

# **LITIGATING OBSTETRIC VIOLENCE IN SOUTH AFRICA: BARRIERS AND OPPORTUNITIES**

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By

**Petunia Bassetsana Koitsioe**

**Student number: 23993104**

Prepared under the supervision of Professor Ebenezer Durojaye

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## LIST OF ACRONYMS

ARV	Antiretroviral
CAT	Convention Against Torture
CGE	Commission for Gender Equality
CRC	Convention on the Rights of the Child
CRR	Center for Reproductive Rights
CS	Caesarean Section
CEDAW	Convention on the Elimination of Discrimination Against Women
GEM	African Gender and Media Initiative Trust
HIV	Human Immunodeficiency Virus
HPCSA	The Health Professions Council of South Africa
ICCPR	International Covenant on Civil and Political rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
IFGO	International Federation of Gynecology and Obstetrics
KELIN	Kenya Legal and Ethical Issues Network
MTCT	Mother-To-Child-Transmission
NAACP	National Association for the Advancement of Colored Persons
NGO	Non-governmental Organisation
NPRC	National Patients' Rights Charter
PIL	Public Interest Litigation
SANC	South African Nursing Council

SERAC	Social and Economic Rights Action Center
TAC	Treatment Action Campaign
UN	United Nations
US	United States
WHO	World Health Organisation

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Introduction

Obstetric violence is a form of violence that occurs against pregnant women and girls encompassing physical, verbal, emotional, psychological, and even sexual violence committed by healthcare providers.<sup>1</sup> The term “obstetric violence” first appeared in Latin America during the 2000s.<sup>2</sup> The term comes from Latin America’s struggle to ‘humanise and de-medicalise childbirth and empower women and girls during pregnancy, labour and birth.’<sup>3</sup> The Latin American movement is based on the trite legal premise that pregnant women have the right to care that maintains dignity, privacy, confidentiality and that ensures freedom from harm and mistreatment and continuous support during labour.<sup>4</sup>

The Fourth World Conference on Women (Beijing Platform) held in Beijing in 1995 recognised women’s reproductive rights as human rights.<sup>5</sup> The Beijing Platform affirmed the connection between human rights and women’s reproductive health and rights. It pledged to end discrimination against women as well as practices that affect women’s reproductive health.<sup>6</sup> The conclusions and recommendations from the Beijing platform echoed the International Conference on Population and Development (ICPD) which was the first to mark the emergence of the evolving discourse about human reproduction positing the human rights of women with regards to personal reproductive autonomy, setting out states’ duties under international law treaties and their obligations to uphold reproductive rights.<sup>7</sup>

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<sup>1</sup> C Pickles ‘Eliminating abusive ‘care’: A criminal law response to obstetric violence in South Africa’ (2015) 54 *South African Crime Quarterly* 6

<sup>2</sup> Pickles (n 1) 6

<sup>3</sup> RJ Chadwick ‘Obstetric violence in South Africa’ (2016) 106 *South African Medical Journal* 423 - 424

<sup>4</sup> M Bohren and others ‘Transforming intrapartum care: respectful maternity care’ (2020) 67 *Best Practice & Research Clinical Obstetrics and Gynaecology* 113-126

<sup>5</sup> RJ Cook and MF Fathalla ‘Advancing Reproductive Rights Beyond Cairo and Beijing’ (1996) 22 *International Family Planning Perspectives* 115

<sup>6</sup> D Bogecho ‘Putting it to Good Use: The International Covenant on Civil and Political Rights and Women's Right to Reproductive Health’ (2004) 1 *Law, Social Justice & Global Development Journal* 68-98

<sup>7</sup> United Nations Population Fund’s *Programme of Action Adopted at the International Conference on Population and Development, Cairo* (1994) Para 8.19-8.27 <https://www.unfpa.org/icpd> (accessed 06 March 2024)

Countries across the globe have made significant inroads in improving maternal health by increasing women's access to facility-based services during childbirth, especially in Latin American countries.<sup>8</sup> While access to maternal health services has been enhanced in these countries, evidence still shows that around the world, many pregnant people experience a range of harmful practices when accessing health services related to pregnancy, childbirth and postpartum care.<sup>9</sup>

Identified practices include forced and coerced sterilisation, forced and coerced contraception, postpartum detention, verbal abuse, emotional abuse, neglect, disrespect, discrimination and, in some cases, physical violence, sexual abuse, lack of confidential and non-consensual care, non-evidence-based use of medical interventions, including routine episiotomies, routine inductions, preventing labour companions, and unnecessary caesarean sections.<sup>10</sup> These practices amount to human rights violations, which in 2019 the United Nations Special Rapporteur on Violence Against Women (Special Rapporteur) categorised these forms of disrespect and abuse of pregnant persons as a form of violence against women.<sup>11</sup> The World Health Organisation (WHO) has called on states to ensure that all pregnant women receive respectful maternity care after publishing new evidence showing significant mistreatment of women during childbirth.<sup>12</sup>

## 1.2 Background

Scholars can assess the prevalence of obstetric violence in South Africa by looking at the statistics and reported experiences of women and girls accessing healthcare. The WHO has highlighted that maternal mortality remains a health challenge globally.<sup>13</sup> According to WHO, 211 deaths occur in

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<sup>8</sup> The Lancet 'Every woman, every newborn, everywhere has the right to good quality care' (2016) Maternal Health Series:<https://www.thelancet.com/pb/assets/raw/Lancet/stories/series/maternal-health-2016/mathealth2016-exec-sum.pdf> (accessed 02 April 2024)

<sup>9</sup> Report on a human-rights based approach to mistreatment and obstetric violence during childbirth issued by Special Rapporteur on violence against women and girls 11 July 2019 para 7/23-8/23

<sup>10</sup> Chadwick (n 3)

<sup>11</sup> Report on a human-rights based approach to mistreatment and obstetric violence during childbirth (n 9 above) para 7/23-8/23

<sup>12</sup> World Health Organisation 'WHO recommendations Intrapartum care for a positive childbirth experience' (2018) <https://iris.who.int/bitstream/handle/10665/272447/WHO-RHR-18.12-eng.pdf> (accessed on 20 July 2024)

<sup>13</sup> World Health Organisation Trends in Maternal Mortality 2000–2017 <https://www.who.int/publications/i/item/9789241516488> (accessed on 27 April 2024)

every 100 000 live births as a result of preventable causes associated with pregnancy and childbirth globally, with 95% of deaths occurring in developing countries.<sup>14</sup> The WHO also found that sub-Saharan Africa alone accounts for two-thirds of all maternal deaths worldwide due to poor obstetric care.<sup>15</sup> Statistics South Africa's most recent report on the *Status of Women's Health in South Africa* reveals that nationally, there has been a decrease from 105, 9 deaths per 100 000 live births in 2019 to 88, 0 in 2020, indicating that South Africa is experiencing a decline in maternal maternity.<sup>16</sup> Even so research conducted by public health and social science experts on the *Disrespect and Abuse Experienced by Women during Childbirth in Midwife-Led Obstetrics*, illuminates the widespread and complex violence faced by pregnant women during childbirth in South Africa.<sup>17</sup>

In 2011, Human Rights Watch (HRW) released a report that found that the South African government was not addressing recurrent health system failures that contribute to poor maternal health outcomes.<sup>18</sup> The government was failing to provide oversight and accountability to ensure the implementation of existing reproductive and sexual health-related laws and policies that could significantly improve maternal health care and overcome abuses documented in the report.<sup>19</sup> In 2014, Amnesty International released a report highlighting critical barriers for women and girls that led them to delay or avoid ante-natal care; these included several coercive practices that were widespread in KwaZulu-Natal and Mpumalanga, such as forced HIV testing of pregnant women and girls, and the disclosure of HIV and pregnancy status without consent.<sup>20</sup> In 2019, the Commission for Gender Equality in South Africa (CGE) released a report on the Forced

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<sup>14</sup> World Health Organisation Trends in Maternal Mortality (n 13 above)

<sup>15</sup> World Health Organisation Trends in Maternal Mortality (n 13 above)

<sup>16</sup> Statistics South Africa 'Maternal mortality rate on decline in South Africa' 2022 <https://www.statssa.gov.za/?p=15321> (accessed on 28 April 2024)

<sup>17</sup> R Malatji & S Madiba 'Disrespect and Abuse Experienced by Women during Childbirth in Midwife-Led Obstetric Units in Tshwane District, South Africa: A Qualitative Study' (2020) 17 International Journal of Environmental Research and Public Health

<sup>18</sup> Human Rights Watch 'Stop Making Excuses' Accountability for Maternal Health Care in South Africa' <https://www.hrw.org/report/2011/08/08/stop-making-excuses/accountability-maternal-health-care-south-africa> 8 August 2011 (accessed 26 February 2024)

<sup>19</sup> As above

<sup>20</sup> Amnesty International 'South Africa: Struggle for maternal health: Barriers to antenatal care in South Africa' 9 October 2014 <https://www.amnesty.org/en/documents/afr53/006/2014/en/> (accessed 26 February 2024)

Sterilisation of Women Living with HIV in South Africa.<sup>21</sup> The CGE found that the complainants' right to the highest attainable standards of health, including sexual and reproductive rights, had been violated.<sup>22</sup> The violations determined by the CGE included complainants not being given adequate knowledge of the sterilisation procedure, being subjected to cruel, tortuous, or inhuman and degrading treatment, and that the medical staff had breached their duty of care to the patients.<sup>23</sup> The release of the CGE report prompted national conversations about violence against pregnant women in public and private hospitals in South Africa.<sup>24</sup> This discourse culminated in social movements and civil society activists in attendance at the 2<sup>nd</sup> Presidential Summit of Gender Based Violence and Femicide<sup>25</sup>, successfully advocating and lobbying for the recognition of the rights of pregnant women in the Summit Resolutions.<sup>26</sup>

### 1.3 Problem statement

It is necessary to understand the colonial history of South Africa and its health sector. During the colonial period, the healthcare sector was an instrument for maintaining white supremacy.<sup>27</sup> Race was the most important variable determining access to health care.<sup>28</sup> Healthcare services were racially segregated and fragmented, with each population group receiving a differential share of healthcare resources from the national government.<sup>29</sup> As a result, South Africa has a two-tier healthcare system: a public health sector and a private one.<sup>30</sup> The public sector serves 80% of the population, and the private health sector, financed through employment-related medical schemes,

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<sup>21</sup>The Commission for Gender Equality of South Africa 'Forced sterilisation of women living with HIV and AIDS in South Africa' <https://cge.org.za/wp-content/uploads/2021/01/forced-sterilisation-of-women-living-with-hiv-and-aids-in-south-africa.pdf> (accessed 12 February 2023)

<sup>22</sup> As above p 53

<sup>23</sup> As above

<sup>24</sup> As above

<sup>25</sup> Report Embrace: The Movement for Mothers 'Obstetric Violence' recognised at Presidential Summit on Gender-based Violence and Femicide 7 November 2022 <https://www.embrace.org.za/obstetric-violence-recognised-at-presidential-summit-on-gender-based-violence-and-femicide/> (accessed on 26 February 2024)

<sup>26</sup> Report Presidential Summit on Gender-Based Violence and Femicide 2022 <https://www.thepresidency.gov.za/content/presidential-gbv-f-summit-2-summit-resolutions-8-dec-2022> (accessed on 11 February 2023) 3 and 6

<sup>27</sup> M Price 'Health Care as an Instrument of Apartheid Policy in South Africa' (1986) 1(2) *Health Policy and Planning* 148-170

<sup>28</sup> C Ngwenya 'Substantive Equality in South African Health Care: The Limits of Law' (2000) 4 *Medical Law International Law* 3

<sup>29</sup> Ngwenya (n 28) 3

<sup>30</sup> V Rensburg and others 'Health Care in South Africa: Structure and Dynamics' (1992) *Academica: Pretoria* 56-94

is largely inaccessible. The advent of the Constitution introduced values of social justice, equality under the law, and respect for human rights.<sup>31</sup> However, the healthcare sector continues to reflect a disproportionate bias in favour of dominant groupings in society, with specific services for Black women continuing to lag behind other services.<sup>32</sup> Therefore, it comes as no surprise that in South Africa, obstetric services during childbirth are divided along racial lines, with Black and Coloured women giving birth primarily in public facilities and white women giving birth with specialists in private hospitals.<sup>33</sup>

In 2015 the United Nations (UN) human rights experts issued a joint statement on the implementation of the 2030 Agenda, calling on States to “address acts of obstetric and institutional violence suffered by women in health care facilities” and “to take all practical and legislative measures to prevent, prohibit, and punish such acts and guarantee redress”.<sup>34</sup> South Africa as a member of the UN adopted the 2030 Agenda for Sustainable Development, and committed itself to the achievement of the goals of healthy lives and well-being for all at all ages<sup>35</sup> and gender equality and the empowerment of all women and girls<sup>36</sup> by ending all forms of discrimination against all women and girls everywhere<sup>37</sup> and eliminating all forms of violence against all women and girls in the public and private spheres<sup>38</sup> thus ensuring access to quality maternal healthcare and guaranteeing women’s and girls’ reproductive autonomy by 2030.

Research conducted by public health and social science experts spanning over twenty years illuminates the widespread and complex violence faced by pregnant women during childbirth in

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<sup>31</sup> As above 56-57

<sup>32</sup> K Moyo “Realising the right to health in South Africa” (2016) *Foundation for Human Rights 5*

<sup>33</sup> As above

<sup>34</sup> Joint Statement by UN Human Rights Experts the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples’ Rights: <https://www.ohchr.org/en/statements/2015/09/joint-statement-un-human-rights-experts-rapporteur-rights-women-inter-american>

<sup>35</sup> Transforming our world: The 2030 Agenda for Sustainable Development (2015) Goal 3 <https://sdgs.un.org/2030agenda> (accessed 05 March 2024)

<sup>36</sup> As above Goal 5

<sup>37</sup> As above Target 5.1

<sup>38</sup> As above Target 5.2

South Africa.<sup>39</sup> Pregnant women face abuse in both public and private healthcare systems.<sup>40</sup> The current assumption is that obstetric violence is only a problem in public-sector maternity services.<sup>41</sup> However the private sector has one of the highest rates of cesarean section in the world, with estimates ranging between 40% and 82%.<sup>42</sup>

Obstetric violence is preventable. The problem is there is little consensus regarding how to prevent and redress such obstetric violence and guarantee respectful maternity care. National mechanisms for addressing obstetric violence include criminal law, administrative law, civil law, and independent oversight bodies. However, these forms of private litigation result in narrow individualistic redress. The public interest litigation (PIL) approach presents an opportunity to devise a long-term strategy combined with other legal and non-legal approaches aimed at creating change in laws and policies and creating legal precedents, thereby enabling change in the lives of women and girls in South Africa.

#### **1.4 Research aims and objectives**

This study aims to identify the benefits of using PIL as a tool to address obstetric violence in South Africa. The study examines PIL from Kenya, which has achieved the promotion of respectful maternity care for the greater Kenyan society through litigation. This study aims to identify critical features of PIL that have been used as a tool to address obstetric violence in Kenya. The study aims to identify critical opportunities and challenges of litigating obstetric violence by studying jurisprudence from other Global South countries that share similar legal challenges. The purpose of this examination is to draw out lessons for South African legal practitioners on how PIL can be used to address and redress victims and survivors of obstetric violence.

