms of violence against women.¹⁴⁹ Accordingly, paragraph 6.3 calls on states to address the sexual and gender based violence experienced by women and girls in conflict affected areas.¹⁵⁰ Also, para 6.2.3, calls on the state to make 'quality maternal and reproductive health more accessible, working towards reducing incidences of unwanted pregnancies, and female genital mutilation (FGM) among others'.¹⁵¹

From the above, it is clear to see that whilst addressing aspects of the sexual and reproductive rights of women, the focus of the framework has predominately been on reproductive rights and women of child bearing ages with no reference made to older women as a vulnerable group within the framework. The same is reflected in the recent EAC gender policy of 2018, indicating that very little has changed with regards to addressing the sexual needs and vulnerabilities of older women.¹⁵²

Also, sexual rights are mainly addressed in the framework from the vantage point of violation and disease prevention rather than the right to a pleasurable and mutually satisfying sexual experience.

3.5.3. Sexual and Reproductive Health and Rights Strategic Policy framework (2007-2015) - Intergovernmental Authority on Development (IGAD)

IGAD has a specific policy on sexual and reproductive rights to complement and strengthen their Gender Policy and Strategy Framework for 2012-2020.¹⁵³ The IGAD SRHR policy framework, though not legally binding, amongst other objectives, seeks to integrate sexual and reproductive health services in the minimum activity package of member states at all levels of the health pyramid, across all stages of life.

Herein, the sexual and reproductive rights of older women were clearly highlighted with specific plans of action developed to address some of the sexual and reproductive health issues faced by older women including concerns about menopause, sexual dysfunction and their management, HIV and Aids, reproductive cancer amongst others.¹⁵⁴

Furthermore, in addressing HIV/AIDS, the framework specifically identifies older women and men as a vulnerable group and prescribes that member states develop affordable preventive and treatment services including counselling, voluntary testing, prevention services and

¹⁴⁹ The EAC Gender and Community Development Framework, adopted November 2006.

¹⁵⁰ EAC Gender and Community Development Framework (n 149) para. 6.3.

¹⁵¹ n 149, para 6.2.3.

¹⁵² EAC Gender Policy, adopted May 2018.

¹⁵³ IGAD Sexual and Reproductive Health and Rights Strategic Policy framework (2007-2015), adopted 23 November, 2006.

¹⁵⁴ n 153, para 4.7.

access to treatment for infected people'.¹⁵⁵ However similar to the gender policies of the other regional blocs, the focus of the framework is more tilted towards reproductive rights and also predominantly concerns itself with absence of disease and violence against women, which although are crucial aspects of sexual and reproductive wellbeing, do not of themselves stop the stigma and discrimination associated with older women and sexuality.

The approach of other international and regional human rights systems on the sexual rights of older women

3.6. The United Nations international human rights system and the sexual rights of older women

The United Nations international human rights system is the oldest in human rights standards setting and since the African human rights system does not operate in a legal vacuum, it will be crucial to see how the sexual rights of older women has been addressed under the UN human rights framework. This analysis is also important given that many African states have signed and ratified international UN treaties and are under the legal obligation to be bound by the provisions therein. Thus, this section will look at the major international human rights instrument under the United Nations and its approach to addressing the sexual rights of older women.

3.6.1. International Bill of Human Rights

The international bill of rights which comprises of the Universal Declaration of Human Rights (Universal Declaration),¹⁵⁶ the International Covenant on Economic, Social and Cultural Rights (CESCR),¹⁵⁷ the International Covenant on Civil and Political Rights (ICCPR),¹⁵⁸ are vital documents that set the much-needed precedents with regards to the respect, protection and promotion of human rights and freedoms across the world. However, none of these documents make mention of sexual rights, even though many of its core principles and provisions are necessary for the realisation of the sexual rights of every person as established in the previous chapters. Furthermore, age-based discrimination or intersecting discrimination on the basis of age and sex were distinctively missing in the provisions of these foundational human rights instruments. Not surprisingly, therefore, older women were not specifically mentioned as a vulnerable group neither were their sexual rights discussed.

While the omission of sexual rights from these core documents is understandable, given the relative newness and complexities that surround sexuality in the human rights discourse, the challenge with the exclusion of older persons and age-based discrimination (sexual and

¹⁵⁵ n 153, para 4.8.

¹⁵⁶ Universal Declaration of Human Rights (Universal Declaration) GA Resolution 217 A (III) 10 December 1948.

¹⁵⁷ International Covenant on Economic, Social and Cultural Rights (CESCR) GA Resolution 2200A adopted 16 December 1966, entered into force on 3 January 1976.

¹⁵⁸ International Covenant on Civil and Political Rights (ICCPR) GA Resolution 2200A adopted 16 December 1966, entered into force on 23 March 1976.

otherwise), is that it creates a normative gap that makes it difficult to fully identify older persons, specifically older women as a vulnerable group in need of special attention.¹⁵⁹ This is evident in the language and distinct focus of many of the other human rights instruments, national laws and policies that used these foundational instruments as a reference point, also omitting or inadequately making reference to the specific needs and vulnerability of older women, more so, their sexual rights.

3.7. Other core international human rights treaties

Among the other core international human rights instruments under the United Nations, only the Convention on the Rights of Persons with Disabilities (CRPD) can be said to make any reference to ‘sexual health’, and ‘the rights of older persons’, but not explicitly in relation to the ‘sexual rights of older women’.¹⁶⁰ According to article 25 (a) of the CRPD,

“States have an obligation to provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes”.¹⁶¹

This provision, read alongside the preamble and article 8 (b), which acknowledges multiple forms of discrimination on the basis of both sex and age, across all sphere of life, can be progressively interpreted to imply that sexual rights are applicable to all persons with disability irrespective of their sex and age.¹⁶² This obligation is however limited to persons living with disabilities.

Furthermore, any reference to age-based discrimination or older persons in general can only be found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)¹⁶³ and the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW) respectively without any direct applicability to the sexual rights of older women.¹⁶⁴ Nonetheless, with the right political will and prioritisation of the sexual rights of older women, some of the general provisions of these instruments such as the right to non-discrimination, dignity, access to justice, health, amongst others can be purposefully evoked to address the sexual rights of older women. This, according to the Committee on the Elimination of Discrimination Against Women (Committee on CEDAW) has unfortunately not been the case as evidenced by the state party reports, wherein, the rights of older women and the multiple forms of discrimination they experience,

¹⁵⁹ HelpAge International ‘International human rights law and older people: Gaps, fragments and Loopholes’ (2012) <https://social.un.org/ageing-working-group/documents/GapsinprotectionofolderpeoplesrightsAugust2012.pdf> (accessed 24 August 2019) 2.

¹⁶⁰ Convention on the Rights of Persons with Disabilities (CRPD) GA resolution A/RES/61/106/ adopted 24 January 2007.

¹⁶¹ n 160, art 25.

¹⁶² n 160, art 8 (b).

¹⁶³ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) GA Resolution A/RES/45/158 adopted 18 December 1990 and entered into force on 1 July 2003.

¹⁶⁴ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) GA resolution vol. 1249 adopted 18 December 1979 and entered into force on 3 September 1981.

have not been systematically addressed.¹⁶⁵ All in all, perhaps even more evident than within the African human rights system, the legally binding instruments within the United Nations system lack the much-needed protection for the sexual rights of older women.

