EVENT

ISLA's Strategy Consultation on Forced Sterilisation in Africa

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In August 2018, the Initiative for Strategic Litigation in Africa (ISLA) hosted a consultative strategy meeting on forced sterilisation in Africa. The meeting focused on cases concerning forced sterilisation and litigation strategies pertaining to them.

Forced sterilisation is an intrusion upon a woman's bodily autonomy, as it deprives her of many rights including the right to make decisions regarding medical intervention. It is a violation of human rights and medical ethics, and is considered an act of torture and a form of cruel, inhuman and degrading treatment. Forcibly ending a woman's reproductive capacity has far-reaching consequences physically, emotionally, socially and culturally.

The forced or coerced sterilisation of women is a global phenomenon, particularly for already marginalised groups of women such as women living with HIV, indigenous women, gender-non-conforming women, and women living with disabilities. Against this backdrop, the meeting considered practical, substantive and procedural issues relating to litigation on forced sterilisation.

The Kenyan cases

The Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), together with the African Gender and Media Initiative Trust (GEM), currently has two petitions before the Constitutional and Human Rights Division of the High Court of Kenya – Petition 605 and 606 of 2014. The petitions bring forth cases of five women who were forcibly sterilised by tubal ligation. The sterilisations occurred under the following circumstances:

- threatening to withhold food portions and baby formula milk from the women;
- inducement through promising to cover the medical expenses;
- through the lack of provision of the necessary information for the women to be able to make informed decisions; and
- through the lack of providing choices on family planning methods.

In Petition 606, the petitioner is an HIV-positive woman who was forcibly sterilised. She was not informed of the procedure but for receiving two vouchers labelled 'CS' and 'TL' prior to giving birth via caesarean section. It was only years later, when trying to conceive with her new husband, that she was informed she had had tubal ligation surgery. Petition 606 captures the nature of forced sterilisation:

> Coerced sterilization occurs when financial or other incentives, misinformation or intimidation tactics are used to compel an individual to undergo the procedure while forced sterilization occurs when a person is sterilised without her knowledge or is not given an opportunity to provide informed consent (para 22).

The first respondent in Petition 606, Marura Maternity and Nursing home, aver in their responding affidavit

The first petitioner ... was informed that if she did not undergo tubal ligation, she would not qualify for food portions and formula. Upon seeking formula after giving birth, she had to provide proof that she had undergone tubal ligation

that they are being wrongly sued.

Petition 605 concerns the forced sterilisation of four women, all HIV-positive. The first petitioner, SWK, was given a consent form to sign before going into theatre for a caesarean and was informed that if she did not undergo tubal ligation, she would not qualify for food portions and formula. Upon seeking formula after giving birth, she had to provide proof that she had undergone tubal ligation before she could receive formula.

Similarly, the second petitioner, PAK, was told she would not get further provision of formula for her twin boys if she did not provide evidence that she had undergone tubal ligation. In undergoing this procedure to ensure access for formula for her sons, she was given a consent form to sign. She cannot read and the contents were never explained to her.

The third petitioner, GWK, was given a form to sign before going into theatre after 48 hours of labour. Only afterwards was it explained to her that they had performed tubal ligation, and she too had to provide proof of this to receive food and formula assistance.

The fourth petitioner, AMM, was denied formula unless she could provide proof of tubal ligation. She underwent this procedure, without its being explained to her, to obtain access to formula. She too was given a form to sign, the contents of which were never explained to her even though she cannot read.

Petition 605 summarises the crux of the case:

> The unlawful and involuntary sterilization of the 1st – 4th petitioners was unreasonable, unjustifiable and unconstitutional because it was not done in accordance with the law and ethics, was not necessary in the circumstances, was not legitimate and necessary and was not the reasonably available alternative of family planning (para 42).

An affidavit in support of the first respondent in Petition 605 is by a woman who willingly underwent tubal ligation and speaks to the counselling received and procedures followed by the first respondent. Another supporting affidavit, by a nutrition assistant, holds that in providing food assistance it did not matter whether women had documentation proving tubal ligation. She alleges that food support could not be withdrawn, regardless of a woman's lack of family planning practices.

The petitioner's cases argue that the forced sterilisation violated the following rights of the victims:

- the right to life (article 26(1) of the Kenyan Constitution);
- the right to equality and freedom from non-discrimination (article 27(1)-(8) of the Constitution);
- the right to human dignity (article 28 of the Constitution);
- freedom and security of the person (article 29(d) and (f) of the Constitution);
- freedom of expression and freedom to seek and receive information and ideas (article 33(1) of the Constitution);
- the right to privacy (article 31 of the Constitution);
- the right of access to information (article 35(1)(b) of the Constitution);
- the right to health (article 43(1)(a) of the Constitution); and
- the rights of consumers to be given services of reasonable quality and the information necessary for them to gain full benefit of the services and

protection of their health (article 46(1)(a)-(c) of the Constitution).

The petitioner's cases allege that the violations of these rights are not justifiable under article 25 of the Constitution and therefore unlawful.

Petition 605 observes as follows:

> It is apparent from the guidelines mentioned as read together with the provisions of the Constitution, International Conventions and instrument that there is a need for policy and law-makers to come up with a law on involuntary/forced/coerced sterilization. Such policy must be compliant with the Constitution and should incorporate principles from international guidelines and best practices in other jurisdictions (para 60).

