LEGAL ABORTION AS A VIABLE OPTION FOR VICTIMS OF CHILD SEXUAL ABUSE IN KENYA

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Declaration

I, MALEEHAH IQBAL KHANDWALLA 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: .....

Date: .....

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

Signed:.....

Mukami Wangai

Abstract

Child sexual abuse is an emotive and sensitive issue in today's world. It is a vice that shocks and traumatizes the victims and undermines the status of females in society. In recent years, the World Health Organization estimated that 30% of all pregnant sexual abuse victims are children aged below 15 years. Abortion as a topic is divisive issue around the world, following the 1973 US Supreme Court decision of *Roe v Wade* declared that a restriction on abortion (before the foetus is viable) which places an undue burden on the mother is unconstitutional. In Kenya, the topic of discussion around abortion still revolves around pro-choice verses pro-life, despite Article 26(4) of the Constitution recognizing legal abortions in cases were the life or health of the mother were jeopardized. The debate between the two thoughts was discussed in Kenya the recent case of *Federation of Women Lawyers v the Attorney General* where a minor was forced to have sexual intercourse with an older man. She went through an unsafe abortion and lost her life due to complications stemming from the same. Despite the decision in the above case recognizing legal abortions, the lack of policy and framework is leading to an inability to access and lack of trained health professionals for safe abortions. This coupled with the lack of information on legal abortion is leading to girls and women choosing unsafe methods to terminate their pregnancies. Focus in this study is placed on child sexual abuse because not only does the abuse infringe on the very basic rights of reproductive health, of choice and dignity of human beings, the nature and dynamics of child sexual abuse are distressing and hamper normal social growth as well as cause several psychological problems.

List of Abbreviations

ACHPR – African Charter on Human and People's Rights

CEDAW – Convention on the Elimination of Discrimination against Women

CTOPA – Choice on Termination of Pregnancy Act

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICPD – Cairo Programme of Action of the 1994 United Nations Conference on Population and Development

KOGS – Kenya Obstetrical and Gynaecological Society

NCAPD – National Coordinating Agency for Population & Development

NCCK – National Council of Churches of Kenya

UDHR – Universal Declaration of Human Rights

UNICEF – United Nations International Children's Emergency Fund

WHO – World Health Organization

List of cases

List of legal instruments

Children's Act (No 8 of 2001)

Clinical Management and Referral Guidelines (2009)

Constitution of Kenya (2010)

Constitution of the Republic of South Africa (1996)

Heath Act (No. 21 of 2017)

Kenya Medical Practitioners and Dentist Act (Cap 253)

Offences Against the Person Act (1861)

Penal Code (CAP 63)

Reproductive Healthcare Bill (2014)

Sexual Offences Act (No. 3 of 2006)

CHAPTER ONE: INTRODUCTION

1.1 Background

In Kenya, incidences of sexual abuse against children are exceptionally high, a study in 2015 revealing that three out of every ten children in Kenya face sexual abuse, with rates increasing every year.[1] Section 2 of the Children's Act defines a child as any human being below eighteen years old.[2] World Health Organization (WHO) defines child sexual abuse as the unconsented/ uninformed consented participation of a child in sexual activity whose consequences he/she cannot fully understand.[3] United Nations International Children's Emergency Fund (UNICEF) stated that sexual abuse includes rape, sexual assault, defilement and incest.[4]

In recent years, data from Nairobi Women's Hospital (a private institution that specialises in obstetrics and gynaecology) indicates that 55% of women who experience sexual abuse are aged between zero and fifteen years old.[5] Findings from a survey conducted by UNICEF in 2010 designates that 32% of females in Kenya experience sexual violence (one type of sexual violence is child sexual abuse) during their childhood. [6] Out of this percentage, the frequency of pregnancy as a result of child sexual abuse lies between 15 and 18%. [7]

Pregnancies among children have life-threatening consequences in terms of sexual and reproductive health.[8] Child pregnancy causes irreparable damage to the victim in terms of trauma, preeclampsia, pre-term labour and even miscarriages. [9] Abortion therefore serves as a viable option for minors to avoid such complications.

Abortion as defined by the Health Act is the "termination of a pregnancy before the foetus is viable as an independent life outside the womb."[10] As a topic, abortion is divided between three central rights: the human dignity of the victim as well as freedom from discrimination, protected under Article 28 and 27 of the 2010 Constitution of Kenya respectively, and which

[1] Kenya Catholic Secretariat of Religious Education, A study of child abuse in Kenya, 2015, 14.
[2] Section 2, *Children's Act* (No. 8 of 2001).
[3] World Health Organization, *Report of the Consultation on Child Abuse Prevention,* March 1999, 5.
[4] United Nations Glossary on Sexual Exploitation and Abuse, 2nd Edition.
[5] Lilian N. O, 'The effects of sexual abuse on academic performance: a case of Mathare Constituency, Nairobi County', unpublished, University of Nairobi, Nairobi, 2013, 2.
[6] Ministry of Gender, Children & Social Development, *Violence against children in Kenya,* 2010, 7.
[7] Ruto J.S, 'Sexual Abuse of School Age Children: Evidence from Kenya' 12(1) Journal of International Cooperation in Education, 2009, 177.
[8] World Health Organization, *Sexual health, human rights and the law,* 2015 13.
[9] United Nations Populations Fund, *Adolescent Pregnancy: A review of the Evidence,* 2013, 3.
[10] Section 2, *Health Act* (No. 21 of 2017).

forms the basis of the pro-choice argument,[11] and the right to life: underpinned by Article 26, a right which protects the unborn child.[12]

The pro-life approach holds two main perspectives: one moral and the other religious. The moral perspective revolves around the thought that abortion is as wrong as killing and stealing, regardless of circumstance and cultural values. That the foetus is a living human being and therefore has full rights and moral status. The religious perspective embraces the belief that the Almighty created all life. The religious perspective is based on the fact that life is sacred because it is a gift from the Almighty and since abortion terminates life, it should not be allowed.[13]

The pro-choice perspective is grounded on women having the freedom to choose whether they want to carry the child or not. Since the beginning of time, women have been given the title of caregiver and nurturer. Changes in society have resulted in women being given a place in society where they can determine what role in society they want to play – work-oriented or domestic. Pro-choice advocates are of the opinion that considering women are more work-oriented, they are less likely to want a child in the first place and the attention they pay towards unwanted children is lesser, leading to children developing behavioural issues. In such cases, abortion is an option which saves both the unwanted child and parent.[14]

Another backing of the pro-choice perspective comes from the crime and abortion relationship. Researches realised that one of the consequences of the Roe v Wade 1973 Supreme Court judgement,[15] was low criminality rates. [16]This is because it gave women the choice of not having an unwanted child. Children from unwanted pregnancies do worse in school, have less stable employment, more mental health problems and are more likely to use drugs and commit crimes.[17]

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[11] Article 28, *Constitution of Kenya* (2010).
[12] Article 26, *Constitution of Kenya* (2010).
[13] Lopez R, 'Perspective on Abortion: pro-choice, pro-life and what lies in between' 27(4), *European Journal of Social Sciences*, 2012, 511-517.
[14] Smith A, 'Beyond pro-choice verses pro-life: women of colour and reproductive justice' 17(1), *NWSA Journa*l, 2005, 119-140.
[15] Roe v Wade, 410 US, 113, 1973..
[16] Joyce TJ, 'Abortion and crime: a review' National Bureau of Economic Research, Working paper No. 15098, 2009, 1-10,< https://www.researchgate.net/publication/46467163_Abortion_and_Crime_A_Review> on 21 September 2019.
[17] Joyce TJ 'Abortion and crime: a review' National Bureau of Economic Research, Working paper No. 15098, 2009, 1-10.

Furthermore, forcing a child to carry an unborn child causes negative emotional, psychological and physical effects on that child.[18] In terms of physical effects, child pregnancy is considered to be more risky than adult pregnancies due to the biological immaturity of the child.[19] Psychologically and emotionally speaking, there is a high likelihood of victims developing trauma associated with the incidence falling into depression leading to suicide.[20]

The history of abortion laws in Kenya is a convoluted one, one that dates back to the colonial period which established the therapeutic exception, to abortion then being criminalised in the Penal code during the post-colonial period, to legal abortion being explicitly recognized in cases of sexual abuse in *Federation of Women Lawyers v the Attorney General* hereon referred to as the JMM case, all of which are discussed in Chapter three. The question that therefore stems is: now what? What are the next steps in order to fully realize the right to lawful abortion in cases of sexual abuse – what comes next?

