

**UNIVERSITY OF PRETORIA**

**A HUMAN RIGHTS APPROACH TO INVOLUNTARY STERILISATION OF POOR  
WOMEN LIVING WITH HUMAN IMMUNODEFICIENCY VIRUS IN KENYA**

**BY:**

**BENTA MOIGE MORANGA**

**STUDENT NUMBER: 20809264**

**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE  
CONFERMENT OF A MASTER OF LAWS DEGREE IN SEXUAL AND  
REPRODUCTIVE RIGHTS IN AFRICA.**

**SUPERVISED BY:**

**DR. ASHWANEE BUDOO-SCHOLTZ**

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## PLAGIARISM DECLARATION

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## **DEDICATION**

To my family and the women of Kenya.

## ACKNOWLEDGEMENT

I thank God for fulfilling my life's dream.

I acknowledge my family emotional and financial support. I am eternally grateful to have you.

To Purity, Brandon, Trevor, Samantha, Tess and Assa, I did this for you too, always know that nothing is impossible.

Uncle Edward and Aunt Caren, thank you for your support.

I appreciate my supervisor Dr. Budoo for helping me structure a proper research. I appreciate the critique, gentle guidance, thorough and timely feedback has made the completion of this research possible.

I thank the Centre Human Rights at the University of Pretoria for the opportunity for giving me an avenue to learn how to realise the rights of women.

To the Sexual and Reproductive Rights Master's class of 2020, thank you for sharing your knowledge. May our paths cross often.

Leone, thank you for being my classmate and teacher.

And to my friends who have supported me in various ways while I tried to accomplish this mission, I thank you most sincerely. A special mention to Gladys Ogoti, Fabian, Max and Kevin.



## ABBREVIATIONS

<b>CEDAW</b>	-	Convention on the Elimination of All Forms of Discrimination against Women
<b>CESCR</b>	-	Committee on Economic, Social and Cultural Rights
<b>ECHR</b>	-	The European Court of Human Rights
<b>FIGO</b>	-	International Federation of Gynaecologists
<b>HIV</b>	-	Human Immunodeficiency Virus
<b>ICCPR</b>	-	International Convention on Civil and Political Rights
<b>ICWLH</b>	-	The International Community of HIV-Positive women/AIDS
<b>KELIN</b>	-	Kenya Legal & Ethical Issues Network on HIV and AIDS
<b>PMTCT</b>	-	Prevention of Mother to Child Transmission
<b>UDHR</b>	-	Universal Declaration of Human Rights
<b>UN</b>	-	United Nations
<b>UNAIDS</b>	-	United Nations Programme on HIV/AIDS
<b>UNHRC</b>	-	United Nations Human Rights Committee
<b>WHO</b>	-	World Health Organisation

## CHAPTER ONE: INTRODUCTION

### 1.0 Background

Kenya has about 1.5 million people living with Human Immunodeficiency Virus (HIV).<sup>1</sup> The prevalence is higher among women with a percentage of 6.6% compared to that of men which is at 3.1 %.<sup>2</sup> Being a low income country, 7.8 million of its population is poor,<sup>3</sup> with women as the majority of those living below the poverty line.<sup>4</sup> According the Ministry of Health, poverty is one of the drivers of HIV in the country, making women more vulnerable.<sup>5</sup>

In 2011, a report detailing stories of HIV-Positive women being forcefully sterilised, was realised by the African Gender and Media Initiative (Gender and Media Initiative).<sup>6</sup> Some of the women in the report were forced to undergo sterilisation in hospitals while giving birth without proper education on the effects of the procedure.<sup>7</sup> The report indicated that majority of HIV-Positive women from impoverished areas within Kenya, have undergone forced sterilisation.<sup>8</sup> Some international organisations even pay poor HIV-Positive women so that they can have birth control procedures performed on them.<sup>9</sup>

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<sup>1</sup> Ministry of Health 'Report: Kenya HIV County Profiles' (2014) [http://nacc.or.ke/wp-content/uploads/2015/10/Kenya\\_County\\_Profiles.pdf](http://nacc.or.ke/wp-content/uploads/2015/10/Kenya_County_Profiles.pdf) (accessed 15 September 2021).

<sup>2</sup> The East African Survey 'Report: HIV-Positive women in Kenya twice as many as men – survey' (2020)<https://www.theeastafrican.co.ke/tea/science-health/women-living-with-hiv-in-kenya-twice-as-many-as-men-survey-1437198> (accessed 15 September 2021).

<sup>3</sup> R Komi 'Kenya: Four Million Women Live Below Poverty Line' (2020) <https://africasustainabilitymatters.com/kenya-four-million-women-live-below-poverty-line/> (accessed 17 September 2021).

<sup>4</sup> As above.

<sup>5</sup> Ministry of Health 'Report: Kenya HIV Estimates Report' (2018) <https://africasustainabilitymatters.com/kenya-four-million-women-live-below-poverty-line/> (accessed 15 September 2021).

<sup>6</sup> African Gender and Media Initiative 'Report: Robbed of Choice: Forced and Coerced Sterilisation Experiences of HIV-Positive women in Kenya. Nairobi, Kenya' (2012).

<sup>7</sup> Gender and Media Initiative (n 6) 2.

<sup>8</sup> Gender and Media Initiative (n 6) 9.

<sup>9</sup> Z Villines 'HIV Transmission: Know the facts' (2010) <https://www.medicalnewstoday.com/articles/315920> (accessed 18 September 2021).

Accordingly, some of the women did not know that they had been sterilised and came to know of the procedure after a visit to the doctor asking when they could expect their next child.<sup>10</sup> Statistics show that only 18.8% of women in Kenya are informed of the side effects of sterilisation.<sup>11</sup> The experiences shared by the women indicate that they were scared by the prospect of having unhealthy children and they are now suffering psychologically because of the stigma experienced from society and their family members.<sup>12</sup>

It was confirmed that most sterilisations of HIV positive women was done in public hospitals.<sup>13</sup> In some cases, consent was acquired when the women were vulnerable such as when in labour or unable to afford treatment. In these vulnerable states, they had to rely on the goodwill from medical personnel.<sup>14</sup>

The National Family Planning Guidelines for Service Providers of Kenya (the guidelines) emphasise the need for informed consent before sterilisation.<sup>15</sup> They provide that every woman who opts for this method must do so voluntarily and is fully informed of its irreversibility nature and the availability of other family planning methods.<sup>16</sup>

Historically, involuntary sterilisation was designed to target ‘undesirable’ groups.<sup>17</sup> It has always existed within a system protected by law, ignorance of the community and complacency of professionals such as doctors.<sup>18</sup> Therefore, Kenya needs to have a human rights conscious legal and institutional framework to address human rights violations occasioned upon poor HIV-Positive women by the unsanctioned sterilisations.

## 1.1 Research Problem

This research is based on two problematic areas. The first one is the involuntary sterilisation of poor women living with HIV in Kenya. A survey conducted by the International Community of

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<sup>10</sup> D K Muniyako ‘More women now take to sterilization’ Sunday Nation (Nairobi) 15 September 1985 at 5.

<sup>11</sup> Centre for Reproductive Rights & Federation of Women Lawyers in Kenya ‘Report: Failure to Deliver: Violations of Women’s Human Rights in Kenyan Health Facilities’ (2007) 21.

<sup>12</sup> African Gender and media Initiative (n 6) 3.

<sup>13</sup> Y Kakande ‘HIV-Positive women Ugandan women complain of forced sterilization in government hospitals’ 2016 1 *Healthcare & Phrama* 1.

<sup>14</sup> As above.

<sup>15</sup> Ministry of Health, ‘National Family Planning Guidelines for Service Providers’ (2010) <https://tciurban.health.org/wp-content/uploads/2019/04/Kenya-National-Family-Planning-Guidelines-6th-Edition-for-Print> (accessed 20 May 2021).

<sup>16</sup> As above.

<sup>17</sup> J F May *World population policies: their origin, evolution, and impact* (2012) 5.

<sup>18</sup> N Antelava *Forced sterilization of women in Uzbekistan* (2013) 15.

Women living with HIV Eastern Africa concluded that 20 of the 72 HIV positive women sampled, had undergone forced sterilisation.<sup>19</sup> In Kenya, 40 women who were interviewed by the Gender ad Media Initiative had been forcibly sterilised.<sup>20</sup> These numbers show a pattern and a confirmation that indeed there is a problem where women living with HIV are sterilised against their will.

The second problematic area is the response from the government which has not done much to elevate the situation. The Kenyan government has been issuing statements against involuntary sterilisation of poor women living with HIV.<sup>21</sup> The response cannot be said to be human rights based. This is because, according to the human rights approach theory, the government will be said to have taken a human rights approach when it introduces and implements policies against this vice.<sup>22</sup> A human rights approach is meant to issue lasting solutions.

In the past, governments have justified illegal sterilisation as a way of curbing population increase and reducing the rates of HIV infections, which approach utterly disregards fundamental rights.<sup>23</sup>

The government has a duty to protect all its citizens against discrimination.<sup>24</sup> It must uphold and enforce the Bill of Rights as provided under article 21 of the Constitution (the Constitution). The government is mandated to respect, protect and promote realisation of human rights including the rights to non-discrimination, health and protection from all forms of violence.<sup>25</sup> Accordingly forced sterilisation, of poor HIV-Positive women in Kenya has caused mental anguish, discrimination, and deprivation of their basic rights.<sup>26</sup> Additionally, their economic status makes it difficult for them to explore the remedies stipulated in the Constitution for violation of rights.<sup>27</sup>

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<sup>19</sup> News deeply ‘Women and Girls Women with HIV Take Fight Against Forced Sterilization to Court’ <https://deeply.thenewhumanitarian.org/womenandgirls/articles/2017/01/11/women-hiv-take-fight-forced-sterilization-court> (accessed 4 January 2022).

<sup>20</sup> As above.

<sup>21</sup> As above.

<sup>22</sup> As above.

<sup>23</sup> World Health Organisation, ‘Report: Eliminating forced, coercive and otherwise involuntary sterilisation: An interagency statement’ (2014) [https:// www. unaids. org/ sites/ default/ files/ media\\_ asset/ 201405\\_ sterilization\\_ en. pdf](https://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf) (accessed 10 July 2021).

<sup>24</sup> Constitution of the Republic of Kenya 2010 art 27.

<sup>25</sup> W K Ochieng ‘The horizontal application of the Bill of Rights and the development of the law to give effect to rights and fundamental freedoms’ (2014) 1 *The Journal of Law and Ethics* 78.

<sup>26</sup> Chapter 4.

<sup>27</sup> Art 23(3) (a)-(f).

Moreover, there is a gap on the causes of action and remedies available in the event of forced sterilisation or impending forced sterilisation.<sup>28</sup>

The government of Kenya has done little to prevent discrimination against poor HIV-Positive women and it ought to be held accountable. In the principle of horizontal and vertical application of human rights the government should protect its citizens from human rights abuse from state and non-state actors.<sup>29</sup> Traditionally, only the state was deemed to have the ability to abuse human rights.<sup>30</sup> However, with the new constitutional dispensation, even private persons and entities can abuse human rights despite their ‘public law’ nature.<sup>31</sup>

Despite the robust international legal framework on how to address violations such as involuntary sterilisation, the affected women have had little recourse. This is because they have no knowledge on how or where to seek redress and what remedies are available to them. This research therefore highlights the various system failures and the remedies available to them. It brings out the human rights approach to the already existing legal and policy framework in realising the rights of poor HIV-Positive women in Kenya.

## 1.2 Research Questions

The focal research question is to what extent involuntary sterilisation of poor HIV-Positive women in Kenya violates their human rights? The sub questions are:

- (i) To what extent does involuntary sterilisation affect poor HIV-Positive women in Kenya?
- (ii) What are the human rights violations of involuntary sterilisation of poor HIV-Positive women in Kenya?
- (iii) To what extent do the laws, policies and institutions protect and provide remedies for poor HIV-Positive women in Kenya from involuntary sterilisation?
- (iv) How can the poor HIV-Positive women be protected from involuntary sterilisation?

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<sup>28</sup> Africa Gender Media Initiative (n 6)13.

<sup>29</sup> As above.

<sup>30</sup> Ochieng (n 25) 78.

<sup>31</sup> As above.

## 1.3 Definitions

### 1.3.1 HIV

HIV is defined as: ‘Human Immunodeficiency Virus which attacks the cells which are responsible for fighting infection of the body.’<sup>32</sup>

### 1.3.2 Sterilisation

‘Sterilisation is a form of permanent family planning.<sup>33</sup> It is irreversible and is expected that parties opting for this method ought to be fully prepared for the procedure.’<sup>34</sup>

### 1.3.3 Forced Sterilisation

Forced sterilisation ‘is sterilisation which is procured without the express consent of the person being sterilised.’<sup>35</sup> It occurs when the affected party is subjected to a procedure, which permanently prevents them from reproducing, without being granted an opportunity to decide whether they want to undergo the procedure.<sup>36</sup> This can also happen when the consent is acquired through duress or coercion.<sup>37</sup> Forced sterilisation infringes on human rights.<sup>38</sup>

### 1.3.4 Poverty

Poverty is defined as ‘living below a dollar which makes one lack the capacity to participate effectively in society’.<sup>39</sup>

### 1.3.5 Poor Women

Poor women, refers to persons of the female gender, who are of the reproductive age and live below a dollar a day.<sup>40</sup> Most of these women live in the villages and slum areas of Kenya.<sup>41</sup>

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<sup>32</sup> World Health Organisation ‘Immunisation, Vaccines and Biologicals’ (2010) <https://www.who.int/immunization/diseases/hiv/en/> (accessed 18 May 2021).

<sup>33</sup> R J Cook & B M Dickens ‘Voluntary and involuntary sterilisation: Denials and abuses of rights’ (2000) 68 *International Journal of Gynaecology and Obstetrics* 61.

<sup>34</sup> As above.

<sup>35</sup> Cook & Dickens (n 33) 61.

<sup>36</sup> Cook & Dickens (n 33) 63.

<sup>37</sup> As above.

<sup>38</sup> As above.

<sup>39</sup> United Nations ‘Report: Teaching Tolerance United Nations Definition of Poverty’ (1998) [https://www.learningforjustice.org/sites/default/files/tt\\_poverty\\_h1.pdf](https://www.learningforjustice.org/sites/default/files/tt_poverty_h1.pdf) (accessed 31 May 2021).

<sup>40</sup> R Bleiweis ‘The Basic Facts About Women in Poverty’ (2020) <https://www.americanprogress.org/issues/women/reports/2020/08/03/488536/basic-facts-women-poverty/> (accessed 17 September 2021).

<sup>41</sup> As above.

## 1.4 Methodology

This research employs secondary methods of research as it is desk based. It relies on existing data, case law and articles. The research also focuses on existing data including information filled from surveys and made available to the public including books, articles, peer reviews, dissertations and online sources. It refers to reports from the government and non-governmental organisations, media and press releases.

This research also focuses on primary sources such as national and international instruments and laws. It, among other instruments relies on the Constitution of Kenya, the Health Act of Kenya,<sup>42</sup> the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the African Charter on Human and Peoples' Rights (the African Charter), the International Covenant on Economic, Social and Cultural rights and the Universal Declaration on Human Rights (UDHR).

Finally, this research employs the diagnostic method of analysis where it contextualises the state of sterilisation of poor women living with HIV in Kenya and also tries to devise solutions to the is problem. This analysis method shall be supported by the data collected from the primary and secondary sources discussed above.

## 1.5 Theoretical Background

This research is anchored on the feminism and intersectionality theories. The theories advocate for autonomy and equality as the founding pillars of human existence and interactions.<sup>43</sup>

### 1.5.1 Feminist Theory

The feminist theory is understood in so many spectrums.<sup>44</sup> This research has adopted the understanding posited by Bartlett that the theory majorly concerns itself with work concerning women and the law, which eventually leads to normative conclusions in form of laws and policies on areas such as abortion, sterilisation among others.<sup>45</sup> The guiding principle in this

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<sup>42</sup> Health Act 21, 2017.

<sup>43</sup> K Engle 'International Human Rights and Feminism: When Discourses Meet' (1992) 3 *Michigan Journal of International Law* 520.

<sup>44</sup> As above.

<sup>45</sup> As above.

theory, despite the divergent approaches is the intention to improve the statuses of women.<sup>46</sup> The theory advocates for undoing of the ‘colonised faces’ within the law affecting women, such as reproductive health and giving of consent.<sup>47</sup>

According to Hughes, equality in feminism aims at ensuring equal privileges for women in public and social lives despite their gender or social and economic status.<sup>48</sup> Forcing women to undergo sterilisation goes against the pillars of feminism especially the freedom of choice and equality.<sup>49</sup>

Drakopoulou posits that consent is the interrelation element which is manifested through communicated acceptance.<sup>50</sup> This concept is important in dealing with reproductive rights.<sup>51</sup> This concept is an integral part of the feminist movement which fights towards giving women the power to willfully consent to or reject certain actions.<sup>52</sup> Freedom of choice is central to feminism and this is one of the most important aspects to be addressed when discussing involuntary sterilisation.<sup>53</sup>

The feminist theory is relevant in this research because the topic of research is on the challenges faced by vulnerable women from poor economic areas and are living with HIV.<sup>54</sup> The feminist theory is anchored on equality, choice, and care, which are absent when women are forced to undergo sterilisation.<sup>55</sup> For instance, one of the social media users observed that when her husband wanted to undergo a vasectomy, the medical personnel were so cooperative, and it was evident that they trusted this decision compared to when she had to undergo an abortion and so many consents and procedures were required of her.<sup>56</sup>

In conclusion, the feminist theory addresses the inequalities in society and how they affect the day to day lives of women and in this case, poor HIV-Positive women. It will be vital in

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<sup>46</sup> G Lawson ‘What is feminist legal theory: Panel feminist legal theories’ (1995) 18 *Harvard Journal of Law & Public Policy* 325.

