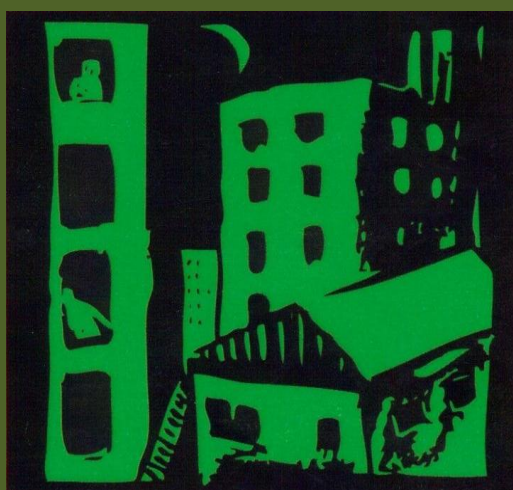


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The relevance of a multidisciplinary interpretation of selected aspects related to women's sexual and reproductive health rights in Africa

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1 INTRODUCTION

Generally, women's rights and interest are steadily being recognised and given the attention they deserve at the global, regional and national levels. Despite this recognition of women's rights at these levels, and in several human rights

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instruments, it should be noted that the protection and enforcement of women's sexual and reproductive health rights, particularly, has not been given sufficient attention in the priority list of some governments and the legislation they have enacted.¹ Unfortunately, this legislative vacuum intensifies the traditional recognition and the value of women in some communities only for their childbearing ability. This, the absence of their childbearing ability automatically extinguishes such value and limits women's enjoyment of their sexual and reproductive health rights. This is the more so, because conventional African traditions, such as patriarchal customary practices do not empower women to make decisions especially on issues that relates to their own lives, families, the lives of their children, or communities. This is so because these practices are deep-rooted concepts of culture and tradition in many sub-Saharan African societies designed by men.

However, in the 1990s a trend in worldwide events calling for women's rights in general and their sexual and reproductive health rights in particular to be protected and enforced, enabled women to receive some credit for and acceptance of the legality of their claims to sexual, reproductive and related choices. Specifically, international conferences, designed to address issues such as, human rights,² population and development,³ social development,⁴ and women,⁵ improved and guaranteed the protection and enforcement of women's sexual and reproductive health rights. These conferences contributed broadly to make sexual and reproductive health rights part of human rights and bestowed legitimacy on the need to protect women's sexual and reproductive health rights.⁶ Despite their different schedules and themes, the debates at these conferences regarding the protection of women's sexual and reproductive health rights were valuable and expanded the scope of these rights, through linkages with other crucial women's rights, such as, their rights to life and physical dignity.

The consensus documents produced by these conferences could be seen as a flicker of light signalling the hope that the protection and promotion of women's sexual and reproductive health rights could be given the attention they deserve in the priority list of human rights bodies and governments. However, Cook maintains that the development of women's rights in general "must go beyond the drafting of conference documents" and that State parties and related stakeholders must ensure that the rights recognised in such documents "in principle are respected in practice through effective

¹ Cook R "International protection of women's reproductive rights" (1992) 24(2) *Journal of International Law and Politics* 645.

² The Vienna Declaration and Programme of Action, Vienna, 14-25 June 1993, United Nations (UN) Doc. A.CONF.157/24 (1993).

³ The International Conference on Population and Development ("ICPD"), Programme of Action of the International Conference on Population and Development, Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, UN Doc. A/CONF.171/13 (1994).

⁴ The Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development, Copenhagen, 6-12 March 1995, UN Doc. A/CONF.166/9 (1995).

⁵ The Fourth World Conference on Women (FWCW), the Platform for Action of the Fourth World Conference on Women, Beijing, 14-15 September 1995, UN Doc. A/CONF.177/20 (1995).

⁶ Castro R & Erviti J "Violations of reproductive rights during hospital births in Mexico" (2003) 7(1) *Health and Human Rights* 90 at 91.

legal protection".⁷ Therefore, the lack of a legislative principle guaranteeing women's sexual and reproductive health rights in Africa exacerbated the abuse suffered by women. However, in 2003, women gained significant legislative protection and promotion of their right to control their sexual and reproductive health.⁸ Regrettably, despite this legislative development, several legal debates and research in favour of women's rights, women's health concerns, human rights and social security in Africa, comprehensive women's sexual and reproductive health care is still inadequately understood and/or applied in most African countries.

This contribution seeks to highlight through its suggestion for the adoption of a multidisciplinary interpretative approach, the legal interpretative gaps that have characterised the understanding and implementation of three crucial aspects deeply related to women's sexual and reproductive health rights, namely: non-discrimination, informed consent and HIV/AIDS. Nevertheless, an inclusive assessment of women's sexual and reproductive health rights in Africa would unavoidably have to scrutinise in detail each and every related aspect of these rights, such as, but not limited to abortion, dignity, marriage, fertility control and contraception. This article, however, is selective and limits itself to the aspects of non-discrimination, informed consent and HIV/AIDS. The selection of these three aspects is based on the premise that although a comprehensive understanding of women's sexual and reproductive health rights includes several other aspects, these selected aspects are central and fundamental to women's rights in general and their sexual and reproductive health rights in particular, especially in Africa. In fact, they may be considered as a "golden thread" that runs through women's sexual and reproductive health rights and constitute the core of ascertaining whether women's sexual and reproductive health rights have been protected and enforced. Also, these aspects could, rightly so, be referred to as the foundation from which the nature, significance and range of these crucial rights radiate. Regarding their interpretation from a multidisciplinary approach, they (the selected aspects and disciplines) are simply presented as "guinea pigs" in the broader enhancement of the understanding and protection of women's sexual and reproductive health right.

The focus is on promoting the relevance of a multidisciplinary interpretation of women's sexual and reproductive health rights in Africa through the interpretation of selected aspects related to these rights with the help of identified disciplines. The main African instrument of reference shall be the Protocol to the African Charter on the Rights of Women in Africa ("African Women's Protocol").⁹ At this point, it is important to first put women's sexual and reproductive health rights into context in an attempt not only to provide a synopsis of what this right entails but also to justify why and how

⁷ Cook R "Keynote speakers: Human rights and reproductive self-determination" (1995) 44(4) *American University Law Review* 975 at 977.

⁸ The Protocol to the African Charter on the Rights of Women in Africa ("African Women's Protocol") (2003).

⁹ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003, and entered into force on 25 November 2005. As of 22 July 2010, only 28 African states had ratified the African Women's Protocol.

these three critical aspects have been identified. Later, a legal interpretation of these three aspects relating to women's sexual and reproductive health rights will be analysed and then, the relevance of adopting a multidisciplinary interpretative approach to enhance the understanding and implementation of women's sexual and reproductive health rights will be considered.

