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The evolving law on sexual and reproductive health rights

and the right to abortion in Kenya.

By

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ALNSAR001

Research Dissertation submitted for the approval of Senate in fulfillment of part of the requirements for the Master of Laws in approved courses and a minor dissertation.

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‘O Lord, that lends me life, lend me a heart replete with thankfulness!’

William Shakespeare, King Henry V1, Part 2

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Abstract

Article 26(4) of the Constitution of Kenya guarantees the right to abortion in these circumstances: 'where there is danger to the life of the mother; where there is danger to the health of the mother; if there is need for emergency treatment of any kind; and if allowed by any other written law.' Accordingly, this dissertation argues that the jurisprudence of international and regional human rights bodies demonstrates that the right to abortion is a justiciable human right. Therefore, it probes whether Kenya is honouring her state obligation to respect, promote and fulfil the right to abortion as a human right as guaranteed in the Constitution and international law obligations. Furthermore, it analyses Kenyan law and policy on the right to abortion and assesses whether Kenya's law on abortion is a barrier to the effective realization of the right to abortion. To investigate whether safe abortion is accessible to Kenyan women and a realizable human right in Kenya, the dissertation examines the Constitution, legislation and government policies on access to abortion vis-à-vis the reality and experiences of Kenyan women accessing safe abortion. The dissertation finds that the subsisting contradiction between the constitution and the penal code provisions on access to abortion reinforced by inconsistent policies from the government of Kenya continues to exacerbate unsafe abortion in Kenya thus hindering the effective realisation of the right to abortion in Kenya. The study compares how South Africa, has implemented its progressive law on the right to abortion and the insights that Kenya could draw from the South African experience.The study concludes by appealing to Kenya to ensure the effective realisation of the right to abortion by revoking the punitive clauses of the penal code, aligning laws and government policies with Article 26(4) of the Constitution, enacting the Reproductive Healthcare Bill that will expand access to abortion and educating Kenyans on the current permissive legal provisions on access to safe abortion.

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List of Acronyms and Abbreviations

WHO	World Health Organization
CEDAW	Convention on the elimination on all forms of discrimination against women
ICCPR	International convention on civil and political rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
HRC	Human Rights Committee
UN	United Nations
CRC	Convention on the Rights of the Child
ICPD	International Conference on Population and Development
CoE	Committee of Experts
CTOPA	Choice on Termination of Pregnancy Act
CLA	Christian Lawyers Association
TMB's	Treaty Monitoring Bodies

CHAPTER ONE

1:0 INTRODUCTION

1.1 Background

The World Health Organization(WHO) defines unsafe abortion as 'a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking minimal medical standards or both.'[1] Unsafe abortion affects more women from poor regions of the world where abortion is restricted by law than in regions with permissive laws.[2] It is argued that where abortion is legalised and made accessible to women, 'abortion is one of the safest medical procedures' with minor risks of morbidity or death.[3] According to WHO, the health complications that can follow after a termination of pregnancy can be avoided if the procedure is conducted by well-trained health personnel and in health facilities that are safe, hygienic and equipped to handle the procedure at the particular stage of the pregnancy.[4]

Unsafe abortion is a major cause of maternal morbidity and mortality in Kenya, oftentimes it results in complications that can lead to long term health effects, such as chronic pelvic pain, tubal blockage, infertility, increased risk of ectopic pregnancy, miscarriage or preterm delivery in subsequent pregnancies.[5] Unsafe abortion causes '30-40% of maternal deaths in Kenya, which is much greater than the global average of 13%.'[6] It is documented that 'at least 2,600 women die from unsafe abortion in Kenya; 21,000 more women are hospitalized annually with complications from incomplete and unsafe abortion, whether spontaneous or induced.'[7]

Unfortunately, these percentages do not take into account the many women who die or suffer irreparable consequences but whose cases are unrecorded.[8] Factors such as the social stigma surrounding abortion hinder reporting of unsafe abortion cases resulting in many women in Kenya

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[1] World Health Organization, Preventing Unsafe Abortion (2010) available at http:// www.who.int/reproductivehealth/topics/ unsafe abortion/hrpwork/en/index.html last accessed 2nd May 2020

[2] Ibid

[3] David A. Grimes et al 'Unsafe abortion: the preventable pandemic' (2006) 368 *The Lancet* at *1*908

[4] WHO Safe Abortion: Technical and Policy Guidance for Health Systems (2nd ed) (2012)

[5] Hailemichael Gebreselassie et al. 'The magnitude of abortion complications in Kenya' (2005) 112:9 *An International Journal of Obstetrics and Gynecology* at 1229

[6] Center for Reproductive Health Rights 'In Harm's Way: The impact of Kenya's restrictive abortion law' (2010) *Center for Reproductive Health Rights* at 9

[7] Ibid

[8] Ibid

suffering or dying in silence.[9] In particular, unsafe abortion disproportionately affects poor Kenyan women since the economically empowered Kenyan women can access expensive safe abortion services from well qualified medical personnel.[10] A study that examined lay narratives surrounding abortion in Kenya concluded that abortion has always existed in Kenyan society only that it was more common today than in past days due to the current widespread poverty and inequality.[11] Further, that it was likely to persist despite legal restrictions because women use abortion as a shield to escape from negative social, economic and cultural consequences brought about by ill-timed pregnancies.[12]

In Kibera the biggest informal settlement in Kenya, a study demonstrated that despite the current Kenyan law permitting access to abortion in certain circumstances,[13] access to safe abortion remains a mirage.[14] The study found that poverty, uncertainty on the law on abortion and stigma surrounding abortion fuelled by religious doctrines that equates abortion to murder greatly hampered women from seeking abortion services from qualified medical providers.[15]

Additionally, a study on access to post-abortion care, which is the treatment given to complications arising from unsafe abortions thus minimizing morbidity and mortality after unsafe abortions, found that post-abortion care was compromised on account of the contradictory legal and policy scenario in Kenya[16]. Despite the Constitution permitting abortion in certain circumstances, the punitive law on abortion in the penal code hindered women from seeking safe abortion from well-trained health personnel.[17] Regrettably, this unclear legal landscape coupled with the stigma associated with abortion instilled fear among health providers hence hindering effective post-abortion care after an unsafe abortion.[18] Furthermore, research conducted in the Kenyan public

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[9] Ibid

[10] Jane Wambui 'Implementing Reproductive Health and Abortion Provisions in The Kenya Constitution 2010' (2018) 23:6 *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* at 65

[11] Chimaraoke Izugbara, Kennedy Otsola and Alex Ezeh 'Men, Women, and Abortion in Central Kenya: A Study of Lay Narratives' (2009) 28:4 *Medical Anthropology* at 414

[12] Ibid at 407-411

[13] Article 26(4) of the Constitution of Kenya provides that; 'abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.'

[14] Edna Bosire et al 'Women's Three Bodies: An Anthropological Perspective on Barriers to Safe Abortion Services in Kibera Informal Settlements, Nairobi, Kenya' (2019) 4:2 *Journal of Maternal and Child Health* at 105-107

[15] Ibid

[16] Michael Mutua et al. 'Policy, law and post-abortion care services in Kenya' (2018) 13:9 *PLoS ONE* at 1

[17] Ibid at 2-3

[18] Ibid

health facilities demonstrated that '77% of Kenyan women who sought post-abortion care experienced moderate to severe complications like localized peritonitis to sepsis and death.'[19] The study revealed that there was an urgent need for Kenya to improve access to post-abortion care and eliminate the scourge of unsafe abortion which greatly contributed to women's deaths in their reproductive years.[20]

From the foregoing, it is evident that Kenya is failing in its obligation to its female citizens to ensure that several of their fundamental rights such as the right to life, right to health and right to dignity are respected by not only addressing unsafe abortion as a public health issue but also as a human rights issue.[21] Through article 2(6) of the Kenyan constitution all international laws ,treaties and instruments ratified by Kenya are part of Kenya's law.[22] Because of this provision, Kenya enacted the treaty making and ratification act to set out the procedure to be followed when negotiating and ratifying treaties.[23]

Kenya has international obligations to women concerning the right of access to abortion as provided for by the Protocol to the African charter on the rights of women;[24] as interpreted by the monitoring committee of the Convention on the elimination on all forms of discrimination against women(CEDAW) which requires states to abolish punitive measures applied to women who undergo abortions;[25] and as interpreted by the Human Rights Committee(HRC) that interprets the International Convention on Civil and Political Rights(ICCPR).[26] The HRC has interpreted article 6(1) on right to life to obligate states to report to the HRC of 'any measures taken by the states to

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[19] Abdhala K Ziraba et al 'Unsafe abortion in Kenya: a cross-sectional study of abortion complication severity and associated factors' (2015) 15:34 *BMC Pregnancy and Childbirth* at 6
[20] Ibid at 10
[21] Center for Reproductive Health Rights (2010) op cit note 6 at 9-10
[22] Article 2(6) of the Constitution of Kenya provides, 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'
[23] Treaty Making and Ratification Act, no.45 of 2012. www.kenyalaw.org(last accessed 14th August 2020)
[24] African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003; Article 14(2)(c) of the Protocol to the African charter on the rights of women provides that "states parties shall take all appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.
[25]UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; Committee on the Elimination of Discrimination against Women, General Recommendation 24, 'Women and Health', U.N. Doc. A/54/38/Rev.1, 1999, Para 14; See LC v Peru, CEDAW Committee, Communication No. 22/2009, para. 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011); Kenya ratified CEDAW in 1984
[26] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Kenya ratified the ICCPR in 1976

help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.'[27] By the same token, General Comment no. 22 on the right to sexual and reproductive health which interprets article 12 of the (ICESCR),[28] acknowledges sexual and reproductive health rights as a cornerstone of the right to physical and mental health.[29] In the spirit of interdependence and indivisibility of human rights states are urged to ensure that they 'respect, promote and fulfil women's reproductive health rights since they are integral to women's enjoyment of human rights.'[30]

Mindful of the position of international law in Kenya and fortified by existing international obligations that require promotion and fulfilment of the right to physical and mental health which is interlinked with the right to access abortion, it is incumbent on Kenya to ensure abortion is a realisable human right by enacting a law that will exhaustively provide for access to safe abortion.

1.1.1 The debate on abortion law

Arguably, the global legal discourse on abortion began with the 1973 Supreme Court of the United States of America's judgment in the case of *Roe v. Wade*.[31] Before this decision, American women did not have a constitutional right to abortion, thus each state regulated abortion.[32] In *Roe v Wade*, the United States Supreme Court in a ground-breaking fashion decided that women could access abortion as they had a right to individual autonomy and privacy.[33] The brief facts of the case were that a young lady who used the pseudonym Roe in the case had an unwanted pregnancy considering that she had delivered twice before and given up the children for adoption.[34] At that time Texas,

[27] Human Rights Committee, General Comment No. 28: Equality of rights between men and women (article 3), para. 10, U.N. Doc. CCPR/C/21/Rev.1/ Add.10 (2000).
[28] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; Article 12(1) of the ICESCR states that 'the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'; Kenya ratified the ICESCR in 1972; General comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N Doc E/C.12/GC/22 (2016)
[29] General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/22 at paras 1-5
[30] Ibid at paras 9,10,39-48
[31] *Roe v Wade* 410 US 113 (1973)
[32] Merle H Weiner 'Constitutional Law: Roe v Wade case' (2015) *Oxford University Press* at para 5
[33] Ibid at para 1
[34] *Roe v Wade* 410 US 113 (1973) 113

her state of residence criminalized abortion with the exception of saving a woman's life and Roe sought to challenge the laws on abortion.[35]

The decision in *Roe v Wade* established that abortion was within the right to privacy of women and that it may be restricted in a narrow way due to compelling state interest.[36] Further, before a pregnancy is viable the interest of the state is not compelling.[37] Moreover, when the state's interest becomes compelling abortion is necessary to protect a woman's life or health.[38]The court held the view that the state was not to 'justify restrictions on abortion based on one theory of when life begins.'[39]

It is worth noting that the *Roe v Wade* case was consolidated with another case of *Doe v Bolton*.[40] In *Doe v Bolton*, the plaintiff sought to challenge the Georgia state law that required that an abortion be performed in an accredited hospital where two doctors would confirm the applicable exception and that the hospital's abortion committee would approve the procedure.[41] The Supreme Court invalidated the law and determined that in as much as a woman did not have an absolute right to an abortion on demand throughout her pregnancy, a physician could ascertain when it was necessary for her health.[42]

The holding in *Roe v Wade* was preceded years earlier by the United States of America Supreme Court decision on the right to privacy in *Griswold v. Connecticut*.[43] In this case, the appellant was convicted of violating a Connecticut law that prohibited the use of contraceptives as she had given medical advice to married persons on the means of preventing conception.[44] The Supreme court held that the law was unconstitutional for violating the right to privacy since the marital relationship was private.[45] The principle of the right to privacy was further applied in *Eisenstadt v*

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[35] Ibid at 113,114,115
[36] Ibid at 154,163
[37] Ibid at 155,156,157
[38] Ibid at 155-160
[39] Ibid at 160-163; Center for Reproductive rights 'Roe v Wade and the right to privacy' (2003) *Center for Reproductive rights* at 29
[40] *Doe v Bolton* 410 US 179 (1973)
[41] Ibid at 179,180,183,184
[42] Ibid at 201,202
[43] *Griswold v Connecticut* 381 US 479 (1965)
[44] Ibid at 479,480
[45] Ibid 485,486

Baird,[46] where it was determined that the right to privacy protects access to contraceptives even for unmarried people.[47]

In sum, the United States of America Supreme Court decisions of *Roe v Wade* and *Doe v Bolton* can be largely regarded as the genesis of the abortion discourse globally considering the rise in the global trend towards liberalizing abortion laws.[48]

1.1.2 Abortion in Kenya: Past and Present

Abortion law before the 2010 constitutional dispensation

Kenya was subject to British laws by virtue of being a British colony until it gained its independence in 1963.Therefore, Kenya and other British colonies were guided by the provisions on abortion found in the English Offences Against the Person Act of 1861.[49] Section 58 of the Act,[50] outlawed abortion and section 59 of the Act called for punishment of anyone assisting a woman to perform an abortion.[51]

The 1938 British case of *Rex v Bourne*,[52] broadened the scope of performing abortion from the narrow confines of saving the pregnant woman's life to considering a threat to her physical and mental health.[53] In this case, a doctor obtained parental consent to perform an abortion on a 14-year-old girl who had been raped.[54] The doctor was subsequently charged with unlawfully procuring an abortion contrary to the English Offences Against the Person Act of 1861 Act.[55] The

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[46] *Eisenstadt v Baird* 405 US 438 (1972)
[47] Ibid at 438-454
[48] Center for Reproductive Rights (2003) op cit note 39 at 51
[49] Offences Against the Person Act 1861 available at https://www.legislation.gov.uk/ukpga/Vict/24-25/100/contents(last accessed August 18, 2020.
[50] Section 58 of the English Offences against the Person Act of 1861 stated that 'every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with the intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony and being convicted thereof shall be liable to imprisonment for life.'
[51] Section 59 of the English Offences against the Person Act of 1861 stated that 'Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable . . . to be kept in penal servitude.'
[52] *R v Bourne* (1938) 3 ALL ER 615, Crown Court of England and Wales
[53] Ibid at 620
[54] Ibid
[55] Ibid at 616

doctor defended himself to the effect that he intended to save the girl from greater harm.[56] The doctor asserted that he had provided the abortion so that the girl would not become a mother at such a tender age while bearing a child conceived from a rape incident.[57]

Experts testified that the minor child would have been mentally devastated had the pregnancy continued.[58] Justice McNaughten who was the trial judge acquitted the doctor through this famous holding that '…if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequences of continuance with the pregnancy will be to make the woman a physical or mental wreck, the jury is entitled to take the view that the doctor who under those circumstances and in that honest belief operates, is operating for the purposes of saving the life of the mother.'[59]

Post-independence, Kenya's abortion law was enacted in the Kenyan Penal Code.[60] It is instructive to note that the Penal code of Kenya is similar to the English Offences Against the Person Act. Under Sections 158,[61] 159,[62] and 160 of the Penal Code,[63] the law criminalizes the woman and a person who provides abortion, with the two liable for prison sentences of up to 14 years if found guilty. Notably, section 240 of the Penal Code,[64] provides an exception by allowing for legal abortion to save a woman's life.

