THE CASE FOR ABORTION IN KENYA

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BY

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I, Charles Njuru Kihara

declare that: This dissertation is my original work and has not been presented for a degree in any other University.

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DEDICATION

For my parents, Mr. J. Kihara Njuru and Mrs. Winnie Wangari for whom I can find no words to thank, for their untiring and unfaltering efforts to see me academically successful to this level, I humbly say may the Lord Almighty add more years to their lives.

And you thank them by doing a paper on the legalisation of abortion? (Rolls eyes)

CONTENTS

ABBREVIATIONS

Journals/Periodicals

A. Jnl. J.	The American Journal of Jurisprudence
COL. L. R.	Columbia Law Review
Harv. L.R.	Harvard Law Review
I.C.L.Q.	International and Comparative Law Quarterly
M.L.R.	Modern Law Review

Cases

All. E.R.	All England Law Reports
E.A.C.A.	Eastern Africa Court of Appeal
K.B.	Kings Bench

INTRODUCTION

Undoubtedly, the issue of abortion rank among the most controversial medico-legal and moral questions in our contemporary Kenyan society. Apparently, it portends to remain so until a "legal revolution" can completely reverse and overhaul the legal prohibitions.

In writing this dissertation a Lenin like approach has been found the most suitable. Such was formulated by Lenin when he told the Sverdlov University Community that:

> "The most reliable thing in a question of social science.... is to approach this question scientifically is not to forget the underlying historical connection, to examine every question from the standpoint of how the given phenomenon arose in history and what were the principal stages in its development, to examine what it has become today."[1].

In a nut-shell, such is the thesis of this dissertation coupled with some key recommendations for reform.

It has been observed that most legal and non-legal historians and chroniclers go to great lengths to preserve and assure their objectivity. Sincerely, such a task has been found impossible. The shortcomings enhanced by the abortion prohibiting laws are too glaring for pretending a neutral position of what is going on in this country.

The discussants personal views need not be underscored here, as, they will become obvious in the course of the thesis. Thus, simply admitted that we have opinions and it cannot be ruled out with certainty, that they do influence or not our propositions towards solving such a problem. This is not to say that we have falsified, suppressed or distorted any view or information that came to our knowledge.

The truth is that the reality is more depressing and terrifying possibly than what is presented herein. A detailed realistic painting of our present society viz-viz abortion evils is likely to go beyond the scope of an average person's imagination. The abortion controversy goes to the root of the population issue. These two twin issues have not always been as explosive as they are today. That being the case, it is therefore reasonably observed that every historical period has laws of its own. Thus a call for liberalization only confirms the fact that as soon as any society has outlived a given period of development, and obviously, it is passing over from one given stage to another, it rightly ought to be subject also to other laws.

Any social engineer worth his salt should not accept that the law of a society should be the same at all times and in all places. Where social interactions are in play, the law governing them is obviously not to be likened to the laws of physics and chemistry.

That being the fact, then the law of abortion and even population should vary with the changing degree of the varying degree of the society's vices and virtues.

This reminds me of the words by Adam Smith when he wrote that:

> "A smuggler is a person who, though no doubt highly blameable for violating the laws of his own country, is frequently incapable of violating those of natural justice, and would have been in every respect an excellent citizen had not the laws of the country made that a crime which nature never meant to be so."[2]

So far so good, but let us not find ourselves in the same situation, any longer, if possible.

Finally, sincere acknowledgement to this dissertation's Supervisor, Dr. Ooki-Ooko-Ombaka of the Faculty of Law, University of Nairobi, whose invaluable suggestions and guidance at the time of contemplating and actual writing saw it its successful end. Similarly, the same for the excellent typing assistance given by Florida Kellikho is deeply appreciated.

There are also many others whose services rendered its successful completion. It is, with respect, hoped that the little success, if any, of this piece, serves the purpose of acknowledging them.

In brief, if abortion becomes legalized now or in the immediate future, that in itself will be enough recognition.

CHAPTER ONE:

LAW OF ABORTION IN KENYA - HISTORY AND PRESENT POSITION

Defination

As used by the medical profession,* and others, the word "abortion", which will be used extensively, throughout this thesis, denotes the termination of a pregnancy after the implantation of the blastocyst in the endometuum but before the fetus has attained viability.[1] As permedical tradition, it is after twenty-eight weeks from the last day of the last normal menstral period, that viability is attained.

As man gets to know himself more and more, this seems to bring some change as far as this long held view is concerned. As a result of advances in the care of premature infants during recent years a re-evaluation of viability has occurred. Mostly, this arose due to the fact that a few infants born at less than twenty-four weeks of gestation have been reported to have survived, while at the same time the long held view that 28 weeks and 1,000 grams were necessary for viability, other weighing less than 600 grams at birth have also survived.

However, it appears that there is no well-documented case of survival of any infant born at less than these 24 weeks of gestation and weighing less than 600 grams. But all the same, the duration of the pregnancy as well as the infants weight cannot be left out when considering or presuming viability.

