Re GREAT LAKES INITIATIVE FOR HUMAN RIGHTS AND DEVELOPMENT (GLIHD)

[Rwanda, SUPREME COURT- RS/INCONST/SPEC 00001/2021/SC – (Ntezilyayo, P.J., Nyirinkwaya, Cyanzayire, Hitiyaremye and Karimunda) 24 December 2021

Constitution – Right to life – It is a fundamental human right on which all other rights are based, it must be protected so that no one can be arbitrarily deprived of life – The Constitution of the Republic of Rwanda of 2003 revised in 2015, Article 12.

Constitution – Right to good health – Having good health is not limited to the fact that a person does not feel sick nor have disability rather it means that he/she feels healthy physically, mentally and socially.

Constitution- Right to physical and mental integrity- All acts that violate the right to physical and mental integrity- They are all acts that cause physical harm such as murder, personal injury, whether severe or minor, torture, enslavement, forcible rape or any other form of sexual harassment, and all other acts with aim to degrading him/her.

Constitution- Right to equality before the law- Discrimination-all persons are equal before the law, without inequality nor discrimination and the enacted law treats them equally - It is called discrimination when it intends to deprive opportunities to some persons and favour others on unreasonable grounds.

Constitution- Right to respect for the privacy of a person- It is a right that every person owns to keep his or her personal affairs, social interactions away from illegal interference, he/she enjoys it freely and without any fear- The constitution of the Republic of Rwanda of 2003 revised in 2015, Article 23.

Facts: Great Lakes Initiative for Human Rights and Development (GLIHD) filed a petition before the Supreme Court requesting the Court to order that articles 125, paragraph 2, and article 126, paragraph 3 of the Law Nº68/2018 of 30/08/2018 determining offences and penalties in general are inconsistent with articles 12, 14, 15, 16, 21 and 23 of the Constitution and with the International Conventions on Human Rights because they violate the rights of women and girls, because those articles provide that legally allowed abortion is only done by a recognized medical doctor, hence that other trained medical professionals are excluded.

It further stated that those articles and article 2 (3°) of the Ministerial Order Nº 002/MOH/2019 of 08/04/2019 determining conditions to be satisfied for a medical doctor to perform an abortion should be reformulated, where it is stated that a recognized medical doctor it should be added or any other trained medial professional and authorized by the competent public entity.

During the hearing, there was an *amicus curiae* called the Health Development Initiative (HDI), and the Government of Rwanda was also represented, stating that those articles should not be reformulated.

The first issue analyzed by this Court is to determine whether article 125, paragraph 2, and article 126, paragraph 3 of the Law 68/2018 aforementioned are contrary to the right to life, and the right to good health as provided for by articles 12 and 21 of the Constitution. The petitioner argues that

the article 21 of the Constitution provides that all Rwandans have the right to good health and on the high level as it is also highlighted by different international treaties ratified by Rwanda.

He states that the international laws relating to the human rights provide that in order to improve the quality of good health, the countries have the obligations to establish quality reproductive health services. For the enforcement of such obligation, it requires the availability of adequate sufficient information on reproductive health, the establishment of human health facilities, the training of the professional personnels, and the availability of essential medicines.

The claimant argues that concerning the girls who were raped and impregnated, are legally entitled to abortion services that are conducted only by a physician, which infringes their rights because this medical doctor is only available at the hospital while those children have no capacity nor time to reach at the hospital. While other persons receive medical services at the health center, which is closer to the community, but the women and girls are obliged to receive that service at the hospital, and that fact contravenes their right to good health.

It concludes by stating that the fact that such service is not available at the decentralised medical facility since at that level there are no medical doctors so that it can be offered by nurses and midwives, it amounts to the inexistence of such service and discourages women and girls to the extent that they commit unsafe abortion while they are legally entitled to it, which increases the risks to women and girls because they can die while giving birth.

The State Attorney stated that articles 123 and 124 of the Law Nº68/2018 of 30/08/2018 abovementioned protect the right to life whereby it hightlights the principle that self-induced abortion, or performing abortion on another is prohibited and is an offence, while article 125, paragraph 2, and article 3 of the same Law provide the special circumstances in which a woman or a girl is allowed to abort by a recognized medical doctor, therefore they are not inconsistent with article 12 and article 21 of the Constitution. With regard to the International Conventions on which the petitioner relies, they should be enforced as other laws because they were adopted by Rwanda, but some of them provide that abortion depends on the special reasons.

Concerning the fact that women and girls who are entitled to the service of abortion do not get it, because it is not available at the health centers for being offered by nurses and midwives, the State Attorney states that the safe abortion legally allowed cannot be performed at that place for the benefit of the service beneficiaries, because there should be the need for advanced emergency services which cannot be provided at the health centers.

Amicus curiae stated that the Law determining offences and penalties in general implies that those who can receive abortion services are women who have capacity to find medical doctor or those who have financial means for transport or medical fee. It also reads that in other countries, medical professionals who are not trained physicians, offer safe abortion and make follow up after such service. In addition, the international medical regulations also provide that those who offer basic health services can and should be allowed to offer abortion services.

It further states that due to obstacles that hinder safe and legally allowed abortion, many women and girls in Rwanda commit unsafe abortion which is life-threatening. It states that the prior approval of abortion by another person including a physician delays medical care, which can cause the abortion service be offered after the expiration of the time legally provided for, this makes it too hard and the abortion service fee increases and becomes life-threatening for the woman.

In as far as services offered by midwives and nurses, HDI, amicus curiae, explains that nurses, midwives and medical assistants in Rwanda are allowed to offer medical care to women after abortion which is basic medical care afforded to the woman in case she experiences complications due to unsafe abortion or in case of unsuccessful abortion using curettage operations in the first trimester from the woman's conception. There is no reason to exclude those medical professionals available at the health centers to perform abortion. Hence the Law Nº68/2018 of 30/08/2018 aforementioned should not exclude them from those who have to discharge such service.

Regarding the issue of abortion services performed by a recognized medical doctor rather than anyone who has studied medicine, the petitioner argues that it is contrary to the right to physical and mental immunity provided under article 14 of the Constitution because it violates women's and girls' rights, as it reduces the number of service providers and beneficiaries.

The applicant alleges that the African Commission on Human and Peoples' Rights, basing on Maputo Protocol, in the context of the implementation of the provisions relating to the performance of effective, reliable and legal abortion services stated under the Protocol, it sets up guidelines that the countries should not impose restrictions or limitations on the requirements for the medical professionals who are allowed to provide such medical services. The applicant sustains that the Commission was further of the view that, in general, due to the fact that in many African countries there is a shortage of doctors, medical assistants, such as midwives and other medical professionals should be trained to take care of those in need of abortion service.

The State Attorney submits that concerning this issue, it is clear that the Government has chosen that a person who has the capacity to assist a woman who needs to abort is a medical doctor with the expertise recognized by the competent organs. This means that a professional other than a physician cannot provide such service because of the health risks that may result from abortion when performed by someone other than a medical doctor. He concludes that he finds that the paragraph 2 of article 125 and the paragraph 3 of article 126 of Law nº 68/2018 of 30/08/2018 aforementioned contradict article 14 of the Constitution which provides for the right to physical and mental integrity.

Another issue to analyzed in this case is to determine whether articles providing for abortion performed by a recognized medical doctor are contrary to the right to equality before the law and the protection from discrimination provided for in articles 15 and 16 of the Constitution and the International Convention. In this regard, the petitioner alleges that such service is inconsistent with the right to equality before the law and the protection from discrimination of women and girls in general. He further submits that the Convention provides for the obligations of the States to eradicate any form of discrimination and to promote the equality of all, including women.

He concludes that inequality before the law and the discrimination against women and girls in the above-mentioned articles against which the petition was filed are based on the fact that the medical abortion service for a woman or girl who are legally allowed is only approved by a recognized medical doctor available at the District Hospital, therefore it is contrary to the right to equality before the law and protection from discrimination of women and girls in general enshrined in the Constitution. They submit there is gender-based discrimination because there is a medical service available to the man at the nearest health centers, but the woman cannot benefit from the abortion medical service. They also sustain that there are other types of discrimination based on economic categories because women and girls who have means are those who have access to the services at

the hospital where a medical doctor is available, while those who do not have means cannot have access to it because it is too expensive.

The State Attorney submits that the petitioner does not prove the inequality before the law and the discrimination against the women provided under the articles of the aforementioned Law Nº 68/2018 of 30/08/2018, apart from stating them verbally and indicating the International Conventions signed and enforced by Rwanda. They do not provide evidence of the so-called inequality before the law or the discrimination against for those who need the reproductive health services. He also submits that various medical services provided to the hospital clients from the health posts, the health centers, the district hospitals, the province hospitals and General the hospitals annexed to the Ministerial Order No 20/39 of 29 / 01/2016 determining the medical services provided at each level of health facilities to make them public and each hospital client is informed of his/her right to benefit from those services without discrimination nor inequality before the law. This was set up to ensure that every client of medical facility is informed of the service provided and its cost without any form of discrimination. Thus, he finds that there is no inequality before the law nor discrimination proved by the petitioner, and if such is the case, the latter should be subject to the investigation, the involved party would pay damages because such acts are civil rather than criminal.

