

# Women's right to sexual and reproductive health information: The Gambia's fix for female genital mutilation

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**ABSTRACT:** This article argues that the African Union's theme for 2024, 'Educate an African fit for the 21st century', provides an avenue to galvanise support for the protection of women's right to sexual and reproductive health information (women's right to SRHI) considering the power of knowledge and information to foster socio-cultural transformation and sustainable development. The right protects women's sexuality, reproductive health and well-being and is a precondition for substantive equality between men and women. The provision of comprehensive information and education in schools and in public on women's rights to sexual and reproductive autonomy can drive the transformation of harmful cultural practices and historical discriminations against African women in reproductive healthcare. In Africa, as elsewhere, despite legislation and policies against gender-based violence and discrimination, the prevalence of female genital mutilation (FGM) disempowers women from attaining their sexual and reproductive health. The rise in FGM during the COVID-19 pandemic and recent attempts to overturn its ban in The Gambia portray the danger of possible reversal of the previous gains of FGM ban. This article therefore makes the case for the express recognition of women's right to SRHI. In doing this, it draws from empirical, legal and health literature and policy documents to re-conceptualise women's right to SRHI based on substantive equality, and examines the merits of the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) and related instruments to safeguard women's access to comprehensive information and education on sexual and reproductive health and rights. The article reveals gaps between policy and women's lived experiences regarding access to SRHI and concludes by encouraging the African Union and development partners to support The Gambia and other African states to prioritise access to culturally sensitive sexuality information and education.

## TITRE ET RÉSUMÉ EN FRANÇAIS

### **Le droit des femmes à l'information sur la santé sexuelle et reproductive : l'approche de la Gambie face aux mutilations génitales féminines**

**RÉSUMÉ:** Cet article soutient que le thème de l'Union africaine pour 2024, intitulé «Éduquer une Afrique adaptée au XXI<sup>e</sup> siècle», offre une opportunité cruciale pour promouvoir le droit des femmes à l'information sur la santé sexuelle et reproductive. Ce droit, indispensable à la protection de la sexualité, de la santé reproductive et du bien-être des femmes, constitue une pierre angulaire pour parvenir à l'égalité réelle entre les hommes et les femmes. L'accès à une information complète et à une éducation publique sur les droits des femmes à l'autonomie sexuelle et reproductive est essentiel pour transformer les pratiques culturelles néfastes et les discriminations

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historiques. En Afrique, malgré l'existence de législations et de politiques visant à lutter contre la violence et la discrimination fondées sur le genre, la prévalence des mutilations génitales féminines (MGF) continue de compromettre gravement le droit des femmes à la santé sexuelle et reproductive. L'augmentation des cas de MGF pendant la pandémie de COVID-19 et la tentative récente de révoquer leur interdiction en Gambie illustrent les risques de recul dans la lutte contre ces pratiques. L'article plaide pour une reconnaissance explicite du droit des femmes à la santé sexuelle et reproductive, en s'appuyant sur des analyses empiriques, juridiques et politiques. Il reconceptualise ce droit à travers le prisme de l'égalité réelle et évalue le rôle des instruments juridiques régionaux, notamment le Protocole de Maputo, dans la protection et la promotion de l'accès des femmes à une information et une éducation complètes en matière de santé sexuelle et reproductive. En révélant les écarts persistants entre les politiques adoptées et les expériences vécues par les femmes, l'article souligne l'urgence pour l'Union africaine et ses partenaires de développement de soutenir des États comme la Gambie dans leurs efforts pour prioriser l'accès à une éducation sexuelle adaptée, respectueuse des cultures et intégrée aux politiques de santé publique. L'article conclut en appelant à un engagement renouvelé pour garantir que ces droits fondamentaux soient au cœur du développement durable et des transformations socioculturelles en Afrique.

**KEY WORDS:** Maputo Protocol; sexual and reproductive health and rights; women's right to sexual and reproductive health information and education; sexuality education; FGM

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**1 INTRODUCTION**

Women's (including girls') right to sexual and reproductive health information (women's right to SRHI) is vital to the realisation of sexual and reproductive health and rights (SRHR) such as the right to health, right to life, non-discrimination, freedom from torture, right to education, and is an essential pre-condition for substantive equality between men and women.<sup>1</sup> This means that states have an overarching obligation to provide appropriate information and educational measures to address all discriminatory norms that hinder women's enjoyment of SRHR on equal basis with men. This would require 'saving' women's right to SRHI from its current fragmentation under international human rights law or, as it were, 'from the shadows': a task of re-conceptualisation. Also, women's right to SRHI suffers from

1 R.J Cook & M.F Fathalla 'Advancing reproductive rights beyond Cairo and Beijing' (1996) 22 *Comment* 119.

multiple conceptualisations which tends to unnecessarily confuse its normative content and ultimate realisation whereby a conceptual overload could 'imply that access to information plays a subordinate role to the right that it is facilitating'.<sup>2</sup> Most importantly, any attempt to anchor a human right from multiple sources implies a rudimentary perception of the right considering that governments are required to respect, protect, promote and fulfil every human right.<sup>3</sup> Conversely, religious and traditional misconceptions and misinformation underlie female genital mutilation (FGM), which is the partial or total removal of the external female genitalia or other injury to the female organs for non-medical reasons, making it a violation of women's SRHR.<sup>4</sup> Though it is not ordinarily done with the intention of inflicting harm, but driven and reinforced by patriarchy, FGM seriously affects women of reproductive age (between 15-49 years) and has an insidious connection with early/child marriage.<sup>5</sup> Furthermore, FGM deprives women and girls of making choices and decisional autonomy over their reproductive health and well-being free of coercion and violence. The procedure is usually performed by traditional practitioners actively supported by parents, elderly women, and religious leaders whereby it constitutes girls' rite of passage, indicative virginity, and marriageability.<sup>6</sup> FGM results in death, infant mortality and life-long mental and physical health challenges.<sup>7</sup> An estimated 230 million plus women and girls are FGM victims globally over 144 million of whom are in Africa and where FGM is concentrated across not less than 27 countries.<sup>8</sup> Nigeria has the world's third largest number of FGM victims while countries in North Africa and the horn of Africa have about 95 and 98 per cent of the women as victims respectively.<sup>9</sup> Whilst not less than 24 African countries had prohibited FGM as of 2020 and ratified the Protocol to the African Charter on Human and Peoples' Rights on

- 2 CA Bishop 'Internationalizing the right to know: conceptualizations of access to information in human rights law' PhD dissertation, University of North Carolina, 2009 37.
- 3 Vienna Conference on Human Rights 1993.
- 4 Department of Women's Health, Family and Community Health, World Health Organization 'a systematic review of the health complications of female genital mutilation including sequelae in childbirth WHO/FCH/WMH/00.2' (2000) 11.
- 5 UNICEF 'Understanding the relationship between child marriage and female genital mutilation: a statistical overview of their co-occurrence and risk factors' (2021) 7-42, <http://data.unicef.org/resources/understanding-the-relationship-between-child-marriage-and-fgm/> (accessed 20 October 2024); World Vision UK 'Exploring the links: female genital mutilation/cutting and early marriage' (2014) 7-13, [http://Exploring\\_the\\_links\\_FGM\\_cutting\\_and\\_early\\_marriage.pdf](http://Exploring_the_links_FGM_cutting_and_early_marriage.pdf) (accessed 20 October 2024).
- 6 UNICEF 'Female genital mutilation/cutting: a global concern' (2016) 2, <https://data.unicef.org/resources/female-genital-mutilationcutting-global-concern/> (assessed 15 August 2024); A Kaplan and others 'Health consequences of female genital mutilation/cutting in The Gambia, evidence in action' (2001) 8 *Reproductive Health* 1; K Nakamura and others (eds) *Female genital mutilation/cutting: global zero tolerance policy and diverse responses from African and Asian Local Communities* (2023) 5.
- 7 As above.
- 8 UNICEF Data 'Female genital mutilation (FGM)', [https://data.unicef.org/topic/child-protection/female-genital-mutilation/#\\_edn1](https://data.unicef.org/topic/child-protection/female-genital-mutilation/#_edn1) (assessed 15 August 2024).
- 9 As above.

the Rights of Women in Africa (African Women's Protocol or Maputo Protocol) 2003, secretive practices of FGM persist. Significant reductions only occurred in states that carried out public awareness and comprehensive sanctions.<sup>10</sup> Even where there is enforcement of legal sanctions, some religious hardliners still display open resistance to FGM eradication as happened recently in The Gambia.