2 PUTTING WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH RIGHTS INTO CONTEXT

The need for the protection and enforcement of women's sexual and reproductive health rights within certain African communities, for instance, raises sensitive issues because it relates to women's sexuality and affects the "moral order" of most African communities.¹⁰ The belief in some African communities is that women cannot make decisions on issues relating to their sexuality without the consent of their male partners or husbands. In these communities, protecting and enforcing women's sexual and reproductive health rights is believed to have lasting moral effects on male dominance. In some cases, this moral order is reflected in national laws, as these laws in most cases maintain and promote male supremacy by controlling and denying women's sexual and reproductive health rights.¹¹

It is possible that the non-recognition of women's sexual and reproductive health rights within certain African communities results from the fact that then there was no concise or explicit definition of what exactly women's sexual and reproductive health rights were. However, participants at the 1994 Programme of Action of the ICPD defined sexual and reproductive health as "a state of complete physical, mental and social well-being...in all matters relating to the reproductive system and to its functions and processes".¹² Understanding sexual and reproductive health, therefore, is not mainly about the absence of "disease or infirmity".¹³ According to Packer, sexual and reproductive health entails that "people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so".¹⁴

The protection and enforcement of sexual and reproductive health rights, therefore, knows no gender or sexuality boundaries and are thus important to every human being. However, women's biological challenges, such as, childbearing and their delicate body anatomy, distinguish women's sexual and reproductive health priorities from those of any other human being and identify women as vulnerable. It is this vulnerability that highlights women's sexual and reproductive health rights as critical in asserting their dignity. For example, the Supreme Court of Canada observes in *R v Morgentaler* that

¹⁰ Cook (1992) at 645.

¹¹ See for example ss 296, 297 and 298 of the Penal Code of Cameroon.

¹² ICPD para 7.3.

¹³ ICPD para 7.3.

¹⁴ Packer C, *The right to reproductive choice: A study in international law* (1996) at 1.

women's sexual and reproductive health rights have become "an integral part of a modern woman's struggle to assert her dignity and worth as a human being".¹⁵

Over the years, women's sexual and reproductive health rights have developed and are founded on a wide range of ethical, religious and political traditions. An example of such is the Universal Declaration of Human Rights¹⁶ ("UDHR"). Also, most accepted and recognised international human rights monitoring bodies, such as, the Committee on the Elimination of All Forms of Discrimination against Women ("CEDAW Committee"), have adopted a consistent standard explicitly ensuring that women's sexual and reproductive health rights in particular are protected and enforced. Unfortunately, only the African Union (AU) is the exception, and the African Women's Protocol is the only human rights instrument that has overtly protected women's sexual and reproductive health rights.¹⁷ Nevertheless, women's sexual and reproductive health rights are rooted, however inexactly, in other binding international human rights conventions. Examples of such conventions are: the Convention on the Elimination of All Forms of Discrimination against Women¹⁸ ("CEDAW"); the Convention on the Rights of the Child,¹⁹ ("CRC"); the International Covenant on Economic, Social and Cultural Rights²⁰ ("ICESCR"); the International Covenant on Civil and Political Rights,²¹ ("ICCPR"); and the Convention on the Elimination of All Forms of Racial Discrimination²² ("CERD").

Moreover, women's sexual and reproductive health rights are human rights but are not isolated rights. Related rights include, amongst others, the rights to life, dignity, medical abortion, information, informed consent, health, non-discrimination, access to medicine, and mother to child prevention of HIV/AIDS, as well as the right to decide on the number and spacing of children.²³ Also, the right to privacy and the right to be free from sexual and gender based violence are linked to the violation of women's sexual and reproductive health rights.²⁴ Furthermore, women's right to physical integrity is recognised in treaty provisions protecting the right to human dignity and the rights to liberty and security of the person.²⁵ At the AU level, for example, the right to physical

¹⁵ *R v Morgentaler* 1988 (30), CAN at 172.

¹⁶ Art 16(1) of the UDHR (1948).

¹⁷ Art 14 of the African Women's Protocol

¹⁸ Arts 10(h), 11(f), 12, 14(2)(b) and 16 of the CEDAW, UN Doc. A/34/46 (1979).

¹⁹ Arts 24(2)(d) and (f) of the CRC, UN Doc. A/44/49 (1989).

²⁰ Art 12 of the ICESCR, UN Doc. A/34/46 (1966).

²¹ Art 23(2) of the ICCPR, UN Doc. A/6316 (1966).

²² Art 5 of the ICERD, UN Doc. A/6014 (1966).

²³ Sadik N, "The Right to Reproductive and Sexual Health" (1997). Available at <http://www.un.org/ecosocdev/geninfo/women/womrepro.htm> (accessed 10 January 2010).

²⁴ See *Roe v Wade* 1973 (410) U.S. 113. Available at <http://www.caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=410&invol=113> (accessed 12 July 2010). In which the Supreme Court of America held that the constitutional right to privacy extends to a woman's decision to have an abortion. See also *A.S v Hungary* CEDAW Committee, Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004 (2006) in which the CEDAW Committee in this landmark case stressed the importance of obtaining informed consent in ensuring women's sexual and reproductive health rights, and lamented, amongst other things, that Mrs Szijarto's lack of informed consent to be sterilized "permanently deprived her of her natural reproductive capacity".

²⁵ Art 12 of the UDHR and Art 17 of the ICCPR.

integrity is given formal recognition in Article 4 of the African Charter of Human and Peoples' Rights²⁶ ("African Charter") and in the Americas, Article 5(1) of the American Convention on Human Rights²⁷ ("American Convention").

Generally, denying a woman the option of avoiding pregnancy or childbirth limits her chances and interferes with her right to decide on a matter with far-reaching effect for her body and personal liberty. According to the Committee on Economic, Social and Cultural Rights ("ICESCR Committee") in its General Comment No 14 on the right to health, these related rights to women's health in general and their sexual and reproductive health rights in particular are "underlying determinants of health".²⁸ The ICESCR Committee also adds that these underlying determinants of health and women's sexual and reproductive health rights also includes their right to control their body and to be free from any interference, torture, non-consensual medical treatment and experimentation.²⁹

From the above discussion it follows that the non-recognition of women's sexual and reproductive health rights in Africa, for example, has a strong potential to violate international and/or African human rights norms. This is the case especially in situations where women are forcefully sterilised or refused the right to abortion in pregnancy situations which could result in their deaths or further physical complications. Women's right to free and full consent in matters relating to their sexual and reproductive health, as recognised in international and/or African human rights norms, cannot be achieved if a woman is not in the right frame of mind to make informed decisions. Similarly, consent obtained through force or duress also indicates a clear violation of accepted human rights norms that require that there should be free and full consent at all times in matters relating to women's sexual and reproductive health rights.

3 LEGAL INTERPRETATION OF WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH RIGHT

The primary African women's rights under examination in this article are women's sexual and reproductive health rights. In Africa, this right is given full recognition in Article 14 of the African Women's Protocol. As already stated above, this instrument is the only human rights instrument that gives explicit expression to the protection and enforcement of women's sexual and reproductive health rights. In doing so, the African Women's Protocol contributes, by way of codification, in expanding the values implicit in other international human rights instruments, such as, the UDHR, the CEDAW, and the ICESCR. The African Women's Protocol [also] obliges State parties in general to "combat all forms of discrimination against women through appropriate legislative,

²⁶ African Charter on Human and Peoples' Rights, adopted 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (1982) (entered into force 21 October 1986).