#### **1.5 Research questions**

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<sup>39</sup> Malatji (n 17)

<sup>40</sup> J Rucell and others ‘Obstetric Violence in South Africa: Violence against women in reproductive health & childbirth’ (2019) [https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/ReproductiveHealthCare/Commission for Gender Equality South Africa.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/ReproductiveHealthCare/Commission%20for%20Gender%20Equality%20South%20Africa.pdf) (accessed 26 April 2024)

<sup>41</sup> M Lappeman and L Swartz ‘Rethinking obstetric violence and the “neglect of neglect”: the silence of a labour ward milieu in a South African district hospital’ (2019) 30 *BMC International Health and Human Rights* 2

<sup>42</sup> R Naidoo & J Moodley ‘Rising rates of caesarean sections: an audit of caesarean sections in a specialist private practice’ (2009) 51 *South Africa Family Practice* 254-258

The main research question of this study is:

*What is the potential for public interest litigation on obstetric violence in South Africa?*

The study will also answer the following sub-questions:

1. What are South Africa's obligations under international and regional law to protect women and girls from obstetric violence?
2. Does South Africa's domestic legal framework and policies recognise obstetric violence?
3. What are the main challenges in public interest litigation on obstetric violence in South Africa?
4. What can South Africa learn from Kenya's jurisprudence regarding challenges and opportunities of litigating obstetric violence?

## **1.6 Research methodology**

A comparative legal research methodology of Kenyan jurisprudence will be used to make findings of the key features of PIL where it has been used to address and redress obstetric violence. The comparative research method allows us to better understand South Africa's jurisdiction by analysing how other jurisdictions formulate, adjudicate, and enforce their judgments on litigation pertaining to obstetric violence.

## **1.7 Significance of the study**

Global PIL efforts have focused on establishing an appropriate legal and political framework to advance reproductive rights. Advances in Latin American regional jurisprudence have shaped the international dialogue on obstetric violence, through significant cases such as *Alyne da Silva Pimentel Teixeira v. Brazil*<sup>43</sup> *L.C v. Peru*,<sup>44</sup> *K.L v. Peru*,<sup>45</sup> *S.F.M. v. Spain*,<sup>46</sup> *N.A.E v Spain*.<sup>47</sup> This study contributes to this dialogue by discussing African PIL jurisprudence on obstetric violence. This study establishes and clarifies the international and regional legal standards applicable to South Africa, establishing the African state in the broader Global South international and regional

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<sup>43</sup>*Alyne da Silva Pimentel Teixeira v. Brazil* Communication No. 17/2008 CEDAW Committee CEDAW/C/49/D/17/ (2008)

<sup>44</sup>*L.C. v. Peru* Communication No. 22/2009 CEDAW Committee CEDAW/C/50/D/22/ (2009)

<sup>45</sup>*K.L. v. Peru* Communication No. 1153/2003 Human Rights Committee CCPR/C/85/D/1153/2003 (2005)

<sup>46</sup>*S.F.M v Spain* Communication No. 138/2018 CEDAW Committee CEDAW/C/75/D/138/ (2018)

<sup>47</sup>*N.A.E v Spain* Communication No. [2022] CEDAW Committee CEDAW/C/82/D/149/ (2019)

discourse. This study seeks to assess the potential for PIL to advance the rights of victims and survivors of obstetric violence to create social change.

## 1.8 Theoretical framework

The theoretical approach that will form the foundation of this study is the theory of PIL, leaning on the literature of Cummings and Rhode. PIL has been used as a tool for lawyers to mobilise and use the law to change institutional rules and redistribute power.<sup>48</sup> The study examines PIL undertaken in Kenya to address and redress obstetric violence. The study draws on the sociology of law and social movements to explore the interplay between legal proceedings and political mobilisation. The study provides varied perspectives on PIL and critiques of the PIL theory. Using this theoretical approach enables us to draw on lessons from the Global South PIL strategies on obstetric violence.

## 1.9 Literature review

Litigation for sexual reproductive rights has been an ongoing practice for the last decade. Literature by Roa & Klugman provides a study on strategic litigation as an advocacy tool to show how strategic litigation can be used as an advocacy tool in advancing reproductive rights and its effectiveness in examining its impact on reproductive health policies and practices.<sup>49</sup> In Africa, an examination of the challenges and opportunities of using litigation to advance sexual and reproductive health rights has been conducted, as written by Mirugi-Mukundi et al. The study shows how sexual and reproductive health rights can be promoted through various mechanisms, including strategic litigation.<sup>50</sup>

When it comes to defining obstetric violence, leading South African obstetric violence scholar Pickles provides a contextualised reflection exploring the dynamics surrounding the terminology

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<sup>48</sup> S Cummings & D Rhode 'Public Interest Litigation: Insights from Theory and Practice' (2009) 603 *Fordham Urban Law Journal* 606

<sup>49</sup> M Roa & B Klugman 'Considering Strategic Litigation as an Advocacy Tool: A Case Study of the Defence of Reproductive Rights in Colombia' (2014) 22 (44) *Reproductive Health Matters* 31-44

<sup>50</sup> E Durojaye, G Mirugi-Mukundi and C Ngwenya *Advancing Sexual and Reproductive Health Rights in Africa: Constraints and Opportunities* (2021) 5-9

used to describe violations experienced by women during childbirth in healthcare facilities.<sup>51</sup> Pickles also looks at the implications of using terms like "obstetric violence," "mistreatment," and "disrespect and abuse" in highlighting systemic issues within maternal healthcare systems.<sup>52</sup> Pickles critically analyses the political and social dimensions of naming these violations, shedding light on power dynamics, gender inequalities, and human rights considerations inherent in childbirth practices.<sup>53</sup> Through reflective discourse, her work contributes to broader discussions on maternal health, patient rights, and advocacy efforts to improve childbirth experiences for women worldwide. South African academic Chadwick looks closely at birth, marginality, and epistemic violence. Chadwick explores practices of silencing in the context of birth, addressing issues of marginality and epistemic violence.<sup>54</sup>

One of the main reports on obstetric violence from an African country indicates the urgent need to address systemic challenges and human rights violations in maternal health care services across Sub-Saharan Africa. The Centre for Reproductive Rights & the Federation of Women Lawyers – Kenya published a report on the failure to deliver, reporting on women’s human rights violations in Kenyan health facilities.<sup>55</sup> This report documents violations of women's human rights in Kenyan health facilities, shedding light on the mistreatment and abuse experienced during childbirth. Cowgill & Ntambu conducted a case study in a hospital in the Democratic Republic of the Congo. This study investigates hospital detention practices in Lubumbashi, highlighting issues of maternal healthcare and rights.<sup>56</sup>

The discussion on obstetric violence has expanded to include issues of accountability for maternal health care services in Sub-Saharan Africa. For example, Hulton underscores the significance of evidence-based approaches in driving accountability and improving maternal and newborn health

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<sup>51</sup> C Pickles ‘Obstetric Violence “Mistreatment,” and “Disrespect and Abuse”’: Reflections on the Politics of Naming Violations During Facility-Based Childbirth’ (2023) 38(1) *Cambridge University Press* 630

<sup>52</sup> As above 630

<sup>53</sup> As above 634

<sup>54</sup> RJ Chadwick *Practices of Silencing: Birth, Marginality and Epistemic Violence* (2019) 1-19

<sup>55</sup> Report Centre for Reproductive Rights & the Federation of Women Lawyers: ‘Failure to Deliver: Violations of women’s human rights in Kenyan health facilities’ (2007) [https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/pub\\_bo\\_failuretodeliver.pdf](https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/pub_bo_failuretodeliver.pdf) (accessed 26 February 2024)

<sup>56</sup> KD Cowgill & AM Ntambu ‘Hospital Detention of Others And Their Infants At A Large Provincial Hospital: A Mixed-Methods Descriptive Case Study, Lubumbashi, the Democratic Republic of the Congo’ (2019) 16(1) *Reproductive Health Matters* 1-15

outcomes across the continent.<sup>57</sup> Pickles discusses the phenomenon of obstetric violence in the context of South Africa and proposes a criminal law response to address this issue and investigates the various forms of mistreatment and abuse experienced by women during childbirth, including physical, verbal, and emotional abuse, as well as violations of dignity and autonomy.<sup>58</sup> Pickles argues that obstetric violence constitutes a violation of women's human rights and should be treated as a criminal offense under South African law and explores the potential benefits and challenges of using criminal law mechanisms to combat obstetric violence, highlighting the importance of legal frameworks, healthcare policies, and community engagement in safeguarding women's reproductive rights and ensuring respectful maternity care.<sup>59</sup>

While the literature on obstetric violence is rife, what is missing from the literature is what this study aims to provide, which is a unique assessment of the challenges and opportunities of litigating obstetric violence in South Africa. This exceptional contribution will detail a study of jurisprudence from Kenya that shares similar legal challenges. This study will provide research on the lessons, barriers, and opportunities for advancing litigation for obstetric violence in South Africa.

## **1.10 Chapter outline**

Chapter 1 introduces the study, provides background information, outlines the research problem and questions, explains the study methodology, explains the study's significance, and provides an overview of the literature.

Chapter 2 defines PIL and discusses its origins and historical development. It then discusses its key features, including its advantages and critiques. It also provides a framework that will be used to analyse Kenyan PIL jurisprudence on obstetric violence.

In Chapter 3, we delve into the international and regional legal framework, a crucial backdrop that delineates state obligations in the context of obstetric violence. This section also scrutinises

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<sup>57</sup> L Hulton and others 'Using evidence to drive action: A 'revolution in accountability' to implement quality care for better maternal and newborn health in Africa' (2014) 27(2) *International Journal Gynecology Obstetrics* 96-101

<sup>58</sup> C Pickles 'Eliminating abusive 'care': A criminal law response to obstetric violence in South Africa' (2015) 54 *South African Quarterly* 6

<sup>59</sup> Pickles (n 58) 9

international PILs on obstetric violence, demonstrating how international treaty bodies interpret the legal standards on this issue.

Chapter 4 presents a critical analysis of South Africa's national legal framework on obstetric violence, juxtaposed with the real-life experiences of victims and survivors in the country. The chapter concludes with a compelling call to action, stressing the urgent need to address and redress obstetric violence in South Africa, with PIL emerging as the most potent tool for driving the desired social change.

Chapter 5 uses two Kenyan cases *Josephine Oundo Ongwen v. the Attorney General and 4 Others (Bungoma High Court Petition No. 5 of 2014) Kenya Court of Appeal Decision in County Government of Bungoma v. Josephine Oundo Ongwen (Kenya Civil Appeal No. 61 of 2018)* and *L A W & 2 others v Marura Maternity & Nursing Home & 3 others; International Community of Women Living with HIV (ICW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 others (Amicus Curiae) (Constitutional Petition 606 of 2014) [2022] KEHC 17132 (KLR)*. These cases are examples of how PIL organisations can go about engaging the courts for addressing and redressing obstetric violence.

Chapter 6 summarises the study's main findings, draws conclusions, and offers recommendations.

## CHAPTER 2

### PUBLIC INTEREST LITIGATION THEORETICAL FRAMEWORK

#### 2.1 Introduction

This chapter provides an overview of PIL, the study's theoretical framework. It defines PIL, traces its origins and key features, including its advantages, and presents critiques of the theory. The chapter also provides a framework that will be used to structurally analyse Kenyan PIL jurisprudence on obstetric violence.

#### 2.2 Public Interest Litigation defined

There is no one definition of PIL.<sup>60</sup> Lawyers, activists, and scholars use terms such as ‘PIL,’ ‘strategic litigation,’ ‘impact litigation,’ or ‘social rights litigation’ to refer to litigation that aims to achieve a desired end.<sup>61</sup> The most traditional definition of PIL is defined by a set of principles, values, and objectives based on social justice and a desire to see law become a tool for social change.<sup>62</sup> In other words, PIL is a movement that advances court-centered social change, enlisting the courts in progressive social reform.<sup>63</sup> Over the last three decades, PIL has been a powerful tool to advance rights, hold governments accountable, ensure compliance with human rights obligations, and protect, promote, and fulfill human rights.<sup>64</sup> Examining whether this form of litigation “works” requires evaluating the political, economic, and cultural conditions within which the litigation is taking place.<sup>65</sup> This is because when PIL is used strategically, it can be used as a political tool to stimulate meaningful change by complementing other political efforts.<sup>66</sup> PIL, unlike private litigation, which aims at personal redress, is primarily aimed at impacting the public

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<sup>60</sup> J Delbruck ‘Laws in the Public Interest- Some Observations on the Foundations and Identification of Erga Omnes Norms in International Law’ in Volmar Gotz et al. (eds), *Liber Amicorum Gunther Jaenicke-zum Geburtstag* (Springer 1999) 33-34

<sup>61</sup> As above 33

<sup>62</sup> E Rekosh and others ‘Pursuing the Public Interest A Handbook for Legal Professionals and Activists’ (2001) 81-82

<sup>63</sup> J Handler ‘Social Movements And The Legal System: A Theory Of Law Reform And Social Change’ (1978) 10

<sup>64</sup> Roa (n 49) 31-41

<sup>65</sup> S Gloppen ‘Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health’ (2008) 10 *Health and Human Rights Journal* 24

<sup>66</sup> Gloppen (n 65) 24

by raising constitutional or statutory issues. The outcome of public litigation may affect a wide range of persons beyond the litigants, making it a powerful tool for societal change.<sup>67</sup>

### 2.3 Origins of Public Interest Litigation

PIL is grounded in liberal democracy and constitutionalism.<sup>68</sup> Liberal democracy refers to where the citizens of a country vote to elect their leaders, who then make the necessary country decisions.<sup>69</sup> Constitutionalism is a system of governance that follows constitutional principles flowing from a Bill of Rights that guarantees human rights protection.<sup>70</sup> Embedded in the constitution is a system of checks and balances, which allows the different pillars of government to check each other to avoid abuse of power by one branch. This is the principle of separation of powers between the legislature, executive, and judiciary.<sup>71</sup> The judiciary, being independent and not elected, plays a unique role. Essential for this study is the principle of judicial review, which is the judiciary's power to interpret statutes and require the executive and or the legislature to do things they are supposed to be doing or to undo what they have done that is contrary to the Constitution. The independence of the judiciary means no one can interfere in the work of the Constitutional Court or other courts in the country, ensuring a fair and just legal system.<sup>72</sup>

PIL emerged in the 1960s and 1970s in the United States (US). The movement envisioned the court as the center for social change, drawing on models from the civil rights and civil liberties groups, in particular the test-case strategy of the National Association for the Advancement of Coloured Persons (NAACP) Legal Defense and Educational Fund.<sup>73</sup> The NAACP led the campaign in the *Brown v Board of Education of Topeka*<sup>74</sup> case, which declared segregation in

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<sup>67</sup> *Ferreira v Levin* 1996 (1) SA 984 (CC) para 229

<sup>68</sup> AJ Jjuuko 'Beyond Court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' PhD thesis University of Pretoria, 2018

<sup>69</sup> As above

<sup>70</sup> As above

<sup>71</sup> K O'Regan 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' (2005) *Potchefstroom Electronic Law Journal* 5 F W De Klerk Memorial Lecture Delivered at Potchefstroom 10 October 2005