In The Gambia, there is a heightened concern over the health risks that the prevalence of FGM poses to women who constitute 50.6 per cent of the 2.3 million population.<sup>11</sup> While 75 per cent of women and girls between the ages of 15 and 19 have undergone various forms of FGM,<sup>12</sup> three in four girls and women of reproductive age have undergone the procedure.<sup>13</sup> Moreover, infants as young as 5 months old are not spared from the FGM violence.<sup>14</sup> FGM not only constitutes gender-based discrimination and violence under the international human rights obligations undertaken by The Gambia,<sup>15</sup> it also violates Gambian laws and policies established to eradicate gender discrimination.<sup>16</sup> Violence against women was prohibited<sup>17</sup> and FGM criminalised including failure to report preparatory, contemporaneous or past acts thereof since 2015,<sup>18</sup> but victims of FGM or their families hardly ever lodge official complaints and so prosecutions are not

10 United Nation's Office of the Human Commissioner for Human Rights (OHCHR) 'Women's Rights in Africa 37.

11 *Countrysmeters*, 'Gambia population' <https://countrysmeters.info/en/Gambia> (accessed 12 January 2020); T Manuh & A Biney 'Exploring intersections between gender-based violence and adolescent sexual and reproductive health and rights in West Africa: A review of the literature produced in the sub-region' (2021) 25 *African Journal of Reproductive Health* 126.

12 United Nations Population Fund 'Female Genital Mutilation Dashboard (FGM) - Gambia', <https://www.unfpa.org/data/fgm> (assessed 20 October 2024); United Nations International Children Emergency Fund, 'Gambia: Statistical Profile on Female Genital Mutilation' (2019) 2.

13 B Mboge and others 'Female genital cutting in The Gambia: can education of women bring change?' (2019) 43(2) *Journal of Public Health* 398.

14 UNFPA (12).

15 The Gambia must respect and protect women's right to SRHI in terms of human rights treaties it has signed, ratified and/or acceded. These include the Convention on the Elimination of all forms of Discrimination against Women 1979, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

16 See Gender and Women's Empowerment Policy 2010-2020 revised in 2017; National Action Plan on the Implementation of the United Nations Security Council Resolution (UNSCR 1325); National Population Policy (geared towards the empowerment of women and girls, fundamental rights protection and access to sexual and reproductive health information); National Child Protection Strategy 2016-2020; National Social Protection Policy (NSPP) 2015-2025; National Health Policy 2015-2025; National Reproductive Maternal, New born, Child and Adolescents Health Policy 2017-2026; National Action Plan on FGM/C 2013-2018. See The Gambia National Report on the Five-Year Review of the Implementation of the Addis Ababa Declaration on Population and Development Beyond 2014, The Gambia & UNFPA (2018) 9-10.

17 See Domestic Violence Act 2013.

18 Women's (Amendment) Act 2015, sec 32B (a culpable defendant is liable on conviction to three years' imprisonment or to a fine of Fifty Thousand Dalasis or both).

common.<sup>19</sup> In fact, the first criminal indictment and convictions for FGM involving three women only took place in 2023.<sup>20</sup> The health and human rights-related complications of FGM are also well documented,<sup>21</sup> but the majority Muslim population, many Christians, elderly women and even educated Gambians see nothing wrong with it based on traditional and religious prejudices since it is believed to prevent promiscuity in women.<sup>22</sup> Hence, state-sponsored manipulation of health-related information,<sup>23</sup> discriminatory cultural norms and patriarchal attitudes that engender the stereotyping of women and girls persist. Moreover, the Constitution of The Republic of The Gambia 1977 (CRG 1977) (as amended) has no provision on the right to health. Rather, it protects several rights including cultural rights<sup>24</sup> while section 28 thereof protects women's 'equal dignity of the person with men' under which women's right to SRHI could be implicitly derived.

Based on the foregoing, this paper argues that the realisation of women's right to SRHI makes it imperative to end FGM,<sup>25</sup> and makes the case for The Gambia and other African countries to re-invigorate sexuality and reproductive health education in school curricula to protect and promote women's right to SRHI. In doing so, part 1 of the paper introduces the subject. Part 2 re-conceptualises women's right to SRHI while part 3 appraises the international human rights standards, the African Women's Protocol and related consensus documents on women's right to SRHI. Part 4 undertakes a case study of how the practice of FGM violates women's right to SRHI in The Gambia. Part 5 concludes and makes suggestions for the way forward.

19 See S Mutambasere, A Budoo-Scholtz & D Murden (eds) *The impact of the Maputo Protocol in selected African states* (2023) 118.

20 F Baldeh & S Birchanger 'Keeping up the ban against FGM/C: a strong signal for reproductive health and rights from The Gambia to the World *PRIF Blog*, <https://blog.prif.org/2024/08/08/keeping-up-the-ban-against-fgm-c-a-strong-signal-for-reproductive-health-and-rights-from-the-gambia-to-the-world/> (accessed 20 October 2024).

21 Such as infections, urinary incontinence, infertility, emotional trauma, maternal deaths, childbirth complications and other health, see PD Mitchum 'Slapping the hand of cultural relativism: female genital mutilation, male dominance, and health as a human rights framework' (2013) 19 *William & Mary Journal of Race, gender and Social Justice* 585, 591-592; Kaplan and others (n 6) 1-6.

22 AK Marcusán and others 'Female genital mutilation/cutting: changes and trends in knowledge, attitudes, and practices among health care professionals in The Gambia' (2016) 8 *International Journal of Women's Health* 103-117; Kaplan and others (n 6).

23 SI Boshia and Others 'The impact of the presidential alternative treatment program on people living with HIV and The Gambian HIV response' (2019) 21 *Health and Human Rights Journal* 239, 240 (former President Jammeh's fraudulent scheme to cure HIV and AIDS).

24 CRG 1997, sec 32.

25 See Sustainable Development Goals Goal 5 which aims to end FGM by 2030.

## 2 RE-CONCEPTUALISING WOMEN'S RIGHT TO SRHI

Women and girls have specific healthcare needs which must be met to enable them to live meaningful and dignified lives as autonomous human beings. In many societies, gender-based assumptions, stereotypes and women's subordination to men fuel violations of SRHR. While states might have adopted legal and policy measures to eliminate discrimination against women in healthcare, such have been patronising while systematically excluding vulnerable and voiceless adolescent girls, rural women, women living with aids, etc., to whom the state is accountable. Women's right to SRHI obligates states to provide access to comprehensive and appropriate goods, information and services including public awareness campaigns for a participatory approach to the advancement of women's SRHR including fertility control, contraception, family planning, etc. This part re-conceptualises women's right to SRHI as a substantive right related to multiple rights that underscore the significance of comprehensive information and education required for women and girls to attain substantive equality within the context of sexual and reproductive self-determination.

### 2.1 Substantive equality and women's right to SRHI

As against formal equality which treats people alike irrespective of their differences, substantive equality aims to achieve a just and egalitarian society by making adjustments and accommodations to eliminate or reverse historical and structural disadvantages among different segments of society.<sup>26</sup> Accordingly, human rights instruments such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Maputo Protocol protect women and girls from discrimination to reclaim human dignity based on the notion of substantive equality. These human rights treaties mandate states to implement remedial and right-based legal, policy, administrative measures, support women and create public awareness to address these disadvantages.<sup>27</sup> The consensus documents such as the International Conference on Population and Development (ICPD) and the Fourth World Conference on Women (FWCW) which created the normative background for states' obligation on the right to information and education towards sexual and reproductive well-being of women and

26 E Durojaye & Y Owoeye "Equally unequal or unequally equal": adopting a substantive equality approach to gender discrimination in Nigeria' (2017) 17(2) *International Journal of Discrimination and the Law* 4-5.