These normative gaps notwithstanding, the UN system has since taken formidable steps in addressing the rights of older women (including their sexual rights) through soft law provisions and policy directives, in recognition of the rapidly aging population and the feminisation of aging.¹⁶⁶ These soft laws and policies, whilst not legally binding on state parties, elaborate on the provisions of the core instruments and offer opportunities for state and non-state actors to improve their understanding and response to the human rights of older women worldwide.¹⁶⁷ Applicable particularly to the sexual rights of older women is the General Recommendation 27 of the Committee on CEDAW¹⁶⁸ and the Madrid International Plan of Action on Ageing (MIPAA).¹⁶⁹

3.7.1. General Recommendation 27 and the sexual rights of older women

General Recommendation 27 of the Committee on CEDAW is one of the most comprehensive instruments that addresses the specific and multiple vulnerabilities faced by older women as well as their entitlements and rights. It recognises quite fundamentally, that women's rights can only truly and fully be achieved through a 'life-cycle approach that recognizes and addresses the different stages of women's lives –from childhood through adolescence, adulthood and old age– and the impact of each stage on the enjoyment of human rights by older women'.¹⁷⁰

Filling a crucial gap in CEDAW, General recommendation 27 went further to tackle the neglect of the sexual rights of older women, with suggestions on the measures needed by states to address the burgeoning challenges to the sexual health and wellbeing of older women, who are often considered inactive in their productive and reproductive roles.¹⁷¹ According to the General Recommendation, 'post-menopausal, post-reproductive and other age-related and gender-specific physical and mental health conditions and diseases tend to be overlooked by research, academic studies, public policy and service provision.¹⁷² Also, information on sexual health and HIV/AIDS is rarely provided in a form that is acceptable, accessible and appropriate for older women'.¹⁷³ The general recommendation also identified exploitation, abuse and

¹⁶⁵ Committee on the Elimination of Discrimination Against Women (Committee on CEDAW) General recommendation 27 on older women and the protection of their human rights CEDAW/C/2010/47/GC.1 para 1.

¹⁶⁶ M Fredvang & S Biggs 'The rights of older persons': protection and gaps under human rights law' (2012) *The Centre for Public Policy* 5.

¹⁶⁷ n 166, 8.

¹⁶⁸ General Recommendation 27 (n 165).

¹⁶⁹ United Nations 'Madrid International Plan of Action on Ageing (MIPAA)' (2002)

https://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf (accessed 25 August 2019).

¹⁷⁰ General Recommendation 27 (n 165) para 15.

¹⁷¹ FA Begum 'ageing, discrimination and older women's human rights from the perspectives of CEDAW convention' http://www.ngocoa-ny.org/perspective_human-rights_ol.pdf (accessed 25 August 2019).

¹⁷² General Recommendation 27 (n 165) para 21.

¹⁷³ n 165, para 21.

discrimination of older women as a major challenge that is constantly overlooked as a result of age and sex based discrimination.¹⁷⁴

Nonetheless, whilst older women's sexual health and rights have been extensively addressed and provided for by the general recommendation 27, this instrument, much like its predecessors, still continues to neglect the sexual agency of older women, largely viewing their sexual rights from a violence and abuse perspective, rather than promoting or encouraging alongside, an independent right to bodily autonomy and sexual pleasure.

3.7.2. The Madrid International Plan of Action on Ageing

The Madrid International Plan of Action on Ageing (MIPAA) is another UN policy document (non-legally binding) that recognises to some degree the sexual rights of older women, addressing crucial gaps in both the Vienna International Plan of Action on Ageing (1982) and the UN Principles for Older Persons (1991) which were hitherto silent on this pivotal issue.¹⁷⁵ The provisions of the UN Principles for Older Persons were particularly gender neutral, failing to recognise the specific needs and vulnerabilities of older women. Consequently, the MIPAA made provision for access to age appropriate health care and services for older persons including sexual health care.¹⁷⁶ MIPAA also acknowledged the specific vulnerability of older women to abuse and sexual exploitation due to discriminatory societal attitudes and harmful traditional and customary practices in many societies, which are often exacerbated by poverty and lack of access to legal protection.¹⁷⁷ Hence, though MIPAA is not a human rights treaty and is not legally binding, it serves as an important tool in promoting certain aspects of the sexual rights of older women given that about 193 member nations of the UN, including many African states have signed on to the Madrid Plan.¹⁷⁸

3.8. Other regional systems with provisions for the sexual rights of older women

Apart from the African human rights system, the Inter-American human rights system is one of the few regional human rights systems with legally binding instruments that explicitly makes reference to the sexual rights of older persons, including older women. The Inter-American human rights system is also the only other regional body that has a convention specifically on the rights of older person, which was signed in 2015 and entered into force in January 2017.¹⁷⁹ Thus, this section will look at the Inter-American Convention on Protecting the Human Rights of Older Persons (Inter-American Convention on the Rights of Older Persons) to analyse its approach to addressing the sexual rights of older women.

¹⁷⁴ n 165, para 27.

¹⁷⁵ United Nations Principles for Older Persons (UNPOP) GA resolution 46/91 of 16 December 1991.

¹⁷⁶ MIPAA (n 169) para 58.

¹⁷⁷ n 169, para 108.

¹⁷⁸ M Choi, P Brownell & SI Moldovan 'International movement to promote human rights of older women with a focus on violence and abuse against older women' (2015) *International Social Work* 174.

¹⁷⁹ Inter-American Convention on Protecting the Human Rights of Older Persons (Inter-American Convention on the Rights of Older Persons) OAS GA 70 adopted June 15 2015 and entered into force January 11 2017.

3.8.1. Inter-American Convention on Protecting the Human Rights of Older Persons and the sexual rights of older women

In contrast to the Protocol to the African Charter on Human and Peoples' rights on the Rights of Older Persons in Africa (Older Person's Protocol), the Inter-American Convention on the Rights of Older Persons explicitly recognises the sexual and reproductive rights of older persons, as an independent right necessary for the full enjoyment and exercise, of all human rights and fundamental freedoms of older persons.¹⁸⁰ According to the Convention, state parties are expected to 'foster public policies on the sexual and reproductive health of older persons' and also ensure access to affordable and quality health care services for older persons that include the treatment of sexually transmitted diseases.¹⁸¹

Herein, the Convention acknowledges the specific vulnerability and multiple forms of discrimination faced by older women on the basis of age, sex, gender identity and sexual orientation amongst other factors.¹⁸² The Convention also clearly defines violence against older persons to include sexual violence, prompting states to take every necessary step to 'actively promote the elimination of all practices that generate violence and affect the dignity and integrity of older women' in both public and private spheres.¹⁸³

Furthermore, beyond the general obligation placed on the right to non-discrimination and right to health, the Convention has some ground breaking provisions essential for the protection and promotion of the sexual rights of older women. This includes the right of older women to privacy and 'intimacy'.¹⁸⁴ The reference to intimacy in particular connotes the recognition of older persons as 'sexual agents' in complete disparity with other instruments under the African human rights system and those of the UN international human rights system.