In the light of this, the petitioners' cases seek the following:

- a declaration of the violation of rights;
- a declaration that threats such as these experienced amount to a rights violation;
- a declaration that women living with HIV have equal reproductive health rights;
- an order directing respondents to put in place guidelines, measures and training for health-care providers and social workers regarding informed consent;
- an order directing the introduction of a seven-day waiting period between the obtaining of consent and the commencement of the procedure; and
- an order for the issuance of a circular by the Ministry of Health that this practice of forced sterilisation is ***not*** government policy.

These petitions continued to be heard before the High Court in Nairobi 2018 and 2019. As at January 2020, the High Court in Nairobi had given directions that the two (Petition 605 and 606 of 2014) continue for hearing in May 2020.

The Ugandan case

The Ugandan case also concerns the forced sterilisation of four HIV-positive women. The Uganda Network on Law, Ethics and HIV/AIDS (UGANET) are in the initial stages of development of their case.

The third petitioner in the Ugandan case underwent a caesarean that resulted in a still birth. The caesarean was consented to by a relative of the petitioner – a paternal aunt – without any discussion with the petitioner on the matter. Only years later, when trying to conceive again and failing to do so, did the petitioner go for a medical examination and find that tubal ligation surgery had been performed on her when the still birth occurred.

The doctor who performed the caesarean allegedly deemed her unfit to have children because of her HIV-positive status. The petitioner remarks:

> My life has since been overburdened with stress and self-pity – I feel less of a woman since I cannot bear any child anymore and since my husband and I cannot enjoy any conjugal rights following this history of painful events (para 7).

Another petitioner in the Ugandan case also had to undergo a caesarean in giving birth, at the age of 26. She is HIV-positive. Before going into the surgery, but already in labour, she was asked by the doctor to say how many children she had. She answered that she had none. The doctor then said (translated from the Luganda language), 'We are going to stop you.'

The next day, when another doctor was making ward rounds, she overheard him ask who performed the caesarean and why tubal ligation was performed on a 26-year-old. She did not understand what this meant.

Only years later, after her son passed away (the third child she had lost) and when unable to conceive again, was she informed by a doctor that she had undergone tubal ligation in her last caesarean. She says, '[The] doctor deemed me "unworthy" and therefore denied me the ability to procreate, thereby violating my right under articles 21 and 31 of the Constitution.'

Her discharge form from the caesarean and tubal ligation surgery has been lost.

The Ugandan case is still in the preparation stages due to the challenges faced.

- Practical issues identified in the Ugandan cases include dealing with the litigant's high

expectations and confronting the gaps in psychosocial support.

- Substantive issues include a lacuna in the domestic law, which does not include sexual and reproductive health rights. The Ugandan Constitution has no specific article dealing with sexual and reproductive health rights and therefore they need to rely on international and regional instruments as well as qualify these rights through interpretation of other rights. The case shall rely on the right to protection from inhumane and degrading treating under article 24 of the Ugandan Constitution and the right to privacy under article 27. The right to privacy has been interpreted to include the right to bodily autonomy and the right to be free from physical intrusion in the body.
- Procedural barriers include the lack law on the issues and having to choose between, on the one hand, an approach which is acceptable but fetches lesser tangible remedies to the clients and more remedies in terms of orders to change policies and laws, and, on the other, approaches that may result in more client-centred remedies but less structural and policy changes.
- The next steps in the case include identifying a medical expert to re-examine the survivors; taking survivors through these medical examinations; managing survivors' psychosocial needs; redrafting of pleadings; and holding a litigation surgery to prepare for court.

This case also raises a somewhat unique issue concerning the Elimination of Mother-to-Child-Transmission (EMTCT) of HIV Validation Programme of the World Health Organisation. Countries doing EMTCT undergo assessment of their programme in order to achieve a recognised status globally depending on performance. Uganda has been doing EMTCT and is now going through the validation exercise.

ISLA got to know of this through its partner, the International Community of Women Living with HIV Eastern Africa (ICWEA), which did the research and brought this case to it. A staff member of ICWEA sits on the National Validation Committee and raised the concern that, for countries where sterilisation is taking place, the validation exercise cannot go through positively. The filling of this case means that ISLA is bringing the matter into the limelight, which will frustrate the validation.

The further focus of the meeting

In addition to considering the cases, the meeting engaged with article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter Maputo Protocol). The purpose of this was to aid ISLA's development of a litigation manual on article 14, which concerns health and reproductive rights.

The Maputo Protocol states that 'any practice that hinders or endangers the normal growth and affects the physical development of women and girls should be condemned and eliminated'. The Protocol contains progressive provisions, such as protecting women's rights in the context of HIV (the first human rights instrument to do so); affirming women's autonomy regarding their reproductive capacities; and allowing for abortion on certain grounds. State obligations under article 14 are further clarified in General Comments 1 and 2 of the African Commission.

The adoption of the Maputo Protocol provides African states with the opportunity to rely on a human rights instrument that explicitly recognises SRHRs. This litigation manual will be published by ISLA.

Michelle du Toit is an independent legal researcher who worked as a consultant for ISLA for the purposes of this meeting. For more information

References

KELIN (2019) 'Media advisory: Mention of Petition 605 and 606 of 2014 on Forced and Coerced Sterilisation of Women Living with HIV.' Available at https://bit.ly/2Tcsvw0

KELIN (2020) 'High Court to continue the hearing of the cases challenging forced and coerced sterilisation of women living with HIV in May 2020.' Available at https://bit.ly/3a2Ka00