These provisions of the penal code have been applied in some cases where medical providers have been prosecuted. In the case of *Republic v Noah Imonje Misango*,[65] where the respondent was

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[56] Ibid
[57] Ibid at 620
[58] Ibid
[59] Ibid
[60] The Penal Code, Chapter 63 Laws of Kenya
[61] Any person who with intent to procure the miscarriage of a woman, whether she is or is not with child unlawfully administers to her or causes her to take any poison or other noxious thing or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years. (Penal Code, p. 66)
[62] Any woman who being with child with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony and is liable to imprisonment for fourteen years. (Penal Code, p. 66-67)
[63] Any person who unlawfully supplies or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years. (Penal Code, p. 67)
[64] A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case. (Penal Code, p. 85)
[65] *Republic v Noah Imonje Misango*, Migori HCR Case No. 44 of 2014 eKLR

charged with murder contrary to section 203 as read with section 204.[66] The prosecution called eight witnesses to prove that the accused had murdered the deceased in the course of procuring an abortion.[67] However, the court did not find sufficient cause to convict the accused person.[68]

Also, in the case of *Republic v Dr John Nyamu and 2 others,*[69] the court charged the accused persons with the offence of murder contrary to section 203 and 204 of the Penal Code.[70] The accused persons were acquitted for lack of sufficient evidence to prove the offence.[71] Further, in *Republic v Enid Kaari Nganga*,[72] the state charged the respondent with the offence of supplying drugs or instruments to procure abortion contrary to section 160 of the penal code.[73] The court dismissed the charge for lack of a vital witness to support the complainant's accomplice evidence.[74]

Lastly, in *Jackson Tali v Republic*,[75] a nurse and the appellant in this case, was prosecuted and found guilty for the offence of murder contrary to section 203 as read with section 204 of the Penal code.[76] The prosecution alleged that Mr Tali had been trying to assist the deceased to procure an illegal abortion which led to her death.[77] On appeal, the Court of appeal quashed Mr Tali's conviction and set aside the death sentence that had been meted out against him citing that the court was not 'satisfied beyond reasonable doubt' that the appellant had murdered the deceased.[78]

The fact that these provisions of the penal code that broadly criminalize abortion have not been revoked to reflect the permissible circumstances of performing abortion provided for in the Constitution is problematic. It is this inconsistency between the Constitutional provision on access to safe abortion and the punitive provision in the penal code that continues to perpetuate the denial of access to safe abortion for Kenyan women.

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[66] Ibid at para 1
[67] Ibid at para 2
[68] Ibid at paras 21,22
[69] *Republic v Dr John Nyamu and 2 others*, Nairobi HCR Case No. 81 of 2004 eKLR
[70] Ibid at 1
[71] Ibid at 11
[72] *Republic v Enid Kaari Nganga*, Nairobi HCR case No. 95 of 2006 eKLR
[73] Ibid
[74] Ibid
[75] *Jackson Tali v Republic* Nairobi Criminal Appeal No.173 of 2016 eKLR
[76] Ibid at 1
[77] Ibid at 2,3,4
[78] Ibid at 10

Abortion law after the new constitutional dispensation.

After the promulgation of the Kenyan Constitution in 2010(the Constitution),[79] the discourse on abortion in Kenya changed course. Article 26 (4) of the Constitution of Kenya provides four circumstances when abortion is permitted: (a) where there is need for emergency treatment and (b) where the life, or (c) where the health of the mother is in danger or (d) when permitted by any other written law.[80] In the four scenarios, the opinion of a trained health professional is required.[81]

It is noteworthy that the constitution allows a possibility of enacting a law on abortion which may broaden the circumstances where abortion may be performed.[82] The provision of safe abortion in the Constitution should be interpreted in tandem with the right to health including reproductive health provided in Article 43 (1) (a).[83] Nevertheless, Article 43 (2),[84] which prohibits denial of emergency medical treatment also requires that post-abortion care services are given to women.[85]

Apart from the Constitution, section 6(1) of the Health Act,2017(the Health Act),[86] provides that every person has a right to reproductive health care that includes abortion.[87] The Act also requires that any procedure shall be carried out in a legally recognized health facility with an enabling environment consisting of the minimum human resources and infrastructure.[88]

The Sexual Offences Act of 2006 which prohibits various forms of sexual violence including rape, defilement and incest requires that victims of sexual offences be provided with free treatment.[89] In line with this law, the Ministry of Health(the Ministry) published national guidelines on the

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[79] The Constitution of Kenya,2010

[80] Article 26(4) The Constitution of Kenya, 27 August 2010 states that 'abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law'.

[81] Ibid

[82] Ibid

[83] Article 43 (1) (a) Constitution of Kenya,2010 states that 'every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.'

[84] Article 43(2) Constitution of Kenya,2010 states that 'a person shall not be denied emergency medical treatment'.

[85] Ministry of Health National Guidelines for quality obstetrics and perinatal care, 2011.Ministry of Health, Kenya

[86] The Health Act, Act No. of 2017

[87] Section 6(1) of the Health Act states that 'every person has a right to reproductive health care which includes (c) access to treatment by a trained health professional for conditions occurring during pregnancy including abnormal pregnancy conditions, such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable conditions.'

[88] Section 6(1),6 (2) of the Health Act,2017

[89] Section 35 of the Sexual Offences Act of 2006

management of sexual violence in Kenya which outline the process of clinical management of sexual violence.[90] The guidelines recognize that a survivor of sexual violence has a right to termination of pregnancy and post-abortion care.[91]

Furthermore, the Ministry launched standards and guidelines for the reduction of maternal morbidity and mortality from unsafe abortion(standards and guidelines).[92] The guidelines aimed at clarifying the circumstances under which abortion could be legally provided.[93] This included the type of facility that could carry out terminations, a guide for persons allowed to provide termination of pregnancy, a guide for situations where the pregnancy poses a danger to the life or health of the pregnant woman, a guide for conscientious objection by health professionals and overall training of medical personnel involved in abortion care.[94] In addition, the standards and guidelines set out the management of post-abortion care, which includes the treatment of women who present at health facilities with abortion-related complications like sepsis and haemorrhage.[95] The standards and guidelines act as an authoritative guide on how to undertake emergency medical treatment, offer counselling and last but not least advise on contraception to prevent unwanted pregnancies.[96]

However, in an unexpected turnaround, the Ministry withdrew the 2012 standards and guidelines and the national training curriculum for the management of unintended, risky and unplanned pregnancies**.**[97] All health workers in public/private/faith-based organizations were barred from participating in any training on safe abortion.[98] The memo went on to state *'the 2010 Constitution of Kenya clearly provides that abortion on demand is illegal and as such there was no need to train health care workers on safe abortion or importation of medicines for medical abortion.'* [99]

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[90] Ibid
[91] National Guidelines on Management of Sexual Violence in Kenya,3rd ed (2014) 78
[92] Ministry of Health Policies, Standards and Guidelines on the Reduction of Maternal Mortality in Kenya, 2012.Ministry of Health, Kenya
[93] Ibid at 9,10,11
[94]Ibid 11,12,13,14,15
[95] Ibid at 19,20
[96] Ibid at 21,22
[97] Letter dated 3rd December 2013 (Ref. No. MOH/CIR/2/1/2
[98] Ibid
[99] Memo from the Ministry of Health Kenya to all Health Workers dated 24th February 2014 (Ref. No. MOH/ADM/1/1/2

The Ministry's actions of withdrawing the 2012 guidelines led to the filing of a constitutional petition *Fida Kenya & 3others v The Attorney General & 2 others*.[100] The petition was filed on behalf of JMM who had died after procuring an unsafe abortion at the hands of an unqualified person.[101] JMM was a high school student who became pregnant after being raped an older man.[102] From the testimony that her mother gave in the petition JMM resorted to abortion because of the fear of stigma and consequences of an ill-timed pregnancy.[103] She approached an unqualified person who performed an unsafe abortion that led to a myriad of complications such as chronic kidney disease that ultimately led to her death.[104]

The 5-bench judge heard the Constitutional petition and issued a ground-breaking judgment. They found that the actions of the Kenyan Ministry of Health violated several rights such as the right of health, right to non-discrimination, right to information, consumer rights, and right to benefit from scientific progress of women and adolescent girls of reproductive age.[105] The court also ordered the government to pay the mother of JMM a financial compensation of 3 million Kenya shillings for the psychological and emotional anguish endured following JMM's constitutional violations.[106] Furthermore, the court clarified that rape and defilement were exceptional circumstances as envisioned in Article 26(4) of the constitution.[107]

On the other hand, it is disheartening to note that the court issued an order declaring abortion illegal in Kenya except in the circumstances enunciated in Article 26(4) of the Constitution.[108] The court clarified their interpretation of Article 26(4) that abortion is not legal in Kenya.[109] Furthermore, the judgment stressed that the drafters of the Kenyan constitution must have had a good reason to begin the clause by stating- 'abortion is not permitted…' and that parliament had been given an opportunity by the Constitution to legislate situations where abortion is permissible.[110]

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[100] *Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* (2019) eKLR
[101] Ibid at 2
[102] Ibid
[103] Ibid
[104] Ibid
[105] Ibid at 68,69 paras 415
[106] Ibid at para 415.6
[107] Ibid at Para.415
[108] Ibid at para 415.4
[109] Ibid at 47,48,49,57
[110] Ibid at paras 304,305

This study takes the view that the case was a victory on one hand and a loss on the other hand. The court interpreted the Constitution to mean that abortion is illegal save in the four circumstances enunciated in Article 26(4) and in cases where a woman becomes pregnant after sexual violence. Evidently, in as much as gains are being made the law is still restrictive and narrow. The current legal landscape leaves women hard-pressed to qualify under the permissible circumstances to deserve a safe abortion. This study submits that this legal scenario hinders the realization of abortion as a human right.

1.2 Problem Statement

The current law enabling women to access safe abortion in Kenya is provided under Article 26(4) of the Constitution of Kenya.[111] This provision lists four broad indications when a medical provider can perform a safe abortion. These are: where there is danger to the life of the mother; where there is danger to the health of the mother; if there is need for emergency treatment of any kind; and if allowed by any other written law.[112]

Even with the legal landscape that permits safe abortion in certain circumstances, the factual reality is that safe abortion is not accessible to many Kenyan women.[113] One of the reasons for the inaccessibility of safe abortion is that notwithstanding the law that permits abortion in certain instances hospitals, law enforcement officials and the general public are ignorant of the legal development.[114] Moreover, since the punitive provisions in the Penal Code have not been revoked, law enforcement officers continue to intimidate and harass medical providers who perform safe abortion.[115] Consequently, many women resort to back street clinics where unqualified people perform abortion under unhygienic conditions leading to a myriad of health complications.[116]

Moreover, the state has not put in place adequate measures, resources or plans to educate law enforcement officers and other stakeholders in society over the permissible circumstances when abortion can be performed.[117] Most government and faith-based hospitals that are the main health

[111] Article 26(4) Constitution of Kenya,2010
[112] Ibid
[113] Center for Reproductive Health Rights (2010) op cit note 6 at 13-15
[114] Ibid
[115] Ibid; Sections 158,159,160 of the Penal Code, Kenya
[116] Center for Reproductive Health Rights (2010) op cit note 6 at 13-15
[117] Ibid at 11-17

providers are not well-versed with the new legal landscape.[118] Therefore, with this confusing scenario access to safe abortion for women in Kenya remains a pipe dream regardless of the permissible circumstances.[119]

It had been argued by Marge Berer that complicated laws regarding abortion do not make any legal or public health sense.[120] She asserts that abortion is safe if it is available at the woman's request and is universally affordable and accessible.[121] Therefore, this research aims at suggesting reform through clarifying Kenya's abortion laws and expanding the grounds within which women can access safe abortion.

1.3 Research Hypothesis

This dissertation hypothesises that Kenya's law on abortion is limited and unclear, therefore denying women the realisation of the right to abortion as a human right.

1.4 Significance of The Study

This research is significant since it seeks to contribute to the global discourse on abortion as a women's sexual reproductive health rights issue. It seeks to analyse the current law on abortion in Kenya and identify where it falls short in enabling access to safe abortion in Kenya. Further, it will lend its voice to the global struggle for abortion rights for all women and girls regardless of their social, cultural, economic differences.

The ideas that will arise from this study may contribute additional knowledge for researchers in the area of abortion rights in Kenya. The research may assist academics, advocates and activists and other institutions working on Kenya's legal framework on abortion in Kenya particularly regarding the inadequacies in law and policy on the accessibility of safe abortion. The study may help stakeholders in this area to realise that a law can be enacted that helps realise the right to abortion by expanding the right to abortion through statute. Finally, this research may prove that it is important to revoke the criminalizing provisions found in the penal code of Kenya.