²⁷ American Convention on Human Rights (1969), O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (entered into force 18 July 1978).

²⁸ ICESCR Committee, General Comment No 14 para 4.

²⁹ ICESCR Committee, General Comment No 14 para 8.

institutional and other measures”,³⁰ particularly “those harmful practices which endanger the health and general well-being of women” and to ensure that their “sexual and reproductive health is respected and promoted”.³¹

The possible inferred underlying ambition of the African Women’s Protocol expressed through its protection of women’s sexual and reproductive health rights, is to lessen maternal mortality and morbidity and to improve women’s dignity and their sexual and reproductive self-determination. Surely, this underlying ambition can be achieved if State parties undertake to ensure effective preventive and therapeutic measures at national level to afford women the capacity for sexual and reproductive self-determination by eliminating discriminatory legislation and practices. Currently, this ambition is far from being realised. This is evident, amongst others, in the case relating to women’s sexual and reproductive health rights in Uganda (*Centre for Health Human Rights and Development and others v Attorney General*), in which the Constitutional Court of Uganda dismissed the case predominantly basing its decision on meagre political excuses with little or no significant bearing on the underlying ambition of the African Women’s Protocol in general.³²

As broad as women’s sexual and reproductive health rights seem, it is beyond the scope of this article to consider all their related aspects. Thus, only the three aspects identified above as essential determinants for ensuring the full protection and enforcement of women’s sexual and reproductive health rights shall, in this section, undergo legal interpretation. The debate here largely deals with the identification and analysis of the loopholes that exist within the legal interpretation of the case law and statutes with explicit prominence with regard women’s sexual and reproductive health rights in Africa. It is important to highlight at this point that even though no complaints have been brought before either the African Court on Human and Peoples’ Rights³³ (“African Court”), or the African Commission on Human and Peoples’ Rights, (“African Commission”) relating to women’s sexual and reproductive health rights in Africa, court decisions and legislation elsewhere relating to the interpretation and enforcement of these rights and related aspects shall be considered in an attempt to strengthen and to add value to the importance of ensuring these rights for African women. This section seeks to extend the legalistic understanding of women’s sexual and reproductive health rights by emphasising both its contributions and limitations and proposing possible supplementary interpretative approaches of other social sciences, such as, anthropology, sociology and psychology. It is argued that each makes a crucial contribution but that none is sufficient on its own; each should be applied to supplement the limitations of the others; and legal approaches should positively assimilate the approaches of other social sciences.

³⁰ Art 2(1) of the African Women’s Protocol.

³¹ Arts 2(1)(b) and 14(1) of the African Women’s Protocol.

³² *Centre for Health Human Rights and Development and others v Attorney General*, Constitutional Petition No 16 of 2011.

³³ The African Court was established on the 25 January 2004.

The traditional methods of interpreting legal provisions are provided for by the juridical methods of interpretation stated in the Vienna Convention on the Law of Treaties (“Vienna Convention”) namely, contextual interpretation and interpretation in good faith.³⁴ Perhaps, these methods of interpretation, on their own, have stood the test of time in explaining and decoding legal provisions through adopting purely legalistic interpretative techniques. However, exploring other methods of interpretation to supplement the legal interpretation of women’s sexual and reproductive health rights is critical. Moreover, such consideration does not diminish in any way the crucial contribution legal interpretation has made and continues to make in strengthening human rights norms in general. The three key aspects identified in this paper will be suggested as a legal interpretative approach and possible multidisciplinary interpretative approaches will be separately examined with the assistance of identified disciplines.

3.1 Non-discrimination

The constraint of what constitutes discrimination against women is not a concern which African governments, for example, willingly accept or deny. However, the legal obligation for State parties to the African Women’s Protocol, for example, to eliminate all forms of discrimination against women is a deep-rooted principle of international human rights law.³⁵ Elsewhere, still within the African human rights system, non-discrimination has been protected by the African Charter³⁶ and the African Charter on the Rights and Welfare of the Child.³⁷ Also, African governments at the Third Ordinary Session of the AU Assembly of Heads of State and Government in Addis Ababa, Ethiopia, in July 2004, adopted and fully committed themselves to the Solemn Declaration on Gender Equality in Africa. The AU has also gone a step further in addressing gender equality by appointing, for the first time in Africa, a Special Rapporteur on the rights of

³⁴ Art 31 of the Vienna Convention. See also Dugard J, *International law: A South African perspective* (2000) at 338-339, in which he confirms that these methods of interpretation have no hierarchical order. Any applies when necessary.

³⁵ See generally Art 2 of the African Women’s Protocol which provides an expansive definition, state obligation and coverage of women’s right to non-discrimination.

³⁶ Art 2 states: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”. Art 3(1) (2) expressly provides that “[e]very individual shall be equal before the law, [and] shall be entitled to equal protection of the law”. Under Art 18(3), the African Charter States parties are called to ensure “...the elimination of every discrimination against women”. Considering that the African Charter also protects the rights of peoples’ (collective rights) it is imperative to mention Art 19 which provides: “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”

³⁷ See generally Art 3 which provides that “[e]very child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child’s or his or her parents’ or legal guardians’ race, ethnic group, colour, sex, language, relation, political or other opinion, national and social origin, fortune, birth or other status” and Art 21(1) which calls on State parties to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular - those customs and practices discriminatory to the child on the grounds of sex or other status”.

women.³⁸ Despite these developments, in Africa discrimination based on sex, for instance, is one of the core catalysts of most human rights violations suffered by women all through their life cycle – making them vulnerable in some instances. Discrimination against women within most communities in Africa is both endemic and well-documented. Nonetheless, the measures put in place by various African states to completely eliminate discrimination against women are, in most cases, inefficient and do not address the underlying causes of such practices. An example that comes to mind, though not relating to women directly but to discrimination directed against vulnerable group (mentally ill persons) of people, is the African Commission's decision in the case of *Purohit and Moore v The Gambia*³⁹ ("*Purohit case*"). This communication was submitted before the African Commission by Purohit and Moore on behalf of patients (some of whom were women) detained at Campama (a psychiatric unit of the Royal Victoria Hospital) as well as current and future mental health patients detained under the Mental Health Acts of The Gambia. In this case, the African Commission decided on the merits by exploring the prohibition of discrimination on the grounds of disability and the meaning of the right to health as provided for by the African Charter.⁴⁰ In interpreting the African Charter, the African Commission relied heavily on its own jurisprudence, and on apposite and applicable international and regional human rights instruments, principles and standards as prescribed by Articles 60 and 61 of the African Charter.⁴¹ This communication therefore, presented an opportunity for the African Commission to explore and develop the human rights of mental patients. In so doing and finding The Gambia in violation of Articles 2 and 3 of the African Charter in particular, the African Commission stated *inter alia* that:

Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.⁴²

Though the decision of the African Commission in finding the Republic of The Gambia in violation, amongst others, of Article 2 of the African Charter, which provides a central principle of the commitment of the African Charter and is therefore critical in

³⁸ The first Special Rapporteur on the rights of women in Africa was appointed during the 25th Ordinary Session held in Bujumbura, Burundi, from 26 April to 5 May 1999, when the African Commission adopted resolution ACHPR/res.38 (XXV) 99 on the appointment of a Special Rapporteur on the Rights of Women in Africa. The resolution appointed the first Special Rapporteur in May 1999 retroactively as from October 1998. For more details on the mandate of the Special Rapporteur see <http://www.achpr.org/mechanisms/rights-of-women/about/> (accessed 1 August 2012).

