

KENYA'S DUTY TO ENSURE IMPLEMENTATION OF ARTICLE 26(4) IN ENHANCING THE RIGHT TO REPRODUCTIVE HEALTH

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School

By
LISA ACHIENG OWINO
081198

Prepared under the supervision of
DR. J. OSOGO AMBANI

MARCH, 2018
Word count (9,880)

Table of Contents

KENYA'S DUTY TO ENSURE IMPLEMENTATION OF ARTICLE 26(4) IN ENHANCING THE RIGHT TO REPRODUCTIVE HEALTH	i
Acknowledgement	iv
Declaration	v
Abstract.....	vi
CHAPTER ONE: INTRODUCTION	1
1.1 Background	2
1.2 Statement of the problem	6
1.3 Research propositions	6
1.4 Chapter Breakdown.....	7
CHAPTER TWO: A HUMAN RIGHTS-BASED APPROACH TO ABORTION.....	8
2.1 Introduction	8
2.2 The development of reproductive rights.....	9
2.3 Kenya and the Maputo Protocol	10
2.3 Abortion and the right to the highest attainable standard of reproductive health.....	11
2.4 Human rights based approach to abortion in international law	12
2.5 Conclusion.....	16
CHAPTER THREE: KENYA'S DUTIES IN ENSURING FULFILMENT OF RIGHTS	18
3.1 INTRODUCTION	18
3.2 The nature of Kenya's obligations.....	18
3.3 Progressive realisation of right to safe, legal abortion in Kenya.....	23
3.4 Conclusion.....	24
CHAPTER FOUR: PROPOSED LEGISLATIVE FRAMEWORK.....	25
4.1 Introduction	25
4.1 Key provisions.....	25
4.2 Conclusion.....	31
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS	32
5.1 Introduction	32
5.2 Restating the initial problem.....	32
5.3 Research findings	32
BIBLIOGRAPHY	36
Municipal Legislation	36

Regional and International Instruments.....	36
Soft Law Instruments.....	36
Municipal Cases	37
Regional and international cases.....	38
UN Documents.....	38
List of Books.....	38
List of Journal Articles.....	39
List of Reports by Institutional Authors.....	40
Conference and Working papers.....	41
List of Internet resources.....	41

Acknowledgement

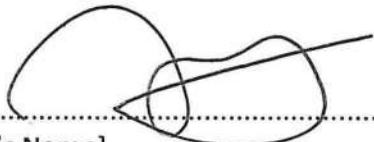
I would like to express my sincere gratitude to my supervisor Dr. J. Ambani for his guidance, patience and above all, insight, as I waded in the confusing waters that is writing a dissertation. I would also like to thank my fellow supervisees who played a major role in reading through and improving my work.

Declaration

I, LISA ACHIENG OWINO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: Li:-
Date: 29th MAY 2018

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 
[Supervisor's Name]
29 MAY 2018

Abstract

The Constitution of Kenya (2010) established an entitlement to therapeutic abortions under article 26(4) following advocacy by women's and international human rights groups that the strict rules regarding abortion in the repealed Constitution were contributing substantially to the country's high maternal mortality and morbidity. Article 26 was an attempt at compromise between preserving the right to life, which begins at conception as per the Constitution, and the right to obtain an abortion when the life and/or health of the mother is in danger and where it is provided under any other written law. This provision however, has done little to aid the situation on the ground with many women who would fall under the protected class of article 26(4) still obtaining abortions through illegal and unsafe means. Human rights groups have argued that this situation is aggravated by the hesitation of medical practitioners to perform abortion due to the lack of information on the legal parameters of article 26(4). This study suggests that the lack of a framework within which protected women can exercise their article 26(4) entitlement leads to a violation of women's rights including their rights to reproductive health services under Article 43(1)(a) of the Constitution.

LIST OF CASES

1. *Christian Lawyers' Association v National Minister of Health and Others* (2004), Transvaal Provincial Division, High Court of South Africa.
2. *Doe v Bolton* (1973), Supreme Court of the United States.
3. *Greater Glasgow Health Board v Doogan and another* (2014) United Kingdom Supreme Court.
4. *Federation of Women Lawyers (Fida-Kenya) & 3 others v Attorney General & 2 others* [2016] eKLR.
5. *Mitu-Bell Welfare Society v Attorney General & 2 others*, Nairobi Petition No. 164 of 2011 (Unreported).
6. *R v Bourne* (1938), Crown Court of England and Wales.
7. *Roe v Wade* (1973), Supreme Court of the United States.
8. *Bruggeman and Scheuten v Federal Republic of Germany*, ECmHR, 1981
9. *KL v Peru*, CCPR Comm No. 1153/2003 (24 October 2005)
10. *LC v Peru*, CEDAW Comm No.22/2009 (21 October 2011)
11. *P and S v Poland*, ECtHR, Judgement of 30 October 2012
12. *RR v Poland*, ECtHR, Judgement of 26 May 2011
13. *X and Y v The Netherlands*, European Court of Human Rights, 1985. *P and S v Poland*, ECtHR, Judgement of 30 October 2012
14. *White and Potter v United States*, IACmHR Case 2141 (1981)

CHAPTER ONE: INTRODUCTION

1.1 Background

Abortion has been a bone of contention in the legal and social sphere from time immemorial. The movements now known as the pro-life and pro-choice movements which respectively argue that life is sacred and begins at conception; and that women should have inviolable rights over their bodies are characteristic of the two differing opinions on the issue. Regardless of opinion, statistics show that restrictive abortion laws do little to deter women from seeking them, with abortion rates higher than or similar to areas with liberal laws.¹ They only make abortions unsafe, which has a negative toll on the maternal mortality and morbidity rate on a country.² More women resort to unsafe abortions performed by back-alley quacks or self-induce abortions through crude and unsafe means resulting in maternal mortality or other morbid conditions (including post-partum haemorrhage, sepsis, complications from delivery, and hypertensive disorder) which are responsible for nearly 75 percent of maternal death worldwide.³

Developed countries like the United Kingdom noted the increased toll unsafe abortions took on maternal health.⁴ This situation led to a move from stringent abortion policy⁵ to the allowance of statutory exceptions including: risk of injury to life of mother, injury of physical and mental health, and substantial risk of physical or mental deformity of the child.⁶ This trend was reflected in other developed countries like the United States where the criminalisation of abortions was banned by the landmark case, *Roe v Wade*.⁷

¹ Sedgh G, Singh S, Shah H, Ahman E, Henshaw S, and Bankole A, 'Induced abortion: incidence and trends worldwide from 1995 to 2008' 379 *Lancet*, 2012, 630

² See generally: World Health Organisation, *Unsafe abortion: global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008*, 2011.

³ <http://www.doctorswithoutborders.org/article/qa-consequences-unsafe-abortion> on 28 January 2017.

⁴ In 1933, fifteen percent of maternal deaths could be attributed to unsafe abortions; <http://www.abortionrights.org.uk/history-of-abortion-law-in-the-uk/> on 27 January 2017.

⁵ Procuring or performing abortions was punished with a life sentence; Chapter 141, *Offences against the person Act*, (United Kingdom).

⁶ Section 1, Chapter 7, *Abortion Act*, (United Kingdom).

⁷ In this case, a Texas resident, sought to terminate her pregnancy by abortion. Texas law prohibited abortions except to save the pregnant woman's life and in the cases of rape and incest. She sought leave of the court in deciding that Texas abortion law was unconstitutional. The Supreme Court held that the right to abort within the first trimester was encompassed by the constitutional right to privacy. *Roe v Wade* (1973), Supreme Court of the United States.

International bodies have also espoused positions on the matter with most favouring a human rights approach on the basis that maternal health is encompassed in the right to reproductive health and that the occurrence of preventable mortality and morbidity is a violation of this right. According to the World Health Organisation, the degree of legal access to abortion co-determines the frequency and related mortality of unsafe abortion.⁸ The position of the United Nations Office of the High Commissioner of Human Rights is that maternal mortality and morbidity is a human rights issue that can be addressed through reducing of unsafe abortions and thus, effectively imposes a duty on States to provide access to safe abortion services, wherever legal, in a bid to improve public health.⁹

Pre 2010, the Kenyan Constitution only allowed abortion to protect the pregnant woman's life.¹⁰ The Penal code criminalises self-inducing abortion, or providing any other type of "unlawful" abortion, as felonies punishable by a 7–14-year prison sentence.¹¹ These restrictions did not do much to reduce incidences of abortion let alone unsafe abortions. Unsafe abortion soon became recognised as a leading cause of high maternal morbidity and mortality rates in the country.¹² The Centre for Reproductive Rights reported that every year, at least 2,600 women die from unsafe abortion in Kenya; 21,000 more women are hospitalised with complications from incomplete and unsafe abortion annually, based on a study conducted between 2009 and 2010. It further argued that the stringent laws regarding abortion substantially contributed to the high maternal mortality and morbidity rates.¹³

In an effort to ameliorate the situation, the Federation of Women Lawyers (FIDA) in conjunction with the Reproductive Health Rights Alliance worked towards the inclusion of reproductive rights including the right to procure abortions during the constitution drafting process.¹⁴ The Committee of Experts had recommended the inclusion of an abortion provision allowing

⁸ World Health Organisation, *The world health report: Primary health care, now more than ever*, 2008, 65.

⁹ Office of the United Nations High Commissioner for Human Rights, *Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable mortality and morbidity*, 2012, 4 and 8.

¹⁰ Section 71, *Repealed Constitution of Kenya* (1963).

¹¹ Sections 158, 159 and 160, *Penal Code*, (Act No.81 of 1948).

¹² Solo J, Billings DL, Aloo-Obunga C, Ominde A and Makumi M, Creating linkages between incomplete abortion treatment and family planning services in Kenya, *30 Studies in Family Planning* 1, 2003, 17-27.

¹³ Centre for Reproductive Rights, *In harms way: The impact of Kenya's restrictive abortion law*, 2010, 9, 25.

