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## The Right to Access Contraception: A Third World Feminist Analysis of the CEDAW and the Maputo Protocol as interpreted in Nigeria and Uganda

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### Abstract

*This article will explore the extent to which there is a right to access contraception in international law and African regional law, through the CEDAW and the Maputo Protocol. The theoretical right to access contraception will not only be compared but the practical implementation will also be examined – in an attempt to understand the scope of a woman’s right to access contraception when applied. This is evaluated through a comparative case study on how the right to access contraception is interpreted by Nigeria and Uganda. Through examining the respective state reports submitted in fulfilment of their CEDAW and Maputo Protocol obligations, this article will draw conclusions on the implementation of contraceptive access in both states. This article uses the lens of third-world feminism to explore the legal pathways to access contraception for African women and thus contributes to a decolonial perspective by highlighting progressive understandings of contraception in African regional law. Amongst the major findings, access to healthcare services directly impacts access to contraception and therefore states should apply intersectional approaches to policy planning and implementation, acknowledging that women are not a homogenous group, in order to promote greater contraceptive access and empowerment. Application of third-world feminism reveals that the Maputo Protocol can be considered more empowering than the CEDAW, though the CEDAW committee has made crucial advances with their general recommendations.*

### Key words

contraception, African women’s rights, third-world feminism, empowerment, comparative law.

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## 1 Introduction

Feminists have critiqued international law for not comprehensively encompassing women's experiences.<sup>1</sup> This critique continues to be a global present-day concern in light of decisions such as *Dobbs v Jackson Women's Health Organisation* that erode women's reproductive rights.<sup>2</sup> Third-world feminism (TWF)<sup>3</sup> has brought the challenges faced by women in non-Western countries into international legal prominence.<sup>4</sup> However, inclusion of women in the international legal dialogue on their sexual and reproductive rights (SRR) has been limited and amidst the growing literature, most of the seminal pieces focus on abortion.<sup>5</sup> In contrast, the right to access contraception has not been as extensively scrutinised even though women accessing contraception remains a challenging issue.<sup>6</sup> Women continue to have insufficient sexual health information and access, with women-centred issues comparatively sidelined when it comes to legislation and policy decisions. Considering the risk of sexually transmitted infections (STI), such as HIV/AIDS, contraceptive choice and access should be a priority for states.

This article will link the analysis of the right to access contraception with empowerment, given that empowerment is one of the 'grammatical' features of human rights.<sup>7</sup> This understanding of empowerment is with reference to human rights as tools to assist in political and legal circumstances. Empowering women to make decisions regarding their own bodies can address discrimination, promote gender

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<sup>1</sup> Rebecca J. Cook, 'Human Rights and Reproductive Self-Determination' (1995) 44:4 *American University Law Review*, at 975.

<sup>2</sup> US, *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health et. al. v Jackson Women's Health Organisation et. al.*, 24 June 2022, 597, [www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf) (accessed 3 August 2022). This has been a landmark judgment in the United States of America given its consequences on women's right to an abortion.

<sup>3</sup> The phrase 'third world' can have certain negative connotations and, as such, some social sciences literature such as Melanie D. Janzen, 'The Women of Agabagaya: Education and Post-Development Theory' (2008) 31:1 *Canadian Journal of Education*, at 8; and Bernon Lee, *Marginal(ised) Prospects Through Biblical Ritual and Law* (Palgrave Macmillan, 2017) have referenced *majority world feminism* as a substitute term. The intention here is to serve as a reminder of the size of the population and, therefore, influence coming from the majority part of the world. A more detailed discussion in support of adopting this phrase in a legal context is unfortunately outside the scope of this article.

<sup>4</sup> See inter alia Fareda Banda, 'Blazing a trail: The African Protocol on women's rights comes into force' (2006) 50:1 *Journal of African Law*, at 72.

<sup>5</sup> Charles Ngwenya, 'Access to Safe Abortion as a Human Right in the African Region: Lessons from Emerging Jurisprudence of UN Treaty Monitoring Bodies' (2013) 29:2 *South African Journal on Human Rights*, at 399.

<sup>6</sup> Julia Gebhard, Diana Trimiño, 'Reproductive Rights, International Regulation' (2012) *Max Planck Encyclopedia of Public International Law*.

<sup>7</sup> David Kinley, 'Bendable rules: The Development Implications of Human Rights Pluralism' (2015) *Legal Pluralism and Development Policy*, C. Sage, B. Tamanaha, M. Woolcock (eds) Forthcoming, Sydney Law School Research Paper No. 10/104 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1695304](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695304) (accessed 7 November 2023).

equality and uphold inherent dignity.<sup>8</sup> This is not to say that rights apply uniformly, rather, through acknowledging a minimum standard, rights can be an empowerment tool.<sup>9</sup>

The World Conference of the International Women's Year was the first influential meeting involving over one hundred states and saw the earliest acknowledgement of what SRR entail in international law.<sup>10</sup> The report of this conference resultantly addressed criticism related to the public/ private distinction as a justification for limiting SRR rights.<sup>11</sup> This turning point spring boarded further developments, namely the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>12</sup> The CEDAW expanded the understanding of reproductive rights and remains one of the foremost binding international documents for women.<sup>13</sup> Given the prevalence of *inter alia* maternal mortality in African states, this article will center on African States with the African Charter on Human and Peoples' Rights (Banjul Charter) being the founding document for regional human rights, and this article focusing on the subsequent Maputo Protocol (MP) given its unequivocal endorsement of the right to contraception.<sup>14</sup>

Outlining the extent to which there is a right to access contraception in the CEDAW and the MP holds immense value in the African context to empower women to have choices regarding their sexual and reproductive decisions.<sup>15</sup> Seeking to address *inter alia* maternal mortality and HIV/AIDS in states where women experience them most prevalently, Nigeria and Uganda have been selected as case studies.<sup>16</sup> Nigeria and Uganda are classified as similar cases in terms of case selection for this article, with historical connections as former British colonies who gained independence around the

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<sup>8</sup> Sylvia Tamale, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (2008) 16 :1 *Feminist Legal Studies*, at 47; Paola A. Guzman Alejandro, 'Reproductive Rights' (2020) 89:1 *Revista Juridica UPR*, at 261; Cook (1995) 1014 on dignity.

<sup>9</sup> *Ibid.*

<sup>10</sup> UN, 'Report of the World Conference of the International Women's Year', Mexico City 19 June – 2 July 1975.

<sup>11</sup> *Ibid.*

<sup>12</sup> UNGA, CEDAW, UNTS 1249, 18 December 1979, at 13.

<sup>13</sup> Rebecca J. Cook, 'International Protection of Women's Reproductive Rights' (1992) 24:2 *New York University Journal of International Law and Politics*, at 660.

<sup>14</sup> For the Banjul Charter, see CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981; for the Maputo Protocol, see CAB/LEG/66.6, 11 July 2003.

<sup>15</sup> Charles Ngwena and Ebenezer Durojaye, 'Strengthening the Protection of Sexual and Reproductive Health Through Human Rights in the African Region: An Introduction' in Charles Ngwena, Ebenezer Durojaye (ed.), *Strengthening the protection of sexual and reproductive rights in the African region through human rights* (Pretoria University of Law Press, 2014); Rhoda Asikia Ige, 'Speaking for Ourselves: African Feminism and the Development of International Human Rights Law' (2014) 6 *KNUST Law Journal*, at 105-128.

<sup>16</sup> The World Health Organisation, 'Country Profile 2021', WHO/UCN/HHS/21.10 (2021) <https://cfs.hivci.org/index.html> (accessed 3 August 2022).

same time.<sup>17</sup> As a result of British colonisation, both states have pluralistic legal systems, including English common law and customary law.<sup>18</sup> However, in terms of religion, Nigeria has a higher Muslim population than Uganda, with more Christians. These religious and cultural differences evidence how diverse the African continent is, and subsequently, the importance of a contextual analysis and how this can affect the implementation of the right to access contraception.<sup>19</sup> A comparative case study analysis in this context is valuable in providing regional insights on contraceptive access, considering similarities and differences in the interpretation of the right.

