COVAW

Coalition on Violence Against Women

The Right to Choose:

A Report on the Impact of Government Reservations on Reproductive Rights under the Maputo Protocol in Kenya

COVAW
Coalition on Violence Against Women

SOLIDARITY FOR AFRICAN WOMEN'S RIGHTS
A force for freedom

MOUVEMENT DE SOLIDARITÉ POUR LES DROITS DES FEMMES AFRICAINES
Une force pour la liberté

This publication has been financially supported by the Swedish Development Cooperation through Equality Now and SOAWR.

Sida

Sweden
Sverige

Equality Now
A just world for women and girls.

PREFACE

In the discourse of human rights, the recognition and protection of women's reproductive rights stand as fundamental pillars for societal progress and equality. This examination examines the impact of the Kenyan government's reservations under Article 14(2)(c) of the Maputo Protocol – a crucial document advocating for women's rights in Africa. This study was part of one year (2023) project titled ***Securing Change: Popularizing and Strengthening the Implementation of Maputo Protocol in Kenya.*** The project had been funded by the Swedish Development Cooperation through Equality Now.

The Maputo Protocol, adopted by the African Union in 2003, is a landmark initiative aimed at advancing women's rights, with a specific focus on reproductive health. Article 14(2)(c) addresses the matter of abortion, acknowledging the delicate balance between women's autonomy over their bodies and the imperative to safeguard their health. However, the reservations made by the Kenyan government under this provision prompt critical inquiries into the realization of these rights within the country.

This analysis goes beyond legal considerations; it looks at the tangible impact on the lives of women and girls in Kenya. Reproductive rights encompass not only medical procedures but also a woman's agency to make decisions about her body, family planning, and access to comprehensive healthcare. The consequences of the reservations under Article 14(2)(c) extend beyond legal nuances, shaping women's choices, opportunities, and overall well-being.

This examination invites us to engage thoughtfully with the complexities of the Kenyan government's stance on reproductive rights. It encourages reflection on the broader implications for gender equality, bodily autonomy, and the overall welfare of women and girls in Kenya. The document provides insights from legal, social, and ethical perspectives, offering a comprehensive understanding of the issue. Through this lens, we seek to foster nuanced insights into the challenges posed by reservations under Article 14(2)(c) of the Maputo Protocol.

This study urges us to scrutinize the impact of policies on the ground, challenge assumptions, and envision a future where reproductive rights are celebrated as an integral part of human rights. May this work inspire conversations, policy reforms, and positive changes in the lived experiences of women and girls in Kenya and beyond.

Fridah Wawira Nyaga,

Fridah Wawira

Acting Executive Director,
Coalition on Violence Against Women (COVAW).

ACKNOWLEDGEMENTS

In the completion of this research into the impact of Kenyan government reservations under Article 14(2)(c) of the Maputo Protocol, COVAW extends its heartfelt gratitude to those whose support and contributions have been indispensable.

First and foremost, we express our appreciation to the organizations, scholars, activists, and experts whose insights enriched this report. Your dedication to advancing the discourse on reproductive rights is commendable, and your perspectives contributed significantly to the depth and breadth of this work.

This research study was made possible with the great coordination and support of the COVAW staff led by a dedicated project team comprising of Acting Executive Director Fridah Wawira Nyaga, and Programmes Associate Julie Diffu. COVAW greatly appreciates the consultant Joyce Majiwa who conducted the research study and report writing.

Lastly, COVAW remains grateful for the continued valued partnership with the Swedish Development Cooperation, through Equality Now and SOAWR, whose financial support made this study possible.

ABBREVIATIONS AND ACRONYMS

AIDS	Acquired Immuno-Deficiency Syndrome
ARHD	Adolescent Reproductive Health and Development
CDoH	County Department of Health
CHMT	County Health Management Team
CPR	Contraceptive Prevalence Rate
CRR	Center for Reproductive Rights
CSO	Civil Society Organization
FIDA-Kenya	Federation of Women Lawyers in Kenya
FP	Family Planning
HIV	Human Immunodeficiency Virus
HMIS	Health Management Information System
HRH	Human Resources for Health
ICPD	International Conference on Population and Development
KDHS	Kenya Demographic and Health Survey
KEPH	Kenya Essential Package for Health
KHIS	Kenya Health Information System
KHP	Kenya Health Policy 2014-30
KOGs	Kenya Obstetrical and Gynaecological Society
KHRC	Kenya Human Rights Commission
KNBS	Kenya National Bureau of Statistics
M&E	Monitoring and Evaluation
MCPR	Modern Contraceptive Prevalence Rate
MDGs	Millennium Development Goals
MERL	Monitoring, Evaluation, Research and Learning
MOH	Ministry of Health
NACADA	National Authority for the Campaign against Alcohol and Drug Abuse
NASCOP	National AIDS and STD Control Programme
NCK	Nursing Council of Kenya
NCPD	National Council for Population Development

NGO	Non-Governmental Organization
PAC	Post Abortion Care
SGBV	Sexual and Gender Based Violence
STIs	Sexually Transmitted Infections
UHC	Universal Health Coverage
UNFPA	United Nations Population Fund
UNICEF	United Nations International Children's Emergency Fund

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Impact of Kenyan Government Reservations under Article 14(2)(c) of the Maputo Protocol on Women's Rights and Reproductive Healthcare Access

Introduction: This study examines the impact of the Kenyan Government's reservations to Article 14(2)(c) of the Maputo Protocol, focusing on women's rights and reproductive healthcare access within the country. Kenya ratified the Maputo Protocol in 2010 but placed a reservation citing inconsistencies with domestic laws.

Key Findings:

Legal Framework and Domestic Alignment: Kenya's reservations reflect a tension between international human rights obligations and domestic legal constraints, particularly Article 26(4) of the Kenyan Constitution. The domestic legal framework, including the Health Act, Penal Code, and Article 26(4) of the Kenyan Constitution, lacks internal coherence and alignment with the Maputo Protocol's objectives. This leads to inconsistencies, a lack of clarity on permissible abortion circumstances, and a tension between international human rights obligations and domestic legal constraints. The overall lack of clarity hinders women's access to safe abortion services.

Limitations on Reproductive Rights: The reservation has the effect of restricting women's reproductive rights, including in cases of sexual assault, rape, incest, or when a pregnancy endangers a woman's physical or mental health.

> **women undergoing unsafe abortions may encounter severe complications, such as infections, haemorrhages, and organ damage, which can contribute to enduring health issues or disabilities.**

Healthcare Access and Consequences: Limited access to safe abortion services due to reservations may lead some women to resort to unsafe methods, endangering their health and lives.

Psychological and Emotional Impact: Beyond the physical health implications, unsafe abortion can have profound psychological effects on women, impacting their overall well-being. Restrictive abortion policies can contribute to stigma, potentially leading to mental health challenges for women seeking abortions.

Unrealized Impact on Unsafe Abortions: Despite the constitutional provision permitting abortion in specific situations, the anticipated reduction in unsafe abortions has not materialized.

High Mortality and Morbidity Rates: The prevalence of ambiguous legal frameworks restricting safe abortion has resulted in a rise in maternal mortality rates. This increase is attributed to complications stemming from unsafe procedures. Moreover, women undergoing unsafe abortions may encounter severe complications, such as infections, haemorrhages, and organ damage, which can contribute to enduring health issues or disabilities. Additionally, the fear of legal consequences may cause women experiencing complications to postpone seeking medical assistance, exacerbating the severity of health outcomes.

Implementation Gaps in Health Laws and Policies: The constitutional provisions and the existing health laws and policies supporting reproductive health and women's rights face challenges in implementation. The reinforcement and enforcement of these policies are essential to ensure access to essential reproductive health services, including safe abortion procedures where legally permissible. The failure to adequately implement constitutional provisions related to abortion has fostered enduring stigma and misconceptions, hampering women's access to safe procedures.

Continued Application of Penal Code Sections 158-160, 214 and 240: The persistent application of Penal Code Sections **158-160, 214 and 240** contributes to issues surrounding unsafe abortions, revealing a lack of harmony between constitutional provisions and existing Provisions of the Penal Code.

Impact on the Health Sector: Healthcare providers' reluctance to offer comprehensive services due to the fear of legal repercussions has resulted in suboptimal healthcare for women seeking lawful abortion services. Legal charges are still based on pre-2010 constitutional provisions, indicating a failure to adapt the legal framework to the new constitutional landscape. While courts are asserting constitutional protection, challenges persist.

Social and Economic Implications: Deaths and injuries resulting from unsafe abortion have profound effects on individuals, families and communities, both emotionally and economically. The loss of a family member or the burden of caring for someone with long-term health issues can destabilize households. Families dealing with the aftermath of unsafe abortion may be trapped in a cycle of poverty, as healthcare costs and lost productivity affect their economic stability while the number of cases related to unsafe abortion can strain healthcare facilities, diverting resources from other critical healthcare needs.

Violation of Human Rights and Social Justice: Denying access to safe abortion can be viewed as a violation of women's human rights, particularly the right to life, health, and freedom from cruel, inhuman, or degrading treatment. The negative consequences of unsafe abortion often disproportionately affect marginalized and economically disadvantaged populations, exacerbating existing social inequalities.

Clear Policies, Regulations, and Education: The absence of clear policies and regulations exacerbates challenges in effectively implementing abortion laws. Widespread education on constitutional provisions is crucial to dispel misperceptions and ensure proper understanding.

Legal Challenges and Advocacy: Civil society organizations and advocates have actively engaged in legal challenges and advocacy efforts to address the impact of reservations, seeking to protect and promote women's rights.

International Scrutiny: Kenya's reservations have drawn international scrutiny, prompting debates about compatibility of the health laws with established human rights norms.

Challenges and Opportunities: The reservations pose challenges but also stimulate conversations about potential legal and policy reforms to align domestic laws with international standards.

Mitigating Measures: Kenya has taken measures to mitigate the impact of the reservations, including the development of Safe Abortion Guidelines and Reproductive Health Policy 2022-2030.

Conclusion: This study enhances understanding of the complexities of the impact of Kenya's reservation under Article 14(2)(c) of the Maputo Protocol on women's reproductive health and rights. It underscores the need for legal reforms, improved healthcare access, education, empowerment, and international cooperation. The future of women's rights in Kenya hinges on collective action, cooperation, and unwavering dedication to gender equality, making Kenya an example of positive change in the region. To address persistent uncertainties surrounding Kenya's abortion laws and policies, it is crucial to remove the reservation under Article 14 (2) (c) of the Maputo Protocol, reform the penal code, establish explicit implementation guidelines and regulations, and encourage widespread education on constitutional provisions.

The future of women's rights in Kenya hinges on collective action, cooperation, and unwavering dedication to gender equality, making Kenya an example of positive change in the region.

Recommendations:

1. **Reform and Align Legal Frameworks:** Urgently undertake comprehensive legal reforms to align domestic laws, particularly the Penal Code, with constitutional provisions on abortion rights. Review update and harmonize legislation, eliminating inconsistencies, and ensuring legal clarity to safeguard women's reproductive rights and health.

2. **Remove Reservations under Article 14 (2) (c):** Set in motion the process for the removal of reservations under Article 14 (2) (c) to eliminate barriers hindering women's access to safe abortion services.

3. **Enact a comprehensive Reproductive Health law** to pave the way for clear and comprehensive policies and regulations that guide the implementation of abortion laws, ensuring healthcare providers, legal professionals, and the public have a clear understanding of the legal landscape.

4. **Provide Adequate Resources for Healthcare Access and Provider Training:** Allocate resources to improve healthcare access for women seeking lawful abortion services, addressing the challenges posed by providers' reluctance. Allocate resources to ongoing training and sensitization of healthcare professionals to ensure they are well-informed about and supportive of constitutional provisions related to abortion.

5. **Invest in Comprehensive Education Programs:** Allocate funds for nationwide educational campaigns aimed at dispelling misconceptions and reducing the stigma surrounding abortion. Allocate funds for the implementation of mandatory educational programs in schools and communities to increase awareness of constitutional provisions, reproductive rights, and the importance of safe and legal abortion services.

6. **Ensure the Implementation of the Constitution and the Existing Health Law and Policies:** Strengthen and enforce the implementation of existing health policies that support reproductive health and women's rights. This involves ensuring that healthcare facilities are equipped and staffed to provide essential reproductive health services, including safe abortion procedures where legally permissible.

7. **Invest in Healthcare Infrastructure:** Substantial investment is required in Kenya's healthcare infrastructure to ensure facilities are adequately equipped and staffed to provide safe and legal abortion services.

These recommendations emphasize the need for parliamentary action in reforming laws, removing barriers, implementing clear policies, improving healthcare access, and investing in education to create a supportive environment for women's reproductive rights in Kenya.

I. INTRODUCTION

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa commonly known as the Maputo Protocol is a regional human rights instrument specifically dedicated to promoting and protecting the rights of women and girls on the African continent. The Maputo Protocol represents a significant milestone in the ongoing global effort to achieve gender equality and protect the rights of women and girls.

The Maputo Protocol provides a comprehensive framework for African countries to advance women's rights, eliminate discrimination, and empower women and girls across the continent. Maputo Protocol represents a significant step towards achieving gender equality in Africa and addressing the unique challenges faced by African women and girls. It reflects the commitment of African states to promote and protect the rights of women as an essential component of human rights and development in the region. It is one of the most comprehensive and progressive international agreements addressing gender equality and women's rights in Africa. The Maputo Protocol's impact is far-reaching, as it has influenced legal reforms, increased awareness about women's rights, and held governments accountable. It serves as an important framework for African countries to work towards gender equality and address the unique challenges faced by women and girls in the region.

