UNVEILING THE NEED FOR A SEPARATE AND COMPREHENSIVE LAW ON REPRODUCTIVE HEALTHCARE IN KENYA

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By

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Prepared under the supervision of

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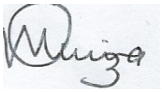
DECLARATION

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

Signed: .....  .....

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[DR. JENNIFER GITAHI]

ABSTRACT

The progressive realisation of women's rights is overriding for any nation that seeks to empower its people**.** Reproductive healthcare is key when discussing women's rights. It is a fundamental human right as well as human development issue that states must strive to fulfill completely. This right is provided for expressly in Article 43(1) of the 2010 Constitution of Kenya. The conundrum lies in the fact the Constitution of Kenya as well as other pieces of existing legislation such as the Health Act are not specific to the protection of reproductive healthcare rights. They only provide for an umbrella of rights such as that to dignity, right to freedom and security of a person, the right to the highest attainable standard of health and that abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law. There is no separate and extensive law on the right to reproductive healthcare. This has negatively impacted the enforcement of this right thus leading to numerous violations especially against women and girls. This study therefore explicates on the need to develop a separate and comprehensive law on reproductive healthcare.

LIST OF ABBREVIATIONS

CEDAW Convention on the Elimination of Discrimination Against Women

ICPD International Conference on Population and Development

IPPF International Planned Parenthood Federation

ICCPR International Covenant on Civil and Political Rights

KNCHR Kenya National Commission on Human Rights

UNESCO United Nations Educational, Scientific and Cultural Organisation

FPAK Family Planning Association of Kenya

FIDA The Federation of Women Lawyers-Kenya

NGOs Non-Governmental Organisations

MMR Maternal Mortality Ratio

STIs Sexually Transmitted Infections

CSE Comprehensive Sexuality Education

FSW Female Sex Workers

LIST OF CASES

FIDA Kenya (JMM through PKM) & 3 others v The Attorney General & 12 others (2015) eKLR

J.O.O v The Attorney General & 6 other (2014) eKLR

Millicent Awuor Ouma & Another v The Attorney General and 4 others (2012) eKLR

Glasgow City Council v Zafar (1997), The House of Lords of Scotland.

Lakshmi & Others v The Government of Nepal (2007), The Supreme Court of Nepal.

Prakash Mani Sharma & Others v The Government of Nepal (2008), The Supreme Court of Nepal.

LIST OF STATUTES

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Children Act, (Act No.8 of 2001).

Prohibition of Female Genital Mutilation Act, (Act No. 32 of 2011).

Reproductive Healthcare Bill, (2014)

Reproductive Healthcare Bill, (2019).

The Right to Safe Motherhood and Reproductive Health Act, 2075 (2018).

African Charter on Human and Peoples' Rights, 19 January 1981.

International Covenant on Economic, Social and Cultural Rights, 3 January 1976.

The Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, 25 November 2005.

Universal Declaration of Human Rights, 10 December 1948.

International Covenant on Civil and Political Rights, 23 March 1976.

CHAPTER ONE: INTRODUCTION

1.1 Background to the problem

Traditionally, the response to reproductive health was addressed through population control policies. However, the 1994 International Conference on Population and Development (ICPD) shifted the paradigm from population and development to reproductive rights largely in response to the inequity of women's reproductive health experience.[1] Roseman & Reichenbach cite that the ICPD Programme of Action was primarily imperative in that it laid out a radically different approach to the population 'problem,' stating that population concerns could not be separated from other economic and social development agendas, particularly the need for women's empowerment.[2]

Black's Law Dictionary defines reproductive rights as a person's constitutionally protected rights relating to the control of his or her procreative activities specifically the cluster of civil liberties relating to pregnancy, abortion and sterilization.[3]The term 'reproductive rights' has yet to be defined by any official national laws in Kenya. The Reproductive Healthcare Bill of 2019, however, defines reproductive rights to include the right of all individuals to attain the highest standard of sexual and reproductive health and to make informed decisions regarding their reproductive lives from discrimination, coercion or violence.[4]

The phrase 'reproductive rights' has also not yet been defined by any international human rights convention. However, General Comment Number 2 on Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, better known as the Maputo Protocol, expressly articulates women's reproductive rights as human rights.[5] According

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[1] Eggers M, 'Embodying inequality: The criminalization of women for abortion in Chile,' University of Connecticut Graduate School, 1059,21,- https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=7318&context=dissertations- on 23 April 2021.

[2] Reichenbach L, Roseman M, *Reproductive health and human rights: The way forward,* University of Pennsylvania Press, Philadelphia, 2009.

[3] *Black's Law Dictionary,* 9th Edition.

[4] Section 2, *Reproductive Healthcare Bill,* (2019).

[5] *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa General Comment Number 2,* 12 May 2014, 11.

to Temmerman and Khosla's article on sexual and reproductive health rights, these rights: Incorporate efforts to eliminate avertible maternal and neonatal mortality and morbidity; pledge quality sexual and reproductive health services; address matters such as STIs, cervical cancer as well as vehemence against women and girls; and focus on the reproductive health needs of adolescents.[6] This is what can be termed as full reproductive rights.

The aforementioned Bill describes reproductive health, on the other hand, as 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 productive system and to its functions and processes.[7] Reproductive healthcare services in the form of access and administration of methods of contraception have been available in Kenya from as early as 1955 through autonomous voluntary family planning associations.[8] Kenya even became the first Sub-Saharan African country to adopt an official national family planning program in 1967.[9]

This right to reproductive healthcare is now guaranteed in regional and international human rights instruments of which Kenya is party to such as the Maputo Protocol[10] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[11]respectively. Locally, Article 43(1) of the 2010 Constitution provides that every person has the right to the highest attainable standard of health, which includes reproductive healthcare. [12] The same is reiterated in Section 3(b) of the Health Act of 2017.[13]

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[6] Temmerman M, Khosla R and Soy L, 'Sexual and Reproductive Health and Rights: A global development, health and human rights priority,' *384 The Lancet*, 2 August 2014, - https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)61190-9/fulltext- on 25 November 2020.

[7] Section 2, *Reproductive Healthcare Bill,* (2019).

[8]Krystall A, Mwaniki A, Owuor J, 'Studies in family planning,' Family Planning Programmes: World Review, *Population Council*, August 1975, 286.

[9] Ogola S, Ngatia K, Solomon M, 'Family planning services,' The Demographic and Health Surveys Program, 2003, 5_< https://dhsprogram.com/pubs/pdf/SPA8/05Chapter5.pdf>_ on 22 September 2020.

[10] Article 14, *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,* 25 November 2005.

[11] Article 11, 12 and 14, *Convention on the Elimination of all forms of Discrimination Against Women,* 1249, 3 September 1981.

[12] Article 43(1), *Constitution of Kenya,* (2010).

[13] Section 3(b), *Health Act,* (No. 21 of 2017).

Despite major efforts that have been reached to protect the right to reproductive healthcare in Kenya, full success in this area remains elusive.[14]This is because frequent violations of this right such as reduced quality and inaccessibility of reproductive healthcare services, which are constitutional abuses, persist. This has led to adverse health effects such as high maternal and child morbidity, unsafe abortions, unplanned pregnancies, amongst other atrocities, in the country.[15] These violations, which have affected mostly women, can be attributed to the inadequacies of reproductive healthcare laws in Kenya.

1.2 Statement of the problem

Women's reproductive healthcare is a fundamental human right as well as human development issue that states are necessitated to endeavour.[16]The Constitution of Kenya however, as well as other pieces of legislation such as the Health Act are not specific to the protection of reproductive healthcare rights.[17] They only provide for an umbrella of rights such as that to dignity, right to freedom and security of a person, the right to the highest attainable standard of health and that abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.[18]

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[14] Chivusia S, 'Experiences from the Kenya National Commission on Human Rights KNCHR) on the Promotion and Protection of Sexual and Reproductive Health and Rights,' in Durojaye E, Mirugi-Mukundi G and Ngwena C (ed) 1st ed, *Advancing sexual and reproductive health rights in Africa: Constraints and opportunities,* Routledge Contemporary Africa, 2021, 13.

[15] Chivusia S, 'Experiences from the Kenya National Commission on Human Rights KNCHR) on the Promotion and Protection of Sexual and Reproductive Health and Rights,' in Durojaye E, Mirugi-Mukundi G and Ngwena C (ed) 1st ed, *Advancing sexual and reproductive health rights in Africa: Constraints and opportunities,* Routledge Contemporary Africa, 2021, 13.

[16] Kenya National Commission on Human Rights, *Realising sexual and reproductive health rights in Kenya: A myth or reality? A report of the public into violations of sexual and reproductive health rights in Kenya,* April 2012, 85. -http://www.knchr.org/portals/0/reports/reproductive_health_report.pdf- on 18 October 2020.

[17] Wachira T, 'An analysis of reproductive health laws in Kenya,' *Kituo Cha Sheria*, 5 March 2020, -< https://kituochasheria.wordpress.com/2020/03/05/an-analysis-of-reproductive-health-laws-in-kenya/#_ftn1>- on 13 April 2021.

[18] Article 43(1), *Constitution of Kenya,* (2010), Section 6, *Health Act,* (No.21 of 2017).

As Professor David Barnhizer cited, legal strategies are likely to fail if the law is too narrow to deal with the situation.[19] There is, therefore, no extensive binding law in Kenya that prevents the violation of reproductive healthcare rights.[20] This has resulted in numerous human rights infringements such as costly reproductive healthcare services as well as poor quality services that have in turn led to high maternal and child morbidity, unsafe abortions, the spread of HIV and other STI's, unplanned pregnancies, amongst other brutalities.[21] This study therefore looks into the need to develop distinct, wide-ranging law on reproductive healthcare in Kenya.

