

Legal Theories Underpinning Access to Justice for Victims of Sexual Violence in Refugee Camps in Africa

O. E. Eberечи, G. P. Stevens

Abstract—Legal theory has been referred to as the explanation of why things do or do not happen. It also describes situations and why they ensue. It provides a normative framework by which things are regulated and a foundation for the establishment of legal mechanisms/institutions that can bring about a desired change in a society. Furthermore, it offers recommendations in resolving practical problems and describes what the law is, what the law ought to be and defines the legal landscape generally. Some legal theories provide a universal standard, e.g. human rights, while others are capable of organizing and streamlining the collective use, and, by extension, bring order to society. Legal theory is used to explain how the world works and how it does not work. This paper will argue for the application of the principles of legal theory in the achievement of access to justice for female victims of sexual violence in refugee camps in Africa through the analysis of legal theories underpinning the access to justice for these women. It is a known fact that female refugees in camps in Africa often experience some form of sexual violation. The perpetrators of these incidents may never be apprehended, prosecuted, convicted or sentenced. Where prosecution does occur, the perpetrators are either acquitted as a result of poor investigation, inept prosecution, a lack of evidence, or the case may be dismissed owing to tardiness on the part of the prosecutor, which accounts for the culture of impunity in refugee camps. In other words, victims do not have access to the justice that could ameliorate the plight of the victims. There is, thus, a need for a legal framework that will facilitate access to justice for these victims. This paper will start with an introduction, and be followed by the definition of legal theory, its functions and its application in law. Secondly, it will provide a brief explanation of the problems faced by female refugees who are victims of sexual violence in refugee camps in Africa. Thirdly, it will embark on an analysis of theories which will be a help to an understanding of the precarious situation of female refugees, why they are violated, the need for access to justice for these victims, and the principles of legal theory in its usefulness in resolving access to justice for these victims.

Keywords—Access to justice, underpinning legal theory, refugee, sexual violence.

I. INTRODUCTION

ACCESS to justice is a fundamental right in any society; a justice system is a failure if it does not provide justice for the vulnerable and poor in society, especially refugees in camps in Africa.

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It is a known fact that refugees are extremely vulnerable to all forms of violence, especially sexual violence (SV), and that, although both sexes are victims [1], female refugees are more vulnerable to the acts of SV than men are. In general, the statistics are often inaccurate owing to underreporting of incidents [2]. The focus of this article is on female victims of sexual violence. Despite the provisions of Article 16 (1) (2) (3) of the UN Convention relating to the status of refugees [3], which provides for access to courts in host states and the ratification of international refugee instruments in most states in Africa [4], victims of the SV in refugee camps in Africa may never enjoy access to the courts and, consequently, access to justice.

The response of the authorities even in the camps with reporting mechanisms can, however, be inadequate or careless, as in the example stated by this victim, “I feel hopeless because when I reported a rape to the police I was told to fence my home, but I do not have money to build a fence, I ended up selling my food rations in order to get money to buy wood for fencing from neighboring Turkana” [1].

The perpetrators may never be apprehended and, consequently, they are not prosecuted [5], [6]. The immediate effect of this is the entrenchment and the promotion of a culture of impunity, which results in justice not being served. The perpetrators of these crimes include caregivers, locals from the host community, peacekeepers, security forces, aid workers, male refugees and a myriad of others [5]. Peacekeepers are simply repatriated, while aid workers may be subjected to some administrative measures, which may not deter them [6].

Where prosecution does occur, the perpetrators are either acquitted because of poor investigation, inept prosecution [5], or a lack of evidence, or the case may be dismissed [5] owing to tardiness on the part of the prosecutor [5]. This illustrates the lack of procedural and substantive justice. On the rare occasions that convictions are secured and sentences are imposed, those perpetrators who are sent to prison may never serve their prison term [5].

The victims, meanwhile, languish in refugee camps, living with the consequences of the SV without remedy and reparation for the harm suffered, which includes physical and psychological trauma, serious injuries, unwanted or early pregnancies, sexually transmitted diseases/infections (STD), including infertility and infections from the human immunodeficiency virus and acquired immune deficiency

syndrome (HIV/AIDS) and venereal diseases [7]. Victims also prone to suicide, mental health problems, post-traumatic stress disorders (PTSD) [7], miscarriages if raped and pregnant, prolonged hemorrhage, vesico-vaginal and recto-vaginal fistulas, insomnia, nightmares, chest and back pains, painful menstruation, and complications resulting from unsafe abortions and death [7].

