

Ensuring Gender Equality in Constitutions:

Engaging the Next Generation of Stakeholders



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Introduction

The United Nations has placed the full realisation of gender equality at the heart of its Sustainable Development Agenda, and women's empowerment is said to be a precondition for addressing many of the issues facing our world today. Sustainable Development Goal No.5 aspires to 'end all forms of discrimination...[and]... all forms of violence against women and girls' both in the private and public spheres.' The 2030 Sustainable Development Agenda, alongside international declarations and conventions, serves as a catalyst for the reimagining of constitutions, creating a more equitable world where women are valued, empowered and truly equal. It is in this spirit, that our papers seek to address the ways in which constitutions can be used to realise this end. Across a variety of countries, we examine the intersections not only between gender equality and constitutional provisions, but also the ways in which deep cultural bias can intersect with and frustrate the realisation of this goal.

In the face of this persistent discrimination against women and the girl child, these papers attempt to think creatively about how constitutional texts can be used to overcome this and to ensure that no woman is left behind as we head towards 2030.

The first chapter entitled *The Forced Sterilization of Aboriginal Women in Canada*, is an exploration of the continuation of wrongs that Aboriginal women have experienced at the hands of the Canadian government. From residential schooling to forced sterilisation, the lack of support in the Canadian Constitution was a main contributor to the perpetuation of these wrongs. Constitutional gaps in protection between section 25 and section 35 created a legal vacuum. This meant that there was little option in terms of protecting the individual rights of Aboriginal women. The eventual adoption of the UNDRIP provides a tool to possible reconciliation. While the declaration is not binding in nature, it provides a template for the reimagining and reinterpretation of the constitutional provisions.

With increasing efforts made by the UN to encourage transitioning countries to include a gendered perspective into their agenda, the 2010 Kenyan constitution is thought to serve as an example for including explicit gender perspective into the legal system during transitional periods. Chapter 2 analyses the effectiveness of gender equality provisions within the context of conflict and post-election violence in Kenya. This research draws upon relevant constitutional provisions by assessing the extent to which gender sensitive provisions increase the participation of women in transitional justice mechanisms and enhance women's access to redress to sexual violations during conflict.

Continuing with the transformative Kenyan Constitution, the next chapter examines the high maternal mortality rate in Kenya as a consequence of unsafe abortion. This paper considers whether the new 2010 Kenyan Constitution, together with legislation and case law, creates a positive right to access abortion in cases of rape. Furthermore, this paper examines how wider constitutional provisions might be used to ensure access to safe abortion more broadly. The Kenyan situation highlights a deep patriarchal bias, resulting in the relevant constitutional provisions being frustrated by lack of implementation. This, in turn, results in negative implications for women's reproductive health and safety.

The final chapter explores the nature and extent of state obligations to protect women from domestic violence. Drawing upon examples from South Africa and Ecuador, the research illustrates how constitutional transformation can be harnessed at the national level to replicate the positive development made by international law and to encourage more proactive responses to domestic violence. It highlights the importance of a global community that puts pressure on individual states to protect victims, deter perpetrators, and increase knowledge, awareness, and non-discrimination, particularly through constitutional provisions and interpretations.

Collectively, these papers offer suggestions and recommendations to national governments and the UN bodies by providing possible solutions for the way forward in each of the countries analysed. We hope that these papers highlight new ways in which constitutional provisions can be reimagined to advance gender equality.

The Forced Sterilization of Aboriginal Women in Canada:

An Exploration of How the Canadian Constitutional Provisions Have Addressed the Continuity of Wrongs

Simone Thomas

According to the national anthem, Canada is “our home and native land”, “the true north strong and free”. The national anthem should reflect the ethos, history, and traditions of the Canadian people. In reality, the source of our national identity has its foundation in the stolen identities of the Aboriginal men and women who are the true native inhabitants of this land we call home. Prior to European colonization, Aboriginal women especially, were considered to be strong, sacred, and spiritual beings that were the foundation of their families and communities. They were the very representation of strength and freedom. To have a national anthem that makes no reference to the very people upon whom the country was built sets the stage for the continuity of wrongs Aboriginal women have experienced for the last hundred years.

Throughout the process of European colonization, there has been a systematic dismantling of Indigenous womanhood. This was and continues to be an important step in the disenfranchisement and assimilation of native people into Canadian society. One of the first ways this assimilation initiative was achieved was through the founding of residential schools in the 1800s to which native children were sent.¹ In the early 1900s a global eugenics movement emerged that aimed to improve the genetic ‘quality’ of the population based on a series of arbitrary qualities that were seen to be inferior.² It was on this foundation that the United Farmers government of Alberta and the Liberal government of British Columbia enacted formal legislation in the form of sexual sterilization acts³. These legally allowed sterilization procedures to be performed without consent. In this way, the reproductive violence and forced sterilization that Aboriginal women faced predominantly between the 1930s and 1970s was merely a different tool to achieve the same goal; part of a continuity of wrongs against Aboriginal women. Forced sterilization, residential schools, and the missing and murdered Aboriginal women all fall within a wider group of wrongs that cannot be viewed in isolation. They are a result of discriminatory policies, provincial legislation, and national biases.

*I would like to extend my gratitude to the academic staff at Birmingham Law School for their continued support on this project. Without the guidance of Professor Fiona de Londras, Dr Emma Oakley and Dr Lydia Morgan this project could not have been the success that it was. I would also like to thank UN Women for creating this opportunity, allowing for so many inspirational female leaders from around the world to come together, collaborate and be the change-makers this world needs. Lastly, I would like to thank Collette Power, Magdalena Furgalska, Natasha Rushton and Umaeono Nkspong for their friendship and support throughout this project and beyond.

¹‘Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada’, (The Truth and Reconciliation Commission of Canada 2015) <http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> accessed 23 January 2017

² Stefan Kühl and others, *For the betterment of the race: The rise and fall of the international movement for Eugenics and racial hygiene*: 2013 (Palgrave Macmillan 2013)

³ Sterilization Act 1928, c. 37; Sterilization Act of British Columbia 1933, c. 59

This paper will discuss the history of residential schools, the eugenics movement, and the implementation of the Sexual Sterilization Acts in British Columbia and Alberta. Aside from the legislation allowing sterilization without consent, a large number of sterilizations in Canada were performed using coerced or uninformed consent.^{4,5} This demonstrates a progression from an outright infringement of human rights to a more subtle encroachment on the right to personal autonomy. The same underlying themes are still present and this is demonstrated when we see medical practitioners offer tubal ligations⁶ as a prerequisite to medical treatments or after pregnancies, especially if the mother is underage or has had multiple children. This section will aim to explore the experiences of women who have come forward and establish the impact that the sexual sterilization of Aboriginal women has had on their identity, families, and greater communities.

Constitutional Relevance

In 1982 the Canadian government redrafted the Constitution to include section 35, which recognizes and affirms Aboriginal rights. It is judicially recognized that the purpose of Section 35 is to,

“Provide a constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions, and cultures, is acknowledged and reconciled with the sovereignty of the crown”.⁷

Section 25 of the Canadian constitution is a non-derogation clause and was also incorporated as a way to protect the existing Aboriginal rights although some have argued that the clause has been used as a way to avoid early consultation with Aboriginal leaders.⁸ This section of the paper will first assess how effective section 35 is in addressing the wrongs Aboriginal women have been subject to in terms of violent reproductive practices. It will then explore how s.35 and s. 25 work in conjunction with each other and determine how these clauses facilitate reconciliatory consultation with Aboriginal leaders (or a lack thereof).

Acknowledging Aboriginal rights in the Constitution is a step in the right direction, however there are clear inconsistencies between legislation, policy, and implementation. It is difficult to truly harmonize Aboriginal policies with the execution of those policies when, in material ways, the Canadian Constitution is merely a renaming of the British North America Act 1867. The British North America Act 1867 and the Indian Act 1876 reduced the identity of Native Indians

⁴ It is difficult to accurately estimate the number of coerced sterilizations that took place. Karen Stote has engaged with this issue in her book, *An Act of Genocide: Colonialism and the Sterilization of Aboriginal Women*. In the research she has done it is estimated that just over 1000 sterilizations were performed between the years of 1970 and 1975 in the North alone. Of course this number will be much larger considering locations outside of the North, dates beyond 1975, and cases that have gone unreported.

⁵ Karen Stote, 'An Act Of Genocide: Eugenics, Indian Policy, And The Sterilization Of Aboriginal Women In Canada' (PhD, The University of New Brunswick 2012).

⁶ A tubal ligation is a surgical procedure where a medical professional cuts and ties the fallopian tubes of a woman as a form of permanent birth control. This can also be achieved by sealing the tubes using a tool with an electric current or blocking the tubes with a clamp.

'Sterilization For Women | Tubal Ligation Procedure' (www.plannedparenthood.org, 2017) <<https://www.plannedparenthood.org/learn/birth-control/sterilization-women>> accessed 27 March 2017.

⁷ R v Van Der Peet [1996] 2 SCR 507

⁸ Gordon Christie, 'Aboriginal citizenship: Sections 35, 25 and 15 of Canada's Constitution Act, 1982' (2003) 7(4) *Citizenship Studies* 481–495

and Metis to strictly a legal definition and gave no consideration to the distinct cultures and traditions of the individual tribes. The history of Indigenous relations in Canada paints a picture where the current injustices and inconsistencies fit perfectly into the foreground.

In order to gain an appreciation of the wider context to which coercive reproductive practices fits within, this final section will consider the similarities with the *Stolen Sisters*. In the last 30 years thousands of women and girls in Native communities have been murdered or reported missing. Not only have a large number of these crimes gone unsolved, but also they have not been adequately investigated. It can be argued that the lower standard of protection afforded to Native women is at the root of the disproportionate reproductive and physical violence that women in Aboriginal communities experience.

A History of Wrongs

In addressing the history of residential schools in Canada, the Truth and Reconciliation Commission describes the process of assimilation, which caused Aboriginal peoples to cease to exist as independent entities, as a cultural genocide.⁹ This cultural genocide was mainly facilitated by the introduction of reserves and residential schools.

The first attempt at forced assimilation of Indigenous peoples into Canadian society came in the mid-1830s in the form of day schools.¹⁰ These schools were most often located on the reserves and involved Methodist or Catholic missionaries teaching the Indigenous peoples of Upper Canada European trades, crafts, and methods of agriculture.¹¹ Day schools proved to be successful in influencing the adoption of clothing and domestic arrangements¹², however it was not as effective as the Canadian government would have hoped in fulfilling its true purpose. After the government realized that the day schools were not achieving the level of assimilation that they aimed for, there was a radical restructuring of the school system.

The residential school system can be said to have officially begun in 1879 in Western Canada with the introduction of three large residential schools for Aboriginal children.¹³ This number rapidly grew to 80 schools at its peak and the Truth and Reconciliation Report has estimated that at least 150,000 First Nation, Inuit, and Metis students passed through the system.¹⁴ Students would be forcefully removed from their homes and brought to these residential schools. There is overwhelming documentation that depicts numerous instances of physical abuse and sexual violence. In addition, in most cases it was unlikely that these children would ever see their families again. Arguably, one of the most impactful consequences of the assimilation period was the reimagining of the Indigenous identity.

⁹ (n1)

¹⁰ J. R. Miller, *Skyscrapers hide the heavens: A history of Indian-white relations in Canada* (3rd edn, University of Toronto Press 2000), 130

¹¹ H. Maclean, "The Hidden Agenda: Methodist Attitudes to the Ojibwa and the Development of Indian Schooling in Upper Canada, 1821-1860 (MA Thesis, University of Toronto 1978), 89

¹² Miller (n10) 131.

¹³ (n1)

¹⁴ Ibid 3.

In addressing the House of Commons, Sir John A MacDonal, the first Prime Minister of Canada, made the intention of residential schools explicit:

“When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write, his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men.”¹⁵

This ideological mentality that Native peoples are savages and should be sanitized of their culture and traditions, and assimilated into Euro-Canadian society, is the theme that allows the perpetuation of wrongs against Indigenous peoples today.

This was one of the first successful large scale attempts to assimilate Indigenous people into Canadian culture. Moreover, this assimilation tool effectively disrupted Aboriginal families, halting the passage of language, culture, and spirituality. In many traditional Aboriginal communities, motherhood was an affirmation of a woman’s power and a demonstration of her central role in society.¹⁶ With colonization and the introduction of residential schools, however, this reverence for a mother’s role in society was lost. Christian and Jesuit missionaries taught young girls how to behave in a patriarchal family structure. This included degrading the Indigenous family values and replacing them with the submissive and subservient ideals of a “domesticated” white woman.¹⁷ This disintegration of family values, achieved through residential schools, was crucial to the assimilative objectives of colonialism and was, in essence, a cultural genocide.

The Truth Commission Report describes biological genocide as the “destruction of the group’s reproductive capacity”.¹⁸ The continuity of wrongs against Indigenous women proceeds in this direction. In the early 1900s an international eugenics movement emerged. With its foundations in Mendelian laws of inheritance, the study of eugenics (or race hygiene) was based on the idea that social and intellectual traits were genetically inherited.¹⁹ Eugenicists believed that certain population groups were inferior and their reproduction would result in the “degeneration of the human race”.²⁰ Dr William Hutton, the president of the Eugenics Society of Canada advocated for the sterilization of the “feeble-minded”, “socially inadequate”, and “oversexed” in order to regulate the reproduction of these “inferior” groups.²¹

¹⁵ Canada, House of Commons Debates (9 May 1883), 1107–1108.

¹⁶ Kim Anderson, *A recognition of being: Reconstructing native womanhood* (Second Story Press 2000), 83

¹⁷ Ibid.

¹⁸ (n1)

¹⁹ Kühl (n2)

²⁰ Ibid 13.

²¹ Angus McLaren, *Our own master race: The eugenic crusade in Canada* (Oxford University Press, Canada 1990)

Eugenic beliefs reached their peak between the 1930s and 1970s after the American case of *Buck v Bell*²² in which the Supreme Court upheld Virginia's compulsory sterilization laws aimed at preventing the reproduction by "potential parents of socially inadequate offspring".²³ Carrie Buck was a 17-year-old girl who became pregnant as a result of rape. Upon examination of her family records, it was concluded that she suffered from hereditary feeble-mindedness and was "a typical picture of the low-grade moron".²⁴ She was promptly admitted into a health facility and was sterilized.

Only one year later, Aboriginal women north of the border began to experience a similar narrative. In 1928 Alberta enacted formal legislation called the *Sexual Sterilization Act*, and in 1933 British Columbia followed suit with legislation of the same name. Section 5 of British Columbia's Sexual Sterilization Act essentially states that its Board may order sterilization if they were convinced that upon release from a mental institution the "risk of multiplication of the evil by transmission of the disability to progeny was [not] eliminated".²⁵ Given that women of Aboriginal descent were disproportionately targeted by these policies, it is easy to see why the dismantling of Aboriginal identities was a crucial step in the assimilation process. By reconstructing the way Aboriginal women thought about themselves and vilifying sexualized behaviour, the state was able to implement these violent reproductive policies without interference. Shirley Williams, a survivor of the Blue Quills Residential School in Alberta, recounts the way she began to feel as a result of her time in the residential school system:

Many times they talked about that, so we began to feel that there was something wrong with our bodies; that because we were Indian girls, we were dirty. That was the way they talked. So, as you are growing, you begin to think that you are not worth anything, being Indian. Being an Indian woman is dirty. Being Indian was to be told that you are not worthy. You are less than. You begin to feel this low self-esteem. I think we came out of there so pitiful.²⁶

In 1945, the Essondale Report was released. This is a case study of sixty-four individuals institutionalized at the Essondale Mental Hospital who were sterilized under the Sexual Sterilization Act (British Columbia) between 1935 and 1943.²⁷ Of the 64 individuals in the report, fifty-seven were women, between the ages of thirteen and forty-four.²⁸ The reasons cited for sterilization are a reflection of the racist, patriarchal, and eugenic undertones in Canadian society at the time. Of the 57 women sterilized, forty-six of them were single and thirty-five of them were sterilized because of promiscuous behavior. In addition, thirty-three women had an IQ of

²² 274 U.S. 200 (1927).

²³ Dorothy E. Roberts, *Killing the black body: Race, reproduction, and the meaning of liberty* (Knopf Doubleday Publishing Group 2000), 68

²⁴ *Ibid* 69.

²⁵ Sterilization Act 1928, c. 37, s.5

²⁶ Anderson (n16) 93.

²⁷ Karen Stote, 'The coercive sterilization of aboriginal women in Canada' (2012) 36(3) *American Indian Culture and Research Journal* 121

²⁸ Gail van Heeswijk, 'An Act Respecting Sexual Sterilization: Reasons for Enacting and Repealing the Act' (MA Dissertation, University of British Columbia 1994) 51

69 or below²⁹, which meant that they were classified as “mentally defective”³⁰ and therefore, the Board did not need consent for sterilization procedures³¹. There is one case in the Essondale Report that warrants particular concern. A twenty-three year old single woman was reported to have “marked sexual tendencies”, and was diagnosed as an imbecile despite having an IQ of 76.³² She made an appeal to not be sterilized, however this was rejected and the Provincial Secretary’s Department provided the consent.³³

The main difference between the Albertan and British Columbian Sexual Sterilization acts is that the Albertan Act was amended three times to expand the scope of who would be eligible for sterilization recommendations.³⁴ The British Columbian Act however remained unchanged and offered quite a limited scope in comparison. The case study in the Essondale Report proves that, despite legislative limitations, the BC Provincial government was able to take matters into their own hands to further their agenda. This is an explicit example of the ways in which the government violated Aboriginal women’s right to choice.

Even after the Alberta and British Columbia sterilization acts were repealed in 1972 and 1973, respectively, health facilities around Canada still failed to provide Aboriginal women with true autonomy over their reproductive health. Many women only experience the illusion of choice, which Rickie Sollinger refers to in this quote:

In theory, choice refers to individual preference and wants to protect all women from reproductive coercion. In practice, though, choice has two faces. The contemporary language of choice promises dignity and reproductive autonomy to women with resources. For women without, the language of choice is a taunt and a threat. When the language of choice is applied to the question of poor women and motherhood, it begins to sound a lot like the language of eugenics: women who cannot afford to make choices are not fit to be mothers. This mutable quality of choice reminds us that sex and reproduction—motherhood—provide a rich site for controlling women, based on their race and class ‘value’.³⁵

The idea of choice being a “taunt and a threat” was exactly how forced sterilization evolved into coerced sterilization. Since medical facilities could no longer perform sterilizations without consent they used coercion to manufacture consent. Often times the “option” of sterilization

²⁹ *ibid* 52.

³⁰ *ibid* 49.

³¹ Jana Grekul, Arvey Krahn, and Dave Odynak, 'Sterilizing the 'feeble-minded': Eugenics in Alberta, Canada, 1929-1972' (2004) 17(4) *Journal of Historical Sociology* 358–384

³² Heeswijk (n28) 51.

³³ *ibid* 51.

³⁴ This expansion of scope resulted in 4725 sterilization proposals and 2822 of those proposals being approved. Compare with British Columbia whose Act was employed only a few hundred times. Angus McLaren, 'The creation of a haven for 'human thoroughbreds': The sterilization of the feeble-minded and the mentally ill in British Columbia' (2016) 67(2) *The Canadian Historical Review* <<https://muse.jhu.edu/article/573723/pdf>> accessed 24 February 2017 127–150, 145

³⁵ Rickie Solinger, *Beggars and choosers: How the politics of choice shapes adoption, abortion, and welfare in the United States* (Hill and Wang 2001) 225

would be introduced as a prerequisite for medical treatment, as a punishment for crimes, or through fraudulent consent forms.³⁶

Other times, manufactured consent is received through sheer intimidation and pressure. Brenda Pelletier's case is the prime example of this type of coercion. Brenda Pelletier is a Cree Metis woman who, in 2010, gave birth to her seventh child at the Royal University Hospital in Saskatchewan.³⁷ She claims that a social worker told her that she wouldn't be discharged from the hospital until she signed the consent form and underwent a tubal ligation. If she didn't agree to the procedure she would be labeled as a negligent mother. At no point did Brenda actually want to undergo the procedure, however she claims that after hours of being repeatedly asked to sign the consent form she did so simply so that the social workers would leave her alone and she could go home with her daughter. Brenda was also under the impression that the ligation would be using clamps, in effect making the procedure reversible. In reality, however, as Brenda was lying on the operating table she began to sense a burning smell as the anesthesiologist said, "It's okay dear. They're just burning the ends." This is an explicit example of what coerced sterilization looks like in practice.

Five years later, in 2015, the Saskatoon Health Region issued an apology to Brenda Pelletier and one other woman who experienced a similar situation. But one must consider why it took the health authority five long years to merely issue an apology. Is there any coincidence that the apology was issued less than a month before the Truth and Reconciliation Commission was due to issue its Final Report on the residential school system? On the same day that the TRC's Final Report was published, Justin Trudeau, Canada's Prime Minister, also made a formal statement of apology.³⁸ Given the context and surrounding events, it seems that there may be a possibility that the Saskatoon Health Region issued their apology as a strategic public relations decision. In their 2015 apology, Jackie Mann (Vice President for Integrated Health Services) stated that an external review had been ordered and "the person who would be heading the review would be selected in the next week or two".³⁹ It has now been over 2 years later and the full review was only begun on January 20, 2017.⁴⁰ Although there was an initial lack of urgency in addressing this issue there now does seem to be an actual commitment to finding redress. The Saskatoon Health Region has been working with the First Nation and Metis health service and has been receiving guidance from elders in the Aboriginal community to make sure the women feel supported throughout the process. In addition, a new policy has been put in place at the hospital to inform the procedure of gaining consent. The main changes that have been implemented as a result are as follows⁴¹:

³⁶ McLaren (n34)

³⁷ 'Saskatoon woman sterilized against her will suffering 5 years later', *CBC News* (19 November 2015) <<http://www.cbc.ca/news/canada/saskatoon/saskatoon-woman-sterilized-against-will-1.3324980>> accessed 6 March 2017

³⁸ Joanna Smith and Alex Boutilier, 'Time to lift the burden of residential schools, says prime minister Justin Trudeau | Toronto star' *The Star* (15 December 2015) <<https://www.thestar.com/news/canada/2015/12/15/time-to-lift-the-burden-of-residential-schools-trudeau-says.html>> accessed 6 March 2017

³⁹ (n36)

⁴⁰ *ibid.*

⁴¹ Leanne Smith, 'Maternal Services Policy and Procedure Manual' <https://www.saskatoonhealthregion.ca/locations_services/Services/Maternal-Newborn-

1.4 - In order to facilitate full, free and informed consent, this discussion must occur prior to hospitalization between the patient and her care provider; documentation of said discussions must be included on the patient's prenatal record.

3.2 - Staff are not to ask women if they are considering a tubal ligation if their desire for a postpartum tubal ligation (PPTL) is not documented on the prenatal record.

4.1.2.1 - Consent must be obtained in the patient's room, prior to transfer to the OR holding area.

4.1.5 - If there is no documentation on the prenatal record or signed consent prior to the patient coming to OR holding, the tubal ligation will be cancelled.

These policy changes aim to prevent the wrongs that Brenda Pelletier and others like her have experienced. It is too soon to really analyze the impact of this policy change and although this is just one change at one hospital, it is a step in the right direction.

I argue that there is a correlative link between a national focus on Aboriginal rights and the implementation of new policies and procedures at a grassroots level. Historically, the lack of concern for the rights of Aboriginal peoples, from a governmental perspective, has meant that extremely important issues have been swept under the rug and largely gone ignored. On the other hand, when it is clear, on a national level, that Aboriginal issues are important and need to be taken seriously, there is a trickle down effect that causes a shift in perception and practice.

Section 35 of the Canadian Constitution

As mentioned above, the Truth and Reconciliation Commission Final Report brought widespread attention to Aboriginal rights and the Canadian government's failure to protect those rights. Ironically, this large-scale inquiry into the history of the residential school system came about as a result of the *In re Residential Schools Class Action Litigation*.⁴² In this class action suit the plaintiffs were former students at residential schools and they brought a claim against the Canadian government, as well as number of churches, for the harms that arose from their Indian Residential School experience. With a settlement of \$1.9 billion CAD, this was the largest class action settlement in Canadian history.⁴³

Care/Documents/1300%20PPTL%20Policy%20Oct%202016%20Leanne%20Signed%20off.pdf>accessed 6 March 2017

⁴² *Quatell v Attorney General of Canada* [2017] BCSC, 1840 (BCSC).

⁴³ Government of Canada, 'Timeline - Indian residential schools' (*Indigenous and Northern Affairs*, 27 May 2015) <<https://www.aadnc-aandc.gc.ca/eng/1332939430258/1332939552554>> accessed 6 March 2017

Canada is one of the few countries that entrenches Indigenous rights in its Constitution. This is mainly facilitated through section 35(1) which provides that:

The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.⁴⁴

In essence, s.35 goes further than simply recognizing the rights of Aboriginal people; it affirms the Crown's obligations. Borrows takes the view that, "whenever Aboriginal 'rights' are invoked, governmental 'duties' are summoned".⁴⁵ If this is the case, and Aboriginal rights were constitutionally invoked through the incorporation of s.35 in 1982, why did it take a record-breaking class action lawsuit to trigger the governmental investigation into abuses experienced by Aboriginals? If this is what it takes for the government to satisfy its positive obligations to the indigenous community, the road to reconciliation will be a long one. Not only that, but it may mean that the government has set a precedent and created an environment that facilitates the continuation of wrongs experienced by Aboriginal women.

Before assessing how or if s.35 can be used to protect the rights of Aboriginal women, one must first examine the scope of the provision and seek to determine what rights the section aims to protect. Subsections 2 and 3 provide further clarity in the meaning of s.35 (1). Section 35(2) provides that:

"Aboriginal peoples of Canada' includes the Indian, Inuit and Metis people of Canada"

Section 35(3) provides further guidance to the meaning of 'treaty rights':

"For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

Claims arguing a violation of treaty rights typically involve questions of land ownership and land use (the right to fish, hunt, trap, etc.).

While it is commendable that the Canadian government has constitutionally recognized the rights of Aboriginal communities, this provision also raises some concerns. Drafted in the light of the assimilationist views of the past, section 35 seems to only address the rights of communities, and not the individuals within them. This idea is inherent in the identification and codification of Aboriginal people. The Canadian government's ability to define who can and cannot be considered 'Aboriginal' takes a personal decision and a cultural identity and reduces it down to a legal concept. To fully understand, one must turn to the history of the Indian Act.

The Indian Act first came into effect in 1876⁴⁶, not long after Canada's confederation in 1867 and was simply a comprehensive consolidation of Indian policies prior to confederation⁴⁷. Despite becoming its own country, Canadian Indian policy still adopted the racist views of British North America. There was no consultation with individual Native tribes to take into

⁴⁴ The Constitution Act, 1982, s35(1)

⁴⁵ John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press 2010) 186

⁴⁶ The Indian Act 1876

⁴⁷ John F Leslie, 'The Indian Act: A Historical Perspective' (2002) 25 *The Canadian Parliamentary Review* <<http://www.revparl.ca/english/issue.asp?art=255¶m=83>> accessed 9 March 2017.

consideration their cultural, religious, or ideological norms.⁴⁸ Whiteside argues that the Indian Act was intended to:

1. Undermine traditional religion, leadership, and culture;
2. Sever natural relationships with other Amerindians; and
3. Ensure that the authority for every important decision was removed from the influence of and control of Indigenous people.⁴⁹

The Indian Act currently makes the distinction between status (or registered) and non-status Indians. A registered Indian is “a person who, pursuant to this Act, is registered or is entitled to be registered as an Indian”.⁵⁰ Non-status Indians may personally identify as being from Indigenous background but, from a legal standpoint, their ethnicity has no bearing on the rights afforded to them by the government. The systematic categorization of Indigenous people by the Canadian government was merely a way of using ethnic descent to identify those to whom it had a legal and financial obligation, thereby ignoring the individual. From this perspective, the Indian Act was just yet another tool that was used to dismantle and reconstruct the identity of Aboriginal women.

Meaning and Scope of Section 35

In terms of the purpose of s.35 it was held that the provision should provide a constitutional framework for reconciling the existence of indigenous societies with the assertion of settler sovereignty.⁵¹ Prior to this, the first time the Supreme Court had the opportunity to analyze the meaning of s.35(1) was in *R v Sparrow*⁵² in 1990. Sparrow was a member of the Musqueam band in British Columbia and was challenging the decision in the Court of Appeal, which said that he had no inherent Aboriginal right to fish. He appealed this decision on the grounds that s.35(1) should have protected his right to fish. The Supreme Court unanimously agreed, however the court’s analysis of s.35 is more important to the argument here than the actual facts of the case. In determining whether the Musqueam band had the right to fish, the Court systematically analyzed the meaning of each contentious word in s.35(1). Beginning with the word ‘existing’, Rt. Hon. Dickson stated

The phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time... Section 35(1) is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights.⁵³

⁴⁸ James S. Frideres, *Native People In Canada: Contemporary Conflicts* (Pearson Education Imports: Depositories 1983).

⁴⁹ *ibid* 25.