³⁹ *Purohit and Moore v. The Gambia* (2003) African Communication No. 241/2001.

⁴⁰ *Purohit* at paras 77 – 83.

⁴¹ *Purohit* para 47. It is noteworthy that, though there are instruments at the global level specifically designed to protect the rights of mentally ill persons, such as, the Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care (United Nations General Assembly Resolution 46/119 adopted on 17 December 1991) and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (United Nations General Assembly Resolution 48/96 of 20 December 1993), there is no regional human rights instrument that overtly protects the rights of mental patients.

⁴² *Purohit* para 80.

eliminating discrimination in all its manifestations, and Article 3 of the African Charter, which is imperative because it assures fair treatment of all individuals within the legal structure of a given country, is commendable, it is submitted that the African Commission failed to apply its reasoning on the merits of this communication beyond legal interpretative boundaries. A step beyond the boundary of legal interpretation could have given the African Commission the opportunity to benefit from the interpretative techniques of other disciplines, such as, sociology. As a supplement to legal reasoning, sociological interpretative techniques have the potential of addressing and establishing such discriminatory practices from their root causes which in this case would be dissecting and interpreting what can aptly be referred to as human behavioural acceptance of mental patients.

In a different scenario relating to discrimination, several African traditions and customs, such as, patriarchy and property inheritance or ownership, suppress and discriminate against African women and [also] puts them in a bargaining position where they have little, if any, control over decisions which affect their physical conditions.⁴³ It is as a result of this insignificant status ascribed to African women by tradition and custom, or as a result of overt and/or covert discrimination, that limits them from financially and physically accessing sexual and reproductive health facilities. In fact, it is suggested that the lack of financial independence and alternative accommodation increases vulnerability to women's physical, sexual and emotional abuse.⁴⁴ In the Nigerian case of *Mojekwu v Iwuchukwu*,⁴⁵ ("Mojekwu case"), for example, the Nigerian Supreme Court held that the *Lli-Ekpe* custom which openly prohibited women from inheriting property is repugnant to natural justice, equity and good conscience, and went on to grant the widow (respondent) the right to inherit her late husband's property. Though acceptable, the decision in this case is similar to several other court decisions in Africa relating to the same legal issue, wherein lawyers and judges restrict, yet not enough, their reasoning only within legal doctrines. In this case, the Court's reasoning and decision were based on the human rights guarantees of the Nigerian Constitution and international human rights instruments, such as, CEDAW, in interpreting stringent customary practices that prohibit women from inheriting property.⁴⁶ Redistribution of property can affect various people's economic paths positively (acquiring more wealth) or negatively (loss of wealth from previously existing rights to property).⁴⁷ It is argued that property inheritance, though regulated by law, is an economic achievement that involves in some instances the use of figures

⁴³ Adjetey F "Reclaiming the African woman's individuality: The structure between women's reproductive autonomy and African society and culture" (1995) 44(4) *American University Law Review* 1351.

⁴⁴ Crichton J *et al*, *Painful tradeoffs: Intimate-partner violence and sexual and reproductive health Rights in Kenya* (2008) at 16.

⁴⁵ *Mojekwu v Iwuchukwu* 2004 (4) Nigeria SC 1.

⁴⁶ See generally, the summary of *Mojekwu* Case 1-2. Available at http://www.law.utoronto.ca/documents/reprohealth/LG028-9_Nigeria-Mojekwu_cases.pdf (accessed 18 November 2010). See also, the South African Case of *Bhe v Khayelitsha Magistrate* 2004 (1) SA 580 (CC) in which the Constitutional Court also relied on strictly legal principles, such as, the South African Constitution and case law in arriving at its decision.

⁴⁷ Cooper E *Women and inheritance in 5 Sub-Saharan African countries: Opportunities and challenges for policy and practice change* (2010) at 1.

and economic classification. It provides, to some extent, economic stability to the heir. The absence of such stability especially to an unemployed woman has the potential of depriving her from fully enjoying her right to sexual and reproductive health rights, amongst others.

The Court's decision in declaring void the *Lli-Ekpe* practice was, and still is, considered a landmark victory for the women of the Igbo community in Nigeria and Africa as a whole. Legally, while the court's approach to simply rely on the provisions of legislation to understand and interpret discrimination and decide on what should be done to address discrimination in the Igbo community is revolutionary, it is also strategically tricky when the decision forces change in a conservative community, without completely engaging issues that surround such customs and practices. Engaging issues, such as, patriarchal and/or patrilineal practices, holistically would address women's inheritance concerns from their root causes and not merely from the standards codified in legal instruments. In fact, the Court's interpretation of discrimination in this case is problematic in that it fails to analyse the structural imbalances of power between men and women and the complete nature of discrimination based on property inheritance that might exist within the Igbo community in Nigeria. The Court's failure to analyse these issues in this case using different interpretative techniques only results in a shallow solution to an entrenched practice that reduces women to sub-human beings.

The right to inherit property has the potential to enable women to derive from such property the necessary economic stability they need to access sexual and reproductive health facilities autonomously. Women's economic stability will virtually reinstate their dignity within the communities in which they live, and in almost certain terms reinstate their pride [as well] as human beings.

However, the Court's interpretation of women's right to property inheritance falls short in expanding this crucial women's right (right to non-discrimination) and creating sufficient linkages with other women's rights, such as, their right to physical dignity. Also, the Court missed out on a great opportunity to supplement its reasoning by expanding the meaning of this right with the help of the interpretative techniques of other disciplines, such as, sociology.⁴⁸

An inclusive sociological perspective, for example, through its "social-scientific"⁴⁹ interpretative approach of institutionalising human rights, has the potential of connecting the dots between a legalistic interpretation and a social understanding of women's right to inheritance and discrimination as a result of such practice. It is noteworthy that a socio-legal interpretative perspective gives judges and lawyers the opportunity to examine and understand women's right to non-discrimination relating to

⁴⁸ Cragun T *et al* *Introduction to sociology* (2006) at 7. Where sociology is defined as "the Study of Human Social Life".