1.2 Statement of the Problem

As to sexual abuse, the Children's Act, Section 15 declares that minors must be sheltered from sexual exploitation, inducement or coercion to engage in sexual activity. [21] Section 119 states that a child who is pregnant and has been sexually abused is in need of care and protection. Similarly, under the United Nations Convention on the Rights of a Child (UNCRC) – Article 19 positions that States must protect minors from sexual abuse.[22]

During the post-independence era up until 2010, abortion was criminalised under Sections 158 – 160. These three sections provided for strict penalties for pregnant women who unlawfully procured their own abortions,[23] persons who act with the intent to unlawfully procure an abortion,[24] as well as doctors who perform unlawful abortions.[25] The three sections mention unlawful abortion, implying that there ought to have been circumstances whereby lawful abortions would be carried out, however neither define such circumstances. Furthermore, the

[18] Goonewardene M 'Adverse effects of teenage pregnancy' 50(3), *Ceylon Medical Journal*, 2005, 116-120.
[19] Baker P, 'Teenage pregnancy and reproductive health' Royal College of Obstetricians and Gynaecologists, 2007.
[20] Lilian NO, 'The effects of child sexual abuse on academic performance: a case of Mathare Constitutency, Nairobi County', unpublished, University of Nairobi, Nairobi, 2013, 45.
[21] Section 15, *Children's Act* (No. 8 of 2001).
[22] Section 119, *Children's Act* (No. 8 of 2001).
[23] Section 58, *Penal Code* (CAP 63).
[24] Section 59, *Penal Code* (CAP 63).
[25] Section 60, *Penal Code* (CAP 63).

lack of post-independence Kenyan High Court cases resulted in unclear and varied interpretations of abortion laws.[26]

The promulgation of the 2010 Constitution brought with it Article 26 which protects the right to life, that begins at conception and states that no person shall be deprived of their life deliberately unless permitted by law.[27] It, however, allows for leeway when it comes to abortion: in an emergency or if the life or health of the mother is in danger, as per Article 26(4).[28]

What then is the definition of emergency treatment and when can the life or health of a mother be in danger? Section 6(1) of the Health Act provides that where the pregnancy is a danger to the life or health of the mother, she has the right to treatment by a trained health professional.[29] Section 6(2) defines a trained health professional as having formal medical training in skills needed to manage the pregnancy-related complication and has a valid licence to carry out the abortion.[30]

These definitions were brought to light in the recent JMM case, however, the case also shone light on prevailing issues with regards to unsafe abortion in Kenya.

In the petition, one of the main limbs of contention was the revocation of the 2012 Standards and Guidelines as well as the Training Curriculum by the Director of Medical Services (the Director).[31] The Director also stated that participation in trainings on safe abortion conducted pursuant to the 2012 Standards and Guidelines as well as the Training Curriculum should be stopped. The Director went on to state, after getting information from members of Kenya Obstetricians and Gynaecologists Society (KOGS) – a registered association of professional Obstetricians and Gynaecologists – that the 2010 Constitution provides that abortion on demand is illegal hence training is not necessary.[32]

[26] Centre for Reproductive Rights, '*In harm's way: the impact of Kenya's restrictive abortion laws',* 2010, 31.
[27] Article 26, *Constitution of Kenya,* (2010).
[28] Article 26(4), *Constitution of Kenya,* (2010).
[29] Section 6(1), *Heath Act* (No. 21 of 2017)
[30] Section 6(2), *Heath Act* (No. 21 of 2017)
[31] Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Centre for Law& Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (2019), eKLR, 13.
[32] Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Centre for Law& Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (2019), eKLR, 6.

The Court in the above case held that abortion is legal for pregnancies resulting from sexual abuse, however, there still exists no policy and framework to implement this, considering that the Court did not mandate the Guidelines and Training Manuals be re-enacted.

It is therefore because of the lack of information, the lack of policy and framework as well as misinterpretation of Article 26(4) that unsafe abortion remains the main cause of maternal mortality in Kenya.

1.3 Justification of the study

Child sexual abuse is a growing worldwide concern due to the devastating life-long effects on the victim and the offspring. [33]

The uncertainty and gaps in the legislative framework regarding legal abortion and child sexual abuse means that Kenya's legal framework does not adequately protect child mothers.[34] This dissertation therefore seeks to study and identify factors contributing to the current laws on abortion as well as the gap between legalising abortion and providing a framework for legal abortions. Findings from this study are useful in preparing a policy meant to deal specifically with the protection of a pregnant victim of child sexual abuse, formation of policy and framework for application of the decision in the JMM case and in contributing to the body of knowledge in public health.

1.4 Hypothesis

Misinterpretation of law as well as the lack of policy and framework on legal abortion cause harm to the victims of child sexual abuse as it leaves them no option but to resort to methods of unsafe abortion and thus the high maternal mortality rates in Kenya.

1.5 Research Questions

1. What is the background of abortion laws in Kenya?
2. What are the ideologies behind abortion laws?
3. How did abortion laws develop in Kenya and do the current Kenyan policy and legislation on abortion sufficiently protect victims of child sexual abuse?

[33] Ministry of Gender, Children & Social Development, *Violence against children in Kenya*¸ 2010, 7.
[34] Macharia GM, 'Rethinking abortion in Kenya: a reproductive health right for victims of rape and sexual abuse', unpublished, University of Strathmore, Nairobi, 2018, 3.

4. How have other jurisdictions such as South Africa handled legal abortions, and can South African legislation and policy be an inspiration for the development of Kenyan abortion laws?

1.6 Methodology

The methodology utilized to answer the research questions is dependent on the review of qualitative data. Among the primary sources used are statute and case law while auxiliary sources used include journal articles, books, publications and reports. The study will further use quantitative literature which includes latest world, regional and national statistics on legal and illegal abortion as well as child sexual abuse. This research will be analytical, critical as well as comparative in terms of outlining the top practices in other jurisdictions (here the South African jurisdiction will be used), that Kenya can draw inspiration from, in order to best protect victims of child sexual abuse.

1.7 Limitations

The limitations faced when completing this study are twofold: first that the researcher is a student hence the limitation to access to certain resources in various fields of expertise, second: time – that the research must be done in the specific time-frame allocated which means that the research may not include all the positions on the topic.

1.8 Chapter Breakdown

This dissertation is divided into five chapters. Chapter one is an introduction into the study and provides a background of the topics of child sexual abuse and legal abortion as well as a statement of the problem, the hypothesis being used and the research questions which will dictate the topics of the next chapters.

Chapter two covers the theoretical framework. Theories that shall be used include theories of punishment – specifically deterrence, feminist legal theory and utilitarianism.

Chapter three will involves an examination of the development of abortion laws which date as far back as the colonial period up until Article 26(4) of the 2010 Kenyan Constitution as well as international law. This is in order to analyse the current views on abortion to determine if current abortion laws are adequate to protect victims of child sexual abuse.

Chapter four covers a comparison between the policy and framework of South Africa and Kenya. Legal challenges associated with legislation and policy in South Africa will be assessed in order to determine whether South African law and policy on abortion can be used to develop policy and framework for legal abortion in Kenya. It will cover an understanding of what the most effective practice on how abortion should be regulated in Kenya.

Chapter five entails a summary on the topic based on the results of the study as well as conclusion and recommendations on the current legislation in order to address the problem.

CHAPTER TWO: THEORETICAL FRAMEWORK

In order to develop an understanding on abortion and analyse current abortion legislation and policy in Kenya, it is imminent to discuss theories and ideologies underlying abortion. This Chapter therefore delves into three main theories: of punishment (specifically deterrence), feminist legal theory and utilitarianism in order to justify and criticize the current abortion legislation and policy in Kenya.

2.1 Theories of punishment

Every crime responds to a penal sanction. Penal sanctions against abortion are mainly for deterrence and prevention purposes. The reason behind this is that abortion is looked at in Kenya as a moral question where the life of the unborn child is at stake. [35]

2.1.1 Deterrence

Penal sanctions are primarily deterrent when their objective is to display the futility of the crime (here the killing of an unborn child). Penal sanctions stand to teach a lesson to others. Since deterrence acts on the actual or potential motive of offenders, the objective of punishment is to demonstrate that the crime is not advantageous to the offender. Furthermore, through the penal sanctions, the State seeks to create apprehension in the society thus preventing them from committing the crime.[36]

Deterrence theorists such as Thomas Hobbes, Jeremy Bentham and Cesare Beccaria state that man is a rational creature and therefore seeks pleasure and avoids pain.[37] At the base of the deterrence theory is the concept that people tend to choose pleasure over pain – by the State imposing penal sanctions therefore, crime becomes a painful act and individuals would therefore avoid it.[38]

When it comes to abortion laws, the earliest laws criminalizing abortion laws were viewed as crimes against the foetus. Courts and commentators at that time stated that quickening (first four months of pregnancy) was the stage at which the law should be considered. Prior to this, the common law deemed abortion not to be a crime because the foetus was not considered to be a living being.[39] This was as detailed in *Smith v State* which was decided by the Supreme

[35] -< https://shodhganga.inflibnet.ac.in/bitstream/10603/45012/9/09_chapter%204.pdf> on 23 September 2019
[36] Haag EVD, 'The criminal law as a threat system' 73(2), *The Journal of Criminal Law and Criminology,* 1982, 769.
[37] Hobbest T, 'Early classical philosophers of deterrence theory', 41, Criminology, *1968*, 99 -130.
[38] Jerop TK, 'Minors, sex and the law: rethinking regulation of consensual sex between minors in Kenya', unpublished, Strathmore University, Nairobi, 2018, 8.
[39] Buell SW, 'Criminal Abortions Revisited' 66(1174), *New York University Law Review*, 1991, 1774 – 1800.