In 1950, the Third World Health Assembly adopted a definition that if after expulsion or removal, a non-viable fetus shows such signs of life as heartbeat or respiration, whether it dies thereafter or not it be treated as a "liveborn infant."

There are two varieties of abortions. These are induced and spontaneous. Induced abortions refer to those willingly done with

a view to end pregnancy, while all the other abortions are called spontaneous regardless of whether an external cause is involved such as injury or even high fever.

In this thesis the term "abortion" shall be used only in reference to induced abortion, including legal and illegal abortion as may be held by the laws of a country. Therefore phrases like "miscarriage", "therapeutic abortion", and "Criminal abortion", which are at times used in lieu of spontaneous abortion, legal abortion, and illegal abortion, respectively, will deliberately be avoided, unless where statutorily used. Contraceptives and other fertility regulating methods that should act or acts on the fertilized ovum before implantation are outside the scope of this thesis. How does a physical distinction between induced and spontaneous abortion come about? A local gynaecologist said that a differential diagnosis between the two is often impossible. This is due to the fact that an induced one cannot be identified without any evidence of manipulation, such as injury to the cervix or uterus perforation or information from the woman, members of her immediate family or even the abortionist. It is no wonder that most septic abortions have been thought to be induced, while many illegally induced abortions show no signs or symptoms of infection, while at the same time some spontaneous abortions do.

With the foregoing, this discussion now sets upon examining the present legal position of abortion in Kenya. The contemporary Penal Code which can generally be said prohibits abortion in Kenya owes its birth in the colonial era. How the colonial powers imposed their values, virtues and even vices upon the colonised territories need no substantiation in such a discussion. This they did in total disregard for the inhabitants of such territories' welfare. It is contended further that a deep analysis of the functions of criminal law is not necessary at this particular stage of the thesis. Before embarking on an examination of the particular provisions relating to abortion law in Kenya, it is only reasonable that a brief

history of abortion as a crime be outlined, in order to understand what had become of abortion as at the time it was taken care of in Kenya's colonial Penal Code. This is necessary partly because for a doctor to understand a patient's problem it is very necessary that he gets his medical history, otherwise he diagnosis in error.

"Under the common law of England," abortion had been an offence "long before 1861 and even before parliament ever existed". These were the words of Macnaghten, J. in R. v. Bourne a 1938 English case that became a cornerstone of their recent abortion law developments.[3] These words echoed the true position in England despite the fact that abortion is evidently a crime without much recorded or reported history. This is testified by the paucity of references to authorities which only becomes understandable if, one, on a verge to despair consults the current text-books on the related subjects or subject itself, Law Reports, and historical English sources such as Coke, Blackstone, Chitty and the others.

In English Law only general history discovered was Westermarck's account of abortion practice amongst some "Savage communities and includes the approvals by Plato and Aristotle.[4]

Common Law

The historical common law paid little attention to abortion. In fact it considered it no more than a misdemeanour which could only be committed after what the Englishmen called the "stage of quickening". This quickening stage was usually set at 14 weeks after conception. At this stage we can observe that any acts relating to the removal of the contents of the uterus after conception and before the 14th week were not punishable at whatever degree. Apparently, it was not even morally blameworthy. Therefore it is no wonder that the first statute that dealth with "procuring a miscarriage" was enacted in 1803. This was called Lord Ellenborough's Act of 1803. It made it a felony both "unlawfully" to administer a substance to procure the

miscarriage of a woman who was "quick with child", as the English called it, and to use any means for the same purpose regarding a woman not quick with a child. This Act was not clear as to whether a woman who was acting upon herself was legally liable.[5]

In 1828, the Lord Ellenborough's Act was replaced by Lord Landsowne's Act, which changed very little. This similarly did not resolve the 1803's uncertainities. Later, in 1837 the 1828 Act was replaced by the Offences aganist the Persons Act. Similarly, it did not distinguish the woman quick with child from the one not. At the same time it went silent as far as the issue of a woman acting on herself was concerned. One is in fact left wondering why they were in fact enacted. As per the knowledge of this discussant, they were re-drafted without any additional provisions, which catered for their predecessor's weakness, contradittions and possible legal loopholes.

But for purposes of outlining a logical development of the law in this field, it has been thought necessary for inclusion. The 1837 Act went along way in developing the law from the previous Act, it encompassed anyone "unlawfully" administering a noxious thing, and "unlawfully" using an instrument or other means, intending to procure a miscarriage. This Act was also short of an unambigous clarification of whether there was a lawful miscarriage. The reasonable inference from this can only be that they did contemplate (or the legislators) some lawful instances of miscarriage.