Victims of the SV in camps are often stigmatized, ostracized or even have sanctions imposed by their families which may worsen their physical and psychological injuries [8]. Some of these consequences outlive the victims [8], for instance, the children born as a consequence of the sexual violence may be abandoned, suffer infanticide, or be stigmatized and discriminated against [8]. On the other hand, the existence of traditional dispute resolution courts, such as the Maslaha Courts in Kakuma camp in Kenya, which are common among Somali refugees [1]. These traditional courts have not proven helpful, because they are dominated by men who promote patriarchal subjugation, and therefore, their decisions are tailored according to local tradition with no regard for the rights of victims [1]. For example, when an SV case is decided in favor of the victor, the perpetrator is either asked to pay a fine, which could be in the form of a goat paid to the family of the victim, or be forced to marry their victim with no recourse to her feelings or to the injury suffered. There is also a lack of any enforcement mechanisms in such cases [1]. Mwangi states that, despite the legal improvement by promoting greater reporting of SV against female refugees in the Kakuma refugee camp, official responses are still lacking [1]. In the Buduburam Refugee Camp, a predominately Liberian refugee camp in Ghana, West Africa, it was the opinion that refugees appear to have been alienated from the legal institutions of their host countries [9]. This paper, therefore, argues for the adoption of the principles of legal theory (LT) in the facilitation of access to justice for female victims of SV in refugee camps in Africa through the analysis of legal theories underpinning access to justice for victims.

II. LEGAL THEORY

LT has been denoted as an “abstract statement that explains why certain phenomena or things do (do not) happen” [10], [11]. For an LT to be valid it must have the ability to predict further occurrences or observations of the phenomena in question and to validate or test the theory through experiment or some other forms of empirical observation [11]. LT has also been described as the branch of an “inquiry that explains and investigates legal structures, processes, relations, products and has as its object the goal of understanding and interpreting the perplexities of a phenomena” and also the solving of practical problems and the achievement of humane justice [12]. LT is also a system the fundamental ideas of which are interdependent and consistent, and whose propositions are justified, necessary, clear, and accurate and can be perceived, and are unlimited in their application to a legal phenomenon [12].

Friedmann [13] affirms that a lawyer in any field, consciously or unconsciously, is guided by the principles of LT theory formulated in the professional form from the precepts of philosophy and political theory [13]. LT also clarifies legal values and proposes their philosophical foundation [13], provides an explanation for an event, thereby accounting for it, and also serves as a guide to its modification [13].

LT has been distinguished from both jurisprudence and the sociology of law. Jurisprudence is the study of the legal forms developed by the various systems of law, the methods that have been employed by societies to meet their problems, and the compulsions that have guided solutions [12]. It begins with data, which are broken down into a series of concepts and attempts to present the concepts in an orderly and consistent manner [12]. The materials are the legal forms and processes of particular societies and the focus of attention is applied. Jurisprudence is not capable of self-criticism and does not develop the foundations of a theory that will permit it rationally to undertake the inquiry it pursues [12].

The primary objective of LT is the establishment of such a foundation on a level that possesses as much assurance as knowledge offers us today, and, in part, an effort to find the principles that contemporary jurisprudence takes for granted when it follows its own investigations [12]. The interest of LT is logical and not practical; whether or not it passes into the latter phase depends upon the success of its initial undertaking [12]. Both disciplines have the law as their subject matter, but the difference is that while LT undertakes the discovery of the necessary assumptions of any effort to explain legal phenomena, jurisprudence embarks on the organization of the legal phenomena itself with no conscious examination of the necessary premises of such an enterprise [12]. On the other hand, LT and the sociology of law are similar because they both aim at a systematic statement of legal phenomena in terms of rationally connected propositions [12]. There are, however, two differences between them. The sociology of law regards itself as deriving its chief inspiration, both in its point of view and in its methodology, from sociology. Its basis is an attempt to apply the conclusions of sociology to the legal domain [12]. LT, however, welcomes any assistance from sociology and draws inspiration from philosophy, science and other social sciences when it is necessary to do so [12]. “Moreover, the sociology of law insists that the problem of value lies beyond the scope of rational inquiry. That problem has, it is true, not yet submitted to the kind of reduction that can be accepted as satisfactory, while legal orders are based upon implicit or consciously formulated ends [12]”.

Grounded on the above functions of LT, we advocate the incorporation of the principles of the following LT as the pillars for addressing access to justice for those victims referred to above. An analysis the feminist theory of sexual coercion and rational choice theory is, therefore, put forward as an explanation for the perpetration of the crime of SV against female residents in refugee camps in Africa, the need for access to justice and why perpetrators must be punished, as well as the incorporation of the principle of the theories of the

rule of law as the foundation for asserting their rights and for holding accountable all categories of perpetrators no matter their status.