1.3 Purpose of the study

i) To expound on the blatant violations of the right to reproductive healthcare in Kenya.

ii) To show the link between the violations and the absence of a separate comprehensive law on reproductive healthcare.

iii) To analyse Nepal's separate and comprehensive law on the right to reproductive healthcare for purposes of benchmarking in Kenya.

iv) To offer legal and non-legal approaches of reform to enhance the compliance of the right to reproductive healthcare in Kenya.

1.4 Hypothesis

This study is based on the presumption that numerous violations to the right to reproductive healthcare in Kenya such as costly and poor-quality reproductive healthcare services can be attributed to lack of a separate and comprehensive law reproductive healthcare. These breaches have led to the persistence of high maternal and child morbidity, the spread of sexually transmitted infections and HIV, unsafe abortions and unplanned pregnancies. [22]

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[19] Barnhizer D, 'What causes laws to succeed or fail?' Cleveland-Marshall College of Law, Research Paper 16-297, March 2016, 6.

[20] Wachira T, 'An analysis of reproductive health laws in Kenya,' Kituo Cha Sheria, 5 March 2020.

[21] Chivusia S, 'Experiences from the Kenya National Commission on Human Rights KNCHR) on the Promotion and Protection of Sexual and Reproductive Health and Rights,' in Durojaye E, Mirugi-Mukundi G and Ngwena C (ed) 1st ed, *Advancing sexual and reproductive health rights in Africa: Constraints and opportunities,* Routledge Contemporary Africa, 2021.

[22] Central Bureau of Statistics, Kenya *Demographic and Health Survey*, 2003, _ https://dhsprogram.com/pubs/pdf/FR151/FR151.pdf>_ on 22 September 2020.

1.5 Research questions

i) To what extent has the right to reproductive healthcare been violated in Kenya?

ii) What is the link between the violations of the right to reproductive healthcare in Kenya and the absence of a separate and comprehensive law on reproductive healthcare?

iii) What constitutes a comprehensive reproductive healthcare law in reference to Nepal's laws?

iv) What are the necessary legal and non-legal reforms to enhance the right to reproductive healthcare in Kenya?

1.6 Justification of study

There is need for proper legal guidance when it comes to dealing with reproductive healthcare matters in Kenya. Due its gravity, there is need for a separate and comprehensive law. Over the years, the violation of the right to reproductive healthcare has been rife due to strain in its enforcement that can be attributed to the lack of a comprehensive law. This study has the capacity to provide direction and place pressure on legislators in Kenya to pass the 2019 Reproductive Healthcare Bill which is a solution in establishing an individual and wide-ranging law on reproductive healthcare in the country. Most crucially, this study answers the plight of women in Kenya in regard to reproductive healthcare matters.

1.7 Scope of the study

The study covers reproductive healthcare in relation to the Kenyan context. Additionally, it shall be compared Nepal which has a progressive and comprehensive law on reproductive healthcare.

1.8 Literature review

This research neither portrays itself as a pioneer in the controversy and the issues involving the subject of reproductive healthcare nor does it set to be the first to extensively study the legal issues surrounding this matter. Certainly, there are numerous distinguished scholars and researchers who have undertaken and written extensively on this subject. Similarly, there are various local and international instruments that provide for the right to reproductive healthcare.

Locally, the 2010 constitution of Kenya provides for the right to healthcare including reproductive health.[23] It also states that no person shall be denied emergency medical treatment.[24] This can be construed to mean that even in the event that an adolescent urgently seeks reproductive healthcare in the form of a contraceptive, she should not be turned away. Article 43(3) further provides that the state shall offer suitable social security to persons who are incapable of assisting themselves and their dependents.[25]Section 3 of the Health Act of 2017 requires the safeguard, reverence, advancement and implementation of health rights of every person in Kenya including reproductive health.[26] Section 6 further states that every person has a right to reproductive healthcare which includes family planning, available ante-natal services and access to healthcare by professionals.[27]

In regard to the Penal Code, it only provides for punishment in regard to abortion only. Section 158 stipulates the liability of the person who has intent to procure a miscarriage and does so by unlawfully administering a poison or noxious drug or uses any other means. Once found guilty is liable to imprisonment for 14 years.[28] Section 159 makes it an offence for a person to procure their own miscarriage. Such a person is liable to imprisonment for 7 years.[29] Section 160 on the other hand, provides that anyone who supplies or makes available drugs or equipment to procure a miscarriage and has knowledge on the same is liable to 3 years imprisonment.[30] Wachira criticises these provisions as being restrictive not providing for ways and specifications in regard to safe abortion.[31]

Section 68 of the same Act stipulates that the National Health System is mandated to device a comprehensive programme to improve reproductive health including; operative family planning services; application of means to decrease hazardous sexual practices; adolescence and youth sexual and reproductive health; maternal and child health; abolition of female genital mutilation;

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[23] Article 43(1), *Constitution of Kenya,* (2010).

[24] Article 43(2), *Constitution of Kenya,* (2010).

[25] Article 43(3), *Constitution of Kenya,* (2010).

[26] Section 3(b), *Health Act,* (No. 21 of 2017).

[27] Section 6, *Health Act,* (No. 21 of 2017).

[28] Section 158, *Penal Code,* (CAP 63 of 2007).

[29] Section 159, *Penal Code,* (CAP 63 of 2007).

[30] Section 160, *Penal Code,* (CAP 63 of 2007).

[31] Wachira T, 'An analysis of reproductive health laws in Kenya,' *Kituo Cha Sheria*, 5 March 2020.

and maternal nutrition and micronutrient supplementation.[32] Both the Reproductive Healthcare Bills of 2014[33] and 2019[34] are reviewed in this study as well.

Regionally, Kenya is party to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. It is also known as the Maputo Protocol. Article 14 of this Protocol guarantees women's right to health including sexual and reproductive health. This article and its corresponding General Comment 2 relate to women's rights to control their potency, contraception, family planning, information and education, and abortion.[35] However, when ratifying the Maputo Protocol, Kenya placed a reservation on Article 14(2)(c) of the Protocol. This Article requires the promotion of women's access to safe abortion services.

Internationally, Kenya is also party to CEDAW. Article 10 of CEDAW specifies that women's right to education includes access to definite educational information to benefit the health and welfare of families including information and advice on family planning.[36] Article 16 further guarantees women equal rights in determining at their liberty and responsibly on the number and spacing of their children as well as have access to information, education and ways to empower them to implement these rights.[37] Kenya is, additionally, a signatory to International Covenant on Economic, Social and Cultural Rights. The right to sexual and reproductive health is an integral part of the right to health and is enshrined in Article 12 of this Covenant.[38]

In dissecting the human rights theory, John Locke reasoned that the law of nature obliges all human beings to safeguard the sovereignty and health of each other.[39] Thomas Hobbes held a similar view. The conception of man in a "state of nature" is where Hobbes drew his understanding of natural rights. He argued that man's indispensable natural (human) right was to use his own power the

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[32] Section 68(1)(e), *Health Act,* (No. 21 of 2017).

[33] *Reproductive Healthcare Bill,* (2014).

[34] *Reproductive Healthcare Bill,* (2019).

[35] Article 14, *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women and Girls in Africa,* 25 November 2005.

[36] Article 10, *The Committee on the Elimination of Discrimination Against Women,* 3 September 1981.

[37] Article 16, *The Committee on the Elimination of Discrimination Against Women,* 3 September 1981.

[38] Article 12, *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966.

[39] Locke J, *The two treaties of civil governments,* Hollis Edition, 1689, https://oll.libertyfund.org/titles/locke-the-two-treatises-of-civil-government-hollis-ed on 19 October 2020.

same way he would apply it to another person. Consequently meaning, the safeguarding of one's individuality. According to Hobbes, the law of nature is built on mutual security implying the notion that one cannot infringe on another's natural rights. This is because every man is equal and has the same inalienable rights.[40]

Ambani and Mbondenyi's views are in accordance with Hobbes and Locke's sentiments as well. In their opinion, one dominant view that holds human rights are those entitlements that become due to every human person at the commencement of life.[41]This study therefore proves that reproductive rights are indeed human rights which are inherent, inalienable and universal thus worthy of respect. Moreover, the equality theory is applied in this study to advance the women's reproductive healthcare agenda further through the works of Katherine Barnett[42] as well as Catherine Barnard.[43]

In the book 'Advancing Sexual and Reproductive Health Rights in Africa: Constraints and Opportunities,' Chivusia's chapter explains that despite the strides that have been reached to protect the right to reproductive healthcare in Kenya, full success in this realm still remains obscure.[44] This is because frequent violations to this right such as reduced quality and inaccessibility of reproductive healthcare services have consequently led to high maternal and child morbidity, unsafe abortions, unplanned pregnancies, amongst other atrocities, in the country.[45] Wachira attributes this to the lack of a separate and comprehensive law on reproductive

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[40] E Schwitzgebel, *Human nature and moral education in Meniscus, Xunzi, Hobbes and Rousseau,* University of Illinois Press, 2007, 147-148, -http://www.jstor.org/stable/27745086- on 19 October 2020.

[41] Mbondenyi M, Ambani J, *The new constitutional law of Kenya: Principles, government and human rights,* LawAfrica Publishing (K) Limited, Nairobi, 2016, 169.

[42] Barnett K, *Feminist legal theory foundations,* Temple University Press, Philadelphia, 1993, 550-551.

