



**FORCED STERILISATION: CRITICAL ANALYSIS OF LEGAL FRAMEWORK
SURROUNDING REPRODUCTIVE RIGHTS IN KENYA**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE BACHELOR
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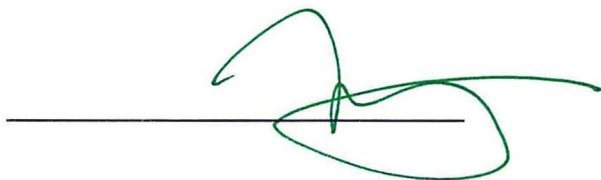
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Above all, I thank the Almighty God for giving me the strength and resources to undertake this project.

DECLARATION

I hereby certify that this is my original work done in partial fulfilment of the requirements of the Bachelor of Laws degree and it has not been submitted to any other institution for any other qualification.

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ABSTRACT

Women's rights are central to the progress of women in social, economic, political and cultural spheres of life. It is for this reason that these rights have been given special regard at both an international and national levels. Among such women's right is the right to reproduction; a right encompassing a conglomerate of rights such as the right to the highest attainable standard of health and the right to decide the number and spacing of one's children and the right to be free from discrimination. Reproductive rights are further premised on the principle of bodily integrity which enshrines the right of the person to make decisions concerning one's body.

Forced and coerced sterilisations involve making a woman permanently unable to bear children without her consent, or with consent obtained under duress or incentive without proper understanding or knowledge of the procedure consequences. This study aims to show how such sterilisations undermine the human dignity of the person and the resultant violation of the right to reproduction at both international and national level, more specifically Kenya.

The research is a qualitative one based on information from text books, journal articles, news articles and appropriate case law from various jurisdictions. The paper looks to apply its findings to the Kenyan jurisdiction and to propose mechanisms through which reproductive rights within the region can be more strongly protected by reducing the occurrence of harmful practices such as forced and coerced sterilisations.

LIST OF ABBREVIATIONS

CAT - Convention against Torture and Cruel, Inhuman or Degrading Treatment

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

CIDT- Cruel, Inhuman or Degrading Treatment

CSCCE - Conference on Security and Co-operation in Europe

HIV - Human Immuno-deficiency Virus

ICCPR - International Covenant on Civil and Political Rights

ICERD - International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICTY – International Criminal Tribunal of the former Yugoslavia

ICPD – International Conference on Population and Development

OHCHR- Office of the High Commissioner for Human Rights

OSCE - Organization for Security and Co-operation in Europe

UDHR – Universal Declaration on Human Rights

UN- United Nations

REGIONAL AND INTERNATIONAL INSTRUMENTS

1. African charter on the Rights and Welfare of the Child, July, 1990, OAU Doc. CAB/LEG/24.9/49.
2. *International Covenant on Civil and Political Rights*, 1 May 1972, 999 UNTS 171
3. *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, Vienna, 14-25 June 1993, UN Doc A/CONF.157/23 (1993); 32 ILM 1661 (1993)
4. UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
5. Organization for Security and Co-operation in Europe (OSCE), *Conference on Security and Co-operation in Europe (CSCE) : Final Act of Helsinki*, 1 August 1975.
6. International Conference on Population and Development, *Report of the International Conference on Population and Development*, Document A/Conf. 171/13, New York, United Nations (1994).
7. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 21 February 1997, 1465 UNTS 85
8. Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, ETS 126 .
9. Organization of American States (OAS), *Inter-American Convention to Prevent and Punish Torture*, OAS Treaty Series, No 67.
10. *International Covenant on Civil and Political Rights*, 1 May 1972, 999 UNTS 171
11. *International Covenant on Civil and Political Rights*, 1 May 1972, 999 UNTS 145.
12. *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, 1 May 1972.
13. *Convention on the Elimination of All Forms of Discrimination Against Women*, 9 March 1984, 1249 UNTS 13.
14. *Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace*, 2 July 1975, E/CONF.66/34. , E/CONF.66/34. .
15. United Nations, *Report of the Fourth World Conference on Women*, Document A/Conf. 177/20, New York, United Nations, 1995.

NATIONAL LEGISLATION

1. Constitution of Kenya, (2010)
2. Reproductive HealthCare Bill, Senate Bill No 7, (2014)
3. Sexual *Offences Act*, (Act No 12 of 2012)

LIST OF CASES

- 1) *Siliadin V. France*, ECtHR Application no. 73316/01
- 2) *V.C. v Slovakia*, ECtHR Application no. 18968/07
- 3) *Prosecutor v. Furundzija*, ICTY case No. IT-95- 17/1-T, judgement (1998).
- 4) *John Njuguna Mwaura & 2 others v Republic* [2013] eKLR
- 5) *Re the Matter of Zipporah Wambui Mathara* [2010] eKLR
- 6) *Beatrice Wanjiku & Another v Attorney General & Another* [2012] eKLR
- 7) *W.J & another v Astarikoh Henry Amkoah & 9 others* [2015] eKLR

CHAPTER 1: INTRODUCTION

Children are the reward of life. ~ African Proverb

1.1 Background of the Study

Sterilisation refers to “a process or act that renders an individual incapable of sexual reproduction”.¹ This is done mostly by the use of surgical methods. However, sterilisation can also be performed by the introduction of hormones which inhibit pregnancy, into the body through injection.² Sterilisation is often used as means of contraception by women who have given their informed consent after receiving full and detailed information on the procedure and its consequences.³ However, in other situations, the procedure is carried out on women who have not given their consent or have given consent without a full understanding of the process or due to undue pressure on them to do so. Sterilisation is termed as **Coerced sterilisation** when financial or other incentives, misinformation or intimidation tactics are used to compel an individual to undergo the procedure.⁴ It will also be considered coerced sterilisation if it is a precondition to receiving health services, employment or other benefits. On the other hand, sterilisation is termed as **Forced sterilization** if occurs when a person is sterilized without her knowledge or is not given an opportunity to provide consent. For the purposes of this article, forced and coerced sterilisation are used interchangeably to refer to sterilisation carried out on a victim who was either unwilling, not informed, misinformed, or forced to undergo the procedure using an incentive or fear of a negative consequence.

In an African setting, children bear a special status⁵ and are considered as a blessing.⁶ Traditionally, children were used as a measure of wealth, a continuation of lineage and a

¹ Human Rights Watch, *Sterilisation of Women and Girls with Disabilities; A Briefing Paper* (2011), on 14 February 2015.

² <http://www.globalresearch.ca/is-the-un-using-vaccines-to-secretly-sterilize-women-all-over-the-globe/5413599/> on 14 February 2015.

³ Open Society Foundation, *Against Her Will: Forced And Coerced Sterilization Of Women Worldwide* (2011), 2.

⁴ Open Society Foundation, *Against Her Will: Forced And Coerced Sterilization Of Women Worldwide* (2011), 2.

⁵ Preamble, African charter on the Rights and Welfare of the Child, July, 1990, OAU Doc. CAB/LEG/24.9/49.

⁶ GB Tangwa, *ART and African sociocultural practices: worldview, belief and value systems with particular reference to francophone Africa* available at http://www.gobata.com/files/art_african_sociocultural_practices.pdf page56

source of labour for the family⁷ and therefore the inability to conceive a child was generally frowned upon by the society.

Despite this, the practice of forced sterilisation is still rampant among many African countries such as South Africa, Namibia, Swaziland, Lesotho, Zambia, Zimbabwe and Kenya.⁸ This sterilisation is targeted towards, mostly, women from poor backgrounds who are infected with HIV/AIDS.⁹

Kenya has also been plagued by the practice of coerced sterilisation. In November 2014, The Ministry of health set up a commission to inquire into the safety of tetanus vaccines being distributed in a vaccination campaign.¹⁰ The vaccines were thought to be laced with the Human Chorionic Gonadotropin (HCG) hormone, which when introduced into the body, causes the body to create antibodies leading to sporadic abortions for a period of about three years after receiving the vaccine.¹¹ There also have been cases of HIV positive women who claim to have had sterilisations performed on them without their prior, full and informed consent.¹²

A study conducted by the African Gender and Media Initiative in partnership with Women Fighting Aids in Kenya, Lean on Me and Grassroots Empowerment Trust, between October and November 2011, in Nairobi and Kakamega counties revealed the stories of 40 women who were either forced or coerced to accept permanent sterilization while giving birth through caesarean section in healthcare facilities.¹³

Some of the women claim that the consent forms to proceed with their sterilisation were offered to them while they were heavily in labour and therefore were not in the proper state

⁷ Howard S, *Children and Childhood*, Oxford University Press (2013).

⁸ <http://www.osisa.org/hiv-and-aids/regional/african-commission-condemns-coerced-sterilisation-hiv-women/> on 11 February 2015.