<sup>72</sup> As above

<sup>73</sup> L Kalman 'The Strange Career of Legal Liberalism' (1996) 537

<sup>74</sup> 347 US 483 (1954)

schools based on race as unconstitutional.<sup>75</sup> During this time, a number of factors were identified as indicators of ripeness for his form of litigation: 1. “A federal judiciary receptive to civil rights claims; 2. Centralised administration agencies susceptible to form through impact lawsuits and 3. A system of welfare entitlements open to enforcement and expansion”.<sup>76</sup> The US PIL movement elicited *backlash* fueled by PIL's success, which was seen as a threat to the structures and foundations of law, fueling a conservative reaction to curb and limit federal authority over civil rights, civil liberties and social welfare.<sup>77</sup> This move caused the curtailment of welfare entitlements foreclosing on litigation opportunities for liberal public interest organisations by federal agencies.<sup>78</sup> In addition public interest organisations faced financial constraints with congress preventing federally funded legal services lawyers from bringing class actions, lobbying, collecting attorney fees and engaging in political advocacy.<sup>79</sup> This backlash was exacerbated by criticism questioning the efficacy of litigation strategies drawn from research showing the inadequacy of law reform as a vehicle of social change.<sup>80</sup>

## 2.4 Key features of public litigation

In South Africa, section 38 of the Constitution allows anyone acting in their interest, or on behalf of another person, or a member of an interest group or class of persons, or acting in the public interest the right to approach a court alleging that a right in the Bill of Rights has been infringed or threatened. Provided that there was no other way in which the matter could be resolved, what the relief sought is, the extent to which the case is of general or prospective application, the range of persons affected by the court's decision, and whether such persons had a chance to appear and present evidence.<sup>81</sup>

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<sup>75</sup> MV Tushnet *The NAACP's legal strategy against segregated education 1925-1950* (1987) 1-222

<sup>76</sup> M McCann & J Dudas ‘Retrenchment...And Resurgence? Mapping The Changing Context Of Movement Lawyering In The United States, In Cause Lawyers And Social Movements’ (2006) 37

<sup>77</sup> Cummings (n 48) 607

<sup>78</sup> As above

<sup>79</sup> As above

<sup>80</sup> As above 608

<sup>81</sup> *Ferreira v Levin NO & Ors* 1996 (1) SA 984 (CC) para 234

PIL in South Africa is characterised with a relaxation of the rules. In *Biowatch Trust v Registrar Genetic Resources & Others* the Constitutional Court set precedent that parties unsuccessful in constitutional litigation should not be ordered to pay costs and that the state should be ordered to pay costs when such a case succeeds.<sup>82</sup>

PIL is more effective when strategically embedded in broader political campaigns that define litigation goals and enforce mandates.<sup>83</sup> This means enlisting multiple strategies, including policy, organising, and media initiatives. In this way, lawyers can sometimes be required to play a supportive role by empowering organisations to achieve their goals.<sup>84</sup>

An example of the potential of linking litigation to other forms of advocacy in South Africa is the *Minister of Health and Others v Treatment Action Campaign and Others* (TAC).<sup>85</sup> This case developed sophisticated linkages between legal and non-legal strategies. This case concerned the issue of mother-to-child transmission (MTCT) of HIV.<sup>86</sup> By 1998 it was estimated that up to 70 000 children were born with HIV every year, and there were already signs that HIV was causing a rise in infant mortality.<sup>87</sup> One of the earliest and most enduring breakthroughs in the fight against the AIDS pandemic was the discovery that the use of the antiretroviral (ARV) drug AZT could dramatically reduce the risk of MTCT.<sup>88</sup> In 1998 the TAC was formed and together with various HIV and AIDS organisations began lobbying the Minister and the Department of Health to develop a policy and programme to prevent MTCT.<sup>89</sup> However, after two years, lobbying was failing. In 2000, the TAC launched an urgent High Court application for access to Nevirapine on behalf of several women in the late stages of pregnancy.<sup>90</sup> However, despite scientific consensus on its

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<sup>82</sup> 2009) ZACC 14 para 24

<sup>83</sup> Cummings (n 48) 615

<sup>84</sup> J Gordon 'Concluding Essay: The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change' (2007) 95 *California Law Review* 2133

<sup>85</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002)

<sup>86</sup> A Kapczynski and J Berger 'The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa' in DR Hurwitz, L Margaret & Satterthwaite (eds) *Human Rights Advocacy Stories* (2009) 3

<sup>87</sup> As above 6

<sup>88</sup> As above 6

<sup>89</sup> As above 7

<sup>90</sup> As above

safety and efficacy, the medicine has not yet been registered in South Africa for MTCT. The TAC's lawyers supporting the movement cautioned against commencing litigation before Nevirapine was registered because a court formally condoning off-label use of medicines was inviting compromise in the medicine registration system.<sup>91</sup> The TAC had no option but to continue the campaign while delaying the litigation. The TAC engaged in intensive public mobilisation, attracting enormous support and media interest.<sup>92</sup> After two years, the application was heard, and in the court of public opinion, newspaper editorials and political cartoonists lambasted the government's opposition.<sup>93</sup> The last leg of the case was to be heard in the Constitutional Court, and on the first day of court, marches were prepared throughout the country.<sup>94</sup> Over 5 000 people marched to the Constitutional Court to support the TAC.<sup>95</sup> The Constitutional Court was filled with activists, doctors, nurses, and the media. In the end, the Constitutional Court decided that the government's policy had not met the state's constitutional obligations to provide people with access to health care services in a reasonable manner that took account of pressing social needs.<sup>96</sup> Drawing on its own prior judgments and foreign jurisprudence, the Court confirmed the judiciary's right to issue instructions to the government to amend policies where these were found to be unconstitutional.<sup>97</sup>

The TAC is a good illustration of combining social mobilisation with litigation, showing lawyers and activists that multiple tactics can be used to form a coordinated response.<sup>98</sup> Ultimately, the TAC achieved universal treatment for everyone living with HIV. This was because of the skillful way the TAC not merely succeeded in the litigation but regarded this as just one component of its overall struggle for access to medicines.<sup>99</sup> The TAC case is an example of a court that plays a role in enforcing its judgment by ordering the government to take all necessary measures to ensure amendment policies that were found unconstitutional.<sup>100</sup>

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<sup>91</sup> Budlender and others 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2014) *The Atlantic Philanthropies* 50

<sup>92</sup> As above

<sup>93</sup> As above

<sup>94</sup> As above

<sup>95</sup> As above

<sup>96</sup> As above 51

<sup>97</sup> As above

<sup>98</sup> As above 57

<sup>99</sup> As above

<sup>100</sup> As above

## 2.5 Advantages of using Public Interest Litigation

According to Gloppen, since the 1900s, there has been a spread of court cases seeking to advance the right to health.<sup>101</sup> Many cases have focused on access to health services and medication, emergency medical treatment, and denial of access to health goods.<sup>102</sup> Gloppen informs us that PIL has been used to fight for health rights over the years: to access justice, call for law reform, and as political empowerment.<sup>103</sup> PIL can also use the power of the courts to nullify laws and declare conduct unconstitutional and to either make alterations or to order the legislature or executive to make the necessary alterations.<sup>104</sup> PIL is a promising avenue for legal change as the courts can make orders that are more likely to be enforced than not.<sup>105</sup> This is because courts are also a conduit through which that state can be engaged on a particular issue.<sup>106</sup>

## 2.6 Critique of Public Interest Litigation

The PIL approach has faced much criticism. For instance, Gloppen finds that litigation is not always the best approach to advancing the right to health in society.<sup>107</sup> A significant concern for Gloppen is that litigation may increase inequalities, where people with low incomes are less likely to litigate, and “the haves” tend to come out ahead in court.<sup>108</sup> This potential reinforcement of inequalities through litigation should be a cause for urgent action. According to Gloppen, even when disadvantaged groups succeed, litigation is prone to privilege some groups over others and thus reinforce inequalities.<sup>109</sup> Gloppen warns that litigation can be too costly and time-consuming.<sup>110</sup> Other scholars argue that a court victory may not necessarily translate to better living conditions for the claimants.<sup>111</sup> Another argument against health rights litigation is about the separation of power principle.<sup>112</sup> It is often argued that by allowing the courts to adjudicate on

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<sup>101</sup> Gloppen (n 65)

<sup>102</sup> As above

<sup>103</sup> As above 22

<sup>104</sup> As above

<sup>105</sup> Jjuuko (n 68)

<sup>106</sup> As above

<sup>107</sup> Gloppen (n 65) 23

<sup>108</sup> As above 24

<sup>109</sup> As above 25

<sup>110</sup> As above

<sup>111</sup> GN Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (1991) 338

<sup>112</sup> Budlender (n 91)

socio-economic rights issues, including the right to health, the courts might be creeping into the powers of other organs of government.<sup>113</sup> It is also argued that the courts do not always have the expertise to decide on policy issues involving resource allocation.<sup>114</sup> It is better left to the parliament or other organs of the state. Lon Fuller has argued that entrusting decisions on socio-economic rights issues, including the right to health, to the court may result in unforeseen circumstances beyond the court's control.<sup>115</sup> He reasons that judges lack the competence to decide on social matters that have budgetary implications.<sup>116</sup> Litigation may also undermine the opportunity for parties to engage in meaningful discussion toward an amicable resolution of issues.<sup>117</sup> In many African societies, conflicts, and disagreements were resolved amicably without an adversarial court process.<sup>118</sup> However, with the advent of colonialism and the introduction of the court system, litigation became the order of the day to resolve disagreements and conflicts.<sup>119</sup>

Leading public interest litigation scholar Rosenberg has been critical of the use of courts to achieve social change, he writes that courts could “almost never be effective producers of significant social reform” because of their dependence on other political institutions and their lack of enforcement powers.<sup>120</sup> Further criticism has been expressed by Scheingold who warned against the “myth of rights,” which he believes, diverts attention from the political roots of social problems.<sup>121</sup> Many critical legal scholars see law as politics and have argued that the reframing of collective grievances in terms of individual rights dissipates the collective political energy.<sup>122</sup> Theoretical scholar Simon joins these critics, and holds that, collective political struggle is the only effective

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<sup>113</sup> DM Brinks and others ‘Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular’ (2015) 11 *The Annual Review of Law and Social Science* 299

<sup>114</sup> As above 298

<sup>115</sup> As above

<sup>116</sup> As above

<sup>117</sup> Gloppen (n 65) 14

<sup>118</sup> T Gonese-Manjonjo & E Durojaye ‘Lessons from litigating for sexual and reproductive health and rights’ in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Southern in Advancing Sexual and Reproductive Health and Rights in Africa* (2019) 188

<sup>119</sup> Gonese-Manjonjo (n 118) 189

<sup>120</sup> Rosenberg (n 111) 338

<sup>121</sup> SA Scheingold *The Politics Of Rights: Lawyers, Public Policy, And Political Change* (1974) 3-10

<sup>122</sup> P Gabel and P Harris ‘Building Power and Breaking Images: Critical Legal Theory and the Practice of Law’ (1983) 11 *N.Y.U. Review of Law & Social Change* 369

way to challenge structural inequality.<sup>123</sup> While Simon questions public interest litigation, he believes that litigation, when combined with inclusive political processes, can be put to pragmatic ends.<sup>124</sup>

Social scientist McCann's scholarship goes beyond a causal analysis of the relationship between court decisions and social outcomes, by looking at the complex processes by which law shapes social meaning and informs individual and collective action.<sup>125</sup> McCann finds that "[w]hen carefully coordinated with demonstrations, pranks, and other media events, high-profile litigation worked as a double-barreled threat—at once mobilising public opinion against targeted 'abusers' and threatening both costly legal proceedings and possible defeats in court."<sup>126</sup> This perspective is supported by Sarat and Scheingold, who have similarly concluded that in the right circumstances, lawyers can make "seminal contributions to the building of social movements".<sup>127</sup> In his work Cummings' examines lawyers who view legal advocacy as part of a comprehensive campaign that deploys multiple strategies to advance local policy reforms to strengthen labor rights.<sup>128</sup> Similarly Rhode's sees litigation as important, but that it should be used strategically in tandem with other initiatives.<sup>129</sup>

## 2.7 Public Interest Litigation approach framework for this study

Gloppen offers a framework for exploring litigation to advance the right to health and reproductive rights and hold governments accountable to human rights norms. In chapter 5 of the study, the following list of interrelated stages will form the framework of the comparative analysis.

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<sup>123</sup> CF Sabel and WH Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 Harvard Law Review 1015, 1021

<sup>124</sup> As above 1015, 1021

<sup>125</sup> M McCann, H Silverstein 'Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers' in A Sarat & S Scheingold (eds) *Cause Lawyering: Political Commitments and Professional Responsibilities* (1998) 269

<sup>126</sup> M McCann 'How Does Law Matter for Social Movements?' in B Grath and A Sarat (eds) *How Does Law Matter? Fundamental Issues In Law And Society Research* (1998) 76, 83-84

<sup>127</sup> A Sarat & S Scheingold 'What Cause Lawyers Do For, and To, Social Movements: An Introduction' in A Sarat & S Scheingold (eds) *Cause Lawyers And Social Movements* (2004) 1

<sup>128</sup> SL Cummings 'Law in the Labor Movements Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight' (2007) 1927

<sup>129</sup> DL Rhode 'Public Interest Law: The Movement at Midlife' (2008) 60 Stanford Law Review 2027, 2037

The following are the litigation stages that will be studied:

1. Claims formation stage, in other words, which mechanisms have been provided to hold the government accountable;<sup>130</sup>
2. The analytical framework and adjudication stage of the court process;<sup>131</sup>
3. The implementation stage of the court judgment.<sup>132</sup>

## **2.8 Analytical framework: conditions for public interest litigation for reproductive rights**

Roa and Klugman provide an overview of the theory of strategic litigation of reproductive rights by Charels Epp.<sup>133</sup> This theory provides the elements of a successful litigation strategy to achieve success that leads to social change<sup>134</sup>. Epp furnishes litigants with four conditions that are required for successful strategic litigation of reproductive rights.<sup>135</sup> The first condition is that in order to achieve social change through the courts, litigants must frame the rights violations around the constitutional or legal framework that recognises human rights.<sup>136</sup> The second condition required to achieve success is access to an independent and knowledgeable judiciary.<sup>137</sup> The third condition to be met is that the litigants must have the capacity to frame and articulate social problems as rights violations.<sup>138</sup> The fourth condition needed is a network to support and leverage the opportunities presented by litigation.<sup>139</sup> According to Epps provided that all four conditions are present or can be created and strengthened through the judicial process, only then can strategic public interest litigation can be used as a tool to advance human rights. The detection of these conditions within the international, regional and South African legal landscape, make up the thread that ties in the theoretical framework in chapters 3, 4, 5 and 6 of this study together, supporting the rational of the findings of each chapter.

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<sup>130</sup> Gloppen (n 65)

<sup>131</sup> As above

<sup>132</sup> As above

<sup>133</sup> M Roa, B Klugman 'Considering Strategic Litigation as an Advocacy Tool: A Case Study of the Defence of Reproductive Rights in Colombia' (2014) 201 4;22(44):3 *Reproductive Health Matters* 1-41

<sup>134</sup> Roa, Klugman (n 1 above) 32

<sup>135</sup> C Epp *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (1998) 1-342

<sup>136</sup> Roa (n 49) 32

<sup>137</sup> As above 33

<sup>138</sup> As above

<sup>139</sup> As above

## 2.8 Conclusion

PIL is one of the most vital tools for holding governments accountable for their obligations under international law and national law.<sup>140</sup> By employing the PIL theory to address obstetric violence, the study provides lawyers, activists, and scholars with direction as to how PIL strategies can be used to: 1. Bring about policy change 2. Strike down unfavourable discriminatory laws or policies that perpetuate harmful gender stereotypes, or 3. Bridge the gap between national health laws and policies, bringing them in line with the health rights obligations created by human rights norms.