¹⁴ Maingi G, The Kenyan Constitutional reform process: A case study of the work of FIDA Kenya in securing women's rights, *15 Feminist Africa*, 2011, 73.

abortion when the life and/or health of the mother were in danger.¹⁵ Religious groups were adamantly against this stating that the constitution ought to state that life begins at conception and ensuring that abortion is only allowed during emergency treatment, when the life of the mother is in danger.¹⁶ This debate culminated in the compromise that is article 26. Though this article explicitly states that life begins at conception and that abortion is illegal, subsection 4 permits abortion when in the opinion of a trained medical professional, the life or health of the mother is in danger; in cases of emergency treatment; and as permitted in any other written law.

On paper, these provisions relax the severe laws that restricted termination of pregnancies to situations where the life of the mother was in danger.¹⁷ However, with over six years under its belt, the provision on paper isn't translating to practical application on the ground. Statistical and anecdotal evidence shows that women, even women who would fall under the protected class in Article 26(4), are still resorting to unsafe abortions. The Kenya National Human Rights Commission (KNHRC) noted that a lack of information about Kenya's abortion law, on the part of healthcare providers and the general public forces women who genuinely qualify for lawful termination of pregnancy, in line with the Kenya Constitution 2010, to resort to unsafe abortions, endangering their own lives.¹⁸ Because of this, the maternal mortality and morbidity rate is still as high as it was before 2010. In a 2012 study conducted by the Ministry of Health and other interested parties, it was revealed that the average annual post abortion care caseload is 157,762 (48 out of every 1000) women with a little over 100,000 receiving this care from public hospitals.¹⁹ Though the morbidity rates were not measured, the 2014 Kenya Demographics and Health Survey placed the mortality rate at 362 deaths per 100,000 live births.²⁰

The lack of practical application of the provisions could be attributed to the uncertainty surrounding the legal provisions of Article 26(4). To begin with, medical practitioners are unsure of the circumstances when abortion is legal. In line with its functions, the Ministry of Medical

¹⁵ Dagne T, *Kenya: Current conditions and the challenges ahead*, Diane Publishing, Pennsylvania, 2010, 1.

¹⁶ Maingi G, *The Kenyan Constitutional reform process: A case study of the work of FIDA Kenya in securing women's rights*, 78.

¹⁷ Section 71, *Repealed Constitution of Kenya* (1963).

¹⁸ Kenya National Human Rights Commission, *Realising sexual and reproductive health rights in Kenya: a myth or reality?* 2012, 47.

¹⁹ African Population and Health Research Center, Ministry of Health, Kenya, Ipas, and Guttmacher Institute, *Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study*, 2013, 7.

²⁰ This survey does not measure maternal deaths occurring due to injuries after unsafe but effective abortions, effective here meaning that it does not result in a live birth.

Services released policy guidelines ‘the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion’ in October 2012 to aid in interpreting the constitutional provisions for abortion.²¹ These guidelines were repealed arbitrarily in 2013 when the Director of Medical Services wrote a letter to all health workers directing them not to participate in any training on safe abortions and warned them of dire legal consequences if they did so.²² This left a legal lacuna causing legitimate medical practitioners to hesitate in performing terminations for fear of legal repercussions, even when such terminations would fall under the caveat of Article 26(4).²³ This triggered the institution of a suit against the government by FIDA and the Centre for Reproductive Rights on behalf of an adolescent rape survivor suffering from kidney failure and other health complications due to an unsafe abortion.²⁴ Hers is not the only story. Many other women continue to suffer due to the government’s reluctance to gazette policy guidelines regarding abortion. Reproductive health advocates argue that the lack of guidelines necessarily means that no resources can be allocated towards training medical practitioners in performing safe abortions and providing other critical resources to aid health facilities in delivering this service.²⁵

Generally, States have a duty to ensure the enforcement and protection of rights. Kenya specifically has a constitutional duty set out in Article 21 to observe, respect, protect, promote and fulfil rights expressed in the Bill of Rights. This includes the right to the highest attainable standard of reproductive health²⁶ including the legal entitlement to abortion created by Article 26(4). This paper argues that these duties require Kenya to do everything possible to ensure attainment of these rights and encompass the duty to ensure clear interpretation of the provisions of Article 26(4). It should be noted that an attempt has been made to legislate on Article 26(4) in the Health Bill. However, the attempt remains woefully insufficient as the Bill only provides for

²¹ <http://www.ipas.org/en/News/2012/October/Kenya-approves-new-guidance-for-provision-of-safe-abortion-care.aspx> on 4 February 2017.

²² *Federation of Women Lawyers (Fida-Kenya) & 3 others v Attorney General & 2 others* [2016] eKLR.

²³ Interview with Dr John Nyamu by Ipas.

²⁴ *Federation of Women Lawyers (Fida-Kenya) & 3 others v Attorney General & 2 others*

²⁵ Chimbi J, Government urged to release safe abortion guidelines, Daily Nation, 22 June 2016

<http://www.nation.co.ke/news/Govt-urged-to-release-safe-abortion-guidelines/1056-3261678-psus7rz/index.html> on 6 February 2017.

²⁶ Article 43(1)(a), *Constitution of Kenya* (2010).

the right to reproductive health services and tasks the government with the corresponding duty to ensure the implementation of this right.²⁷

1.2 Statement of the problem

It is evident that lack of a clear framework governing the exercise of Article 26(4) has had and continues to have effects on women's life and maternal health. This is in flagrant violation of their rights to the highest attainable standard of health including reproductive health care under Article 43(1)(a). Medical practitioners do not perform abortions, as there is uncertainty as to what constitutes a legal abortion, and they fear legal repercussions. Due to the 'chilling effect'²⁸ that criminalisation of abortion has on doctors, women are unable to access information on safe and legal abortion services and opt for unsafe means of performing abortions leading to injuries to their health and even fatal consequences. In light of the above, the study argues that Kenya ought to exercise its duties to protect, respect, promote and fulfil the right to reproductive health by providing a clear framework guiding legal abortions in order to ameliorate the on-going violations of this right.

1.3 Research propositions

This study hypothesises that:

- Without the express provision of a right to abortion, international human rights law guarantees abortion through the right to health including reproductive health, the right to life, freedom from cruel, inhuman and degrading treatment and the right to privacy.
- Article 43 of the Constitution of Kenya creates a right to the highest attainable standard of reproductive health including the legal entitlement to safe abortion services as per article 26(4).
- By not clarifying the circumstances under which abortion is permissible under article 26(4) through law, the State has failed to fulfil its duties to observe, respect, protect,

²⁷ Clauses 6 and 15, *Health Bill* (2016).

²⁸ The chilling effect is a term used to refer to discouragement or inhibition of legitimate exercise of a legal right for fear of penalty or sanction <http://law.yourdictionary.com/chilling-effect> on 20 December 2017.

promote and fulfil women's right to the highest attainable standard of reproductive health services.

- Enacting laws or policies that interpret and clarify the meaning of article 26(4) will enable the enjoyment of reproductive health rights.

1.4 Chapter Breakdown

Chapter one is the introduction chapter and it starts by giving a brief history of abortion law and policy in Kenya and the United Kingdom, incorporating key cases and legislative and constitutional provisions. The chapter then assesses the current abortion situation in Kenya, before laying out the problem.

Chapter two shall lay out a conceptual framework for the thesis. It shall aim to prove that under international human rights law, abortion warrants a human-rights based approach and thus, states have certain duties to be exercised towards their realisation. The chapter shall use formulations of sexual and reproductive health rights that incorporate various other human rights including privacy, freedom from torture, and cruel, inhuman and degrading treatment to illustrate that abortion should be treated as a right.

Chapter three shall assess Kenya's duties, both under national and international law, to observe, respect, protect, promote and fulfil reproductive rights. This chapter shall include discussions of what each duty entails, and shall refer to national and international cases on State duties with regard to human rights. It shall also utilise general comments and recommendations issued by international human rights bodies on State duties regarding particular rights. This will be done with the aim of illustrating how Kenya can exercise its duties with regard to legal abortions in the context of the right to reproductive health.

Chapter four shall lay out key provisions that ought to be in any legislation or policy on abortion. The chapter shall refer to legislation and policies from other jurisdictions for example the United Kingdom and South Africa, to illustrate vital provisions.

Chapter five shall conclude the research findings. It shall give recommendations to Kenya on how best to fulfil its duties and ensure actual implementation of article 26(4).

CHAPTER TWO: A HUMAN RIGHTS-BASED APPROACH TO ABORTION

2.1 Introduction

The previous chapter has made it clear that the major problem faced by women seeking legal abortions is the lack of a framework within which they can exercise this right. This chapter aims to prove that safe abortion is encompassed in the right to reproductive health, and warrants a human-rights based approach.

While the State as a general rule ought to enforce the law, human rights require a higher duty to ensure that they are fulfilled. Compelling Kenya to take active measures pursuant to their duties²⁹ to ensure realisation of human rights demands that abortion is a right or at the very least, warrant a human rights based approach. It cannot be assumed that the fact that the abortion exception is in the Constitution makes it a right (and therefore ascribes requisite duties to the State). In fact the phrasing of the provision itself: ‘Abortion is not permitted unless...’ would lead one to suspect that this was the intention of the drafters of the Constitution. Even in the international sphere an explicit ‘right to abortion’ doesn’t exist instead preferring to term abortion as warranting a human rights-based approach.³⁰ Why then would a provision for abortion still require certain duties on the State? This Chapter seeks to answer that question by showing that despite its uncertain status as a right, abortion still warrants a human-rights based approach as per international human rights law.³¹

A human rights-based approach to abortion recognises the existence of rights to which access to safe abortion is linked and reinforces the capacities of duty bearers (usually the government) to respect, protect and fulfil these rights.³² Regional and international human rights bodies are reluctant to classify abortion itself as a right, and instead choose to frame it in terms of other

²⁹ Kenya’s Constitution espouses specific duties to be exercised in ensuring constitutional rights and fundamental freedoms; Article 21(1), *Constitution of Kenya* (2010).