Court of the United States, where the court stated: "if before the mother has become sensible of its motion in the womb, abortion was not a crime, if afterwards, when it was considered by common law, that the child had a separate and independent existence, it was held highly criminal." [40] At this point, abortionists were prosecuted for performing post-quickening abortions. Therefore, common law was focussed primarily on protection of life: the idea of quickening being when life began. Criminal laws intrusion, after the point of quickening, with penal sanctions was seen as a punishment for an offence against the foetus. [41]

The only time that abortion pre-quickening was a crime was when the abortion resulted in the mother's death. This suggests a secondary purpose to anti-abortion laws: deterrence of conduct that endangered a mother's life. [42]

Common criminal law surrounding abortion therefore announced a moral principle as well as the protection of the mother in a way.

Abortion became a statutory crime in the 19th Century around the world – a movement could be seen where state legislatures including Kenya adopted anti-abortion laws and courts enforced the same.[43] The concerns surrounding women's health and safety which were prominnent in the early common law became moot with the emergence of safe abortion techniques. During this period, society's condemnation of abortion became stronger, however, society still refused to condemn the mother for being part of it as they were considered morally vulnerable and therefore needed protection from the State. [44]

This changed during the late 19th Century when States penalized attempted abortion and declared that women who solicited abortions had committed a crime and deserved sentences. The motive behind this was to deter future wrongful conduct. It was at this point when abortion statutes were classified under homicide, offences against the person, crimes against chastity, morality and decency and miscellaneous sex crimes.[45]

In Kenya, the abortion situation was characterised by strict laws, weak enforcement and high rates of criminal abortions, rendering criminal law in this area ineffective to a certain extent.

[40] *Smith v State* (1851), Supreme Court of Maine, United States of America, 54-55.
[41] Buell SW, 'Criminal Abortions Revisited' 66(1174), *New York University Law Review*, 1991, 1780-1783.
[42] Buell SW, 'Criminal Abortions Revisited', 1774 – 1800.
[43] See the analysis of the post-colonialism laws in Kenya in Chapter three.
[44] Shapiro I, *Abortion: The Supreme Court Decisions, 1965-2000* 2nd Ed, Hacking Publishing Company Inc, Cambridge, 2001, 29.
[45] Buell SW, 'Criminal Abortions Revisited' 1774 – 1800.

Under the Penal Code, Article 158 criminalizes attempts to procure abortion,[46] article 159 prohibits the procurement of abortion by the mother,[47] and article 160 prohibits supplying drugs or instruments for the procurement of abortion. The idea behind this was to deter abortion in its entirity, in order to protect the unborn child.[48]

The 2010 Consitution changed this perspective by allowing lawful abortion, in cases where there is danger to the life and health of the mother. It also put to task Parliament to provide laws regarding the same.[49] Despite this, according to figures from Kenya's National Coordinating Agency for Population & Development (NCAPD), 13% of maternal deaths (of women aged between 15 and 49) result from unsafe abortions. [50]

2.2 Feminist legal theory

Society has always been organized into 2 major sexes: women and men. This simple division is what motivates the entirety of all social relations. Feminist theory is a theory of power that recognizes that distinctions such as these are unjust, it is therefore a theory of social inequality. Every effort to eliminate barriers to equality therefore stem from giving women life chances without regard to sex and gender.[51]

As per Catherine Mackinnon, when looking at prevalent crimes like rape against women, feminist theory suggests that dominance equates, in the male system, to pleasure. Rape therefore becomes the "defining paradigm of sexuality."[52] In rape, the unfortunate truth is that women are objectified.[53] In recent studies on rape, it was found that not only do men rape to affirm their manhood and dominance, they do it because they want to.[54]

Legislation is therefore key in the protection of women against such crimes. In order to protect women accordingly, statute must first be examined for inequality: feminist theory calls for both: analyses of its framing and substantive validity.[55]

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[46] Section 158, *Penal Code* (CAP 63).
[47] Section 159, *Penal Code* (CAP 63).
[48] Section 160, *Penal Code* (CAP 630.
[49] Article 26(4), *Constitution of Kenya* (2010).
[50] The STEP-UP Research Programme Consortium, African Population and Health Research Center and Population Council, *Unintended Pregnancies in Kenya: A Country Profile*, 2014, 2-5.
[51] Mackinnon AC, *Towards a feminist theory of the State*, 1st Ed, Harvard University Press, United States of America, 1991, 16-20.
[52] Mackinnon AC, *Towards a feminist theory of the State*, 144.
[53] Mackinnon AC, *Towards a feminist theory of the State*, 145.
[54] Mackinnon AC, *Towards a feminist theory of the State*, 143.
[55] Mackinnon AC, *Towards a feminist theory of the State*, 184.

If we examine the Penal Code, that is stringent on abortion which is a recourse to crimes such as rape, analyses would seek to reveal that legislation seems to neglect the issue that women who seek abortions did indeed become pregnant while having intercourse with men. In terms of sexual abuse, women did not mean or wish to conceive, however, looking at it through the morality that always underlies Kenyan laws: sexuality, reproduction and gender seem to be inseparable, whether there is consent or not.[56] Feminist legal theory on abortion therefore attempts to separate control over sexuality and reproduction and distinguish that from gender. It moves towards consent being the backbone of reproduction and therefore allowance of abortion.[57]

2.3 Utilitarianism

The Utilitarian theory, as developed by Jeremy Bentham is concerned with the outcome of an action. As a teleological and consequentialist theory, it concerns itself with the consequences of an action being the general welfare and the common good. Bentham stated that utilitarianism is the root of all systems of religion and morality, that codes of law were founded upon it and it is the unseen an unacknowledged guide to human action. Any action should therefore be performed with the view of the good of the community, the interest of the public and the welfare of mankind.[58]

Utilitarianism is also known as the 'greatest happiness principle' which states that human actions should promote the greatest happiness for the greatest number of people.[59] A clear strength of using utilitarianism as a theory to discuss abortion is that it does not place fundamental significance on human life hence avoiding, but not in totality, moral questions regarding when life begins. Utilitarianism asks for every case to be judged individually and on its merits meaning that every situation would need to be seen as independent hence situations such as the life and well-being of the child would come into consideration as well as the circumstances of the pregnancy. [60]

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[56] Mackinnon AC, *Towards a feminist theory of the State*, 185.
[57] Mackinnon AC, 186.
[58] Ngare NPM, 'The philosophical and ethical principles regarding the practice of punishment in Kenya' unpublished, University of Nairobi, 1996, 78.
[59] Francis MN, 'Towards a national philosophy of education: a conceptual analysis of the philosophical foundations of Kenyan education system', unpublished, Kenyatta University, Nairobi, 2013, 1.
[60] -https://www.mytutor.co.uk/answers/11213/A-Level/Philosophy-and-Ethics/Utilitarianism-is-the-best-ethical-theory-when-discussing-abortion-Discuss/ on 26 Feb 2019.

CHAPTER THREE: ABORTION IN THE KENYAN CONTEXT

This chapter entails an examination of the development of abortion laws from the colonial period to the period post the promulgation of the 2010 Constitution as well as Kenya's international obligations. This is in order to discover the gaps in the legislation, policy and framework of abortion laws in Kenya.