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[118] Ibid

[119] Ibid

[120] Marge Berer 'Abortion law and policy around the world: in search of decriminalization' (2017) 19:1 *Health and Human Rights Journal* at 13

[121] Ibid

1.5 Scope of The Study

This study will assess the adequacy and limitation of Kenyan law on abortion by studying the international legal framework and norms vis-a-vis the Kenyan legal framework on abortion. Additionally, a comparative study of a jurisdiction that has implemented a liberal abortion law will be conducted in an effort of drawing on the best practices and lessons for Kenya. The conclusion will bear the suggested legal reform for Kenya's abortion law.

At this point, it is important to note that this research reflects the discourse on Kenya's abortion law as of the submission date of this study. The debate on Kenya's abortion law is in progress, therefore, the law and attendant policies discussed in this study are inclined to change.

1.6 Objectives of The Study

i. To explore the discourse on abortion as a sexual and reproductive health right and ultimately a human right internationally and regionally.
ii. To assess whether Kenya's law on abortion is a barrier to the realization of abortion rights in Kenya.
iii. To provide appropriate suggestions on how the law on abortion in Kenya can be reformed to make safe abortion a realizable human right in Kenya.

1.7 Research Questions

i. What are the ramifications of abortion law as currently provided for in the Constitution and in the statute?
ii. Is safe abortion accessible to women in Kenya in the current legal landscape?
iii. Is safe abortion a realizable human right in Kenya?
iv. Is Kenya meeting its international law obligation in respect of the treaties ratified regarding abortion?

1.8 Methodology

This research relies on the feminist action research methodological and conceptual framework that pursues social justice and change in women's lives by putting women's experiences at the centre of the research.[122] This study discusses abortion as a sexual and reproductive health right that should be realisable by women therefore raising social justice questions. Therefore, the feminist action research methodology will be used to address the question of abortion as a social justice agenda.[123] This study focuses on women's experiences and problems in a bid to find a solution to the issue of unsafe abortion as a key enemy of the progress of women and girls.

In a bid to gain a thorough understanding of abortion in Kenya, a desktop review of relevant existing documents and published literature and research on the subject is done. This research investigates and examines the relevant existing legal frameworks and policies on abortion. Additionally, international conventions and treaties, case law, statutes, books, journal articles, publications, newsletters and online sources are analysed to respond to the research question.

1.9 Literature Review

Abortion rights as an area of study has received considerable attention from many academics and authors. Attempting to examine the available literature on abortion is an enormous task that cannot be fully exhausted by this study. However, this study will refer to major studies and writings on abortion.

R B Siegel argues that reproductive rights encompass the decision of whether and when to give birth and that reproductive rights significantly affect the dignity and agency of women.[124]Siegel posits that abortion is an issue of gender justice as it gives women freedom and recognizes that women are capable to take care of themselves and their families.[125]

Marge Berer proposes that convoluted laws on abortion be reformed.[126] She asserts that the purpose of decriminalizing abortion is to achieve a situation where;-'nobody is punished for

[122] Reid Colleen 'Advancing women's social justice agendas: A feminist action research framework' (2004) *International Journal of Qualitative Methods* at 2-4
[123] Ibid at 4,5
[124] Reva B. Siegel 'Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression' (2007) 56:4 *Emory Law Journal* at 819
[125] Ibid
[126] Berer op cit note 120 at 14

providing a safe abortion;-nobody is punished for having an abortion;-the police are not involved in investigating or prosecuting abortion;-the courts are not involved in whether or not to allow an abortion and where abortion is treated like any other health-service delivery, training of abortion providers and development of evidence-based guidelines is done using the existing law to deal with any negligence.'[127]

Recently, J.N Erdman and R.J. Cook acknowledged that international human rights law has evolved to agree that punitive measures on abortion should be withdrawn.[128] They posited that abortion laws should be liberalized at a minimum level on specified grounds, effective access on those grounds ensured and decriminalization of abortion to reduce unsafe abortion and to protect the health, equality, and dignity of people.[129]

On the legal landscape in Kenya regarding abortion, Ngwena states that Kenya is an example of a country that has taken the constitutional route to reform its abortion laws.[130] However, he argues that even with the development in the constitution, there has been no tangible implementation of what is constitutionally guaranteed.[131] In what he refers to as 'transparency duties' by States, Ngwena argues that transparency requires that States are held accountable and are capable of translating abortion rights that they have guaranteed in their laws to tangible and claimable rights.[132] By arguing so, he relies on the idea of an 'overlapping consensus' developed by the philosopher John Rawls.[133] The idea of 'overlapping consensus' postulates that despite pluralism and differing opinions in society over a matter, in this case abortion, 'overlapping consensus' requires equality under the law notwithstanding societal views on the moral rightness or wrongness of abortion.[134]

It then follows that, in Kenya where abortion is permitted in certain circumstances under domestic law, Kenya has a corresponding duty to ensure that any 'attendant rights are amenable to effective

[127] Ibid
[128] J.N. Erdman and R.J. Cook 'Decriminalization of abortion: A human rights imperative' (2020) 62 *Best Practice & Research Clinical Obstetrics and Gynecology* at 12
[129] Ibid
[130] Charles Ngwena '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 410
[131] Ibid
[132] Charles Ngwena 'Reforming African abortion laws to achieve transparency: Arguments from equality' (2013) 21:3 *African Journal of International and Comparative Law* at 426
[133] Ibid at 411-413; J. Rawls, John Rawls 'The Idea of an Overlapping Consensus' (1987) 7:1 Oxford J Leg Stud 1
[134] Ibid

realisation.'[135] The duty to ensure effective realisation includes a duty to raise awareness about the legality of abortion among women and healthcare providers and a duty to provide access to administrative procedures that facilitate timely review of any decisions to deny abortion.[136] In sum, transparency as a transformative way of looking at human rights requires that human rights impose positive obligations on States like Kenya so that effective realisation of human rights is guaranteed.[137]

A review of other writings on this subject as well as a discussion on what abortion is forms part of Chapter two of this study.

1.10 Chapter Outline

This dissertation is divided into five chapters. Chapter one provides the introduction of the study which includes, inter alia, the background, the statement of the problem, the study objectives, the literature review and research methodology.

Chapter two commences by providing a brief overview of what authors and scholars have written on abortion in Kenya. Thereafter, the chapter discusses abortion as a public health and human rights issue worldwide by examining the global developments on abortion law through the international and regional normative frameworks on abortion, the jurisprudence of the UN treaty monitoring bodies, general comments and recommendations and report of UN special rapporteurs among others. Ultimately, the chapter demonstrates that abortion has evolved to be recognised as a human right.

Chapter three evaluates abortion law and policy in Kenya under the Constitution, statute and government policy documents. The chapter intends to ascertain whether Kenya's law on abortion adequately protects the right to safe abortion. Furthermore, the chapter investigates whether safe abortion as a human right is accessible to Kenyan women and therefore a realisable human right. Lastly, this chapter assesses whether Kenya is meeting its international human rights obligation to respect, promote and fulfil the right of access to safe abortion protected by international human rights law.

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[135] Ibid at 399
[136] Ibid
[137] Ibid at 400

Chapter four is a case study of a jurisdiction with progressive abortion laws. South Africa has been chosen for this purpose. The chapter seeks to establish if there are any lessons that Kenya can draw from the implementation of South Africa's abortion laws and especially South Africa's 1996 Choice on Termination of Pregnancy Act.

Chapter five provides the findings, conclusions and recommendations for legal reform of Kenya's abortion law.

CHAPTER TWO

2.0 LEGAL FRAMEWORK ON THE RIGHT TO ABORTION

2.1 Introduction

The objective of this chapter is twofold. On the one hand, this chapter aims at exploring the existing legal framework on the right to abortion as well as how scholars have analysed the question of access to abortion. On the other hand, this chapter scrutinizes the right to abortion within the scope of international and regional human rights. The chapter reflects on the significance of international, regional norms and jurisprudence from the international treaty-monitoring bodies on the right to abortion. The chapter argues that the right to abortion has evolved in the international and regional human rights domain as a recognizable and justiciable human right.

2.2 Literature Review

The question of liberalizing abortion laws has been written on by scholars, advocates, human rights campaigners and medical professionals among others. Available literature demonstrates the development of the abortion discourse from stigma to toleration.

Concerning Kenya, a study conducted by a human rights body found that 2,600 women die each year from unsafe abortion accounting for 35% of the maternal deaths in Kenya.[138] The report found that those numbers did not include those women who died without visiting a health centre and thus whose death was not recorded, a common situation in Kenya.[139] The study attributes the high deaths from unsafe abortion on account of a poorly equipped public health care system, lack of capital, both in resources, equipment and training of medical personnel for abortion and post-abortion care.[140] Besides, unclear laws instilled fear in medical personnel and prevented them from performing safe abortions.[141]

Equally, a study by the Government of Kenya and key partners found 'that unsafe abortion accounted for the high maternal morbidity and mortality in Kenya.'[142] The report recommends

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[138] Centre for Reproductive Rights (2010) op cit note 6 at 9
[139] Ibid
[140] Ibid
[141] Ibid at 15
[142] African Population and Health Research Centre, Ministry of Health, Kenya, Ipas, and Guttmacher Institute 'Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study' (2013) at 24-26

educating the Kenyan society on the permitted circumstances under the law, addressing abortion stigma and enhancing uptake of family planning services in a bid to combat unsafe abortion.[143]

Another study on abortion in Kenya contends that the need to terminate pregnancies by Kenyan women should be understood from a socio-cultural perspective in order to address unsafe abortion comprehensively.[144] The author cites reasons such as early marriages, lack of access to education and unemployment as some of the factors driving women to seek unsafe abortions.[145] The legal framework on access to abortion in Kenya is appraised and found to be deficient in realising the right to abortion.[146] The author argues that the creation of strong administrative structures governing abortion services and sensitization on the public on abortion is key to enable the realisation of the right to abortion.[147]

Furthermore, a study by a gynaecologist evaluates the role played by article 26(4) and 43(1) (a), (2) of the Kenyan Constitution in accessing safe and legal abortion.[148] Despite acknowledging the legal success of expanding the circumstances under which women can procure safe and legal abortion, she argues that the failure to establish clear guidelines to implement the constitutional provision defeats the constitutional intention.[149] Regrettably, she observes that pregnant adolescents continue to have secretive and unsafe abortions due to the stigma sowed by religion and the education sector.[150] Thus, failure for the state to clarify the law on abortion will continue to result in high maternal death tolls.[151] She also blames Kenya's weak health system which requires women to pay for abortion and other family planning services for the persistent maternal deaths because 'unsafe abortion disproportionately affects poor women.'[152]

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[143] Ibid at 27
[144] Charles O Owuor 'Abortion and The Law in Kenya' (2017) *SSRN* at 1
[145] Ibid
[146] Ibid at 2-5
[147] Ibid at 6-7
[148] Wambui op cit note 10 at 62; Article 26(4) of the Kenyan Constitution provides, 'abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law,': Article 43(1) (a) of the Kenyan Constitution provides, 'every person has the highest attainable standard of health, which includes the right to health care services, including reproductive health care': Article 43(2) of the Kenyan Constitution provides, 'a person shall not be denied emergency medical treatment.'
[149] Ibid at 63-65
[150] Ibid at 67
[151] Ibid at 68
[152] Ibid

She appeals to the Kenyan government to inject human and financial resources to strengthen reproductive health services and to revise the penal code to reflect the Constitution to deter the hesitancy by medical personnel to perform safe abortion fearing prosecution.[153]

Regarding the import of article 26(4) of the Constitution of Kenya on the right to access safe abortion in Kenya, a thesis posits that the constitutional provision should be supported by legislation and policy reforms to expand the scope of abortion in Kenya.[154] The study suggests clarifying the constitutional provision under article 26(4) and article 43(2) of the Constitution of Kenya on what constitutes emergency medical treatment and revising the rules governing medical health personnel to be in tandem with international standards especially on the issue of abortion.[155] Lastly, the thesis cites the thorny issue of conscientious objection as a possible impediment to the provision of safe abortion considering the preponderance of religious views in Kenyan society.[156]

The present study surmises that the afore-discussed studies failed to propose legal or policy reform to address the barriers identified. The writers identified the need to have procedures that will implement the constitutional provision that permits abortion in broad circumstances but failed to propose particular procedures. The present study recommends legal reform through enacting legislation that will particularly clarify Kenya's abortion law and establish mechanisms to address the hindrances to the provision of safe abortion. Furthermore, this study presents a case study discussion in chapter four of a jurisdiction that has implemented liberal abortion laws effectively though not perfectly. The case study lessons can help Kenya navigate the law and policy on access to safe abortion to ensure safe abortion is a realizable human right in Kenya.

2.3 The Right to Abortion Within the Scope of International and Regional Human Rights Law

Globally, women who live in countries that have restrictive abortion laws often resort to unsafe abortion which endangers their life and compromises their current and future health.[157] Thus,

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[153] Ibid at 69

[154] Benson C Atonga Interpreting article 26(4) of the Constitution of Kenya 2010: Implications for Abortion Law, Policy and Practice (Master's Degree Thesis, University of Pretoria Faculty of Law ,2019) at 60-64

[155] Ibid at 65

[156] Ibid.

[157] World Health Organization op cit note 1

unsafe abortion is now recognised not only as a public health issue but as a human rights issue.[158] Presently global laws and policies are moving away from criminalising abortion to preventing unsafe abortion as a way of protecting and promoting women's reproductive health.[159]

The next section will evaluate how the right to safe abortion has been provided for and guaranteed within the African Human Rights System which is the human rights system that encompasses Kenya.