27 As above.

girls are also grounded in substantive equality.<sup>28</sup> Moreover, the power of education to transform lives, impart information and instil ideas to create inclusive societies and 'a just and peaceful world' and as a source of empowerment for individuals and groups cannot be overemphasised.<sup>29</sup> This is integral to the Africa Union 2024 theme which aims at building resilient education systems to reverse the negative impact of discrimination and the non-fulfilment of the sexual reproductive and health needs of young people on the enjoyment of the right to education in Africa.<sup>30</sup> Accordingly, women's right to SRHI including sexuality education is an essential precondition for the enjoyment of SRHR guaranteed internationally, in regional treaties, and domestic laws, towards gender equality and to enable women and girls to protect their health and plan their families.<sup>31</sup> However, the realisation of women's right to SRHI towards the enjoyment of other SRHR and the eradication of harmful cultural and religious practices like FGM can be challenging, particularly in Africa, where sexual and reproductive rights matters are viewed with suspicion due mainly to socio-cultural and religious reservations.<sup>32</sup> As a result, women and girls are beholden to the horrors of FGM which is prevalent in 35 countries in African, Middle Eastern and Asian communities and among immigrant communities in the Western world.<sup>33</sup> This makes the link between comprehensive sexuality education (CSE) and women's right to SRHI crucial by providing adolescent girls with the necessary knowledge and skills to make informed decisions about their bodies, relationships, and reproductive choices, empowering them to exercise their SRHR through access to accurate healthcare-related information regarding their sexuality and reproduction. Essentially, CSE is a key tool of substantive equality to enable women address religious and cultural hindrances such as FGM that prevent the full realisation of their SRHR.

- 28 E. Durojaye 'Realizing access to sexual health information and services for adolescents through the Protocol to the African Charter on the Rights of Women' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 162-170; E. Durojaye 'Substantive equality and maternal mortality in Nigeria' (2012) 44 *The Journal of Legal Pluralism and Unofficial Law* 117-118.
- 29 UNESCO 'UNESCO welcomes ambitious African Union education goals', <https://www.unesco.org/en/articles/unesco-welcomes-ambitious-african-union-education-goals> (accessed 20 October 2024).
- 30 African Union & African Committee of Experts on the Rights and Welfare of the Child 'Concept Note for the Day of the African Child 2024: 'Education for all children in Africa: the time is now' (2024) 5, [https://www.acerwc.africa/sites/default/files/2024-03/Concept-Note\\_Day-of-the-African-Child\\_2024\\_ENG.pdf](https://www.acerwc.africa/sites/default/files/2024-03/Concept-Note_Day-of-the-African-Child_2024_ENG.pdf) (assessed 20 October 2024).
- 31 R. Brown and others 'A sexual and reproductive health and rights journey: from Cairo to the present' (2019) 27 *Sexual and Reproductive Health Matters* 326; Centre for Reproductive Rights 'The human right to information on sexual and reproductive health government duties to ensure comprehensive sexuality education' (2008) 2.
- 32 V. Balogun & E. Durojaiye 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights' (2011) 11(2) *African Human Rights Law Journal* 387.
- 33 Marcusán (n 22).

Incidentally, statistical evidence has shown the correlation between high exposure to FGM in sub-Saharan Africa and women and girls in poorest households, the less educated, those with lower access to media, etc.<sup>34</sup> Relatedly, to transform and revitalise education to achieve gender equality in Africa demands that women's access to SRHI be included as part of school curricula of health education considering that major international and regional consensus documents all speak of women empowerment through education.<sup>35</sup> Moreover, women's right to comprehensive SRHI and education is a development of an iterative process by human rights bodies on the right to health including on SRHR protected in various formulations in human rights treaties, health Declarations, and international and regional consensus documents and policies. These include the Universal Declaration of Human Rights (Universal Declaration),<sup>36</sup> World Health Organisation Constitution,<sup>37</sup> CEDAW,<sup>38</sup> the International Covenant on Civil and Political Rights 1966 (ICCPR),<sup>39</sup> the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR),<sup>40</sup> the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment, and the Convention on the Rights of the Child (CRC) 1989.<sup>41</sup> This is elaborated upon in paragraph 3.1 below with regards to access to information and functional sexuality education from the Concluding Observations, General Comments, and case decisions made

- 34 UNICEF Data 'Understanding the relationship between child marriage and female genital mutilation' <https://data.unicef.org/resources/understanding-the-relationship-between-child-marriage-and-fgm/> (accessed 11 June 2024); BO Ahinkorah and others 'Socio-economic and demographic determinants of female genital mutilation in sub-Saharan Africa: analysis of data from demographic and health surveys' (2020) 17 *Reproductive Health* 162.
- 35 See Sustainable Development Goal (SDG) 2030 goal 5's target to eliminate all harmful practices including FGM by year 2030 and UN Agenda 2030 African Union (2023) Linking Agenda 2063 and the SDGs, <https://www.au.int/agenda2063/sdgs> (accessed 31st July 2024); African Union 'Agenda 2063: the Africa we want' [https://au.int/sites/default/files/documents/33126-doc-framework\\_document\\_book.pdf](https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf) (assessed 20 October 2024); Continental Education Strategy for Africa (CESA 2016-2025), <https://www.au-continental-strategy-on-education-for-health-and-well-being-of-young-people-in-africa.pdf> (assessed 11 August 2024).
- 36 Adopted 10 December 1948, UNGA Res 217 A (III), art 25(1) (the right to a standard of living adequate for health and well-being including food, clothing, housing and medical care), art 25(2) (motherhood and childhood are entitled to special care and assistance).
- 37 Adopted 7 April 1948, 14 UNTS 185 Preamble.
- 38 Adopted 18 December 1979 entered into force 3 September 1981) GA Res 54/180 UN GAOR 34th session Supp 46, UN Doc A/34/46 (1980) art 10(1)(h) (access to health-specific educational information and on family planning) art 12 (the right to the highest standard attainable of physical and mental health without discrimination and ensure gender equality in access to healthcare), art 14(2)(b) (states' obligation to provide access to family planning information and education) and art 16(1)(e) (right to reproduction choice information).
- 39 General Assembly Resolution 2200A (XXI) (adopted 16 December 1966 entered into force 3 January 1976).
- 40 General Assembly Resolution 2200A (XXI) (adopted 16 December 1966 entered into force 3 January 1976) art 12(1) & (2)(a) (states' obligation to take steps to reduce stillbirth and infant mortality).
- 41 Adopted 1989, entered into force 2 September 1990, UN Doc A/44/49.



at various times by their respective monitoring bodies and special mechanisms.

## 2.2 Women's right to SRHI as a substantive right

Several rationales that intertwine with the right to access to information, freedom of expression, right to health, the right to privacy, etc.,<sup>42</sup> could be advanced for women's right to SRHI. In the same vein, the Centre for Reproductive Rights asserts that the right, 'like all reproductive rights, is firmly rooted in the most basic international human rights standards, including protections of the rights to life, health, education, and non-discrimination'.<sup>43</sup> Consequently, the task of re-orientating women's right to SRHI begins with a brief analysis of the extant 'conceptualisation literature'. The first one will be referred to as 'the purist freedom of expression and access to information conceptualisation'. According to Mendel, freedom of expression and access to information are intricately linked in that<sup>44</sup>

freedom to receive information prevents public authorities from interrupting the flow of information to individuals and ... freedom to impart information applies to communications by individuals. It would then make sense to interpret the inclusion of freedom to seek information, particularly in conjunction with the right to receive it, as placing an obligation on government to provide access to information it holds.

The foregoing exposition of the provisions of the ICCPR, article 19 tallies with all international human rights provisions and soft law developed under the auspices of the United Nations and regional authorities that guarantee the freedom 'to seek, receive and impart information'<sup>45</sup> though the extent of information covered may not be conclusively determinable. This conceptualisation would, by implication, impose a negative duty on government in a democratic society of non-interference with information required for effective public participation in addition to a positive obligation to make health governance-related legal, policy level and other information held by public (and some private) bodies freely available to all citizens subject to legitimate exemptions. This is particularly more so because

42 Inter-American Commission on Human Rights 'Access to information on reproductive health from a human rights perspective' OEA/Ser.L/VII. Doc.61 (22 November 2011) 1.

43 Centre for Reproductive Rights (n 31) 3.

44 T Mendel 'Freedom of information: an internationally protected human right' (2003) 39 *Comparative Media Law Journal* 95, 40; A Roberts 'Structural pluralism and the right to information' (2001) 513 *University of Toronto Law Journal* 243, 260.