Nigeria's and Uganda's provision of the right to access contraception is assessed by examining the periodic state reports submitted to the CEDAW and MP monitoring committees in compliance with their obligations, and the resultant feedback from the relevant committees. These are considered together with non-governmental (NGO) shadow/ alternate reports to provide a more holistic picture of the domestic interpretation of the right to access contraception. Only the most recent reports are included to narrow the current scope and ensure up-to-date analysis. It is important to note that this is not a comprehensive depiction of contraceptive access, given that only submitted reports are analysed – yet this limited analysis from the perspective of the Nigerian and Ugandan states together with the NGOs indicates the extent of compliance with the CEDAW and the MP.<sup>20</sup>

In contemplation of women's diverse contraceptive access and requirements, applying TWF will enhance this article's analysis. TWF has highlighted that a regional instrument such as the MP can be more inclusive and localised, given references to and incorporation of regional and local culture.<sup>21</sup> This incorporation of culture in the MP can make it more attuned to flexibility and collaboration, in contrast to the CEDAW, and therefore has the potential to be more empowering. Specifically, in including a comparative case study of two African states, this article will examine this assertion of the flexibility of the international and regional legal position through the

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<sup>17</sup> Victor Oluwasina Ayeni 'Nigeria' and Agaba Daphine Kabagambe, 'Uganda' in Victor Oluwasina Ayeni (ed), *The Impact of the African Charter and the Maputo Protocol in selected African States* (Pretoria University Law Press, 2016). On case selection, see Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53:1 *American Journal of Comparative Law* 125, at 134.

<sup>18</sup> Ibid, 265.

<sup>19</sup> Giovanna Maria Frisso, 'Third World Approaches to International Law: feminists' engagement with international law and decolonial theory' in Susan Harris Rimmer and Kate Ogg (ed) *Research Handbook on Feminist Engagement with International Law* (Edward Elgar, 2019), at 480.

<sup>20</sup> For a comprehensive analysis of the status of compliance with the Maputo Protocol amongst selected African states, see Victor Oluwasina Ayeni (ed), *The Impact of the African Charter and the Maputo Protocol in selected African States* (Pretoria University Law Press, 2016).

<sup>21</sup> Jing Geng, 'The Maputo Protocol and the Reconciliation of Gender and Culture in Africa' in Susan Harris Rimmer and Kate Ogg (ed), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar, 2019).

issue of contraception.<sup>22</sup> The examination of the MP will challenge the assumption that Africa is 'lagging' in terms of its human rights development, as the MP's approach to contraception is comparatively ahead of the CEDAW, as it directly references 'contraception' and facilitates access to a wider group of women.<sup>23</sup> This direct reference could be attributed to the MP being adopted more than twenty years after the CEDAW; nevertheless still contributes to the narrative that Africa can be at the forefront of women's SRR.

Given this article's application of TWF, the next section will discuss how the analysis of the right to access contraception through this lens is valuable. Following this, the implication of the right to access contraception is explored through its indivisibility and interrelatedness with other human rights. The article will then compare the right to access contraception under the CEDAW and the MP, identifying similarities as well as differences between the positions on contraceptive access, and assessing the significance of any differences. The comparative case study follows, reviewing the Nigerian and Ugandan state reports together with the NGO reports submitted to the relevant committees, in fulfilment of treaty obligations.

## **2 Third World Feminism and the Application of the Right to Access Contraception**

The reality of the living circumstances of women calls for more active questioning of the role and content of international and regional law. Therefore, applying TWF when analysing the right to access contraception will not only provide a nuanced critique but also help understand how this right can be interpreted to empower the greatest number of women. TWF does this by incorporating and building on the analysis by third world approaches to international law (TWAIL) scholars and feminist critique, critically examining the content of international law.<sup>24</sup> TWAIL identified gaps in international law, revealing its Eurocentric nature and its perpetuation of a power imbalance despite being in the 'postcolonial' period.<sup>25</sup> The first wave of TWAIL was spearheaded on the basis of challenging the power dynamics in international law in the context of

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<sup>22</sup> Fareda Banda, 'Global Standards: Local Values' (2003) 17:1 *International Journal of Law, Policy and the Family*.

<sup>23</sup> Ige, (2014) 105. See also, Ebenezer Durojaye and Lucyline Nkatha Murungi, 'The African Women's Protocol and sexual rights' (2014) 18:7-8 *The International Journal of Human Rights*, at 881.

<sup>24</sup> Dianne Otto, 'The Gastronomics of TWAIL's Feminist Flavours: Some Lunch-Time Offerings' (2007) 9:4 *International Community Law Review*, at 345-352.

<sup>25</sup> Anthony Anghie, 'The Evolution of International Law: colonial and postcolonial realities' (2006) 27:5 *Third World Quarterly*, at 739-756.

colonialism and imperialism.<sup>26</sup> Gathii, in his mapping of TWAIL's development, acknowledges that it continues to evolve and encapsulate the views of 'new scholars', implying that TWAIL is not a closed group – *inter alia* waves of feminism can be infused into a TWAIL analysis.<sup>27</sup> TWF fits within the framework of TWAIL but for the purposes of this article, specific reference to TWF as opposed to TWAIL identifies the focus on the nuanced perspective for women that provides more value in the contraceptive access analysis.<sup>28</sup>

Feminist approaches to international law have been broadly categorised based on the concerns that they identify and address, such as the geographical scope of the critique.<sup>29</sup> The initial global feminist critique of international law originated in the Global North, with Cook, Charlesworth, Chinkin and Wright among the standout proponents.<sup>30</sup> Despite attempting to voice women's rights, this feminist critique framed women as one group with identical issues and therefore left a gap for how Global South women experience international law.<sup>31</sup> Gender should also not be viewed as the sole indicator of what shapes women's experiences of law. TWF, amongst whom are Tamale, Oloka-Onyango and Banda contributing in the African context, addresses this gap by infusing intersectionality to move away from viewing women as a homogenous group, filling the gap of critiques from TWAIL and feminist approaches.<sup>32</sup> Conflation of members of the same racial group is incorrect, given that other markers like socio-economic status and sexuality can create further challenges and subsequent considerations for empowerment through law.<sup>33</sup>

TWF has also been subject to some criticism, such as perpetuating the narrative of women as a homogenous group, merely with the added detail of being

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<sup>26</sup> James Thuo Gathii, 'TWAIL: A Brief History of its Origins, Its Decentralised Network, and a Tentative Bibliography' (2011) 26:3 *Trade Law and Development*, at 27.

<sup>27</sup> *Ibid.*, 34.

<sup>28</sup> *Ibid.*, 37.

<sup>29</sup> Ranjoo S. Herr, 'Transnational, Third World, and Global Feminisms' in Patrick L. Mason (ed.), *Encyclopaedia of Race and Racism* (Routledge 2013). There is also transnational feminism which intends to move beyond state-centricity in international law and identify non-state actor's role in perpetuating gender inequality. Given that the focus of this article is on state's responsibilities, a discussion of this critique is beyond the scope.

<sup>30</sup> See *inter alia* Cook (1995) 975; Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85:4 *The American Journal of International Law*, at 613-645.

<sup>31</sup> J Oloka-Onyango and Sylvia Tamale, 'The Personal is the Political, or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17:4 *Human Rights Quarterly*, at 699.

<sup>32</sup> *Ibid.* See *inter alia* Fareda (2003).

<sup>33</sup> Meghan Campbell, 'The Distance Between Us: Sexual and Reproductive Health Rights of Rural Women and Girls' in Shreya Atrey (ed) and Peter Dunne (ed.), *Intersectionality and Human Rights Law* (Bloomsbury, 2020).

from the third world.<sup>34</sup> However, there has also been an active effort of instilling intersectionality into the analysis – an aim that this article echoes in understanding the benefit of contraceptive access not merely for women generally but also an understanding of the position of specific groups.<sup>35</sup>

TWF accounts for the historical context of states, including colonisation and the need to amplify the voices of women of colour. TWF highlights the gap in international law that assumes that all women face the *same* oppression.<sup>36</sup> This is problematic in that it perpetuates the narrative that women of the Global South are incapable of helping themselves or are victims.<sup>37</sup>

The application of TWF in the analysis of the right to access contraception will be valuable for three reasons. Firstly, it is particularly useful to address Global North's critiques of the status of human rights in the African context, through an inclusive reading that can reconcile potential differences rather than outright rejections (such as rejection of cultural practices rather than reconciliation or modification).<sup>38</sup> Secondly, the TWF reading of human rights and, more specifically, the right to access contraception allows for a more intersectional understanding and critique – to understand better how this right can apply to the widest group of women given that contraceptive access does not apply uniformly when considering *inter alia* socioeconomic status. Thirdly, TWF, therefore, not only shines a light on the diversity of women but also frames issues from a contextualised empowerment perspective, aligning with this article's intention to empower through the right to access contraception.<sup>39</sup>

### **3 Connecting the Right to Access Contraception within the Human Rights Framework**

Given that the right to access contraception is in a state of development, the right can be more legally realisable through an inclusive reading of other, more established human rights.<sup>40</sup> This analysis of the right to access contraception as it intersects with

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<sup>34</sup> Asma Mansoor, "Marginalization" in third world feminism: its problematics and theoretical reconfiguration' (2016) 2 *Palgrave Communications*.