<sup>47</sup> M Fineman ‘Feminist theory and law’ (1995) 18 *Harvard Journal of Law & Public Policy* 351.

<sup>48</sup> As above.

<sup>49</sup> C Hughes, ‘Key concepts in feminist theory and research’ (2002) 3.

<sup>50</sup> M Drakopoulou ‘Choice and Consent: Feminist Engagements with Law and Subjectivity’ (2007) 1.

<sup>51</sup> As above.

<sup>52</sup> As above.

<sup>53</sup> Hughes (n 49).

<sup>54</sup> As above.

<sup>55</sup> As above.

<sup>56</sup> As above.



explaining some of the underlying causes of involuntary sterilisation such as patriarchy. It will also help devise solutions which are centered on poor HIV-Positive women.

### 1.5.2 Intersectionality Theory

Crenshaw came up with this theory to help explain the multi dimensionality of the challenges faced by black women in the country.<sup>57</sup> She brought out the need to view issues compounded as compared to just looking at them as singular issues.<sup>58</sup> Crenshaw insists on looking beneath the existing forms of discrimination and level the ground for those who are suffering in more than one way of discrimination.<sup>59</sup> For example, fighting racism without acknowledging that black women in America suffer discrimination based on race, gender and social status does not cure the challenges faced by these women.<sup>60</sup>

Hernandez explains that intersectionality is simply an examination of sex, gender, class, nationality among other factors, play out in different settings.<sup>61</sup> Furthermore, the theory advocates that the various social differences should be considered central to various issues affecting all classes of persons. It should be put to consideration how the differences come in to uniquely identify the group and how their experiences can be different based on the various factors that affect their way of life.<sup>62</sup>

In *Canada (Attorney General) v. Mossop*, Justice L'Heureux-Dube explained intersectionality as:<sup>63</sup>

It is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect.

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<sup>57</sup> K Crenshaw 'Demarginalising the intersection of race and sex: A black feminist critique of antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 *University of Chicago Legal Forum* 139 at 165.

<sup>58</sup> As above.

<sup>59</sup> A Y Davis *Women, Race & Class* (1983) 6.

<sup>60</sup> As above

<sup>61</sup> T Hernandez 'The Salience of Intersectionality Theory Analysis for Women of All Colours' (2003) *Rutgers University Law School-Newark* 2.

<sup>62</sup> N Carrim & S Nkomo 'Wedding Intersectionality Theory and Identity Work in Organisations: South African Indian Women Negotiating Managerial Identity' (2016) *Gender, Work and Organisation* 261.

<sup>63</sup> R Sifris 'Involuntary sterilisation of HIV-Positive women: An example of intersectional discrimination' (2015) 2 *Human Rights Quarterly* 464.

The theory posits that a person's social and political identities can, come together to occasion discrimination upon them.<sup>64</sup> For instance, in this research, women have been facing social imbalances by virtue of them being women, additionally that they are poor and living with HIV heightens their turbulent and injustice occasioned upon them.<sup>65</sup> Its import is to dispel the notion that gender is the major source of discrimination because several other factors including social class determine a woman's quality of life.<sup>66</sup>

## 1.6 Literature Review

### 1.6.1 History of Forced Sterilisation

In 1927, the Supreme Court of the United States allowed sterilisation of a woman who was considered unfit to procreate because of her disability.<sup>67</sup> This led to involuntary sterilisation of over 70,000 women in the United States.<sup>68</sup> The motivation behind this decision was the desire to do away with people who were less desirable people in society.<sup>69</sup> This gives pointers on the general societal attitude towards sterilisation selection criteria. If society considers an individual's condition to be undesirable or 'detrimental' to the community, it feels the need to restrict their ability to reproduce.

Historically, sterilisation was used as tool of improving genetics.<sup>70</sup> It later morphed into a tool of controlling general populations and laws were developed allowing for this procedure to be carried out especially on vulnerable populations.<sup>71</sup> However, most governments reformed their laws around this area after the world war allowing for individuals to consent to sterilisation but even so, coercion was still used.<sup>72</sup>

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<sup>64</sup> Harnandez (n 61) 3.

<sup>65</sup> Gender Media Initiative (n 6) 30.

<sup>66</sup> H Bell *Feminist Theory: From margin to centre* (1984) 52.

<sup>67</sup> *Buck v Bell* 274 U.S. 200 (1927).

<sup>68</sup> National Public Radio 'Report: The Supreme Court Ruling That Led To 70,000 Forced Sterilizations' (2016) <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations> (accessed 15 September 2021).

<sup>69</sup> Disability Justice 'Report: The Right to Self-Determination: Freedom from Involuntary Sterilisation' (2015) <https://disabilityjustice.org/right-to-self-determination-freedom-from-involuntary-sterilisation/> (accessed 27 May 2021).

<sup>70</sup> E Durojaye 'Involuntary sterilisation as a form of violence against women in Africa' (2017) 53 *Journal of Asian and African Studies* 721.

<sup>71</sup> As above.

<sup>72</sup> As above.

Sterilising women with HIV was adopted mostly by countries with high HIV infection rates as a way of combating mother-to-child transmissions even though this technique violated internationally set human rights standards.<sup>73</sup> Durojaye further notes that it is not clear for how long this practice has been ongoing but HIV-Positive have suffered over the years.<sup>74</sup> In Kenya, involuntary sterilisation Kenya can be traced back to the 80s where a woman was involuntarily sterilised at Pumwani maternity hospital. She was informed about the procedure when she inquired on why she was not conceiving.<sup>75</sup>

### a) Understanding Consent

Informed consent has been defined as ‘a process of getting permission before conducting a health care prevention on a person.’<sup>76</sup> The law mandates medical personnel to take reasonable steps to get the consent of a patient before performing a medical procedure.<sup>77</sup> Additionally, before seeking the consent, the health professional has a duty to inform the patient of their health status, the kind of medical treatment they are in need of and the risks attached to the treatment, the other options available to the patient and the costs of the treatment.<sup>78</sup> This information should be relayed in a language that the patient understands.<sup>79</sup>

One of the contentious subjects when it comes to consent is the issue of women with disabilities and their capacity to consent to medical procedures such as sterilisation. Traditionally persons with disabilities and specifically women have been denied the right to make choices concerning their reproductive rights.<sup>80</sup> It is imperative to note that women with intellectual disabilities have a right to decide what happens to their reproductive health.<sup>81</sup> States must facilitate dissemination of information to disabled women while ensuring that they remain the primary decision makers even with the help that they receive.<sup>82</sup> In cases of disability, guardians can make the decisions

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<sup>73</sup> As above.

<sup>74</sup> As above.

<sup>75</sup> Gender and Media Initiative (n 6) 7.

<sup>76</sup> Sec 2.

<sup>77</sup> Section 9 (1).

<sup>78</sup> Section 8.

<sup>79</sup> Section 8.

<sup>80</sup> C G Ngwena ‘Reproductive autonomy of women and girls under the Convention on the rights of persons with disabilities’ (2018) 140 *International Journal of Gynaecology and Obstetrics* 128.

<sup>81</sup> United Nations Convention on the Rights of Persons with Disabilities (CRPD) adopted in 2006 and enforced in 2007.

<sup>82</sup> UN Committee on the Rights of Persons with Disabilities General Comment 3: Article 6: Women and girls with disabilities (2016) CRPD/C/GC/3 dated 2 September 2016 para 2.

but with the patient's consent.<sup>83</sup> In cases where the patient is severely incapacitated, the court can permit a guardian to consent on their behalf.<sup>84</sup>

The National Patients' Rights Charter of Kenya (the patient's charter) mandates medical practitioners to ensure that they relay all relevant information to patients to facilitate issuance of consent and informed decision making.<sup>85</sup> The exception to receiving informed consent from a patient is only when the patient is in need of an emergency procedure or when failure to treat the patient may put the public at risk.<sup>86</sup>

The shortcoming of the Health Act and the patient's charter is that they have not addressed the question as to what happens when a patient gives consent but the medical practitioner exceeds the consent given. For instance, when a patient consent to a caesarian section to deliver a baby, only to have a sterilisation procedure performed.

Central to this research, is the concept of consent. 'Involuntary' connotes the absence of free will and as Drakopoulou points out, consent goes beyond the boundaries of so many disciplines and traverses boundaries which may be considered unexplored.<sup>87</sup> This means that consent goes beyond what society has accepted as the norm and addresses the issues of whether the person whose approval is required is comfortable to do that what is asked of them.

While analysing the importance of consent in fertility treatments in Kenya, Parker and others argue that patients in Kenya are often coerced into accepting medical procedures by their close family members, friends and even insurance companies.<sup>88</sup> Medical practitioners should ensure that the consent obtained from patients is free and informed.<sup>89</sup>

Sterilisation should be a consensual process where all women are given an opportunity to choose. Despite this requirement, there is documented evidence on forced sterilisation of women

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<sup>83</sup> Section 9 (1) (a) & (b) 2017 Health Act.

<sup>84</sup> As above.

<sup>85</sup> Amnesty International, 'Report: The Kenya National Patients' Rights Charter'(2013) <https://www.amnestykenya.org/wp-content/uploads/2019/04/PATIENTS-CHARTER-BOOKLET-FINAL.pdf> (accessed 16 September 2021).

<sup>86</sup> Sec 9 2017 Health Act.

<sup>87</sup> Drakopoulou (n 50) 1.

<sup>88</sup> R B Parkar 'Regulation of Informed Consent: A Focus on Fertility Treatments In Kenya' 94 *East African Medical Journal* 420 at 422.

<sup>89</sup> Parker (n 88) 426.

in Africa especially those who are HIV positive.<sup>90</sup> This research adds to the scholarly materials which emphasise the need to have free and informed consent of patients before performing medical procedures.

The right to consent is considered to have been breached when an individual's HIV status is revealed to their partner or other people.<sup>91</sup> Moyer in her findings noted that disregard of HIV-Positive women's right to consent is common in the Kenyan healthcare system.<sup>92</sup> The disregard of the mandatory requirement of obtaining the consent of HIV positive persons is often influenced by the discriminatory practices existing in the systems.<sup>93</sup>

Cook and Dickens explain that the woman who wishes to undergo sterilisation has to expressly consent.<sup>94</sup> Consent given by any other person other than the woman undergoing the procedure equates to forced sterilisation.<sup>95</sup> However this has been the situation and trained medical personal in fact take part in aiding this violation.<sup>96</sup> This research recommends causes of action against persons who illegally give consent on behalf of their spouses and how to prevent medical practitioners from performing these procedures without consent.

#### **b) Involuntary Sterilisation and Discrimination**

Atrey, suggests that, because of the many aspects of discrimination involved, intersectional discrimination should be recognised independently as a form of discrimination.<sup>97</sup> It is imperious to focus on vulnerable groups of women because their underlying circumstances diminish their quality of life.<sup>98</sup> According to the International Federation of Gynaecologists (FIGO), forced sterilisation amounts to violence and should be dealt with as per the guidelines for the

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<sup>90</sup> International Federation of Gynaecology and Obstetrics 'Female Contraceptive Sterilisation' (2011). [https://www.womenenabled.org/pdfs/International\\_Federation\\_of\\_Gynecology\\_and\\_Obstetrics\\_Sterilization\\_Guidelines\\_FIGO\\_2011.pdf?attredirects=0](https://www.womenenabled.org/pdfs/International_Federation_of_Gynecology_and_Obstetrics_Sterilization_Guidelines_FIGO_2011.pdf?attredirects=0) (accessed 15 July 2021).

<sup>91</sup> As above.

<sup>92</sup> E Moyer & Others 'The duty to disclose in Kenyan health facilities: A qualitative investigation of HIV disclosure in everyday practice' (2013) 1 *Journal of Social Aspects of HIV/AIDS* 61.

<sup>93</sup> N R Sircar et al 'Assessing human rights-based approach to HIV in Kenya' (2019) 21 *Health and Human Rights Journal* 267.

<sup>94</sup> Cook & Dickens (n 33) 65.

<sup>95</sup> Cook & Dickens (n 33) 66.

<sup>96</sup> Family Health International 'Report: Country Assessment: Kenya Family Planning Needs in the Context of the HIV/AIDS Epidemic' (2004) 4.

<sup>97</sup> S Atrey *Intersectional Discrimination* (2019) 1.

<sup>98</sup> As above

management of female survivors of sexual assault.<sup>99</sup> This directs the medical personnel on how to address the issue of sterilisation and the steps should be followed before a sterilisation procedure is performed.<sup>100</sup>

This research focused on the plight of women in the aftermath of involuntary sterilisation of HIV-Positive women.<sup>101</sup> Additionally, a research conducted in Kenya concluded that HIV-Positive women in Kenya were susceptible to discrimination and violence compared to men because of societal beliefs and attitudes.<sup>102</sup> The scholarly works however fail to address how to effectively resolve the apparent existing discriminatory practices in the health system while also addressing the underlying gender biases against women. This research addresses this loophole.

A Health Country Assessment on Kenya (the assessment) indicated that, some health care providers are still unwilling to discuss contraception with HIV-Positive women as they are expected to be sexually inactive.<sup>103</sup> Some of the healthcare providers still believe that pregnancy for HIV positive women should be prevented and they even discourage those seeking fertility treatments to subvert their desire to have children.<sup>104</sup> The assessment although helpful, it does not give solutions on how the mentality and approaches adopted by the health workers can be cured. This research recommends some of the ways to resolve the problem.

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<sup>99</sup> United Nations 'Report: Handbook for Legislation on Violence against Women' (2010) [https://www.un.org/women\\_watch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf](https://www.un.org/women_watch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf) (accessed 20 September 2021).

<sup>100</sup> International Federation of Gynaecology (n 90).

<sup>101</sup> Z Essack & A Strode ' "I feel like half a woman all the time": The impacts of coerced and forced sterilisations on HIV-Positive women in South Africa. Agenda: Empowering Women for Gender Equity' (2012) [https://www.researchgate.net/publication/269702468\\_I\\_feel\\_like\\_half\\_a\\_woman\\_all\\_the\\_time\\_The\\_impacts\\_of\\_coerced\\_and\\_forced\\_sterilisations\\_on\\_HIV-Positive\\_women\\_women\\_in\\_South\\_Africa](https://www.researchgate.net/publication/269702468_I_feel_like_half_a_woman_all_the_time_The_impacts_of_coerced_and_forced_sterilisations_on_HIV-Positive_women_women_in_South_Africa) (accessed 17 July 2021).

<sup>102</sup> T Copeland 'Poverty, nutrition, and a cultural model of managing HIV/AIDS among women in Nairobi, Kenya' (2011) 35 *Annals of Anthropological Practice* 81.

<sup>103</sup> Centre for Reproductive Rights & Federation of Women Lawyers in Kenya 'Report: Rights Violations of HIV Positive Women in Kenya Healthcare Facilities' (2008) <https://oltem1bixloh0d4busw018c-wpengine.netdna-ssl.com/sites/default/files/documents/At%20Risk.pdf> (accessed 15 September 2021).

<sup>104</sup> Family Health International 'Report: Country Assessment: Kenya, Family Planning Needs in the Context of the HIV/AIDS Epidemic' (2004).

### c) Human Rights Perspective

Access social services in Kenya has always followed the trickle down approach, where the services get to the people at the top in the social class before the middle class and the poor.<sup>105</sup> This approach affects the quality of the services received by the poor.<sup>106</sup> The poor are always left to make use of the deplorable government resources available to them<sup>107</sup> and are prone to the HIV predisposing factors therefore likely to suffer most from the effects of HIV.<sup>108</sup>

Poverty makes it difficult for women living with HIV to access better services because they cost more.<sup>109</sup> With this in mind, the injustice meted upon HIV-Positive women coupled up with inaccessibility of medical facilities and apparent discrimination in those which are within their reach is devastating.<sup>110</sup> Scholars address the effects which poverty occasions upon HIV-Positive women but overlook the aspect of their sexual and reproductive rights.<sup>111</sup> In addition to the already harsh environments and diminished health and other services, their reproductive choices are still curtailed.<sup>112</sup>

Andrews and others conducted a research among HIV-Positive women in Nairobi, in an effort to determine the human rights violations occasioned upon them.<sup>113</sup> The findings were revealing as they indicated that the systems were designed in such a way that they were discriminated against in all aspects including accessing health care services.<sup>114</sup> This discrimination extends to domestic spaces.<sup>115</sup> The research however focuses on violence as the main human rights violation against these women leaving out other aspects such as involuntary sterilisation which shall be addressed in this research.