[43] Barnard C, Hepple B, 'Substantive equality, *Cambridge Law Journal,* Volume 9, November 2009, 562-585

[44] Chivusia S, 'Experiences from the Kenya National Commission on Human Rights KNCHR) on the Promotion and Protection of Sexual and Reproductive Health and Rights,' in Durojaye E, Mirugi-Mukundi G and Ngwena C (ed) 1st ed, *Advancing sexual and reproductive health rights in Africa: Constraints and opportunities,* Routledge Contemporary Africa, 2021, 13.

[45] Chivusia S, 'Experiences from the Kenya National Commission on Human Rights KNCHR) on the Promotion and Protection of Sexual and Reproductive Health and Rights,' in Durojaye E, Mirugi-Mukundi G and Ngwena C (ed) 1st ed, *Advancing sexual and reproductive health rights in Africa: Constraints and opportunities,* Routledge Contemporary Africa, 2021, 13.

healthcare in Kenya has resulted in inadequate enforcement of reproductive health rights which has in turn led to the violations.[46]

Professor David Barnhizer further explains that one of the reasons why legal strategies fail is if they are too narrow to deal with the situation.[47] As Wachira explained, the current legal framework on reproductive healthcare in Kenya only provides for an umbrella of rights and does provide extensively for the core facets of issue.[48] Nepal's Act known as The Right to Safe Motherhood and Reproductive Health Act, 2075 (2018)[49] is an example of a law on reproductive healthcare which is separate and comprehensive and is used in this study as a framework from which Kenya should benchmark.

The existing legal context on reproductive healthcare in Kenya additionally, does not provide expansively on sanctions for those who contravene this right. As Mushanga stated in his book 'Criminal Homicide in Uganda,' punishment is intended to serve a certain objective and it is therefore not imposed for the sake of it.[50] Barnhizer also states that laws are also abound to fail if the law contains no sanctions for failure to comply or if the sanctions are so inadequate that "bad actors" are willing to risk the potential penalty because the sanctions are *de minimus*, the probability of detection or prosecution is low, or the benefit for violation is high relative to the sanctions.[51]

In providing legal solutions to this menace, this study refers to the Reproductive Healthcare Bill of 2019[52] and how there is need for key changes before it is passed. In regard to legal solutions, Tenkorang and Owusu emphasise on the vitality of education. They assert that Women who are empowered (albeit educated, wealthy and employed) have been found to be more assertive on their

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[46] Wachira T, 'An analysis of reproductive health laws in Kenya,' *Kituo Cha Sheria*, 5 March 2020.

[47] Barnhizer D, 'What causes laws to succeed or fail?' Cleveland -Marshall College of Law, Research Paper 16-297, March 2016_http://ssrn.com/abstract=2744885_ on 25 November 2020.

[48] Wachira T, 'An analysis of reproductive health laws in Kenya,' *Kituo Cha Sheria*, 5 March 2020.

[49] *The Right to Safe Motherhood and Reproductive Health Act,* 2075 (2018).

[50] Mushanga T, *Criminal homicide in Uganda,* LawAfrica Publishing (K) Ltd, Nairobi, 2011,148-152.

[51] Barnhizer D, 'What causes laws to succeed or fail?' Cleveland -Marshall College of Law, Research Paper 16-297, March 2016.

[52] *Reproductive Healthcare Bill,* (2019).

sexual and reproductive rights, and better at negotiating for safer sexual intercourse than their counterparts who are less empowered[53]

1.9 Limitations of the study

This research is founded and based mainly upon the geographical region of Kenya, with significant reference to Nepalese laws on reproductive healthcare.

1.10 Delimitations of the study

Reproductive healthcare is an issue that affects both men and women. However, this study places emphasis solely on women's right to reproductive healthcare as they are the class most affected.

1.11 Chapter breakdown

This research is broken down into five chapters. Chapter one is the introductory chapter. It includes: the background of the problem, statement of the problem, purpose of the study, hypothesis, research questions, justification of the study, scope and limitations of the study, and a chapter summary.

Chapter two deals with the theoretical framework of the study. It consists of the theories which provide a perspective through which to examine this study. It therefore expounds on the human rights theory as well as the equality theory. This chapter also includes the research methodology.

Chapter three firstly delves into the violations on the right to reproductive healthcare in Kenya as well as the social and legal repercussions that have arisen as a result. Furthermore, this chapter expounds on the link between the infringements and the lack of a separate and comprehensive law on reproductive healthcare.

Chapter four of this study details on the comprehensive reproductive health law in Nepal for purposes of drawing lessons in Kenya.

Chapter five provides for the findings, conclusion and recommendations of this study.

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[53] Tenkorang E, and Owusu Y, 'Coerced First Sexual Intercourse Among Women in Ghana: Evidence from the Demographic and Health Survey,' *Sexuality & Culture,*2012,170,-< https://www.researchgate.net/publication/257771339_Coerced_First_Sexual_Intercourse_Among_Women_in_Ghana_Evidence_from_the_Demographic_and_Health_Survey>- on 23 April 2021.

CHAPTER TWO: THEORETICAL FRAMEWORK AND METHODOLOGY

2.1 Introduction

This study is premised on two key legal theories touching on the rights and liberties of women and girls. They provide a lens through which this study can be viewed through. These theories are the human rights theory and the equality theory.

2.2 Human rights theory

One dominant view that holds human rights are those entitlements that become due to every human person at the commencement of life.[54] It therefore follows that rights are not granted by governments but accrue to human beings naturally. Law and governments can only affirm this reality.[55] According to the Universal Declaration on Human Rights (UDHR), all human beings are born free and equal in dignity and rights.[56] Human rights are not only inherent but also inalienable. This means that one set of rights cannot be enjoyed fully without the other.[57] For example, denying a woman her full reproductive rights in turns violates her right to privacy as well as her right to equality and non-discrimination. Human rights are also universal which means they are applicable to every single human being in the world.[58]

John Locke is a proponent of this theory. He reasoned that the law of nature obliges all human beings to safeguard the sovereignty and health of each other.[59] Thomas Hobbes held a similar view. The conception of man in a "state of nature" is where Hobbes drew his understanding of natural rights. He argued that man's indispensable natural (human) right was to use his own power the same way he would apply it to another person. Consequently meaning, the safeguarding of one's individuality. According to Hobbes, the law of nature is built on mutual security implying the

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[54] Mbondenyi M, Ambani J, *The new constitutional law of Kenya: Principles, government and human rights,* LawAfrica Publishing (K) Limited, Nairobi, 2016, 169.

[55] Mutakha-Kangu J, 'The theory and design of limitation of fundamental rights and freedoms,' *The Law Society of Kenya Journal,* 2008, 1.

[56] Article 1, *Universal Declaration of Human Rights,* 10 December 1948.

[57] 'What are human rights?' United Nations Human Rights: Office of the High Commissioner, 1996-2020, - https://www.ohchr.org/EN/PublicationsResources/Pages/Publications.aspx>

[58] Wilson R, *Human rights culture and context: Anthropological perspective*, Pluto Press, 1997, https://anthrosource.onlinelibrary.wiley.com/doi/abs/10.1525/pol.2002.25.2.113- on 19 October 2020.

[59] Locke J, *The two treaties of civil governments,* Hollis Edition, 1689, https://oll.libertyfund.org/titles/locke-the-two-treatises-of-civil-government-hollis-ed on 19 October 2020.

notion that one cannot infringe on another's natural rights. This is because every man is equal and has the same inalienable rights.[60]

2.21 Reproductive rights as human rights

Reproductive rights thus embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents.[61] These rights are even included in the 2010 Constitution of Kenya and they include: The right to autonomy and security of person;[62]the right to health, including sexual and reproductive health;[63]the right to privacy;[64]the right to be free from practices that harm women and girls;[65]the right to not be subjected to torture or other cruel, inhuman, or degrading treatment or punishment;[66]and the right to be free from sexual and gender-based violence.[67]

Reproductive rights are indeed human rights. However, the only puzzle that lies in viewing reproductive rights as human rights such as the right to dignity or the right to not be subjected to torture is the fact that they only provide for an umbrella of rights which are not specific aspects of reproductive healthcare.[68]As Crichton cited, abstract, legal and individualistic concepts of rights may be inadequate for capturing the multiple and often ambiguous nature of rights as are

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[60] E Schwitzgebel, *Human nature and moral education in Meniscus, Xunzi, Hobbes and Rousseau,* University of Illinois Press, 2007, 147-148, -http://www.jstor.org/stable/27745086- on 19 October 2020.

[61] Obaid T, 'Programme of action,' International Conference on Population and Development, Cairo, 5-13 September 1994,46.

[62] Article 29, *Constitution of Kenya,* (2010).

[63] Article 43(1), *Constitution of Kenya,* (2010).

[64] Article 31, *Constitution of Kenya,* (2010).

[65] Article 27, *Constitution of Kenya,* (2010)

[66] Article 25, *Constitution of Kenya,* (2010).

[67] Article 27, *Constitution of Kenya,* (2010).

[68] Crichton J, 'Painful tradeoffs: Intimate-partner violence and sexual and reproductive Health rights in Kenya,' Institute of Development Studies, IDS Working Paper 312,2008, 14, - https://www.researchgate.net/publication/242621446_Painful_Tradeoffs_Intimate-partner_Violence_and_Sexual_and_Reproductive_Health_Rights_in_Kenya/link/0c9605368bdacd8ba7000000/download- on 23 April 2021.

experienced by individuals, and the multiple constraints they face in exercising them.[69] This is why the development of separate and comprehensive law on in Kenya with particular provisions on reproductive healthcare which reflect human rights is key.