The claimant prayed the Court to determine whether the abortion provided for under the law determining offences and penalties in general violates the right to privacy of persons provided for in the Constitution in its Article 23. He states that only a recognized medical doctor performs safe abortion service to a woman or girl entitled to it, but before enjoying such service, she has to apply for a transfer from the health center. This means that all staff members dealing with that document will be informed of what she is going to get until she arrives at the hospital where she must first be provided with in-depth counselling services before the abortion service. This means that in those steps, she was deprived of her right to secrecy to the medical service because many people will be aware of the service he is requesting whereas the information should be kept between her and the medical doctor.

The State Attorney avers that the principle of protection of secrecy of information from a patient or any client of the hospital is provided for in Law N ° 49/2012 of 22/01/2013 establishing medical professional liability insurance, and Ministerial Order N ° 002 / MoH / 2019 of 08/04/2019 determining conditions to be satisfied for a medical doctor to perform an abortion. In the event where a recognized doctor does respect the law and keep the secrecy in relation to the patient, he is liable for the consequences thereof, thus, there is no inconsistency between the paragraph 2 of article 125 as well as the paragraph 3 of article 126 of the Law Nº 68/2018 of 30/08/2018 mentioned above and article 23 of the Constitution on the right to respect for one's privacy.

Held: 1. The right to life is a fundamental human right on which all other rights are based, it must be protected in such a way that no one can be arbitrarily deprived of it. Thus, allowing midwives and nurses to perform abortion and performed in the health facilities, as prayed by the petitioner, can be life-threatening for women and girls in need of such services rather than helpful for them.

2. Having good health is not limited to the fact that a person does not feel sick nor have disability rather it means that he/she feels comfortable physically, mentally and socially. Therefore, the provisions of Articles 125, paragraph 2 and Article 126, paragraph 3, of the aforementioned Law Nº 68/2018 of 30/08/2018, are among the measures aimed at protecting the right to life relating

specifically to reproductive health, abortion act within the period prescribed by law falls under the responsibility of a medical doctor with the necessary knowledge and equipment.

3. Acts that cause physical harm such as murder, personal injury, whether severe or minor, torture, enslavement, forcible rape or any other form of sexual harassment, and all other acts aiming at degrading him/her. Thus, the fact that a woman or girl who needs abortion service, can complicate her while going to get it where the law indicates, this has no link with the right to physical and mental integrity.

4. Persons are equal before the law, without inequality or discrimination and the law enacted equally treat the concerned person. It is considered as discrimination when it is intended to deprive some persons of opportunities and favor others on basis of unreasonable grounds. Thus, the fact that the girls and women can get the abortion service at the hospital afforded by a recognized medical doctor is not a matter of discrimination for them, rather it is a matter concerning those who need medical services and other issues not handled at the level of the health centers in general.

5. The right to one's privacy is the right of every individual to freedom personally and socially without any illegal interference nor intrusion, he/she exercises his/her right freely and without any fear. Thus, the fact that the abortion service for women and girls is performed only by a recognized medical doctor has no link with violation of one's privacy.

The petition has no merit.
Article 125, paragraph 2 and 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general are not inconsistent with the Constitution of the Republic of Rwanda.

Statutes and statutory instruments referred to:
The Constitution of the Republic of Rwanda of 2003 revised in 2015, articles 12, 14, 15, 16, 21, 23 and 61.

Universal Declaration of Human Rights of 1948, articles 3 and 25.
International Covenant on Civil and Political Rights of 1966, Articles 6, 17 and 26.
International Covenant on Economic, Social and Cultural Rights (ICESCR), article 12.
The International Convention for the Elimination of All Forms of Racial Discrimination signed in 1965, article 5.
International Convention on the Elimination of All Forms of Discrimination against Women, Articles 2, 11 and 12.
African Charter on Human and Peoples' Rights, articles 6 and 16.
Additional Protocol to the African Charter on Human and Peoples' Rights, signed in Maputo on 11 July 2003, articles 8 and 14
Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general, Articles 107,123, 124, 125, 126, 155 and 158.
Law No. 32/2016 of 28/08/2016 governing persons and family, article 10.
Law N° 21/05/2016 of 20/05/2016 on human reproductive health.
Law N°46/2012 of 14/01/2013 establishing the Rwanda Allied Health Professions Council and determining its organization, functioning and competence, article 36.
Law N°49/2012 of 22/01/2013 establishing medical professional liability insurance, article 4

Ministerial Order Nº 002 / MOH / 2019 of 08/04/2019 determining conditions to be satisfied for a medical doctor to perform an abortion, article 2.
Ministerial Order Nº. 20/39 of 29/01/2016 determining the medical services provided at each level of health facilities.
Ministerial Order Nº 20/25 of 18/04/2012 determining the profession of nurses and midwives

International referred to:
European Union Convention on Human Rights, article 2.

Cases referred to:
Re Kabasinga Florida, RS/INCONST/ SPEC 00003/2020/ SC, rendered by the Supreme Court on 27/11/2020.
Re Murangwa Edward, RS/INCONST/SPEC00001/2019/SC, rendered by the Supreme Court on 29/11/2019.
Akagera Business Group, RS/SPEC/ 0001/16 /CS, rendered by the Supreme Court on 23/09/2016.
Thlimmenos v. Greece (Application no. 34369/97), Strasbourg 6 April 2000.
The Prosecutor vs Jean-Paul Akayesu Case ICTR-96-4-T, § 504 (Trial judgement, 2 September 1998).
Case of Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, Application n° 47848/08, para. 130.
Öneryildiz v. Turkey, Application no. 48939/99, para. 71.
Bărbulescu v. Romania, ruled by the European Court of Human Rights, Application no. 61496/08, para. 71.
Francis Coralie Mullin vs The Administrator, Union Territory of Delhi and others ruled by the Supreme Court of India on January 13, 1981.
Justice K S Puttaswamy (Rtd) vs Union of India. ruled by the Supreme Court of India.

Authors cited:
Paulin Basinga, Ann M. Moore, Susheela D. Singh, Elizabeth E. Carlin, Francine Birungi, and Fidele Ngabo, Abortion Incidence and Post-Abortion Care in Rwanda, in Rwanda Medical Journal / Revue Médicale Rwandaise, June 2012, Vol. 69 (2).

Judgment

I. BACKGROUND OF THE CASE

[1] GLIHD represented by Mulisa Tom filed a petition in the Supreme Court seeking to declare that Article 125, Paragraph 2, and article 126, Paragraph 3, of Law Nº 68/2018 of 30/08/ 2018 determining offences and penalties in general are inconsistent with articles 12, 14, 15, 16, 21 and 23 of the Constitution, and also violate international human rights conventions because they infringe upon the rights of women and girls, as these articles provide that, where legally allowed, the abortion is performed only by a recognized medical doctor, so that they exclude other trained medical professionals.

[2] They state that these articles as well as Article 2 (3 °) of Ministerial Order Nº 002/MOH/2019 of 08/04/2019 determining conditions to be satisfied for a medical doctor to perform an abortion should be reformulated, where it is stated a recognized medical doctor there should be added "**or another medical professional who has been trained and authorized by the competent public entity"**.

[3] Article 125, paragraph 2, of the aforementioned Law Nº 68/2018 of 30/08/2018, provides that abortion is performed by **a recognized medical doctor**, and Article 126, paragraph 3, provides that a person requesting abortion for the child over whom he/she has parental authority, files a request with **a recognised medical doctor**, accompanied with the child's birth certificate containing the date of birth.

[4] The State Attorney avers that Article 125, Paragraph 2, and Article 126, Paragraph 3, of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general are not inconsistent with the Constitution or the international conventions signed by Rwanda, so there is no reason for such articles as well as Article 2 (3 °) of Ministerial Order Nº 002 / MOH / 2019 of 08 / 04/2019 mentioned above would be reformulated.

[5] The judgment was heard in public on 18/10/2021, GLIHD represented by Mulisa Tom assisted by Counsel Twizeyimana Théophile together with Counsel Umulisa Vestine, with the presence of the Government of Rwanda represented by Counsel Kabibi Specioza. There was also amicus curiae, HDI represented by Counsel Garuka Christian.

[6] In this case, the petitioner had requested the Court to determine whether:

1. -Article 125, paragraph 2 and Article 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general are inconsistent with Article 12 and Article 21 of the Constitution which provide for the right to life and the right to good health.
2. Article 125, paragraph 2 and Article 126, paragraph 3, of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general are inconsistent with Article 14 of the Constitution which provides for the right to physical and mental integrity.
3. Article 125, paragraph 2 and Article 126, paragraph 3, of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general are inconsistent with Article 15 and Article 16 of the Constitution which provide for the right to equality before the law and the protection from discrimination.
4. Article 125, paragraph 2 and Article 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general are inconsistent with Article 23 of the Constitution which provides for the right to respect for privacy.
5. Article 125, paragraph 2 and 126, paragraph 3, of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general, as well as Article 2 (3°) of Ministerial Order N ° 002/MOH/2019 of 08/04/2019 determining conditions to be satisfied for a medical doctor to perform abortion should be reformulated.

II. ANALYSIS OF LEGAL ISSUES

Determine whether Article 125, paragraph 2 and Article 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general is inconsistent with Article 12 and Article 21 of the Constitution which provide for the right to life and the right to good health.

[7] Mulisa Tom representing GLIHD and his counsels state that the provisions of Article 125, Paragraph 2, and Article 126, Paragraph 3, of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general, the abortion legally stipulated is performed only by a recognized medical doctor for a woman or a girl contravenes the right to good health as provided under the Constitution and international conventions ratified by Rwanda.