2.3.1 The Right to Abortion: The African Human Rights System

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa also known as the Maputo Protocol (Maputo Protocol) is the first human rights treaty to pronounce itself on the right to abortion.[160] The Maputo Protocol is the 'first legally binding human rights instrument that explicitly addresses abortion as a human right and affirms that women's reproductive rights are human rights.'[161] Article 14(2)(c) of the Maputo Protocol provides that:

> 2. states parties shall take all appropriate measures to:
>
> c. protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.[162]

Ngwena argues, and this study supports his view that the abortion provision in the Maputo Protocol is crucial for Africa since it elevates abortion rights to continental status urging states to liberalize their laws on abortion while changing 'from a crime and punishment model to a reproductive health model' thus combating the scourge of unsafe abortion in Africa.[163] He further posits that

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[158] Christina Zampas and Jaime M. Gher 'Abortion as a Human Right-International and Regional Standards' (2008) 8:2 *Human Rights Law Review* at 250
[159] Rebecca J. Cook and Bernard M. Dickens 'Human Rights Dynamics of Abortion Law Reform' (2003) 25:1 *Human Rights Quarterly* at 12,19
[160] Protocol to the African Charter on Human and Peoples' Rights and on the Rights of Women in Africa. Adopted on 11 July 2003 during the 2nd Ordinary Session of the Assembly of the African Union, AHG/Res. 240 (XXXI). The Maputo Protocol entered into force on 25 Nov. 2005; Kenya ratified the Maputo Protocol in 2010.
[161] Ibid
[162] Article 14 (2) (c) Maputo Protocol
[163] Charles G. Ngwena 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa' (2009-2010) 32:4 *Human Rights Quarterly* at 785

Article 14(2)(c) is significant because it impresses upon African governments an obligation to allow abortion in the circumstances set out in the Maputo Protocol. [164]

Moreover, the African Commission on Human and Peoples' Rights (African Commission) which has the mandate under the African Charter on Human and Peoples' Rights (African Charter),[165] to 'formulate and develop rules and principles that address legal problems regarding the enjoyment of human and peoples' rights developed General Comment No.2 that interprets the provisions of Article 14(2)(c) of the Maputo Protocol.[166] General Comment No.2 underscores the fact that when assessing risks to a pregnant woman's health, health must be interpreted according to the WHO definition, namely: 'state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'[167] Furthermore, the right to access therapeutic abortion after suffering from sexual assault, rape and incest, as well as in a pregnancy where the foetus has deformities that are incompatible with survival is emphasized.[168]

State obligation to respect, protect, promote and fulfil Article 14 (2) (c) is clarified to the effect that States are required to inform women of safe abortion services, prevent third parties from interfering with women's access to safe abortion services, eliminate stigmatization of and train health workers that offer safe abortion services.[169]

In a nutshell, States are required to revisit restrictive laws, policies and administrative procedures relating to safe abortion services and ensure that their citizenry and particularly stakeholders such as law enforcers, the judiciary, medical providers are trained and sensitized on the rights guaranteed by the Maputo Protocol.[170] It is evident that through the development of General Comment No.2, the African Commission is taking a bold step in making States which have ratified the Maputo Protocol such as Kenya accountable in their duty to respect, protect, promote and fulfil the right to safe abortion.

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[164] Ibid

[165] Organization of African Unity, African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

[166] General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

[167] Ibid at para 38

[168] Ibid at paras 39,40

[169] Ibid at paras 41-45

[170] Ibid at paras 46-63

Moreover, since the Maputo Protocol is a legally binding international agreement it means that women in Africa have a judicially enforceable right to abortion in the prescribed circumstances.[171] For a region struggling with the scourge of unsafe abortion enshrining abortion as a human right in a regional treaty is a strategic approach to remedying the devastation caused to the women and girls of Africa.[172] It can only be hoped that the women and girls of Africa hasten to exercise this right not only in their domestic jurisdiction but also to litigate in the African Court on Human and Peoples' Rights (African Court) if need be.

Furthermore, on 20th January 2017, the Africa Leaders' Summit on Safe Legal Abortion issued the Africa Leaders' Declaration on Safe, Legal Abortion as a Human Right (Africa Leaders' Declaration).[173] The African Leaders' declaration bolstered Article 14 of the Maputo Protocol and invoked governments to liberalise abortion laws and realise abortion as a women's human right in Africa.[174]

Under Article 2(6) of the Kenyan Constitution, international treaties ratified by Kenya form part of Kenya's law.[175] Kenya is a party to the Maputo Protocol despite having entered a reservation to article 14 (2) (c) while being governed by the repealed constitution which did not provide for abortion.[176] Not only is the reservation inconsistent with the current constitution but also with the Health Act and the policies and guidelines supporting article 26(4) and 43 (1) (a),(2) of the Constitution of Kenya. The Maputo Protocol is not a self-executing treaty; it requires States to enact legislation to implement it. Since the Constitution provides an opportunity to legislate on abortion, it behoves the Kenyan legislature in the spirit of the Maputo Protocol to enact a law that will not only widen the permissible circumstances under Article 26(4) of the Constitution but will also establish a procedural framework to govern access to abortion.

Having discussed the right to safe abortion under the African human rights system, it is imperative to review how the other regional human rights systems have considered the subject. The next two

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[171] Ngwena (2009-2010) op cit note 163 at 810-811
[172] Ibid
[173] The Africa Leaders' Declaration on Safe, Legal Abortion as a Human Right (Africa Leaders' Summit on Safe Legal Abortion, 20 January 2017)
[174] Ibid
[175] Article 2(6) of the Constitution of Kenya provides: 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'
[176] Kenya signed the Maputo protocol on 17 December 2003 and ratified the Maputo protocol on 6 October 2010

sections will address first, the right to abortion under the European human rights system thereafter the right to abortion under the Inter-American Human rights system.

2.3.2 The Right to Abortion: The European Human Rights System

A discussion of the right to abortion under the European human rights system is important because the European Court of Human Rights(European Court) has blazed the trail in developing abortion jurisprudence that supports the concept of an 'overlapping consensus' which informs the transparency duty which this study proposes that Kenya should use to enable women to realise their right to abortion.[177]

The European Court has determined that states must ensure that where abortion is legal, it is practically accessible.[178] In *Tysiac v Poland*,[179] the European Court of Human Rights affirmed that due to the 'historical criminalization and stigmatization of abortion' there are bound to be differences of opinions among health-care professionals even when abortion is permitted in certain circumstances.[180] Thus states must set up 'a clear and dependable framework for resolving disagreements in a manner that protects women's rights to administrative justice, including the rights to be heard and be provided with written reasons where a request for an abortion is refused.'[181] Notably, it was highlighted that administrative procedures should be expedited considering time is a great factor in abortion and delays may lead to late-term abortions which endanger women's lives.[182]

Furthermore*, in A, B and C v Ireland,[183]* where the applicants travelled to the United Kingdom to obtain abortions believing that Irish law did not permit abortion.[184] One of the applicants, C, argued that Irish law breached Article 8 of the European Convention of Human Rights,[185] by failing to set

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[177] Ngwena (2013) op cit note 132 at 413
[178] Ibid
[179] *Tysiac v Poland,* App. No. 5410/03, ECHR 2007-IV (2007)
[180] Ibid at para 116
[181] Ibid at para 117
[182] Ibid at para 118
[183] *A, B and C v Ireland* App. No.25579/05 (2010), [2010] ECHR 2032
[184] Ibid at paras 13,18,22
[185] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5; Article 8 of this Convention states that: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of

out clear guidelines which would have enabled her to determine if she met the ground for abortion based on the risk to her life.[186] In agreeing with her, the European Court determined that Ireland violated Article 8 of the European Convention by failing to have criteria that would have enabled C to evaluate the risk to her life.[187] This case, like *Tysiac v Poland,* underscores the importance of transparency in the implementation of abortion law, where States are required to have clear administrative structures relating to abortion.[188]

In the same spirit, the Parliamentary Assembly of the Council of Europe weighed in on access to safe and legal abortion by acknowledging women's 'right to physical integrity and to control their own bodies' and proclaimed that only the woman concerned should decide whether or not to have an abortion.[189] The next section will evaluate the right of abortion under the Inter-American human rights system.

2.3.3 The Right to Abortion: The Inter-American Human Rights System

It is important to consider how another regional human rights system has dealt with the right to abortion and what lessons can be drawn from there. The Inter-American Commission on Human Rights, which is the body mandated to examine violations of human rights addressed the right to abortion in *Paulina Ramírez v. Mexico*.[190] The complainant in this case was a minor who became pregnant from a rape and whose request for an abortion was rejected .[191] The minor contended that by denying her the abortion Mexico violated the American Convention on Human Rights that protected her personal integrity;[192] the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women that protected her from violence;[193] Convention on

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the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[186] Ibid at para 243

[187] Ibid at para 253

[188] Ngwena (2013) op cit note 132 at 415

[189] Parliamentary Assembly of the Council of Europe, Resolution 1607: Access to safe and legal abortion in Europe (2008), para. 6.

[190] Inter-American Commission on Human Rights, Petition No. 161-02, *Paulina Ramírez v. Mexico*, Report No. 21/07, OEA/Ser.L/V/II.130, Doc. 22, rev. 1 (2007) ('Friendly Settlement')

[191] Ibid at para 1

[192] See articles 1, 5, 7, 8, 11, 12, 19, and 25 of the Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969

[193] See articles 1, 2, 4, 7, and 9 of the Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belem do Para'), 9 June 1994

the Rights of the Child(CRC) that protected a child from being abused;[194] and Convention on the Elimination of All Forms of Discrimination against Women that prohibited discrimination against women in reproductive healthcare.[195]

Through a friendly settlement that was mediated by the Inter American Commission, Mexico took the responsibility for the crime of rape that was visited upon the minor and the subsequent denial of a right to abortion.[196] The state not only convicted the attacker for the crime but publicly acknowledged that Paulina's rights were violated and committed to establishing administrative reforms to make abortion accessible.[197]

The next section focuses on how the international human rights system has tackled the right to abortion.

2.3.4 The right to Abortion in the International Human Rights system

United Nations Human Rights Treaty Jurisprudence

United Nations (UN) treaty bodies recognise the right to access safe abortion as necessary for the enjoyment of fundamental human rights. Accordingly, the CEDAW which is monitored by the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), underscored the human rights implications of restrictive abortion laws.[198] In General Comment 24 issued in 1999 it stated that that the right to health required that 'when possible, legislation criminalising abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.'[199] Moreover, the CEDAW Committee urged states through their health services to comply with CEDAW by meeting women's specific reproductive health needs.[200]

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[194] See articles 19, 37, and 39 of the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

[195] Ibid at para 2: See article 12 of the UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13

[196] Ibid at part 4, para 16

[197]Ibid See annex: Official Journal, Government of The State of Baja California Public Acknowledgment of Responsibility Paulina Ramirez Jacinto, P-161/02 February 10, 2006

[198] Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981)

[199] Committee on the Elimination of Discrimination Against Women General Recommendation No 24: Article 12 of the Convention (Women and Health) A/54/38/Rev.I (1999) at 7

[200] Ibid

The CEDAW Committee through the Optional Protocol to CEDAW,[201] determined on the right to access abortion in *LC v Peru*.[202] The brief facts of the communication were that LC a 13-year-old girl was impregnated through sexual abuse which led to her suicide attempt by jumping off a high rise building which seriously injured her necessitating spinal surgery.[203] However, the surgery couldn't be performed without the pregnancy being terminated. When her mother requested a legal abortion, it was denied.[204]

The CEDAW Committee held that article 12 of CEDAW right to equality in healthcare was violated when she was denied access to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required.[205] The CEDAW Committee also concluded that article 2(c) and (f) which requires states to establish legal measures to ensure equal rights for women had been violated since Peru lacked an effective mechanism to ensure the right to abortion is accessed.[206] Moreover, a violation of article 3 which requires states to 'ensure equal enjoyment of rights between women and men' was found as well as a violation of article 5 which requires states to banish gender stereotypes since LC was denied an abortion due to the stereotypic view that a woman should be a mother.[207]

The CEDAW Committee's decision asserted that the denial of abortion breached recognised treaty rights prohibiting discrimination.[208] Besides, the CEDAW Committee noted that despite LC being entitled to abortion under Peruvian law the legal and health systems failed to establish and implement procedures to realise the right to abortion.[209] It was also determined that article 119 of the Peruvian Penal Code that allowed abortion was implemented arbitrarily and inconsistently which each hospital administration deciding on how a woman satisfies the threshold for an abortion resulting in violations of CEDAW.[210]

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[201] UN General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 6 October 1999, United Nations, Treaty Series, vol. 2131, p. 83; See also Ibid at para 1
[202] Committee on the Elimination of Discrimination Against Women Views: Communication No 22/2009, *LC v Peru* CEDAW/C/ 50/D/22/2009 (4 November 2011).
[203] Ibid at paras 2.1-2.15
[204] Ibid
[205] Ibid at para 8.9-8.10
[206] Ibid at paras 8.16-8-17
[207] Ibid at para 8.15,8.17
[208] Ibid
[209] Ibid
[210] Ibid at para 8.17

In supporting the concept of implementing abortion laws transparently, the CEDAW Committee buttressed the point that once a state permits abortion in certain situations, it then follows that it should institute a framework that enables women to realise the legal entitlement.[211] The state is obligated to fulfil the right by not only making it possible for the women seeking abortion but also to 'guarantee the necessary legal security' to the medical personnel performing a safe abortion.[212]

Furthermore, the HRC which is the body that interprets the ICCPR has denounced restrictive abortion laws.[213] Through General Comment No. 28, the HRC urges governments to 'give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions' when reporting on the right to life.[214]

The HRC has also determined the right to abortion in three seminal cases, the first one being *KL V Peru*.[215] Here, a teenager was pregnant with a malformed foetus and the attending doctor recommended an abortion since the teenager's life was in danger.[216] The medical authorities denied her the abortion on the basis that it was illegal.[217] The HRC determined that by failing to allow her access to abortion as permitted by the Peruvian Penal Code the authorities violated articles 2 'right to an effective remedy', 7 'right to be free from cruel, inhuman or degrading treatment', 17 'right to privacy' and 24 'right to special protection as a minor' of the ICCPR.[218] In this case, the HRC supports the concept of a duty of transparency since it found that Peru fell short of translating the Peruvian Criminal Code into a legal and administrative framework that effectively regulated abortion.[219]

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[211] Ngwena (2013) op cit note 132 at 416
[212] Ibid at 417
[213] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[214] Human Rights Committee, General Comment No. 28: Article 3 (Equality of rights between men and women), in Compilation of General Comments supra n. 32 at 179, para. 10
[215] United Nations Human Rights Committee International Covenant on Civil and Political Rights Views: Communication No 2532/2003, *KL v Peru* CCPR/C/85 /D/1153 /2003 (22 November 2005)
[216] Ibid
[217] Ibid at paras 2.1-2.9
[218] Ibid at paras 6.4,6.5,6.6,7
[219] Ngwena (2013) op cit note 132 at 418