The concept of access includes the ability and the power required for the victims of SV to obtain justice. The theories of justice, which include retributive justice, as the foundation for the punishment of offenders, and reparative justice, a victims' oriented criminal justice that is required to ameliorate the consequences of the SV on the victims. We, also, however, investigated the theories of rights, which include wills theory, claim theory, interest theory, the theories of natural and human rights as a fundamental basis for enforcing their rights of accessing justice and, finally, the theory of deterrence as the best form of justice.

A. Feminist Theory of Sexual Coercion

A study [14] revealed that one out of four women will be victims of forced sexual acts in a lifetime [14]. This accounts for the feminist movement with the emphasis on rape as its main issues [14], [15]. SV has many theories; of interest are the theories of sexual coercion [16] which includes evolution theory, feminist theory, sexual coercion and a synthesized (Biosocial) theory of rape [16]. For the purposes of this article, the central argument will hinge on the feminist theory of sexual coercion.

The feminist theory of sexual coercion holds that all men use rape as a process of intimidation by which all women are kept in a state of fear [14]. It also proposes that rape and sexual coercion are hindrances to women's right to choice and opportunity, sexually and otherwise [16]. Feminist theorists assert that sexual coercion is motivated by the urge to exert control over women and not out of lust [16], and, further, that rape is not necessarily a sexual act, but an act of violence [16] and that violence asserts power and dominance [16].

Feminists also believed that a woman is raped if she engages in a sexual act and feels violated, whether she initiated it or not, or whether it was due to economic, social and personal pressures [16], [17]. From the victim's point of view feminist theorists affirm that rape is a pseudo-sexual act that is violent [16]. Moreover, feminists also claim that any adult female at any age could be a victim of rape, despite her appearance and status [16]. The theorists argue, moreover, that the male attackers are also bigger in height and weight than the woman and have both a physical and psychological advantages over their victims [16], [17].

Refugee camps create an environment for the dominance of women by men, because the camps are managed and ruled by men, although women and children constitute the highest number of people in the camps [18]-[20]. For example, refugee permits and food cards are issued in accordance with male heads of households [18]-[20]. Women and children especially, and female heads of households are left out, and this also affects the distribution of food in the camps. Consequently, female refugees are coerced into SV [18]-[20].

B. Rational Choice Theory

Rational choice theory (RCT) has its roots in the classical criminology developed by Cesare Beccaria [21], [22]. It is the theory that adopts utilitarian beliefs that a man reflects on his action, and, before he acts, he deliberates on the means, ends, cost and benefits and makes a rational choice [23]. Cornish and Clarke [23] were of the opinion that "RCT assumes that crime is a purposive behavior designed to meet the offender's commonplace needs for such things as money, status, sex and excitement and that meeting these needs involve the making of (sometimes quite rudimentary) decisions and choices [23], constrained as these are by limits of time and ability and availability of relevant information" [23]. The crime of the SV is not an involuntary crime, but a calculated act to derive pleasure from, or to subdue or dominate the victims. This theory is based on several assumptions, first of all that a person sees himself as an individual [24] who wants to maximize his goal and self-interest [24]. Offenders are self-centered who think only of how to achieve their aims, without taking into cognizance the harm or losses suffered by their victims [24]. Keel [25], [24] enumerated the central point of RCT, as follows, that:

A human being is a rational actor, rationality involves an end/means calculation, people (freely) choose behavior, both conforming and deviant, based on their rational calculations, the central element of calculation involves a cost benefit analysis of pleasure versus pain or hedonistic calculus, choice, with all other conditions equal, will be directed towards the maximization of individual pleasure, choice can be controlled through the perception and understanding of the potential pain or punishment that will follow an act judged to be in violation of the social good, the social contract; the state is responsible for maintaining order and preserving the common good through a system of laws (this system is the embodiment of the social contract); the swiftness, severity, and certainty of punishment are the key elements in understanding a law's ability to control human behavior [25], [24].

RCT has been criticized in many ways, the details of which are out of the scope of this article. Some of the critics [26] of RCT have argued that people are psychologically different as assumed by the theory [26], and that, therefore, the assumption that criminals make a rational decision to commit a crime is not absolute. On the other hand, RTC has been criticized from the notion of bounded rationality that relates to two aspects, one part arising from cognitive limitations and the other from extremes in emotional arousal [27]. It is sometimes asserted that emotional arousal at time that a crime is committed can be acute, and that, therefore, would-be offenders find themselves out of control, and rational considerations are far less salient [27]. This is a theory with which we disagree, and argue that all men have the power to exercise control over their sexual urges, even if he has been aroused by a woman, and that most perpetrators of rape against refugees see the women they attack as their prey.