[8] They expound that Article 21 of the Constitution provides that all Rwandans have the right to good health and at the highest attainable standard of physical and mental health, as guaranteed by the various international treaties to which Rwanda is signatory. They further sustain that Article 14 of the Maputo Additional Protocol to the African Charter on Human and Peoples' Rights, signed by Rwanda in 2004 provides for the obligations of the State to protect and promote women's rights, including the reproductive health.

[9] They argue that in the context of protecting women's rights to reproductive health, Article 14 (2) of the aforementioned Protocol calls on Rwanda as a signatory country to monitor its implementation by affording legal and safe abortion service. They state that Article 16 of the African Charter on Human and Peoples' Rights recognizes that everyone has the right to enjoy the best attainable state of physical and mental health and calls on the States to take necessary measures to protect the health of their people.

[10] They sustain that the same is provided under the African Charter on the Rights and Welfare of the Child which stipulates that every child has the right to freedom of thought, conscience and religion and they link this statement with the provisions of the Convention on the Rights of the Child which requires the States to undertake all necessary measures to ensure health care services for every child.

[11] They further submit that the right to good health is enshrined in Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

[12] They argue that, even if there is no definition of the word "good health" provided under the Constitution, the World Health Organization (WHO) has defined it as a state of complete physical, mental, and social well-being. They further argue that basing on that definition, good health does not merely mean the absence of disease or infirmity, rather it includes, for example, the reproductive health, access to women health services, family planning and to have legal and access to reliable information about abortion health services legally and safely afforded.

[13] They also argue that international human rights law stipulates that, in order to improve the quality of life, States have the obligation to put into place the quality services for reproductive

health. In order to fulfill that obligation, it is necessary to have access to adequate information on reproductive health, to put into place human health facilities, to provide trainings to professionals as well as to have access to essential medicines.

[14] With regard to the right to good health, GLIHD representatives maintain that the Committee on Economic, Social and Cultural Rights analyzed Article 12 of the Covenant which is in the same vein with Article 21 of the Constitution and found that the enjoyment of such right requires the following key elements:

- Accessibility to health care, which means that medical services and medicines should be available at the decentralized medical facility.
- Non-discrimination in the provision of medical services. This means that medicines and medical services should be provided to everyone without discrimination, especially with regard to the most vulnerable and marginalized sections of the population, in law or in facts). For example: children who have been defiled, women and girls who have been raped.
- Affordability of medical services to all. This means that medical facilities, medicines and medical services must be accessible to everyone in the proportion of his/her means.

[15] Basing on the foregoing statements, GLIHD representatives explain that the fact that girls are raped and impregnated, the law allows them to get abortion services afforded only by a doctor, violates their rights because the doctor is available only at the level of the hospital and those children have no means nor time to reach there. They add that the fact that other categories of people have access to health care at the health center which is closer to the community, but the women and girls allowed to abort for various reasons, such as rape, forced marriages, etc. are required to get such services in the hospital, also violates their right to good health.

[16] They conclude by stating that the provisions of Article 125, Paragraph 2 and Article 126, Paragraph 3, of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general provide that the abortion service legally allowed to women and girls is only performed by recognized medical doctors violate the right of women and girls to good health enshrined in the Constitution and the International Conventions because such fact entails that the medical service is not affordable nor easily accessible as the recognized medical doctor is only available at the hospital, while the decentralized health facility is the health center and the post center. They sustain that the cat that such service is not offered at the decentralized health facility because there are no doctors at that level so that it can be afforded by nurses and midwives, leads to its inaccessibility and the discouragement of women and girls who unsafely abort while such service is legally recognized, this increases the risks for women and girls who can die during the childbirth.

[17] The State Attorney submits that Article 123[1] and 124[2] of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general provide that self-induced abortion and performing abortion on another person are prohibited and they are offences. Article 125, paragraph 2 and Article 126, paragraph 3 of the same Law provide for exceptions for a woman or girl authorized to have abortion performed by a recognized medical doctor.

[18] She further added that, basing on the provisions of Article 12 of the Constitution which stipulates that everyone has the right to life, that no one may be deprived of his or her life arbitrarily, and on Article 21 which provides that all Rwandans have the right to have good health, she finds that they are not contrary to the provisions of articles 125, paragraph 2, and 126, paragraph 3, of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general, because the right to life is protected within the scope of Articles 123 and 124 of that Law.

[19] The State Attorney also argues that in the case of an international conventions on which the petitioner is based, should be applied as other laws because they have been ratified by Rwanda, but that some of them stipulate that abortion is performed for special reasons. She cites the example of Article 14, paragraph 2, subparagraph (c), of Additional Protocol on the African Charter on Human and People's Rights on the Rights of Women, signed in Maputo on 11 July 2003 which provides that "States Parties shall take all appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus[3]".

[20] She further states that these four (4) reasons allow a woman to apply for abortion in exceptional circumstances, as agreed by other signatory states. He explains that, normally, international conventions provide for guidelines, and each State puts into place legislation and strategies for its enforcement based on culture, capacities or other reasons, it is in this context that the impugned articles prohibit the voluntary abortion but the State establishes those only four reasons which allow an authorized woman or girl to have an abortion.

[21] She concludes that GLIHD should refer to the Law N° 21/05/2016 of 20/05/2016 on reproductive health as that Law clarifies some of the issues about the reproductive health and the State's responsibility to protect the health of women and children, therefore, the provisions of

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[1] It provides that "Any person who self-induces an abortion commits an offence. Upon conviction, she is liable to imprisonment for a term of not less than one (1) year and not more than three (3) years and a fine of not less than one hundred thousand Rwandan francs (FRW 100,000) and not more than two hundred thousand Rwandan francs (FRW 200,000)".

[2] It provides that "Any person who performs an abortion on another person, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than three (3) years and not more than five (5) years. Any person who, because of negligence or carelessness, causes another person to abort is liable to imprisonment for a term of not less than one (1) year and not more than two (2) years and a fine of not less than three hundred thousand Rwandan francs (RWF 300,000) and not more than five hundred thousand Rwandan francs (RWF 500,000) or only one of these penalties. If abortion causes disability certified by a relevant medical doctor, the offender is liable to imprisonment for a term of not less than twenty (20) years and not more than twenty-five (25) years. If abortion causes death, irrespective of whether or not the person having an abortion has given her consent, the offender is liable to life imprisonment".

[3] Protocol to The African Charter On Human And Peoples' Rights On The Rights Of Women In Africa, Better known As The Maputo Protocol, 11 July 2003.

article 125, paragraph 2 and article 126, paragraph 3, of Law No. 68 / 2018 of 30/08/2018 determining offences and penalties in general, are not contrary to the Constitution.

[22] With regard to the fact that the abortion service for authorized women and girls is not afforded in health centers by nurses and midwives as requested by the applicant, the Ministry of Health (MINISANTE), according to a document uploaded by the State Attorney, indicates that the safe and legally recognized abortion cannot be performed in such place for the interests of those who need such service, as some times they need high-level assistance and they do not have access to it. Basing on the statements of health experts such as Calvert C. and Owolabi O., the Ministry of Health indicates the research points out that one of the most common side effects during abortion is excessive bleeding, in which case it would be difficult to treat it at a health center because it requires blood transfusion for the woman who had aborted and when necessary they can undergo uterus surgery. Both operations must be performed at the hospital level so that medical doctors can jointly conduct them.

[23] Another reasons on which the Ministry of Health is based to indicate that such service should be performed in hospitals, are that the one who underwent the abortion should be taken care of before and after the operation, in order to avoid its effects, the ultrasound equipment and the blood group and rhesus in order to protect the one who aborted in case of new pregnancy. In addition, those who need such service also seek for legal advice, usually provided by ISANGE One Stop Center operating at the level of each Hospital.

[24] The Ministry of Health also clarifies that the various responsibilities of nurses and midwives are determined by Ministerial Order N° 20/2518/04/2012 regulating the practice of nursing and midwives, they are not responsible for providing abortion services. There is even a small number of midwives (1562 midwives for a population estimated at 12,518,757) in Rwanda, on one hand there is a health center without anyone, and on the other hand there is a health center with one who do not work every day, this can be an obstacle to the care required for a woman who aborted at a health center, therefore, the Ministry of Health indicates that, due to all those concerns, the abortion should be performed at the Hospital level where there are medical doctors and equipments necessary to handle any complication that can arise so that it is settled by a team of doctors.

[25] Concerning the statements of the Ministry of Health, GLIHD sustains that it concurs with it about the deaths and disabilities arising from abortion unsafely performed while competent professionals can prevent them in case it is performed. GLIHD submits that this supports its argument according to which the powers vested in medical doctors for safe and authorized abortion should also be entitled to health workers in the health centers in order to prevent those deaths in case those who need abortion service are unable to get medical doctors due to their insufficiency. It therefore requests the Ministry of Health to provide training to health workers before they begin to afford these services, as many of them have been trained about the post-abortion care.

[26] GLIHD explains that the operations aimed at resolving post-abortion complications are mainly about providing emergency medical care, advising on the time for the following pregnancy to avoid unplanned pregnancy that can occasion another unsafe abortion. It points out that due to the fact the District Hospital has insufficient medical doctors, a patient can spend more than two

hours before being diagnosed, the reason why the Ministry of Health should provide trainings to nurses and midwives on abortion services so that they can afford such services.

[27] In terms of equipments, GLIHD states that there are health centers in the Western Province and the Southern Province that have ultrasound equipments provided by the Ministry of Health in collaboration with the Belgian Development Agency (ENABEL). Blood group and rhesus test equipments are also provided to health facilities as per the service categories provided by the Ministry of Health. It also mentions that there are some health centers such as Bigogwe in Nyabihu District and Gikonko in Gisagara District which have already supplied with the necessary facilities so that it is possible to have access to services such as those provided at the hospital.