³⁰ Tozzi P, International Law and the right to abortion, Catholic Family and Human Rights Institute, Legal Studies Series Number 1, 2010, 1.

³¹ Ngwena C, *Africa’s abortion laws: A handbook for judges*, Ipas Africa Alliance, Nairobi, 2014, 37.

³² Kenya National Human Rights Commission, *Realising sexual and reproductive health rights in Kenya: A myth or reality?* 2012, 22.

human rights. Cook, Dickens and Fathalla theorise that abortion is a reproductive right, and reproductive rights include the rights to: life, the highest attainable standard of health, privacy, access to information, be free from cruel, inhuman and degrading treatment, among others.³³

2.2 The development of reproductive rights

Reproductive rights first appeared in the international sphere as a subset of human rights in the 1968 Proclamation of Teheran. The proclamation gave parents the basic human right to freely determine the number and spacing of their children.³⁴ This right was then affirmed by the United Nations General Assembly (UNGA) in 1969 terming it as a 'parent's exclusive right'.³⁵

The catalysts for the movement to recognise reproductive rights as human rights in the international sphere were the International Conference on Population and Development (ICPD) held in Cairo in 1994, and the Fourth World United Nations Conference on Women held in Beijing the following year.³⁶ While none of the outcome documents advocate for a right to abortion instead framing unsafe abortions as a public health issue (as opposed to a human rights one), they nevertheless reflect the notion that reproductive health is a basic human right.³⁷ The ICPD Programme of action for instance, tenders a definition of reproductive health:

Reproductive health is a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes... reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to

³³ Cook R, Dickens B and Fathalla M, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law*, Oxford University Press, Oxford, 2003.

³⁴ UNGA, *Proclamation of Tehran*, UN A/RES/2442, 19 December 1968.

³⁵ UNGA, *Declaration on Social Progress and Development*, UN A/RES/2542, 11 December 1969.

³⁶ Zampas C, Gher J, 'Abortion as a Human Right – International and Regional Standards,' *8 Human Rights Law Review* 249, 2008, 252.

³⁷ United Nations Population Fund, 'Programme of Action' International Conference on Population and Development, 21st special session of the General Assembly, New York, 30 June – 2 July 1999, iii.

make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.³⁸

The Beijing Platform further explained that reproductive rights embrace certain human rights that are already recognised in national laws and international human rights documents.³⁹

In 2003, WHO developed guidance on safe abortion as a public health response to the global persistence of unsafe abortion.⁴⁰ That same year, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol) in Africa was adopted in July,⁴¹ and it provided for the right to reproductive health and an explicit right to therapeutic abortions.⁴²

2.3 Kenya and the Maputo Protocol

The Maputo Protocol is a progressive legal framework that addresses the social, political and economic rights of women in Africa.⁴³ Among other progressive rights on marriage, divorce, FGM and other contentious issues, the Maputo protocol includes a section on health and reproductive rights.⁴⁴ The most unique aspect of this sections is its inclusion of a right to '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.'⁴⁵ It is the only binding international or regional human rights instrument that specifically ascribes abortion as a right.⁴⁶

Kenya ratified the Maputo Protocol in 2010⁴⁷ and as per the Constitution, the protocol is now part of Kenyan law.⁴⁸ This would be an easy fix to the dilemma that this chapter is trying to solve

³⁸ United Nations Population Fund, Programme of Action, paras 8.25 and 12.17.

³⁹ United Nations, Report of the Fourth World Conference on Women, Fourth World Conference on Women, Beijing, 1995 para 95.

⁴⁰ Ngwena C, Africa's abortion laws: Handbook for judges, 43.

⁴¹ <http://maputoprotocol.com/about-the-protocol> on 10 November 2017.

⁴² Article 14(2), *Maputo Protocol*, (11 July 2003) 1520 UNTS 26363.

⁴³ Waweru N, The Star, What you need to know about the Maputo Protocol, 7 April 2015 https://www.the-star.co.ke/news/2015/04/27/what-you-need-to-know-about-the-maputo-protocol_c1125094.

⁴⁴ Article 14, *Maputo Protocol*.

⁴⁵ Article 14(2)(c), *Maputo Protocol*.

⁴⁶ The Parliamentary Assembly of the Council of Europe has stated that abortion is a right, but in a non-binding report; Council of Europe Parliamentary Assembly, Resolution 1607 on access to safe and legal abortion in Europe, 15th sitting, Strasbourg, 16 April 2008.

⁴⁷ Dechert LLP, The Lawyer's Circle, Oxfam, SOAWR and FIDA Kenya, Implementing the Protocol on the rights of women in Africa: Analysing the compliance of Kenya's legal framework, 2014, 3.

as it would mean that Kenyan law provides for a right to therapeutic abortion. However, Kenya made a reservation upon ratification on article 14(2)(c) on the right to abortion stating that it 'does not consider as binding upon itself the provisions of ... Article 14(2)(c) which is inconsistent with the provisions of the Laws of Kenya on health and reproductive rights'.⁴⁹ While neither an express right to reservation nor even a procedure to file reservations is provided for by the African Charter,⁵⁰ it is common practice for state parties to submit reservations while ratifying a protocol. Arguably, there is no evidence to suggest that Kenya's reservation wasn't accepted and thus, abortion cannot be viewed as a right in Kenya solely by dint of article 14(2) (c).

2.3 Abortion and the right to the highest attainable standard of reproductive health

It is unclear whether the normative content of the right to reproductive health includes the right to safe abortion. The right to the highest attainable standard of health including reproductive health is provided for as an economic, social and cultural right in Kenya's Constitution.⁵¹ While there lacks a straightforward answer within international human rights law, this chapter argues that a right to safe abortion can be implied in the right to reproductive health due to the latter's content on maternal health. Most works that discuss abortion and reproductive rights use maternal mortality and morbidity as a starting point.⁵² Maternal health is encompassed in the right to reproductive health, and maternal mortality and morbidity due to unsafe abortion are usually termed as violations of this right. Preventing maternal mortality and morbidity due to unsafe abortion is a state duty in realising the right to reproductive health. It follows that the issue of right of access to a safe, legal abortion falls squarely within the right to reproductive health.

⁴⁸ Article 2(6), *Constitution of Kenya* (2010): 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

⁴⁹ Asuagbor L, "Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa" 60th Meeting of the Commission on the status of women, New York, 18 March 2016.

⁵⁰ Ziemela I, Lasma L, 'Reservations to human rights treaties: From draft guideline 3.1.12 to guideline 3.1.5.6' 24 *European Journal of International Law* 4, 2013, 1141.

⁵¹ Article 43(1)(a), *Constitution of Kenya* (2010).

⁵² See generally, Hendriks A, 'Promotion and Protection of Women's Right to Sexual and Reproductive Health under International Law: The Economic Covenant and the Women's Convention' 44 *American University Law Review*, 1123 (1995); Hill J, 'Reproductive Rights as Health Care Rights' 18 *Columbia Journal of Gender and Law*, 501 (2009); Balogun V and Durojaye E, 'The African Commission on Human and People's Rights and the promotion and protection of sexual and reproductive rights' 11 *African Human Rights Law Journal*, 2 (2011).

The Maputo protocol also includes reproductive rights (including the right to safe therapeutic abortions) within the broader context of the right to health.⁵³ In its interpretative comment, the African Commission on Human and Peoples' Rights (ACHPR) makes it clear that reproductive rights encompass various other human rights. When discussing the abortion provision, the Commission makes reference to the right to equality and non-discrimination, right to privacy, the right to be free from cruel, inhuman or degrading treatment among others.⁵⁴

WHO defines health as 'a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity'.⁵⁵ CESCR has made it clear that freedom to control one's health and body including sexual and reproductive freedom is a core element of the right to health.⁵⁶ In the same vein, states are required to remove all barriers interfering with access to health services, education and information including in the area of sexual and reproductive health.⁵⁷

2.4 Human rights based approach to abortion in international law

While most international and regional human rights instruments do not provide for an explicit right to abortion, human rights bodies have made it clear that abortion warrants a human rights based approach when interpreting treaties. WHO⁵⁸ has noted that abortion touches on the right to life, the right to non-discrimination, the right to the highest attainable standard of health, the right to be free from cruel, inhuman and degrading treatment and the right to privacy, confidentiality, information and education.⁵⁹ In interpreting rights within their conventions, treaty-bodies have also espoused a human-rights based approach to abortion, obliging state duties with regard to particular rights.

⁵³ Article 14(2)(c), *Maputo Protocol*.

⁵⁴ ACHPR, *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*, 2014, paras. 31 – 36.

⁵⁵ WHO, *Constitution of the World Health Organization*, 22 July 1946, 4 UNTS 221, preamble.

⁵⁶ CESCR *General Comment No. 14: The right to the highest attainable standard of health*, 11 August 2000, para 8.

⁵⁷ CESCR, *General Comment No.14*, para, 21.

⁵⁸ Though not necessarily a human rights body, it is mandated with ensuring the realisation of the highest attainable standard of health for all; <http://www.who.int/about/en/> on 24 January 2018.