3.1 Abortion laws during the colonial period in Kenya (1895 -1963)

It was in 1894 when Britain declared Kenya to be a British protectorate, the outcome of which was, among others, that Britain started imposing its own administration and governance in Kenya without taking into account consensus of community leaders.[61] The British had taken complete control of Kenya's judiciary and legislative processes, so much so that any British precedent or legislation was directly applicable to Kenya.[62]

For British colonies such as Kenya, the English Offences against the Person Act of 1861 (1861 Act) was the initial major landmark in the development of abortion law.[63] Under Section 58 of the 1861 Act it was an offence for the mother to get an abortion unlawfully, which would result in a life imprisonment sentence. [64]Section 59 of the 1861 Act reprimanded a person that supplied the mother with the means to procure the unlawful abortion.[65] Since the Act made use of the term "unlawfully", Courts interpreted this to mean that not all abortions were unlawful, however, in the absence of explicit legislative intervention, Courts were unclear as to whether besides saving the life of the mother, whether abortion could be performed under any other lawful context. [66]

Courts through the case of *Rex v. Bourne (Bourne case)* clarified this position. [67] The case involved a minor who got pregnant because she was raped by five soldiers. The parents of the minor had given the doctor consent to perform an abortion on the minor. When caught, the doctor was charged with an attempt to procure an abortion unlawfully, contrary to the 1861

[61]Ndege P, Colonialism and its legacies in Kenya – Lecture delivered at Moi University, Nairobi, Kenya, 2009, 2.
[62] Ndege P, Colonialism and its legacies in Kenya – Lecture delivered at Moi University, Nairobi, Kenya, 2009, 4-5.
[63] Section 58, *Offences against the Person Act* (1861).
[64] Section 59, *Offences against the Person Act (1861).*
[65] Ngwena C, *Human rights and African Abortion laws,* 1st Ed, Ipas Africa Alliance, Nairobi, 2014, 30-40.
[66] Macharia GM, 'Rethinking abortion in Kenya: a reproductive health right for victims of rape and sexual abuse' 13- 15.
[67] *Rex v. Bourne* (1939), Central Criminal Court, United Kingdom.

Act. The doctor claimed that the abortion was not unlawful because he was avoiding a situation where the minor became a mother at such a delicate age and gave birth to a child conceived from rape. Expert witnesses testified that if the girl was required to continue with the pregnancy, she would be traumatized.[68] Justice McNaughten agreed with the doctor and stated, in explaining the therapeutic exception to unlawful abortion: in the event that the doctor is of the opinion, that continuing with the pregnancy will harm the physical or mental health of the mother, then the jury is entitled to take the view that the doctor is trying to save the life of the mother.[69]

The ruling in *Rex v. Bourne* created a significant impact on abortion laws as Justice McNaughten's direction to the jury, for the first time, clarified the defence of therapeutic exception – that the pregnancy can be terminated if it causes harm to the mental health of the mother. The direction to the jury highlighted that the threat to the mother's life and the threat to the mother's mental health cannot be separated, the two are intrinsically intertwined.[70]

The ruling in *Rex v Bourne* did not only reform abortion laws in Britain and British Colonies such as Kenya, but also in Africa as a whole.[71] This decision was reaffirmed in *Mehar Singh Bansel v. R* in 1995 by the East African Court of Appeal which stated that an abortion is lawful if it is conducted for the purposes of saving the mother's life or health.[72] The ruling also impacted the decision by the West African Court of Appeal in *R v. Edgal, Idike and Ojugwu* which decided an abortion case by applying the therapeutic exception (as explained above).[73]

The fact that the mental health of the pregnant minor was taken into consideration meant that the therapeutic exception opened up the narrow confines of lawful abortion to be constricted only to circumstances where there is danger to the life of the mother.

[68] Macharia GM, 'Rethinking abortion in Kenya: a reproductive health right for victims of rape and sexual abuse' 13- 15.
[69] Bibbings LS. 'R v. Bourne Commentary' University of Bristol, 2017, 1-5.
[70] Durand WR. 'Abortion: Medical Aspects of Rex v. Bourne' 2(3), *The Modern Law Review*, 1938, 236-239.
[71] Macharia GM, 'Rethinking abortion in Kenya: a reproductive health right for victims of raoe and sexual abuse' 13-15.
[72] Mehar Singh Bansel v. R (1995), East African Court of Appeal, Kenya.
[73] R v. Egal, Idike and Ojugwu (1939), West African Court of Appeal, Sierra Leone.

3.2 Abortion laws in post-independence Kenya (1963 – 2010)

In Kenya, unsafe abortion is one of the main causes of maternal mortality. Statistics from a 2004 country-wide survey of public hospitals revealed that 316,560 abortions occur in the annually out of which 20,893 women are hospitalized due to complications. Of the 20,893 women, 2,600 women die.[74]

Before the promulgation of the 2010 Constitution, abortion was marked by restrictive and unclear laws that criminalised access to abortion services.[75] Sections 158 to 160 of the Kenyan Penal Code spell out felonies relating to the procurement of abortion, without recognition that the 'offender' could be a child too. Section 158 places a third party liable where the third party assists to procure an unlawful abortion or miscarriage.[76] If the third party is a medical practitioner, they face up to fourteen years imprisonment under this section as well as probable suspension as an additional penalty under the Medical Practitioners and Dentists Board Act,[77] which is why medical practitioners have always been so cautious and even unwilling to procure lawful abortions. [78] Before constitutional reform, healthcare workers were even scared to perform procedures, due to the strict penalties imposed.[79]

This situation was not made any easier with the police officers continuously raiding, plotting and planning against healthcare workers which were offering abortion services. One such case is *R v. Dr. John Nyamu and two others.*[80] Dr. Nyamu's clinic was raided, where fifteen stillborn babies, described as aborted foetuses were allegedly planted (by the police) and then found. When investigations were carried out, it was found that there was no link between the clinic and the stillborn babies hence all charges were dropped and Dr. Nyamu was set free. He continued to provide legal abortions within what he considered to be the meaning of Section 240 of the Penal Code (to save the life of the mother) but continued to be harassed regularly by the police.[81]

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[74] Mohamed SF. Et al, 'The estimated incidence of induced abortion in Kenya: a cross-sectional study' BMC Pregnancy and Childbirth, 2015, 1.
[75] Kenya National Commission on Human Rights, *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations,* October 2011, 62.
[76] Section 158, *Penal Code* (CAP 63).
[77] Section 20, *Kenya Medical Practitioners and Dentists Act* (CAP 253).
[78] Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules, (1979).
[79] Kenya National Commission on Human Rights, *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations,* October 2011, 62.
[80] Republic v. John Nyamu & 2 others (2005) eKLR.
[81] Republic v. John Nyamu & 2 others (2005), eKLR, 1-5.

Another such case is *R v Jackson Namunya Tali*.[82] In 2009, a nurse – Jackson Namunta Tali – who operated a primary-level medical clinic, received a patient named Christine Atieno. Christine had been bleeding continuously after receiving a botched and unsafe abortion, allegedly from another clinic. After administering some form of treatment to her, Christine died. Upon Christine's death, which the Government Pathologist could not find the cause of, a charge was filed against Mr. Tali. The Court held that Mr. Tali did not have necessary skill to administer the advance treatment and despite Mr. Tali stating that he was not the one who interfered with the pregnancy in the first place and there was no evidence to prove otherwise, Mr. Tali was sentenced to death. [83]

Not only were healthcare workers facing harsh penalties for procuring abortions, if the mother took a drug in order to induce the abortion, she would face up to seven years of imprisonment as per Section 159 of the Penal Code.[84] Section 160 places a penalty of up to three years of imprisonment on any person who supplies medicine or drugs which are intended for unlawful abortion purposes.[85] Furthermore, Section 228 places a sentence of life imprisonment for any person who prevents the child from being born alive by any act or omission.[86]

Despite the Penal code prescribing strict penalties for abortion, Section 240 of the very same Penal Code states that abortion can be performed if there is a threat to the mother's life, situations of which are not however, spelled out.[87] It is the 2009 Clinical Management and Referral Guideline that stipulates: before the abortion to save the mother's life is carried out, the doctor performing it must consult with two senior experienced colleagues. Termination of the pregnancy could only be offered after one demonstrated that the pregnancy was a threat to the mother's life.[88]

To worsen issues, the mental health of the mother was not considered at all, as the Penal Code did not provide for an exception for the health of the mother when it came to abortion.[89] A mother's mental health was and still is severely impacted by the fact that she is a victim of sexual violence, but this was not taken into account at all, due to there being no exceptions.

[82] Republic v Jackson Namunya Tali (2014) eKLR.
[83] Republic v Jackson Namunya Tali (2014), eKLR, 1- 5.
[84] Section 159, *Penal Code* (CAP 63).
[85] Section 160, *Penal Code* (CAP 63).
[86] Section 228, *Penal Code* (CAP 63).
[87] Section 240, *Penal Code* (CAP 63).
[88] Kenya National Commission on Human Rights, *Making the Bill of Rights operational: Policy, Legal and Administrative Priorities and Consideration*, October 2011, 60-70.
[89] Section 240, *Penal Code* (CAP 63).