This paper pitches its argument on RCT that has its roots in the principles of utilitarian theory. It insists that crime is calculated and deliberate. This means that all criminals, especially those who perpetrate the crime of SV against female refugees in camps, are usually rational human beings, who have weighed the pleasure they will gain to be higher than the losses [26], since they may never be apprehended, prosecuted, convicted or sentenced [5]. On the other hand, if offenders are aware that they will be swiftly apprehended and receive severe punishment with certainty, they are more likely weigh the pleasure against the pain, and decide willfully to refrain from the commission of the crime. RCT, as part of utilitarian theory, also promotes access to justice for female victims of sexual violence in refugee camps because the theory encourages impartiality, agent neutrality, and the happiness and the well-being of the victims [26], the good of society in general, as well as creates a level of deterrence among perpetrators and curb the culture of impunity.

C. Theories of Rule of Law

The rule of law is the legal principle that law should govern a nation, as opposed to its being governed by the arbitrary decisions of individual government officials. Primarily, it refers to the influence and authority of law within society, particularly as a constraint upon behavior, including the behavior of government officials [28], with the basic principle that “no person is above the law” [29]. For the United Nations [30]:

“The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency” [30].

Historically, the expression can be traced back to 16th century Britain, and, in the following century, the Scottish theologian Samuel Rutherford used the phrase in his argument against the divine right of kings [31]. The rule of law was further popularized in the 19th century by British jurist A. V. Dicey [32], [33] who described the rule of law as:

The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.... It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts ... and lastly... that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and

of its servants; thus the constitution is the result of the ordinary law of the land [32], [33].

Moreover, Dworkin’s [34] theory of rule of law is about individual rights and it:

Assumes that citizens have moral rights and duties with respect to one another, as well as political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights [34].

As for Allan [35], the rule of Law is:

Primarily a corpus of basic principles and values, which together lend some stability and coherence to the legal order... The rule of law, is an amalgam of standards, expectations, and aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between governments and governed. Nor can substantive and procedural fairness be easily distinguished; each is premised on respect for the dignity of the individual person.... The idea of the rule of law is also inextricably linked with certain basic institutional arrangements. The fundamental notion of equality, which lies close to the heart of our convictions about justice and fairness, demands an equal voice for all ... citizens in the legislative process: universal suffrage may today be taken to be a central strand of the rule of law [35].

From the doctrines stated above we argue that one of the causes of SV against female refugee in refugee camps in Africa is the absence of the rule of law. In addition, we argue that, without the rule of law there cannot be access to justice, since the rule of law promotes accountability for a crime against any segment of society, which includes female refugees, through the subjection of states, individuals and corporate perpetrators to the law. We, therefore, argue that peacekeepers and caregivers should be considered to have waived their immunity automatically when they SV refugees and must be punished under the domestic law of the host state. The principles of rule of law also place emphasis on individual rights and provide the mechanisms for the enforcement of such rights. If these principles are incorporated into the running of a refugee camp, the current culture of impunity by the violators of female refugees will be curbed.

The principles of the rule of law should serve as a foundation on which female refugees who are victims of SV will assert their right of accessing justice in the refugee camps. The rule of law also promotes equal protection before the law; this implies that refugees should be accorded the same protection against sexual violations as is accorded women in the host states.

D. Concept of Access

The expression “access” has not been fully theorized [36], but has been used by property analysts and other social theorists [37]. It has also been used in other diverse ways and with different meanings depending on the context within which it is being employed. The most common are access to information, gate, house or a person without a proper definition. Ribot and Peluso [36] defined “access” as “the ability to derive benefits from things” and “the right to benefit from things.” Access has also been described as all possible means by which a person is able to benefit from things [36].

We examine “access” from the perspective of “ability” and “right” (property rights, not in real estate) and as it relates to access to justice. Access as an ability has been defined as “the ability to benefit from things, including material objects, persons, institutions, and symbols” [36]. Ability is analogous with power (bundle of power), and defined as the capacity of some actors to affect the practices and ideas of others [38], [39] and power is regarded as emergent from, though not always attached to people [36]. Power has also been assumed to be inherent in certain kinds of relationships and can emerge from, or flow through, the intended and unintended consequence or effects of social relationships [36].