"The Maputo Protocol's impact is far-reaching, as it has influenced legal reforms, increased awareness about women's rights, and held governments accountable.

The Maputo Protocol was adopted on July 11, 2003, during the 2nd Ordinary Session of the Assembly of the African Union (AU) held in Maputo, Mozambique. It entered into force on November 25, 2005, after being ratified by the required number of AU member states.

The primary purpose of the Maputo Protocol is to address various forms of discrimination, violence, and harmful practices against women and girls in Africa. Its key objectives include:

1. Promoting and protecting women's rights and gender equality.
2. Eliminating discrimination against women and ensuring their full and equal participation in all aspects of life.
3. Preventing and addressing gender-based violence, including domestic violence and harmful traditional practices.

4. Promoting women's sexual and reproductive health and rights.
5. Safeguarding the rights of women in conflict and post-conflict situations.
6. Promoting and protecting the rights of women in marriage and family life.
7. Enhancing women's access to justice and legal remedies.

The Key Provisions: The Maputo Protocol contains a wide range of provisions that address various aspects of women's rights and gender equality, including:

- Protection against gender-based violence and discrimination.
- Protection of women's rights in conflict and post-conflict situations.
- The right to life, integrity, and security of the person.
- The right to participate in political and decision-making processes.
- Rights related to marriage, divorce, and inheritance.
- Prohibition of harmful practices such as female genital mutilation and child marriage.
- Economic and social rights, including property rights and access to education and healthcare.[1]

To ensure compliance with the Protocol, the Maputo Protocol adopts the African Commission on Human and Peoples' Rights as the monitoring body responsible for receiving state reports, conducting investigations, and addressing violations of women's rights under the Protocol.

Kenya signed the Maputo Protocol on February 11, 2004, and ratified it on October 27, 2010, with reservations on Articles 10 (3) and 14 (2) (c). According to the Constitution of Kenya, any treaty or convention ratified by the country becomes an integral part of its legal framework. The Maputo Protocol is therefore incorporated into the laws of Kenya by virtue of Article 2(6) of the 2010 Constitution. This means that Kenya is legally bound to uphold the rights of women and girls as outlined in the Protocol except with regard to the reservations on Articles 10 (3) and 14 (2) (c).

Objectives and Scope of the Study

1. To assess and analyze the specific reservations placed by the Kenyan government under Article 14(2)(c) of the Maputo Protocol and the rationale behind these reservations.

---

1 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi4y4qw6dOBAxV1zwIHHbmFDfcQFnoECBQQAQ&url=https%3A%2F%2Fau.int%2Fen%2Ftreaties%2Fprotocol-african-charter-human-and-peoples-rights-rights-women-africa&usg=AOvVaw2A1CNIJr60RLPaYHPc13fW&opi=89978449

2. To examine the legal and constitutional framework within Kenya that influences and interacts with these reservations, particularly focusing on Article 26(4) of the Constitution, which permits abortion under specific circumstances.

3. To evaluate the impact of Kenya's reservations on the implementation of the Maputo Protocol, specifically in relation to women's reproductive rights and access to safe and legal abortion services.

4. To explore any legal, policy, or social developments within Kenya regarding women's reproductive health and rights, as well as any related challenges or controversies that have arisen since Kenya acceded to the Protocol.

The study provides a comprehensive analysis of Kenya's reservations to Article 14(2)(c) and its impact within the context of women's reproductive rights and the Maputo Protocol. It aims to contribute to the understanding of the legal, policy, and social dynamics surrounding this issue and shed light on the broader implications for women's rights in Kenya.

Background and Context

The Coalition on Violence Against Women (COVAW) is dedicated to addressing violations against women and girls, particularly Sexual and Gender-Based Violence (SGBV). Focused on creating a society where women and girls enjoy equal rights and thrive in safe environments, COVAW strategic focus areas are Access to Justice, Access to comprehensive SGBV and Sexual and Reproductive Health Rights (SRHR) services, Women's Economic Empowerment, Women's Leadership Development, and Institutional Development. COVAW's interventions target societal norms, laws, policies, and practices influencing the well-being of women and girls. Its efforts involve implementing gender progressive practices, developing regulatory frameworks, and engaging with stakeholders to improve responses for SGBV and life-saving SRHR services.

The Maputo Protocol, an extension of the African Charter on Human and People's Rights, addresses women's rights. While Kenya has signed and ratified the protocol, implementation gaps persist.

Under the "Securing Change" project, funded by Equality Now, COVAW seeks to promote and strengthen the implementation of the Maputo Protocol in Kenya. As part of this initiative, COVAW embarked on research on the impact of Kenyan government reservations under Article 14(2)(c) of the Maputo Protocol on the rights of women and girls. The research findings will inform advocacy and action.

Historical Context

Abortion practices predate the colonial era. However, during the period of British colonial rule, stringent abortion restrictions were imposed, many of which persisted after Kenya achieved independence in 1963. Kenya inherited a legal framework concerning abortion that places a greater emphasis on safeguarding women's health and lives from Britain[2].

2 A Decade of Existence: Tracking Implementation of Article 26(4) of the Constitution.

The provisions related to abortion were and continue to be primarily located within the Penal Code[3], specifically under sections addressing "offences against morality" (Chapter XV, sections 158 to 160) and "offences connected with murder and suicide" (Chapter XXI, sections 221 to 228). The penal code made it illegal to engage in the "unlawful administration" or "unlawful supply or procurement" of substances, force, or means with the intent of "unlawfully… procuring the miscarriage of a woman." However, the penal code did not offer a clear definition of circumstances under which abortion would be considered lawful.

These restrictive abortion laws had significant consequences for women's reproductive rights and their access to safe abortion services. Women often resort to unsafe and clandestine abortions (Unsafe abortion is defined by WHO as a procedure meant to terminate an unintended pregnancy that is performed by individuals without the necessary skills, or in an environment that does not conform to the minimum medical standards, or both), leading to high maternal mortality rates and severe health complications[4].

Socially, while the increased participation of girls in education and the delayed age of marriage signify positive societal advancements, the concurrent challenges of unsafe sexual practices, unintended pregnancies, perilous abortions, premature childbirth, and heightened HIV risks underscore the pressing need for improved access to essential reproductive healthcare services. Failure to address these issues not only compromised the health and well-being of women and girls but also hampered the nation's overall progress towards gender equality and public health.

In the 1980s and 90s, especially concerning abortion, data from the Kenyatta National Hospital indicated that "incomplete abortions" accounted for over half of all gynaecological admissions[5]. Unsafe abortion practices in Kenya were driven by numerous factors, including the restrictive legal environment, inadequate services, stigma associated with terminating pregnancies, fears of loss of privacy, and a lack of education and awareness about reproductive health and contraceptive options in society to mention but a few. When in need, women and girls resorted to

Unsafe abortion is defined by WHO as a procedure meant to terminate an unintended pregnancy that is performed by individuals without the necessary skills, or in an environment that does not conform to the minimum medical standards, or both, leading to high maternal mortality rates and severe health complications.

3 [REV 2012] Penal Code CAP 63 of the Laws of Kenya https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiO9Ie86tOBAxV9gf0HHVjRA_gQFnoECAYQAQ&url=https%3A%2F%2Fwww.ilo.org%2Fdyn%2Fnatlex%2Fdocs%2FELECTRONIC%2F28595%2F115477%2FF-857725769%2FKEN28595.pdf&usg=AOvVaw1-N3v915BXVLK.osC1CYvRM&opi=89978449

4 Center for Reproductive Rights, In Harm's Way: The Impact of Kenya's Restrictive Abortion Law (2010),

5 Center for Reproductive Rights A Decade of Existence: Tracking Implementation of Article 26(4) of the Constitution. CRR 2020

seeking clandestine abortions in private clinics, midwives, or herbalists, or attempted self-induced abortions[6].

During the early 1990s, there was a growing resistance in Kenya against the education of adolescents on sexual reproductive health, spearheaded by religious and political leaders. Both Catholic and Muslim religious figures led public protests in August 1995. The President then Daniel Arap Moi initially supported these movements but later shifted his stance in 1999, endorsing the promotion of contraception in response to the HIV/AIDS epidemic in Kenya[7]. This shift sparked renewed public debates and discussions on contraception and sexual reproductive health in the country.

The National Assessment of the Magnitude and Consequences of Unsafe Abortion in Kenya, conducted in 2003, found that over 300,000 women underwent unsafe abortions every year. Maternal mortality rates were alarmingly high in Kenya, primarily due to unsafe abortions, resulting in around 2,000 women losing their lives each year[8]. Despite the country's commitment to reducing maternal deaths, there was a lack of strong political support. Debate on abortion laws had been ongoing in Kenya, with some advocating for more lenient regulations while others vehemently opposed any changes, particularly religious leaders. In 2004, a proposed constitution included stringent anti-abortion clauses, sparking further controversy. The issue of girls leaving school due to unplanned pregnancies exacerbated the problem. In a contentious case, Dr. John Nyamu, a prominent obstetrician-gynaecologist and 2 nurses, faced charges of murder[9] after the discovery of 15 foetuses near a stream in Nairobi. After this incident, it was common place to find foetuses strewn in various places in Nairobi and other major cities. Religious fundamentalism played a significant role in opposing reproductive health measures up until the time of the passing of the new Constitution in 2010. Efforts to address these challenges included drafting intervention papers and forming a national reproductive health task force which included the Kenya Medical Association and the Kenyan Society of Obstetricians and Gynaecologists.

The 2008–2009 Kenya Demographic and Health Survey[10] documented a maternal mortality ratio of 488 deaths per 100,000 live births, with a significant number of these fatalities linked to complications arising from unsafe abortions.

Complications arising after abortions and delays in seeking medical care contributed significantly to mortality rates in Kenya. More than 75% of post-abortion patients suffered from moderate to severe health issues. Studies show that adolescents and young adults aged 10-19 years experience the longest delays in seeking post-abortion care, and these age groups have a higher incidence of abortion-related complications. Dangerous abortion

---

6 Center for Reproductive Rights, In Harm's Way: The Impact of Kenya's Restrictive Abortion Law (2010), page 32 [hereinafter CRR: In Harm's Way (2010)]

7 Oronje, Rose N (2013). "The Kenyan national response to internationally agreed sexual and reproductive health and rights goals: a case study of three policies". *Reproductive Health Matters*. 21 (42): 151–160.

8 The National Assessment of the Magnitude and Consequences of Unsafe Abortion in Kenya, conducted in 2003, found that over 300,000 women underwent unsafe abortions every year. Over 20,000 women with complications of unsafe abortion were admitted to public hospitals, of which over 2,000 women are estimated to die annually.

9 Republic v John Nyamu & 2 others, High Court Criminal Case No. 81 of 2004 [2005] eKLR https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiKn_aT7s-BAxWVnf0HHSxEDU0QFnoECA0QAw&url=http%3A%2F%2Fkenyalaw.org%2Fcaselaw%2Fcases%2Fview%2F11246%23%3A~%3Atext%3DCRIMINAL%2520CASE%252081%2520OF%25202004%2520%252D%2520Kenya%2520Law&usg=AOvVaw0oxUAoXQrOx5M-xSK6aglZ&opi=89978449

10 2008–2009 Kenya Demographic and Health Survey

practices led to complications such as localized peritonitis and sepsis, maternal deaths remained a significant consequence of unsafe abortions.

Section 240 of the penal code, categorized under "offences endangering life and health", included an implicit exception. It stated that an individual would not be held criminally responsible for performing a surgical operation, provided it was done in good faith, with reasonable care and skill, and for the benefit of the patient or to preserve the life of an unborn child, if the operation was deemed reasonable given the patient's condition and the surrounding circumstances. This allowed for surgical procedures on an unborn child when necessary to save the mother's life, potentially excluding other medical abortion methods.

The legal foundation for this approach was drawn from the 1938 UK case of Rex v. Bourne[11], where a surgeon faced charges for performing an abortion via surgery on a rape victim. The court ruled the surgery as lawful since it protected the physical and mental health of the girl, a precedent later upheld in Kenya's Mehar Singh Bansal v. R (1959) case[12]. The legal and policy landscape regarding abortion in Kenya was thus marked by inconsistency and uncertainty.

With more girls staying in school and the age of marriage increasing[13], the insufficient access to family planning and abortion care in Kenya posed a significant risk[14]. This situation resulted in the loss of many young women due to unsafe sexual practices, unwanted pregnancies, unsafe abortions, early childbirth, and increased vulnerability to HIV infection.

Medical organizations like the Kenya Obstetrical and Gynaecological Society (KOGS), the National Nurses Association of Kenya and women's rights organizations, human rights advocates, took a firm position on abortion as part of their broader commitment to advancing safe motherhood and reducing maternal mortality rates. Initially, the efforts to address the issue of unsafe abortion primarily focused on providing post-abortion care (PAC) as a life-saving measure. However, this approach created a somewhat awkward situation where women and girls often resorted to inducing abortions on their own, resulting in self-inflicted injuries before seeking medical help at hospitals for PAC.