Furthermore, strict penalties imposed on abortion by the Penal Code and Medical Practitioners and Dentists Board Act made it impossible for victims of sexual abuse to get recourse to abortion services.[90]

The next Act of Parliament important to understanding the situation of abortion pre-2010 is the Sexual Offences Act. Section 35(3) of the Sexual Offences Act requires the Minster of Health to prescribe situations where a victim of sexual offence can access treatment in a public hospital.[91] It was pursuant to this, that the Ministry of Health released the second edition of the 2009 National Guidelines on Management of Sexual Violence (2009 Guideline).[92]

The 2009 Guidelines required medical practitioners to provide an option on abortion to victims of sexual abuse after examination and make appropriate referrals.[93] The issue with the provision were two-fold, one that it lacked support in law pre-2010 and second, medical practitioners gave more credence to the Medical Practitioners and Dentists Board Act,[94] and therefore did not utilise the guidelines before they were repealed by the Director, later in 2013.[95]

Restrictive and unclear legal policy and framework forced victims of sexual violence to resort to unsafe methods of abortion which cause a myriad of devastating consequences such as haemorrhage, sepsis, cervical lacerations, some of which even lead to death. [96]

3.3 Abortion laws post-2010 in Kenya

The Catholic Church in Kenya has always been a key player in influencing State decisions, (since a majority of Kenyans identify themselves as Christians),[97] especially in the field of reproductive health and abortion. An example of this influence was the January 2010 referendum for the 2010 Constitution where abortion was largely contested.[98] During the 2010 Constitution referendum, religious groups opposed Article 26(4) of the 2010 Constitution which permitted abortion to an extent. The reason behind it was the idea of morality: morality

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[90] Ngwena C, *Human Rights and African Abortion Laws*, 1st Ed, Ipas Africa Alliance, Nairobi, 2014, 35.
[91] Section 35(3), *Sexual Offences Act* (No. 3 of 2006).
[92] Section 57, *Clinical Management and Referral Guidelines*, (2009).
[93] Standards and Guidelines for reducing morbidity &mortality from unsafe abortion in Kenya (2009), 6.
[94] Section 20, *Kenya Medical Practitioners and Dentist Act* (CAP 253).
[95] Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (2019) eKLR.
[96] World Health Organization, *Clinical Guidelines for Emergency Treatment of Abortion Complications*, 1994, 11.
[97] -< https://www.africa.upenn.edu/NEH/kreligion.htm> accessed on 26 November 2019.
[98] Cooks RJ. And Dickens MB, 'Abortion Laws in African Commonwealth Countries' 25(2), *Journal of African Law*, 1981, 60-79.

ought to inform the formulation of the new law governing Kenya. Christian ideologies of morality surrounding abortion stem from the basis that foetal life is a sacred canopy, that life begins at conception.[99]

Religious leaders refused the inclusion, in the draft of the Constitution, abortion rights for women, during the 2004 National Constitutional Conference. [100] In 2008, the Archbishop of Catholic Archdiocese of Nairobi stated in a warning letter to the Government (against passing the Reproductive Health and Rights Bill) that abortion was an unspeakable crime as it was the destruction of a human baby. [101]

When negotiations for a new draft of the Constitution resumed after the 2004 draft was rejected, the Catholic Church and the National Council of Churches of Kenya (NCCK) insisted that the draft included an Article stating that "life begins at conception", asserting that the Constitution should recognize the sanctity of human life. Their demands were accepted after religious leaders threatened to reject the draft if it was not added.[102]After the 2007/2008 post-election violence, the new Constitution became a principal issue. For the first time, issues surrounding permitted/lawful abortions were brought up in cases where there is a danger to the health of the mother. The 2010 Constitution which includes the article on life beginning at conception as well as permitted/lawful abortion was passed by majority votes.[103]

Article 26 of the 2010 Constitution asserts that life begins at conception as well as that no person shall be intentionally deprived of their life. [104] There is international recognition that the right to life accrues to all humans at birth, however, there has always been a push by religious groups and leaders to extend this right to life before birth i.e. at conception. Protection of the right to life must also be consistent with women's rights. If a balance is not reached, it would lead to girls and women being denied the full range of reproductive healthcare services which are crucial to their fundamental rights to equality and dignity. [105]

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[99] Mutua M, *Kenya's Quest for Democracy: Taming Leviathan,* 1st Ed, Lynne Rienner Publishers, Colorado, 2008, 110- 200.
[100] Ndzovu JH, 'Post-colonial Kenyan attitudes towards religion and the predicament of Muslims' 1st Ed, *Muslims in Kenyan Politics,* Northwestern University Press, Evanston, 2014, 62.
[101] Macharia GM, 'Rethinking abortion in Kenya: a reproductive health right for victims of rape and sexual abuse', unpublished, University of Strathmore, Nairobi, 2018, 3.
[102] Ndzovu JH, 'Post-colonial Kenyan attitude towards religion and the predicament of Muslims' 1st Ed, *Muslims in Kenyan Politics,* Northwestern University Press, Evanston, 2014, 64.
[103] Kwatemba WS, 'Review Kenya's Quest for Democracy: Taming Leviathan 7(2), *Journal of African Elections,* 2008, 178.
[104] Article 26(1), *Constitution of Kenya* (2010).
[105] Centre for Reproductive Health, *Whose right to life? Women's rights and prenatal protections under the human rights and comparative law',* 2014, 5-10.

In order to realize this balance, Article 26(4) of the Constitution provides for lawful abortion i.e. the exception to the right to life: abortion is permissible if the life or health of the mother is in danger.[106] This goes beyond Section 240 of the Penal Code which only allowed abortion in cases where the life of the mother was in danger.[107] By permitting abortion in certain circumstances, the drafters of the Constitution were attempting to realize the general right to health and the right to reproductive health enshrined in Article 43 of the Constitution.[108] By taking a step ahead of Section 240 of the Penal Code and including mental health as a ground for legal abortion, the Constitution has attempted to realize the right to health of the mother in its entirety.

However, there are several aspects to the right to reproductive health: the right to access information on legal abortions, access to contraceptives as well as safe abortion services. Most of these aspects such as access to safe abortion services and access to information on legal abortion are unavailable to Kenyan women. [109]

Article 26(4) does not guarantee women the right to abortion. It grants women whose life and health are in danger, in the opinion of a trained health professional, the right to abortion.[110] The definition of a trained health professional is as stated in Chapter One.

Added definitions may offer some clarity but have not solved issues surrounding abortion which are: firstly, in cases where the woman seeking abortion is a victim of sexual violence and a minor as well, the mental and social well-being of the child carrying the baby is severely affected.[111] Where safe abortion is not available to such a victim, there is a possibility of a myriad of violations occurring: the right to privacy and freedom of choice, dignity of the victim as well as the right to reproductive health and non-discrimination.[112]

A 2010 study carried out by the Centre for Reproductive Rights, brought to attention that there were approximately three court cases every week in each county in which women were being

[106] Article 26(4), *Constitution of Kenya* (2010).
[107] Section 240, *Penal Code,* (CAP 63).
[108] Article 43, *Constitution of Kenya,* (2010).
[109] Maina SM, 'Implementing Article 26(4) of the Constitution of Kenya: regulating abortion' unpublished, University of Nairobi, Nairobi, 2015, 27-43.
[110] Article 26(4), *Constitution of Kenya* (2010).
[111] Kenya National Commission on Human Rights, *Realising sexual and reproductive health rights in Kenya: a myth or reality?* 2012, 12.
[112] Wambui J, 'Implementing Reproductive health and abortion provisions in the Kenyan Constitution (2010)' *IOSR Journal of Humanities and Social Science,* 2018, 65.

charged for having illegal abortions. Among the cases examined in the survey by the Centre, ten out of every twenty cases involved minors.[113]

What furthers this issue is that the 2014 Reproductive Healthcare Bill, which was to give effect to Article 26(4) of the Constitution, does not provide for what types of healthcare facilities as well as which healthcare practitioners can provide legal abortions, thus failing to actualize women's right to reproductive healthcare.[114]

Despite the JMM case enforcing that abortion is permitted for victims of sexual violence as well as cases of child sexual abuse – as JMM was a minor when she got pregnant, the High Court has left many questions un-answered such as: when can these services be accessed? Does one have to prove the sexual violence through a court case before accessing abortion services? How will victims of sexual violence access these services since the relevant guidelines still remain withdrawn?[115]

The second issue surrounding legal abortion is that because of the harsh penalties imposed on abortion through the Penal Code and the general lack of understanding of the 2010 Constitutional provisions, healthcare workers are still getting arrested for procuring abortions even though some of them are legal.[116] Despite Article 26(4) of the Constitution that provides for legal abortions, healthcare workers are still being charged under the Penal Code. [117]

Increasing safe and legal abortion services after legal reform requires dedicated human and financial resources. Legal reform surrounding abortion requires relevant policy and framework instructing, informing and mandating legal abortion.[118]

[113] Centre for Reproductive Rights, *In Harm's Way; the Impact of Kenya's restrictive Abortion Law,* 20 I 0, 68-69.
[114] *Reproductive Healthcare Bill* (2014).
[115] Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (2019), eKLR, 3.
[116] Kahura C, 'The 'Unaffordable' Pro-life Abortion Policy in Kenya, Oxford Human Rights Hub, 2019, 1.
[117] Finden AE. 'The law, trials and imprisonment for abortion in Kenya', International Campaign for Women's Right to Safe Abortion, 2017, 1.
[118] Hussain R, 'Abortion and unintended pregnancy in Kenya' *Guttmacher Institute,* 2012, 1-4.