⁹ <http://www.osisa.org/hiv-and-aids/regional/african-commission-condemns-coerced-sterilisation-hiv-women/> on 11 February 2015 ; Open Society Foundation, *Against Her Will: Forced And Coerced Sterilization Of Women Worldwide (2011) 2*.

¹⁰ <http://www.globalresearch.ca/is-the-un-using-vaccines-to-secretly-sterilize-women-all-over-the-globe/5413599/> on 14 February 2015.

¹¹ <http://www.globalresearch.ca/is-the-un-using-vaccines-to-secretly-sterilize-women-all-over-the-globe/5413599/> on 14 February 2015.

¹² <http://www.theguardian.com/global-development/2014/dec/11/hiv-positive-women-sue-kenya-government-and-ngos-over-sterilisation/> on 10 February 2015; <http://www.theguardian.com/society/2012/sep/04/hiv-positive-women-kenya-investigation/> on 10th February 2015.

¹³ Kasiva F, *Robbed of Choice: Forced and Coerced Sterilization-Experiences of Women Living with HIV in Kenya*, African Gender and Media Initiative (2012).

of mind to comprehend their actions.¹⁴ These procedures occurred despite the fact that these women had their reproductive rights protected under Kenyan legislation.¹⁵

From the above case studies, it is clear that robbing women the ability to conceive and bear children is a personal affront to the victims of such sterilisations. Immanuel Kant proffered a theory that human beings have an intrinsic worth-human dignity, which makes them valuable beyond measure. Kant's theory further contends that the intrinsic worth flows from the ability of human beings to reason and make choices directed towards their desired end.¹⁶ It is from this dignity that human rights are founded.¹⁷ These rights are accorded to all due to the need to respect all men as equals.¹⁸ To deny people the opportunity to enjoy their rights due to the fact that they belong to certain categories of sex, gender, race, religion, beliefs among others, qualifies as discrimination.¹⁹

Women's rights refer to the rights that promote a position of legal and social equality of women with men.²⁰ They are mainly associated with reproductive rights, sexual and domestic violence, and employment discrimination.²¹ According to a report on a study carried out by Amnesty International;

“Sexual and reproductive health rights- including access to sexual and reproductive health care and information as well as autonomy in sexual and reproductive decision making- are human rights...grounded in other essential human rights including the right to health, the right to be free from discrimination, the right to privacy, the right not to be subjected to ill-torture or ill-treatment, the right to determine the number and spacing of one's children and the right to be free from sexual violence.”²²

¹⁴ Uberoi D and de Bruyn M, 'Human rights versus legal control over women's reproductive self-determination', *Harvard Health and Human Rights Journal*, Vol 15; No 1, (2013) page 163.

¹⁵ Kenyan legislation protecting the right to reproductive health is discussed further in Chapter 3 of this thesis.

¹⁶ Rachels J, 'Kantian Theory: The idea of Human Dignity' in J Rachels, *The Elements of Moral Philosophy*, Mc-Graw Hill, (1986) pg. 114-17, 122-23

¹⁷ UNESCO, 'Casebook on Human Dignity and Human Rights', *Bioethics Core Curriculum Casebook Series, No. 1*, UNESCO: Paris, 144 (2011) page x

¹⁸ Rachels J, 'Kantian Theory: The idea of Human Dignity'

¹⁹ Article 26, *International Covenant on Civil and Political Rights*, 1 May 1972, 999 UNTS 171 which is considered the principle clause on non-discrimination and states that; "All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"

²⁰ <http://www.oxforddictionaries.com/definition/english/women%27s-rights/> on 10th December 2015

²¹ Harvard Law School, 'Women's Rights Guide' (2007)

²² <http://www.amnestyusa.org/pdfs/SexualReproductiveRightsFactSheet.pdf> accessed on 12th February 2015.

1.2 Hypotheses of the Study

The field of sexual and reproductive health is one that has been extensively written about. Information ranges from the right to access highest standards of sexual and reproductive healthcare to the right to choose whether or not to start a family by childbirth.

With regard to the scope of the proposed research, the information available appears to create a connection of the right to sexual reproduction with the human dignity of the person and consequently any acts in violation of such rights are condemned. In this paper, I take the hypothesis that forced sterilisation is a violation reproductive rights guaranteed as per Kenyan legislation. For purposes of clarity of discussion, this thesis breaks down the hypothesis into three smaller hypotheses:

- a) Reproductive rights have their foundation as human rights in the principle of human dignity.
- b) The right to reproductive health is protected at an international level and that forced sterilisation is a violation of international consensus on this right.
- c) Reproductive rights enjoy protection under Kenya's Constitutional order.

1.3 Limitations

The author recognises that the field of human rights is a vast one. This thesis narrows down the area to the discussion on reproductive rights as a branch of human rights. Furthermore, reproductive rights exist as a conglomerate of various human rights, making a discussion on this field extensive. This thesis adopts a thematic approach to forced sterilisation as a violation of human rights. This is in the interest of precision and conciseness of the research.

The research shall be limited to occurrences within the geographical region of Kenya and seek to find recommendations to be implemented within the same. However, a rich bank of information concerning the field of research exists from foreign jurisdictions. Where applicable, such information is used for purposes of expounding on ideas, contrasting opinions and situations or as a recommendation of good practice to be implemented in Kenya.

An argument may be raised that the report by Kasiva is the only conclusive evidence of forced sterilisation in Kenya given that the results of the contamination of the TB vaccines were contested. In this thesis, the author argues from of point that these events, although

seemingly insignificant, sound the alarm with regard to the inadequacy of Kenyan legislation to cater for such violations should they concretise in the future.

Lastly, the study has been undertaken over a period of 1 year. However, information gathered in the writing of this thesis reflects the views of scholars within different periods in time.

1.4 Methodology

As earlier mentioned, the field of reproductive health is one that is heavily researched and written on. Given this fact, the paper is based on the collation of qualitative data obtained from primary, secondary and tertiary sources. More specifically, this thesis analyses and appraises relevant scholarly articles, textbooks, organisation reports and local and international legislation and jurisprudence in the field of research. News articles from reputable media centres are also used to shed light on the current situation in the practice of forced sterilisation.

While the thesis does not carry out a comparative analysis, international jurisprudence and legislation has been applied at a local level where applicable. This has been done following an explanation of the applicability, similarity and importance of such application.

As earlier stated, results of the research is presented using a thematic approach in this thesis.

1.5 Chapter Breakdown

This introductory chapter serves as the first chapter of this thesis. The chapter sets the pace for the research by introducing the main definitions and arguments presents in the thesis. It also outlines the importance and relevance of carrying out a study on forced sterilisation in Kenya and sets out the methodology and limitations of the research.

The second chapter acts partially as a theoretical framework by discussing the theories considered when making claims throughout the thesis. The chapter then interrogates the concept of the human dignity of the person and its relationship to forced sterilisation and the right to reproductive health vis-a-vis these theories. In doing so, it endeavours to explain the concept of human dignity, the arguments advanced in support of human dignity as a basis for the human rights, focusing on the right to reproduction. The discussion in the chapter draws a link between the ideas in order to create a philosophical understanding of the right to reproductive health and why forced sterilisation is a gross violation of both.

The third chapter looks into international consensus on sexual and reproductive rights. This involves an investigation as to the different perspectives through which forced sterilisation is viewed and the laws supporting these perceptions.

Chapter four focuses on the current practice of coerced and uninformed sterilisation in Kenya. It examines at the existing legal framework surrounding the right to reproduction and whether forced sterilisation amounts to a violation of these rights.

The concluding chapter is composed of a summary of the issues discussed in the paper. It aims to show the ways in which the research ties in with the hypotheses presented and suggests recommendations that may strengthen the protection of the reproductive rights in Kenya.

CHAPTER 2: HUMAN DIGNITY AND THE RIGHT TO REPRODUCTIVE HEALTH

2.1 Introduction

What is human dignity? The philosophical concept of human dignity is one that has proved elusive and contentious to define.²³ This comes as a surprise as it has been at the core of numerous treaties on human rights.²⁴ Such treaties include the preambles of the Charter of United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Chapter 1 gives a glance of the practice of forced sterilisation in Kenya by showcasing news reports and case studies on its incidences within the country. The chapter highlights the importance of children in an African setting, especially on the status of the woman. However, in order to grasp the gravity of the offence of forced or coerced sterilisation, it is important to examine the morality of the act: How does it affect a person's life? Are there rights that exist to prevent this offense? What are these rights founded upon? This chapter provides a more philosophical basis to the understanding of the right to reproductive health as a human right in a bid to explore the first sub-hypothesis of the research, that is, that reproductive rights have their foundation as human rights in the principle of human dignity. Forced reproduction, as a violation of reproductive rights, also amounts to a violation of human dignity.