[28] With regard to legal assistance provided by the Isange One Stop Center operating at the hospital level, GLIHD states that such is not provided for in the Ministerial Order, except that fact, there is reliable information provided by the Rwanda Investigation Bureau (RIB) according to which these services are planned to be performed at the level of health centers.

[29] Regarding the petition filed by GLIHD, HDI, as amicus curiae, states that despite the legal development, Rwanda still faces significant obstacles in the enforcement of the Law N^{o} 68/2018 of 30/08/2018 determining offences and penalties in general for assisting women and girls to safely and lawfully abort, given that, on basis of that Law and Ministerial Order N° 002/MOH/2019 of 08/04/2019, only recognized medical doctors are allowed to perform safe and lawful abortion, while other reproductive health officials, such as midwives or nurses, are not allowed to do so.

[30] It sustains that there are insufficient doctors in Rwanda because the latest data released by the Ministry of Health indicate that the number of doctors operating in public and private health facilities is only 709, which means a ratio of 1 doctor to 15,510 persons, and among them those who accept to perform abortion are available only in Kigali City and its vicinity. It maintains that those who can have access to abortion services are women who have means to get a doctor or pay for travel or medical expenses. It also states that in other countries, non-medical professionals are trained, they provide safe abortion services and post abortion care. In addition, the international medical regulations also recognize that providers of basic health care may and should be allowed to afford abortion services.

[31] It further explains that due to the obstacles to safe and lawful abortion, many women and girls in Rwanda have unsafe and life-threatening abortion. It cites the report which indicates that more than half of abortions in Rwanda are unsafely performed by untrained people, such as traditional practitioners, or by the concerned persons. It indicates that women in rural areas with low incomes are at a higher rate of 74% of abortions in that manner, compared to 15% of women with means living in Kigali City. It also points out that 40% of abortions are dangerous, of which the concerned women perform 67%, and 61% are performed by the traditional practitioners. It also mentions that even if there are no data for the girls who unsafely abort in Rwanda, the Government has released a report indicating that unplanned girl pregnancies are a serious problem, this is also a reason which can be a cause of unsafe abortion.

[32] It further submits that in the technical and policy guidance for safe abortion, World Health Organization (WHO) has found that States should not require anyone else to grant the right to abortion other than the woman concerned and the health professional who provides the service to

her. It maintains that WHO indicates that abortion should be performed without delay, especially when a woman's health is compromised physically or mentally. It relies on those explanations to state that being first allowed by another person to abort including a medical doctor delays medical care, which can cause the abortion service be offered after the time determined by the law, this makes it complicated and the abortion service fee increases and it can endanger the woman's health.

[33] Due to a small number of medical doctors with knowledge about reproductive health, HDI states that the African Commission on Human and Peoples' Rights has made a general comment where it elaborates on the provisions of Article 14 (2) of the Maputo Protocol, acknowledges that there is a small number of trained doctors, and therefore, it calls on the signatories to train the professionals who provide basic health services such as midwives and other health care providers in order perform safe abortion. This procedure entails rapid and cheap abortion service for those who need them because it is afforded at the local level (Health Centers) where those who need it live. It also mentions examples of countries in Africa such as Ethiopia, Kenya, South Africa, Mozambique, Ghana, Senegal and Burkina Faso that allow the providers of basic health services to perform abortion by means of curettage in the first trimester and drugs used for abortion.

[34] With regard to the services provided by midwives and nurses, HDI explains that due to the fact nurses, midwives and medical assistants in Rwanda are allowed to provide medical care to a woman after abortion, which is essential medical treatment provided when a woman who experiences complications due to unsafe or incomplete abortion by means of curettage in the first trimester from the date a woman becomes pregnant, there is no reason to exclude those professionals available in the health centers from performing the abortion. HDI concludes that the aforementioned Law Nº 68/2018 of 30/08/2018 should not have excluded them from the providers of such services.

DETERMINATION OF THE COURT

With regard to the right to life provided under Article 12 of the Constitution

[35] Article 12 of the Constitution stipulates that everyone has the right to life, and no one shall be arbitrarily deprived of life. This right is also enshrined in various international treaties, including *the Universal Declaration of Human Rights*[4]*, the International Covenant on Civil and Political Rights*[5]*, the African Charter on Human and People's Rights*[6]*, European Convention on Human Rights*[7].

[36] In the context of the implementation of the Additional Protocol on the African Convention on Human and Peoples' Rights of Maputo, in its article 14.2 (c), the signatories, including Rwanda,

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[4] *Article 3 of the Declaration reads: everyone has the right to life, liberty and security of person.*
[5] *Article 6, 1° of the Covenant reads: every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
[6] *Article 4 of Charter stipulates: human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.*
[7] *Article 2§1 of the Convention reads: everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

are committed to protect the right of women to have abortion within the period provided for in that article[8], in Law N° 68/2018 of 30/08/2018 determining offences and penalties in general, the Government of Rwanda has included Article 125 which provides that there is no criminal liability for abortion[9]. In order to achieve this objective of assisting one who experiences complication, in paragraphs two of that Article and three of Article 126, the legislator provides that abortion for those who are in the categories provided under those articles is performed only by a recognized medical doctor. The legislator has chosen this procedure to ensure that the purpose of these articles is achieved without any other problem, and the potential problems could be addressed as soon as possible in order to protect the health of the beneficiaries of the service, as the Ministry of Health has indicated it in the document included in the case file.

[37] Basing on the fact that the legislator has decided that the abortion for authorized woman or a girl is performed only by a recognized medical doctor, GLIHD has filed a petition seeking the abrogation of article 125, paragraph 2 and 126, paragraph 3, of the aforementioned law violate the right to life provided for in article 12 of the Constitution. In addressing this issue, the Court deems necessary to first clarify what that right means, and to determine whether, in fact, the fact that only a recognized medical doctor is authorized to perform abortion violates the right to life for those who need that service.

[38] In defining right to life protected by the State, the European Court of Human Rights, in the case of the Center for Legal Resources on behalf of Valentin Câmpeanu v. Romania[10], upheld that article 2§1 of the European Convention on Human Rights does not only require the States to avoid any unjustifiable cause of its citizens 'death but also it mandates them to take appropriate steps to safeguard the lives of those within their jurisdiction. In the case of Öneryıldız v. Turkey[11], the Court clarified that the right to life referred to in article 2 is not only limited to the deaths resulting from the agents of State who use excessive force, but also it concerns the obligation of States to take appropriate steps to safeguard the lives of those within their jurisdiction. Such obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites.

[39] In explaining what life means, in the case Francis Coralie Mullin vs The Administrator, Union Territory of Delhi and others rendered by the Supreme Court of India, on 13 January 1981[12],

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[8] *States Parties shall take all appropriate measures to: […] c. protects the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.*

[9] Article 125, paragraph one of the Law N^0 68/2018 of 30/08/2018 determining offences and penalties in general provides that "There is no criminal liability if abortion was performed due to the following reasons: 1^0 the pregnant person is a child; 2^0 the person having abortion had become pregnant as a result of rape; 3^0 the person having abortion had become pregnant after being subjected to a forced marriage; 4^0 the person having abortion had become pregnant as a result of incest up to the second degree; 5^0 the pregnancy puts at risk the health of the pregnant person or of the foetus.

[10] *Case of Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, Application n° 47848/08, para.130. The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.*

[11] *Case of Öneryildiz v. Turkey, Application no. 48939/99, para. 71.*

[12] *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & ORS, p. 12.*

basing on Article 21 of the Constitution of India which stipulates that no one shall be deprived of his life or personal liberty except in accordance with the procedure established by law, it expounded that "by the term life as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world".

[40] In a statement issued by the *United Nations Human Rights Committee*, by explaining Article 6 of the *International Covenant on Civil and Political Rights* mentioned above which provides for the right to life, it expounded that "*the right to life is a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 guarantees this right to all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes*[13]*".*

[41] In explaining what the right to life means, the African Commission on Human and Peoples'Rights, in its commentary on Article 4 of the African Convention on Human and Peoples' Rights[14], stated that "the right to life should be interpreted broadly. The State has a positive duty to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties. In cases where the risk has not arisen from malicious or other intent then the State's actions may not always be related to criminal justice. Such actions include, inter alia, preventive steps to preserve and protect the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies[15]".

[42] The Court finds that the right to life is a fundamental human right and that all other rights are based on it, and Article 12 of the Constitution stipulates that it is a right to be protected so that no one can be deprived of it arbitrarily. In the context of protecting that right, as recommended by the United Nations Human Rights Committee[16], the Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general provides for the prohibition of the deprivation of one's human rights and severe punishment for the perpetrator[17]. The legislator aimed at protecting that right by including in the law the provisions that prohibit the abortion[18], because a conceived child is entitled

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[13] *Human Rights Committee General, Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018, §3.* *https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf. Accessed on 02/12/2021.*

[14] *Supra, ref. 6.*

[15] *African Commission on Human and Peoples 'Rights, General Comment n° 3 on African Charter on Human and Peoples 'Rights: Right to life (Article 4), §41*

[16] *Idem. §4. Paragraph 1 of article 6 of the Covenant provides that no one shall be arbitrarily deprived of his life and that the right shall be protected by law. It lays the foundation for the obligation of States parties to respect and to ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life.*

[17] *Article 107 of the Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general provides that "A person who intentionally kills another person commits murder. Upon conviction, he/she is liable to life imprisonment".*

[18] *Articles 123 and 124 of the Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general*

to the civil right recognized for every person[19], the legislator provided for exception by recognizing that the abortion is authorized in the period stipulated in article 125, first paragraph of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general[20], and it is only performed by medical doctors with all necessary equipment so as not to endanger and lose the life of the person in need of abortion.