⁵⁹ WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems*, 88

2.4.1 Abortion and the right to life⁶⁰

While the right to life is usually invoked by it has been established that the right to life should not be understood in a restrictive manner 'but requires States to take positive steps to protect it, including the measures necessary to ensure that women do not resort to clandestine abortions which endanger their life'.⁶¹ A number of UN human rights bodies have stated that unsafe abortions are a violation of the right to life.⁶²

In interpreting Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), its constitutive body –the Human Rights Committee (CCPR)- for instance has been quite vocal in asserting that restrictive laws whose consequence is women resorting to unsafe abortions violate women's right to life. This is especially prominent in its Concluding Observations on the right to life. It has noted that the lack of an abortion provision for rape victims constituted a violation of the right to life.⁶³ It also notes in General Comment No. 28, that imposing a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion is a potential violation of the right to life.⁶⁴

This was also noted by the Inter-American Commission of Human Rights (IACmHR) in the Baby Boy case where an American doctor was prosecuted for manslaughter after providing an abortion to a teenage girl at her behest and that of her mother. A claim was brought to the Commission on the basis that the right to life was absolutely protected under article 1 of the American Declaration of Rights and Duties of Man. The commission held that the protection was not absolute as it would conflict with state abortion laws.⁶⁵

While the International Convention on the Elimination of all Forms of Discrimination against Women doesn't confer a right to life, the Committee on Elimination of all Forms of

⁶⁰ Article 6(1), ICCPR, 19 December 1966, 999 UNTS 171.

⁶¹ CCPR, *General Comment 6 on Article 6 in Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, 2003, 114.

⁶² CEDAW *Concluding observations on Chile*, 22 June 1999.

⁶³ CCPR *Concluding Observations on Ecuador*, 18 August 1998, Para. 11 and 15.

⁶⁴ CCPR *General Comment No. 28: Article 3 (Equality of rights between men and women)*, 29 March 2000, para 20.

⁶⁵ *White and Potter v United States*, IACmHR Case 2141 (1981).

Discrimination Against Women (CEDAW) has recognised that the issue of maternal mortality is as a result of unsafe abortions and raised the issue as a violation of the right to life.⁶⁶

2.4.2 Freedom from discrimination

Sunstein argues that women's reproductive capacities belong to them and abortion restrictions selectively turn these capacities into something for the use and control of others while no parallel disability is imposed on men. This, he states, violates women's right to be free from sex discrimination by the law and a law that is targeted solely at women inherently contains a *de jure* distinction on the basis of sex.⁶⁷

In *LC v Peru*, CEDAW held that lack of legislative and administrative measures regulating access to therapeutic abortion condemns women to legal insecurity as doctors may subject them to their own prejudiced opinions on abortion. This in effect, leads to discrimination as the woman is unable to enjoy her right to therapeutic abortion. This case concerned a Peruvian teenager who was sexually abused and became pregnant as a result. In distress, she attempted suicide by jumping off a building. At the hospital she was given a psychological evaluation which determined that carrying the pregnancy to term would cause her severe emotional distress. She had also sustained severe injuries which the hospital refused to operate on due to the risk posed to the unborn baby.⁶⁸

ACHPR has stated that access to information and health services for safe abortions ensures that women can exercise their rights without discrimination. Subjecting women to criminal proceedings or otherwise imposing sanctions on women for benefitting from abortion services violates women's right to be free from discrimination.⁶⁹ CEDAW reflects this view stating that criminalising reproductive health services that only women need is discriminatory in itself.⁷⁰

⁶⁶ CEDAW Concluding Observations regarding Belize, 1 July 1999, para. 56

⁶⁷ Sunstein C, 'Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)'

⁹² *Columbia Law Review*, 1 (1992), 31 -36.

⁶⁸ *LC v Peru*, CEDAW Comm No.22/2009 (21 October 2011) para 1-3.1, 7.2.

⁶⁹ ACHPR General Comment No. 2, para 31 and 32.

⁷⁰ CEDAW General Recommendation 24: women and health, 2 February 1999, para 31(c).

2.4.3 Right to privacy

The concept underlying the recognised international right to privacy is that there are areas of citizen's lives that are outside the neither the government nor the public should concern itself with.⁷¹ No case is more illustrative of this than *Roe v Wade*. In this case, the Supreme Court held that the right to privacy, founded in the concept of personal liberty, is broad enough to cover a woman's choice in terminating her pregnancy.⁷²

ACHPR has previously held that for women who have the right to therapeutic abortion, the practice of interrogation by healthcare providers, the police and/or judicial authorities is a violation of their right to privacy and confidentiality.⁷³ Requiring doctors to report women who have undergone abortions could also lead to violations of this right.⁷⁴

2.4.4 Freedom from torture and cruel, inhuman and degrading treatment

Characterisations of lack of access to abortions as cruel, inhuman or degrading treatment are rife in international and regional human rights tribunals. In the 2005 case *KL v Peru*,⁷⁵ CCPR received a communication on behalf of a Peruvian minor, KL. KL was a minor who became pregnant at the age of 17. She was given a scan which showed that she was carrying an anencephalic foetus, anencephaly being a condition that is fatal to the foetus in all cases. She was advised to terminate the pregnancy as continuation of the pregnancy risked her life. Both a psychiatrist and a social worker wrote reports advising for termination as KL was in distress and showed symptoms of depression. All these were delivered to the hospital director of the local hospital. The director however, refused to authorize an abortion as per Peru's Criminal Code abortion is not exempted for foetal abnormalities. KL carried her pregnancy to term, delivered and her baby died four days later causing her to fall into a deep and severe depression. Among

⁷¹ Report of the Secretary-General, *Respect for the Privacy of Individuals and the Integrity and Sovereignty of Nations in the Light of Advances in Recording and Other Techniques*, 29 U.N. ECOSOC 10, 1973, U.N. Doc. E/CN.4/1116.

⁷² *Roe v Wade* (1973), Supreme Court of the United States.

⁷³ ACHPR General Comment No. 2, para 34.

⁷⁴ CCPR General Comment 28: *Equality of Rights Between Men and Women (Article 3)*, in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 168,

⁷⁵ *KL v Peru*, CCPR Comm No. 1153/2003 (24 October 2005) para 6.3.

others, KL stated that her treatment amounted to cruel and inhuman treatment as per article 7 of the ICCPR. CCPR ruled for her stating that the foreseeable mental anguish that KL experienced amounted to cruel and inhuman treatment.

The Committee against Torture (CAT) has also weighed in on the issue, raising concerns about restrictive abortion laws especially with regard to rape. It has stated that such laws 'put women's physical and mental health at grave risk and that constitutes cruel and inhuman treatment'.⁷⁶ CCPR has also averred that when looking at whether States have complied with the duty to guarantee the right to freedom from cruel, inhuman and degrading treatment, it will have regard to whether the State 'gives access to safe abortion to women who have become pregnant as a result of rape'.⁷⁷

2.4.5 Right to enjoy the benefits of scientific progress

The right to benefit from scientific progress is particularly salient in any discussion on abortion as numerous safe, effective and low-cost health interventions, such as medical abortions, can substantially improve women's access to safe abortion services, thereby reducing the incidence of unsafe abortion, and decreasing maternal morbidity and mortality rates.⁷⁸ In the Kenyan context, one could argue that Kenya's Director of Medical Services' threat of legal sanction for participating in any training on the use of Medabon (Mifepristone + Misoprostol)⁷⁹ violates women's right to benefit from scientific progress.

2.5 Conclusion

In conclusion, it is clear that abortion is contained in the right to reproductive health and warrants a human rights-based approach. Clearly, Kenya is bound to eliminate regulatory and administrative barriers that impede women's access to safe abortion services or it will violate its treaty and constitutional obligations to respect, protect and fulfil the right to life, the right to non-

⁷⁶ *CAT Conclusions and recommendations on Peru*, 19 May 2006, para 23

⁷⁷ *CCPR General Comment No. 28*, para 11

⁷⁸ Centre for Reproductive Rights, *Safe and legal abortion is a woman's human right*, 2011, 5.

⁷⁹ *FIDA-Kenya and 3 others v the Attorney General and 2 others* [2016] eKLR

discrimination, the right to the highest attainable standard of health, the right to be free from cruel, inhuman and degrading treatment and the right to privacy, confidentiality, information and education.

CHAPTER THREE: KENYA'S DUTIES IN ENSURING FULFILMENT OF RIGHTS

3.1 INTRODUCTION

Legal rights generally have no use if they lack a framework to facilitate their genuine exercise. This is the rationale behind the imposition of obligations (whether positive or negative) by international human rights instruments on state parties. The previous chapter set the stage by proving that abortion is encompassed in the right to reproductive health and that it requires a rights-based approach. This chapter shall examine the duties that bind Kenya in realising this right. As the right to safe, legal abortion is inextricably linked with the right to reproductive health, it shall be treated as an economic, social and cultural right (ESCR) for the purposes of this chapter.

International human rights law provides for three pronged typology of duties: respect rights by not violating them, protect rights by taking positive action against third party violators and to fulfil rights by employing the authority of the instruments of state to afford individuals the full benefit of human rights. ESCR require active intervention on the part of governments and cannot be realised without such intervention.⁸⁰

3.2 The nature of Kenya's obligations

Generally, the international human rights strategy to ensure state implementation of rights is two-pronged. First, it imposes *negative* obligations by prohibiting state interference in certain aspects of citizens' lives. However, because of its status as the most proper vehicle to ensure implementation of certain rights, states have positive obligations requiring them to provide goods, services, opportunities and protections to ensure realisation of rights.⁸¹ Traditionally, civil and political rights are seen as imposing negative obligations while economic, social and cultural rights (to which the right to health is a part) impose *positive* obligations on states to progressively

⁸⁰ Alston P, Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' 9 *Human Rights Quarterly*, 156 (1987).

