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MASTER OF LAWS

PROVISION OF SAFE ABORTION CARE FOR SURVIVORS OF SEXUAL VIOLENCE IN KENYA: THE IMPLICATIONS OF ARTICLE 26 (4) OF THE CONSTITUTION.

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DECLARATION

Students Declaration

This thesis is my original idea and has not been submitted for award of degree or diploma in any other institution.

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Supervisor's Name: Ms. Koki Mbulu

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ACRONYMS

ACHPR –African Charter on Human and Peoples' Rights

ARHD- Adolescent Reproductive Health Development

AG- Attorney General

CEDAW- Convention on the Elimination of all forms of Discrimination Against Women

COE- Committee of Experts

CSOs-Civil Society Organizations

FIDA - Federation of Women Lawyers

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

ICPD- International Conference on Population and Development

KNCHR- Kenya National Commission on Human Rights

MDGs-Millennium Development Goals

MOH-Ministry of Health

MVA-Manual Vacuum Aspiration

NNAK-National Nurses association of Kenya

NRHP- National Reproductive Health Policy

PSC-Parliamentary Select Committee

RH-Reproductive Health

RHDC-Revised Harmonized Draft Constitution

RHN – Reproductive Health Network

RHRA- Reproductive Health & Rights Alliance

SAC- Safe Abortion Care

SECR-Social Economic and Cultural Rights

SGBV-Sexual & Gender Based Violence

UDHR-Universal Declaration of Human Rights

UN-United Nations

UNCRC-United Nations Convention on the Rights of the Child

US-United States

WHO-World Health Organization

ABSTRACT

The Constitution of Kenya 2010 under Article 26 (4) prohibits the procurement of abortions in Kenya. However, the provision introduces more exceptions when a safe abortion may be procured. While the Penal Code[1] provided for one exception when an abortion would be legally procured that is, when the life of the mother was in danger, Article 26 (4) of the Constitution provides for three exceptions. Under the provision an abortion may be procured legally, first "*where there is need for emergency treatment*", secondly "*where the health of the mother is in danger*" and thirdly "*where the life of the mother is in danger*." Additionally, the subsection also gives room for safe abortions to be procured under any other circumstances "*if permitted by any written law*."

This thesis investigates the implications of article 26 (4) to survivors of sexual violence in light of various rights such as the right to health and the right to be free from torture under the Constitution, regional and international instruments.

It is the argument of this thesis that there is inadequate legislation to give effect to article 26 (4) this is especially so because the Penal Code for example is yet to be amended to reflect the extended exceptions as provided for under the Constitution. Additionally, the Reproductive health Bill, 2015 fails to give effect to article 26 (4) as it does not give clarity for example on what qualifies as a threat to health that would be a basis for the procurement of a safe abortion in pregnancies resulting from sexual violence. Additionally, Kenya is yet to withdraw its reservation to Article 14 (2) (c) of the Maputo protocol that obligates states to provide safe abortion care to survivors of sexual violence.

This thesis gives recommendations of interventions including legislative reform that are required to give effect to Article 26 (4). The urgency to give effect to the article is that failure to do so continues to endanger the health and lives of survivors of sexual violence who may opt for clandestine abortions in the absence of provision of safe abortion care. Studies carried out in 2012 showed that 30-40% of maternal mortality in Kenya resulted from complications arising out of unsafe abortions.[2] This is much higher than the world percentage of 13%.

While the provision of safe abortion care which is the writer's main discussion is important, it should not substitute the provision of adequate information and reproductive health services among all women and girls of child bearing age. It is the opinion of this thesis that the high rate of unsafe abortion highlighted in the various studies and publications referred to in this thesis can be prevented if first appropriate reproductive health information and services are made available.

Secondly, the government and non-state actors including religious institutions should be at hand to provide support for girls and women who are willingly without any coercion ready to keep unplanned pregnancies to full term. The government should for example make information on

[1] Chapter 63 of the Laws of Kenya.

[2] Center for Reproductive Rights and Federation of Women Lawyers-Kenya, *Failure to deliver: Violations of Women's Human Rights in Kenyan Health Facilities*, New York (2007) p. 24.

putting up a child for adoption as an option more readily available while clearly distinguishing it from the sell or trafficking of children.

Thirdly, if the stigma surrounding pregnancies acquired outside marriage for example teen pregnancies is reduced. This will call for collaborative effort by all in the society. Religious, education and other such like institutions should consider doing away with any discriminatory policies or rules that may lead especially young girls to seek unsafe abortions. This thesis for example notes that rules that lead to the excommunication from a religious institution, dismissal from employment or expulsion from institutions of learning on the basis of an out of wedlock pregnancy should be done away with. Additionally, any form of public humiliation for example forcing a girl or woman to apologize in front of a congregation or be stopped from receiving Holy Communion should also be reconsidered. In the opinion of this thesis such acts make a pregnancy out of wedlock appear like the greatest sin and this would make a woman or girl to go to any lengths however risky to terminate a pregnancy to avoid the humiliation that she would be put through if the pregnancy was to be discovered.

This thesis however emphasizes the importance of provision of safe abortion care especially in instances that fall under the exceptions set out in Article 26 (4) which would in the opinion of this thesis include pregnancies resulting from sexual assault that is rape and defilement.

CHAPTER ONE

1.1 INTRODUCTION

The Constitution of Kenya (2010) guarantees all Kenyans the right to the highest attainable standard of health which includes the right to health care services and the specific right to reproductive health care services[3].

Reproductive Health (RH) has been defined as "A state of complete physical, mental and social well-being in all matters relating to the reproductive system and to its functions and processes. It implies that people have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this is the right of men and women to be informed and have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility, which are not against the law, and the right of access to health-care services that will enable women to go safely through pregnancy and childbirth. RH care also includes sexual health, the purpose of which is the enhancement of life and personal relations."[4]

In addition to the constitutional guarantee to RH care services, there are a number policies developed by the government including the Adolescent Reproductive Health Development (ARHD) Policy (2003).[5] This was the first policy to focus on the reproductive health of adolescents in Kenya.[6] Section 3.6.4 of the policy recognized that a majority of women seeking care for unsafe abortion complications are below 25 years of age it further stated that the policy would enable the promotion of knowledge and adoption of appropriate attitudes towards abortion related issues.

In 2009 the National Reproductive Health Strategy (2009-2015)[7] was developed to facilitate the operationalization of the NRHP. One of the objectives of the strategy was to enhance the provision of a comprehensive range of essential sexual and reproductive health services.[8]

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[3] Article 43(1) (a) Constitution of Kenya (2010).

[4] See the WHO definition of health, available at <http://www.who.int/topics/reproductive_health/en/> (accessed on 25th March 2014) and Chapter VII (A) of the ICPD Programme of Action adopted at the 1994 International Conference on Population and Development (ICPD) in Cairo, available at <http://www.unfpa.org/public/home/sitemap/icpd/International-Conference-on-Population-and-Development/ICPD-Summary#chapter7> (accessed on 25th March 2014).

[5] Available at <http://www.k4health.org/sites/default/files/Kenya%20Adolescent%20Reproductive%20Health%20and%20Development%20Policy.pdf> (accessed on 25th March 2014).

[6] <http://www.prb.org/Publications/Articles/2013/kenya-policy-assessment-report.aspx> (Accessed on 25th March 2014).

[7] Available at< http://www.c-hubonline.org/sites/default/files/resources/research-testing/Reproductive_Health_Strategy.pdf>(Accessed on 25th March 2014).

[8] Ministry of Public Health and Sanitation & Ministry of Medical Services, National Reproductive Health Strategy (2009-2015) pp. 9

These policies were preceded by the MDGs derived from the Millennium Declaration and signed by 189 countries including Kenya, in September 2000.[9] MDG 5 is on the improvement of maternal health with the target being the reduction of maternal mortality.

The Kenya Vision 2030[10] adopted in 2012 also touches on health care delivery under the socio-economic pillar. Under section 4.3, Kenya's vision for health is stated as the provision of "equitable and affordable health care at the highest affordable standard" to her citizens.[11] Sub -standard health care delivery services, a poor work ethic among health care personnel and lack of the necessary medical supplies at the time of labour, delivery and immediately after birth are highlighted as the causes of maternal deaths.[12]

Kenya also developed the Reproductive health care Bill (2014) the objectives of the legislation include to provide a framework for the protection and advancement of reproductive and health rights for women. The Bill will be discussed in more detail under chapter 3 of this thesis specifically to highlight the gaps in the Bill as relates to the provisions on safe abortion care (SAC).

The development of these policies and the draft legislation attests to the fact that RH is a crucial part of general health.[13]However RH is more than just a health issue. It is a development issue as well as a human rights issue.[14] RH issues remain one of the most controversial health issues in international law[15]. An example of the controversy surrounding RH under international law is the opposition to and reservations by countries to Article 14 of the Maputo Protocol,[16] which deals with RH. The biggest controversy related to the provision that tasks state parties with the duty to

> "…*protect the reproductive rights of women by authorizing 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."*[17]

Due to the strong opposition to the provision some countries refused to sign the treaty some like Kenya held a reservation with Article 14 (2) (c) of the protocol.

In Kenya, there was a lot of controversy that surrounded the inclusion and phrasing of the provisions on life and abortion during the constitutional review process. At Bomas, for example, individuals who might in private discussion have supported openings for a wider right to

[9] <http://www.alliance2015.org/fileadmin/user_upload/MDGs.pdf >(Accessed on 25th March 2014).

[10]Sessional Paper No. 10 of 2012.

[11] ibid pp. 104.

[12] id (n.14) pp. 106.

[13] United Nations Population Information Network (POPIN) UN Population Division, Department of Economic and Social Affairs, with support from the UN Population Fund (UNFPA); Guidelines on Reproductive Health for the UN Resident Coordinator System available at <http://www.un.org/popin/unfpa/taskforce/guide/iatfreph.gdl.html> (accessed on 25th March 2014)

[14] id Cook, Dickens and Fathalla pp. 8.

[15] id Kenya National Commission on Human Rights pp.14.

[16] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

[17] ibid article 14 (2) (c).

abortion would find it difficult to stand against the sort of emotion that this topic produced in plenary.[18]

Religious leaders played a huge role in the phrasing of the Constitutional provision on life and the clause on abortion. The adamancy of the religious leaders saw the inclusion of the clauses prohibiting abortion and stating that life began at conception.[19]

RH encompasses various concerns and issues including birth control, sexually transmitted infections and diseases, infertility,[20] maternal health, gynecologic disorders, emergency contraception, abortion and reproductive system cancers such as cervical and prostate cancer.[21]

While there is a myriad of topics and issues under Reproductive Health this thesis will focus on the right to safe abortion care for survivors of sexual violence. It adopts the WHO understanding of what qualifies as a safe abortion that is

> *"…an abortion that is performed by trained health care providers with proper equipment, correct technique and sanitary standards.[22]"*

The thesis will focus on abortion for the following reasons. First, unsafe abortions have been cited as one of the major causes of maternal mortality in the world.

Secondly, Kenya's abortion law has for a long time been criticized as being restrictive thus leading women to procure unsafe abortion.[23] Before 2010 the safe abortion was restricted to instances where the life of the mother was at threat.[24]There were no exceptions regarding woman's health. There are still no exceptions for issues on age or for cases of sexual violence such as rape, defilement and incest[25].