In order to fulfil this objective, the chapter is broken down into sections. The first section examines the concept of the human dignity of man and the theories supporting the concept. It lays the groundwork for the second section, which explores the birth of human rights from the concept of human dignity. The third section endeavours to introduce the right to reproductive healthcare as a human right is conferred. It looks at the theoretical basis of the right to reproduction drawing from the arguments posited in the discussion on human dignity. This is important as it proves that by virtue of reproductive rights being human rights, they are inalienable and owed to all.

²³ Lebech M, 'What is Human Dignity?', National University of Ireland (2004)

²⁴ Kretzmer D and Klein E, *The Concept of Human Dignity in Human Rights Discourse*, Springer Netherlands (2002), 142.

The last section of the chapter shows that the practice of forced and coerced sterilisations, as violations of the human right to reproductive healthcare, are also acts demeaning the human dignity of the victims.

2.2 Breaking down Human Dignity

Human dignity has been taken as self-evident and therefore requiring no theoretical defence.²⁵ It is admittedly an ethereal concept which can mean many things.²⁶ The European Court of Human Rights, in one of its judgements, stated that dignity is “a particularly vague concept, and one subject to random interpretation”²⁷ highlighting the inherent vagueness that is at the core of defining dignity. This definition can be seen in attempts made by international bodies to define dignity. One such example is the definition provided by the United Nations Economic and Social Council which states that “*Dignity refers to the minimum dignity which belongs to every human being- a threshold, a kind of respect and care beneath which the treatment of any human being should never fall.*”²⁸ ***emphasis added***

However, despite this vagueness, dignity of the human person as a basic ideal is so generally recognized as to require no independent support.²⁹ There is agreement as to what dignity might mean at its core, despite the lack of consensus as to what the effect of this meaning might be.³⁰ Various definitions of human dignity share the common premise that dignity is not based on any human quality, legal decree, or individual merit or accomplishment. Human dignity is an inalienable and intrinsic quality that cannot be separated from other essential aspects of the human person.³¹

Immanuel Kant proposes the theory that human beings have an intrinsic worth that makes them valuable beyond measure.³²

²⁵ Kateb G, *Human Dignity*, The Belknap Press of Harvard University Press (2011) , 1.

²⁶ Glensy RD, ‘The Right To Dignity’, *Columbia Human Rights Law Review*, (2011), 67.

²⁷ *Siliadin V. France*, ECtHR Application no. 73316/01, Judgement of 26th October 2005, para 101.

²⁸ UNESCO, *Casebook on Human Dignity and Human Rights* (2011) , x.

²⁹ Schachter O, ‘Human Dignity as a Normative Concept’, *American Journal of International Law*, (1983), 848–850 .

³⁰ Glensy RD, ‘The Right to Dignity’, (2011), 68.

³¹ Sr. Feely K, ‘The Principle of Human Dignity, Education for Justice’, (2009)

³² Kant I, *Practical Philosophy*, (translation of Kant’s *Metaphysics of Morals* by Mary J. Gregor), Cambridge University Press, (1996), 81.

This intrinsic worth is based on the fact that human beings have reason and will, and that they have the power to direct such reason and will towards a particular end.³³ It is due to this fact that human beings must place a certain amount of respect and worth upon other human beings.³⁴ This intrinsic worth is human dignity. It is due to this dignity that man must be treated as an end in himself.³⁵

The idea of human dignity contends on the recognition of the person in relation to all other persons.³⁶ Human dignity can, therefore, be put at stake in two ways: when an individual is treated in a manner that is below that which a human deserves; as if the person is less of a human or when a person is treated as if he or she is merely an inconsequential statistic-just one more human being in a species- rather than a unique and irreplaceable individual.³⁷

The theory of liberal egalitarianism draws from the Kantian notion of autonomy of man as a vital characteristic of the human person. A liberal egalitarian theory of justice seeks to combine the values of equality, personal freedom, and personal responsibility.³⁸ In his writing³⁹, John Rawls considers justice to be attained through fairness. He comes up with two fundamental principles of justice. The first is that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others such as freedom of speech, freedom of choice and freedom of conscience among others. Secondly, social and economic inequalities are to be arranged so that they are to be of the greatest benefit to the least-advantaged members of society. According to Rawls, it is only through the realisation of the two principles that human beings can achieve their ends.

2.3 Human Rights vis-à-vis Human Dignity

Thus far, a common thread running through the discussion is that human dignity is inherent and it is owed to man by virtue of his humanity- his ability to his reason to come to a rational decision upon what actions may best influence his life.

³³ Kant I, *Practical Philosophy*, (1996), 79.

³⁴ Kant I, *Practical Philosophy*, (1996), 80.

³⁵ Kant I, *Practical Philosophy*, (1996), 84-85.

³⁶ Kateb G, *Human Dignity*, (2011),10.

³⁷ Kateb G, *Human Dignity*, (2011) ,10-11.

³⁸ Cappelen A W and Tungodden B, 'A Liberal Egalitarian Paradox', *Cambridge Journal on Economics and Philosophy*, Volume 22 (2006) 393.

³⁹ Rawls J, *A Theory of Justice* (1999)

It can therefore be inferred that denying man an opportunity to use his reason and will towards making his decisions would be a death knell to their intrinsic worth, that is, their human dignity.

Human rights are founded upon this struggle to promote human dignity.⁴⁰ The rights are needed and expected to secure and uphold the dignity of the human person⁴¹.

The United Nations Office of the High Commissioner for Human Rights defines human rights as rights inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.⁴² All persons, without discrimination, are equally entitled to these rights. In addition, human rights are all interrelated, interdependent and indivisible.⁴³

In 1948, The Universal Declaration of Human Rights⁴⁴ recognised the foundational role of human dignity in human rights by stating in its preamble that the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. The Helsinki Final Act⁴⁵ affirms in Principle VII that all human rights and fundamental freedoms “derive from the inherent dignity of the human person.”

The assertion that human rights are derived from the inherent dignity of the person implies that rights are not derived from the state or any other external authority.⁴⁶ It is important to study this foundational element of human rights in order to obtain a deep and practical understanding of human rights given the importance they weigh in law.⁴⁷

⁴⁰ UNESCO, *Casebook on Human Dignity and Human Rights*, (2011) , xi.

⁴¹ UNESCO, *Casebook on Human Dignity and Human Rights*, (2011) , xi.

⁴² <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> accessed on 16th November 2015

⁴³ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, Vienna, 14-25 June 1993, UN Doc A/CONF.157/23 (1993); 32 ILM 1661 (1993), I.5.

⁴⁴ UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁴⁵ Organization for Security and Co-operation in Europe (OSCE), *Conference on Security and Co-operation in Europe (CSCE) : Final Act of Helsinki*, 1 August 1975.

⁴⁶ Schachter O, ‘Human Dignity as a Normative Concept’, *American Journal of International Law*, vol 77 (1983) 853.

⁴⁷ Waldron and Jeremy J., ‘Is Dignity the Foundation of Human Rights?’, *New York University Public Law and Legal Theory Working Papers*. Paper 374. (2013) 10.

2.4 The Right to Reproductive Healthcare

Human rights are codified in legal documents such as international declarations and conventions as well as in the Constitutions of different countries and states. In 1994, The United Nations International Conference on Population and Development⁴⁸ (ICPD) attempted at defining reproductive rights by amalgamating various rights aimed at safeguarding reproductive health. The 1994 ICPD defined reproductive health as:

“...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 health therefore implies that people are able to have a satisfying and safe sex life and that they have the capacity to reproduce and the freedom to decide if, when and how often to do so...”⁴⁹

Drawing from this definition of reproductive health, The ICPD then defined reproductive rights as;

“Reproductive rights embrace certain human rights that are already recognized 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 make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.”

Reproductive health is a component of the universal right to the highest attainable standard of physical and mental health, enshrined in the Universal Declaration of Human Rights⁵⁰ and in other international human rights conventions,⁵¹ declarations, and consensus agreements.⁵²

⁴⁸ International Conference on Population and Development, *Report of the International Conference on Population and Development* (1994).

⁴⁹ *Report of the International Conference on Population and Development*, Document A/Conf. 171/13, New York, United Nations, 1994, paragraph 7.2

⁵⁰ Article 25.1

⁵¹ The right to the highest attainable standard of health can also be found enshrined in i) Article 12.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) ii) Article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1965, iii) Articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women

Among the four ethical principles⁵³ that have been advanced to provide a foundation for reproductive rights for women, is bodily integrity. The 1975 Declaration of the International Women's Year Conference⁵⁴ declared that the human body is inviolable, and respect for the male and female body is directly related to human dignity and freedom as was proposed.⁵⁵ The idea of bodily integrity was further elaborated in the Beijing Platform for Action⁵⁶ which stated that:

“The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between men and women in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.”