The relationship between female refugees who are victims of SV in refugee camps and that of a host state should, therefore, invoke access as the ability that is the power, to enable female refugees to assert their right of access to justice against their violators. Without the ability (power) drawn from this relationship there cannot be access to justice. The host states have the duty to protect these victims and issue legal documents for their legal stay in the host states, provide facility for them to access the justice system, and also provide disciplinary institutions/mechanisms and practices that can cause people (refugees in camps) to act in certain ways without any apparent coercion [40], [41]. This is what is required in refugee camps for the prevention and protection of female refugees against SV. On the other hand, MacPherson describes right-based access as being when the ability to benefit from something derives from rights attributed by law, custom or convention. Contemporary theorists have usually called it “property,” [41] and, going further, claim that access as rights has to do with claims [41] and property as “. . . a right in the sense of an enforceable claim to some use or benefit of something” [41]. Moreover, an “enforceable claim” is one that is acknowledged and supported by society through law, custom, or convention. This is the aspect of access that we are advocating for female victims of SV in refugee camps in Africa. Moreover, we canvass for access to justice both as an ability, as previously defined, and as a right for female victims of SV in refugee camps. Our intent is to enable scholars and others to map dynamic processes and relationships of access to resources, locating property rights as one set of access relationships among others.

E. Theories of Justice

Justice (fairness) [42], as the main objective of this article, has been used in many parlances with different meanings. In

English it is said to mean, “Fairness in the way people are dealt with” [42]. It is also referred to as law or the system of laws in a country that judges and punishes people [42]. In legal phraseology, justice means protecting rights and punishing wrongs using fairness [43].

There are many schools of thought with regard to the doctrine of justice [44]. For Augustine, the cardinal virtue of justice requires that we try to give all people their due; for Kant, it is a virtue whereby we respect others’ freedom, autonomy, and dignity by not interfering with their voluntary actions, so long as they do not violate the rights of others; Mill argued that justice is a collective name for the most important social utilities, which are conducive to fostering and protecting human liberty [44]. Rawls analyzed justice in terms of maximum equal liberty regarding basic rights and duties for all members of society, with socioeconomic inequalities requiring moral justification in terms of equal opportunity and beneficial results for all. Plato argued that justice is a virtue establishing rational order, with each part performing its appropriate role and not interfering with the proper functioning of other parts [44].

Aristotle was of the opinion that justice consists of what is lawful and fair, with fairness involving equitable distribution and the correction of what is inequitable [45], and that “justice is considered as the greatest virtue, and neither evening or morning star is as wonderful” [45]. Aristotle further explains that universal justice is what is lawful, while particular justice is what is equal and fair [45]. And he further asserts that, “justice is that kind of a state of character which makes people disposed to do what is just and makes them act justly and wish for what is just.” While “injustice is that state which makes them act unjustly and wish for what is unjust” [45]. Aristotle went on to clarify that an unjust man is lawless, while an unfair man is grasping, and, on the contrary, the just man is lawful and just [45].

We argue that all the meanings and principles enunciated by various scholars of the word “justice” should be incorporated into the administration of refugee camps in Africa, and, as a paradigm for other refugees around the world who are victims of SV, through addressing the unjust and unlawful acts of SV suffered by female refugees in camps in a just, lawful and equitable manner. There are, however, different theories of justice, but, for the purpose of this article, we will focus on theories of retributive justice and reparative justice.

1. The Theory of Retributive Justice

Retributive justice (RJ) is a theory that considers punishment, if proportionate, to be the best response to crime. It promotes liability and eligibility for the punishment of an offender [46] who is guilty of a crime [47]. Retribution is not revenge; it deals with what is wrong; has its limits; it is not personal and does not take delight in the suffering of the offender, but employs procedural standards [48], [49]. Retribution is also backward looking, justified by the crime that has been committed and carried out to atone for the damage already done [46].

Hart [50] defined punishment to include pain, unpleasant consequence and claimed it must be for an offence against a legal rule. He further highlighted the fact that the retributive theory of punishment [51] is composed of three tenets: first of all that punishment should be meted to a person who deliberately commits a crime; secondly that the punishment must be proportionate to the crime; and, finally that the justification for punishing persons is the return of suffering in place of a voluntary crime committed, because it is just and morally good to do so [51]. Bedau [47] refers to these tenets as the principles of; responsibility (R1), proportionality (R2) and just retribution (R3) respectively [47].

The principle of responsibility means that a perpetrator of a wrong doing must be held liable for their actions. This is followed by the principle of proportionality, which denotes that the punishment meted to the offender must be proportionate to the severity of the crime. And lastly, by the principle of just retribution, which means that people should be rewarded or punished in accordance with that which is due to their conduct or motives [47]. Just as retribution also involves the idea of someone paying back something to another [47] who has suffered harm from the actions of the offender, this principle is a basis for the notion of a remedy and reparation.