⁵⁰ The Indian Act 1985 c.2(1)

⁵¹ *Van der Peet* (n7)

⁵² [1990] 1 S.C.R. 1075

⁵³ *ibid* [1078]

Despite there being no definitive list of Aboriginal rights, s.35 has only ever been used to protect collective rights to language, education, or culture, or for treaty and land based rights. Never has it been used to protect a breach of a fundamental human right. Taking a purposive approach and interpreting s.35(1) flexibly, there seems to be no reason why individual rights and freedoms should not be protected by s.35. If reconciliation is the goal and the Constitution is the tool, the government should be affording Aboriginal people an added protection for their fundamental human rights that are so often breached, especially as a result of systemic racism and coercive reproductive policies.

When addressing “recognition and affirmation”, the Supreme Court said that these words “incorporate the government’s responsibility to act in a fiduciary capacity with respect to aboriginal people”.⁵⁴ This reasoning in *R v Sparrow* created a precedent in the way it interpreted s.35(1), in that it established that the government has a special duty and responsibility to protect the rights of Aboriginal people.

R v Van der Peet, a later Supreme Court case, provides further guidance on the meaning and scope of s.35 rights. It held that s.35 provided a constitutional framework for reconciliation based on the fact that Native peoples inhabited the land prior to European invasion and had a distinct set of traditions and cultures. This separated Aboriginal peoples from other minorities and mandated their special legal and constitutional status.⁵⁵

In contrast, however, it also established the “integral to a distinctive culture” test that said that in order to count as Aboriginal rights, any claim brought to court must center on practices, customs, and traditions that were distinct to the culture in pre-colonial communities.⁵⁶ This narrows the scope of rights that warrant protection and in effect is a dangerous precedent to set. This test essentially freezes Aboriginal rights in the past and doesn’t allow for the flexibility and evolution of Aboriginal rights over time, contrary to the judgment in *Sparrow*. John Borrows states,

With this test, as promised, Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospective. It is about what was, 'once upon a time,' central to the survival of a community, not necessarily about what is central, significant, and distinctive to the survival of these communities today. His test has the potential to reinforce troubling stereotypes about Indians.⁵⁷

Borrows’ argument gets right at one of the main points of this paper. Aboriginal people are continually being told, in various different ways, that they are not allowed to determine their own identity and culture, and they have no autonomy over their own lives. While fishing and hunting was central to survival prior to European contact, arguably, what is necessary for the survival of Aboriginal communities today is the distinct protection against continual human rights violations.

⁵⁴ *ibid* [1079]

⁵⁵ *Van der Peet* (n7)

⁵⁶ *ibid*

⁵⁷ John Borrows, *Recovering Canada: The Resurgence Of Indigenous Law* (1st edn, University of Toronto Press 2002).

Section 25

Section 25 is the other main provision in the Constitution that addresses Aboriginal rights. Moreover, it is the only provision in the Charter that expressly refers to Aboriginal rights.⁵⁸ It says:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including,

- a) Any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- b) Any rights or freedoms that now exist by way of land claims agreement or may be so acquired.⁵⁹

Section 25 was introduced into the Constitution in a later redrafting after there was much concern from the Aboriginal communities about the inclusion of section 15. Section 15 was the biggest threat to the rights of Indigenous peoples in Canada.⁶⁰ It provides that,

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁶¹

This posed a threat for Aboriginal peoples because the provision potentially meant that there would be an infringement on treaty and aboriginal rights on the grounds that they were receiving increased protection and benefit from the law. From this perspective, s.25 was introduced in order to protect against the abrogation and derogation of Aboriginal rights by way of s.15.

In comparison with s.35, there has been significantly less case law surrounding the application of s.25. However, the purpose of s.25 was also analyzed in *R v Agawa* in the Court of Appeal. In this case, it was established that the section does not confer any new rights onto Aboriginals but instead shields old ones.⁶² Former Prime Minister Jean Chrétien also indicated a similar

⁵⁸ William Pentney, 'Part I: The Interpretive Prism Of Section 25 The Rights Of The Aboriginal Peoples Of Canada And The Constitution Act, 1982' (1988) 22 University of British Columbia Law Review 27 <<http://heinonline.org/HOL/Page?handle=hein.journals/ubclr22&id=1&size=2&collection=journals&index=journals/ubclr#>> accessed 26 March 2017.

⁵⁹ The Constitution Act 1982, s25

⁶⁰ Jane Arbour, 'The Protection Of Aboriginal Rights Within A Human Rights Regime: In Search Of An Analytical Framework For Section 25 Of The Canadian Charter Of Rights And Freedoms' (2003) 3 Supreme Court Law Review 43

⁶¹ The Constitution Act 1982, s15

⁶² *R v Agawa* (1988) 43 CCC

purpose.⁶³ Given the history of how s.25 came to implementation, Arbour summarizes the purpose of s.25 as follows:

To prevent Charter rights and freedoms from diminishing other rights and freedoms of Aboriginal peoples in Canada, whether those rights are in the nature of Aboriginal, treaty, or 'other' rights.⁶⁴

Further to the relative lack of academic and legal discussion surrounding the purpose of s.25, there has also been disagreement on how the provision should be applied in practice. William Pentney viewed s.25 as an "interpretive prism" that was "intended only as an interpretive guide and not as an independently enforceable guarantee of aboriginal and treaty rights."⁶⁵ His reasoning for this is that s.25 is placed in the 'General' section of the Charter; separate from the substantive rights and freedoms. Taking this approach, s.25 would hold very little weight in actually providing any rights guarantees and would provide very little additional protection beyond the rights afforded in s.35.

An alternative view of the operation of s.25 is that it acts as either a selective shield or a full shield to the adverse affect of other Charter rights on Aboriginal rights.⁶⁶ A selective shield means, "Only certain aspects of Aboriginal rights are immune from the limiting effects of conflicting Charter rights".⁶⁷ This takes a similarly problematic approach to the "integral to a distinctive culture" test in *Van Der Peet*. In trying to dictate which Aboriginal rights should be protected by s.25, there is the potential of a) speaking on behalf of aboriginal people without adequate consultation with community leaders and b) isolating important rights outside the scope of protection. On the other hand, a full shield dictates that when a Charter right and an Aboriginal or treaty right conflict, the latter must prevail.⁶⁸ Some say that this approach creates a hierarchy of rights that is incompatible with the principles in the Canadian Constitution⁶⁹, however it could also be seen as a way to provide a more substantive means of protecting the rights of Aboriginal people; something that is desperately needed in light of the continuous wrongs they have faced.

How Do These Provisions Work in Conjunction with One Another?

⁶³ Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32d Parl., 1st Sess., vol. 4, No. 49 (30 January 1981) at 93 [Special Joint Committee].

⁶⁴ Arbour (n60) 32-33.

⁶⁵ Pentney (n58).

⁶⁶ Debbie Oy Chi Chan, 'Reconciliation And Balance: Resolving Conflicts Between Charter Rights And Aboriginal And Treaty Rights Within The Canadian Constitutional Framework' (Masters of Law, University of Toronto 2006).

⁶⁷ *ibid.*

⁶⁸ Brian Slattery, 'Brian Slattery, 'The Constitutional Guarantee Of Aboriginal And Treaty Rights' (1982) 8 *Queens Law Journal* 239-40

⁶⁹ Oy Chi Chan (n66) 22.

One of the main differences between section 35 and 25 is their placement within the Canadian Constitution. Section 25 is in Part I of the Constitution and is included in the ‘General’ section of the Charter of Rights and Freedoms. As mentioned above, this could be read to mean that s.25 is only of interpretive value, rather than protecting Charter rights in and of itself. Section 35, on the other hand, is in Part II of the Constitution and is outside of the Charter of Rights and Freedoms. This configuration has proven to be quite contentious and has several problematic implications.

The first implication is that since s.35 is in Part II, it is not subject to the limitations of Section 1. Section 1 provides that:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁷⁰

This is essentially a “notwithstanding” clause that places a limit on the protection of rights if doing so would be unreasonable. Prima facie, this placement of s.35 outside of the Charter seems to be advantageous because it means that the Aboriginal rights it protects cannot be limited via the s.1 notwithstanding clause. However, there are also some concerns that arise from this placement and the way in which the sections may work together. Returning to the “special duty” conferred on the government that was established in *Sparrow*, one must consider whether it is protected by s.25. In other words, can Aboriginal peoples argue that this special fiduciary and vindicatory duty granted by s.35 be used to protect individual Charter rights, rather than collective treaty rights? The wording in s.35 suggests that it cannot be used for this purpose, but arguably, this would be quite a narrow construction of the provision. To interpret it in this way would create a gap where the individual rights of Aboriginal peoples are not being adequately protected. This oversight and lack of protection is especially concerning considering the explicit focus on limiting the reproductive autonomy of Aboriginal woman.

So while s.25 says that treaty rights cannot be abrogated or derogated from, it makes no provision for the application of the s.35 ‘special duty’ to individual rights. Essentially, the individual rights of Aboriginal peoples are being protected through the same mechanism as every other Canadian. This falls short of the federal responsibility that is owed to Aboriginal people. It is exactly this type of legal vacuum that creates a fertile environment for perpetual human rights violations such as the ones Indigenous women in Canada have been facing for the last hundred years and more.

Christie argues that section 25 needs to be seen as a tool of “physical, mental, and spiritual decolonization” in order to “assist in the deconstruction and removal of hierarchal and unjust power systems”.⁷¹ To this I would agree, however, I would disagree with the approach he suggests. He suggests that s.25 be used to challenge the conception that rights are solely tied to individual persons, however, how can you adequately protect collective rights if individual rights

⁷⁰ The Constitution Act 1982, s1

⁷¹ Gordon Christie, 'Aboriginal Citizenship: Sections 35, 25 And 15 Of Canada's Constitution Act, 1982' (2003) 7 Citizenship Studies.

aren't also being protected? How can one truly operate within a collective if there is a lack of autonomy and freedom of the individual?

Individuals need to be empowered, autonomy needs to be restored, and identities need to be reclaimed before the community can prosper.

Saranchuk would agree that individual rights and collective rights do not have to be incompatible.⁷² In fact, he says that “many individual rights are not unambiguously individual and many collective rights are not unambiguously collective.”⁷³ If this is the case, there is little justification for differentiating between the scopes of s.35 and s.25. Because individual rights are inherently intertwined in collective rights and vice versa, it seems as though the attempt to separate them in the Constitution creates a void in the protection of rights where the collective and the individual overlap. This becomes especially apparent when trying to resolve the human rights violations of Aboriginal communities, such as those addressed in this paper. There is an argument to be made that these human rights violations ought to be protected under s.35 collective rights because the violation of the individual rights has arisen as a result of being a part of the collective.

United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples is an international declaration that is the result of over 20 years of consultation with Indigenous communities around the world.⁷⁴ Its main purpose is to protect the cultural distinctiveness of indigenous peoples and to provide a tailored response to the current threats they face by defining a set of basic rights.⁷⁵ Article 1 of the UNDRIP states

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.⁷⁶

There is an underlying tension between this full protection of collective and individual rights in the UNDRIP and the balancing of rights in the Constitution. This conflict became incredibly apparent when the Canadian government refused to adopt the UNDRIP in 2007. It is this attempt at balancing collective vs. individual rights, which creates a gap in the protection of

⁷² Andrew Saranchuk, 'Aboriginal And Treaty Rights: Collective Or Individual Rights?' (LLM, Laval University 1997) 18

⁷³ *ibid*

⁷⁴ Stefania Errico, 'The Draft UN Declaration On The Rights Of Indigenous Peoples: An Overview' (2007) 7 Human Rights Law Review.

⁷⁵ *ibid* 745.

⁷⁶ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (29 Jun 2006) (adopted by 143 votes to 4; 11 abstentions)

rights as a whole. Immediately after the UN had announced the UNDRIP, former Indian Affairs minister, Chuck Strahl, commented:

In Canada, you are balancing individual rights vs. collective rights, and (this) document...has none of that. By signing on, you default to this document by saying that the only rights in play here are the rights of the First Nations. And, of course, in Canada, that's inconsistent with our constitution.⁷⁷

This placed Canada in the company of the United States, Australia, and New Zealand, which were the only other countries to explicitly reject the declaration. It is hard to overlook the British influence and the colonialist past that these countries have in common. One would think that given the historical mistrust between the indigenous peoples and the British settlers in each of these countries, they would be quick to adopt the UNDRIP in an attempt to demonstrate their supposed commitment to indigenous rights. This would make sense, unless, of course, their commitment was purely symbolic with little aspiration to actually implement policies that would invoke accountability and improve the protection of individual and collective rights of aboriginal people.

This stance seems to reflect the view that prioritizing the individual rights of the indigenous people of Canada is inconsistent with the Constitution on the grounds that it neglects the rights of other individuals. However, this reasoning is flawed because it assumes that conferring a special duty on the government to protect the individual rights of indigenous people means that the rights of others have somehow diminished. This is not the case. The issue at hand here is confusion between equity and equality. Equality is the equal treatment of groups or individuals regardless of their background or differences between them. Equity, on the other hand, refers more to a 'leveling of the playing field', especially when a certain group is facing both current and historical grievances. Sometimes this may require a special obligation or an increased level of assistance in order to ensure that their rights are being upheld to the same degree as the rest of the population. Canada signed the International Convention on the Elimination of All Forms of Racial Discrimination in 1966 which states

Special measures...may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms...⁷⁸

When Strahl, and other government officials, made reference to the incompatibility of the UNDRIP with the Constitution they failed to acknowledge Canada's colonialist past and the fact that special attention is actually required in order to remedy those wrongs. Not only is the UNDRIP compatible with s.35 of the Constitution, it actually gets right to the heart of its purpose. It provides an additional means of "recognizing and affirming" the rights of Aboriginal

⁷⁷ Steven Edwards, 'Tories Defend 'No' In Native Rights Vote' *Montreal Gazette* (2007) <<http://www.pressreader.com/canada/montreal-gazette/20070914/281706905302273>> accessed 22 March 2017.

⁷⁸ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965) UNGA Res 1904 (XVIII) Art 1(4)

peoples in Canada. It also provides direction and guidance to the application of s.35 and confirms that there is in fact a special duty to protect these rights, concurrent with *Sparrow*.

Although the UNDRIP reaffirms *Sparrow*, it contradicts *Van der Peet's* interpretation of s.35. While it is not legally binding, the UNDRIP may be persuasive in triggering a revisiting of the s.35 interpretation in order to give it more of a positive purposive approach. Recall that *Van der Peet* established the “integral to a distinctive culture” test and dictated that in order to be considered an Aboriginal right, the cultural practice in question must have been present prior to European contact. In addition to being in contradiction with *Sparrow*, this interpretation is directly contrary to Art 11 of the UNDRIP which states that

Indigenous people have the ... right to maintain, protect and develop the past, present and future manifestations of their cultures.⁷⁹

Article 11 indicates that rights should not be frozen in time but instead open to evolution, a similar argument to the one Burrows makes.

In the 10 years since the UNDRIP has been in effect, all four countries who initially rejected the declaration have since adopted it. This includes Canada, which formally offered its support in November 2010 but still referred to it as an “aspirational document”.⁸⁰ In 2016 Canada went a step further when Carolyn Bennett, Minister of Indigenous and Northern Affairs, announced that Canada is now a full supporter of the UNDRIP without qualification.⁸¹ This announcement also confirmed that Canada would take the appropriate steps to “implement the principles of the declaration”.⁸² Doing so meant “we will be breathing life into section 35 of Canada’s Constitution, which provides a full box of rights for Indigenous peoples.”⁸³

Although it has only been a year since Canada fully adopted the UNDRIP and still is too early to predict the impact it may have, this declaration could provide the framework for justifying a purposive interpretation and the inclusion of individual rights within the scope of s.35. If treated as something more than simply an aspirational and symbolic document, the UNDRIP as an overall declaration offers a unified approach to Aboriginal rights protection that could potentially inform the way rights violations are addressed and prevented in Canada.

⁷⁹ibid Art 11.

⁸⁰ Government of Canada, 'Canada's Statement Of Support On The United Nations Declaration On The Rights Of Indigenous Peoples' (2010) <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>> accessed 27 March 2017.

⁸¹ ibid

⁸² ibid

⁸³ ibid

The Wrongs Continue: Stolen Sisters

Despite the abolition of residential schools and forced sterilization legislation in the 1970s, Aboriginal women continued to face violence in another form. Since the 1970s Aboriginal women in Canada have gone missing or have been found murdered at an increasingly alarming rate. This is the third type of genocide referred to in the Truth and Reconciliation Commission's Final Report. The mystery of the *Stolen Sisters* can be considered a physical genocide.

Because of a lack of adequate reporting it is difficult to cite an accurate representation of the number of Indigenous women who have been affected. The Royal Canadian Military Police estimated that between 1980 and 2012 approximately 1,200 Aboriginal women had gone missing or murdered, however, activists working for Walk 4 Justice estimate this number to be over 4000.⁸⁴ This gap between the official number and the activist number is far too large and well beyond the margin of error. One reason for the lack of an accurate estimate is because the RCMP does not necessarily record the ethnicity of crime victims.⁸⁵ This is such a simple change that could be made and would go a long way in providing an increased level of protection to Aboriginal women who are victims of violence. This is yet another example of the ways in which the government has failed Aboriginal women and provides further evidence that the wrongs that Aboriginal women face are just a part of a larger context.

The 2004 Amnesty International report on the *Stolen Sisters* declares that

When a woman is targeted for violence because of her gender or because of her Indigenous identity, her fundamental rights have been abused. And when she is not offered an adequate level of protection by state authorities because of her gender or because of her Indigenous identity, those rights have been violated.⁸⁶

This is not a revolutionary statement, however it seems that Canadian authorities have had to be reminded of this simple fact time and time again.

Despite the historical lack of protection, there was some evidence that the adoption of the UNDRIP in May 2016 triggered a positive response. In September 2016, the Government of Canada announced that they would be launching an independent National Inquiry into the Missing and Murdered Indigenous Women and Girls.⁸⁷ Generating an accurate database of information is the first step to reconciliation, however there is already some doubt surrounding the Inquiry's ability to do so. To date, the names of only 122 family members have been added

⁸⁴ John Paul Tasker, 'Confusion Reigns Over Number Of Missing, Murdered Indigenous Women' *CBC News* (2016) <<http://www.cbc.ca/news/politics/mmiw-4000-hajdu-1.3450237>> accessed 27 March 2017.

⁸⁵ Amnesty International, 'Stolen Sisters: A Human Rights Response To Discrimination And Violence Against Indigenous Women In Canada' (2004) <<https://www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf>> accessed 27 March 2017.

⁸⁶ *ibid*

⁸⁷ 'About Us — National Inquiry Into Missing And Murdered Indigenous Women And Girls' (*National Inquiry into Missing and Murdered Indigenous Women and Girls*, 2016) <<http://www.mmiwg-ffada.ca/en/about-us/>> accessed 27 March 2017.

to the database. This is concerning considering the estimate that 4000 women and girls have gone missing or have been murdered. Currently the onus has been placed on the families of the missing and murdered women to register their interest in participating in the inquiry. Many people have concerns with this approach, as it potentially isolates families in remote communities who do not have access to Internet, telephone, or fax machines.⁸⁸ The fact that families have to register at all is also something people take issue with. The last potential point of concern will be the locations of the hearings that are set to begin in May 2017.⁸⁹ The locations of the hearings have not yet been released but it is important to consider the ease of accessibility for those who may not have access to a vehicle.

If the inquiry is not going to provide a more comprehensive analysis than the report the RCMP released, the wrongs that Aboriginal women and their families have faced will continue to go unaddressed, further perpetuating the wrongs they have faced. So, while it is commendable that the government has started an independent inquiry, it will only be as successful as they make it accessible. In other words, the National Inquiry into the Missing and Murdered Indigenous Women and Girls needs to be extremely cautious of the potential barriers to participation they impose simply by virtue of the inquiry procedures they choose to implement. If the inquiry proceeds with a lack of representative consultation it runs the risk of being little more than another empty promise.

Conclusion: Moving Forward

In trying to find a viable method of redress and reconciliation, the Canadian government must go beyond the surface level apologies they once thought to be sufficient. The government and the rest of Canadian society need to transform its views on Indigenous peoples. Self-identification and the ability to define who they are as peoples, rather than consistently being told who they are from a legal perspective is a transformative process in and of itself. Society's perception should then follow suit.

Beyond the social change that needs to occur, lasting reconciliation will only happen with the support of the Canadian Constitution and the legal system. The Canadian constitution has the framework necessary to facilitate this. However, it is the adoption of the UNDRIP that challenges the current precedent, forcing the government and the judiciary to take a more expansive view as to the scope of its Constitutional protections. Only when both the social and the legal aspects have come together will we see a sustained improvement and lasting change.

⁸⁸ Martha Troian, 'Inquiry Into Missing And Murdered Indigenous Women Has Just 122 Names Registered' *CBC News* (2017) <<http://www.cbc.ca/news/indigenous/mmiw-commission-database-just-122-names-1.4035181>> accessed 27 March 2017.

⁸⁹ *ibid*

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Gender-Sensitive Transitional Justice Mechanisms in Kenya

Umaeno Mimi Nkposong**

In many recent conflicts women have disproportionately suffered sexual and gender-specific forms of violence including, systematic rape, domestic violence, forced pregnancy, sexual slavery, forced sterilizations and abortions.¹ Sexual and gender-based violence during conflict has been found to be a deliberate strategy of warring factions perpetrated for reasons such as ethnic cleansing, forcibly displacing communities, destroying the fabric of families and so on.² Given women's position and role in traditional societies, women frequently experience socio-economic violations, such as lack of property rights due to discriminatory inheritance and property laws. Yet, these violations have historically been left outside the mandate of transitional justice processes.³ In addition, the physical and psychological trauma suffered by women during conflicts have not been appropriately addressed by transitional justice mechanisms.

With regards to Kenya, there has been a significant improvement in incorporating gender into its transitional justice mandate through increasing women's participation in its transitional justice mechanisms. For instance, it has established gender quotas in its governmental institutions. This is provided in Article 81(b) of the 2010 Kenyan constitution which stipulates: "the electoral system shall comply with the following principles ... not more than two-thirds of the members of elective public bodies shall be of the same gender".⁴ In addition, the Kenyan Truth, Justice and Reconciliation Commission (TJRC) post-2000 had four out of nine female commissioners.⁵ This was the highest percentage of women commissioners in the TJRCs compared with other transitional nations.⁶ Despite, the marked number of women appointed as commissioners, its TJRC fell short of the expectations of the Kenyan government.⁷ Also, the Kenyan TJRC was criticised for not providing adequate redress for women victims of sexual gender based violations. It was further criticised by the authors of the Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation for not involving prosecutions of the perpetrators of sexual violence against women.⁸ Consequently, the Nairobi Declaration was created and adopted as a guiding principle for the enhancement of reparations for women survivors of sexual violence. The Declaration suggests that reparations must include women at

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¹ Sexual and Gender-Based Violence were used as a tactic of conflict in for example, the Tunisia and Côte d'Ivoire situations. See: <https://www.ictj.org/gallery-items/gender>

² Human Rights Watch 'I Just Sit and Wait to Die'; Reparations for Survivors of Kenya's 2007-2008 Post-Election Sexual Violence (2016) 4.

³ Valji (n 2) 2.

⁴ Article 81(b) Constitution of Kenya 2010.

⁵ Pricilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (first published 2001, Routledge 2011 2nd ed).

⁶ *ibid.*

⁷ Valérie Couillard, 'The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence' *The International Journal of Transitional Justice* Vol. 1 (2007) 444-453, 447.

⁸ *Ibid.*

all stages of planning, design and implementation of future reparations programmes.⁹ In addition, it sought to transform the social frames by establishing policies which not only alleviate physical and psychological harm, but also eliminate future fear and insecurity of women.¹⁰ Notwithstanding, reports have shown that there is yet to be a significant improvement in access to justice and redress for these women. For example, Human Rights Watch criticised the Kenyan government for its “half-hearted” efforts towards accountability for post-election crimes.¹¹ Moreover, the Kenyan government has not fully included the socio-economic hardships faced by these women post-2007 into its transitional justice mandate. On this basis, this paper will conclude that the increased participation of women in the transitional justice mechanisms employed in Kenya in the aftermath of the 2007 elections has enhanced access to justice and provided redress for women who were sexually violated in the aftermath of the 2007 elections only to a limited extent.

Prior to this conclusion, this paper will begin with an explanation of transitional justice, the four main transitional justice mechanisms; institutional reforms, prosecutions, truth-seeking and reparations and broad critiques of the mechanisms. It will then provide a background to the 2007-08 Kenyan violence. Afterwards, the inception of transitional justice in Kenya and the ways in which women have been included in the four main transitional justice mechanisms identified above will be explored. Additionally, the paper will analyse the extent and impact of women’s participation on access to justice and provision for redress for the women victims of sexual violence in the aftermath of the 2007 elections. The paper will also suggest areas of improvement for the Kenyan government.

Defining Transitional Justice

Transitional justice generally refers to the set of processes, judicial and non-judicial mechanisms implemented by different nations in order to provide redress and justice to victims and survivors of past human rights abuses.¹² There is no universally agreed upon definition of the phrase ‘transitional justice’. This stems from the fact that the focus of transitional justice has evolved since the inception of the notion. At the outset, it was concerned with political transitions from authoritarian regimes to democracies, such as the political changes which occurred in Latin America and Eastern Europe between the late 1980s and early 1990s.¹³ In light of the focus on achieving justice within the context of ‘transitions to democracy’, the concept was termed ‘transitional justice’.¹⁴ More recently, transitional justice processes have been employed to respond to contexts of conflict, political strife, as well as human atrocities more generally,

⁹ Principle 2(b) of the Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation 2007.

¹⁰ *ibid*, preamble.

¹¹ Human Rights Watch ‘Turning Pebbles’: Evading Accountability for Post – Election Violence in Kenya (2011) 16.

¹² International Centre for Transitional Justice ‘What is transitional justice?’ < <http://ictj.org/about/transitional-justice> > Accessed 12 March 2017. See also AG Reiter et al ‘Transitional justice and civil war: Exploring new pathways, challenging old guideposts’ (2012) 1 *Transitional Justice Review* 137 138.

¹³ Ruti Teitel ‘Transitional Justice Genealogy’ 16 *Harvard Human Rights Journal* (2003) 69.

¹⁴ ICTJ (n 20).

thereby widening its ambit significantly.¹⁵ For the purpose of this paper, transitional justice is defined as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing level of international involvement (or none at all).”¹⁶ This definition is useful as it highlights the overriding objectives of transitional justice and it refers to ‘abuses’ broadly rather than focusing narrowly only on authoritarian regimes or conflicts. It should be noted that there is no consensus on the goals of transitional justice as it varies depending on the context. Notwithstanding, the International Centre for Transitional Justice (ICTJ) has pointed out that it is rooted in the “recognition of dignity of individuals; the redress and acknowledgement of violations; and the aim to prevent the violations from recurrence.”¹⁷ Complementary aims of transitional justice include, developing accountable institutions and restoring confidence in the old ones, increasing access to justice for the most vulnerable members of society in the aftermath of conflict, ensuring that women and marginalised groups play an effective role in the transitional processes; respect for the rule of law, establishing a basis to address the underlying causes of conflict and advancing the cause of reconciliation.¹⁸

There is no unanimity on the precise scope of transitional justice, that is, which mechanisms and processes fall within the sphere of that which is generally thought to comprise transitional justice.¹⁹ Traditionally, there have been four main transitional justice mechanisms, namely, criminal prosecutions at both the domestic and international level; ‘truth-seeking’ through Truth, Justice and Reconciliation Commissions; reparations for human rights violations, which may take a variety of forms – individual, collective, material and symbolic; and institutional reforms, including the vetting of the police, judiciary military and military intelligence and constitutional amendments.²⁰ In contemporary times, transitioning nations have increasingly infused a gender-perspective into their transitional justice framework. This is due to pressures from the United Nations, which has continuously requested and demanded that transitioning nations ensure that women play a participatory role in the political decision-making post conflict and that redress and justice is provided for victims of gender-based violence. This is reflected in Security Council Resolutions 1325(2000)²¹ and related resolutions 1820(2008)²², 1888(2009)²³, 1889(2009)²⁴ and 1960(2010)²⁵ which deals with ensuring women’s involvement in all aspects of post-conflict recovery. Furthermore, statistical evidence showed that when women are included in transitional processes there is a 20% increase in the probability of an agreement lasting at least two years and

¹⁵ Reiter et al (n 21).

¹⁶ Kofi Annan, Secretary-General’s remarks on International Women’s Day. New York, 8 March 2006: <<http://www.un.org/apps/sg/sgstats.asp?nid=1946>> Accessed 7 March 2017.

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ Evelyne Asaala and Nicole Dicker, “Transitional Justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to from here?” *African Human Rights Law Journal* (2013) 13) 324-355, 329.

²⁰ ICTJ (n 20).

²¹ Res 1325 (n 4).

²² Res 1820 (n 5).

²³ Res 1888 (n 6).

²⁴ Res 1889 (n 7).