[43] Regarding the common complications resulting from abortion, a study *"Abortion incidence and post abortion care in Rwanda"* conducted by Dr Basinga Paulin and colleagues, indicates that in 2009, there were 25,727 women and girls in Rwanda treated by doctors due to post-abortion complications, 40% of them were treated by medical doctors due to serious complications. The experts state that "*Complications may result, however, from procedures conducted by trained providers who have little experience or who works in unhygienic settings)* [...]. They explain that in Rwanda doctors use the following methods of abortion: surgical method (evacuation dilation and curettage), *oral and vaginal administration of harmonic medication and manual vacuum aspiration* (MVA). They submit that the most common method used by District Hospitals as well as District and Referral Hospitals is surgical method *(evacuation dilation and curettage).* Having noticed post-abortion complications, they recommend to the administration that the legalized abortion method should be improved, for example, it should be decided that a medical doctor is the one allowed to determine the abortion method and the guidelines should be established to indicate the medial staff authorized to provide such service and the medical facilities where it should be performed[21].

[44] Regarding the surgical method as one frequently used in Rwanda, as outlined above, the World Health Organization (WHO), in a paper entitled *Safe abortion: technical and policy guidance for the health system*, states that it is a very painful method, it recommends that "where it is still practised, all possible efforts should be made to replace dilatation and curettage procedures with vacuum aspiration, to improve the safety and quality of care for women. Dilatation and curettage procedures should be performed by well-trained staff under adequate supervision[22]". In his article *"Hospital across Africa, A Lack of post-abortion care*", Patrick Adams indicates that dilation and curettage procedure has various effects, it is unproductive and painful, compared to manual vacuum aspiration, and due to the fact that it should be performed by a doctor with sufficient equipment who can immediately operate a woman or a girl who has had abortion if necessary, it is very expensive[23].

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[19] *Article 10 of the Law N⁰ 32/2016 of 28/08/2016 governing persons and family provides that " A conceived child is entitled to civil rights recognized for every person, provided he/she is born alive. A child, simply by virtue of being conceived is deemed to have been born whenever its interests so dictate".*

[20] *Idem supra. ref. number 9.*

[21] *Paulin Basinga, Ann M. Moore, Susheela D. Singh, Elizabeth E. Carlin, Francine Birungi, and Fidele Ngabo, Abortion Incidence and Post-abortion Care in Rwanda, in Rwanda Medical Journal / Revue Médicale Rwandaise, June 2012, Vol. 69 (2).*

[22] *Safe abortion: technical and policy guidance for health systems Second edition,p.41,https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf*

[23] *Patrick Adams, "In Hospital across Africa, A Lack of post-abortion care", NPR (Mar 2021) https://www.npr.org/sections/goatsandsoda/2021/03/09/936206516/in-hospitals-across-africa-a-lack-of-post- abortion-care.*

[45] The Court finds that the foregoing statements indicate that allowing midwives and nurses to perform abortion in the health centers, as requested by the petitioner, could endanger the health of women and girls who need such services. Authorizing them to perform such service requires them to have been given specialized trainings, and to put into place special regulations requesting them to perform abortion using vacuum aspiration and medical abortion and provide health centers with equipment related to the service. However, this is not a matter of law, rather it is a matter of policies to be taken by competent authorities in order to improve the delivery of abortion services in line with the national resources.

[46] With regard to the petitioner statements about the training of health care providers such as midwives and other health care providers in order to perform safe abortion in the health centers, the Court finds that, although this would be understood in view of the difficulties and problems that may arise in the provision of such services as described above, such issue cannot be settled in a lawsuit seeking the abrogation of statutory provisions which stipulate that such services should only be provided by recognized medical doctor, in other words, the one who has competence and knowledge, but such issue should be submitted to the organs competent to set up health-related policies, as they have so far found that a recognized medical doctor is the only one who has the expertise to provide a safe abortion service. Requesting the Court to rule on what should be done in the context of strategies and policies related to the health sector would be contrary to the principle of separation of powers[24]. This is the position set by this Court in cases n ° RS / SPEC / 0001/16 / CS, Akagera Business Group[25], and RS / INCONST / SPEC 00001/2019 / SC[26].

[47] On the basis of all the foregoing explanations, the Court finds that GLIHD which filed a petition failed to prove the fact that Article 125, paragraph 2 and Article 126, paragraph 3, of Law Nº 68/2018 of 30/08/2018 abovementioned which stipulate that abortion service for women and girls is only authorized for a recognized medical doctor infringes upon the right to life provided for in Article 12 of the Constitution. Therefore, its petition on this issue is unfounded.

With regard to the right to good health provided under Article 21 of the Constitution

[48] Article 21 of the Constitution stipulates that all Rwandans have the right to good health. This right is also enshrined in various international treaties, including the *Universal Declaration of Human Rights*[27], International *Convention on the Elimination of All Forms of Racial Discrimination*[28], signed in 1965, *the International Covenant on Economic, Social and Cultural*

[24] *Article 61of the Constitution of the Republic of Rwanda of 2003 revised in 2015.*
[25] *Judgment RS/SPEC/0001/16/CS, Akagera Business Group, para. 29, rendered on 23/09/2016.*
[26] *Judgment RS/INCONST/SPEC 00001/2019/SC, MURANGWA Edward, para. 102, rendered on 29/11/2019.*
[27] *Article 25, 1° reads: everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*
[28] *Article 5 (e) (iv) reads: in compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: … The right to public health, medical care, social security and social services.*

Rights[29]*, the Convention on the Elimination of All Forms of Discrimination against Women*[30] *, the African Charter on Human and Peoples' Rights*[31].

[49] The Constitution of the World Health Organization defines good health as **a state of complete physical, mental and social wellbeing** and not merely the absence of disease or infirmity[32].

[50] With regard to the right to good health, the *United Nations Committee on Economic, Social and Cultural Rights*, in its general comment of Article 12 of the International Covenant on Economic, Social and Cultural Rights "interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels[33]".

[51] In a paper entitled "Ruling for Access, Leading court cases in developing countries on access to essential medicines as part of the fulfilment of the right to health" published by the World Health Organization (WHO), the experts wrote that "In determining which actions or omissions amount to a violation of the right to health, it is important to distinguish between the inability and the unwillingness of a State party to comply with its obligations under Article 12. However, a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations mentioned above. Violations of the obligation to fulfil occur through the failure of

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[29] *Article 12 reads: 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child.
(b) The improvement of all aspects of environmental and industrial hygiene.
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases.
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[30] *Article 11 (1) (f) reads: 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: … The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*
Article 12, 1° reads: States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

[31] *Article 16 reads: every individual shall have the right to enjoy the best attainable state of physical and mental health.*
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

[32] *Constitution of World Health Organisation*

[33] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4), § 1, https://www.refworld.org/pdfid/4538838d0.pdf, accessed on 24/11/2021.

states to take all necessary steps to ensure the realization of the right to health. Examples quoted in General Comment No.14 include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources; failure to monitor the realization of the right to health at a national level; and failure to take measures to reduce the inequitable distribution of health facilities, goods and services[34]".

[52] According to the Committee on Economic, Social and Cultural Rights, the right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

a. *Availability.* Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party*;*

b. *Accessibility.* Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party*;*

c. *Acceptability.* All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned ;

d. *Quality.* As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality[35].

[53] The explanations aforementioned indicate that:

- essential elements of good health include a person's physical, mental and social well-being;
- the right to good health is not only limited to adequate health care but it is inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health;
- The right to good health depends on aavailability of public health and health-care facilities, goods and services, as well as programmes in sufficient quantity within the State party;
- It is considered that a State does not fulfil its obligation when no necessary policies have been taken to ensure that everyone has the right to good health.

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[34] Hans V. Hogerzeil, Melanie Samson andi Jaume Vidal Casanova, "Ruling for Access Leading court cases in developing countries on access to essential medicines as part of the fulfilment of the right to health, https://www.who.int/medicines/areas/human_rights/Details_on_20_court_cases.pdf?ua, accessed on 24/11/2021.

[35] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4), § 12.

[54] On the basis of the foregoing statements, the Court finds that in respect of the right to good health, the State has an obligation to put into place policies, laws and regulations governing public and private health facilities for the protection of human health. In the event of availability of health services and medical doctors, as sustained by GLIHD, the remaining obligation of a State is to ensure the equal accessibility for all to services in accordance with the established standards, and the State should be held liable only if the health of a citizen is in danger due to the fact that he/she is denied available service to which he/she is entitled.

[55] Regarding this case, it is clear that the State has put into place hospitals which are provided with medical doctors who can perform safe abortion for women and girls. The fact that such service is provided at the hospitals by doctors rather than at the Health Centers by midwives or nurses as the requested by the claimant, could not be considered as a violation of the right to good health. It would be deemed as a violation of such right if it was legalized but not provided at all, delivered in inappropriate place, by incompetent staff or it is evident that the beneficiaries exceed the providers, so that the service delay is life-threatening to them.