45 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (Universal Declaration), art 19; International Covenant on Civil and Political Rights (adopted 16 December 1966 entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 19(1); American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36, 1, OAE/Ser. L./V/II.23 doc. Rev. 2, entered into force 18 July 1978 (ACHR) art 13; Declaration of Principles on Freedom of Expression in Africa 2002, African Commission Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res. 62 (XXXII) 2002 (African Declaration 2002) sec 4.

information 'gathered by public officials at public expense is owned by the public'.<sup>46</sup> Like Mendel, Weeramantry views the right to freedom of expression and information as underpinning the right to health because, as it is with every human right, its enjoyment requires an 'ancillary' right necessary for its exercise.<sup>47</sup> The only drawback which stems from Weeramantry's conceptualisation is his subordination of access to information to other rights. Second, Coliver, likewise many legal experts conceptualise women's right to SRHI from a cluster of rights such as freedom of expression and information, equality and non-discrimination, right to life, right to health, right to dignity and the right to private and family life. These latter rights impose both negative and positive obligations on the government to provide 'information necessary for reproductive health and choice'.<sup>48</sup> She argues forcefully that the obligation necessary for the protection and promotion of reproductive health and choice includes:<sup>49</sup>

[t]he affirmative obligation to provide information necessary for the protection and promotion of a minimum standard of reproductive health (including information about effective methods of contraception), where women, particularly those at high risk, such as rural women and adolescents, do not otherwise have access to such information.

A third understanding of women's right to SRHI stems from the right to personal information such as medical or clinical records. This one has been invoked from a combination of the right to privacy and freedom of expression.<sup>50</sup> This is an extension of the right to control information or data about oneself held by public and private entities and to effect corrections thereto or update such information subject to such countervailing interests permissible in a democratic society.<sup>51</sup> However, even when the rationales for access to SRHI exist in all these conceptualisations, their combined effect is to render the contours of the right more uncertain and at best an instrumental right. Moreover, that all the rationales reference human dignity as their baseline makes the argument for re-conceptualising women's right to SRHI such as this paper aims to be more compelling and helps to denote the right's status in international law.<sup>52</sup> The concept of substantive equality thus provides the leverage for the understanding of access to information as an enabler of the substantive enjoyment of other rights, especially the

46 J Stiglitz 'On liberty, the right to know, and public disclosure: the role of transparency in public life' (1999), [http://www2.gsb.columbia.edu/faculty/jstiglitz/download/2001\\_On\\_Liberty\\_the\\_Right\\_to\\_Know\\_and\\_Public.pdf](http://www2.gsb.columbia.edu/faculty/jstiglitz/download/2001_On_Liberty_the_Right_to_Know_and_Public.pdf) (accessed 23 January 2020).

47 CG Weeramantry 'Access to information: a new human right, the right to know' (1994) 4 *Asian Yearbook of International Law* 99, 102.

48 S Coliver 'The right to information necessary for reproductive health and choice under international law' (1995) 44 *The American University Law Review* 1292.

49 Coliver (n 48) 1280.

50 Bishop (n 2) 106-107; Inter-American Commission on Human Rights (n 42).

51 Inter-American Commission on Human Rights (n 42) 29-33.

52 Weeramantry (n 47) 99, 111.

realisation of socio-economic rights.<sup>53</sup> Flowing from the foregoing is that the right of access to information in the socio-economic field can serve to equalise the power relations in a polity.<sup>54</sup> Obviously then, information is both empowering, reassuring and creates awareness, especially government information required to upturn disadvantages in society.<sup>55</sup> By extrapolation, this resonates for women's right to SRHI of women and girls whose reproductive rights are in jeopardy from the observance of discriminatory cultural norms. Timely access to healthcare information and services can prevent, alleviate and even obviate the unnecessary reproductive health complications and burdens that adolescents and women in disadvantaged settings bear. In addition, 'education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any ... prohibited grounds'<sup>56</sup> to inure in an egalitarian society, and be flexible enough to 'adapt to the needs of changing societies and communities'.<sup>57</sup> Moreover, UN human rights bodies, intergovernmental institutions, and policy think-tank have played an activist role in etching out the normative frontiers of sexual and reproductive health and rights (SRHR) pertaining to all individuals, but more so for women.<sup>58</sup> Since then, gradual progress has been made to seek a more comprehensive approach of reproductive health and rights presumed on the lifecycle from adolescence, reproductive age, midlife to older adulthood with access to education and information required for informed decision-making. This has pushed the recognition of health rights and development at the centre of policies, programmes and implementation plans which emphasise the strategic roles of information, education, community mobilisation and gender equality in the provision and access to quality healthcare.

A comprehensive reproductive health approach not limited to concerns for women of reproductive age but extended to include the lifetime concerns for men and women from birth to old age beginning with the Cairo International Conference on Population and Development (ICPD) in 1994<sup>59</sup> and the Beijing Fourth World Conference on Women (FWCW) in 1995.<sup>60</sup> These rights began to

53 S Jagwanth 'The right to information as a leverage right' in R Calland & A Tilley (eds) *The right to know, the right to live: access to information and socio-economic justice* (2002) 3.

54 As above.

55 Bishop (n 2) 73; RA Wildeman 'Access to information can fundamentally alter society's power relations' (2009) 3.

56 Bishop (n 2) 86.

57 Bishop (n 2) 87.

58 O Gbadamosi *Reproductive health and rights: African perspectives and legal issues in Nigeria* (2007) 20-21.

59 Report of the International Conference on Population and Development (ICPD) 7, UN Doc A/CONF.171/13 (1994); Balogun & Durojaye (n 32) 374-376.

60 Fourth World Conference on Women Beijing (FWCW) held on 15 September 1995, A/CONF.177/20.

receive a lot of attention in contemporary times,<sup>61</sup> particularly paragraph 7(2) of ICPD and as paragraph 94 of FWCW state thus:<sup>62</sup>

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system ... Reproductive health therefore implies 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. Implicit in this last condition are the rights of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice ... and the right of access to appropriate health-care services ... It also includes sexual health [for] ... the enhancement of life and personal relations ...

The 1994 ICPD Programme of Action describes reproductive health as that which

[c]oncerns the capability to reproduce and the freedom to make informed, free and responsible decisions. It also includes access to a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free and responsible decisions about their reproductive behaviour.

The foregoing conferences and meanings ascribed to sexual and reproductive health are integral to the subsequent emergence of reproductive rights in international human rights instruments<sup>63</sup> though asymmetrically slanted towards the reproductive than sexual essence.<sup>64</sup> Subsequently, sexual health was defined as 'a state of physical, emotional, mental and social well-being in relation to sexuality.'<sup>65</sup> SRH encompasses child-bearing or reproductive health-care services, sexuality, sexual education, bodily integrity, consensual sexual relations and marriage, etc.,<sup>66</sup> requiring the mastery of the complex nature of human physiology and related healthcare facilities, goods, services and conditions. Women's right to SRHI would therefore involve mandatory access to or the right to seek, receive and impart all information relevant to the cyclical enhancement of human life, social well-being and personal development. In addition, it would entail the training and equipping of health practitioners with technical capacity and knowledge to facilitate the dissemination of relevant information. Relatedly, the New York Law School has determined that health information has four dimensions, viz; information related to treatment of diseases in formal settings (professional healthcare information); information for disease prevention and availability of health services (health education); information emanating from treatment of diseases in familial or informal settings (lay healthcare information); and information required for participatory healthcare decision-making

61 Gbadamosi (n 58) 16-22.

62 FWCW (n 60).

63 Gbadamosi (n 58).

64 Balogun & Durojaye (n 32) 376.

65 CESCR General Comment 22.

66 World Health Organisation 'Defining sexual health, Report of a technical consultation on sexual health' (2006) 5.

(health policy information).<sup>67</sup> Dytz has also described health information as ‘one of the rights of the user of the public health care system’.<sup>68</sup> Reproductive healthcare would then involve having access to a range of good-quality information and services: family-planning counselling, information, education, including access to safe and effective contraceptive methods; education for prenatal care, safe delivery and post-natal care, infant and women’s healthcare. It would also signify: the prevention of unsafe abortion, reproductive tract infections, sexually transmitted diseases (STDs) and other reproductive health conditions; prevention of harmful practices such as FGM/C; and information, education and counselling on human sexuality, reproductive health and responsible parenthood.<sup>69</sup> However, considering Africa as the world’s most youthful continent, the necessity for age-appropriate CSE for adolescents cannot be overemphasised.<sup>70</sup>

Adolescents often engage in risky behaviours but must make decisions vital to their sexual wellbeing with high quality, comprehensive reproductive and sexual health education offering information on reproduction, contraception, STDs, etc. This would help them to understand the importance of their sexuality and the value of equality in gender relations. Incidentally, sexuality education is relatively new and just beginning to take root in Africa.<sup>71</sup> Since 2013, 21 countries in Eastern and Southern Africa agreed to increase access to sexuality education for the youths in a structured manner<sup>72</sup> while several West African countries have joined the bandwagon with donor funding.<sup>73</sup> The basic challenge with extant CSE programmes is their HIV-tilted nature reflecting donor biases.<sup>74</sup> The Gambia, for instance, has plans for ‘age appropriate’ comprehensive sexual and reproductive health and rights (SRHR) education and family planning and contraceptive use.<sup>75</sup> The UNESCO’s International Technical Guidance on Sexuality Education proposes the subjects’ curricula on key youth-related developmental issues such as interpersonal relationships, life skills, sexual behaviour, culture, etc. While such themes are considered best practices by researchers, the emphasis on gender norms

67 New York Law School ‘Access to health information under international human rights law’ (2012), <http://www.hifa2015.org/hifa2015-and-human-rights/> (accessed 14 January 2020).