With regard to policy, the Ministry of Health (MoH) in an attempt to offer guidance to healthcare professionals, introduced two crucial documents: -the Medical Practitioners and Dentists Board Code of Professional Conduct and Discipline (MPDB Code) and the 2004 National Guidelines on Medical Management of Sexual Violence. While these documents established certain standards, they also imposed restrictions by limiting authorized abortion providers to medical doctors and gynaecologists. This exclusionary approach overlooked the significant role played by clinical officers and nurses, who often serve as primary healthcare providers, especially in rural areas, and receive training in post-abortion care (PAC).

---

11 https://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/united_kingdom_1938_bourne.pdf

12 [1959] E.A.. C.A.. MEHAR SINGH BANSEL v. R.

13 Children Act passed in 2003 put the Age of Marriage at 18 years.

14 Center for Reproductive Rights and Federation of Women Lawyers – Kenya, *Failure to Deliver: Violations of Women's Human Rights in Kenyan Health Facilities* 23 (2007)

Additionally, the guidelines mandated consultation with senior colleagues, potentially including a gynaecologist and a psychiatrist, which created access barriers for women seeking abortion services. The language used in the guidelines implied the necessity of specialized expertise for performing abortions, which discouraged non-specialized doctors from providing these services. Furthermore, the 2004 National Guidelines introduced the requirement for psychiatric evaluation and recommendations in cases of pregnancies resulting from rape. Varying interpretations of MoH guidance contributed to inconsistencies in the curricula followed by health professionals, further complicating the landscape of abortion care. It was commonplace, however, that post-abortion care alone could not fully eliminate the issue of unsafe abortions. To achieve this goal, there was a pressing need to reconsider and reform restrictive laws on abortion. The efforts made to change these laws, in Kenya, were organized in opposition to legal reform. This led to the arrest of three healthcare providers.

Advocacy for improved abortion laws gained momentum in the country and went in tandem with the quest for Constitutional Review which provided a window for law reform in the country. Coincidentally, this was also the period of advocacy for ratification of the Maputo Protocol in Kenya. Kenya ratified Maputo Protocol in the same year that the Constitution of 2010 was promulgated. It was time for Kenya to make a commitment to eliminate deaths and disabilities caused by unsafe abortions while respecting women's rights to make decisions regarding the number and timing of their children.

The 2010 Constitution of Kenya contains explicit provisions that safeguard the right to health, which includes reproductive health care. These provisions also allow for the termination of a pregnancy under certain circumstances, such as when emergency treatment is required when the life or health of the pregnant individual is in jeopardy, or as permitted by other written laws.

Advocacy for improved abortion laws gained momentum in the country and went in tandem with the quest for Constitutional Review which provided a window for law reform in the country.

However, in contradiction to the protective measures outlined in the Constitution, access to safe reproductive health care remained limited within the country. This is because the laws pertaining to abortion continued to be housed in the penal code, under "offences against morality" and "offences connected with murder and suicide." Kenya's Penal Code dates back to 1963 and continues to classify all forms of abortion as criminal. This legal discrepancy has resulted in confusion within the populace and the medical community regarding the legality of providing abortion services and has limited the availability of accurate information for individuals in Kenya seeking abortion and reproductive health care.

At the regional level, Africa has shouldered a disproportionately high burden of reproductive health issues worldwide, with unsafe abortion being a particularly overlooked concern. Unsafe abortion in Africa was shrouded in stigma and silence until the International Conference on Population and Development in 1994. Each year, up to five million unsafe abortions are performed in Africa, with a disproportionate impact on young women. The lack of attention to unsafe abortion in Africa prior to the International Conference on Population and Development (ICPD) in 1994 can be attributed to the stigma and silence surrounding the issue. This also explains why unsafe abortion has not received significant attention from most national governments, communities, and funding organizations.

In the decade following the International Conference on Population and Development (ICPD) and the Fourth World Conference on Women in Beijing, several transformations have occurred. These include changes in the policy environment, advancements in information and safe technology for abortion care, skill enhancement, and the increasing status of women in Africa. These factors are driving a dynamic process that offers Africa the opportunity to follow the developed world in reducing and eventually eliminating deaths and health complications related to unsafe abortion. In addition, there was a growing shift towards legal reform in Africa. This shift has led to greater provision of legal abortion services.

However, little effort has been made to reform the colonial-era abortion laws in the region and to provide post-abortion care. While post-abortion care has been instrumental in saving lives, it alone cannot eliminate unsafe abortion. The ambiguity in the abortion laws needs to be addressed. In Kenya, there has been organized opposition to reforming the law on abortion even as regional bodies, including the African Union, have taken a stance on abortion as part of broader efforts to improve maternal health and reduce maternal mortality. Advocacy for improved abortion laws is gaining momentum across the region.

Article 14(2)(c) of the Maputo Protocol allows for medical abortion in cases of sexual assault, rape, incest, and various threats to the mental or physical health of the mother or foetus. Kenya's reservation under this article highlights the tension that can arise when a state seeks to balance its international treaty commitments, such as the Maputo Protocol, with the national legal framework. This reservation underscores the complexity of aligning international human rights obligations with domestic legal systems and demonstrates the need for further exploration

Article 14(2)(c) of the Maputo Protocol allows for medical abortion in cases of sexual assault, rape, incest, and various threats to the mental or physical health of the mother or foetus.

of the impact of the reservation on women's rights and access to healthcare especially access to reproductive health in Kenya.

This study emphasizes the importance of protecting women and girl's reproductive health and rights by lifting the reservation made by Kenya under Article 14(2)(c) of the Maputo Protocol and making the Article part of the country's law thus allowing medical abortion in specific situations. This should include cases of sexual assault, rape, incest, and when there are threats to the mental or physical health of the pregnant woman or the life of the mother or foetus as enshrined in the Maputo Protocol's commitment to safeguarding women's health and well-being.

Article 14(2)(c) of the Maputo Protocol and its significance

Article 14(2)(c) of the Maputo Protocol holds significant importance in recognizing and safeguarding reproductive rights while promoting gender equality in Africa. The provision recognizes reproductive rights as a fundamental human right, encapsulating principles critical for the continent.

Acknowledgement of Reproductive Rights: Article 14(2)(c) is crucial in recognizing and protecting reproductive rights in Africa. These rights include family planning, sexual health, and the autonomy to make informed decisions about one's reproductive life. This recognition is essential for ensuring women's agency and their right to make decisions about their bodies and lives.

Emphasis on Gender Equality: This provision strongly emphasizes gender equality in matters related to reproductive rights. It asserts that women should have equal rights and opportunities in decisions about family size, child spacing, and access to reproductive healthcare services. Gender equality becomes a foundational principle, protecting women from discrimination and harmful reproductive practices.

Non-Discrimination Principle: Article 14(2)(c) highlights the principle of non-discrimination, emphasizing that reproductive rights should be enjoyed without bias based on gender, race, ethnicity, or socioeconomic status. This inclusivity is vital to ensure that women from vulnerable backgrounds have equal access to reproductive healthcare and information.

Fundamental Human Rights Aspect: By designating reproductive rights as fundamental human rights, Article 14(2)(c) reinforces that these rights are inherent to all individuals. This obligates African governments to protect, respect, and fulfil these rights, providing a legal basis for individuals to assert their reproductive rights in cases of violation.

Legal Framework Support: Functioning as a strong legal framework, Article 14(2)(c) empowers African countries to create and implement policies and laws that advance reproductive rights and gender equality. It encourages states to create an environment facilitating women in exercising their reproductive choices, accessing healthcare services, and being shielded from discrimination and harmful practices.

Alignment with International Standards: In alignment with international human rights standards and commitments, such as the Convention on the Elimination of All Forms of

Discrimination Against Women (CEDAW) and the Sustainable Development Goals (SDGs), Article 14(2)(c) aligns Africa with global frameworks advocating for gender equality and widespread access to sexual and reproductive health services.

Article 14(2)(c) is a key driver in advancing reproductive health and rights while upholding the principles of gender equality and non-discrimination. Establishing these rights as fundamental human rights sets a formal foundation for governments, civil society organizations, and individuals to champion and ensure the realization of these rights across the African continent.

The Maputo Protocol is thus a crucial instrument for advancing women's rights and reproductive health across Africa. Article 14(2)(c) specifically aims to facilitate women's access to safe and legal abortion services. However, the interpretation of the Protocol, especially in the context of Kenya's reservations under Article 14(2)(c), is under intense scrutiny from various stakeholders, including legal experts, healthcare practitioners, and human rights activists.

Methodology

The methodology used for assessing the impact of Kenyan reservations, particularly its reservation to Article 14(2)(c) of the Maputo Protocol, involves a systematic approach to data collection, analysis, and interpretation. Below, is the outline of a research methodology that encompasses data sources, data collection methods, data analysis techniques, and potential limitations:

Literature Review: The research begins with an extensive literature review to understand the impact of Kenya's reservation, reproductive rights, and related topics.

Research Objectives: Clear research objectives are defined to guide the study. These pertain to the impact of the reservation on women's healthcare access, legal challenges, policy implications, and the broader human rights context.

Data Sources: Primary and secondary data sources are identified. Primary data sources include interviews and legal documents. Secondary data sources encompass academic articles, government reports, legal decisions, and human rights reports.

> **"The research methodology for assessing the impact of Kenyan reservations was however a multifaceted approach that combined qualitative and quantitative data collection and analysis.**

Data Collection Methods:

- **Document Analysis:** Researchers analyze legal documents, court cases, government reports, and international human rights instruments to gather information on Kenya's reservation and its impact.

- **Interviews:** Interviews with key stakeholders, legal experts, healthcare professionals, civil society representatives, and women's rights activists. These interviews provide insights into the practical implications of the reservation.

Data Analysis Techniques: Qualitative Analysis: Qualitative data from interviews and document analysis are subjected to thematic analysis. Key themes, patterns, and perspectives related to the impact of the reservation are identified and canalized.

Ethical Considerations: Ethical considerations are taken into account, especially when conducting interviews and informed consent was ensured.

Limitations of the Methodology:

- **Data Availability:** One potential limitation is the availability of data, particularly for assessing the reservation's long-term impact.
- **Bias and Subjectivity:** Qualitative data analysis may be subject to researcher bias and subjectivity, which can influence the interpretation of interview responses and document analysis.
- **Generalizability:** Findings may have limited generalizability beyond the specific context of Kenya. The impact of the reservation may vary in different countries with different legal frameworks and cultural norms.
- **Temporal Factors:** Assessing the reservation's long-term impact may have been constrained by the timeframe of the study, as some consequences may manifest over years or decades.
- **Time Constraints:** Conducting interviews and data analysis can be time and resource-intensive. Limited time and resources may have impacted the scope and depth of the study.

The research methodology for assessing the impact of Kenyan reservations was however a multifaceted approach that combined qualitative and quantitative data collection and analysis. While it provides valuable insights into the reservation's impact, the study is mindful of potential limitations related to data availability, bias, generalizability, and resource constraints.

The study looks at the period after Kenya ratified the Maputo protocol in 2010 although reference is made to the earlier period for historical context and perspective.

2. LITERATURE REVIEW

The Maputo Protocol is a crucial instrument for advancing women's rights and reproductive health across Africa. Article 14(2)(c) specifically aims to facilitate women's access to safe and legal abortion services. However, the interpretation of the Protocol, especially in the context of Kenya's reservations under Article 14(2)(c), has been under intense scrutiny from various stakeholders, including legal experts, healthcare practitioners, and human rights activists.

Unsafe abortion and its complications are a major problem in Kenya, endangering the lives of many women and girls. The practice of unsafe abortion is so rampant that the need for safe abortion to reduce this problem is urgent. For example, between 2015 - 2019, there were a total of 2,380,000 pregnancies annually. Of these, 1,450,000 pregnancies were unintended and 551,000 ended in abortion.[15]

In 2012, a survey conducted by the Ministry of Health, in collaboration with the African Population and Health Research Center and IPSAS, revealed that there were 464,000 induced abortions during that year[16]. This translates to an abortion rate of 48 per 1,000 women aged 15–49 and an abortion ratio of 30 per 100 live births. A closer examination of this survey indicates that out of the reported abortions in 2012, approximately 25%, or 116,000 cases, were treated for complications. Among women who experienced complications from abortions, 87,000 cases were categorized as moderate to severe, and 40,000 of these complications were reported by women who were 19 years old or younger.

“In 2012, a survey conducted by the Ministry of Health, in collaboration with the African Population and Health Research Center and IPSAS, revealed that there were 464,000 induced abortions during that year.

Hospital-based data from the years 2004 to 2012 also suggests an increase in the estimated number of induced abortions in Kenya. Furthermore, it was found that nearly half (49%) of all pregnancies in Kenya were unintended, with 41% of these unintended pregnancies resulting in abortions. According to estimates by Marie Stopes[17] International, approximately 2,600 women lose their lives each year due to unsafe abortions, amounting

15 https://www.guttmacher.org/regions/africa/kenya#:~:text=In%20Kenya%20in%202015–2019,and%20551%2C000%20ended%20in%20abortion.

16 Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study (Nairobi, Kenya: African Population and Health Research Center, Ministry of Health, Kenya, Ipas, and Guttmacher Institute 2013) available at https://www.guttmacher.org/sites/default/file s/report pdf/abortion-in-kenya.pdf [hereinafter Incidence and Complications of Unsafe Abortions in Kenya (2012)].

17 Marie Stopes is one of Kenya's biggest private providers of legal, affordable post-abortive care, and abortions when the life of the woman is at risk

to an average of seven deaths daily. Additionally, nearly 120,000 women are hospitalized annually due to complications arising from abortions. The publication of these statistics in 2018 and the tragic death of activist *Caroline Mwatha* in February 2019 as a result of an unsafe abortion drew significant attention to the abortion debate in 2019[18].