The crime of SV is a deliberate act, as discussed under the feminists' theory of sexual coercion and that of rational choice, and so we are promoting the introduction and the implementation of the principles of RJ, in particular the punishment of offenders, to be included in addressing the problems of the female victims of SV in refugee camps to curb the culture of impunity and to bring justice to female victims of SV in refugee camps.

Kant [52] is of the opinion that punishment, which is a part of retribution, is justice that must be implemented by the state in accordance with established laws. He argues that, if the guilty are not punished, there is no law [52]. Retribution is absent in refugee camps and that accounts for the lawlessness and paints a vivid picture of the situation for female victims of SV in camps. Based on the principle of just retribution that is a part of retributive justice, we will consider theories of reparative justice.

2. Theories of Reparative Justice

Reparations were generally a civil remedy that was intended to redress the harm resulting from an unlawful act that violates the rights of a person [53]. In most domestic laws, reparations were typically awarded by courts [53]. The concept of reparations revolves around the idea of justice [50]; it serves as a critical strategy for achieving the central justice aims of transitional justice [53]. It is retrospective in nature in order to right past wrongs [53].

Reparative justice, which can be traced to ancient times, was often used in terms of "corrective justice" [53], and it branches from the principle of civil remedies that has its roots in classical legal theory [54]. Plato argued that when a person has "done wrong... he must make the damage good to boot" and that the law "must be exact in determining the magnitude

of the correction imposed on the particular offence and... the amount of compensation to be paid" [55].

In discussing the notion of "rectificatory or corrective" (*diorthotikos*, literally "making straight") justice, Aristotle [56], the proponent of the theory of corrective justice [57], [58], argued that:

It makes no difference (from a corrective justice standpoint) whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it [57], [58].

This implies that justice means the law does not discriminate, but treats everyone as equal. In the context of female victims of SV in refugee camps, however, the law should be applied to the myriad of perpetrators of this act, regardless of their standing within the community, who enjoy immunity from prosecution in the host states.

With regards to the issue of remedies, Aristotle reiterated the fact that [58], [59]:

The judge tries to equalize things by means of the penalty, taking away from the gain of the assailant. For the term "gain" (*kerdos*) is applied generally to such cases, even if it be not a term appropriate to certain cases, e.g. to the person who inflicts a wound and "loss" (*zemia*) to the sufferer; at all events, when the suffering has been estimated, the one is called loss and the other gain... Therefore, the just...consists in having an equal amount before and after the transaction [58], [59].

From the above, it can be implied that if someone violates another wrongfully, they have behaved unjustly irrespective of merit or relativity to the victim, and that the rights of a superior individual do not include the right to injure an inferior person through wrongful conduct [58]. Aristotle also used "the metaphor of an arithmetic balance to show that, one person who causes harm must compensate another for the resulting injury or damage in order to equalize the equation" [56]. The theory of reparative justice is based on the theory of corrective justice, which is a response to an injustice by "righting a wrong" [60]. It also focuses on harms and losses that arise from the infringement of rights [53].

The principle of reparative justice has been employed by international human rights tribunals, where they have generated jurisprudence in remedies through a focus on individualized cases of measurable damages where restitution is not possible or is impracticable [53], [61]. In taking the approach of *restitutio in integrum*, the tribunal adopted modalities to "making a victim whole" and to restoring the "*status quo ante*", and, with an understanding of the impossibility of true restitution and of the immeasurable harm suffered by victims resulting from the various violations [53], [61], these modalities include restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition [62]. This theory is a foundation for the award of reparation to the victims of SV in refugee camps.

Although it is not completely possible to remedy the crime of SV against female refugees in camps in whole, there are some reparative measures that can ameliorate their plight. We are, thus, asserting that the principles of the reparative justice theory be incorporated alongside that of RJ as a heavier burden and a stricter measure for the perpetrators of this heinous crime against these helpless refugees.

F. Theories of Right

The basis for not violating another person or for accessing justice is hinged on rights. Rights have been described as a moral concept which pertains to that which a person is free to do [63]. Wenar [64] described rights as “entitlements not to perform certain actions, or not to be in certain states; or entitlements that others should not perform certain actions or not to be in certain states” [64]. The relationship between rights and duties arises from a contract, while a right *in rem* is correlative to duties in principle incumbent on everyone [63]. This also implies that a holder of “claim right,” is obligated to allow those who owe him/her a duty to perform that specific duty [64]. According to Hohfeld [65], [66] the word “rights” could denote any of the following:

1. Claim Rights

Which is a duty that is owed to a right holder by some other person(s), this implies that the person’s right is dependent on the performance of a particular duty by another [65], [66]. “Claim right,” involves a negative and positive duty both to refrain from acts that are in breach of the rights of the holder of claim-rights, or to prevent others from doing so and to a positive requirement that will enhance the rights of the holder [65], [66]. Claim right has also been classified into right *in personam* and right *in rem*. Claim right *in personam* is a correlative duty peculiarly incumbent on an assignable person, for example the relationship between rights and duties arising from a contract, while a right *in rem* is correlative to duties in principle incumbent on everyone [66]. This also means that a holder of claim right owes a duty to perform or to omit a specific action and this is owed to others [67]. For example, a promisor owes a duty to fulfill his/her promise to a promisee [67] and as such, the government of a host state owes a duty to protect female refugees against sexual violence, and this corresponds with the female refugees’ rights not to be sexually abused by those charged with the duty to protect them, and to a duty to enforce their rights against their assailants.

2. The Will (Choice) Theory of Rights

This theory asserts that the function of rights is to give the right-holders a choice [67]. It creates a right because duties are owed to those who have choices to waive them, and this requires the performance of the promissory duty or its enforcement [67]. Hart’s Will theory, on the other hand, states that “rights” offers the holder the power to exercise legal rights, and that is a legally respected choice [67]. This doctrine supports the fact that refugees in camps have rights and, thus, should be given an opportunity to assert the right of choice, through the provision of a sympathetic/appropriate facility for reporting the violation and for seeking redress in camps [68].

3. Interest Theory of Rights

This theory holds that rights promote the rights-holders interest [67]. It also asserts that duties are owed to those with an interest in the creation or performance of the duties [67]. For example, interest theory opines that property is a right because ownership improves the life of the interest rights holder [67]. The rights of female refugees are embedded in the duty of the host states to protect these refugees against sexual violation in camps and to punish offenders. The choice theory (or will theory) and the interest theory (or benefit) [69] are the theories that dominate human rights discussions [69]. The interest theory asserts that the primary function of human rights is to protect and promote certain human interests, while the will theory attempts to establish the validity of human rights based on the unique human capacity for freedom [70].

4. Natural Rights Theory

The doctrine of natural rights has been understood as an aspect or feature of the modern doctrine of natural law [71], which consists of moral laws specifying what a person should be free to do and which come from God, political laws specifying what a person is free to do which are created by government, and moral laws specifying what a person can do which are inherent in human nature [66]. Natural rights are also based on the political theory that every person has basic rights that the government cannot deny [66]. These rights are also inherent in female refugees in refugee camps *viz.* that they must not be violated by others. Natural rights are the “rights that all men (including women) possess, which may obligate them to act or to refrain from acting in certain ways” [71].

According to Hobbes and Locke, there are many natural rights, but all of them are inferences from one original right, the right that each man has to self-preservation [71]. The doctrine of natural rights teaches primarily that all obligations are derived from the right which every man has to preserve his own life. Conversely, it teaches that no man can be bound to regard as a duty whatever he regards as destructive to the security of his life [71].

According to Paine [72]:

“Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others” [72].

This implies that the natural rights of a man to engage in sexual activities in order to derive pleasure does not include the right to SV against a woman. On the other hand, it is correct to assert that female refugees have a right to live in comfort and happiness with a life free of sexual violation.

5. Theories of Human Rights

Nickel, defined human rights as the, basic moral guarantee that people in all countries and cultures allegedly have, simply because they are humans [73], [74]. These guaranteed “rights” are attached to particular individuals who can invoke them, they are of high priority, and compliance with them is

mandatory rather than discretionary [73], [74]. “Human rights are frequently held to be universal in the sense that all people have and should enjoy them, and to be independent in the sense that they exist and are available as standards of justification and criticism, whether or not they are recognized and implemented by the legal system or officials of a country [73], [74].”

Human rights have also been adjudged to be “universal rights held to belong to individuals by virtue of their being human, encompassing civil, political, economic, social, and cultural rights and freedoms, and based on the notion of personal human dignity and worth” [75]. Dignity is defined as the importance and value that a person has which makes other people respect them or makes them respect themselves [42]. Dignity is the key term for the discussion about human rights. The universal declaration on human rights appeals to human dignity as its basis [76].

An aspect of a woman’s dignity is based on her sexuality and the right to choose with whom to share it. If it is taken forcefully or against her will, as in SV, she feels dehumanized or robbed by the perpetrator. This captures the plight of female refugees in camps. Human rights principles reveal that these female refugees have rights that they can invoke when their personal dignity and worth is violated.