⁴⁹ "This method's basic technique is called scientific observation, which is a precise systematic collection of data under controlled conditions by trained observers. It is intended to collect data as represented by the sociology of knowledge traditions under rigorously controlled conditions so that specific causes of specific results." Available at http://www.cliffsnotes.com/study_guide/Sociological-Research-Designs-Methods.topicArticleId-26957,articleId-26844.html (accessed 31 March 2011).

their sexual and reproductive health rights in its societal, political, and cultural context through analysing African traditional jurisprudential questions, for example, as empirical in nature and not just conceptual.⁵⁰

Elsewhere, a contextual understanding of Articles 1 to 5 and 24 of the CEDAW, which possibly form the common interpretative structure for all substantive provisions within the CEDAW, indicates, according to the CEDAW Committee, that three obligations⁵¹ are crucial to State parties' efforts to completely eliminate discrimination against women at national level. Also, the contextual understanding of these CEDAW provisions requires that these State parties' obligations should be implemented in an integrated fashion that extends beyond a purely formal legal obligation of ensuring equality between men and women.⁵²

Laws governing gender discrimination relating to property inheritance and ownership in Africa, for instance, vary from country to country and in some cases from community to community. The challenges that exist within a certain community may differ from those in another and thus make it difficult to take a broader view without paying attention to details and specific circumstances about discrimination relating to property inheritance against African women. Depending on the circumstances, the same inheritance law could empower or restrain women from the full enjoyment of their sexual and reproductive health rights.⁵³ For instance, in some communities, the inheritor of family property is not allowed to independently choose a partner and in some cases not allowed to have one at all, thus limiting or prohibiting a woman's right to key aspects that surround her sexual and reproductive health rights, such as, choosing, independently, whom to marry and bear children with. It is based on this analysis that this article recommends that, *ceteris paribus*; it would be realistic for courts, legal minds and society to adopt the interpretative techniques of other disciplines. Other interpretative techniques, such as, sociology' social-scientific interpretative approach would pay particular attention to details, clear ambiguities and effectively protect women against discrimination, as opposed to advocating for a complete revamp of an existing structure without thorough analysis as was the case in *Mojekwu's case*.

⁵⁰ Freeman M "Law and sociology" (2005) 8 *Current Legal Issues* 2.

⁵¹ General Recommendation No. 25 on Art 4 (2004) para 1, states: 'Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the de facto position of women through concrete and effective policies and programmes. Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions'.

⁵² General Recommendation No. 25 on Art 4 (2004).

⁵³ See generally, KARAMAH (Muslim Women Lawyers for Human Rights), "New CEDAW concept paper: Economic consequences of marriage and its dissolution" (2009) 2. Available at http://www.karamah.org/Portals/0/Kar_Content/cedaw.pdf (accessed 31 March 2011).

3.2 Informed consent

The significance of the aspect of informed consent as a mechanism for ensuring the complete protection and enforcement of the basic rights of every individual and women's rights in particular cannot be over-emphasised. Embedded in the human right to privacy, the extent of a patient's independence as a steering principle in therapeutic decision making is, in many instances, arguably the axle on which most court decisions rotate. Regarding women's sexual and reproductive health autonomy, the CEDAW Committee contends that informed consent is based on a "realistic and participatory approach aimed at making accessible information and services to couples to prevent unwanted pregnancies that are too closely spaced, too early or too late".⁵⁴

At the African level, even though well-articulated in its binding human rights instruments and national laws, obtaining a woman's informed consent regarding her reproductive health is almost non-existent. For example, in a typical African traditional setting where a man is considered the main "decision maker", women are only informed by their husbands of his "final" decision. However, Eriksson observes that there is a "gradual move away" from this notion and that some women now know at least some contraceptive methods and where to obtain them if needed, without necessarily seeking the consent of their partners.⁵⁵ Also, the *Purohit case*,⁵⁶ though not directly related to the issue of informed consent relating to women's sexual and reproductive health rights, relates to the lack of "consent to treatment or subsequent review of continued treatment" of mentally ill patients in a psychiatric unit.⁵⁷ In the course of handing down the decision, the African Commission, rightly so, endorsed the allegation of the complainants and linked the lack of consent to treatment, amongst others, as constituting separate and joint violations of the "respect for human dignity in Article 5 of the African Charter and the prohibition against subjecting anybody to cruel, inhuman and degrading treatment as contained in the same Charter provision".⁵⁸ The African Commission also made reference to its earlier decisions in *Media Rights Agenda v Nigeria*,⁵⁹ in which it stated that the term "cruel, inhuman or degrading punishment and treatment" should be interpreted as including "the widest possible protection against abuses, whether physical or mental";⁶⁰ and in *Modise v Botswana*,⁶¹ in which it states that "exposing victims to 'personal suffering and indignity' violates the right to human dignity".⁶² The African Commission went on to accentuate that "personal suffering and indignity can take many forms, and will depend on the particular circumstances of each

⁵⁴ Commission on the Status of Women, UN Doc. E/CN.6/1996/CRP.2 (1996) para 71.

⁵⁵ Eriksson M *Reproductive freedom: In the context of international human rights and humanitarian law* (2000) at 245.

⁵⁶ *Purohit*.

⁵⁷ *Purohit* para 5.

⁵⁸ *Purohit* para 55.

⁵⁹ *Media Rights Agenda v Nigeria* (2000) AHRLR 262.

⁶⁰ *Purohit* para 58.

⁶¹ *Modise v Botswana* (2000) AHRLR 30.

⁶² *Purohit* para 58.

communication brought before the African Commission".⁶³ In this communication, the African Commission after carefully and meticulously analysing the alleged violations of the provisions of the African Charter submitted by the complainants, chose, rightly so, to recommend a "[r]epeal of the Lunatics Detention Act [LDA] and replace it with a new legislative regime for mental health in The Gambia compatible with..." the African Charter and "International standards and norms for the protection of mentally ill or disabled persons". The African Commission's preference to adopt such a lucid and targeted or exhaustive recommendation calling for the complete replacement of the LDA, compatible with the African Charter, is brave.⁶⁴

Contextually, informed consent is a very broad concept especially when relating to women's sexual and reproductive health. For example, as illustrated below, while some courts have attended to instances of lack of informed consent that resulted in wrongful birth, others have attended to instances of the same that resulted in sterilisation. In Africa, there is a gradual influx of cases on the lack of informed consent relating to women's sexual and reproductive health rights at national levels. For example, the Windhoek High Court in Namibia recently handed down judgement in favour of the plaintiffs in three cases involving a group of women who were forcefully sterilised without their consent during child birth because they were HIV positive. In all three cases, the plaintiffs (sterilised women) sued the defendant (Namibian Ministry of Health) for forced sterilisation based on their HIV/AIDS status.⁶⁵ After hearing all the facts and evaluating the evidence, in arriving at its decision the Court made it clear that it is highly undesirable that a woman during the height of labour would reasonably sign a consent form.⁶⁶ In respect of the plaintiffs' first claim for lack of informed consent, the Court found the defendant in violation of these women's (plaintiffs) right to informed consent.⁶⁷ However, the Court, in respect of the plaintiff's second claim alleging that "the sterilisation procedures were performed on them because of their HIV status and that this resulted in an unlawful practice of impermissible discrimination against them",⁶⁸ dismissed this claim on the grounds of a lack of substantive evidence proving this claim.⁶⁹ It is submitted that the Court's inability, through its adoption of a purely legal interpretative technique in deciding on this second claim, is clear evidence of the limits of legal interpretation in understanding psychological consequences that could lead to violations of human rights. If the Court had gone beyond its legal reasoning and adopted a multidisciplinary interpretative approach, it would have been almost certain that the defendant would be liable in respect of this second claim. Disciplines,

⁶³ *Purohit* para 58.