<sup>35</sup> Vrushali Patil, 'From Patriarchy to Intersectionality: A Transnational Feminist Assessment of How Far We've Really Come' (2013) 38:4 *Signs: Journal of Women in Culture and Society*, at 848.

<sup>36</sup> Ibid.

<sup>37</sup> Tamale (2008) 47, 52.

<sup>38</sup> Ibid.

<sup>39</sup> Ranjoo S. Herr, 'Transnational, Third World, and Global Feminisms' in Patrick L. Mason (ed.), *Encyclopedia of Race and Racism* (Routledge, 2013).

<sup>40</sup> Ibid.

other human rights is a comprehensive approach to interpreting human rights to apply to all women, taking into account TWF critique. The right to access contraception connects, for example, to the right to life, health, privacy, information and education, scientific progress, culture and religion, dignity and equality.<sup>41</sup> This supports the view that human rights are indivisible and interdependent and, further, that failing to provide access to contraception can implicate other rights.<sup>42</sup>

Given the high rates of maternal mortality and the risk of unsafe abortion practices due to criminalisation by many states, the right to access contraception directly relates to the right to life.<sup>43</sup> Firstly, maternal mortality remains a challenge for women, particularly where healthcare services are limited or inaccessible. Access to contraception could mitigate this risk by empowering women to control if, and when, they have children. Since the right to life can only be limited in specific circumstances, states should take protective measures.<sup>44</sup> An argument can therefore be made that the inadequate provision of access to contraception results in a failure to uphold the right to life for women.<sup>45</sup> This issue further only affects women and, as such, the effect of not addressing it can be viewed as discriminatory. This argument is further bolstered by drawing inspiration from the gender mainstreaming attempts in General Comment 28 to the International Covenant for Civil and Political Rights.<sup>46</sup> The committee affirmed that states must ensure that women have sufficient information on abortions and steps should be taken to 'achieve the effective and equal empowerment of all women'.<sup>47</sup>

The right to access contraception fits within an inclusive reading of the right to health.<sup>48</sup> Such a reading should further mean that the right is justiciable, which is controversially not the case with Nigeria.<sup>49</sup> In other words, reading the right to health without including SRR dismisses the experiences of women and, as such, reinforces

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<sup>41</sup> Berta E. Hernandez, 'To Bear or Not to Bear: Reproductive Freedom as an International Human Right' (1991) 17:2 *Brooklyn Journal of International Law*, at 309.

<sup>42</sup> Theo van Boven, 'Categories of Rights' in D. Moeckli, et. al. (ed.), *International Human Rights Law* (OUP, 2018), at 135-136.

<sup>43</sup> Cook (1995) 993.

<sup>44</sup> Nigel S. Rodley, 'Integrity of the Person' in D. Moeckli, et. al. (ed.), *International Human Rights Law* (OUP, 2018), at 175.

<sup>45</sup> Alejandro (2020) 249.

<sup>46</sup> CCPR/C/21/REV.1/Add.10, 29 March 2000.

<sup>47</sup> Ibid.

<sup>48</sup> Banda (2006) 82.

<sup>49</sup> For further discussion on the justiciability of the right to healthcare in Nigeria, see Sunday Bontur Lugard, 'The Right to Health in Nigeria and its Impact on Citizens' Access to Medical Care' (2022) 67:1 *Journal of African Law*, at 59-77; Obiajulu Nnamuchi, 'Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria' (2008) 52:1 *Journal of African Law*, at 1-42.

the lack of (gender) neutrality of law as proposed by TWF.<sup>50</sup> Contraception services help promote women's overall health, not only with respect to choosing when to become pregnant, but also with STIs, including HIV/AIDS, which may also impact women's right to life over the longer term. Healthcare workers, through clinics and hospitals, can provide contraceptives, without the cost of new infrastructure.<sup>51</sup> Both the World Conference of the International Women's Year and the Cairo Conference explicitly identified the relationship between SRR and the right to health.<sup>52</sup> Other bodies, such as the Committee on Economic, Social and Cultural Rights, have also confirmed this.<sup>53</sup> The MP's construction of the right to access contraception, given its direct wording as discussed later, arguably reinforces a more women-inclusive reading of the right to health when compared to the CEDAW. Additionally, because women's health includes unique concerns to those of men, the failure of healthcare systems to provide for the right to access contraception can additionally be discriminatory.<sup>54</sup>

The right to privacy includes women's reproductive rights, as included in General Comment No. 28, as well as the confidentiality of treatments that do not require third-party consent.<sup>55</sup> A TWF reading of the right to privacy supports women's freedom and autonomy, accounts for cultural differences, and ensures that states do not impose on women's freedom to choose their preferred method of contraception, if any. This right can therefore extend to women's bodily autonomy and empowerment. Interpreting the right to privacy in line with SRR, women's sexual freedom should be without any state or other interference.<sup>56</sup> By extension, the right to access contraception links to the right to privacy in that it enables safer sexual freedom, to the extent that women opt for contraceptive use.<sup>57</sup>

The right to access contraception connects with the right to education in two ways. Firstly, the right to access contraception empowers women to have greater control over their sexual and reproductive health, mitigating the risks that STIs and

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<sup>50</sup> Frisso (2019) 484.

<sup>51</sup> Alejandro (2020) 267.

<sup>52</sup> Cook (1995) 975.

<sup>53</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000.

<sup>54</sup> Hernandez (1991) 311.

<sup>55</sup> United Nations Population Fund et. al. 'Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions' (1 December 2014) [www.unfpa.org/publications/reproductive-rights-are-human-rights](http://www.unfpa.org/publications/reproductive-rights-are-human-rights) (accessed 27 February 2022). See also footnote 27.

<sup>56</sup> Lilian Akhrome-Omonfuegbe, 'A Critical Appraisal of Women's Reproductive Rights in Nigeria' (2019) 10:2 *Journal of Sustainable Development Law and Policy*, at 257-266.

<sup>57</sup> Ibid.

pregnancy can impose on the right to education.<sup>58</sup> Secondly, the right to education relates to SRR information insofar as it influences an informed 'choice'.<sup>59</sup> Even where individuals choose not to use contraception, the benefit of education and information affects the short- and long-term health and well-being of women.<sup>60</sup> Increased access to education clearly empowers women, both the CEDAW and the MP explicitly provide for education and information on family planning.<sup>61</sup> However, it is necessary to note that this line of argument assumes educational infrastructure, which may not be the case in all countries or in rural areas of a country.

The intersection of the right to culture and the right to access contraception can be challenging, inviting TWF accounts on the development of culture as opposed to its elimination. The right to access contraception does not directly implicate this right but certain patriarchal cultural norms, through the right to culture, could prevent full realisation of contraceptive choice.<sup>62</sup> Application of the TWF lens can therefore assist with reconciliation of these two rights which in international law have been, at times, framed as opposing.<sup>63</sup> The different approaches to culture are clearly seen in the CEDAW and the MP, with the CEDAW placing the responsibility on the state to modify or eliminate culture to ensure equality between men and women.<sup>64</sup> In contrast, the MP asserts that women should be entitled to participate in determining cultural policies and the state has the responsibility to facilitate this.<sup>65</sup>

Dignity is inherent to being human, with the exercise of further human rights upholding dignity.<sup>66</sup> The International Conference on Population and Development in Cairo confirmed the link between dignity and women's reproductive autonomy, undoubtedly given effect through the right to access contraception.<sup>67</sup> To the extent that women cannot make decisions regarding their bodies, equality and dignity are

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<sup>58</sup> Cook (1995) 1004.

<sup>59</sup> Katherine Sochacki, 'CEDAW and Treaty Compliance: Promoting Access to Modern Contraception' (2018) 51:2 *Vanderbilt Journal of Transnational Law* 659.