In *LMR. v Argentina*,[220] a lady with a mental disability was impregnated through rape. She was denied an abortion by hospital authorities despite meeting the requirements of Article 86(2) of the 'Argentinean Criminal Code which permits abortion on the ground of danger to the life or health of the pregnant woman or if the pregnancy results from rape or indecent assault.'[221] The HRC determined that the denial violated articles 2(3) 'right to an effective remedy', articles 3 'right to equal enjoyment of rights', 7 'right to be free from inhuman and degrading treatment' and 17 'right to privacy' of the ICCPR.[222] The HRC declared that the failure by Argentina to set up an administrative framework to enable LMR to realise the right to abortion violated her rights under the ICCPR.[223]

Lastly in *Amanda Mellet v Ireland,*[224] the complainant sought an abortion since the foetus had serious birth defects.[225] She was denied the abortion and was compelled to seek an abortion overseas since Irish law criminalized abortion.[226] The HRC determined that article 7 of the ICCPR 'right to freedom from torture and ill-treatment' was violated 'due to the physical and mental suffering she endured amid the denial.'[227] Also, article 17 of the ICCPR right to privacy was violated by Irish law arbitrarily criminalising abortion and consequently deciding on her reproductive functions.[228] Moreover, it was held that by denying Amanda access to a safe abortion under the Irish public healthcare system Ireland violated article 26 of the ICCPR 'right to freedom from discrimination.'[229] The HRC stressed the fact that by failing to consider Amanda's medical needs vis-à-vis her socio-economic circumstances, Ireland subjected Amanda to the gender stereotype of viewing women as 'reproductive instruments.'[230]

By finding that Ireland breached International human rights in the ICCPR by criminalising abortion, the HRC conveyed a strong message to governments that they will not be free to regulate

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[220] United Nations Human Rights Committee International Covenant on Civil and Political Rights: Views: Communication No 1608/2007, *LMR v Argentina* CCPR/C/101/D/1608/2007 (28 April 2011)
[221] Ibid
[222] Ibid at paras 9.4,10,11
[223] Ibid at Para 9.4
[224] United Nations Human Rights Committee International Covenant on Civil and Political Rights: Views: Communication No. 2324/201, *Amanda Mellet v Ireland,* CCPR/C/116/D/2324/2013 (17 November 2016)
[225] Ibid at paras 2.1-2.5
[226] Ibid
[227] Ibid at paras 7.2-7.3
[228] Ibid at paras 7.7-7.11
[229] Ibid
[230] Ibid at paras 7.10-7.11

abortion as they so wished.[231] The afore-discussed cases demonstrate that the jurisprudence of the UN treaty bodies holds that opaque laws governing abortion lead to unsafe abortion. Hence, governments should take positive steps to 'provide procedural and administrative guarantees' including clarifying abortion laws so that abortion rights are realizable.[232]

Despite the UN treaty bodies decisions lacking the binding force of judicial decisions, they are of high persuasive value to national authorities. These decisions speak to Kenya since the Constitution permits abortion in certain circumstances under article 26(4) of the Kenyan Constitution yet fails to revoke the punitive Kenyan Penal Code which frustrates the accessibility of abortion even in the permissive circumstances. In line with the notion of 'overlapping consensus' which underpins the duty of transparency, Kenya should ensure that the laws, policies and guidelines relating to abortion are clear and structured in a way that is 'concrete and claimable' by Kenyan women.[233]

Even so, it is emerging that the extent to which women's right to abortion is protected relates to when 'a woman's life or health is at risk, the pregnancy resulted from rape or there is a risk of foetal impairment.'[234] Despite regional and international human rights bodies failing to address the right to abortion on request or for economic and social reasons, Zampas argues that the progress made so far can be used to agitate for a right to abortion on demand.[235]

Notably, special procedures of the United Nations Human Rights Council have also recognized abortion rights. The Special Rapporteur on the Right to Health emphasized that criminalising abortion 'infringes women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health.'[236] Likewise, the Special Rapporteur urged states to 'decriminalize abortion and adopt measures to ensure access to legal and safe abortion services.'[237] In similar vein, the Special Rapporteur on Torture recognised 'states have

[231] Anjori Mitra 'We're Always Going to Argue about Abortion: International Law's Changing Attitudes towards Abortion' (2017) 1 *New Zealand Women's Law Journal* at 170
[232] Ngwena (2013) op cit note 132 at 424
[233] Ibid at 411,426
[234] Center for Reproductive Rights (2010) op cit note 6 at 255
[235] Ibid
[236] Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/66/254 (2011), para. 21.
[237] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/ HRC/32/32 (2016), paras. 90, 92

an affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care.'[238]

Soft Law

The discourse on women's reproductive health rights and especially the right to access safe and legal abortion was to a large extent energized by international conferences. The 1994 International Conference on Population and Development Programme of Action (ICPD Programme), signed by 179 states, defined the right to the highest attainable standard of health as including 'a state of complete physical, mental and social well-being ...in all matters relating to the reproductive system ...including the freedom to decide if, when and how often to reproduce.'[239]

The ICPD Programme also urged governments to reduce unsafe abortions, and clarified that it was upon individual states to legislate on abortion by stating that 'any measures or changes related to abortion within the health system can only be determined at a national or local level according to the national legislative process.'[240] Particularly, the ICPD Programme buttresses the point that in states that abortion is legal, the procedure should be made accessible and safe.[241] This position was endorsed in the 1995 Beijing Declaration and Platform For Action.[242] Despite the non-binding nature of these agreements, they symbolize the global changing attitude towards viewing access to abortion as a reproductive health right.

2.4 Conclusion

The purpose of the chapter was to analyse the right to abortion as interpreted by international and regional human rights bodies and as articulated by scholars. The chapter sought to determine whether the right to abortion is recognized as a justiciable human right in the international and regional human rights domain. Moreover, the chapter strove to demonstrate how scholars have discussed the right to abortion in Kenya and showed what the present research will add to the body of knowledge on access to abortion in Kenya. By the same token, the chapter substantiated how

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[238] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57, para. 44
[239] United Nations Report of the International Conference on Population and Development A/CONE171/13/ Rev.1 (1995) at 7.2
[240] Ibid at (8.25) and (8.190- (8.26)
[241] Ibid at 8.25
[242] United Nations General Assembly Implementation of the Outcome of the Fourth World Conference on Women: Action for Equality, Development and Peace A/5 o/ 744 (10 November 1995) at 89-97

the right to abortion has been interpreted by international and regional human rights norms and jurisprudence.

Indeed, the foregoing discussion proves that the right to abortion has progressed to be recognized as a reproductive health right and ultimately a human right. The jurisprudence of the international and regional human rights bodies demonstrates that the right to abortion is a justiciable human right. In sum, the chapter posits that it is incumbent on Kenya to ensure that her laws and policies accord with the international landscape.

The next chapter delves into the right to abortion as provided for by Kenyan law and policy. The chapter aims at assessing whether the right to abortion is realisable in Kenya.

CHAPTER THREE

3.0 ABORTION LAW AND POLICY IN KENYA

3.1 Introduction

The intention of this chapter is twofold. The chapter intends to create an understanding of the historical context of abortion law and policy in Kenya and examine its efficacy. To achieve that, the chapter is divided into two sections. First, the historical context of abortion law in Kenya from the pre-colonial times to the current state of abortion regulation is explored. The reason for this contextualization is to understand the factors that contributed to making abortion a controversial and even a stigmatized topic in Kenya today.

The second section of the chapter analyses the current law and policy regulating access to abortion. The section probes whether the law as currently couched enables women to access safe abortion within the parameters set out by the law and whether the right to abortion is a realizable right by Kenyan women.

3.2 Historical Context of Abortion Law in Kenya

This section assesses the place of abortion in pre-colonial, colonial, and post-colonial Kenya until the promulgation of a new constitutional order in 2010.

3.2.1 Abortion in the pre-colonial cultural context

Pre-colonial Kenya was a heterogeneous co-existence of tribal communities that were governed by their different unwritten customary laws and norms.[243] Kenyan tribes regulated sexuality and reproduction through cultural unwritten norms and regulations that invited sanctions when violated.[244] Historical studies have shown that abortion in some communities in Kenya though not encouraged was allowed for a variety of reasons.[245] For instance, in the Meru community of central Kenya British colonial officials discovered that there were high rates of abortions among girls who

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[243] Brett L. Shadle ‘Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60’ (1999) 40:3 *The Journal of African History* at 411-412

[244] Laurence Juma ‘Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes’ (2002) 4:3 *St. Thomas Law Review* at 467

[245] Lynn Thomas ‘Imperial Concerns and 'Women's Affairs': State Efforts to Regulate Clitoridectomy and Eradicate Abortion in Meru, Kenya, c. 1910-1950’ (1998) 39:1The Journal of African History 1 at 121

were prevented from undergoing female circumcision as a cultural initiation rite.[246] The reason why many women performed abortions was that it was a cultural taboo for an uninitiated woman to bear a child.[247] Therefore the community allowed uninitiated women who became pregnant to terminate the pregnancies.[248]

The study revealed that most girls preferred to keep the pregnancies hidden to avoid being ostracized from the community yet most of these pregnancies and subsequent abortions would be known since the terminations would occur up until six months of pregnancy.[249] Besides, the community had a designated abortionist (muriti wa mauu, translated to 'remover of the womb') whose role was to terminate such unwanted pregnancies.[250] Under those circumstances, the community allowed the practice of abortion to control 'taboo' pregnancies.[251] The next section will look at the place of abortion in Kenya during the colonial period.

3.2.2 Abortion in the colonial era

Kenya became a British Protectorate in 1895 and thereafter a British colony in 1920.[252] Henceforth, the British subjected Kenya to their system of governance and laws.[253] Even so, the colonial government allowed Africans to be subject to African customary law in civil and criminal cases as long as they remained subordinate to British common law.[254]

Ignoring pre-colonial Kenya's handling of abortion as a private issue the colonial regime made abortion a public issue regulated by penal laws.[255] As previously mentioned in chapter one, colonial Kenya's abortion law was found in section 58 and 59 of the imported English Offences

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246 Ibid
247 Ibid
248 Ibid
249 Ibid at 126
250 Ibid at 128
251 Ibid at 144,145
252 Juma op cit note 244 at 477
253 The legal system was established through the ratification of the East African Order in Council,1897 which was later amended in 1902
254 Section 20 of the 1902 East Africa Native Courts Amendment Ordinance stated that: 'In all cases civil and criminal to which natives are parties, every Court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance or any regulation or rule made under any Order in Council or Ordinance; and (b) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without due delay.'
255 Ngwena (2010) op cit note 163 at 829

Against the Person Act 1861,[256] which criminalized and prescribed punishment for it.[257] It seems section 58 of the English Offences against the Person Act's usage of the term 'unlawfully', essentially meant that there were circumstances when abortion could be 'lawful.'[258] Lawful circumstances when abortion could be performed was acknowledged in the previously discussed English case of *Rex v Bourne*,[259] when a doctor who had performed an abortion on a young rape survivor was acquitted.[260]

The court with the direction of the trial judge Lord McNaughten held that the abortion was performed in good faith to prevent the young girl from becoming a mental wreck hence preserving her health.[261] The *Rex v Bourne* decision significantly advanced abortion law since it expanded therapeutic abortion from the narrow margin of saving the life of the pregnant woman to also include preserving her physical and mental health.[262] In this regard, Ngwena posits that the 'direction given to the jury by Lord McNaughten at a time when abortion was highly criminalized in England was forward-looking and effectively constituted judicial reform of abortion law.'[263]

It appears that the clarification of the Rex v Bourne decision reflects the Kenyan penal code's exemption of criminal liability to someone who performs an abortion to preserve the life of a woman.[264] Consequently, Kenyan law permitted abortion only to save the life and/or health of a woman as determined by a physician.[265]

This position was reinforced in 1959 by the now-defunct East African Court of Appeal, in *Mehar Singh Bansel v R*,[266] recognised the *Rex v Bourne* decision as the prevailing law on the issue of

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[256] English Offences Against the Person Act 1861 at https://www.legislation.gov.uk/ukpga/Vict/24-25/100/contents(last accessed 28th August 2020)
[257] Ibid at Section 58 and 59
[258] Rebecca J. Cook and Bernard Dickens 'Abortion Laws in African Commonwealth Countries' (1981) 25:2 *Journal of African Law* at 61
[259] *R. v. Bourne* [1939] 1 K.B. 687; [1938] 3 All E.R. 615 616-620
[260] Ibid
[261] Ibid
[262] Ngwena (2010) op cit note 163 at 831
[263] Ibid
[264] Section 240 of the Kenya penal code provides that: 'A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.'
[265] Cook and Dickens op cit note 258 at 62
[266] *Mehar Singh Bansel v R* (1959) EALR 813

abortion. [267] The decision was made on an appeal from the Supreme court of Kenya which had decided that 'lawful abortion is that which is conducted with a good medical reason,' interpreted by the court as done 'for the purpose of saving the patient's life or preventing severe prejudice to her health.'[268]

Undoubtedly, colonial laws were framed to punish women for termination of pregnancy and were loudly silent on the role of men in that process hence reinforcing patriarchy and the subjugation of women.[269] In any case, the colonial laws were drafted to perpetuate abortion stigma since they used the words 'illegal', 'criminal' and 'unlawful' in reference to abortion.[270] This resulted in women who sought to terminate their pregnancies to be regarded as criminals and socially deviant.[271]

3.2.3 Abortion in post-independent Kenya

Kenya formally gained its independence from Britain on 12th December 1963.[272] However, just like other commonwealth jurisdictions, post-independence Kenya held on to British laws that criminalised abortion on the ostensible principle of protecting the unborn life.[273] As previously stated, post-independence, Kenya prohibited abortion only with the exception to save the life of the woman covered by section 240 of the Kenyan Penal Code.[274] This constituted a highly restrictive and punitive regulation on abortion comparable to the English Offences Against the Person Act of 1861 before it was judicially reformed by Rex v Bourne.[275]

Kenya's disinterest in reforming abortion laws can only be understood by shedding light on the place women's rights occupied in the Kenyan state. The Kenyan ruling elite adopted neo-