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<sup>105</sup> P K Kimalu et al 'A Situational Analysis of Poverty in Kenya. Nairobi' (2002) *Kenya Institute for Public Policy Research and Analysis (KIPPRA)* 3.

<sup>106</sup> O N Gakuru et al & Others 'Living in fear of crime: The case of Nairobi residents. Nairobi' (2002) *Kenya Institute for Public Policy Research and Analysis (KIPPRA)* 3.

<sup>107</sup> E Mwendwa & M Amuyunzu-Nyamongo 'Poverty and the right to HIV/AIDS information in Kenya.'(2006) 4 *East African Journal of Human Rights and Democracy* 39.

<sup>108</sup> M Were 'An Assessment of the Impact of HIV/AIDS on Economic Growth: The Case of Kenya'(2003) *Social Science and Research Network* 1.

<sup>109</sup> Mwendwa. & Amuyunzu-Nyamongo (n 107).

<sup>110</sup> As above.

<sup>111</sup> As above.

<sup>112</sup> As above.

<sup>113</sup> C Andrews et al 'Intimate partner violence, human rights violations, and HIV among women in Nairobi Kenya' (2020) 22 *Health and Human Rights Journal* 155.

<sup>114</sup> As above.

<sup>115</sup> As above.

Moreover, at the High Court of Kenya, a petitioner sought to have a part of the HIV/AIDS Prevention and Control Act (HIV/AIDS Act) declared unconstitutional.<sup>116</sup> The section compelled all HIV positive persons to disclose their status in advance to their sexual contact.<sup>117</sup> The court held the wording of this section to be vague and in breach of the Constitutional right to privacy.<sup>118</sup> This is a very central case in matters rights of HIV-Positive women in Kenya as it is the first case after the inception of the new Constitution to assert the rights of people living with HIV in Kenya. However, because of the judicial duty to only determine issues presented before the court, the case does not address other violations under the Bill of Rights. The current research addresses other remedies within judicial reach and ways in which courts can protect HIV-Positive women in Kenya from involuntary sterilisation.

The African Commission on Human and Peoples' Rights (the Commission), appreciated that sterilisation is one of contraception means.<sup>119</sup> However, the method has been used to prejudice vulnerable women especially those living with HIV and those from poor economic backgrounds.<sup>120</sup> Additionally, the Commission mandates states with guaranteeing that the rights of vulnerable women within their jurisdictions.<sup>121</sup>

Patel further notes that despite the acknowledgement of the existence of involuntary sterilisation, several entities have been unwilling to acknowledge that poor women and women with HIV have been unfairly targeted because of their vulnerable state.<sup>122</sup> This form of discrimination is systematic in that deliberate efforts are made to unfairly target women from specific groups.<sup>123</sup> To further these findings, the current research recommends various ways in which stakeholders

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<sup>116</sup> *AIDS Law Project v Attorney General & 3 others* (2015 eKLR <http://kenya.law.Org/caselaw/cases/view/107033/> (accessed 16 September 2021).

<sup>117</sup> Sec 24 2006 HIV/AIDS Act.

<sup>118</sup> Art 31.

<sup>119</sup> African Commission on Human and Peoples' Rights General Comment 2 (General Comment 2): Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c): Right to health (2014) ACHPR dated 12 May 2014.

<sup>120</sup> As above.

<sup>121</sup> African Commission on Human and Peoples' Rights 'Resolution 260 on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services' Adopted at 56<sup>th</sup> Ordinary session of the Commission on the human and Peoples' Rights held at Banjul Gambia 22 November to 5<sup>th</sup> October (2013) [https://www.achpr.org/sessions/resolutions?id=280#:~:text=260%20Resolution%20on%20Involuntary%20Sterilisation,260%20\(LIV\)%202013&text=Reaffirming%20its%20mandate%20to%20promote,Rights%20\(the%20African%20Charter\)%3B](https://www.achpr.org/sessions/resolutions?id=280#:~:text=260%20Resolution%20on%20Involuntary%20Sterilisation,260%20(LIV)%202013&text=Reaffirming%20its%20mandate%20to%20promote,Rights%20(the%20African%20Charter)%3B) (accessed 30 July 2021).

<sup>122</sup> P Patel, 'Forced Sterilisation of Women as Discrimination' (2017) 38 *Public Health Reviews* 15.

<sup>123</sup> As above.



in the medical field can be held accountable for sterilising HIV-Positive women, without their consent.

From the existing literature, it's evident that forced sterilisation of HIV-Positive women is a reality in Kenya. While appreciating the existing scholarly works, this research adds to the various causes of action available for poor HIV-Positive women who have been forcibly sterilised and the causes of action to prevent such happenings in future. It also adds to the ways in which the government and other agencies can ensure that forced sterilisation does not occur and that the discrimination against poor HIV-Positive women is reduced. Further, it suggests ways to help the affected women heal from the mental effects of the procedure and the social effects of involuntary sterilisation of poor HIV-Positive women specifically in Kenya.

## **1.7 Structure**

Chapter one, encompasses the introduction to the research question, the methodology, the theoretical framework, aims and objectives of the research, definitions, research questions and a tentative chapter breakdown.

Chapter two analyses the effects of forced sterilisation on poor HIV-Positive women in Kenya, including legal and social effects.

Chapter three studies the human rights violations exhibited by forcibly sterilising women who are HIV positive as enshrined in the Constitution of Kenya and other international human rights instruments such as the African Charter. The United Nations Charter (UN Charter), the International Covenant on Civil and Political Rights (ICCPR).

Chapter four explores the various laws governing involuntary sterilisation in Kenya. It also focuses on the various institutions responsible for ensuring realisation of the rights of HIV-Positive women.

Chapter five explains how HIV-Positive women should be protected from involuntary sterilisation and what remedies are available to those whose rights have been violated. It explores the causes of action against forced sterilisation of poor HIV-Positive women and available solutions for the affected women and girls.

## CHAPTER TWO: CAUSES AND EFFECTS OF INVOLUNTARY STERILISATION ON POOR HIV-POSITIVE WOMEN IN KENYA

### 2.0 Introduction

Unlike former years when HIV was discovered, the natural life of persons living with HIV has tremendously improved.<sup>124</sup> Many HIV-Positive women have developed an interest in starting their own families.<sup>125</sup> However, most people are yet to face up with the fact that HIV-Positive women can have long and fulfilling lives, and with proper medical attention, bear healthy children.<sup>126</sup> This attitude ends up spilling to medical professionals who are supposed to help these women raise families.<sup>127</sup>

Nyamongo and Ezeh paint a picture of what it is like to be poor and HIV-Positive.<sup>128</sup> Their article focuses on women living in slums in Kenya.<sup>129</sup> Living in those conditions makes it difficult for them as they risk re-infections resulting from rape, engaging in commercial sex and inability to access drugs improving their health.<sup>130</sup> Additionally, women living in rural areas and with HIV as they are mostly marginalised and live in poverty, making it difficult for them to live quality lives with their health condition.<sup>131</sup>

In addition to the economic struggle, some of these women have to face devastation which comes with involuntary sterilisation.<sup>132</sup> They cannot have children and sometimes end up getting divorced by men who blame them for the inability to have children.<sup>133</sup> As discussed in the first chapter, ‘involuntary’ does not only mean lack of consent, it refers to situations where the

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<sup>124</sup> Y P Cuca & C D Rose ‘Social stigma and childbearing for HIV-Positive women/AIDS’ (2016) 26 *Qualitative Health Research* 1508 at 1509.

<sup>125</sup> As above.

<sup>126</sup> I Ddumba-Nyanzi et al ‘Barriers to communication between HIV care providers (HCPs) and HIV-Positive women about child bearing: a qualitative study’ (2016) 99 *Patient Education & Counselling* 754.

<sup>127</sup> Ddumba –Nyanzi (n 126) 755.

<sup>128</sup> Amuyunzu-Nyamongo & A C Ezeh (n 107) 88.

<sup>129</sup> As above.

<sup>130</sup> As above.

<sup>131</sup> J Mugambi ‘The impact of HIV/AIDS on Kenyan rural women and the role of counselling’ (2006) 49 *International Social Work* 87.

<sup>132</sup> Ddumba – Nyanzi (n 126) 756.

<sup>133</sup> S Rowlands & A Jean-Jacques ‘Non-consensual sterilisation of HIV-Positive women’ (2018) 29 *International Journal of STD & AIDS* 29.

women are put in a position where they cannot refuse the procedure, and this includes threats to withdraw essential support.<sup>134</sup>

This chapter concentrates on how the lack of support from the government has affected the lives of poor HIV-Positive women in Kenya. It also explains the importance of focusing on poor HIV-Positive women. It explains why poor HIV-Positive women are central to this research and discusses the effects occasioned upon these women after suffering involuntary sterilisation.

## 2.1 Why poor HIV-Positive Women?

A research conducted by the Gender and Media Initiative indicated that most of the women who suffered sterilisation were from poor backgrounds.<sup>135</sup> Focusing on complexities which come with being subjected to a number of intersecting biases will help devise a well-reasoned remedy to the intersecting injustices.<sup>136</sup> HIV-Positive women are vulnerable to involuntary sterilisation because of the social exclusion and vulnerability.<sup>137</sup>

Furthermore, human rights advance substantive equality which explains that there are classes of people who require different treatment for them to equally enjoy fundamental rights.<sup>138</sup> Marginalised groups such as poor persons are not only at a higher risk of contracting HIV, but are also susceptible to resultant issues such as sterilisation.<sup>139</sup> This is why it is important to explore how human rights can be useful in ensuring that despite the social and medical statuses these women enjoy human rights.

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<sup>134</sup> Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN) ‘ Report: Breaking the Silence on Forced Sterilisation of HIV-Positive women’ (2016) <https://www.kelinkenya.org/breaking-silence-forced-sterilization-women-living-hiv/>(accessed 28 July 2021).

<sup>135</sup> African Gender and Media Initiative (n 6) 9.

<sup>136</sup> R Sifris ‘Involuntary sterilisation of HIV-Positive women Women: An Example of Intersectional Discrimination’ (2015) <file:///C:/Users/USER/Downloads/SSRN-id2442139.pdf> (accessed 3 August 2021).

<sup>137</sup> International Community of Women with HIV/AIDS East Africa ‘Report: Sexual, reproductive and maternal health and rights regional advocacy meeting and policy forum’ (2011).

<sup>138</sup> UN Committee on Economic, Social and Cultural Rights General Comment 20: Article 2 Paragraph 2: The right to non-discrimination in economic, social and cultural rights (2009) UN Doc E/C.12/GC/20 dated 2 July 2009 para 2.

<sup>139</sup> R J Cook & S Howard ‘Accommodating Women’s Differences under the Women’s Anti-Discrimination Convention, (2007) 56 *Emory Law journal* 1039.

## 2.2 Situational Analysis

The effects of human rights violations are multidimensional and affect almost all spheres of a person's life and the systems around them.<sup>140</sup> This part analyses the situation in the medical environment, in the social sphere and in the legal field.

### 2.2.1 Medical Field

A research conducted in Brazil arrived at a conclusion that, healthcare providers, being the primary caregivers, were the main decision makers on whether women with HIV were sterilised during delivery.<sup>141</sup> This is relevant to Kenya because the roles of medical practitioners are similar all over the world. The situation in the medical field is analysed as follows:

#### a) Medical Malpractice

Medical malpractice occurs when a medical practitioner fails to take the required action to treat a patient resulting in injury or death.<sup>142</sup> The cases of doctors going beyond the consent given to them or even failing to seek proper consent before performing sterilisation on poor HIV-Positive women because of the perceived biases, is a form of medical malpractice because it has injured the patients in question.<sup>143</sup>

In 2011, the FIGO observed that it is unethical for a health professional to perform sterilisation without informed consent from the woman procuring the procedure.<sup>144</sup> If doctors and other medical practitioners perform their duties to the required standard, then the issue of involuntary sterilisation should not exist.<sup>145</sup>

Some doctors indicated that they thought they were helping the said women by sterilising them, which shows the lack of basic human rights education and on concepts such as consent.<sup>146</sup> In this regard, the FIGO noted that it is not advisable for a medical practitioner to be actively involved

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<sup>140</sup> The Truth and Reconciliation Commission of South Africa 'Report: The Truth And Reconciliation Commission' (1999)<https://omalley.nelsonmandela.org/omalley/index.php/site/q/031v02167/041v02264/051v02335/061v02357/071v02398/081v02402.htm> (accessed 18 September 2021).

<sup>141</sup> A A Rossi et al 'R. Perspectives of Brazilian people living with HIV/AIDS on reproductive desire: access and barriers to treatment' (2010) *XVIII International AIDS Conference* 18.

<sup>142</sup> As above.

<sup>143</sup> Gender and Media Initiative (n 6) vii.

<sup>144</sup> International Federation of Gynaecology and Obstetrics (n 90) guideline 2.

<sup>145</sup> Gender and Media Initiative (n 6) 25.

<sup>146</sup> As above

in arriving at a decision to pursue sterilisation<sup>147</sup> or petition on behalf of disabled patients because of a likelihood of having it affect the freewill of the patient.<sup>148</sup>

The Bill of Rights guarantees a healthy human rights environment with implementation mechanisms including seeking redress from the High Court.<sup>149</sup> It is imperative to note that doctors can be held individually liable for forced sterilisation as these actions are criminalised.<sup>150</sup> In Kenya, doctors who participated in making the report on involuntary sterilisation of HIV-Positive women said that they sterilised them with the intention of reducing the number of orphans, help the woman remain healthy and to reduce the rates of mother to child transmissions.<sup>151</sup> However, the important question to ask is whether the state and medical personnel have the power to make such a life changing decision for their patients. After the case *SWK & 5 others*, there is no public record showing that sterilisation is still on the rise in Kenya.

### 2.2.2 Legal Sphere

Litigation on involuntary sterilisation of vulnerable groups of women goes back as far as a few years after the world war.<sup>152</sup> The doctors who took part in the barbaric Nazi activities were sued for forcibly sterilising women of the Jewish descent.<sup>153</sup> This area of law continued to develop in the subsequent cases such as *Buck v Bell*<sup>154</sup> and *Skinner v. Oklahoma*,<sup>155</sup> where the courts made a declaration of rights.

In countries such South Africa,<sup>156</sup> and Namibia<sup>157</sup> courts have determined cases where HIV-Positive women were sterilised without their consent. In Namibia, the court found that there had

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<sup>147</sup> International Federation of Gynaecology and obstetrics (n 90) recommendation 6.

<sup>148</sup> Gynaecology guidelines (n 104), recommendation 6.

<sup>149</sup> Art 21.

<sup>150</sup> Art 7(1)-(g).

<sup>151</sup> E Cameron 'Legal and human rights responses to the HIV/AIDS epidemic' (2006) 1 *Stellenbosch Law Review* 37. 38; United Nations Development Programme 'Global Commission on HIV and the law: Risks, rights and health' (2012) [http:// www.hivlawcommission.org/index.php/report](http://www.hivlawcommission.org/index.php/report) (Accessed 1 August 2021).

<sup>152</sup> G J Annas & Others *The Nazi Doctors and the Nuremberg Code* (1992) 12.

<sup>153</sup> As above.

<sup>154</sup> *Buck v. Bell* (n 68).

<sup>155</sup> *Skinner v. Oklahoma* 316 U S 535 (1942).

<sup>156</sup> L McLaughlin 'The price of failure of informed consent law: Coercive sterilisations of HIV-Positive women in south Africa' (2004) 32 *Law and Inequality: Journal of Theory and Practice* 69.

<sup>157</sup> *LM and Others v Government of the Republic of Namibia* Case 1603/2008 3007/2008 [2012] NAHC 211.

been unlawful sterilisation of HIV-Positive women but held that the acts did not amount to discrimination based on their health status, a finding which was criticised.<sup>158</sup>

In Kenya, despite there being a robust legal framework on human rights, there has not been much litigation of the issue of sterilisation of poor HIV-Positive women.<sup>159</sup> This could be because of the financial disadvantage or the general lack of knowledge of the law and remedies available to them in such situations. In 2014, with the support from nongovernmental organisations and the international community, HIV-Positive women in Kenya who had been involuntarily sterilised moved to court to seek remedy.<sup>160</sup> This case has been in court since then with its last court attention being in November 2020.<sup>161</sup> Despite the long period which it has taken, it is still hoped that the court will make a determination.<sup>162</sup>

### 2.2.3 Social Sphere

There is still social stigma towards HIV-Positive women<sup>163</sup> and because of their inability to have children despite the forced sterilisation.<sup>164</sup> This makes these women live in seclusion from the rest of the community for fear of being treated differently.<sup>165</sup>

HIV-Positive women, especially in rural areas experience stigma and discrimination from the community.<sup>166</sup> This makes it difficult for them to seek medical attention.<sup>167</sup> Additionally, patriarchy has influenced how women with HIV are treated in the community.<sup>168</sup>

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<sup>158</sup> As above.