⁶⁴ The African Commission has also made such brave and laudable recommendations in several of its communications. See for example *Sudan Human Rights Organisation v The Sudan* Communication 279/03 and *Centre on Human Rights and Evictions v The Sudan* Communication 241/2001 AHRLR 96 110 in which the African Commission called on Sudan to rehabilitate economic and social infrastructure, such as, education, health, water and agriculture services, and to resolve issues of water rights.

⁶⁵ *LM and Others v Government of the Republic of Namibia* (2012) NAHC 211.

⁶⁶ *LM* paras 75-80.

⁶⁷ *LM* para 80.

⁶⁸ *LM* para 82.

⁶⁹ *LM* paras 82 and 84(2).

such as, psychology, for example, would have supplemented the legal reasoning of the Court and created linkages between the acts of the medical doctors concerned and the HIV status of the plaintiffs.

In 2008, the South African Supreme Court of Appeal (“SCA”) handed down a controversial decision in *Stewart and another v Botha and another*.⁷⁰ In that case, the plaintiffs (husband and wife) brought an appeal before the SCA on the grounds that the medical practitioner and an obstetrician they had consulted before the birth of their son (Brian) failed to inform them of any abnormality suffered by their child. As a result, Brian was born with severe congenital defects. The issue before the SCA was based on the fact that though professionals, “both medical doctors failed to inform the plaintiff of her foetus’ severe defects which could have resulted in the termination of the pregnancy with the plaintiffs consent”.⁷¹ Unfortunately, the SCA dismissed the appeal based on the fact that it failed to establish the issue of whether “the child would have been better off had he not been born”. Also, the decision required the legislature to address the issue of the legal duty of professionals who negligently fail to inform prospective parents of the congenital defects of a foetus.

Unlike the decisions arrived at in *Roe v Wade*, in which the Supreme Court of the United States of America held that the constitutional right to privacy⁷² extends to a woman's decision to have an abortion, and [also] in the United Nations Human Rights Committee’s landmark case of *KL v Peru*, where the Committee established that denying access to a therapeutic abortion infringes basic women’s rights, including their rights “to life, to health, to privacy and to freedom from cruel, inhuman and degrading treatment”⁷³, the decision in *Stewart’s* case is a cause for concern. This is so particularly because South African courts have over the years gained enormous popularity and recognition for their willingness to develop the law to improve the protection and enforcement of women’s rights, as was the case in *Minister of Health and other v Treatment Action Campaign and others (“TAC”)*⁷⁴ and many others. The SCA in the *Stewart* case rejected a great opportunity to develop the right to be informed and to provide informed consent in relation to women’s sexual and reproductive health rights

⁷⁰ *Stewart and another v Botha and another* (340/07)[2008] ZASCA 84. Available at <http://www.saflii.org/za/cases/ZASCA/2008/84.html> (accessed 10 August 2010).

⁷¹ *Stewart* para 19.

⁷² See *Roe v Wade*, it should be noted that the right to privacy is not expressly articulated in the United State of America’s Constitution. As a result, the American Supreme Court had to find justifications to its reference. The Court stated: “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy... Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved”. S VIII.

⁷³ Human Rights Committee, Communication no 1153/2003, CCPR/C/85/D/1153/2003 (2005) para 3.2(b).

⁷⁴ *Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 721 (CC).

during therapeutic decision making guaranteed both by the South African Constitution⁷⁵ and Article 14 of the African Women's Protocol.⁷⁶

The *Stewart case* illustrates the sensitive nature of legal issues relating to the psychological effects caused by lack of substantial information and consent. While one who negligently fails to provide critical information to a pregnant woman to enable her to make an informed choice on whether to keep or abort her pregnancy should be held accountable, it should be noted that informed consent as articulated in the African Women's Protocol, is very crucial in ascertaining the full enjoyment of a woman's sexual and reproductive health rights. Although an established principle within legal policies relating to women's sexual and reproductive health rights in particular, the principle of informed consent entails three crucial elements⁷⁷ to be present in order to validate therapeutic treatment decisions. Furthermore, a comprehensive understanding of the meaning of informed consent surpasses legal interpretation and requires the interpretative technique of other social sciences, such as, psychology.

In a situation where, for instance, a woman has been sterilised without her informed consent, as was the case in the CEDAW Committee's case of *A.S v Hungary*,⁷⁸ and in the Polish case of *R.R v Poland*,⁷⁹ the judicial decisions as well as the ethical principles of the psychologist place great emphasis on the psychological importance of patient autonomy as a recommended principle of therapeutic decision making. This stance has been strongly been echoed by the Constitutional Court of Columbia in *La Mesa por la Vida y la Salud de las Mujeres*⁸⁰ in which the Court affirmed women's rights to sexual and reproductive autonomy and access to health services without discrimination. In all these decisions, the presiding judges extended their reasoning and understanding of the concept of informed consent, relating to women's sexual and reproductive health, beyond their pure legalistic context.

Surely, the South African SCA's decision in the *Stewart case* was strongly influenced by the inability of legal interpretation to establish whether the victim gave informed

⁷⁵ S 32(b) of the South African Constitution 1996.

⁷⁶ South Africa ratified the African Women's Protocol on 17 December 2004.

⁷⁷ Rosenfeld B "The psychology of competence and informed consent: Understanding decision-making with regard to clinical research" (2002) 30(1) *Fordham Urban Law Journal* at 173, where he states that these elements are, namely, "... knowledgeable 'that is the treatment provider must have disclosed relevant information to the prospective patient', ... voluntary 'that is a decision made of the patient's own free will', and ... competent 'that is by an individual with an adequate level of decision making ability'".

⁷⁸ *A.S v Hungary* (2006) para 11.4.

⁷⁹ *R.R. v Poland* (2011) no. 27617/04. In Poland, the law that governs and regulates abortion just as in several African countries is restrictive. However, this law does allow for abortion in limited instances especially if the pregnancy could lead to severe deformity. Nonetheless, after the physician in this case "noticed irregularities in a sonogram, the plaintiff was refused a "genetic prenatal examination", which according to Polish law is, "a prerequisite for undergoing an abortion". In fact, Mrs. R.R. was denied access to an abortion to which she was legally entitled, simply because the physician was "unwilling to perform even a legal abortion." Available at <http://www.reproductiverights.org/en/rr-v-poland-st-v-poland-z-v-poland> (accessed 10 June 2011).

⁸⁰ *La Mesa por la Vida y la Salud de las Mujeres* Decision T-841. Summary of the case is available at http://www.esccr-net.org/caselaw/caselaw_show.htm?doc_id=1634772&focus=14021 (accessed 7 June 2012).

consent or whether she was in the right state of mind to do so. As such, psychology, because it studies the human mind, might significantly supplement legal interpretation by establishing through its “experimental”⁸¹ interpretative technique, whether, when the violation was committed, the woman in question was competent enough to make a treatment decision, thus, bridging the gap between legal doctrines, interpretation and practical realities.

3.3 HIV/AIDS

The contextual understanding of women’s sexual and reproductive health rights requires that every woman has access to quality health care. In the context of HIV/AIDS, the African Women’s Protocol, for example, requires women to have access to treatment, medicine and care from their loved ones.⁸² Moreover, practices, such as, testing and treatment for HIV/AIDS, must be carried out in a manner that respects women’s physical dignity and autonomy.