A study carried out in 2013 by the African Population and Health Research Center (APHRC) in conjunction with the Ministry of Health unveiled alarming statistics concerning unsafe abortions in 2012[19], revealed that approximately 120,000 women sought medical attention for complications arising from unsafe abortions during that year, highlighting the grave issue surrounding unsafe pregnancy termination. Furthermore, the report disclosed that nearly 500,000 Kenyan citizens underwent unsafe abortions in 2012 alone, as per findings presented in a joint report by the government and a non-governmental organization (NGO). These figures equate to a high national abortion rate of 48 per 1,000 women aged between 15 and 49. The report also indicated that nearly all of these abortions took place in clandestine clinics, major hospitals where they were disguised as other medical treatments, or through other perilous procedures, many of which resulted from unintended pregnancies.

According to the 2014 Kenya Demographic Health Survey[20], unsafe abortions accounted for a staggering 35 per cent of maternal deaths that year, a rate far above the global average of 13 per cent. Additionally, the African Population and Health Research Center has highlighted the substantial financial burden placed on the healthcare system due to the illegality of abortion. In 2016, Kenyan public health centers spent $6.3 million treating complications resulting from unsafe abortion procedures[21]. These statistics underscore the urgent need for women and girls to have access not only to safe abortion services but also to comprehensive sex education and contraception. Unfortunately, it is very intriguing that the 2022 Kenya Demographic Health Survey did not have clear statistics on unsafe abortion or its impact. This can be regarded as a pushback and there is a greater need to provide statistics as according to the Kenya Medical Association, unsafe abortion is the third leading cause of maternal mortality. Ultimately, the distressing number of lives lost among women and girls due to unsafe abortions should serve as a wake-up call to both Kenyan citizens and the government. It is a compelling argument in favour of advocating for the removal of the reservation under Article 14 (2)(c) of the Maputo Protocol and creating an environment for safe and legal abortion services to protect the health and well-being of women and girls across the country.

UNFPA report in 2017[22] from Kenya reveals that a significant number of adolescent girls experienced pregnancies in the period spanning from July 2016 to June 2017. To provide more precise figures, among these pregnancies, 28,932 involved girls aged 10 to 14, while 349,465 were among girls aged 15 to 19. The report underscores the need for the Ministry of Health to take stronger measures to prevent teenage pregnancies and their associated

---

18 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiJosuoxdWBAxWshf0HHe9uAFMQFnoECA0QAQ&url=https%3A%2F%2Fnews.trust.org%2Fitem%2F20190215172429-7vymk&usg=AOvVaw2LbRxPMbsJAxrtv4Elh1vJ&opi=89978449

19 Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study (Nairobi, Kenya: African Population and Health Research Center, Ministry of Health, Kenya, Ipas, and Guttmacher Institute 2013) available at https://www.guttmacher.org/sites/default/file s/report pdf/abortion-in-kenya.pdf [hereinafter Incidence and Complications of Unsafe Abortions in Kenya (2012)].

20 Kenya Demographic and Health Survey 2014 Kenya National Bureau of Statistics Nairobi, Kenya

21 Ministry of Health: The Costs of Treating Unsafe Abortion Complications in Public Health Facilities in Kenya, 12 http://aphrc.org/wp-content/uploads/2018/02/The-Costs-of- Treating-Unsafe-Abortion-Complications- in-Public-Health-Facilities-in- Kenya_Final.pdf.

22 https://kenya.unfpa.org/sites/default/files/pub-pdf/KCO%20Annual%20Report%202017.pdf

consequences. One such measure would be making information available to empower girls and women to avoid unintended pregnancies.

A study titled "A Decade of Existence: Tracking Implementation of Article 26(4) of the Constitution" provides a sobering analysis of the persistent problem of unsafe abortion in Kenya, despite constitutional provisions aimed at protecting women's reproductive rights and health[23]. The study reveals several key findings including the High Maternal Mortality Rate. The Study observes that before constitutional reforms in 2009-2010, Kenya experienced a severe maternal health crisis, with around 2,600 women dying annually due to complications from unsafe abortions. This statistic highlighted the significant public health impact of unsafe abortion practices in the country. With regard to the Contribution to Maternal Deaths; The study shows that in the early 2000s, roughly 35% of maternal deaths in Kenya were linked to unsafe abortions. This meant that a substantial number of women were losing their lives due to unsafe abortion procedures, a rate nearly three times higher than the global average for such deaths, which stood at 13%. The study also highlights the Limited Progress; Despite the constitutional reforms aimed at safeguarding women's reproductive rights and health, the study indicates that the situation concerning unsafe abortion in Kenya has not significantly improved. The persistently high maternal mortality rate associated with unsafe abortions underscores the challenges in effectively implementing these constitutional provisions. These findings emphasize the complexity of comprehensively addressing unsafe abortion. While constitutional reforms provide a legal framework for protecting women's reproductive rights, the actual implementation of these provisions and access to safe abortion services remain significant challenges.

The study's findings support the findings of previous studies in highlighting the urgent need for a coordinated effort to address the issue of unsafe abortion in Kenya through a multifaceted approach that goes beyond legal reforms, including:

- **Access to Safe Abortion Services**: Ensuring that healthcare facilities are equipped and staffed to provide safe and legal abortion services as mandated by constitutional provisions.
- **Education and Awareness**: Raising awareness among women about their reproductive rights and the availability of safe abortion services, coupled with comprehensive sex education.
- **Reducing Stigma**: Combatting social stigma and discrimination surrounding abortion to encourage women to seek safe and legal healthcare options.
- **Monitoring and Accountability**: Establishing effective monitoring and enforcement mechanisms to ensure healthcare providers adhere to legal and ethical standards when providing abortion services.
- **Collaboration**: Promoting collaboration between government agencies, civil society organizations, healthcare providers, and legal experts to collectively work toward improving women's access to safe abortion services.

---

23 A Decade of Existence: Tracking Implementation of Article 26(4) of the Constitution. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjJ1qOvx9WBAxWb7rsIHT65A4kQFnoECBQQAQ&url=https%3A%2F%2Freproductiverights.org%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2FA-Decade-of-Existence-Kenya_0.pdf&usg=AOvVaw0Q_BEMwdptiqSJKKfpQGNb&opi=89978449

The study concludes that while constitutional provisions have been established, their effective implementation and the reduction of maternal mortality associated with unsafe abortion remain significant challenges that demand continued attention and action.

Despite legal provisions of Article 26 (4) of the Constitution permitting abortion for the protection of women's life or health, access to corresponding services remains unclear and restricted. Many health professionals tend to take conservative approaches, considering most abortions as illegal.

In 2010, research[24] conducted in Nyeri and Kisumu revealed a significant number of abortion cases filed in lower courts, primarily affecting women and girls. The accused individuals often lacked legal representation, pleaded guilty, and received sentences involving probation and community service instead of the jail terms specified by the penal code. Criminal cases related to abortion often led to convictions based on limited evidence and resulted in lenient sentences, indicating a similar stance in both the criminal justice and health sectors.

The investigations conducted by Center for Reproductive Rights (CRR) in Nyeri and Kisumu in 2010 unveiled a notable surge in abortion cases brought before lower courts, predominantly impacting women and girls. The accused parties often without legal representation, pleaded guilty. However, the sentences handed down contrasted with the penal code's stipulation of jail terms, instead favouring probation and community service[25].

In September 2021, The Kenya National Commission on Human Rights (KNCHR)[26] issued an Advisory urging the Attorney General to act to remove Kenya's reservation on Article 14 (2) (c) of the Maputo Protocol[27]. The advisory was based on the Commission's assertion that Kenya's existing reservation to Article 14(2)(c) of the Maputo Protocol is in direct violation of the Constitution of Kenya, rendering it null and void. Additionally, the Commission highlighted that this reservation places Kenya in a state of contradiction regarding its international obligations and commitments, particularly concerning the vital issue of women's rights. The commission argued that the persistent presence of this reservation poses a direct threat to the realization of 'the highest attainable

Criminal cases related to abortion often led to convictions based on limited evidence and resulted in lenient sentences, indicating a similar stance in both the criminal justice and health sectors.

24 Center for Reproductive Rights A Decade of Existence: Tracking Implementation of Article 26(4) of the Constitution

25 In Harm's Way the Impact of Kenya's Restrictive Abortion Law https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiK4sSAwdWBAxU8gf0HHehbCeEQFnoECAoQAQ&url=https%3A%2F%2Freproductiverights.org%2Fsites%2Fcrr.civicactions.net%2Ffiles%2Fdocuments%2FInHarmsWay_2010.pdf&usg=AOvVaw0XO4Ddjz-ST1IP8EBGwoxw&opi=89978449

26 The Kenya National Commission on Human Rights (KNCHR), an independent institution established under the Kenyan Constitution. Under Article 59 (2) (g) of the Kenyan Constitution, KNCHR holds the crucial role of ensuring the state's compliance with international treaties and conventions related to human rights that Kenya has ratified.

27 Kenya National Commission on Human Rights Advisory on The Removal of Kenya's Reservation on Article 14 (2) (C) of The Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa

standard of health,' which encompasses the right to health care services, including reproductive health care, as guaranteed by Article 43 of the Constitution of Kenya. The Advisory thus recommended that Kenya take steps to remove the reservation and align its position with international commitments regarding women's rights and health.

During the review of Kenya's Seventh Periodic Report by the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) in 2011[28], several concerns emerged. The Committee noted that illegal abortions significantly contributed to the high maternal mortality rate in Kenya[29]. Furthermore, the Committee also noted that the country's strict abortion laws often compelled women to resort to unsafe and illicit abortion procedures. The Committee expressed disappointment that maternal health policies did not adequately address the complications arising from unsafe abortions. In response to these issues, the Committee made recommendations to Kenya, key among them: (1) The Committee suggested that women should have access to high-quality services to manage complications resulting from unsafe abortions, and (2) The Committee encouraged Kenya to consider reviewing its abortion laws to eliminate punitive measures targeting women who undergo abortions. This recommendation aimed to align Kenya's laws with the Committee's general recommendation No. 24 and the principles outlined in the Beijing Declaration and Platform for Action.

In the concluding observations following the review of Kenya's eighth periodic report in 2017[30], seven years after the passing of the Constitution, the CEDAW Committee again reiterated concerns about the persistently high maternal mortality rate, which could be partially attributed to unsafe abortions. The Committee also highlighted the restrictive and ambiguous legal framework surrounding abortion in the country, which often drove women to seek unsafe and illegal abortion services. The Committee's recommendations to Kenya in this instance included: (1) Urging Kenya to amend the Penal Code to decriminalize abortion and legalize it, particularly in cases of rape, incest, severe foetal impairment, and when there is a risk to the health or life of the pregnant woman (2) Emphasizing the importance of ensuring access to high-quality post-abortion care, especially when complications arise from unsafe abortions (3) Calling for the reinstatement of the Standards for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya, which were initially issued in 2012 and (4) Encouraging Kenya to revisit and adopt the bill on reproductive health care from 2014. These recommendations underscore the international community's concern regarding the impact of Kenya's abortion laws on maternal health. The Committee emphasized the urgent need to enhance access to safe and legal reproductive health care services, particularly in cases involving risks to women's health or instances of rape, incest, and severe foetal impairment.

In a Daily Nation article from October 2, 2017, Senior Researcher Agnes Odhiambo of the Women's Rights Division, of Human Rights Watch drew attention to a pressing issue in Kenya. She highlighted how the fear of prosecution under Kenya's Penal Code, which imposes severe penalties for both women seeking abortions and those assisting them,

---

28 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjiuMjiydWBAxUyVPEDHW5wC80QFnoECA4QAQ&url=https%3A%2F%2Fwww2.ohchr.org%2Fenglish%2Fbodies%2Fcedaw%2Fdocs%2Fco%2FCEDAW-C-KEN-CO-7.pdf&usg=AOvVaw1oHuV731H2qE68k18yy1hU&opi=89978449

29 On March 9, 1984, Kenya officially ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

30 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjbxfvcytWBAxX-8LsIHaO_DagQFnoECA8QAQ&url=https%3A%2F%2Fwww.ohchr.org%2Fen%2Fdocuments%2Fconcluding-observations%2Fcedawckenco8-concluding-observations-eighth-periodic-report-kenya&usg=AOvVaw1cc8jJzSmMOsOdViaPJ7-q&opi=89978449

has led to reluctance among healthcare providers to offer abortion services. This fear has driven many women to seek unsafe abortions, posing significant health risks.

The researcher advocated for the support of women and girls and urged the Kenyan government to openly endorse their right to access safe and voluntary abortion services where permitted by law. She stressed the importance of post-abortion care to address complications arising from unsafe procedures and emphasized the need for accessible, high-quality family planning information and services. In essence, the article underscored the importance of safeguarding women's reproductive rights and health in Kenya[31].

The Kenyan National Commission on Human Rights (KNCHR) has previously expressed deep concern regarding the persistent neglect of sexual and reproductive health rights within Kenya over the years. In its comprehensive public inquiry report titled "Realising Sexual and Reproductive Health Rights in Kenya: A Myth or a Reality?[32] A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya", the Commission found that there are gross violations of Kenyan citizens' sexual and reproductive health rights. Moreover, the report underscored the direct link between the reduction of maternal mortality rates and the fundamental right to the highest attainable standard of health, which inherently encompasses reproductive health rights[33].