<sup>60</sup> Akhirome-Omonfuegbe (2019) 262.

<sup>61</sup> See inter alia Art. 10(h) CEDAW and Art. 14(1)(g) MP in this regard.

<sup>62</sup> Tamale (2008) 53.

<sup>63</sup> Ibid.

<sup>64</sup> Art. 5(a) CEDAW.

<sup>65</sup> Art. 17 MP.

<sup>66</sup> Cook (1992) 977.

<sup>67</sup> Ibid. 978.

diminished.<sup>68</sup> Both the CEDAW and the MP acknowledge the importance of dignity in their preambles.<sup>69</sup>

In addition to the above, women in urban areas are perceived as having more privileged access to contraception relative to those who belong to rural, disabled, or refugee groups. Additional identity markers, such as class and sexual orientation, can also influence 'privilege' and access.<sup>70</sup> Further, the unequal distribution of healthcare services means that women in certain areas lack access to contraception. This indicates the need for an intersectional approach to understanding and implementing the right to access contraception per TWF. Both the CEDAW and the MP strive to address gender inequality: addressing the gap of inequality that continues to persist based on gender forms the basis and motivation behind the CEDAW, while provisions in the MP (such as Article 17) recognise the law's ability to serve as a reference for areas that require transformation in service of equality.<sup>71</sup>

#### 4 The CEDAW and the MP Analysis

The intersection of the right to access contraception with other human rights is confirmed when looking at both the CEDAW and the MP, albeit to a limited extent. This section will therefore compare the extent to which the CEDAW and the MP provide for a right to access contraception, to understand the international and regional positions on contraceptive access before analysing the state obligations that arise as a result of being parties to both instruments.<sup>72</sup> Analysis of the legal position can also be an empowerment tool for African women in determining whether the CEDAW or the MP is stronger to turn to when seeking to exercise their contraceptive right. The similarities between the CEDAW and the MP are first outlined before turning to the differences. Based on the analysis that follows, it is argued that the MP is more empowering than the CEDAW, at least textually.

This paragraph will compare the provisions in the CEDAW and the MP pertaining to 'family planning'. Article 10(h) of the CEDAW promotes gender equality through equal provision of information and advice on family planning.<sup>73</sup> Article 12 again mentions family planning, in relation to eliminating discrimination in the

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<sup>68</sup> Ibid, 985-986.

<sup>69</sup> Preamble to the UNGA, CEDAW, UNTS 1249, 18 December 1979; Preamble to the Maputo Protocol, CAB/LEG/66.6, 11 July 2003.

<sup>70</sup> Ibid.

<sup>71</sup> Geng (2019).

<sup>72</sup> Ruther Halperin-Kaddari and Marsha A. Freeman, 'Backlash Goes Global: Men's Groups, Patriarchal Family Policy, and the False Promise of Gender-Neutral Laws' (2016) 28:1 *Canadian Journal of Women and Law*, at 182-210.

<sup>73</sup> UNGA (1979).

provision of healthcare. The reference to addressing discrimination against women is echoed in the Banjul Charter's Article 18, the only explicit mention of discrimination against women in the entirety of the charter. Article 16(e) includes mention of women having equal rights to men in deciding the number and spacing of their children.<sup>74</sup> Turning to state obligations associated with the right, Articles 10, 12, 14 and 16 of the CEDAW refer to women having access to 'family planning' related education and services.<sup>75</sup> Similarly, the reference to 'family planning' in Article 14(1)(g) of the MP is in relation to equality in education, linking back to the need for education as described in the CEDAW. Both the CEDAW and the MP mention the need for education as well as services, a clear indication of how states can give effect to the substance of the right.

The CEDAW and the MP make attempts to stress that the right to access contraception should apply to different groups of women. However, neither the CEDAW nor the MP acknowledge the possible barriers to accessing contraceptive services, which could include having reproductive health education available in accessible languages.<sup>76</sup> Article 16(1)(e) of the CEDAW discusses the right of all women, in relation to the equal right of men, to decide the number and spacing of their children. Article 14(1)(b) of the MP reinforces the wording from the CEDAW with reference to the number and spacing of one's children, while Article 14(1)(a) of the MP provides for the right to control one's fertility.<sup>77</sup> A key difference between the two is the MP's version provides the right to women independently, whereas the right in the CEDAW is in relation to men. Insofar as it relates to women's right to access contraception, this phrasing of 'number and spacing' facilitates women's right to choose how many children they would like, and when. Article 14 (2)(b) of the CEDAW provides for the same right regarding the number and spacing of one's children to apply to rural women, recognising their particularly vulnerable position. Article 14(2)(a) of the MP also makes direct mention of the provision of healthcare and other services to women in rural areas, within the context of health and reproductive rights. In terms of TWF, this shows the CEDAW's ability to have an intersectional approach and not approach women as one homogenous group.<sup>78</sup> General Comment No. 2 to

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Center for Reproductive Rights, 'The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights' Briefing Paper (February 2006) <https://reproductiverights.org/the-protocol-on-the-rights-of-women-in-africa-an-instrument-for-advancing-reproductive-and-sexual-rights> (accessed 15 February 2022).

<sup>77</sup> African Union (2003).

<sup>78</sup> Patil (2013).

the MP further reinforces the rights of rural women. Arguably it goes even further in paragraph 61 by mentioning not only women in rural areas but also refugee women and women living with disabilities.<sup>79</sup> Article 14 of the CEDAW addresses state's duty to provide adequate healthcare to rural women.<sup>80</sup> These references align with TWF through inclusion of a broader range of women and acknowledge that certain groups require additional mention to ensure substantive equality.<sup>81</sup>

This paragraph explores the potential of language in the MP to elevate the right to contraception in comparison to the CEDAW. The explicit acknowledgement of indivisibility in the MP's preamble can advocate for more clarity on the status of the right to access contraception within the human rights framework. This can place women in a more empowered position aligned with the TWF critique. This statement of indivisibility can be viewed as advanced in that there is an acknowledgement that the rights in the MP, like the right to access contraception, cannot be viewed in isolation but are inextricably linked to other human rights.<sup>82</sup> While the CEDAW acknowledges a link between the right to access contraception and the right to health, this is not on the same scale as the statement of indivisibility in the MP.<sup>83</sup> However, as a starting point, the framing of both these instruments is different – the CEDAW addresses discrimination against women while the MP focuses on women's rights. Turning to the MP, Article 14(2) provides obligations for state parties regarding the right to access contraception, with reference to healthcare, education, information and communication.<sup>84</sup> General Comment No. 2 by the African Commission on Human and Peoples' Rights (ACmHPR) provides further guidance to state parties on how to more effectively fulfil their obligations in Article 14 of the MP.<sup>85</sup> Article 14(1), subsections (a), (b) and (c) are stated as being indivisible.<sup>86</sup> Therefore though the initial statement of indivisibility in the MP's preamble may not be binding, the concept of indivisibility is applied in the above-stated articles which enforces the inseparable status of the right to access contraception.

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<sup>79</sup> African Commission on Human and Peoples' Rights, General Comment No. 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2 (a) and (c) of the MP, 28 November 2014.

<sup>80</sup> UNGA (1979).

<sup>81</sup> Campbell (2020).

<sup>82</sup> van Boven (2018) 135.

<sup>83</sup> CEDAW Committee (1999).

<sup>84</sup> CEDAW Committee, General Recommendation No. 24 (1999) Article 12 of the Convention (women and health), A/54/38/Rev.1, chap. I para, at 17-18.

<sup>85</sup> African Commission on Human and Peoples' Rights (2014).

<sup>86</sup> *Ibid*, para 23.