²⁵ Res 1960 (n 8).

there is a 35% increase in the probability of an agreement lasting at least fifteen years.²⁶ The calls for gender-sensitive transitional justice stems from the recognition that women are disproportionately targets of human rights violations because of their gender and the marginalisation they suffer in many societies.²⁷ For instance, women whose husbands are forcibly displaced in conflict might suffer prolonged psychological trauma, unjust legal barriers because of inheritance laws, and other forms of discrimination because of their inconclusive status as neither married nor officially widowed.²⁸ Consequently, they are exposed to a higher risk of exploitation due to poverty exacerbated by the loss of a primary breadwinner, and marginalisation by their families and society. Compounding these harms, women's ability to seek redress and justice is often further hampered as a result of pre-existing structural inequalities. Hence, why the fourth guiding principle in the Guidance Note of the Secretary-General's Approach to Transitional Justice²⁹ emphasises the need for transitioning nations to pay special attention to violations committed against women when deciding upon their transitional justice processes, as gender inequality has often been exacerbated in the aftermath of conflict.³⁰ This is in line with the UN's 2030 sustainable development goals (SDG).³¹ Goal 5 of the 2030 SDGs provides that the UN hopes to achieve gender equality and empower all women and girls.³² In so doing, it hopes to eliminate all forms of discrimination, violence and all 'harmful practices, such as child, early and force marriage and female gender mutilation' and ensure women's 'full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life.'³³

Similarly, it is difficult to pinpoint all the goals of gender-sensitive transitional justice as it is very context-specific. Nonetheless, principles such as providing gender-specific reparations, ensuring women full participation in transitional processes, developing laws that respect and foster gender equality and implementing prosecution initiatives which ensures accountability for crimes committed during conflict against women and girls have been suggested to be the core aims of gender-sensitive transitional justice.³⁴ However, the inclusion of a gendered perspective into transitional justice mechanisms remains an ongoing challenge. Thus, it is important to assess how these mechanisms have addressed women's issues in the aftermath of conflict and the extent to which they have enhanced justice and provided redress to women. This paper will now turn to provide a general overview the four main transitional justice mechanisms identified above and examine how a gender-perspective has been infused into the framework of each of these mechanisms.

²⁶ UN Women, 'Women at the forefront of peacebuilding' <<http://www.unwomen.org/en/news/in-focus/women-peace-security>> Accessed 8 March 2017.

²⁷ ICTJ, 'Transitional Justice Issues: Gender Justice' < <https://www.ictj.org/our-work/transitional-justice-issues/gender-justice> > Accessed 8 March 2017.

²⁸ *ibid.*

²⁹ Fourth Principle on the Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (March 2010).

³⁰ *ibid.*

³¹ UN, 'Transforming our world: the 2030 Agenda for Sustainable Development' <<https://sustainabledevelopment.un.org/post2015/transformingourworld>> Accessed 9 March 2017.

³² *ibid.*, Goal 5.

³³ *ibid.*, Goal 5.3 and 5.5, respectively.

³⁴ *ibid.* and Valji (n2) 4.

Transitional Justice Mechanisms

Institutional Reforms

The ICTJ defines institutional reforms as, “the process of reviewing and restricting state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents.”³⁵ These reforms can take many shapes, including, transforming legal frameworks through constitutional amendments or international human rights treaties to enhance protection and promotion of human rights; structural reform – restructuring the police force and judiciary in order to increase accountability, ensure representation and promote integrity; and vetting – this requires examining personnel backgrounds during restructuring or recruitment to eliminate from public service or otherwise sanction abusive and corrupt officials.³⁶

Recently, there have been calls for these reforms to move beyond the traditional remit of justice and security to include reforms to redress past gender injustices. As a result, transitioning nations such as Liberia have increased women’s participation in public-decision making roles through establishing quotas for recruiting women in their parliament and judiciary.³⁷ Other countries, such as South Africa have repealed all previously discriminatory laws and adopted legislations which enhances women’s rights.³⁸ However, nations still face challenges in providing gender-sensitive institutional reforms. This is evident both at the international and domestic levels. In relation to the former, the International Criminal Court (ICC) only appointed its first ever woman president in 2015.³⁹ That same year, only six out of eighteen judges were women. With regards to the latter, there are currently no women judges in the International Criminal Tribunal of the Former Yugoslavia (ICTY).⁴⁰ Thus, showing that women still remain a minority and lack full representation in governmental and legislative institutions. Kenya faces a similar challenge. This will be addressed in greater detail later in the case study section.

Prosecutions

I. Domestic Prosecutions

International courts and tribunals are set up as courts of last resort to prosecute offences where national courts have been unwilling and unable to act effectively. As such, most of the

³⁵ ICTJ, ‘Transitional Justice Issues: Institutional Reforms’ < <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform> > Accessed 9 March 2017.

³⁶ *ibid.*

³⁷ In 2016 Liberia enacted an Equal Representation and Participation Act of 2016 which established seven ‘Special Constituencies’ among which five seats are to be reserved for women, one for youth and one for the disabled: UN Women, ‘Signalling a boost for gender equality, Liberia passes the Affirmative Action Bill’ (03 October 2016) < <http://www.unwomen.org/en/news/stories/2016/10/liberia-passes-the-affirmative-action-bill> > Accessed 15 March 2017.

³⁸ For example, customary marriages in South Africa were not legally recognised. This left women in such unions with no rights. Further, women were deprived of rights to own property, custody of their children and an education. See generally, Ronald Nhlapo, *International Protection of Human Rights and the Family: African Variations on a Common Theme*, 3 INT’L J.L. & FAM. 1, 10 (1989).

³⁹ Kelly Askin, ‘For the First Time, a Woman Judge Heads the International Criminal Court’ (March 11 2015) < <https://www.opensocietyfoundations.org/voices/first-time-woman-judge-heads-international-criminal-court> > Accessed 10 March 2017.

⁴⁰ United Nations, International Criminal Tribunal for the former Yugoslavia ‘The Judges’ < <http://www.icty.org/en/about/chambers/judges> > Accessed 10 March 2017.

prosecutions of serious crimes are left to the national justice systems. This has been a challenge in many transitioning nations as most of their national courts and police forces have been undermined or completely destroyed during conflict. Consequently, the vast majority of perpetrators of serious crimes evade accountability. In addition, when these societies are recovering from conflict or past human rights injustices, they more often than not lack the political will to prosecute these crimes. For instance, in the aftermath of Colombia's armed conflict many crimes of rape, sexual assault, and other forms of gender-based abuse were neglected almost fully ignored by the criminal justice system.⁴¹ This is supported by the fact that in 2008, a referral of 183 cases of sexual violence was made to the national prosecutor yet, no guarantees of justice or redress were made to these women.⁴² Furthermore, in many of these transitioning nations, sexual and gender-based violence issues are dealt with through informal justice processes. For example, in South Africa, the constitution permits certain powers to be held by traditional leaders.⁴³ Other informal justice processes include providing compensation to the family of the sexually violated woman and/or forcing the woman to marry her rapist in order to preserve her (and by implication her family's) honour and dignity.⁴⁴ These examples show that domestic prosecutions as a transitional justice mechanism has been an inadequate tool for bridging the impunity gap where there are no international prosecutions or special tribunals dealing specifically with past human rights injustices. Although, sophisticated legal systems may also lack the capacity to effectively deal with such crimes as they are often very large scale. This remains an on-going challenge facing many transitioning nations, including Kenya.

II. International Prosecutions

International prosecutions involve the investigation and prosecutions of international crimes; genocide, crimes against humanity and war crimes. This has been recognised as a fundamental element of transitional justice.⁴⁵ It has roots in international legal obligations that can be traced back to the Nuremberg trials and it continued with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal of Rwanda (ICTR).⁴⁶ In 2002, the International Criminal Court was established to be a court of last resort to prosecute offences where national courts have failed to adequately do so.⁴⁷

Over the past decade and a half, a gendered perspective has been infused into international prosecutions as conflict-related sexual gender-based violence (SGBV) are now regarded as a crime against humanity. This was firstly recognised by the ICTY in 1993, when it expressly listed

⁴¹ ICTJ, 'Transitional Justice and Women's Rights: Four Watch This Year' <<https://www.ictj.org/news/transitional-justice-womens-rights>> Accessed 10 March 2017.

⁴² *ibid.*

⁴³ S.16(1), Schedule 6 of the Constitution of the Republic of South Africa 1996.

⁴⁴ Valji (n2).

⁴⁵ ICTJ, 'Transitional Justice Issues: Criminal Justice' <<https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice>> Accessed 9 March 2017.

⁴⁶ *ibid.*

⁴⁷ Helen Scanlon and Kelli Muddell, 'Gender and transitional justice in Africa: Progress and prospects' *AJOL* Vol.9 No. 2 (2009)16.

rape as a crime against humanity.⁴⁸ Similar provisions can be found in the 1994 statute of the ICTR.⁴⁹ In addition, the Rome Statute, contains specific reference to gender-based violence as a potential war crime and crime against humanity.⁵⁰ International case law regarding sexual violence in conflict has also developed substantially. The landmark judgement of the ICTR in the *Akayesu* case (1998)⁵¹ provides an illustrative example. The case concerned Akayesu, a former mayor, who was convicted by a unanimous verdict on nine counts: genocide, direct and public incitement to commit genocide, and crimes against humanity, including extermination, murder, torture and rape. The trial chamber found that the systematic rape of Tutsi women encouraged by Akayesu amounted to genocide.⁵²

Notwithstanding, there are fewer rape convictions than the number of incidents reported. For instance, in 1994 the ICTR had handed down 21 sentences including, 18 convictions and 3 acquittals.⁵³ An overwhelming 90% of those judgements contained no rape convictions. More surprisingly, there were double the number of acquittals for rape than there were rape convictions.⁵⁴ This data stems from the fact that women do not frequently participate as witnesses before international and hybrid courts owing to the social stigma attached to testifying as a victim of sexual violence and the insensitivity with which victims are often treated, amongst other things. This is the same challenge with domestic prosecutions, hence, why adequate redress has not been provided for many women victims of conflict-related gender based violence.

Truth-Seeking through the Truth, Justice and Reconciliation Commissions

The ICTJ defines truth-seeking as, “non-judicial inquiries established to determine the facts, root causes and societal consequences of past human rights violations.”⁵⁵ These inquiries are carried out by inquiry bodies commonly referred to as Truth, Justice and Reconciliation Commissions (TJRCs). TJRCs are usually granted a limited period of time for statement-taking, investigations, research and public hearings before completing their work with a final public report.⁵⁶ Their other objectives includes identifying victims for reparations, contributing to the development of a culture of respect for the rule of law and human rights, making recommendations for

⁴⁸ Article 5(g) of the Updated Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

⁴⁹ Article 3(g) Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994.

⁵⁰ Rome Statute of the International Criminal Court, art. 7(1), 17 July 1998, A/CONF.183/9: it recognises gender-based violence such as, rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization.

⁵¹ *Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, 2 September 1998.*

⁵² Binaifer Nowrojee, “‘Your Justice is Too Slow’ Will the ICTR Fail Rwanda’s Rape Victims?” United Nations Research Institute for Social Development (2005).

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ ICTJ, ‘Can We Handle The Truth?’ < <https://www.ictj.org/gallery-items/truth-commissions> > Accessed 10 March 2017.

⁵⁶ Office of the United Nations High Commissioner for Human Rights, “Rule of Law Tools for Post-Conflict States: Truth commissions,” New York: United Nations, 2006.

institutional reforms, and serving as a platform for nation-building and reconciliation.⁵⁷ As of early 2011, 40 truth commissions had been created to provide an account of past human rights violations.⁵⁸

This first set of TJRCs were established in Latin America (the Argentine Republic (1983-1984) and the Republic of Chile (1990-1991)). These TJRCs were largely gender-blind as they did not include a gendered perspective in their national truth-seeking.⁵⁹ However, in recent ages, progress has been made in mainstreaming gender into the mandate of TJRCs. For instance, the Peruvian TJRC created a separate gender unit to ensure the inclusion of gender considerations in the daily work of the commission.⁶⁰ Another example is the Sierra Leone TJRC (2002-2003), which provided special support to women victims, which in turn encouraged many of them to speak up about the violations they experienced during conflict.⁶¹ The report of these proceedings was noted as the first to make the positive correlation between pre-conflict gender inequalities and the gendered nature of violations during conflict.⁶² However, not all TJRCs have achieved this level of success. This is demonstrated by the Kenyan situation, where the work of the TJRCs was criticised for being inadequate in redressing violations faced by victims of sexual gender-based violence.⁶³ In addition, there were a number of controversies surrounding the work of Kenya's TJRC, such as allegations of political interference from the president's office and subsequent alterations made to the TJRCs without the consent of some of the commissioners.⁶⁴ As a result, there was a lack of faith in the work of the TJRC being able to provide redress and justice for victims who suffered human rights violations (in particular, marginalised groups such as women and girls) in the aftermath of 2007 elections. Consequently, this led to the adoption of the Nairobi Declaration on Women's and Girls' Right to A Remedy and Reparation.⁶⁵ The report of the Kenyan TJRC and its achievements and failures will be further examined and analysed under the case study section.

Reparations

The ICTJ defines the aim of reparations as the need to “recognise and address the harms suffered by victims of systematic human rights violations.”⁶⁶ They take various forms, including compensation to individuals or groups; guarantees of non-repetition; social services such as healthcare or education; and symbolic measures such as formal apologies or public commemorations.⁶⁷ The concept of reparations is enshrined in various international treaties and

⁵⁷ Valji (n2) 8.

⁵⁸ *ibid.*

⁵⁹ *ibid.*, 9.

⁶⁰ United Nations Women, ‘Gender and Transitional Justice Programming: A Review of Peru, Sierra Leone and Rwanda’ (2013).

⁶¹ World Bank, ‘Gender, Justice and Truth Commissions’ (June 2006) <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/GJTClayoutrevised.pdf>> Accessed 10 March 2017.

⁶² *Ibid.*

⁶³ Human Rights Watch (n 19).

⁶⁴ <http://www.aljazeera.com/indepth/opinion/2013/06/201369114316134587.html>

⁶⁵ Nairobi Declaration (n18).

⁶⁶ ICTJ, ‘Transitional Justice Issues: Reparations’ < <https://www.ictj.org/our-work/transitional-justice-issues/reparations> > Accessed 10 March 2017.

⁶⁷ *ibid.*

is a principle which has been employed in many transitional justice systems. In recent times, the UN has encouraged transitioning nations to include a gendered perspective into their reparations processes. This is owing to the fact that most previous programmes implicitly discriminated against women by excluding reparations for reproductive violence, such as forced pregnancy, sterilization and forced abortions.⁶⁸ Additionally, transitioning nations often neglect the range of socio-economic violations experienced by women during and following the conflict. The UN Women Organisation and the UN Office of the High Commissioner adopted a General Guidance Note on Reparations for Conflict-Related Sexual Violence in 2014 to assist transitioning nations in awarding reparations.⁶⁹ The guidance note includes the need for reparations programmes to have a transformative impact, which addresses both the single violation as well as the structural inequalities embedded in the system which creates gender inequality and renders women more vulnerable to violence.⁷⁰ Also, it calls for survivors of conflict-related sexual violence to be at the forefront as agents of reform and it highlights the need to establish reparations programmes that acknowledge and respond to men and women's different needs.⁷¹ Though, prior to the adoption of these guidelines, some transitioning nations had already begun including a gendered perspective into their reparations programmes. For example, in 2010, the President of Sierra Leone formally apologised to women victims of his country's 10-year armed conflict.⁷² In addition, the Year 1 project, financed by the UN Peacebuilding Fund, paid out \$100 each to 2,918 victims of sexual violence and 4,745 widows.⁷³ Another 235 women received fistula surgery or medical treatment for health issues arising from sexual violence.⁷⁴ Notwithstanding, reparations programmes of transitioning nations have encountered serious challenges. For instance, reparations are rarely paid out in a full and comprehensive manner and low literacy levels have resulted in women not knowing their rights. Thereby limiting their rights to reparations and so on. Kenya has faced similar challenges in implementing the recommendations made in the Nairobi Declaration on Women's and Girls' Right to A Remedy and Reparation. These challenges will be further explored and analysed in the case study discussion below.

This paper will now turn to analyse these mechanisms using the case study of Kenya. I am using this case study because Kenya has incorporated all the four types of mechanisms identified above into its transitional justice mandate. In addition, it was a fairly recent conflict, as such, it provides a current perspective on the strengths and weaknesses of these transitional justice mechanisms. However, it should be noted that this paper is not seeking to provide a full picture of transitional justice. Rather, it is focusing on the extent to which the increased participation of women in Kenya's transitional justice mechanisms has enhanced access to justice and provided redress for women survivors of sexual violations in the aftermath of the 2007 Kenyan elections.

This paper acknowledges that women are subjected to a myriad of harms during conflict. However, since sexual violence has been one of the core concerns of both the UN and Kenyan government, it is important to examine the successes and failures in this area. This view is

⁶⁸ Valji (n2)16.

⁶⁹ Guidance Note of the Secretary-General; Reparations for Conflict-Related Sexual Violence (June 2014) 5-14.

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² Valji (n2) 17.

⁷³ *ibid.*

⁷⁴ *ibid.*

supported by the by the adoption of the UN's Security Council Resolution 1325(2000)⁷⁵ and the incorporation of a gendered perspective into the Constitution of Kenya 2010⁷⁶ and the Kenya Truth Justice and Reconciliation Commission of 2008.⁷⁷ The following analysis on Kenya's approach to gender-sensitive transitional justice will show that despite the progress Kenya has made on paper through providing gender-quotas in its institutions, promoting gender equality in its 2010 constitution and so on, in practice it is yet to fulfil its goals of enhancing access to justice and providing better redress for women survivors of sexual violence.

Case Study: Kenya

The 2007-08 Kenyan violence erupted in Kenya after former President Mwai Kibaki was announced the winner of the presidential election held on December 27, 2007. The crisis resulted predominantly from allegations of electoral manipulation by the supporters of Kibaki's opponent, Ralia Odinga of the Orange Democratic Movement intersected with ethnic tensions. Odinga, who had been reportedly winning by 370,000 votes with 90% of the constituencies reporting, was subsequently announced the loser by 200,000 votes. After declaring a victory for Kibaki, the electoral commissioner announced that he was pressured to announce the vote, and he was doubtful whether Kibaki was in fact the winner. In addition, there was evidence of irregularities and vote rigging in the tallying process in Nairobi. Following the announcement of results and Kibaki's hasty swearing it, violent clashes with the police broke out in Odinga's home province of Nyanza and in the densely populated slums of Nairobi.⁷⁸ Over the course of the two-month period in the aftermath of the 2007 Kenyan elections, an estimated 1,300 killings occurred, and more than 500,000 people were displaced, and thousands of cases of sexual violence were reported.⁷⁹

As post-election violence heightened, emergency measures were required to quell the crisis and human rights violations. Various regional attempts were proposed to bring the then ruling party (Party of National Unity) and the then opposition party (Orange Democratic Movement) to reach an agreement. These efforts were futile initially. Subsequently, in January 2008, President Kikwete of Tanzania and President Kuffuor of Ghana intervened on behalf of the African Union by initiating a peace mediation process for Kenya, which resulted in the establishment of the Kenya National Dialogue and Reconciliation Committee (KNDRC) under the leadership of former UN Secretary-General Kofi Annan and Kenyan civil society groups.⁸⁰ The KNDRC was tasked with mediating a halt in the violence and broader humanitarian and political crisis as well as setting up mechanisms geared at enabling Kenya's transition to a just, human rights and rule

⁷⁵ Res 1325 (n4).

⁷⁶ The Constitution of Kenya 2010.

⁷⁷ Laws of Kenya, The Truth, Justice and Reconciliation Commission Act No.6 of 2008. (Revised Edition 2012).

⁷⁸ Jennifer Cooke, 'Background on the Post-Election Crisis in Kenya' (Center for Strategic and International Studies August 6, 2009). < <https://www.csis.org/blogs/smart-global-health/background-post-election-crisis-kenya> > Accessed 15 March 2017.

⁷⁹ CPIEV 'Report of the Commission of Inquiry into Post-Election Violence' (Commission of Inquiry into Post-Election Violence (2008). See also Human Rights Watch *Turning Pebbles: Evading accountability for post-election violence in Kenya* (2011) 3.

⁸⁰ Asaala and Dicker (n 27).

of law compliant future.⁸¹ Acknowledging impunity as an important stumbling block hampering Kenya's transition, the KNDRC created an agreement as to the establishment of various transitional justice mechanisms, including a truth commission and a comprehensive constitutional, legal and institutional reform processes.⁸² As Hansen points out, this agreement 'seemed to provide a comprehensive framework for addressing the roots of political violence and other human rights abuses in the country'.⁸³ In addition, the negotiating teams agreed to the establishment of four commissions: a Constitutional Review Commission; a Commission of Inquiry into the Post-Election Violence (CIPEV, also commonly known as the Waki Commission named after its president, Justice Philip Waki), which was established and mandated to, amongst other things, investigate the violence that erupted in the aftermath of the 2007 elections and make recommendations as to legal redress; an Independent Review Commission to examine the electoral process (known as the Kriegler Commission); and a Truth, Justice and Reconciliation Commission.⁸⁴

This paper now turns to analyse the extent to which increased women's participation in these transitional justice mechanisms employed in Kenya have enhanced access to justice and provided redressed for women who were victims of SGBV in the aftermath of the 2007 elections.

As a part of its transitioning process, on the 27th of August 2010, Kenya promulgated a new constitution entitled, '*the Constitution of Kenya 2010*'.⁸⁵ This repealed and replaced the old 1963 constitution. The 2010 constitution is progressive and remarkable for its incorporation of a strong gendered-perspective into its constitutional order. It makes provisions for women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres⁸⁶; Kenyan women should be able to transfer citizenship to their children irrespective of whether or not they are married to Kenyans⁸⁷; right to health should be accorded including reproductive health to women⁸⁸; there are equal rights in marriage⁸⁹; parental responsibility shall be shared between both parents irrespective of their marital status⁹⁰; the functions of the Kenyan National Human Rights and Equality Commission are to "promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming into national development."⁹¹; there shall be no gender discrimination laws in relation to land and property rights and women have the right to inheritance and equitable access to land⁹²; and there

⁸¹ Kenya National Dialogue Reconciliation Committee 'Annotated agenda for the Kenya dialogue and reconciliation' KNDR Conference (2008).

⁸² Kenya National Dialogue Reconciliation Committee 'Agreement on agenda item three: How to resolve the political crisis' (2008) 3.

⁸³ Thomas Hansen 'Kenya's power-sharing arrangement and its implications for transitional justice' (The International Journal of Human Rights (2013) 17, 307.

⁸⁴ Asaala and Dicker (n 27) 339.

⁸⁵ The Constitution of Kenya 2010.

⁸⁶ *ibid*, Article 27(3).

⁸⁷ *ibid*, Article 14(1).

⁸⁸ *ibid*, Article 43(1)(a).

⁸⁹ *ibid*, Article 45(3).

⁹⁰ *ibid*, Article 53(1)(c).

⁹¹ *ibid*, Article 59(2)(b).

⁹² *ibid*, Article 60(1)(f).

is a one third requirement for either gender in elective bodies giving women of Kenya at least 1/3 minimum in elective bodies.⁹³

Institutional Reforms in the Aftermath of the 2007 Kenyan elections

The constitutional provisions identified above in the Constitution of Kenya 2010⁹⁴ shows efforts being made to strengthen gender equality and they have laid the foundation for important institutional reforms especially in Kenya's judiciary, police force and other governance institutions geared to prevent the recurrence of past human rights injustices. One strength of this strong inclusion of a gender-perspective into the constitution is that it addresses historical injustices which women and girls have been subjected to, such as discriminatory laws relating to inheritance rights and marriage, widespread gender-based violence, the wide disparity in male and female rates of education and unemployment and the underrepresentation of women in political decision-making positions. As rightly noted by the International Center for Policy and Conflict, a gender-sensitive constitution "contributes to the democratization in valuing equal participation in the public sphere as well as vertical reconciliation as trust is built between previously marginalised populations and state institutions."⁹⁵

Despite the progressive gender equality policies and laws provided for in the 2010 Kenyan constitution, many institutional reform efforts have been hindered 'due to the culture of silence and impunity'⁹⁶ and very lax enforcement policies. Thus access to redress and justice is still limited for women. This contention is supported by the *Federation of Women Lawyers Kenya (FIDA-K) and five others v Attorney General and another* case.⁹⁷ The case concerned a number of petitions brought by FIDA-K and five other women's rights organisations against the Attorney General for the unconstitutional appointment of the Kenyan Supreme Court judges. FIDA-K and others argued that the Judicial Service Commission (JSC) had violated Article 27 of Kenya's 2010 Constitution⁹⁸ and the Fundamental Rights and Freedoms of Kenyan women by recommending to the President five persons as Judges of the Supreme Court, of the five recommended only one was a woman and four were men.⁹⁹ This is because Article 27(8) explicitly provides that, "the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."¹⁰⁰ Thus, the appointment of the five judges failed to meet the mandatory requirement and threshold set by the Constitution. Consequently, the petitioners prayed for the following order; 'a declaration that the recommendation of people of more than two-thirds or 66.7% of the male gender and less than one-third or 33.3% of the female gender for approval and or eventual appointment to the office of Judges of the Supreme Court is gender insensitive, discriminatory against women,

⁹³ *ibid*, Article 81(b).

⁹⁴ (n 93).

⁹⁵ International Center for Policy and Conflict, 'Gender and Transitional Justice in Kenya: Guidelines for Engendering the Process' (Engendering Transitional Justice and Constitution Implementation Policy Framework June 2011) 23.

⁹⁶ *ibid*, v.

⁹⁷ *Federation of Women Lawyers Kenya (FIDA-K) and five others v Attorney General and another* case [2011] EKLR.

⁹⁸ Article 27(8) of the Constitution of Kenya 2010.

⁹⁹ (n 105) 4.

¹⁰⁰ (n 106).

disrespectful of women and contrary to article 27 ... of the Constitution of the Republic of Kenya and is therefore null and void.”¹⁰¹ In addition, they sought an order barring any further purported appointments of the Judges of the Supreme Court pursuant to the recommendations made by the JSC.¹⁰² However, their petition was dismissed by the High Court, which ruled that the JSC did not breach the constitutional provisions and had acted appropriately within its discretions. The court did not provide any explicit reasons as to its finding on the JSC not breaching the constitutional provisions. The outcome of the case is disappointing. Nevertheless, made a positive impact as the JSC is reportedly more sensitive to gender balance in its recent judicial appointments.¹⁰³ For example, its nominations to the High Court in August 2011 consisted of almost a proportionate number of women and men judges (13 women and 15 men). Thereby widening the one-third gender threshold.¹⁰⁴

However, as Kamau pointed out, this could be due to the JSC’s awareness of the possibility of legal challenges should they not adhere to constitutional requirements.¹⁰⁵ Furthermore, this one-third gender quota is yet to be fulfilled with regards to the Supreme Court. As of today there are only two women justices in Kenya’s supreme court.¹⁰⁶ The fact that women are still being marginalised in the Supreme Court and are more concentrated in the subordinate courts reinforces the social perception that men are better at holding higher positions in the judiciary. As of 2013, a woman magistrate reported having to breastfeed her child in her car due to a lack of childcare facilities in the courts.¹⁰⁷ Thus showing that structural and institutional barriers still exist as to women’s participation in the judiciary. Despite the hindrances women judges and magistrates face they have continued to make invaluable contributions to the administration of justice. For instance, Honourable Lady Justice Effie Owuor (now retired) was a Chair of the task force on the laws relating to laws affecting women (1993) which resulted most notably in the enactment of the Sexual Offences Act of 2006.¹⁰⁸ This legislation marked a radical departure from the previous Penal Code, which only recognised rape as a violation against women and girls’ and failed to provide a comprehensive definition of rape. By contrast, the Sexual Offences Act of 2006¹⁰⁹ sought to exhaustively define all unlawful acts of a sexual nature by including new categories of sexual offences in Kenya’s criminal justice system. The offences include sexual assault with an object¹¹⁰, gang rape¹¹¹, deliberate infection with HIV/AIDS¹¹², trafficking for sexual exploitations¹¹³. It further expanded the definition of existing offences such as rape, which now includes the penetration of genital organs of women or men in its definition.¹¹⁴ These contributions show why women need to be empowered, rather than being marginalised. Also, it

¹⁰¹ (n 105) 5.

¹⁰² *ibid.*

¹⁰³ Winifred Kamau, ‘Women Judges and Magistrates in Kenya: Challenges, Opportunities and Contributions’ in *Gender and Judging* (Hart Publishing, edited by Ulrike Schultz and Gisela Shaw 2013) Part 2.3, 179.

¹⁰⁴ *Ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ The Supreme Court of Kenya, < <http://www.judiciary.go.ke/portal/page/supreme-court> > Accessed 17 March 2017.

¹⁰⁷ Kamau (n 111) 184.

¹⁰⁸ *Ibid.*, 180.

¹⁰⁹ Laws of Kenya, Sexual Offences Act, No.3 of 2006 (Revised Edition 2014).

¹¹⁰ *Ibid.*, S.5.

¹¹¹ *Ibid.*, S.10.

¹¹² *Ibid.*, S.26.

¹¹³ *Ibid.*, S.14.

¹¹⁴ *Ibid.*, S.3.

supports the contention that the increased participation of women in a country's institution enhances access to justice for women and provides better redress because it is only women that can understand their experiences. Furthermore, women judges and magistrates have promoted gender equality through their interpretation of the law in the courts and they have further enhanced access to justice for women largely through the Kenyan Women Judges Association (KWJA). The achievements of KWJA include the establishment of the family division of high court and a compendium of sexual offences cases, which acts a guide to judicial officers on how to address offences under the Sexual Offences Act of 2006.¹¹⁵ Again, the achievements of KWJA show why it is necessary for women to be included fully in all aspects of decision-making in Kenya's transitional justice mandate. Thus, the Kenyan government need to ensure that the one-third gender quota in Article 27 and other gender equality provisions in the Constitution of Kenya 2010 need to be strictly adhered to in order to live up to her promises of enhancing access to justice and providing redress for women survivors of human rights violations.