68 JLG Dytz ‘Right of access to health information’ (2004) 57 *Revista Brasileira Enfermagem* 139, 139.

69 United Nations, *Reproductive Health Policies* (2017) 1-2.

70 R Engelman ‘Sexuality education begins to take root in Africa’ *NewSecurityBeat*, <https://www.newsecuritybeat.org/2020/03/sexuality-education-begins-root-africa/> (accessed 15 August 2024).

71 As above.

72 As above.

73 As above.

74 F Murunga and others ‘Comprehensive sexuality education in Sub-Saharan Africa’ (2019) 8.

75 See The Gambia ‘Combined report on the African Charter on Human and Peoples’ Rights for the period 1994 and 2018 and initial report under the Protocol to the African Charter on the Rights of Women in Africa’ (2018) 153, [https://www.rightofassembly.info/assets/downloadsReport\\_of\\_Gambia\\_to\\_the\\_ACHPR\\_\(2018\).pdf](https://www.rightofassembly.info/assets/downloadsReport_of_Gambia_to_the_ACHPR_(2018).pdf) (accessed 20 October 2024).

particularly for gay and lesbian young people will surely prove problematic for African states. Though discussion of topics regarded as 'no-go areas' in African societies are now being opened-up by African scholars, the dearth of teachers, sex taboos, and the fear of initiation of adolescents into early sex life and relationships considered immoral or 'unAfrican' will likely hinder CSE implementation without broad-based education across societal strata.<sup>76</sup> By analogy, the European Court on Human Rights, for instance, showed sensitivity to parents' religious and philosophical convictions though it upheld a compulsory sex education course 'conveyed in an objective, critical and pluralistic manner' and does not aim at indoctrination.<sup>77</sup> Human rights education stakeholders in African states must assist to find that middle ground in schools' educational curricula that balances educational needs and societal norms. An analysis of international human rights treaties and interpretations as regards women's right to SRHI is further required in this regard.

### **3 WOMEN'S RIGHT TO SRHI: INTERNATIONAL AND REGIONAL STANDARDS AND CONSENSUS DOCUMENTS**

Women's right to SRHI obligates states to prevent and remedy the denial of human dignity occasioned through the evisceration of women's sexual and reproductive health needs and choices.<sup>78</sup> Women's right to SRHI also implicates issues of timely access to accurate sexual and reproductive health information which states have international human rights obligations to provide to empower vulnerable girls and disadvantaged women to make informed decisions as regards their sexuality, bodily integrity, and private and family lives. The emergence of women's right to SRHI reflects the significance of the international human rights' normative framework on human dignity, which particularly underwrites the advancement of rights pertaining to vulnerable women and girls. Hence, this part clarifies the content, scope, and status of women's right to SRHI developed under the auspices of the United Nations, the African Union, comparative

76 CK Wangamati 'Comprehensive sexuality education in sub-Saharan Africa: adaptation and implementation challenges in universal access for children and adolescents' (2020) 28 *Sexual and Reproductive Health Matters* 56-61; MA Adesina & II Olufadewa 'Comprehensive sexuality education (CSE) curriculum in 10 East and Southern African countries and HIV Prevalence among the youth' (2020) 4 *European Journal of Environment and Public Health* 5-6; FM Wekesah and Others 'Comprehensive sexuality education in Sub-Saharan Africa' (2019) 8-10; *Open Door Counselling and Dublin Well Women Centre v Ireland* (1992) 15 EHRR 244.

77 *Kjeldsen v Denmark* (1976) 1 EHRR 711 para 53.

78 Coliver (n 48) 1297.

regional bodies, and their monitoring mechanisms, reporting and interpretive frameworks.<sup>79</sup>

### 3.1 International and regional treaties and consensus documents

Women's right to SRHI has emerged from the basic understanding of the principle of substantive equality in treaties and consensus documents and their elaborations by international human rights agencies. These include the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities 2006 (CRPD),<sup>80</sup> the Convention of the Rights of the Child (CRC),<sup>81</sup> ICESCR,<sup>82</sup> CAT, ICCPR, and CEDAW.<sup>83</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol or Maputo Protocol) 2003,<sup>84</sup> and comparative regional human rights authorities<sup>85</sup> and national constitutions<sup>86</sup> are also noteworthy. Whether conceived from a narrow position of right to reproductive self-determination and family planning choices-related information<sup>87</sup> or a wider 'right to' information required to enjoy all human rights,<sup>88</sup> women's right to SRHI is firmly rooted in the principle of substantive equality.<sup>89</sup> This principle underlies the pronouncements of UN treaty-based bodies in various reports, Concluding Observations, General Comments and other

79 As above.

80 Art 23(1)(b) (right to age-appropriate reproductive health information).

81 Art 24(3).

82 Art 12.

83 Art 12 (the right to the highest standard attainable of physical and mental health without discrimination and ensure gender equality in access to healthcare).

84 Adopted 2003 entered into force 25 November 2005, OAU Doc CAB/LEG/66.6) art 2 (states to take positive action to address inequalities between women and men), arts 2(2) & 5(a) (states to provide public information on strategies to eliminate harmful traditions), art 4(1)(h) (prohibition of medical experiment on women without informed consent), art 14(1)(e) (right to information on health status), art 14(2)(a) (rural women's right to reproductive health information).

85 Eg, the European Court of Human Rights held that the right to life guaranteed under article 2 of the European Charter may be violated if a state fails to prevent unintentional loss of life during pregnancy or childbirth (*Tavares v France* App 16593/90). The principle of extraterritoriality is found in various European legislations pertaining to harmful African practices, such as FGM. The most promising example in this regard is Spain, which under its Constitutional Act 3/2005, provides that FGM committed abroad is a crime.

86 The Constitution of the Republic of South Africa 1996 Act 106 1996 (as amended) art 9(2).

87 Coliver (n 48) 1285.

88 See, for instance: freedom of expression – ICCPR, art 19; right to health: Universal Declaration, UN General Assembly Resolution 217 A (III), 10 December 1948 (Universal Declaration) art 25; ICESCR, art 12; CEDAW, arts 12(1)(2)(b) & 14(2); CRC, art 24(1) & (2); right to personal integrity – ICCPR, arts 7& 9(1); right to be free of sexual and gender violence – CEDAW, arts 5 and 6; right to equality and non-discrimination in the area of reproductive health – ICCPR, art 2(1).

89 See JGD Trimiño 'Reproductive rights, international regulation' (2012) 1-2.

documents affirming women's right to SRHI. Article 10(h) of CEDAW requires that women have 'specific educational information to help to ensure the health and well-being of families, including information and advice on family planning'. The CEDAW Committee has issued General Recommendation 24 on Women and Health,<sup>90</sup> which *inter alia* compels states to ensure the right to sexual health information and education for all women particularly of adolescents and girls on family planning methods.<sup>91</sup> Also, Recommendation 24 reaffirm women's right to access healthcare services, information, and education based on equality with men under article 12 of CEDAW.<sup>92</sup> The Committee has emphasised systematic sexuality education programmes as priority for states including specific contents like reproductive rights information, responsible sexual behaviour and parenthood, and sexual and reproductive health (SRH), particularly for boys and girls, while stressing the correlation between STI and teenage pregnancy prevention and family planning.<sup>93</sup>

Similarly, CESCR has encouraged sexual and reproductive health education in school curricula and called for public awareness on these through sexuality education in schools and awareness campaigns to combat maternal and child mortality, while advocating comprehensive sexuality education programmes to eliminate the practice of FGM.<sup>94</sup> It aims to equip children and young people with knowledge, skills, attitudes and values that empower them to realise their health, well-being and dignity. In General Comment 14,<sup>95</sup> CESCR, cognisant of the underlying social determinants of health such as freedom to make responsible decisions and choices, freedom from violence, and discrimination concerning one's body and health, interpreted article 12(1)<sup>96</sup> and (2)(a)<sup>97</sup> of ICESCR as not just about being healthy. Rather, it conceived the right to health as an inclusive right and an entitlement to accessible and quality health education and information, including on sexual and reproductive health.<sup>98</sup> Furthermore, CESCR affirmed that the 'realisation of women's right to health requires the removal of

90 Women and Health, 11th Session, February 1994, UN Doc HRI/GEN/1/Rev. 1 (29 July 1994).

91 OA Savage-Oyekunle & A Nienaber 'Adolescents' access to emergency contraception in Africa: an empty promise?' (2017) 17 *African Human Rights Law Journal* 476, 523.