⁸¹ Donnelly J, *Universal human rights in theory and in practice*, 3ed, Cornell University Press, Ithaca, 2013, 34.

realise them.⁸² Whether economic, social and cultural rights impose negative or positive obligations or whether they impose binding obligations as opposed to 'goals to be achieved'⁸³ has been a matter for debate. The Kenyan Constitution lays out a unilateral provision on the nature of the state's duties in realising all rights in the Bill of Rights. It states that: 'It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights'.⁸⁴ For ESCR, there is an additional requirement to take legislative, policy or other measures to achieve the progressive realisation of ESCR.⁸⁵

The obligation to **respect**, requires States to refrain from any actions that violate the integrity of the individual or their freedom.⁸⁶ This duty is generally described as negative as it requires states to be 'hands-off' or merely reflects a 'minimalist undertaking'.⁸⁷ In the context of realising reproductive rights, states must abstain from interfering with the enjoyment of rights, usually occasioned by denying or limiting access to sexual and reproductive health services.⁸⁸ Women's regulation of their reproductive capacities may be deemed a violation of the State's duty to respect their private life. However, the State does not violate this duty if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁸⁹ Further, the nature and extent of the limitation in article 26(4) is (arguably) necessary to protect the right to life of the unborn. This was the position in the *Bruggemann* case where the European Commission of Human Rights (ECmHR) held that Germany's newly enacted restrictions on abortions did not violate the duty to respect private life as the state was measuring this right against the right to life of the unborn.⁹⁰

⁸² Sepulveda M, *The Nature of obligations under the International Covenant on Economic, Social and Cultural Right*, Intersentia, Antwerp, 2003, 2-3.

⁸³ Cranston M, *What are human rights?* The Bodley Head, London, 1973.

⁸⁴ Article 21(1), *Constitution of Kenya* (2010).

⁸⁵ Article 21(2), *Constitution of Kenya* (2010)

⁸⁶ Hendriks A, 'Promotion and Protection of Women's Right to Sexual and Reproductive Health under International Law: The Economic Covenant and the Women's Convention'.

⁸⁷ Steiner H, Alston P, Goodman R, *International human rights in context: Law, politics, morals*, 3ed Oxford University Press, Oxford, 2007, 187.

⁸⁸ Kenya National Human Rights Commission, *Realising sexual and reproductive health rights in Kenya: A myth or reality?* 19.

⁸⁹ Article 24, *Constitution of Kenya* (2010).

⁹⁰ *Bruggeman and Scheuten v Federal Republic of Germany*, ECmHR, 1981, paras. 50 to 66.

The duty to **protect** obliges the State and its agencies to act to prevent human rights violations by private parties.⁹¹ This was stated in *X and Y v The Netherlands* where the court held that states are required to take positive measures concerning events that occurred between private individuals where human rights had been violated. This obligation means that states should take steps to prevent third parties from jeopardising the right to reproductive health of others.⁹² This obligation could be termed 'positive' as it must be implemented immediately and requires the state to intervene.⁹³ Arguably, the State has to intervene to protect women from unsafe abortions as their right to reproductive health can be violated if quacks perform unsafe procedures resulting in ill consequences to health.

The duty to **promote** is a new addition and goes beyond the typology of state duties in international human rights law. It generally necessitates that the State educate its citizenry on its rights.⁹⁴ It also obliges states to create legal, economic and social conditions that enable women to exercise their reproductive rights.⁹⁵ To fulfil this obligation, Kenya not only needs to ensure that women who would fall under the exception in article 26(4) are aware of their right to a safe abortion but must also educate communities and train health-care workers.⁹⁶

Fulfilling rights requires that states take appropriate legislative, administrative, budgetary, judicial and other measures to the maximum extent of their available resources to ensure that women realise their rights to health care.⁹⁷ This is done by adopting relevant laws, policies and programs that ensure *de jure* and *de facto* fulfilment of reproductive rights.⁹⁸ Therefore, if the government fails to address major issues affecting women's health for example; mortality and morbidity due to unsafe abortions, it may be in breach of its duty.⁹⁹ Many of the specific duties elucidated by treaty bodies for the realisation of reproductive health can be viewed as part of the

⁹¹ Cook R, Fathalla M, Duties to implement reproductive rights, 67 *Nordic Journal of International Law*, 1 (1998).

⁹² Kenya National Human Rights Commission, *Realising sexual and reproductive health rights in Kenya: A myth or reality?* 19.

⁹³ *X and Y v The Netherlands*, ECtHR Judgement of 26 March 1985.

⁹⁴ Japhet B, *The Inclusion of Socio-Economic Rights in the 2010 Constitution: Conceptual and Practical Issues* Kenyan Section of the International Commission of Jurists, Judiciary Watch Report, 2011, 2.

⁹⁵ ACHPR General Comment No. 2, para 44.

⁹⁶ ACHPR General Comment No. 2, para 44.

⁹⁷ CESCR, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26 1997; CEDAW General Comment No. 24: *The right to health*, para 17.

⁹⁸ ACHPR General Comment No. 2, para 45.

⁹⁹ Cook R, Fathalla M, Duties to implement reproductive rights, 7.

duty to fulfil. This is likely because states are meant to fulfil rights by employing governmental means to afford individuals the full benefit of their human rights.¹⁰⁰

Cook and Fathalla term the obligation of the state to remove legal and administrative barriers to legal abortion services as a part of the duty to fulfil.¹⁰¹ This obligation has been echoed by many bodies in the international sphere and includes the duty to repeal restrictive abortion laws and replace it with enabling measures.¹⁰² The first mention of repealing restrictive abortion laws is the Beijing Platform which requires states to consider ‘reviewing laws containing punitive measures against women who have undergone illegal abortions’.¹⁰³ CESCR reflected this ambition in its General Comment 22 arguing that the realisation of women’s rights and gender equality requires states to repeal or reform any discriminatory laws, policies, and practices in this area. Laws that criminalise or restrict abortion are touted by the comment as examples of laws that ought to be repealed.¹⁰⁴ The Human Rights Committee also leaves no room for doubt stating: ‘in cases where abortion procedures may lawfully be performed, all obstacles to obtaining them should be removed’.¹⁰⁵ The CEDAW Committee has also recommended taking steps towards decriminalising abortions by obliging states to modify or repeal such laws.¹⁰⁶

Perhaps the most relevant obligation to this paper is the duty to provide a legislative framework to govern the exercise of the right to safe abortion where it has been provided for. This obligation is especially relevant to the Kenyan case as the right to a therapeutic abortion exists in the Constitution but there are no guidelines, policies or legislation operationalising it. This obligation was first set out in UNGA’s review and appraisal of the implementation of ICPD in 1999. It stated that in operationalising the right to reproductive health, health systems should train and equip health-service providers and should take other measures to ensure that such abortion is safe and accessible where it is legal.

¹⁰⁰ *CEDAW General Comment: Women and Health*, para 13 -15

¹⁰¹ Cook R, Fathalla M, ‘Duties to implement reproductive rights’, 7-9.

¹⁰² Nnaemeka O, Ezeilo J, *Engendering human rights: Cultural and socioeconomic realities in Africa*, Springer, New York, 2005, 89.

¹⁰³ United Nations, *Report of the Fourth World Conference on Women, Fourth World Conference on Women, Beijing, 1995*, para 106k.

¹⁰⁴ *CESCR General Comment 22*.

¹⁰⁵ *CCPR Concluding Observations on Argentina*, UN Doc. CCPR/CO/70/ARG, 15 November 2000.

¹⁰⁶ Committee on the Elimination of Discrimination Against Women, *Report of 15th Session*, UN Doc. A/51/38 (1996), para. 131.

This position has also been set out in multiple international human rights cases. The first of these cases was *KL v Peru* which was decided in 2005 by the Human Rights Committee. The CCPR found that Peru had breached its obligations by denying access to a therapeutic abortion permitted by its own law. CCPR's judgement rested on (among others) the lack of any administrative procedure that KL could use to obtain an abortion.¹⁰⁷

Tysiac v Poland which was decided in 2007. The case concerned a Polish woman who suffered from severe myopia while she was pregnant with her third child. She was warned that delivery would likely escalate her disease and she tried to get an abortion. Her requests were denied by several doctors and she delivered her third child resulting in her sight deteriorating extremely. The European Court held that Polish law did not contain any effective mechanisms to determine whether she met the conditions for a lawful abortion. The Court specifically stated:

‘...once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it... the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman’s legal position’.¹⁰⁸

The court maintained this position in *A, B and C v Ireland* in 2010 and *P and S v Poland* in 2012. In *A, B and C v Ireland*, the third applicant discovered she was pregnant while on chemotherapy and was advised against continuing with chemotherapy for the safety of the child. She was unable to get any further information on whether she could get an abortion in Ireland on these grounds. The Court, in recognising that the problem was that there was no authority C could approach to get a legally authoritative determination of what her rights were in her situation, held that legislation specifying the conditions governing access to a lawful abortion and procedures to be followed, would be an appropriate means in implementing Ireland’s abortion law.¹⁰⁹ In *P and S v Poland*, a minor was denied an abortion despite the fact that she was raped and had parental

¹⁰⁷ *KL v Peru*, HRC, 24 October 2005, communication 1153/2003.

¹⁰⁸ *Tysiac v Poland*, European Court of Human Rights, Judgement of 20 March 2007, para 116.

¹⁰⁹ *A, B and C v Ireland*, European Court of Human Rights, Judgement of 16 December 2010, para 26.

permission. The Court held that in addition to subjecting P to inhuman and degrading treatment, Poland's lack of a clear legal framework increased her difficulties.¹¹⁰

3.3 Progressive realisation of right to safe, legal abortion in Kenya

The Kenyan Constitution portends the difficulty of realising economic, social and cultural rights and allows the State to exercise its duties with an aim of progressively achieving realisation of ESCR. This is a direct reflection of the nature of Kenya's obligations in the Covenant for Economic, Social and Cultural Rights (CESCR).¹¹¹ Progressive realisation acknowledges the resource and knowledge constraints faced by many countries, including Kenya¹¹² and allows realisation of rights to be achieved over time.

The fact that rights can be realised over time does not rob this duty of all meaningful content. The covenant imposes an obligation to move as expeditiously and effectively as possible towards that goal.¹¹³ Further, there are obligations considered to be of immediate effect to meet the minimum essential levels of each of the rights called minimum core obligations. If a State fails to meet these because it does not have the resources, it must demonstrate that it has made every effort to use all available resources to satisfy these obligations.¹¹⁴ Some of these minimum core obligations in the context of the right to safe abortion include: assessing the state of enjoyment of the right legal, safe, abortion; formulating strategies and plans, incorporating indicators and timebound targets in the realisation of this right, adopting the necessary laws and policies, and making adequate funds available to put the plans and strategies into practice and establishing grievance mechanisms so that individuals can complain if the State is not meeting its

¹¹⁰ *P and S v Poland*, ECtHR, Judgement of 30 October 2012. Before P and S, the court pronounced itself on the same issue in *RR v Poland*, ECtHR, Judgement of 26 May 2011, para 200 where it held that the state is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion.