The restrictive laws have however not reduced the number of women and girls procuring abortions in Kenya. Statistics show that 30-40% of maternal deaths in Kenya result from complications arising out of unsafe abortions.[26] WHO notes that in countries where the abortion laws are restrictive the rate of induced abortions is high and most are unsafe.[27]

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[18] Jill Cottrell and Yash Ghai, 'The role of Constitution-building process in democratization' (2004) available at < http://www.idea.int/cbp/upload/CBPkenyaFInaliss-2.pdf> (accessed on 13th May 2014)

[19] id pp. 110

[20]Reproductive Health available at < http://www.hhs.gov/opa/reproductive-health/> (accessed on 9th April 2014).

[21] Reproductive Health Topics available at <https://www.arhp.org/Topics> (accessed on 9th April 2014).

[22] World Health Organization ,'Safe Abortion: Technical and Policy Guidance for Health Systems pp.14 (2003) available at http://apps.who.int/iris/bitstream/10665/42586/1/9241590343.pdf (accessed on 17th August 2015).

[23] Concluding observations of the Committee on the Elimination of Discrimination against Women made at the Forty-eighth session , CEDAW/ C/KEN/CO/7 , 2011, p. 9 paragraph 37.

[24] id (n.32).

[25] ibid.

[26] Center for Reproductive Rights and Federation of Women Lawyers-Kenya, *Failure to deliver: Violations of Women's Human Rights in Kenyan Health Facilities*, New York (2007) p. 24.

[27]World Health Organization , *Unsafe abortion: Global and Regional estimates of the incidence of unsafe abortion and associated mortality in 2008 - 6th ed*.(2011) pp.6.

Finally, as will be argued later in this thesis, Article 26(4) the Constitution appears to expand the parameters within which a safe abortion may be carried out in Kenya. Article 26 (4) of the Constitution provides for three exceptions. Under the provision an abortion may be procured legally, first *"…where there is need for emergency treatment"*, secondly "…where the health of the mother is in danger" and thirdly "*…where the life of the mother is in danger*." Additionally, the subsection also gives room for safe abortions to be procured under any other circumstances if permitted by any written law. While interpreting this Constitutional provision this thesis adopts the WHO understanding of health that is

> "*…a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*[28]"

meaning then that a threat to a girl or woman's mental wellbeing would qualify as a threat to health. Despite this constitutional provision sections under the Penal Code[29] which criminalize abortion are yet to be repealed and Kenya is yet to withdraw its reservation to article 14 of the Maputo protocol[30]. There also remain legislative and policy gaps as relates to the provision and regulation of safe abortion care to survivors of sexual violence. This thesis highlights these gaps and gives recommendations on how they can be addressed.

1.2 BACKGROUND OF THE PROBLEM

Abortion remains a sensitive and controversial topic in Kenya. As is the case in other parts of the world for example the USA abortion engenders heated controversy. The controversy notwithstanding according to the Google Zeitgeist 2012 report, Kenya's most searched topic on Google under the "How to" category was "How to abort".[31] Additionally according to a survey released in August 2013 by the African Population and Health Research Centre there were 464,690 abortions procured in Kenya in 2012.[32]

According to the Kenya Medical Association and Kenya Obstetrical and Gynecological Society, unsafe abortions cause 30% to 40% of maternal deaths in Kenya.[33] Kenya's abortion related fatality is higher than the estimated rate in Africa and the worldwide average of 13%[34]. Annually

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[28] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

[29] Sections 158,159 and 160 of chapter 63 of the laws of Kenya.

[30] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

[31] *http://www.google.com/zeigeist/2012/#the-world (accessed* on 15th December 2012*).*

[32] Simon Ndonga, *Over 400,000 abortions in Kenya last year – survey***(2013)** available at *http://www.capitalfm.co.ke/news/2013/08/over-400000-abortions-in-kenya-last-year-survey/* (accessed on 24th January 2014)

[33] id (n 1) pp. 24.

[34] ibid pp.9.

at least 2,600 women die from unsafe abortion and 21,000 are hospitalized with complications from incomplete and unsafe abortion[35].

Despite the alarmingly high number of women's lives lost as a result of unsafe abortion Kenya has failed to give the issue proper attention. In the concluding observation of the Kenyan 7th CEDAW periodic review, the committee expressed concern over the high number of maternal deaths as a result of unsafe abortions.[36] The committee recommended that the state consider reviewing the restrictive laws that lead women into seeking unsafe abortions[37].The restrictive laws include the penal code for example section 58 which criminalizes attempts to procure an abortion and imposes a penalty of fourteen years, Section 20 of the Medical Practitioners and Dentists Act[38] additionally proscribes a very severe punishment for medical practitioners found to have violated the provisions of the Act or committed an offence under the Penal Code which would include section 58.This and other restrictive provisions will be addressed in depth under chapter three of this thesis.

Article 26 (4) of the Constitution prohibits abortion. However, the Article provides wide exceptions when abortion may be legally procured but as stated above restrictive provisions remain in the Penal Code[39] and other legislations and this would prevent reproductive health providers from conducting safe abortions even when a woman needs emergency treatment, for fear of legal consequences.[40]

1.3 STATEMENT OF THE PROBLEM

The overall research problem addressed in this thesis is that, despite a constitutional provision which this thesis argues expands the circumstances under which a safe abortion may be procured there is lack of adequate legislative framework to give effect to article 26 (4) of the Constitution. Additionally, the penal code provisions criminalizing provision of abortion remains in force, with the only exception being abortions procured to save a mother's life which is only one of the grounds under article 26 (4).

As a result of the inconsistency between the Constitutional provisions and the Penal Code and codes of regulations, medical providers may be reluctant to perform abortion for any reason for fear of legal consequences, especially because of the Penal Code penalties.[41] The consequence of this is that girls and women who are survivors of sexual violence would then be forced to procure unsafe abortions.

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[35] id .
[36] id Kenya National Commission on Human Rights pp.62.
[37] ibid.
[38] Chapter 253 of the Laws of Kenya.
[39] Chapter 63 of the Laws of Kenya.
[40] Hussain R, *Abortion and unintended pregnancy in Kenya* :*In Brief*, New York: Guttmacher Institute, 2012, No 2.pp.1.
[41] id Hussein R. pp. 1.

This thesis also argues that Kenya's reservation to article 14 of the Maputo protocol is an indication of the lack of political will by the government to make safe abortion care accessible to women and girls who unfortunately find themselves with pregnancies resulting from sexual violence. The said reservation fails to take into account article 43 (1) of the Constitution of Kenya which when read with article 26 (4) and with the WHO understanding of health as including mental wellbeing entitles survivors of sexual violence to safe abortion care.

Further there is no clear policy or law that has been developed to give clarity on issues related to the provision of safe abortion care (SAC) while the Ministry of Health (MOH) spearheaded the development and subsequent adoption of the '*Standards and guidelines for reducing morbidity and mortality for unsafe abortion in Kenya*' in 2012 which provided clarity for RH providers on the right for sexual violence survivors to access SAC, the guidelines were arbitrarily withdrawn in December 2013 by the director medical services without the involvement of stakeholders. This resulted in a policy gap on the provision of SAC.

This was later followed by a ban issued by the ministry barring health professionals in government facilities from attending any training on provision of SAC.[42] The ban meant that health professionals were not in a position to add on to or even acquire necessary skills on the provision of abortion care which is a critical component to the realization of women's constitutional to access the highest attainable standards of health care specifically reproductive health and the right to emergency treatment. The issuance of the ban therefore means that Kenya may not be in a position to provide safe abortion care to women and girls under any grounds. The WHO defines a safe abortion as being one that amongst other factors is conducted by trained health care providers using proper technic this can only be achieved through continuous training which is now prohibited by the ban issued by the director medical services.

The withdrawal of the guidelines and subsequent issuance of the ban cited above formed the grounds for a Constitutional petition that was filed by FIDA Kenya and 3 others against the AG, the Director medical services and the Cabinet secretary for Health.[43] Some of the petitioners' prayers included that;

"…the Court issue a declaration that the right to the highest attainable standard of health, right to nondiscrimination, right to life, right to be free from cruel, inhuman, and degrading treatment, right to benefit from scientific progress of the 2nd, 3rd, and 4th Petitioners as women of reproductive age and other women and adolescent girls of reproductive age whose interest they represent had been violated by the issuance of the ban."

The petitioners also prayed for the Court to declare that rape and defilement were legal grounds for termination of pregnancy. They also prayed that the Court order the cabinet secretary for health and the director of medical services to publicise the Ministry of Health Guidelines on Management of Sexual Violence in Kenya and to adopt effective administrative measures for practical realisation of appropriate health services to survivors of sexual violence.

[42] *FIDA Kenya & 3 others vs. the AG & 2 others* (*Nairobi High Court Constitutional Petition No. 266 of 2015).*
[43] ibid.

While referring the matter to the Chief Justice to constitute a bench of Judges to hear and determine the petition in line with article 165 (4) of the Constitution, the Constitutional Court made statements that are relevant to the problem that this thesis seeks to address. The Court acknowledged that abortion as a subject was a matter of great public concern and interest adding that moral, ethical, legal and factual questions with debatable and difficult implications would arise in determining what constituted safe abortion.

The Court further stated that while abortion was unlawful in Kenya by dint of Article 26(4) of the Constitution**,** the proviso thereto was to the effect that abortion would be permissible where in the opinion of a trained health practitioner, the life (or health) of the mother was in danger. The Court stated that the proviso had never been the subject of judicial determination by a superior Court and the parameters thereto had never been settled.

The last issue that the Court stated needed to be addressed was whether the actions of the Director of Medical Services contravened the rights to health and life were contravened under the Constitution and under a multiplicity of international instruments relating to those rights. The Court concluded that these issues were weighty and were yet to be resolved by any of the Courts.

It was expected that the Reproductive Health Care Bill (2014,) would give the much-needed guidance on issues related to safe abortion care such as whether a woman's ill mental health resulting from depression as a consequence of a pregnancy resulting from sexual violence would be a ground for her to be availed safe abortion care. The Bill is also silent on the places or facilities where abortion care may be provided. A critique of the Bill will be done under chapter 3 of this thesis where it will be compared with the provisions of similar legislations in other jurisdictions such as South Africa and India.

It is there for clear that there is lack of adequate legislative and policy guidelines to give effect to article 26 (4) of the Constitution. The Courts are also yet to give an interpretation of the article. There is there for gap for example on what would be considered a threat to health. These gaps if not addressed could force many survivors of sexual violence to continue procuring unsafe abortions. The cost of unsafe abortions in Kenya cannot be ignored. Studies have shown that the management of botched abortions costs Kenya approximately 250-300 million shillings.[44] This may eventually undermine the attainment of women's reproductive health rights, their right to dignity[45] and their right to privacy[46] as is envisaged in the Constitution.

1.4 RESEARCH OBJECTIVES

The main objective of this study is to investigate the legal and policy framework regulating the provision of safe abortion care in Kenya.