2.3 Equality theory

The genesis in understanding the equality theory and women's rights can be looked at from Catherine MacKinnon's point of view. She is a renowned American radical feminist and professor of law. She coined that 'The law sees and treats women the way men see and treat women.'[70] This is quite palpable in the current state of reproductive healthcare in Kenya. There is no separate and comprehensive law on the issue despite its vitality. One can infer that if reproductive healthcare primarily concerned men, there would probably be a broad law on it in existence. Mackinnon uses the same argument with rape and torture. She argues that the reason rape is not seen as a violation of human rights is because of a biased double standard where torture is considered so because it is done to men as well as women, while sexual violence is seemingly gendered.[71]

The key objective of the equality theory therefore is to develop legal assessments that unmask the root cause of the discrimination at hand in order for it to be eradicated.[72] Equality theorists appreciate the multiplicity of women's lived experiences thus pursuing to cherish inclusive and representative appraisals of the law which are applicable to all women.[73]According to author

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[69] Crichton J, 'Painful tradeoffs: Intimate-partner violence and sexual and reproductive Health rights in Kenya,' Institute of Development Studies, IDS Working Paper 312,2008, 14.

[70] MacKinnon C, *Feminism, marxism, method and the state: Toward feminist jurisprudence*, The University of Chicago Press,635, 1983.

[71] McGlynn C, 'Rape as torture? Catharine MacKinnon and questions of feminist strategy' *Feminist Legal Studies*, 2008, 72 — https://www.amherst.edu/media/view/239137/original/rape%2Bas%2Btorture.pdf on 23 April 2021.

[72] Comack E, *Locating law: Race/class/gender/sexuality connections,* Halifax, Winipeg, Fernwood Publishing, 1999, 19.

[72] Comack E, *Locating law: Race/class/gender/sexuality connections,* Halifax, Winipeg, Fernwood Publishing, 1999, 19.

[73] Silvers A, 'Reprising women's disability: Feminist identity, strategy and disability rights,' *Berkeley Women's Law Journal,* 1998, 81.

Elizabeth Comack, equality theorists question the fairness of the official version of the law as an impartial and objective method of conflict resolution.[74]

The official version of the law maintains that the law is neutral and treats everyone the same. The equality theory on the other hand demonstrates that the law is not in fact impartial because it affects men and women differently. Their argument further states that the law can indeed act to propagate gender discrimination in the society. The theorists therefore confront the traditional interpretations of the law which have previously been accepted as unbiased while in real sense perpetuate patriarchy as well as oppression.

According to author Katherine Barnett, the dominant facet of the equality theory is 'asking the woman question' as it attaches itself to women's rights. Barnett explains that in law, 'asking the woman question' is to assess how the law disdains the experiences and values which are more prone to women than men.[75] Hence, just like the human rights theories, the equality theory aims to understand women's oppression in many ways including the failure to develop a comprehensive law on reproductive healthcare as well to promote women's equality within society.

The advancement of a substantive equality analysis is one of the footings of the equality theory which are used to produce substantive results.[76] This is as opposed to formal equality. According to author and scholar Catherine Barnard of the Cambridge Law Journal, in formal equality men and women must be treated alike. This is snubbed under a substantive equality analysis as it vouches for differential treatment projected to test the sources of women's oppression.[77]Barnard further elucidates that the formal equality approach is reflected in the model of less favourable treatment. It is also known as direct discrimination and is based on grounds of race, religion, sex and even political opinion. She explains that the conundrum that arises with the concept of consistent treatment in formal equality is that it exemplifies a notion of procedural justice which

[74] Comack E, *Locating law: Race/class/gender/sexuality connections,* Halifax, Winipeg, Fernwood Publishing, 1999.

[75] Barnett K, *Feminist legal theory foundations,* Temple University Press, Philadelphia, 1993, 550-551.

[76] Barnard C, Hepple B, 'Substantive equality, *Cambridge Law Journal,* Volume 9, November 2009, 562-585, - https://www.jstor.org/stable/pdf/4508714.pdf?refreqid=excelsior%3A3fefabc5c3dce6f0a604576e7ad430dc- on 25 November 2020.

[77] Barnard C, Hepple B, 'Substantive equality, *Cambridge Law Journal,* Volume 9, November 2009, 562.

does not guarantee any particular outcome.[78] In the case of *Glasgow City Council v Zafar*, the court gave the example that formal equality implies that if an employer treats white and black workers equally then there is no sort of violation.[79]

The flaws of the formal equality theory led to the enhancement of the concept of substantive equality. This is because substantive equality reflects that the right to equality should be responsive to those who are underprivileged, degraded, disregarded, or flouted.[80] Women's experiences are snubbed in the current legal framework on reproductive healthcare in Kenya as it only provides for an umbrella of rights and not rights specific to the issue.

2.4 Research methodology

This paper is based on the collation of qualitative data obtained from secondary and tertiary resources. These include but are not limited to, analysis of information from online resources, journals and articles, reports from relevant organizations, textbooks, case law, news articles, and statute. Additionally, works by scholars, professionals and commentaries by those with extensive knowledge in the appropriate fields applicable will be used and cited.

[78] Barnard C, Hepple B, 'Substantive equality, *Cambridge Law Journal,* Volume 9, November 2009, 562.

[79] *Glasgow City Council v Zafar* (1997), The House of Lords of Scotland.

[80] Fredman S, 'A critical review of the enforcement of U.K anti-discrimination legislation,' Independent Review of the Enforcement of U.K. Anti-Discrimination Legislation, Working Paper Number 3, November 1999, 3.7-3.19.

CHAPTER THREE: INSTANCES OF THE VIOLATION OF THE RIGHT TO REPRODUCTIVE HEALTHCARE IN KENYA AND THE REPERCUSSIONS

3.1 Introduction

This study is premised on the understanding that failing to grant women their full reproductive rights by creating a distinct, wide-ranging law on the matter has led to the violation of this right. This chapter therefore attempts to affirm this hypothesis by firstly outlining the infringements of this right in Kenya and the consequent health and legal repercussions. Additionally, it expounds on how these infringements are allied to the absence of a separate and comprehensive law on reproductive healthcare.

3.2 Violations of the right to reproductive healthcare in Kenya

If the words of Professor Rebecca J. Cook are anything to go by, laws protective of women's reproductive health, though present, are rarely or inadequately implemented. Rebecca J Cook is a Professor of Law Emerita at the University of Toronto and co-director of the International Reproductive and Sexual Health Law Program.[81] On a worldwide scale, women's reproductive health rights have been denied, ignored, and violated.[82] The same can be said about the situation in Kenya. This part of the chapter, therefore, investigates how the right to reproductive healthcare has been infringed in Kenya throughout the years.

In joint efforts to address the state of women's reproductive health in Kenya, in 2009 FIDA-Kenya together with the Centre for Reproductive Rights-USA, filed a complaint with KNCHR concerning the violation of women's reproductive health rights in Kenyan health facilities. Consequently, KNCHR launched an extended inquiry into the magnitude and nature of the violation of reproductive health rights and recommend appropriate measures of recourse.[83]The inquiry indeed confirmed that the right to reproductive healthcare in Kenya is indeed being violated. This is in

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[81] Cook R, 'International Human Rights and Women's Reproductive Health, *24 Population Council*, March-April 1993, 73, -: https://www.jstor.org/stable/2939201- on 25 November 2020.

[82] Temmerman M, Khosla R and Soy L, 'Sexual and Reproductive Health and Rights: A global development, health and human rights priority,' *384 The Lancet*, 2 August 2014.

[83]Kenya National Commission on Human Rights, *Realising sexual and reproductive health rights in Kenya: A myth or reality? A report of the public into violations of sexual and reproductive health rights in Kenya,* April 2012, III, - http://www.knchr.org/portals/0/reports/reproductive_health_report.pdf- on 25 November 2020.

terms of: Inaccessibility of crucial sexual and reproductive health services; tasks in retrieving these said services owing to distance or pecuniary matters; the high charges levied on the services making them beyond reach for the less fortunate; the reduced quality of the available services; and the lack of understanding to the cultural norms and beliefs of the people in service delivery. The probe also established that the state has failed to dedicate maximum of its available resources to progressively realise the right to sexual and reproductive health.[84]

An example of a case that brings out these breaches clearly is JOO *& 6 others v The Attorney General & 6 others* (2014). The Petitioner in this instance was a low-income pregnant woman who sought healthcare for delayed labour in 2013. At the ill-funded county hospital that the Petitioner went to, she encountered neglect, privations, and high expenses. Furthermore, the nurses hurled insults at her.[85]

The same intrusions of this right to reproductive health are seen in the case of *Millicent Awour Ouma & Margaret Anyoso Oliele v The Attorney General & 4 others* (2015).[86] In this case, the first Petitioner, Mrs. Ouma, was detained for 24 days at Pumwani Hospital in Nairobi for failing to clear her bill of 3,600 Kenya shillings after giving birth. While at the hospital, she was also subjected to cruelty as she was forced to sleep on the ground next to a toilet which occasionally flooded. Additionally, she was mistreated by the nurses and contracted pneumonia at the end of her stay due to sleeping on the cold ground. Mrs Ouma was only released from Pumwani Hospital after the Mayor of Nairobi at the time, Mr. Geoffrey Majiwa, visited the facility and cleared her bill.

The second Petitioner on the other hand, Mrs Oliele, experienced the same atrocities as the first Petitioner at Pumwani Hospital, only difference being that she endured the horror of these poor reproductive health services twice. The first time in 1991, a pair of scissors was even left in her womb after a caesarean procedure. This is in addition to the fact that before this realisation, she

[84] Kenya National Commission on Human Rights, *Realising sexual and reproductive health rights in Kenya: A myth or reality? A report of the public into violations of sexual and reproductive health rights in Kenya,* April 2012, III.