Prosecutions of Sexual-Gender Based Violence in the Aftermath of the 2007 Kenyan elections violence

Large scale sexual violence ensued following the outcome of the 2007 elections in Kenya. It was used as tactic for conflict.¹¹⁶ Both men and women were victims of sexual violence, however women were reported to be disproportionately affected. This is supported by data collected by Dr Sam Thenya, the CEO of the Nairobi's Women's Hospital, which provides free services to both female and male victims of sexual violence. He reported that his hospital treated about 653 individuals, adding in those treated at other hospitals, at least 900 individuals were treated overall.¹¹⁷ Out of this 900 individuals, 80% of the individuals were reported to have suffered from rape and defilement, while the remaining 20% suffered from domestic violence and other forms of physical and sexual assault. He pointed out that the majority of patients were women.¹¹⁸ Another hospital recorded 184 cases of sexual violence, 80% of which resulted from the post-election violence.¹¹⁹

Despite the alarming figures, the then commissioner of police, Major General Hassan Ali told the Commission of Inquiry into Post-Election Violence (CIPEV) that the police had not collected any information on statistics on such sexual crimes.¹²⁰ This might have been due to factors such as women being afraid of reporting their violations because of the shame and stigma. In other cases, the women did not want to be rejected by their husbands families and many women did not go to the hospital within 72 hours for Post-Exposure Prophylaxis treatment. Thus no forensic evidence of the rape could be collected to be used in criminal trials.¹²¹ In some other cases, the police were the perpetrators as a result there was a lack of faith in the criminal justice system – a seventeen year old girl interviewed by human rights watch recalled being gang raped by officers of the paramilitary General Services Unit.¹²² Further research carried out by human rights watch and the CIPEV showed that many sexual violence survivors

¹¹⁵ Kamau (n 112) 185-6.

¹¹⁶ CIPEV (n 87) 237.

¹¹⁷ *ibid*, 248.

¹¹⁸ *ibid*.

¹¹⁹ *ibid*, 249.

¹²⁰ *ibid*.

¹²¹ Human Rights watch (n19) 67.

¹²² *ibid* 72.

who sought redress and justice by reporting to the police were often turned back to their homes and the police failed to follow up with complaints or investigate complaints.¹²³ For example, one of the women interviewed by human rights watch recalled when her aunt went to report her rape to the police and the policeman responded saying, “You, you are a big girl, how can you say you were raped? You should tell the truth.”¹²⁴ Another Human Rights Watch interviewee recalled the police telling her to wait there because they were going to save others.¹²⁵ The failure of the Kenyan police force to properly investigate and prosecute sexual offences committed during the 2007 post-election violence and take action against its own officers who perpetrated those crimes hampered many survivors’ ability to seek help not only from the police but also medical help. Thereby exacerbating the violations of human rights suffered by women and promoting the culture of impunity as no justice was being served.

While Kenya has ratified a number of international human rights treaties (for example, the Rome Statute of the ICC) and implemented national laws prohibiting violence against women¹²⁶, the limited success of convictions in the national courts and low level of prosecutions by the Kenyan police shows that Kenyan authorities have been unwilling and unable to effectively prosecute post-election violence. Similar criticisms were levelled against the Kenyan police force by the CPIEV.¹²⁷ This put some pressure on them to take action. For instance, following the publication of the CPIEV report, the Kenyan police force announced that it was forming a special task force to investigate sexual offences related to the post-election violence.¹²⁸ The force was to include female police officers as well as lawyers and counsellors from the FIDA. This task force was promising, however, the FIDA members withdrew from the task force in November 2008, after numerous complaints of being excluded from its planning. One FIDA representative commented, “the task force was a response to outcry over the fact that police were not doing anything about victims of rape. We heard we were a part of the task force, but we asked the police repeatedly for meeting and they were never convened. There was no willingness to work with us.”¹²⁹ In addition, the task force’s subsequent work was criticised for lacking credibility because it was not widely publicised and they were reported to have gone around speaking to some survivors as opposed to enhancing access to justice for women by prosecuting accused individuals. Although, the task force’s investigation resulted in a list of 66 complaints (most of which involved alleged rapes committed by members of the security forces), which the force submitted to the Director of Public Prosecutions in 2009.¹³⁰ Most of the complaints, however, did not result in convictions owing to lack of evidence, failure to identify perpetrators and a long time lapse in submitting complaints.¹³¹ Notwithstanding, the Human Rights Watch disagreed with the DPP on the basis that justice could have been served in cases where cell phones were stolen during the sexual assault as the phones could have been tracked to find the perpetrators.¹³²

¹²³ CPIEV Report (n 87).

¹²⁴ Human Rights Watch (n 10).

¹²⁵ *ibid.*

¹²⁶ For example, the Laws of Kenya, Sexual Offences Act No.3 of 2006.

¹²⁷ CPIEV report (n 87).

¹²⁸ Human Rights Watch (n 19) 21.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.*

Thus, reflecting the lax attitude on the part of the Kenyan police towards prosecuting perpetrators of sexual violence.

Due to the ineffectiveness of domestic prosecutions, the CPIEV further recommended that the Kenyan Parliament should establish a special tribunal to handle prosecutions.¹³³ These proposals were rejected by some parliamentarians on the basis that crimes against humanity ought to be tried at the ICC in The Hague.¹³⁴ Later, it was alleged that some of those same parliamentarians called on Kenya from the Rome statute establishing the ICC.¹³⁵ Additionally, President Kibaki reasoned that there was no need for ICC intervention or a special tribunal because the Kenyan TJRC could provide accountability.¹³⁶ As will be shown in succeeding paragraphs, the TJRCs role as a mechanism for enhancing justice was limited, as it could only hold hearings to elicit information about the violence but it could not prosecute the suspects of those sexual crimes. It is unfortunate that the special tribunal was not established because Sierra Leone's Special Court shows that this is an effective mechanism. In 2000, the Sierra Leone Special Court was established and mandated to prosecute those who 'bear the greatest responsibility' for the atrocities committed during the civil war.¹³⁷ It was shown that this court's decisions resulted in numerous landmark legal developments that had a very positive impact for the promotion of gender equality.¹³⁸ For instance, in its definition of crimes against humanity it included gender-based crimes and it also expanded their interpretation of sexual slavery and force marriages.¹³⁹ The court's work is further noteworthy for paying and arranging for access to medical facilities to perform procedures such as fistula repair for women who were to testify at court.¹⁴⁰ This acted as an incentive for many women to come forward, thereby enhancing their access to justice and providing redress for women. As such, Kenya missed a great opportunity to enhance justice and provide redress for women by refusing to create a special tribunal. This

lack of access to justice and redress was one of the main driving forces the Nairobi Declaration on Women's and Girls Right to Remedy a Reparation.

The Kenyan Truth, Justice and Reconciliation Commission

The Kenyan Truth, Justice and Reconciliation Commission (Kenyan TJRC) was established following the enactment of the Kenan TJRC Act of 2008.¹⁴¹ The TJRCs goal was to 'promote peace, justice, national unity, healing and reconciliation among the people of Kenya.'¹⁴² Its mandate entailed investigating and hold hearings for gross human rights violations and violations of international human rights law and abuses which ensued between 12th December 1963 and

¹³³ *ibid.*

¹³⁴ Human Rights Watch (n 10) 71.

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ Human Rights watch, 'Bringing Justice: The Special Court for Sierra Leone' (2004) Vol. 16 No.8(A) 10.

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ Laws of Kenya, The Truth, Justice and Reconciliation Commission Act No.6 of 2008. (Revised Edition 2012). [It is important to note that this Act was one of the outcomes of the KNDRC deliberations.]

¹⁴² *ibid.*, Section 5(a).

28th February 2008, including massacres, sexual violations, murder and extra-judicial killings.¹⁴³ The TJRC was tasked with investigating and providing redress in respect of crimes of a sexual nature against female victims, amongst other things.¹⁴⁴ In addition, the TJRC Act of 2008 listed ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity’ as constituting a crime against humanity when they are part of a widespread or systematic attack against any civilian population.¹⁴⁵

The Kenyan TJRC Act of 2008 is notable for the gender quota in the appointment of commissioners – Section 10(1)(a) of the Act provides ‘the Commission shall consist of 9 commissioners, of whom; 3 shall be non citizens, at least one of whom shall be of the opposite gender, selected by the Panel of Eminent African Personalities.’¹⁴⁶ Out of the nine commissioners, four ended up being women.¹⁴⁷ This was the highest number of women commissioners in post-2000 transitioning nations.¹⁴⁸ The TJRCs final report showed a positive correlation with increased women’s participation and the manner in which gender issues were handled. For instance, the commission adopted special measures such as ensuring that the officers investigating the sexual offences had undergone training, a set of guidelines outlining the method to be adopted in investigating sexual violence was prepared and survivors of sexual violence were provided the option of public or camera hearings.¹⁴⁹ In addition, specific women hearings were set up and counsellors were present to provide psycho-social support before, during and after hearings to enable survivors to narrate their experiences as well as learn how to cope with the trauma which resulted from those experiences.¹⁵⁰ Though these measures improved access to justice for some women, statistics show that there were not as effective as expected. The TJRC recorded only a total of 1,104 statements from adults in regard to sexual violations suffered between 12 December 1963 and 28 February 2008.¹⁵¹ In addition, the TJRC held public hearings in which 778 witnesses (213 from women and 656 from men) provided testimonies in regard to various human rights violations suffered.¹⁵² Of the 778 cases that were heard, only 26 (with 21 from women and 5 from men) were related to sexual violence.¹⁵³ 100 cases were heard in private of which 19 (2 from men and 17 from women) were related to sexual violence. Additionally, over 1,200 women participated in women-only hearings.¹⁵⁴ The TJRC recognised that many sexual violence cases went unreported as a result of the social stigma of being shunned by family and friends, the harsh treatment by the police of survivors of sexual violence discouraged them from reporting¹⁵⁵ and in some cases the police and security agents were the perpetrators of the sexual violence.¹⁵⁶ Other socio-economic barriers such as lack of

¹⁴³ *ibid*, Section 5(c).

¹⁴⁴ *ibid*, Section 6(h).

¹⁴⁵ *ibid*, Section 2(g).

¹⁴⁶ *ibid*, Section 10(1)(a).

¹⁴⁷ United Nations Women ‘A Window of Opportunity: Making Transitional Justice Work for Women’ (2012) 10.

¹⁴⁸ *ibid*.

¹⁴⁹ Full Report of the Truth, Justice and Reconciliation Commission (TJRC) 2013, Volume II, PP.712-713.

¹⁵⁰ *Ibid*.

¹⁵¹ *ibid*, 712.

¹⁵² *ibid*, 713.

¹⁵³ *ibid*.

¹⁵⁴ *ibid*.

¹⁵⁵ *Ibid*, 717: The Gender Violence Recovery Centre reported to the TJRC that some women were turned away from police stations and could not record their violations.

¹⁵⁶ *Ibid*, 715-717.

funding for legal representation, lack of awareness of the legal processes and long distances to courts has prevented many women from seeking redress.¹⁵⁷ In addition, the TJRC found that despite Kenya ratifying numerous international human rights instruments and enacting its own national laws with regard to sexual violence, the failure to fully implement those legislations has left many Kenyans exposed to sexual violence and obstructed access to justice.¹⁵⁸ Consequently, the TJRC recommended amongst other things: the President, within three months of the publication of the TJRC's report should acknowledge and offer a public apology for acts of sexual violence committed by state security agencies and other individuals during generalised periods of violence; a gender violence recovery centre should be established in every county; reparations should be provided for victims and survivors of sexual violence; and, an office if the Special Rapporteur on sexual violence should be set up within 12 months.¹⁵⁹

The TJRCs report provided valuable information and recommendations, its work fell short of the expectations of the Kenyan government. This is because it paid very little attention to the human rights violations that occurred in the aftermath of the 2007 post-election violence. Although, it recognised this deficit and justified its lack of focus on the 2007 post-election violence on the basis that the period of violence constituted only a small portion of its mandate and the previous CPIEV already focused specifically and narrowly on violations during this period.¹⁶⁰ Thus, there was no need to devote so many resources to investigating human rights violations during that period and the ICC already investigated this period of Kenya's history.¹⁶¹ Surely, this undermines the mandate of the TJRC as it was the 2007 violence that served as the catalyst for the establishment of the commission.¹⁶² This substandard treatment of the investigations of the 2007 post-election violence arguably resulted in slower and lesser implementations of the TJRCs recommendations and it negatively impacted the way reparations were awarded. Till date, many survivors of sexual violence are yet to receive any reparations from the government. However, the TJRC cannot be entirely blamed for ignoring the violations which occurred during the 2007 post-election violence considering that their mandate only gave them a two-year time period.¹⁶³ As such, there were only so many investigations they could have carried out. If the Kenyan government decides to set up another TJRC in future, it is suggested that it should emulate the structure adopted by the South-African Commission. The South African TJRC, unlike the Kenyan focused its resources on its most pertinent human rights issues and its commissions mandate covered a shorter period of 33 years with 17 commissioners, supported by a staff of 300 professionals.¹⁶⁴ Thus, allowing its investigations to be more effective, thereby resulting in better recommendations and implementations being made.

¹⁵⁷ Ibid, Volume 4 p.34.

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*, p.36.

¹⁶⁰ Ibid, Volume 4, p.3.

¹⁶¹ *ibid.*

¹⁶² *ibid.*

¹⁶³ n 149.

¹⁶⁴ Evelyne Asaala, 'Exploring transitional justice as a vehicle for social and political transformation in Kenya' (2010) 2 AHRLJ 377-406, 400.

Gender-Sensitive Reparations in Kenya

Women survivors of the 2007 post-election violence experienced a myriad of violations including contracting HIV/AIDS, physical injury, psychological trauma, desertion by their families and spouses, forced pregnancy and so on.¹⁶⁵ As highlighted in the preceding paragraphs, the Kenyan TJRC and police force provided inadequate redress and justice for survivors of sexual violence in the post-2007 elections. Recognising this inadequacy, women's rights advocates, activists and experts as well as survivors of sexual violence in situations of conflict from different parts of the world gathered in Nairobi to draft the Nairobi Declaration on Women's and Girls' Right to A Remedy and Reparation (hereinafter, Nairobi Declaration 2007).¹⁶⁶ This meeting sought to build on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005 (hereinafter, the 'Basic Principles').¹⁶⁷ The Basic Principles only addressed the issue of reparations for victims in general, rather than distinctively dealing with crimes of sexual violence. This led the drafters of the Nairobi Declaration (2007) to reconceptualise reparations from a gendered perspective. The Declaration was grounded on the idea that violations of women's and girls' human rights predate the conflict situation. Thus, in order to provide adequate redress and enhance justice for women and girls, reparation programmes 'must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives'.¹⁶⁸ The innovative proposals made for providing reparations in the Nairobi Declaration include, adopting a definition of 'victim' that is broadly defined and takes into account women's and girls' experiences and their right to reparation in order to accurately reflect the injustices suffered¹⁶⁹; all policies and measures relating to reparation must explicitly be based on the principle of non-discrimination on the basis of sex, gender and marital status amongst other things¹⁷⁰; reparation programmes must empower women and girls by acknowledging their autonomy and including them in decision-making processes¹⁷¹; structural and administrative hindrances in all forms of justice, which hamper women's and girls access to effective and enforceable remedies must be addressed to achieve gender-just reparation programmes¹⁷². In addition, support structures need to be established to assist women and girls in the process of speaking about and accessing reparation.¹⁷³

Couillard complemented the Nairobi Declaration (2007), saying it is the most 'innovative and inspiring contribution' to Kenya's transitional justice mandate.¹⁷⁴ She noted that, its use of 'transformation' as a basis of reparation rather than the orthodox notion of 'restitution' tackles the problems of sexual violence more adequately.¹⁷⁵ This is because 'transformative' reparations seek to address the economic, social and political measures such as discriminatory inheritance

¹⁶⁵ CPIEV Report (n 87) 261.

¹⁶⁶ Nairobi Declaration (n 17) 1.

¹⁶⁷ A/RES/60/147.

¹⁶⁸ Nairobi Declaration (n 17) Principle 3.

¹⁶⁹ Ibid, Principle 4.

¹⁷⁰ Ibid, Principle 1 A.

¹⁷¹ Ibid, Principle 1 D.

¹⁷² Ibid, Principle 2 C.

¹⁷³ Ibid, Principle 3 H.

¹⁷⁴ Couillard (n 15) 444.

¹⁷⁵ Ibid, 450.

laws and cultural practices which oppress women and often exacerbate their violence further in post-conflict situations. Whereas, the orthodox notion of reparation is understood as returning the victim back to their original position prior to the violations suffered during conflict. Thereby inadvertently reinforcing the pre-existing structural inequalities of powerlessness and insecurity of women.

In 2015 President Uhuru Kenyatta apologised to all Kenyan citizens on behalf of his government and previous governments for all past human rights violations. He followed up his apology with a guarantee to establish a 10 billion Kenyan Shilling (approximately \$110 million USD) Restorative Justice Fund for victims of gross human rights violations.¹⁷⁶ Almost two years has passed since Kenyatta's promise, yet the Kenyan government has not adopted a comprehensive reparations policy. The Human Rights Watch recently reported that many sexual violence survivors are yet to receive medical care, counselling and financial compensation.¹⁷⁷ It further noted that rape survivors have been entirely neglected and the government has treated post-election violence survivors worse than other victims of past human rights injustices a decade ago.¹⁷⁸ This is very disheartening as many of these women could not get their violators to be prosecuted for various reasons, including fear of social stigma, lack of forensic evidence to use in convicting the perpetrators and other women were sexually violated by police men so they did not bother reporting. Accordingly, providing adequate remedy for these survivors is the least the Kenyan government could have done. However, on 24 March 2017, the Attorney General, Githu Muigai, announced that a comprehensive reparations programme will be introduced into Kenyan national law through the Public Finance Management (Reparations for Historical Injustices Fund) Bill of 2017.¹⁷⁹ The reparation policy aims to be "a means of dignifying victims by measures that are aimed at promoting justice and reconciliation by addressing historical injustices through rehabilitation, compensation, restitution and/or collective reparations, in a degree that is proportionate to the gravity of the violations and the harm suffered."¹⁸⁰ Githu envisages the Act will be enacted later this year, so that victims and survivors of past human rights violations can start getting compensated in early 2018.¹⁸¹ This announcement is promising and restores hope of many victims and survivors who have longed for justice after a decade. However, as shown under the prosecutions sub-heading, the Kenyan government are quick to make promises but are notoriously slow in fulfilling them. It is hoped that the proposed Public Finance Management Bill of 2017 will be enacted by parliament within the prescribed time. In addition, it is suggested that the Kenyan government should include a gendered dimension to the 2017 Bill by incorporating some, if not all of the suggestions made in the Nairobi Declaration of 2007. As Duggan and Abusharaf pointed out, policy makers ought to "take advantage of opportunities to redefine the social norms that have fostered violence and underscore the

¹⁷⁶ ICTJ (By Christopher Gitari), 'After Collapse of ICC's Ruto and Sang Case, Kenya Must Prioritize Reparations and National Prosecutions' (2016). < <https://www.ictj.org/news/icc-ruto-sang-kenya-reparations-victims> > Accessed 24 March 2017.

¹⁷⁷ Human Rights Watch, (By Agnes Odhiambo) 'Kenya: Hope for Survivors of Political Violence' (March 7 2017) < <https://www.hrw.org/news/2017/03/07/kenya-hope-survivors-political-violence> > Accessed 24 March 2017.

¹⁷⁸ Ibid.

¹⁷⁹ Irene Githinji, 'Attorney-General assures speedy pay-out to victims of historical justice' (March 24, 2017) < <http://www.mediamaxnetwork.co.ke/news/311375/ag-assures-speedy-payout-victims-historical-justice/> > Accessed March 25 2017.

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

importance of structural change.”¹⁸² Kenya should not miss out on this remarkable opportunity to provide redress and enhance justice for survivors sexual violations in the aftermath of the 2007 elections.

Conclusion

This paper assessed the extent to which justice has been enhanced and redress has been provided for women survivors of sexual violence through the incorporation of a gendered perspective and increased women’s participation in the four main transitional justice mechanisms (institutional reforms, truth-seeking through TJRCs, prosecutions and reparations) using the case study of Kenya. It pointed out that poor levels of implementation, enforcement and lack of political will by the Kenyan executive and legislative institutions have continuously undermined efforts to enhance access to justice and provide redress for women survivors of the 2007 post-election violence. As noted in previous paragraphs, there was a failure to prosecute and convict perpetrators of sexual offences, the Minister of Justice did not implement a number of recommendations by the TJRC and there is no strict adherence to the one-third gender rule provided in Article 27 of the Constitution of Kenya 2010. Despite the requirement of property rights being non-discriminatory in the Kenyan Constitution of 2010, in practice this is not the case. Also, the Kenyan government is yet to adopt a comprehensive reparations policy. Thus, there remains a significant challenge in enhancing justice and providing redress for women survivors of the 2007 post-election violence. However, as the old adage goes, ‘Rome was not built in a day’. The gender-sensitive aspects of Kenya’s transitional justice mandate are built on very strong foundations, in particular the Constitution of Kenya, as shown in earlier sub-sections strongly promotes gender equality. As such, there is still hope for women survivors of sexual violence to achieve justice. Furthermore, the Public Finance Management Bill of 2017 is very promising and if enacted quickly, it will be the beginning of many great things for Kenya and her people. It must be noted that the enhancement of justice, the provision of of redress and the broader aim of achieving gender equality can only be achieved by full commitment from the government to enforce strict implementation of all the transitional justice mechanisms.

¹⁸² Margaret Walker ‘Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations’ *International Journal of Transitional Justice*, Vol. 10 1 (2016) 108-125, 113.

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CONF.183/9

Completing the picture of the constitutional right to safe abortion under Kenyan 2010 Constitution

Magdalena Furgalska**

Kenya's 2010 Constitution was thought to ease in a new era for women's rights. Groups such as the Centre for Reproductive justice of Federation of Women's Lawyers (FIDA) believed that the new Constitution will mark a new era of greater reproductive autonomy for women.¹ Despite this, Kenya's constitutional provisions on the right to access safe abortion have not been realised and the government is failing to address lack of clarity and certainty of law.

Article 26(4) of the Constitution deals specifically with abortion care availability in Kenyan law, seemingly allowing a more extensive access than previously. Kenya's law on abortion was predominantly governed by the Penal Code² prior the 2010 Constitution. Various provisions of the Penal Code, discussed later in this paper, criminalise abortion, however s.240 permits abortion for the preservation of the mother's life. Furthermore - often forgotten in the discussion on abortion in Kenya - the Sexual Offences Act 2006 and associated guidelines suggest that abortion may be permitted in cases of rape. Reading the constitutional and legislative provisions alongside one another, one gets a sense of the lack of clarity in respect of the availability of abortion care in Kenya. This paper concentrates on this lack of clarity and possible interpretations.

Healthcare and, in particular, reproductive healthcare, are key areas of concern for women in Kenya. The World Health Organisation (WHO) estimates that Kenya's maternal mortality rate (MMR) is at least 450 deaths per 100,000 live births amongst wealthier women from urban areas and at least 1300 deaths per 100,000 live births in low-income areas.³ Kenya's Development Goal target had been to decrease MMR to 175 deaths per 100,000 live births by 2015.⁴ Recognising that the decrease of MMR has not been achieved, Kenya's government submitted in their State Party report that it is 'worrying' that the MMR is only decreasing by 0.8% each year.⁵ The high

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¹ Centre for Reproductive Rights, 'Kenyan Women Denied Safe, Legal Abortion Services' (29 June 2015). Available at < <https://www.reproductiverights.org/press-room/kenyan-women-denied-safe-legal-abortion-services>> accessed 12 July 2017

² The Penal Code of Kenya 1948 (2014 revision)

³ WHO, 'Maternal and Child Health: Kenya' [2015]. Available at < http://www.who.int/pmnch/media/membernews/2011/20121216_kenyaparliament.pdf> accessed 27 July 2017

⁴ *ibid*

⁵ UN CESCR, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant of Economic Social and Cultural Rights: combined second to fifth periodic reports of State Parties UN Doc E/C.12/KEN/2-5 (2013) [Kenya State Party Report 2013] (para 180)

rate of MMR has been linked to unsafe abortions which are extremely frequent in Kenya where around 75% of all abortions are unsafe.⁶ To reduce this high MMR, it is imperative that women can safely exercise their reproductive autonomy as guaranteed by the 2010 Kenyan Constitution and other available legislation.

The problem of unsafe abortion in Kenya is illustrated in a powerful way by a court case currently pending before the Chief Justice. In winter 2013, a fourteen-year-old Kenyan girl experienced one of the most traumatic acts of sexual violence: rape. Her experience of sexual violence was soon exacerbated when she discovered she was pregnant. Due to social stigma attached to pregnancy out of wedlock and abortion, as well as fear of the reaction of her immediate family, she decided to do what over half a million of women in Kenya do each year: seek unsafe abortion.⁷ Unsafe abortion is defined as 'a procedure of terminating unwanted pregnancy either by persons lacking necessary skills or in an environment lacking minimal medical standards or both'.⁸ As a result of unsafe abortion, she suffered kidney failure. The Centre for Reproductive Rights (CRP) and the Federation of Women Lawyers (FIDA) filed a petition for the High Court to decide that: Wanjiku's right to health had been violated (amongst other rights),⁹ to request the Ministry of Health clarify the law on abortion, and to declare that rape is one of the grounds for a safe and legal abortion.¹⁰ The High Court recognised the unequivocal and undeniable public importance of this case, and referred it to the Chief Justice to compose a bench of three judges and decide on the matter, as per the 2010 Constitution.¹¹

The Centre for Reproductive Right named this girl Wanjiku. In Kenya, Wanjiku symbolises any person. Therefore, Wanjiku is 'any woman, every woman'.¹² Wanjiku represents one of the biggest, if not the greatest public health concerns for Kenya: unsafe abortion.¹³ She also represents the failure of the Kenyan law, the failure of the Kenyan government and the failure of the international community to protect young victims from consequences of violence they survived such as unwanted pregnancy.

Arguably, the problem of unsafe abortion in Kenya can be traced back to the lack of clarity in Kenya's abortion laws and the lack of implementation of constitutional provisions. The central theme of this paper is to analyse Kenyan law in order to suggest ways which would advance arguments presented in the case of *Wanjiku*. Concentrating on the problem of abortion in Kenya, described in the first part of this paper, I will endeavor to canvas wider problems surrounding the issue of abortion specific to Kenya, such as access to contraception and the difficult position of the medical profession. I will then present the *Wanjiku* case as filed by the Centre of Reproductive Rights and the FIDA. The following sections aim to advance arguments

⁶ Kenya National Bureau of Statistics, 'Kenya Demographic and Health Survey: Key indicators' (2015) Available at <<http://dhsprogram.com/pubs/pdf/PR55/PR55.pdf>> accessed 12 February 2017

⁷ *Federation of Women Lawyers & others v Attorney General & others* [2016] EKLK, Petition Number 266 of 2015 (please note that I will refer to this case as *Wanjiku* case in the paper) ; Centre for Reproductive Rights, 'Keep Wanjiku Safe' (4 June 2016) <<https://www.reproductiverights.org/feature/keep-wanjiku-safe>> accessed 29 August 2017

⁸ World Health Organisation, 'Preventing Unsafe Abortion' (no date) <http://www.who.int/reproductivehealth/topics/unsafe_abortion/hrpwork/en/> accessed 1 August 2017 also cited in David A Grimes *et al.*, 'Unsafe Abortion: The Preventable Pandemic' (2006) 368 *The Lancet* 1908

⁹ *Federation of Women Lawyers & others v Attorney General & others* [2016] (n 7)

¹⁰ *ibid*, [5-f]

¹¹ *ibid*, [9]-[14]

¹² Centre for Reproductive Rights, 'Keep Wanjiku Safe' (n 7)

¹³ *ibid*, also Grimes (n 8)

presented in this case. I will propose interpretation of Article 26(4) that suggests it permits Kenyan courts to follow international law on the issue of abortion and human rights more generally. I will then argue that a closer analysis of Kenyan law suggests that there is a positive right to access abortion in cases of rape. I will then move on to analysis of other jurisdictions' approach to reproductive rights to illustrate examples which could advance interpretation of law by Kenyan Courts.

Background: Abortion law in Kenya

Prior to the 2010 Constitution, abortion in Kenya was solely regulated by the Penal Code, first introduced in 1948 and revised on numerous occasions, with the latest revision being 2014. However, even after the 2010 Constitution, the criminalising law on abortion has remained unchanged. Article 240 of the Penal Code states that a person 'is not criminally responsible' for abortion that was conducted for the preservation of a woman's life. Otherwise, persons seeking abortion are at risk of being charged with manslaughter¹⁴ or even murder.¹⁵ Furthermore, persons who conduct abortion for any other reasons are subject to fourteen years of imprisonment.¹⁶ A woman who consents to have an abortion is subject to seven years of imprisonment¹⁷ and any other person involved in helping one to obtain abortion can face up to three years of imprisonment.¹⁸ Kenya is continuously pressured by the CESCR,¹⁹ CEDAW,²⁰ and the Committee against Torture²¹ to decriminalise abortion, clarify the law and allow women to have meaningful access to safe abortion.