[44] Center for Reproductive Rights, *In harm's way-Impact of Kenya's restrictive abortion law,* New York (2010) p. 15.
[45] Article 28 of the Constitution.
[46] Article 31 of the Constitution .

The specific objectives of the study are;

1. To investigate the implications of Article 26(4) as read with articles 43 (1) (a) and 43 (2) of the Constitution to the provision of safe abortion care for survivors of sexual violence in Kenya.
2. To investigate the effects of Kenya's reservation to Article 14 (2) (c) of the Maputo protocol.
3. To highlight the gaps that exist in Kenya's legal framework on safe abortion care including the Reproductive Health Care Bill (2014).
4. To establish the legislative provisions that regulate the provision of safe abortion care in other jurisdictions including South Africa and India and whether these provisions may be borrowed with necessary adjustments to address the gaps in Kenya's legislative framework.
5. To make recommendations on interventions including legislative reform that are necessary to give effect to article 26 (4) of the Constitution.

1.5 HYPOTHESIS

The existing legislative and policy framework does not adequately give effect to article 26 (4) of the Constitution and therefore limits the reproductive health rights of women and girls who are survivors of sexual violence in terms of access to safe abortion care. Reform of the relevant legislative and policy framework to reflect the three grounds under which a safe abortion may be procured under Article 26 (4) will improve access to these important services and therefore reduce the number of unsafe abortions procured in Kenya.

1.6 RESEARCH QUESTIONS

1. What Constitutional provisions can be used to enforce the right to safe abortion care?
2. Can women and girls use article 26(4) as read with article 43 (1) (a) as a basis to demand for safe abortion care at registered health care facilities especially for pregnancies resulting from sexual violence?
3. What laws and policies regulate the provision of Safe abortion care in Kenya?
4. What regional and international instruments can be used to implement the right to safe abortion care?

5. Are there gaps in the legal and policy framework regulating the provision of safe abortion care in Kenya?

6. What are the legal provisions that regulate safe abortion care in other jurisdictions like India and South Africa?

7. What proposals for reform can be suggested to enable the enforcement of the right to safe abortion care for victims of sexual violence?"

1.7 THEORETICAL FRAMEWORK

This study is guided by three theories;

a) Positivist Theory of Law

Legal positivist concern is what the law is and not what the law ought to be.[47] Legal positivists approach to law therefore excludes value judgments and moral considerations.[48] One of the proponents of positivism John Austin stated that the existence of law is one thing, its merit or demerit is another.[49] Positivists approach is therefore that law should be separated from morals and ethical issues.[50] This study seeks to establish whether a positivist approach to abortion law in Kenya can be applied. Moral and religious views have clouded the issue of abortion in Kenya with a resultant effect of Kenya having very restrictive laws. Women and girls who have procured abortions are also judged harshly. Additionally, there is a lot of stigma and intimidation towards reproductive health providers who offer abortion care services[51]. This has led to the high number of unsafe abortions procured by girls and women with some leading to fatalities or serious health complications. Unsafe abortion accounts for up to 35% of all maternal mortalities in Kenya.[52]

Positivism also states that legitimacy of the law is established through the hierarchy of the law. Kenyan laws therefore get legitimacy through their consistency with the Constitution. This would in effect render laws that criminalize and health care providers' codes of conduct that restrict abortion inconsistent with the Constitution and thus illegitimate.

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[47] Omony John Paul, *Key issues in Jurisprudence: An in depth discourse on jurisprudence problems*, Law Africa Publishing (U) Ltd, Uganda (1st Edition) pp. 48.
[48] ibid.
[49] ibid.
[50] ibid pp. 49.
[51] Carole Joffe, 'Abortion and Medicine: A Sociopolitical history' (In Maureen Paul, Steve Lichtenberg, Lynn Borgatta, David A. Grimes, Phillip G. Stubblefield and Mitchell D. Creini eds. *Management of unintended and abnormal pregnancies Comprehensive abortion care*, Blackwell Publishing Ltd (2009) pp8.
[52] Michael Mutua, *Reducing Mortality from Unsafe Abortion in Kenya through Increased Access to Post-abortion care*, available at http://aphrc.org/blogs/reducing-mortality-from-unsafe-abortion-in-kenya-through-increased-access-to-post-abortion-care/ (accessed on 24th January 2014).

b) Liberal Feminism

Feminists use women or gender as a central category of analysis of the law.[53] Feminist approaches to law have entailed exposing and explaining the gendered nature of the law[54].

Liberal feminists have their historical roots in Mary Wollstonecraft's Vindication of the Rights of Women, John Stuart Mill's "The Subjection of Women," and the women's suffrage movement of the nineteenth century.[55] Specifically, liberal feminists argue that gender roles and stereotypes which are acquired through socialization are built over time and become embedded in culture.[56] They argue that these stereotypes are reflected in the law leading to gender biased laws.[57] Liberal feminism emphasizes on core principles of equality of opportunity, individual rights, non-discrimination and freedom of choice.[58]

Liberal feminist theory is therefore relevant to this thesis. The thesis takes the view that laws restricting abortion are gender biased laws as abortion services can only be sought by women and girls. While this thesis acknowledges that reproductive health providers who are both male and female may be harassed on the basis of the restrictive laws the greatest percentage of those who safer because of the restrictive laws are women and girls who might be forced to have unsafe abortions with serious repercussions to their health and in some instance resulting to death. The restrictive laws therefore infringe on women's right with regard to access to safe and safe abortion services. Liberal feminists support the provision of maternity and health benefits for women.[59]

c) Social- legal theory

Social legal theorists link laws with the social situations in which they operate.[60] The founding fathers of sociology Max Weber and Emeil Durkheim are credited for the development of this theory. Weber's writings although not a systematic sociology of law, contribute significantly to the understanding of legal thought and the judicial process. Durkheim analysed the sociology of law giving it an important place within sociology.[61] Roscoe Pound puts forward a sociological jurisprudence to law. He states that the question should not be what law is, but what law does, how it does it, what it can be made to do and how.

The social- legal theory is relevant to this thesis which argues that the restrictive abortions laws that fail to give effect to article 26 (4) of the Constitution have a resultant effect on more women

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[53] Christopher Roederer and Darrel Moellendorf, *Jurisprudence* in Catherine Albertyn, *Feminism and the law*, Juta and Company Ltd (2004) pp. 292.
[54] ibid.
[55] Tong, Rosemarie and Williams, Nancy, "Feminist Ethics", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), http://plato.stanford.edu/archives/win2016/entries/feminism-ethics/ (Accessed on 15th November 2016)
[56] ibid pp. 301.
[57] ibid.
[58] ibid.
[59] ibid pp. 302.
[60] David N. Schiff, *Socio-Legal Theory: Social Structure and Law*, The Modern Law Review, Vol. 39, No. 3 (May, 1976), p. 287-310, 287.
[61] ibid p. 289

and girls resorting to unsafe abortions which is a health and social problem as the unsafe abortions in some instances result in serious effects to their health and at times ending in their death as a result of complications.

1. 8 LIMITATIONS OF THE STUDY

As a result of financial and time constraints the study will not investigate the level of knowledge among members of the public on RH rights and specifically the right to safe abortion under the Constitution (2010).

The thesis does not also probe the reproductive health providers' perspective of the implications of Article 26 (4).

The thesis does not focus on provision of safe abortion care in instance of failed contraception or on demand.

Additionally, while the thesis makes a comparison of Kenya's legal framework on safe abortion care with that of other jurisdictions including the UK, India and South Africa it does not undertake a cultural comparison of Kenya and the said jurisdictions.

1.9 LITERATURE REVIEW

There have been many studies conducted on the relationship between restrictive laws and high incidences of deaths and complications arising from unsafe or botched abortions. In Kenya, most of the studies conducted and articles written on the issue of safe abortion have been by CSOs.

The impact of restrictive abortion laws is highlighted by, Rebecca J. Cook, Bernard M. Dickens and Mahmoud F. Fatalla who state that governments have for years controlled women's reproductive rights.[62] The authors argue that one way governments have done this is by prohibiting abortion.[63] They note that there has been an increased realization of the harmful effects on the health and welfare of individuals especially women as a result of punitive control of reproduction and sexuality.[64]

Generally, the authors urge states to ensure that women's RH rights are achieved. They emphasize on the need to divorce morality and the law. They highlight the right to safe and affordable abortion care and post abortion care, in cases of incomplete abortion, as a fundamental right for all women. The argument of separating morality from the law is relevant to this thesis as a clouding of the two has resulted in restrictive abortion laws that this thesis critiques. However, while the book demonstrates clearly the link between restrictive abortion laws and maternal mortality in the world, it does not address Kenya specifically.

Iqbal H. Shah and Elisabeth Ahman investigate the global health challenge resulting from unsafe abortion. They highlight for example the challenges faced by adolescents who rarely have access to information and counselling on sexual and reproductive health and are frequently excluded

[62] id Rebecca J. Cook, Bernard M. Dickens and Mahmoud F. Fathalla pp.154.
[63] ibid.
[64] ibid pp. 155.

from contraceptive services. They also make a comparison of the maternal mortality rates resulting from unsafe abortions in three developing regions in the world amongst Latin America, Asia and Africa they state that the incidences of such deaths is least in Latin America and at least double the number in Asia and six times more in Africa.

The authors urge states to aggressively address women's family planning needs and most importantly to this thesis they advocate for abortion laws and policies to reflect a commitment to women's health and wellbeing rather than criminal codes and punitive measures.[65]

Kenya's restrictive abortion laws were highlighted by a report by FIDA and the Center for Reproductive Rights (CRR). The report demonstrated the violations of women's reproductive health rights as a result of restrictive abortion. The report noted that the restrictive abortion laws posed a threat to the lives of women.[66] Specifically the fact that the laws did not permit survivors of SGBV to access SAC services was noted as further victimization of the survivors. It was noted that the restrictive laws failed to acknowledge the wide spread sexual violence and limited and inconsistent availability of contraceptives in the country.[67]

A subsequent report by CRR conducted in 2010 highlighted the impact of contradictory abortion laws had on RH Providers. The report highlighted the fact that some healthcare providers, believed abortion to be entirely illegal without considering the exceptions of life or health.[68]

The report noted that a lack of clarity on the implications of the law would lead to undermining of women's reproductive rights. A woman would not be assured of receiving abortion care services even when her life and health were at risk if the RH provider chose to rely on the prohibitive provisions on abortion under the Penal Code.[69]

In a report published by the Kenya National Commission on Human Rights (KNCHR) on April 2012, KNCHR lauded the Constitution of Kenya (2010) as having relaxed the restrictive laws on abortion.[70] It however stated that the provisions of the Constitution were still not in line with international obligations empowering women with the right to self-determine if and when to reproduce.[71] KNCHR also concluded that the effect of the Constitution was to repeal Penal Code provisions that criminalized abortion. This demonstrated that the issue of contradictory laws on abortion that had been raised by the CRR report in 2010 was yet to be addressed two years later.