[85] *JOO & 6 others v The Attorney General & 6others* (2014) eKLR

[86] *Millicent Awour Ouma & Margaret Anyoso Oliele v The Attorney General & 4 others* (2015) eKLR

had been detained for failing to settle her bill after giving birth. In 2010, Mrs.Oliele was subjected to similar evils at the same facility.

FIDA Kenya (JMM through PKM) & 3 others v The Attorney General & 12 others (2015)[87] is another case that proves that there is a severe crisis in the implementation of Article 43(1). In this case, JMM was a 14-year-old girl from a poor family in Kisii, Kenya. She was defiled by an older man and fell pregnant. She was then introduced to an unqualified provider who helped her procure an unsafe abortion. JMM was rushed to Kisii County Referral Hospital as well as Tenwek Mission hospital. They were, however, unable to handle her situation.

12 days after the unsafe abortion, JMM arrived at Kenyatta National Referral Hospital in Nairobi. Here, she received post-abortion care and dialysis. Her diagnosis revealed that she had a septic abortion, haemorrhage shock and chronic kidney disease because of the unsafe abortion procedure. After about 68 days, JMM was discharged but detained at the facility since her bill had accrued to 39,500 Kenyan shillings and she could not settle it. Consequently, she slept on a mattress on the floor of the detention centre in the hospital. Her bill was later waivered when it was discovered that she was unable to settle it.

3.3 General effects of the violations of the right to reproductive healthcare in Kenya

3.3.1 Health repercussions

If the information disseminated by the Kenya Demographic and Health Survey of 2014 is anything to go by, the infringements of this right as expounded on in the latter sub-topic have contributed to high maternal and child morbidity, the spread of sexually transmitted infections and HIV, unsafe abortions as well as unplanned pregnancies.[88]

The Maternal Morbidity Rate (MMR) presently in the country is at 362 maternal deaths per 100,000 live births. The rate of still births on the other hand is at 23 deaths per 100,000 live births.[89]

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[87] *FIDA Kenya (JMM through PKM) & 3 others v The Attorney General & 12 others* (2015) eKLR

[88] Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2014*, December 2015, Foreword, https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf- on 7 December 2020.

[89] Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2014*, December 2015.

According to the survey, these figures are far below the target of 147 maternal deaths per 100,000 live births and 12 still births per 1000 live births, respectively.

Early/teenage pregnancy is another effect of insufficient funding for reproductive health services as well as lack of comprehensive sex education in schools. Data from the government on demographics from 2014 reveals that 15% of girls aged 15-19 years old have already given birth and another 3% are pregnant with their first child.[90] These statistics are the highest in East Africa.[91] Early pregnancy is one of the main reasons why girls drop out of school in Kenya.[92] This disrupts their education and consequently making it difficult for them to economically empower themselves due to decreased chance at formal employment.

The rate of teenage births spiked again during the first three months of lockdown during the COVID-19 pandemic in 2020. 152,000 Kenyan teenage girls became pregnant during this said period which is a 40% increase in the monthly average.[93] Public health officials and women's rights proponents fear that the ongoing pandemic is delaying an adequate response to a growing sexual reproductive health crisis in the country.[94]

In comparison to other countries in Eastern Africa such as Ethiopia, where similar data on unsafe abortions has been collected, Kenya's rate of induced abortion as well as instances of severe abortion impediments, the complication fatality rate is unduly high.[95] It is approximated that 266

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[90] Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2014*, December 2015, 78.

[91] Wado Y, Sully E, Mumah N, 'Pregnancy and early motherhood among adolescents in five East African countries: A multi-level analysis of risk and protective factors,' *BMC Pregnancy and Childbirth,* 2019, 19, -https://bmcpregnancychildbirth.biomedcentral.com/articles/10.1186/s12884-019-2204-z- on 7 December 2020.

[92] Achoka J, 'In search of remedy to secondary school dropout pandemic in Kenya: Role of the principal, 2(9) *Educational and Research Review,* 2007, 236-244, -https://academicjournals.org/article/article1379601331_ACHOKA.pdf- on 7 December 2020.

[93] Patridge-Hicks S, 'Rise in teenage pregnancies linked to COVID-19 Lockdown,' *Global Citizen,* 19 August 2020, -https://www.globalcitizen.org/en/content/rise-in-teenage-pregnancies-during-kenya-lockdown/- on 7 December 2020.

[94] Patridge-Hicks S, 'Rise in teenage pregnancies linked to COVID-19 Lockdown,' *Global Citizen,* 19 August 2020.

[95] Guttmacher Institute, *Incidence and complications of unsafe abortion in Kenya: Key findings of a national study*, August 2013, 25 -https://www.guttmacher.org/sites/default/files/report_pdf/abortion-in-kenya.pdf- on 7 December 2020.

Kenyan women die per 100,000 unsafe abortions.[96] JMM in the case of *FIDA Kenya (JMM through PKM) & 3 others v The Attorney General & 12 others* (2015)[97] is an example of how deadly this unsafe abortion situation can get. The fact that abortion is illegal in Kenya does not help the situation. This is because the illegality of abortion does not stop the practice or the need for abortion, it only drives it underground. In fact, the highest rates of abortion in the world are in countries where abortion is illegal.[98]

The rate of the spread of HIV/AIDS can be attributed partly to the inaccessibility to contraception services as well as the failure to provide CSE in schools.[99] Kenya has an average HIV prevalence rate of 6% and with about 1.6 million people living with the infection.[100] More than half (51%) of all new HIV infections in Kenya in 2015 occurred among adolescents and young people (aged 15-24 years).[101] In a study carried out by the National AIDS Control Council on female sex workers in sub-Saharan Africa, it was found that there is a need to recognize and eradicate barriers to contraceptive use in general but especially amongst Female Sex Workers (FSW) as they are a key population in HIV prevention and treatment interventions.[102]

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[96]Guttmacher Institute, *Incidence and complications of unsafe abortion in Kenya: Key findings of a national study*, August 2013, 8.

[97] *FIDA Kenya (JMM through PKM) & 3 others v The Attorney General & 12 others* (2015) eKLR

[98] Kismodi, E, Bueno de Mesquita, J., Ibañez, X, Khosla, R, Sepúlveda, L. (2012), 'Human rights accountability for maternal death and failure to provide safe, legal abortion: The significance of two ground-breaking CEDAW decisions,' *Reproductive Health Matters*, 2012 31-39, - https://pubmed.ncbi.nlm.nih.gov/22789080/- on 23 April 2021.

[99]Ministry of Health, *Kenya AIDS response progress report*, 2016 xiv, -https://nacc.or.ke/wp-content/uploads/2016/11/Kenya-AIDS-Progress-Report_web.pdf- on 7 December 2020.

[100]UNAIDS, *Joint United Nations Programme on HIV/AIDS Global Report: UNAIDS report on the global AIDS epidemic,* 2013,12, https://www.unaids.org/sites/default/files/media_asset/UNAIDS_Global_Report_2013_en_1.pdf- on 7 December 2020.

[101] Ministry of Health, Kenya *AIDS response progress report*, 2016, xiv, -https://nacc.or.ke/wp-content/uploads/2016/11/Kenya-AIDS-Progress-Report_web.pdf- on 7 December 2020.

[102] Waruguru G, Yuhas K, Wanje G, 'Prevalence and predictors of unmet contraceptive need in HIV-positive female sex workers in Mombasa, Kenya, *PLoS ONE*, 2019, - https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0218291- on 7 December 2020.

3.3.2 Legal repercussions

Poor quality, inaccessible or expensive services as well as detention in health facilities are indeed constitutional violations. They infringe on the following constitutional rights: Equality and freedom from discrimination;[103] right to human dignity;[104] and freedom and security of person and right not to be subjected to any form of violence either by private or public sources or any form of torture either physical or psychological.[105] Additionally, these violations go against various regional and international conventions of which Kenya is party to. Article 14 of the Maputo Protocol stipulates that States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.[106] Similarly, Article 12 of CEDAW stipulates that States Parties shall 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.[107] Article 5 of the UDHR on the other hand, states expressly that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[108] The violations of that have arisen from the infringements of the right to reproductive healthcare therefore have numerous legal effects which have paved way for copious lawsuits evidenced by the aforementioned cases.

3.4 The link between the absence of a separate and comprehensive law on reproductive healthcare and the violations that arise as a result

The lack of a separate and comprehensive law on reproductive healthcare in Kenya has resulted in inadequate enforcement of reproductive health rights which has in turn led to violations such as inadequate reproductive health facilities as well as poor quality of available healthcare.[109] In fact, the Centre for Reproductive Rights Reports that the inadequacy of the legal provisions on abortions

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[103] Article 27(4), *Constitution of Kenya,* (2010).

[104] Article 28, *Constitution of Kenya,* (2010).

[105] Article 29 (c), (d), *Constitution of Kenya,* (2010).

[106] Article 14, *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,* 25 November 2005.

[107] Article 11, 12, 14, *Convention on the Elimination of all forms of Discrimination Against Women,* 1249, 3 September 1981.

[108] Article 5, *Universal Declaration of Human Rights,* 10 December 1948.

[109] Wachira T, 'An analysis of reproductive health laws in Kenya,' *Kituo Cha Sheria*, 5 March 2020.

in Kenya, has led to lack of clarity concerning clinical officers' and nurses' scope of practice in Kenya which has led to most health care providers not offering this service in fear of criminal proceeding being brought against them.[110] It is no wonder that Kenya's rate of induced abortion as well as instances of severe abortion impediments, the complication fatality rate is unduly high.[111]

3.5 Conclusion

The interconnection between the violations of the right to reproductive healthcare in Kenya and the absence of a separate and comprehensive law on the matter is present. Therefore, in order to eradicate the saddening health and legal repercussions of this infringement, Kenya must pass a law granting women their full reproductive rights.