3.9. Lessons to be learnt from the different human rights systems

The African human rights system has set the bar with regards to the recognition of the rights of older women under article 22 of the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).¹⁸⁵ This has been crucial in human rights standard setting and in creating a platform for discussing the vulnerabilities of older women to sexual ill-health and abuse within and beyond the African Continent. Consequently, within the Maputo Protocol, there are avenues for redress for sexual violations and discriminations experienced by older women. Commendably, the language of the Maputo Protocol gave no room for misinterpretation in this regard. However, whilst the Maputo Protocol has been an important tool in the field of sexual and reproductive health and rights, sexual rights for women above the reproductive age bracket remains very limited and

¹⁸⁰ n 179, art 14.

¹⁸¹ As above.

¹⁸² n 179, art 5.

¹⁸³ n 179, art 9.

¹⁸⁴ n 179, art 16.

¹⁸⁵ Maputo Protocol (n 20) art 22.

confined to the parameters of abuse, violence and harmful practices, failing to acknowledge older women as sexual agents.

Within the African human rights system, other instruments such as the Older Persons' Protocol and sub-regional policies such as the SADC Protocol on Gender and Development,¹⁸⁶ and the Sexual and Reproductive Health and Rights Strategic Policy framework (SRHR strategic policy framework) of IGAD,¹⁸⁷ only marginally address the sexual rights of older women, also majorly focusing on the sexual rights of older women from a victim and disease prevention approach. Notably however, the SRHR policy framework, though only for the sub-region, has a detailed non-binding policy that addresses crucial aspects of the sexual rights of older women. The policy framework draws attention to specific challenges to older women's sexual wellbeing including menopause, sexual dysfunction, HIV and Aids, reproductive cancer amongst others.¹⁸⁸ This specificity with regards to the sexual rights of older women is needed across the entire region in a way that encourages a positive image of older women and sexuality in addition to protection from the very real dangers of sexual ill-health and violence against older women.

The Inter-American human rights system addressed the normative gap and inadequacies in the protection of the rights of older persons within the American Convention on Human Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) by establishing a convention solely dedicated to the rights of older persons. Herein, older persons and in particular older women were identified as sexual agents with their sexual and reproductive rights guaranteed. The Inter-American Convention on the Rights of Older Persons clearly moves away from the reluctance of other instruments to name older women as sexual right bearers. It not only addresses sexual and reproductive rights of older persons without limiting this to protection from diseases or violence, it takes it a step further by advocating for their right to privacy and intimacy, which is indeed crucial for older persons who are often treated as children or invalids, violating their right to dignity and their right to make decisions with regards to their own wellbeing.¹⁸⁹ For older women, these violations are even more complex and challenging with the interactions of both sexism and ageism. Hence, having the sexual rights of older persons clearly spelt out and applicable to both negative and positive sexual rights is beneficial in advancing and protecting the sexual rights of older women.

In place of a convention on the rights of older persons, the United Nations System has numerous soft laws, including resolutions and declarations that seek to address the rights of older persons that has hitherto been substantially missing within international human rights laws. However still, the specific needs and intersecting vulnerability of older women including their sexual rights remained largely invisible, prompting the development of the general

¹⁸⁶ SADC Gender Protocol Alliance (n 139)1.

¹⁸⁷ SRHR strategic policy framework (n 153).

¹⁸⁸ n 153, para 13.2.1.

¹⁸⁹ Inter-American Convention on the Rights of Older Persons (n 179) art 16.

recommendation 27 with the approval of the UN General Assembly.¹⁹⁰ General recommendation 27 is the only international and regional document specifically focused on the rights of older women. It also expands the emphasis on sexual health, beyond the limited focus on women of child bearing age to older women who are also susceptible to sexual ill health and violence. Furthermore, the need for information, education and research into the sexual rights of older women was also featured prominently in the general recommendation.¹⁹¹ Notably, the decision to develop a general recommendation solely focused on older women is in itself commendable, given that there are other international instruments that generically address the rights of ‘older persons’ such as General Comment 6 of ICESCR and MIPAA. This move by the CEDAW committee to address a fundamental challenge shows that there may be value in developing new norms and standards that address the specific needs of this vulnerable group and also set new standards with regards to hitherto marginalised rights such as the sexual rights of older women.

3.10. Chapter Conclusion

A general thread that runs through most of the analysed legal frameworks is that the ‘sexual rights of older women’ are not explicitly named or mentioned under any of the legally binding instruments. However, quite notably, most of the legal instruments and frameworks address various components of sexual rights as defined by WHO definition and the WAS declaration of sexual rights. The most common issue addressed, which relates specifically to the sexual rights of older women, is violence against women and HIV/AIDs with limited focus on the positive expression of sexuality. In addition, whilst the universalist language ‘all’ women is used and can be interpreted to apply to diverse categories of women, ‘older women’ are rarely identified as a vulnerable group, failing to recognise their specific intersecting vulnerabilities. It is also clear, as demonstrated within the different human rights frameworks that sexual health tends to be subsumed under reproductive health and rights.¹⁹² This is a shortcoming in view of the fact that not all sexual activities lead to procreation.

In this regard, the next chapter will focus specifically on the lived realities of older women in Africa, in relation to the available legal framework identified under the African human rights system, and the previously established conceptual notions of sexual rights.

¹⁹⁰ Choi (n 178)172.

¹⁹¹ General Recommendation 27 (n 165) para 21.

¹⁹² Durojaye & Murungi (n 130) 883.

4. A SITUATIONAL ANALYSIS OF THE SEXUAL RIGHTS OF OLDER WOMEN IN AFRICA

4.1. Introduction

A life cycle approach to sexuality means that sexuality is evident at every stage of human existence and interaction, hence the claim on sexual rights in law and practice cannot and must not exclude older women who suffer compounded forms of discrimination on the basis of sex, gender, age, sexual orientation and gender identity, amongst others. Consequently, this chapter explicitly deals with the sexual rights of older women drawn from the aforementioned legal frameworks and expounded upon by the World Association for Sexual Health's (WAS) declaration of sexual rights, analysing how these rights intersect and how older women in Africa have been treated in relation to their sexual health and wellbeing. Furthermore, it also analyses the impact of the available law on the lived realities of African women.

Herein, the sexual rights 'most applicable' to older women include: ¹⁹³

1. The right to equality and non-discrimination.
2. The right to autonomy and bodily integrity.
3. The right to be free from torture or to cruel, inhumane or degrading treatment or punishment.
4. The right to life, liberty, and security of the person.
5. The right to be free from all forms of violence and coercion.
6. The right to privacy.
7. The right to the highest attainable standard of health, including sexual health; with the possibility of having pleasurable, satisfying, and safe sexual experiences.
8. The right to enjoy the benefits of scientific progress and its application.
9. The right to information.
10. The right to education and the right to comprehensive sexuality education.
11. The right to marry and to found a family and enter into marriage with the free and full consent of the intending spouses, and to equality in and at the dissolution of marriage.
12. The right to freedom of opinion and expression.
13. The right to freedom of association and peaceful assembly.
14. The right to an effective remedy for violations of fundamental rights.

While all these sexual rights are inalienable, indivisible, interdependent and interrelated, the analysis below will focus on interrogating a few of the sexual rights that are a central theme in this paper, namely:

¹⁹³ The term 'most applicable' is used within the confines of current scientific and technological advancements and the norm at this time, because one cannot tell what science and medical advancement on an issue such as reproduction may have in store for post-menopausal women in future.