¹¹¹ This is a direct reflection of Kenya's obligations under Article 2(1), Convention on Economic, Social and Cultural Rights.

¹¹² Dias C, 'Towards effective monitoring of compliance with obligations and progressive realisation of ESCR', United Nation Development Program, Second Global Forum on Human Development, Rio de Janeiro, 9–10 October 2000.

¹¹³ *CESCR General Comment No. 3: The nature of States parties obligations*, para 2

¹¹⁴ Office High Commissioner of Human Rights, Frequently Asked Questions, 16.

responsibilities.¹¹⁵ The Committee on Economic, Social and Cultural Rights also recognises that legislation is desirable in meeting core minimum obligations.¹¹⁶ Legislation is an indispensable element for the protection of women's reproductive health.

From chapter 1, it is clear that Kenya has not taken any steps towards realising the right to safe, legal abortion. The government may defend itself by pleading inadequate resources.¹¹⁷ However, in the *Mitu-Bell*¹¹⁸ case, Mumbi Ngugi held that the argument that ESCR cannot be claimed years after the promulgation of the Constitution was insufficient.

'... no provision of the Constitution is intended to wait until the state *feels* it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be '*progressive realisation*' of social economic rights, implying that the state must begin to take steps, and I might add *be seen* to take steps, towards realisation of these rights'.

3.4 Conclusion

This chapter has defined the duties that the State must play in realising the right to safe, legal abortion. Using human rights case law and treaty-body interpretations, it has established that the right to safe, legal abortion needs to be progressively realised. There are some steps that can and should be realised immediately most importantly, the duty to enact the necessary laws. The desired content for these laws shall be addressed in the next chapter.

¹¹⁵ <https://www.escr-net.org/resources/minimum-core-obligations> on 23 January.

¹¹⁶ *CESCR General Comment No. 3: The nature of States parties obligations*, 1990, para 3

¹¹⁷ Article 20(5), *Constitution of Kenya* (2010)

¹¹⁸ *Mitu-Bell Welfare Society v Attorney General & 2 others*, Nairobi Petition No. 164 of 2011 (Unreported).

CHAPTER FOUR: PROPOSED LEGISLATIVE FRAMEWORK

4.1 Introduction

The previous chapter sought to establish the duties that Kenya ought to exercise in ensuring the realisation of the right to a therapeutic abortion. The main duty that the study focused on was the duty to provide a framework for the exercise of the right to abortion, which Kenya is lacking. The importance of a governing framework is clear from the first chapter that outlines the problems that women (who fall under the exception of 26(4)) have a problem getting abortions. This chapter shall outline key provisions that ought to be included in any framework governing abortion.

4.1 Key provisions

4.1.1 In the opinion of a trained medical professional

The requirement that a trained medical professional give their opinion is the precursor to any assessment of the existence of the conditions in article 26(4). It needs to be clarified. First, would an opinion have to be reduced to some sort of written form for instance a certificate or a report? More importantly, how much discretion do trained medical professionals have in giving their opinion? The ‘good faith’ requirement in the English Abortion Act¹¹⁹ may be instructive as it requires that the doctor is not negligent or dishonest in forming the opinion that there are legal grounds for the procedure.¹²⁰

4.1.2 Need for emergency treatment

¹¹⁹ Article 1, *Abortion Act* 1967 (United Kingdom).

¹²⁰ British Pregnancy Advisory Service, *Britain’s abortion law: What it says and why*, 2013, 6.

To begin with, this ground reflects the constitutional commitment to the right to emergency medical treatment.¹²¹ This provision is especially important in the context of abortion as it ensures that no legal impediments prevent a woman in need of an emergency abortion from obtaining one.

4.1.3 *Life of the mother is in danger*

Any provision interpreting this must include the formulation of threat to life from *R v Bourne*.¹²² There is a threat to life if the 'probable consequences of continuance with the pregnancy will make the woman a physical or mental wreck'. Ngwena also theorises that this case can be deemed to include rape in the 'life' ground as the severe mental suffering caused by the pregnancy resulting from rape was considered a threat to her life.¹²³ This extension of the life ground may be unnecessary as the National Guidelines on Management of Sexual Violence allow for terminations in the case of rape.¹²⁴ This arguably falls under the 'provided by any other written law' ground.

4.1.4 *Health of the mother is in danger*

From the formulation in article 26(4), it is unclear whether health refers only to physical health or whether it also incorporates mental health. *Bourne* may still be instructive in this, with the physical or mental wreck formulation. The meaning of 'health' is set out in *Doe v Bolton*, '...physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient. All these factors may relate to health'.¹²⁵ Any interpretation of the health ground must encompass both physical and mental health of the mother.

4.1.5 *Conscientious objection*

¹²¹ Article 43(2), *Constitution of Kenya*, 2010.

¹²² *R v Bourne* (1938) Crown Court of England and Wales.

¹²³ Ngwena C, Human rights and African abortion laws: A handbook for judges, 52-53

¹²⁴ Ministry of Health, National Guidelines on Management of Sexual Violence, clause 7, 13.

¹²⁵ *Doe v Bolton*, (1973) Supreme Court of the United States.

The Bill of Rights accords the right to freedom of conscience, religion, belief and opinion to every person.¹²⁶ Moreover, it explicitly states that no person shall be compelled to engage in any act that is contrary to their belief or religion.¹²⁷ In a predominantly Christian (and in fact, religious) country¹²⁸ where a majority of the population have less than accepting attitudes about abortion, a provision on conscientious objection is paramount to the success of any policies or legislation. Both freedom of conscience and the right to reproductive health may be limited¹²⁹ and thus a balance must be struck between the two. Generally, no country allows conscientious objections by institutions.¹³⁰ Individuals may object to perform an abortion on grounds of conscience but the law must specify who is allowed to object. *Greater Glasgow Health Board v Doogan* clarifies this, with the court in the case ruling that conscientious objection is limited to those directly participating in treatment and that they can object only to services directly related to abortion care.¹³¹ While South Africa also allows conscientious objection, the objector is obligated to refer the woman to a non-objecting professional who can perform the procedure. Public health services are compelled to provide the service.¹³² Kenya can adapt these provisions in its own law. Compelling private practitioners to refer women to non-objectors ensures that both freedom of conscience and the right to reproductive health services are respected, protected and fulfilled. Compelling public health services to provide abortions may be the only practical way for a country with few public hospitals to ensure that women of lower socio-economic class' rights are protected. There a number of issues surrounding conscientious objection that should be legislated on including: procedure to become an objector and guarantees for women who encounter objectors.

4.1.6 Right to information

¹²⁶ Article 32(1), *Constitution of Kenya* (2010)

¹²⁷ Article 32(4), *Constitution of Kenya* (2010)

¹²⁸ United States Bureau of Democracy, *Human Rights and Labor, Kenya 2014 international religious freedom report*, 2014, 2.

¹²⁹ Article 25, *Constitution of Kenya* (2010)

¹³⁰ International Planned Parenthood Federation, *Legal abortion: a comparative analysis of health regulations in Latin America and selected countries in Europe and Africa*, 2009, 78.

¹³¹ *Greater Glasgow Health Board v Doogan and another* (2014) United Kingdom Supreme Court.

¹³² Article 1.12 and 1.13, Policy on the Management of Termination of Pregnancy Services, Department of Health, Western Cape.

Every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom.¹³³ Within a provision, the right to information has two dimensions. The general right of all women to receive information on their right to reproductive health and the right of women seeking an abortion to receive information. The first aspect of the right is directly within the state's duty to promote the right to reproductive health by educating the public. The latter aspect relates more specifically to the content of information that must be provided to women. Depending on the jurisdiction, this information may be provided in mandatory or voluntary counselling. Such counselling ought to be non-biased, truthful, sufficient and timely information on the procedure, risks, consequences so that the pregnant woman is able to make a free and informed decision.¹³⁴

Generally, it is advisable for Kenya to provide guidelines about the content of the information and the nature in which it is given to protect pregnant women's right to access information on abortion services. The content of the information provided can be as minimal as the woman being informed of her rights. However, to fully realise the right to information in such a sensitive context necessitates complete information. Some jurisdictions even provide for a specific right to medical information which includes the right to receive complete information.¹³⁵ The woman ought to be informed of her rights, the risks, benefits and effects of the procedure as a bare minimum. Further, if additional requirements are imposed by law (other than the trained medical professional's opinion), women ought to be informed of such requirements.

4.1.7 Consent to services

Another issue that cannot be overlooked in drafting a policy or law is consent. Consent flows from the right to information as the standard for medical procedures is informed consent defined as, permission by a patient to a doctor for medical treatment with full knowledge of the possible consequences and benefits.¹³⁶ Informed consent would require the woman to make a voluntary statement (whether written or oral) requesting and consenting to a legal abortion for which she is aware of her rights, the risks, effects and consequences of the procedure.

¹³³ Article 35(2), *Constitution of Kenya* (2010)

¹³⁴ Article 148, *Mexico City Penal Code*

¹³⁵ Article 3, *General Informed Consent Act of Spain*, (2002)

¹³⁶ https://en.oxforddictionaries.com/definition/informed_consent on 19 January, 2018.