<sup>159</sup> KELIN (n 134).

<sup>160</sup> *SWK & 5 others v Médecins Sans Frontières-France & 10 others* (2016) eKLR <http://kenyalaw.org/case/law/cases/view/125001/> (accessed 5 August 2021).

<sup>161</sup> KELIN (n 134).

<sup>162</sup> As above.

<sup>163</sup> A Government Agiresaasi 'Lawsuits Spotlight Forced sterilisation of Women with HIV in East African Countries' (2016) <https://globalpressjournal.com/africa/kenya/lawsuits-spotlight-forced-sterilization-of-women-with-hiv-in-east-african-countries/> (accessed 4 August 2021).

<sup>164</sup> As above.

<sup>165</sup> As above.

<sup>166</sup> A P Mahajan et al 'Stigma in the HIV/AIDS epidemic: a review of the literature and recommendations for the way forward Aids' (2008) 22 *Social Science and Medicine* 67.

<sup>167</sup> B L Genberg and others, 'A comparison of HIV/AIDS-related stigma in four countries: negative attitudes and perceived acts of discrimination towards people living with HIV/AIDS' (2009) 68 *Social Science and Medicine* 2279.

<sup>168</sup> M Colombini & Others 'Experiences of stigma among HIV-Positive women attending sexual and reproductive health services in Kenya: a qualitative study' (2014) 14 *BMC Health Service Repository* 412.

Women are always faulted by their partners for having contracted HIV even where their partners might have caused the infection.<sup>169</sup> Social attitudes make it difficult for HIV-Positive women to seek proper medical attention and effectively realise their reproductive rights because of the fear instilled in them on how the society will react to their statuses.<sup>170</sup>

Despite the progress which has been made in the study of HIV, stigma is still common.<sup>171</sup> Communities and even family still believe that HIV-Positive women do not deserve reproductive rights but still place a burden upon them to bear children and lead ‘normal’ lives like other women.<sup>172</sup> It is against this social background that poor HIV-Positive women in Kenya find themselves as they strive to exercise their rights.

## **2.3 Effects of Involuntary Sterilisation**

### **2.3.1 Discrimination**

Discrimination is ‘unfair treatment of people and groups based on distinguishing attributes such gender, sexual orientation, age among others.’<sup>173</sup> The Constitution prohibits all forms of discrimination against all persons.<sup>174</sup> Treating women who cannot bear children differently as they are considered lesser to other women amounts to negative differential treatment.<sup>175</sup>

Yamin explains that involuntary sterilisation of HIV-Positive women amounts to discrimination because it affects only women who are poor and live with HIV.<sup>176</sup> Even in hospitals, HIV-Positive women are treated differently, judged and mistreated by healthcare providers for their decision to have children.<sup>177</sup>

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<sup>169</sup> As above

<sup>170</sup> As above.

<sup>171</sup> Colombini (n 168).

<sup>172</sup> As above.

<sup>173</sup> Atrey (n 97).

<sup>174</sup> Constitution (n 24) art 27.

<sup>175</sup> M Hollos & U Larsen ‘Motherhood in Sub-Saharan Africa: The Social Consequences of Infertility in an Urban Population in Northern Tanzania’ (2008) 10 *Culture, Health & Sexuality* 159.

<sup>176</sup> A Yamin & C Prachniak-Rincon ‘Compounded injustice and cautionary notes for progress in the sustainable development era: Considering the case of sterilisation of HIV-Positive women’ (2018) 41 *Harvard Journal of Law and Gender* 395.

<sup>177</sup> J. Buchanan ‘Rhetoric and Risk: Human Rights Abuses Impeding Ukraine's Fight against HIV/AIDS’ (2006) *Human Rights Watch* 44; 51.

This pressure impacts on their mental wellbeing causing some of them to stop seeking medical attention for HIV and other opportunistic diseases.<sup>178</sup> In Namibia, HIV-Positive women were afraid of telling medical practitioners that they are unwell because the doctors and nurses then treat them differently because they believe they are the ones suing the government unnecessarily.<sup>179</sup>

This amounts to discrimination because other patients are not subjected to this procedure. Poor HIV-Positive women have preconditions before they can access medical services and even basic treatments, procedures which other individuals are not subjected to.

### 2.3.3 Emotional Distress

The emotional aspect of involuntary sterilisation runs through all other effects of involuntary sterilisation.<sup>180</sup> Some of the stories told by the Gender and Media Initiative can be used to underscore this issue.<sup>181</sup> For instance, Alice knows that she cannot have children because a doctor coerced her into signing consent forms for sterilisation while in labour.<sup>182</sup> She has not disclosed this to her husband but she lives on the edge because she is scared of what her husband will do if he finds out.<sup>183</sup> For this, she is always troubled and looking for ways hide the truth, which acts can cause mental toil on anyone.<sup>184</sup> The emotional turmoil which comes as a result of having to leave secretly because of the fear of being treated differently from others is emotionally appalling.

In Africa, children are considered central to the institution of marriage and it is therefore difficult for women who are married to live in their matrimonial homes without children.<sup>185</sup> This affects their mental wellbeing because of the constant questions from their family and their personal

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<sup>178</sup> National Council of HIV/AIDS Kenya 'Report: Kenya Aids response progress report' (2014) [https:// www.medbox.org/document/kenya-aids-response-progress-report-2014-progress-towards-zero#GO](https://www.medbox.org/document/kenya-aids-response-progress-report-2014-progress-towards-zero#GO) (accessed 5 August 2021).

<sup>179</sup> K Bakare& S Gentz 'Experiences of forced sterilisation and coercion to sterilise among HIV-Positive women (WLHIV) in Namibia: An analysis of the psychological and socio-cultural effects' (2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7887903/> (accessed 5 August 2021).

<sup>180</sup> L Simbayi & Others 'A: Internalized stigma, discrimination, and depression among men and HIV-Positive women/AIDS in Cape Town, South Africa' (2007) 64 *Social Science Medicine* 1823.

<sup>181</sup> Robbed of choice (n 6) 30.

<sup>182</sup> As above.

<sup>183</sup> As above.

<sup>184</sup> As above.

<sup>185</sup> KELIN (n 134)



desire to have children.<sup>186</sup> All persons have the freedom to start their own families regardless of their HIV status or any other ground.<sup>187</sup> Taking away this right causes emotional pain and suffering because they cannot meet the ‘standards’ set by society.<sup>188</sup>

HIV-Positive women who had been forced to undergo sterilisation report that they still experienced emotional anguish several years after the procedure.<sup>189</sup> They experienced symptoms of anxiety.<sup>190</sup> The cases of emotional distress are widely reported with some of them being severe, amongst HIV-Positive women who were involuntarily sterilised.<sup>191</sup>

Accordingly some medical personnel forced HIV-Positive women to undergo sterilisation before procuring medication forced some of them to forgo their life saving medication to avoid the procedure.<sup>192</sup> This increased the HIV infection rate and even deterioration of health.<sup>193</sup> For some women, having children and raising families is part of their life’s purpose and taking it away from them affects them to an extent that they are no longer interested in quality lives.<sup>194</sup> Furthermore, the fear of forced sterilisation is likely to drive away these women from medical care and attention which they need from time to time in order to take good care of their health.<sup>195</sup>

#### **2.3.4 Broken Families**

Selina, explains that her husband gave consent to have her sterilised while she was giving birth because of her HIV status.<sup>196</sup> He later left her and took their children with him because she couldn’t raise a family’.<sup>197</sup> Selina, despite her HIV status had a family and was doing everything in her power to live a normal life with her children. However, her dreams of having a better life

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<sup>186</sup> As above.

<sup>187</sup> Constitution (n 24) art 45.

<sup>188</sup> S E Mthembu & Others ‘A qualitative report of HIV-Positive women women’s experiences of coerced and forced sterilisations in South Africa’ (2011) 20 *Reproductive Health Matters* 61.

<sup>189</sup> As above.

<sup>190</sup> As above

<sup>191</sup> As above.

<sup>192</sup> P Patel & B Davidson ‘Namibia women face forced sterilisation’ *Huffington Post* (Windhoek) 12 November 2009.

<sup>193</sup> As above.

<sup>194</sup> As above

<sup>195</sup> S MacCarthy & Others ‘The pregnancy decisions of HIV-Positive women: the state of knowledge and way forward, (2012) 20 *Reproductive Health Matters* 119.

<sup>196</sup> Robbed of Choice (n 6) 1.

<sup>197</sup> As above.

were cut short leaving her sad and bitter as she was never given an opportunity determine her path because she was HIV positive.<sup>198</sup>

Baloyi notes that childless marriages in the African community have a very slim chance of survival and it is the woman who bears the blame for not having children.<sup>199</sup> Kenya being a community with conservative African ideologies makes women bear the burden of being the child bearer and their value is attached to their ability to bear children.<sup>200</sup> In most cases men whose wives cannot bear children marry second wives without determining the cause of the inability to have children, depicting the picture that a woman is always blamed for the lack of children.<sup>201</sup> Sometimes men divorce their wives who cannot have children and proceed to get back their bride prices from the woman's family.<sup>202</sup>

This shows the amount of pressure put on women in order to keep their families intact.<sup>203</sup> However unfair the practice is, some women still want to live a fulfilling life by having children. Therefore, when a woman is sterilised shorn of consent because of their HIV and social statuses, they still worry about their marriages.

### 2.3.5 Occupational Functioning

Mental wellbeing plays a role in job performance because extraneous factors including family conflicts, affect an employee's productivity.<sup>204</sup> It has been determined that an employee's wellbeing plays a huge role in their productivity and in turn the progress and success of an organisation.<sup>205</sup> Considering the emotional burden born by poor HIV-Positive women and the physical pain which they experience as a result of sterilisation, their quality of life and in turn their performance at work considerably declines.<sup>206</sup> Furthermore, because of the stigma

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<sup>198</sup> As above.

<sup>199</sup> M E Baloyi 'Gendered character of barrenness in an African context: An African pastoral study' (2017) 51 *In Skriflig* 1.

<sup>200</sup> As above.

<sup>201</sup> As above.

<sup>202</sup> G Kimathi 'Your marriage and family' (1994) 1 *Institute for Reformational Studies* 58.

<sup>203</sup> J S Mbiti 'The role of women in African traditional religion' (1988) 22 *Cahiers des Religions Africaines* 69.

<sup>204</sup> P B Karapinar and Others 'Employee well-being, work holism, work-family conflict and instrumental spousal support: a moderated mediation model' (1988) 1 *Journal of Happiness Studies* 1.

support: a moderated mediation model' (1988) 1 *Journal of Happiness Studies* 1.

<sup>205</sup> A B Bakker & J Hetland 'Daily strengths use and employee wellbeing: the moderating role of personality' (2019) 92 *Journal of Occupational and Organizational Psychology* 144.

<sup>206</sup> E C Sigel 'Stigma consciousness: the psychological legacy of social stereotypes' (1999) 76 *Social Psychology* 114.

associated with HIV, most of these women shun the idea of getting psychological support in an effort to keep their health status private.<sup>207</sup>

One of the women who were interviewed in Kenya indicated that after sterilisation, she could not perform even menial duties because she had constant back pain and heavy bleeding.<sup>208</sup> Similar effects were reported in the field study conducted in Namibia, where some of the women had to stop working because their backs ached most of the time and they were not always in a good mental state to perform their duties.<sup>209</sup> Even the emotional discomfort affects the productivity at work and it can never be the same.<sup>210</sup>

## 2.4 Conclusion

This chapter has identified the effects of involuntary sterilisation on poor HIV-Positive women in Kenya. It has also assessed the reactions in the legal, medical and social spheres. As observed by the Truth and Reconciliation Commission of South Africa, while documenting stories of the victims of the apartheid regime, telling how violations of dignity and other human rights affects individuals not only heals but also helps find solutions.<sup>211</sup>

This chapter has established that human rights violations always have a ripple effect as it affects all spheres of life. Identifying the effects of human rights violations such as involuntary sterilisation is the beginning of addressing them and coming up with viable solutions.

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<sup>207</sup> S Maman & Others ‘A comparison of HIV stigma and discrimination in five international sites: the influence of care and treatment resources in high prevalence settings’ (2009) 68 *Social Science and Medicine*. 2271.

<sup>208</sup> As above.

<sup>209</sup> Bakare& Gentz (n 179).

<sup>210</sup> As above.

<sup>211</sup> Truth and Reconciliation Commission of South Africa ‘ Report: Consequences of gross violation of human rights’ (1999) <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02335/06lv02357/07lv02398/08lv02402.htm> (accessed 17 September 2021).

## CHAPTER THREE: HUMAN RIGHTS VIOLATIONS OCCASIONED BY INVOLUNTARY STERILISATION OF POOR HIV-POSITIVE WOMEN IN KENYA

### 3.0 Introduction

There are benefits which accrue to all individuals by virtue of them being human.<sup>212</sup> Denial or of these rights because of the medical or economic status of a person is a breach of their human rights.<sup>213</sup> HIV-Positive women face violations of their the right to non-discrimination, freedom from violence and torture, right to information, the right to attain or receive highest attainable standards of health, the right to family, freedom of choice and bodily autonomy among others.<sup>214</sup> It is imperative to understand that these rights are protected in the Bill of Rights<sup>215</sup> and other international instruments recognised as part of Kenyan law.<sup>216</sup>

Schwie defines a human rights violation as ‘the disallowance of the freedom to which every human’s legally have a right.’<sup>217</sup> Violations can be occasioned directly by the state or through its assigned agents such as the police and doctors.<sup>218</sup> Private persons entities can also violate human rights and can equally be held responsible for the violations.<sup>219</sup> In cases where private persons violate human rights, the state can still be held liable for failure to prevent this eventuality.<sup>220</sup>

Abuse of human rights is occasioned by the ignorance of the due diligence principle.<sup>221</sup> The principle mandates businesses and private actors to take active measures to identify, resolve and prevent future human rights violations within their place of work.<sup>222</sup> Furthermore, the principle burdens states with protecting against human rights abuses through legislation, enactment of

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<sup>212</sup> J Griffins ‘Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights’ (2001) *Proceedings of the Aristotelian Society* 1 at 2.

<sup>213</sup> J Gardner “‘simply in virtue of being human’”: the whos and whys of human rights’ (2008) 2 *Journal of Ethics and Social Philosophy* 2.

<sup>214</sup> Universal Declaration of Human Rights (UDHR) 1948.

<sup>215</sup> Constitution (n 24) cap 4.

<sup>216</sup> Constitution (n 24) art 2.

<sup>217</sup> H Schwie ‘Examples of Human Rights Violations’ 21 November (2019) <https://borgenproject.org/examples-of-human-rights-violations/> (accessed 14 August 2021).

<sup>218</sup> Human Rights Careers ‘What are Human Rights Violations’ (2019) [https:// www. humanrightscareers.com/issues/ what-are-human-rights-violations/](https://www.humanrightscareers.com/issues/what-are-human-rights-violations/) (Accessed 16 August 2021).

<sup>219</sup> Ochieng (n 25) 80.

<sup>220</sup> As above.

<sup>221</sup> United Nations special procedure *Summary of the report of the Working Group on Business and Human Rights to the General Assembly on Corporate human rights due diligence: emerging practices, challenges and ways forward* October 2018 (A/73/163).

<sup>222</sup> As above.

policies and adjudication.<sup>223</sup> This helps create a human rights friendly environment and prevents penitential liability resulting from violations.<sup>224</sup>

Cook and Dickens explain that any law or authority which allows another person to consent to forced sterilisation of a vulnerable or disadvantaged group or individual violates their human rights.<sup>225</sup> They further explain that it is imperative that medical personnel understand that when performing forced sterilisation procedures, they are violating the human rights.<sup>226</sup>

This chapter addresses the rights violated by involuntary sterilisation of poor women living HIV in Kenya. It also discourses the horizontal and vertical application of human rights. The chapter also addresses the issue on whether human rights are absolute or whether they can be limited and to what extent they can limit the rights.

### **3.1 Human Rights Violated by Involuntary Sterilisation**

A violation therefore occurs when these rights are denied to affected persons because they are HIV positive and are of low economic status. This is not only considered a breach of medical duties by the medical practitioners performing the procedure, but also a violation of internationally recognised human rights.<sup>227</sup>

#### **3.1.1 The Right to Procreation and Family**

The right to procreate is an individual right which accrues to all persons, notwithstanding all other surrounding factors.<sup>228</sup> The UDHR states that ‘men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.’<sup>229</sup> This entails the ability to have children and stay together.<sup>230</sup>

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<sup>223</sup> J Morrison, ‘The “State of Play” of Human Rights Due Diligence Anticipating the next five years’ (2011) 1 *Institute for Human Rights and Business* 6.

<sup>224</sup> As above.

<sup>225</sup> Cook R & Dickens B (n 33) 61.

<sup>226</sup> As above.

<sup>227</sup> S Bi & T Klusty ‘Forced Sterilisations of HIV-Positive women Women: A Global Ethics and Policy Failure’ *AMA Journal of Ethics* (2015) <https://journalofethics.ama-assn.org/article/forced-sterilizations-HIV-Positive-women-women-global-ethics-and-policy-failure/2015-10>(accessed 25 July 2021).