However, with the introduction of the new 2010 Constitution, the restrictive law on abortion was thought to be eased. Article 26(4) provides:

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

Although abortion is generally prohibited, the 2010 Constitution established several exceptions: emergency treatment, when the life of the mother is in danger, when the health of the mother is in danger or when permitted by any other law. However, the new constitutional provision raises a variety of unanswered questions: What is an emergency treatment? If it is solely dependent on the opinion of a trained medical professional, who is regarded as such for the purposes of the constitutional provision? Does exception on the ground to health entail reproductive and mental health? No legislation has been introduced to clarify these matters, so that neither the Constitution nor any other law or guidelines regulate the accessibility and availability of abortion.

¹⁴ The Penal Code of Kenya 2014, Article 205

¹⁵ *ibid*, Article 203

¹⁶ *ibid*, Article 158

¹⁷ *ibid*, Article 159

¹⁸ *ibid*, Article 160

¹⁹ CESCR, Concluding Observations: Kenya (2008) UN Doc. E/C. 12/KEN/CO/1, [33]

²⁰ CEDAW, Concluding Observations: Kenya (2011) UN Doc. CEDAW/C/Ken/CO/7, [38]

²¹ CAT Committee, Concluding Observations: Kenya (2013) UN Doc. CAT/C/KEN/CO/2, [28]

Instead the Constitution appears to empower ‘trained healthcare professionals’ to make decisions about the availability of abortion, but these people operate largely in a legislative vacuum.

In 2012, the Ministry of Health developed ‘Standards and Guidelines for Reducing Morbidity and Mortality for unsafe abortion in Kenya’.²² The guidelines promised specialised training for medical professionals, which in turn would satisfy constitutional requirement of medical professionals authorised to perform abortions.²³ Importantly, these guidelines would allow medical professionals to understand exactly when law permits abortion. This immensely important step towards implementation of the right to abortion and an opportunity to clarify the law was lost just a year later, when the Ministry of Health suddenly withdrew the guidelines without offering explanation or considering the involvement of stakeholders.²⁴ This was exacerbated by the issuance of a memorandum, following the withdrawal of guidelines, which stated that Constitution clearly expresses that abortion is illegal.²⁵ The memorandum also banned training on safe abortions including both surgical and medical abortions. Ostensibly, any medical professional who seeks training on abortion will be sanctioned, both legally and professionally.²⁶

FIDA & 3 others v Attorney General & 2 others [2016] EKLK

Withdrawal of the Standards and Guidelines (discussed above), and the issuing of the highly controversial memorandum, prompted the Centre for Reproductive Rights and Federation of Women’s Lawyers to take judicial action against the Kenyan government.²⁷ The case presents an opportunity to address several abortion issues in Kenyan law.²⁸ It was filed on behalf of four petitioners and is represented by the story of *Wanjiku* as presented in the introductory part of this paper, as her story illustrates the scope of the problem and injustice experienced by Kenyan women and girls everyday. The central argument made by the petitioners in this case was that revocation of the Standards and Guidelines and issuing of the memo which prohibits safe abortion and medical training violates following rights:

- Right to life and to procure safe, legal abortions²⁹
- Right to the highest attainable standard of health³⁰
- Right to access comprehensive and accurate health information³¹
- Right to non-discrimination³²
- Right to be free from cruel, inhuman and degrading treatment³³

²² Centre for Reproductive Rights, ‘Kenyan Women Denied Safe, Legal Abortion Services’ (29 June 2015) (n 1)

²³ *ibid*

²⁴ *ibid*

²⁵ *Federation of Women Lawyers & others v Attorney General & others* (n 7) [3]

²⁶ *ibid*

²⁷ *FIDA & 3 others v Attorney General & 2 others* (n 7)

²⁸ Centre for Reproductive Rights ‘Keep Wanjiku Safe’ (n 7)

²⁹ *FIDA & 3 others v Attorney General & 2 others* (n 7) [5a]

³⁰ *ibid*

³¹ *ibid*

³² *ibid*

³³ *ibid*

- Right to privacy³⁴
- Right to scientific progress³⁵

As a result, the petitioners asked the High Court to do the following:

- Declare that women's rights alongside the rights of the health-workers have been violated³⁶
- Issue an order which clearly states that government officials are prohibited from interfering with healthcare professionals' training, access to medical information, or provision of accurate information to patients³⁷
- Issue an official order which states that the government must develop and publish guidelines on safe abortion care to ensure the quality of services offered³⁸
- Issue an order which requires the Director of Medical Services to release a new memorandum which clarifies the exceptional circumstances for safe abortion under the 2010 Constitution³⁹
- Declare that rape is one of the grounds for a legal abortion in Kenya⁴⁰

In considering the case, the High Court found that the matter was sufficiently complex, raised novel points and required a substantial consideration due to undeniable public importance.⁴¹ It therefore refrained from judgment and referred the case to the Chief Justice to compose a bench of three judges to hear and decide this case.⁴²

This case highlights the multiple ways in which women's human rights are violated by the lack of legal clarity about the availability of abortion in Kenya. However, violations highlighted in this case are not strictly linked to the lack of Constitutional clarity, but reflect a broader context. Thus, in the next section, I aim to canvas the scope of problems interrelated with and linked to unsafe abortion in Kenya.

Background: unsafe abortion, contraception and medical profession

Over 42% of the Kenyan population lives below the poverty line.⁴³ Women, children and the rural population are disproportionately affected.⁴⁴ Maternal mortality rates are 450 per 100,000, and 1300 per 100,000 in rural areas.⁴⁵ This is closely linked with government's capacity to

³⁴ *ibid*

³⁵ *ibid*

³⁶ *ibid*, [5b]

³⁷ *ibid*, [5b-d]

³⁸ *ibid*, [5e]

³⁹ *ibid*, [5g]

⁴⁰ *ibid*, [5f]

⁴¹ *ibid*, [7]

⁴² *ibid*, [6]; the court is referring to Article 165(4) of the 2010 Constitution which states: *Any matter certified by the Court as raising a substantial question of law under clause(3) (b) or (d) shall be heard by an uneven number of Judges, being not less than three, assigned by the Chief Justice.*

⁴³ UNICEF, 'Kenya at glance'. Available at < https://www.unicef.org/kenya/overview_4616.html > accessed 1 September 2017

⁴⁴ *ibid*

⁴⁵WHO, 'Maternal and Child Health : Kenya' (n 3)

provide for basic needs. Another major factor in Kenya's poverty is 'inequality and marginalisation, which is highly entrenched in political, economic and social spheres'.⁴⁶ Only 3.7%⁴⁷ of the Kenyan budget is allocated to health (a drop since 2011, when the figure was 6.5%),⁴⁸ from which majority is being allocated to the treatment of HIV.⁴⁹ The supply of contraception is inadequate. In 2001, Kenya committed to the Abuja Declaration, where African leaders pledged that they would commit at least 15% of their national budget to healthcare.⁵⁰ Kenyan budgetary allocation appears to be set in abstract, given the increasing number of women who die each year from the lack of reproductive care.

The current population of Kenya is 47 million people. This means that the population has increased by 12 million people in the last twelve years.⁵¹ The World Factbook of the Central Intelligence Agency reports that the reason for such a shocking rise in population is a decline in mortality rate and an increase in birth rate.⁵² Shockingly, more than 40% of Kenyans are under the age of fifteen and 60% are under the age of twenty-four.⁵³ The existence of such a young population is linked to sustained high fertility, early marriages and shortages in family planning needs.⁵⁴ Kenya has struggled with high birth rates for many decades, and in 1970s the Government officially supported the use of contraception.⁵⁵ The aim of promoting contraception was to decrease the fertility rate and effectively control population growth. Ostensibly, the government has been successful, as the fertility rate decreased from eight per woman in 1970s, to three per woman in 2016.⁵⁶ However, even with the decreased fertility rate, the population continues to grow. The family planning incentives have not progressed and have even stagnated since 1990.⁵⁷ This is due to the government re-centering their focus - in the context of health to address the HIV epidemic, and thus most the health budget has been focused on this.

⁴⁶ NW Orago, 'The Place of the "Minimum Core Approach" in the Realisation of the Entrenched Socio-Economic Rights in the 2010 Kenyan Constitution' (2015) 59(2) *Journal of African Law* 237

⁴⁷ Ministry of Health, 'National and County Health Budget Analysis 2016-2017, 6. Available at <http://www.healthpolicyplus.com/ns/pubs/6138_6239_FINALNationalandCountyHealthBudgetAnalysis.pdf> accessed 25 June 2017

⁴⁸ Gesellschaft für Technische Zusammenarbeit (GTZ), 'Kenyan Health Sector - Budget Analysis' (2010/2011) Available at: <http://www.gtzkenyahealth.com/blog3/wp-content/uploads/2010/07/Health-Budget-Analysis_FINAL.pdf> accessed 25 June 2017

⁴⁹ Ministry of Health, 'National and County Health Budget Analysis 2016-2017, 6. Available at <http://www.healthpolicyplus.com/ns/pubs/6138_6239_FINALNationalandCountyHealthBudgetAnalysis.pdf> accessed 25 June 2017

⁵⁰ The Abuja Declaration 2001 *cited* Kenya National Commission on Human Rights, 'Realising Sexual and Reproductive Health Rights in Kenya: a myth or reality? A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya' (April 2012), 17. Available at: <http://www.knchr.org/portals/0/reports/reproductive_health_report.pdf> accessed: 5 July 2017, 16

⁵¹ Central Intelligence Agency, 'The World Factbook: Africa: Kenya'. Available at: <<https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>> accessed 25 June 2017

⁵² *ibid*

⁵³ *ibid*

⁵⁴ *ibid*

⁵⁵ *ibid*

⁵⁶ *ibid*

⁵⁷ *ibid*

Access to contraception remains extremely limited. The Centre for Reproductive Rights highlights that main failures of the government are inadequate supplies of contraceptives.⁵⁸ The financial barriers experienced by women in obtaining contraceptives, along with social stigmas, are the main reasons why access to reproductive healthcare is difficult to facilitate and obtain. The Centre for Reproductive Rights discovered that one-in-five clinics were out of stock of combined and progesterone only pills.⁵⁹ The emergency contraception has the potential to significantly reduce any number of unwanted pregnancies. There are continuous stock-outs of emergency contraception (69%) and implants and injectable contraceptives (75%); these pose a significant hurdle for women to obtain reproductive healthcare.⁶⁰ Furthermore, emergency contraception – along with contraceptive pills, injections and implants – are part of the WHO’s essential medicine list, and therefore Kenya is required to provide them.⁶¹ Astonishingly, most doctors require women who seek contraception to provide spousal consent.⁶² This is disproportionately discriminatory to unmarried women and adolescent girls.

The Kenyan National Commission on Human Rights, established under the new Constitution, noted that spousal consent should never be required, as it severely limits gender equality and women’s right to health. Access to contraception was regarded by the Commission as a prerequisite for gender empowerment, equality, and improvement to women’s health.⁶³ Mwaniki highlighted that there is a shortage of at least \$13 million worth of what would be considered an adequate supply of necessary contraception.⁶⁴ Consequently, the lack of access to a wide range of contraception methods, along with the lack of access to safe abortions, means that the Constitutional right to the highest attainable healthcare is not achievable. Consequently, the government is potentially in breach of the Constitution, as it does not provide adequate means to guarantee this right.

As outlined in the first part of this paper, Article 26(4) of the Constitution appears to concede a significant amount of power to the medical profession in deciding whether abortion can be justified in any particular set of circumstances. Thus, it is imperative to consider the current situation of medical profession in Kenya. Currently, there are 3,956 doctors for the population of 47 million people.⁶⁵ This means that the ratio is one doctor per 12,000 persons; this is against

⁵⁸ Centre for Reproductive Rights, ‘In Harm’s Way: the Impact of Kenya’s Restrictive Abortion Laws’ (2010). Available at: <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/InHarmsWay_2010.pdf> accessed 25 June 2017

⁵⁹ Kenya National Bureau of Statistics, ‘Kenya Demographic and Health Survey’ (n 6) *also cited in* The Centre for Reproductive Rights, *Failure to Deliver: Violations of Women’s Human Rights in Kenyan Health Facilities* (2007) Available at: <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bo_failuretodeliver.pdf> accessed 25 July 2017

⁶⁰ The Centre for Reproductive Rights, ‘Failure to Deliver’ (n 59)

⁶¹ WHO, *WHO Model List of Essential Medicines* (20th list, March 2017), 40. Available at: <http://www.who.int/medicines/publications/essentialmedicines/20th_EML2017.pdf?ua=1> accessed 1 August 2017

⁶² Kenya National Commission on Human Rights, ‘Reproductive Health Report’ (n 50) 37

⁶³ *ibid*

⁶⁴ Mike Mwaniki, *Shortage of Contraceptives Looms*, Daily Nation, Aug. 4, 2009 *cited in* Centre for Reproductive Rights, ‘Failure to Deliver’ (n 59)

⁶⁵ Central Intelligence Agency, *The World Factbook: Africa: Kenya*’ (n 51)

WHO's recommendation of 1 doctor per 1000 persons.⁶⁶ The lack of clarity and punitiveness of the current abortion law caused the Code of Professional Conduct to include provisions which form significant obstacles to accessing an abortion. The permission of three senior practitioners is required for abortion,⁶⁷ along with an opinion of a psychiatrist.⁶⁸ Such requirements have been previously criticised by the Human Rights Committee as posing an obstacle to women's life and health, and consequently leading to unsafe abortion.⁶⁹ The scope of this obstacle is clearly highlighted by the doctor/person ratio and the fact that there is just over 60 psychiatrists in Kenya, the majority of whom reside in Nairobi.⁷⁰ The situation and requirements imposed for accessing safe and legal abortion somewhat resemble those in the US case *Whole Women's Health*, where Justice Ginsburg highlighted that such obstacles in obtaining abortion do not preserve women's health, and are undue burden.⁷¹ Given the above numbers, accessing legal and safe abortion appears to be almost impossible.

In Kenya, criminal punishment for procuring abortion is almost exclusively imposed on women, which results in disproportionate prosecution of women compared to the providers of illegal abortion.⁷² Nevertheless, the country is still experiencing the chilling effect of the *Nyamu* case, where three doctors were prosecuted for murder⁷³ for offering post-abortion care: 'after Dr Nyamu's case, the stigma around post-abortion care was much more'.⁷⁴ As a result, it is estimated that at least 50% of women in Kenya who die following an unsafe abortion did not seek appropriate medical help.⁷⁵ Prosecution of abortion providers increased after this case.⁷⁶ There

⁶⁶ WHO, 'Global Health Observatory: Density of Physicians' (2017) Available at: <http://www.who.int/gho/health_workforce/physicians_density/en/> accessed 10 July 2017

⁶⁷ Medical Practitioners and Dentists Code of Conduct Article 16 *cited in* Centre for Reproductive Rights, 'In Harm's Way' (n 58) 36

⁶⁸ The Centre for Reproductive Rights 'In Harm's Way' (n 58) 37

⁶⁹ Human Rights Committee, Concluding Observations: Zambia (2007) UN Doc. CCPR/C/ZMB/CO/3, [18]

⁷⁰ National Academies of Sciences, Engineering, and Medicine, *Providing sustainable mental and neurological health care in Ghana and Kenya: Workshop summary*. Washington, DC: The National Academies Press. Available at <https://www.ncbi.nlm.nih.gov/books/NBK321108/pdf/Bookshelf_NBK321108.pdf> accessed 25 July 2017

⁷¹ *Whole Woman's Health v Hellerstedt* 579 US (2016) Concurring opinion of Justice Ginsburg; : " [a]bortion is one of the safest medical procedures performed in the United States. [...] Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory- surgical-center or hospital admitting-privileges requirements." [46] - This case was primarily concerned with the House Bill 2 (HB2) law operating in Texas. The HB2 law placed many requirements on physicians and abortion clinics, meaning that women's access to abortion was severely restricted. The requirements often meant that a pregnant woman was forced to make several trips to physicians and clinics before she could have an abortion, which significantly delayed the process of obtaining an abortion, and the bureaucratic realities made access difficult and daunting. The Supreme Court deemed this law unconstitutional. If the law had not been deemed unconstitutional, fewer than ten clinics across the largest state of the US would have been able to satisfy the HB2 law and provide legal abortions, and would have then faced significant procedural obstacles. Justice Ginsburg's concurring judgment is an extraordinary one in my view. In a short and powerful way, Justice Ginsburg conveys an important message: abortion is a safe medical procedure. Consequently, abortion should not be viewed in simple legal terms; abortion is a matter of health and therefore should be easily accessible. For a good analysis on this case see

Greasly K, 'Taking Abortion Rights Seriously: Whole Woman's Health v Hellerstedt' (2017) 80(2) *Modern Law Review* 325

⁷² The Centre for Reproductive Rights, 'In Harm's Way' (n 58) 137

⁷³ *Republic v John Nyamu & 2 others* [2005] eKLR: not charged due to lack of evidence, but all doctors as well as their families suffered from constant harassment

⁷⁴ The Centre for Reproductive Rights, 'In Harm's Way' (n 58) 29

⁷⁵ *ibid*, 25

⁷⁶ *ibid*, 29

was also an increase of family members reporting women who had procured abortions to the police in order to avoid prosecutions themselves⁷⁷.

Considering the fear and tension criminalisation of abortion created for health professionals, training in abortion is effectively unavailable. The Medical Chair explains: 'It's not that they're not capable, but we don't want them to run into problems of interpretation of the law. If it was legal, they would be trained in termination'.⁷⁸ Since 2013, any training in the provision of abortion care is banned. The Special Rapporteur on the Right to Health reported that when abortion is legal it must be made accessible and safe. Thus in order to fulfil its international commitments Kenya is required to: 'train and equip health service providers and take other measures to ensure that such abortions are not only safe but accessible.'⁷⁹

In short, the lack of legal clarity and certainty combined with wider problems, such as inadequate access and availability of family planning, as well as, scaremongering amongst the medical profession mean that there is no meaningful access for women not only to access abortion but to secure their wider reproductive needs. This section highlights only a few problems encountered by Kenyan women.

Status of International Law in Kenya and 'any other written law'

When the High Court decided that the Wanjiku case should be decided by the Chief Justice, it emphasised the importance of Constitutional provisions alongside with international instruments relating to the case, which should be read alongside one another.⁸⁰ This draws our attention to the fact that, due to its status in Kenyan law, international law may be used to aid in the interpretation of laws relating to abortion. Article 2(5) of the 2010 Constitution states that 'general rules of international law form a part of Kenyan Law' and further, Article 2(6) states that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'. These two provisions appear simple enough: international law forms part of Kenyan law, once ratified. In fact, I will suggest a novel interpretation to Article 26(4) where the vague statement that abortion is prohibited unless stated otherwise by 'any other written law' is not limited to the provisions of the Penal Code, but rather includes international treaties ratified by Kenya. If so Kenya should, at the very least, decriminalise abortion.

The apparent simplicity of Articles 2(5) and 2(6) is undermined by reading them in conjunction with other constitutional provisions that introduce some ambiguity about the status of international law. Prior to the 2010 Constitution, in order for international law to become a part of domestic law, it had to be enacted through legislation.⁸¹ Now, via the virtue of Article 2(6),

⁷⁷ *ibid*: fearing consequences, it had been reported that families and friends of women who procured abortions would report this to the police to avoid prosecution themselves

⁷⁸ *ibid*, 99

⁷⁹ Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (16 February 2004) UN Doc. E/ CN.4/2004/49, [30]

⁸⁰ *ibid*

⁸¹ Nicholas W Orago, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 12 *African Human Rights Law Journal* 415, 416

once Kenya ratifies a treaty it does not simply become a party to that instrument, but also binds itself by it at domestic level.⁸² The Parliament enacted the Treaty Making and Ratification Act 2012 [revised in 2014] (TRMT) in order to give full effect to Article 2(6) of the Constitution.⁸³ Under this Act, ratification powers are vested in the hands of the executive.⁸⁴ This might appear as a process which is contrary to the power vested in the Parliament by the Constitution.⁸⁵ Nevertheless, the TRMT applies only to treaties ratified after the commencement of the Act.⁸⁶ This is not novel, given a well-established principle that law in general should not be applied in a retroactive manner.⁸⁷ Therefore, commentators such as Oduor argue that the treaties enacted before the TRMT have a full ratification force within Kenyan law.⁸⁸ This means that international instruments by which Kenya is bound at the domestic level include: The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),⁸⁹ International Covenant on the Civil and Political Rights (ICCPR),⁹⁰ International Covenant on the Economic, Social and Cultural Rights (ICESCR)⁹¹ - which are most relevant in the discussion of women's rights.

Remarkably, for the discussion on the issue of human rights specifically, Article 21(4) of the Kenyan 2010 Constitution states that 'the State shall enact and implement legislation to fill its international obligations in respect of human rights and fundamental freedoms.' Oduor notices that this provision can be interpreted as a requirement for the State to implement changes if an international law is ratified.⁹² Failure to do so could amount to the violation of constitutional law.⁹³ This interpretation appears to be consistent with a literal interpretation of Article 2(6).

Following on from this point, the Constitution requires courts to develop human rights law by adopting an interpretation which is the most favourable for the enforcement of human rights and fundamental freedoms.⁹⁴ Therefore, it is imperative to look at the way in which courts have positioned IHRL within the human rights context since the enactment of the 2010 Constitution. In the case of *Kituo cha Sheria*,⁹⁵ the Court decided that non-refoulement formed part of international customary law, and so the meaning of Article 2(5) is that customary international law forms part of Kenyan law.⁹⁶ One of the most significant cases is the *Mathara*⁹⁷ case which

⁸² *ibid*

⁸³ Treaty Making and Ratification Act 45 of 2012, Preamble

⁸⁴ *ibid*, section 4

⁸⁵ Maurice Oduor, 'The Status of International Law in Kenya' (2014) 2 *African Nazarene University Law Journal* 97, 100; also Article 94 of the Constitution of Kenya

⁸⁶ Treaty Making and Ratification Act 4 of 2012, s 3(1)

⁸⁷ Oduor (n 32) 102

⁸⁸ *ibid*

⁸⁹ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, (opened for signature 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

⁹⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

⁹¹ International Covenant on Economic, Social and Cultural Rights, (adopted opened for 16 December 1966, entered into force 3 January 1976) 999 UNTS 3

⁹² Oduor (n 85)

⁹³ *ibid*

⁹⁴ The Constitution of Kenya (Promulgated 27 August 2010), Article 20(3)

⁹⁵ *Kituo cha Sheria and Others v Attorney General* [2013] eKLR, Petition No. 19 of 2013 Consolidated with Petition No. 115 of 2013

⁹⁶ *ibid*, [71]

⁹⁷ *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR

concerned an individual being arrested under Kenyan civil law for outstanding debt when seeking a bankruptcy order. Within the applicant's argument, it was alleged that imprisonment was contrary to Article 11 of the International Covenant on Civil and Political Rights, which makes it unlawful for anyone to be imprisoned for not being able to fulfill contractual obligation.⁹⁸ Additionally, it was argued that international law forms part of Kenyan law.⁹⁹ The Court deemed the imprisonment unconstitutional, as it was contrary to the rules of the ICCPR.¹⁰⁰ Surprisingly, courts in above cases did not engage in explicitly establishing hierarchy of laws in Kenya.

However, in the similar case of *Mulwa*,¹⁰¹ the High Court engaged in more of a discussion on the status of international law in domestic law by stating that there is a 'three tier hierarchy of the law'.¹⁰² The Constitution was thought to be the supreme law of the land, followed by Acts of Parliament, and then subsidiary legislation. Finally, the Court decided that the ICCPR is of equal rank to an Act of Parliament.¹⁰³ This is contrary to the view of Justice Majanja in the *Mathara* case, who believed that the court should engage in 'purposive interpretation' of the law, rather than deciding on the hierarchy of law and then it being followed blindly.¹⁰⁴

The issue of the exact positioning of international law within the Kenyan legal system remains somewhat unclear. However, it is clear that the intent of the Constitution is to ensure the highest consideration for human rights and that ratified international laws must be considered in each case to which they apply. Ostensibly, Kenyan Courts could abandon the need for establishing the hierarchy. As scholars such as Peters argue, the increasing absorbency and merging of constitutional laws around the world with norms prescribed by international law results in harmonization of the rules.¹⁰⁵ Thus, it is not meaningful for courts to engage in deciding whether to apply constitutional human rights or international human rights instruments, as essentially both operate and can be applied together.¹⁰⁶ Peters persuasively explains that courts should engage in a 'substance-oriented perspective' where norms are regarded in accordance with their substantive significance.¹⁰⁷ Consequently, if international provisions convey human rights in a more sophisticated way that offer higher protection of the right, the Constitutional right should give way to that international law.¹⁰⁸ Hence the idea of supremacy of law is inconsistent with the requirement for any national constitution to interpret the law in conformity with international human rights law,¹⁰⁹ just as Kenyan Constitution does in accordance with Articles 20(3) and 21(4). In effect, without having to establish the hierarchy, the IHRL and constitutions are essentially of the same status.

⁹⁸ ICCPR (n 90)

⁹⁹ *Re Mathara* (n 98) [3]

¹⁰⁰ *ibid*, [9] – [10]

¹⁰¹ *Diamond Trust Kenya Ltd v Daniel Mwena Mulwa* [2010] eKLR

¹⁰² *ibid*, 3

¹⁰³ *ibid*

¹⁰⁴ *Re Mathara* (n 98) [78] (Justice Majanja)

¹⁰⁵ Anne Peters 'Supremacy lost: International law meets domestic constitutional law' (2009) 3 *International Constitutional Law Journal* 171, 197 ; Peters refers to this as an effect of complete vertical and horizontal harmonization of law.

¹⁰⁶ *ibid*

¹⁰⁷ *ibid*

¹⁰⁸ Orago, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (n 81) 431

¹⁰⁹ Peters (n 105) 177-179

Peters' view of the changing position of international law within domestic constitutions is consistent with the *Mathara* case, in which the court considered the substantive weight and value of the case and ruled national law unconstitutional, giving international human rights provision a constitutional standing. This is the exact same view that was adopted in the Advisory Opinion of the Supreme Court regarding a constitutional gender rule, which provides for enhancing gender representation in politics.¹¹⁰ The court relied heavily on CEDAW provisions in establishing that lack of gender representation in Parliament is a form of discrimination. Neither, the majority or the dissent thought it necessary to engage in the hierarchical discussion of the relationship and hierarchy between the international human rights law and national law.¹¹¹

Following from the above analysis, the argument that 'any other written law' within the meaning of Kenya's constitutional provision on abortion refers to international law appears not only persuasive, but to be in line with constitutional intent and emphasis on relying on international provisions to ensure the most favourable interpretation of law in the advancement of human rights. The right to abortion in international community has been framed through the lens of human rights, more specifically: the right to health, the right to privacy, the right to be free from torture, cruel, inhuman and degrading treatment and the right not to be discriminated against amongst others. Therefore, since the right to abortion has not been established as a stand-alone right, Kenyan court in deciding the case of *Wanjiku* should engage in the interpretation of various international provisions which are the most relevant to the case and which offer the most favourable interpretation allowing for the upmost respect of women's rights. Nevertheless, in assessing legal grounds for abortion in Kenya, I argue that in cases of rape, the answer can be extracted purely based on Kenyan law.