3.4 International laws applicable to Kenya in the abortion context

3.4.1 The African Chatter on Human and People's Rights

The African Charter on Human and People's Rights (ACHPR) under Article 2 and Article 4 provides for rights which anchor the right to safe abortion. Article 2 provides for the right to non-discrimination on the basis of gender (further emphasized in Article 18(3)),[119] which is violated when the state does not take into account women's rights. Article 4 provides for the right to respect for life and inherent dignity of the person which is violated when a woman is forced to carry a child conceived out of sexual violence. [120]

Furthermore, Article 16(1) of the ACHPR stipulates that all individuals have the right to the best attainable state of physical and mental health, both of which form the core basis for the right to reproductive health, which includes the right to safe abortion.[121] Moreover, the Charter under Article 16(2) obliges States to take steps to ensure that their people obtain appropriate medical care.[122]

3.4.2 The Protocol to the ACHPR on the Rights of Women in Africa (Maputo Protocol)

The Maputo Protocol was developed under Article 66 of the ACHPR, [123] and is designed to safeguard the right to safe abortion, where the pregnancy was a result of sexual violence.

Article 14(1) of the Maputo Protocol guarantees women the right to control their fertility and to decide whether they want to have children or not as well as the number and spacing of children.[124] Article 14(2) mandates States to provide sufficient, reasonable and available healthcare services, part of this obligation is to provide information, education and communication programs for women.[125] The State is also obligated, under Article 14(2)(c) to safeguard the reproductive rights of women by permitting medical abortion where the life of the mother or foetus is in danger, where the mental and physical health of the mother is affected and in cases of sexual violence. [126]

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[119] Article 2, *African Charter on Human and People's Rights, 27 June 1981, 1520 UNTS 217.*
[120] Article 4, *African Charter on Human and People's Rights*.
[121] Article 16(1), *African Charter on Human and People's Rights*.
[122] Article 16(2), *African Charter on Human and People's Rights*.
[123] Article 66, *African Charter on Human and People's Rights*.
[124] Article 14(1), *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,* 11 July 2003, CAB/LEG/66.6.
[125] Article 14(2), *Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa*.
[126] Article 14(2)(c), *Protocol to the African Charter on Human and Peoples' Rights on the Righst of Women in Africa*.

On 6 of October 2010, Kenya ratified the Protocol, however, it opted to place a reservation on Article 14(2)(c). This reservation was placed before the 2010 Constitution (which allows for legal abortions under Article 26(4)) was promulgated and therefore the outcome of this reservation expressed a clear indication of Kenya's then unwillingness to allow abortion in cases of sexual violence. [127]

3.4.3 The Universal Declaration of Human Rights

Despite the Universal Declaration of Human Rights (UDHR) being non-binding, States have generally agreed that it is the foundation of human rights law – it contains the most basic human rights and reciprocal State obligations.

The Preamble as well as Article 1 of the UDHR emphasize the right to inherent dignity of all human beings – the anchor to the right to reproductive health.[128] The right to a standard of living that is adequate for the health and well-being of oneself is stated in Article 25 of the UDHR. [129]It includes the right to medical care which, when put with the right to life under Article 3 of the UDHR forms the core pillars of the right to reproductive health.[130]

3.4.4 The International Covenant on Economic, Social and Cultural Rights

Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) obligates States parties to recognize the right of persons to enjoy the highest standard of physical and mental health. [131]These words are reflected in Article 43(1)(a) of the 2010 Constitution of Kenya. The only difference is that whereas the ICESCR explicitly refers to and includes the right to reproductive healthcare, Article 43(1)(a) of the 2010 Constitution makes no such mention.[132]

3.4.5 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) does not explicitly provide for the right to health, which is the core to the right to safe abortion, however, it does recognize the right to inherent dignity of the person, as well as the right to life, which are both pillars of the right to reproductive health. The ICCPR also safeguards persons from being subject to

[127] Maina SM, 'Implementing Article 26(4) of the Constitution of Kenya; regulating abortion', 27-43.
[128] Article 1, *Universal Declaration of Human Rights,* 10 December 1948, 217 A (III).
[129] Article 25, *Universal Declaration of Human Rights*.
[130] Article 3, *Universal Declaration of Human Rights*.
[131] Article 12, *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, 993 UNTS 3.
[132] Article 43(1)(a), *International Covenant on Economic Social and Cultural Rights*.

inhuman and degrading treatment. This right has been interpreted and extended to sexual violence survivors i.e. a survivor of sexual violence who is then forced to carry a child amounts to degrading treatment.[133]

3.4.6 The Convention on the Elimination of all forms of Discrimination against Women

The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) enforces the right against discrimination of women on a universal bases, and thus forms a bill of rights for women around the globe.[134] Kenya is a state party to CEDAW which obligates the state to respect, protect and fulfil women's rights.

The right against discrimination of women is infringed when access to essential services such as reproductive healthcare is hindered. When a State neglects its duty of providing safe abortion services to women, they are failing to protect the fundamental right to reproductive healthcare.[135] Restrictive provisions in law such as Sections 158 to 160 of the Penal Code of Kenya which criminalizes abortion, as well as the previous interpretation of Article 26(4) of the Constitution that did not take into account sexual violence as a reason for abortion violate Article 2(f) of the CEDAW which requires all State Parties to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."[136]

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

Despite the Cairo Programme of Action of the 1994 United Nations Conference on Population and Development (ICPD) being adopted by Kenya, it is still legally non-binding. However, it was an important step in recognizing the right to reproductive healthcare. At the Conference, Delegates adopted the first ever internationally recognized definition of reproductive health, which included physical, mental as well as social well-being. Principle 8 of the ICPD highlights the right to physical as well as mental health and asks States to ensure that men as well as women have universal access to healthcare services, including reproductive healthcare. It further stipulates that couples should be free to decide the number and spacing of their

[133] *International Covenant on Civil and Political Rights,* 16 December 1966, 999 UNTS 171.
[134] *Convention on the Elimination of All forms of Discrimination against Women*, 18 December 1979, 1249 UNTS, 13.
[135] Maina SM, 'Implementing Article 26(4) of the Constitution of Kenya; regulating abortion' 27-43.
[136] Article 2(f), *Convention on Elimination of All forms of Discrimination against Women*.

children.[137] The very recent Nairobi Summit on ICPD 25 saw commitments made by Governments including Kenya to support the 'three zero's' goal: zero maternal mortality, zero tolerance towards gender based violence and serio unmet needs for family planning, in order to secure women's rights. In as much as this can be seen as a step in the right direction, what needs to be seen is steps to actualize these goals.[138]

[137] Principle 8, *United Nations International Conference on Population and Development Programme of Action,* 2014.

[138] -<http://www.nairobisummiticpd.org/news/afp-nairobi-icpd25-summit-deemed-huge-success-some-challenges-ahead> on 26 November 2019.

CHAPTER FOUR: A COMPARATIVE STUDY OF SOUTH AFRICA'S AND KENYA'S ABORTION LAWS

One of the main factors that ties together Kenya and South Africa is their history of British colonialism – Kenya was under British rule from 1895 to 1963 and South Africa was a formal British colony from 1806 to 1961. British colonialism meant that common law was enforced in both countries, making the 'starting point' of examination of abortion laws the same. Furthermore, the 2010 Kenyan Constitution brought with it right to legal abortion, through its Bill of Rights. It is however widely known that the Kenyan Bill of Rights is heavily inspired by the South African example and several articles in both constitutions, when compared, have the exact same wording and a similar extent of protection.[139]

Since the South African example has proved to be an adequate model for the 2010 Constitution, hence this Chapter aims to compare the South African and Kenyan abortion laws. The purpose of the comparison is to examine how South Africa has implemented the right to abortion and whether South African law and policy can be an inspiration for the development and actualization of the right to legal abortion in Kenya, to better protect the victim of child sexual abuse, in cases of pregnancy.