While the KNCHR report offers concrete recommendations on what needs to be done to ensure that women's right to health is enjoyed by all women, it fails to offer specific solutions to unsafe abortion. This is despite the fact that it acknowledges abortion as a leading cause of maternal mortality in Kenya.[72] The report further fails to define clearly the specific circumstances when abortion is permitted under Article 26(4). It further fails to highlight if the government has any

[65] ibid.
[66] id Center for Reproductive Rights and FIDA pp. 24.
[67] ibid.
[68] ibid.
[69] ibid.
[70] ibid Kenya National Commission on Human Rights pp.66.
[71] ibid.
[72] ibid pp 67.

duty under Article 26(4) to provide SAC to women. It is also not clear from the report whether government hospitals have a duty to offer abortion and post abortion care services.

The literature reviewed clearly demonstrates the impact that restrictive abortion laws have on limiting access to safe abortion care and therefore impeding of women and girls' right to reproductive health. The existing literature does not however delve into investigating the meaning of health, life and emergency treatment in the context of article 26 (4). There is also no reference to international and regional instruments that could be used to give effect to the said article. These are some of the issues that this thesis investigates and makes recommendations on what changes including legislative reform may be made to give effect to article 26 (4).

1.10 METHODOLOGY

The thesis adopts a doctrinal methodology as it investigates what Kenya's legislative framework on safe abortion care is and whether the same gives effect to article 26 (4) of the Constitution. It also analyzes relevant Constitutional provisions, international and regional instruments and case law that would give effect to the said Constitutional provision.

1.10.1 Sources of data for the study

The study will use both primary and secondary sources of data.

The primary sources of data include a desktop research on the Constitutional, national, regional and international law provisions that guide the provision and access to safe abortion care. The regional instruments that will be analyzed include the Maputo Protocol. International instruments will include the International Covenant on Economic, Social and Cultural Rights and CEDAW.

A desktop research of national legislative and policy framework will be undertaken under chapter three of this thesis. A comparative analysis of the safe abortion care provisions under Kenyan law vis a vie the provisions in other jurisdictions including India and South Africa will also be undertaken under the same chapter. Under this chapter an analysis of relevant case law will also be done.

Relevant literature will be used as a secondary source of data this will include literature by recognized authors on reproductive health and reports by institutions that have wide experience in reproductive health.

1.10.2 Data Analysis

The data collected will be analyzed qualitatively that is writing of a summary of the data collected and interpreting the same to draw informed conclusions.

1.11 CHAPTER BREAKDOWN

The study is organized as follows. Chapter one is the introduction of the study and includes the background of the problem, statement of the problem, theoretical framework, research objectives, hypothesis, research questions, limitations of study, literature review, methodology

Chapter two will be an investigation of the regional and international instruments relevant to safe abortion as a reproductive health right. Chapter three will be an in-depth analysis of the legal basis of the right to safe abortion care for survivors of sexual violence in Kenya.

Chapter four will include a Summary of the study and a conclusion of the research. Under this chapter Recommendations will also be made on what should be done to ensure that the Reproductive Health rights of women are attained especially regarding access to safe abortion care.

CHAPTER TWO: REGIONAL AND INTERNATIONAL INSTRUMENTS RELEVANT TO SAFE ABORTION AS A RH RIGHT

2.1 Introduction

This Chapter analyzes the regional and international treaties and conventions that address various human rights that are relevant to the provision of safe abortion care that Kenya is a party to. These instruments become relevant when addressing the issue of safe abortion care because as has been stated earlier in this thesis and as shall be better demonstrated in chapter three there is inadequate Kenyan legislation to give effect to Article 26 (4) of the Constitution which provides grounds when safe abortion care may be provided.

The gaps that exist in Kenyan legislation can be addressed by looking into the regional and international instruments that form part of Kenyan law under Article 2 (6) of the Constitution. International bodies like the WHO also give definitions of terms used under Article 26 (4) that are important while interpreting the said Article. These definitions are more clearly incorporated in international and regional instruments than they are by Kenyan legislation.

The WHO defines health as

> "…state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[73]

This definition becomes relevant when establishing the meaning of health within the context of Article 26 (4). This understanding of health is replicated in the regional and international instruments that are referred to in this chapter.

2.2 Regional Instruments

2.2.1. African Charter on Human and Peoples' Rights[74]

The Charter guarantees every individual *"…the right to enjoy the best attainable state of physical and mental health which is a core basis for the right to SAC which as mentioned earlier is a reproductive health right."*[75] The charter obligates state parties to *"…take the necessary measures to protect the health of their people and to ensure that they receive medical attention*

[73] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.
[74] Available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed on 2nd July 2014).
[75] Article 16 (1).

when they are sick."[76] In addition to this core right the charter also provides for other rights which anchor the right to reproductive health first it provides that all human beings are entitled to respect for their life and the integrity of his person.[77] It also recognizes that every individual has the right to the respect of the dignity inherent in a human being.[78]

2.2.2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)[79]

The protocol was developed on the basis of Article 66 of the African Charter on Human and Peoples' Rights. The protocol was the first human rights instrument to explicitly protect women and girls from FGM and also provide for the right to SAC to women and girls for pregnancies resulting from sexual violence.[80]

The protocol under Article 14 (1) has the following specific rights which are relevant to provision of safe abortion;

> *"a) the right to control their fertility;*
> *b) the right to decide whether to have children, the number of children and the spacing of children;"*

Sub Article 14 (2) further obligates States to:

> *"a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;*
> *c) protect the reproductive rights of women by authorizing 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.*(Emphasis mine)."

[76] Article 16 (2).
[77] Article 4
[78] Article 5
[79] Available at http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (Accessed on 2nd July 2014).
[80] Muthoni Muriithi, An analysis of the Protocol to the African Charter on Human and People's rights on the rights of women in Africa (in Kombo, Sow & Mohamed '*Journey to equality: 10 years of the Protocol on the Rights of Women in Africa* , 2013) available at http://www.equalitynow.org/sites/default/files/MaputoProtocol_JourneytoEquality.pdf (accessed on 24th September 2014).

Kenya ratified the protocol on 6th October 2010[81] but it is among the states that have a reservation to Article 14 (2) (c) this reservation could be interpreted to be an indicator of Kenya's lack of political will to allow abortion on demand in cases of pregnancies resulting from sexual violence. However, one could make a case for abortion in cases of sexual assault including rape or incest based on Article 26 (4) considering the mental health of the mother.[82]

The protocol also guarantees all African women the right to dignity inherent in a human being which is a supportive right to the right to health and specifically the right to reproductive health. It also guarantees African women and girls the recognition and protection of their human and legal rights.[83]

2.3 International Instruments

2.3.1 Universal Declaration of Human Rights

The UDHR which although non-binding is generally agreed to be the foundation of international human rights law. It was adopted in 1948.

Article 25 provides

"… everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including medical care. This right together with the right to life[84] is the core right that grounds the right to reproductive health."

The preamble to the declaration and Article 1 affirm the right to inherent dignity for all persons. This as will be argued later in this thesis is a right on which the right to reproductive health can be indirectly anchored.

It also recognizes the right of all individuals not to be subjected to inhuman or degrading treatment.[85]This right as will be explained later in this thesis has been interpreted by courts to extend to the right to SAC where the pregnancy causes a woman mental or physical anguish.

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[81] See the list of countries which have signed, ratified/acceded to the protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa available at http://www.au.int/en/sites/default/files/Rights%20of%20Women.pdf (Accessed on 2nd July 2014).

[82] See FIDA Kenya's Assessment of the Implementation of the Previous Concluding Observations on Kenya (CCPR/CO/83/KEN) at the time of the Review of the Third Periodic Report pp.11(August, 2011) available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCMQFjAB&url=http%3A%2F%2Ftbinternet.ohchr.org%2FTreaties%2FCCPR%2FShared%2520Documents%2FKEN%2FINT_CCPR_NGO_KEN_103_9368_E.doc&ei=wfKzU--bO8Wd0AXrloGQCA&usg=AFQjCNGN1pl5-tXCmfopR9PXqNn9yxNgWg&sig2=Mz_2z4wbfoThGJhPD_uEgA (Accessed on 2nd July 2014).

[83] Article 3.

[84] Article 3.

[85] Article 5

2.3.2 International Covenant on Economic, Social and Cultural Rights

The covenant calls on state parties to recognize *"...the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."*[86] This wording is reflected in article 43 (1) (a) of Kenya's Constitution although the latter goes a step further and specifies that the right includes the right to reproductive health care.

2.3.3 International Covenant on Civil and Political Rights

Although ICCPR does not explicitly provide for the right to health on which the right to SAC is anchored it provides for other rights that can be interpreted to indirectly anchor the right to health. First the covenant recognizes the inherent dignity of all human beings and that the rights under the covenant are derived from this inherent dignity. As will be discussed under Chapter three of this thesis the right to dignity has been interpreted by different judicial bodies as one of the rights on which the right to health is anchored. It also guarantees all persons the inherent right to life.[87]

The covenant also protects all individuals from subjection to torture or to cruelty, inhuman or degrading treatment. There has been long standing debate that a survivor of sexual violence being forced to carry to term and give birth as a result of sexual violence amounts to cruelty and subjection to mental anguish.

Article 17 guarantees all individuals the "*... right not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence*." As will be highlighted under chapter three of this thesis courts in different jurisdiction have interpreted the right to privacy widely enough to encompass a woman's decisions regarding her pregnancy.

2.2.4 CEDAW

The Convention sets legally binding obligations to the States parties and sets the international standard for what is meant by equality between men and women including in the area of health.

The convention calls on States Parties

[86] Article 12(1).
[87] Article 6.

"…to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."[88]

It also calls on the states parties to

> *"…ensure that rural women have access to adequate health care facilities, including information, counseling and services in family planning.*[89] *It further provides that women and men should have the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."*[90]

2.3.4 Cairo Programme of Action of the 1994 United Nations International Conference on Population and Development (ICPD)

Although not legally binding, the Cairo ICPD Programme of Action is an important step in recognizing reproductive rights internationally. Delegates at the ICPD adopted the first internationally recognized, normative definition of reproductive health, which incorporated aspects of physical, mental, and social well-being.[91]

At this conference the ICPD program for action was adopted by 179 governments including Kenya. Principle 8 provides;

> "*Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health. Reproductive health-care programmes should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so*."[92]

2.4 Conclusion

This chapter has set out the international instruments on which the right to SAC is directly or indirectly anchored.

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[88] Article 12.
[89] Article 14(2) (b).
[90] Article 16(1) (e).
[91] Ritu Sadana, *Definition and measurement of reproductive health*, Bulletin of the World Health Organization (2002) pp. 407 available at http://www.who.int/bulletin/archives/80%285%29407.pdf (Accessed on 3rd July 2014).
[92] ibid.

The provisions of these instruments are of great significance considering that the Constitutional Court in Kenya has severally pronounced that international instruments to which Kenya is a party are part of Kenyan law under Article 2(6) of the Constitution. In *Walter Osapiri Barasa v Cabinet Secretary Ministry Of Interior And National Co-Ordination & 6 others [2014] eKLR* Justice Mwongo stated "*The Constitution, 2010, has cemented the place of international law, treaties and conventions alike. As cited above, Article 2(6) of the Constitution recognizes any treaty or convention ratified by Kenya as forming part of the law of Kenya*"

The international instruments highlighted under this chapter will be referred to under chapter three in this thesis which will have a more in depth analysis of the right to SAC in the Kenyan context.