The right to health and abortion in cases of rape

Considering the status of international law in Kenyan law, it has become apparent that ambiguous provisions which state that abortion is permitted if any 'other written law' permits it could refer to IHRL, given its special status within the Constitution. Therefore, Kenya is obliged to refer to international instruments when trying to establish the legality access to abortion. Nevertheless, Kenya still made a reservation to Article 14(2)(c) of the Maputo Protocol¹¹² (which establishes the right to abortion), stating that the provision which allows abortion in cases of rape, incest, sexual assault and endangering the life or the health of the mother is inconsistent with the legal provisions in Kenya on health and reproductive rights.¹¹³

¹¹⁰ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Supreme Court of Kenya, Advisory Opinion Application 2 of 2012 [11.1] cited in Orago, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (n 81) 421

¹¹¹ *ibid*

¹¹² Maputo Protocol (adopted 11 July 2003, entered into force 25 November 2005) AHG/res 240 (XXXI)

¹¹³ Solidarity for African Women's Rights, 'Implementing the Protocol on the Rights of Women in Africa: Analysing the Compliance of Kenya's Legal Framework' (March 2014) 7. Available at <<http://www.soawr.org/sites/default/files/ml-implementing-protocol-womens-rights-africa-010314-en.pdf>> accessed 1 September 2017

The right to health as encompassing reproductive health is protected by Article 43(1)(a) of the Constitution: ‘everyone has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive healthcare.’¹¹⁴ Other subsections of Article 43 guarantee rights which are recognised by international instruments as interlinked to the right to health: food,¹¹⁵ water,¹¹⁶ education¹¹⁷, and so on.¹¹⁸ By constructing the right to health in this way, the Kenyan Constitution mirrors the language of international law instruments with respect to the right to health. Comparable is also Article 21(2) of the Constitution, which states that the right to health is subject to progressive realisation. This again mirrors the obligation in regards to socio-economic rights. The influence is even more apparent when one considers that the Kenya National Human Rights Commission noted that Kenyan policy framework on reproductive human rights is highly influenced by the ICPD 1994.¹¹⁹ This is evidenced by Vision 2030, where Kenya’s goal is to provide equitable and affordable healthcare to all.¹²⁰ Kenya appears to make some effort to implement measures in order to improve reproductive health. A Division of Reproductive Health and Public Health Sanitation was created in 2007.¹²¹ The National Reproductive Health Policy was introduced, followed by reproductive health strategies which were to be implemented between 2009-2015.¹²² The key aim is to improve access to reproductive services by all people in Kenya. This access should be equitable, efficient and effective.¹²³ This mirroring of the language of international provisions further upholds the view that Kenya’s reproductive health rights are to be understood as closely aligned in the meaning and content of the international provisions.¹²⁴

In light of contradictory actions taken by the government, it is not surprising that a close analysis of Kenyan law (without having to argue that abortion in cases of rape could be permitted

¹¹⁴ The Right to Health is recognised as a socio-economic right (Article 12 of the ICESCR; (n 91) In 1994, the right to reproductive health has been formally recognised in: United Nations Population Division, ‘Report of the International Conference on Population and Development’ (18 October 1994) UN Doc A/ CONF.171/13 and later on reiterated by CEDAW: UN CEDAW, ‘General Recommendation No. 24: Article 12 of the Convention (Women and Health) (1999) UN Doc A/54/38/Rev.1. Abortion has been recognised as part of the right to health within the international arena United Nations Department for Policy Coordination and Sustainable Development, Report of the Fourth World Conference on Women (17 October 1995) UN Doc A/ CONF.177/20, [94] for academic analysis on the right to health and its relevance to abortion see: *Review* 185; Siller H, Hochleitner M, ‘Abortion as one aspect of Women’s Health’ (2017) 38(9) *Health Care for Women* 907; Hammel H, ‘Is the Right to Health a Necessary Precondition for Gender Equality?’ (2011) 35 *NYU Review of Law and Social Change* 131

¹¹⁵ The Constitution of Kenya 2010, Article 43(1)(b)

¹¹⁶ *ibid*, Article 43(1)(d)

¹¹⁷ *ibid*, Article 43(1)(f)

¹¹⁸ Universal Declaration of Human Rights (adopted 10 December 1948. UNGA Res 217 A(III)) (UDHR): Article 25 merged the right to health with other rights associated with adequate standard of living, such as the right to food, water, housing and medical care. These were later separated in ICESCR. For the discussion on the development of the right to health in international law see: B Saul, D Kinley and J Mowbray, *The International Covenant on Economic, Social and Cultural Rights Commentary, Cases and Materials* (Oxford University Press, 2016) 978

¹¹⁹ Kenya National Commission on Human Rights, (n 50) 17

¹²⁰ *ibid*

¹²¹ Ministry of Health Republic of Kenya, National Reproductive Health Policy: Enhancing Reproductive Health Status for All Kenyans’ (2007) Available at <https://www.k4health.org/sites/default/files/National%20Reproductive%20Health%20Policy%20booklet_0.pdf> accessed 28 July 2017

¹²² Ministry of Health Republic of Kenya, National Reproductive Health Strategy 2009-2015 (August 2009). Available at: <https://www.k4health.org/sites/default/files/National%20RH%20Strategy_0.pdf> accessed 28 July 2017

¹²³ *ibid*, v

¹²⁴ see (n 114)

through the analysis of international law) reveals a construction of a positive right to access abortion on grounds of rape, and frames it through this by stating that rape endangers woman's mental health, and hence falls under the Constitutional exception. Nevertheless, the law on abortion before 2010 and at present is subject to contradictory interpretations. Ngwena argues that postcolonial African countries such as Kenya should still benefit from precedents from former European colonizing countries when dealing with a novel issue; the experience of colonizing countries is still present in persuasive authorities.¹²⁵ There is some value in using these precedents, as modern jurisprudence of previously colonised countries has utilised and inherited laws from the global north and particularly of these countries' former colonial powers.¹²⁶ Even with adoption of modern constitutions assuming supremacy over any other laws, it can be extremely useful to seek answers from colonial precedents notwithstanding the unquestionably problematic nature of colonial legacies in post-colonial legal and political systems.

This value has been clearly acknowledged by some scholars such as Cook and Dickens, who attempted to look at the pre-independence framework of Kenya to clarify whether abortion on grounds of rape is permitted in Kenya.¹²⁷ Cook and Dickens point out the precedent of the British case of *R v Bourne*.¹²⁸ In this case, the House of Lords attempted to clarify the grounds on which abortion could be legally available under British Law. In *Bourne*, a doctor was tried for performing an abortion on a rape victim. The question in this case was whether the abortion was lawful when performed for health reasons. The Court held that the abortion was lawful, as it prevented the woman from becoming 'a physical and mental wreck'.¹²⁹ The House of Lords decided that it was lawful to perform an abortion if the procedure was completed 'in a good faith for the purpose only of preserving the life of the mother'.¹³⁰ Furthermore, the House of Lords assigned a significant role to healthcare professionals in deciding what 'preservation of the mother's life' means, stating: 'If the doctor is of the opinion, on reasonable ground and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck [then this is acting] for the purpose of preserving the life of the mother.'¹³¹ This meant that the House of Lords created both physical and mental health exceptions for abortion in the UK.¹³²

Cook and Dickens note that this specific case carries a lot of authority and importance for the law of former British colonies, including Kenya.¹³³ They further argue that provisions of the Penal Code are identical to the judgment and the language of the House of Lords in *Bourne*.¹³⁴ I would go further in arguing that placing the decision-making capacity (regarding the legality of

¹²⁵ Charles Ngwena, 'Conscientious Objection to Abortion and Accommodating Women's Reproductive Health Rights: Reflections on a Decision of the Constitutional Court of Colombia from an African Regional Human Rights Perspective' (2014) 58(2) *Journal of African Law* 183

¹²⁶ *ibid*

¹²⁷ Rebecca Cook and Bernard Dickens, 'Abortion Laws in African Commonwealth Countries' (1981) 25(2) *Journal of African Law* 60

¹²⁸ *Rex v. Bourne* [1939] 1 K.B. 687 *cited in* Centre for Reproductive Rights 'in Harm's Way' (n 81) 33

¹²⁹ *ibid*

¹³⁰ *ibid*

¹³¹ *ibid*

¹³² Cook and Dickens (n 127) 65

¹³³ *ibid*

¹³⁴ *ibid*

abortion) into the hands of healthcare professionals by the Kenyan Constitution further mirrors the decision in *Bourne*, especially considering the influence of this case in Kenyan Law.

In 1959, the East African Court of Justice heard an appeal from the Supreme Court in Kenya in *Mehar Singh Bansel v R* where the standard established in *Bourne* was applied.¹³⁵ The Supreme Court argued, and the East African Court affirmed the position, that lawful abortion is performed for ‘a good medical reason’, which was further interpreted by the Courts to be for ‘the purpose of saving the patient’s life or preventing severe prejudice to her health’.¹³⁶

Cook and Dickens¹³⁷ and the Centre for Reproductive Rights argue that Kenya has retained its colonial law on abortion and therefore the *Bourne* precedent is binding.¹³⁸ It is a very persuasive argument, even though *Bourne* has not yet been applied in the Kenyan courts.¹³⁹ In the late 1970s, the Commonwealth Secretariat’s Legal Division requested the Attorney General of Kenya to confirm Kenya’s position on whether Kenya still follows the judgment in *Bourne*.¹⁴⁰ In response, the Attorney General pointed out that although this has not been tested in Courts, the meaning of ‘unlawful’ abortion as understood in *Bourne* applies now to Kenya.¹⁴¹ When the Attorney General was subsequently asked to clarify Kenya’s legal position on abortion, the Attorney General replied that grounds for abortion include rape and incest depending on the affect this crime had on a woman, and for the preservation of the woman’s life and her physical and mental health.¹⁴² This would mean that rape potentially satisfies the standard set by *Bourne*, where abortion for the victim of rape was allowed because it had an effect on her mental health. From my point of view, it becomes clearer that *Bourne* applies to Kenyan law and, as a result of the above analysis, rape is a ground for abortion, as it impacts the mother’s mental health. It has also been confirmed by the Chairman of the Medical Board that health in Kenya’s regulation is to be understood as both physical and mental health.¹⁴³

Finally, the position on abortion in cases of rape raises more questions when we analyse post-rape and post abortion care in Kenya. The National Guidelines on the Medical Management of Sexual Violence, as developed in 2004 and revised in 2014, both consider emergency contraception¹⁴⁴ and termination of pregnancy as measures for post-rape care.¹⁴⁵ This is still the case despite the fact that Ministry of Health banned training on abortion and stated that abortion

¹³⁵ *Mehar Singh Bansel v. R* [1959] E.A.L.R. 813, cited in Cook and Dickens (n 127) 61

¹³⁶ *Mehar Singh Bansel v. R* [1959] E.A.L.R. 813 cited in Centre for Reproductive Rights, ‘Harm’s Way’ (n 58) 33

¹³⁷ Cook and Dickens (n 127) 62

¹³⁸ Centre for Reproductive Rights ‘In Harm’s Way’ (n 58) 33

¹³⁹ *ibid*

¹⁴⁰ Letter from Attorney General to Commonwealth Secretariat, Legal Division (April 26, 1977), Ref. No. 5067/12 II(98) cited in Centre for Reproductive Rights, ‘In Harm’s Way’ (n 58) 33

¹⁴¹ *ibid*

¹⁴² Letter (questionnaire response enclosed) from Attorney General to Commonwealth Secretariat, Legal Division (Oct. 7, 1976), Ref. No. 5057/12 II(58). cited in Centre for Reproductive Rights, ‘In Harm’s Way’ (n 58) 33

¹⁴³ Interview with Professor Julius Kyambi, Chairman, Medical Practitioners and Dentists Board, Nairobi, July 13, 2009; interview with Daniel Yumbya, Chief Executive Officer, Medical Practitioners and Dentists Board, Nairobi, July 1, 2009. Conducted and cited by The Centre for Reproductive Rights ‘Harm’s Way’ (n 58) 120

¹⁴⁴ Ministry of Health, National Guidelines on the Management of Sexual Violence in Kenya (3rd Edition, 2014) at [7]; the guidelines state that emergency contraception should be administered within 120 hours after rape. Available at < https://www.law.berkeley.edu/wp-content/uploads/2015/10/Kenya_Natl-Guidelines-on-Mgmt-of-Sexual-Violence_3rd-Edition_2014.pdf> accessed 25 June 2017

¹⁴⁵ *ibid*, Annex 11

is 'prohibited'.¹⁴⁶ In 2004, it was also promised that the guidelines would form a part the Sexual Offences Act 2006.¹⁴⁷ Again, this Act does not mention post-rape care or termination of pregnancy.¹⁴⁸ It is possible that exclusion of post-rape care from the Sexual Offences Act 2006 is a simple omission and the Act might need to be revised to explicitly include post-rape care.

The second undeniable connection between the access to legal and safe abortion in Kenya and the right to health is another Constitutional exception, where abortion - in the opinion of the medical professional - is emergency treatment, as it is linked directly with Article 43(2), which states that nobody can be denied medical emergency treatment. In my view, this is a clear indication of the need for Constitutional founders to recognise that abortion is linked to and dependent on one's right to health and reproductive health.

The above section analysis does not clarify the law in Kenya, but it makes a persuasive argument which questions the legitimacy of the government's reservation to the Maputo protocol. Consequently, Kenya is obliged to provide women with meaningful access to their reproductive health rights by satisfying the minimum core obligations, at the very minimum.

Lessons from other countries

Decriminalisation of abortion

As already argued, scholars such as Ngwena argue that African courts interpreting new or recently changed constitutional orders should look to other jurisdictions in constitutional interpretation.¹⁴⁹ Were the Kenyan courts to do this, it might lead to a more efficient and rights-based interpretation of human rights relating to access to abortion. Orago argues that in the development of human rights jurisprudence, Kenyan Courts appear to almost exclusively rely on and be inspired by the South African Constitutional Court (SACC).¹⁵⁰ However, over-reliance on one comparative jurisdiction may not always translate well to all cases.¹⁵¹ Thus, courts in Kenya should look for more similar examples of constitution and rights issues that Kenya is experiencing and expand its horizons and look beyond the judgements of SACC. On the issue of

¹⁴⁶ *Federation of Women Lawyers & others v Attorney General & others* (n 7) [3]

¹⁴⁷ Centre for Reproductive Rights, Letter to the Committee on the Rights of the Child, Human Rights Treaties Division, Geneva (15 December 2015) p. 6 Available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Kenya-CRC%20Committee-71%20full%20session%20letter.pdf> accessed 17 August 2017

¹⁴⁸ The Republic of Kenya Sexual Offences Act 2006 [Revised Edition 2014]

¹⁴⁹ Ngwena (n 125)

¹⁵⁰ Orago, 'The Place of Minimum Core ...' (n 46)

¹⁵¹ For instance, in the case of *Mathew Okwanda v Minister of Health and Medical Services and 3 Others* [2013] eKLR, Kenyan Court followed the SACC judgment in *Soobramoney v Minister of Health* [1998] 1 SA 765 (CC) where SACC rejected the idea of minimum core in relation to the right to health; CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health' (11 August 2000) E/C.12/2000/4: The General Comment No. 14 translated 'minimum core' to emphasise its meaning in relation to the right to health. Consequently, the list of the MCO in relation to health can be understood to include: (1) non-discriminatory access to health services and facilities; (2) access to food, shelter, water and sanitation; (3) provide essential drugs as defined by WHO; (4) equitable distribution of health services; (5) adopting national public health strategy to address major health concerns. Other minimum core requirements of 'comparable priority' include reproductive healthcare, access to information and appropriate training for health professionals. [43-44] According to the status of IHRL in Kenyan law, Kenya is bound by the MCO to show that it protects, respects, and fulfills the minimum content of the right to health.

decriminalisation of abortion, the perfect example which could be followed by Kenyan Court in answering questions posed by the case of *Wanjiku* is to look at the Colombian Constitution and the Colombian Constitutional Court's work on the issue of accessing abortion. Article 93 of the Constitution of Colombia 1991 states that:

International treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have domestic priority. The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia.'

This provision in the Colombian Constitution gives international law similar status to the one promulgated by Article 2(6) of the Kenyan Constitution; effectively, both constitutions incorporate international human rights law as forming part of country's own law.

Utilising this provision, the CCC made a ground-breaking decision in ruling that prohibition of abortion and criminalisation thereof under the Colombian Penal Code was unconstitutional.¹⁵² The significance of this judgment is not simply the fact that the Court liberalised abortion but further, the Court actually established the right to abortion¹⁵³ through the use of Article 93 of the constitution, which allowed the Court to use international human rights provisions to establish this right.¹⁵⁴ Using the human rights approach the Court framed abortion as part of women's right to health including reproductive health and reproductive autonomy. Ngwena argues that by doing so, the CCC 'treated women as moral agents and not as sacrificial reproductive instruments at the service of humanity thus breaking from gender stereotypes that underpin and sustain the historical criminalization of abortion worldwide.'¹⁵⁵ Furthermore, the Court rejected framing abortion as a clashing concept between women's and foetal rights.¹⁵⁶ In arriving at above conclusions, the CCC looked beyond its constitutional provisions relating to health, dignity or life and instead drew heavily from international human rights provisions such as the ICESCR and CEDAW. The CCC furthermore emphasised that existence of the right must correspond with its implementation, which in this instance meant making abortion available and accessible within the public health sector.¹⁵⁷

Given the similarities between the status of international law in both countries, the CCC could serve as an exemplary model to the Kenyan Court, when deciding the *Wanjiku* case. Through this approach, the Court would do more than what is requested by the Centre for Reproductive Rights and the FIDA. Instead of looking at each right separately, the Kenyan Court could consider the right to abortion as being a stand alone right of women which requires the state to

¹⁵² Case T-355/06 (2006); discussed in: Ngwena (125) and R Cook "Excerpts of the Constitutional Court's ruling that liberalized abortion in Colombia" (2007) 15 *Reproductive Health Matters* 160. Ngwena (125) 185 states that: 'Prior to Case C-355/06, the Colombian Constitutional Court's position was that the prohibition of abortion under the Colombian Penal Code, even in cases of rape, was compatible with the Colombian Constitution'

¹⁵³ Ngwena (n 125) 185

¹⁵⁴ *ibid*

¹⁵⁵ Ngwena (n 125) 185. Recently, the Human Rights Committee criticised Ireland for restricting and criminalising abortion in *Mellet v Ireland*, UN Human Rights Committee Decision CCPR/C/116/D/2324/2013, 9 June 2016, Sarah Cleaveland (para 6 of concurring opinion) and Yadh Ben Achour (para 4 of concurring opinion) believed that criminalisation of abortion is discriminatory. For academic analysis see: Fiona de Londras, 'Fatal Foetal Abnormality, Irish Constitutional Law and *Mellet v Ireland*' (2016) 24(4) *Medical Law Review* 591

¹⁵⁶ Ngwena (n 125) 185

¹⁵⁷ *ibid*, 186

fulfill its international obligations to ensure the minimum core,¹⁵⁸ the progressive realisation¹⁵⁹ as well as the availability and accessibility of this right.¹⁶⁰

The problem of contraception and relevant training for medical professionals

The CCC provides additional example of judicial transforming of the public health system. The CCC developed the minimum core for the right to health in one of its *tutela* actions, which means that every individual is entitled to judicial protection.¹⁶¹ Consequently, in one of the cases, the CCC considered twenty-two alleged violations of the right to health. The case considered restrictions on the access to care, financing essential medicine, and wider health financing issues.¹⁶² Having considered the problem of accessing contraceptive medications and budgetary restrictions in Kenya, yet another example from the CCC could appear useful to Kenyan Court.

In assessing the violation, the CCC considered whether these issues meant that the State violated its constitutional obligation to respect, protect and fulfill the right to life.¹⁶³ The decision reaffirmed that the right to health was fundamental in achieving a dignified life.¹⁶⁴ The Court further distinguished that the right to health has both negative and positive obligations. Positive obligations include providing specific resources.¹⁶⁵ Negative obligations include abstaining from actions which might be detrimental to individuals' access to health. Negative obligations are regarded as having an immediate effect, whereas positive are subject to progressive realisation.¹⁶⁶ However, this does not offer a state leeway in implementing the right to health.¹⁶⁷ The Court drew on minimum core obligations identified in General Comment No. 14.¹⁶⁸ The effect was as significant as by giving content to the right to health, the CCC modernised the entire health system in line with the IHRL.¹⁶⁹

Drawing in the case of *Wanjiku*, it, may be wise for the Court to at least acknowledge or elaborate on wider issues underpinning this case, namely problems within the health sector and

¹⁵⁸ General Comment No 14 on minimum core in relation to health (n 151)

¹⁵⁹ On states' obligations: ICESCR (n 91) Article 2(1) and CESCR 'General Comment No. 3: The Nature of States Parties' Obligations' (14 December 1990) E/1991/23: for academic analysis on States obligations see Alston P, Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156

¹⁶⁰ *ibid*

¹⁶¹ *tutela* enshrined in Article 86 of the 1991 Colombian Constitution: Every individual may claim legal protection before the judge.

¹⁶² Decision T-760 of July 2008 Colombian Constitutional Court *cited in* Monica A Olaya, 'The right to health as a fundamental and judicially enforceable right in Colombia' 2009) 10(4) *ESR Review* 16–17, available at: <http://reference.sabinet.co.za/webx/access/electronic_journals/esrev/esrev_v10_n4_a6.pdf> accessed 5 September 2017

¹⁶³ *ibid*

¹⁶⁴ D Landau 'The promise of a minimum core approach: The Colombian model for judicial review of austerity measures' in A Nolan, *Economic and Social Rights after the Global Financial Crisis* (2014, Cambridge University Press) 270.

¹⁶⁵ Olaya (n 162) *also discussed in* Orago, 'The Place of the "Minimum Core Approach" in the Realisation of the Entrenched Socio-Economic Rights in the 2010 Kenyan Constitution' (n 46) 266-270

¹⁶⁶ *ibid*

¹⁶⁷ *ibid*

¹⁶⁸ *ibid*

¹⁶⁹ Orago, 'The Place of the "Minimum Core Approach" in the Realisation of the Entrenched Socio-Economic Rights in the 2010 Kenyan Constitution' (n 46) 268

health budgeting. This is because, such action of the Kenyan Court would stress the importance of budget realigning to meet some of the biggest health concerns for women and girls in Kenya.

Resource Allocation

The problem of resource allocation has been highlighted throughout this paper. This is because, without the essential allocation to reproductive healthcare, women's right to abortion will not be exercisable even if it becomes recognised by the Kenyan Court. To ensure meaningful access to this right, the government will need to implement this in an effective way which requires resources. This will require human resources – more of skilled medical professionals, who require training and in turns the implementation will require much greater resource allocations.

The Kenyan Constitution is not silent on this issue. Article 20(5)(b) of the Constitution provides that 'in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right [...] having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.' However, the Courts do not have the authority to interfere with the government decision on how to allocate available resources.¹⁷⁰ This significantly limits the power of the court to adjudicate on the issue of resources. However, this is a common practice for national laws across the globe and some courts have addressed this issue.¹⁷¹ Nevertheless, the Kenyan Court adjudicated in a couple of eviction cases where it stated that a two-day eviction notice was inhumane, and went against human dignity.¹⁷² It therefore required the state to provide adequate housing immediately within the available resources.¹⁷³ Under Article 21(2), the State binds itself to adopting legislation, policy and other measures that would achieve a progressive realisation of rights guaranteed under Article 43.

Bridging this gap between discriminatory budgetary allocations and realisation of women's right to health can only be achieved through an introduction of a human-rights-adherent budget,¹⁷⁴ specifically a women's budget.¹⁷⁵ For instance, South Africa participates in a Women's Budget Initiative which does not require the state to use alternative budgets, but instead works within the country's budget from women's perspective.¹⁷⁶

¹⁷⁰ The Constitution of Kenya 2010, Article 20(5)(c)

¹⁷¹ Philip Alston and Craig Scott, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) Osgoode Digital Commons, Osgoode Hall Law School of York University. Available at: http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1801&context=scholarly_works accessed 17 July 2017

¹⁷² *Susan Waitibera Kariuki & others v Town Clerk, Nairobi City Council & others* [2011] eKLR, Petition 65 of 2010 discussed in J Oloka-Onyango, 'Using courts of law to tackle poverty and social exclusion: The case of post 2010-Kenya' (2015) 19 *Law Democracy and Development* 193

¹⁷³ *ibid*

¹⁷⁴ Jaakko Kuosmanen, 'Human Rights, Public Budgets and Epistemic Challenges' (2016) 17 *Human Rights Review* 247

¹⁷⁵ Zero Tolerance, Rebecca Gindele 'Bridging the Gap: Gender-Responsive Budgeting and Compliance in the Country Reporting Process' (2010). Available at <<http://www.zerotolerance.org.uk/sites/www.vawpreventionscotland.org.uk/files/Executive%20Summary%20to%20CEDAW%20Committee1.pdf>> accessed 20 July 2017

¹⁷⁶ Bhatnagar Deepti; Dewan Ankita; Moreno Torres Magui; Kanungo Parameeta. 2003. *Women's budget initiative : South Africa*. Empowerment case studies. Washington, DC: World Bank. Available at:<<http://documents.worldbank.org/curated/en/387121468114545832/Womens-budget-initiative-South-Africa>> accessed 19 July 2017

Resource constraints are not a permissible justification for renegeing on international obligations,¹⁷⁷ but they do have a huge impact on women's right to meaningfully exercise abortion in Kenya. Therefore, rather than requiring a government to find extra money it might not have, adopting a women's budget (which realigns priorities based on the need of the women) would significantly improve progressive realisation of women's rights under Article 43. Currently, budgetary allocations do not appear to fulfil the general obligation for progressive realisation.

Although the Courts around the globe are thought to be ill-equipped in adjudicating resource allocation, it did not stop some of the Courts from doing so. In fact there appears to be growing trend where courts begin to adjudicate on resources around the globe.¹⁷⁸ The first example is the case form the CCC discussed above. The SACC has been an active example. In the Treatment Action Campaign case (TAC), the SACC decided on the reasonableness of the state's policy for the treatment of HIV.¹⁷⁹ Several factors in assessing governmental policy were considered, such as safety of the drug and the actual ability of the government to implement the policy. The Court held that:

Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as this constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.¹⁸⁰

In the *Grootboom*¹⁸¹ case, the Court was even more decisive by stating that the government had to provide a drug which would prevent mother-to-child HIV transmission. This case resulted in the government changing its policy on this specific drug.

Budgetary allocations have become justiciable in numerous jurisdictions around the globe. It is important, as although budgets are political decisions, they directly affect the rights of people. Therefore, Kenyan Court could engage in a similar conclusion when deciding the case of *Wanjiku*. This would highlight and exert pressure on the Kenyan government to consider its progress with achieving declared 15% of budgetary allocation towards health and improving women's reproductive rights.

Conclusion

¹⁷⁷ General Comment No. 14 (n 151) [12] for academic analysis see: Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12(3) *Human Rights Law Review* 393

¹⁷⁸ *ibid* – Skogly

¹⁷⁹ *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC)

¹⁸⁰ *ibid* [99, 113]

¹⁸¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46

The 2010 Kenyan Constitution has unquestionable transformative potential. The Constitution itself promotes gender equality and places importance on the realisation of women's rights. The Constitution also addresses the matter of abortion, however this is done in a way which does not provide reasonable legal clarity and certainty. Therefore, the case of *Wanjiku*, pending before the Chief Justice is an enormous opportunity for the Court to engage in the deeper interpretation of Constitutional provisions alongside with relevant international human rights provision in order to shed some light on Article 26(4) of the Constitution.

A single solution to the problem of unsafe abortion is not possible. Instead, this paper considered possible ways in which the law could be interpreted to contribute to an improvement of women's reproductive health in Kenya. After outlining the law on abortion as it currently stands and background to the problem of abortion, I argued that international law and international human rights law could be considered as 'any other written law' within the meaning of Article 26(4) on abortion. I established that by examining not only relevant constitutional provisions but also available Kenyan jurisprudence.

The Constitution places medical professionals at the centre of the decision-making process. Kenyan doctors' interpretation of women's health included physical, mental, and reproductive health, as well as their social well-being. This meant that abortion is permitted in cases of rape when it is established that sexual violence had a profound effect on women's mental health. This suggests that medical practice is, at times, more liberal than law suggests. Thus, by placing decision-making into the hands of medical professionals, the practice of abortion must be regulated by other means. The opportunity for providing clarity and regulation of the practice of abortion was lost when the Ministry of Health withdrew the National Standards and Guidelines on Reducing Morbidity and Mortality for unsafe abortion in Kenya. The guidelines were essential in clarifying the law, as they answered following questions: Who is a trained medical professional? What constitutes an emergency treatment for the purpose of Article 26(4)? What does 'danger to women's health' mean? The guidelines were also crucial in de-stigmatising abortion in hospitals by stating that each health worker must be trained in abortion and welcome all women who find themselves to be unintentionally pregnant. These guidelines called for a dialogue between a pregnant woman and a doctor, which is currently non-existent. Simultaneously, the Ministry of Health issued a deeply problematic memorandum which prohibited healthcare workers from obtaining necessary training on safe abortion. The memorandum went further in stating that all health workers who sought training on performing abortions would be sanctioned both legally and professionally. This thereby added to the dichotomy between what the law is and what health care workers do in practice.

By looking at the abortion in practice and by examining the status of international law in Kenya, I argued that the Court in the case of *Wanjiku* should explicitly state that abortion is permitted in rape cases and in circumstances which are aligned with the interpretation of international human rights law. Finally, the last section considered jurisprudence of different countries such as Colombia and south Africa. I suggested the ways in which Kenyan Courts could gain their experience by engaging with the interpretation of law by using approaches of Colombian ground-breaking judgements on abortion and the right to health. Finally, I argued that by engaging in adjudication on resource allocation, the Court in Kenya could exert necessary pressure on the government to reconsider and realign its budgets.

As it stands, the legal framework on abortion in Kenya is confusing and its impact is deep. It is important to remember that restricting legal and medical access to abortion does not decrease the number of abortions. It simply means that more abortions are unsafe. Unsafe abortions leave women to suffer devastating consequences of substandard procedures, such as severe health complications or death. Therefore, the Kenyan government needs to accept culpability for creating an environment where the first port of call for a woman who is unintentionally pregnant is an unsafe 'medical' provider, rather than a hospital. Reinstating the relevant guidelines is the first step towards preventing unsafe abortions. The Centre for Reproductive Rights emphasises the importance of the guidelines; however, they fail to acknowledge that simple reinstatement is not a sufficient measure. The biggest issue lies with resources. Allocating adequate financial resources to women's reproductive health is an investment, not a cost. The government needs to reconsider the national budget with care, as this could be a pivotal measure for reducing the mortality and morbidity rate amongst Kenyan women.