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<sup>140</sup> As above 23

## CHAPTER 3

# RECOGNITION OF OBSTETRIC VIOLENCE IN INTERNATIONAL AND REGIONAL STANDARDS

### 3.1 Introduction

PIL is an avenue to hold the government accountable for human rights violations. In order to ensure that a PIL strategy succeeds, lawyers must have an understanding of the applicable international and regional normative standards. This chapter discusses the relevant international and regional human rights norms and standards relevant to obstetric violence. It also shows how the norms and standards have been interpreted in relation to obstetric violence PIL at an international and regional level. The chapter concludes with a summary of the State obligations pertinent to obstetric violence.

### 3.2 Reproductive health rights in international and regional law applicable to obstetric violence

#### 3.2.1 Right to health under international

Article 25 (1) of the Universal Declaration of Human Rights (Universal Declaration) provides that “everyone has the right to a standard of living adequate to the health and well-being of himself and of his family...” This provision is relevant to violence against women in reproductive health services during childbirth and obstetric violence. The provision further provides that ‘[M]otherhood and childhood are entitled to special care and assistance.’<sup>141</sup> The International Covenant of Economic, Social, and Cultural Rights (ICESCR) also entrenched the right to health.<sup>142</sup> Article 12 of ICESCR provides everyone to enjoy the highest attainable standard of physical and mental health. That State parties must to achieve the full realisation of this right which shall include reducing the stillbirth-rate, infant mortality and ensure the healthy development of

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<sup>141</sup>Article 25(1) Universal Declaration

<sup>142</sup>Article 12 ICESCR

the child...”<sup>143</sup> This provision is relevant to obstetric violence as it occurs primarily in health service facilities. ICESCR General Comment 14 provides that the right to health is an inclusive right that recognizes the social determinants of health.<sup>144</sup> The right to health contains freedoms and entitlements such as the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference such as torture, non-consensual medical treatment, and experimentation.<sup>145</sup> Even so, some birthing practices have been found to constitute torture. For instance, the Committee against Torture addressed the complaints of numerous women related to a birthing called symphysiotomy and found that it constitutes torture.<sup>146</sup>

Article 2 of ICESCR provides that “each State must undertake to take steps ... to the maximum of its available resources, to achieve progressively the full realization of the rights recognized in the present Covenant.”<sup>147</sup> ICESCR lays out a framework for the minimum standards for delivering on the right to health, which are “availability, accessibility, acceptability and quality.”<sup>148</sup> Availability requires that health services should always be available to everyone equally, including adequate provision of health facilities, trained health personnel, and essential medicines.<sup>149</sup> Accessibility requires that health services must be reachable to everyone without discrimination.<sup>150</sup> To achieve this, services must be financially and physically affordable. Accessibility is divided into four parts: physical accessibility, economic accessibility,<sup>151</sup> and information accessibility.<sup>152</sup> Acceptability requires that healthcare services and goods be rendered respectfully and appropriately that is consistent with culture.<sup>153</sup> Quality means health services and goods must be culturally acceptable, scientifically, medically appropriate, and exceptional.<sup>154</sup> To achieve this, there must be trained medical professionals, scientifically certified and unexpired drugs, adequate and functioning

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<sup>143</sup>Article 12 ICESCR

<sup>144</sup> UN Committee on Economic, Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant) E/C.12/2000/4 para 8

<sup>145</sup> As above

<sup>146</sup> Committee against Torture, concluding observations, Ireland (CAT/C/IRL/CO/2, paras. 29–30).

<sup>147</sup> Article 2 ICESCR

<sup>148</sup> General Comment 14 (n 144) para 8

<sup>149</sup> As above

<sup>150</sup> As above

<sup>151</sup> As above

<sup>152</sup> As above

<sup>153</sup> As above

<sup>154</sup> As above

hospital equipment, different and safe contraceptive methods, clean, secure, and potable water, as well as sufficient and safe sanitation.<sup>155</sup> This framework applies to obstetric violence as this form of violence's root causes are related to health systems conditions and constraints which are a structural cause of obstetric violence.<sup>156</sup>

Obstetric violence has a direct effect on the health and well-being of the child. It is, therefore, important to look to article 24 (1) of the Convention on the Rights of the Child (CRC), which states that states parties must “recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health...”<sup>157</sup> States must take appropriate measures to develop and implement an effective healthcare system for all children.<sup>158</sup>

### 3.2.2 Right to health under regional law

The African Charter on Human and Peoples' Rights (African Charter) and The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol for Women) have made provision for the right to health, including the right to sexual and reproductive health. Article 16 of the African Charter provides every person the right “to enjoy the best attainable state of physical and mental health.”<sup>159</sup> In *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*<sup>160</sup> the African Commission emphasised the importance of the right to health. The African Commission held that it would make all efforts to apply and enforce socio-economic rights, such as the right to health, to meet the needs of people in Africa.<sup>161</sup> In *Purohit and Moore v The Gambia*<sup>162</sup>, the African Commission stated that “[e]njoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and

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<sup>155</sup> As above

<sup>156</sup> Special Rapporteur (n 9) para 39

<sup>157</sup> Article 24(1) CRC

<sup>158</sup> Article 24(1) CRC

<sup>159</sup> Article 16 African Charter

<sup>160</sup> *Civil Liberties Organisation Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria African Commission Communication No. 218/98 (1998)* at paras 27, 37 and 41

<sup>161</sup> *Civil Liberties Organisation Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria African (n 31 above)* paras 27, 37 and 41

<sup>162</sup> *Purohit and Moore v The Gambia African Commission Communication No. 241/2001 (2003)*

freedoms.” Article 14 of the Protocol on Women provides that States “shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.”<sup>163</sup> The African Commission’s General Comment on article 14(1)(d) and (e) recognises “that women in Africa have the right to the highest attainable standard of health which includes sexual and reproductive health and rights.”<sup>164</sup> States are required under the African Charter and Protocol on Women to make health care services available, accessible, affordable, and of quality. In *Sudan, Human Rights Organisation and COHRE v Sudan, the African Commission, in examining the meaning of the right to health in the African Charter, recognized the obligations of the State to respect, protect and fulfill health rights by providing services that are available, accessible, acceptable, and of quality*. The Commission has adopted Resolution 260 on involuntary Sterilisation as a form of human rights violation against women.<sup>165</sup> In Resolution 260, the Commission affirmed that involuntary sterilisation based on the HIV status of women constitutes human rights violations in the African Charter. This includes the rights to dignity, non-discrimination, health, life, and freedom to be free from cruel, inhuman, and degrading treatment.<sup>166</sup> Moreover, it has been argued that involuntary sterilisation of women consociates act of violence prohibited under international law.<sup>167</sup>

### 3.2.3 Right to autonomy under international law

Obstetric violence is perpetuated by harmful gender stereotypes of women’s decision-making competence, women’s natural role in society, and motherhood, which limit women’s autonomy and agency.<sup>168</sup> These stereotypes arise from strong religious, social, and cultural beliefs and ideas about sexuality, pregnancy, and motherhood.<sup>169</sup> Women have reported a lack of autonomy and

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<sup>163</sup> Article 14 Protocol for Women

<sup>164</sup> General Comments on article 14(1)(d) and (e) Protocol for Women

<sup>165</sup> Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services - ACHPR/Res.260(LIV)2013

<sup>166</sup> As above

<sup>167</sup> As above

<sup>168</sup> Special Rapporteur (n 9) para 57

<sup>169</sup> RJ Cook & S Cusack ‘Gender Stereotyping: Transnational Legal Perspectives’ (2010) 21 *Feminist Legal Studies University of Pennsylvania Press* 34

decision-making, including the chance to choose their preferred position for delivery during childbirth in public hospitals.<sup>170</sup>

Article 16(1) (e) of the CEDAW asserts women’s right to autonomy and states that women have the right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights...”<sup>171</sup>

### **3.2.4 Right to life under international and regional law**

The International Covenant on Civil and Political Rights (ICCPR) entrenches certain essential rights relevant to the right to health, such as the right to life.<sup>172</sup> The right to life is first mentioned in Article 3 of the Universal Declaration, which states that “everyone has the right to life, liberty, and security of person.”<sup>173</sup> Furthermore, the right to life is also entrenched in Article 6 (1) of the ICCPR, which states that “every human being has the inherent right to life and that no one shall be arbitrarily deprived of his life.”<sup>174</sup> The Human Rights Committee has stated that “the measures taken by the states should aim to reduce infant mortality and to increase life expectancy.”<sup>175</sup> Further to this article 6 of the CRC protects the right to life and urges state parties to recognise that “every child has the inherent right to life.”<sup>176</sup>

An example that illustrates how the right to life is linked to obstetric violence is an episiotomy procedure. This procedure is a deep cut in a woman’s perineum into the pelvic floor muscle, which is designed to help women who are delivering a child vaginally surgically.<sup>177</sup> While it is appreciated that the procedure may be of benefit to the infant and the mother when medically necessary, if this procedure is done unnecessarily and or without informed consent, it may have

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<sup>170</sup> Special Rapporteur (n 9) para 30

<sup>171</sup> Article 16(1)(e) CEDAW

<sup>172</sup> Article 6 (1) and 9 (1) ICCPR.

<sup>173</sup> Article 3 UDHR.

<sup>174</sup> CEDAW General Recommendation No. 15: Avoidance of Discrimination Against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS) U.N. Doc. A/45/38 (1990).

<sup>175</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 1982 para 5

<sup>176</sup> Article 6 CRC

<sup>177</sup>Special Rapporteur (n 9) para 25

adverse physical and psychological effects on the mother, can lead to death and which may amount to gender-based violence and torture and inhuman and degrading treatment.<sup>178</sup>

Article 14 (2) (c) of the Protocol for Women provides that state parties shall take all necessary measures to: “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.”<sup>179</sup>

### 3.2.5 Equality and non-discrimination

The Universal Declaration stipulates that all individuals have a right to a dignified life and non-discrimination. The CEDAW committee in its General Recommendation 24 the CEDAW emphasises the obligation of states to prevent all discrimination perpetrated against women when accessing health care services “particularly in the areas of family planning, pregnancy, confinement and during the post-natal period.”<sup>180</sup>

In *Mellet v. Ireland*<sup>181</sup> the Human Rights Committee discussed how gender stereotypes contribute to the notion that “women should continue their pregnancies regardless of the circumstances, their needs and wishes, because their primary role is to be mothers and caregivers.”<sup>182</sup> To curb these kinds of violations, the International Federation of Gynecology and Obstetrics (IFGO) provides guidelines on ‘Harmful stereotyping of women in health care,’<sup>183</sup> offering guidance to health care providers on how to avoid negative stereotyping in the provision of health care.<sup>184</sup>

In *Alyne da Silva Pimentel v. Brazil*,<sup>185</sup> a case where gender stereotypes led to the violation of a woman’s reproductive rights, the CEDAW committee highlighted that states must: address and reduce maternal mortality, ensure women’s rights to safe motherhood, provide affordable access

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<sup>178</sup> As above Para 25

<sup>179</sup> Article 14 Protocol for women

<sup>180</sup> CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1. para 2

<sup>181</sup> *Mellet v. Ireland*, Communication No. 2324/2013, CCPR/C/116/D/2324/2013, para. 3.19.

<sup>182</sup> As above para. 3.19.

<sup>183</sup> International Federation of Gynecology and Obstetrics: Ethical Issues in Obstetrics and Gynecology (Harmful stereotyping of women in health care, London 47

<sup>184</sup> As above

<sup>185</sup> *Alyne da Silva Pimentel Teixeira v. Brazil* (n 43) para. 7.6.

to adequate emergency obstetric care, meeting the specific and distinctive health needs of women, particularly women from low-socioeconomic backgrounds and historically marginalised groups.<sup>186</sup>

The various forms of obstetric violence discussed in Chapter 1 are forms of gender-based violence that, in some cases, amount to torture or cruel, inhuman, or degrading treatment.<sup>187</sup> The CEDAW committee's General Recommendation 35 on gender-based violence against women, updating General Recommendation 19 and Article 2 of CEDAW, provides that the overarching obligation of States parties is to pursue by all appropriate means and without delay, a policy eliminating discrimination against women, including gender-based violence against women.<sup>188</sup>

In *S.F.M v Spain*,<sup>189</sup> the case concerned the pathologisation of a woman in labour. A woman was admitted to a healthcare facility after her water broke. The woman reported experiencing: “unnecessary digital vaginal examinations, the administration of oxytocin without information or consent, she was forced to give birth in the lithotomy position, the performance of an instrumental extraction and an episiotomy without information or consent.”<sup>190</sup> The woman was also separated from her daughter. The woman argued that she experienced these forms of obstetric violence because of structural discrimination based on gender stereotypes regarding sexuality, maternity, and childbirth”.<sup>191</sup> The CEDAW Committee agreed that stereotyping affects the right of women to be protected against gender-based violence, in this case, obstetric violence.<sup>192</sup> The CEDAW Committee stated that authorities responsible for analysing responsibility for such acts should exercise particular caution in order not to reproduce stereotypes.<sup>193</sup> During the National court adjudication of this case, the woman observed that the administrative and judicial authorities of the State party applied stereotypical and thus discriminatory notions by assuming that it is for the doctor to decide whether or not to perform an episiotomy”.<sup>194</sup> The CEDAW Committee found that

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<sup>186</sup> As above para. 7.6.