92 Centre for Reproductive Rights (n 31) 3.

93 Centre for Reproductive Rights (n 31) 3-4.

94 Centre for Reproductive Rights (n 31) 8.

95 The Right to the Highest Attainable Standard of Health, Twenty-second session of the CESCR E/C.12/2000/4 (11 August 2000), <http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC14.pdf> (accessed 28 February 2020).

96 The right to the enjoyment of the highest attainable standard of physical and mental health.

97 Obligation of states parties to take steps necessary for the reduction of stillbirth and infant mortality and healthy development of the child.

98 See also CESCR, General Comment 22 (The right to sexual and reproductive health) (2016) UN Doc E/C.12/GC/22, <https://www.escrnet.org/resources/general-comment-no-22-2016-right-sexual-andreproductive-health> (accessed 28 February 2020).



all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health'.<sup>99</sup>

Allied to the foregoing, the Committee further asserted that the right to seek, receive and impart information on health issues is a component of the general right to health and reproductive health services, especially recommending adolescent or 'youth-friendly' healthcare including information and counselling. The CAT once recommended that a state party must take 'necessary steps to eradicate the practice of female genital mutilation, including through nationwide awareness-raising campaigns'.<sup>100</sup> Relatedly, HRC in its General Comment 28: 'Equality of Rights Between Men and Women' interpreted the right to equality before the law protected by article 26, as requiring states parties to eliminate discrimination against women in public and private life, including education and service provision while it has requested a state party which removed sexuality education from the school curriculum to reintroduce it in public schools.<sup>101</sup> Moreover, international human rights law obliges states to respect, protect and fulfil all rights, the right to health not excepted.<sup>102</sup> The obligation to respect demands that states refrain from censoring, withholding or intentionally misrepresenting health-related information.<sup>103</sup> Obligations to protect include, *inter alia* measure to ensure that third parties do not limit people's access to health-related information and services.<sup>104</sup> The obligation to fulfil relates to the dissemination of appropriate information relating to healthy lifestyles, harmful traditional practices and which helps to make informed health choices.<sup>105</sup> Consequently, states' duty regarding SRHI in CESCR's view presupposes not just a negative freedom of non-interference with information necessary for women's expression of sexuality or bodily autonomy;<sup>106</sup> it includes a positive obligation to provide information on medical facilities, goods and services related thereto.<sup>107</sup> Interestingly, regional bodies have followed the example and sometimes performed creditably better than UN bodies on matters pertaining to women's right to SRHI as the African system exemplifies.

99 General Comment 14 para 21.

100 Centre for Reproductive Rights (n 31).

101 Concluding Observations: The Human Rights Committee, see Centre for Reproductive Rights (n 31) 6.

102 CESCR General Comment 14 paras 34-7.

103 CESCR General Comment 14 para 34.

104 CESCR General Comment 14 para 35.

105 CESCR General Comment 12: The right to adequate food (art 11 of the Covenant) UN Committee on Economic, Social and Cultural Rights (CESCR) para 37, <https://www.refworld.org/docid/4538838c11.html> (accessed 25 February 2020).

106 General Comment 14 paras 4 & 11.

107 General Comment 14 paras 12(a), (b)(i), (ii), (iii), (iv), 12(c) & 12(d).

### 3.2 African regional treaty bodies and jurisprudence

The African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) are designated to monitor the implementation of the African Charter on Human and Peoples' Rights (African Charter)<sup>108</sup> and interpret other human rights treaties like the Maputo Protocol to which African states are signatory. The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) monitors the African Convention on the Rights and Welfare of the Child (African Children's Charter).<sup>109</sup> The foregoing African regional instruments have received encouraging elaborations and jurisprudential expositions<sup>110</sup> in terms of international law through their designated treaty bodies and special mechanisms. Article 16 of the African Charter guarantees 'the right to enjoy the best attainable state of physical and mental health'. The African Commission's Resolutions and General Comments on the content of the right cut across maternal mortality, access to medicines and reproductive health services and information as human rights. The Maputo Protocol was the first comparative human rights treaty to expressly obligate states to ensure respect for the right of women to sexual and reproductive health.<sup>111</sup> This right includes the rights such as to family choices,<sup>112</sup> choice of contraceptive,<sup>113</sup> self-protection against sexually-transmitted infections,<sup>114</sup> to be informed of one's health status and a partner's, particularly if affected with STDs,<sup>115</sup> and family planning education.<sup>116</sup> Furthermore, article 5 of the Protocol enjoins state parties to take legislative and other measures to prohibit FGM in all its ramifications while article 12(1)(c) enjoins state parties to protect women, especially the girl-child from all forms of abuse.<sup>117</sup> Corroborating Stefiszyn,<sup>118</sup>

108 Adopted 27 June 1981, entered into force 21 October 1986, (1982) 21 ILM 58.

109 OAU Doc CAB/LEG/24.0/49 (1990) (entered into force 29 November 1999).

110 *Purohit and other v The Gambia* (2003) AHRLR 96 (ACHPR 2003); *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Government of Namibia v LM and others* (forcible sterilisation without informed consent); *Ahamefule v Imperial Hospital and other* (testing for HIV without consent); *Kingaibe and Another v the Attorney General* (forcible testing for HIV of military personnel in Zambia); *E Durojaye Litigating the right to health in Africa* (2015).

111 Art 14.

112 Art 14(b).

113 Art 14(c).

114 Art 14(d).

115 Art 14(e).

116 Art 14(g).

117 AO Ayanleye 'Women and reproductive health rights in Nigeria' 6 (2013) *OIDA International Journal of Sustainable Development* 9, 13.

118 K Stefiszyn 'Adolescent girls, HIV, and state obligations under the African Women's Protocol' in E Durojaye, G Mirugi-Mukundi & C Ngwenya (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 163.

Mkwananz,<sup>119</sup> and Assefa,<sup>120</sup> the African Commission and the African Children's Committee recently affirmed the tenure of article 5 on the need for 'public awareness in all sectors of society regarding harmful practices through information, formal and informal education' and FGM-related content in formal education towards its eradication.<sup>121</sup> The African Commission adopted General Comment 1 on article 14(1)(d) (the right to self-protection and the right to be protected from HIV and sexually transmitted infections) and 14(e) (the right to be informed on one's health status and the health status of one's partner).<sup>122</sup> The African Commission reckons that the right protected in article 14(1)(d):<sup>123</sup>

[I]ncludes women's rights to access information, education and sexual and reproductive health services ... are also intrinsically linked to other women's rights including the right to equality and non-discrimination ... [the violations of which] will impact on women's ability to claim and realise ... [her] right to self-protection.

In addition, the African Commission 'recognises that an enabling legal and policy framework [for implementing access to sexual and reproductive health information protected under article 14(1)(d) and (e)] is intrinsically linked to women's right to equality, non-discrimination and self-protection'.<sup>124</sup> The Commission has issued resolutions relating to topical issues affecting the sexual and reproductive lives of Africans.<sup>125</sup> The African Commission's also adopted General Comment 2 on the Maputo Protocol which recognises the right to informed consent and states' obligation to provide women and girls with accessible information on abortion, family planning, and maternal health.<sup>126</sup> Article 14(2)(a) of the Maputo Protocol provides that state parties shall take all appropriate measures to 'provide adequate, affordable and accessible health services, including information, education and communication programmes to women,

119 S Mkwananz 'It takes two to tango!: The relevance and dilemma of involving men in the realization of sexual and reproductive health and rights in Africa' in Durojaye, Mirugi-Mukundi & Ngweni (n 118) 80.

120 AG Assefa 'Monitoring implementation of the sexual and reproductive health and rights of adolescents children: The role of the African Committee of Experts on the Rights and welfare of the Child' in Durojaye, Mirugi-Mukundi & Ngweni (n 118) 231.