The right to equality and non-discrimination

Older women experience discrimination with regards to their sexual rights which is often exacerbated by attitudes and bias about their sexual behaviour (gendered ageism) based on assumptions about their age and inferred asexuality rather than on the direct impact of declining health or sexuality.¹⁹⁴ These attitudes and stereotypes affect the way older women see themselves and subsequently the way they choose to attend to their sexual health and well-being based on the belief that sexual wellbeing is not something they can reasonably expect.¹⁹⁵ In Africa, sexual relationships are closely tied to marital status based on cultural and religious underpinnings, with many older women having long-term monogamous and heterosexual relationships.¹⁹⁶ Hence, older women often relate the end of their sexual lives to the death of their spouse irrespective of continued desire to maintain sexual relationships.¹⁹⁷ While research is lacking as to whether or not men's experiences are similar in this regard, the gendered patterns of aging and the dominant view of African men's sexual prowess irrespective of age as reflected in a popular Nigerian literature 'The lion and the jewel' (which showed the ability of older men to attract younger women based on their sexual capability), suggests otherwise.¹⁹⁸

In addressing the issue of discrimination, article 2 of the African Charter identifies the grounds upon which a person must not be discriminated against including sex, race, ethnic group, colour, language, religion and 'other status'.¹⁹⁹ It was however silent on discrimination on the basis of age or sexual orientation as grounds for non-discrimination. This silence is ominous because inequality among and between persons and groups is a strong predictor of the burdens of ill health, including sexual ill-health.²⁰⁰ These inequalities are manifested through differential access to services and resources, in people's abilities to participate in the laws and policies that govern their lives, as well as to seek remedies for abuses committed against them.²⁰¹

Article 2(1) and 2 (1)(b) of the Maputo Protocol also speaks to ending all forms of discrimination against women.²⁰² Read with article 22 (b) of the Protocol,²⁰³ the Maputo protocol states in very clear terms that older women are rights bearers and are protected from all forms of discrimination on the basis of sex and age which when applied to the area of sexuality extends to non- discrimination of their sexual rights. This is important, given that older women continue to suffer discrimination with regards to their sexual health and

¹⁹⁴ Lusti - Narasimhan & Beard (n 30) 1.

¹⁹⁵ C Barrett & S Hinchliff 'Bundle of potential: The sexual rights of older people' in Barrett & Hinchliff (n 11) 17.

¹⁹⁶ Nyanzi (n 6) 491.

¹⁹⁷ As above.

¹⁹⁸ W Soyinka *The Lion and the Jewel* (1963).

¹⁹⁹ African Charter (n 53) art 2.

²⁰⁰ Miller, Kismödi, Cottingham & Gruskin (n 71) 25.

²⁰¹ As above.

²⁰² Maputo Protocol (n 20) art 2(1)(b).

²⁰³ n 20, article 22 (b).

wellbeing without recourse to the law.²⁰⁴ However, the interpretation, application and implementation of this right in a way that prevents older women from intersectional discrimination is a huge challenge. This is evidenced by the absolute lack of jurisprudence and case laws in this regard, especially any that seeks to claim the sexual rights of older women.

The right to autonomy and bodily integrity

Bodily autonomy and independence are a crucial aspect with regards to the promotion and protection of the sexual rights of older women. However, within patriarchal societies that place women's needs as secondary to men's, women are in a constant battle to assert their bodily autonomy and sexual rights.²⁰⁵ These gender-based inequalities continue over a lifetime and are often mirrored by offspring and caregivers who begin to play a paternalistic role, limiting the right of older persons to make decisions about their own sexual behaviour, practices and relationships.²⁰⁶ This negative attitude is premised on notions of diminished capabilities of older persons to make informed decisions about their lives and wellbeing including those related to their sexuality, most especially when there is an intersection of age, gender, disability or impairment (including chronic or mental illness) that are often viewed as limiting factors.²⁰⁷ Furthermore, linked closely with the right to bodily autonomy is the right to privacy regarding one's own body, consensual sexual relations and practices without arbitrary interference and intrusion.²⁰⁸ In this regard, 'old age homes' provide little opportunity for privacy, which further constrains the ability of older women to express their sexuality without discrimination and censure.²⁰⁹

Article 5 of the Protocol on the Rights of Older Persons speaks to this critical issue- the right to make decisions regarding one's own wellbeing, albeit without any specific reference to the neglected area of sexual desires, sexual activity and sexual relationship. Notwithstanding, article 5(1) calls on state parties to ensure that 'appropriate legislation exists that recognises the rights of older persons to make decisions regarding their own wellbeing without interference from any person or entity'.²¹⁰ This contradicts in principle, the notion that older persons, particularly older women are 'incapable' of making decisions on matters that relate to their sexual health and wellbeing. Most unfortunately, while many African societies view older women as 'care givers' and defer to them with regards to stereotypical 'motherly' roles of nurturing and caring for grandchildren and younger relatives, many find it unacceptable and unthinkable for older women, especially those who have lost their spouses to have sexual desires, thoughts of intimacy or pleasure, more so decide to act on these desires.²¹¹ Hence, many older women are confined to their role as care givers and are not able to explore their

²⁰⁴ Choi (n 178) 171.

²⁰⁵ SO Ademiluka 'Patriarchy and Women Abuse: Perspectives from Ancient Israel and Africa' (2018) *Scientific Electronic Library Online* 340.

²⁰⁶ C Barrett & S Hinchliff 'Bundle of potential: The sexual rights of older people' in Barrett & Hinchliff (n 11) 19.

²⁰⁷ As above.

²⁰⁸ WAS (n 84) 2&3.

²⁰⁹ R Thorpe, B Fileborn & LH Clark 'Framing the sexual rights of older heterosexual women: acknowledging diversity and change' in Barrett & Hinchliff (n 11) 34.

²¹⁰ Older person's protocol (n 10) art 5 (1).

²¹¹ Nyanzi (n 6) 491.

sexuality without being shamed or mocked, usually with derogatory words such as ‘*agbaya*’.²¹² This social bias which often assumes that ‘sex repels all post-menopausal women’ force older women to repress their sexual drive or shy away from expressing their sexual desire.²¹³

Thus, related to article 5 on the right of older women to make decisions with regards to their sexual health and wellbeing, is also the right of older women to social protection as provided for in article 7 of the Older Persons’ Protocol.²¹⁴ While this right is not directly applicable to the sexual rights, it has a bearing on the attainment of other sexual rights given that older women are more likely than others to be impoverished and dependent on others for sustenance.²¹⁵ This point was buttressed by Lottes, explaining how material, economic, and social conditions can hinder sexual health and sexual pleasure.²¹⁶ For example, an older woman without pension or any form of social security will find it hard to demand her right to make independent decisions regarding her sexual health or wellbeing, lest she offends the sensibilities of those who she depends on. It will also negatively impact on her ability to leave an abusive environment, even in cases of sexual assault or access justice in instances where she depends on the perpetrator or relatives for her daily sustenance. Thus, increasing the vulnerability of older women to sexual abuse by known and unknown perpetrators. Also, getting the appropriate health care becomes even less possible wherein, the older woman has no personal income of her own to facilitate access to the needed sexual and reproductive health care services. This is unfortunately the lived realities of many older women in Africa who do not have a social security safety net due to years of unpaid care work, widowhood practices, land and inheritance rights that are largely unfavourable to women as well as lack of specific policies and interventions on the issue by government.²¹⁷

In this regard, while the Protocol is clear on the issue of autonomy and bodily integrity, the question remains as analysed under the Maputo Protocol, whether or not older women in Africa are able to exercise such rights given that sexual rights are not explicitly spelt out in a way that galvanises state parties to take action in addressing the specific challenges of older women including the issue of bodily autonomy and privacy. Also, the fact that the Protocol is not currently justiciable is another hindrance to the attainment of these rights.