As is perhaps common knowledge for many medical practitioners and legal scholars, currently the HIV/AIDS pandemic is one of the greatest challenges confronting most countries in Africa. This is the case in countries, such as, Botswana, Lesotho, Swaziland and South Africa.⁸³ In reality, the already incessant human rights abuses and challenges facing the African continent aggravate the consequences of HIV/AIDS.⁸⁴ In the Final Communiqué of the 29th Ordinary Session of the African Commission, the Commission classified the HIV/AIDS epidemic as a severe peril to the human rights of Africans and accentuated the challenges that HIV/AIDS patients in Africa face in accessing treatment as a major impediment to fully enjoy their right to health.⁸⁵ In recent years, some African states have developed prevention schemes to respond to the rapid growth of the pandemic amongst women.⁸⁶ For instance, the South African government adopted nevirapine as their drug of choice to prevent mother-to-child transmission (“MTCT”) of HIV/AIDS. The pandemic in South Africa annually claims more than one million people,⁸⁷ and “more than 150 children are born with HIV daily;

⁸¹ “Experimental psychology is an area of psychology that utilizes scientific methods to research the mind and behaviour. This technique is used by psychologist to ascertain competence, assesses everything from childhood development to social issues with the goal of explaining the nature of reality”.

⁸² Art 14(1)(d)(e) of the African Women’s Protocol.

⁸³ For full details of countries greatly affected by this pandemic, see <http://www.avert.org/hiv-aids.htm> (accessed 25 August 2010).

⁸⁴ Gumedze S “HIV/AIDS and human rights: The role of the African Commission on Human and Peoples’ Rights” (2004) 4 *African Human Rights Law Journal* 182.

⁸⁵ The Final Communiqué of the 29th Ordinary session of the African Commission para 7.

⁸⁶ The main problem with these good initiatives from African governments is their method of implementation, as will be seen below.

⁸⁷ According to HIV/AIDS statistics in South Africa, based on a wide range of data, including the household and antenatal studies, UNAIDS/WHO in July 2008 published an estimate of “18.1% prevalence in those aged 15-49 years old at the end of 2007. Their high and low estimates are 15.4% and 20.9% respectively”. According to their own estimate of total population (which is another contentious issue), “this implies that around 5.7 million South Africans were living with HIV at the end of 2007, including 280,000 children under 15 years old.” Available at <http://www.avert.org/safricastats.htm> (accessed 29 May 2010).

MTCT is the most common source of HIV virus in children”.⁸⁸ The vulnerability of women in particular to the pandemic is a direct outcome of a number of issues, including “physiological susceptibility, gender-based violence, early marriage, and low economic status”.⁸⁹

With the high prevalence of HIV in Africa, most national courts are increasingly struggling with whether and how persons, especially pregnant women infected with HIV, should be protected in certain circumstances. This is justifiable because most African states lack, or have little, legislation that protects HIV/AIDS infected persons. Consequently, courts are bound to read-in words in existing legislation that is somehow related to the pandemic or its effects. For instance, the *TAC* case⁹⁰ disputed the reasonableness of the MTCT prevention programme in South Africa. In that case, the central issue raised was based on the limited approach adopted by the South African government by the distribution of nevirapine only to pilot sites. The South African Constitutional Court (“CC”) in its decision advised the government to re-think its approach and make nevirapine available in both private and public hospitals.⁹¹ The CC also “ordered the government to plan an effective and comprehensive national programme to prevent MTCT”.⁹²

In arriving at its decision, the CC expanded on the right to health to include women’s rights to sexual and reproductive health duly protected in the South African Constitution.⁹³ Even though the CC did not make any reference to the African Women’s Protocol, its decision to order the government to plan an effective and comprehensive national programme to prevent MTCT is in accordance with the spirit of Article 14(2)(a) of the African Women’s Protocol which requires State parties to take all appropriate measures to provide “adequate, affordable and accessible health services ...” to every woman.

It is worth mentioning that the ruling of the CC in the *TAC* case was, and still is, a landmark victory for all pregnant women who are HIV positive and children who could be infected in the course of being born. The decision upholds not only women’s right to health but places a particular emphasis on their sexual and reproductive health in relation to HIV/AIDS. Furthermore, the CC in this case transcended the mere mentioning of the provisions of section 27 of the South African Constitution as it did in the *Soobramoney* case,⁹⁴ and expanded on its content and the state’s obligation in terms thereof.

As timely and necessary as the provisions of Article 14 of the African Women’s Protocol may be, its provision on HIV/AIDS is not without blemish. For example, even

⁸⁸ See <http://www.avert.org/safricastats.htm>.

⁸⁹ Center for Reproductive Rights *et al*, *Legal grounds reproductive and sexual rights in African Commonwealth courts* (2010) Vol 2 at 82.

⁹⁰ At the African level, this case stands out as the first case to be brought in court on issues of HIV/AIDS related to women’s sexual and reproductive health rights.

⁹¹ *TAC* para 135.

⁹² *TAC* para 135(3)(d).

⁹³ S 27(1)(a) of the South African Constitution 1996.

⁹⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

though a different school of thought might be satisfied with its requirement for disclosure of one's health status and the health status of one's partner, Viljoen holds that the provision is "ambiguous and should not form the basis for the erosion of rights".⁹⁵ This notwithstanding, it is submitted that the ambiguity that exists in this provision may be based on the legal connotation embedded in the doctrine of disclosure. The adoption of a multidisciplinary approach to its interpretation might be the remedy for clarifying such ambiguity.

In fact, the biological characteristics of HIV/AIDS could determine, to an extent, the rate at which it spreads, but Ainsworth notes that "human behaviour plays a critical role in transmission".⁹⁶ In this regard, issues such as gender relations and the different cultures and beliefs that exist within African societies towards sexual behaviour are both crucial and require, to some degree, the attention of anthropologists before conclusions are drawn. The imparting of knowledge about the risk that surrounds HIV/AIDS is not enough and will do little to translate into changes in sexual behaviour. Ramin recommends that the interpretation and understanding of HIV/AIDS "... needs to take account of traditional beliefs and value systems, as well as popular mythologies that circulate" within a particular community.⁹⁷ Such interpretative requirements, from an anthropological perspective, will not only provide a better insight into HIV/AIDS, but will also develop the basis for "culturally sensitive and culturally appropriate community based HIV/AIDS prevention programmes" especially amongst women.⁹⁸ As such, anthropology, through its interpretative technique of "cultural particularism",⁹⁹ has the ability to supplement legal interpretation and understanding of the concept of HIV/AIDS by studying each community and substantiating how certain beliefs within a particular community influence their sexual behaviour, HIV infection and approach towards AIDS patients.

4 THE RELEVANCE OF ADOPTING A MULTIDISCIPLINARY INTERPRETATION

The adoption of a multidisciplinary approach in interpreting law as seen above is not new. In fact, the long existing relationships between law and other social sciences (sociology and law - socio-legal; law and psychology - legal-psychology; law and medicine - *medicina forensis*) have proven to have far-reaching effects on society in

⁹⁵ Viljoen F *International human rights law in Africa* (2012) at 255.