This literature review emphasizes the significance of Article 14(2)(c) of the Maputo Protocol in promoting women's rights and reproductive health, focusing on the urgent need for safe and legal abortion services. The situation in Kenya reveals alarming statistics related to unsafe abortions, leading to high maternal mortality rates and significant healthcare costs. Despite constitutional reforms, the persistence of unsafe abortion practices highlights the need for a comprehensive approach, including improved access to safe abortion services, comprehensive sex education, stigma reduction, and collaboration among stakeholders. Legal and societal challenges in implementing existing constitutional provisions, particularly Article 26(4), underscore the necessity of aligning the legal environment with international standards. Recommendations from various entities stress the importance of decriminalizing abortion, lifting the reservation under Article 14 (2)(c) of the Maputo Protocol and ensuring access to quality post-abortion care, and aligning laws with global standards. The reluctance of healthcare providers due to legal uncertainties further underscores the need for clear legal support for women's reproductive rights.

“The reluctance of healthcare providers due to legal uncertainties further underscores the need for clear legal support for women's reproductive rights.

31 http://www.nation.co.ke/oped/opinion/Women-still-dying-from-unsafe-abortions-despite-the-law-/440808-4118598-pnfb0v/index.html

32 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjNhYquzNWBAxVmyLsIHbHDDIQQFnoECAkQAw&url=http%3A%2F%2Fwww.knchr.org%2Fportals%2F0%2Freports%2Freproductive_health_report.pdf&usg=AOvVaw3ui_g75HwDG3b3nuq8K4r5&opi=89978449

33 Kenya National Commission on Human Rights (2012) 'Realising Sexual and Reproductive Health Rights in Kenya: A Myth or a Reality? A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya' ("Public Inquiry Report") available at https://www.knchr.org/Publications/Th2ematic- Reports/Ecosoc-Rights/Right-to-Health

3. LEGAL FRAMEWORK

Understanding the legal framework surrounding abortion in Kenya requires looking into its historical development and current regulations. This involves scrutinizing the constitution and the implications stemming from Kenya's reservations under Article 14(2)(c) of the Maputo Protocol.

Many of the current abortion laws in Kenya have their roots in colonial history. Kenya inherited from Britain a legal framework concerning abortion that did not place a greater emphasis on safeguarding women's health and lives.

Initially, the primary legal framework governing abortion in Kenya is established in the Penal Code, specifically Sections 158 to 160[34]. These sections categorize abortion as a criminal act, except when the life or health of the mother is endangered. These provisions have persisted since colonial times and are notably stringent.

Section 158: Attempts to procure abortion

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

Section 159: The like by woman with child

> Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony and is liable to imprisonment for seven years.

Section 160: Supplying drugs or instruments to procure abortion

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

Section 228: Killing unborn child.

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

34 The Penal Code of CAP 63 of the Laws of Kenya

Section 240 of the Kenya Penal Code, however, provides some clarification of the basis of surgical operations in relation to a mother's health and unborn children.

Section 240: Surgical operation

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

With regard to the constitutional provisions, Kenya's 2010 Constitution brought about significant changes. Article 26(4) acknowledges the right to life, encompassing that of unborn children. Nevertheless, it does permit abortion when a qualified healthcare professional deems it necessary to safeguard the life or health of the mother, or when authorized by other laws. This provision offers limited flexibility for situations where maternal life or health is at risk.

The Constitution enshrines the right to health care and access to reproductive health services while the Health Act 2017 broadens the definition of health defining health as a complete state of physical, mental and social well-being and not merely the absence of disease which include reproductive health, making these laws more facilitative. These laws permit abortion when a woman needs emergency treatment; whose pregnancy poses a danger to her life; or whose pregnancy resulted from sexual violence. The Penal Code however continues to be punitive criminalizing incidents of abortion.

The Constitution and Legal Implication under the Reservation on Article 14(2)(C) of the Maputo Protocol

The Kenyan Constitution is highly relevant to Article 14(2)(c) of the Maputo Protocol, as it provides the legal foundation for how international agreements, such as the Maputo Protocol, are treated within Kenya's legal system. Article 2(5) of the Constitution specifically states that "An international treaty ratified by Kenya shall form part of the law of Kenya under this Constitution." This means that once Kenya ratifies an international treaty, such as the Maputo Protocol, it automatically becomes an integral part of Kenyan law. Article 2(5) also highlights that international treaties ratified by Kenya are enforceable in Kenyan courts. If there is a conflict or a legal issue related to the Protocol, Kenyan courts can address it based on the Protocol's provisions as if they were part of Kenyan law. The Constitution also establishes mechanisms for constitutional oversight, including judicial review. If there are concerns or disputes related to the implementation or interpretation of Article 14(2)(c) within Kenya, the Constitution provides for a legal process to resolve these matters through the courts.

Article 14(2)(c) of the Maputo Protocol deals with women's reproductive health rights, particularly in the context of access to safe and legal abortions. The Article guarantees the rights of women and girls to access abortion services in cases involving pregnancies resulting from sexual assault, rape, incest, or situations where the continued pregnancy threatens the mental or physical health of the mother, her life, or that of the foetus. The

African Commission on Human and Peoples' Rights, in its General Comment No. 2 on Article 14, provides further elaboration on the substance of Article 14(2)(c). The Commission clarified that Article 14(2)(c) is intended for situations where pregnancies arise from sexual violence, emphasizing that compelling a woman to sustain such a pregnancy can inflict additional trauma, adversely affecting her physical and mental well-being and that Article 14(2)(c) of the Protocol allows for medical abortion when a woman's life is endangered by the pregnancy or when there is a risk to the foetus.

Kenya's reservation regarding Article 14 (2) (c) of the Maputo Protocol stemmed from concerns about its apparent incongruence with the provisions outlined in Article 26 (4) of the Kenyan Constitution. In October 2010, at the time of enacting this reservation, the nation grappled with the ambiguity surrounding the legality of abortion.

Article 43(2) of the Constitution of Kenya provides that: No person may be denied emergency medical treatment. This includes post-abortion care, which is medically given to women for treatment of abortion complications.

Article 26 of the Constitution of Kenya, 2010 provides that:

(1) Every person has the right to life

(2) The life of a person begins at conception

(3) A person shall not be deprived of life intentionally except to the extent provided by this Constitution or other written law

(4) 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.

From the text of Article 26 (4) of the Constitution, it is clear that the Constitution of Kenya, 2010, addresses the issue of abortion. It states:

"Abortion is not permitted unless, in the opinion of a trained health professional, there is a need for emergency treatment or the life or health of the mother is in danger, or if permitted by any other written law."

This provision sets out the conditions under which abortion is allowed in Kenya:

1. When there is a need for emergency treatment: Abortion may be performed if a trained health professional determines that it is necessary to save the life of the pregnant woman immediately.
2. When the life of the mother is in danger: Abortion is permissible if a medical professional determines that the continuation of the pregnancy poses a direct threat to the life of the pregnant woman.
3. When the health of the mother is in danger: Abortion can also be carried out if a qualified health professional concludes that the pregnancy poses a risk to the woman's health.

4. When permitted by any other written law: The Constitution acknowledges that there may be other laws that specifically address abortion in Kenya, and if such laws permit abortion in certain circumstances, those provisions would also apply. This particular text envisages that abortion laws and regulations should not be stagnant but should evolve with the development of necessary laws and regulations.

The Reproductive Health Policy 2022-2032 (RH Policy)[35] expounds on the fundamental responsibility of the Ministry of Health in accordance with the constitution. Its primary purpose is to provide guidance and direction for the country in reducing the substantial burden of preventable reproductive health-related illnesses and deaths. The overarching goals of this policy are to ensure that all individuals in the country have access to high-quality and comprehensive reproductive health services, enhance the responsiveness to the specific reproductive health needs of clients, and strengthen the essential components of the healthcare system that support reproductive health, including fostering partnerships and collaborations.

The RH Policy has been shaped by a variety of sources, primarily: the Kenya Constitution of 2010 as well as the previous Reproductive Health Policy from 2007, the Kenya Health Policy spanning from 2014 to 2030, the Kenya Vision 2030, the Kenya Medium Term Expenditure Plans, the commitments made at the Kenya ICPD at 25 Nairobi Summit, the Sustainable Development Goals (SDGs), as well as both domestic and international legal instruments and treaties. Additionally, it draws upon a growing body of research that identifies best practices in the field of reproductive health. However, the absence of the Maputo Protocol and the State obligations that flow from it must be noted. The policy anticipates a significant surge in demand for reproductive health services in Kenya over the next decade due to the country's increasing life expectancy and a modest annual population growth rate of 2.2%, with nearly a quarter of the population being adolescents (as per the 2019 census). Consequently, there is a pressing need to build upon the progress achieved so far while concurrently addressing both existing and emerging gaps in reproductive health. The policy states that the top five direct causes of maternal deaths were haemorrhage, hypertension in pregnancy, infections/sepsis, obstructed labour and post-abortion complications (CEMD, MOH, 201730)[36] making post-abortion complications the third direct cause of maternal deaths.

“The policy anticipates a significant surge in demand for reproductive health services in Kenya over the next decade due to the country's increasing life expectancy and a modest annual population growth rate of 2.2%, with nearly a quarter of the population being adolescents (as per the 2019 census).

35 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjs9JKIzdWBAxWw_7sIHYEfBQgQFnoECAgQAw&url=http%3A%2F%2Fguidelines.health.go.ke%2F%23%2Fcategory%2F18%2F347%2Fmeta&usg=AOvVaw0FQ45Q0saxA7MiOL80i8Uw&opi=89978449

36 CEMD, MOH, 2017

The Policy defines the meaning and the words contained in the Constitution including the following definitions:

Abortion: Abortion means termination of pregnancy.

Health: A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity

Opinion of a Trained Health Professional: The documented outcome after taking history of presenting illness, performing a physical examination, reviewing results of relevant tests, and treatment advised by a trained health professional.

Reproductive Health: Reproductive health refers to the condition of male and female reproductive systems during all life stages[37]. WHO further qualifies reproductive health to include a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, in all matters relating to the reproductive system, its functions, and processes[38].

Reproductive Health Rights: The basic right of all couples and individuals to decide competently, freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of reproductive health. It includes the right to make decisions concerning reproduction free of discrimination, coercion and violence.

Sexual Offence: This includes defilement, rape, incest, sodomy, bestiality and any other offence prescribed in the Sexual Offences Act.[39]

Article 14(2)(c) of the Maputo Protocol deals with the right of women to make choices about their reproductive health, particularly in the context of abortion. It encourages African countries to ensure that women have access to safe and legal abortions when their lives are in danger or when they face serious health risks due to pregnancy. In essence, it emphasizes the importance of protecting women's health and lives when it comes to reproductive choices, including abortion, in the countries that have adopted this protocol. Kenya has expressed reservations under Article 14(2)(c) of the Maputo Protocol aimed at expanding access to safe abortions. This stance is influenced by cultural and religious factors, (both of which stigmatize premarital and extra-marital sex) reflecting a conservative position on abortion. Consequently, the abortion-related provisions of the Maputo Protocol that could enhance the legal environment for safe abortion do not carry legal weight in Kenya, leaving the existing legal framework, including the Penal Code, in charge of regulating abortion. The lifting of the reservation on Article 14 (2) (c) of the Maputo Protocol carries profound implications for Kenya, sparking a much-needed reassessment and reinforcement of the legal framework. In doing so, it aligns directly with the stipulations articulated in Article 2(5)(6) of Kenya's 2010 Constitution.

37 Reproductive health (who.int) accessed Feb 2022)

38 Reproductive health (who.int) accessed Feb 2022)

39 The Sexual Offenses Act, No.3 of 2006, Laws of Kenya

The conflicts in abortion laws and reservations have significant consequences for women's reproductive rights and their access to safe abortion services. Women often resort to unsafe and clandestine abortions, leading to high maternal mortality rates and severe health complications.

It's worth noting that discussions and advocacy efforts aimed at giving clarity to Kenya's abortion laws are ongoing. Some groups advocate for a more permissive approach to abortion in order to protect women's health and rights. However, these efforts face resistance from conservative factions within the country.

Kenya's legal framework regarding abortion thus remains a complex interplay of historical influences, constitutional provisions, and restrictions outlined in the Penal Code. The country's reservations under Article 14(2)(c) of the Maputo Protocol maintain the status quo of unclarity and ambiguity of abortion laws, affecting women's access to safe and legal abortion services while safeguarding their health and rights. The debate over abortion laws in Kenya remains a contentious and evolving issue, with profound implications for women's reproductive health and rights. A comprehensive understanding of the legal basis for these reservations is pivotal in assessing Kenya's stance on this crucial matter.

Kenya's reservation on Article 14 (2)(c) of the Maputo Protocol is ostensibly due to concerns about its compatibility with Kenya's constitution. This reservation raised questions about the extent of abortion rights in Kenya. The High Court in Kenya clarified that abortion is permitted under certain circumstances as per Article 26(4) of the Kenyan Constitution[40]. These circumstances include emergency treatment and when the life or health of the mother is in danger. Additionally, abortion is allowed under other laws, such as for women and girls who become pregnant due to sexual violence under the Sexual Offences Act.

The African Commission provided further clarification through General Comment No. 2 on Article 14. Failure to remove the reservations makes Kenya avoid its obligations which it would have upon removing the reservation on Article 14(2)(c) of the Maputo Protocol. Kenya would be obligated to respect, protect, and fulfil the right of women and girls to access abortion services as defined in the Protocol. This includes reporting on legislative and other measures taken to implement Article 14(2)(c) of the Maputo Protocol.