<sup>228</sup> As above.

<sup>229</sup> Universal Declaration (n 214) art 16(1).

<sup>230</sup> U N Human Rights Committee General Comment No 19: Article 3: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (2007) U N Doc. HR1/GEN/1/REV adopted during thirty-ninth session 1990 at 107.

As determined in the case of *Skinner v Okalahoma*.<sup>231</sup> Procreation is a basic civil rights. In this case, state of Oklahoma had approved a law which prescribed sterilisation as the punishment for habitual criminals.<sup>232</sup> The appellant in this case was convicted for a fourth time for theft and was sentenced to sterilisation. The sentence was appealed to the supreme court of Oklahoma, which upheld this verdict. His lawyers then proceeded to the Supreme Court of the United States and challenged this decision.<sup>233</sup> The Court, in determining whether the statute allowing mandatory sterilisation of persons who were considered to be habitual criminals started by observing that the right to procreation is essential for perpetuating life.<sup>234</sup>

Additionally, procreation is considered one on the most sensitive rights.<sup>235</sup> In the recent developments in the medical field, persons have a right to use medical and technological advancements to facilitate procreation.<sup>236</sup> This point was emphasised in *Carey v. Population Services International Insurance*,<sup>237</sup> where the court observed that the decision to bear children is personal and the state or any to other person has no right to interfere.<sup>238</sup> Sterilising women with HIV when there is technology preventing mother to child transmissions is a grave infringement upon this right.<sup>239</sup>

Furthermore, considering the irreversibility of the procedure, there have to be safeguards and protections because limitation of the right was actually a threat to civil rights.<sup>240</sup> This case gives a background on why the right to procreation is considered essential. It emphasises on the fact that no human being should be subjected to involuntary sterilisation regardless of their health or social status. Poor HIV-Positive women in Kenya have the right to enjoy the right to procreation just like all persons.

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<sup>231</sup> *Skinner v Oklahoma* (n 155).

<sup>232</sup> As above.

<sup>233</sup> As above.

<sup>234</sup> As above.

<sup>235</sup> *Skinner v. Oklahoma* (n 155).

<sup>236</sup> M B. Rosenberg 'The Individual Right to Procreate and Gestational Surrogacy' (2016) [https:// www.lcc.leg.mn/lcs / meetings / 10112016 / ABA % 20 Paper % 20 The % 20 Individual % 20 Right % 20 to % 20Procreate%20Final%202016.pdf](https://www.lcc.leg.mn/lcs/meetings/10112016/ABA%20Paper%20The%20Individual%20Right%20to%20Procreate%20Final%202016.pdf) (accessed 5 August 2021).

<sup>237</sup> *Carey v. Population Services International Insurance* 431 U.S. 678 (1977).

<sup>238</sup> As above.

<sup>239</sup> As above.

<sup>240</sup> E Spriggs 'Involuntary sterilisation: An unconstitutional menace to minorities and the poor' (1974) 4 *New York University Review of Law and Social Change* 127.

The Constitution identifies the family as the basic unit and states that ‘[t]he family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.’<sup>241</sup> Limiting the right of women to have children amounts to limiting the right to family as having children is part of developing the family.<sup>242</sup> This is a right which accrues to all persons despite the health, social status or any other consideration.<sup>243</sup> The family is supposed to be always protected and assured of all forms of assistance.<sup>244</sup> Mothers are also entitled to special care and protection during and after birth and this care includes the right to not have unwarranted procedures including involuntary sterilisation performed on them during this vulnerable period.<sup>245</sup>

### 3.1.2 The Right to Health

The right to health is a fundamental human right to be enjoyed by every human being without discrimination.<sup>246</sup> The Constitution guarantees the highest standard of health including the right to reproductive health, to all persons,<sup>247</sup> which provision is emphasised in the Health Act.<sup>248</sup>

In interpreting the right to health under international law, the Committee on Economic, Social and Cultural Rights (the Committee) has stated that it includes both freedoms and entitlements including ‘effective protection from all forms of violence, torture and discrimination and other human rights violations that negatively impact on the right to sexual and reproductive health.’<sup>249</sup> The committee further mandates states to take steps, particularly legislative steps, to progressively realise this right and ensure that it is exercised without any form of discrimination on any party.<sup>250</sup>

The right to health is broad and cannot only be assessed on one front as it has many aspects including having systems which are functional and efficient in providing information and all the

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<sup>241</sup> Art 45.

<sup>242</sup> World Health Organisation ‘Sexual and Reproductive Health and Research’ (2009) [https:// www.who.int/teams/sexual-and-reproductive-health-and-research](https://www.who.int/teams/sexual-and-reproductive-health-and-research) (accessed 10 August 2021).

<sup>243</sup> Art 41(2)

<sup>244</sup> International Convention Economic Social and Cultural Rights adopted in 1976 and came to force in 1976 art 27.

<sup>245</sup> Universal Declaration (n 214) art 10.

<sup>246</sup> ‘World Health Organisation Constitution Preamble, 1946’.

<sup>247</sup> As above.

<sup>248</sup> Health Act, 2017.

<sup>249</sup> CESCR Comment 22: Article 12 Right to sexual and reproductive (20160 U.N. Doc. E/C.12/GC/22 dated 7 May 1, 2016).

<sup>250</sup> International Convention on Civil and Political Rights adopted in 1966 and came to force in 1976 article (2)(1).

required services precisely and in good time.<sup>251</sup> It is an inclusive right and it entails freedoms such as the freedom from non-consensual treatment which includes medical experiments and specifically, forced sterilisation.<sup>252</sup>

The United Nations Human Rights Committee recommends that the right to health encompasses the right of the recipient to access information and education on any medical procedures to be performed on the patient.<sup>253</sup> Moreover, the Committee on Economic, Social and Cultural Rights (CESCR) provides that the right to health is inclusive of the right to make reproductive choices without interference from any other party.<sup>254</sup> Enjoyment of the right also guarantees the freedom from discrimination and entitlement to equal opportunities for all persons to enjoy the right to health.<sup>255</sup> States have the duty to ensure that positive measures are implemented to protect susceptible groups including persons living with HIV from the hurdles that prevent the realisation of their right to health.<sup>256</sup>

Additionally, reproductive health is a major constituent to the right to health and women should be allowed to make independent choices regarding their reproductive health.<sup>257</sup> This right is guaranteed in the Maputo Protocol and obligates all state parties to ensure that women have access to reproductive healthcare.<sup>258</sup> When all these things do not work as stipulated, then the HIV-Positive women cannot fully enjoy their rights as required.<sup>259</sup> The mental and physical effects occasioned upon poor HIV-Positive women breach these provisions as they prevent full enjoyment of the right to health.<sup>260</sup>

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<sup>251</sup> E AllCicia & Others ‘Implementing a Circle of Accountability: A Proposed Framework for Judiciaries and other actors in enforcing Health-Related Rights (2015) 14 *Journal for Human Rights* at 321.

<sup>252</sup> UN Office of the High Commissioner for Human Rights (OHCHR), ‘Fact Sheet No 31, The Right to Health’ June 2008 <https://www.refworld.org/docid/48625a742.html> (accessed 29 August 2021).

<sup>253</sup> United Nations Fact sheet (n 206) 3.

<sup>254</sup> CESCR General Comment 14: Art 12: The Right to the Highest Attainable Standard of Health (2000) E/C.12/2000/4) dated 11 August 2000 para 8.

<sup>255</sup> United Nations Fact sheet (n 253) 4.

<sup>256</sup> United Nations Fact sheet (n 253) at 22.

<sup>257</sup> United Nations ‘Report of the International Conference on Population and Development’ 5–13 September (1994) [https://www.unfpa.org/sites/default/files/event-pdf/icpd\\_eng\\_2.pdf](https://www.unfpa.org/sites/default/files/event-pdf/icpd_eng_2.pdf) (accessed 20 September 2021).

<sup>258</sup> Art 14 (2).

<sup>259</sup> United Nations ‘Population Fund, Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions’ 14 June 2014 <https://www.ohchr.org/documents/publications/nhrihandbook.pdf> 29 (accessed 2 August 2021).

<sup>260</sup> As above



States must ensure equality of rights among men and women in the right to health and preservation of the function of reproduction.<sup>261</sup> Further, they ought to ensure that family planning and all other health services are provided equally and without prejudice upon one gender.<sup>262</sup> Due to the economic disadvantage experienced by women in rural areas, should ensure that there is adequate access to health services even with their location and social status.<sup>263</sup>

### 3.1.3 Right to Bodily Integrity and Freedom of Choice

The right to bodily integrity is arguably the utmost right of all human rights.<sup>264</sup> It is the autonomy for one to choose what happens to their body.<sup>265</sup> Autonomy in this case therefore, entails being able to make informed choices without coercion or interference from anyone.<sup>266</sup> If there is any help or advice sought by the said woman, it should be given without having any conditions attached to it because then they will lose the autonomy.<sup>267</sup> Some scholars have defined the right to bodily autonomy as a conglomeration of rights which. Among other rights, include the right to reproductive rights.<sup>268</sup>

There has been a debate on whether bodily integrity includes the right to have the physical or the mental aspect of freedom.<sup>269</sup> Discussions around this seem to have a common point which is the ability of the affected person being able to choose what happens to them mentally or physically.<sup>270</sup> Therefore, forcibly performing a medical procedure is a way of depriving HIV-Positive women of the freedom to choose what happens to their bodies.<sup>271</sup> Forced sterilisation violates bodily autonomy of women as it takes away their right to prefer what should happen to their bodies.<sup>272</sup>

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<sup>261</sup> Convention on the Elimination of all Forms of Discrimination against Women adopted in 1979 and came to force in 1981 art 11 (1) - (f).

<sup>262</sup> Convention (n 261) art 12.

<sup>263</sup> Convention (n 261) art 14.

<sup>264</sup> R Ludbrook 'The child's right to bodily integrity' (1995) 7 *Current Issues in Criminal Justice* 123.

<sup>265</sup> As above.

<sup>266</sup> R Faden Beauchamp, *A history and theory of informed consent* (1986) 30.

<sup>267</sup> African Commission on Human and People's Rights 'Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services' 2013 <https://www.achpr.org/sessions/resolutions?id=280> (accessed 29 August 2021).

<sup>268</sup> M C Nussbaum, *Human capabilities: Female human beings. In Women, culture and development: A study of human capabilities* (1995) 54.

<sup>269</sup> M Patosalmi, *Bodily Integrity and conceptions of Subjectivity* (2009) 136.

<sup>270</sup> Patosalmi (n 269) 137.

<sup>271</sup> Cook & Dickens (n 33).

<sup>272</sup> As above.

### 3.1.4 Protection from Discrimination/Equal Protection by Law

When assessing the HIV pandemic in Africa, the main things which come to one's mind are: women, because of the high rates on infection amongst them, sexual and reproductive rights and importantly, discrimination against persons living with HIV.<sup>273</sup> The Maputo Protocol calls upon state parties to take all measures to end discrimination against women.<sup>274</sup> It emphasises on the need to have the right to non-discrimination inculcated in law and amending of all the laws which perpetuate discrimination against women.<sup>275</sup> States also have the duty to conduct public education in order to end the stereotypes associated with women.<sup>276</sup>

### 3.1.5 Freedom from Violence, Torture and other Forms of Degrading Treatment

Violence is 'any act which occasions harm of any form whether mental, physical or emotional, these acts of violence can take place privately or in public.'<sup>277</sup> FIGO in 2011, released updated guidelines on female contraceptive sterilisation, which recognise coerced sterilisation as an act of violence against women.<sup>278</sup> Involuntary sterilisation not only inflicts physical pain, it also occasions emotional trauma to the women who undergo the procedure.<sup>279</sup> And as explained by Durojaye, violence in this case arises in two ways: one is the emotional battle and distresses faced by the said women and secondly the physical interference of their bodies with this irreversible procedure.<sup>280</sup>

Involuntary sterilisation is an active form of violence against women and the International Convention on Economic Social and Cultural Rights (ICESCR) Constitution of Kenya and other human rights instruments which have been explored in the process of this prohibit all forms of violence and against women, which principles have been violated by involuntary sterilisation in Kenya. The Constitution prohibits discrimination on any ground including sex and health status.<sup>281</sup> It goes ahead to grant the right to protect the inherent dignity of all persons and assure

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<sup>273</sup> Z Essack & A Strode (n 101).

<sup>274</sup> Art 2

<sup>275</sup> As above.

<sup>276</sup> As above.

<sup>277</sup> UN General Assembly, Declaration on the Elimination of Violence against Women, (20 December 1993), A / RES / 48/ 104.

<sup>278</sup> International Federation of Gynaecology (n 90) recommendation 5.

<sup>279</sup> International Federation of Gynaecology and Obstetrics (n 90) recommendation 3.

<sup>280</sup> Durojaye (n 70) 721.

<sup>281</sup> Art 27.

protection from all forms of violence.<sup>282</sup> How does involuntary sterilisation amount to a form of violence and how does it go against the fundamental human rights principles? These are some of the answers which this research seeks to achieve.

In 2011, the Human Rights Watch affirmed the position that involuntary sterilisation is indeed a form of violence against women as it inflicts suffering and limits their right to make choices for themselves and it is a tool used to control their social lives.<sup>283</sup> The Human Rights Watch reinforced that these acts of violence can take place privately or in public privately or in public.<sup>284</sup> United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, urged states to take measure to end involuntary sterilisation.<sup>285</sup> It further noted that involuntary sterilisation is an act of sexual and gender-based violence which then escalates to torture because of the mental and physical implications attached to the procedure.<sup>286</sup> This position was then reiterated by the Committee on the Prevention of Torture in Africa.<sup>287</sup>

These comments only add to the position arrived at by the Gender and Media initiative in Kenya where HIV-Positive women narrated their ordeal and the mental and physical effects of forced sterilisation.<sup>288</sup> The Constitution clarifies that every person has the right to be free and have their person protected from any form of violence whether the acts happen in private or in public glare.<sup>289</sup>

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<sup>282</sup> Arts 28 & 29.

<sup>283</sup> Human Rights Watch 'Report: A Test of Inequality Discrimination against HIV-Positive women in the Dominican Republic' (2004) <https://www.hrw.org/report/2004/07/12/test-inequality/discrimination-against-women-living-hiv-dominican-republic> (accessed 5 August 2021).

<sup>284</sup> United Nations. Declaration on the Elimination of Violence against Women (1993).

<sup>285</sup> U N Committee on the Protection of the Rights of All Migrant Workers and Members of their Families General Comment 4: State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (2017) E/C.12/GC/22 dated 2 May 2016.

<sup>286</sup> As above.

<sup>287</sup> As above.

<sup>288</sup> Gender and Media Initiative (n 6) 1.

<sup>289</sup> Art 29 (c).

The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has unambiguously declared:

Forced sterilisation is an act of violence and a form of social control, and violates a person's right to be free from torture and ill treatment. Full, free and informed consent of the patient herself is critical and can never be excused on the basis of medical necessity or emergency when obtaining consent is still possible.<sup>290</sup>

### 3.1.6 Right to Privacy

The Constitution guarantees the right to privacy on all persons including the right not to have their family or personal matters superfluously revealed.<sup>291</sup> It is a fundamental right despite not being expressly provided for in the Constitution or any other basic law.<sup>292</sup> Furthermore, this right is an automatic accompaniment to all other fundamental rights.<sup>293</sup>

The Supreme Court of the United States noted that the government cannot intrude on the exercise of rights such as the right to procreation because that would be infringing on the right to privacy of anyone seeking to exercise this right.<sup>294</sup> This then means that the government cannot be invested in determining who should and should not have children because these are personal decisions made by the individuals who are seeking to enforce these rights.<sup>295</sup> The right to privacy and procreation are intertwined as privacy is enshrined in the principle of liberty which requires all human beings to be free.<sup>296</sup>

### 3.1.7 Right to Dignity

The Maputo Protocol provides that the right to dignity includes respect and free development of personality. The Maputo Protocol mandates state parties to take all measures to ensure that women's right to dignity is realised.<sup>297</sup> This position has been retaliated in the Constitution which guarantees that all persons have a right to have their dignity upheld.<sup>298</sup>

The European Court of Human Rights (ECHR) while explaining that sterilisation is supposed to be a voluntary process, stated that forced sterilisation of any person is in fact 'incompatible with

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<sup>290</sup> Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (2016) U N Doc A/HRC/31/57 dated 5 Jan 2016.

<sup>291</sup> Art 31.

<sup>292</sup> Rosenberg (n 236).

<sup>293</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>294</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>295</sup> 431 U S 678 (1977).

<sup>296</sup> *Roe v Wade* 410 U.S. 113 (1973).

<sup>297</sup> Art 3.