Another matter to consider is whether minors¹³⁷ need parental consent to terminate a pregnancy. South Africa for example, doesn't require parental consent for minors.¹³⁸ In *Christian Lawyer's Association v National Minister of Health*, the plaintiff brought a case before the High Court claiming that the provision allowing minors to get abortions without parental consent was unconstitutional. The court held that a rigid age requirement was not necessary as the measure used is capacity to give informed consent.¹³⁹ In Brazil, adolescents between 16 and 18 years of age must be aided by their parents or legal representative who give consent with the adolescent. Adolescents younger than 16 years of age must be represented by their parents or a representative, who give consent for them.¹⁴⁰ In deciding whether parental consent is necessary, Kenya must have the best interests of the child¹⁴¹ in mind. If this means that parental consent is necessary, then a provision on how to resolve a conflict between the minor's and the parent's wishes should be included. Italy has a mechanism to resolve conflicts which can be applied if a request is made within the first 90 days, at which point the physician shall forward the request to a judge who supervises guardianships. If performance of the abortion is urgent, the health professional may perform the procedure without consulting a judge, parent or guardian.¹⁴²

Women with mental disabilities would also need special requirements on consent due to the uncertainty of their capacity. The general rule in many jurisdictions is that the woman's representative will give consent.¹⁴³ In South Africa, if the woman has no representative and is completely unable to understand the nature of her abortion then a *curator personae* can give consent on her behalf but two medical practitioners must consent as well.¹⁴⁴ Any such provision should give value to the woman's wishes (where she can give them) and have procedures in place for resolving any conflict in wishes between the woman and her representatives.

¹³⁷ The age of majority is 18 years; Section 2, *Children Act*, (Act No 8 of 2001).

¹³⁸ Section 5(3), *Choice on Termination of Pregnancy Act* (Act 92 of 1996 of South Africa)

¹³⁹ *Christian Lawyers' Association v National Minister of Health and Others* (2004), Transvaal Provincial Division, High Court of South Africa.

¹⁴⁰ WHO, *Technical Regulations for Humane Abortion Care*, 2005.

¹⁴¹ Article 3(1), *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3.

¹⁴² Article 12, *Regulations on the Social Protection of Motherhood and Voluntary Interruption of Pregnancy* (1978).

¹⁴³ International Planned Parenthood Federation, *Legal abortion: a comparative analysis of health regulations in Latin America and selected countries in Europe and Africa*, 2009, 75.

¹⁴⁴ Section 5(4), *Choice on Termination of Pregnancy Act* (Act 92 of 1996 of South Africa)

4.1.8 Training and accreditation

One of the main problems that this study highlights is the repeal of Technical guidelines on abortions and the Director of Medical Service's prohibition of training on performing abortions. Without training, it is virtually impossible for women to realise the right to safe, therapeutic abortions. Article 26(4) requires the opinion of **trained** (emphasis mine) medical professional to determine whether the legal grounds for an abortion have been met. It is unclear what is meant by 'trained' but any uncertainty will work against women seeking legal abortions. Training is thus the pillar upon which realisation of the right to reproductive health rests. The government must institute measures for training medical professionals in the medical and psychosocial aspects of abortion, including the body that is responsible for the training.

4.1.9 Appeal and Review

A procedure for appealing a trained medical professional's decision not to perform an abortion should be included in any policy or legislation. This is especially important in Kenya as without it, the decision shall lie solely with a medical professional. Norway is the only country that includes appeal processes in its law. A woman can apply to an abortion board (a committee of two doctors) for an abortion when she has surpassed the legal time limit of 12 weeks. If her application is rejected, it is automatically referred to the Norwegian national appeals board.¹⁴⁵ In Kenya, the Medical Practitioners and Dentists Board¹⁴⁶ would be the most proper body to listen to appeals as it is already empowered to listen to disciplinary proceedings¹⁴⁷ and is likely less congested than the formal court process. Moreover, the formal court process is quite time-consuming which would put pregnant women at a disadvantage. Alternatively the Division on Reproductive Health of the Ministry of Health could be empowered to hear such claims as it is the body tasked with implementing programmes to promote reproductive health in Kenya.¹⁴⁸

¹⁴⁵ Norwegian Directorate of Health, *Information about applying for termination after pregnancy week 12*, 2.

¹⁴⁶ Established under section 4, *Medical Practitioners and Dentists Act* (Act 20 of 1977).

¹⁴⁷ Section 20, *Medical Practitioners and Dentists Act* (Act 20 of 1977).

¹⁴⁸ Ministry of Health, *National Reproductive Health Policy*, 2007, Clause 2(g),

4.2 Conclusion

The aim of this chapter was to lay out the most basic considerations when drafting a policy or legislation to ensure realisation of reproductive health through safe, legal abortions. Numerous vital issues haven't been canvassed within this chapter including description of abortion techniques, referral systems in cases of complications, funding or the entity that is responsible for guaranteeing service provision.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study intended to assess what obligations Kenya has in reducing the maternal mortality and morbidity rate in Kenya due to unsafe abortion, and how these obligations can be exercised. It is clear that the articulation of the right to a safe, legal abortion in Article 26(4) is not enough to ensure proper implementation on the ground. This chapter shall conclude this study by summarising the key findings of the study and giving recommendations.

5.2 Restating the initial problem

The lack of a clear framework governing the exercise of Article 26(4) has had and continues to have effects on women's life and maternal health. This is in flagrant violation of women's rights to the highest attainable standard of health including reproductive health care under Article 43(1)(a). Women who qualify for abortions under article 26(4) are unable to access safe and legal abortion services as medical practitioners are reluctant to perform abortions for fear of criminal sanctions. This leads women to opt for unsafe abortions by back alley quacks leading to injuries to their health and even fatal consequences.

5.3 Research findings

This study was inspired by the problem women face and sought to answer one main question: what are Kenya's duties in ensuring the enjoyment of the right to safe, legal abortion. This proceeded from the hypothesis that providing a legal framework within which the right to safe, legal abortion can be exercised would fulfil Kenya's international and constitutional duties in curbing high rates of maternal mortality and morbidity. In confirming this hypothesis, the study sought to answer the following questions: i) Is safe, legal abortion a right guaranteed in the Kenyan Constitution? ii) What duties is the government constitutionally bound to exercise in ensuring safe, legal abortion services? iii) What core content should be in any proposed legislation, policy or guidelines?

5.3.1 Is safe, legal abortion a right guaranteed in the Kenyan Constitution?

The first concern for this study was whether safe, legal abortion is a right and thus ascribes requisite duties to the State. In answering this question, the study comes to two conclusions. First, the right to safe, legal abortions is implicit in the right to the highest attainable standard of reproductive health in article 43(1) of the Kenyan Constitution. This is largely due to the normative content of the right to reproductive health, which includes maternal health or protection from maternal mortality and morbidity. This protection of maternal health requires that States provide access to safe, legal abortion services (though not necessarily on demand).

The second conclusion is that regardless of the content of the right to reproductive health, abortion warrants a human-rights based approach in international human rights law. Majorly employing international human rights law cases and international human rights treaty-body interpretations, it is clear that there is a broad constellation of rights that guarantee safe, legal abortion services including (but not limited to): the right to life, right to privacy, freedom from cruel, inhuman and degrading treatment, freedom from discrimination and the right to benefit from scientific progress. The effect of this conclusion is that Kenya has to exercise its constitutionally-mandated duties to achieve realisation of the right to safe, legal abortion services.

5.3.2 What duties is the government constitutionally bound to exercise in ensuring safe, legal abortion services?

Another question that the study sought to answer was what duties Kenya has to exercise in realising the right to safe, abortion services. In answering this, the study defines the duties set out in Article 21 of the Kenyan Constitution including the duty to protect, promote, fulfil and respect rights. The duty to respect requires States to refrain from any actions that violate the integrity of the woman or their right to a safe, legal abortion. Protection obliges the State and its agencies to act to prevent violations of this right by private parties for example, Kenya ought to protect women who qualify under article 26(4) from quacks who perform illegal and injurious abortions. Fulfilling rights requires that states take appropriate legislative, administrative, budgetary,

judicial and other measures to the maximum extent of their available resources to ensure that women can access safe, legal abortion services.

The study also assesses duties laid out in the international sphere to legislate on and decriminalise abortion. Because abortion is inextricably linked with the right to reproductive health, this study treated it as an economic, social and cultural right that should be progressively achieved. The issue of progressive realisation is canvassed in the study including minimum core obligations set out in the international sphere most especially, the duty to legislate. It concludes that Kenya has violated its minimum core obligation to legislate on safe, legal abortion services.

5.3.3 What core content should be in any proposed legislation, policy or guidelines?

This question directly follows from the previous research finding that Kenya needs to provide legislative or policy guidance to fulfil its minimum core obligations. The study assesses a number of abortion laws from other jurisdictions to come up with an unexclusive list of provisions that ought to be included in any law or policy governing abortion services. The study canvasses a number of issues including: the meaning of life and health as per article 26(4) of the Constitution; conscientious objection; informed and parental consent; appeal or review procedures for a woman whose request for abortion has been denied; training and accreditation among others.

5.4 Limitations of the study

This study is by no means perfect and the author faced a number of limitations when assessing the issues above. First, there is a significant dearth of information on Article 26(4) of the Constitution. The court has never ruled on a matter concerning this provision so its parameters had to be implied from international human rights law and case law from national and regional courts. Only one case has been brought before a Kenyan court on this provision and it is ongoing.

This study would likely have benefitted from anecdotal evidence on whether women can actually invoke article 26(4) and get an abortion but due to the chilling effect, people weren't

willing to participate. The author tried to contact a few practitioners in Kenyatta National Hospital but such efforts were largely ignored.

5.5 Conclusion and Recommendations

Concluding this study confirm the hypothesis that the lack of a legal framework governing the exercise of the right to safe, legal abortion services has led to violations of this right, the right to reproductive health, life, freedom from discrimination, among others.

This study concludes by giving two recommendations for the problem that the study is trying to solve. First, the Kenyan government must enact legislation or issue policy or guidelines that govern how women can access safe, abortion services. Such a framework is indispensable to the women of Kenya realising this right. Moreover, efforts must be made to decriminalise abortion and repeal that section from the Penal Code. This is in recognition of the disadvantages that criminalisation of abortion can have in influencing whether women can even get a legitimate abortion.