The right to be free from all forms of violence and coercion

Who will want to rape *Gogo*? She is old, unappealing and out of commission.²¹⁸ This statement exemplifies the common narrative about older women in many African societies.²¹⁹ It, however, belies the truth as gender-based violence (GBV) can happen at any and all times

²¹² ‘*Agbaya*’ is a derogatory Yoruba word commonly used in South-West Nigeria to refer to older persons who behave or act ‘unbefitting’ of their age; sometimes like they are younger or ‘act’ in a way that is socially unacceptable. The yard stick for what is befitting or not befitting is defined by societal norms, beliefs and customs. Legit ‘8 Insults Yoruba Mothers use well’ <https://www.legit.ng/1031944-8-insults-yoruba-mothers-use-will-reset-brain.html> (accessed 23 September 2019).

²¹³ Nyanzi (n 6) 485.

²¹⁴ Older Person’s Protocol (n 10) art 7(2).

²¹⁵ Begum (171) 1.

²¹⁶ Lottes (101) 380.

²¹⁷ HelpAge International (n 159) 8.

²¹⁸ *Gogo* is another name for older women or grandmother, commonly used in Southern Africa. Nyanzi (n 6) 494.

²¹⁹ n 6, 479.

across the life course of an individual.²²⁰ For older women, the unfortunate reality is that interpersonal and sexual violence do not stop at 50 or 60, once a woman crosses the reproductive thresholds.²²¹ Instead, additional gendered forms of violence and abuse are introduced and ‘the drivers of violence become more complex as power relationships change in old age and the inequalities of power associated with ageism are added’.²²² Consequently, older women become vulnerable to sexual assault in private and public places by intimate partners, family members and strangers. This situation is further exacerbated by intersecting inequalities that include the woman’s socio-economic and marital status. These constraints put older women at increased risk of being victims of sexual violence and are also some of the factors that keep them from reporting abuse. Also, based on myths and superstitious beliefs, many older women in Africa have been sexually assaulted on the ridiculous and erroneous belief that sex with an old woman will cure HIV/AIDS.²²³

Unfortunately however, action to end this form of violence within the global and regional strategies and interventions has been largely limited, with the focus being on women within the reproductive age bracket.²²⁴ This is also underscored by the lack of research on the prevalence of sexual violence against older women in sub-Saharan Africa.²²⁵ For example, ‘most studies of violence against women set an upper age limit for data collection at age 49 years, which stems from a traditional focus on women in reproductive age and overlooks violence in older women’s lives’.²²⁶ Underlying this gap are again assumptions about the ‘desirability’ of older women, which serves to many as a ‘logical’ protection from sexual violence and abuse. The picture is not always gloom however, as many older women are beginning to exercise their agency by refusing to be inherited as a wife by their dead husband’s brother or other kin in a widowhood practice that often exposes older women who are widowed to sexual abuse and violence.²²⁷ Nonetheless, as summarised above, older women are entitled to enjoy a life free from sexual abuse, sexual harassment, sexual exploitation, and violence as provided for in article 22 of the Maputo Protocol.

The right to the highest attainable standard of health, including sexual health, with the possibility of having pleasurable, satisfying, and safe sexual experiences

Do women experience sexual dysfunction as a result of aging? Yes, older women often experience sexual dysfunction and some of the challenges faced by older women include lower sexual desire, difficulty with vaginal lubrication and anorgasmia.²²⁸ Also, influencing the sexual health of older women are chronic diseases such as dementia,

²²⁰ HelpAge International ‘Transforming gender relations in an ageing world: A policy discussion paper’ (2018)12.

²²¹ As above.

²²² n 220, 12.

²²³ Centre for Human Rights ‘the impact of the Protocol on the Rights of Women in Africa on violence against women in six selected Southern African countries: An advocacy tool’ (2009) 80.

²²⁴ Heidari (n 40) 2.

²²⁵ Nyanzi (n 6) 491.

²²⁶ United Nations Development Programme ‘Ageing, older persons and the 2030 agenda for sustainable development’ (2017) 15.

²²⁷ Nyanzi (n 6) 491.

²²⁸ Nyanzi (n 6) 492.

diabetes and renal failure, which have an adverse effect on sexual health, among older persons.²²⁹

Does this mean that they are asexual? No, it does not, unlike the popular myth surrounding older women and sexuality; ‘there are no age limits to enjoying a healthy sex life’ and, also, no scientific evidence to buttress the pervasive myth that older women are asexual.²³⁰ Studies have rather shown that older women engage in satisfying sexual activity (quality over quantity), although to many older women, sexual relations are defined more broadly than just coital activity to include affection, sexual intimacy, emotional and physical closeness that gives emotional pleasure, sensory pleasure, and relationship pleasure.²³¹ Nonetheless, these myths about asexuality proliferate the denial of the sexual rights of older women and the healthcare required to maintain their sexual health.²³² For example, stigma associated with aging and continued sexual activity especially for a widowed woman can prevent older women from even discussing their sexual health with healthcare providers. Other myths equate sexual interest to a sign of illness dissuading older women from engaging in sexual activities.²³³

Other barriers older women face in accessing healthcare include their own attitudes towards later life sexuality, which are influenced by the society in which they live; dismissal of their sexual concerns on the basis that sexual problems are part of the normal aging process; stigma or fear and lack of information concerning sexual health related services, amongst others.²³⁴ Furthermore, the absence of deliberate policy interventions and guidelines that include the sexual rights of older persons means that older women are neglected with regards to health care services including screening programmes, HIV/AIDS treatments, amongst others, as they are not seen as a ‘most at risk’ group. This analysis is erroneous because HIV infection and transmission can impact directly on older persons who are sexually active and those who are sexually assaulted.²³⁵ In a study in South Africa in 2006, 3.7 percent of women with HIV were over the age of 60.²³⁶ Hence, it is important for health care workers to deepen their knowledge of sexuality in old age and develop techniques aimed at increasing women’s access to sexual health information, education and services in a gender and age sensitive manner. It will also require guaranteeing access to quality women-centred HIV prevention methods and treatment to all women, not based on discriminatory assessment of risk that often exclude older women.²³⁷

²²⁹ As above.

²³⁰ JK Muliira & RS Muliira ‘Sexual health for older women: implications for nurses and other healthcare providers’ (2013) *Sultan Qabboos University Medical Journal* 470.

²³¹ Muliira & Muliira (n 230) 473.

²³² n 231, 471.