2.5 What is the nexus between such forced sterilisations and human dignity?

As earlier mentioned, Man's ability to reason- to determine his end and make choices that would lead him to such an end, is an integral part of human dignity.

Consider a situation where a woman has a sterilisation procedure carried out upon her without her consent, or where she has given consent but under false or no information of what the consequences of such a procedure are. Sometime after the procedure, the woman realises that she will no longer be able to conceive or bear a child.⁵⁷ This woman has had the choice of bearing children, as enshrined in the Beijing Platform of Action, taken away from her.

(CEDAW) of 1979 iv) Article 24 of the Convention on the Rights of the Child of 1989 as well as in regional charters such as the African Charter on Human and Peoples' Rights of 1981 in Article 16.

⁵² Amnesty International, Fact Sheet on Sexual and Health Rights accessible at

<http://www.amnestyusa.org/pdfs/SexualReproductiveRightsFactSheet.pdf>Reproductive

⁵³ Correa S and Petchesky R, 'Reproduction and Sexual Rights; A Feminist Perspective', Harvard Series on Population and International Health (1994).

⁵⁴ The conference was one of the world conferences on women organised by the United Nations and held in Mexico] in 1975.

⁵⁵ Article 11, *Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace*, 2 July 1975, E/CONF.66/34. .

⁵⁶ United Nations, *Report of the Fourth World Conference on Women*, Document A/Conf. 177/20, New York, United Nations, 1995, paragraph 96.

⁵⁷ Facts similar to the case of *V.C. v Slovakia*, ECtHR Application no. 18968/07, Judgement of 8 February 2012 which will be examined further in chapter 3

Kant proposed a principle known as the Categorical Imperative which explained the status of man as a person per two important facts: That human beings have desires and goals, and only see value in other things, such as material things and animals, only in so far as those things have a role in achieving their goal; and that humans have an intrinsic worth because they are rational agents capable of making their own decisions, setting their own goals, and guiding their conduct by reason relation to their projects.⁵⁸

This basic principle has further been interpreted to create an understanding that a person must “act only on that maxim through which you can at the same time will that it should become a universal law and in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”⁵⁹

Simply put, the maxim requires one to proffer the same treatment upon each individual as he would himself or any other individual and without viewing such individual as a means to attaining a particular goal. In the same way, the treatment of women, as not merely objects and as a means of achieving social goals such as population control must be assured through protecting decision making autonomy.

From the discussion in this chapter, every human being has inherent human dignity, and in the aim of protecting this dignity, the human being is accorded certain inalienable rights. Among these rights is the woman’s right to reproductive health. The respect of both human dignity and human rights demands an element of autonomy to make decisions that influence one’s life, giving rise to the notion of personhood. Actions such as forced and coerced sterilisations negate the very grain of the personhood of a woman by treating her as a means to an end- a pawn in a game of chess-rather than as a matchless and inimitable person. They also interfere with the free exercise of her reproductive rights, fulfilling the hypothesis that forced sterilisation is simultaneously against the woman’s human dignity and human right to reproductive health.

⁵⁸ Rachels J, ‘The Elements of Moral Philosophy’, Mc-Graw Hill,(1986) pg. 114-17,122-23.

⁵⁹ Nelson J, ‘Human Personhood from a Kantian Perspective’, Cedarville University Press (2009) at 3.

CHAPTER 3: FORCED STERILISATION THROUGH AN INTERNATIONAL LENS

3.1 Introduction

Chapter 2 examined the theoretical basis of the right to reproductive health as human right. The discourse on the concept of human dignity revealed that all human beings have dignity that is inherent- it is not granted by any state or institutional body. The promotion and protection of this dignity is the foundational basis of human rights, and among these rights, the right to reproductive health. Man's ability to reason and make reasoned choices was seen to be of particular import in upholding the dignity of man. This forms the basis of the theory of bodily integrity that supports the right to reproductive healthcare. Bodily integrity may be interfered with where a person denied their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. This is the case in sterilisation without the victim's full and informed consent.

This chapter answers the second objective of the research by delving further into the other ways through which such sterilisation violates various rights as enshrined under various international instruments. The chapter first summarises the case of *V.C v Slovakia*.⁶⁰ This case is instrumental to the rest of the chapter as it introduces the discussion on forced sterilisation from an international perspective. In the case, the Court views forced sterilisation as a violation of various rights including: i) against a woman's freedom from torture, cruel, inhumane or degrading treatment and ii) amounting to discrimination. International consensus has also evaluated forced sterilisation through these two lenses. This chapter proceeds to discuss these two themes in the third and fourth sections respectively. Lastly, in the lights of the importance of the person's autonomy as discussed in the previous chapter, the fourth section delves into a brief discussion on the concept of informed consent and its ambit in the discussion of forced and coerced sterilisation at an international level.

3.2 Case Study: V.C v Slovakia

23rd August 2000: A Romanian woman, V.C, arrives at Presov Hospital in Eastern Slovakia ready to deliver her second child. The medical personnel of Presov Hospital enquire as to her

⁶⁰ *V.C. v Slovakia*, ECtHR Application no. 18968/07, Judgement of 8 February 2012

desire to have more children and when she responds in the affirmative, she is warned that a future pregnancy would be fatal. In the heat of her labour, they then furnish her with a document labelled "Request for Sterilisation" which she signs without any understanding of what the procedure entails or its consequences.⁶¹ V.C is sterilised after she delivers her child through caesarean section and later realises what effect the sterilisation has on her. She also finds out that neither her life nor that of her child was under threat; the doctors had performed her sterilisation on account of the fact that she was of Roma ethnicity, thus amounting to discrimination. As a result of her inability to conceive, her husband divorced her, she was ostracized by the community, experienced a hysterical pregnancy and had to undergo psychiatric counselling.⁶²

V.C presented her case to the European Court of Human Rights alleging the violation of her right to freedom from inhuman and degrading treatment,⁶³ her right to private and family life⁶⁴ and her right to marry and to found a family.⁶⁵ The Court rejected the assertions of the medical necessity that were adduced by the Slovak Government on the basis that sterilisation is not a lifesaving procedure and therefore informed consent is necessary.⁶⁶

The court also recognised private life as a "broad term, encompassing, aspects of an individual's physical, psychological and social identity such as the right to personal autonomy and personal development, the right to establish and develop relationships with other human beings and the right to respect for both the decisions to have and not to have a child"⁶⁷ and that the applicant's rights had been violated as evidenced by the repercussions in her private and family life⁶⁸. The same argument was used by the court to prove a violation of her Article 12 rights.⁶⁹

The case of *V.C v Slovakia* remains the landmark case and is highly considered in all discourse surrounding the area of forced sterilisation.

⁶¹ *V.C. v Slovakia* „para 9-16.

⁶² *V.C. v Slovakia*, 19,20.

⁶³ Article 3, *European Convention on Human Rights*, 1950.

⁶⁴ Article 8, *European Convention on Human Rights*, 1950.

⁶⁵ Article 12, *European Convention on Human Rights*, 1950.

⁶⁶ *V.C v Slovakia*, 110.

⁶⁷ *V.C v Slovakia*,138.

⁶⁸ *V.C v Slovakia*,143.

⁶⁹ *V.C v Slovakia*,160 as read with 161.

Forced sterilisation has been taken as a violation of various rights, as enshrined in different international instruments, with some of these rights discussed in the *V.C v Slovakia*. For purposes of this discussion, we will focus on the degrading treatment approach and the discrimination approach mentioned by the court.

3.3 Freedom from Torture, and Cruelty, Inhumane or Degrading Treatment(CIDT)

Traditionally, torture and CIDT were understood to take place in prisons and other detention settings, during interrogations, and in conflict scenarios. However, over time, it has been realised that the same can also occur in other settings.

There has been a push to recognise the importance of taking a gendered approach towards the issue.⁷⁰ Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the CEDAW.⁷¹

The field of healthcare has not been left behind; there has been recognition that that specific harms experienced by women and girls can constitute torture or CIDT leading to various consequences for their lives.⁷²

The United Nations Convention against Torture and Other Forms of Cruelty, Inhuman and Degrading Treatment⁷³ (UN CAT) defines torture as:

“...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person..., or intimidating or coercing him or a third person...for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...”⁷⁴

⁷⁰ Sifris R, ‘Conceptualising Involuntary Sterilisation as ‘Severe Pain or Suffering’ for the Purposes of Torture Discourse’, *Netherlands Quarterly of Human Rights*, Vol. 28/4, (2010), 528.