General Comment No. 2 to the MP proves to be more advanced than the CEDAW in identifying the barriers to women exercising the right to access contraception and calls on states to update their healthcare and education services, rectifying the lack of acknowledgement in the MP.<sup>87</sup> The MP includes references to the CEDAW, connecting regional and international obligations of African states. The CEDAW Committee in General Comment No. 36 stresses the links with the right to health and education, calling on states to develop curricula at all levels to promote informed contraceptive choice.<sup>88</sup> These additions to the MP as well as to the CEDAW show a greater awareness of structural limitations to women exercising the right to access contraception, more aligned with TWF critiques as they call on states to assist women with making contraceptive choices that are informed.<sup>89</sup>

The MP's construction of the right to access contraception is more inclusive based on sexual orientation. Article 16(1) of the CEDAW provides for the right specifically with reference to 'marriage and family relations'. This formulation arguably supports an interpretation that could limit the right to access contraception to married women.<sup>90</sup> Additionally, the right in the CEDAW appears to apply to heterosexual women, to the exclusion of other sexual orientations. This is indicated by Article 16's phrasing 'on the basis of equality of men and women'. However, the CEDAW was drafted more than forty years ago, contextualising why family planning was conceptualised along these lines, and why the CEDAW Committee has expanded upon the initial limitations of the text through general recommendations.<sup>91</sup>

The most significant difference when comparing the conceptions of the right is Article 14(1)(c) of the MP's direct reference to 'contraception', in contrast to the CEDAW which never mentions this. From the perspective of TWF, an explicit right to access contraception is more empowering for women. The indirect wording in the CEDAW, together with references to 'family planning' and 'spacing of children,' limit the access to contraception not only to women in heterosexual relationships, but further excludes sexual activity outside the reproductive frame. In doing so, this wording excludes the risk of STIs compared to the direct mention in the MP in Article 14(1)(d). This can also reinforce the stereotype that women only have sex to have children, which fails to promote women's sexual freedom beyond reproduction and correspondingly fails to provide adequate contraceptive access. The CEDAW

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<sup>87</sup> African Commission on Human and Peoples' Rights (2014).

<sup>88</sup> CEDAW/C/GC/36, 27 November 2017.

<sup>89</sup> Ibid; see also Center for Reproductive Rights (2006) 8.

<sup>90</sup> Dianne Otto, 'Women's Rights' in D. Moeckli, et. al. (ed.), *International Human Rights Law* (OUP, 2018), at 318.

<sup>91</sup> See inter alia CEDAW/C/GC/28, 16 December 2010.

Committee successfully addressed this gap with General Recommendation No. 24, recommending government action 'for the prevention and treatment of sexually transmitted diseases'.<sup>92</sup>

The wording of Article 16 of the CEDAW referring to 'marriage' read together with reference to equality between men and women results in unmarried women, non-heterosexual women and those that are gender fluid excluded from the ambit and subsequent benefits of this Article.<sup>93</sup> It should be noted that the CEDAW Committee has gone on to clarify in General Recommendation No. 28 that the CEDAW should be read expansively to include all sexual orientations.<sup>94</sup> This interpretation aligns with the purpose of the CEDAW in addressing discrimination against all women and should be used by states in interpreting their correlative obligations. However, homosexual marriages are not always afforded legal recognition by states, highlighting a limitation in understanding contraception with reference to marriage. In the MP, a woman would, in theory, be entitled to access any method of contraception of her choosing, regardless of marital status or sexual orientation.<sup>95</sup> The ACmHPR have recognised the precarious position of non-heterosexual people as well as gender non-conforming in certain African states, indicating that states may need to take added measures for their protection and empowerment.<sup>96</sup>

The emancipatory potential of the MP is further seen with reference to its regional focus, more incorporative of culture in comparison to the CEDAW.<sup>97</sup> This is an important consideration of the application of human rights, in balancing culture and not imposing human rights imperialistically.<sup>98</sup> When it comes to culture, both the CEDAW (Article 5) and the MP (Article 2) include similar provisions calling on states to take the necessary measures in order to modify cultural patterns that reinforce or perpetuate discrimination against women. Importantly, the MP includes 'harmful' when considering the kind of cultural practices for the purposes of its Article. States should, therefore, not be too quick to reform and dismiss cultural values. Aspects of the MP better engage with the country's context as seen through the unique Article

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<sup>92</sup> CEDAW Committee (1999).

<sup>93</sup> Ibid, 319-320.

<sup>94</sup> CEDAW/C/GC/28, 16 December 2010.

<sup>95</sup> Article 14(1)(c) MP. See also African Union, General Comment No. 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2 (a) and (c) of the MP, 28 November 2014.

<sup>96</sup> African Commission on Human and Peoples' Rights, 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, 12 May 2014.

<sup>97</sup> Geng (2019) 417.

<sup>98</sup> Frédéric Mégret, 'Nature of Obligations' in D. Moeckli, et. al. (ed.), *International Human Rights Law* (OUP, 2018), at 91.

17, including women in adapting cultural practices, and state's facilitating this.<sup>99</sup> Article 17 read together with Article 14 of the MP therefore reinforces the ability of this regional instrument to be more culturally astute and empowering for women, in the context of accessing contraception.

To conclude, this section has explored the fundamental difference of intentions between the CEDAW and the MP and how this affects the construction of the right to access contraception, with the CEDAW addressing ending discrimination against women and the MP being a direct instrument for women's rights. Given that the CEDAW is also an older document, the references of equality in relation to men can be contextualised; the CEDAW Committee additionally uses the general recommendations to expand the scope of the CEDAW strategically. No references to marital status or equality with men in the MP provide protection to women who intend to access contraception before marriage as well as those who never intend to marry, a much broader and unconditional framing.

## **5 The Comparative Case Studies: The Nigerian Interpretation from State Reports to the CEDAW Committee and the ACmHPR**

Following the analysis of the right to access contraception in the CEDAW and the MP, the case studies will show whether the differences in the conception of the right are reflected in the reports submitted in fulfilment of the state obligations. Nigeria's and Uganda's state reports are evaluated rather than directly looking at state policies or legislation. The intended analysis centres on how Nigeria and Uganda present the fulfilment of their obligations and which legislation and policies they refer to as a result. This allows for a more streamlined approach, as the resultant policies or laws mentioned will indicate the fulfilment of state obligations through the lens of TWF. The shadow reports by NGOs undoubtedly provide more critique of the domestic position in terms of contraceptive accessibility. In terms of the legal status of the CEDAW and the MP: in Nigeria, the CEDAW is ratified but not domesticated, while in Uganda the provisions of the CEDAW have been both ratified and domesticated.<sup>100</sup> The MP has been ratified but not yet domesticated in both countries. In Uganda, this is due to reservations regarding the MP's Article 14 pertaining to a safe abortion and a women's right to control her fertility. One of the Ugandan reservations is to Article 14(1)(a) concerning women's fertility in that it should apply to *all* women regardless of

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<sup>99</sup> Celestine Nyamu Musembi, 'Pulling apart? Treatment of legal pluralism in the CEDAW and Maputo Protocol' in Anne Hellum and Henriette Sinding Aasen (ed.), *Women's Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013), at 213.

<sup>100</sup> Kabagambe (2016) 263.

marital status, albeit that the provision does not mention control of fertility being dependent on marital status.<sup>101</sup> The result of these reservations means that the article's legal effect is modified for Ugandan women.<sup>102</sup> Interestingly, Uganda has no reservations for the CEDAW, leaving the conclusion as to the state's overall approach to women's SRR more convoluted.

The Nigerian state report points to three findings: there is existing demand for contraception, the state is unable to meet this demand, and location affects access to contraception and therefore, disproportionately disadvantages rural women.<sup>103</sup> Chapter 10 of Nigeria's 2016 report to the CEDAW Committee (Nigerian CEDAW Report) pertains to Article 12 of the CEDAW and acknowledges the issue of maternal mortality as a significant area to address.<sup>104</sup> While further steps are still required to address maternal mortality, the state has implemented various measures such as the supply of 'family planning consumables'.<sup>105</sup> This suggests that the state recognises the role that access to contraception can play in reducing maternal mortality. The Nigerian CEDAW Report refers to the 2013 Nigeria Demographic and Health Survey (NDHS) to provide statistics on the use of contraception by girls and women.<sup>106</sup> The NDHS indicates a two percent increase in the total number of women using contraception between 2003 and 2013, and that contraceptive use between urban and rural women varies significantly (26.8% in contrast to 8.5%).<sup>107</sup> The reason for this difference is not provided. However, it could be speculated that various factors, such as access to family planning education and services, or religious or cultural considerations, are influential.<sup>108</sup> These low contraceptive figures not only show a substantial difference between urban and rural women but raise the question as to why so few Nigerian women, in general, are making use of contraception.

In contrast to the Nigerian CEDAW Report, the report on the Banjul Charter to the ACmHPR (Nigerian BC Report) outlines in detail the measures taken by the

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<sup>101</sup> Special Rapporteur on the Rights of Women in Africa (African Commission on Human and Peoples' Rights) 18 March 2016; The second reservation pertains to abortion within Article 14(2)(c), which will only apply in Uganda when there is domestic law in place.