<sup>298</sup> Art 28.

respect for human freedom and dignity.<sup>299</sup> Other human rights and freedoms such as the right to attain to have access to the highest attainable standards of health,<sup>300</sup> cannot be limited or pegged on whether or not a woman undergoes sterilisation without her free will.<sup>301</sup>

### 3.2 Who bears the Duty to prevent Human Rights Violations?

Conventionally human rights were a matter of public consumption and responsibility, therefore absolving private persons and entities of liability in human rights violations.<sup>302</sup> States have the duty to respect, protect and fulfil human rights.<sup>303</sup> This then means that the government is expected to put in place measures to ensure that human rights are protected and respected by state organs and private individuals.<sup>304</sup> However, overtime, there has been a general acceptance that private institutions and persons may, sometimes, have the power or influence sufficient to violate or infringe upon human rights.<sup>305</sup>

This position has been reflected and incorporated in the Constitution, which provides that ‘the Bill of Rights binds all persons and all state organs.’<sup>306</sup> In expounding the meaning and intent of the duty bestowed upon the state to promote, respect and fulfil human rights, Ochieng explains that the state has to ensure that it not only respects and promotes human rights, but also that the same is done and followed by all other actors, including private persons.<sup>307</sup> The courts have also adopted this position noting that it is not sustainable to argue that human rights can only be applied vertically.<sup>308</sup>

The state is the ultimate protector of human rights and should ensure that the rights provided and protected in the Bill of Rights are not only respected by the state and state actors but also by private citizens.<sup>309</sup> This then brings up the question whether doctors have the duty to promote

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<sup>299</sup> *Soares de Melo v. Portugal* 72850/14, IHRL 4018 (ECHR 2016).

<sup>300</sup> Constitution (n 24).

<sup>301</sup> As above.

<sup>302</sup> D M Chirwa ‘The Horizontal Application of Constitutional Rights: A Comparative Perspective’ (2006) 10 *Law, Democracy and Development* 21.

<sup>303</sup> Art 21

<sup>304</sup> As above

<sup>305</sup> J J Paust ‘Human Rights Responsibilities of Private Corporations’ (2002) 1 *Vanderbilt Journal of Transnational Law* 801 at 802.

<sup>306</sup> Art 20(1).

<sup>307</sup> Ochieng (n 25) 81.

<sup>308</sup> *Mwangi Stephen Muriithi v Daniel Toroitich Arap Moi* (2016) eKLR <http://kenyalaw.org/caselaw/cases/view/117737> (accessed 12 August 2021).

<sup>309</sup> Ochieng (n 25) 77.

human rights? The answer has been well analysed that, doctors, working in public hospitals act and are considered to be agents of the state and they have a duty to protect rights guaranteed in the constitution and other instruments.<sup>310</sup>

### 3.3 Restriction of Human Rights

The Constitution provides that human rights accrue to all persons equally and cannot be limited on any ground, including on the basis of the health status of an individual.<sup>311</sup> Rights can only be limited by law and to an extent that the limitation can be considered to be fair and dignified in any democratic society.<sup>312</sup> Additionally, among other rights, the right to freedom and protection from torture and inhuman treatment cannot be limited on any grounds.<sup>313</sup>

Additionally, governments have an obligation to uphold human rights and to avoid unnecessary and unlawful restrictions.<sup>314</sup> It is important for state agencies to understand that rights can only be limited by law and even so, the limitation should not nullify the right or make it impossible to realise the right.<sup>315</sup> The right to health is more of a ground right because without good health, it is almost impossible to enjoy and exercise the other protected and guaranteed rights.<sup>316</sup> It is also important to understand that poor HIV-Positive women have rights just like any other citizen.<sup>317</sup> Sterilisation of poor HIV-Positive women is a violation of human rights.<sup>318</sup>

Despite the legal protections on the extent to which reproductive rights can be limited, Roberts indicates that history has it that restricting the reproductive rights has been rampant throughout history.<sup>319</sup> The explanation for this is that, poor women have limited reproductive options which are mostly dependant on the government.<sup>320</sup> From the onset, it should be noted that the rights of poor women cannot be restricted because of their social and health status.<sup>321</sup> However, in order

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<sup>310</sup> As above.

<sup>311</sup> Art 19.

<sup>312</sup> Art 24 (1).

<sup>313</sup> Art 25 (1) (a).

<sup>314</sup> *In Civil Liberties Organisation in respect of the Nigerian Bar Association v Nigeria*, 140/94-141/94-145/95.

<sup>315</sup> *Civil Liberties* (n 224) para 42.

<sup>316</sup> United Nations High Commissioner for Human Rights 'Vienna Declaration and Programme of Action' (1993) <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (accessed 8 September 2021).

<sup>317</sup> As above.

<sup>318</sup> As above.

<sup>319</sup> D E Roberts 'The future of reproductive choice for poor women and women of colour' (1992) 14 *Women's Rights Law Reporter* 305.

<sup>320</sup> Roberts (n 319) 308.

<sup>321</sup> Roberts (n 319) 314.

to ensure that their rights are treated and realised like any other rights, the past and present discrimination can only be solved affirmatively like broader problems such as racism.<sup>322</sup>

The Constitution recognises basic human rights for all persons including poor HIV-Positive women for the purpose of preserving the dignity of all persons and promoting social justice.<sup>323</sup> As discussed above, rights can only be limited by law and no law exempts the enjoyment of human rights including reproductive rights by poor HIV-Positive women in Kenya.<sup>324</sup>

### **3.4 Conclusion**

This chapter has discussed the various human rights violated by forcefully sterilising poor HIV-Positive women in Kenya. Some of these rights violated include the right to health, right to family and procreation and the right to privacy. It has also been discussed that the state and all other private persons are capable of violating human rights. Finally, the government of Kenya bears the duty to ensure protection, promotion and realisation of the rights of HIV-Positive women.

This chapter explains why it is important to address involuntary sterilisation as a violation of human rights. International human rights instruments to be discussed in chapter 4 shall give a background within which involuntary sterilisation can be addressed.

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<sup>322</sup> As above.

<sup>323</sup> Article 19(2).

<sup>324</sup> Article 19 (3) (c).

## CHAPTER FOUR: LAWS, POLICIES AND INSTITUTIONS PROTECTING AND PROVIDING REMEDIES FOR POOR HIV-POSITIVE WOMEN IN KENYA FROM INVOLUNTARY STERILISATION

### 4.0 Introduction

The previous chapters have analysed the human rights violated by forcefully sterilising poor HIV-Positive women in Kenya. It is imperative to comprehend how the legal framework, policies and institutional structures help protect and realise the rights of poor HIV-Positive women in Kenya.

Naturally, human beings are egoistic and behave in ways which offend the wellbeing of others.<sup>325</sup> This is why human beings, despite knowing and acknowledging the existence of human rights violate them.<sup>326</sup> That is why human rights ought to be included in the legal structure of any country to ensure that there is a legal obligation to comply.<sup>327</sup>

Despite countries having ratified some human rights instruments, the ratification is a small gesture of the desire to accept and abide by those laws.<sup>328</sup> The intention to abide by these rights can also be reflected in the inclusion of human rights in major governing laws and instruments such as constitutions and acts of parliament.

Additionally, it has been argued that human rights can only exist within a legal and institutional framework which will ensure their implementation and compliance.<sup>329</sup> Therefore, human rights exist as a product of human existence and existence of legal providing remedies for poor HIV-Positive women in Kenya. It also analyses the domestic and international institutions established to ensure that the existing laws are implemented.

The national, regional institutions which monitor the implementation of the laws and recommend the changes to be made to the existing structures in order to be protect poor HIV-Positive women

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<sup>325</sup> E Serfontein 'Humans: The Biggest Barrier to Realising Human Rights - A South African Perspective, Education' (2019) 1 *Human Rights and Peace in Sustainable Development* 1.

<sup>326</sup> As above.

<sup>327</sup> As above.

<sup>328</sup> LC Keith 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behaviour?' (1999) 36 *Journal of Peace and Research* 95.

<sup>329</sup> As above.



in Kenya. Finally, this chapter looks at the shortcomings of the prevailing legal structures while trying to protect HIV-Positive women from involuntary sterilisation.

#### **4.1 Legal Framework Protecting Poor HIV-Positive Women in Kenya**

The legal structure of a jurisdiction includes its Constitution, legislation, policies, regulations and various contracts and agreements which govern people.<sup>330</sup>

##### **4.1.1 The Constitution of Kenya**

The Constitution prohibits discrimination on any ground including health and social status.<sup>331</sup> It also assures all persons of dignity.<sup>332</sup> Additionally, it mandates the state to address the needs of vulnerable groups including women and persons with disabilities.<sup>333</sup> To ensure compliance, the constitution asserts upon every person, the right to institute court proceedings alleging a violation of a right.<sup>334</sup> The court has the power to award damages, issue an injunction or conservatory order or invalidate any law which results in an infringement of the right claimed.<sup>335</sup> These provisions apply to all persons including poor HIV-Positive women.

##### **4.1.2 HIV/AIDS Prevention and Control Act**

The HIV/AIDS Prevention and Control Act (the Act) was enacted in 2006. Its main objective is the protection of persons living with HIV/AIDS in Kenya. Additionally, the act guarantees their rights to privacy and autonomy are protected and that they have access to medical care and attention from medical personnel.<sup>336</sup> The Act prohibits refutation of treatment based on HIV status and violation of the non-discriminatory clauses amounts to cognisable offence.<sup>337</sup> It creates avenues such as the HIV/AIDS Tribunal from which HIV-Positive women might seek recourse if their rights are violated.

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<sup>330</sup> Natural Resource Governance Institute, 'Legal Framework Navigating the Web of Laws and Contracts Governing Extractive Industries' (2015) [https://www.Resourcegovernance.org/sites/default/files/nrgi\\_Legal-Framework.pdf](https://www.Resourcegovernance.org/sites/default/files/nrgi_Legal-Framework.pdf) (accessed 30 August 2021).

<sup>331</sup> Art 27.

<sup>332</sup> Art 28

<sup>333</sup> Art 21 (3).

<sup>334</sup> Art 22 (1).

<sup>335</sup> Art 23 (2).

<sup>336</sup> Section 3 2006 HIV/AIDS Act.

<sup>337</sup> Section 38 2006 HIV/AIDS Act.

#### **4.1.3 Guidelines for Prevention of Mother-To-Child Transmission of HIV/AIDS in Kenya**

The Guidelines for Prevention of Mother-to-child transmission of HIV/AIDS in Kenya (the PMTCT guidelines) intend to reduce the incidences of new HIV infections by recommending interventions throughout pregnancy, labor, and in the post-partum period.<sup>338</sup> The guidelines recommend family planning as an intervention of PMTCT.<sup>339</sup> The policy recommends other strategies which include the use of contraceptives, which contraception has to be explained before the woman can decide which of the contraception methods to use.<sup>340</sup> This policy protects HIV-Positive women from being forced to use a specific form of contraception including sterilisation.<sup>341</sup>

#### **4.1.4 National Elimination of Mother-To-Child Transmission of HIV/AIDS Communication Strategy**

The National elimination of mother to child transmission of HIV/AIDS communication strategy (EMTCT) was conceived specifically to establish channels for dissemination of information onto protection HIV positive mothers from discrimination and intrusive medical procedures such as sterilisation.<sup>342</sup> The National EMTCT Communication Strategy delineates a roadmap fostering critical linkages designed to reduce gender inequality, maternal and child deaths, as well as improving women's access to safe and consensual family planning interventions.<sup>343</sup>

#### **4.1.5 Kenya HIV/AIDS Strategic Framework**

The Kenya HIV/AIDS Strategic Framework is a policy designed to use a human rights approach to enable access to healthcare services by persons living with HIV.<sup>344</sup> The policy removes barriers to access of HIV/AIDS health services, sexual and reproductive health information and services in public and private entities.<sup>345</sup> It is designed to improve policy frameworks for the

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<sup>338</sup> Ministry of Health, Guidelines for the prevention of mother to child transmission of HIV/AIDS IN Kenya (2012) [http://guidelines.health.go.ke:8000/media/Guidelines\\_for\\_PMTCT\\_of\\_HIVAIDS\\_in\\_Kenya-1.pdf](http://guidelines.health.go.ke:8000/media/Guidelines_for_PMTCT_of_HIVAIDS_in_Kenya-1.pdf) (accessed 20 September 2021).

<sup>339</sup> As above.

<sup>340</sup> As above.

<sup>341</sup> As above.

<sup>342</sup> Ministry of Health, National Communication Strategy towards elimination of mother to child transmission of HIV and Keeping mothers alive.(2012) [https:// www. The compass for sbc. Org / sites / default / files / project\\_examples/kenya-national-emtct-communication-strategy-20121.pdf](https://www.Thecompassforsbc.Org/sites/default/files/project_examples/kenya-national-emtct-communication-strategy-20121.pdf) ( Accessed 20 September 2021).

<sup>343</sup> As above.

<sup>344</sup> As above.

<sup>345</sup> As above.

protection of poor people living with HIV. It also, provides avenues through which injustices and abuses of reproductive rights of HIV-Positive women can be redressed.<sup>346</sup>

## 4.2 Institutional Framework

### 4.2.1 National Framework

#### (a) HIV/AIDS Tribunal<sup>347</sup>

The National HIV/AIDS Tribunal (the tribunal) is established by the HIV/AIDS Act.<sup>348</sup> The tribunal is comprised of seven members and at least two of the members must be women, which places it at a better place to hear and determine human rights violations and discrimination against HIV-Positive women and in this case, sterilisation of HIV-Positive women.<sup>349</sup>

The tribunal was created to have an avenue faster than courts and a process which ensures confidentiality and privacy of persons living with HIV.<sup>350</sup> The tribunal hears complaints on human rights violations which complaints can be filed through letters to make the process easier.<sup>351</sup>

This tribunal is the only tribunal in the world whose jurisdiction is to deal with HIV/AIDS related complaints.<sup>352</sup> Despite this recognition, this tribunal is not very popular and it became operational in 2011 despite its inception in 2006.<sup>353</sup> It is important that its existence be known to the public to ensure that cases such as those of involuntarily sterilisation have a platform to file their grievances and have them resolved.<sup>354</sup>

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<sup>346</sup> As above.

<sup>347</sup> Section 25 2006 HIV/AIDS Act.

<sup>348</sup> As above.

<sup>349</sup> As above.

<sup>350</sup> Kenyan HIV and AIDS Tribunal ‘Strategic plan 2013-2017. Nairobi: HIV and AIDS Tribunal’ (2013) <http://www.undp.org/content/dam/kenya/docs/Democratic%20Governance/HIV%20and%20AIDS%20TRIBUNAL%20STRATEGIC%20PLAN.pdf> (accessed 15 August 2021).

<sup>351</sup> P M Eba ‘The HIV and AIDS Tribunal of Kenya An Effective Mechanism for the Enforcement of HIV-related Human Rights?’ (2016) 18 *Health and Human Rights Journal* 1.

<sup>352</sup> As above.

<sup>353</sup> As above.

<sup>354</sup> As above.

The tribunal, if it finds fault or wrong doing against the complainant after conducting investigations, has the authority to award damages and/or recommend resolution of discrimination claims and other human rights violations to other relevant bodies.<sup>355</sup>

### **(b) National Courts – Constitutional and Human Rights Division of the High Court**

Human rights courts are established to protect and enforce human rights including against all persons including HIV-Positive women.<sup>356</sup> They are expected to be strict when dealing with violation of these rights because they are considered custodians of the rights.<sup>357</sup>

The Constitution creates High Court and it has unlimited jurisdiction.<sup>358</sup> The human rights division of the High Court and other divisions were created by the judiciary to administer matters in an efficient manner. The Constitution and human rights division hears and determines matters where there are alleged constitutional and human rights violations.<sup>359</sup>

In 2014, a group of HIV-Positive women in Kenya filed a petition alleging violation of their rights as they had been sterilised involuntarily.<sup>360</sup> The secretary of the Joint United Nations Programme on HIV/AIDS and the National Gender and Equality Commission were admitted by the court as friends of the court to help present evidence and submissions on the on involuntary sterilisation of poor HIV-Positive women in Kenya.<sup>361</sup> This decision shall set precedent on the forced sterilisations in Kenya because there has not been a court decision addressing this issue.<sup>362</sup>

### **(c) Kenya National Human Rights Commission**

The Kenya National Human Rights Commission (the National Commission) is established by the Kenya National Human Rights Commission Act<sup>363</sup> and article 59 of the Constitution. It has the

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<sup>355</sup> As above.

<sup>356</sup> A Barak 'Foreword—A judge on judging: The role of a Supreme Court in a democracy' (2002) 16 *Harvard Law Review* 119.

<sup>357</sup> As above.

<sup>358</sup> Art 165.

<sup>359</sup> High Court of Kenya 'Notification of Practice Directions on the Division of the High Court of Kenya' (2015). <http://kenyalaw.org/kl/index.php?id=6041>(accessed 30 August 2021).

<sup>360</sup> S W K & 5 others (n 160).

<sup>361</sup> S W K & 5 Others (n 160) paragraphs 72 & 74.

<sup>362</sup> As above.