⁷¹ UN Women, General recommendation No 19 (7) to the Convention on the Elimination of Discrimination against Women, (1992).

⁷² Committee against Torture, *Concluding Observations: Chile*, para. 7(m), U.N. Doc. CAT/C/CR/32/5 (2004).

⁷³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 21 February 1997, 1465 UNTS 85.

⁷⁴ Article 1, UN CAT.

According to a UN Report of the Special Rapporteur on Torture or Other Cruel, Inhuman or Degrading Treatment, the purposes of torture as stated in Article 1, are only of an indicative nature and not exhaustive. At the same time, only purposes which have something in common with the purposes expressly listed are sufficient.⁷⁵ Acts that fall short of meeting the criteria set out for torture as per Article 1 of the UN CAT re considered as Cruel, Inhumane or Degrading Treatment.⁷⁶ Cruel and inhuman treatment, like torture, requires evidence of severe pain or suffering, however, it is sufficient to show that that the act was aimed at humiliating the victim, regardless of whether severe pain was inflicted.⁷⁷

Protection against Torture and CIDT is also enshrined in other international instruments such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁷⁸, and the Inter-American Convention to Prevent and Punish Torture⁷⁹ exclusively address eradication of torture and CIDT. Key international human rights treaties also contain prohibitions of torture and CIDT, for example; Article 7 of the International Covenant on Civil and Political Rights (ICCPR)⁸⁰ prohibits torture and CIDT.

The paradigm shift from looking at torture and CIDT in its traditional form to conceptualising it within the reproductive health sphere provides the platform to cement an understanding of any such violations and to highlight the positive obligations that States have to prevent, prosecute and redress such violations.⁸¹ This is due to the nature of torture and CIDT as one of the few absolute and non-derogable human rights,⁸² a matter of *jus cogens*; a peremptory norm of customary international law.⁸³

Torture, as the most serious violation of the human rights to personal integrity and dignity, presupposes a situation of powerlessness, whereby the victim is under the total control of

⁷⁵ UN General Assembly, *Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, Juan E. Méndez Doc number A/HRC/22/53 (2013) para 21.

⁷⁶ Article 16, UN CAT.

⁷⁷ Centre for Reproductive Rights, *Reproductive Rights Violations As Torture And Cruel, Inhuman, Or Degrading Treatment Or Punishment: A Critical Human Rights Analysis* (2010), 12.

⁷⁸ Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, ETS 126 .

⁷⁹ Organization of American States (OAS), *Inter-American Convention to Prevent and Punish Torture*, OAS Treaty Series, No. 67.

⁸⁰ *International Covenant on Civil and Political Rights*, 1 May 1972, 999 U.N.T.S. 171.

⁸¹ UNGA, *Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, Juan E. Méndez Doc number A/HRC/22/53 (2013) para 82.

⁸² Art 2, UN CAT, Art. 7. *International Covenant on Civil and Political Rights*

⁸³ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija*, case No. IT-95- 17/1-T, judgement (1998).

another person.⁸⁴ Patients in health-care settings fall under the category of such persons as they rely on health-care workers from whom they seek assistance.⁸⁵ Medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may therefore constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned.⁸⁶ This is even more so when the patient belongs to a marginalised group⁸⁷ such as women, HIV+ persons and the underprivileged. Consequently, forced and coerced sterilisation amount to torture or CIDT where the full and informed consent⁸⁸ of the patient has not been granted.

Torture and CIDT framework should be applied in a gender-inclusive manner with a view to strengthening the protection of women from any activities that may amount to torture⁸⁹ such as forced sterilisation in this case.

3.4 Discrimination

The right to freedom from discrimination is recognised in the Universal Declaration of human rights which states that all human beings are born free and equal in dignity⁹⁰ and further that "everyone is entitled to all the rights and freedoms... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty"⁹¹ It is further entrenched in international law through its enshrinement in treaties such as the International Covenant on Civil and Political Rights⁹² and the International Covenant on Economic, Social and Cultural Rights⁹³.

⁸⁴UNGA, *Report Of The Special Rapporteur Of The Human Rights Council On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, Manfred Nowak, A/63/175 (2008), para 50.

⁸⁵ *Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, para 31.

⁸⁶ *Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, para 32.

⁸⁷ *Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, para 32.

⁸⁸ The phrase "informed consent" will be examined in detail later in this chapter

⁸⁹ *Reproductive Rights Violations As Torture And Cruel, Inhuman, Or Degrading Treatment Or Punishment: A Critical Human Rights Analysis*, 7.

⁹⁰ Article 1, *Universal Declaration of Human Rights*

⁹¹ Article 2, *Universal Declaration of Human Rights*

⁹² Article 7, *International Covenant on Civil and Political Rights*, 1 May 1972, 999 UNTS 145.

⁹³ Article 12, *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, 1 May 1972.

While both men and women are subject to forced and coerced sterilisation, women and girls continue to be disproportionately impacted.⁹⁴ Women often face discrimination and coercion on the base ground that they are women.⁹⁵ The Vienna Declaration and Programme of Action, drafted at the Vienna World Conference on Human Rights in 1993, refers to vulnerable groups protected under international law and explicitly elaborates on the human rights of women and of the girl-child which are an inalienable, integral and indivisible part of universal human rights.⁹⁶ It proceeds to highlight the importance of eliminating all forms of Gender-based violence as they are incompatible with the dignity and worth of the human person.⁹⁷

Furthermore, the CEDAW Convention describes discrimination of women as '*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field.*'⁹⁸ Gender based and sexual violence, as per the definition of discrimination in the CEDAW convention, is discriminatory in nature. Gender-based violence is considered to be 'any harmful act directed against individuals or groups of individuals on the basis of their gender'⁹⁹, in this case, violence that is directed against a woman because she is a woman or that affects women disproportionately.¹⁰⁰ Sexual violence is a form of gender-based violence directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting and includes forced sterilization.¹⁰¹

Given that the unconsented sterilisation of women brings about the violation of their various rights, as earlier discussed, it falls under the ambit of discrimination as the CEDAW Convention describes it.

⁹⁴ WHO, *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement- OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO*, (2014) 1.

⁹⁵ *Eliminating forced, coercive and otherwise involuntary sterilization*, 3.

⁹⁶ Art 18, *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, Vienna, 14-25 June 1993, UN Doc A/CONF.157/23 (1993); 32 ILM 1661 (1993).

⁹⁷ Art 18, *Vienna Declaration and Programme of Action* (1993)

⁹⁸ Article 1, *Convention on the Elimination of All Forms of Discrimination Against Women*, 9 March 1984, 1249 UNTS 13.

⁹⁹ United Nations, Office of the High Commissioner for Human Rights, *Report On Sexual And Gender-Based Violence In The Context Of Transitional Justice*, (2014) 1.

¹⁰⁰ UN Women, *General recommendation No 19(6) to the Convention on the Elimination of Discrimination against Women*, (1992).

¹⁰¹ *Report On Sexual And Gender-Based Violence In The Context Of Transitional Justice*, (2014) 1.

International and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender.¹⁰²

A report prepared by Open Society Foundation, based on research on forced and coerced sterilisation of women worldwide, found that there are also other intersecting grounds over which women are sterilised without their consent, that amount to discrimination. They include the forced or coerced sterilisation of women living with disability, HIV, or those belonging to indigenous populations or ethnic minorities.¹⁰³ Most times, the women belonging to these categories are targeted with the aim of implementing negative eugenics, that is, an effort to improve the qualities of the human species or a human population by discouraging reproduction by persons having genetic defects or presumed to have inheritable undesirable traits. In her writing,¹⁰⁴ Sarah Conly supports this argument by adding that;

“What one might fear is that being denied the chance to have children by someone deprecates your dignity. Historically, such denials have been predicated on either of two claims: that you are inferior, and thus we don't want more like you around or, that whatever your merits, you, unlike the rest of us, lack the rationality to be in charge of your own reproduction. (Both rationales have been used for sterilizations based on race, criminality, or retardation.) Such discrimination does deny dignity.”

3.5 Defining Informed Consent

Informed consent is a prerequisite of any medical surgery that is not prompted by a life threatening incidents. As discussed in chapter 2, human being's ability to reason and make their own choices geared towards a certain end in their lives has a large part to play in their human dignity. The principle of bodily integrity is founded upon this autonomy of man over his life. However, bodily integrity cannot be achieved where one lacks information or receives insufficient or false information. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health observed that informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision.

¹⁰²UN Human Rights Committee, *General Comment No. 28*, (2000), para. 11.

¹⁰³ Open Society Foundation, *Against Her Will: Forced And Coerced Sterilization Of Women Worldwide*, (2011) 3.