<sup>102</sup> Daniels Müller, 'Reservations and Time: Is there only one right moment to formulate and to react to reservations?' (2013) 24:4 *European Journal of International Law* 1113.

<sup>103</sup> *Ibid.*

<sup>104</sup> CEDAW Committee, Consideration of reports submitted by States parties under article 18 of the Convention, Seventh and eighth periodic reports of States parties due in 2014, Nigeria (Nigerian CEDAW Report), 11 January 2016, CEDAW/C/NGA/7-8, para 10.1.

<sup>105</sup> *Ibid.*, para 10.2.

<sup>106</sup> National Population Commission (Nigeria) and ICF International, 2014, Nigeria Demographic and Health Survey (NDHS) 2013, Abuja, Nigeria, and Rockville, Maryland, USA: NPC and ICF International.

<sup>107</sup> *Ibid.*

<sup>108</sup> Banda (2006) 75.

state to protect women's sexual and reproductive health and wellbeing.<sup>109</sup> The Nigerian BC Report also interprets the right to health to include health services relating to 'women's reproductive health rights without any discrimination'.<sup>110</sup> Critically, since the Nigerian constitution does not explicitly account for the right to health, the Nigerian BC report infers the right to health based on the rights to life, security and the welfare of people.<sup>111</sup>

While state reports directly linked to the CEDAW and MP are not consistently effective in promoting access to contraception in isolation, they can be viewed as more effective together with domestic legal instruments introduced by the state. One such instrument is the National Strategic Health Development Plan, implemented to increase the use of modern methods of contraception in Nigeria.<sup>112</sup> This goal was introduced as a means of reducing the national population growth rate and 'encouraging child spacing', though not necessarily with the direct intention of promoting women's SRR.<sup>113</sup> Viewing the need to promote access to contraception in light of population control, the Nigerian BC Report highlights a shortcoming of the state potentially viewing women as objects and minimising their autonomy.<sup>114</sup> Additionally, Nigeria introduced the Gender and Equal Opportunities Bill to domesticate both the CEDAW and the MP, a necessary step in improving the implementation and accountability of the state obligations.<sup>115</sup> This Bill would more directly enforce the CEDAW and the MP provisions for access to contraception, and serve as a tool for keeping the state accountable in the event of deficient service delivery or denial of women's rights.

In filling an information gap from the state reports, the shadow reports are more critical of states' implementation of contraceptive access. The shadow report submitted to the CEDAW Committee was compiled by the Women Advocates' Research and Documentation Centre (Nigerian CEDAW NGO Report). This report shows improvement in addressing maternal mortality in Nigeria but also highlights that implementation of the National Health Act has been ineffective in providing

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<sup>109</sup> For the full list of policies, see Nigerian BC Report (2014), at 67.

<sup>110</sup> Nigerian BC Report (2014), at 87.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Nigerian BC Report (2014), at 91.

<sup>115</sup> Nigerian BC Report (2014), at 125. As at the writing of this article, there were no sources indicating whether the status of the Bill had changed.

healthcare that is accessible and affordable.<sup>116</sup> Reference to affordability directly relates to women's socioeconomic status and how this impacts contraceptive access – a critique that aligns with TWF. Regarding women's healthcare specifically, Nigeria introduced a 'free healthcare policy' intended to cover SRR.<sup>117</sup> International donors predominantly fund the contraception and family planning services available in Nigeria.<sup>118</sup> However, the implementation of such services has been underfunded and mismanaged, so women must pay for the relevant services and medication personally.<sup>119</sup> Ultimately, the Nigerian CEDAW NGO Report recommends that the state allocate additional funds to address the inadequate provision of women's healthcare, indicating how monetary considerations impact rights being given effect to.

Several issues are further highlighted in the Nigerian CEDAW NGO Report as limitations on Nigerian women's access to contraception, including personal financial barriers, insufficient stock to meet demand, education, and access to state services.<sup>120</sup> The Nigerian BC Report suggests that unmet contraceptive demand is affected by 'residence, education and wealth status'.<sup>121</sup> Resultantly, the 2004 Revised National Health Policy intended to increase access to healthcare nationally.<sup>122</sup> There is a significant difference in the availability of healthcare services depending on location; the urban south experiences lower maternal mortality rates relative to the northeast and more rural areas.<sup>123</sup> The Nigerian CEDAW NGO Report also illustrates the direct link between increasing education levels and contraceptive usage.<sup>124</sup> To this end, the Nigerian CEDAW NGO Report recommends state investment to improve contraceptive awareness through both information and school-based curriculum, in order to meet its obligations.<sup>125</sup>

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<sup>116</sup> NGO Coalition Shadow Report to the 7<sup>th</sup> and 8<sup>th</sup> Periodic Report of Nigeria on the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) (Nigerian CEDAW NGO Report), June 2017, at para 5.

<sup>117</sup> *Ibid*, para 10.2.

<sup>118</sup> Nigerian CEDAW NGO Report (2017), at para 15.3.1.

<sup>119</sup> *Ibid*, at para 15.3.1.

<sup>120</sup> *Ibid*, at para 7.1.

<sup>121</sup> Federal Republic of Nigeria, Nigeria's 5<sup>th</sup> Periodic Country Report: 2011-2014 on the Implementation of the Banjul Charter in Nigeria (Nigerian BC Report), produced by the Federal Ministry of Justice, Abuja (June 2014), at 52.

<sup>122</sup> Federal Ministry of Health, Revised National Health Policy (2004), Nigeria.

<sup>123</sup> *Ibid*, para 15.3.1.

<sup>124</sup> *Ibid*, para 15.1.1.

<sup>125</sup> *Ibid*, para 13.5.

Considering the above factors, the Nigerian CEDAW NGO Report clearly illustrates how healthcare does not exist in isolation but is reliant on providing other state services such as water and electricity, which are not being delivered adequately in Nigeria. This failure of the state to consistently deliver basic services is another key influence over the implementation of rights in Nigeria. The Nigerian CEDAW NGO Report also highlights the pivotal role played by traditional birth attendants in providing maternity services – and the increased risk to women due to a lack of consistent state monitoring and, therefore, accountability. However, state monitoring of the traditional birth attendants is missing, creating a risk for women using these services and overall lack of accountability. These services underline a vital role that traditional and natural methods play where healthcare infrastructure is lacking.

The comments from the CEDAW Committee and ACmHPR are included as they provide added insights on the content of the state reports submitted, and whether states are complying as well as falling short.<sup>126</sup> The CEDAW Committee calls for urgent action given Nigeria's high levels of HIV/AIDS, when compared to global levels. These high levels can be viewed as disproportionately affecting women, showing an urgent need for information on and access to contraception.<sup>127</sup> The state, on the basis of the submitted information on education, does not appear to be doing enough when it comes to 'appropriate education programmes on sexual and reproductive health and rights for all levels of education'.<sup>128</sup> Rural women are highlighted as being particularly vulnerable when it comes to the right to health, in relation to contraceptive and other health services, indicating a shortcoming of the state in delivering on the right to access contraception.<sup>129</sup>

Nigeria's current approach, based on the Nigerian CEDAW NGO Report, inadequately considers how religion can limit access to contraception.<sup>130</sup> A possible solution would be area-focused plans, rather than a single national policy that may not account fully for local circumstances. However, in other parts of the country, the Nigerian state has taken action to unite various groups, through *inter alia* inter-faith dialogue committees.<sup>131</sup> This is significant in facilitating cultural and religious

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<sup>126</sup> Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42:3 *Vanderbilt Journal of Transnational Law* 945.

<sup>127</sup> CEDAW/C/NGA/CO/7-8 (2017), at 12-13.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*, para 16.

<sup>130</sup> Nigerian CEDAW NGO Report (2017), at para 9.2.4; 9.2.6 and 17.4.1.

<sup>131</sup> *Ibid.*, para 26.

differences and could extend to integrating the right to access contraception while respecting Nigeria's diversity, supporting the approach in the MP.<sup>132</sup>

Despite the free healthcare policy, the ACmHPR focuses on maternal mortality and appeals to the Nigerian state to strengthen access to healthcare in this respect.<sup>133</sup> There appears to be a significant gap between the policy and service delivery, resulting in the unrealised right to access contraception. Traditional birth attendants and other traditional healers filling in the healthcare gap is commendable, but without state oversight of this, there is potential scope for abuse.