<sup>187</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57)

<sup>188</sup> Article 2 CEDAW

<sup>189</sup> *S.F.M. v. Spain* (n 46)

<sup>190</sup> As above para 15.2

<sup>191</sup> As above para 15.7

<sup>192</sup> As above para 15.2

<sup>193</sup> As above para 15.2

<sup>194</sup> As above para 15.2

this situation constituted a violation of her rights to high-quality health services free from violence and discrimination, to personal autonomy, and physical and psychological integrity, in violation of articles 2, 5, and 12 of the Convention”.<sup>195</sup>

### 3.2.6 Right to information

Article 19 (2) of the ICCPR provides the right to information, which states that “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds...”<sup>196</sup> This means women have the right to information such as their reproductive physiology, the impact of pregnancy on their health, how sexual diseases can be transferred and the measures for reducing the transmission, the benefits and risks of using different methods of contraception, including the safe options to rely on when those methods fail.<sup>197</sup> The IFGO recognizes that implementing informed consent is an obligation, even though it can be challenging and time-consuming.<sup>198</sup> General Comment 24 on Article 12 of the CEDAW provides that quality healthcare services are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality, and is sensitive to her needs and perspectives.<sup>199</sup> The general comment also states that women have the right to be fully informed, by trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of the proposed procedure and available alternatives.<sup>200</sup>

In *N.A.E v Spain*<sup>the CEDAW</sup> case concerned a woman who attended a hospital after her water broke. The woman’s labour was subsequently induced despite her not consenting to the procedure, and her requests for more information were unanswered.<sup>201</sup> The woman suffered various forms of obstetric violence while at the hospital, including an unnecessary procedure of cesarean.<sup>202</sup> The CEDAW Committee referred to the Special Rapporteur’s 2019 report. It highlighted that obstetric violence is caused by structural inequality, discrimination, and patriarchy and that it is also the result of a lack of proper education and training, as well as a lack of respect for women’s equal

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<sup>195</sup> As above para 15.5

<sup>196</sup> Article 19(2) ICCPR

<sup>197</sup> Special Rapporteur (n 9) para 32

<sup>198</sup> As above

<sup>199</sup> CEDAW General Recommendation 24 para 22

<sup>200</sup> As above

<sup>201</sup> *N.A.E v Spain* (n 47) para 15.2

<sup>202</sup> As above para 15.2

status and human rights.<sup>203</sup> The CEDAW committee also referred to the Special Rapporteur's assertions that a cesarean section was practiced without the woman's consent and that the use of trainee medical staff to carry out gynecological examinations are acts that may amount to obstetric violence.<sup>204</sup> Also of particular relevance is the Special Rapporteur's assertion that informed consent for medical treatment related to reproductive health services and childbirth is a fundamental human right.<sup>205</sup> Women have the right to receive complete information about recommended treatments to make well-considered and informed decisions.<sup>206</sup> The CEDAW Committee made a recommendation for the prevention of obstetric violence to guarantee women's right to a birth companion of their choice.<sup>207</sup>

### **2.3.7 Right to be free from inhumane and degrading treatment**

The right to be free from inhuman and degrading treatment is recognised in Article 7 of the ICCPR, where the following is stated: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment." In the case of *KL v Peru*,<sup>208</sup> a seventeen-year-old young woman was coerced to carry a pregnancy to full term despite anencephaly, a fatal severe anomaly incompatible with life, even though Peruvian law permits abortion on therapeutic grounds.<sup>209</sup> KL argued that the State had failed to protect her right to be free from inhumane and degrading treatment.<sup>210</sup> The Human Rights Committee agreed and ruled that rejecting access to lawful abortion infringes on women's most basic human rights.<sup>211</sup>

### **3.3.8 Right to a Remedy**

ICCPR provides that governments must ensure that any person whose rights under the Covenant are violated "shall have an effective remedy" and that any person claiming a remedy "shall have

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<sup>203</sup> As above para 15.4

<sup>204</sup> As above para 15.4

<sup>205</sup> As above para 15.4

<sup>206</sup> As above para 15.2

<sup>207</sup> As above para 15.2

<sup>208</sup> *K.L. v. Peru* (n 45)

<sup>209</sup> As above para 2.1

<sup>210</sup> As above para 3.2

<sup>211</sup> As above para 6.2

his right to it determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.”<sup>212</sup>

The African Charter includes the right of an individual “to have his cause heard” when fundamental rights are violated.<sup>213</sup> Likewise, the Women’s Protocol requires that states “provide appropriate remedies to any woman whose rights... have been violated... [and] ensure that such remedies are determined by competent judicial, administrative or legislative authorities or any other competent authority provided for by law.”<sup>214</sup>

In its General Recommendation, 24 CEDAW Committee calls specifically for the enactment and enforcement of laws to provide sanctions for, among other things, discrimination and abuse of women and girls in healthcare settings, including by private persons and organizations.<sup>215</sup>

The Committee on ICESCR has recognised the rights of victims of violations of the right to health to access judicial or other remedies and adequate reparation in “the form of restitution, compensation, satisfaction or guarantees of non-repetition.”<sup>216</sup>

ICCPR establishes that the duty to provide an effective remedy to victims of human rights violations, whether at the hands of public officials or private individuals, includes the obligation to “exercise due diligence to prevent, punish, investigate, or redress the harm caused by such acts.”<sup>217</sup> The Committee emphasised that states must ensure “accessible and effective remedies” for human rights violations and to take into account “the special vulnerability of certain categories of person,” further noting that “a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”<sup>218</sup>

### 3.4 Conclusion

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<sup>212</sup> Article 2(3) ICCPR Article

<sup>213</sup> Article 7 African Charter

<sup>214</sup> Article 25(a) Protocol for women

<sup>215</sup> General Recommendation 24 (n 180) para. 15 (a and c)

<sup>216</sup> General Comment 14 (n 144) para. 59

<sup>217</sup> Human Rights Committee General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

<sup>218</sup> As above para. 15.

The government of South Africa is obligated to respect, protect, and fulfill women's human rights, including the right to the highest standard attainable of physical and mental health during reproductive services and childbirth that is: 1. Free from mistreatment and gender-based violence 2. To adopt appropriate laws and policies to combat and prevent such obstetric violence to 3. Prosecute perpetrators and to provide reparations and compensation to victims of obstetric violence.<sup>219</sup> The government of South Africa is obligated to address the problem of obstetric violence from a human rights perspective and use this approach to conduct an independent investigation into women's allegations of mistreatment and gender-based violence in healthcare facilities.<sup>220</sup>

This chapter roots reproductive rights in international, regional, and comparative law, capturing for litigants an understanding of the human rights guarantees regarding supporting action towards eradicating obstetric violence. This chapter provides a starting point for where litigants, activists, and scholars can design a PIL strategy to combat obstetric violence. According to Epps' first condition, this existing rights framework is necessary for achieving social change.

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<sup>219</sup> Special Rapporteur (n 9) para 75

<sup>220</sup> As above 80

## CHAPTER 4

### RECOGNITION OF OBSTETRIC VIOLENCE IN SOUTH AFRICA'S HUMAN RIGHTS FRAMEWORK

#### 4.1 Introduction

PIL lawyers often use international and regional norms to hold the state accountable for ongoing human rights violations. This chapter examines how global and regional norms and standards are interpreted by South Africa's constitution and other domestic laws applicable to obstetric violence. This chapter also discusses how obstetric violence manifests when women access obstetric care in public health care facilities health in South Africa under each applicable right. This chapter aims to clarify the legal basis for PIL in South Africa.

#### 4.2 Domestication of international law in South Africa

International law has become a touchstone by which South African lawyers can refer to determine lawful government action and to protect individual rights.<sup>221</sup> The South African Constitution presents a dualist approach, which means international obligations are treated as agreements entered into by sovereign states, and the obligations to which those agreements give rise are owed to the sovereign states and no one else.<sup>222</sup> In other words, disputes regarding interpreting these agreements are resolved diplomatically or through a mandated international tribunal.<sup>223</sup> In turn, obligations binding at the domestic level will be those enacted by Parliament, as supplemented by the common law.<sup>224</sup>

Section 231 of the Constitution provides the process for international negotiation and the incorporation of international agreements.<sup>225</sup> Section 231(1)-(4) explains that the national

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<sup>221</sup> B Meyersfeld 'Domesticating International Standards: The Direction of International Human Rights Law in South Africa' (2013) 5 *Constitutional Court Review* 400

<sup>222</sup> MD Stubbs 'Three-Level Games: Thoughts on Glenister, Scaw and International law' (2011) 4 *Constitutional Court Review* 141

<sup>223</sup> As above 142

<sup>224</sup> As above

<sup>225</sup> Section 231

executive is responsible for negotiating and entering into international agreements<sup>226</sup> that international agreements that are not of a ‘technical, administrative or executory nature’ become binding upon the Republic once they have been approved by resolution of Parliament,<sup>227</sup> for an international agreement to have domestic effect it must be enacted as legislation.<sup>228</sup> However, Stubbs reminds us that failure to incorporate an international agreement does not render that agreement irrelevant to a court’s decision.<sup>229</sup> According to Stubbs, “When interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law ... [and] [w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”<sup>230</sup> This reading is consistent with section 39(1)(b)(c), which states that courts must consider international law and that courts may consider foreign law when interpreting the Bill of Rights. The reading is also consistent with Section 233, which states that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation consistent with international law over any alternative inconsistent with international law. This clarifies that the use of international law as an interpretive tool is confined to interpreting the constitutional rights contained in the Bill of Rights and applies to understanding any other domestic law.<sup>231</sup>

### **4.3 Reproductive Health Rights in the South African Constitution**

#### **4.3.1 Right to health**

Section 27 of the Constitution provides access to healthcare services, including reproductive health care.<sup>232</sup> This provision is drawn from the global reproductive rights framework established at the

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<sup>226</sup> Section 231(1)

<sup>227</sup> *President of the Republic of South African v Van Rooyen; Goodwin v Director-General, Department of Justice and Constitutional Development* 2009 8 BCLR 785 (CC).

<sup>228</sup> Stubbs (n 222) 142

<sup>229</sup> As above

<sup>230</sup> As above

<sup>231</sup> RLK Ngidi ‘The role of international law in the development of children’s rights in South Africa: A children’s rights litigator’s perspective’ in *International law and domestic human rights litigation in Africa* (ed) M Killander (2010) 176

<sup>232</sup> Section 27(1)(a)

ICPD.<sup>233</sup> Section 27 is imbued with socio-economic rights drawn from Article 12 of the ICESCR.<sup>234</sup> In terms of section 27, the government of South Africa is to take ‘all reasonable legislative and other measures within its available resources, to achieve ‘progressive realisation’ of the right to health.<sup>235</sup>

The Constitutional Court interpreted the meaning of ‘available resources’ in *Soobramoney v Minister of Health, KwaZulu-Natal*.<sup>236</sup> This case addressed the issue of the criteria used to allow patients access to the limited dialysis machines in the health facility. The Court ruled that the guidelines and criteria used to assess whether a patient is eligible for dialysis treatment, which was applied but excluded Soobramoney, were reasonable and non-discriminatory.<sup>237</sup> The Court further held that the reality of limited resources may require the state to “adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.”<sup>238</sup> The Constitutional Court concluded that: ‘[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters.’<sup>239</sup> Scholars have questioned the effectiveness of this remedy. Tushnet describes such a remedy as weak in that it requires the state to craft programs that hold out some promise of eliminating the violation, and once this is done, the court steps back.<sup>240</sup>

The interpretation of ‘take reasonable legislative steps and other measures, within its available resources, to achieve the progressive realisation of this right’ was canvassed in the *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>241</sup> the court established that the

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<sup>233</sup> C Albertyn ‘Women and Constitution-Making in South Africa’ in H Irving (ed) *Constitutions and Gender* (2017) 66-72

<sup>234</sup> AM Starrs et al ‘Accelerate Progress—Sexual and Reproductive Health and Rights for All: Report of the Guttmacher–Lancet Commission’ (2018) 391 *Lancet* 2644-5

<sup>235</sup> Section 27(2)

<sup>236</sup> 1998 (1) SA 765 (CC)

<sup>237</sup> As above para 25

<sup>238</sup> As above para 31

<sup>239</sup> As above para 29

<sup>240</sup> M Tushnet ‘Social welfare rights and the forms of judicial review’ (2004) 82 *Texas Law Review* 1910

<sup>241</sup> 2001 (1) SA 46 (CC)

socio-economic rights in the South African Constitution are judicially enforceable.<sup>242</sup> With regards to “whether the measures taken by the state to realize the right . . . are reasonable,” in the circumstances, the court held that the government’s housing program was not reasonable because it failed “to recognize that the state must provide for relief for those in desperate need.” The Court ordered the government to “devise and implement within its available resources a comprehensive and coordinated program progressively to realise the right of access to adequate housing.” In the High Court judgment, Judge Davis crafted a proposal for a declaratory order that was powerful enough to have the command of a mandatory interdict. The High Court directed the respondents to, within three months, present a report under oath as to the implementation of the order. Scholars argue that, in effect, this enables a court to declare the law while leaving it to the other organs to decide how the law, as declared, should be observed.<sup>243</sup> However, Mbazira cautions that once a judgment is accompanied by an order to report back to the court, although the respondent seemingly still has discretion, this discretion is significantly depreciated.<sup>244</sup>

In *Minister of Health v Treatment Action Campaign* the court found the government’s inaction unreasonable and unconstitutional on several grounds. It concluded that section 27 ‘require[d] the government to devise and implement within its available resources a comprehensive and coordinated program to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.’ The Court order started with a declaration that the government policy of reducing mother-to-child transmission of HIV fell short of the requirements of a reasonable program. The declaration was followed by a mandatory order requiring the state, without delay, to do several things to remove restrictions on nevirapine access. However, the order reflected judicial deference immediately followed by this statement: It is the above deference and the failure to make a supervisory order that disqualifies the TAC order as a potent remedy when one follows Tushnet’s characterization. The court dismissed judgment, a request for a supervisory order because ‘the government has always respected and executed orders of this Court’ and there was no ‘reason to believe that it will not do so.’<sup>245</sup>

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<sup>242</sup> As above

<sup>243</sup> As above 66

<sup>244</sup> As above

<sup>245</sup> Kapczynski (n 86) 20

An analysis of these judgments reveals the Court's unenviable task of maintaining a 'delicate balance' of the separation of powers.

#### **4.3.2 Right to Life**

Section 11 of the Constitution provides that 'everyone has the right to life.' This provision is in line with the international and regional obligations. Article 6 of the ICCPR, General Comment No. 3 of the African Commission, Article 4 of the Women's Protocol, and General Comment No.36 of the Human Rights Council provide that the right to life lays the foundation for the obligation to respect and give effect to the right through legislative and other measures.<sup>246</sup>

#### **4.3.3 Right to non-discrimination**

Section 9 provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law. This position is consistent with CEDAW at Articles 2, 3 and 4 which proscribe discrimination and set out the kind of measures, whether legal, administrative and otherwise, States must take that to put an end to discrimination against women in all fields including health. Section 9(3) also complements Article 12 of CEDAW, which prohibits discrimination on the grounds of sex regarding access to health care services by men and women, including those related to family planning. Section 9(4) compliments Article 2 of the Women's Protocol, which obligates States to fight all forms of discrimination perpetrated against women through the enactment and adoption of "appropriate legislative, institutional and other measures."

#### **4.3.4 Right to access information**

Section 32 of the Constitution provides the right to access information in line with Article 19(2) of the ICCPR and Article 9(1) of the African charter. This section is also consistent with Articles 10(h) of CEDAW and Article 14(2) of the Women's Protocol, which entrenches the right to access health education and health-related information, including information on family planning.

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<sup>246</sup> Human Rights Committee General Comment 36 para 4

General Comment No.2 of the African Commission obligates the State to provide complete and accurate information to necessitate the “respect, protection, promotion and enjoyment” of the right to health, including the choice of family planning methods. The right to information is closely linked to full and informed consent. Section 6 of the Health Act provides that users are to have complete knowledge and information during the provision of health care services, read together with section 7 of the Health Act provides that a health service may not be provided to a user without the user’s informed consent.

#### **4.3.5 Right to freedom and security of the person**

Section 12 of the constitution provides that ‘everyone has the right to freedom and security of the person. Section 12(2)(b) guarantees the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and to security in and control over their body. The right to security in one’s body prevents unwanted disturbance of bodily integrity. Section 12(1)(c) guarantees the right to freedom and security of the person, including the right to be free from all forms of violence from public or private sources. This provision aligns with Articles 12 of the CESCR and Article 14 of the Women’s Protocol. The CESCR in General Comment No. 22 urges State parties to ensure that women have access to reproductive health care services without interference from third parties.

#### **4.3.6 Right to human dignity**

Section 10 of the Constitution provides that “everyone has inherent dignity and the right to have their dignity respected and protected.” In *S v Makwanyane*, the Constitutional Court re-affirmed the importance of the right to dignity by stating that recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings, independent of their situation in life. It further stated that, without dignity, human life is substantially diminished. Only when a person is treated with dignity do they feel worthy and influential in society. This right is violated when persons are subjected to conduct that is degrading and humiliating.