121 The African Children's Committee and African Commission 'Joint General Comment on Female Genital Mutilation' (2023) 13, 21.

122 General Comment 1 on article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 6 November 2006), achpr\_instr\_general\_comments\_art\_14\_rights\_women\_2012\_eng.pdf (accessed 27 February 2020).

123 General Comment 2 para 11.

124 General Comment 2 para 33.

125 Balogun & Durojaye (n 32) 378.

126 General Comment 2 on art 14(1)(a), (b), (c) and (f) and art 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 28 November 2014) On Article 14(1)(a)(b)(c) and (f), achpr\_instr\_general\_comments2\_rights\_of\_women\_in\_africa\_eng.pdf; <https://www.achpr.org/legalinstruments/detail?id=13> (accessed 24 February 2020); Maputo Plan of Action for the implementation of the Continental Guiding Framework and the Abuja Declaration.

especially those in rural areas' on which General Comment 2 also elaborates upon. Commenting on a related instrument, CESCR remarked thus:<sup>127</sup>

The enjoyment of rights is non-discriminatory and grants gender equality when women are well informed of products, procedures and health services that are specific to them and when they actually have access to the latter ...

By the foregoing, women's right to SRHI has thus received a boost within the African regional human rights system. Furthermore, whilst most African countries might not have explicitly recognised women's right to SHRI as a justiciable right in their constitutional frameworks, the right is embedded within the right to health guaranteed in the numerous human rights treaties and instruments they have ratified.<sup>128</sup> For instance, in *Purohit and Another v The Gambia*,<sup>129</sup> the African Commission relied on the ESCR Committee's General Comment 14<sup>130</sup> to affirm the state's obligation under article 16 of the African Charter to take concrete and targeted steps within available resources to ensure full realisation of the right to health. The African Commission explicitly explained the nature of the right to health in the African Charter as embracing health facilities, goods and services to be guaranteed to all without discrimination of any kind.<sup>131</sup> The African Commission has interpreted article 14(1)(e) and (2)(a) of the Maputo Protocol which enjoins states to 'take all appropriate measures' to provide adequate and accessible health services, including information and education to women.<sup>132</sup> The African Commission reasoned that '[t]he right to be informed on one's health status includes the rights of women to access adequate, reliable, non-discriminatory and comprehensive information about their health'.<sup>133</sup> Hitherto, there was little legal challenge to non-access to sexual and reproductive health services (SRHS) and violence against women despite 'the fact that African women continue to bear the greatest burden of sexual and reproductive ill-health in the world'.<sup>134</sup> Nowadays, activists and civil society have become more assertive on women's rights before African regional and national judicial bodies. Incidentally, African treaty-monitoring bodies<sup>135</sup> and special mechanisms are also well-positioned to provide authoritative meaning and interpretive gloss on several aspects of women's SRH.<sup>136</sup>

127 General Comment 2 para 31.

128 See Balogun & Durojaye (n 32) 370, 375-377.

129 (2003) AHRLR 96.

130 'The right to the highest attainable standard of health', UN Committee on Economic, Social and Cultural Rights, UN Doc E/C/12/2000/4 para 12.

131 Balogun & Durojaiye (n 32) 389.

132 General Comment 2 on art 14(1)(a), (b), (c) and (f) and art 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

133 General Comment on art 14(1)(d) and (e) of the Protocol to the African Charter on the rights of women (2014) para 13.

134 Balogun & Durojaiye (n 32) 386.

135 African Commission on Human and Peoples Rights' (African Commission); African Committee of Experts on the Rights and Welfare of the Child (ACERWE).

136 Balogun & Durojaye (n 32) 394.

A 2022 African Children's Committee decision proves invaluable in this regard. In *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania (Tanzanian girls' case)*,<sup>137</sup> the complainants alleged that the Respondent's failure to uphold its obligation to respect, protect, and fulfil the rights of Tanzanian girls to health information and services the deprivation of which results in unwanted pregnancy. It was also alleged that forcing girls to undergo pregnancy testing under similar conditions violated the rights to equality, and non-discrimination, education, RHS, etc., in the African Children's Charter.<sup>138</sup> The respondent argued that it has the responsibility to promote African morality and that it considered sexual relations among children to be immoral and against African values which must be punished.<sup>139</sup> Among the issues for determination was whether the alleged absence of access to appropriate information and youth-friendly CSE and SRHS violated the African Children's Charter.<sup>140</sup> The African Children's Committee found:<sup>141</sup>

Children – when in situations where their health and well-being are implicated – should be provided 'with adequate and appropriate information to understand the situation and all the relevant aspects concerning their interests, and be allowed, when possible, to give their consent in an informed manner.

Following its Joint General Comment with the African Commission on Ending Child Marriage,<sup>142</sup> and Africa Commission's General Comment 2, African Children's Committee, boldly asserted: 'The fulfilment of the right to health includes the facilitation of access to information and services'.<sup>143</sup> The decision serves as a wake-up call for African governments to begin an introspection into African values on sexuality. Incidentally, the Centre for Reproductive Rights in New York had cause to research into the problem of criminalising consensual adolescent sexual intimacy as addressed by national courts in Africa.<sup>144</sup> The organisation had cause to counsel governments that resort to such punitive measures to rather enhance sexuality education and reproductive health services in ways that conform to the rights of the

137 Communication No 0012/Com/001/2019, Decision No 002/2022.

138 *Tanzanian girls' case* paras 2, 18, 25-26.

139 *Tanzanian girls' case* para 27.

140 *Tanzanian girls' case* para 76.

141 *Tanzanian girls' case* para 71.

142 Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWE) on Ending Child Marriage (2017).

143 *Tanzanian girls' case* paras 78-90, 83. See also ECW/CCJ/JUD/37/19 *Women Against Violence and Exploitation in Society (WAVES) & Child Welfare Society, Sierra Leone (On Behalf of Pregnant Adolescent School Girls in Sierra Leone) v Sierra Leone*, para 33 (ECOWAS Court decision on the integration of SRR rights into school curricula).

144 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZAGPPHC 1, Case No 73300/10 (South Africa, High Court); *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* CCT 12/1, [2013] ZACC 35 (South Africa, Constitutional Court).

child.<sup>145</sup> This counsel is applicable to The Gambia, a country caught in the throes of FGM.

## **4 FGM AND WOMEN'S RIGHT TO SRHI IN THE GAMBIA**

The constitutional review underway in The Gambia provides the leeway to redress gender-based discrimination since women in The Gambia are disadvantaged by a patriarchal stranglehold which robs them of decision-making power regarding their sexuality and reproductive health.<sup>146</sup> This part explores how the constitutional moment can be leveraged to address the near relapse of the extant FGM ban.

### **4.1 Constitutional and socio-cultural background to FGM prevalence in The Gambia**

The Constitution of the Republic of The Gambia 1997 (as amended) (CRG 1977) embodies a bill of rights.<sup>147</sup> It guarantees the rights of every person irrespective of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status, subject to respect for the rights and freedoms of others and the public interest. The fundamental rights enshrined shall be respected and upheld by all organs of state, all natural and legal persons, and enforceable by the courts under the Constitution.<sup>148</sup> However, section 7 of the Constitution preserves customary law applicable to local communities and integrates the application of Sharia law among Muslims as regards matters of marriage, divorce and inheritance into Gambian law. The integration of Sharia precepts into Gambian law of itself is not inherently problematic, but it's rather the societal accretion of traditional practices thereto that perpetuates violence and reinforces discrimination to women and girls such as FGM. FGM is highly prevalent among the Serahuleh, Mandinka, Fula and Jola tribes in the rural hinterland who regard it as a rite of passage from girlhood to womanhood and test of female chastity among the populace under the unifying force of Islam.<sup>149</sup> Though the combined threat of imprisonment issued by former President Jammeh and the enlightenment crusades led by civil society and women rights activists seriously lowered the practice, FGM has increased since the advent of democracy. The Gambia is a dualist country like all Anglo-phone commonwealth nations whereby international treaties must be

145 Centre for Reproductive Rights & Pretoria University Law Press 'Legal grounds reproductive and sexual rights in sub-Saharan African Courts Volume III' (2017) 45, 49, 53.