Specific Obligations include:

1. Enacting legislation to protect the rights of women and girls to access abortion services within the parameters of the Kenyan Constitution and the Maputo Protocol.
2. Reviewing and potentially amending the Penal Code sections that criminalize abortion to align with the lawful grounds outlined in the Constitution. The blanket criminalization of abortion without clear exceptions creates confusion among healthcare providers and contributes to unsafe abortions in Kenya, the current legal framework is untenable in light of the constitutional provisions. The High Court of Kenya observed that the blanket prohibition of abortion under the Penal Code is

40 *FIDA Kenya & 3 Others v. Attorney General & 2 Others*67 (Nairobi High Court Petition No. 266 of 2015

inconsistent with the constitutional provisions that allow abortion in specific circumstances. Therefore, the Penal Code should be read in conjunction with the Constitution to accommodate these exceptions.

The evolving legal landscape of abortion rights in Kenya emphasises the need for the obligations imposed by the Maputo Protocol, and the need for legal reforms and clarity to ensure access to safe abortion services while protecting women's rights and health.

Kenya's legal framework for implementing international agreements encompasses a series of steps, including ratification, legislative alignment, constitutional recognition, implementation by government agencies, oversight by the judiciary and parliament, and reporting to international bodies. This comprehensive framework ensures that international agreements become an integral part of Kenyan law and that Kenya fulfils its commitments on the global stage.

> **"Every individual possesses the entitlement to the highest achievable standards of health, encompassing access to healthcare services, including reproductive healthcare."**
>
> *- Article 43(1)(a) of the Kenyan Constitution*

Litigation and Case Law

Sexual Violence Victims/Survivors Have a Constitutional Right to Abortion

The case of *FIDA-Kenya and 3 Others versus Attorney General and 2 Others [2019] eKLR2*, (The FIDA case)[41], involves a tragic incident in which a 14-year-old girl named JMM, lost her life due to complications arising from an unsafe abortion. JMM became pregnant as a result of a rape, but she faced significant obstacles in accessing safe abortion services. Consequently, she resorted to an unqualified provider for an abortion, received inadequate post-abortion care and eventually lost her life. The High Court of Kenya provided clarity regarding the provisions outlined in Article 26 (4) of the 2010 Constitution of Kenya.

The genesis of the case is that in 2014, the Ministry of Health made the decision to withdraw its "Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya." This policy document had previously played a crucial role in providing guidance to healthcare providers on the appropriate circumstances and procedures for safe and legal abortions, as well as post-abortion care.

In 2019, in the FIDA case[42] the High Court ruled that the Director of Medical Services and the Ministry of Health had violated the rights of Kenyan women and girls. They did so by arbitrarily withdrawing the guidelines, which resulted in confusion regarding the legality of abortion and instilled fear of criminal prosecution among medical providers, ultimately discouraging them from performing abortions.

---

41 *FIDA-Kenya and 3 Others versus Attorney General and 2 Others [2019] eKLR2*

42 The case of *FIDA-Kenya and 3 Others versus Attorney General and 2 Others [2019] eKLR2*

The FIDA-Kenya case eventually provided much-needed clarity when the High Court affirmed that while the Constitution generally prohibits abortion, it does allow for exceptions. Importantly, it explicitly recognized that Kenyan law grants women and girls impregnated through sexual violence, the right to access abortion services provided by qualified healthcare professionals if the professional determines that the mother's life or health is in jeopardy.

The Court defined "emergency treatment" as immediate healthcare that is essential to prevent death or the exacerbation of a medical condition. Furthermore, the Court clarified that the Constitution permits abortion when a pregnancy poses a threat to the life or health of the mother, as determined by a trained health professional. The definition of a trained health professional, as per Section 6(2) of the Health Act, 2017, includes individuals with formal medical training such as medical officers, nurses, midwives, or clinical officers proficient in managing pregnancy-related complications in women, holding valid licenses from recognized regulatory authorities.

Additionally, the Court highlighted that the Constitution allows abortion when it is authorized by any other applicable law. Notably, the Court emphasized that in Kenya, the Sexual Offences Act of 2006, specifically under Section 35(3), grants women and girls who become pregnant as a result of sexual violence the right, as per Kenyan law, to undergo an abortion if a trained health professional deems it necessary to protect the life or health of the mother. The Court clarified that the concept of "health" encompasses both physical and mental well-being.

Article 43(1) of the Constitution assumes significance when discussing constitutional provisions related to abortion in Kenya. Article 43(1)(a) explicitly states:

> **"Every individual possesses the entitlement to the highest achievable standards of health, encompassing access to healthcare services, including reproductive healthcare."**

In the FIDA-Kenya case highlighted above, the High Court of Kenya offered further clarity by affirming that Article 43(1)(a) encompasses the rights of women and girls to access reproductive healthcare services, which include abortion and post-abortion care, as outlined in Article 26(4) of the Kenyan Constitution.

Additionally, the Court also expounded that in accordance with Article 21(1) of the Constitution, the State bears the responsibility to safeguard, uphold, and fulfil these rights. This obligation encompasses "the enactment of legislation, formulation of policies, and other necessary measures, including the establishment of standards, to progressively realize the rights guaranteed under Article 43."

It is important to note that the interpretation offered by the Court regarding the circumstances under which abortion is permitted by law, as outlined in Article 26 (4) of the Kenyan Constitution, closely parallels the provisions of Article 14 (2) (c) of the Maputo Protocol. Thus, it becomes evident that both the Kenyan Constitution and the Maputo Protocol endorse women and girls' access to safe abortion services in cases involving sexual violence, emergencies, or threats to the life or health of the pregnant individual.

The High Court in the FIDA-Kenya case, duly recognized the striking similarity between the language used in Article 26 (4) of the Kenyan Constitution and Article 14 (2) (c) of the Maputo Protocol.

In yet another case[43], PAK, a teenage student, found herself pregnant while in secondary school and experienced complications, leading her to seek medical help. She was attended to by a registered clinical officer who diagnosed her with a spontaneous abortion and performed a manual vacuum evacuation. However, the situation took a troubling turn when plain-clothed police officers arrived at the clinic, demanded and confiscated PAK's treatment records, and subsequently arrested her, the clinical officer, and two clinic employees. They were charged with offences related to abortion.

In response, the petitioners challenged these charges in the High Court, arguing that the provisions of the Penal Code criminalizing abortion were unconstitutional due to the absence of a statutory framework to implement Article 26(4) of the Kenyan Constitution. Article 26(4) allows abortion in certain circumstances, such as for emergency treatment or when the life or health of the mother is at risk.

The High Court ruled in favour of the petitioners, asserting that in Kenya, there is a right to access safe abortion services. The judge emphasized the interconnectedness of rights, stating that denying someone the choice to terminate an unwanted pregnancy or pushing them toward an unsafe abortion violates their human rights, including privacy and bodily autonomy, thus infringing upon the right to life. The judge also argued that the absence of a statutory framework further violated the right to life.

Regarding the relationship between the right to privacy and the right to abortion, the judge stressed that a woman's decision to terminate a pregnancy should primarily be left to her, with the only limitation being that it requires authorization from a trained medical provider.

Finally, the High Court declared the relevant provisions of the Penal Code unconstitutional for criminalizing abortion without providing a proper framework for accessing therapeutic abortion as outlined in Article 26(4). As a result, the charges against the individuals involved were quashed. The Judge directed parliament to "fast track legislation that provides for access to safe abortion for women in Kenya and to actualize the provisions of Article 26(4) of the Constitution".

Despite these legal victories, abortion remains challenging to obtain in Kenya due to recurring unjust prosecutions of healthcare providers, creating a chilling effect on abortion service provision.

43 Constitutional Petition No. E009 of 2020 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiY-4erztWBAxVviv0HHdUoBTIQFnoECA4QAQ&url=http%3A%2F%2Fkenyalaw.org%2Fcaselaw%2Fcases%2Fview%2F231489%2F&usg=AOvVaw1E74ucq9CzV5Ntjfe5Ovdq&opi=89978449

On 28th September 2023, the Chief Magistrates Court in Makadara, Nairobi, acquitted Samson Mwita, a licensed healthcare provider, and Grace Wanjiku, a mother, of all charges related to procuring abortion care. Mwita and Wanjiku were arrested and charged in September 2018 when police intervened at the health facility where Mwita was treating Wanjiku's 16-year-old daughter for pregnancy-related complications resulting from a sexual assault when she was a minor. The charges under section 158 of Kenya's Penal Code, carry a potential prison sentence of up to 14 years, but the court found no evidence to support these charges, leading to their acquittal. Importantly, this acquittal prevents the two from being charged again for the same allegations. The court relied on the Judgement of 2022 when the High Court of Kenya in Malindi[44] also ruled that the arbitrary arrest and prosecution of patients and healthcare providers seeking or offering abortion services is illegal, further reinforcing the right to access abortion care in Kenya.

However, despite these legal victories, abortion remains challenging to obtain in Kenya due to recurring unjust prosecutions of healthcare providers, creating a chilling effect on abortion service provision. The fear of arrest and prosecution among providers continues to impact the availability of safe reproductive healthcare services.

44 *PAK and Salim Mohammed vs the Attorney General and 3 others (Petition E009 of 2020).*

4. ANALYSIS OF THE IMPACT OF KENYA'S RESERVATION UNDER ARTICLE 14(2)(C) OF THE MAPUTO PROTOCOL: IN RELATION TO WOMEN'S REPRODUCTIVE RIGHTS AND ACCESS TO SAFE AND LEGAL ABORTION SERVICES

The legal and practical implications of the reservation.

Kenya's reservation under Article 14(2)(c) of the Maputo Protocol has far-reaching legal and practical consequences, influencing both the national and regional landscapes.

Legal Implications: From a legal standpoint, the reservation under Article 14(2)(c) introduces legal ambiguity and uncertainty into Kenya's legal framework, especially in interpreting Article 26(4) of the Kenyan Constitution, which allows abortion under specific circumstances. The misalignment between international commitments and domestic laws raises concerns about the compatibility of Kenya's reservations with the core objectives of the Maputo Protocol. The FIDA-Kenya case exemplifies these concerns, particularly regarding the withdrawal of the National Training Curriculum, contributing to confusion around safe and legal abortion practices, creating uncertainty in healthcare protocols and legal frameworks and these have life consequences for women and girls.

Dr. Wahome Ngare's affidavit in the FIDA-Kenya case[45] cited Kenya's reservations under Article 14(2)(c) stating that Kenya made a conscious decision to disallow abortion under those grounds and used the same argument to justify the withdrawal of the National Training Curriculum was linked to its alleged use as a guide for health workers in performing abortions beyond the limits of Article 26(4). This highlights the need to lift Kenya's reservation, in order to foster a more coherent and rights-respecting legal framework. Lifting the reservation will contribute to aligning reproductive health laws with international human rights standards, providing clear legal guidance and enhancing the protection of women and girls' reproductive rights.

Practical Consequences: Practically, Kenya's reservation under Article 14(2)(c) limits women's

> **Addressing challenges surrounding Kenya's abortion laws and policies requires comprehensive reforms, including penal code amendments, clear implementing policies, and extensive education to ensure a proper understanding and implementation of constitutional provisions.**

45 FIDA-Kenya and 3 Others versus Attorney General and 2 Others [2019] eKLR2

reproductive choices, especially in terms of access to medical abortion. This has profound implications for maternal health, leading to increased unsafe abortions and maternal mortality, disproportionately affecting marginalized women. The reservations also create uncertainty in healthcare services, deterring providers from offering abortion services due to legal ambiguity. This hesitancy may result in delays in care and inconsistent access to essential services.

Human Rights Implications: From a human rights perspective, Kenya's reservation under Article 14(2)(c) poses significant challenges. It potentially violates women's fundamental human rights, encroaching upon reproductive autonomy and contradicting efforts to eliminate gender-based discrimination. The reservation introduces uncertainties and restrictions, compromising women's rights, particularly reproductive autonomy — a cornerstone of women's human rights. Moreover, it contravenes international human rights standards and the overarching goals of the Maputo Protocol, which aim to safeguard women's rights. The reservations raise questions about Kenya's commitment to regional agreements like the Maputo Protocol. The reservations, particularly on matters related to reproductive rights, are incongruent with the spirit of the Protocol, which seeks to advance women's rights in Africa[46].

The impact of these reservations extends to policy making and healthcare delivery, challenging policymakers and healthcare providers to navigate complex legal frameworks[47]. The arbitrary withdrawal of guidelines on reducing morbidity and mortality for safe abortions exemplifies the challenges posed by an ambiguous legal environment complicated by reservations[48]. Civil society organizations and women's rights advocates have played a crucial role in calling the State to address these practical repercussions through advocacy efforts aimed at raising awareness, influencing legal and policy changes, and safeguarding women's reproductive choices.

Addressing the challenges surrounding Kenya's abortion laws and policies requires comprehensive reforms, including penal code amendments, clear implementing policies, and extensive education to ensure a proper understanding and implementation of constitutional provisions. This aligns with the African Commission General Comment No. 2, emphasizing the need for legal clarity, protection of women's rights, and the elimination of discriminatory practices in the realm of reproductive health.