## **4.4 Reproductive Health Rights in the South African legislation and policies**

### **4.4.1 National Health Act**

The National Health Act (Health Act) of South Africa recognises the socio-economic injustices, imbalances and inequities of health services and the need to improve the quality of life of all citizens.<sup>247</sup> The Health Act was enacted in terms of section 27(2) of the Constitution.<sup>248</sup> The Health Act mandates free healthcare services to all pregnant and breast-feeding women. Accordingly, these rights are extended to all women and birthing persons, ‘without bias based on legal status in the country’.<sup>249</sup>

### **4.4.2 Sterilisation Act 44 of 1998**

The Sterilisation Act 44 of 1998 provides for the right to sterilisation and regulates the right. According to its preamble what the act aims to do is to indicate that people, regardless of gender have the right to sterilisation. Accordingly, this right is subject to the individuals being fully informed about the procedure. This Act ensures that individuals have a safe, effective, affordable, and dignified fertility procedure. In *Khosa v Minister of Social Development*, the court held that the word ‘everyone’ in section 12(2) of the Constitution includes all persons irrespective of their HIV status. The complainants are entitled to equal protection and treatment under the law as envisaged under section 12(2) of the Constitution.

### **4.4.3 The National Patients’ Rights Charter**

The National Patients’ Rights Charter (NPRC)<sup>250</sup> sets out the factors that need to be in place for a person to decide for themselves what they want in regards to, their healthcare and for them to realise that decision otherwise known as ‘informed consent’.<sup>251</sup> Section 4 mandates the provision

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<sup>247</sup> Preamble to the National Health Act 61 of 2003

<sup>248</sup> Section 27

<sup>249</sup> Preamble (n 230)

<sup>250</sup> National Patients’ Rights Charter of 1999

<sup>251</sup> As above

of free healthcare services to all pregnant and breastfeeding women.<sup>252</sup> The NPRC regulates the relationship between the patient (user) and the health services provider.

#### **4.4.4 Guidelines for Maternity Care**

In 2016, the National Department of Health issued Guidelines for Maternity Care in South Africa (guidelines). These guidelines provide, among other things, a practical approach for primary healthcare to manage pregnancy, labour and childbirth with the ultimate aim of reducing deaths of mothers.<sup>253</sup> The guidelines are for health professionals providing obstetric, surgical, and anaesthetic services for pregnant women.<sup>254</sup> The guidelines provide, among other things, a practical approach for primary healthcare to manage pregnancy, labour and delivery in South Africa to reduce maternal mortality. For example, chapter 5 of the guidelines discusses the need for skilled attendance at birth and mothers' waiting areas where women with advanced pregnancy stay until they go into labour.<sup>255</sup> As of November 2024, the guidelines have been updated but still have no mention of obstetric violence.

#### **4.5 Accessing justice**

South African law makes provision for various avenues of recourse for medical mistreatment. Section 18 of the National Health Act enables any user of health services to complain about the manner in which they were treated. The National Health Act further requires Members of the Executive Councils of Provinces to establish procedures for complaints. The Health Professions Council of South Africa<sup>256</sup> (HPCSA) and the South African Nursing Council (SANC) are mechanisms for recourse. The purpose of this mechanism is to ensure that the right of patients and their families/support persons to complain is upheld.<sup>257</sup> Section 18 of the National Health Act

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<sup>252</sup> As above

<sup>253</sup> Guidelines For Maternity Care In South Africa A long and healthy life for all South Africans A manual for clinics, community health centres and district hospitals Fourth Edition 2016

<sup>254</sup> As above

<sup>255</sup> As above 40

<sup>256</sup> Health Professions Council of South Africa (HPCSA) Guidelines for Good Practice in The Health Care Professions. Seeking Patients' Informed Consent: The Ethical Considerations Booklet 9, May 2008.

<sup>257</sup> Section 18 (n 230)

states that “any person may lay a complaint about the treatment they or their family member received at a health facility.”<sup>258</sup> Once a complaint has been received, it must be investigated, and every complaint received must be acknowledged and referred for investigation to the relevant facility and authority.<sup>259</sup> The Health Ombudsman & The Office of Health Standards and Compliance is an independent office of the Health Ombudsman and was established by the National Health Amendment Act 12 of 2013. The Health Ombudsman has jurisdiction to deal with complaints against health establishments, including persons employed by health establishments, and make recommendations.<sup>260</sup>

## **4.6 The lived Experiences of women accessing obstetric services and Childbirth in South Africa**

### **4.6.1 Denial of care**

In *Section 27 and 3 others v MEC Gauteng Department of Health and four others*,<sup>261</sup> the National Department of Health (NDoH) came into the spotlight when three pregnant migrant women were denied access to maternal healthcare. PIL organisation SECTION27 argued that irrespective of nationality and documentation status, pregnant women can access free health services at all public health establishments, including hospitals.<sup>262</sup> SECTION27 called on the (NDoH) to take reasonable legislative steps and other measures, within its available resources, to achieve the progressive realisation of this right. The court declared that any other similar policies or circulars that prevent pregnant and lactating women and children under six from accessing free health services are inconsistent with the National Health Act and are invalid. The National Department was ordered, by no later than 17 July 2023, to direct the preparation and display of posters or notices in all health establishments in all the provinces which state that all pregnant women, all women who are lactating, and all children below the age of six are entitled to free health services at any public health establishment, irrespective of their nationality and documentation status.

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<sup>258</sup> As above

<sup>259</sup> As above

<sup>260</sup> As above

<sup>261</sup> *Section27 and 3 others v Mec, Gauteng Department of Health and 4 others (case no 19304/22)* court order

<sup>262</sup> As above

#### 4.6.2 Neglect, physical abuse, verbal abuse

In as early as 1997, Jewkes conducted research on *‘Why do nurses abuse patients? Reflections from South African Obstetric Services.’*<sup>263</sup> Many of the patients reported clinical neglect and verbal and physical abuse from nursing, which was at times reactive and, at others, ritualised in nature.<sup>264</sup> Although the study was carried out two years before the promulgation of the NPRC, it still shows that contrary to popular nursing discourses of the caring profession, nurse and patient relationships in parts of South Africa’s public health services are at times characterised by conflict, clinical neglect, verbal and physical abuse. The findings suggest that nurses deploy violence against patients as a means of creating social distance and maintaining fantasies of identity and power.<sup>265</sup>

The reality is that the South African healthcare system is marred with substandard care and in a study by Silal et al, highlighted the low standard of care experienced by women in public health facilities during antenatal care and delivery.<sup>266</sup> A survey by Chadwick et al. highlighted four central themes in women’s narrative of distress in health facilities: 1. Negative interpersonal relations with caregivers: women receive hostile and punitive treatment; humiliation; they are being told to ‘clean up their mess’ after giving birth and screaming. 2. Lack of information: nurses and midwives withheld information from women even after they requested the specific information, and birth complications were not explained to them. Consequently, they could not actively participate in their own birth experience and have a say in their bodies. 3. Neglect and abandonment: women are being left alone for hours, and nurses tell patients ‘they forget about them. 4. Absence of labour companions: women giving birth in public facilities are often denied the presence of labour companions.

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<sup>263</sup> R Jewkes and others ‘Why do nurses abuse patients? Reflections from South African Obstetric Services’ (1998) 47 *Social Science & Medicine* 1781-1795

<sup>264</sup> As above 1781

<sup>265</sup> As above 1794

<sup>266</sup> M Hasting-Tolma and others ‘Birth Stories From South Africa: Voices Unheard’ (2018) 31 *Women and Birth* 43

#### 4.6.3 Lack of attendance at birth and mothers' waiting areas

In a recent case, the Health Ombudsman concluded an investigation into allegations against Rahima Moosa's Mother and Child Hospital, where expectant mothers were sleeping on the hospital floor.<sup>267</sup> On the night of the incident, 31 March / 01 April 2022, the admission registers and midnight statistics report confirmed that there were 59 pregnant women admitted. Of these, 39 patients were accommodated in beds, and 20 sat on chairs.<sup>268</sup> The Health Ombudsman found overwhelming evidence that healthcare quality in South Africa has been compromised by various challenges that negatively impact healthcare quality.<sup>269</sup> The Health Ombudsman noted that the decline in quality health care has caused the public to lose trust in the healthcare system in South Africa.<sup>270</sup> These challenges affect patient safety by placing patients' lives at risk.<sup>271</sup>

#### 4.6.4 Stillbirths

Neglect plays a role in whether a woman or child lives during childbirth. In *Hoffman v Member of the Executive Council Department of Health, Eastern Cape*,<sup>272</sup> a woman in labor was ignored when she informed the hospital staff that she was a high-risk patient and must give birth by cesarean section. After the hospital staff informed the woman that she must monitor the fetal heart rate with a machine, the woman told the staff that the heart rate was low. The cesarean section was only performed hours later, and the infant was stillborn. The court held that the hospital staff had acted negligently and were liable to pay damages to the woman. In *Mbhele v MEC for Health*<sup>273</sup> the fetus was in distress, and despite the woman requiring urgent medical treatment, the hospital staff did not attend to her during labour and the child was stillborn. The hospital was held liable and ordered to pay damages for the pain and suffering caused by negligence.

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<sup>267</sup> Investigation Report into Allegations Against Rahima Moosa Mother and Child Hospital (2023) 1-96

<sup>268</sup> As above 2

<sup>269</sup> As above

<sup>270</sup> As above 61

<sup>271</sup> As above

<sup>272</sup> *Hoffman v Member of the Executive Council Department of Health, Eastern Cape* 2011 JDR 1081 (ECP)

<sup>273</sup> [2016] ZASCA para 166

#### 4.6.5 Forced and or coerced sterilisation of women living with HIV

HIV/AIDS is a recognised ground of discrimination.<sup>274</sup> The CGE released an investigation report on the *Forced Sterilisation of Women Living with HIV in South Africa* where the complainants and their clients were subjected to forced and or coerced sterilisation in public hospitals.<sup>275</sup> The clients were Black women who mainly were HIV positive, who alleged forced coerced sterilisations, were pregnant, when seeking medical assistance at various hospitals in the country.<sup>276</sup> “Just before giving birth, but either while in labour and or in extreme pain, they were coerced or forced to sign forms that they later learnt through various means were consent forms allegedly permitting the hospital to sterilise them. The women were allegedly subjected to this process of sterilization and gave birth through the cesarean section”.<sup>277</sup> The CGE concluded that sterilisation, when performed without informed consent, violates an individual’s rights to dignity, humane treatment, health, family, information, privacy, and to freely decide the number and spacing of children, among others.

#### 4.6.6 Lack of information

The HRW released a report, *Stop Making Excuses: Accountability for Maternal Health-Care in South Africa*.<sup>278</sup> About consent, this report found that: 1. Health workers failed to provide information to women about issues crucial to their obstetric care. This information included failing to obtain informed consent from women before Caesarean surgery. 2. Ambulance dispatchers provided poor, or lack of, communication, which resulted in women not being able to deliver in a health facility. 3. Some women were reported as saying that “poor communication by health workers, sometimes due to language barriers, resulted in situations where the women had too little information to know whether to consent to procedures.”<sup>279</sup> This is often linked to challenges in

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<sup>274</sup> *Hoffman v South African Airways* (CCT 17/00) [2000]; 2001 (1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC)

<sup>275</sup> Investigation Report on the Forced Sterilisation (n 21) 36

<sup>276</sup> As above

<sup>277</sup> As above

<sup>278</sup> Human Rights Watch Report (n 18)

<sup>279</sup> As above

communication and language barriers, especially among migrant women. HRW report found that “these failures in communication can lead to a delay in diagnosis and treatment and turn to increased morbidity and mortality. They also may contribute to unnecessary psychological suffering in women and can drive women away from seeking care.”<sup>280</sup>

#### 4.6.7 Involuntary sterilisation

In reality, research conducted by Strode et al. on women living with HIV showed a pattern of coercive and forced sterilisation in South Africa.<sup>281</sup> The study screened 32 HIV-positive women in Gauteng and KwaZulu-Natal provinces using a questionnaire.<sup>282</sup> This identified 25 (68%) of those screened, as having undergone an involuntary sterilisation procedure.<sup>283</sup> Additionally, the South Africa National Aids Council's 2015 stigma index revealed that out of 6,719 HIV-positive women interviewed, an estimated 500 said they had been forcibly sterilized.<sup>284</sup> In *Khosa v Minister of Social Development*,<sup>285</sup> the court held that the word ‘everyone’ in section 12(2) of the Constitution includes all persons irrespective of their HIV status. The complainants are entitled to equal protection and treatment under the law as envisaged under section 12(2) of the Constitution.

#### 4.6.8 Barriers to Justice

Barriers to accessing justice for survivors and victims of obstetric violence in South Africa were reported by HRW which found that health facilities were characterised by poor awareness of rights and complaints procedures, low awareness of rights and complaints mechanisms which deter healthcare users from lodging complaints about poor treatment by health staff.<sup>286</sup> The report also showed that suggestion boxes were present in health facilities as the primary mechanism for patients to lodge complaints.<sup>287</sup> The boxes were marked with “compliment, criticise, and

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<sup>280</sup> As above

<sup>281</sup> A Strode and others ‘She made a choice for me: 22 HIV-positive women’s experiences of Involuntary Sterilisation in Two South African Provinces’ (2012) 20 *Reproductive Health Matters* 61

<sup>282</sup> As above

<sup>283</sup> As above

<sup>284</sup> South African National AIDS Council, ‘The People Living with HIV Stigma Index, South Africa: Summary Report’ (2015)

<sup>285</sup> 2004 (6) SA 505 (CC) para 111

<sup>286</sup> Human Rights Watch (n 18)

<sup>287</sup> As above

complain,” but in reality they were almost totally defunct.<sup>288</sup> The report also found that there was a failure to respond to complaints and to provide redress, address root causes of complaints, fail to meet the critical objectives of accountability mechanisms, ensure non-recurrence of systemic failures and gaps, and promote interventions at an adequate level.<sup>289</sup>

#### 4.7 Conclusion

PIL can contribute immensely to addressing ongoing obstetric violence in South Africa; as noted in *M v Member of the Executive Council for Health, KwaZulu-Natal*<sup>290</sup> private litigation regarding malpractice suits is retroactive because it seeks to remedy past wrongs. While this position resolves the dispute, it does not deal with the systemic issues. The court contemplates a form of litigation that “meets the features of PIL and aims for long-term sustainable solutions.”<sup>291</sup> PIL has the potential to fulfill this role to stimulate social change for victims and survivors of obstetric violence. It is through the courts that this vulnerable group may gain legal equality.

This chapter provides an analysis of PIL jurisprudence, which illustrates that South African judges understand the rights framework, its relationship to advancing social justice, and how it can play a key role in promoting social change through the courts. As seen from the TAC case, judges took on the role of the advocate bringing the litigation by understanding their role as promoters of human rights. The TAC case typifies the judicial independence of the South African judiciary. This judicial posture exemplifies Epps’ second condition, which requires that the judiciary must be independent in order to ensure the rights of groups that have been pushed to the margins.

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<sup>288</sup> As above

<sup>289</sup> As above

<sup>290</sup> Unreported case no 14275/2014.

<sup>291</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* (n 236) para 31

## CHAPTER 5

# PUBLIC INTEREST LITIGATION ON OBSTETRIC VIOLENCE: LESSONS FROM KENYA

### 5.1 Introduction

This chapter will illuminate lessons from litigation, highlighting the issues around obstetric violence and how the court interpreted these rights. Two Kenyan cases will be discussed. The first case relates to the denial of maternal healthcare; the second cases deal with forced and or coerced sterilisation of women living with HIV, which are both recognized as forms of obstetric violence.