BIBLIOGRAPHY

Municipal Legislation

Abortion Act, (United Kingdom, 1967).

Choice on Termination of Pregnancy Act (Act 92 of 1996 of South Africa)

Constitution of Kenya (2010).

General Informed Consent (Spain, 2002)

Health Bill (2016).

Medical Practitioners and Dentists Act (Act 20 of 1977).

Regulations on the Social Protection of Motherhood and Voluntary Interruption of Pregnancy (1978).

Repealed Constitution of Kenya.

Penal Code (Act No.81 of 1948).

Offences against the person Act, (United Kingdom, 1861).

Regional and International Instruments

Convention on the Rights of the Child, 1989, 1577 UNTS 3

Constitution of the World Health Organization, 1946, 4 UNTS 221

International Convention on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

International Covenant for Civil and Political Rights, 1966, 999 UNTS 171.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, 2003, 1520 UNTS 26363.

Soft Law Instruments

ACHPR, 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, 2014

CAT Conclusions and recommendations on Peru, 2006

CCPR Concluding Observations on Ecuador, 1998

CCPR General Comment 28: Equality of Rights Between Men and Women (Article 3), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, 2000.

CCPR General Comment No. 6 on Article 6 in Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies, 2003

CEDAW Concluding observations on Chile, 1999

CEDAW Concluding Observations regarding Belize, 1999

CEDAW General Recommendation 24: women and health, 1999.

CESCR, General Comment 22 on the right to sexual and reproductive health, 2016

CESCR General Comment No. 3: The nature of States parties obligations, 1990

CESCR General Comment No. 14: The right to the highest attainable standard of health, 2000

Council of Europe Parliamentary Assembly, Resolution 1607 on access to safe and legal abortion in Europe, 2008.

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997.

UNGA, Key actions for the further implementation of the Programme of Action of the International Conference on Population and Development

UNGA, *Proclamation of Tehran*, UN A/RES/2442, 19 December 1968

UNGA, *Declaration on Social Progress and Development*, UN A/RES/2542, 11 December 1969

United Nations Population Fund, *Programme of Action of International Conference on Population and Development*, 5-13 September 1994

Municipal Cases

Christian Lawyers' Association v National Minister of Health and Others (2004), Transvaal Provincial Division, High Court of South Africa.

Doe v Bolton (1973), Supreme Court of the United States.

Greater Glasgow Health Board v Doogan and another (2014) United Kingdom Supreme Court.

Federation of Women Lawyers (Fida-Kenya) & 3 others v Attorney General & 2 others [2016] eKLR.

Mitu-Bell Welfare Society v Attorney General & 2 others, Nairobi Petition No. 164 of 2011 (Unreported).

R v Bourne (1938), Crown Court of England and Wales.

Roe v Wade (1973), Supreme Court of the United States.

Regional and international cases

Bruggeman and Scheuten v Federal Republic of Germany, ECmHR, 1981

KL v Peru, CCPR Comm No. 1153/2003 (24 October 2005)

LC v Peru, CEDAW Comm No.22/2009 (21 October 2011)

P and S v Poland, ECtHR, Judgement of 30 October 2012

RR v Poland, ECtHR, Judgement of 26 May 2011

X and Y v The Netherlands, European Court of Human Rights, 1985.

White and Potter v United States, IACmHR Case 2141 (1981)

UN Documents

United Nations, Report of the Fourth World Conference on Women, 1995

Report of the Secretary-General, *Respect for the Privacy of Individuals and the Integrity and Sovereignty of Nations in the Light of Advances in Recording and Other Techniques*, 29 U.N. ECOSOC 10, 1973, U.N. Doc. E/CN. 4/1116.

Office of the United Nations High Commissioner for Human Rights, *Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable mortality and morbidity*, 2012.

Committee on the Elimination of Discrimination Against Women, Report of 15th Session, UN Doc. A/51/38 (1996)

List of Books

Cook R, Dickens B and Fathalla M, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law*, Oxford University Press, Oxford, 2003

Cranston M, *What are human rights?* The Bodley Head, London, 1973.

Dagne T, Kenya: *Current Conditions and the Challenges Ahead*, Diane Publishing, Pennsylvania, 2010.

Ngwenya C, *Africa's abortion laws: A handbook for judges*, Ipas Africa Alliance, Nairobi, 2014.

Nnaemeka O, Ezeilo J, *Engendering human rights: Cultural and socioeconomic realities in Africa*, 2005, Springer,

Donnelly J, *Universal human rights in theory and in practice*, 3ed, Cornell University Press, Ithaca, 2013

Sepulveda M, *The Nature of obligations under the International Covenant on Economic, Social and Cultural Right*, Intersentia, Antwerp, 2003

Steiner H, Alston P, Goodman R, *International human rights in context: Law, politics, morals*, 3ed Oxford University Press, Oxford, 2007

List of Journal Articles

Alston P, Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' 9 *Human Rights Quarterly*, 156 (1987).

Balogun V and Durojaye E, 'The African Commission on Human and People's Rights and the promotion and protection of sexual and reproductive rights' 11 *African Human Rights Law Journal*, 2 (2011)

Cook R, Fathalla M, Duties to implement reproductive rights, 67 *Nordic Journal of International Law*, 1 (1998).

Dias C, 'Towards effective monitoring of compliance with obligations and progressive realisation of ESCR', 2000.

Hendriks A, 'Promotion and Protection of Women's Right to Sexual and Reproductive Health under International Law: The Economic Covenant and the Women's Convention' 44 *American University Law Review*, 1123 (1995)

Hill J, 'Reproductive Rights as Health Care Rights' 18 *Columbia Journal of Gender and Law*, 501 (2009)

Maingi G, The Kenyan Constitutional reform process: A case study of the work of FIDA Kenya in securing women's rights, 15 *Feminist Africa*, 2011.

Sedgh G, Singh S, Shah H, Ahman E, Henshaw S, and Bankole A, 'Induced abortion: incidence and trends worldwide from 1995 to 2008' 379 *Lancet*, 2012.

Solo J, Billings DL, Aloo-Obunga C, Ominde A and Makumi M, Creating linkages between incomplete abortion treatment and family planning services in Kenya , 30(1) *Studies in Family Planning*, 2003.

Sunstein C, 'Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)' 92 *Columbia Law Review*, 1 (1992)

Ziemela I, Lasma L, 'Reservations to human rights treaties: From draft guideline 3.1.12 to guideline 3.1.5.6' 24 *European Journal of International Law* 4, 2013

Biegon Japhet, *The Inclusion of Socio-Economic Rights in the 2010 Constitution: Conceptual and Practical Issues*. P. 22, published by the Kenyan Section of the International Commission of Jurists, Judiciary Watch Report, *Judicial Enforcement of Socio-Economic Rights under the New Constitution: Challenges and Opportunities for Kenya*. V.10 (2011)

List of Reports by Institutional Authors

African Population and Health Research Center, Ministry of Health, Kenya, Ipas, and Guttmacher Institute, *Incidence and Complications Abortion in Kenya: Key Findings of a National Study*, 2013.*of Unsafe*

British Pregnancy Advisory Service, Britain's abortion law: What it says and why, 2013

Centre for Reproductive Rights, *In harms way: The impact of Kenya's restrictive abortion law*, 2010.

Dechert LLP, The Lawyer's Circle, Oxfam, SOAWR and FIDA Kenya, *Implementing the Protocol on the rights of women in Africa: Analysing the compliance of Kenya's legal framework*, 2014

Kenya National Human Rights Commission, *Realising sexual and reproductive health rights in Kenya: a myth or reality?* 2012

Ministry of Health, National Guidelines on Management of Sexual Violence

Ministry of Health, *National Reproductive Health Policy*, 2007,

Norwegian Directorate of Health, *Information about applying for termination after pregnancy week 12*,

Policy on the Management of Termination of Pregnancy Services, Department of Health, Western Cape.

United States Bureau of Democracy, Human Rights and Labor, Kenya 2014 international religious freedom report, 2014

World Health Organisation, *Unsafe abortion: global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008*, 2011.

International Planned Parenthood Federation, *Legal abortion: a comparative analysis of health regulations in Latin America and selected countries in Europe and Africa*, 2009,

World Health Organisation, *The world health report: Primary health care, now more than ever*, 2008.

Conference and Working papers

Asuagbor L, "Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa" 60th Meeting of the Commission on the status of women, New York, 18 March 2016.

Tozzi P, International Law and the right to abortion, Catholic Family and Human Rights Institute, Legal Studies Series Number 1, 2010.

United Nations Population Fund, 'Programme of Action' International Conference on Population and Development, 21st special session of the General Assembly, New York, 30 June – 2 July 1999.

United Nations, Report of the Fourth World Conference on Women, Fourth World Conference on Women, Beijing, 1995.

List of Internet resources

Chimbi J, Government urged to release safe abortion guidelines, Daily Nation, 22 June 2016

<http://www.nation.co.ke/news/Govt-urged-to-release-safe-abortion-guidelines/1056-3261678-psus7rz/index.html>

<http://www.abortionrights.org.uk/history-of-abortion-law-in-the-uk/>.

<http://www.doctorswithoutborders.org/article/qa-consequences-unsafe-abortion>

<http://www.ipas.org/en/News/2012/October/Kenya-approves-new-guidance-for-provision-of-safe-abortion-care.aspx>

<http://law.yourdictionary.com/chilling-effect>

<http://maputoprotocol.com/about-the-protocol>

Susan Cohen, 'Access to Safe Abortion in the Developing World: Saving Lives While Advancing Rights', Guttmacher Institute, 17 October 2012_

<https://www.guttmacher.org/gpr/2012/10/access-safe-abortion-developing-world-saving-lives-while-advancing-rights>