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[110] Centre for Reproductive Rights, *In harm's way: The impact of Kenya's restrictive abortion law*, 2010, 14, -https://uniteforreprorights.org/wp-content/uploads/2018/01/InHarmsWay_2010.pdf- on 23 April 2021.

[111] Guttmacher Institute, *Incidence and complications of unsafe abortion in Kenya: Key findings of a national study*, August 2013, 25 -https://www.guttmacher.org/sites/default/files/report_pdf/abortion-in-kenya.pdf- on 7 December 2020.

CHAPTER FOUR: NEPAL'S REPRODUCTIVE HEALTHCARE LAW AS A BENCHMARK FOR KENYA

4.1 Introduction

Chapter three has proven that the inadequacies on reproductive healthcare law in Kenya have had a negative impact both health-wise and legally. Various states across the globe such as the United States, Philippines, the United Kingdom and Nepal have attempted to create comprehensive laws enhancing women's reproductive healthcare. This chapter therefore briefly outlines why Nepal is the country of choice for benchmarking regarding reproductive healthcare law.

4.2 Nepal

Nepal, officially the Federal Democratic Republic of Nepal, is a country in South Asia. It is a landlocked country that lies along the southern slopes of the Himalayan Mountain ranges. Her capital city is Kathmandu.[112]Nepal is an independent, indivisible, sovereign, secular, inclusive, democratic, socialism-oriented, federal democratic republican state.[113]Due to how progressive Nepal's reproductive healthcare law is, as this chapter reveals, it is seemingly the most suitable country from which Kenya can benchmark. Nepal also applies English Common Law in its legal system just like Kenya.

Additionally, Kenya and Nepal are two out of the five countries in the world which house the Centre for Reproductive Rights.[114]This is a global human rights organisation of lawyers and advocates who ensure reproductive rights are protected in law as fundamental human rights for the dignity, equality, health and well-being of every person.[115] This shows that both countries have a key interest in protecting the right to reproductive healthcare.

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[112] -https://www.britannica.com/place/Nepal- on 23 April 2021.

[113] Article 4, *Constitution of Nepal,* (2015).

[114] Committee on Economic, Social and Cultural Rights, *Supplementary information on Nepal, scheduled for review by the Committee on Economic, Social and Cultural Rights, during its 53rd session,* 15 September 2014, -https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/NPL/Centre%20for%20Reproductive%20Rights%20and%20other%20NGOs_18301_E.pdf- on 20 April 2021.

[115] -< https://reproductiverights.org/about-us/>- on 20 April 2021.

4.3 Reproductive healthcare law in Nepal

Firstly, the Constitution of Nepal, which is the supreme law of the land, provides that every woman shall have the right to safe motherhood and reproductive health.[116] Additionally, in its decision in the landmark case of *Lakshmi & others v The Government of Nepal (2007),* the Supreme Court of Nepal issued a directive order to its government and other governmental agencies to enact separate and comprehensive law on abortion incorporating reproductive health related provisions from international human rights law.[117] One may therefore deduce that the enactment of the reproductive healthcare law in Nepal, known as the Right to Safe Motherhood and Health Act, 2075 (2018) was prompted by this directive issued in 2007 by the country's highest court.

4.3.1 The Right to Safe Motherhood and Reproductive Health Act, 2075(2018)

'Whereas, it is expedient to make necessary provisions on making motherhood and reproductive health service safe, qualitative, easily available and accessible, in order to respect, protect and fulfil the right to safe motherhood and reproductive health of the women conferred by the Constitution of Nepal.'[118] Right from the preamble of this Act, it is evident that the Federal Democratic of Nepal places women's autonomy, experience and reproductive healthcare in very high regard and is worth emulating by Kenya.

Regarding abortion, Section 3(5) of the aforementioned Act states that women shall have the right to obtain abortion services.[119] Furthermore, chapter 4 is dedicated solely to safe abortion. It places emphasis on the consent of the pregnant woman and stresses that an abortion shall not be carried out if it is revealed that the woman was coerced[120] or if the procedure is carried out due to the identification of the sex of the foetus.[121]Family planning is another salient feature of this Act. Section 3(3) provides that every woman shall have the right to determine the gap between births and the number of children.[122] Sub-section 4 further states that every woman shall have the right

[116] Article 38(2), *Constitution of Nepal,* (2015).

[117] *Lakshmi & others v The Government of Nepal (2007),* The Supreme Court of Nepal.

[118] Preamble, *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[119] Section 3(5), *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[120] Section 16, *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[121] Section 17, *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[122] Section 3(3), *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

to get information regarding contraceptives and use them.[123] Once again, prominence is placed on consent as the Act forbids coercing a person to use contraceptives.[124]In favour of safe motherhood, the Act stipulates for the right to get obstetric services, emergency obstetric and new-born care as well as obstetric leave with pay for a minimum of ninety days before or after the delivery.[125] In regard to service charge, Section 32 states that a governmental health institution or health institution that receives government grants shall have to provide not only free pre-natal, antenatal and postnatal care but also free reproductive health service in general.[126]

CSE is an additional prominent facet of this Act. Section 3(1) provides that every woman and teenager shall have the right to obtain education, information, counselling and service relating to sexual and reproductive health.[127] Finally, in regard to government responsibility, the Act stipulates that the national and provincial governments shall have to appropriate grant amount through its budget every year for the purpose of motherhood and reproductive healthcare service.[128] In a bid to make essential suggestions to the Government of Nepal for preparing policies, plans and programs relating to safe motherhood and reproductive health, there shall be a Reproductive Health Coordination Committee.[129] Failure to adhere to the laws provided in the Right to Safe Motherhood and Reproductive Health Act attracts a maximum penalty of imprisonment not exceeding one year and a fine not exceeding 100,000 Rupees or both.[130]

4.4 Case law on the right to reproductive healthcare in Nepal

As was mentioned earlier in this chapter, the ground-breaking decision in the case of *Lakshmi & others v The Government of Nepal (2007)*[131] can be attributed to the enactment a comprehensive law on reproductive healthcare in Nepal, in the name of the Right to Safe Motherhood and Reproductive Health Act, 2075(2018). In this case, Lakshmi, a poor woman from the east side of

[123] Section 3(4), *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[124] Section 12, *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[125] Section 3(8), *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[126] Section 32, *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[127] Section 3(1), *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[128] Section 22 (2)(3), *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[129] Section 24, *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[130] Section 26, *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[131] *Lakshmi & others v The Government of Nepal (2007),* The Supreme Court of Nepal.

Nepal was expectant with her sixth child. Due to her family's economic status, Lakshmi and her husband knew that having another child would be strenuous on their family and take a substantial toll on her health. They therefore sought a legal abortion at a governmental hospital where they were asked to pay a total of 1,130 Rupees. Lakshmi and her husband were unable to raise that fee and were forced to carry the child to full term.[132]

With assistance from the Forum of Women, Law and Development (FWLD) and in collaboration with other co-petitioners, on February 22nd, 2007, Lakshmi filed a writ at the Supreme Court of Nepal. This writ questioned the failure of the Nepal Government in guaranteeing access to safe abortion services despite the legalisation of abortion on broad grounds in 2002. Lakshmi argued that her incapacity to receive a safe and legal abortion violated her reproductive rights and other fundamental rights, including the right to live with dignity, freedom, equality and non-discrimination, self-determination, and confidentiality. Furthermore, she claimed that there was a violation of Nepal's human rights obligations in accordance with international treaties as well as the then Interim Constitution of Nepal, 2007.The petition called on the Court to order the enactment of a separate law on abortion to ensure women's access to safe and affordable abortion services.[133]

In May 2009, Nepal's Supreme Court issued an order of mandamus to the Nepal government to guarantee access to safe and affordable abortion services through required measures such as retaining confidentiality of women who seek abortion services, removing disparities in service fee and raising public awareness. Additionally, the Court issued a directive order to the Nepal Government, specifically the office of the Prime Minister and the Council of Ministers, the Ministry of Health and Population and the Ministry of Law and Justice to enact a separate and comprehensive law on abortion encompassing the aforementioned issues and reproductive health rights provisions from international human rights.[134] The Right to Safe Motherhood and Reproductive Health Act was then enacted in 2018. The verdict not only reasserted the government's obligation to guarantee safe and affordable access to abortion services for all

[132] *Lakshmi & others v The Government of Nepal (2007),* The Supreme Court of Nepal.

[133] *Lakshmi & others v The Government of Nepal (2007),* The Supreme Court of Nepal.

[134] *Lakshmi & others v The Government of Nepal (2007),* The Supreme Court of Nepal.

women, but also acknowledged that reproductive rights are a vital part of women's human rights.[135]

Prakash Mani Sharma and others v The Government of Nepal (2008),[136] is another Nepalese case essential to the right to reproductive healthcare. In this lawsuit, a petition against five government institutions including the Prime Minister and Council of Ministers and the Nepal National Human Rights Commission seeking mandamus for provision for women's health relative to uterus prolapse, implementation of educational programmes, and the drafting of a bill on women's reproductive health.