### *5.2 Josephine Oundo Ongwen v. the Attorney General and 4 Others (Bungoma High Court Petition No. 5 of 2014)*

#### 5.2.1 Background

This matter was brought by the Center for Reproductive Rights (CRR) a global human rights organisation that ensures reproductive rights are protected in law as fundamental human rights.<sup>292</sup> The CRR focuses on litigation, legal policy, and advocacy work with constitutional, international, and comparative human rights law expertise.<sup>293</sup> CRR has played a central role in transforming how courts, governments, and human rights bodies understand reproductive rights.<sup>294</sup> The CRR filed this case for the Petitioner Josephine Oundo Ongwen (Josephine). The Petition was supported by Women's Link Worldwide, an international non-governmental organisation working to uphold women's right as Amicus Curiae.<sup>295</sup> The Petition was also supported by the African Gender and Media Initiative Trust (GEM), a registered research organization that works toward advancing gender equality and women's rights, as an Interested Party, whose application was granted by consent of all parties.

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<sup>292</sup> Centre for Reproductive Rights: <https://reproductiverights.org/about-us/> (access 30 June 2024)

<sup>293</sup> As above

<sup>294</sup> As above

<sup>295</sup> Women's Link Worldwide: <https://womenslinkworldwide.org/en/> (accessed 20 June 2024)

Josephine Oundo Ongwen visited the Bungoma County Referral Hospital, a public health care facility that was to provide free maternal health care.<sup>296</sup> Upon admission to the hospital, she was asked to purchase cotton wool and the induction drug to be administered to her.<sup>297</sup> She was forced to share a bed with another patient.<sup>298</sup> The Josephine was informed by the nurses that, at the onset of labour pains they would have to walk to the delivery room. When her labour pains intensified, she again sought help, which was not forthcoming. As earlier instructed, she walked to the delivery room, where she found that the three beds in the room were occupied by other women who were in the delivery process. Josephine then left with no choice; she attempted to walk back to the labor ward. However, she lost consciousness along the way as she delivered her baby. Josephine woke up to shouts and abuses from two nurses who questioned her as to why she had delivered and had soiled the floor. Without any assistance, she was ordered to carry her placenta and walk to the delivery room to have the same expended, despite her weak and vulnerable condition.<sup>299</sup>

### 5.2.2 Rights formation stage

CRR argued that due to the physical, verbal abuse and neglect, infringement of her dignity, failure by the National and County Governments to ensure quality maternal care, and failure by the hospital to display its internal complaint mechanisms publicly, likewise the National and County Government, her fundamental rights as enshrined in the Constitution, international and regional laws were violated.<sup>300</sup>

It is trite that the right to the highest attainable standard of health is at the core of access to quality reproductive health care, which includes maternal care.<sup>301</sup> Abuse, mistreatment, and denial of care violate one's fundamental human rights.<sup>302</sup> Article 12 of the CEDAW provides that "State parties should take all appropriate measures to eliminate discrimination against women in the field of

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<sup>296</sup> *Josephine Oundo Ongwen v. the Attorney General and 4 Others (Bungoma High Court Petition No. 5 of 2014)* para 5

<sup>297</sup> As above para 6

<sup>298</sup> As above

<sup>299</sup> As above

<sup>300</sup> As above para 9

<sup>301</sup> Report of the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN Doc. No. A/HRC/7/11 (2008)

<sup>302</sup> (n 9) para 4

health care to ensure, based on equality of men and women, access to health care services, including those related to family planning.”<sup>303</sup> The Article 10 of the ICESCR provides that “special protection should be accorded to mothers during a reasonable period before and after childbirth.”<sup>304</sup> In the *Alyne da Silva Pimentel v Brazil*<sup>305</sup> whereby Alyne lacked immediate treatment leading to her death, the CEDAW Committee found that Article 12 of the convention had been violated. Therefore, Kenya as a member State is called upon to “strengthen its efforts to investigate ... harmful practices in connection with reproductive health and identity and punish those involved in such practices”.<sup>306</sup>

### 5.2.3 Adjudication stage

#### 5.2.3.1 Right to Healthcare

The right to health care can be found in Article 43(1) (a) of the Constitution of Kenya. It provides that “every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.”<sup>307</sup> Article 12(1) of the ICESCR states that “the state parties to the present covenant recognise the right for everyone to enjoy the highest attainable standard of physical and mental health.”<sup>308</sup> Article 16 of the African Charter states that “every individual shall have the right to enjoy the best attainable state of physical and mental health”<sup>309</sup> accordingly State parties are under an obligation to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.<sup>310</sup> The right to health care encompasses proper treatment at the hospital and the availability of necessary equipment, facilities, and medication.<sup>311</sup> According to the court's analysis, Josephine received none of the above at the hospital.<sup>312</sup> The state failed to provide the basics, such as drugs and cotton wool, which are introductory provisions in any healthcare system. To require Josephine

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<sup>303</sup> Article 12 CEDAW

<sup>304</sup> Article 10 ICESCR

<sup>305</sup> *Alyne da Silva Pimentel v Brazil* (n 43)

<sup>306</sup> *Josephine Oundo Ongwen v. the Attorney General* (n 296) para 44

<sup>307</sup> Article 43 Constitution of Kenya

<sup>308</sup> Article 12 ICESCR

<sup>309</sup> Article 16 African charter

<sup>310</sup> Article 16 African charter

<sup>311</sup> General Comment 14 (n 144) para 8

<sup>312</sup> *Josephine Oundo Ongwen v. the Attorney General* (n 296) para 58

and other poor women to purchase necessities in a public facility where health care is anchored on the Constitution and where a Presidential directive was specific on the provision of free maternal care is a violation of fundamental rights.<sup>313</sup>

### **5.2.3.2 Right to Dignity**

Article 28 of the Constitution provides that; “every person has an inherent dignity and the right to have that dignity respected and protected. Article 29(j) “every person has the right to freedom and security of the person which includes the right not to be treated or punished in a cruel, inhuman and degrading manner.”<sup>314</sup> The African Charter on its part states that “every individual shall have the right to respect of the dignity inherent in human beings.”<sup>315</sup> The Women’s Protocol recognises that every woman has the right to dignity inherent in human beings.<sup>316</sup> Josephine certainly did not deserve the cruelty and abuses meted out to her. As healthcare providers, nurses owe a duty of care to their patients at all times; they have a calling to serve humanity in vulnerable circumstances.<sup>317</sup> What Josephine required was understanding and compassion at the time.<sup>318</sup> This behavior constituted a violation of Josephine’s right to dignity.<sup>319</sup>

### **5.2.3.3 Right to Information**

The court found that Article 35 of the Constitution regarding access to information is not applicable in the circumstances of this case as Josephine did not anticipate complaining against anyone during her admission and discharge from the hospital, nor did she testify to the fact that necessary information was not disclosed to her.<sup>320</sup>

### **5.2.3.4 Obligation to Legislate**

The court found that the State’s policy guidelines to effectively implement National directives on free maternal care, establish policy guidelines and other measures, including allocating maximum

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<sup>313</sup> As above

<sup>314</sup> Article 28 of the Constitution of Kenya

<sup>315</sup> Article 2 African charter

<sup>316</sup> Article 1(g) Protocol for women

<sup>317</sup> As above

<sup>318</sup> As above

<sup>319</sup> *Josephine Oundo Ongwen v. the Attorney General* (n 296) para 67

<sup>320</sup> As above

available resources to comply with the law and implement the directive, or establish and monitor standards of free maternity care services have been fulfilled.<sup>321</sup>

#### **5.2.3.4 Remedies**

The Court relied on Article 23(3) to grant various remedies, including the right and compensation declaration.<sup>322</sup> The court found that Josephine's rights to maternal healthcare were infringed; there was equally a violation of her right to dignity as a woman and as a human being by the omission and commission of the nurses or Health facility.<sup>323</sup> On redressing the injuries suffered by Josephine, the physical and verbal abuse meted out at her has amounted to a violation of her right to dignity, the right not to be subjected to cruel, inhuman, and degrading treatment.<sup>324</sup> The neglect Josephine suffered resulted from the state's failure to ensure healthcare services are of quality and are available.<sup>325</sup> The State failed to develop or implement policy guidelines on healthcare, thus denying the petitioner her right to primary healthcare.<sup>326</sup> The State was unable to implement and or monitor the standards of free maternal health care and services, therefore resulting in the mistreatment of Josephine and the violation of her right to dignity and treatment that is devoid of cruelty, inhuman, and not degrading.<sup>327</sup> The court ordered a formal apology to Josephine by the State and the three nurses as having violated Josephine's rights—an award for damages of Kshs. 2,500,000 was made as a result of the infringement of her rights.<sup>328</sup> The court also awarded the costs of the suit to Josephine and created an award that included costs in equal shares.<sup>329</sup>

#### ***5.2.3.5 Kenya Court of Appeal Decision in County Government of Bungoma v. Josephine Oundo Ongwen (Kenya Civil Appeal No. 61 of 2018)***

The State appealed, submitting that the trial Judge erred in law and fact by making a declaration that there was a violation as per Article 22(1) 25, 27(4) & (5), 28, 29(e) & (f), 35(1) & (6) and 43

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<sup>321</sup> *Josephine Oundo Ongwen v. the Attorney General* (n 296) para 70

<sup>322</sup> Article 23(3) of the Constitution of Kenya

<sup>323</sup> *Josephine Oundo Ongwen v. the Attorney General* (n 296) para 72

<sup>324</sup> As above

<sup>325</sup> As above para 73

<sup>326</sup> As above

<sup>327</sup> As above

<sup>328</sup> As above

<sup>329</sup> As above

(1) of the Kenya Constitution. However, the appeal court found that the appeal was meritless, dismissed it, and affirmed the judgment of the High Court with costs.<sup>330</sup>

## 5.2.4 Implementation Stage

### 5.2.4.1 Lessons and challenges

This case illustrates how PIL was relied upon to hold the State accountable through a judicial process. The judiciary played the role of protecting individual rights against potential overreach or unfair practices by State actors.

However, lawyers involved in the case have argued that the judiciary missed a significant opportunity to find the right to information, even where the State admitted that they failed to inform Josephine of the hospital's complainants' procedure.<sup>331</sup> The judiciary had a chance to set a precedent requiring the State to share information proactively.<sup>332</sup> It failed to make substantive orders regarding the state's obligation to ensure the delivery of maternal health care services and the critical role of policy guidelines in implementing minimum standards in service delivery and monitoring implementation to allow for improvement.<sup>333</sup> Lastly, the judiciary failed to mandate human rights training for health providers and absolved the Nurses' Council. The lawyers suggest that this is typical of applying the general rule that courts must adhere to the separation of powers by not venturing into the confines of policymakers and limiting the judiciary from declaring significant policy changes and improvements in governance regarding addressing systemic issues or administrative practices.

## ***5.3 L A W & 2 others v Marura Maternity & Nursing Home & 3 others; International Community of Women Living with HIV (ICW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 others (Amicus Curiae) (Constitutional Petition 606 of 2014) [2022] KEHC 17132 (KLR)***

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<sup>330</sup> Kenya Court of Appeal Decision in *County Government of Bungoma v. Josephine Oundo Ongwen* (Kenya Civil Appeal No. 61 of 2018)

<sup>331</sup> B Odallo and others 'Litigating to ensure access to quality maternal health care for women and girls in Kenya' (2018) 26 *Reproductive Health Matters* 127

<sup>332</sup> Odallo et al (n 314) 127

<sup>333</sup> As above

### 5.3.1 Background

This case was filed by the 1st petitioner, L.A.W, an adult female living with HIV. The Petition was supported by Kenya Legal and Ethical Issues Network (KELIN), which is a non-partisan, non-profit making, non-governmental organization committed to the protection, promotion, and enjoyment of the right to health and more so protecting and promotion of HIV-related human rights through public interest litigation, advocacy, training, and law reform.<sup>334</sup> The Petition was also supported by GEM, as referenced above.<sup>335</sup>

In 2006, L.A.W was pregnant and attending her ante-natal appointment when she was referred to a community health worker who handed her two vouchers, one written ‘CS’ and the other ‘TL’.<sup>336</sup> The community health worker advised L.A.W that when she was due for delivery, she would use the vouchers at the hospital.<sup>337</sup> When L.A.W was due for delivery, she was admitted to the hospital and presented the vouchers. L.A.W underwent a cesarean section (CS) operation and delivered her baby. It was later revealed to LAW that her fallopian tubes were blocked. LAW inquired with the community health worker; it dawned on her that the vouchers meant that she was going to undergo a bilateral tubal ligation (BTL) during the cesarean section and was informed that the procedure was done where both her fallopian tubes were tied.<sup>338</sup>

### 5.3.2 Rights formation stage

The L.A.W claimed that the BTL was conducted on her without her being informed and that her consent was obtained. She averred that the procedure resulted in permanent inability to conceive in violation of her reproductive health rights and her right to dignity, non-discrimination, freedom from torture, privacy, freedom of expression, life, and the right to the highest attainable standard of health to reasonable quality health care and the right to found a family.<sup>339</sup>

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<sup>334</sup> *L A W & 2 others v Marura Maternity & Nursing Home & 3 others; International Community of Women Living with HIV (ICW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 others (Amicus Curiae)* (Constitutional Petition 606 of 2014) [2022] KEHC 17132 (KLR) Para 3

<sup>335</sup> As above para 3

<sup>336</sup> As above para 9

<sup>337</sup> As above

<sup>338</sup> As above para 14

<sup>339</sup> As above para 18

Article 12 of CEDAW and Article 16 of the African Charter provide the enjoyment of the best physical and mental health attainment. Article 14 of the Women's Protocol, specifically article 14.1(a), (b), (c) and (f) and 14.s(a) and (f) and the General Comment No. 2 on article 14 requires state parties to ensure that the right to health of women, including sexual and reproductive health is respected and promoted. Article 5 of UDHR forbids torture to cruel, inhuman, or degrading treatment or punishment as read with Article 7 and Article 2 and Article 5 of the ICCPR and Convention against Torture (CAT) and African Charter, respectively. On the issue of sterilisation, the Special Rapporteur posited that non-consensual sterilisation is an act of violence and a form of social control that constitutes a violation of the right to be free from torture and other cruel, inhuman, and degrading treatment.<sup>340</sup>

### **5.3.3 Adjudication stage**

#### **5.3.3.1 Right to Healthcare**

Article 43 guarantees all persons the right to the highest attainable standard of health, which encompasses sexual and reproductive health and rights. Article 12 of the CEDAW, Article 16 of the African Charter, and Article 14 of the Women's Protocol incorporate the right to health. The CESCR General Comment No.14 provides that the right to health is an inclusive right that recognises the social determinants of health.<sup>341</sup> The right to health contains freedoms and entitlements such as the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference such as torture, non-consensual medical treatment, and experimentation.<sup>342</sup> It must be underscored that forced and coerced sterilisation is a grave human rights and medical ethics violation and has been described as acts of torture and cruel, inhuman, and degrading treatment by the former United Nations Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment.<sup>343</sup> Similarly, the Africa Commission Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services recognised that all forms of involuntary sterilisation violate, amongst others, the right to

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<sup>340</sup>Special Rapporteur (n 19)

<sup>341</sup> General Comment 14 (n 144) para 8

<sup>342</sup> As above

<sup>343</sup>Special Rapporteur (n 19)

be free from torture, cruel, inhuman, and degrading treatment, as enshrined in regional and international human rights instruments.