Impact of Kenyan Reservations on Women's Rights on Health

Kenya's reservation to Article 14(2)(c) of the Maputo Protocol has complex implications for women's reproductive rights and healthcare. The reservation, which places constraints on women and girls' reproductive choices, has significant consequences on healthcare access and overall well-being. Analyzing the impact reveals a multifaceted scenario, highlighting the depth of challenges faced by women and girls in Kenya as follows:

1. **Limited Access to Safe Abortion Services:** Kenya's reservation under Article 14 (2) (c) of the Maputo Protocol restricts access to safe abortion services

46 Interview with a key informant on October 3 2023

47 Interview with a key informant on October 3 2023

48 Interview with a key informant on October 3 2023

in circumstances considered critical for women's reproductive health. This limitation can have dire consequences as it may compel women to resort to unsafe and clandestine abortion procedures, endangering their lives. The abrupt closure of Marie Stopes in 2018 is a stark example of the tangible impact on women's access to safe abortion services. This closure significantly reduced the availability of essential reproductive healthcare, leaving women with fewer alternatives and pushing some towards unsafe procedures, intensifying health risks dramatically.

2. **Violations of Human Rights with Real-world Ramifications:** Global statistics from the World Health Organization paint a grim picture. The lack of quality abortion care infringes upon various human rights of women and girls, including the right to life, the right to the highest possible standard of physical and mental health, the right to benefit from advancements in science, the right to make informed decisions about family planning, and the right to be free from torture and cruel, inhuman, or degrading treatment. Unsafe abortions contribute to maternal mortality, causing approximately 6,900 deaths annually in East Africa. The absence of accessible, safe abortion services in Kenya not only violates fundamental human rights but also perpetuates a stark health disparity that disproportionately affects women.

3. **Maternal Health Implications in Numbers:** Data from the Ministry of Health provides alarming statistics. Denying women access to safe abortion services in life-threatening situations significantly contributes to an elevated maternal mortality ratio of 362 deaths per 100,000 live births (2017). These numbers underscore the critical need for ensuring safe reproductive healthcare services. The absence of access to safe, affordable, timely, and respectful abortion services, along with the social stigma attached to abortion, present threats to the physical and mental well-being of women across their lifetimes.

4. **Social Repercussions through Case Studies:** In-depth case studies further illustrate the social repercussions of ambiguous abortion laws. Ambiguous abortion laws and regulations can lead to emotional distress and social stigma, potentially violating the human rights of women and girls, including the right to privacy and the right to freedom from discrimination and inequality. Additionally, such regulations impose financial burdens on women and girls. Requirements that force women to travel long distances to access legal abortion care, or necessitate compulsory counselling and uncertain waiting periods, result in lost income and other financial expenses, making abortion unattainable for women with limited resources. Moreover, this reservation has the potential to limit women's reproductive choices, curtailing their ability to terminate pregnancies in situations deemed medically necessary or arising from sexual violence. This restriction reverberates into the broader context of family planning and control over one's reproductive future.

5. **Barriers to Healthcare Access:** Empirical evidence from a comprehensive study conducted by reproductive health organizations in Kenya reinforces the challenges women face. Fear of legal repercussions creates formidable barriers to healthcare access, resulting in delays in seeking timely and adequate medical attention. These

delays expose women to increased health risks and complications. Women facing unwanted pregnancies, especially those resulting from sexual assault, navigate a landscape of stigmatization and discrimination. This not only adds emotional distress but also acts as a significant deterrent, preventing them from seeking the crucial medical care they need.

6. **Gender Equality Disparities in Quantifiable Terms:** Quantifiable studies reveal the stark gender equality disparities perpetuated by restrictive abortion laws. Women are systematically denied the right to make decisions about their bodies, fostering a power imbalance that impacts their autonomy and overall well-being. These disparities extend beyond healthcare, affecting broader aspects of women's lives.

7. **Impact on Reproductive Choices:** Post the closure of Marie Stopes, data from reproductive health clinics indicates a noticeable decrease in women seeking reproductive healthcare services. A restrictive legal environment not only limit women's reproductive choices but also deprives them of the ability to terminate pregnancies in medically necessary situations, contributing to adverse health outcomes. The presence of a reservation creates additional barriers to healthcare access as women may fear legal repercussions, dissuading them from seeking timely and adequate medical attention. This delay poses an added risk to their health and overall well-being.

8. **Maternal Health Implications:** One focal point of concern is the potential impact on maternal health. Restricting access to medical abortion, even in situations where the mother's mental or physical health is at risk, may lead to adverse outcomes such as increased unsafe abortions and maternal mortality. Despite ratifying the Maputo Protocol, the reservation maintains the status quo regarding abortion, sparking worries about the deterrence of healthcare providers from offering lawful abortion services.

9. **Psychological and Emotional Impact:** Beyond the physical health implications, unsafe abortion can have profound psychological effects on women, impacting their overall well-being. Restrictive abortion policies can contribute to stigma, potentially leading to mental health challenges for women seeking abortions.

The presence of reservation to Article 14(2)(c) of the Maputo Protocol in Kenya carries significant implications, particularly concerning maternal health and women's well-being. Addressing these challenges requires a holistic approach. Inaccessibility of quality abortion care has been summarised by WHO as "violating a range of human rights of women and girls, including the right to life, the right to the highest attainable standard of physical and mental health, the right to benefit from scientific progress and its realization, the right to decide freely and responsibly on the number, spacing, and timing of children; and the right to be free from torture, cruel, inhuman and degrading treatment and punishment. It is also worth noting that criminalization of abortion not only hinders access to medical abortion but also impedes the enjoyment of a wide range of rights, including the referenced rights".[49] The challenges stemming from Kenya's reservations to Article 14(2)

49 https://www.who.int/news-room/fact-sheets/detail/abortion

(c) of the Maputo Protocol can obstruct the effective implementation of the Protocol in the country. They contribute to legal uncertainty, access barriers, potential rights violations, and international scrutiny that detract from the Protocol's goals of promoting women's rights, health, and gender equality. Addressing these challenges is essential to ensure the full realization of the Maputo Protocol's objectives within Kenya.

Impact of Kenyan Reservations on Women's Other Human Rights

The consequences of ambiguity in reproductive health laws, exacerbated by the reservation under Article 14 (2)(c), extend beyond the health sector. It has an impact on many other areas of women and girls' lives including in the areas of education, economic empowerment, and political participation.

Impact on Education: Women and girls often face challenges in pursuing education due to unintended pregnancies, leading to higher dropout rates. Limited access to safe abortion often forces women and girls to resort to unsafe methods, resulting in health complications that disrupt their education. To mitigate the practical implications of the reservation on women's education, there is a need for comprehensive sex education programs that empower girls with knowledge about their reproductive rights, choices, and available support services.

Impact on Economic Empowerment: Unsafe abortions can lead to increased healthcare costs, impacting a woman's economic stability. Health issues arising from unsafe abortions can lead to absenteeism or decreased productivity in the workforce. Limited career opportunities: Women may face obstacles in career advancement due to the consequences of unsafe abortions. To mitigate the economic implications of the reservation, there is a need for comprehensive reproductive health services that include safe abortion options. This can empower women to make choices that align with their economic goals. Addressing these implications requires a comprehensive approach that considers not only legal reforms but also access to reproductive health services and gender equality initiatives to support women's economic empowerment in Kenya.

Impact on Political Participation: Impact on political engagement: Restrictions on safe abortion may affect women's ability to participate actively in civic and political activities. Reproductive rights as a political issue: The limitations on abortion access can become a focal point in political discourse, influencing public opinion and policy decisions. Addressing these implications necessitates a holistic approach involving legal reforms and support for women's reproductive choices and political engagement to ensure equitable and meaningful political participation in Kenya.

Impact on Women's Rights and Gender Equality: Firstly, it is contended that these reservations perpetuate gender-based discrimination by potentially subjecting women to undue risks and challenges when seeking reproductive healthcare[50]. Denying women access to safe abortion services when their health is at risk can be seen as a violation of their human rights. Moreover, these reservations could undermine efforts to achieve

50 Interview with key informants on October 3 and October 5 2023

gender equality in Kenya, as they limit reproductive rights and bodily autonomy, integral components of gender equality.

An ambiguous and unclear abortion legal and policy environment can result in emotional distress and social stigma, potentially infringing upon the human rights of women and girls. These rights encompass privacy, non-discrimination, and equality.

The challenges stemming from Kenya's reservations to Article 14(2)(c) of the Maputo Protocol can obstruct the effective implementation of the Protocol in the country. They contribute to legal uncertainty, access barriers, potential rights violations, and international scrutiny that detract from the Protocol's goals of promoting women's rights, health, and gender equality. Addressing these challenges is essential to ensure the full realization of the Maputo Protocol's objectives within Kenya.

5. CASE STUDIES OR EXAMPLES THAT ILLUSTRATE THE IMPACT OF KENYA'S RESERVATION ON ARTICLE 14(2)(C) OF THE MAPUTO PROTOCOL

To illustrate the impact of Kenya's reservation on Article 14(2)(c) of the Maputo Protocol, the following case studies highlight how this reservation can affect women's access to reproductive healthcare and their rights:

Case Study 1: Lack of Access to Safe Abortion Services

JMM experienced a traumatic incident of sexual assault, leading to an unintended pregnancy discovered two months later. Seeking assistance, she sought the services of a purported "doctor" in the back room of a pharmacy. Despite initial promises of a resolution, the interventions failed, resulting in severe complications including heavy bleeding and vomiting.

Fearing her parents' reactions, JMM kept her condition secret. However, news of her worsening health reached her mother through her elder sister's mother-in-law. Urged by her mother, JMM was taken to the nearby dispensary in Ibeno in Kisii County. Unfortunately, due to a lack of equipment and skilled staff, the facility couldn't complete the abortion or provide proper post-abortion care. Consequently, she was transferred by ambulance to Kisii Teaching and Referral Hospital, approximately 15.6 km away.

At the hospital, doctors removed the foetus and disclosed that JMM had undergone an unsafe abortion. With her kidneys failing, she was then referred to Tenwek Mission Hospital, located 50 kilometres away. Financial constraints forced JMM's family to transport her to Tenwek by taxi. After a seven-day stay, she was transferred by ambulance to Kenyatta National Hospital in Nairobi, which had dialysis facilities.

At Kenyatta National Hospital, JMM was diagnosed with a septic abortion, haemorrhagic shock, and chronic kidney disease. She underwent surgery and a two-month-long treatment, including dialysis and the hospital bill was beyond her family's means. Consequently, JMM was detained for non-payment, and the deplorable conditions in the detention room worsened her health. After the fee was waived, she was discharged two weeks later.

Post-discharge, she was advised to undergo monthly routine dialysis at same hospital's renal unit, a cost her family couldn't bear. Tragically, by the time the legal case was heard, JMM had succumbed to kidney failure at the age of 18. Represented in the case by her mother and guardian, known as "PKM," this incident underscores the urgent need for improved reproductive healthcare and support and more so for survivors of sexual assault. Due to Kenya's reservation, the healthcare system is ill-equipped and an avenue has been created for quacks exploit the situation wreaking havoc on women's bodies in the name of the provision of abortion services.

Case Study 2

PAK, an 18-year-old adolescent from Ganze Location in Kilifi County, was enrolled as a form two student at Patanguo Mixed Day Secondary School in Ganze Sub-County, Kilifi County, at the relevant time. PAK conceived following consensual intercourse with a fellow student. Facing complications such as severe pain and bleeding, PAK sought treatment at the Chamalo medical clinic in Ganze Location on the 19th of September 2019. At approximately 5:00 pm on the same day, Salim Mohammed, a trained health worker, received PAK at Chamalo Medical Clinic. PAK reported experiencing intense abdominal cramps, followed by mild vaginal bleeding that escalated over time.

While at the clinic, PAK received emergency care from Salim Mohammed, a registered clinical officer with a current practice license from the Clinical Officers' Council. A holder of a diploma in Clinical Medicine and Surgery from the Kenya Medical Training College, Mohammed successfully performed a manual vacuum evacuation. Subsequently, PAK was in fair general condition, though experiencing mild lower abdominal pain, and was allowed to return to the female ward for recovery.

Two days later around 7:00 pm on September 21, plain-clothed police officers came to the clinic without prior notice or permission, demanding PAK's treatment records. The officers confiscated the records from Salim Mohammed. Both PAK and Salim Mohammed, alongside two female employees working as cleaners at Chamalo Medical Centre, were arrested and taken to Ganze Police Patrol Base. At the police base, PAK was coerced into signing a statement prepared by the inquiring police officer.

Following these events, on the 22nd of September 2019, PAK underwent a medical examination at Kilifi County Hospital, where a medical examination form was completed. On the 23rd of September, PAK was charged in Kilifi Criminal Case No. 395 of 2019 for 'Procuring abortion contrary to section 159 of the Penal Code. In the charge sheet, it was alleged that, on the 19th of September 2019 at around 1900 hours at Game location in Game Sub-county within Kilifi County, she intended to procure her miscarriage by self-administering drugs, leading to her miscarriage.

Simultaneously, Salim Mohammed faced charges in the same case, including 'Procuring abortion contrary to section 158 of the Penal Code' and, alternatively, 'Supplying drugs to procure abortion contrary to section 160 of the Penal Code.' The charges outlined his alleged involvement in unlawfully administering unknown drugs to PAK that led to her miscarriage and unlawfully supplying drugs to PAK with the intent of procuring her miscarriage.