<sup>363</sup> Kenya National Human Rights Commission (Laws of Kenya Act No 12 of 2011).

mandate to promote respect and adherence of human rights and create a human rights culture in Kenya.<sup>364</sup>

The National Commission has the mandate to hear and determine human rights complaints, report on and make recommendations on how improvements can be made in both private and public spheres and to improve the human rights culture.<sup>365</sup> It is also an oversight body meant to observe the activities of government entities and any allegations of impropriety.<sup>366</sup>

The National Commission is open for anyone who wishes to file a complaint alleging a violation of human rights and as determined in the previous chapter of this research, involuntary sterilisation of HIV-Positive women is violation of fundamental rights and freedoms and such a complaint can and should be made and addressed by the National Commission.<sup>367</sup>

#### **4.2.2 Regional Courts and Commissions**

##### **a) African Commission on Human and Peoples' Rights**

The Commission has been at the forefront in defending the rights of women girls.<sup>368</sup> It expressed concern on the rise in cases on involuntary sterilisation of HIV-Positive women across African countries.<sup>369</sup> It called upon state parties of the African Charter to ensure that persons are accorded the right to health and access to sexual and reproductive rights.<sup>370</sup> It advises that medical procedures must be conducted with consent of the person concerned and in regards with internationally prescribed standards.<sup>371</sup>

The African Commission on Human and Peoples' Rights,' Resolution 260 on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services (Resolution 260) calls upon state parties to ensure that HIV-Positive women are not exposed to involuntary sterilisation and other medical procedures with receiving adequate information and a lee way to make choices concerning their reproductive health.<sup>372</sup> This can be done by training medical

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<sup>364</sup> Sec 59(1) 2011 Kenya Citizenship and Immigration Act.

<sup>365</sup> As above

<sup>366</sup> As above

<sup>367</sup> As above.

<sup>368</sup> Resolution 260 (n 121).

<sup>369</sup> As above

<sup>370</sup> As above

<sup>371</sup> As above

<sup>372</sup> As above

personnel and investigating the claims of involuntary sterilisation of HIV-Positive women.<sup>373</sup> Finally the National Commission calls on reparations of the HIV-Positive women who have been involuntarily sterilised.<sup>374</sup>

The National Commission affirms that forced sterilisation is indeed an act of violence and torture against HIV-Positive women.<sup>375</sup> This discussion was furthered in their general comment on article 14(2) of the charter insisting and non-discrimination of HIV-Positive women and poor women.<sup>376</sup> It further insisted that medical personnel should be trained to ensure compliance.<sup>377</sup> Medical personnel should be should be trained on free consent and autonomy of women and girls.<sup>378</sup>

### 4.2.3 International Framework

#### a) Convention on Elimination of all Forms of Discrimination against Women

The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) calls upon states to take measures to ensure that women are not discriminated against and that they have access to reproductive services.<sup>379</sup>

CEDAW further urges states to take all appropriate measures to ensure that women have access to health services including family planning.<sup>380</sup> It urges states to ensure that women have access to all services related to pregnancy, including proper nutrition and pre –natal services without costs.<sup>381</sup> Additionally, it takes note of the plight of women living in rural areas and it urges states to provide services commensurate to their needs.<sup>382</sup>

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<sup>373</sup> African Commission on Human and Peoples' Rights resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services Resolution 260 (2003)- ACHPR/Res.260(LIV) (2013) v.

<sup>374</sup> As above

<sup>375</sup> African Commission on Human and People's Rights General Comment 4: Article 4: African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (2014) ACHR art 58.

<sup>376</sup> African Charter on Human and Peoples' Rights (1981) art 14(2).

<sup>377</sup> Resolution 260 (n 121) resolution 55.

<sup>378</sup> Resolution 260 (n 121) resolution 58.

<sup>379</sup> Art 11(f).

<sup>380</sup> Art 12 (1)

<sup>381</sup> Art 12(2).

<sup>382</sup> Art 14(1).

States should ensure that women in rural areas benefit from development projects in rural areas.<sup>383</sup> The member states also have the duty to ensure access to basic health services including family planning and counselling.<sup>384</sup>

#### **b) Maputo Protocol**

It provides that all women have a right to control their fertility, including the right to decide the number and spacing of their children.<sup>385</sup> Women have a right to choose the method of contraception and they cannot be compelled to use a single method of contraception.<sup>386</sup> Finally, it mandates states to ensure availability of reproductive services to all women by establishing structures and institutions to offer these services.<sup>387</sup>

#### **c) General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

The Commission in general comment 14, urges states to review all laws restricting women from exercising their sexual and reproductive rights.<sup>388</sup> Further, it urges states to ensure that policies and legal frameworks guarantee that no woman is sterilised because of their HIV status.<sup>389</sup> It encourages states to offer a variety of family planning methods including voluntary sterilisation.<sup>390</sup>

Furthermore, the Commission notes that although the Maputo Protocol is a landmark, it does not ensure full implementation of women's sexual and reproductive health.<sup>391</sup> It burdens states to ensure that there is effective access to information on HIV/AIDS and contraception for all women.

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<sup>383</sup> Art 149(2)

<sup>384</sup> As above.

<sup>385</sup> Maputo Protocol art 14(1)(a)-(b).

<sup>386</sup> 14(1)(c)

<sup>387</sup> 14(2).

<sup>388</sup> General comment 14 (n 254) para 46.

<sup>389</sup> General comment 14 (n 254) para 57.

<sup>390</sup> General comment 14(n 254) para 58.

<sup>391</sup> General comment 2 (n 119).

**d) General Recommendation No. 24: Article 12 of the Convention (Women and Health)**

In affirming women's right to health, it urges states not permit coercion of women to forced procedures such as sterilisation to prevent abuse of the women's right to dignity and informed consent.<sup>392</sup> It also emphasises the importance of informed consent and non-discrimination against women.

**e) United Nations Programme on HIV/AIDS**

This organisation is a brainchild of the United Nations as response to the HIV/AIDS pandemic.<sup>393</sup> The United Nations Programme on HIV/AIDS (UNAIDS) was created to foster best practices and encourage favourable response from countries on HIV/AIDS.<sup>394</sup> It also ensures that there is widespread compliance with ethical measures including non-discrimination, when dealing with patients who are HIV positive.<sup>395</sup>

It monitors the United Nations treaty members and reporting on the findings from the data collected.<sup>396</sup> It also promotes non-discrimination and advocates for increased access to health care and healthcare services to reduce the vulnerability of persons already infected with HIV/AIDS.<sup>397</sup>

A statement issued jointly with UNAIDS Office of the High Commissioner for Human Rights, and the World Health Organisation in 2014 emphasised that despite the fact that HIV-Positive women have the freedom to choose sterilisation as a method of contraception, they are often forced to undergo sterilisation because of their HIV status.<sup>398</sup> They further noted that women are also a special target group because of the historical alignments and biases.<sup>399</sup> They called upon

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<sup>392</sup> CEDAW 'General recommendation No. 24: Article 12 of the Convention (women and health)' (1999) [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_GEC\\_4738\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4738_E.pdf) (accessed 26 September 2021).

<sup>393</sup> Joint United Nations Programme on HIV/AIDS 'What UNAIDS Does' (2021), <https://www.unaids.org/en> (accessed 20 August 2021).

<sup>394</sup> S Timberlake 'Unaid: Human rights, ethics, and law' (1998) 3 *Health and Human Rights* 187.

<sup>395</sup> United Nations Development Programme (UNDP) 'International Ethical Guidelines for Biomedical Research Involving Human Subjects' (1993) <https://ur.booksc.eu/book/49964322/46fb13> (accessed 23 August 2021).

<sup>396</sup> S Timberlake (n 397).

<sup>397</sup> UNAIDS '4 PCB Meeting 1997' (1997) [https://www.unaids.org/en/aboutunaids/unaids\\_programme\\_coordinating\\_board/pcb\\_meeting\\_archive/04-pcb-meeting](https://www.unaids.org/en/aboutunaids/unaids_programme_coordinating_board/pcb_meeting_archive/04-pcb-meeting) (accessed 24 August 2021).

<sup>398</sup> World Health Organisation (n 23) 3.

<sup>399</sup> As above.



the healthcare providers to ensure that HIV-Positive women have proper access to contraception methods and are free from coerced or forced sterilisations.<sup>400</sup>

Issuance of statements and calling upon states to ensure that women with HIV are accorded proper health care including protection from coerced sterilisation is one of the methods used by monitoring bodies to bring to an end to discrimination of poor HIV-Positive women.<sup>401</sup> The Office of the Ambassador, which is a creation of UNAIDS helps spread awareness and end stigma surrounding HIV/AIDS.<sup>402</sup>

Kenya, being a member of the United Nations and therefore has an obligation to abide by its communications.<sup>403</sup> Further, Kenya is bound by the provisions of article 2(5) (6) of the Constitution which provides that Kenya is bound by the general rules of international law.

#### **f) International Community of HIV-Positive Women/AIDS**

The International Community of HIV-Positive women/AIDS (the Community) has been vital in the fight against forced sterilisation of HIV-Positive women through creating awareness and making public statements.<sup>404</sup> The community conducts field studies and raises concern over forced sterilisations.<sup>405</sup> The community made an appeal to UNAIDS to intervene and help end the forced sterilisations in various countries, after which a comprehensive statement was issued.<sup>406</sup> Use of litigation has also been a major tool used by the organisation to support for the affected women.<sup>407</sup> The International Community of HIV-Positive women have also been instrumental in addressing the issue of involuntary sterilisation of poor HIV-Positive women in Kenya. It has done this by availing information on HIV/AIDS despite the limited structural support in Kenya.

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<sup>400</sup> World Health Organisation (n 23) 4.

<sup>401</sup> As above

<sup>402</sup> UNAIDS (n 397).

<sup>403</sup> As above.

<sup>404</sup> E Haber 'The united nations' response to HIV/AIDS in Africa (2002) 18 *New York Law School Journal of Human Rights* 3 467.

<sup>405</sup> L M & Others v Namibia (n 157).

<sup>406</sup> Haber (n 404).

<sup>407</sup> As above.

### **4.3 Shortcomings of the Existing Legal and Institutional Framework**

It cannot be said that the legal and institutions have successfully protected women living with HIV in Kenya from involuntary sterilisation.<sup>408</sup> The institutions discussed above have illuminated on the issues affecting poor women living with HIV in Kenya. However, for laws and policies to be effective, there has to be goodwill and support from the government. This support can be in the form of policies or procedures to ensure expeditious resolution of human rights violations.

For instance, when the report on involuntary sterilisations was released, the HIV/AIDS Prevention and Control Act was already in existence but still the women were involuntarily sterilised against their consent pointing out that there are still loopholes and shortcomings with the existing framework. Some of the shortcomings of the existing laws, policies and institutional framework include:

#### **a) The Periods within which Courts Resolve Cases**

Courts in Kenya have a backlog of cases and this sometimes affects the period within which matters are determined.<sup>409</sup> Petitions filed in the constitutional division take a long time to be resolved.<sup>410</sup> For instance, in Kenya the case filed at the human rights and constitutional division in 2014, been in court over six years without resolution.<sup>411</sup>

This may not only discourage the petitioners in their quest to have their rights realised, but also cause doubt in the ability of the existing institutional structures to realise human rights as envisaged in the Constitution and other human rights instruments discussed in this chapter. The established institutions may not be in favour of the complainants even when they present evidence towards discrimination based on their HIV statuses.<sup>412</sup>

#### **b) Failure of Laws to Achieve the Desired Purpose**

The law sometimes falls short of the expected results in that it may fail to cover areas which it is supposed to cover. For instance, the HIV/AIDS act does not expressly outlaw discriminatory

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<sup>408</sup> L K Kemboi, The Case Backlog Problem in Kenya's Judiciary and the Solutions (2021) [https:// www. Research gate. Net / publication / 351556013 The Case Backlog Problem in Kenya's Judiciary and the Solutions](https://www.Researchgate.Net/publication/351556013/The_Case_Backlog_Problem_in_Kenya's_Judiciary_and_the_Solutions) (accessed 20 September 2021).

<sup>409</sup> As above.

<sup>410</sup> As above.

<sup>411</sup> As above.

<sup>412</sup> L M & Others v Namibia (n 157).

procedures such as involuntary sterilisation against HIV-Positive women. The Acts prohibits denial of treatment based on HIV status but does not speak on discrimination and differential treatment by medical personnel on persons living with HIV in general.<sup>413</sup>

**c) Long and Tiresome Procedures required to get Audience from the African Commission and the African Court of Human and Peoples' Rights.**

The African Charter provide that a complain to be filed at the African Commission can only be filed by a state against a state who is a party of the African Union<sup>414</sup> or by an individual or organisation claiming that a state has violated the rights provided for under the Charter.<sup>415</sup> The provision that complaints can only be filed against a state party makes it difficult for complainants to file claims against private individuals or entities which breach human rights. Additionally, the charter provides for rules which are to be met before the complaint can be admitted to the commission.<sup>416</sup>

Moreover, communications made from the commission are not binding and are often ignored by states.<sup>417</sup> This makes the recourse issued by the commission less effective. Additionally, there is a lot of interference from governments and the general lack of political goodwill has made it difficult to implement communications from the Commission.<sup>418</sup> Communications made to the commission must also show that local remedies have been exhausted or that it is apparent that the local remedies are taking longer than they should.<sup>419</sup> Exhaustion of local remedies in legal proceedings for instance, has been understood to mean litigating the matter to the highest court in the land, which process may take many years therefore delaying delivery of justice.<sup>420</sup>

The African Court on Human and Peoples' Rights (African Court) does not allow individuals to file complaints on behalf of a country in the court unless the state in question allows such

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<sup>413</sup> Act No 18 of 2006..

<sup>414</sup> Art 48-49

<sup>415</sup> Art 55

<sup>416</sup> Art 55

<sup>417</sup> M Samb 'Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union' (2009) 15 *Annual Survey of International & Comparative Law* 7.

<sup>418</sup> H Abbas *Africa's Long Road to Rights* (2007) (11); (13).

<sup>419</sup> The African commission on human and peoples' rights information sheet No. 3 communication procedure organisation of African unity (2011) [file:///C:/Users/USER/Downloads/achpr\\_communication\\_procedure\\_eng.pdf](file:///C:/Users/USER/Downloads/achpr_communication_procedure_eng.pdf) (accessed 27 September 2021).

<sup>420</sup> As above.

jurisdiction.<sup>421</sup> This has also made it difficult for individuals to file complaints which cannot or have been negligently not filed by the Court. Furthermore, the Charter provides for only a few of the socio-economic rights causing doubts as to whether the commission can handle complaints associated with rights not covered in the charter.<sup>422</sup> However the Court has expanded its jurisdiction cover rights secured in other human rights instruments.<sup>423</sup>

Finally, budgetary constraints for the two bodies also make their service delivery less effective and taking longer periods compared to similar human rights bodies around the world.<sup>424</sup>

#### **d) Patriarchy and Societal Norms**

Over the years, women have been deemed to be under the rule of men.<sup>425</sup> This has made men the primary decision maker in all decisions concerning the family including reproductive decisions and choices, putting women at risk because they are unable to make decisions regarding their reproductive rights.<sup>426</sup> Additionally, the classification of marriage, children and even reproduction as private matters have propelled the notion in society that they are matters without the purview of law.<sup>427</sup> This makes it difficult to implement the rights, regardless of how robust they are in law, against involuntary sterilisation and other forms of discrimination against women.

#### **e) Lack of Legal Knowledge of the existing Laws and Institutional Framework**

Most HIV-Positive women in Kenya are not aware of the laws which protect them from discrimination. For instance in Kenya, only 32.5 % people living with HIV/AIDS are aware of the existence of the HIV/AIDS Tribunal.<sup>428</sup> Most Kenyans have little or no knowledge of the

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<sup>421</sup> Art 34

<sup>422</sup> Samb (n 417) 13.

<sup>423</sup> Samb (n 417) 8.

<sup>424</sup> Samb (n 417) 9.

<sup>425</sup> J Grace 'The Human Rights Patriarchy: "Masculine Liberal Subjects" and the Paradox of Universalism' (2013) <https://humanrights.fhi.duke.edu/wp-content/uploads/2015/04/Grace-Koontz-Prize-HR-Final-Paper.pdf> (accessed 26 September 2021).

<sup>426</sup> As above

<sup>427</sup> Circle of Rights 'Economic, Social and Cultural Rights Activism: A Training Resource' (2000) <http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module4.htm> (accessed 25 September 2021).

<sup>428</sup> P M Eba 'The HIV and AIDS Tribunal of Kenya: An Effective Mechanism for the Enforcement of HIV-related Human Rights?' (2016) 18 *Human Rights Journal* 176.

existing laws because the laws are written in complex language.<sup>429</sup> For this reason, seeking remedy for violation of rights may be minimal because people are unaware of the existence of the rights and the laws which protect them. The legal structure Kenya is inadequate in imparting legal knowledge to citizens.<sup>430</sup>

#### 4.4 Conclusion

The existing laws, as discussed above have provisions against discrimination of poor HIV-Positive women in Kenya. They also have enlisted the various ways in which victims of discrimination can seek recourse.