¹⁰⁴ Conly S, 'The Right To Procreation: Merits And Limits', *American Philosophical Quarterly Volume 42*, Number 2, (2005) 105-115.

Guaranteeing informed consent is a fundamental feature of respecting an individual's autonomy, self-determination and human dignity in an appropriate continuum of voluntary healthcare services.¹⁰⁵

In cases of sterilisation, informed consent must be taken to include that counselling, advice or information given by health-care providers to the patient should be unbiased, enabling individuals to make decisions that are best for themselves.¹⁰⁶

Such information must be provided to them in a form or language that they will understand; this includes braille for the blind and the availability of this information in a language that the patient can understand.¹⁰⁷ Patients should also be equipped with the knowledge that sterilization is a permanent procedure.

In addition, medical practitioners must ensure that the patient is in the cognitive position to understand the decision she is about to make. Capacity is a condition assigned to agents, in this case, patients, that exercise free will and choice and whose actions are attributed legal effects.¹⁰⁸ Once it has been ascertained that the patient has understood the procedure and is capable of giving valid consent, her informed decision must be respected, even if it is considered liable to be harmful to her health.¹⁰⁹

In summary, international consensus submits that reproductive rights are validly protected under various international conventions such as the ICESR and the ICCPR. Forced sterilisation is viewed, at this level, as a violation of reproductive rights by amounting to torture or cruel, inhuman or degrading treatment and by being discriminatory in nature. This proves the second hypothesis of the thesis. The chapter also concludes that full, informed and intentional consent is interrelated with the notion of bodily autonomy discussed in Chapter two. Given that sterilisation is not a life-saving surgery as is exemplified in the decision reached by the Court in the *V.C v Slovakia*, the patient should be allowed to choose whether or not to go through with the procedure. Where such consent is absent, Court can easily proceed to conclude that the violations discussed above have occurred.

¹⁰⁵ UNGA, *Special Rapporteur On The Right Of Everyone To The Enjoyment Of The Highest Attainable Standard Of Physical And Mental Health*, Grover A, A/64/272 (2009) para 18.

¹⁰⁶ *Eliminating forced, coercive and otherwise involuntary sterilization*, 9.

¹⁰⁷ *Eliminating forced, coercive and otherwise involuntary sterilization*, 11.

¹⁰⁸ *Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, para 27.

¹⁰⁹ *Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, para 32.

CHAPTER 4: KENYAN POSITION ON THE RIGHT TO REPRODUCTIVE HEALTH

4.1 Introduction

The discourse in Chapter 3 revealed that forced sterilisation is viewed as a violation of numerous rights protected under various international treaties. These violations can, however, be grouped into two main categories: Forced sterilisation as amounting to discrimination; and forced sterilisation as amounting to cruel, inhuman or degrading treatment. This chapter proceeds to answer the third and last objective of the research, that is, to investigate the position of Kenyan laws with regard to the right to reproductive health, and even more so, how these rights relate to forced sterilisation. In doing so, the chapter first examines the nature of Kenya's obligations as a State Party to the various international covenants that protect the right to reproductive healthcare and its constituent right. It then gives a brief assessment on the impact of the Convention on the Elimination of Discrimination on Kenyan legislation on reproductive health and concludes by enumerating and expounding on the existing Kenyan legislation on reproductive rights that shows that forced sterilisation is, indeed, prohibited in Kenya.

4.2 Nature Of Kenya's State Obligation To Ratified Conventions

Kenya is party to numerous international treaties and conventions that protect the right to reproductive health. Some of these treaties have been mentioned in the previous chapters. They include the ICCPR, ICESCR, ICERD and CEDAW. As a state party to these conventions, Kenya has a common duty to respect, protect and fulfil the obligations set out in the conventions. The ICESCR General Comment on the Right to the Highest Attainable Standard of Health¹¹⁰ explains the nature of these obligations by expounding on the terms "respect, protect and fulfil". The comment states that "...the obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees.

¹¹⁰ICESCR General Comment No. 14: *The Right to the Highest Attainable Standard of Health (Art. 12)*, Document E/C.12/2000/4.

Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.¹¹¹

In the context of this study, states must refrain from practices such as forced sterilisation as they interfere with the enjoyment of rights by denying the right to decide on the number and spacing of children, amounting to a breach of the States' obligation to respect. To fulfil the obligation to protect, the State must also take steps to ensure that third parties do not violate these reproductive rights. The obligation to fulfil requires that states take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of rights.

While Article 2(1) of the ICESCR introduces the possibility of progressive realisation of obligations to State parties which are developing,¹¹² there are also some obligations that must be realised with immediate effect, for instance, the obligation to respect an individual's freedom to control his or her health and body and the obligation to ensure freedom from discrimination and from torture, cruel, inhuman and degrading treatment.¹¹³

4.3 Impact Of CEDAW On Kenya's Reproductive Rights Legislation

The most important and legally binding international human rights instrument in the field of women's rights is the Convention on the Elimination of Discrimination against Women (CEDAW).¹¹⁴

It establishes a human rights framework to attain and maintain gender balance in public and political life¹¹⁵ through guaranteeing women's individual rights, giving social support to women and enhancing social and cultural change.¹¹⁶

¹¹¹ ICESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* Para 33.

¹¹² Art 2(1), *International Covenant on Economic, Social and Cultural Rights*, 1972

¹¹³ Kenya National Commission on Human Rights, *Realising Sexual and Reproductive Health Rights in Kenya: A Myth or a Reality? A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya*, 2012, 20.

¹¹⁴ International Institute for Democracy and Electoral Assistance (IDEA)/CEE Network for Gender Issues, Schöpp-Schilling HB, *The Role of the Convention on the Elimination of All Forms of Discrimination Against Women and its Monitoring Procedures for Achieving Gender Equality in Political Representation*, (2004), 1.

¹¹⁵ HB Schöpp-Schilling, *The Role of the Convention on the Elimination of All Forms of Discrimination Against Women and its Monitoring Procedures for Achieving Gender Equality in Political Representation*, (2004), 5.

Article 2 of CEDAW sets the groundwork for the formulation of law and policy supporting at a national level. The Article stipulates that State Parties undertake to take appropriate means of eliminating discrimination against women by agreeing to implementing legislation, establishing national tribunals and institutions as well as taking any and all other appropriate measures to ensure that discrimination does not occur in the institutions, whether they be public or private. States must also modify practices and customs that put women in discriminatory positions.

Further, Article 3 of CEDAW adds that States Parties have the duty to take all appropriate measures, including legislation, to ensure the full development of and advancement of women in all fields, be they political, social, economic or cultural, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. Article 5b then takes a step further by recognising maternity as a social function. Such recognition implies that the State has the duty to pass legislation to protect the maternal function of women.

Article 16 affirms the right of parents to decide freely and responsibly on the number and spacing of their children. General Recommendation 19 to the Convention further asserts that forced sterilisation adversely affects women's physical and mental health, and curtails personal integrity by infringing the right of women to decide on the number and spacing of their children. The Recommendation also avers that such sterilisation amounts to both discrimination and gender violence.

Kenya adopted the Convention on 9th March 1984, making her bound as a State Party to the Convention's obligations. Article 2 of the Constitution of Kenya 2010¹¹⁷ states that the general rules of international law shall form part of the law of Kenya.¹¹⁸ Furthermore, any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.¹¹⁹

¹¹⁶ Holtmaat R, 'The CEDAW: a holistic approach to women's equality and freedom, in Hellum A and Aasen HS, *Women's Human Rights : CEDAW in International, Regional and National Law*, Cambridge University Press, (2013).

¹¹⁷ 2010

¹¹⁸ Article 2(5), Constitution of Kenya, (2010)

¹¹⁹ Article 2(6), *Constitution of Kenya*, (2010)

Although the articles seem to imply that any treaty ratified by Kenya becomes part of Kenya's national law, there was initial confusion as to whether Kenya remained dualist or whether that had truly been transition to being monist.¹²⁰

Kabau and Ambani discuss the uncertainty that plagued the legal sphere with regard to the hierarchy of national and international laws. In *Re the Matter of Zipporah Wambui Mathara*¹²¹, the court was faced by the issue of the interplay between international law and local statutes. It ruled that the Civil Procedure Act of Kenya provisions on civil jail were inapplicable due to their inconsistency with international law.¹²² This gave rise to the implication that international law prevails over national law. However, in 2012, the court in *Beatrice Wanjiku & Another v Attorney General & Another*¹²³ endorsed a more superior role for Acts of Parliament. Justice Majanja averred that the executive arm of the Government is generally expected to ratify international instruments in good faith on the behalf of and in the best interests of the citizens. However, the framers of the Constitution could not have intended that the Constitution be inferior to international laws.¹²⁴

In 2013, the Kenyan Courts clarified their position regarding this hierarchy by stating that:

*"...while international instruments and the norms of international law do form part and parcel of our law, they do so only in so far as they are not inconsistent with the Constitution. This is provided at Article 2 (4) which states that 'Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency...'"*¹²⁵

In this respect, the provisions of the Convention on the Elimination of Discrimination of Women validly form part of the law of Kenya and must be adhered to and applied.