[56] The Court finds, however, that the provisions of Article 125, paragraph 2 and Article 126, paragraph 3, of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general, are among strategies meant for protection of the right to good health, especially with regard to reproductive health, the abortion procedure is regulated by the law and performed by a medical doctor with competence and necessary equipment. On basis of these explanations, the Court finds that GLIHD failed to prove the fact that the articles against which it filed a claim which provide that the abortion service is only provided by a recognized medical doctor violates the right to good heath provided under Article 21 of the Constitution, therefore its petition on that issue is unfounded.

Determine whether Article 125, paragraph 2, and Article 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general are inconsistent with Article 14 of the Constitution on the right to physical and mental integrity

[57] Mulisa Tom, representative of GLIHD and his counsels, argue that the conditions provided under the Law determining offences and penalties abovementioned that lawful and safe abortion services are provided only by a recognized medical doctor instead of anyone who has studied medicine, violate the right of women and girls because it reduces the number of providers and recipients of the service.

[58] They expound that the World Health Organization clarified that medical assistants, such as nurses and midwives or other hospital staff can provide efficient and safe abortion services. They submit that the African Commission on Human and Peoples' Rights, basing on Maputo Protocol, for the purpose of enforcing the provisions related to efficient, safe and lawful abortion services enshrined in that Protocol, issued the guidelines indicating that the States should not impose restrictions or obstacles for the conditions for the doctors authorized to provide such medical service. They sustain that the Commission further indicates that, in general, due to the fact that in many African States there are insufficient doctors, medical assistants, such as midwives and other health care workers, should be trained so as to take care of those in need of abortion service.

[59] They conclude by stating that women and girls who are allowed to have abortion have the challenge of accessing to hospital where the doctor can be available because it is far away from them, this finally leads to unsafe abortion and they have access to doctor, being in a critical situation; in addition, they are convicted of abortion, they maintain that this is detrimental to their physical and mental integrity.

[60] The State Attorney avers that in consideration of this issue, it is clear that the State has decided that the one who is allowed to perform the abortion for a woman who needs such service is a medical doctor whose the expertise is approved by the competent organs. This means that a non-medical doctor cannot provide that service because of the health effects that can result from abortion performed by a non-medical doctor. This is further emphasized by the fact that articles 4 and 7 of Ministerial Order N°002/MoH/2019 of 08/04/2019 determining conditions to be satisfied for a medical doctor to perform abortion provide that a person who wishes to get abortion services has to be first diagnosed thoroughly and the gestation must not be beyond twenty - two (22) weeks and she should be advised on the post-abortion effects.

[61] She further avers that the Ministerial Order N ° 002/MoH/2019 abovementioned provides that a recognized medical doctor is a person qualified to practice the medical profession after obtaining at least a Bachelor's Degree in Medicine, registered and licensed by a health profession regulatory body in Rwanda and working in public or private health facility. This means that the one who has to help someone to have abortion has to recognize its effects and have enough knowledge about abortion.

[62] She concludes on this issue by stating that the paragraph 2 of Article 125 and the paragraph 3 of Article 126 of Law Nº 68/2018 of 30/08/2018 mentioned above are not inconsistent with Article 14 of the Constitution which provides for the right to physical and mental integrity.

DETERMINATION OF THE COURT

[63] Article 14 of the Constitution stipulates that everyone has the right to physical and mental integrity. No one shall be subjected to torture or physical abuse, to cruel, inhuman or degrading treatment. No one shall be subjected to experimentation without his or her informed consent. Modalities of the consent and experiments are determined by law. These rights are also enshrined in various international treaties including the *Universal Declaration of Human Rights*[36]*, the International Covenant on Civil and Political Rights*[37]*, The Charter of Fundamental Rights of the European Union*[38]*, the African Charter on Human and People's Rights*[39].

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[36] Article 5 states: no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[37] Article 7 reads: no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

[38] The article 3 of the Charter reads: 1. Everyone has the right to respect for his or her physical and mental integrity. 2. In the fields of medicine and biology, the following must be respected in particular: the free and informed consent of the person concerned, according to the procedures laid down by law, the prohibition of eugenic practices, in particular those aiming at the selection of persons, the prohibition on making the human body and its parts as such a source of financial gain, the prohibition of the reproductive cloning of human beings.

[39] Article 5 of the Charter reads: every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman and degrading punishment and treatment shall be prohibited.

[64] Article 14 of the Constitution sets out the following three main parts:

a. -The fact that no one should be physically and mentally harmed.

b. -The fact that no one shall be subjected to torture, to cruel, inhuman or degrading treatment.

c. -The fact that no one shall be subjected to experimentation without his or her informed consent.

[65] With regard to the first part, the United Nations Human Rights Committee, in its general comment of Article 7 of the above-mentioned International Covenant on Civil and Political Rights, states that "*The purpose of the provisions of Article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to provide everyone protection through legislative and other measures as may be necessary against acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*[40]".

[66] With regard to the second part, the Committee clarified that "The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim," August said. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educational or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions[41]".

[67] With regard to the third part, the Committee states that: "Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure compliance with this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health[42]".

[68] In order to protect the right to physical and mental integrity, as recommended by the United Nations Human Rights Committee, the law N° 68/2018 of 30/08/2018 determining offences and

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[40] CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992. §2. https://uniteforreprorights.org/wp-content/uploads/2018/01/453883fb0.pdf accessed on 1/12/2021.

[41] Idem, § 5.

[42] Idem, § 7.

penalties in general, includes articles 112[43] and 113[44] which provide for and punish the offence of torture.

[69] Concerning the extent of the right to physical and mental integrity, the International Criminal Tribunal for Rwanda (ICTR) in the case of Akayesu Jean Paul, in its interpretation of Article 2 (2) (b)[45] of its Statute, states that "*For the purposes of interpreting Article 2 (2) (b) of the Statute, the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution[46]"*.

[70] The Court finds that acts detrimental to the right to physical and mental integrity are all acts of bodily harm such as murder, personal injury, whether serious or minor, torture, forced labor, rape or any form of sexual harassment, and any other acts aimed at discrediting her. Therefore, the fact that a woman or girl in need of abortion service does not yet have access to health care facilities as requested by the petitioner, this can be difficult for her to seek such service in the place provided under the law for the reasons described above in paragraph 42 or by that time, she can face other complications, such has no relation with the right to physical and mental integrity, for this to happen, as already explained, there must be acts of physical harm intended to violate that right.

[71] Basing on the aforementioned explanations about the meaning of the right to physical and mental integrity, the Court finds that GLIHD has failed to prove the fact that the abortion service for authorized women and girls is only performed by a recognized medical doctor is inconsistent with Article 14 of the Constitution which provides for the right to physical and mental integrity, therefore its claim on that issue is unfounded.

Determine whether Article 125, paragraph 2, and Article 126, paragraph 3, of Law No 68/2018 of 30/08/2018 determining offences and penalties in general is contrary with Articles 15 and 16 of the Constitution providing for the right to equality before the law and to the protection from discrimination

[72] Mulisa Tom, representative of GLIHD and his counsels, argue that the provisions of Article 125, paragraph 2, and Article 126, paragraph 3 of the aforementioned Law Nº 68/2018, that the abortion service for a woman or a girl legally authorized is only performed by a recognized medical doctor, are contrary to the right to equality before the law and protection from discrimination of

[43] The article provides that "For the purpose of this Law, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. Any person who commits any of the offences referred to under Paragraph One of this Article commits an offence".

[44] It reads that "Any person convicted of torture is liable to imprisonment for a term of not less than twenty (20) years and not more than twenty- five (25) years. If torture results in an incurable illness, permanent incapacity to work, full loss of function of an organ or mutilation of any key body organ, death or is committed by a public official in his/her duties, the penalty is life imprisonment".

[45] […]2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: […] (b). Causing serious bodily or mental harm to members of the group.

[46] The Prosecutor vs Jean-Paul Akayesu Case number. ICTR-96-4-T, § 504 (Trial judgement, 2 September 1998).

women and girls in general provided under articles 15[47] and 16[48] of the Constitution and in the International and Regional Conventions ratified by Rwanda.

[73] They further sustain that there are the following provisions of the international conventions which emphasize the right to equality before the law and protection from discrimination for all:

- Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- Articles 2 and 12 of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
- Article 2 of the International Covenant on Civil and Political Rights [ICCPR].
- Article 14 of the Maputo Additional Protocol, and
- Article 18 of the Banjul Charter, all articles provide for the right to equality before the law and protection from discrimination.

[74] They sustain that, in particular, those conventions confer to the States the obligations of eliminating any form of discrimination and protecting equal rights for all, including women. For example, the Human Rights Committee agrees that the signatory states must accord equality to all without any form of discrimination. They aver that Banjul Charter provides that "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of woman and the child as stipulated in international declarations and conventions".

[75] They also point out that, as reiterated in the International Conventions on Human Rights, respecting the women's rights must not only be reflected in the law, but it must also be reflected in their daily entitlements for the equality enforcement.

[76] They further argue that the inequality before the law and discrimination they note in the challenged articles abovementioned concern the abortion medical service for authorized woman or girl only performed by a recognized medical doctor available at the District Hospital, therefore such is contrary to the right to equality before the law and to protection from discrimination of women and girls provided under the Constitution. They maintain that there is a form of sexual discrimination because there is a medical service available to a male at nearby health centers, but a female cannot access the abortion service at the same place. They also point out that there are other forms of discrimination and inequality in those articles based on economic categories because rich women and girls are the ones who have access to abortion services at the hospitals where a doctor is available, while the poor ones cannot reach such place because it is too expensive.