CHAPTER THREE:

LEGAL BASIS OF THE RIGHT TO SAFE ABORTION CARE FOR SURVIVORS OF SEXUAL VIOLENCE IN KENYA

3.1 INTRODUCTION

Governments protect people's health and well-being through various measures including implementation of laws and regulations as a framework for programs and facilities.[93]

This chapter takes an in depth look at the Constitutional provisions that ground the right to safe abortion care which as was explained in the introduction to chapter two of this thesis forms a critical component of the right to RH which is a subset of the broader right to health. As the Article 26 (4) which prohibits abortion sets out a threat to life, a threat to health or the need for emergency treatment as some of the grounds under which an abortion may be procured, this chapter will look at these three exceptions especially in light of the Constitutional provisions that guarantee each of them.

This chapter also highlights of the legislative framework to give effect to Article 26 (4). The Penal Code[94] which is yet to be amended in line with Article 26 (4) and only provides for abortion in instances when the life of the mother is at threat will be one of the legislations discussed in this chapter.

Finally, chapter also makes a comparative analysis of Kenya's legislative provisions on safe abortion care vis a vie those of other jurisdictions including India, South Africa, America and the United Kingdom.

3.1 CORE HUMAN RIGHTS ANCHORING ACCESS TO SAFE ABORTION CARE

3.1.1 Right to Health

The Constitution of Kenya (2010) introduced for the first time SECR which were not included in the independence and the 1969 Constitutions. This includes the right to health and specifically Reproductive Health.[95]

Reproductive health has been defined as

[93] ibid.
[94] Chapter 63 laws of Kenya.
[95] Article 43(1).

> "*…a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.*[96] *Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so*."

Reproductive Health encompasses various concerns and issues including birth control, sexually transmitted infections and diseases, infertility,[97] maternal health, gynecologic disorders, emergency contraception, abortion and reproductive system cancers such as cervical and prostate cancer

The inclusion of the mental aspect to the definition of reproductive health becomes relevant while interpreting the meaning of a threat to health within the context of article 26 (4). This thesis argues then that a pregnancy resulting from sexual violence that causes a girl or woman mental anguish would then qualify as a threat to health and thus entitling the girl or woman to accessing safe abortion care. Safe abortion care in this regard becomes a critical component of reproductive health. Additionally, abortion has been termed as a public health issue albeit one surrounded by controversy.[98]

WHO defines a safe abortion as;

> "*…an abortion that is performed by trained health care providers with proper equipment, correct technique and sanitary standards*."[99]

It contradicts this with an unsafe abortion which it defines

> *"…as a procedure for terminating an unintended pregnancy, carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both*."

The phrase "enjoyment of the highest attainable standard of health" is repeated in many international law provisions on the right to health. It is therefore important to investigate what it means. According to Paul Hunt and Gunilla Backman

> *"…the right to the highest attainable standard of health is only achievable where there is an effective and integrated health system encompassing medical care and the underlying*

[96]World Health Organization, *Reproductive health strategy to accelerate progress towards the attainment of international development goals and targets* adopted by the 57th World Health Assembly (WHA) in May 2004.
[97]Reproductive Health available at < http://www.hhs.gov/opa/reproductive-health/> (accessed on 9th April 2014).
[98] Carl W. Tyler Jr. ,*The public health implications of abortion,* Annual Review of Public Health, Vol. 4: 223 -258 (1983).
[99] id World Health Organization p.18.

determinants of health, which is responsive to national and local priorities and accessible to all.[100]"

Relevant to the position of this thesis on the need to uphold the right of women to access safe abortion care services Hunt and Backman echo the WHO stand that health systems and services must move from mainly focusing on disease and rather focus on the person as a whole, whose body and mind are linked and who needs to be treated with dignity and respect.[101]

A similar position is held by the African Commission which views the right to health as

"*…not just limited to access to health care but to every other supporting treatment, management or service which promotes the highest attainable standard of health for everyone regardless of age, sex or gender*."[102]

General comment 14 of the ICESCR which details the normative content of article 12 also gives a broad interpretation of the right to health as

"…an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health."[103]

It further sets out four essential elements to the right to health;

"…first is availability of public health and health-care facilities; goods and services. Second is accessibility of health facilities, goods and services accessibility here refers to nondiscrimination, physical, economic and information accessibility. Third is acceptability, health facilities, goods and services must be respectful of medical ethics and culturally appropriate and finally health facilities, goods and services must also be scientifically and medically appropriate and of good quality."[104]

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[100] Paul Hunt and Gunilla Backman, 'Health systems and the right to the highest attainable standard of health' (2013) HHR < http://www.hhrjournal.org/2013/09/13/health-systems-and-the-right-to-the-highest-attainable-standard-of-health/> accessed on 11th August 2014

[101] ibid.

[102] Victoria Balogun and Ebenezer Durojaye, 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights' ((2011) 11 (2) AHRLJ 368,380 available at < http://www.chr.up.ac.za/images/files/publications/ahrlj/ahrlj_vol11_no2_2011.pdf> accessed on 26th August 2014.

[103] Paragraph 11.

[104] Paragraph 12.

These elements are important when discussing Kenya's legislative and policy framework on the provision of safe abortion care. Based on the provisions of the Penal Code, which will be discussed later in this thesis, safe abortion services are unavailable and inaccessible for women and girls who are survivors of sexual violence as the said legislation does not permit abortions to be procured on the basis of a threat to health which would include mental health. Additionally the director for medical services is yet to withdraw the ban he issued prohibiting health practitioners from attending any training on the provision of safe abortion. The ban therefore means that the abortion services that would be offered even in cases of a threat to life may fall short of the fourth element as set out under general comment 14 as the quality of services offered by health practitioners is correlated to the quality of training that they receive.

3.1.2 Right to life

Article 26(1) of the Constitution guarantees all citizens the right to life.

Regionally the African Commission has recognized the link between the right to life and other rights such as the right to health.[105]This right could then be used to hold the government accountable for its non- action to prevent maternal deaths and specifically deaths arising from unsafe abortions which as was stated in chapter one of this thesis amount to the highest percentage of maternal deaths in Kenya.

3.1.2.1 Who is entitled to the right to life? When does life begin?

These questions become relevant when discussing the right to safe abortion care. Article 26 (2) of the Kenyan Constitution states that life begins at conception this article as read with article 26 (1) extends the protection of the right to life to the unborn.

Legal provisions that extend the right to life to the unborn have been critiqued as attempts to restrict reproductive choices.[106] The COE expressed reservations against Article 26(2) which was not included in the RHDC but included later in the PSC draft. Despite their reservations to the Article the COE left it intact because according to the PSC it was a deal maker in getting some sections of religious leaders to support the proposed Constitution. The COE however felt that the article infringed on the Constitutional right to health.

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[105] Sisay Alemahu Yeshanew, 'Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives' (2011) 11 (2) AHRLJ 317, 335 available at
< http://www.chr.up.ac.za/images/files/publications/ahrlj/ahrlj_vol11_no2_2011.pdf> accessed on 26th August 2014.

[106] id (n.2) pp. 156.

The position held by the COE is validated by the fact that Kenya has no state religion.[107]Additionally while the Constitution recognizes the rights of individuals to manifest any religion or belief by among other things practice and teaching[108], it protects persons from being compelled to act or engage in acts contrary to a person's belief or religion. It is for this reason that where a constitutional provision recognizes one religious groups' right to certain unique facilities or provisions, the Constitution is clear that the same may not be imposed on persons who do not profess the said faith; an example is the jurisdiction of the Kadhi's Courts.[109]

Article 26(2) of the Constitution would therefore appear as an imposition of one religious group's beliefs on others this is because while different Islamic scholars hold different views on whether abortion is right or not there is a general agreement that termination of a pregnancy is allowed in some instances as long as it is done before "ensoulment" which some state happens at 40 days while others state happens at the 120th day.[110]

In the U.S. Supreme Court decision in *Roe v. Wade*[111] the court investigated in depth the notion of when life is believed to begin by various groups. The Court established that there were varied views on when life began and for this reason the Court disagreed with the state of Texas adopting one theory of life, that is that life begins at conception, to override the rights of the pregnant woman that were at stake.

Despite Article 26 (2) providing that life begins at conception, Article 26 (4) provides exceptions when a safe abortion may be procured that is in cases where there is a need for emergency treatment or the life or health of the mother is in danger.

3.1.3 Right to Emergency treatment

Emergency treatment is one of the grounds under which a safe abortion may be procured under Article 26(4). Article 43 (2) of the Constitution further provides *"...A person shall not be denied emergency medical treatment*."

[107] Article 8 of the Constitution (2010).
[108] Article 32(2).
[109] Article 170(5).
[110] Sanctity of life Islamic teachings on abortion available at http://www.bbc.co.uk/religion/religions/islam/islamethics/abortion_1.shtml accessed on 12th June 2014.
[111] 410 U.S. 113 (1973) Roe et al. V. Wade, District attorney of Dallas county appeal from the United States district court for the northern district of Texas no. 70-18 available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=410&invol=113 accessed on 11th June 2014.

What qualifies as an emergency? In *Thiagraj Soobramoney v. Minister of Health (Kwazulu Natal)*[112] The Constitutional Court of South Africa defined what was meant by emergency treatment under Section 27(3) of the South African Constitution which provision is similar to Article 43(2) of the Kenyan Constitution quoted above. The appellant in this case was a man in his 40s suffering from terminal renal failure in addition to other complications arising out of his diabetic condition. Due to these additional complications, he was not an eligible candidate for a kidney transplant. The only option available for his was continuous dialysis 2 to 3 times a week. The said dialysis would only pro long his life as his kidney failure was incurable. After exhausting his resources at a private hospital, where he had been undergoing dialysis, the appellant sought treatment at a public hospital. However, based on the public hospital's policy, under which only some patients qualified for dialysis, that is patients whose kidney failure was curable or those who qualified for kidney transplant, the appellant was denied dialysis services. The High Court where he initially brought a case against the hospital dismissed his application seeking to have the hospital ordered to offer him treatment. He therefore appealed against the Court decision to the Constitutional Court.

The Court in finding that the treatment of a lifelong condition did not amount to emergency treatment defined emergency treatment as;

> *"…sudden occurrence, the patient had no opportunity of making arrangements in advance for the treatment that was required, and there was urgency in securing the treatment in order to stabilise his condition… section 27(3) envisages a dramatic, sudden situation or event which is of a passing nature in terms of time. There is some suddenness and at times even an element of unexpectedness in the concept…"*

The Court in this case also highlighted the importance of interpretation of the right to emergency treatment and right to health in recognition of the limited resources of the state which would require that the enjoyment of these rights be limited to available resources and competing interests or rights of other citizens.