The state and shadow reports regarding the CEDAW identify the vulnerable position of rural women, given the differences in accessing contraceptive and medical supplies relative to urban areas. This is another clear shortcoming in the current Nigerian interpretation and application of the right to contraception, with inadequate service delivery most impacting rural women.<sup>134</sup> Religion can also be a barrier to contraceptive access, with the Nigerian state making some attempts to address this, but not wholly succeeding.<sup>135</sup>

## **6 The Ugandan Interpretation: An Examination of Ugandan State Reports to the CEDAW Committee and the ACmHPR**

Turning to the position of contraceptive access in Uganda, the most recent state report submitted to the CEDAW Committee was in 2018 (Ugandan CEDAW Report).<sup>136</sup> The domestication of CEDAW has been achieved through a variety of policies, some of which are discussed below. Uganda's National Sexuality Framework has been used by the state as a tool for mainstreaming sexual and reproductive health education in primary and secondary schools.<sup>137</sup> This is key to fulfilling the education and information aspect of the right to access contraception in the CEDAW and the MP. The state is also increasing contraception access through various initiatives, such as providing access through existing clinics.<sup>138</sup> To promote access to healthcare, different

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<sup>132</sup> Musembi (2013), at 213-214.

<sup>133</sup> African Union, African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the Banjul Charter (2011 – 2014), 57<sup>th</sup> Ordinary Session, 4-18 November 2015, at para 117.

<sup>134</sup> Nigerian CEDAW NGO Report (2017), at para 15.3.1.

<sup>135</sup> CEDAW Committee (2017), at para 26.

<sup>136</sup> CEDAW/C/UGA/8-9, 11 December 2020.

<sup>137</sup> *Ibid*, 26.

<sup>138</sup> *Ibid*.

types of health centres provide services related to family planning and specialised women's health services.<sup>139</sup>

Several policies address the disproportionate impact that HIV/AIDS has on women, more so those in rural areas.<sup>140</sup> This indicates the right to access contraception realised through minimising STI transmission, beyond pregnancy prevention and family planning. Distinguishing the provision of services based on differing needs in areas also aligns with the CEDAW and the MP's recognition of the vulnerable position of rural women. On top of noting specific domestic policies, the Ugandan CEDAW Report acknowledges the overlap between access to contraception and other women's health issues, such as female genital mutilation and child marriage. The Ugandan CEDAW Report also indicates that, despite sex work being illegal, Uganda aims to protect sex workers through the provision of information and access to contraception.<sup>141</sup> These issues show the Ugandan state expanding the right to access contraception, indicating a wider conception of the right to access contraception than other African countries, for instance, Nigeria.

In contrast, the Ugandan report submitted to the ACmHPR (Ugandan BC Report), makes no mention of contraception. There is some reference to legislative efforts to address gender inequality, but there is nothing expansive on SRR beyond the potential domestication of provisions of the MP.<sup>142</sup> The Ugandan BC Report requests an extension of the reporting period as the state finds the existing timeframe too short.<sup>143</sup> The Center for Reproductive Rights prepared a supplementary report to the ACmHPR on the topic of SRR in Uganda (Ugandan BC NGO Report), which will therefore be focal in understanding the Ugandan position regarding the MP.

The Uganda Women's Network's report supplements the state information provided to the CEDAW Committee (Ugandan CEDAW NGO Report). This report is critical of the Ugandan constitution, given the inference of the right to health from other provisions.<sup>144</sup> Similarly, the right to access contraception can be interpreted through the constitutionally enshrined right to dignity for women.<sup>145</sup> This results in a

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<sup>139</sup> Ibid, 31.

<sup>140</sup> Ibid, 27.

<sup>141</sup> Ugandan CEDAW Report (2020), at 67.

<sup>142</sup> The Republic of Uganda, 5<sup>th</sup> Periodic Report to the African Commission on Human and Peoples' Rights (Ugandan BC Report), the Government of the Republic of Uganda, 22<sup>nd</sup> October – 5<sup>th</sup> November 2013, at 27.

<sup>143</sup> Ibid, 31. Uganda requested an additional year be added to the reporting period.

<sup>144</sup> Uganda Women's Network, 8<sup>th</sup> Alternative Report by Civil Society on the implementation of the Convention of the Elimination of all Forms of Discrimination against Women (Ugandan CEDAW NGO Report) in Uganda (2014), at 59.

<sup>145</sup> Ibid.

weaker construction of the right to access contraception, when compared to the MP's direct right or even that of the CEDAW. This repeats the Nigerian approach, given the similar lack of a direct constitutional right to health.

The Ugandan CEDAW NGO Report makes an unequivocal link between gender-based violence (GBV) by a spouse or partner and access to contraception. Given the prevalence of GBV, the Ugandan CEDAW NGO Report finds that injectable contraceptives are preferred for their discretion.<sup>146</sup> A woman's right to privacy is implicated given the barriers to making a confidential contraceptive decision.<sup>147</sup> However, low levels of education and information, inadequate supply in healthcare facilities as well as the negative stigma perpetuated by healthcare workers limit usage.<sup>148</sup> Despite containing more direct references to contraception than the BC counterpart, the Ugandan CEDAW NGO Report is not without criticism; the CEDAW Committee notes that access to contraception's biggest gap lies in service delivery. There is a need for greater state provision of information and transparency on the availability of modern contraception services.<sup>149</sup> Despite a strength in relevant policies, implementation and service delivery detract from the right to access contraception being realised in Uganda.

While the CEDAW Committee focuses primarily on information and education regarding contraception, the ACmHPR focuses on Uganda's healthcare infrastructure, finding the number and quality of healthcare facilities to be inadequate to realise the right to health.<sup>150</sup> Access to healthcare is identified as a necessary element in order to lower the rate of maternal mortality.<sup>151</sup> Yet the majority of hospitals are privately owned, which raises concerns about the extent to which non-state actors are obligated to fulfil the right to health and associated rights.<sup>152</sup> The concern for privatisation also applies in the sphere of education, with the ACmHPR finding that the state has been delegating its educational obligation, with private schools increasing.<sup>153</sup> This, in turn, can impact the educational aspect of the right to access

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<sup>146</sup> Ibid.

<sup>147</sup> United Nations Population Fund et. al (2014).

<sup>148</sup> Ibid.

<sup>149</sup> CEDAW/C/UGA/Q/8-9, 10 March 2021, at para 16.

<sup>150</sup> African Union, African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations on the 5th Periodic Report of the Republic of Uganda on the Implementation of the Banjul Charter (2010 – 2012), 57<sup>th</sup> Ordinary Session, 4-18 November 2015, at para 79.

<sup>151</sup> Ibid, para 117.

<sup>152</sup> Andrew Clapham, 'Non-state Actors' in D. Moeckli, et. al. (ed.), *International Human Rights Law* (OUP, 2018), at 557.

<sup>153</sup> African Union (2010-2012), at para 80, 116.

contraception, with states losing control over the school curriculum. Uganda's reservations to Article 14 are also highlighted by the ACmHPR, particularly to the extent that they are limiting women's right to access an abortion.<sup>154</sup>

The state and shadow reports regarding the CEDAW indicate that education on contraception through the school curriculum and access through existing clinics' healthcare infrastructure is improving. Uganda also acknowledges the disadvantaged position of GBV survivors and accounts for the resultant higher demand for emergency contraception – in theory. The reports suggest that Uganda recognises contraceptives are not one-size-fits-all, and that information and education are essential for women to choose which method is most suitable for them. The state reports also indicate that Uganda recognises the need to protect disabled women and factors their unique needs. These findings align with TWF in providing more comprehensive access to contraception to a diverse range of women.

However, there are shortcomings in Uganda's interpretation of the right to access contraception, particularly service delivery and the interests of vulnerable groups. Both NGO reports identified the negative role of religious leaders as a barrier to access contraception through the abuse of power and deterring contraceptive use. The Ugandan NGO BC Report further points out the cultural stigma associated with contraceptives, which highlights the need for increased information and education. The broader stigma calls for adaptation in culture, something the MP provides for by including women in the changing of cultural practices.<sup>155</sup> The facilitation of such cultural adaptation that could include more women in having the choice to access contraception supports TWF through potentially greater empowerment.