4.1 The development of South African abortion laws

4.1.1 The apartheid era (1948 -1994)

During the apartheid era, individual policies were developed for white, black and coloured South Africans, by the Afrikaner-controlled National Party government. The policies surrounding reproductive health stemmed from a fear of unsustainable population growth which had racist undertones: that the black population was increasing more than the white population, placing a burden on the country's resources. [140]

Prior to 1975, abortion on demand was unlawful. However, white women would still have access to abortion services by using private practitioners. These abortion services were justified by common law and were permitted where the pregnancy was a danger to the mother's well-being. Black women in South Africa occupied low paying and insecure jobs thus could not afford private abortion services. These financial difficulties were coupled with the trouble of

[139] Glinz C, 'Kenya's new Constitution: a transforming document of less than meets the eye?' 44(1), *Law and Politics in Africa, Asia and Latin America*, 2011, 69-71.
[140] Guttmacher S et al, 'Abortion reform in South Africa: a case study of the 1996 Choice of Termination of Pregnancy Act' 24(4), *International Perspectives on Sexual and Reproductive Health*, 1998, 1.

finding a doctor that would agree to perform an abortion on a black woman, thus the use of untrained mid-wives, lay practitioners and non-trained doctors.[141]

4.1.2 The 1975 Abortion and Sterilization Act

During the apartheid period in South Africa, the high maternal mortality rates due to unsafe abortion which led to medical establishments pressurizing the South African government to expand the circumstances in which legal abortions were allowed.[142]

The 1975 Abortion and Sterilization Act (ASA) was therefore passed which allowed for abortion but only under a narrow range of circumstances: where the pregnancy – seriously threatens the mother's life, physical or mental health, causes a severe handicap to the unborn child or where the unborn child was conceived through rape, incest or other unlawful intercourse (this had to be proved in a Court). It appeared that the 1975 ASA increased the circumstances in which abortion could be performed, however, the Act further required an approval of two physicians and the procedure to be performed by a third. The issue with this is that it limited and lowered the access to lawful abortion procedures and increases the financial costs which became a burden on the mother.[143]

4.1.3 The 1996 South African Constitution and the Choice on Termination of Pregnancy Act

It was during 1994, that feminist arguments changed in South Africa, taking an approach of public health needs rather than the pro-choice approach. The background to this change was the rate of maternal mortality: it was 69 deaths per 100,000 live births. It was also found in that year that 90% of the women admitted to hospital for awry abortion procedures were black, and all the women that died from illegal abortion were also black. Thus, tying public health, gender equality and racial equality together.[144]

The major change in South African abortion law arose during the period of transition from apartheid to independence. During this period, equality, women's rights and reproductive rights

[141] Adeleke FAR, 'The extreme provisions of the Choice of Termination of Pregnancy Act in South Africa' 16, *Fort Hare Papers,* 2010, 28.
[142] Guttmacher S et al, 'Abortion Reform in South Africa: A case study of the 1966 Choice on Termination of Pregnancy Act' 1.
[143] Favier M et al, 'Safe abortion in South Africa: We have wonderful laws, but we don't have people to implement those laws' 143(54), International Journal of Gynaecology Obstetrics, 2018, 38-44.
[144] Guttmacher S et al, 'Abortion Reform in South Africa: A case study of the 1966 Choice on Termination of Pregnancy Act' 1.

were enshrined in the new South African Constitution through Section 27,[145] and Section 12 which provided the right to bodily and psychological integrity. [146]

In order to solve the issue of unaffordable abortion services, section 27(1) of the South African Constitution provides that the State has the responsibility to cater for public patients who cannot afford abortion services, if it is within the State's available resources. Additionally, in emergency cases, where the mother's life is at risk – any doctor whether state-employed or privately employed is required morally, legally and ethically to assist the mother and procure the abortion.[147]

In non-emergency situations, however, a doctor or nurse can conscientiously object to perform abortions where performing the abortion violates their religious or personal beliefs. In such situations, the conscientious objector must affirm that the mother has a right to abortion and explain their decision to the mother in a non-stigmatising way.[148]

It was also during that period that the Choice on Termination of Pregnancy Act (CTOPA) of 1996 was enacted, which addressed the needs to lower maternal mortality rates.[149] CTOPA established abortion as a legally codified and constitutional right which is available during the first twelve weeks of gestation – upon request – and the abortion can be performed by a registered medical practitioner (doctor), registered nurse or mid-wife who has completed training. During thirteen to twenty weeks of gestation, termination of pregnancy is available on condition of rape or incest, if it is a danger to the mother's physical or mental health, if the foetus is not viable or if the pregnancy affects a mother's socioeconomic conditions. In these cases, the abortion can only be performed by a registered medical practitioner. Abortion is also available above twenty weeks of gestation but only if it is a severe threat to the life of the mother or foetus or if the foetus has severe cognitive problems. These cases can, again, only be performed by a registered medical practitioner.[150] A report by Amnesty International states that since the CTOPA came into force, maternal mortality rates reduced by 90%.[151]

The CTOPA provides no age of consent for abortions: a woman and a minor can request for an abortion without the need of consent from a spouse, guardian or parent. There are two

[145] Section 27, *Constitution of the Republic of South Africa*, (1996).
[146] Section 12, *Constitution of the Republic of South Africa*, (1996).
[147] Section 27(1)(a), *Constitution of the Republic of South Africa*, (1996).
[148] *Choice on Termination of Pregnancy Act* (No. 96 of 1996).
[149] Bhekisisa Mail & Guardian Centre for Health Journalism, *Abortion in South Africa: A reporting guide for journalists*, 2018,9.
[150] *Choice on Termination of Pregnancy Act* (No. 96 of 1996).
[151] Amnesty International, *Barriers to Safe and Legal Abortion in South Africa*, 2017, 3.

exceptions to this: where the mother is unconscious and would not be able to gain consciousness during the time to have an abortion or where the mother is severely mentally disabled and would not understand the consequences and nature of such a decision.[152]

Voluntary counselling is offered to mothers before and after the abortion, according to the COTPA. The counselling provided is not directive in nature – the mother should not be told whether to have an abortion or not, but rather is told about the different procedures and methods to procure the abortion and the symptoms of a failed abortion that would require follow-up care. [153]

The CTOPA, however, was not enacted without resistance – a Christian anti-abortion group, in the case of Christian Lawyers Association v. Minister of Health, challenged the constitutionality of the Act, claiming that it violated the right to life of the unborn child. The Transvaal Provision of the Hight Court of South Africa dismissed the arguments stating that extending the right to life to incorporate unborn children would adversely affect women's rights to reproductive health and choice. [154]

4.2 Conclusion of the comparison between South African and Kenyan abortion laws

When compared to South Africa, Kenya seems to be on the backfoot when it comes to abortion laws even when laws during the colonial period in each country are compared. Even during the apartheid period, South African laws have always allowed for abortion when the mental health of the mother is in danger (especially in cases of sexual violence). Kenya on the other hand, as seen in Chapter three, during the colonial period and up until the 2010 Constitution was promulgated, only provided for legal abortion where the life of the mother was in danger, under the Penal Code.

As seen, it was the 1975 ASA in South Africa that expanded the range of circumstances for legal pregnancy to include the mental health of the mother as well as allowing for abortion specifically in cases of unlawful intercourse. The catch here was that the legal abortion had to be approved by two physicians. The 1975 ASA unfortunately, is what Kenya currently operates on, in the form of the Clinical Management and Referral Guideline, which require consultation,

[152] Maina SM, 'Implementing Article 26(4) of the Constitution of Kenya; regulating abortion' 62.
[153] Guttmacher S et al, 'Abortion Reform in South Africa: A case Study of the 1966 Choice of Termination of Pregnancy Act' 1.
[154] *Christian Lawyers Association of SA and Others v Minister of Health and Others* (1998), Transvaal Provision of the Hight Court, South Africa.

prior to abortion, with two experienced senior colleagues. Challenges such as limited access to lawful abortion services as well as an increase in financial costs, which were suffered by South Africans under the 1975 ASA, are and will continue to be faced by Kenyans if the Clinical Management and Referral Guideline is not revised.[155]

Since the biggest problem regarding abortion laws in Kenya is actualizing the right itself, inspiration can be taken from the South African context through the CTOPA. In order to make it easy for legal abortion services to be accessed, the CTOPA provides exactly when legal abortion services can be accessed, by whom and who should perform the procedure.[156] This level of conciseness and clarity goes beyond merely stating that abortion is legal for victims of child sexual abuse victims – as was stated in the JMM case.[157]

In order to better realize the right to legal abortion, the CTOPA provides for a legal duty for all doctors to perform emergency abortions. This is a huge step in actualizing women's right to reproductive healthcare, and this ought to be implemented in the Kenyan context in order to reduce the rising rates of maternal mortality.

The one thing that is very much common between the South African and Kenyan context is the influence of the church in political decision-making processes. As discussed above, the promulgation of the right to legal abortion in South Africa was met with resistance by the Christian anti-abortion group and as seen in Chapter Three, the right to legal abortion was heavily opposed by the Catholic Church in Kenya before the promulgation of the 2010 Constitution.[158] In order to reach a 'middle ground' between actualizing the right to legal abortion and not offending the religious and moral views of healthcare practitioners, a conscientious objection is allowed in South Africa. The conscientious objection, applied to the Kenyan context would work towards achieving a 'balance' between the right to freedom of choice of a healthcare practitioner – in terms of choosing not to perform the abortion due to religious or moral views and the right to legal abortion of mothers.