Based on this does provision of safe abortion care qualify under the right to emergency treatment? This thesis argues that it does, this is based on the following. First as compared to terminal conditions such renal failure as was the case in the *Soobramone*y case unplanned pregnancies are of a passing nature. Secondly, provision of SAC is time bound meaning failure to provide it early or urgently enough would increase the chances of risk to the woman or girl if termination is to be done later in the pregnancy. Risks associated with abortion increase with the

[112] Constitutional Court of South Africa Case CCT 32/97

length of the pregnancy.[113] Information, counseling and abortion procedures should therefore be provided as promptly as possible without undue delay.[114]

Additionally, unlike the *Soobramoney* where the cost of dialysis treatment of all patients with terminal renal failure was found to be untenable because of the high cost the reverse is true for provision of SAC. This is because failure to provide SAC forces girls and women to undergo clandestine abortions which may lead to complications whose management as was stated in chapter one of this thesis costs Kenya approximately 250-300 million shillings

OTHER HUMAN RIGHTS RELEVANT TO ACCESS TO SAFE ABORTION CARE

The Constitutional Court in Kenya has recognized the interdependence and indivisibility of rights. In *Mitu-Bel v The Attorney general & 2 others*[115] in response to a contention by the 2nd respondent that the claim by the petitioners was for social and economic rights, which are second generation and progressive in nature and should therefore not be claimed two years after the promulgation of the Constitution, Lady Justice Mumbi Ngugi stated the following;

> *"Such an argument fails to recognise the essential connection, inter-dependence and indivisibility of rights and more importantly, is made in ignorance of the fact that the classification of rights as first or second generation has long been abandoned, and the indivisibility and interdependence of human rights recognized."*

Based on these principles of interrelatedness, interdependence and indivisibility of rights the following rights are relevant and indirectly anchor the right to safe abortion care.

3.1.4 Right to dignity

Promoting and protecting health requires explicit and concrete efforts to promote and protect human rights and dignity.[116]

The Kenyan Constitution takes a multi-faceted approach by recognizing human dignity as a specific right which must be respected[117] and also as one of the national values and principles of

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[113] World Health Organization, *Safe abortion: technical and policy guidance for health systems* ,2 ed. World Health Organization (2012). p 32.

[114] ibid p.36.

[115] Nairobi High Court Constitutional & Judicial Review Division Petition no. 164 of 2011 available at http://kenyalaw.org/caselaw/cases/view/87948/ accessed on 28th August 2014.

[116] K.Y Anda, S.V. Smith, A. Rosenfield, 'Reproductive health and human rights' (2003) 82 International Journal of Gynecology and Obstetrics 275 available at <http://ac.els-cdn.com/S0020729203002261/1-s2.0-S0020729203002261-main.pdf?_tid=ef472eb2-f13e-11e3-9c00-00000aab0f6c&acdnat=1402474015_b83e66e629f30bb2dfc1ffc182659b34> Accessed on 11th June 2014.

[117] Article 28.

governance.[118] This makes dignity a binding principle on all persons including state and public officers whenever they interpret the Constitution, enact or interpret any laws or make or implement public policy decisions.[119] This obligation extends to the Courts and tribunals too as they interpret the Bill of Rights.[120]

Dignity is important to this thesis as the writer argues that condemning a survivor of sexual violence to carry a pregnancy to term and eventually delivering and raising a child that will always be a reminder of the horrible experience that she had to endure not only causes mental anguish but also undermines the survivor's dignity.

3.1.5 Right to Privacy

The definition of reproductive health as per the ICPD plan of action that was referred to earlier in this thesis encompassed a woman's or girl's right to decide when to have a child. In cases of pregnancies resulting from sexual violence or even failed contraception the woman or girl's right to choose when to have a child is undermined. It is the argument of this thesis that in such instances the girl or woman should have the right to privately with consultation and after receiving counseling by a trained health provider to choose without coercion whether to keep or terminate the pregnancy. This thesis argues that in such instances the woman or girl's right to privacy should be respected.

This thesis argues that while the right to privacy may be relied upon within the exceptions under Article 26 (4) to ground the right to safe abortion care especially for survivors of sexual violence.

The right to privacy is closely linked to the right to dignity. It has been used to anchor abortion rights in countries where the right to dignity is less pronounced for example in the U.S. whose Constitution does not refer specifically to human dignity.[121] In the case of *Thornburg v. American College of Obstetricians and Gynecologists,* for example, the Court stated:

> "…*few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision – with the guidance of her physician and within the limits specified in Roe – whether to end her pregnancy. A woman's right to make that choice freely is fundamental*…"

In *Planned Parenthood v Casey* the Court stated "…*a woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal*

[118] Article 10(2) (b).
[119] Article 10(1).
[120] Article 20 (4) (a).
[121] id Vicki C. Jackson (n 49)16.

nature…the authority to make such traumatic and yet empowering decisions is an element of basic human dignity..."[122]

This thesis argues that a similar conception of the right to privacy may be drawn from Article 31 of the Kenyan Constitution.

In ***Tysiąc v. Poland*[123],** the European Court of Human Rights linked the right to privacy to personal integrity as relates to a decision to procure an abortion. The Court stated;

> *"The Court agrees. It first reiterates that legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus …The Court also reiterates that "private life" is a broad term, encompassing, inter alia, aspects of an individual's physical and social identity, including the right to personal autonomy...Furthermore the Court has previously held that private life includes a person's physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity…The Court notes that in the case before it a particular combination of different aspects of private life is concerned. While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – also be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be."* (Emphasis mine)

3.1.6 Equality and non-discrimination

The Constitution guarantees all persons the right to equal protection and equal benefit of the law[124] which includes the full and equal enjoyment of all rights and fundamental freedoms.[125]

States have a duty to ensure that health services are accessible to all without discrimination.[126] This right rights apply also to access to safe abortion care as a reproductive health right for survivors of sexual violence.

3.1.7 Freedom and security of the person

The Constitution guarantees all citizens

[122] ibid.
[123] Application no. 5410/03.
[124] Article 27(1).
[125] Article 27(2).
[126] ibid.

> "*... the right to freedom and security of the person*[127] *which includes the right not to be subjected to torture in any manner, whether physical or psychological*[128] *or treated or punished in a cruel, inhuman or degrading manner.*"[129]

The definition of reproductive health that this thesis adopts encompasses mental wellbeing. In the case law referred to below the Courts pronounced that a pregnancy resulting out of sexual violence caused mental anguish or psychological torture to the victims. The right to freedom and security of the person therefore becomes relevant to this thesis based on the protection from psychological torture which this thesis interrelates with the right to health and specifically reproductive health that encompasses mental well being.

In *Ripples International & 11 Others v. Inspector General of Police & 2 others*[130] the Constitutional Court declared that failure by police officers at various police station in Meru to investigate and arrest individuals suspected of defiling 11 of the petitioners amounted to a breach of the petitioners' rights including their freedom and security of the person. The Court also recognized the harm done to the petitioners due to unwanted pregnancies as a result of the sexual violence it stated;

> "*I further find that the petitioners in this petition have suffered horrible, unspeakable and immeasurable harm due to acts of defilement committed against them. They each suffered physical harm in the form of internal and external wounds from the perpetrators assaults and some suffered consequences of unwanted pregnancies vested on children not physically mature enough to bear children. The petitioners have suffered psychological harm ...*"

As stated above a pregnancy resulting from sexual violence causes psychological torture and mental anguish to the victim. This was the position taken by Macnagten J in ***R v. Bourne***[131] where Bourne, a doctor, was accused of unlawfully procuring abortion of a girl who was below 15 years who became pregnant as a result of rape the Judge stated the following in his judgment,

> "*...No doubt and I think the evidence now makes it clear it is very undesirable that a young girl should be delivered a child. Parliament has recently raised the age of marriage for a girl under the age of 16 should marry and have a child. The medical evidence given here establishes that view. Apparently the pelvic bones are not set until a girl is 18, and it is an observation that appeals to one's common sense that it is undesirable that a girl should go through the state of pregnancy and finally of labour when she is of tender years. Then, too, you must consider the evidence about the effect of*

[127] Article 29.
[128] Article 29 (d).
[129] Article 29 (f).
[130] Meru High Court Petition No. 8 of 2012 (eKLR,2013)
[131] [1938] 3 All ER 615.

rape, especially on a child, as this girl was, under the age of 15. Within the last ten days she has reached the age of 15. Here you have the evidence of Dr. Rees, a gentleman of eminence in the profession, that, from his experience and knowledge, the mental effect produced by pregnancy brought about by the terrible rape which Dr. Gorsky described to you must be most prejudicial. You are the judges of the facts, and it is for you to say what weight you give to the testimony of the witnesses, but no doubt you will think it is only common sense that a girl who for 9 months has to carry in her body the reminder of the dreadful scene and then go through the pangs of childbirth must suffer great mental anguish..." (Emphasis added)

Based on the above case law this thesis argues that the Kenyan government has a Constitutional duty to protect survivors of sexual violence from continued psychological torture and mental anguish which is caused by the government's failure to provide safe abortion care for pregnancies resulting from the said violence.

Article 14 (2) (c) of the Maputo protocol mirrors this view and calls on member states to

> *"...protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother."*

Kenya is however one of the states that held a reservation to this Article. Kenya's reservation could be deemed unconstitutional considering the exception under Article 26 (4) permitting safe abortion care to be provided where there is a threat to the mother's health. This thesis has so far demonstrated that the right to health encompasses mental wellbeing which may be threatened by a pregnancy resulting from sexual violence.

Right to access information

The Constitution guarantees all citizens the right of access to information required for the exercise or protection of any right or fundamental freedom.[132] Access to information is vital to the enjoyment of RH rights.

In *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013] eKLR* right to access information held by the state as a matter of right was the first limb that the Court considered. The second limb that the Court considered was the right to access information held by an individual. In this case the Court stated that the right to access such information was not automatic; one needed to prove that the information held by the said individual was necessary for the enjoyment of any fundamental freedom or right of the person seeking such information. The duty on individual citizens to share information is therefore qualified; one must prove that they require such information to exercise a particular right or

[132] Article 35 (1).

freedom. This duty can therefore not be imposed on women or girls seeking SAC services or the RH providing the said services. As has been stated earlier in this thesis and as will be explained in chapter four RH providers have been and continue to be survivors of police harassment including unwarranted police raids were police demand to see patient files when they raid RH clinics.

The link between the right to information and other rights is well grounded in jurisprudence on the right to health care. According to Hunt and Backman health-related education and information, including on sexual and reproductive health is critical for the enjoyment of the right to health.[133]

In Uganda, a study conducted by the Center for Reproductive Rights in 2012 established that women failed to seek safe abortion care eve when it was legal for them to do so as they were not aware of the availability and legality of the said services.[134]

3.2 LEGISLATIVE PROVISIONS AND POLICY GUIDELINES LIMITING ACCESS TO SAFE ABORTION CARE IN KENYA

Despite Article 26 (4) of the Constitution providing for three grounds under which an abortion may be legally procured in Kenya there are several legislations and policies that criminalize acts related to the procurement of abortion in Kenya without consideration of the exceptions under article 26 (4).

The said laws are highlighted below;

3.2.3 The Penal Code[135]

The Penal Code is the main criminal law in Kenya it declares which acts are criminal and provides the punishments for the commission of the said acts.

Section 158 criminalizes attempts to procure abortion it provides as follows

> "*Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years*."

Section 160 criminalizes the supply of drugs and instruments used for abortion;

[133] id n. 4
[134] ibid.
[135] Chapter 63 of the Laws of Kenya.

> "*Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years."*

Section 228 criminalizes the killing of an unborn child it provides;

> "*Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a felony and is liable to imprisonment for life*."