The case confirmed Nepal's legal pledges under its constitution to effectively implement the right to health, including reproductive health. At the time, the definition of reproductive health in domestic law was absent. The Supreme Court therefore depended on international health and human rights principles to define women's rights to reproductive health and the State's obligations to ensure enjoyment of those rights. The Court asserted that reproductive health includes decision regarding reproduction, voluntary marriage, decision as to conceive or not, decision to abort a child pursuant to law, period and determination of number of children, reproductive education, and freedom from sexual violence, which have also been prescribed in various treaties and declarations. The Supreme Court of Nepal therefore ordered the Ministries of Women, Children and Social Welfare and of Population and Health to provide free services and facilities to women affected by uterus prolapse and commence effective programs for raising awareness of the issue. It further ordered the Prime Minister and Council of Ministers to consult with experts and draft a bill for submission to the legislature.[137] One can therefore deduce that he decision in this case also prompted the creation of the Right to Safe Motherhood and Reproductive Health Bill will was later passed to law in 2018. From the two cases discussed above it is evident that Nepal has put up a strong fight in protecting women's right to reproductive healthcare.

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[135] *Lakshmi & others v The Government of Nepal, Unite* for Reproductive Rights, -< https://uniteforreprorights.org/resources/lakshmi-others-v-government-nepal/>- on 20 April 2021.

[136] *Prakash Mani Sharma and others v The Government of Nepal (2008),* The Supreme Court of Nepal.

[137] *Prakash Mani Sharma and others v The Government of Nepal (2008),* The Supreme Court of Nepal.

4.5 A brief comparison between the legal framework on reproductive healthcare in Nepal and in Kenya

Firstly, the right to reproductive healthcare is provided for under both the Kenyan and Nepalese constitutions. In the Kenyan constitution, this right is provided for under Article 43(1)[138] whereas in the Nepalese Constitution, it is stipulated in Article 38(2).[139] As was cited earlier in this study, Article 43(1) of the Kenyan constitution provides that every person has the right to the highest attainable standard of health, which includes reproductive healthcare. On the other hand, Article 38(2) of the Nepalese Constitution stipulates that every woman shall have the right to safe motherhood and reproductive health. Moreover, whereas the constitution of Kenya provides for abortion in certain circumstances, there is no mention of abortion in the Nepalese constitution.

Thirdly, Nepal has a whole comprehensive law dedicated to the right to reproductive healthcare. It is known as the Right to Safe Motherhood and Reproductive Health Act, 2075 (2018).[140] It provides meticulously for laws on safe abortion, family planning and contraception, pre-natal, antenatal and postnatal care as well as CSE. In Kenya on the other hand, there is no comprehensive law on the right to reproductive healthcare. The highest attempt to regulate this right is seen fleetingly in the Health Act of 2017. Section 6(1) of this Act states that every person has a right to reproductive health care which includes the right of men and women of reproductive age to be informed about and to access reproductive health services including safe, effective, affordable and acceptable family planning services.[141]

Furthermore, in Nepal, failure to adhere to various reproductive health laws such as deprivation of obstetric care, disclosure of confidentiality, making forceful use of contraceptives, amongst others, attracts imprisonment terms not exceeding one year as well as fines not exceeding 100,000 Rupees.[142] In Kenya however, the Penal Code only provides for punishment regarding abortion only. Section 158 stipulates the liability of the person who has intent to procure a miscarriage and does so by unlawfully administering a poison or noxious drug or uses any other means. Once found

[138] Article 43(1), *Constitution of Kenya,* (2010).

[139] Article 38(2), *Constitution of Nepal,* (2015).

[140] *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[141] Section 6(1), *Health Act,* (No. 21 of 2017).

[142] Section 26, *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

guilty is liable to imprisonment for 14 years.[143] Section 159 makes it an offence for a person to procure their own miscarriage. Such a person is liable to imprisonment for 7 years.[144] Section 160 provides that anyone who supplies or makes available drugs or equipment to procure a miscarriage and has knowledge on the same is liable to 3 years imprisonment.[145]These provisions are also restrictive and do not provide for ways and specifications in regard to safe abortion.[146]

4.6 What Kenya can incorporate from Nepal's legal framework on reproductive healthcare

The enactment of a law dedicated solely to safe motherhood and reproductive healthcare is the first tactic that Kenya should borrow from the Federal Democratic Republic of Nepal. There is a proposed law in the Kenyan Senate known as the Reproductive Healthcare Bill of 2019[147] which attempts to make this a reality. However, this bill has been faced with backlash from various fonts such as religious forums as well as a large majority of the lawmakers.[148]This proposed law provides extensively for access to family planning, safe motherhood, termination of pregnancy as well as reproductive health of adolescents. It is essential to have a comprehensive law on reproductive healthcare in order to fully realise this right.

Not only is it vital for Kenya to enact a comprehensive law on reproductive healthcare but also it is imperative that there be a vast provision of those who breach this right. Currently, the Kenyan Penal Code only provides for punishment for perpetrators of abortion. Additionally, the stipulations are restrictive and do not provide for safe abortion. In Nepal on the other hand, there are a number of infringements that can make one liable to a fine, imprisonment or both. These

[143] Section 158, *Penal Code,* (CAP 63 of 2007).

[144] Section 159, *Penal Code,* (CAP 63 of 2007).

[145] Section 160, *Penal Code,* (CAP 63 of 2007).

[146] Wachira T, 'An analysis of reproductive health laws in Kenya,' *Kituo Cha Sheria*, 5 March 2020.

[147] *Reproductive Healthcare Bill,* (2019).

[148] Mwoka M, Ajayi A, 'Kenya is having another go at passing a reproductive rights bill. What is at stake,' The Conversation, 12 July 2020,-< https://theconversation.com/kenya-is-having-another-go-at-passing-a-reproductive-rights-bill-whats-at-stake-142387>- on 20 April 2021.

include: Deprivation of obstetric care services; forceful family planning; failure of a health facility to provide a birth certificate; disclosure of confidentiality, amongst others.

In considering the type of punishment to give offenders of this right, Kenyan legislators should adopt a deterrent or preventive mode of punishment just like Nepal. In a bid to dissuade future prevalence, deterrent punishment uses the punishment of the offender as an example to the rest of society, with hope that the punishment imposed will teach a lesson to both the offender and the society.[149] Preventive punishment on the other hand, is intended to inhibit the recurrence of a crime by disabling the offender.[150] As Professor David Barnhizer cites, legal strategies succeed if there are sanctions sufficient to inhibit targeted behaviour as well fear of consequences by those who would otherwise not obey the law.[151]

Finally, in accordance with the equality theory, it is important that the lawmakers in Kenya hold women's autonomy, experiences and reproductive healthcare in high regard just as is the case in Nepal. The enactment of an all-inclusive law on reproductive healthcare proves that indeed women are held highly in that regard.

4.7 Conclusion

Since the implementation of the Right to Safe Motherhood and Reproductive Health Act in 2018, it has been difficult to obtain statistics on the impact the law has had on particularly women in Nepal. However, as Barnhizer emphasises, legal strategies succeed when they fit with the values and concerns of the people who must comply with the law.[152] In this case the aforementioned Act fits impeccably with the values and concerns of women in regard to their reproductive health and it is therefore bound to thrive.

It is safe to say that a comprehensive law on reproductive healthcare must include safe abortion, family planning, safe motherhood, CSE, adolescent friendly reproductive health services as well

[149] Mushanga T, *Criminal homicide in Uganda,* LawAfrica Publishing (K) Ltd, Nairobi, 2011,148-152.

[150] Musyoka M, *Criminal law,* LawAfrica Publishing (K) Ltd, Nairobi, 2016,192.

[151] Barnhizer D, 'What causes laws to succeed or fail?' Cleveland-Marshall College of Law, Research Paper 16-297, March 2016, 7, -https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2744885- on 20 April 2021.

[152] Barnhizer D, 'What causes laws to succeed or fail?' Cleveland-Marshall College of Law, Research Paper 16-297, March 2016, 7.

as national and county governmental obligations. Additionally, repercussions must be put in place for those who fail to adhere to these provisions. Nepal has demonstrated the essence of developing a separate and broad law on reproductive healthcare and Kenya should therefore borrow lessons from this jurisdiction.

CHAPTER FIVE: FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter provides both the research findings which will give birth to the conclusion and necessary recommendations of the study.as well as the conclusion of the study.

5.2 Research Findings

Through thorough desktop research of international, regional and national instruments, case law, jurisprudence on reproductive rights, as well as reports and journals on reproductive healthcare, the following was arrived at:

5.2.1 Kenya is lagging behind in granting women their full reproductive rights

As brought forth in chapter four of this study, Kenya is way behind in granting women their full reproductive health rights. It has been 58 years since Kenya received her independence and 65 years since reproductive health services were introduced in the country and there is still no distinct, comprehensive law on reproductive healthcare. There are inadequacies on the current legal framework on reproductive healthcare in the country. Reproductive rights are indeed human rights. However, they only enigma in viewing reproductive rights as human rights such as the right to dignity or the right to not be subjected to torture, is the fact that they only provide for an umbrella of rights which are not specific to the aspects of reproductive healthcare.[153]As Crichton cited, abstract, legal and individualistic concepts of rights may be inadequate for capturing the multiple and often ambiguous nature of rights as are experienced by individuals, and the multiple constraints they face in exercising them.[154]

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[153] Crichton J, 'Painful tradeoffs: Intimate-partner violence and sexual and reproductive Health rights in Kenya,' Institute of Development Studies, IDS Working Paper 312,2008, 14, - https://www.researchgate.net/publication/242621446_Painful_Tradeoffs_Intimate-partner_Violence_and_Sexual_and_Reproductive_Health_Rights_in_Kenya/link/0c9605368bdacd8ba7000000/download- on 23 April 2021.