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[267] L. L. Kato 'The Court of Appeal for East Africa: From a Colonial Court to an International Court' (1971) 7:1 *East African Law Journal* at 1-7**;** The East African Court of Appeal was established by the British Colonial regime in 1902 to serve as the appellate court for the High Courts of the three East African colonies (Kenya, Uganda and Tanganyika)
[268] Ngwena (2010) op cit note 163 at 833
[269] Rebecca J. Cook and Susannah Howard 'Accommodating Women's Differences under the Women's Anti-Discrimination Convention' (2007) 56:4 *Emory Law Journal* at 1078-1080
[270] RJ Cook et al (eds) 'Abortion law in transnational perspective: Cases and controversies' (2014) at 351
[271] Cook and Howard op cit note 269 at 1042-1048
[272] James Gibbs 'Uhuru na Kenyatta: White Settlers and the Symbolism of Kenya's Independence Day Events' (2014) 42:3 *The Journal of Imperial and Commonwealth History* at 503-505
[273] Cook and Dickens op cit note 258 at 60
[274] Ngwena (2010) op cit note 163 at 833; The punitive provisions of the Kenyan penal code (sections 158,159,160 and 228) subsist to-date even after the promulgation of a new constitution that permitted abortion in certain circumstances.
[275] Ibid

patrimonialism where despite the presence of formal and legal structures of government they used the government for private gain.[276] This neo-patrimonial style of governance, with its resultant vices of corruption and marginalization, impeded the development of any clear policy reform on women's rights issues and in particular the question of abortion.[277] What is more, the ruling class covertly left reproductive rights issues including abortion to religious and cultural control and interpretations to avoid antagonizing their political bases which include religious leaders and their flock.[278] The involvement of religious patriarchal ideals, reinforced by state support in Kenyan politics has undeniably prejudiced women's rights and particularly the right to abortion.[279]

Professor Julius Meme who was the Permanent Secretary in the Kenyan Ministry of Health in 1999 depicted the reality of unsafe abortion during this era with this sentiment- 'I have seen so much misery at the Kenyatta National Hospital . . . where women with abortion-related problems have died and others lost uteruses. There is no doubt the existing laws are colonial and too strict in the modern society.'[280]

During this period, Kenya's abortion law received criticism from international human rights treaty monitoring bodies(TMB's) such as the Committee on the Rights of the Child(CRC), which is the body mandated to implement the Convention on the Rights of the Child,[281] urged Kenya to formulate health policies and programmes aimed at preventing teenage pregnancies and unsafe abortions.[282] Shortly after, the Committee on Economic, Social and Cultural Rights, which is the body that monitors the implementation of the ICESCR[283] issued a concluding observation noting the high number of unsafe abortions in Kenya and the limited access to sexual and reproductive healthcare services particularly in rural and poorer urban areas.[284]As a result, the Committee recommended that Kenya puts in place programmes to ensure free access to contraceptive, access

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[276] Michael Bratton and Nicholas Van de Walle 'Neo-patrimonial regimes and political transition in Africa' (1994) 46:4 *World politics* at 458
[277] Jane W Njagi 'The State and Sexual Politics: An Analysis of Abortion Discourses in Kenya' (PhD Thesis, University of Waikato, 2013) at 9
[278] Ibid at 158-159
[279] Ibid at 161-162
[280] Centre for Reproductive Rights (2010) op cit note 6 at 11
[281] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3
[282] Concluding Observations: Kenya. adopted 2 February 2007, UN GAOR, Committee on the Rights of the Child, 44th Session, UN Doc. CRC/C/KEN/CO/2 (2007), paras 49 50
[283]ICESCR supra note 28
[284] Concluding Observations: Kenya, adopted 19 November 2008, UN GAOR, Committee on Economic, Social and Cultural Rights, 41st Session, UN Doc. E/C.12/KEN/CO/1 (2008), para. 33

to safe abortion services, raising public awareness on contraception as well as strengthening the school curriculum on sexual and reproductive health.[285]

Having discussed the place of abortion in post-independence Kenya, we progress to the debates surrounding the right to abortion during the clamour for a new Kenyan Constitution.

3.2.4 The abortion controversy during the clamour for a new constitution

To a great extent, anti-abortion discourses in Kenya during the clamour for a new constitution were presented through moralistic, foetal life-focused, and generally popular angles.[286] Abortion became a highly emotive and contested issue with anti-abortion advocates alleging that the inclusion of reproductive rights in the constitution would lead to 'abortions on demand.'[287] Anti-abortion advocates led by religious leaders marshalled support against the inclusion of the right to abortion in the draft constitution.[288] This was evident in the National Constitutional Conference where religious leaders crusaded against including abortion and reproductive health rights in the draft constitution.[289] This led to the 2004 Draft Constitution of Kenya containing a proclamation that life begins at conception and a narrow exception to abortion only to save the life of a woman.[290]

After the proposed constitution failed to sail through in the national referendum a Committee of Experts (CoE),[291] was tasked to consider the opposing views of Kenyans on the constitution and develop a harmonized constitutional draft.[292]. However, the parliamentary select committee proceeded to include new subsections; one recognizing that 'life begins at conception' and the

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[285] Ibid
[286] Njagi op cit note 277 at 196
[287] Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review' (2010)10-12
[288] Ibid
[289] Ibid at 174; The National Constitutional Conference was convened on 12 January 2004 to deliberate on and produce a draft Constitution which was to be subjected to a referendum. On 15 March 2004, delegates to the conference adopted the Draft Constitution of Kenya, 2004. The referendum was held on 21 November 2005 but the proposed new Constitution was voted down by a 58 per cent majority of Kenya's voters.
[290] Ibid; Draft Constitution of Kenya (2004) Part II, section 32(2) stated that 'The life of a person begins at conception' and section 34(3) stated that 'Abortion shall not be permitted unless, in the opinion of a registered medical practitioner, the life of the mother is in danger.'
[291] The Committee of Experts was the main technical organ in the Constitutional Review process. It comprised nine experts and two ex officio members who were nominated by the National Assembly and appointed by the President. The committee was mandated to finalize the Constitutional Review process and deliver a new constitutional dispensation for Kenya
[292]Final Report of the Committee of Experts on Constitutional Review 2010,13-15

other stating clearly that 'abortion is not permitted unless in the opinion of a registered medical practitioner, the life of the mother is in danger' in the final draft.[293] This inclusion and qualification of when abortion can be permitted depicts the awareness parliament had of the influence religious leaders wielded over the citizens and the fear of scuttling the overall constitutional making process.[294]

In spite of having reservations on the clause stating that 'life begins at conception', the CoE noted that the parliamentary select committee stressed the fact that it was a 'deal-breaker' or 'deal-maker' for the draft constitution.[295] Moreover, the CoE observed that the 'life begins at conception' clause was at odds with the clause on freedom of conscience, religion, belief and opinion since Kenya was also home to Muslims who believed that life begins on the 40th day of pregnancy or Traditionalists who believe that life begins at birth.[296]

In this section, I have demonstrated that despite the patriarchal nature of traditional African society, abortion was not proscribed.[297] In fact, abortion was allowed and regulated in certain situations.[298] The section also showed how the advent of colonisation criminalised abortion.[299] Furthermore, I contended how the post-independent neo-patrimonial regime of Kenya put abortion rights on the back burner.[300] I assessed the abortion discourse especially during the lobbying for a constitutional order in Kenya and how the influence of religious leaders over political leaders led to the inclusion of the clause stating that 'life begins at conception' and the qualification of when abortion is permitted.[301] In sum, it is clear that despite the patriarchal and religious influence on the abortion discourse in Kenya, the promulgation of a new constitution liberalising abortion was a climax on the right to abortion discourse in Kenya. After exploring the discourses surrounding the right to abortion during the clamour for a new constitutional dispensation, we now advance to exploring the current Kenyan law on abortion.

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[293] This is the clause that subsists to-date after the promulgation of the new Kenyan constitution on 27th August 2010
[294] Njagi op cit note 277 at 174
[295] Final Report of the Committee of Experts on Constitutional Review 2010,111
[296] Ibid
[297] Thomas op cit note 244
[298] Ibid
[299] Ngwena (2010) op cit note 163
[300] Njagi op cit note 277 at 158-159
[301] Committee of Experts on Constitutional Review op cit note 287 at 10-12

3.3 Analysis of The Current Law On Abortion in Kenya

This section examines the existing legal and policy framework on abortion, and specifically the effect of article 26(4) of the Constitution. Whereas the Constitution broadened the scope of when abortion can be accessed by Kenyan women, the punitive provisions of the Kenyan penal code subsist to date. Here, the contradictory legal landscape compounded by inconsistent policies on access to abortion is discussed to assess whether the right to access abortion as intended by the Constitution has been realised by Kenyan women. The analysis is grounded in the right to abortion as an international human right and a constitutional right envisioned by Article 26(4) of the Constitution of Kenya.

3.3.1 Effect of Article 26(4) of the Constitution on access to abortion in Kenya

Access to abortion in Kenya is grounded in Article 26(4) (the Article 26(4) clause) of the Constitution which states that: abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment or the life or health of the mother is in danger, or if permitted by any other written law.[302] It should be emphasized that the Article 26(4) clause permits abortion in four circumstances: (a) where there is need for emergency treatment and (b) where the life, or (c) where the health of the mother is in danger or (d) when permitted by any other written law.[303] This clause places great importance on the 'opinion of a trained health professional' and that it only needs to be one health professional.[304] It seems that the drafters of the clause were aware of the medical human resource limitations of Kenya and allowed a singular health professional to determine whether a woman qualifies for either emergency treatment, whether her life is in danger or whether health (including her mental health) is in danger.

Article 26(4) clause is meant to be interpreted in conjunction with the right to health including reproductive health provided in Article 43 (1) (a) and Article 43 (2),[305] which prohibits denial of emergency medical treatment also requires the provision of post-abortion care services. Accordingly, the Health Act defines emergency medical treatment as: 'necessary immediate health

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302 Article 26(4) Constitution of Kenya
303 Ibid
304 Section 6(2) of the Health Act states that 'a trained health professional' shall refer to a health professional with formal medical training at the proficiency level of a medical officer, a nurse, midwife, or a clinical officer who has been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women, and who has a valid license from the recognized regulatory authorities to carry out that procedure.'
305 Article 43(2) Constitution of Kenya,2010 states that 'a person shall not be denied emergency medical treatment.'

care that must be administered to prevent death or worsening of medical situation.'[306] Therefore, section 7(3) of the Health Act makes it an offence for health providers to decline to render emergency treatment.[307]

The Health Act builds on Article 26(4) clause by providing for reproductive health.[308] In particular, section 6(1)(c) provides that 'every person has a right to be treated with any pregnancy-related conditions that threaten the life or the health of the mother.'[309] Besides, the Act requires that such treatment is rendered in a facility that conforms to health standards as prescribed by the Health Act.[310] Along with that, the Sexual Offences Act,2006 contemplates emergency medical treatment which includes termination of pregnancy and post-abortion care to be rendered to victims of sexual crimes.[311]

In the same vein, the Ministry of Health published a post-abortion guide for healthcare providers to enhance the knowledge and skills of reproductive healthcare providers to deal with abortion.[312] The post-abortion guide intends to use a 'woman-centred, rights-based approach' in dealing with the abortion needs of women.[313] The guide is a comprehensive rule book that deals with the most conceivable abortion-related issues and how healthcare providers are expected to navigate them.[314]

Also, as previously discussed in chapter one, the Ministry issued standards and guidelines for the reduction of maternal morbidity and mortality from unsafe abortion.[315] These standards and guidelines are aimed at equipping healthcare workers with skills of managing unsafe abortions

[306] Section 3 of the Health Act

[307] In as much as the freedom to one's religion and beliefs are protected by the Constitution, section 12(2) of the Health Act 2017 directs health providers to offer emergency medical treatment.

[308] Section 6 of The Health Act

[309]Section 6(1) (c) of the Health Act states that: 'Every person has a right to reproductive health care which includes- access to treatment by a trained health professional for conditions occurring during pregnancy including abnormal pregnancy conditions, such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable conditions.'

[310] Section 6(3) of the Health Act states that**:** 'Any procedure carried out under subsection (1) (a) or (1) (c) shall be performed in a legally recognized health facility with an enabling environment consisting of the minimum human resources, infrastructure, commodities and supplies for the facility as defined in the norms and standards developed under this Act.'

[311] Section 35 of the Sexual Offences Act,2006; National Guidelines on Management of Sexual Violence in Kenya,3rd ed (2014) 78

[312] Ministry of Health, Kenya, Post Abortion Care: A Pocket Guide for Healthcare Providers, 2019

[313] Ibid at 1-4

[314] Ibid at 5-32

[315] Ministry of Health Policies, Standards and Guidelines on the Reduction of Maternal Mortality in Kenya, 2012 supra note 91

ranging from offering counselling services, offering emergency medical treatment, and navigating conscientious objections.[316] Yet, in an apparent reversal of policy, the ministry of health withdrew the standards and guidelines and forbade health providers from attending any abortion training.[317]

It took the civil society and a representative of a young lady who had succumbed to injuries from an unsafe abortion to file a constitutional petition challenging the legality of the withdrawal of the standards and guidelines.[318] In a ground-breaking judgment, the High Court held that the 'withdrawal of the standards and guidelines was unconstitutional.'[319] On abortion, the court recognised that abortion is allowed to preserve the mental health of a woman; after rape or defilement and that nurses, midwives or clinical officers can determine when an abortion is necessary and proceed to perform one.[320] Despite the Ministry of Health reinstating the standards and guidelines following the court order, it continues to ignore pleas to clarify its position on the standards and guidelines.[321]

A sexual and reproductive health advocate argues that the inconsistent actions by the Ministry and resultant violations of reproductive rights are influenced by the Global Gag rule and the fear by the Government of Kenya of antagonizing a development partner.[322] She observes that despite the Ministry stating that post-abortion care is legal in Kenya, women continue to be anxious about either police harassment and possible prosecution or abuse from healthcare providers hence recoiling from safe abortion services.[323] Regrettably, she points out that the prevailing Covid-19 situation has aggravated Kenya's deficient healthcare and further curtailed access to reproductive healthcare facilities for women and girls.[324]

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[316] Ibid at 1-23

[317] Memo from the Ministry of Health Kenya to all Health Workers dated 24th February 2014 (Ref. No. MOH/ADM/1/1/2

[318] *FIDA Kenya and 3 others V. AG and others* supra note 100

[319] Ibid para 415

[320] Ibid para 415

[321] https://www.ipas.org/news/kenya-restores-standards-and-guidelines-for-comprehensive-reproductive-health-including-abortion/ (last accessed on 8th August 2020)

[322] Evelyne Opondo 'Perspectives of an SRHR advocate on the impact of the Global Gag Rule in Kenya' (2020) 28:3 *Sexual and Reproductive Health* Matters at 2-3; The Global Gag rule was a policy employed by the former United States of America administration that prohibited non-governmental organisations incorporated outside the US and receiving US global health assistance funds from using this money to perform or promote abortion as a method of family planning.