Section 214 has a contradictory description with Article 26 (2) of the Constitution on when life is deemed to begin. It provides;

> "*A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel string is severed or not*."

However, based on Article 2 (4) of the Constitution the description under the Article 26 (2) of the Constitution that life begins at conception invalidates section 214 of the Penal code.

Section 240 exempts from criminal responsibility a person who performs an abortion to save a mother's life. It provides,

> "*A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.*"

This section fails to adequately reflect the provisions of Article 26 (4) which provide for three grounds under which a safe abortion may be procured first where there is a threat to the mother's life, secondly where there is a threat to the mother's heath and lastly where there is need for emergency treatment. In Kenya's Constitution the right to life and the right to health are addressed under different articles and are also seen as independent rights though they are interrelated. A similar approach is taken by the regional and international instruments that were referred to under chapter two of thesis.

This thesis notes that for the rights of survivors of sexual violence to be addresses in terms of their access to safe abortion care the Penal code must make specific mention of a threat to health as an exception from criminal liability where an abortion is procured. This is because the mental

anguish resulting from a pregnancy caused by sexual violence is more directly linked to a threat to health based on the mental wellbeing component than it is linked to a threat to life.

Additionally, the drafters of the Constitution and Kenyans by voting for the Constitution recognized the need for the three exceptions as mentioned in article 26 (4). It can therefore not be argued that the aspect of health is addressed by the mention of preservation of mother's life under section 240 of the Penal Code. There is therefore a gap in the penal code as abortion for pregnancies that threaten the health of the mother is yet to be decriminalized in line with Article 26 (4).

3.2.4 Pharmacy and Poisons Act[136]

This Act prohibits advertisements on abortion under section 38 it provides;

> "*Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drug, appliance or article of any description, in terms which are calculated to lead to the use of such drugs, appliance or article for procuring the miscarriage of women."*

3.2.5 Medical Practitioners and Dentists Act[137]

Section 20 of the Act proscribes a very severe punishment for medical practitioners found to have violated the provisions of the Act or committed an offence under the Penal Code. The offences under the Penal code would include the offences highlighted above relating to abortion.

The section provides;

> 20 (1) "*If a medical practitioner or dentist registered or a person licensed under this Act is convicted of an offence under this Act or under the Penal Code (Cap. 63), whether the offence was committed before or after the coming into operation of this Act, or is, after inquiry by the Board, found to have been guilty of any infamous or disgraceful conduct in a professional respect, either before or after the coming into operation of this Act, the Board may, subject to subsection (9), remove his name from the register or cancel any licence granted to him*."(Emphasis mine)

[136] Chapter 244 of the Laws of Kenya.
[137] Chapter 253 of the Laws of Kenya.

3.2.6 Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules

The rules are subsidiary legislation under section 20 of the Medical Practitioners and Dentists Act. Under this rules and the Act the Medical Practitioners and Dentists Board developed disciplinary proceedings statutory provisions.[138]

Listed among the types of conduct which raise disciplinary issues under the statutory provisions is termination of pregnancy on demand. The statutory provisions also provide that when there is a need to terminate a pregnancy where the life or health of the mother is in danger nonjudgmental counseling is to be offered by the practitioner. The statutory provisions provide the following related to abortion;

> **"***The Constitution of Kenya and the Laws of Kenya do not permit termination of pregnancy on demand. Termination of pregnancy is only allowed where in the opinion of a medical practitioner registered under this Act, there is need for emergency treatment or the life or health of the mother is in danger or if permitted by any other law. In applying this article, the following shall be undertaken-*
> *i) Nonjudgmental counseling. In counseling the practitioner shall consider health broadly also in line with the right to health, consumer rights and right to information as provided in the Constitution of the Republic.*
> *ii) The practitioner and the hospitals or health facility must maintain complete record of each case.*
> *iii) Where proper services are unavailable for whatever reasons the practitioner shall refer patients appropriately."*

Chapter IV of the Code of professional conduct also makes a similar provision. It must be noted however that the code of professional conduct and the statutory provisions reflect the expanded grounds for provision of safe abortion care which the penal code fails to do.

Are these Acts Constitutional?

The Penal Code and the Medical Practitioners and Dentists Act predate the Constitution. Section 7 of the Sixth schedule gives guidance on the effectiveness of laws that were already in existence before the promulgation of the Constitution. It provides that such laws will continue in force but will be construed with alterations, adaptations, qualifications and exceptions necessary to bring

[138] The statutory provisions are available at the boards website http://www.medicalboard.co.ke/resources/DISCIPLINARY_POWERS_OF_MPDB.pdf (Accessed on 2nd July 2014)

them into with the Constitution. This section places a duty on the Courts to interpret legislations that pre-dated the Constitution in a manner that conforms to the Constitution.

As has been highlighted above the Penal Code does not reflect two of the grounds for safe abortion care cited under article 26 (4). The Penal Code and the Medical Practitioners and Dentists Act directly impact on the health care providers referred to under article 26 (4) of the Constitution as they could be used to harass or intimidate RH care providers offering women safe abortion care services within the limits of the Constitution that is including a threat to health and a need for emergency treatment that are not reflected in the Penal Code. Cases of police harassment of RH care providers have been highlighted by several reports by civil society organizations.

3.3.6 Efficacy of the criminal law provisions in reducing the number of abortions procured in Kenya.

As was highlighted in chapter one of this thesis unsafe abortions result in the highest number of maternal deaths in Kenya.[139] This is in spite of the criminal provisions on abortion that have been highlighted above. It is therefore prudent to evaluate whether the criminalization of abortion has had the intended effect of deterring procurement of abortions in the country. Is criminalization of abortion, a reproductive health issue, effective in reducing the number of unsafe abortions procured?

In responding to this question, I will borrow from an evaluation made by Marius Pieterse on the efficacy of criminalization of HIV transmission a health issue which like abortion is entangled in social morality issues resulting in criminalization. Pieterse argues that criminalization of public health issues fails only fuels stigma and legitimizes victimization.[140]

The intimidating effect of laws that criminalize abortion even when a countries Constitution permit procurement of abortion in some circumstances was highlighted in the case of ***Tysiąc v. Poland***[141] where the European Court of Human Rights stated the following about Poland's law that criminalized abortion despite the country recognizing women's right to safe abortion in some circumstances;

> "*The Court further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of safe*

[139] Center for Reproductive Rights and Federation of Women Lawyers-Kenya, *Failure to deliver: Violations of Women's Human Rights in Kenyan Health Facilities*, New York (2007) pp. 24.

[140] Marius Pieterse, 'Disentangling illness, crime and morality: Towards a rights-based approach to HIV prevention in Africa' (2011) 11 (1) AHRLJ pp 57-74.

[141] European Court of Human Rights Application no. 5410/03

abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. 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 approach taken by the Court would be relevant to Kenya where the Constitution under Article 26 (4) provides expanded grounds for provision of safe abortion care yet the same is not reflected in the Penal Code which still criminalizes the provision of safe abortion care even in cases where the continuance of a pregnancy threatens a woman or girls right to health by causing her mental anguish in instances where the pregnancy results from sexual violence. There is need therefore for the legislative framework including the Penal Code to reflect the expanded exceptions under Article 26 (4) of the Constitution.

Pieterse argues that the criminalization of a public health issue diverts focus from systemic causes and failures that result in the problem. He proposes that health laws and policies be evaluated for human rights compliance by weighing the extent to which the measures succeed in achieving their purpose.[142] Based on his argument one must question whether the anti- abortion provisions in the Penal Code have achieved their purpose or have only increased the number of clandestine abortions conducted in unsafe ways resulting to deaths and injuries as was highlighted in chapter one of this thesis.

3.3 A critique of the Reproductive Health Care Bill, 2014

The Bill addresses various aspects of RH including access to contraceptives and family planning services, gestational surrogacy, reproductive health of adolescents, termination of pregnancies among others. It would be expected that the Bill would address the gaps in the legislative framework on safe abortion care highlighted in this thesis, this is however not the case.

While sections 19 and 20 of the Bill introduce the concept of consultation and consent by the pregnant woman before a pregnancy is terminated the Bill fails to adequately give effect to Article 26 (4) of the Constitution.

The Bill fails to give clear direction on some critical issues relating to safe abortion care within the context of Article 26 (4) as read with Article 43 (1) of the Constitution. First the Bill does not provide clarity on what qualifies as a threat to life, a threat to health or a need to emergency treatment that would justify the provision of safe abortion care under article 26 (4). This clarity is necessary for health providers and also for women and girls especially in instances of pregnancies resulting from sexual violence which if the Bill would adopt the WHO and ICPD plan for action definition of health and reproductive health would encompass mental anguish that

[142] id.

such a pregnancy causes as a ground for provision of safe abortion under the threat to health exception.

The Bill is also silent on the type of health facilities where safe abortion care may be offered, it also fails to obligate health practitioners to make referrals where for one reason or the other they are not well equipped or for any other reason are not in a position to offer safe abortion care within the exceptions under Article 26 (4) of the Constitution.

3.4 CONCLUSION

This chapter sought to establish the legal basis for the right to safe abortion care in Kenya. The right to safe abortion care as was explained in the introduction section of this chapter is a sub set of the right to health specifically reproductive health which is well anchored as a direct right and as an interrelated and interdependent right to other rights in the Constitution of Kenya and international instruments including the ICSECR, ICCPR, The African Charter on Peoples' and Human rights and the Maputo Protocol. The right to safe abortion care especially for survivors of sexual violence is grounded on Article 26 (4) as read with Article 43 (1) of the Constitution. Additionally, the right to safe abortion care for survivors of sexual violence can be grounded on other rights such as the right to freedom from torture.

There is however inadequate legislation to give effect to Article 26 (4) of the Constitution as the Penal Code for example is yet to be amended to reflect the exceptions under the Constitutional provision additionally the Reproductive health Bill fails to give clarity on what instances would qualify as grounds for safe abortion care under the three exceptions under Article 26 (4) of the Constitution.

CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSION.

4.1 Introduction

This thesis sought to establish the implications of Article 26 (4) on women's right to safe abortion care (SAC) for survivors of sexual violence including whether the said provisions place a duty on the government to offer SAC including access to SAC related information.

In chapter one it was established that unsafe abortions resulted in 13% of maternal deaths in the world.[143] The statistics in Kenya were worse with unsafe abortions causing 30-40% of maternal deaths.[144] It was noted that the treatment of complications arising out unsafe abortions also cost the government hundreds of millions of shillings annually.

This thesis also established that other than Article 26 (4) there were other Constitutional provisions especially under the Bill of rights that supported the right to SAC either directly or indirectly.[145] The right to SAC, it was established, was also well grounded under international law by instruments that Kenya was a party to.[146]

The inadequacies and gaps that existed in the legislative and policy framework to give effect to Article 26 (4) of the Constitution were highlighted. Based on the gaps that were noted the following recommendations are proposed.

4.2 Recommendations

1. **Amendment of the Reproductive health care Bill in line with Articles 26(4) and Article 43 (1)(a)**

The Reproductive health care Bill (2014) was analyzed under chapter 3 of this thesis. A number of gaps were highlighted in the Bill including the fact that it replicated the provisions of Article 26 (4) therefore failing to give the much-needed clarity on the provisions of the Constitutional provision. There is a need to amend Part V of the Bill so that it gives clarity on SAC especially on provision of SAC for pregnancies resulting from sexual violence.