²³³ Nyanzi (n 6) 491.

²³⁴ As above.

²³⁵ n 6, 494.

²³⁶ As above.

²³⁷ n 125, para 30.

In this regard, as highlighted in the previous chapter, article 16(1) of the African Charter and article 15 of the Older Persons' Protocol provide for the right to health. More specifically, article 14 of the Maputo Protocol provides for the sexual and reproductive rights of women. Unfortunately, however, sexual rights independent of reproductive health and rights once again took the back seat in the Maputo Protocol, de-emphasising non-reproductive sexual activities and sexual relations.²³⁸ Consequently, as observed by Balogun & Durojaye, 'the language of the Protocol does not explicitly confer on women the possibility of asserting their sexuality. Rather, women are viewed through a stereotypical lens of 'motherhood''.²³⁹ This imbalance and bias in favour of reproductive health, which is even more evident in reality, is one of the barriers faced by older women in accessing or asserting their sexual rights. Alternatively, if both sexual and reproductive health and rights are given prominence in the actualisation of the right to health, women will be empowered to exercise their sexual choices and sexual autonomy free of prejudices and discrimination throughout their life span, embracing sexuality as a vital part of life rather than a means to reproduction only.

The right to enjoy the benefits of scientific progress and its application

In recent decades, there has been noticeable progress and development in science aimed at improving sexuality in later life. However, this progress is mainly centred around the medical and pathological aspects of sexuality. The rise of sexuopharmaceutical drugs is feeding the media frenzy to feel good, look younger and kickback the impact of aging on one's sexuality.²⁴⁰ These developments can be both positive and negative for older women. Positive, because they provide an opportunity to improve the sexual functioning of older women by introducing interventions such as psychotherapy and supplementary hormonal treatment to address issues of low sexual desire, arousal problems, difficulty in climaxing and issues with sexual satisfaction.²⁴¹ However, this is where the need for information and sexuality education comes in for older women in order for them to be aware of the advantages and risks associated with such interventions, which includes increased risk of cancer, stroke, embolism amongst others.²⁴² The reality in Africa, however, is that many older women don't even have the opportunity (accessibility and availability) to explore such breakthrough in science; older women (many who have been taught to suppress their sexuality from adolescence up until old age) may view this as the less important aspect of their lives when considering other pressing challenges such as access to financial resources and general health care.²⁴³

One of the negative sides to scientific progress in later life sexuality, apart from the side effects of the drugs themselves, has been in the approach of pharmaceutical companies to marketing

²³⁸ Durojaye & Murungi (n 130) 887.

²³⁹V Balogun & E Durojaye 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights' (2001) 2 *African Human Rights Law Journal* 368-395.

²⁴⁰ Nyanzi (n 6) 492.

²⁴¹ Muliira & Muliira (n 230) 474 & 475.

²⁴² n 230, 471.

²⁴³ Nyanzi (n 6).

drugs for older persons. There has been lesser focus on promoting a positive image of aging and more focus on selling more and more drugs by capitalising on the natural fears of older persons about aging and sexuality. Furthermore, sexual activity is presented as essential to aging well, driving a sense of guilt and failure amongst those who cannot age well in this way. Consequently, care must be taken not to create unrealistic expectations of sexuality and sexual health for older women and older persons, in general, while promoting the right to be sexually active or inactive as desired.²⁴⁴

The rights to information, education and the right to comprehensive sexuality education

Some of the challenges to a pleasurable and satisfying sexual health for older women can only be resolved if information related to sexuality is made accessible to women as provided for in article 14(2)(a) of the Maputo Protocol and is not inhibited by cultural beliefs and stereotypes. This is, however, usually not the case in many African societies. Studies have shown that health care practitioners find it difficult to broach sex related matters with older persons, specifically older women.²⁴⁵ Healthcare pamphlets and resource materials are also rarely targeted toward promoting the sexual health and wellbeing of older persons except as they relate to the use of sexuopharmaceutical drugs, which is also disproportionately targeted and made more readily accessible to older men. The impact of this lack of information about issues relating to the sexual health of older women is the continued marginalisation of older women with regards to their sexual rights and increased social biases and stereotypes about older women's asexuality.

These biases are made evident in the media representation of older women in movies. For example, in Nollywood movies (the popular Nigerian movie industry), older women are very seldom portrayed as sexually active citizens or sexual rights holders, independent of their stereotypical roles as 'wives', 'mothers', 'mothers in law', 'grandmothers' and 'care givers'. These are some of the narratives that influence people's perceptions and beliefs about older women's sexuality and stifle the importance placed on providing the right kind of information to older women to improve their sexual health and wellbeing. On the flipside, the media can also become an important medium in changing the narrative, stereotypes and misconceptions about older women by providing the needed information and education about sexuality, sexual health and rights.

The right to comprehensive sexuality education is also closely related to the right to information, with older women requiring 'age appropriate, scientifically accurate, culturally competent comprehensive sexuality education that must be grounded in human rights, gender equality and a positive approach to sexuality, ageing and pleasure'.²⁴⁶ According to Muliira and Muliira, having knowledge about sexuality in later life, even from an early age, is

²⁴⁴ S Hinchliff & C Barrett 'Introduction to the sexual rights of older people' in C Barrett & S Hinchliff (n 11) 7.

²⁴⁵ Muliira & Muliira (n 230) 472.

²⁴⁶ WAS (n 84) 3.

important in developing a more positive attitude towards sexuality among older persons.²⁴⁷ Hence, older women have a right to education on issues relating to sexual health and wellbeing as opposed to the oppressive 'silence' that characterises the issue of sexuality among older women in Africa.²⁴⁸

The right to an effective remedy for violations of fundamental rights

With regards to access to justice, it is important to see how intersecting vulnerabilities and discrimination can hinder older women from accessing justice, remedy and redress in an equitable manner. If getting law enforcement agents to take violence against women seriously is a huge challenge based on patriarchal norms and beliefs that lend themselves to victim blaming and shaming, re-traumatisation and re-victimisation of the victim, one can then begin to understand the increased difficulty experienced by older women when ageism is added to the mix. As indicated previously, older women's experiences of sexual violence are usually downplayed and dismissed based on the aforementioned stereotypes and biases, limiting access to justice for older women.²⁴⁹

Hence, as provided for under article 8 of the Maputo Protocol, states will need to ensure the availability and accessibility of redress and referral services, including medical and legal services, taking into consideration the compounded vulnerability that older women face.²⁵⁰ However, beyond accountability for sexual assault and sexual violence for older women, there is a need for justice with regards to other forms of discrimination that older women face from healthcare practitioners, family members, partners and children.

4.2. Major gaps in addressing the sexual rights of older women within the African human rights system

The African human rights system has made definite strides in advancing the sexual rights of older women. However, a number of challenges remain in older women being able to access or enjoy their sexual rights in an equitable manner under the available legal frameworks. One of such challenges is the normative gap that still exists in the areas of sexual rights and more specifically with regards to the sexual rights of older women.²⁵¹ Even though under the African human rights system there are two major legally binding instruments that address the sexual rights of older women, a holistic approach to sexual rights based on the definition of sexual rights by the World Health Organisation (WHO)²⁵² and the World Association for Sexual Health (WAS) is still largely missing.²⁵³

²⁴⁷ Muliira & Muliira (n 230) 474.