However, the rights provided for by some of the national law and international instruments do not directly address a specific person or institution to ensure fulfillment of these rights.<sup>431</sup> This means that when a violation is committed, liability cannot,<sup>432</sup> be apportioned to a specific individual. Furthermore, some institutions are enablers and even take part in violation of human rights and it is debatable whether the existence of these institutions prevents the abuse as the violations still take place with private persons.<sup>433</sup> However, it is assumed that the duty to realise these rights fall on the governments and structural institutions in the subject's country of origin.<sup>434</sup>

It is for this reason that the law and various institutions, including international organisations and charities should chip in and ensure that there is compliance with the duties provided and protected in law.<sup>435</sup> Addressing the government alone can lead to a situation where private individuals and organisations deny responsibility for violations even when they have breached human rights.<sup>436</sup>

The legal provisions and the institutional framework in Kenya discussed in this chapter are vital protection of poor HIV-Positive women are treated fairly and protected from involuntary

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<sup>429</sup> N Arnold 'Ignorance of the Law is no Defence: Street Law as a Means to Reconcile this Maxim with the Rule of Law' (2018) 1 *Strathmore Law Review* 40.

<sup>430</sup> As above.

<sup>431</sup> O O'Neill *Hunger, Needs, and Rights* (1988) at 76.

<sup>432</sup> As above

<sup>433</sup> As above.

<sup>434</sup> H Shue *Mediating Duties* (1988) 687.

<sup>435</sup> J W Nickel 'How human rights generate duties to protect and provide' (1993)15 *Human Rights Quarterly* 77.

<sup>436</sup> As above.

sterilisation because they also deserve equal protection and respect before the law.<sup>437</sup> Governments have the duty to realise rights and prevent abuse from citizens, while citizens are expected to abide by the legal provisions and also join efforts with non-governmental institutions to hold the government liable and ensure compliance.<sup>438</sup>

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<sup>437</sup> As above.

<sup>438</sup> As above.

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.0 Introduction

There are safeguards and many remedies which can be accorded to HIV-Positive women who have been sterilised without their consent.<sup>439</sup> However, the remedies cannot be fully realised without accountability.<sup>440</sup> Accountability and inclusion of the affected group ensures that the laws and policies in place are adhered to and that those affected by human rights violations have a proper reporting system.<sup>441</sup> Kenya has an international obligation to put in place human rights accountability systems in order to realise human rights.

### 5.1 Conclusion of findings

Chapter one of this research addressed background of involuntary sterilisation of poor HIV-Positive women in Kenya and evidenced that, poor HIV-Positive women in Kenya have, been subjected to involuntary sterilisation. These acts are rooted in the stigma and notions associated with HIV and poverty. This research has established that there are laws enshrined in domestic statutes and international instruments protecting poor women from violation of their human rights.

The courts nationally and internationally are asserting the rights of poor HIV-Positive women by ensuring that their right to non-discrimination is protected. This research was anchored upon the intersectional feminism theory, which recommends a multi-dimensional approach on discrimination against HIV-Positive women because the shortcomings they face are multi-faceted.

This final chapter recommends some of the ways in which sterilisation of poor HIV-Positive women can be remedied. It suggests the various ways in which stakeholders can come in to ensure that there is equality and fairness towards HIV-Positive women when they access medical services from public hospitals or any other health facilities. Their rights, just like all other human beings are paramount and ought to be respected and protected at all times.

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<sup>439</sup> World Health Organisation (n 23).

<sup>440</sup> As above.

<sup>441</sup> As above

## 5.2 Lessons from other Jurisdictions

HIV-Positive women continue to face discrimination and there seems to be a habitual trend where health care professionals withhold healthcare as means to get these women to sign consent forms.<sup>442</sup> Due to their economic status, these women have no option but to agree with the conditions given.<sup>443</sup> Kenya can learn from:

### a) Namibia

In the Namibian case the court emphasised the importance of consent.<sup>444</sup> Badul and Strode note that the court noted that acquiring consent during labour does not promote autonomy and the voluntariness of sterilisation.<sup>445</sup> The court failed to define the tenets of discrimination when it dismissed the second argument on discrimination. It found that the lack of documentary evidence implied that plaintiffs were not discriminated against despite their accounts which were corroborated.<sup>446</sup> With the cases pending at the high court of Kenya, we hope that the court will be persuaded to find for discrimination.<sup>447</sup>

### b) Inter-American Court of Human Rights

The Inter-American Court of Human Rights, awarded damages to a complainant who had been sterilised against her will.<sup>448</sup> The Court noted that, performing such a procedure without due regard to the patient's rights including the right to dignity, family, protection from gender-based violence was an abuse of her rights.<sup>449</sup> It emphasized the importance of informed consent and non-discrimination, which principles can be borrowed by the High Court of Kenya.<sup>450</sup>

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<sup>442</sup> R Sifris 'Involuntary sterilisation of HIV-Positive Women: An Example of Intersectional Discrimination' (2015) *Human Rights Quarterly* 464.

<sup>443</sup> As above

<sup>444</sup> L M & Others (n 157).

<sup>445</sup> C Badul & A Strode 'LM and others vs Government of the Republic of Namibia: The first Sub-Saharan African case dealing with coerced sterilisations of HIV-Positive women quo vadis' (2013) 13 *African Human Rights Law Journal* 214.

<sup>446</sup> As above.

<sup>447</sup> SWK & Others (n 160).

<sup>448</sup> *I V v Bolivia* Inter-American Commission of Human Rights, I Am Comm of HR(30 November 2016)40/08.

<sup>449</sup> As above

<sup>450</sup> As above.



### c) European Court of Justice

It brought out a new aspect, where the court indicated that even transgender persons have a right to lead private lives without being forced to undergo sterilisation just because they belong to a minority group and have the intention of changing their gender identity.<sup>451</sup>

### d) South Africa

One of the lessons to be borrowed from South Africa is the legal framework and institutional organisation because it has a high number of HIV positive people.<sup>452</sup> It has a well-structured legal system and a constitution which protects the rights of all persons including HIV-Positive women and insists on the importance of informed consent when performing procedures such as sterilisation.<sup>453</sup>

Finally, their civil organisation is robust as it has been vital in collecting and documenting data on the experiences of HIV-Positive women and sterilisation in South Africa.<sup>454</sup> The situation of HIV-Positive women seems to be similar in the various countries analysed. The catastrophic effects are also similar in all cases which necessitate the need to take action and devise long lasting solutions to deal with forced sterilisation of HIV-Positive women in Kenya.

## 5.3 Recommended Remedies for Kenya

### 5.3.1 Involvement of the Government in Medical Services

Implementation of laws of a country relies on goodwill from the government.<sup>455</sup> Unlike individual actors and other agencies, governments are better equipped and therefore have the capacity to implement and realise these policies.<sup>456</sup>

The Kenyan Government has a duty to realise reproductive rights of citizens including poor HIV-Positive women forced to undergo sterilisation.<sup>457</sup> In the *Alyne* case, a poor Brazilian

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<sup>451</sup> *A P Garçon and Nicot v France* ( 6 April 2017) 79885/12 52471/13 52596/13.

<sup>452</sup> J Harries et al 'Policy Maker and Health Care Provider Perspectives on Reproductive Decision-Making Amongst HIV-Infected Individuals in South Africa' (2007) <http://www.biomedcentral.com/contentpdf58-7-282.pdf> (accessed 29 August 2021).

<sup>453</sup> R Rebouch 'The Limits of Reproductive Rights in Improving Women's Health' (2011) 63 *American Library Association Journal* (12); (13).

<sup>454</sup> L McLaughlin 'The price of failure of informed consent law: Coercive sterilisations of HIV-Positive women in South Africa' (2014) 32 *Law and Inequality: Journal of Theory and Practice* 69.

<sup>455</sup> A Yamin & Prachniak-Rincon (n 176).

<sup>456</sup> As above

woman died because she was denied adequate maternal care.<sup>458</sup> The CEDAW committee observed that, that governments should regulate provision of reproductive and healthcare services because without constant regulation, private actors and other agencies are prone to abuse these freedoms, leading governments to fail in their international commitments.<sup>459</sup> In Kenya the government has done little to regulate hospitals and implement non-discrimination policies.<sup>460</sup>

Considering the intersecting discrimination upon HIV-Positive women because of the existing stereotypes on HIV, the government should boost the existing laws and framework and facilitate multi-agency cooperation and continuous efforts to end involuntary sterilisation and other stereotypes on HIV.<sup>461</sup>

### **5.3.2 Enactment of Human Rights Sensitive Laws**

The legal, institutional and policy framework is important in preventing involuntary sterilisation of HIV-Positive women in Kenya.<sup>462</sup> There is need to have policies which protect HIV-Positive women from stereotypes around HIV, how to identify a violation and how they can report violations of these rights.<sup>463</sup> The policies must provide protection vulnerable groups and ensure that sterilisation is not a condition for receipt of services in health facilities.<sup>464</sup>

It is important to have laws which are structurally sound and clearly lay out procedures which can be followed when one wants to go through sterilisation to avoid a declaration of unconstitutionality or that it breaches the most basic human rights requirements.<sup>465</sup>

It further provides measures which governments should adopt to address violence against women. This ranges from enacting law to prevent violence against women, punishing perpetrators of violence against women to rehabilitating victims of violence.

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<sup>457</sup> Committee on Elimination of All forms of Discrimination Against Women (CEDAW) 'Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (2011) <https://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-17-2008.pdf> (accessed 7 August 2021).

<sup>458</sup> As above.

<sup>459</sup> As above.

<sup>460</sup> Gender and Media Initiative (n 6).

<sup>461</sup> A Yamin, A & C Prachniak (n 176).

<sup>462</sup> World Health Organisation (n 23).

<sup>463</sup> As above.

<sup>464</sup> As above.

<sup>465</sup> As above.

### 5.3.3 Strategic Litigation

Courts are the custodians of the law have the power to influence change through interpretation of the existing laws.<sup>466</sup> They have the power to provoke thoughts of citizens and the civil society who in turn have the capacity to influence the legislature and the executive arms of government to bring change in law and policy.<sup>467</sup>

When a matter alleging human rights violations is filed in a court of law, the court has the freedom to grant various remedies including monetary compensation because sterilisation is an irreversible procedure, restitution and/or a commitment to not repeat the said action.<sup>468</sup>

The Constitution, accords courts the authority to issue remedies such as compensation declaration of rights, injunctions, invalidating any unconstitutional laws and policies, judicial reviews and conservatory rights.<sup>469</sup> Courts not only give remedies, they also influence a change in norms and practices in various institutional structures which are responsible for realising human rights, including the right to health.<sup>470</sup>

Judicial officers understand that national and regional courts have a role in protecting vulnerable groups.<sup>471</sup> They are to consider the dynamics of the case and how they affect the claimants. They ought to consider how stigma and the myths surrounding HIV impact on the decisions made by various actors in government and the health sectors.<sup>472</sup>

### 5.3.4 Training of Medical Personnel

Medical personnel should be trained on human rights care when dealing with patients who are living with HIV and the importance of adhering to standards on sterilisation.<sup>473</sup> In other

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<sup>466</sup> J Sanghera et al 'Human rights in the new global strategy' (2015) [http:// www. bmj. com/ content/351/ bmj. h4184](http://www.bmj.com/content/351/bmj.h4184) (accessed 12 August 2021).

<sup>467</sup> As above.

<sup>468</sup> Human Rights Council 'Technical Guidance on the Application of a Human-Rights Based Approach to the Implementation of Policies and Programmes to Reduce Preventable Maternal Morbidity and Mortality' (2 July 2021) U N Doc. A/HRC/21/22.

<sup>469</sup> Art 23(3)(a)-(f)

<sup>470</sup> A Yamin 'Taking the right to health seriously: Implications for health systems, courts and achieving universal health coverage' (2017) 39 *Human Rights Quarterly* 341.

<sup>471</sup> Human Rights Council (n 468).

<sup>472</sup> A Ahmed et al, ' "At the Hospital there are no human rights": Reproductive and Sexual Rights Violations of HIV-Positive women in Namibia' (2013) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2220800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220800) (accessed 3 August 2021).

<sup>473</sup> As above.

jurisdictions, introducing human rights causes in medical trainings has been effective in ensuring that medical practitioners are aware of the duties bestowed upon them while on duty.<sup>474</sup>

Moreover, education on human rights in medical schools and institutions because over the years, it has been made clear, from the happenings during the apartheid regime in South Africa and the Nazi regime, that doctors and medical practitioners are part of a larger social and political system.<sup>475</sup> They can be used or take part in acts against humanity because of the extraneous pressure.<sup>476</sup> That is why education for medical practitioners is important and it should be done from medical school all the way through refresher courses. Because realising human rights in the medical field is not a continuous exercise.<sup>477</sup>

### 5.3.5 Criminal Liability

Health professionals who perform involuntary sterilisation can be held personally liable for assault or the crime of mayhem in common law, where one is culpable for mutilating apart of someone else's body part.<sup>478</sup>

It has been analysed that it would have been impossible for the Nazi regime to commits atrocities without the participation and constant help and facilitation from the physicians.<sup>479</sup> Even though the government came up with the policies, the doctors implemented the policies using their professional training and were held liable for the crimes at individual capacities.<sup>480</sup> Kenya can borrow from the trial of doctors of the Nazi regime.<sup>481</sup> The trial of doctors and medical practitioners who sterilized HIV-Positive women, involuntarily deserve to be charged in law.<sup>482</sup>

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<sup>474</sup> C J Ezer 'Human rights in patient care: a theoretical and practical framework. (2013) 15 *Health Human Rights* 7.

<sup>475</sup> J N Eedman 'Human rights education in patient care' (2017) 38 *Public Health Reviews* 1.

<sup>476</sup> B M Cislighi & B Mackie 'Report: Advancing transformative human rights education' Appendix D to the report (2016).

<sup>477</sup> As above.

<sup>478</sup> As above.

<sup>479</sup> M A Grodin & Others 'The Nazi Physicians as leaders in eugenics and "euthanasia": Lessons for today ' (2018) 1 *Am J Public Health* 53.

<sup>480</sup> M A Grodin 'Mad, bad, or evil: how physician healers turn to torture and murder' (2010) 1 *Palgrave Macmillan* 51.

<sup>481</sup> As above.

<sup>482</sup> As above.

### 5.3.6 Sensitisation of the Public

Sometimes, human rights violations take place because of limited information or knowledge by the public.<sup>483</sup> Offering trainings and sensitisation on the rights of women and the importance of informed consent on procedures such as sterilisation, by the government, will go a long way in ensuring that the public does not unknowingly violate the said rights.<sup>484</sup>

### 5.3.7 Reparations

Reparations in form of damages should be made to the complainants for the suffering caused by the involuntary procedure.<sup>485</sup> The government and stakeholders in the health department should acknowledge the existence of policies which have led to acts to involuntary sterilisation. For that, statements of acknowledgement of wrong doing and apologies should be issued.<sup>486</sup> These policies should be abolished if they are still in existence.<sup>487</sup>

Investigations should be conducted and prompt feedback on the findings should be given.<sup>488</sup> In instances where there are women who might not be aware that they were involuntarily sterilised, they should be informed of the same and allowed to seek redress.<sup>489</sup>

Legal assistance should be made readily available by the government through the National Legal Aid programme and the judiciary.<sup>490</sup> Finally, if there is a possibility of having successful reversal procedures, it should be made available and facilitated by the government.<sup>491</sup>

### 5.3.8 Family Counselling

The effects of involuntary sterilisation such as breaking up of families, domestic violence revolves around the family. They are influenced by the mental state of the members of the family

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<sup>483</sup> N Luterstein 'The gender of reparations: Unsettling sexual hierarchies while redressing human rights violations' (2010) 23 *Leiden Journal of International Law* 473.

<sup>484</sup> As above.

<sup>485</sup> World Health Organisation (n 23) 14.

<sup>486</sup> As above.

<sup>487</sup> As above.

<sup>488</sup> As above.

<sup>489</sup> As above.

<sup>490</sup> As above.

<sup>491</sup> As above.

which is as a result of the strain and tension caused by sickness and unforeseen situations such as sterilisation.<sup>492</sup>

Family counselling ensures that the affected women and their families have support in understanding that involuntary sterilisation is not to be faulted on the women and that blame does not solve issues at hand.<sup>493</sup> It is advised that family counseling for persons living with HIV should be a continuous process.<sup>494</sup>

## 5.4 Conclusion

If the recommendations above are implemented by the government and other stake holders, HIV-Positive women in Kenya will be able to realise their rights guaranteed in human rights instruments. The HIV/AIDS pandemic cannot be ended without tackling the issue of discrimination.<sup>495</sup> Social injustice should be the basis of fighting the HIV pandemic and realisation of Human Rights.<sup>496</sup>

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<sup>492</sup> P Sharma 'Family system based counselling in HIV/AIDS' (2016) 1 *International Journal of Scientific Development and Research (IJS DR)* 470.

<sup>493</sup> Sharma (n 492) 471.

<sup>494</sup> Sharma (n 492) 472.

<sup>495</sup> UNAIDS 'Leaving no one behind: ending stigma and discrimination through social justice and inclusive societies' (2016) [https://www.unaids.org/en/resources/presscentre/featurestories/2016/june/20160609\\_panel4](https://www.unaids.org/en/resources/presscentre/featurestories/2016/june/20160609_panel4) (accessed 18 September 2021).

<sup>496</sup> As above.

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