[77] They conclude that the reason for them to assert that Articles 125, paragraph 2 and 126, paragraph 3 of the abovementioned Law reflect discrimination and inequality against women and

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[47] The Article provides that "All persons are equal before the law. They are entitled to equal protection of the law".
[48] The Article provides that "All Rwandans are born and remain equal in rights and freedoms. Discrimination of any kind or its propaganda based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other form of discrimination are prohibited and punishable by law".

girls seeking medical care for abortion service, is that in Rwandan legislation there is no other medical care that requires that only a doctor is only allowed to provide a particular medical service.

[78] The State Attorney submits that the petitioner does not prove the inequality before the law or discrimination against women under the articles of the aforementioned Law Nº 68/2018 of 30/08/2018, apart from stating them verbally and indicating the articles of international conventions signed and enforced by Rwanda. She asserts that the claimants do not produce elements of evidence indicating the alleged inequality before the law or discrimination against those who seek reproductive health services. She explains that equality before the law or protection from discrimination for medical services beneficiaries provided under Article 4 of Law N ° 49/2012 of 22/01/2013 Law establishing medical professional liability insurance which provides that "No one shall be subjected to any form of discrimination in access to consultation and healthcare services as well as other paramedical procedures".

[79] She further states that various medical services are provided to the beneficiaries of services provided by health facilities from health posts, health centers, District Hospitals, Provincial Hospitals and referral Hospitals, annexed to of the Ministerial Order Nº 20/39 of 29/01/2016 determining the medical services provided at each level of health facilities to make them public and known by each beneficiary for being aware of his/her right to get such services without discrimination or inequality before the law. This was done to ensure that everyone who gets medical service, without any form of discrimination, is aware of the service provided at each level of health facilities and its cost. She concludes that she finds that there is no inequality nor discrimination evidenced by the petitioner, and, if such can be the case, there should be investigation so that the person involved in those acts should be held liable for damages because such acts are civil rather than criminal.

DETERMINATION OF THE COURT

[80] Article 15 of the Constitution provides that all persons are equal before the law. They are entitled to equal protection of the law. Article 16 of the Constitution provides that any form of discrimination or dissemination may be based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other form of discrimination are prohibited and punishable by law.

[81] The articles for which GLIHD seeks abrogation submitting that they are contrary to the abovementioned provisions of the Constitution are Article 125, paragraph 2, and Article 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general. These articles provide that abortion for a woman or girl is authorized only by a recognized medical doctor.

[82] In order to clarify whether these articles reflect inequality or discrimination based on gender and economic categories as stated by GLIHD which filed the petition so that they are inconsistent with Articles 15 and 16 of the Constitution, it is necessary to first explain how these articles are construed. As explained in the Akagera Business Group case[49] rendered by this Court

[49] *Judgment RS/SPEC/0001/16/CS, Akagera Business Group, paragraph 29, rendered 23/09/2016.*

on 23/09/2016, articles 15 and 16 of the Constitution are so closely related that in their interpretation they should not be separated. As also explained in the case, article 15 states that all persons are equal before the law and are entitled to equal protection of the law. There should be no discrimination that leads to unequal protection of persons or deprivation of rights while they are entitled to them. Article 16 further states the circumstances in which the person distinction is considered as discrimination and unconstitutional. Both articles are construed as containing the same principle of non-discrimination of persons for their entitlements or prohibitions with intent of depriving some of them from their rights legally recognized.

[83] The principle of equality before the law and protection from discrimination is not only enshrined in the Constitution of Rwanda, it is also embedded in the International Conventions signed by Rwanda. For example, article 7 of the *Universal Declaration of Human Rights, 1948*[50], article 26 of the *International Covenant on Civil and Political Rights, 1966*[51]. Especially, with regard to equality between men and women, Article 8 (f) of the Maputo Additional Protocol to the African Convention on Human and Peoples' Rights provides that *"Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:… (f): reform of existing discriminatory laws and practices in order to promote and protect the rights of women*[52]*".*

[84] After explaining the meaning of equality before the law, for the purpose of expounding the issue of this case to determine whether article 125, paragraph 2, and article 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties reflect the discrimination, it is also necessary to explain what discrimination is. In the case of Akagera Business Group[53] rendered on 23/09/2016, this Court explained that in general discrimination is the persons 'distinction in order to deprive some of opportunities and favor others, on basis of unreasonable grounds. With regard to gender-based discrimination, the International Convention on the Elimination of All Forms of Discrimination against Women, in its first article, provides that "*For the purposes of this Convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*[54]*".*

[85] As already indicated in the legal provisions and international conventions mentioned above, the principle of equality before the law means that people are entitled to equal rights, without inequality nor discrimination, and the enacted law equally treats the concerned persons. In the case of Murangwa Edward[55], rendered by this Court on 29/11/2019, basing on the statements

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[50] *Article 7 states: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination.*

[51] *All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.*

[52] *Rwanda signed the Protocol on 25/06/2004.*

[53] *Judgment RS/SPEC/0001/16/CS, para. 22.*

[54] *Rwanda signed on 02/03/1981.*

[55] *Judgment RS/INCONST/SPEC 00001/ 2019/SC, rendered on 29/11/2019, para. 35.*

of Erwin Chemerinsky, it expounded that the same things are alike treated and the different things are differently treated according to their differences. In other words, people should be equally treated, but on basis of their characteristics. This principle according to which there is discrimination or inequality when the persons in the same situation are differently treated and without reasonable justification was also reiterated in the case of Thlimmenos v. Greece rendered by the European Court of Human Rights, which upheld that "*The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification*[56]".

[86] After the explanations above provided on inequality before the law and discrimination, it is obvious to determine whether article 125, paragraph 2, and article 126, paragraph 3 of Law nº 68/2018 mentioned above providing that the abortion for authorized woman or girl is only performed by a recognized medical doctor, convey inequality before the law or discrimination because the law stipulates that such service is provided only by a recognized medical doctor who is not available at health centers, thus a woman or a girl who needs abortion service cannot get it over there, however a man who needs another medical service can get it over there, as submitted by the petitioner.

[87] As to the gender-based discrimination reflected in aforementioned articles as alleged by the claimant, basing on the principle that the same things are alike treated and the different things are differently treated according to their characteristics, the Court finds that, due to the fact that the men, by their very nature, are unable to conceive so as to seek abortion service, and due to the fact that the women who need that service get it in the place provided under the law, to wit at hospital where a recognized medical doctor is available, no one can assert that there is discrimination against them in comparison to those who do not need that service. The same position is reiterated in the case of Kabasinga Florida[57] rendered by this Court, in which it upheld that there is an offence provided for women which cannot be committed by a man due to their nature as human being who could not conceive and give birth, as it is the case for a woman and this cannot be considered discrimination.

[88] Regarding the issue that the rich women and girls who need abortion service are the ones who have access to such service at the hospital where a recognized doctor is available, while the poor ones cannot reach such place because it is too expensive, the Court finds that this is not a concern only for those who seek abortion services so that it can be considered as discrimination against them, but it also concerns those who need medical services and other issues not settled in health centers in general. The remedy on that issue cannot be found in repealing the legal provisions, rather it can be sought in policies of decentralizing the health services not affordable at the health centers. Lack of resources or capacity by the Government lead to the impossibility to find sufficient medical doctors to appoint even in health centers, especially even the petitioner himself admits that nurses and midwives themselves are not sufficient due to insufficient resources to make them available.

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[56] *Case of Thlimmenos v. Greece (Application no. 34369/97), Strasbourg 6 April 2000*.
[57] *Judgment RS/INCONST/SPEC 00003/2020/SC, § 27, rendered on 27/11/2020*.

[89] Basing on the explanations provided above, the Court finds that there is no inequality before the law nor discrimination in article 125, paragraph 2, and article 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general, and therefore do not violate articles 15 and 16 of the Constitution. For these reasons, its claim on that issue is unfounded.

Determine whether Article 125, paragraph 2, and Article 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties are inconsistent with Article 23 of the Constitution providing for respect for privacy of a person and of family

[90] Mulisa Tom, representative of GLIHD and his counsels, argue that a privacy of a person, his/her family, his/her home or correspondence cannot not be subjected to interference in a manner inconsistent with the law, his/her honour and dignity shall be respected. They submit that the law determining offences and penalties in general abovementioned provides that a recognized medical doctor is the only one who performs safe abortion for legally authorized woman or girl, such woman or girl seeking such medical service must first go to the health center to apply for a transfer, it is evident that all staff members who will prepare such document will be informed of what he or she is going to get until he or she arrives at the hospital, he/ she must first be provided with in-depth counseling services before getting abortion service. Therefore, they maintain that during those circulations, his/ her right to confidentiality of the medical service provided has already been violated because many people will be aware of the service she is seeking whereas the information should be between the patient and the doctor.

[91] The State Attorney submits that the principle of secrecy of information from a patient or anyone accessing to the hospital is provided for by Law N°49/2012 of 22/01/2013 establishing medical professional liability insurance in its article 8, paragraph 3 and article 3, paragraph 3 of Ministerial Order N° 002 / MoH / 2019 of 08/04/2019 determining conditions to be satisfied for a medical doctor to perform abortion which provides that "the person requesting for abortion is not required to produce evidence of the grounds she invokes". This means that the person requesting for abortion should not produce evidence of the circumstances in which she got pregnant.

[92] She further sustains that in the event of breach by a medical doctor of the secrecy of information related to the patient, he/she is held liable for the effects as provided under Articles 13 and 25 of Law N°49/2012 of 22/01/2013 establishing medical professional liability insurance. She concludes that there is no inconsistency between paragraph 2 of Article 125 and paragraph 3 of Article 126 of the Law Nº 68/2018 of 30/08/2018 abovementioned and Article 23 of the Constitution providing on the respect for privacy of a person and of family.