However, one must not lose sight of the fact that Kenyan Constitution is a very young law. Fortunately, the attitude of Kenyan Courts towards human rights had been to ensure compliance with the Constitution in ensuring the highest protection of all rights. This means that there is a glimpse of possibility that the Court will consider devastating consequences of criminalisation of abortion. This leaves me hopeful. Kenya took an immense step in liberalising abortion law by including exceptions in the Constitution, the next step would be for the Court to interpret this provision and for the government to progressively implement it within the maximum availability of resources, so that slowly but surely, the need for unsafe abortions and stigmatising termination of pregnancy decreases.

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Responding to Domestic Violence in International and Domestic Law

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Despite the progress that has been made in recognising the global magnitude and insidiousness of domestic violence, predominantly through the interpretation and implementation of such international agreements as the 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Bélem do Pará Convention (1994), and the Maputo Protocol (which became effective in 2005), it continues to be a widespread phenomenon. Domestic violence, and more broadly, violence against women, is a barrier to the progression of women and society as a whole, resulting in severe mental, physical, emotional, and financial distress to those who experience it. It undermines the UN Sustainable Development Goals of gender equality (goal 5), good health and wellbeing (goal 3), reduced inequalities (goal 10), and the commitment to reduce poverty (goal 1).¹ It causes great difficulty to the state by hindering the protection of its citizens when they are behind closed doors.

This essay aims to consider four aspects of the responses to domestic violence: the definition of domestic violence that has evolved over time, the dissolution of the public/private divide, the imposition of state obligations, and finally, the domestication of rights to be free from violence (primarily through constitutional codification). It will argue that whilst international agreements and the role of the judiciary are crucial to providing remedies to the victims, this usually only treats the symptoms of the epidemic, and not the cause. The individual state can go further in attempting to use constitutional law to shape cultural attitudes. It can also undertake more obligations to prevent domestic violence (such as European states ratifying the Istanbul Convention, considered below) or improve how they currently undertake their obligations (by more effective monitoring, or greater accountability of the authorities). These actions would help to prevent domestic violence in the first place. This could be achieved by securing and codifying specific rights against domestic violence, the promotion of socio-economic rights, and furthering gender equality, which will shift the focus from punishing the perpetrators to empowering intimate partners and family members, before they ever reach the status of ‘victim’.

This essay will consider each of the four aspects of the response to domestic violence listed above, evaluate their adequacy as a response and potentially preventative measure, and ask what else could be done. The final section will also refer to two case studies of South Africa and Ecuador, both of which have redefined their cultural identity through their constitutions, and consider how this has helped tackle some of the root causes of domestic violence.

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¹ United Nations, ‘Transforming our World: The 2030 Agenda for Sustainable Development’ (United Nations, 2015)

<<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>> accessed 10 February 2017

Defining domestic violence

Defining domestic violence is a fundamental part of tackling the issue, because it is a way to acknowledge those who have experienced it, and allows people in these complex situations to recognise the signs. It is also the first step in understanding what policy makers and legislators are dealing with, to inform crucial policy and legislation. The definitional core of domestic violence has often been difficult to pin down, and as Peterson and Schroeder recognise, there is still no universally agreed conception of it.² There was practically no legal recognition of domestic violence until the 1970s, where the term was first used by Baron Ashley of Stoke (known then as Jack Ashley) in a UK House of Commons debate. Ashley recognised that ‘domestic brutality is often confused with normal domestic dispute’.³ Despite focusing on corporeal brutality, he considered the broader implications, such as women being ‘deprived of their identity’ as well as being subjected to ‘fear, submission, and subservience’.⁴ This development also coincided with the period of second-wave feminism, and a global decade of great social change for women. For example, the ‘Battered Women’s Movement’ saw the establishment of numerous domestic violence help lines, refuges, and legal centres in the US,⁵ the first conference for the UN International Year of Women was held in Mexico City in 1975,⁶ and feminist groups in India fought against ‘dowry deaths’ and ‘bride burnings’.⁷ Thus, the scope, characterisation, and meaning of domestic violence has only recently been explored, as the focus on the emancipation of women has gradually developed.

Since 2000, Meyersfield notes that ‘the lens of international law [has begun] to focus on domestic violence as a specific manifestation of violence against women’.⁸ Violence against women is defined by the UN Declaration on the Elimination of Violence Against Women (1993) in Article 1 as:

‘...any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.’

Importantly, this recognises that violence is not only physical, but also ‘sexual or mental’. More recently, Article 3 of the Istanbul Convention⁹ has given a specific, concrete definition of

² Peterson and Schroeder, *Domestic Violence in International Context* (London and New York: Routledge 2016)

³ Ashley, ‘Battered Wives’ HC Deb 16 July 1973 vol 860 cc218–28

⁴ *ibid*

⁵ K Tierney, ‘The Battered Women Movement and the Creation of the Wife Beating Problem’ (1982) 29(3) *Social Problems* 207

⁶ United Nations, ‘Report of the World Conference of the International Women’s Year’ (*United Nations*, March 1976)

⁷ <http://www.un.org/womenwatch/daw/beijing/otherconferences/Mexico/Mexico%20conference%20report%20optimized.pdf> accessed 28 February 2017

⁸ Elisabeth Bumiller, *May You be the Mother of a Hundred Sons: A Journey Among the Women of India* (Penguin Books, 1990) 47

⁹ Meyersfield, *Domestic Violence and International Law* (Bloomsbury Publishing 2010)

⁹ The Council of Europe Convention on preventing and combating violence against women and domestic violence (2014)

domestic violence (even if this does not precisely align with the definitions that individual member states provide):

‘...[domestic violence] shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim’.

This goes one step further, considering also ‘economic violence’ as coming within the ambit of domestic violence, and removes any indication that cohabitation is a *sine qua non* of domestic violence. Certain word choices can therefore change the response a government takes. Dobash and Dobash highlight this, by pointing out that ‘once an issue has been defined in a specific way, the method of investigation and the possible solutions are encapsulated in that definition’.¹⁰ For example, domestic abuse was historically seen as a woman’s problem only. But of course, studies show that men and children suffer from domestic violence and its effects, as well as women.¹¹ This resulted in the gender neutral provisions above, and the Istanbul Convention’s reference to the ‘domestic unit’ as a whole.¹² Gender-neutral definitions have been criticised by feminists such as Lucinda Finley, who has argued that they are not in fact egalitarian, but continue to take the male standard.¹³ However to remove two significant groups of people suffering from such violence from legal and policy making frameworks would be unhelpfully exclusionary. That said, due to the deeply-rooted global and historical trend that shows women suffer disproportionately from domestic violence, and due to the limitations of this paper, women victims of domestic violence will be the main focus.

States may be unable to agree on an internationally legally binding definition of domestic violence. Every state will understand their issues differently because values and behaviours vary widely, which is an example of cultural relativism. This can be useful to women who suffer from domestic violence. A global definition may limit a more nuanced, culturally sensitive response from the state i.e. a strictly Western definition may not recognise certain cultural aspects of domestic violence. Therefore states have the scope to produce their own idea of what constitutes domestic violence, that may well go beyond what is traditionally associated with it (usually, physical brutality against a spouse). For example, female genital mutilation (as in *Leeds City Council v M, F, B, G*),¹⁴ stalking (in *Omar v Government of the Republic of South Africa and Others*),¹⁵ forced marriage (as in the case of *NS v MI*),¹⁶ and honour-based violence (as in *Amina Al-Jeffery v Mohammed Al-Jeffery*)¹⁷ have all been considered by courts and governments to come within the scope of domestic violence. It also means that broad, non-exhaustive definitions can be interpreted purposively in order to keep up with changing forms of abuse. Perhaps this can

¹⁰ Dobash and Dobash, *Women, Violence and Social Change* (London: Routledge, 2003) 246

¹¹ Douglas and Hines, ‘Children’s Exposure to Partner Violence in Homes Where Men Seek Help for Partner Violence Victimization’ (2016) 31(4) *Journal of Family Violence* 515

¹² Council of Europe Convention (n 9) Article 3

¹³ Lucinda Finley, ‘Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning?’ (1989) 64 *Notre Dame Law Review* 892

¹⁴ [2015] EWFC 3

¹⁵ [2005] ZACC 17

¹⁶ [2007] 1 FLR 444

¹⁷ [2016] EWHC 2151

include more recent forms, such as those involving technology, or as Silverman and Raj recognise, ‘reproductive coercion’.¹⁸

However, states have not always been willing to acknowledge certain ‘cultural’ issues of domestic violence. This has often hindered the state response, particularly in a cosmopolitan society. Instead of trying to create a generalised definition of domestic violence to encapsulate everyone unsuccessfully, legislation should be more sensitive to particular groups of women who may not typically fit the overarching definition than it currently does. For example, Culliton notes that ‘in both the United States and Chile...substantive legal reforms to combat domestic violence [are] hampered by academics and policymakers who believe that “other” classes of women: that is, poor women, Latina women, or women of colour...are more tolerant of male violence than the upper classes’.¹⁹ Culliton illustrates how this is harmful, because police authorities are less likely to respond in the same way, or act as efficiently, to the complaint of a Latin American woman than they are to a white American woman, based on faulty, ‘monolithic, and stereotypical myths’ of what constitutes ‘the Latino culture’.²⁰ Instead, the factors that make these groups more distinct should be incorporated into the state definitions in a more inclusive way, which will provide better responses to these groups, and not arbitrarily disregard their complaints based on perceived differences. Cultural relativism should not be a justification for exclusion, but the rationale for greater attention and care in handling such cases.

A further development was proposed by Evan Stark, who opened up the definition of domestic violence through his important book, *Coercive Control*.²¹ He suggests a whole new way of looking at domestic violence: as a course of conduct, that ‘includes economic exploitation, stalking, isolation and arbitrary controls of a person’s life as well as physical and sexual violence’.²² He more specifically calls it a ‘liberty crime’.²³ Thus, Stark’s vision of domestic violence goes to the very core of fundamental human rights. This description is the most comprehensive thus far. It understands the deep permeation of domestic violence into a victim’s life, representing far more than a single, one-off act of physical violence, but an omnipresent and all-encompassing ‘entrapment of women’. Due to the influence Stark’s ideas have had, ‘coercive control’ has been implemented into the UK Government’s consultation paper that provides guidance as to what constitutes domestic violence,²⁴ but it hardly captures the full meaning, complexity, and the nuances this term provides.

To summarise this section, the definition of domestic violence as an aspect of the response has been a long time coming in the sphere of international law, and has only very recently developed beyond the scope of physical violence. There are a plurality of definitions of domestic violence

¹⁸ Silverman and Raj, ‘Intimate Partner Violence and Reproductive Coercion: Global Barriers to Women’s Reproductive Control’ (2014) 11(9) PLoS Medicine 1

¹⁹ Culliton, ‘Legal remedies for domestic violence in Chile and the United States: Cultural relativism, myths, and realities’ (1995) 26(2/3) Case Western Reserve Journal of International Law 183

²⁰ *ibid*

²¹ Evan Stark, *Coercive Control* (Oxford: Oxford University Press, 2007)

²² Stark, ‘Conference on Coercive Control’ (*Coercive Control*, 2014) <<http://www.coercivecontrol.co.uk/professor-evan-stark>> accessed 5 March 2017

²³ Stark (n 21)

²⁴ ‘Strengthening the Law on Domestic Abuse Consultation–Summary of Responses’ (*Home Office*, December 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf> accessed 27 March 2017

from individual countries, filling the gap left by international law. This could increase the effectiveness of recognising the different forms violence can take, because it can adapt to the many different ways that domestic violence manifests in a variety of cultural, geographical, and social contexts. This has been shown in cases such as *Amina Al-Jeffery v Mohammed Al-Jeffery*²⁵ where honour-based violence and imprisonment in Saudi Arabia was considered a form of domestic violence. However, as noted, states must be more willing to do this for particular cultures and socioeconomic groups that do not fit the stereotypical image of a person from the majority of that country, i.e. a poor, Latina woman from the USA requires more cultural sensitivity in the response to her experience of domestic violence than a white, upper-class woman in the same country. It finally argues that Evan Stark's explanation of domestic violence is the most comprehensive and prescriptive on a general level, because it transforms the act into a systematic cycle of violence that accounts for controlling, violent behaviour throughout a domestic relationship.

The public/private divide

A second part of the response to domestic violence is dismantling the public/private divide, which has historically separated issues that are legislated on and justiciable, and those that are not.²⁶ Samford says that the public/private divide is a 'tendency to divide institutions into 'public' and 'private' and to treat each of them very differently in both theory and practice'.²⁷ This is a typically 'Western' idea, where liberalism has been the foundation of much philosophical literature by scholars such as John Locke, and John Stuart Mill. Locke contributed to the foundations of the US Constitution by first drafting the constitution of North Carolina, and his lasting influence has helped to entrench this division into America's higher law. Locke wrote that: 'these two Powers, Political and Paternal, are so perfectly distinct and separate',²⁸ but in *The Sexual Contract* Carol Pateman noted that this division was in fact a rejection of paternal influence as political influence, and resulted in the creation of 'modern fraternal patriarchy'.²⁹ This effectively excludes women, because 'only masculine beings are endowed with the attributes and capacities necessary to enter into contracts'; therefore 'sexual difference is the difference between freedom and subjection'. If only men fall into this male, and therefore public, sphere, women are relegated to what is private and so 'politically irrelevant', including their experiences of violence.³⁰

From a legal perspective, the public/private divide has been largely perpetuated semantically, within the wording of international legislation and constitutional law, on the basis of these ideals. As McQuigg notes, human rights are often defined negatively, so that there is a right not to be interfered with, but no right to active obligations on the part of the state.³¹ For example, the right

²⁵ [2016] EWHC 2151 (n 17)

²⁶ Susan Boyd, *Challenging the Public/private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997)

²⁷ Charles Samford, 'Law, Institutions and the Public/Private Divide' (1991) 20 *Federal Law Review* 185

²⁸ Locke, *Two Treatises of Government* (London: Awnsham Churchill, 1689)

²⁹ Carol Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) 3

³⁰ *ibid* [6]

³¹ Ronagh McQuigg, *International Human Rights Law and Domestic Violence* (London and New York: Routledge, 2011) 3

to privacy was called ‘the right to be let alone’ by Warren and Brandeis, and they acknowledged ‘its refusal to recognize the intrusion by seduction upon the honour of the family’.³² US Supreme Court judges in the case of *Castle Rock v Gonzales* even went so far as to deny the idea that victims of domestic violence have a right to protection under the constitutional Due Process Clause, because there was no obligation on the state to do so, even in extremely hostile and dangerous situations.³³ As Gostin comments:

‘Colorado, through statutes and enforcement procedures, in effect promised to protect women and children subject to domestic abuse, and Ms. Gonzales relied on this promise. Yet the majority on the Court held there was no deprivation of life, liberty, or property under the due process clause of the Fourteenth Amendment.’³⁴

The justification for this was based on the police enjoying a *discretionary* power to provide ‘benefits’, even though there were mechanisms in place to protect women, such as mandatory arrest laws, no contact orders, and criminal charges. The case perpetuated the idea that private actors do not have rights against the state, vis-à-vis another private individual. This also occurred in the case of *Michael and Others v Chief Constable of South Wales*,³⁵ which was similar to the case of *Castle Rock* mentioned above. Joanna Michael was threatened by her ex-partner. He told her he would kill her, after he found her with another partner. She phoned the emergency services twice, but they did not efficiently communicate the seriousness of the death threats to South Wales Police, nor did they grade the call as ‘immediate’ until the second attempt. Twenty minutes later, she was found murdered. The Court found that the right to life under Article 2 of the European Convention on Human Rights had not been violated. Even though by responding effectively to her phone call, the police could have saved her life. Lady Hale and Lord Kerr dissented in this case, Lady Hale in particular noting that if the trial could succeed under the HRA claim, it could ‘lead to some much-needed improvements in [the police] response to domestic violence’.³⁶ Of course, as we shall see later and throughout this essay, state responsibility for these omissions is increasingly important and relevant. However, this is only due to international human rights law; rights to protection in domestic courts have been limited unlike the more expansive approach that international courts and committees provide.

Of course, there are persistent fears of the state being too paternalistic in their regulation of the home. The autonomy of individuals will surely be undermined if there is too much control over people’s domestic activity. As a general matter, if a dispute arises, then it should be resolved privately – a similar aim is attempted in alternative dispute resolution methods, which are becoming increasingly utilised.³⁷ However, this is far outweighed by the harm and violation of bodily integrity that is caused by domestic violence. For example, the WHO estimates that one in three women have experienced some form of physical or sexual gender-based violence in their lifetime.³⁸ UNICEF has found that ‘200 million girls and women alive today have undergone

³² Warren and Brandeis, ‘The Right to Privacy’ (1890) 4 Harvard Law Review 193

³³ 545 US 748 (2005)

³⁴ Gostin, ‘The Negative Constitution: The Duty to Protect’ (2005) 35(5) The Hastings Center Report 10

³⁵ [2015] UKSC 2

³⁶ *ibid* [para 198]

³⁷ Stipanowich, ‘ADR and the “Vanishing Trial”’: The Growth and Impact of “Alternative Dispute Resolution” (2004) 1(3) Journal of Empirical Studies 843

³⁸ WHO, ‘Violence Against Women’ (*WHO Media Centre*, November 2016) <<http://www.who.int/mediacentre/factsheets/fs239/en/>> accessed 9 February 2017

female genital mutilation in 30 countries'.³⁹ LGBTQ, people of colour, and HIV affected people are especially vulnerable, as an NCAVP report shows.⁴⁰ Statistics like these continue to be produced. Once the ongoing cycle of violence is in full force, it seems difficult to visualise how these parties should settle the dispute themselves, with equality and dignity. It would not be paternalistic or unreasonable for a state to intervene in these matters, just like it is not unreasonable for the state to prosecute a defendant in a criminal case for grievous bodily harm. If the public sphere is concerned with a utilitarian greater good, or the 'public interest', this is certainly a case for it. Domestic violence is not a private issue if it happens to a substantial percentage of the public, and violence does not exist in a vacuum. For example, two of the causes of domestic violence as identified by Lori Heise are 'witnessing marital violence as a child', and 'being abused oneself'.⁴¹ This does not lead to isolated incidents but systematic violence being perpetuated between generations.

However, 'privacy' versus state involvement in the home is a complex issue, remaining both a 'blessing and a curse' for women, as Rambo explains.⁴² She argues privacy is a 'legal paradox', particularly as 'the concept of state non-interference in the private realm that was so critical to the success of the abortion rights movement has also been used to protect batterers within the same private realm'.⁴³ This paradox Rambo highlights also shows that women are not given the option to exist in the public *and* private realm, but they must choose one – either relinquish all autonomy to the state, or have unquestioned non-interference; this is unlike the treatment of men, who have been able to 'move freely between public and private spheres'.⁴⁴

Classical liberalist ideals of the private domain being inviolable may work if all parties were considered equal. Unfortunately, this is not so, and men often have greater financial and physical strengths than women do, creating a huge disparity in power and reliance between the members of a family. It has traditionally been considered that a woman's primary domain is in the home, away from public scrutiny. This remains the case in many societies today, and to truly emancipate women the realities and diversities of their experiences must be confronted. Thus, by name, domestic violence happens within the home and within intimate relationships, and causes significant injury to all involved. To not take action against it, as Roth says, 'tacitly condones that violence',⁴⁵ so states must proactively intervene in this previously private, considered feminine, and usually concealed context.

There is also much feminist scholarship considering this topic. Thornton first argued that the public sphere is where the 'rationality, culture and intellectual endeavour' of men is over-valued,

³⁹ UNICEF, 'New statistical report on female genital mutilation shows harmful practice is a global concern' (UNICEF Press Centre, 5 February 2016) <https://www.unicef.org/media/media_90033.html> accessed 9 February 2017

⁴⁰ NCAVP, 'Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2014' (NCAVP, 2015) <http://www.avp.org/storage/documents/2014_IPV_Report_Final_w-Bookmarks_10_28.pdf> accessed 28 February 2017

⁴¹ Lori Heise, 'Violence Against Women: An Integrated, Ecological Framework' (1998) 4(3) *Violence Against Women* 262

⁴² Rambo, *Trivial complaints: The role of privacy in domestic violence law and activism in the United States* (Columbia: Columbia University Press, 2003)

⁴³ *ibid*

⁴⁴ *ibid*

⁴⁵ Roth, 'Domestic Violence as an International Human Rights Issue' in Cook (ed) *Human Rights of Women: National and International Perspectives* (Pennsylvania: University of Pennsylvania Press, 1994) 326, 327

and the private sphere is where ‘nature, nurture, and non-rationality’ of women is under-valued.⁴⁶ Charlesworth and Chinkin’s ground-breaking feminist analysis of international law⁴⁷ echoes Thornton’s idea that law rests on dichotomies, with the alternative side being associated with women, and therefore, less desirable: ‘mind/body, culture/nature, action/passivity, public/private, protector/protected, independence/dependence’, and so on.⁴⁸ They also recognise that women have been placed in a private sphere which is inherently created by the patriarchal values of society, and to overcome this ‘requires rebuilding the basic concepts of international law in a way that do not support or reinforce the domination of women by men’.⁴⁹ To tackle domestic violence directly, the barrier between what is considered to be regulable and what is not needs to be reconceptualised, because the former is often what concerns men, and alienates women. The reconceptualisation must also crucially be inter-sectional, so that no group of women (whether defined by race, sexuality, gender, or geographic location) are excluded. Only then will the best responses to domestic violence be enacted, because it listens to the voices of the most amount of people and avoids essentialism, or the prioritisation of white, Western women experiencing domestic violence. This is very difficult to achieve because of the scale of the issue and the way certain norms are embedded culturally, however it is important to have a normative feminist viewpoint so that there are effective ways of tackling domestic violence that international and domestic law can aspire to.

The line between what is private and what is public is constantly shifting. Marriage was once in the realm of the informal and unregulated, but now legal marriage is provided for in numerous statutes, and even particular ‘ideals’ of marriage propagated; similarly, so-called ‘wife beating’ was once a private issue, but is now regulated by domestic violence laws. The de-privatisation of domestic violence has been particularly championed by greater awareness and activism, and the judges who decide cases in international courts. For example, the Inter-American Commission created the principle of ‘due diligence’ which García-Del Moral and Dersnah define as ‘a set of standards to determine when a state’s omission or failure to act, prevent, investigate, or punish violations constitutes a breach of its international obligations, even if private persons commit those violations’.⁵⁰ This will be discussed further in the ‘State obligation’ section below, but it highlights the importance of global communities in publicising and recognising an issue as a public one.

Therefore, the dismantling of the public/private divide has been slow and haphazard. Particularly in the early development of government, women were placed in the private side of the dichotomy, and therefore deemed politically irrelevant. As time went on, women were told they could not choose both sides of the divide, and the justification for increased reproductive rights as a private matter was extended to justifying a lack of state interventions in situations of

⁴⁶ Thornton, ‘The Public/Private Dichotomy: Gendered and Discriminatory’ (1991) 18(4) *Journal of Law and Society* 448

⁴⁷ Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000)

⁴⁸ *ibid* [49]

⁴⁹ *ibid* [59]

⁵⁰ García-Del Moral and Dersnah, ‘A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship’ (2014) 18(6-7) *Citizenship Studies* 661

domestic violence. It is therefore argued that a reconceptualisation of the public/private divide is still required to actualise a real change.

Imposing international obligations on the state

One of the most powerful responses to domestic violence is the imposition of obligations upon the state to act to eradicate it. As already outlined, the divide between the private sphere and the public sphere has been slowly but surely eroded in certain instances, particularly within the family domain. It therefore follows this development that states must intervene where necessary for the benefit of domestic violence victims, as they still reside in this overwhelmingly private sphere. As Meyersfield comments, it is the international domain where freedom from domestic violence has shown a shift from ‘an emerging norm to a right in international law.’⁵¹ These obligations must continue to develop, violations must be remedied, and this right must be sacrosanct for all in order to eradicate such violence. This section will explain the development of these obligations from the 1946 formation of the UN, up to the present day, which now offers a multitude of different international agreements that protect women. It will go on to suggest further rights and obligations of the state that can be used to tackle domestic violence, particularly rights to welfare, obligations relating to budgeting, and the right to education. Another crucial obligation is police accountability, as this has been a huge barrier to successfully combatting domestic violence. Throughout, the cases and legislation that have impacted this development will be examined.

a) The development of international obligations

Constitutions and domestic law were originally the sole legal providers of human rights. Human rights broadly came into existence on an international scale much later after World War II, with the Charter of the United Nations in 1945. This Charter helped found the United Nations, setting out procedural and administrative duties, rules, and purposes of the various branches in the majority of the agreement. Substantive values were found in the Preamble and Chapter I, including ‘the dignity and worth of the human person, [and] the equal rights of men and women’. This document did not impose positive binding obligations, but at a basic level codified rights that ensured people were not interfered with (indeed, they were known as ‘fundamental freedoms’, which does not necessarily proactively require states to do anything, but merely allows individuals their liberties). The Charter did pave the way for future developments in international human rights. The specific rights of women came to attention by the formation of the Commission on the Status of Women (CSW) via a UN Economic and Social Council resolution in 1946, which aimed to promote equality of the genders and provide a large-scale platform for women’s rights. At the first meeting, all fifteen representatives were women. Meyersfield comments that ‘the CSW has been more effective at promoting women’s rights than engaging

⁵¹ Meyersfield (n 8)

and remedying specific violations',⁵² suggesting that it has not been greatly useful in addressing accountability issues. Yet the CSW had to function in a very male-dominated sphere of international law, which had not previously considered issues that were in this private, and typically female sphere. In any case, it was influential on the developments that were to come.

Thirty-three years after the CSW came the CEDAW in 1979, a landmark treaty. It was the first legally binding treaty that imposed obligations upon its member states to help eradicate discrimination against women. The treaty did not explicitly mention domestic violence, but it has been interpreted to cover these situations. It was also confirmed in the extensive General Recommendation No. 19 (1992) that gender-based violence was a form of discrimination against women.⁵³ This recommendation also highlighted the obligations that states have to eradicate such violence, and how it violates eight different articles of the Convention (including 'the right to life' in 1(a), 'the right to liberty and security of person' in 1(d), and 'the right to the highest standard attainable of physical and mental health' 1(g)).⁵⁴

However CEDAW does not have any enforcement mechanisms. Whilst there is a complaints procedure, which can be utilised via individual communications, state-to-state complaints, and inquiries, and presented to the 'treaty body', or Committee on Elimination of Discrimination against Women.⁵⁵ But a review on the ground of 'individual communications' requires the attainment of 19 procedural and substantive criteria beforehand,⁵⁶ and moreover, the committee does not ensure total compliance. It mostly monitors and considers the annual reports that member states will produce, and submit recommendations. A later declaration by the UN, DEVAW (1993), was introduced in order to ensure that violence is considered in the interpretation of 'discrimination'. However, neither of these mechanisms defined, or explicitly referred to, domestic violence *per se*. Thus, even though international bodies go a long way to put pressure on states, this could not remain the only recourse for victims; further obligations were required to continue the progress made by CEDAW. After the international system that was imposed by CEDAW and the UN, steps were taken to provide this protection at a *regional* level. There are two systems that will be discussed here: the Inter-American, and the European.

⁵² *ibid*

⁵³ Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (11th session, 1992)

⁵⁴ *ibid*

⁵⁵ 'Individual Complaint Procedures under the United Nations Human Rights Treaties' (OHCHR, May 2013) <<http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>> accessed 27 July 2017

⁵⁶ *ibid*

b) Regional obligations

The Inter-American system developed the Bélem do Pará Convention. It came into force in 1994. This was the first convention of its kind, which is binding upon the signatories, and Meyersfield says it is ‘stronger and more authoritative’ than DEVAW.⁵⁷ The effect of this convention should not be underestimated – it is very progressive.

The US case mentioned earlier, of *Castle Rock v Gonzales*,⁵⁸ was later heard by the Inter-American Commission as *Jessica Lenahan (Gonzales) v United States*.⁵⁹ They provided a much more effective and just response to the victim’s claim, highlighting the unquestionable nature of state obligations to ‘respond to the discrimination that perpetuates this problem’ and ‘adopt the required measures to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either of the sexes’.⁶⁰ This obligation was based on the rights to life, non-discrimination, special protection of children, and judicial protection. This hard line taken by the IAC was necessary to condemn such behaviour. Unfortunately, this decision and its implications were never fully realised in the US, but it provides an excellent template for a zero tolerance response. Another notable point from this decision is that it referred approvingly to much of the European jurisprudence (discussed below), showing judicial comparativism that further strengthens the international effect and highlights the need for a greater global cooperation.

The European system is made up of the ECHR (1950) and the Istanbul Convention (2011). The rights under the ECHR are interpreted broadly, such as the right to life, family life, the right to be free of torture, and the right to liberty and security. The Istanbul Convention is very much a European version of the Bélem do Pará, in that it is binding, and condemns violence in the ‘public and private sphere’. It then goes further to provide an extensive list of state obligations and rights in order to eradicate this violence, such as monitoring mechanisms in Chapter IX that set up a group of experts (GREVIO) who monitor the implementation of the convention, international cooperation in Chapter VIII that is conducive to more efficient cross-border investigations, and the prohibition of mandatory alternative dispute resolution in Article 48.⁶¹

In terms of what constitutes ‘due diligence’, a term that was coined by the Inter-American Commission, there are many ‘appropriate measures’ a state must take. In the ECHR case of *Opuş v Turkey*, ten different forms were recognised in the various international laws that were examined.⁶² These included: making specific laws prohibiting domestic violence, investigating claims, reporting the claims, imposing sanctions, providing damages, safe places for the survivors and their families, condemnation of the practice, awareness of the issue, training to become more sensitive to the issue, and finally, a greater impetus on the decision to prosecute when a victim has retracted their claims. This not only clearly states what the state’s responsibilities are for the

⁵⁷ Meyersfield (n 8)

⁵⁸ *Castle Rock* (n 33)

⁵⁹ Report No 80/11, Case 12.626 (2011)

⁶⁰ *ibid*

⁶¹ Council of Europe Convention (n 9)

⁶² App no 33401/02 (ECHR, 9 June 2009)

protection of their citizens, giving them little excuse for non-implementation, but also gives the citizens themselves knowledge of the requisite level of protection they should be receiving.