### **5.3.3.2 Right to non-discrimination**

Articles 27(4) and 27(5) of the constitution provide that the state shall not discriminate against any person on any ground, including pregnancy or health status. The right to non-discrimination is guaranteed under Articles 2 and 3 of the ICCPR, Article 12 of CEDAW, Articles 2 and 18(3) of the African Charter, and Article 2 of the Women's Protocol. In its General Recommendation 19, the CEADW states that coercive acts can amount to discrimination, this includes acts that inflict physical or mental and sexual harm. In this case, the petitioner argued that coercive medical procedures can result in physical, mental harm, and sexual to women. Resolution 260 states that the coerced sterilization of HIV-positive women in Africa violates their right to freedom from discrimination.<sup>344</sup>

### **5.3.3.3 Right to Information**

Article 35(1)(b) of the constitution provides that the right to information is fundamental. Article 10(h) of CEDAW requires that women have access to specific educational information to help ensure families' health and well-being, including information and advice on family planning. Deprivation of the right to access information leads to a violation. L.A.W was sterlised without her informed consent. Information was not provided comprehensively.

### **2.3.3.4 Right to life**

Article 26(1) provides for the right to life. This is in line with Article 6 of the ICCPR, General Comment No. 3 of the African Commission, Article 4 of the Protocol for Women, and General Comment No.36 of the Human Rights Council, which provide that the right to life lays the foundation for the obligation to respect and give effect to it through legislative and other measures.

### **2.3.3.5 Right to freedom and security of the person**

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<sup>344</sup> Resolution 260 (n 148)

Article 29 of the Constitution provides that ‘every person has the right to freedom and security of the person which includes the right not to be subjected to physical and psychological torture or treated in a cruel, inhuman or degrading manner. Article 7 of the ICCPR and Article 5 of the African Charter both provide that no one should be subjected to torture or cruel, inhuman, or degrading treatment. Failure to obtain L.A.W’s informed consent before her sterilization caused her psychological torture and subjected her to cruel, inhuman, and degrading treatment. Resolution 260 on involuntary sterilisation and protection of human rights in access to HIV services provides that all forms of involuntary sterilisation violate the right to equality, non-discrimination, dignity, liberty and security of person, freedom from torture, cruel, inhuman and degrading treatment, and the right to the best attainable state of physical and mental health.<sup>345</sup>

### **5.3.3.6 Right to Dignity**

Article 28 of the Constitution provides that every person has inherent dignity and the right to have dignity respected and protected. This right is guaranteed under Article 1 of the Universal Declaration, Article 5 of the African Charter, and Article 3 of the Protocol for Women. The involuntary centralisation of L.A.W led to her suffering and indignity as she was unable to engage in a fundamental reproductive act of bearing children.

### **5.3.3.7 Right to privacy**

Article 31 of the Constitution states that everyone has the right to privacy”. The right to privacy is also protected in Article 12 of the UDHR, Article 17(1) of the ICCPR. The right to privacy goes to the heart of one’s autonomous identity.<sup>346</sup> Failure to obtain L.A.W’s informed consent violated her right to make decisions and undermined her autonomous identity.

In the judgement, the Court, amongst other things, stated that the social and economic rights under Article 43 of the Constitution were positive rights that imposed obligations on the State to do as much as it could to secure for its citizens a core minimum of the social and economic rights.<sup>347</sup> The state must, therefore, take positive steps to realise these rights. The court further stated that

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<sup>345</sup> As above

<sup>346</sup> *Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and anti-Corruption Commission & 5 others* [2016] eKLR

<sup>347</sup> *L A W & 2 others v Marura Maternity & Nursing Home & 3 others* (n 334) para 30

the full realisation of the petitioner's right to reproductive health called upon the State to among other things develop health policies, legislate on health, build and equip hospitals, employ qualified health professionals and facilitate their training.

### **5.3.3.8 Remedies**

The court declared A declaration hereby issued that it is the right of women living with HIV to have equal access to reproductive health rights, including the right to freely and voluntarily determine if, when, and how often to bear children. A declaration as a result of this issues that the act of sterilization of the 1st petitioner herein by the 1st respondent by way of bilateral tubal ligation was undertaken without obtaining the 1<sup>st</sup> petitioner's informed consent and as such, it amounted to violation of the 1st petitioner's constitutional rights and fundamental freedoms under articles 27, 28, 43(1)(a) and 45 of the Constitution.

The 1st petitioner is as a result of this awarded compensation in the sum of Kshs 3,000,000/- (Kenya shillings three million only). Payment thereof shall be based on 70% against the 1<sup>st</sup> respondent and 30% against the 2nd respondent since this is a public interest litigation, each party to bear its costs.

### **5.3.4 Implementation stage**

#### **5.3.4.1 Lessons and Challenges**

The case demonstrates how PIL was used to address a systemic issue and hold state institutions accountable. The court's interpretation of legal provisions has set an important precedent for future cases. Regarding state liability, the court, in favour of the government, stated that the National Government could not be held to have aided the infringement because it had passed legislation and policies on informed consent and adopted international treaties and instruments on health. Further, the state was not found liable because, according to the court, the government had put in place mechanisms for complaints against health providers and institutions and how such complaints are dealt with. The court, by exonerating the state entirely even though the second health center was under the charge of the County government, brings into question whether or not the overall judgment by the court was a win in the broader scheme of things.

## 5.4 Conclusion

A lesson for South African litigators is that in the claims formation stage, it is important to consider who litigates carefully. The content of the claims and its relationship to the right to health.<sup>348</sup> In both cases, the litigation was supported by legal experts in reproductive health rights. The litigation also found support from international and national experts who lent their voices to effectively enable litigates to argue their case through amicus briefs. In the above cases, one was adjudicated in the high court and the other in the constitutional court, and what these cases have in common is that they were both successful. The legal opportunity structure reveals that while the courts displayed independence in how the matters were adjudicated, the judgments lack enforcement power. In both cases, the judges upheld the claims. They provided remedies but did not affirm the claim by missing the opportunity to issue further directions with specific remedies or supervisory orders.

This chapter illustrates how PIL remains essential for addressing systemic issues and holding institutions accountable. It also indicates that implementation and enforcement remain key challenges as this stage does not always result in the desired social change. Litigates must use strategies to incorporate stakeholders such as NGOs, civil society, social movements, and legal experts to strengthen the impact of PIL.

The findings of this chapter corroborate Epps' third condition, which is that litigants must have the capacity to articulate and formulate their grievances effectively. Litigants must be able to convey particular problems within a rights framework and bring these cases to court.

While this analysis shows how public interest litigation can be used as an advocacy tool to advance reproductive rights in South Africa, Epps' four conditions are never perfectly met. Ultimately, Epps' fourth condition, requiring a strong civil society support network throughout the different stages of the judicial proceedings, is the only way to achieve social change. The activities include raising awareness and shaping the debate favourably regarding obstetric violence.

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<sup>348</sup> Gloppen (n 65) 29

## CHAPTER 6

### CONCLUSION AND RECOMMENDATIONS

#### 6.1 Introduction

This chapter discusses the findings and conclusions of the study. This chapter will provide a summary of the theoretical framework guiding the research and its relevance in providing an understanding of PIL as a tool for addressing and redressing victims and survivors of obstetric violence. This chapter will also summarise international and regional law protections of reproductive rights regarding obstetric violence and the obligations of the state concerning these rights. This chapter will provide an overview of the laws and policies that South Africa has introduced to ensure the realisation of reproductive health and rights of victims and survivors of obstetric violence. This overview will include a summary of women's lived experiences accessing maternal and obstetric care. This chapter will summarise the lessons South African litigators can learn from Kenya regarding the strategy employed to undertake PIL on obstetric violence. The chapter will then give recommendations on what can be done to address obstetric violence and the obstacles that hinder redress.

#### 6.2 GENERAL CONCLUSIONS

##### 6.2.1 Public Interest Litigation Theoretical Framework

Chapter two focused on unpacking the PIL theory by discussing features related to it, such as its origins, contextualising the theory in South Africa. The study found that PIL is defined by a set of principles, values, and objectives to use the law and the courts to effect social change. In discussing the PIL theory, the study found that PIL is grounded in liberal democracy and constitutionalism systems, which contain mechanisms for different organs of state, executive, legislature, and the judiciary to check and balance each other. For PIL, the judiciary is the most important pillar, as this organ has the power to require the executive and legislature to do or refrain from doing something. According to Gloppen, over the last decade, PIL has been used to fight for health rights as a way to access justice, to call for law reform, and as a political empowerment. This study found that PIL is a promising avenue for legal change as the courts are a conduit through which the state

can be engaged on a particular issue. According to Gloppen, to effectively analyse the effectiveness of a PIL strategy, lawyers must look at 1. Which mechanisms have been provided to the government accountable? 2. How courts adjudicate, interpret and analyse the legal framework, 3. The implementation stage of the court judgment.

### **6.2.2 Recognition of obstetric violence in international and regional law**

Chapter three of this study addressed the mechanisms provided by international and regional law to hold the government accountable. According to Gloppen, understanding the mechanism available to hold the government accountable is a core feature for PIL. This discussion showed that obstetric violence has been recognized as a form of violence against women. In assessing the protections available to women in international and regional law, the study discussed the link to obstetric violence, such as the right to health, the right to autonomy, the right to life, the right to equality and non-discrimination, the right to information, the right to be free from inhumane and degrading treatment, and the right to remedy.

Reference was made to human rights instruments such as the Universal Declaration, ICESCR, ICCPR, CEDAW, CRC, African Charter, and the Protocol for Women in discussing the rights linked to obstetric violence. This discussion highlighted that obstetric violence is recognised in existing human rights in international and regional human rights instruments. There are specific protections against obstetric violence and associated state obligations to respect, protect and fulfill women's reproductive services and childbirth, which is free from mistreatment and gender-based violence. From a human rights perspective, the government of South Africa is bound by its obligation to address obstetric violence.

### **6.2.3 Recognition of obstetric violence in South Africa's human rights framework**

Chapter four focused on determining the extent to which South Africa has complied with its international and regional human rights obligations in ensuring that women are protected from obstetric violence. This chapter analysed the laws and policies South Africa has in place to ensure that women are protected from obstetric violence. This chapter shows that the Constitution of South Africa protects women's reproductive health rights. The constitution provides for the right to health, which includes reproductive healthcare. This right is subject to the South African

government taking reasonable legislative measures within its available resources to achieve the progressive realisation of the right to health. This chapter discusses this caveat and how it has been interpreted in critical jurisprudence, revealing the delicate balance between the court's powers and those of other state organs. The government of South Africa should be commended for meeting its international and regional obligations by having comprehensive provisions that victims and survivors of obstetric violence can rely on to claim their reproductive health and rights, such as the National Health Act, the National Patients' Rights Charter, the Guidelines for Maternity Care, and the Sterilisation Act. Against this backdrop, however, are the lived experiences of women in accessing obstetric services and childbirth services, which indicate that migrant women are denied maternal healthcare, women face neglect, physical and verbal abuse at the hands of nurses, women are involuntarily sterilised in some cases because of their HIV-positive status, and that women face barriers when trying to access justice and redress.

This study found that the courts have called for forward-looking remedies that seek to resolve problems for the future for long-term sustainable solutions. There is a need to adopt a holistic approach to address obstetric violence in the larger society. In this way, courts can directly create social change as they can enforce their own decisions.<sup>349</sup> For social change to occur, the executive and the legislature must be willing to act.<sup>350</sup> Should there be difficulty in enforcement between these state organs, the court will be seen as lacking the independence to implement its decisions.<sup>351</sup> South African jurisprudence shows us that the courts can enforce their decisions when the legislature and the executive are open to direction. Judging from the jurisprudence there is a likelihood that PIL on obstetric violence in South Africa will result in the enforcement of the rights of victims and survivors of obstetric violence.

#### **6.2.4 Public interest litigation on obstetric violence in Kenya: Lessons for South Africa**

This chapter discussed the jurisprudence regarding PIL on obstetric violence in Kenya. The study focused on three stages of the litigation process: 1. Rights formation stage, 2. Adjudication stage and 3. The implementation stage of the litigation. The case studies focused on two forms of obstetric violence, denial of care and forced sterilisation. The analysis of the Kenyan cases reveal

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<sup>349</sup> Rosenberg (n 111) 4

<sup>350</sup> Handler (n 63) 22

<sup>351</sup> Rosenberg (n 111) 3

that the rights of victims and survivors of obstetric violence are justiciable. Critiques of the judgments center on the application of the general rule that courts must adhere to the separation of powers by not venturing into the confines of policy makers. Limiting the court's ability to create social change. Ultimately the court relies on the other organs of state to take it upon themselves to create tangible social change. The question is whether the courts' judgments have led to social change? The study finds that in order for PIL to meet its full potential, collaborations with different stakeholders are essential.

#### **6.2.4.1 Claims formation stage**

Lawyers should assess whether the state guarantees rights that could be applied to reproductive health. This is important because litigants must frame rights violations around the constitutional or legal framework that recognises human rights in order to achieve social change through the courts.<sup>352</sup> Lawyers should assess whether activists are capable of building cases based on these rights that appeal to judges and send clear and engaging messages to the community to create opportunities to connect with other social movements. Lawyers must have the capacity to frame and articulate social problems as rights violations.<sup>353</sup>

#### **6.2.4.2 Adjudication stage**

Lawyers must examine jurisprudence to assess whether the courts and judges are informed about the complex technical and legal debates around reproductive rights in order to achieve success is access to an independent and knowledgeable judiciary.<sup>354</sup>

#### **6.2.4.3 Implementation stage**

Lawyers must assess whether there are organisations willing to mobilise around the litigation process. This assessment of the landscape of litigating reproductive rights will assist and enable civil society organisations to design advocacy strategies to litigating obstetric violence. Lawyers must network and garner support and leverage the opportunities presented by litigation.<sup>355</sup>

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<sup>352</sup> Roa (n 49) 32

<sup>353</sup> As above 33

<sup>354</sup> As above

<sup>355</sup> As above

## 6.3 RECOMMENDATIONS

### 6.3.1 Further research

This study is limited to identifying the conditions under which PIL can create social change in situations of obstetric violence. There is more research that needs to be done:

- i) To evaluate and distinguish which PIL strategies have led to social change regarding obstetric violence in Africa. Such a study will be of value to international and regional public interest human rights lawyers in Africa, as well as academics and international donors working in the field of reproductive rights. Such a study can be used to enhance law degree curricula, as a reference in seminars, conferences and exchanges among reproductive rights legal practitioners across the world and as applied research to inform policy and legislation and to provide baseline data against which progress can be measured.
- ii) The study participants should include reproductive rights stakeholders such as community and grassroots organisations, judges, practitioners, and key activists involved in PIL on obstetric violence in Africa.
- iii) The purpose of the study will be to assess the changing trends in African PIL on obstetric violence environment as well as current challenges. The study should include case studies of African PIL and significant case studies of recent PIL on obstetric violence.
- iv) The study should result in key strategies for using rights to achieve social change used in conjunction with a public interest to achieve maximum success in advancing social change regarding obstetric violence.
- v) The study should result in a list of factors to maximise the prospect of ensuring that PIL succeeds and achieves social change for victims and survivors of obstetric violence.

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