DETERMINATION OF THE COURT

[93] Article 23, first paragraph, of the Constitution provides that "the privacy of a person, his or her family, home or correspondence shall not be subjected to interference in a manner inconsistent with the law; the person's honour and dignity shall be respected". These rights are also enshrined in various international treaties, including the *Universal Declaration of Human*

Rights[58]*, the International Covenant on Civil and Political Rights*[59]*, and the European Convention on Human Rights*[60].

[94] Regarding the meaning of the respect for privacy of a person and of family, in the case of Bărbulescu v. Romania[61], the European Court of Human Rights considers that *"the notion of private life may include professional activities, or activities taking place in a public context. Restrictions on an individual's professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. It should be noted in this connection that it is in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity to develop relationships with the outside world".* In the case K S Puttaswamy (Rtd) vs Union of India[62] rendered by the Supreme Court of India, the latter ruled that "*Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable," he said. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Those relationships may and do often pose questions to autonomy and free choice…"*

[95] In an article entitled "*Internet: Case-law of the European Court of Human Rights*[63]*"* published by the Research Division of the European Court of Human Rights, it provided the definition of the private life stipulated in article 8 of the European Convention on Human Rights abovementioned. It stated that the private life includes the privacy of communications, which covers the security and privacy of mail, telephone, e-mail and other forms of communication and informational privacy, including online information. It further argued that the right to privacy of

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[58] *Article 12 of the Declaration reads: no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

[59] *Article 17 of the Covenant reads: 1. no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.*

[60] *Article 8 of the Convention reads: 1. everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

[61] *Case of Bărbulescu v. Romania, Application no. 61496/08, § 7, https://hudoc.echr.coe.int/spa?i=001-177082.*

[62] *Writ Petition (Civil) n° 494 of 2012, §2. https://indiankanoon.org/doc/127517806*.

[63] *Research Division of the European Court of Human Rights "Internet: Case-law of the European Court of Human Rights", updated: June 2015, p. 8. Private life includes the privacy of communications, which covers the security and privacy of mail, telephone, e-mail and other forms of communication; and informational privacy, including online information (Copland v. the United Kingdom, no. 62617/00, ECHR 2007-I). The concept of private life moreover includes elements relating to a person's right to their image (Sciacca v. Italy, no. 50774/99, § 29, ECHR 2005-I). In other words, photographs or videos which contain a person's image will fall within the scope of Article 8. In fact, the right to the protection of one's image presupposes the individual's right to control the use of that image, including the right to refuse publication thereof (Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, § 96, ECHR 2012). This is relevant for the storing of images on communal or social websites. This is an area where the protection of the reputation and the rights of others takes on a special importance, as photos may contain highly personal or even private information about an individual or his or her family. The Verlagsgruppe News GmbH and Bobi v. Austria case (no. 59631/09, 4 December 2012) is interesting in this connection. Photos were taken in the course of a private event in the applicant's apartment. They were taken with his agreement but were not meant for the eyes of outsiders (§ 86). They concerned his private life and were not essential to the offending article, so the claimant's interest in the protection of his image prevailed (§§ 89-90), https://www.echr.coe.int/documents/research_report_internet_eng.pdf. accessed on 01/12/2021.*

one's own person and his or her photographs or images should not be exposed to public without his or her consent, the perpetrator would be interfering in one's personal life. This meaning was provided on basis of a series of judgments rendered by that Court.

[96] The United Nations Human Rights Committee, in its general comment of article 17 of International Covenant on Civil and Political Rights abovementioned, states that "*Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honor and reputation. In the Committee's view, this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right*[64]*".*

[97] In order to protect the right to privacy as required by that article, in Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general, article 155[65] provides for and punishes the crime of violation of domicile, article 156[66] provides for and punishes the crime of secretly listening to conversations, taking pictures or disclosing them.

[98] Regarding the statements of the claimant that the fact that the abortion service is provided only by a recognized medical doctor as provided by the articles of the law against which the filed a petition violates the privacy of the person due to the procedures allegedly used for affording such service, although these procedures are not adequate in accordance with the provisions of Article 9 of Ministerial Order n°002/MOH/2019 of 08/04/2019 determining conditions to be satisfied for

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[64] *CCPR General Comment No. 16 : Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation Adopted at the Thirty-second Session of the Human Rights Committee, on 8 April 1988, §1. https://www.refworld.org/docid/453883f922.html. accessed on 02/12/2021.*

[65] *Except in cases provided for by laws, any person who, without authorization of the occupants, enters a home, a house, a room or accommodation of another person, commits an offence. Upon conviction… he/she is liable to imprisonment for a term of not less than two (2) months but less than six (6) months and a fine of not less five hundred thousand Rwandan francs (FRW 500,000) and not more than one million Rwandan francs (FRW1,000,000). If entry into a person's domicile is by recourse to threats, housebreaking or use of false keys, the penalty is an imprisonment for a term of not less than three (3) years and not more than five (5) years and a fine of more than one million Rwandan francs (FRW 1,000,000) and less than two million Rwandan francs (FRW 2,000,000) or only one penalties.*

[66] *Any person who, in bad faith and in any way infringes the personal privacy of another person by*
1[0] *secretly listening to, or disclosing, people's confidential statements without authorization;*
2[0] *taking a photo, audio or visual recording or disclosing them without one's authorization*
commits an offence. Any person who is of any of the acts referred to in Paragraph One of this Article, is liable to imprisonment for a term of not less than six (6) months and not more than one (1) year and a fine of not less than one million Rwandan francs (FRW 1,000,000) and not more than two million Rwandan francs (FRW 2,000,000) or only one of these penalties. If the acts referred to in Paragraph One of this Article are committed in full view and awareness of the persons concerned and without opposing the acts while they were able to do so, their consent is presumed. The penalties referred to in Paragraph 2 of this Article also apply to a person who, in bad faith, distributes in any way whatsoever, a photo, audio and video, recordings or documents obtained as a result of one of the acts referred to in Paragraph One of this Article.

a medical doctor to perform abortion[67], the Court finds that this is not a violation of a person's private life on basis the explanations above mentioned, rather it is secrecy between medical care seeker and medical care provider. This secrecy is protected in accordance with the provisions of article 36 of Law N°46/2012 of 14/01/2013 establishing the Rwanda Allied Health Professions Council and determining its organization, functioning and competence, which provides that "All practitioners of allied health profession and members of the organs of the Council shall be bound by professional secrecy for any information gained from their duties or they have acquired in the course of performance of their duties even after they cease to perform such duties. The same shall apply to any person who, in whatever capacity, participates in the functioning of the Council [...] This is also highlighted by article 158, first and second paragraphs, of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general[68]. In particular, Article 10 of Ministerial Order N ° 002 / MOH / 2019 of 08/04/2019 mentioned above, provides that "The medical doctor and the health facility that received the person requesting for abortion services must ensure the respect of the right to confidentiality".

[99] In the premises, the Court finds that article 23, paragraph 1, of the Constitution, accords to every Rwandan and every other Rwandan resident the right to freedom in his or her personal life, in his or her relations with others without any interference in a manner inconsistent with the law and without his/her consent. He/she exercises such right freely and without fear. Basing on all explanations above provided, the Court finds that the petitioner failed to prove the circumstances in which the challenged articles providing that the abortion service for authorized women and girls is only performed by a recognized medical doctor, are contrary to article 23 of the Constitution, rather his statements concern the right to confidentiality, and as it has been explained, the Court has found it baseless. Therefore, its claim on that issue is unfounded.

[100] The Court finds that the issue raised by the petitioner and examined in the instant case concerns the potential difficulties encountered by the women or girls in case they are not afforded the abortion service at the nearest health centers as submitted by the petitioner intending to relate them to the rights set forth in the Constitution. A similar issue was examined by the European Court of Human Rights in case A, B and C v. Ireland, when the women in that State claimed that their right to life was violated by their inability to have abortion at Hospitals in Ireland. The Court found that there is no issue related to the right to life because nothing excluded women from having abortion in the States recognizing abortion[69]. The Court also finds that there was no legal barrier for girls or women who meet the legal conditions to have access to a recognized medical doctor to get abortion for unwanted pregnancy in accordance with the law.

[101] Having found that articles 125, paragraphs 2 and 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general are not inconsistent with the Constitution, the Court finds that there is no ground to determine whether those provisions as well as Article 2 (3 °) of Ministerial Order N°002/MOH/2019 of 08/04/2019 determining conditions to be satisfied for a medical doctor to perform abortion must be reformulated as requested by the petitioner.

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[67] *A person who wishes to get abortion services has the right to access an accredited health facility of her choice and to receive the services without necessarily presenting the medical transfer*

[68] *Any person who reveals professional secrecy entrusted as privilege to keep by virtue of function, occupation or mandate of a religion, whether in service of after leaving the service, commits an offence.*

[69] A, B and C v Ireland, (CG) n° 25579/05, para 158 α 159, ECHR, 2010.

III. DECISION OF THE COURT

[102] Decides that the petition initiated by the Great Lakes Initiative for Human Rights and Development (GLIHD) has no merit.

[103] Decides that Articles 125, paragraph 2 and 126, paragraph 3 of Law Nº 68/2018 of 30/08/2018 determining offences and penalties in general, are not inconsistent with the Constitution of the Republic of Rwanda.