¹²⁰ Lumumba PLO & Franceschi L, *The Constitution of Kenya, 2010; An Introductory Commentary*, Strathmore University Press, 2014, page 72-73; Kabau T & Ambani JO, *The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?*, Africa Nazarene University Law Journal, Vol 1(1) 2013, 36.

¹²¹ *Re the Matter of Zipporah Wambui Mathara* [2010] eKLR

¹²² *Re the Matter of Zipporah Wambui Mathara*, para 10

¹²³ *Beatrice Wanjiku & Another v Attorney General & Another* [2012] eKLR

¹²⁴ *Beatrice Wanjiku & Another v Attorney General & Another*, para 20

¹²⁵ *John Njuguna Mwaura & 2 others v Republic* [2013] eKLR, page 7.

4.4 National Law And Policy On The Right To Reproduction

This section examines existing and relevant Kenyan legislation that protects, promotes and upholds the right to reproductive health in a bid to prove that the practice of forced sterilisation is a violation of such laws. Majority of the law in this field is contained within the Constitution. Other legislations play a supporting role to that played by the Constitution and are mostly in the form of policies and guidelines.

4.4.1 Constitution of Kenya, 2010

The Kenyan Constitution is the supreme law of the republic of Kenya and binds all persons and state organs at both levels of government.¹²⁶ This means that the Constitution sits on a higher pedestal than all other laws operating within the country, an argument substantiated by the fact that any law that is inconsistent with the provisions of the Constitution is void to the extent of its inconsistency.¹²⁷

Part II of the Constitution of Kenya is the Bill of rights which enshrines the rights due to every citizen as protected by the Constitution. As discussed in the previous chapters, human rights are founded upon the concept of human dignity. Article 28 of the Constitution recognises that every person has inherent dignity and the right to have that dignity respected and protected.

Article 27 of the Constitution then enshrines the equality of all persons before the law and the freedom from discrimination. The right to equality and freedom from discrimination is essential to the enjoyment of other fundamental rights and freedoms.¹²⁸ This article of the Constitution forms the crux of women's rights in Kenya and states that:

- 1) *Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
- (3) *Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

¹²⁶ Article 2(1), *Constitution of Kenya*, (2010).

¹²⁷ Article 2(4), *Constitution of Kenya*, (2010)

¹²⁸ PLO Lumumba and L Franceschi, *The Constitution of Kenya, 2010; An Introductory Commentary*, 2014, 157.

(4) *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

(5) *A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*

Article 27 displays an effort by the State to both comply and reinforce the provisions of the CEDAW Convention, especially Articles 3 which provides for the duty of the state to enhance full development and advancement of women by legislation. The special recognition of women's rights presupposes the realisation that women suffer a certain handicap that requires special support.

Article 43 1(a) of the Constitution enshrines the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. By reading article 43 1(a) together with article 27, it can be deduced that reproductive health and healthcare for women is a right protected under the Kenyan Constitution. The discussion in Chapter 3 revealed that forced sterilisation violates the very essence of the right to reproductive healthcare and amounts to gender violence, both of which amount to discrimination of women.

The Constitution also protects the right of every person to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading manner.¹²⁹

In *W.J & another v Astarikoh Henry Amkoah & 9 others*,¹³⁰ court ruled that sexual violence amounts to a violation of one's right to human dignity, freedom from discrimination, right to the highest attainable standard of health and freedom from torture and inhuman treatment as enshrined in the Constitution.¹³¹ The court opined that *'the consequences of sexual violence are severe: they can affect their physical and emotional well-being, and expose them to the risk of contracting sexually transmitted illnesses, thus affecting their right to health. In addition, the fact that their psychological well-being was affected is a clear violation of their*

¹²⁹ Article 29(d), Constitution of Kenya, (2010).

¹³⁰ *W.J & another v Astarikoh Henry Amkoah & 9 others* [2015] eKLR

¹³¹ *W.J & another v Astarikoh Henry Amkoah & 9 others*, para 151

right to health, which is defined as including the highest attainable standard of physical and mental well-being.¹³²

The principles applied by the court in this case can be similarly applied in the case of forced sterilisation. This is because, as discussed in Chapter Three, forced sterilisation amounts to a violation of reproductive rights and constitutes an act of sexual violence. The act of forced sterilisation can therefore be considered as unconstitutional by virtue of its violation of the above discussed rights.

4.4.2 National Family Planning Guidelines¹³³

Kenya has put in place National Family Planning Guidelines for Service Providers that detail the various courses of family planning methods. These guidelines were prepared by Ministry of Public Health and Sanitation's Division of Reproductive Health in collaboration with a number of organizations and institutions and incorporates the 2009 Medical Eligibility Criteria (MEC) from the World Health Organization (WHO). The Guidelines contain the following highlights¹³⁴ concerning the process of sterilisation;

- i) No incentives are to be given to clients to accept any form of contraception or to providers to recruit clients and perform the surgical procedure.
- ii) The client is free to change her mind at any time prior to the procedure.
- iii) Informed consent must be obtained and the client must sign a standard consent form for the procedure.
- iv) The patient should undergo thorough and careful counselling before she decides to have this procedure.
- v) A consent form must be signed by the client in all cases before the procedure is undertaken and after having received the counselling. In the case of a mentally challenged client, the surgeon may, after consultation with a professional colleague, obtain the written consent of the parent or guardian.

As discussed in previous chapters, forced and coerced sterilisation both interfere with the woman's right to make decisions concerning her reproductive health. Such sterilisations violate the guidelines by failing to give counselling to the patients before the procedure or giving them misleading information as to its nature, coercing them to undergo the procedure

¹³² W.J & another v Astarikoh Henry Amkoah & 9 others, para 121

¹³³ Division of Reproductive Health Ministry of Public Health and Sanitation, *National Family Planning Guidelines for Service Providers*, 2010.

¹³⁴ *National Family Planning Guidelines for Service Providers*, 2010, 173-174.

through threats or incentives and going through with sterilisation without signed consent from the patient or with consent given when not in a proper state of mind.¹³⁵

4.4.3 National Reproductive Health Strategy¹³⁶

Although this strategy's tenure recently met its end, the Government of Kenya relied on it between the period of 2009 and 2015. It is, therefore, prudent to consider the contents of this strategy as we await the launch of the 2016 strategy.

The National Reproductive Health Strategy has numerous objectives as the field of reproductive health is wide. However, for purposes of this discussion, we will narrow down these objectives to that which is most relevant to this research, that is, to "*promote gender equity and equality in decision making in matter of sexual and reproductive health and contribute to the elimination of harmful practices and gender-based violence within a multi-sectoral and legal framework.*"¹³⁷ In doing so, they are guided by the principles of respect for human rights and freedoms regardless of religion, culture and socio-economic status and respect for reproductive and sexual health rights.¹³⁸

The Strategy recognises gender-based violence to be of great concern to reproductive health and constituting a violation of the right to be free from inhumane and degrading treatment as well as causing severe psychological, emotional and medical consequences.¹³⁹ It further submits that the key issues in the spheres of gender equality, sexual and reproductive rights in Kenya can be summarized as a lack of empowerment for women to exercise decision on their own reproductive health and rights and sexual and gender based violence.¹⁴⁰

Having previously recognised forced sterilisation as a form of gender based violence, it can be inferred that such practice is not condoned in Kenya and as one of the harmful practices that the strategy aims to eliminate.

¹³⁵ Testimonials, F Kasiva, *Robbed of Choice: Forced and Coerced Sterilization-Experiences of Women Living with HIV in Kenya*, 2012.

¹³⁶ Kenya Ministry of Public Health and Sanitation, *National Reproductive Health Strategy, 2009-2015*

¹³⁷ *National Reproductive Health Strategy 2009-2015*, 38.

¹³⁸ *National Reproductive Health Strategy 2009-2015*, 15.

¹³⁹ *National Reproductive Health Strategy, 2009-2015*, 17.

¹⁴⁰ *National Reproductive Health Strategy ,2009-2015*, 37.