[143] See n 34.
[144] See n. 41
[145] See chapter 3 of this thesis.
[146] See chapter 2 of this thesis.

The Bill should also make clear provisions that would regulate SAC provision. This would include;

i. Define clearly what circumstances amount to a threat to a mother's health especially mental health. The Indian Act goes a step further and gives examples of instances where a pregnancy would be deemed as causing a woman mental anguish. It provides the following;

> "*…Of opinion, formed in good faith, that,-*
> *(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health …*
> *Explanation 1.-Where any, pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.*
> *Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.*"

ii. Specific provisions on when an abortion may be procured this would be as relates to gestation period. South Africa's Choice on termination of pregnancy Act[147] (herein after referred to as the South African Act) has specific provisions. It provides;

> "*2. (1) A pregnancy may be terminated-*
> *(a) upon request of a woman during the <u>first 12 weeks of the gestation period</u> of her pregnancy;*
> *(b) from the <u>13th up to and including the 20th week of the gestation period</u> if a medical practitioner, after consultation with the pregnant woman, is of the opinion that-*
> *(i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or…*"

The Indian Medical Termination of Pregnancy Act[148] (herein after referred to as the Indian Act) has similar provisions. The Act provides the following;

[147] Act No. 1891. 22 November 1996.

[148] Act No. 34 of 1971.

"3. When Pregnancies may be terminated by registered medical practitioners.-
(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-
(a) where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or
(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are. Of opinion, formed in good faith, that…"

iii. Provisions regulating the places or facilities that abortion care may be provided. The South African Act mentioned above provides the following;

"…Place where surgical termination of pregnancy may take place
3. (1) The surgical termination of a pregnancy may take place only at a facility
designated by the Minister by notice in the Gazette for that purpose under subsection (2).
(2) The Minister may designate any facility for the purpose contemplated in subsection (1), subject to such conditions and requirements as he or she may consider necessary or expedient for achieving the objects of this Act…"

The Indian Act also gives guidance on where an abortion may be procured it provides the following;

"4. Place where pregnancy may be terminated. -No termination of pregnancy shall be made in accordance with this Act at any place other than, -
(a) a hospital established or maintained by Government, or
(b) a place for the time being approved for the purpose of this Act by Government…"

iv. The Bill should also make it an offence for any person to prevent any woman or girl from accessing SAC. The South African Act has such a provision highlighted below;

"*10. (1) Any person who- (c)prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.*"

2. Decriminalization of acts related to safe abortion care

In addition to the enactment of an amended RH Bill (2014) reflecting the provisions proposed above, there will be a need to repeal some sections of the Penal Code and other relevant legislations that were referred to under Chapter 3 of this thesis that criminalize some acts related to SAC and that are used by police officers as a justification to raid and harass RH providers. The repealing should be made clearly within the RH Act as was done by the South African Act which has the following provision in its preamble;

> "…*This Act therefore repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act, 1975 (Act No. 2 of 1975), and promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs…*"

Further there should be clear provisions protecting RH providers from prosecution for acts done in good faith as is provided under the Indian Act as highlighted below;

> "*8.* ***Protection of action taken in good faith***.*- No suit for other legal proceedings shall lie against any registered medical practitioner for any damage caused likely to be caused by anything which is in good faith done or intended to be done under this act."*

3. Development and adoption of guidelines on provision of SAC for survivors of sexual violence.

September 2012 saw the adoption of the '*Standards and guidelines for reducing morbidity and mortality for unsafe abortion in Kenya*' whose development was spearheaded by the Ministry of Health (MOH). The guidelines provided clarity for RH providers on the right for sexual violence survivors to access SAC. The guidelines were however arbitrarily withdrawn in December 2013 by the director medical services without the involvement of stakeholders.[149] This left RH providers in a state of confusion on when SAC may be provided. There is therefore an urgent need either for the director to reinstate the guidelines or MOH to introduce new guidelines and

[149] See the Press statement issued by the Center for Reproductive Rights on 29th June 2015, '*Kenyan Women denied safe, safe abortion services; Center for Reproductive Rights files case against the Ministry of Health in the High Court in Kenya*' (Available at http://www.fidakenya.org/sites/default/files/PRESS%20STATEMENT-KENYAN%20WOMEN%20DENIED%20SAFE%2C%20LEGAL%20ABORTION%20SERVICES.pdf accessed on 3rd July 2015).

standards that appropriately clarify when safe abortion can be provided based on the grounds set forth in the Constitution.[150]

4. Judicial officers to observe objective judicial decision making in SAC related cases

In his decision delivered on 25th September 2014 in *R v Jackson Namunya Tali*[151] Justice Ombija sentenced Namunya, a nurse operating a private clinic at Gachie trading center, to death for the murder of one Christine Atieno who died while allegedly procuring an abortion with his assistance. This was despite the court in its own admission stating that the actual cause of Christine's death was not clear as the forensic report and evidence presented by a Dr. Odiwour that the medical report was unable to establish the cause of death, the Court went ahead to convict Namunya of Christine's murder. This was in disregard of the legal requirement that Courts should make decisions in criminal matters upon being convinced beyond any reasonable doubt of the accused guilt. This thesis argues that the inconclusive forensic evidence tabled before the Court created reasonable doubt that should have convinced the court to hold in favour of the accused.

This case was a departure of the objective decision making that had been done by the High Court in the Dr. Nyamu case[152] in her ruling delivered on 14th July 2005 Justice Rawal delivered a decision guided by the law despite the emotions and public outcry[153]for a conviction that the case had evoked. The Court stated the following;

> *"…Unfortunately I could not find any evidence to link 1st Accused with the offence. I would have expected to see a more comprehensive and professional investigation and prosecution of this case. It is not pleasant to see fetuses dumped on the public places without knowing the sources of these foul deeds. I earnestly hope that the court does not have to see this kind of gruesome acts ever in future.*
>
> *However, as a court of law, I am bound by the law of the land and all its ramifications. In the premises, I find that there is no evidence against any of the three Accused persons at the close of the prosecution case. I thus enter findings of not guilty against them and direct them to be released unless held otherwise as per law."*

5. Intensified lobbying and advocacy for respect and protection of RH rights for survivors of sexual violence

[150] ibid.

[151] Nairobibi HCCR 75 of 2009.

[152] Republic v John Nyamu & 2 others [2005] eKLR

[153] BBC News, '*Foetuses spark Kenya abortion row: Thousands of Kenyans have attended a requiem mass in Nairobi for 15 foetuses - believed to have been illegally aborted - found dumped on a roadside last week.'* available at http://news.bbc.co.uk/2/hi/africa/3773913.stm (accessed on 10th July 2015).

There have been attempts made by various groups especially human rights groups that defend RH rights to advocate for a more liberalized legal framework and conducive environment for women and girls to enjoy their RH rights including accessing SAC where the need arises. These organizations include among others FIDA Kenya, Center for Reproductive Rights and the Planned Parenthood Federation of America. In addition to carrying out research and publishing literature[154]on the status of RH rights in Kenya these organizations have also participated in the training of RH providers and defending those who are arrested and faced with prosecution.

The rights groups have also been engaged in advocacy including through public interest litigation. In June 2015 FIDA Kenya and the Center for Reproductive Rights filed the first case ever filed in Kenya's history to address the issue of safe abortion care for survivors of sexual violence and challenge the MOHs actions which included the withdrawal of the guidelines mention in 2 above and the issuing of a ban against health professionals in government facilities from attending any trainings on provision of SAC.[155]

There is however need for these and other like-minded groups and individuals to intensify lobbying and advocacy for RHR. This would include engaging with the media to intensify advocacy. The media would be a very strong ally in the advocacy for RH as they have a lot of influence on Kenyans. According to a survey on public confidence in state and non-state entities carried out by Ipsos Synovate in May 2015, the media scored highest among non-state entities with nearly half of all Kenyans, 46%, expressing a lot of confidence in it.[156] This therefore means that the media has potential to influence the perceptions of Kenyans towards various issues.

However, for the engagement with the media to be fruitful there is a need to embark on sensitization and training of journalists, editors and management staff on RHR. Such training would include sensitizing the media on the need for objective reporting on issues and stories related to RH. There have been instances where the media's angle to stories on RH has been extremely prejudicial to RHR.[157]

[154] See their reports that were referred to under chapter 1 of this thesis.

[155] FIDA Kenya & Center for Reproductive Rights, '*Fact Sheet on FIDA Kenya & 3 others vs. the AG & 2 others'* available at http://www.fidakenya.org/sites/default/files/PRESS%20STATEMENT-KENYAN%20WOMEN%20DENIED%20SAFE%2C%20LEGAL%20ABORTION%20SERVICES.pdf (Accessed on 3rd July 2015).

[156] Ipsos synovate, *'Ipsos' 1st Quarter SPEC (Social, Political, Economic and Cultural) Survey: 8th Media Release'* available at http://www.ipsos.co.ke/home/index.php/downloads (accessed on 10th July 2015).

[157] See for example Peter Leftie, '*Parents and clerics rebel against law allowing teen sex'* '*Sex Bill targeting teens sparks uproar*' Daily Nation pp.1 and 4 Friday, July 3rd 2015.

Lobbying for SAC should also be done through social media[158] and also through other platforms like radio and television programmes including documentaries. In 2015 one of Kenya's best music groups Sauti Sol released a song titled *Nerea* featuring the music duo Amos and Josh that carried a very strong anti-abortion message.[159] There is therefore a great need for RH activists to use innovative ways such as songs to carry forward their messages.

4.3 Conclusion

The realization of women's reproductive health rights specifically the right to safe abortion services for survivors of sexual violence is dependent on a number of factors. First it is important that the law protects reproductive health care providers to enable them offer comprehensive abortion services[160] without fear of harassment from security officers and members of the public.

There must also be adequate resource allocation to ensure that there are sufficient staff and medical supplies at all public health centers offering safe abortion services[161]. The services must also be offered at an affordable price. The price if too high may lead to poor survivors of sexual violence resorting to quacks who offer cheaper but unsafe services.

It would also be imperative for women and girls to be made aware of their reproductive rights and who and where relevant reproductive health services are offered.[162] The government would have to provide the information that is necessary for the protection and protection of reproductive health and choice.[163]

Other stakeholders such as Civil Society Organizations would also have to create awareness to citizens on the right for women to access abortion services within the provisions of the Constitution. This would be aimed at reducing the stigma associated with abortion in Kenya.

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[158] See for example the 1 in 3 campaign that is seeking to reduce stigma associated with abortion by women and girls sharing their experiences available at http://www.1in3campaign.org/written-stories/2919#more-2919 accessed on 10th July 2015.

[159] As at 10th July 2015 the song had received 899,390 views on YouTube and over 10,000 likes.

[160] id Rebecca J. Cook, Bernard M. Dickens and Mahmoud F. Fathalla pp.51.

[161] ibid pp. 53-58.

[162] ibid pp. 210.

[163] ibid see also Article 43 (1) (a) of the Constitution of Kenya.

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