²⁴⁸ Nyanzi (n 6) 494.

²⁴⁹ S Hinchliff & C Barrett 'Introduction to the sexual rights of older people' in C Barrett & S Hinchliff (n 11) 24.

²⁵⁰ Maputo Protocol (n 20) art 8.

²⁵¹ HelpAge International (n 159) 2.

²⁵² WHO 'Sexual and reproductive health'

https://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/ (accessed 19 June, 2019).

²⁵³ WAS (n 84) 2&3.

The major gap here is the framing of the provisions on sexual rights in both the legally binding and non-legally binding instruments and policy frameworks. In this regard, while the purpose of sexual rights is to both protect ‘people from harm, violence, and abuse (negative) and to promote the freedom for diverse expressions of sexuality (positive), most of the provisions address the negative aspects (the freedom from) and not the positive aspects of sexual rights (freedom to).²⁵⁴ Hence, whilst it is clear that sexual abuse of older women is unacceptable, there are no indications that older women actively have other sexual rights that they are entitled to that are not within the violence or disease prevention framework. Also, even where the instrument or legal framework makes provision for sexual and reproductive rights, it is more often in favour of reproductive rights than sexual rights, leaving older women past childbearing age, outside the umbrella of its protection. Consequently, older women will be less likely to find legal justification for the expression of their sexuality free from discrimination and bias, within current legal frameworks. This challenge stems from the obvious reluctance to holistically embrace sexual rights within the African human rights system based on deeply entrenched cultural and religious biases. As Lottes indicated, ‘it is easier to get acceptance for negative rights that promote freedom from violence and abuse than to get consensus on freedom for diversity and self-expression’.²⁵⁵ Hence, the observable gap in addressing the sexual rights of older women within the African human rights system at regional and sub-regional levels.

Another major issue within the current human rights system with regards to the sexual rights of older women is that of implementation. This implementation gap may be as a result of ‘a lack of political will, a conscious or unconscious de-prioritisation of the issue...alleged lack of resources and lack of visibility of the issue in international or regional discourse to provide impetus for action’.²⁵⁶ It can also be fuelled by lack of a technical understanding on how to implement procedures to be able to fulfil obligations to older women as it affects their sexual health and rights.

Sexual rights of older women are addressed to some extent within the current regional and sub-regional legal frameworks, specifically with regards to protection of older women from sexual violence, exploitation and HIV/AIDs. However, this protection has ultimately failed to translate into more age and gender sensitive laws and policies at the national level, with the policies that exist only marginally focusing on the sexual rights of older persons. According to the study conducted by HelpAge in Southern Africa, there remains a huge legislative deficit in the protection of the rights of older women, including their sexual rights.²⁵⁷ At the time of the study, only South Africa and Tanzania had policies promoting the rights of older women from violence and HIV.²⁵⁸ The laws in Lesotho, Namibia, Malawi and Zambia did not address the discrimination, violence and HIV risk faced by older persons.²⁵⁹ Nevertheless, since then,

²⁵⁴ Lottes (n 101) 379.

²⁵⁵ Lottes (n 101) 379.

²⁵⁶ HelpAge International (n 159) 2.

²⁵⁷ Centre for Human Rights (n 223) 80.

²⁵⁸ n 223, 84.

²⁵⁹ n 223, 84.

countries such as Malawi, Lesotho and Zambia have put in place policies on ageing which whilst commendable, do not address the sexual rights of older persons in a holistic manner save the minimal reference to sexual abuse, violence and HIV risks.²⁶⁰

The African Commission plays a significant role in monitoring the implementation of the African Charter and Maputo Protocol with regards to monitoring the compliance of state parties with the protection and promotion of the sexual rights of older women. However, their capacity at enforcement and getting states to comply with the provisions of the African Charter and the Maputo Protocol has constantly been questioned given that many states are yet to comply with their reporting obligations under article 62 of the African Charter²⁶¹ and article 26 of the Maputo Protocol without any repercussion.²⁶² Also amongst those that have complied, the sexual rights of older women has not been adequately addressed in the state party reports with many states lacking data and statistics on sexual violence against older women and HIV prevalence amongst this vulnerable group. This negligence is an offshoot of the prevalent stereotypes surrounding older women and sexuality and also because of the predominant focus on women in their reproductive age rather than older women.

Lastly, there are very few instruments which actually define sexual rights in a holistic manner to address both positive (freedom to) and negative (freedom from) rights of older women.²⁶³ This gap leads to a general lack of understanding and information about the sexual rights of older women. The common conception is that older women are no longer sexually active and therefore not at risk of contracting the sexually transmitted disease or are immune from rape and sexual abuse.²⁶⁴ These notions of ageing and sexuality fuel the dearth of research and information in this regard. It also contributes to the lack of policy interventions and awareness campaign regarding harmful stereotypes, myths and practices that affect the sexual health and wellbeing of older women such as the myth of sex as a cure for AIDS or rape of older women for money rituals.²⁶⁵ Furthermore, without research, disaggregated data and statistics at the regional and continental level, it is difficult to ascertain from the perspective of older women themselves, the extent of the challenge and the kind of rights and entitlements that may serve to enhance the fulfilment of their sexual rights.

4.3. Chapter Conclusion

From the above analysis of the sexual rights of older women *vis a vis* the available legal framework, it is evident that older women in Africa are a marginalised group when it comes to their sexual health and rights. Few legally binding instruments under the African human rights system address this important issue holistically and in a manner, that sets a positive precedent for the full enjoyment of the sexual rights of older women. Rather, negative

²⁶⁰ These policies include the National Policy for Older Persons, Malawi (2016); Lesotho Policy for Older Persons (2014) and the Zambia's National Policy on Ageing (2012).

²⁶¹ African Charter (n 53) art 62.

²⁶² Maputo Protocol (n 53), art 26.

²⁶³ Lottes (n 101) 379.

²⁶⁴ Begum (n 171) 1.

²⁶⁵ Centre for Human Rights (n 223) 81.

stereotyping, failure to acknowledge the sexual agency of older women and lack of an inclusive approach to sexuality has led to the invisibility of older women in national strategies, development initiatives and policy actions. These gaps have had a major bearing on the realisation of the sexual rights of older women across the African Continent. Ultimately, while these instruments, alongside their interpretative documents such as general comments and guidelines, enhance in principle various aspects of the sexual rights of older women, they remain insufficient in promoting and protecting older women in a way and manner that has a positive impact on their lived realities. In many African countries, ageism and sex discrimination continue to be tolerated and accepted at the individual, institutional and policy level and very few countries have legislation prohibiting discrimination based on age, sex and other intersecting vulnerabilities. Hence, the current legal frameworks will require the purposeful and holistic interpretation of the instruments to explicitly clarify the nature of sexual rights older persons are entitled to.

5. CONCLUSION

5.1. Brief Summary

This final chapter draws together the discussions and conclusions made in the previous chapters which were aimed at addressing the study's three key research questions- what claims to sexual rights do older women have; does the African human rights regional system provide adequate protection for advancing the sexual rights of older women and what lessons can be learnt from other international and regional human rights system to advance the sexual rights of older women in Africa. Herein, this chapter gives a synopsis of the main findings of this study whilst also attempting to suggest a way forward towards better promotion, protection and respect of the sexual rights of older women in Africa. This final evaluation is fundamental since it has been established from the previous chapters that the current legal frameworks are mostly insufficient in guaranteeing the sexual rights of older women.