⁹⁶ Ainsworth M "Setting government priorities in preventing HIV/AIDS" (1998) at 18. Available at <http://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/ainsworf.pdf> (accessed 1 September 2010).

⁹⁷ Ramin B "Anthropology speaks to medicine: The case of HIV/AIDS in Africa" (2007). Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2323482/> (accessed 1 September 2010).

⁹⁸ Parker R, "*Sexuality, culture and power in HIV/AIDS research*" (2001) at 168. Available at <http://www.annualreviews.org> (accessed 1 September 2010).

⁹⁹ "Cultural Particularism emphasizes the importance of studying each culture 'in itself', without trying to explain and/or understand it in some larger theoretical framework. This approach has been marked by such things as detailed data collection and the ideal of 'objective participant observation', in fact, this approach in cultural anthropology treats culture as 'texts' to be understood through the interpretation of their 'deep structure'. Here, culture is treated as 'webs of meaning' to be understood through critical analysis. A key theorist who represents this approach is Clifford Geertz". Available at <http://www.qvctc.comnet.edu/brian/interpr.html> (accessed 3 May 2011).

general and women in particular in the interpretation of legal theories, especially when applying “quantitative techniques and the use of statistics”.¹⁰⁰ It is possible that a comprehensive understanding of what exactly it is that constitutes Article 14 of the African Women’s Protocol would require the interpretative techniques of other disciplines, for example, sociology, psychology and anthropology. This is so because, practically, ensuring women’s sexual and reproductive health care transcends a pure legal ideology and practice. Applying a multidisciplinary interpretation, therefore, to supplement the understanding and interpretation of women’s sexual and reproductive health rights would mean first defining their core knowledge, identifying and uncovering deeper layers of human behaviour which in many instances lies outside the scope and practice of the law. On this basis, Freeman proposes that it would be “sensible to move from law to the social sciences (since, after all, law seeks to regulate society, so it had better understand it) and then to the humanities (since law, and especially human rights law, deals with human beings, so it had better understand them)”.¹⁰¹

Also, the ability to logically identify causes of violations of sexual and reproductive health rights; why they are not protected and enforced, as seen above, within certain communities in Africa; and the difficulties faced in communities that attempt such protection, could be very challenging to legal doctrines as it would entail addressing social, cultural and economic barriers to women’s sexual and reproductive health. The adoption of a multidisciplinary interpretative approach, therefore, is relevant in that it could provide, in the spirit of such interpretation, a well-integrated and practical reform scheme, as is the case, for example, with the sociological interpretation of women’s rights to non-discrimination.

Moreover, within the framework of a multidisciplinary dynamic approach, concentrating only on pure legal interpretative techniques may not enhance women’s rights to sexual and reproductive health on the path of development with justice. The combination of a multidisciplinary interpretative approach of cross-cultural dialogue will hopefully deepen and broaden universal cultural consensus on the concept and normative content of women’s right to be free from all forms of discrimination.

A multidisciplinary approach is also relevant in that it gives judges, lawyers and policy recommenders the opportunity to examine the provisions of Article 14, from a comprehensive and holistic perspective in order to uncover masked societal norms and practices and to truly understand the aims of Article 14 and the actual impact its provisions have on the people they are intended to protect. Not having this often results in working against the rights of women’s in general and their sexual and reproductive health rights in particular in many instances.

Furthermore, as illustrated above, women’s sexual and reproductive health rights go beyond the legal notion of health to include a more comprehensive health protection

¹⁰⁰ Viljoen F “Disciplinary beyondness: A background to the conference and collection of papers” in Viljoen F (ed) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012) at xiii.

¹⁰¹ Freeman M, “On the interactions between law and social science in the understanding and implementation of human rights” in Viljoen (ed) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012) at 4.

and promotion concept which aims to include an “understanding of the behavioural, social, psychological, and environmental components of personal health”.¹⁰² In addition, the adoption of a multidisciplinary approach is relevant in that it helps legal minds to understand that the violation of a woman’s sexual and reproductive health rights is not simply an issue of public health but the consequence of a lack of the realisation of multiple issues, which includes but are not limited to: poverty, cultural beliefs and discrimination. In fact, a critical relevance of adopting a multidisciplinary interpretative approach to enhance the legal interpretation of Article 14 of the African Women’s Protocol is that ultimately a multidisciplinary interpretation *provides variety in interpretation and widens the scope of article 14 by identifying multiple effects to key aspects, such as, abortion and HIV/AIDS. It also gives legal minds and governments reasons why women should exercise their right to participate in decision making processes, especially those affecting their sexual and reproductive health, pregnancy, family planning, childbirth, contraception, and in addressing unsafe abortion and physical dignity and security.*

Remarkably, the consideration of other disciplines in the interpretation of law in general and Article 14 of the African Women’s Protocol in particular, takes nothing away from the particular intention of a legal provision but supplements its meaning and clarifies its intention. Certainly, even though the contributions of other disciplines cannot be measured quantitatively, it will be correct to assert that the adoption of a multidisciplinary approach to the interpretation of Article 14 in particular, is critical, relevant and will in almost certain terms enrich its understanding to a very large extent.

5 CONCLUSION

As demonstrated above, this contribution suggests, through its analysis of three interpretative techniques of selected disciplines (but not limited to them), that the relevance of adopting a multidisciplinary interpretative technique in the interpretation of human rights norms is crucial in enhancing our knowledge of what human rights are, and how they can be effectively realised. Especially considering the relationship that legal studies has with other disciplines (for example, law and anthropology – legal-anthropology) it is not very controversial to assert that lawyers, academia, activists and judges would benefit vastly by supplementing legal approaches to human rights norms with contributions from other disciplines. However, Freeman warns that this could lead to dissipating the “relatively systematic and cohesive analytical methods of a long established discipline such as law”.¹⁰³ This, however, can be avoided through “attempts to combine a limited number of disciplines that appear, fairly obviously, to address similar problems”.¹⁰⁴

It is argued that the encompassing concept of women’s sexual and reproductive health rights that is contained within human rights and which has developed from

¹⁰² Cook (1995) at 1001.

¹⁰³ Freeman (2012) at 4.

¹⁰⁴ Freeman (2012) at 4.

several renowned international conferences, on the one hand, and acceptable human rights instruments, on the other, provide a clearer, more explicit and inclusive basis for a global call for the progressive and multidisciplinary development of women's sexual and reproductive health rights, than, for instance, the pure technical legalistic interpretative approach to women's sexual and reproductive health rights currently espoused by several courts and the UN.

At the implementation level, women's rights in general continue to be a relatively marginalised item on most government's agendas and may be more effectively harnessed by way of a multidisciplinary approach based on the adoption of the interpretative techniques of other disciplines, such as, sociology, anthropology or psychology. This is more so because sexual and reproductive behaviour is characterised by biological, cultural and psychosocial relations, which to an extent require that sexual and reproductive health should be understood within the context of relationships between human beings, communities and societies.

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