[155] Centre for Reproductive Rights, '*In harm's way: the impact of Kenya's restrictive abortion laws',* 2010, 13.
[156] Sections 2- 3, *Choice on Termination of Pregnancy Act* (No. 96 of 1996).
[157] Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (2019), eKLR, 415.
[158] Chapter Three, page 17.

One major difference between the Kenyan and South African context stems from the question: who should give the consent to seek an abortion in cases where the mother is a minor? As a general rule, as per the National Adolescent Sexual and Reproductive Health Policy, and the 2014 Reproductive Healthcare Bill,[159] in the case of a pregnant minor, legal abortion can be performed after consultation with the parent/guardian.[160] In such a situation, the 'best interest of the child' principle as per Article 53(2) of the 2010 Constitution, shall prevail.[161] The minor's parent/guardian and physician owe the minor a legal duty to act in her best interest. In comparison, the South African laws go to such an extent in realizing women's rights that reproductive health is put before the right to life and the general rule is that a woman does not even have to seek consent in order to procure an abortion. The legal issue of whether minors should be allowed to give consent is a much debated issue in Kenya which has resulted in general consensus that minors cannot give consent. In this scenario, it would however, be beneficial to the minor – especially in cases of an emergency abortion that minors be permitted to give consent without consulting with the parent/guardian.

[159] Section 20, *Reproductive Healthcare Bill* (2014).
[160] Glinz C, 'Kenya's New Constitution: a Transforming Document or Less than Meets the Eye?' 44(1), *Law and Politics in Africa, Asia and Latin America,* 2011, 60-64.
[161] Article 158, *Constitution of Kenya* (2010).

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

5.1.1 Need for appropriate policy and framework for legal abortion for victims of child sexual abuse

As discussed in Chapter One and Two, every choice has a consequence. Feminist legal theory dictates that a mother bears a child in her womb alone and it should therefore be her choice, especially in cases of sexual violence, if she wants to keep the child or not. For her not to be allowed that freedom of choice and freedom of reproductive health is degrading her dignity as a human being. The situation becomes much worse where the mother is, herself a child. The gravity of the situation doubles and action should be taken especially since maternal mortality rates are increasing due to unsafe abortion, thus suggesting how ineffective the deterrent purpose of the laws that criminalise abortion under the Penal Code were. Bringing a child into this world should be a means of joy for a parent, when the child is unwanted and a consequence of sexual violence, not only is it difficult to give love and care to that child but matters become worse since the mother in this case is unable – physically, emotionally and financially to provide for the baby. Utilitarian theory would thus dictate that in such cases, it would be the greater good not to have the baby at all. The rights of a woman are not only for herself but for the child, which is relying on her to survive, hence the need for appropriate policy and framework for legal abortion.

5.1.2 Kenya's current legislation does not sufficiently actualize the right to legal abortion hence limiting a woman's right to reproductive healthcare

As seen in Chapter Three, the current legal situation surrounding abortion is making legal abortion difficult to attain means that the right itself cannot be actualized and it is almost as though the right does not exist at all. By withdrawing the Guidelines and Training Curriculum, the Director effectively disabled the right to abortion for women under Article 26(4) of the Constitution,[162] causing it to be as good as though it were not there in the first place. By misinterpreting Article 26(4), not only did the Director violate a mother's right to legal abortion but also the right to the highest attainable standard of health under Article 43 of the 2010

[162] Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (2019), eKLR, 3.

Constitution. [163] The Court in the JMM case recognized that this limitation was unjustifiable and unconstitutional, but did not in its orders, mandate the Director to re-enact the Guidelines and Training Curriculum.[164] The problem of lack of information and misinterpretation thus still exists.

Furthermore, the Court in the JMM case, did not touch upon the issue of when, in cases of child sexual abuse, can the victim obtain a legal abortion: would the victim have to prove the sexual violence first (to avoid cases of abortion on demand) and how long would it take?

Without a proper policy and framework set out for abortion, the problems surrounding legal abortion will continue to exist and right to reproductive health and legal abortion of victims of child sexual abuse will continue to be undermined.

5.1.3 In order to better protect the right to reproductive healthcare of victims of child sexual abuse, Kenya should take inspiration from South African legislation.

As discussed in Chapter Four, the South African laws prove to be a better model for protection of victims for child sexual abuse because not only does the CTOPA provide for rape, incest and other forms of sexual violence as a ground for legal abortion, it also provides specifically for when and by whom the legal abortion can be done.[165] South African law goes further in the protection of the mother by stating that in emergency situations, a doctor has a legal duty to perform the abortion even if he is not state employed, while also balancing the doctors right to freedom of choice by allowing him/her to be a conscientious objector. Kenya therefore ought to take inspiration from the South African context in order to balance the right to reproductive healthcare of the mother as well as the right to life (as abortion will still be an exception, granted in certain circumstances) and freedom of choice. In using South African Law as guidance, Kenya will have effectively provided for the means to actualizing the right to legal abortion.

5.4 Recommendations

Barriers to legal abortion affect pregnant victims of child sexual abuse the most, since the physical and emotional burden they have is higher. What is therefore required are concrete measures for women to realize their rights to reproductive health and legal abortions.

[163] Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (2019), eKLR, 3.
[164] Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (2019), eKLR, 68.
[165] Sections 2- 3, *Choice on Termination of Pregnancy Act* (No. 96 of 1996).

5.4.1 Reforms to current legislation in order to actualize the right to legal abortion

In order to fully realize the right to legal abortion and reproductive health, the State and relevant ministries should not only re-enact the Guidelines and Training Manual,[166] but should also conduct regular training camps, at least once a year, where doctors, nurses and midwives are equipped with the skill to provide legal abortions.

The Penal Code should be amended in order to reflect grounds for legal abortion as provided in Article 26(4) of the 2010 Constitution, in order to avoid misinterpretation of abortion as a whole.

The Ministry of Health should also place a responsibility on health workers to provide abortion services in emergency situations at the expense of the state, just like in the South African case, and, in order to avoid a situation where abortion goes against a health workers religious and moral sentiments, provide for a conscientious objection clause – where the health worker can, without limiting the right to legal abortion of the victim, refuse to perform the abortion, but refer the victim to another worker/institution who can. The responsibility as well as the objector clause should be placed as an amendment – which Parliament should be tasked with - to the Kenya Medical Practitioners and Dentists Act.[167]

Since legal abortion involves an interpretation of the Constitution and is a matter of general public importance, the Ministry of Health should, in conjunction with the Supreme Court, provide an advisory opinion on when legal abortion services can be obtained in cases of child sexual abuse, in order to remove barriers to abortion. Alternatively, Parliament should be tasked to legislate a clear, concise and comprehensive Reproductive Healthcare Act which should cover precise grounds for legal abortion as well as the legal processes in which they can be carried out.

5.4.2 Implementation of policy in order to actualize the right to legal abortion

Abortion services for victims of child sexual abuse place a financial burden on the parent/guardian of that minor. The state should, in order to provide mechanisms for safe abortion, reserve resources specific for assisting victims of child sexual abuse.

Furthermore, there is a pressing need for support services in the form of voluntary counselling given to women before and after abortion procedures. This counselling should be given by

[166] Standards and Guidelines for reducing morbidity &mortality from unsafe abortion in Kenya (2012).
[167] *Kenya Medical Practitioners and Dentists Act* (CAP 253).

specialists who have knowledge of legal abortion and women's rights to reproductive healthcare. The Ministry of Health should mandate every hospital (public and private) to have at least one specialist for such counselling and the counselling should be state sponsored, whether it is in a public or private hospital. The counselling should – like in the South African case, help mothers in making the decision regarding abortion as well as choosing which method of abortion they would prefer and the nature and consequences of such a decision.

The State should also consider the policy task of creating awareness on family planning, contraceptives and legal abortion by providing information to the general public regarding the same.

5.4.3 General recommendations

Civil Society should continue pushing for the right to reproductive health for women, provide legal representation for women, their families as well as healthcare practitioners that provide such services in court cases if the right to legal abortion is limited. Civil society should be the leading voice in maintaining ongoing pressure and demanding the reforms from the State, as stated above. Civil Society should also campaign for the State to incorporate relevant international human rights principles, which it had placed a reservation on – such as the Maputo Protocol – in order to enhance the rights of women and, as the Maputo Protocol requires, establish comprehensive reproductive healthcare services.[168]

5.5 Limitations to the recommendations

The main limitation to the recommendations above is that most, if not all of them require state action and only happen if the state is willing to cooperate and reserve appropriate resources in order to actualize the right to legal abortion for women.

[168] *Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa,* 11 June 2003, CAB/LEG/66.6.

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