The most recent ECHR case concerning domestic violence was *Talpis v Italy*.⁶³ The claimant and her children suffered years of violence at the hands of her husband; her and her children were beaten and threatened, and she was raped. She tried to escape her situation. A shelter accommodated her briefly, before making her leave due to a lack of space and resources. She later qualified the charges she filed against her husband, due to the pressure that his impending release from police custody and the fear of his potential reaction towards her put on Ms Talpis. Shortly after, the husband attempted to kill Ms Talpis, and succeeded in killing her son. The court then held that the claimant's fundamental rights (the right to life, and the prohibition of inhuman or degrading treatment, in conjunction with non-discrimination) were violated by the police response, which was delayed, and did not take into account the severity of the situation or her allegations that were known to the police already. This follows a hardening of the court's approach to police accountability, giving fewer and fewer excuses for the state to not intervene. In a previous ECHR case, *Eremia and Others v Moldova*, two tests of state authorities 'repeatedly condoning' violence, and having a 'discriminatory attitude towards women' were required in order to find an Article 14 (non-discrimination) violation.⁶⁴ But *Talpis* did not focus on the latter requirement, considering instead how the police had failed by allowing such violence, and thereby relaxing the previous stricter approach to police responsibility. The judgment also often referred to the Istanbul Convention principles, showing the usefulness of combined legislative instruments to provide a more legitimate and strong condemnation of domestic violence.

Overall, these regional systems of state obligation are highly important, providing a happy medium between larger scale, but specific and regulated international obligations, and smaller scale, but more onerous guidelines provided by the individual state. Such agreements create international pressure and lead to authoritative approaches to state obligations relating to domestic violence being articulated. Those approaches have developed over time so that now there is less of an emphasis on state consent and more focus on the individual victim and their rights as inviolable and requiring state intervention, even in the so-called private sphere. However there is still a long way to go in ensuring that states comply with the obligations.

c) The potential for further state obligations

States have gradually implemented these obligations at a domestic level, such as by recognising a violation of a right to life where the police failed to fulfil their duty of care, and not responded adequately to knowledge of violence. This has been particularly done in legislation, such as the 2012 Turkish Law to Protect Family and Prevent Violence against Women⁶⁵ or the 2011 Lithuanian Law on Protection Against Domestic Violence.⁶⁶ In practice of course, there is a great difficulty in implementing this protection, due to potential public policy concerns of state

⁶³ ECHR 075 (2017)

⁶⁴ [2013] EqLR 911

⁶⁵ Law No 6248

⁶⁶ No XI-1425

negligence, the attitudes of the authorities involved which can be dismissive or unaware of the signs, or a lack of monitoring of states where they are failing in certain duties. There are also additional issues when victims of domestic violence mitigate or retract their charges against their abusers, as the state must then choose whether to prosecute on the victim's behalf or to comply with their wishes. (As the *Eremia* case highlighted,⁶⁷ some women can receive a dismissive response from the authorities and thus undergo pressure to withdraw their claims in fear of their safety.) This is the first potential area for change. Whilst international obligations are often strict on the accountability of states, states have tended to be slower in ensuring police accountability. There have usually been concerns over 'defensive practice', too much paperwork, the floodgates argument, and the waste of public money in litigation.⁶⁸ However, whilst there is a possibility this may occur, it might also provide the incentives needed to make the police response more efficient, because the potential ramifications of failure would be taken more seriously. A recent development in the UK Supreme Court is the *Worboys* case,⁶⁹ the appeal of which was heard earlier in 2017. This case is debating whether the Human Rights Act 1998 can be used to hold police to account for their failures. This particular case involves the police investigation of rape. If the Supreme Court judges do utilise the Human Rights Act in this way, it would have huge implications in the way that police negligence is treated, because they would be held as violating fundamental rights.

The most common rights that are referred to in the context of tackling domestic violence are the rights to privacy and family life, non-discrimination, freedom from torture and inhuman or degrading treatment, and the right to life. However, additional obligations may concern the protection of socio-economic rights, such as the right to adequate funding for domestic violence infrastructure, which may be more appropriate to tackle the issue head-on, such as money for shelters. Also, as mentioned in ensuring the accountability of police, funds are often scarce for these services, and allocating more resources to them encourages a better response, and further training in handling domestic violence. Such ideas are mentioned in the Istanbul Convention, such as Article 15 which handles the training of professionals, and Article 7 requires the signatories to allocate an adequate amount of 'financial and human resources' in order to implement the convention correctly.

The right to education means that both girls and boys should receive proper information regarding issues like domestic violence, intimacy, and family relationships. While such topics are often required in schools, such as the RSE and PSHE requirement in UK primary and secondary schools,⁷⁰ gender equality and domestic violence awareness needs to be taught holistically throughout all educational stages. In particular, dispelling myths such as 'boys will be boys' goes a long way towards unlearning attitudes that can cause harmful behaviours underpinning much inter-personal violence.⁷¹

Also, a right to justice might be extended to cover legal aid provisions. A lack of legal aid may discourage women to bring their claims for fears of having to face their abuser, either in or out

⁶⁷ *Eremia* (n 64)

⁶⁸ Jamil, 'Police Liability for Negligent Investigations: Unravelling the Blanket of Immunity' (2013) 1(2) *Birkbeck Law Review* 303

⁶⁹ *Commissioner of Police of the Metropolis v DSD and Another* [2015] EWCA Civ 646

⁷⁰ Children and Social Work Act 2017, Chapter 4, section 34-35

⁷¹ Miriam Miedzian, *Boys Will Be Boys: Breaking the Link Between Masculinity and Violence* (New York: Doubleday, 1991)

of court. Also, as the rates of litigants in person rise dramatically (particularly in countries like the UK where legal aid is limited),⁷² women who are already traumatised by their experiences may have to face the court system with little financial assistance. Again, these ideas are mentioned in the Istanbul Convention, in Article 57 on the provision of adequate legal aid.

Thus, there are many ways that states can undertake further obligations to prevent and respond to domestic violence, particularly by using other rights and obligations they must uphold (such as education, or proper training for professionals) to justify intervention. This hard line stance reflects the one taken by international bodies and shows a great willingness to go above and beyond for survivors and potential future victims. This also echoes the complexity of the definitions of domestic violence, as discussed above. Domestic violence can impact on so many aspects of everyday life, so it follows that the obligations that the state must undertake also have this broad-ranging nature.

The domestication of rights

In a 2011 UN Women report, it was found that 125 countries had prohibited domestic violence.⁷³ However that same report found that ‘603 million women live in countries where domestic violence is not considered a crime and more than 2.6 billion live in countries where marital rape is not a criminal offence’.⁷⁴ We have also already seen that in practice, judiciaries have not always been willing to hold other branches of the state to account (for example, in *Castle Rock* and *Michael and Others*). Therefore it is appropriate to consider how states (aside from international or regional commitments) can improve the response to, and the prevention of, domestic violence. One potential way to tackle the issue is through constitutional provisions.

Constitutions are entrenched laws; they represent a country’s values and the normative aspirations they would like to attain.⁷⁵ Constitutions are often difficult to amend by standard legislative processes, such as in Canada or the US.⁷⁶ In many countries they can be utilised to strike down unconstitutional legislation through judicial review,⁷⁷ and they help regulate the separation of state powers.⁷⁸ These documents are powerful tools. It is therefore particularly interesting to consider how constitutions change social values, and might be used to tackle entrenched issues of inequality. This is best exemplified in transitional contexts as the difference before and after transition can be more easily judged. The two to be discussed in this essay are

⁷² Grimwood, ‘Litigants in person: the rise of the self-represented litigant in civil and family cases’ (House of Commons Briefing Paper, 14 January 2016) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113#fullreport>> accessed 20 March 2017

⁷³ UN Women, ‘Progress of the World’s Women: In Pursuit of Justice’ (UN Women, 2011) <<http://www.unwomen.org//media/headquarters/attachments/sections/library/publications/2011/progressoftheworldswomen-2011-en.pdf?vs=2835>>

⁷⁴ *ibid*

⁷⁵ Loewenstein, ‘The ‘Living’ Constitution: Shadow and Substance’ in Blondel (ed) *Comparative Government* (Macmillan Education UK, 1969) 145

⁷⁶ Albert, ‘The Difficulty of Constitutional Amendment in Canada’ (2015) 53 *Alberta Law Review* 85

⁷⁷ Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *The Yale Law Journal* 1346

⁷⁸ Montesquieu, *In The Spirit of the Laws* (1748) trans Thomas Nugent and JV Pritchard, (London, 1914)

Ecuador and South Africa. These are two countries with very different backgrounds, but have both gone through periods of great political, social, and constitutional change from colonialism, dictatorship, and apartheid, towards democracy. More relevantly, they have both indicated the intention to abolish domestic violence and achieve greater gender equality,⁷⁹ and it shall be considered here how they have attempted to use constitutional change for this purpose.

a) Ecuador

Ecuador was colonised by the Spanish in the 16th Century. It regained control from the Spanish in 1822, joining Simon Bolivar's Republic of Gran Colombia, and finally became independent in 1830. Political instability returned to Ecuador, after a brief post-WWII period of peace, in 1960, when there was military rule until 1979, further economic turbulence, corruption in the government, and a series of short-lived Presidencies. Ecuador has had 20 constitutions since independence.⁸⁰ The last major reform of the Constitution occurred in 2008, after President Correa was elected on the basis of a post-neoliberal and socialist agenda. He called this process of reform a 'Citizen's Revolution' with 'a woman's face', suggesting he would prioritise the interests of women and also other marginalised groups such as Afro-Ecuadorians, whose voices have previously gone unheard.⁸¹ This proposed to give the Constitution more of a modern moral legitimacy, because it is the country's people who have decided what they require from their constitution in a contemporary context. Ecuador also redefined the legal definition of the family, allowing the recognition of 'diverse families' and supporting a broader range of relationships.⁸² The country has thus definitely showed great change. Armatta notes that 'until 1989, a husband in Ecuador could legally force his wife to live with him no matter how abusive he was,'⁸³ and this was under the supposedly democratic, and non-discriminatory constitution of 1979. According to local newspaper sources citing a Security Press Conference in 2017, Ecuador reached its lowest rate of violence since 1980 and is the second safest country in South America.⁸⁴ However, there are still huge problems of inequality in Ecuador: indigenous, Afro-Ecuadorian, and Montubio populations are consistently discriminated against, LGBTQ people are not broadly accepted in society, gender stereotypes are commonly proliferated, and women have problems accessing reproductive justice.⁸⁵ This suggests that regardless of constitutional intention, the

⁷⁹ 'Ecuador Leads the Battle Against Domestic Violence in Latin America' (*Council on Hemispheric Affairs*, 1 August 2011) <<http://www.coha.org/ecuador-leads-the-battle-against-domestic-violence-in-latin-america/>> accessed 21 March 2017

⁸⁰ Mihnea Tananesu, *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* (New York: Springer, 2016) 86

⁸¹ Lind, "'Revolution with a Woman's Face'?" Family Norms, Constitutional Reform, and the Politics of Redistribution in Post-Neoliberal Ecuador' (2012) 24(4) *Rethinking Marxism* 536

⁸² *ibid*

⁸³ Judith Armatta, *Getting Beyond The Law's Complicity In Intimate Violence Against Women* (1997) 33 *Willamette L Rev* 4, 19

⁸⁴ 'Ecuador Reaches Lowest Violence Rates in 36 Years' (*Telesur*, 4 January 2017) <<http://www.telesurtv.net/english/news/Ecuador-Reaches-Lowest-Violence-Rates-in-36-Years-20170104-0013.html>> accessed 18 July 2017

⁸⁵ 'Concluding observations on the combined eighth and ninth periodic reports of Ecuador' (Committee on the Elimination of Discrimination against Women, 11 March 2015) <<http://evaw-global-database.unwomen.org/>-

entrenchment of a constitution in everyday social realities is an iterative process, with constitutional principles trickling down over time from the text into reality.

There are specific root causes of domestic violence in Ecuador, as Perilla and Norris argue is the case broadly across the South American countries.⁸⁶ The ‘machismo’ attitude that is encouraged among men in Ecuador usually puts the man at the head of the family, and pushes the idea that he should have full control over his wife, who should embody ‘marianismo’.⁸⁷ Ecuadorian women have traditionally been told not to talk about their experiences of domestic violence (*‘la ropa sucia se lava en la casa’*), and due to the popularity of Catholicism endurance of such abuse within the ‘sacrament of matrimony’ is common.⁸⁸ Such an environment can cultivate a relationship that leads to domestic violence due to controlling behaviour, the familial power disparity, and the proliferation of unhelpful social norms.

i) Constitutional provisions concerning domestic violence

The main provisions in Ecuador’s 2008 constitution that refer to domestic violence are procedural i.e. they determine how claims are treated throughout the judicial system. This means that the process of handling these sensitive issues is a priority, with greater efficiency and more effective remedies. It provides better access to justice for women and ensures they will be dealt with promptly and with high importance. This is particularly important when it comes to vulnerable groups who may be unable to access the courts or feel unable to bring their claim to court. Having a supportive judicial system is a more encouraging environment for victims to speak about their experiences. For example, Article 77 allows wives to testify against spouses in domestic violence situations. This is particularly useful, because immediate family members used to be unable to bring cases against each other in these instances, which propagated the closed off and unregulated private sphere, and encouraged an unbreakable family loyalty that could hinder vulnerable victims. Along with the protective measures that were brought in by the Commissariat of Women and the Family (such as ordering assailants to leave the home, restraining orders, and granting custody of minors), it provides ways for victims to report their experiences with minimised consequences for their safety or that of their children.⁸⁹

Article 81 provides for special expeditious procedures, trials, and attorneys for domestic violence. It is reported by the Bureau for Democracy that, ‘based on 2016 statistics, there were 50 judicial units and 78 courts specializing in gender-based violence. The judicial units have responsibility for collecting complaints and assisting victims may order arrest warrants for up to

</media/files/un%20women/vaw/country%20report/america/ecuador/ecuador%20cedaw%20co.pdf>> accessed 18 July 2017

⁸⁶ Perilla and Norris, ‘Culture and Domestic Violence: The Ecology of Abused Latinas’ (1994) 9(4) *Violence and Victims* 325

⁸⁷ *ibid*

⁸⁸ Council of Hemispheric Affairs Report (n 79)

⁸⁹ ‘Responses To Information Requests (RIRS)’ (Immigration and Refugee Board of Canada, 12 November 2009) <<https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/07/ECU103278.FE.pdf>> accessed 23 July 2017

30 days of detention against the aggressor.⁹⁰ This is useful because it provides dedicated teams who solely deal with this issue, and can therefore create a more direct and rapid response. However in the same token, ‘human rights activists stated that 16,000 cases of domestic violence were pending in the court system. They argued that the court system was not sufficiently staffed to deal with the caseload and that judges lacked specialized training for dealing with gender-based violence.’⁹¹ Once again this shows that even well-designed systems struggle to make change without resources for effective implementation and maintenance.

Article 35 gives priority and specialised care to those affected by violence in the public and private sectors, bolstering the effects mentioned above. More substantively, Article 66 provides:

‘Guaranteed personal well-being including:

- a. Bodily, psychological, moral and sexual safety.
- b. A life without violence in the public and private sectors. The State shall adopt the measures needed to prevent, eliminate, and punish all forms of violence, especially violence against women, children and adolescents, elderly persons, persons with disabilities and against all persons at a disadvantage or in a vulnerable situation; identical measures shall be taken against violence, slavery, and sexual exploitation.
- c. Prohibition of torture, forced disappearance and cruel, inhuman or degrading treatments and punishments.’

Article 66 is both positive and negative, because the state must ‘prevent, eliminate, and punish’, giving it a strong, ‘guaranteed’ effect and little excuse for violating the right. Programmes that Ecuador has introduced to ‘prevent, eliminate [or] punish’ include female-only police stations, anger management counselling for males, preventative workshops for children, and reducing the gender pay gap so that women are potentially less financially dependent.⁹² The use of ‘personal well-being’ in the wording of Article 66 is also very effective, because it is an all-encompassing term; it could mean physical well-being, mental, emotional, financial, and so on. Article 11 also guarantees the equality of all citizens, explicitly including non-discrimination against sex, which can be recognised by ‘competent authorities’. It states that ‘all forms of discrimination are punishable by law. The State shall adopt affirmative action measures that promote real equality for the benefit of the rights-bearers who are in a situation of inequality.’ All of these provisions prioritise certain groups who experience inequalities, and in particular women. It imposes obligations through the use of imperatives: ‘the State *shall* adopt the measures needed’. This provision has been reflected in the legislation, policy, and actions of the state of Ecuador.

There are also other protective constitutional mechanisms in place for those who believe their fundamental rights have been violated, the number of which doubled from three to six after the 2008 reform. Most importantly are the ‘Protection Remedies’, ‘Non-Compliance Actions’, and ‘Extraordinary Actions of Protection’. Miño describes these different forms of remedy.

⁹⁰ Bureau of Democracy, Human Rights and Labor ‘Country Reports on Human Rights Practices for 2016 – Ecuador’ (US Department of State, 2016) <<https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265584#wrapper>>

⁹¹ *ibid*

⁹² Council on Hemispheric Affairs Report (n 79)

Protection remedies ‘seek to provide protection of fundamental rights before actions of any public authority; for the wrongful application of public policies, and for actions of non-state actors that act under its acquisition.’⁹³ Non-compliance actions ‘seek to oblige authorities to comply with national law and decisions of national and international tribunals when such decisions contain an express mandate to do or not to do something.’⁹⁴ Finally, extraordinary actions of protections ‘can be filed against final decisions of national courts that have violated rights enshrined in the Constitution. This remedy should be filed after all other remedies have been exhausted’.⁹⁵ Therefore, Ecuadorians are provided with more available remedies that can be invoked in the constitutional court after the reform, choosing the one most suitable and adapting to each individual’s case.

ii) Future improvements

An improvement to the Ecuadorian response to domestic violence is the tackling of social norms that propagate domestic violence. It is possible that due to the short period of time that the new Ecuadorian constitution has existed, it is yet to establish itself as part of Ecuadorian identity. Or it may be that constitutions simply do not fulfil this purpose. However, the government should attempt greater constitutional and political stability, because the more amendments there are, the less effective they become at creating any such change due to its own nebulous nature.

Also, budget allocations for the provision of domestic violence infrastructure need to be increased. Certainly, not enough is spent in the Latin American region, compared to the severity of the problem.⁹⁶ There are attempts to support domestic violence victims through the all-female police stations. But spending more time, money, and resources on such a cause will combat domestic violence more effectively, and the repercussions will be experienced for generations to come. These resources include more efficient law-making – currently, the law against domestic violence is weak, as the offence is punishable by four days to seven years in prison, or a fine ranging from ‘\$350 to \$5,300’, and this can often be a lengthy process compared to the urgency of the domestic violence complaints.⁹⁷ In fact, ‘human rights activists stated that 16,000 cases of domestic violence were pending in the court system...[due to] under staff[ing]...[and a lack of] specialised training for dealing with gender-based violence.’⁹⁸ Thus, Ecuador has much work to do if it is to achieve its constitutional and political ideals.

⁹³ Maria Dolores Miño, ‘UPDATE: The Basic Structure of the Ecuadorian Legal System and Legal Research’ (*Globalex*, April/May 2015) <<http://www.nyulawglobal.org/globalex/Ecuador1.html#IV>> accessed 15 March 2017

⁹⁴ *ibid*

⁹⁵ *ibid*

⁹⁶ Luciano, Esim, and Duvvury ‘How to Make the Law Work? Budgetary Implications of Domestic Violence Laws in Latin America, Central America, and the Caribbean’ (2005) 1-2 *Journal of Women, Politics & Policy* 123

⁹⁷ ‘Country Reports on Human Rights Practices for 2016’ (*US Department of State*, 2016) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265584>> accessed 24 July 2017

⁹⁸ *ibid*

b) South Africa

South Africa's transitional background demonstrates a more radical change than the Ecuadorian experience. Its new constitution emerged from the adversity and atrocities of apartheid that dominated the country from 1948 until 1994. The racist regime segregated groups of people on arbitrary characteristics, and resulted in the upheaval of millions of South Africans into 'designated areas', prohibited inter-racial marriage, and effectively isolated, alienated, and disenfranchised the majority of the population. Discrimination on the basis of race reaches back to colonial times, as South Africa was invaded by both Dutch and British forces (only becoming independent from Britain in 1961). Apartheid was chipped away at throughout the 1980s by allowing greater self-rule in certain Black ethnic areas, and greater political participation (albeit no voting rights). This culminated in the 1992 referendum that showed overwhelming support for a new democratic order based on 'honour', 'respect', 'fundamental human rights', and to do this so as to 'improve the quality of life of all citizens and free the potential of each person', and 'heal the divisions of the past'.⁹⁹ Reducing rates of domestic violence has been specifically placed on the national transformation agenda for South Africa, the country has ratified the Maputo Protocol, and they also participated in the Beijing Conference, adopting the platform without any reservations.¹⁰⁰

There was no comprehensive domestic violence legislation in South Africa until the new constitution was introduced. As Bendall states, domestic violence in South Africa is still highly prevalent, and women often do not report their experiences, making it even more difficult to estimate how pervasive the practice truly is.¹⁰¹ She points out that domestic violence is treated 'as a private matter', further hindering an effective response,¹⁰² and suggesting that this public/private divide has yet to be diminished in South Africa. In 2017, it was reported in the South Africa Demographic Health Survey of 2016 that 1 in 5 women have experienced physical intimate partner violence, but this statistic is believed to underestimate the true extent of the problem. In a similar way to Ecuador, according to the Special Rapporteur the violence in South Africa can be attributed to:

'violence inherited from the apartheid [which] still resonates profoundly in today's society [...] deeply entrenched patriarchal norms and attitudes towards the role of women [...] and especially in rural areas and in informal settlements, [domestic violence is] a way of life and an accepted social phenomenon.'¹⁰³

The Special Rapporteur also notes that the legislation currently in place (the Domestic Violence Act 1997) 'is gender neutral and insufficiently gender sensitive' disregarding 'the structural inequality between men and women', and instead choosing to 'focus on women and men equality

⁹⁹ The Constitution of the Republic of South Africa 1996, Preamble

¹⁰⁰ 'Research Paper on Domestic Violence' (*South African Law Commission*, April 1999) <<http://www.justice.gov.za/salrc/rpapers/violence.pdf>> accessed 23 July 2017

¹⁰¹ Bendall, 'Domestic Violence Epidemic In South Africa: Legal And Practical Remedies' (2009) 39(2) *Women's Studies* 100

¹⁰² *ibid*

¹⁰³ 'Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa' (UN Human Rights Council, 14 June 2016)

as victims’, despite statistics to indicate the opposite.¹⁰⁴ Equality in such a case does not always mean equal treatment, but equitable treatment. Therefore, South Africa has lofty aspirations to create a non-discriminatory and equal society, but this will require more than what is currently being done, particularly since the country has an entrenched and diverse number of cultures, backgrounds, socio-economic levels, and customary traditions, which can make one singular solution difficult to implement.

i) Constitutional provisions concerning domestic violence

The constitutional provisions that relate to domestic violence are more substantive than procedural, unlike Ecuador. The constitution provides for a vision of South Africa that is more inclusive, fair, and open, as has been noted. It is also somewhat broadly worded. South Africa expressly commits itself to the prohibition of gender inequality and discrimination in section 9 of the constitution. This section is important due to the running constitutional theme of equality for all citizens. In fact, Mahomed DP in the *Fraser v Children’s Court, Pretoria North* commented that ‘there can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.’¹⁰⁵ Section 12 is also a pertinent provision, which says:

‘(1) Everyone has the right to freedom and security of the person, which includes the right – (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right – (a) to make decisions concerning reproduction; (b) to security in and control over their body.’

These provisions have informed legislation concerning domestic violence (such as the Domestic Violence Act 1998, under which victims can obtain Protection Orders) and have been utilised in the case law of the South African Constitutional Court. The main case on this is *S v Baloyi*.¹⁰⁶ In this case, the Prevention of Family Violence was claimed to be unconstitutional due to a reversal of the presumption of innocence. The court however decided that the right to a presumption of innocence was weaker than the right to protection from violence, and also considered just how serious and pervasive domestic violence is in South Africa. This case affirmed that the courts do not see domestic violence as a private matter any longer, and recognised the impact of CEDAW and other international agreements in the necessary imposition of obligations upon the state. Most importantly, the case shows that equality for women was of higher priority than the well-established presumption of innocence until proven guilty, meaning that the perpetrator could not use this excuse to avoid accountability.

¹⁰⁴ *ibid*

¹⁰⁵ 1997 2 SA 261 (CC) 272A

¹⁰⁶ [1999] ZACC 19

ii) Further improvements

Firstly, funding is a huge issue in South Africa when tackling domestic violence. Poverty already increases the number of women who suffer from this violence, but it also means they have little means of escape due to a lack of financial resources or familial help. If or when they do finally manage to leave the abusive situation, shelters that are mainly refuges for the poorer members of society are underfunded and government subsidies have declined. Thus the economic, welfare, and funding rights referred to in the obligations section above would be highly advantageous here, to ensure that women always have a place to go, and that this is an affordable means of escaping an abusive relationship. As established, tackling domestic violence is a public issue, and an increased spending of public funds on this endeavour is one that can only bring positive consequences for the future.

Another major issue that has prevented the effectiveness of domestic violence is the judicial response. Whilst *S v Baloyi* was very progressive in its judgment, Nweze has pointed out that contrasting cases such as *S v Kgafela* and *S v Engelbrecht* have presented bias in their judgments.¹⁰⁷ The defendant in the former case, a black South African woman, killed her husband after years of horrific abuse. The defendant in the latter also killed her husband after similar abuse, but was a white South African. In *Kgafela*, the defendant's sentence of life in prison went unmitigated.¹⁰⁸ In *Engelbrecht*, the defendant walked away after the trial, absolved of her crime due to her circumstances.¹⁰⁹ It is also important to note the continued racial discrimination in the country, where Nowrojee and Manby report that 'black women were told that domestic violence and rape were issues for white women'.¹¹⁰ Combined with the fact that 'black women have the least education and work under the worst conditions' in South Africa¹¹¹ this marginalised group are more at risk of domestic violence, and yet still receive a harsher sentence for self-defence than their white counterparts. Once again we see that an interdisciplinary and balanced approach to tackling domestic violence must occur, by looking not only at gender disparities, but racial and economic, as more vulnerable groups may unfairly be put at an additional risk and receive differing levels of judicial treatment. This would also be the best way to embody the equality principles in the South African constitution that were so essential to its origin.

This section has shown that major shifts in a country's social, political, and economic policies towards democracy can have a positive impact upon the constitution and subsequent legislation via reform. However, each country will have its own set of challenges, and it will take significant time for new constitutions to take root in the psyche of the country's population, or to even have a major effect at all. A recurring theme is that the positive motivations and intentions of the constitutional texts often do not translate into reality as hoped. But, it is always possible to use

¹⁰⁷ Nweze, '(4) Domestic Violence' in Shivdas and Coleman (eds) *Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context* (London: Commonwealth Secretariat, 2010) 72

¹⁰⁸ Case No. 429/2002, 28 May 2003

¹⁰⁹ 2005 (92) SACR 41 (W)

¹¹⁰ Nowrojee and Manby, 'The State Response to Domestic Violence and Rape' (*Human Rights Council*, 1995) <<https://www.hrw.org/reports/1995/Safricawm-02.htm>> accessed 23 July 2017

¹¹¹ *ibid*

these texts as a guiding force towards increased public awareness, better state responses, and allocation of resources to domestic violence causes as opposed to none at all.

Conclusion

In conclusion, this essay has argued that there is still much that can be done in the fight against domestic violence, including through the usage of constitutional rights and international law. These responses range from the pure semantics of a definition of this epidemic, to a reconceptualisation of what it means for an issue to be a 'public' one, to obligations upon the state that are international, regional, and nationwide. It is only through sustained action against this problem that it will be combatted. It is also recognised that domestic violence is a complex issue, and one not likely to be eradicated any time soon without true, complete gender equality: a vision South Africa has attempted to realise through its constitutional commitments. However, normative ideals, particularly the ones painted in constitutional texts are still realistic, hopeful, and something every country can work towards.

This essay has also concluded that the strongest response a state can give is by committing to regional agreements that concern domestic violence. Agreements such as the Bélem do Pará and the Istanbul Convention have provided the toughest stance against the perpetrators vis-à-vis the state, and the one that provides the best outcome for the victim. However, these often fall short in practice by the difficulty in implementation, and it is only through protection at all levels, whether global, regional, or local, in order to ensure a comprehensive safety net, that will provide the most effective, continual, and consistent zero tolerance policy on these issues.

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