Concurrently, in Children's Case No. 72 of 2019, the Children's Officer for Ganze Sub-County sought to have PAK sent to a children's home for about three weeks from the 23rd of September 2019 to the 17th of October 2019. On the 18th of February 2020, for about three weeks the children's officer, Mr Mbogo, wrote a letter to PAK's school head teacher seeking confirmation of her attendance and, regrettably, stigmatizing her due to her legal encounter. Subsequently, the following day on the 19th of February 2020, PAK, along with her mother, was summoned from school by the children's officer. Additionally, on the 1st of March 2020, PAK's father received a court summons, requested by the children's officer in charge of Ganze Sub-county, mandating him to bring PAK from school to court on the 12th of March 2020.

It is only when PAK and Salim Mohammed filed a petition founded on Articles 2, 2(5), 3, 7, 10, 232, 20(3)(a) and (b), 21(1), 24(1), 26(1) and (4), 27, 28, 29, 43, 46, 47, 48, 49, 50,53, 73, 75, 157, 159, 165, 258, 259 of the Constitution of Kenya 2010, Section 6(1) of the Health Act 2017, Sections 158, 159,160 of the Penal Code, Sections 4 and 5 of the Fair Administrative Action Act No. 4 of 2015 among other various legislative provisions that the High Court granted relief[51].

These case studies illustrate the practical consequences of Kenya's reservation to Article 14(2)(c) of the Maputo Protocol. Women and girls face obstacles in accessing safe and legal abortion services even when their circumstances warrant it, leading to potential health risks, legal uncertainties, and delays in receiving essential care. Health professionals are hesitant to offer safe abortion, even though many cases fall under the circumstances outlined in Article 14(2)(c) of the Maputo Protocol. They fear potential legal repercussions and social stigma. Women and girls' access to safe and legal abortion services is limited, forcing them to consider unsafe alternatives or clandestine procedures, endangering their health and well-being if not their lives. These scenarios emphasize the importance of addressing the impact of the reservation on women's reproductive rights and healthcare access within the country.

Opposition and backlash

The environment about abortion and Kenya's reservations to Article 14(2)(c) of the Maputo Protocol have faced significant opposition, and criticism, and have been subject to legal disputes of various forms of opposition and disputes related to these reservations including setbacks in the legislature and the Executive.

Efforts to disseminate information about safe abortion in Kenya can lead to serious repercussions, exposing individuals to opposition from religious leaders and anti-abortion activists. Marie Stopes Kenya, an arm of the international abortion service provider Marie Stopes International, encountered such challenges. In 2018, they initiated the "We Have Your Back" campaign, urging Kenyan journalists to spark a nationwide dialogue on the perceived "unsafe abortion epidemic" in the country and inform women about available safe options. However, this initiative faced significant backlash. The media campaign prompted public outcry, leading to the Kenya Medical Practitioners and Dentists Board prohibiting Marie Stopes Kenya from providing abortion services. The Kenya Film and Classification Board also banned the organization from advertising its abortion services, equating such promotions with advocating abortion. The ban on abortion services was eventually lifted in December 2018, following audits by the Ministry of Health to ensure compliance with legal provisions.

A right-wing misinformation campaign targeted Kenyan MPs Susan Kihika and Esther Passaris when they introduced the Reproductive Health Bill in late 2019, aiming to clarify abortion grounds. In mid-2020, the Kenyan Health Ministry withdrew the Bill, deeming it "fundamentally defective" due to its abortion provisions. During an August 2020 Senate hearing on the Bill, Dr. Mercy Mwangangi, the Health Ministry's Chief Administrative

51 High Court of Kenya in Malindi (2022) *PAK and Salim Mohammed vs the Attorney General and 3 others (Petition E009 of 2020).*

Secretary, criticized it for “normalizing abortion on demand against the Constitution and the country’s values.” The Bill was later withdrawn for more public input.

A recent investigation by Modzilla Academy Fellow Odanga Madung revealed that CitizenGo, a right-wing organization from Spain, had paid anonymous “influencers” to disseminate false information about abortion and attack Kihika and Passaris on Twitter during crucial Bill hearings. Odanga emphasized how this European group used Twitter to inject disinformation into a nuanced regional debate and criticized Twitter’s lack of cultural context, staffing, and resolve to combat the issue. Amnesty International’s Kenya, through its Director Irungu Houghton, has asked Kenyan policymakers to consider comprehensive sex education, safe abortion, and post-abortion care services, especially given the increased sexual and gender-based violence, exacerbated by the COVID-19 pandemic. Houghton stressed that ignoring these issues or criminalizing teenage sex is ineffective, as evidenced by the rising rates of unwanted pregnancies.

6. CONCLUSIONS

In conclusion, Kenya's government reservations under Article 14(2)(c) of the Maputo Protocol have generated a complex and multifaceted impact, intertwining legal, human rights, and practical considerations. The reservations, rooted in perceived inconsistencies with domestic law, particularly Article 26(4) of the Kenyan Constitution, have contributed to a legal environment marked by ambiguity and uncertainty.

From a legal standpoint, the reservations have raised questions about their compatibility with the core objectives of the Maputo Protocol, a regional treaty designed to protect and promote women's rights, including reproductive autonomy. The cited FIDA-Kenya case illuminated the tensions between these reservations and the constitutional framework, underscoring the challenges in interpreting and applying laws related to safe and legal abortions.

On the human rights front, Kenya's reservations present a potential violation of women's fundamental rights, particularly encroaching upon reproductive autonomy and undermining efforts to eliminate gender-based discrimination. The reservations introduce uncertainties and restrictions that could compromise women's agency in making decisions about their pregnancies and health, directly challenging the international human rights norms advocating for the eradication of gender-based discrimination.

Practically, the impact of these reservations has been felt in healthcare delivery, with the arbitrary withdrawal of guidelines further creating confusion and hesitancy among healthcare providers. The withdrawal has limited access to essential reproductive healthcare services, contributing to an environment where unsafe abortions and maternal mortality persist and in particular, disproportionately affecting marginalized women.

Addressing the impact of Kenyan government reservations requires a comprehensive approach that considers legal reforms, awareness campaigns, and policy changes. Efforts should be directed at aligning national laws with international human rights standards, fostering clarity in the legal framework, and ensuring that healthcare providers are empowered to offer essential services without fear of legal repercussions.

In navigating this complex landscape, civil society organizations, women's rights advocates, and international bodies play a crucial role in advocacy and awareness campaigns. By fostering dialogue, pushing for legal reforms, and safeguarding women's reproductive choices, these stakeholders can contribute to creating an environment that respects, protects, and helps fulfill women's rights, as envisioned by the Maputo Protocol and other international agreements. Ultimately, the resolution of this issue requires a collaborative and concerted effort to reconcile legal frameworks, human rights principles, and practical healthcare considerations in the context of women's reproductive rights in Kenya.

7. RECOMMENDATIONS

Based on the analysis of the impact of Kenyan government reservations under Article 14(2)(c) of the Maputo Protocol, the following recommendations are proposed:

1. **Legal Reform and Clarity:** Review and Clarify Legal Frameworks, Conduct a comprehensive review of laws that touch on reproductive health and align them with Article 26(4) of the Kenyan Constitution, and equally align them with the objectives of the Maputo Protocol. Amend existing laws to eliminate inconsistencies and provide clarity on permissible circumstances for abortion. Work towards legal reforms that provide clarity on the circumstances under which abortion is permitted. Explicitly outline situations such as sexual assault, rape, incest, or threats to the mental or physical health of the mother/girl as legally justifiable reasons for abortion.

2. **Remove the Reservation under Article 14(2)(c) of the Maputo Protocol:** Align the national legal framework with international human rights standards to contribute to a more comprehensive and rights-respecting approach to women's reproductive health.

3. **Implement the Constitution and Existing Health Laws and Policies:** Strengthen and enforce the implementation of existing health policies supporting reproductive health and women's rights and ensure healthcare facilities are equipped and staffed to provide essential reproductive health services, including safe abortion procedures where legally permissible.

4. **Strengthen Healthcare Infrastructure:** Invest in healthcare infrastructure to ensure facilities are equipped and staffed to provide safe and legal abortion services and provide training to healthcare providers in the provision of these services.

5. **Reinstate and Strengthen Guidelines:** Reinstate and strengthen guidelines, such as the withdrawn National Training Curriculum, providing clear and lawful procedures for healthcare workers in facilitating safe and legal abortions and involve relevant stakeholders, including medical professionals and women's rights organizations, in the consultation process.

6. **Policy Reforms:** Consider policy reforms prioritizing women's reproductive rights and health and develop and implement policies ensuring access to comprehensive reproductive health services, including safe and legal abortion, in line with international human rights standards.

7. **Capacity Building for Healthcare Providers:** Provide training and capacity-building programs for healthcare providers to ensure they are well-equipped to

offer reproductive health services within the legal framework. And include training on recognizing situations where abortion is legally permissible.

8. **Public Awareness and Education:** Launch public awareness campaigns to educate citizens, healthcare providers, and legal professionals about reproductive health rights and legal provisions, dispel misconceptions and ensure individuals are well-informed about their rights and choices.

9. **Engage Stakeholders:** Foster a multi-stakeholder dialogue involving government agencies, legal experts, healthcare providers, civil society organizations, and women's rights advocates and engage in discussions to address concerns, find common ground, and collaboratively work towards a legal framework that upholds both domestic laws and international human rights standards.

10. **International Collaboration:** Enhance collaboration with international human rights organizations and agencies to share experiences, insights, and best practices and seek support in aligning domestic laws with international human rights standards while respecting the sovereign legal framework of the country.

11. **Monitoring and Evaluation:** Establish mechanisms for continuous monitoring and evaluation of the implementation of reproductive health policies and regularly assess the impact of legal and policy changes on women's access to safe and legal abortion services, maternal health outcomes, and overall reproductive rights.

12. **Women's Participation:** Actively involve women in decision-making processes related to reproductive rights and ensure that policies and legal frameworks consider the perspectives and experiences of women, particularly those who may be disproportionately affected by restrictive abortion laws.

REFERENCES

Laws

The Constitution of Kenya, 2010

The Penal Code CAP 63 of the Laws of Kenya [REV 2012]

The Health Act 2017

Maputo Protocol (2010)

Policies

The Kenya Health Policy 2014-2030,

The Kenya Emergency Medical Care Policy 2020-2030

The National Reproductive Health Policy 2022

The Kenya Vision 2030

Standards and Guidelines for Reducing Morbidity & Mortality from Unsafe Abortion in Kenya. Nairobi: Kenya Ministry of Medical Services; 2012 available at https://www. safeabortionwomensright.or g/wp

Ministry of Health, Republic of Kenya, Kenya National Post Abortion Care Curriculum for Service Providers: Trainer's Manual 1, 26 (2003)

Cases

Constitutional Court of Kenya, Petition 266 of 2015 FIDA Kenya & 3 Others v. Attorney General & 2 Others http://kenyalaw.org/caselaw/cases/view/1 75490/.

Republic v John Nyamu & 2 others, High Court Criminal Case No. 81 of 2004 [2005] eKLR

Mehar Singh Bansel v. R, Court of Appeal at Nairobi, Criminal Appeal No. 115 of 1959, available at https://www.womenslinkworldwide.org/en/g ender-justice-observatory/ court-rulings- database/mehar-singh-bansel-v-r

Rex v. Bourne, Central Criminal Court, 3 All E. R. 615 (1938), available at https://www. womenslinkworldwide.org/en/fil es/2769/gjo-reinounido-1939-en-pdf.pdf

PAK and Salim Mohammed vs the Attorney General and 3 others (Petition E009 of 2020).

Chief Magistrate's Court in Makadara, Nairobi - Samson Mwita and Grace Wanjiku Acquittal (September 28, 2023)

Advisories and Concluding Observations

Kenya National Commission on Human Rights

Advisory on The Removal of Kenya's Reservation on Article 14(2)(c) of The Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa

Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee). "Concluding observations on the seventh periodic report of Kenya." 2011.

Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee). "Concluding observations on the eighth periodic report of Kenya." 2017.

Publications and Articles

A Decade of Existence: Tracking Implementation of Article 26(4) of the Kenyan Constitution.

In Harm's Way: The Impact of Kenya's Restrictive Abortion Law (2010)

Kenya National Commission on Human Rights: A report on the Public Inquiry into Violations of Sexual and Reproductive Rights, 47 (2012), available at http://www.knchr.org/Portals/0/Reports/Rep roductive_health_report.pdf)

Kenyan Ministry of Health Study (2012)

African Population and Health Research Center (APHRC) Study (2013)

UNFPA Report on Adolescent Pregnancies (2017)

Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) Reports

Marie Stopes International Estimates (2018)

Kenya Demographic Health Surveys (2014, 2022)

Kenya National Commission on Human Rights (KNCHR) Advisory (2021)

FIDA-Kenya (2014-2015). "Review and Analysis of Media Reports on Unsafe Abortion and Incidents of Rape and Defilement."

Human Rights Watch (2017). "Kenya: Ensure Access to Safe, Legal Abortion."

Committee on the Elimination of Discrimination Against Women (CEDAW Committee) (2017). "Concluding Observations on the Eighth Periodic Report of Kenya."

COVAW

Coalition on Violence Against Women

Dhanjay Apartments, 8th Floor, Apartment No. 807,
Hendred Avenue, Valley Arcade, Off Gitanga Road, Nairobi
Telephone: +254 20 804 0000
+254 (0) 722 594794/ +254 (0) 733 594794
Email: info@covaw.or.ke
Website: www.covaw.or.ke
@covaw @covaw

END GBV

Report Gender Based Violence
Toll free line:
0800 720553