Comparing the case studies reveals that neither Nigeria nor Uganda has a direct provision on the right to health in their constitutions. The interconnectivity of the right to access contraception within the greater human rights discourse is reiterated throughout the state reports, with the right to access contraception inferred through references to the right to education and health. Within this inferred right to health, both Nigeria and Uganda reference the use of healthcare infrastructure as a means of providing family planning and contraceptive services. The Nigerian interpretation focuses on the need to address maternal mortality whilst the Ugandan construction is wider, addressing access for sex workers, and disabled women and attempting to mitigate GBV and HIV/AIDs. The Ugandan CEDAW NGO Report showing the intersection between survivors of GBV and emergency contraception is a novel one,

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<sup>154</sup> African Union (2010-2012), at para 77.

<sup>155</sup> Musembi (2013) and further see Art. 17 MP.

not explicitly provided for in the text of the CEDAW or the MP.<sup>156</sup> Nigerian NGOs have indicated the need for improved service delivery within the right to education.<sup>157</sup> In contrast, Uganda theoretically provides for SRR curriculum in schools, although funding impedes the full realisation of the right to access contraception, echoing Nigerian critiques on difficulties in implementation. None of the submitted reports provide for legal consideration of refugee women's right to access contraception, despite specific mention of this group in General Comment No. 2 to the MP.<sup>158</sup>

Traditional birth attendants can play a pivotal role in contraceptive access in bridging gaps in infrastructure in under-resourced communities, as indicated in the Nigerian CEDAW Report.<sup>159</sup> The Ugandan CEDAW Report does not touch on this issue, however, traditional healthcare providers could offer solutions in light of similar infrastructure concerns.<sup>160</sup> None of the reports specifically mention any distinction between traditional, natural and modern contraception. The wording in Article 14(1)(c) of the MP regarding the *method* of contraception leaves room for a range of contraception and therefore a wider understanding of what a healthcare provider could do. States could address infrastructure gaps with traditional healthcare providers in under-resourced areas, to give effect to the right to access contraception.

Finally, the role of culture and religion in inhibiting the progress of SRR has been discussed with reference to the African region.<sup>161</sup> Considering that patriarchal values can be perpetrated through culture, women will face difficulties in asserting their rights. The CEDAW Committee pointed out one such example with the insurgency of Boko Haram in the Northern parts of Nigeria, impeding the rights of women on the alleged basis of religion.<sup>162</sup> The power that religious leaders wield was also evidenced in the Ugandan reports with religious leaders discouraging the use of contraception. The tool of inter-faith dialogues in Nigeria can be more extensively utilised, particularly with the inclusion of women per Article 17 of the MP, to facilitate consensus on the right to access contraception.<sup>163</sup>

The Nigerian interpretation of the right to access contraception appears to be developing, with some strength in addressing maternal mortality and catering to rural

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<sup>156</sup> Ibid.

<sup>157</sup> Nigerian CEDAW NGO Report (2016).

<sup>158</sup> African Commission on Human and Peoples' Rights (2014).

<sup>159</sup> Nigerian CEDAW Report (2016).

<sup>160</sup> Ugandan CEDAW Report (2020).

<sup>161</sup> Akhirome-Omonfuegbe (2019), at 277.

<sup>162</sup> CEDAW/C/NGA/CO/7-8 (2017).

<sup>163</sup> Nigerian BC NGO Report (2018), at para 26.

girls and women but there is room for improvement for this to be implemented even more. The framing of contraception in Nigeria's National Strategic Health Development Plan in terms of population growth reveals an approach that is contrary to empowerment and TWF views. Uganda has attempted inclusivity through its access to contraception, aligned with TWF. However, lingering issues of *inter alia* stigma detract from a stronger interpretation of the right to access contraception. Further, infrastructure issues in Nigeria and Uganda, as well as problems with funding and implementation, are directly impacting contraceptive access. In an area where there is no school or clinic, for example, it is nearly impossible to expect successful access to contraception. This affirms the interdependence of human rights, and how giving effect to one - such as the right to education - can have a positive knock-on effect on contraceptive access. Both states can access existing resources, such as traditional birth attendants and healers, to increase contraceptive information and access.

In conclusion of this comparative case study, it is clear that an intersectional approach to the analysis of the state and NGO reports is essential to determining how to empower women's contraceptive access best. Through analysing two African states, it is clear that culture does not have to be an impediment to contraceptive access and to the extent that it is, culture can be changed and modified together with the group affected as facilitated by the MP. Religion can pose a challenge to unrestricted contraceptive access, but Nigeria has shown through inter-faith dialogues that this can be addressed through state mediation. Both states face infrastructural and service delivery challenges in providing contraceptive access, with the pressure of active NGOs evidenced through the shadow reports. It is hoped that the next set of reports will show some improvement in this respect.

## 7 Conclusion

The analysis of the CEDAW and the MP reveal a broad attempt to offer women access to contraception albeit to differing degrees. In the context of empowering women to make informed decisions about their own bodies, the right to access contraception holds immense value.<sup>164</sup> Comparatively, the wording in the MP is stronger than that of the CEDAW, although the CEDAW's position has strengthened through subsequent (non-binding) recommendations from the CEDAW Committee.<sup>165</sup>

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<sup>164</sup> Ibid.

<sup>165</sup> Hanna Beate Schöpp-Schilling, 'The Role of the Convention on the Elimination of All Forms of Discrimination Against Women and its Monitoring Procedures for Achieving Gender Equality in Political Representation' (A paper presented at the International Institute for Democracy and Electoral Assistance Network for Gender Issues Conference, 2004) [www.legislationline.org/documents/id/18879](http://www.legislationline.org/documents/id/18879) (accessed 10 June 2022).

It is challenging to clearly determine how the CEDAW or the MP has individually influenced the domestic legal interpretation given the overlap in the content of the right, and, therefore, the degree of repetition in referencing domestic laws and policies that fulfil the respective state obligations. Within the scope of analysis of the state reports in this article, the unique local circumstances of Nigeria and Uganda influence the interpretation of the right to access contraception. These nuances do not feature in the CEDAW and the MP but reflect a benefit of less specific wording, allowing states to decide the scope according to capability and demand.<sup>166</sup> Domestication of these instruments would arguably provide a stronger basis for women as well as NGOs and the courts, to have direct provisions to rely on in order to keep states accountable and have a more uniform development of the right locally.<sup>167</sup> This is seen through Uganda's domestication of the CEDAW, in contrast to Nigeria, which despite not providing contraceptive choice is attempting to increase the scope of access - although this does not guarantee success in practice.

Both the CEDAW and the MP mention different groups of women, including some consideration of those that are in a more vulnerable position, such as rural women.<sup>168</sup> However, the lack of intersectionality with which the right to access contraception has been formulated can be critiqued.<sup>169</sup> This evaluation may apply more so to the CEDAW, with disabled and refugee women not mentioned. However, both instruments fail to acknowledge the inequalities that can exist within the *same* group.<sup>170</sup> States should consider the diversity of women, as asserted by TWF, in interpreting the right to access contraception, yet this is missing in the reports.<sup>171</sup>

The right to access contraception presents an opportunity for women to be empowered through bodily autonomy. The right to access contraception interlinks with several other human rights. Therefore, giving effect to this right also has positive implications for other rights. The MP's direct wording of the right to access contraception, in contrast to the CEDAW, theoretically provides for a right more aligned with TWF. However, this and other differences in the conceptions of the right in international and regional law were not reflected in the state reports analysed. Uganda's interpretation of the right to access contraception is more expansive than Nigeria's, with more groups of women considered. Practical challenges hinder both

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<sup>166</sup> Banda (2003) 5.

<sup>167</sup> Çali (2018) 411.

<sup>168</sup> Campbell (2020) 155-156.

<sup>169</sup> Ibid.

<sup>170</sup> Campbell (2020).

<sup>171</sup> Durojaye and Murungi (2014) 882.

states and negatively impact the right to access contraception as well as the associated human rights. In the event that implementation was faultless, societal perceptions influenced by culture and religion can still play a role in limiting contraceptive access. Addressing these challenges together will support contraceptive access, and choice according to the MP, ultimately leading to women's empowerment and greater realisation of the interrelated human rights. Finally, intersectional approaches in accordance with TWF when formulating policies and laws can result in a more inclusive interpretation of the right to access contraception.<sup>172</sup>

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<sup>172</sup> Frisso (2019) 480.



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