146 Kaplan and others (n 6) 4.

147 CRG 1997 (as amended) Chapter IV.

148 CRG 1977, sec 17(1).

149 Kaplan and others (n 6) 5.

domesticated to become binding law.<sup>150</sup> In Gambian jurisprudence, the Supreme Court's approach to domestic application of international human rights treaties tends to be relativist. Since inception in 2017, keen watchers of political events in The Gambia have not failed to observe that the Government of President Adama Barrow has been 'undertaking key constitutional and legal reforms to bring our laws in harmony with our international obligations'.<sup>151</sup>

## 4.2 The gap in the legal protection of women's rights in The Gambia

The Constitution of The Gambia 1977 guarantees several rights protective of women such as the right to life, the right to equal treatment with men, including equal opportunities in political, economic and social activities and prohibition of gender discrimination.<sup>152</sup> The National Women's Council (NWC) under the NWC Act 1980 is saddled with the mandate to seek the integration and implementation of gender and women's rights initiatives in government activities. The NWC as a representative body is composed of women in all the country's districts to foster women's participatory decision-making. The Child Rights (Amendment) Act 2016 prohibits marriage of any person less than eighteen years old and criminalises child marriage and betrothals. The Women's Act 2010 (amended by Women's (Amendment) Act 2016)<sup>153</sup> which was passed to advance the rights and welfare of women recognises the right to dignity,<sup>154</sup> access to justice and equal protection of the law,<sup>155</sup> prohibition of discrimination,<sup>156</sup> right to marry,<sup>157</sup> right to health,<sup>158</sup> and rights of rural women.<sup>159</sup> In addition to constitutional provisions, policy initiatives like the National Policy for the Advancement of Gambian Women 2010-2020 aims at gender parity and the optimisation of affirmative action to redress past injustices and discriminatory attitudes against women.<sup>160</sup> That the sufferings of women and girls subjected to FGM and other forms of gender violence remains unabated

150 CRG 1997, sec 79(1)(c); OO Shyllon 'Monism/dualism or self executory: the application of human rights treaties by domestic courts in Africa' (2009) 6-12.

151 IDEA 'From dictatorship to a new Constitution in The Gambia: issues and concerns', <http://constitutionnet.org/news/dictatorship-new-constitution-gambia-issues-and-concerns> (accessed 22 January 2020).

152 See CRG 1977 (as amended) secs 28-33.

153 Criminalisation of female circumcision under Women's Act 2010 which domesticated The Gambia's ratification of CEDAW and the Maputo Protocol. See S Nabaneh 'The Gambia's political transition to democracy is abortion reform possible?' (2019) 21 *Health and Human Rights* 169-179.

154 Women's (Amendment) Act 2016, sec 4.

155 Women's (Amendment) Act 2016, sec 7.

156 Women's (Amendment) Act 2016, sec 10.

157 Women's (Amendment) Act 2016, sec 24.

158 Women's (Amendment) Act 2016, secs 29-30.

159 Women's (Amendment) Act 2016, sec 33.

160 The Gambia (n 75) 121.

despite these litany of statutory rights makes the constitutional protection of the right to SRHI imperative in seriously attenuating their plight. Since CRG 1997 does not contain any definitive pronouncement on the right the ongoing constitutional review process provides a rare opportunity to canvass for its entrenchment.

### **4.3 Women's right to SRHI and ongoing constitutional review in The Gambia**

The recent botched attempt at overturning the FGM ban in The Gambia is a wake-up call to protect women's right to SRHI. Interestingly, The Gambia's Draft Constitution of 2020 provides for socio-economic rights including the right to health and portrays efforts towards a reasoned harmonisation of the customary and Islamic orientations of the people with human rights ethos. According to Maria Dacoster, the Interim President of the National Federation of Gambian Women, though the CRG 1997 accorded significant liberties to women it recognised some discriminatory personal laws which eroded women's rights relating to inheritance, divorce, marriage, etc.<sup>161</sup> This dilemma resonates for rural and urban women, a matter raised in the 'Issues Document'<sup>162</sup> of the Constitutional Review Committee (CRC) set up to outline areas for reform of CRG 1977 thus: 'Should specific provision be made in the new Constitution outlining the right to health care service ... in a similar manner as the current Constitution – provides in relation to education?'<sup>163</sup>

The ongoing constitutional review thus provides a historic opportunity to redress as practicably as possible and ensure more voice for women in reproductive health decision-making. The Draft Constitution of the Republic of The Gambia 2019 consists of 20 chapters and some 315 clauses.<sup>164</sup> The Draft reflects some basic principles of human rights and the rule of law, religious secularism and participatory democracy.<sup>165</sup> Some interesting features of the Draft Constitution include judicial recourse to human rights treaties to which The Gambia is signatory as interpretive aids with respect to any constitutional right<sup>166</sup> and flexible 'standing' rules to aid public interest

161 N Sowe 'Women's ministry wants more stake in new draft constitution' *Foroyaa Newspaper* 24 December 2019, <https://foroyaa.gm/womens-ministry-wants-more-stake-in-new-draft-constitution/> (accessed 29 February 2020).

162 Constitutional Review Commission, The Gambia, Constitutional Review Commission of The Republic of The Gambia: possible areas for constitutional reform (Issues Document) (2018) 1-45.

163 Constitutional Review Commission (n 162) 5.

164 *The Voice* 'Gambia publishes first draft constitution' <https://www.voicegambia.com/2019/11/16/gambia-publishes-first-draft-constitution/> (accessed 17 February 2020).

165 *Africanews* 'Gambia close to getting first post-Jammeh constitution', <https://www.africanews.com/2019/11/17/gambia-close-to-getting-first-post-jammeh-constitution/> (accessed 26 February 2020).

166 Draft 2019 Constitution, sec 9(3).



litigation to enforce fundamental rights.<sup>167</sup> The Draft affirmed the state's positive obligation to respect constitutional rights,<sup>168</sup> to respect, protect, promote and fulfil fundamental rights, particularly of vulnerable groups including women,<sup>169</sup> and non-derogation from the protection from cruel and inhuman treatment.<sup>170</sup> A host of new rights including right of access to information,<sup>171</sup> women's rights to equal dignity and treatment with men,<sup>172</sup> right of children against abuse and violence,<sup>173</sup> and the justiciability of socio-economic rights (formerly directive principles in the 1997 Constitution) have also emerged.<sup>174</sup> With this array of rights alone, the recognition of women's right to SRHI will be complementary, but it could be made a subsection of the right to health in the Draft section 60(1)(a). Women must be sufficiently empowered, protected and accorded equality to exercise and enjoy their full rights as citizens. Imprecise or inadequate fundamental rights provisions to protect women's dignity like CRG 1997, section 32, require reform.

## 5 CONCLUSION

There is no gainsaying that women's right to SRHI is among the corpus of the ever-growing international human rights framework based on a major preoccupation among human rights bodies for substantive and gender equality which has led to the introduction of CSE in several African states. However, despite the benefits of CSE: freedom from discrimination, FGM eradication, and respect for equality, human dignity, and overall, of women's sexual and reproductive health well-being, the reality in Africa is that sexuality education is still shrouded in opaque cultural concerns. African governments must therefore ensure to involve adolescents in the development, implementation, monitoring and evaluation of the content of sexuality education and is culturally sensitive. They must also involve religious and community leaders in development of sexuality curricular and decision-making. Since The Gambia is one of the countries with the highest prevalence of FGM and other discriminatory practices that pose negative impacts to women's overall social well-being, it is hereby advocated that a well-structured provision of the women's right to SRHI be entrenched in the Final Constitution which is the expected outcome of the constitutional

167 Constitutional Review Committee, 'Explanatory memorandum to the proposed Draft Constitution' (2019) 2; Draft 2019 Constitution, sec 33(2)(c).

168 Constitutional Review Committee, 'Explanatory memorandum to the proposed Draft Constitution' (2019) 3; Draft 2019 Constitution, sec 32.

169 Draft 2019 Constitution, sec 32(1) & (3).

170 Draft 2019 Constitution, sec 69(3)(b).

171 Constitutional Review Committee, 'Explanatory memorandum to the proposed Draft Constitution' (2019) 3; Draft Constitution, sec 46.

172 Draft 2019 Constitution, sec 53(1) & (2).

173 Draft 2019 Constitution, sec 54(c).

174 Constitutional Review Committee 'Explanatory memorandum to the proposed Draft Constitution' (2019) 3-4; Draft Constitution, chapter VI, Part II (secs 60-66).

review process. The AU and its development partners must support African governments, civil society organisations and other stakeholders to advocate for the constitutional entrenchment of women's right to SRHI in other African countries while African states must eliminate barriers to access to sexuality education. This will add to the quality, resilience, inclusive and culturally compliant outlook of Africa's educational system.