[154] Crichton J, 'Painful tradeoffs: Intimate-partner violence and sexual and reproductive Health rights in Kenya,' Institute of Development Studies, IDS Working Paper 312,2008, 14.

The result of this being gruesome violations of this right, especially on women. It is true that Rome was not built in a day, but it is high time Kenya borrowed from countries with progressive laws on reproductive healthcare such as Nepal and granted women their full rights.

5.3 Conclusion

Undoubtedly, this study confirms the hypotheses that the violations of the right to reproductive healthcare in Kenya is as a result of the absence of a separate and comprehensive law on the matter. Kenya is evidently yet to grant women the highest attainable standard of health in accordance with Article 43(1) of the 2010 Constitution of Kenya. The current framework on reproductive healthcare in Kenya is insufficient. Fortunately, however horrid the state of the matter may seem in the country, the situation is not a sinking ship. There are legal and nonlegal solutions to remedy this menace.

5.4 Recommendations

5.4.1 Legal Recommendations

5.4.1.1 Amendment to the Reproductive Healthcare Bill of 2019

As was earlier mentioned, such a Bill has been tabled in the Senate twice in the last six years and both times it has sparked all sorts of reactions. The 2019 Bill is currently still being debated in the Senate. Its core provisions include: Access to family planning; assisted reproduction; safe motherhood; termination of pregnancy; and reproductive health of adolescents.[155]These salient provisions of this Bill have the capacity to reverse the current trends of high maternal and child morbidity, the spread of sexually transmitted infections and HIV, unsafe abortions and unplanned pregnancies. These menaces have blighted the compliance of Article 43(1) of the Constitution of Kenya.

Firstly, as was mentioned in Chapter one of this study, this Bill provides definitions for the terms 'reproductive rights' as well as 'reproductive health.'[156] This is essential in that it provides clarity in regard to the legal scope of reproductive healthcare matters. Secondly under Section 7(1) of this proposed law, emphasis is placed on every person having a right to reproductive healthcare services.[157]In regard to dealing with Kenya's high MMR, the Bill requires both the national and

[155] *Reproductive Healthcare Bill,* (2019).

[157] Section 7(1), *Reproductive Healthcare Bill,* (2019).

county governments to put in place the necessary mechanisms to facilitate access to the highest attainable standard and quality of ante-natal, intrapartum, post-partum and neo-natal services in national referral hospitals.[158]In order to ensure safe motherhood, section 24 further states that these services must be free.[159] This provision will consequently help deal with the issue of high maternal health bills which is linked to high MMR.

Concerning unsafe abortions, this Bill details comprehensively in the instances in which abortion procedures should be carried out as well as how the procedure should be undertaken. It states that abortion procedures are only legal if carried out by trained professionals who include a registered clinical officer, a registered nurse and a registered midwife who has acquired the relevant skills for decision-making and provision of reproductive health services.[160] This proposed law even provides for post-abortion care with section 49 expressly requiring trained health professionals to provide postabortion care and counselling for cases of incomplete abortion or complications arising out of the abortion procedure.[161] This will greatly aid in curbing the number of unsafe abortion cases in the country thus enhancing the right to reproductive healthcare services.

The spread of HIV and AIDS is another effect brough about by the poor implementation of the right to reproductive healthcare. Passing this Bill to become Law will ensure the integration of age-appropriate information on reproductive health into the education syllabus.[162] This will be expressly essential for adolescents as this study has shown that the largest spike of HIV/AIDS infections in Kenya has been amongst persons aged between 15 and 24 years.[163] Contraceptives such as condoms will be made more accessible as the proposed law places an obligation on both the national and the county governments to do so.[164] This has a great chance of reducing the spread of HIV/AIDS.

[158] Section (4)(5), *Reproductive Healthcare Bill,* (2019).

[159] Section 24, *Reproductive Healthcare Bill,* (2019).

[160] Section 2, *Reproductive Healthcare Bill,* (2019).

[161] Section 49, *Reproductive Healthcare Bill,* (2019).

[162] Section 4(l), *Reproductive Healthcare Bill,* (2019)

[163]Ministry of Health, *Kenya AIDS response progress report*, 2016.

[164] Section 9(2), *Reproductive Healthcare Bill,* (2019).

In light of the unplanned pregnancy nuisance, which is closely tied to teenage pregnancies, as previously articulated, Section 7(1) of this Bill stresses on every person having the right to reproductive healthcare services which includes contraception.[165]Contraceptives are a major method of avoiding unplanned/teenage pregnancies. The general contraceptives include: Long-acting reversible contraception such as the Intrauterine Device (IUD); hormonal contraception; barrier methods such as use of condoms; emergency contraception; fertility awareness; and permanent contraception.[166]The introduction of CSE as well as the enhancement of family planning and counselling services, as is required in this Bill, may also considerably assist in the reduction of teenage/unplanned pregnancies.

Despite this Bill providing vastly for reproductive healthcare, its scope for punishment in the event of breach in comparison to Nepal's is limited. Punishment is intended to serve a certain objective and it is therefore not imposed for the sake of it.[167]Additionally, legal strategies are bound to fail if they do not impose sufficient sanctions for disobedience.[168] Therefore, when the Bill moves to the second reading stage, in accordance with the National Assembly Standing Orders, amendments should be made to widen the scope of punishment for perpetrators.

5.4.1.1.1 Proposed amendments to the Reproductive Healthcare Bill of 2019

Currently, the only offences in the Reproductive Healthcare Bill of 2019 are: If a health professional fails to carry out a sterilisation procedure in compliance with the mandatory requirements;[169]and if a trained health professional who has a conscientious objection to the

[165] Section 7(1), *Reproductive Healthcare Bill,* (2019).

[166] Trussell J, *Contraceptive Technology,* Ardent Media Incorporation, (19th Edition) New York, 2009, 19, - https://books.google.co.ke/books?hl=en&lr=&id=txh0LpjjhkoC&oi=fnd&pg=PA1&dq=examples+of+contraceptive+methods&ots=p_6RBV_yyB&sig=GYsboaXHiSs9skjsBMV8TKAHhq8&redir_esc=y#v=onepage&q&f=false- on 19 December 2020.

[167] Mushanga T, *Criminal homicide in Uganda,* LawAfrica Publishing (K) Ltd, Nairobi, 2011, 145-182.

[168]Barnhizer D, 'What causes laws to succeed or fail?' Cleveland-Marshall College of Law, Research Paper 16-297, March 2016, 7.

[169] Section 25(1), *Reproductive Healthcare Bill,* (2019).

termination of a pregnancy fails to refer a pregnant woman to another trained health professional seeking this service.[170]

Borrowing from Nepal's The Right to Safe Motherhood and Reproductive Health Act,[171] the Reproductive Healthcare Bill of 2019 should therefore make the following offences liable to fines and imprisonment: Depriving one of obstetric care; refusal to provide obstetric care by any health institution providing obstetric care; referral to other health institution deliberately even upon the treatment being possible in his or her health institution; forceful conduction of abortion as well as family planning; making forceful use of contraceptives; and breaching, or causing to be breached of, confidentiality.

Additionally, under the miscellaneous provisions, a clause on non-discrimination should be inserted. Just like Nepal's Act on reproductive healthcare, it should forbid discrimination on the bounds of seeking services such as family planning, reproductive health, safe motherhood, safe abortion, emergency obstetric and new-born care, morbidity on the ground of one's origin, religion, colour, caste, ethnicity, sex, community, occupation, business, sexual and gender identity, physical or health condition, disability, marital status, pregnancy, ideology, state of being infected with or vulnerable to any disease or germ, state of morbidity, personal relationship or any other similar ground. This will assist in taking away the stigma surrounding reproductive health matters in Kenya. This study therefore asserts that once the aforementioned changes are made to the 2019 Bill and it passes, the law on reproductive healthcare in Kenya will be wholesome.

5.3 Non-legal recommendations

5.3.1 Education and research on reproductive healthcare

Education is vital in that it helps individuals to make informed decisions that impact their very well-being including sexuality.[172] Women who are empowered (albeit educated, wealthy and employed) have been found to be more assertive on their sexual and reproductive rights, and better

[170] Section 21(1), *Reproductive Healthcare Bill,* (2019).

[171] Section 25, *The Right to Safe Motherhood and Reproductive Health Act,* 2075(2018).

[172] Yeboah K, Batse Z, 'Prevalence and predisposing factors of violence against women and girls in Cusack K and Manuh T (Eds)., *The architecture for violence against women,* A Gender Studies & Human Rights Documentation Centre, Accra, 2009, 68-92.

at negotiating for safer sexual intercourse than their counterparts who are less empowered.[173] As has been mentioned continuously in this study, the Kenyan government, through the Kenya Institute of Curriculum Development, therefore ought to incorporate CSE into the curriculum from primary school to tertiary school levels. This will assist greatly in alleviating the problems facing reproductive healthcare in Kenya.

As is mandated by the Reproductive Healthcare Bill of 2019, the national government must promote research and innovation in the field of reproductive health. Therefore, reproductive healthcare research must be of great interest to the government of Kenya. The government should therefore imperatively fund a periodic comprehensive national study on the issue. This will aid identifying and being informed about contemporary reproductive healthcare matters and problems that have bedeviled the nation. The aim of this will be to expand knowledge and understanding on this topic.

[173] Tenkorang E, and Owusu Y, 'Coerced First Sexual Intercourse Among Women in Ghana: Evidence from the Demographic and Health Survey,' *Sexuality & Culture,*2012,170,-< https://www.researchgate.net/publication/257771339_Coerced_First_Sexual_Intercourse_Among_Women_in_Ghana_Evidence_from_the_Demographic_and_Health_Survey>- on 23 April 2021.

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