4.4.4 Reproductive HealthCare Bill 2014¹⁴¹

The Reproductive Healthcare Bill of 2014 shows the progress in which Kenya is taking to give a direct focus on the importance of Reproductive Rights. The Bill aims to make provision for the actualization of reproductive rights. It recognises the right to make free and informed decisions as central to the exercise of any right and that such right shall not be subjected to any form of coercion and must be fully guaranteed by the State in an effort to promote the rights and welfare of women of every person particularly couples, adult individuals, women and adolescents.¹⁴²

The Bill describes reproductive rights as to include the right of all individuals to attain the highest standard of sexual and reproductive health and to make informed decisions regarding their reproductive lives free from discrimination, coercion or violence.¹⁴³ It then proceeds to define informed choice means a voluntary decision by a patient to use or not to use a contraceptive method or to accept a sexual and reproductive health service, after receiving adequate information regarding the options, risks, advantages and disadvantages of all the available methods¹⁴⁴ as distinguished from informed consent which refers to consent obtained freely, without threats or improper inducement, after appropriate disclosure to the patient of adequate and understandable information in a form and language understood by the patient.¹⁴⁵

Among the shortcomings of the Bill is its focus on issues concerning surrogacy, childcare and termination of pregnancy. It fails to explicitly recognise the other ways in which reproductive rights can be interfered with. Inference can, however, be drawn from this Bill that actions that interfere with informed choice and consent are violations of reproductive rights. Forced sterilisation, therefore, is a violation of this right.

The Bill proposes the establishment of a Reproductive and Child Health Care Tribunal¹⁴⁶ which has the jurisdiction to hear and try complaints arising out of breach or any other matter as may be referred to it pursuant to the provisions of the Bill.¹⁴⁷ Forced sterilisation, as a violation of main objective of the Bill, can be brought before the Tribunal despite the failure of the Act to explicitly mention it as an offense in the provisions of the Bill. This is because

¹⁴¹ Reproductive HealthCare Bill, Senate Bill No 7, (2014)

¹⁴² Memorandum of objects and reasons, *Reproductive Healthcare Bill*, (Senate Bill No. 7), 2014.

¹⁴³ Section 2, *Reproductive Healthcare Bill*, 2014.

¹⁴⁴ Section 2, *Reproductive Healthcare Bill*, 2014.

¹⁴⁵ Section 2, *Reproductive Healthcare Bill*, 2014.

¹⁴⁶ Section 41, *Reproductive Healthcare Bill*, 2014.

¹⁴⁷ Section 44, *Reproductive Healthcare Bill*, 2014.

the Bill takes a nuanced approach to resolving violations by introducing the ability of the Tribunal to hear suits and convict persons for offences for which no penalty is provided.¹⁴⁸

In conclusion, this chapter shows that Kenya does, indeed have national legislation that protects the right to reproductive health and reproductive health services. This protection is reinforced by a number of guidelines that provide guidance on the proper administration of reproductive health services. It is, however important to note that Kenyan legislation does not expressly mention the offense of forced sterilisation in any of its provisions. It therefore falls upon the Kenyan courts to apply the approach taken by the courts in *V.C v Slovakia*, as discussed in Chapter Three. Such an approach would be viable in Kenya given that the Kenyan Constitution contains a Bill of Rights which lists various rights, a number of which would be violated upon the execution of forced sterilisation. The success of such possible suit can also be inferred from the court's recognition that acts of sexual violence violate one's rights to dignity, freedom from discrimination, freedom from torture and inhuman treatment as well as the right to the highest attainable standard of health. This chapter therefore proves the final hypothesis, that is, that forced sterilisation is a violation of reproductive rights guaranteed under Kenya's constitutional framework.

¹⁴⁸ Section 48, *Reproductive Healthcare Bill*, 2014.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

Human beings are social beings.¹⁴⁹ It is human nature to seek companionship with others and to desire to start a family. So important is this desire, that the Kenyan Constitution, in Article 45, enshrines this desire to start a family as a right owed to every individual. The Constitution further goes on to cite this basic unit as an aspect deserving State protection. The reports on *Robbed of Choice* and Open Society Foundation both provide a local and worldwide view of impact of forced and coerced sterilisation. The reports reveal that women who have undergone forced or coerced sterilisation suffer mental and psychological consequences; they are rejected and ostracised by their families and communities and experience a diminished sense of self.

Chapter 2 of this paper revealed that human beings are equal and have an intrinsic worth that makes them valuable beyond any measure. They have the ability to reason and act towards attaining a particular chosen end. To respect this ability to reason is to respect that intrinsic worth- human dignity. Human rights are founded upon the premise of protecting the dignity of all persons as a whole and as individuals. It is for this reason that human rights are owed to all without discrimination.

As a minority group, women suffer a handicap in the process of attaining social, economic, political and even cultural success. This handicap has been recognised at an international level and has led to the recognition of the rights owed to women as a special category which is deserving of special attention and care. One of these rights is the right to reproductive health and healthcare. This right is a conglomeration of various rights protected at international and national level, including the rights 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 and to exercise these rights in a manner free of discrimination, coercion and violence.

At an international level, these rights are enshrined in various treaties such as the ICCPR, ICESCR, ICESR and CEDAW. The ability to exercise control over decisions concerning their bodies and health is considered central to the right to reproductive health. This ability is referred to as bodily integrity and was given special focus in the Beijing Platform for Action. Actions that contravene the idea of bodily integrity are considered as violations of the right to reproductive health and its constituent rights. Forced and coerced sterilisations, therefore,

¹⁴⁹ Kateb G, *Human Dignity*, (2011) ,45.

constitute violations of this right as they take away the woman's ability to decide on the timing, number and spacing of her children.

Chapter 3 looked into the practice of forced sterilisation from an international perspective. It concludes that international consensus views forced and coerced sterilisations in two main ways. The first is as constituting cruel, inhuman and degrading treatment in contravention of the Convention against Torture and Cruel, Inhuman and degrading treatment while the second is as amounting to discrimination. For the latter, this discrimination can be viewed in two ways: i) discrimination to women in general on account of the fact that women are mostly affected by the scourge of forced sterilisation or ii) as a more specific discrimination against certain categories of women based on their race, financial or health or HIV status.

Chapter 4 discusses how these two views can be applied in Kenya. It also while examining national legislation concerning the issue. The Constitution of Kenya, 2010, enshrines and protects the human dignity of every person as well as the various rights owed to all persons in its Bill of rights. These rights are due to all free from discrimination on any grounds. Women's rights are protected by Article 27 of the Constitution which emphasises the need for the protection of equal treatment of men and women at the law. Among these rights is the right to the highest attainable standard of health, including reproductive health and the right of every person to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading manner.

CEDAW obligates states to put in place measures to protect and actualise the rights of women within their state. The National Reproductive Health Strategy can be considered as one of these measures. The Strategy aims to improve the recognition and status of reproductive rights and to eliminate harmful practices and gender based violence of women in Kenya. Harmful practices include any practice that violates the right to reproductive health as enshrined in the Constitution. Drawing from international consensus, forced and coerced sterilisations amount to harmful practices and gender based violence in this context. The National Family Planning Guidelines then proceed to give the circumstances under which sterilisations can be performed, highlighting the importance of counselling and informed consent by the patient before conducting the procedure.

From the review of Kenya's laws, it is clearly visible that the scope of activities listed as constituting violations of the right to reproductive health or gender based violence is not

exhaustive; it fails to take into consideration the newer approaches to concepts such as Gender based violence, limiting their scope to offences such as rape, defilement, sex trafficking, incest, child prostitution and sexual harassment.¹⁵⁰ The most progressive piece of legislature in Kenya appears to be the Reproductive Healthcare Bill which was proposed in 2014 and is still awaiting its third reading in Parliament. The Bill creates room for the hearing of suits that are in violation of the right to reproduction even when no specific penalty has been set out for such offences. It also defines reproductive rights, informed consent and informed decisions and recognises the importance of free and informed decisions in the exercise of the reproductive rights. Should the Bill be passed into law, it will make a greater step towards solidifying the lack of tolerance by the State towards activities such as forced and coerced sterilisation.

This research was carried out under the main hypothesis that forced sterilisation is a violation reproductive rights guaranteed as per Kenyan legislation. The arguments and findings presented throughout this thesis prove the verity of this hypothesis. There is, therefore, a need to remedy the situation in the interests of protecting the rights of any potential victims of forced sterilisation. To this end, the following recommendations are made:

- i) That Kenya passes legislation broadening the scope of actions constituting violations of reproductive rights.
- ii) That research and investigations be carried out with the aim of finding the statistics of the occurrence of forced sterilisation in Kenya.
- iii) That more effort be made towards the creation of awareness and sensitization of women on their reproductive rights and how forced sterilisation amounts to breach of these rights. Such awareness campaigns may also be targeted at the spouses and partners of women to strengthen the war against such violations.
- iv) That medical practitioners from both public and private institutions are trained on due process before carrying out sterilisations and the consequences of breach of procedure.

¹⁵⁰ *Sexual Offences Act*, (Act No 12 of 2012)

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