5.2. Summary of findings

With the general ambiguity of the term 'sexual rights', this study was able to breakdown what the sexual rights of older women really are. Essentially framing the sexual rights of older women through the lens of existing rights, a narrative that has been expounded upon by the World Health Organization (WHO) and World Association for Sexual Health (WAS) in their definition of sexual rights. In this regard and directly applicable to the sexual rights of older women are the right to non-discrimination, the right to autonomy and bodily integrity, right to privacy, freedom from all forms of sexually related violence and coercion, the right to the highest attainable standard of health including sexual health, and the right to comprehensive sexuality education amongst others. Ultimately, this study agrees with Miller that sexual rights principles must comprise of the following groupings: 'integrity= autonomy rights (personhood), equality=nondiscrimination rights (diversity), bodily integrity=health rights, and participatory=empowerment rights'.²⁶⁶

Taking this analysis further in the review of the available legal framework within the African human rights system and other international and regional human rights system, this study notes that whilst the 'sexual rights of older women' are not explicitly mentioned in majority of the legally binding instruments, most of the frameworks analysed have provisions promoting aspects of the sexual rights of older women, the most common direct provision relating to protection from violence and HIV/AIDs. Nevertheless, a major gap is that sexual rights is yet to be addressed in a holistic manner, with the focus of many instruments being reproductive health and rights, inadvertently leaving out older women past their reproductive age and the discourse on sexual agency and pleasure. This makes it even more difficult to change the narrative, towards seeing older women as sexual citizens with their own

²⁶⁶ Miller (n 12) 90.

entitlements and rights. Nevertheless, the Inter-American Convention on the Rights of Older Persons, despite its limitations, gives the most comprehensive glimpse of the legal protection available for older women's sexual rights as it establishes clearly, with no room for misinterpretation, that older persons are sexual agents.²⁶⁷ This can serve as a reference point towards strengthening the protection of the sexual rights of older women under the African human rights system.

Furthermore, this study also surmised that older women in Africa face specific and intersecting forms of discrimination on the basis of their age, sex, socio-economic status, disability, sexual orientation and gender identity amongst others, but are largely invisible when it comes to laws, policy actions and interventions.²⁶⁸ Older women are also missing in the sexuality research and discourse based on presumptions about aging and sexuality that often peddle older women as asexual and not involved or interested in sexual activities.²⁶⁹ These assumptions are rife within the society, shaping older women's perception of themselves, influencing their interactions with both the health care and justice systems and altogether limiting older women's ability to enjoy pleasurable and safe sexual experiences.²⁷⁰

Consequently, a review of the sexual rights of older women within specific regional context makes clear the insufficiency of the current legal framework under the African human rights system in addressing the sexual rights of older women in Africa. Hence, this study makes a case for strengthening the current legal framework for a more holistic sexual rights framework that embodies both freedom from (negative rights) and freedom to (positive rights) and centres on the specific needs and vulnerabilities of older women. Fundamental, however, is that interventions in this regard must not be peddled as a one size fits all approach but rather be flexible enough to address the multiple and diverse ways in which sexuality is understood and experienced by older women.

5.3. Recommendations

Having acknowledged the normative gap that exists in the African human rights system for the protection and promotion of the sexual rights of older women in Africa, it becomes imperative that the African Commission and member states take concrete steps to address the very pertinent needs and vulnerabilities of older women. Some of the ways by which these can be done include:

²⁶⁷ n 179, art 14.

²⁶⁸ HelpAge International (n 159) 8.

²⁶⁹ R Thorpe, B Fileborn & LH Clark (n 209) 32.

²⁷⁰ n 209, 35.

5.3.1. Strengthening the oversight function of the African Commission

The African Commission has a tripartite mandate which is the protection and promotion of human rights as well as the interpretation of the African Charter and its Protocols.²⁷¹ Hence, in accordance with the African Commissions' promotional mandate, more visibility needs to be given to older women's sexual rights, an area which has hitherto been marginalised in the human right and sexuality discourse. This can be done through the African Commission's promotional and sensitisation visits to member states as well as targeted fact finding missions. More research also needs to be commissioned across the region to determine the extent of the challenges faced by older women with regards to their sexual rights. These action by the African Commission will assist in demystifying the assumptions and bias surrounding older women and sexuality. It will also throw more light to the specific challenges faced by older women in Africa in accessing their sexual rights free from discrimination and abuse.

Also, and very significantly, steps required to holistically address the sexual rights of older women include expanding the scope of existing laws to more concretely speak to the lived realities of older women in Africa. This action is critical in order to dismantle the sexual hierarchy that has reproductive sex and bodies at the top and other non-reproductive sexualities underneath and repressed. Consequently, the African Commission has a role to play in human rights standard setting, through the issuance of general comments and adoption of resolutions and other soft laws instruments that elaborate on existing laws and clearly spell out the sexual rights of older women to include both positive and negative rights. This strategy is not without its challenges, given that soft laws are not binding in nature and have limited capacity for enforcement.

The Commission can also use its protection mandate and its duty to monitor the implementation of the Africa Charter and its protocols to draw member states attention to the gaps in national laws and policies that fail to holistically address the sexual needs and vulnerabilities of older women. With regards to the lack of implementation of existing provisions that address aspects of the sexual rights of older women, the African Commission has a major role to play in holding government accountable to the protection of the sexual rights of older women as enshrined in the African Charter, Maputo Protocol and the yet to be enforceable, Older Persons' Protocol. Unfortunately, as analysed in the previous chapters, accountability becomes difficult in instances where the sexual rights of older women are not clearly spelt out. In this regard, the African Commission must also encourage the submission of individual communications and complaints in this area to develop regional jurisprudence for better protection of the sexual rights of older women.

²⁷¹ African Commission on Human and Peoples' Rights 'Mandate of the Commission' <https://www.achpr.org/mandateofthecommission> (accessed 24 September, 2019).

5.3.2. Bridging the normative gap at sub-regional level

The AU regional economic communities (RECs) blocs play a crucial role in promoting human rights standards across the region. They also complement and sometimes inform the policies and plan of action of the AU. Hence, they can be instrumental in addressing the sexual rights of older women in Africa through research and the development of specific policies, across the different sub-regions, which will address the sexual rights of older women and the implementation thereof. The IGAD Sexual and Reproductive Health and Rights Strategic Policy framework is a good example despite its lack of reference to older women as a vulnerable group.

5.3.3. Litigation as a pathway

Litigation is another avenue for addressing the gaps in the available legal framework with regards to the sexual rights of older women. This can be at the regional, sub-regional and national level and allows the court to elaborate and expand on the provisions of the law, giving more progressive meaning to articles and sections that do not currently explicitly cover sexual rights of older women. Hence, this litigation strategy which can be pursued by civil society organisations (CSOs); state parties and other interest groups will be vital in creating case law precedent and jurisprudence to better protect the sexual rights of older women. Also creating a legal eco-system wherein, the enforcement of the sexual rights of older women is more plausible and justiciable.

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