[323] Ibid at 1

[324] Ibid at 3-4; Government of Kenya National Emergency Response Committee on Corona Virus. Update of coronavirus in the country and response measures, Brief No 46. May 2020.

With that said, it is worth pointing that the Kenyan penal code which maintains punitive provisions against abortion has not been revoked or amended to reflect the permitted circumstances provided by the Constitution.[325] A study that investigated the impact of the law and policy on abortion in Kenya established that this contradiction in the law hampers women from seeking professional abortion care, instils doubt in healthcare providers, and adversely impacts access to safe abortion care.[326] From the interviews conducted, it was apparent that the law on safe abortion was unclear thus fuelling fear among reproductive healthcare providers and patients with either party apprehensive of the legal consequences.[327]

Furthermore, it was discovered that the uncertainty on the law breeds discrimination against patients by healthcare providers and societal discrimination against reproductive healthcare providers.[328] In reality, this fear and uncertainty caused by obscure laws on abortion have the overall effect of inhibiting patients from seeking a safe abortion and hindering the provision of quality abortion care hence exacerbating unsafe abortions.[329] In what is described as the 'chilling effect' caused by vague laws, healthcare providers often decline to perform abortions fearing prosecution by the authorities.[330] Ultimately, access to safe abortion in Kenya fails because the punitive penal code deters it from being regarded as a legitimate health service thus hindering its safety regulation through training, equipping, and licensing of health providers.[331]

3.3.2 Current discourse on access to abortion in Kenya

Article 26(4) clause empowers parliament to legislate a law that permits abortion.[332] To this end, the Senate of Kenya is currently debating the Reproductive Healthcare Bill, 2019.[333] In its preamble, the Bill states that it intends to set the standards of reproductive health and provide for

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https://www.health.go.ke/wpcontent/uploads/2020/05/CamScanner-05-03-2020-18.22. 56.pd_(last accessed on 10th September 2020)

325 Section 158-160,240 of the Penal Code Chapter 63 Laws of Kenya, Revised (2012)

326 Mutua MM et al 'Policy, law, and post-abortion care services in Kenya' (2018)13:9 *PLoS ONE* at 2-3,13

327 Ibid at 10

328 Ibid

329 Ibid

330 Erdman and Cook op cit note 128 at 15-16

331 Ibid at 19

332 Article 26 (4) (d) Constitution of Kenya provides 'abortion is not permitted unless…when permitted by any other written law'.

333 The Reproductive Healthcare Bill, 2019 available at http://www.parliament.go.ke/sites/default/files/2020-02/Reproductive%20Healthcare%20Bill%2C%202019.pdf (last accessed on 11th September 2020)

the right to make decisions regarding reproductive health.[334] In line with the constitution, the Bill provides that a pregnancy may be terminated when; there is a need for emergency medical treatment, the pregnancy would endanger the life or health of the mother, or if there is a substantial risk that the foetus would suffer from severe mental or physical abnormality incompatible with life outside the womb.[335] The Bill elaborates circumstances when a health professional should refer a patient upon making a conscientious objection, how to counsel patients and obtain consent, and how to conduct post-abortion care.[336]

In addition, the Bill provides that the government ensures access to reproductive health services by adolescents which shall include training on reproductive knowledge, mentorship, moral guidance, and counselling.[337] However, this study finds the provisions of the Bill relating to adolescent access to reproductive health services to be problematic particularly concerning the requirement of obtaining parental consent before providing reproductive health services.[338] This study opines that the provision is well-intended but may not be practical especially regarding emergency post-abortion care services. This provision may place health professionals in a dilemma when faced with an adolescent in a reproductive health emergency. The intersection of parental consent and emergency treatment of reproductive healthcare issues need to be revisited and clarified.

Presently, the debate on the Bill has stalled due to emotive opposition from pro-life groups.[339] Pro-life groups submitted memoranda to the Senate against the Bill alleging that it intends to legalise 'abortion on demand contrary to the constitution and the penal code.'[340] Currently, the ministry of health has called for further consultations and possible re-drafting of the bill.[341]

[334] Ibid Preamble
[335] Ibid Article 26(1)
[336] Ibid Article 26(2),27,28,29,30
[337] Ibid Articles 32-33
[338] Ibid Article 33(a), (b)
[339]https://mg.co.za/africa/2020-09-10-pro-family-campaigners-ignore-pregnant-women-dying-during-covid-lockdowns/ (last accessed 11th September 2020)
[340] https://www.kbc.co.ke/pro-life-memoranda-health-bill/ (last accessed 11th September 2020)
[341]businessdailyafrica.com/economy/Health-ministry-wants-abortion-bill-withdrawn-talks/3946234-5607580-y0facz/index.html (last accessed 11th September 2020)

Considering that the CEDAW Committee had urged Kenya to ensure the speedy enactment of the Reproductive Rights Bill,[342] it is crucial that the debate on the Bill continues with an aim of clarifying all its problematic provisions. It is hoped that after a spirited debate, the Bill will be enacted into law such that the gains made by the Constitution on the right to abortion are not erased.

In a nutshell, this section has demonstrated that the progressive Article 26(4) clause of the constitution is ineffective in guaranteeing access to safe abortion care on account of the contradiction caused by the punitive Kenyan penal code**.** Moreover, the current onslaught on reproductive health rights and particularly the right to access abortion by the misrepresentation of the Reproductive healthcare Bill signals that the journey to realise abortion rights in Kenya is far from over.

3.4 Conclusion

This chapter began by exploring the historical context of abortion in Kenya. Thereafter, the chapter discussed the current legal and policy foundation of the right to abortion in Kenya. In that regard, the chapter has demonstrated that access to safe abortion within the parameters set out by the constitution is still a mirage. The chapter has proved that the subsisting contradiction between the constitution and the penal code reinforced by inconsistent actions of the ministry of health officials regarding the right to abortion continues to exacerbate unsafe abortion in Kenya. The chapter concludes by appealing to the government of Kenya to implement the right to abortion in Kenya in a 'transparent' manner so that Kenyan women can realise their right to abortion as permitted by the constitution and protected by international human rights.

The next chapter will examine how South Africa has implemented the right to abortion in its law and which lessons Kenya may draw from South Africa's experience.

[342] Concluding Observations: Kenya, adopted 2 February 2011, UN GAOR, Committee on the Elimination of All Forms of Discrimination against Women, 48th Session, UN Doc. CEDAW/C/KEN/CO/7 (2011), para. 38

CHAPTER FOUR

4.0 CASE STUDY OF PROGRESSIVE ABORTION LAWS: SOUTH AFRICA

4.1 Introduction

In this chapter, I conduct a case study of South Africa's abortion laws to draw on South Africa's experience to inform Kenya's abortion law reform. I do so by examining South Africa's abortion legislation and jurisprudence. I commence by justifying why South Africa has been chosen as a case study. Thereafter, I describe the legislative framework on abortion in South Africa followed by a discussion on the resultant jurisprudence. I conclude by identifying the instructive lessons, if any that Kenya can draw from the South African experience.

4.2 Abortion Law in South Africa

4.2.1 The justification for the case study on South Africa

South Africa stands out in Africa as a model for reproductive rights protection since legalising abortion in 1996.[343] South Africa's forward-looking and liberal legal landscape on abortion is unique in Africa.[344] The country serves as a compelling example for abortion rights in Africa since it has one of the most developed public healthcare system for the provision of abortion care on the continent.[345] Taking stock of the South African experience with the legal access to abortion can boost the Kenyan abortion law reform discourse considering that the Bill of Rights in the Constitution of South Africa,[346] played a role in inspiring and influencing the Bill of Rights in the Constitution of Kenya.[347]

Given that South Africa is an African country whose legal system is influenced by the English common law system like Kenya,[348] its experience is best placed to be persuasive and authoritative to Kenya. This study argues that South Africa serves as a solid example to Kenya on navigating

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[343] Karen A. Trueman and Makgoale Magwentshu 'Abortion in a Progressive Legal Environment: The Need for Vigilance in Protecting and Promoting Access to Safe Abortion Services in South Africa' (2013) Vol 103(3) *American Journal of Public Health* at 397
[344] Ibid
[345] Ibid
[346] Constitution of the Republic of South Africa,1996
[347] *http://researchblog.law.hku.hk/2018/05/cottrell-ghai-on-contribution-of-south.html*
[348] Chris Nwachukwu Okeke 'African Law in Comparative Law: Does Comparativism Have Worth? (2011) Vol 16(1) 1 *Roger Williams University Law Review* at 32-35

the legal right to abortion since just like South Africa, the advancement of the right to abortion in Kenya is founded on human rights such as the right to health including the right to reproductive healthcare grounded in the Bill of Rights.[349] Therefore this case study aims at drawing instructive lessons from the best practices, failures and shortcomings in the South African abortion law landscape.

At the same time, this study acknowledges that in as much as the South African implementation of a liberal abortion law is exemplary, it is not perfect.[350] Also, this research is mindful of the fact that despite the two countries sharing a similar common law history and commitment to the advancement of human rights, there are other variables at play such as a different population and economic dynamic and distinct political, legal and social contexts.[351] For this reason, this study does not recommend a 'cookie cutter approach' out of South Africa's rule book for Kenya. In essence, this research seeks to draw on what has worked with South Africa's abortion law to inspire Kenya. The next section focuses on the legislative framework of abortion in South Africa.

4.2.2 The legislative framework of abortion law in South Africa

South Africa's law on access to abortion is grounded in the Constitution of South Africa that envisioned an inclusive, non-racial and non-sexist democracy, based on equality, dignity, freedom and social justice.[352] To this end, the Bill of rights in section 12(2) of the Constitution provides that 'everyone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction and (b) to security in and control over their body.'[353] Thereafter, section 27 of the Constitution further guarantees the right of access to healthcare services, including reproductive healthcare.[354]

At the same time, the South African parliament enacted the Choice on Termination of Pregnancy Act(CTOPA),[355] designed to guarantee women the right to access abortion.[356] In its preamble, the CTOPA states that it repeals the 'restrictive and inaccessible provisions' of the Abortion and

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[349] Article 43 (1)(a) Constitution of Kenya,2010; Section 27 Constitution of South Africa
[350] Trueman and Magwentshu op cit note 343 at 398
[351] *http://researchblog.law.hku.hk/2018/05/cottrell-ghai-on-contribution-of-south.html op cit note 342*
[352] Catherine Albertyn 'Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts' (2019) 2019 *University of Oxford Human Rights Hub Journal* at 105
[353] Section 12(2) (a) and (b) Constitution of South Africa
[354] Ibid section 27
[355] Choice on Termination of Pregnancy Act,1996(Act No.92 of 1996)
[356] Ibid

Sterilization Act,[357] and promotes reproductive rights and freedom of choice by allowing women to choose whether to have a safe abortion according to their individual beliefs.[358] Furthermore, the CTOPA preamble asserts the furtherance of the constitutional values of human rights, human dignity, equality and 'security of the person, non-racialism and non-sexism.'[359] Significantly, the CTOPA acknowledges that the state is responsible for the provision of reproductive health services to all persons and that the right of choice should be exercised without fear or harm.[360]

The CTOPA allows abortion on demand in the first trimester, and socio-economic grounds in the second trimester.[361] The relevant section provides as follows:

> A pregnancy may be terminated(a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy; (b) from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that(i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or (ii) there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or (iii) the pregnancy resulted from rape or incest; or (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman.[362]

As evidenced, the CTOPA allows access to abortion in a graduated approach based on the gestation period.[363] Moreover, the CTOPA requires that abortion is provided with the 'informed consent' of a woman.[364] Noteworthy is that spousal or parental consent is not required, although minors must be requested to confer with their parents.[365] However, the CTOPA mandates that minors should be allowed to access abortion even if they choose not to consult their parents or family.[366] Certainly, the CTOPA makes abortion more accessible in the first trimester since it authorises registered midwives and nurses to perform first-trimester terminations.[367]

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[357] Abortion and Sterilization Act, 1975 (Act No.2 of 1975)
[358] Ibid
[359] CTOPA Preamble
[360] Ibid
[361] CTOPA Section 2(1) CTOPA
[362] Ibid
[363] Ibid
[364] Ibid Section 5
[365] Ibid Section 5(2)
[366] Ibid Section 5(3)
[367] Ibid Section 2(2)

In addition, state policy in terms of the National Health Act,[368] requires abortion services to be provided free of charge at public health-care facilities.[369] To enhance the implementation of the CTOPA, regulations governing access to abortion were enacted.[370] These regulations emphasize the provisions of the CTOPA and govern issues such as consent forms for abortion or how to navigate the issue of consent for a woman who is mentally disabled or who is a minor.[371] The regulations, just like the CTOPA also provide for the requirement to conduct non-mandatory counselling for women seeking an abortion and emphasizes that the counselling be done in private.[372]

To guarantee the proper implementation of the CTOPA and the attendant regulations, the CTOPA makes it an offence for non-qualified people to perform abortions.[373]Moreover, the CTOPA requires medical practitioners to collate and furnish the government with the records of all abortions performed while respecting the privacy of the women involved.[374]Also, medical practitioners who fail to prepare and notify the government of the abortions performed as required by the CTOPA commit an offence and are liable to pay a fine or to be imprisoned.[375] Lastly, the CTOPA penalises any person who obstructs access to safe abortion and if such a person is convicted he is liable to pay a fine or to be imprisoned.[376] It is clear from the foregoing that the South African Constitution and CTOPA advance women's right to access safe abortion and assigns them agency as citizens and rights-bearers.[377]

Yet, the CTOPA and state policy fail to provide guidance on how to deal with the thorny issue of conscientious objections by medical practitioners. It is argued that the lack of law or policy on conscientious objections impedes the provision of abortion services since some medical practitioners use it to deny women abortion, refuse to inform them of their right to abortion and refuse to refer them to a willing provider.[378]Also, despite the progressive law on access to

[368] National Health Act No.61 of 2003
[369] Ibid section 4(3)(c)
[370] Regulations Under the Choice On Termination of Pregnancy Act, 1996 (Act No. 92 Of 1996)
[371] Ibid Regulations 4,5,6
[372] Ibid Regulation 7
[373] CTOPA section 10(a) (b)
[374] Ibid section 7 (1) (2) (3)
[375] Ibid section 10(2)
[376] Ibid section 10(c)
[377] Albertyn op cit note 352 at 105
[378] Trueman and Magwentshu op cit note 343 at 398

abortion, the implementation of the right to access abortion is dogged by challenges such as poor public healthcare infrastructure and the inability to retain trained personnel.[379] Studies on the lived experiences of women accessing safe abortion under the CTOPA revealed that many women experienced delays due to ineffective referrals and many were subjected to stigma and judgment from medical personnel at the public health facilities.[380] Moreover, the studies showed that the general public including medical personnel were not conversant with the provisions of the CTOPA on access to safe abortion.[381]

Indeed there has been an increase in the provision of safe abortion to South African women and a decrease in maternal mortality due to unsafe abortion credited to the CTOPA,[382] However, at the same time, the lived experiences of women reveal that the CTOPA has not been efficiently implemented particularly concerning indigent women.[383] Therefore, it is argued that the state needs to revise its implementation policy by engaging the different stakeholders involved such as educating the public on the CTOPA and revamping the public healthcare system to improve the provision of safe abortion services to South African women.[384] Having examined the law on abortion the next section considers how the courts have interpreted the right to abortion in South Africa.