Historically, human rights can be traced to 539 B.C [77], when the armies of Cyrus the Great, the first king of ancient Persia, conquered the city of Babylon. But it was his next move that marked a major advancement for mankind. He freed slaves, established racial equality, and declared that all people had the right to choose their own religion. These and other decrees were recorded on a baked-clay cylinder in the Akkadian language with cuneiform script [77]. Known today as the Cyrus Cylinder, this ancient record has now been recognized as the world’s first charter of human rights. It is translated into all six official languages of the United Nations and its provisions parallel the first four Articles of the Universal Declaration of Human Rights. From Babylon, the idea of human rights spread quickly to India, Greece, and eventually to Rome [77]. Theoretically, a human right is “derived from the theory of natural law and originating in Greco-Roman doctrines” [77]. The notion of human rights also appeared in some “early Christian writers’ works and is reflected in the Magna Carta (1215)” [77]. The idea winds as a philosophical thread through 17th and 18th century European and American thought, including the Declaration of Independence (1776) and the French Declaration of the Rights of Man and Citizen (1789) [77]. The United Nation’s Commission on Human Rights, with Eleanor Roosevelt as chair, created the UN’s Universal Declaration of Human Rights (1948), which reasserted the concept of human rights after the horrors of World War II. Human rights have since become a universally espoused, yet widely disregarded, concept [77].

The natural rights theory of human rights underlies contemporary human rights doctrines [78]. The term “human rights” is generally taken to mean what Locke and his successors meant by natural rights, namely rights

(entitlements) held simply by virtue of being a person (human being) [78]. Human rights are inherent in all human beings, which include female refugees whose rights must not be violated and must be enforced by those charged with their care.

G. The Theory of Deterrence

Prevention has been known to be better than cure; hence preventing SV against female refugees in camps in Africa is the best form of justice that is available; thus, making relevant the discussion on deterrence as a solution to the problem of SV in refugee camps in Africa and as a paradigm to other refugee camps around the world.

The word “deterrence” has its origin in the Latin word, “*de-terrere*” [79]-[81], which means to frighten from or away. It has been defined as an “act or the process of discouraging certain behavior, particularly by fear, especially as a goal of criminal law, in the prevention of a criminal behavior for fear of punishment” [82]. It is also seen as a method of retrospective interference by holding out threats that whenever a wrong has been committed, the wrong doer shall incur punishment [82]. It could be a “general deterrence”, which is the discouragement of potential offenders from committing a crime as a result of a specific conviction and sentence passed on a criminal [83], or “specific deterrence,” which has “the goal of dissuading offenders from committing crimes in the future, as a result of a specific conviction and sentence they have received.” [83].

Deterrence theory can be traced to such early utilitarian’s as Cesare Beccaria and Jeremy Bentham [25], [84]. The underlying principle is that people will commit crimes to the extent they are more pleasurable than painful. Certain, severe, and swift legal punishments increase the pain for crimes and, thereby, can deter people from committing them [85]. It has also been argued that deterrence, as an efficacious method of penal sanction, is as old as criminal law itself, and it has been described as the primary and essential principle of almost all criminal legal systems [86]. This principle was applied in the case of S v. M [87], a 21-year-old Bantu male teacher who was convicted and imprisoned by a South-Eastern Cape Local Division Court for the rape of a 17-year-old Bantu female student. The appellate court later dismissed an appeal and affirmed the court’s decision where it was held that, “it is important for the crime of rape committed by a teacher upon one of the pupils entrusted to his care to be severely punished, as a deterrent and warning to other persons similarly placed in the positions of trust *vis- a- vis* young girls.”

Freedman states that, “manipulating another’s behavior through threats is a natural phenomenon [79].” The strongest often survives through persuading potential predators that they are not too fast to be caught, that they will fight back when necessary and that even if they are overwhelmed, they are inedible [79], [88], [89]. “Some of these forms of natural deterrence can be quite subtle and even rely on confusing opponents. The owl eyes on the wings of the Caligo butterfly serve to encourage birds to keep their distance [79], [88], [89].” On the other hand, Monarch butterflies have to produce

a poisonous substance that will make blue jays ill in order to sustain the deterrence. That is because blue jays only learn not to eat them after the first attempt at eating them which makes them ill [79], [88], [89]. "When one jumping spider approaches another, leg waving behavior is used to mark a territory. There is a fly that has acquired wings markings that resemble the legs of a jumping spider, and this ability to create the impression of leg-waving is sufficient to persuade a potential predatory spider that it is in the presence of another so that it backs away [79], [86], [87].

The above principles support the concept of holding out threats and the infliction of pain to deter others from committing a crime. We advocate that the principles of deterrence be employed as a deliberate attempt to persuade potential perpetrators of SV against female refugees in camps to change their attitude. We conclude that without the fear of legal punishment, the perpetrators of the crime of SV against refugees in camps will not be deterred from the commission of the crime.

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