4.2.3 Jurisprudence on the right to abortion in South Africa

Since its enactment, the CTOPA has been challenged in the South African courts. First, the case of *Christian Lawyers Association (CLA) v Minister of Health*,[385] alleged that the CTOPA violated section 11 of the Constitution on the right to life, which they argued, includes the rights of unborn children.[386] The court held that the Constitution did not cater for foetal rights but on the other hand explicitly provided for reproductive rights which enable women to control their bodies, make decisions with respect to reproduction, granted women rights to equality, dignity, privacy and

[379] Camilla Pickles 'Lived Experiences of the Choice on Termination of Pregnancy Act 92 of 1996: Bridging the Gap for Women in Need' (2013) Vol 29(3) *South African Journal on Human Rights* at 518
[380] Ibid 520-525
[381] Ibid
[382] Trueman and Magwentshu op cit note 343 at 397
[383] Pickles op cit note 379 at 535
[384] Ibid
[385] *Christian Lawyers Association V Minister of Health* 11998 (4) SA 1113 (South African High Court)
[386] Ibid at paras15,16,17 at 4

healthcare.[387] Hence the Court determined that the Constitution firmly granted women the right to access abortions.[388]

Several years later the CLA contested that the CTOPA enabled adolescent girls to access abortion without the agreement of their parents arguing that the provisions breached the state's obligation under section 28 of the Constitution to act in the best interest of the child.[389] The CLA argued that since adolescents were incapable of making informed choices, they needed to be subjected to parental control and mandatory counselling.[390] In dismissing the case, the court determined that 'informed consent' of a woman was a key element of access to abortion under the CTOPA and that any woman regardless of age could make an informed consent depending on their emotional and intellectual capacity at the time.[391] This case enabled the court to determine that the 'fundamental right to individual self-determination' was the cornerstone of the right to abortion.[392]

These two cases demonstrate that South African courts have not faltered in the advancement of abortion rights.[393] Moreover, the courts have aptly highlighted the interconnection of the right to abortion with other human rights such as the right to privacy, dignity and non-interference.[394] Having analysed how the right to abortion is protected, implemented and interpreted by the South African legal system, the next section addresses which lessons can be derived by Kenya from this legal system.

4.3 Lessons Drawn from The Case Study

The South African legal framework on abortion is executed through the CTOPA which is a stand-alone statute grounded on the human rights protections guaranteed in the South African Constitution. The enactment by South Africa of a distinct piece of legislation is a best practice that deserves to be replicated by Kenya. The reason for this is that Kenya, just like South Africa guarantees the right to abortion in the Constitution yet it has not enacted legislation to operationalise the constitutional protection of the right to abortion.[395] Besides, article 26(4) of the

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[387] Ibid 20-26
[388] Ibid
[389] *Christian Lawyers Association V Minister of Health* 112005 (1) SA 509 (South African High Court)
[390] Ibid
[391] Ibid at 514
[392] Ibid at 519
[393] Albertyn op cit note 352 at 107
[394] Ibid
[395] Article 26(4) Constitution of Kenya,2010

Constitution of Kenya provides the minimum grounds for access to abortion and allows room for the expansion of the grounds of access to abortion through the phrase….'if permitted by any other written law.'[396] Considering the South African example, expansion of the grounds to access abortion can be done through the enactment of a statute on access to abortion.

The second issue that the South African approach gives insight on is the question of the timing of access to abortion services.[397] The CTOPA gives access to abortion based on a graduated approach that depends on the gestation period.[398] This is an important factor to consider in the negotiation and drafting of the Kenyan law on abortion. As things currently stand, the Reproductive Healthcare Bill,2019 has not been drafted in a manner that considers the different stages of pregnancy and the grounds that should be considered at each stage.[399] Closely linked to this point is the fact that the CTOPA allows women to access abortion if the pregnancy significantly alters their socio-economic circumstances.[400] This is a ground of access to abortion that should be considered by stakeholders who are negotiating a statute on access to abortion. The reason for this assertion is that studies continue to demonstrate that poverty drives many Kenyan women to seek unsafe abortions.[401]

The other practice that South Africa's experience may give insight to Kenya is on the question of ensuring that consent from third parties is not a requirement for a woman to access abortion.[402] The Reproductive Healthcare Bill has a provision that makes it a requirement for a medical provider to consult with the minor's parent and determine whether it is in the minors best interest to access abortion.[403] The South African approach that enables a minor access abortion even when they have chosen not to consult with their parents is better since it safeguards women's agency, privacy and autonomy. Moreover, the South African court's determination that informed consent is the bedrock of the right to abortion is insightful in this thorny matter.[404] This study posits that

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[396] Ibid
[397] CTOPA Section 2(1)
[398] Ibid
[399] Section 26(1) Reproductive Healthcare Bill,2019
[400] CTOPA section 2 (1) (IV)
[401] Bosire op cit note 14 at 105-107
[402] CTOPA section 5(1) (2)
[403] Reproductive Healthcare Bill,2019 Section 28(b)
[404] *Christian Lawyers Association V Minister of Health* supra note 385

the best interests of the minors should be considered using their evolving emotional and intellectual capacities.[405]

The last but equally important lesson that this study considers Kenya can derive from the South African experience is the fact that the state bears the responsibility to provide abortion.[406] After the enactment of the CTOPA, the South African government had to restructure the public healthcare system to be able to provide reproductive health services to women from all walks of life.[407]As a result, access to safe abortion was greatly expanded leading to a 'significant reduction in maternal morbidity and mortality.'[408] For the right to abortion to be realised by Kenyan women, Kenya is required to replicate the South Africa example by mandating that abortion services are offered free of charge through the public healthcare system and that abortion is made accessible to women in rural areas and informal settlements. The reason for this assertion is that studies have shown that it is the indigent Kenyan women in the rural areas and the informal settlements who bear the brunt of unsafe abortions.[409]

4.4 Conclusion

This chapter has demonstrated that South Africa has put its Constitutional protection of the right to abortion into action by operationalising the CTOPA and the attendant regulations which have established mechanisms that ensure the right to abortion is effectively implemented. The salient mechanisms established by the South African law and policy include the provision of free abortion through the public healthcare system, provision of abortion using a graduated approach which considers gestation period and clarifying on the issue of non-denial of abortion for minors in the absence of consent from their parents. Furthermore, the chapter has proved that the South African courts are prepared to protect the right to abortion in conformity with the Constitution. Indeed, the South African experience in implementing access to abortion should inspire Kenya considering that it's exemplary but not flawless.

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[405] Ibid
[406] CTOPA, Preamble
[407] Cathi Albertyn 'Claiming and Defending Abortion Rights in South Africa' (2015) Vol 22 *Revista Direito* at 440
[408] Ibid
[409] Bosire op cit note 14 at 105-107

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

In this chapter, I commence by briefly discussing the findings of the study based on the research questions that this study set out in chapter one. Thereafter, I will present the conclusions on the findings and recommend the way forward.

5.2 Findings and Conclusions

The objectives of this study were; to ascertain the right to abortion as a human right internationally and regionally; to assess whether Kenya's law on abortion is a barrier to the realization of abortion rights in Kenya and to provide appropriate suggestions on legal reform to make safe abortion a realizable human right in Kenya. In achieving this objective, the study interrogated how the right to abortion is protected in Kenyan law; interrogated whether women effectively access safe abortion in the current legal landscape; interrogated if access to safe abortion was a realizable human right in Kenya and lastly interrogated whether Kenya was respecting its obligations in respect of international law protecting access to safe abortion.

To this end, chapter one commenced the study by discussing the scourge of unsafe abortion in Kenya. Here it was demonstrated that Kenyan women are greatly hampered in accessing safe abortion due to a myriad of reasons such as poverty, contradictory law and policy on abortion and societal stigma.[410] Besides, it was shown that despite the constitution permitting abortion in certain circumstances such as saving the life or the health of the mother and as an emergency medical treatment the government has failed to implement the law and policy to offer tangible access to safe abortion to women even in those limited circumstances.[411]

Chapter two demonstrated that the right to abortion has progressed to be recognized as a reproductive health right and ultimately a human right internationally and regionally. Moreover, a discussion of the jurisprudence of international TMB's proves that the right to abortion is now a justiciable human right. Therefore, it is incumbent on Kenya to; implement the right to abortion

[410] Mutua et al op cit note 16 at 1; Ziraba et al op cit note 19 at 6; Bosire op cit note 14 at 105-107
[411] Ibid

transparently and ensure that it is a realizable human right in Kenya and to align its legal and policy landscape on abortion with international law particularly since Kenya regards international law as part of its law.[412]

Chapter three explored Kenyan law and policy on the right to abortion from when abortion was criminalised to the present scenario where the Constitution permits abortion in certain circumstances.[413] Regrettably, it was shown that despite grounding access to abortion in certain circumstances in the Constitution, the Health Act and government policies, Kenyan women continued to face multiple barriers which defeats access to safe abortion. Furthermore, it was demonstrated that currently, the right to abortion was not a realizable human right in Kenya and that Kenya had failed to implement its human rights obligations grounded in international and regional human rights treaties.

Chapter four examined South Africa's legal framework on abortion as a case study to draw lessons to inform the Kenyan legal landscape. This chapter proved that South Africa has succeeded in implementing access to abortion as protected by the Constitution and the CTOPA. Moreover, the chapter found that South Africa had dealt with thorny matters such as including abortion services in the public healthcare system, consent by minors and a graduated approach of accessing abortion which relies on the gestation period more progressively.

In the final analysis, this study concludes as follows:

Kenya succeeded by grounding the right to abortion in permissive circumstances in the Constitution.[414] Yet, the contradictory legal landscape caused by the punitive clauses in the penal code and actions of the government of Kenya such as withdrawing the standards and guidelines continues to act as a barrier to access abortion.[415] To this extent, Kenya has failed to translate the abortion rights guaranteed in the law to claimable and tangible rights.[416] The duty to ensure effective realization of the right to abortion has been defeated in the following ways;

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[412] Article 2(5) and (6) of the Constitution of Kenya

[413] Article 26(4) Constitution of Kenya

[414] Ibid

[415] Mutua et al op cit note 16 at 10-13; Ministry of Health policies standards and guidelines (2012) supra note 92; section 158-160,240 of the Penal Code Chapter 63 Laws of Kenya, Revised (2012)

[416] Ngwena (2013) op cit note 131 at 426

i. failing to revoke the punitive clauses of the penal code to accord with the permissive grounds provided in the Constitution;
ii. failing to raise awareness among women and healthcare providers about the permissible circumstances when abortion can be accessed;
iii. failing to provide access to administrative procedures that facilitate timely review of any decisions to deny abortion;
iv. continuing to issue contradictory policy directives such as the withdrawal of the standards and guidelines which instils fear and creates a chilling effect in health providers thus hindering the provision of safe abortion services; and
v. failing to strengthen the public healthcare system with an infrastructure that is capable of executing the right to abortion provided for in the permissive circumstances in the Constitution and tackling emergency post-abortion care services.

Ultimately, Kenya has failed to effectively implement the right to abortion guaranteed in its laws. This study finds that in as much as it is vital to enact a statute that expands on the circumstances when abortion can be accessed, it would be in futility if the government does not implement that law effectively. Without a doubt, had the present laws permitting access to abortion on the grounds set out in Article 26(4) of the Constitution been effectively implemented, the right to abortion would have been realized in Kenya. In the next section, I recommend the way forward.

5.3 Recommendations

All things considered, this study recommends as follows:

i. Kenya should honour its international obligations by effectively realising the right to abortion guaranteed in its laws. Therefore, the government should forthwith remove the barriers which hinder access to safe abortion by revoking the punitive clauses of the penal code and aligning laws and policies with Article 26(4) of the Constitution.
ii. Kenyan stake-holders should be pro-active in the negotiations surrounding the Reproductive Healthcare Bill,2019 to ensure that the Bill expands on the grounds of access to safe abortion and also clarifies on problematic issues such as consent by minors.
iii. In the long-term, enact a stand-alone statute on access to abortion expanding the grounds of accessing abortion to include; abortion on demand in the first 12 weeks of pregnancy;

abortion on socio-economic grounds and a graduated approach to the provision of abortion based on gestation period.

iv. Government and relevant stakeholders to forthwith embark on the dissemination of information to women, health providers and the general populace on reproductive health rights and particularly the right to abortion permitted by Article 26(4) of the Constitution.

v. Supporting the recommendation in the Reproductive Healthcare Bill, this study affirms that the government includes programmes on reproductive health particularly the question of contraception in the school curriculum to prevent early pregnancies.

vi. The government should embark on training judicial and law-enforcement officers on the right to abortion guaranteed by Article 26(4) of the Constitution with a view of preventing arrest and prosecutions of women and health providers accessing and providing abortion within the Article 26(4) of the Constitution ambit.

vii. The government should strengthen the public healthcare system with an infrastructure that is capable of executing the right to abortion provided for in the permissive circumstances in the Constitution and tackling emergency post-abortion care services. As much as possible, ensure that abortion-care services are free of charge in public hospitals.

viii. Moreover, this study calls upon the judiciary to emulate the TMB's and the South African judiciary by interpreting the Article 26(4) clause of the Constitution more progressively and in a manner that protects and promotes the rights of women and girls.

In the end, this study proposes that further research be conducted on the effect of the constitutional clause that 'life begins at conception' which alludes to the protection of foetal rights and its effect on the right to abortion in Kenya.

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