In 1867 another Act came into operation and replaced the 1837 Act. This 1867 Act employed the word "unlawfully" several times, but did not also resolve much as far as our line of interest is concerned. The law remained unclear until about a hundred years, that a formal clarification of the abortion prohibition was undertaken as a result of Dr. Bourne's apparent acts of humanism and Lord Justice Macnaghten, who presided over the land mark case of R. v. Bourne in 1938. This case was the first in modern English

criminal law where a precedent setting court addressed the issue of any circumstances, if any, in which abortion could possibly be lawful. It is as a result of this celebrated case that English courts acknowledged the legality of therapeutic abortion under then still operational prohibiting 1861 Act in their subsequent decisions before the coming of a more liberalized law in 1967.[6] More in the style of colonialism than any other possible explanation, the pace setting decision of Macnaghten, L.J., in R. v. Bourne was bound to have influence in Kenya. This was clearly evidenced in 1959 in a decision of the Eastern African Court of Appeal in Mehar Singh Bansel v. R.[7] Despite the fact that the then Kenyan penal provisions owed their origin from a Cyprus Code the decision in R. v. Bourne was uncautiously applied. In Mehar Singh Bansel v. R., it was contended in an appeal against a manslaughter conviction by the then Supreme Court of Kenya (now the High Court), that the trial judge had put inept questions to the assessors in a similar light to Macnaghten, L.J.'s in R. v. Bourne.

In fact even in dismissing the appeal as well as approving the trial judge's ruling the Eastern Africa Court of Appeal took the R. v. Bourne decision's theme. Fully in Bourne's fashion the court observed that:

> "An illegal operation is an operation which is intended to terminate pregnancy for some reason other than what can perhaps be best called a good medical reason, and the only good medical reason in the eyes of the law for the termination of pregnancy is the genuine belief that the operation is necessary for the purpose of saving the patient's life or preventing severe prejudice to her health."[8]

ABORTION IN KENYA:

As the English abortion legislation of 1967 has been outlined and anlysed in the foregoing, it would only suffice to briefly outline the origin of the contemporary Kenyan Penal Code and as a consequent of so doing have an attempt at explaining its present

position from its past.

All the East African, Nigerian and Ghanaian Penal Codes had a common ancestry origin. This is the "Draft Code" of "Sir James Fitzjames Stephen of 1878".[9] Seidman in recording the historical roots of African Penal Codes says that:

> "Following Stephen's pioneering efforts, a Royal Commission was appointed in 1879 to consider the codification of the Criminal Law of England. Although never adopted in England, the Draft Code of 1879, largely modelled upon the Stephen Code of the preceding year, because the pattern for many later adopted throughout the Empire.
>
> For Africa, the most important of these was the code adopted by Queensland, Australia, in 1899, becoming effective in 1901."[10]

Despite the above identified facts, the East African territory was originally subject to a code that had sprung from the Indian Penal Code. This code operated until the 1930s when it was replaced by Codes which were drafted by the Colonial office. These colonial office codes for the East African regions were all alike other than for very minor textual differences. This colonial office code was patterned almost verbatim upon the Cyprus code of 1928. This 1928 Cyprian code in return had begged much from the Nigerian code and the Queensland code. But all the same these Nigerian and Queensland codes which the Kenyan code, in particular, owes much of its roots had sprung from the same trunk of which the Stephen Draft Code is undoubtedly the taproot.

The Criminal Procedure and Penal Codes which were intended to effectively re-introduce in codified form the basic principles of criminal law and punishment in force in England are the ones very much in operation upto now. These have only had minor amendments.

In fact the following provisions would lead one to conclude that we are "legally dependent" on our said "mother country."[11] This

can be testified to by section 3 of Kenya's Penal Code,[12] which reads:

> "3. This code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English Criminal Law and shall be construed in accordance therewith."

I believe this is supposed to subject our criminal system, including those on abortion. This is supplemented by the procedural code for criminal offences' wording which provide that:

> "The practice of the High Court in its criminal jurisdiction shall be assimilated as nearly as circumstances will admit to the practice of Her Majesty's High Court of Justice in its criminal jurisdiction and of courts of Oyer and Terminer and General Gaol Delivery in England."[13]

It is, therefore, obvious that this type of enactments has enhanced a tradition or attitude which is sympathetic to the English judges interpretations' and decisions. Such thereby, leads to their acceptance and adoption in whole.

Other than the immediately above observed reasons of an inclination towards the English criminal law system our criminal law codes, for another time (At the risk of repetition), like most other former British colonies borrowed much from the Steven's Code of 1879. This code which contained several safeguards for the performance of emergency surgery directly influenced Kenya's present abortion law. Section 67 of the Steven's Code which provided that; and I quote in extenso:

> "Everyone is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit; provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all circumstances of the case."

Can reasonably be inferred to have included abortion as is evident from the form in which this provision presently appears in one of the codes inspired by this "legendary" Steven's 1879 Draft. In black on white section 240 of the present day Kenyan Penal Code, for example, states that:

> "A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, OR UPON AN UNBORN CHILD FOR THE PRESERVATION OF THE MOTHER'S LIFE, (Emphasis mine) if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case."

Undoubtedly, this provision is only confined to surgical operations, which are not our concern at the moment. It is a great weakness because at the moment and the immediate past, non-surgical abortion is common and rampant among our people, particularly the youthful females. Further, this provision protects only "a person performing" the operation, while it has not been clear in regard to the woman permitting it to be done on her. Such law which is only allowing therapeutic indication for abortion cannot be rightly considered liberalized in operation.

Statutorily, Kenya in effect is one of the countries that still retain the old abortion prohibiting enactments, as from the colonial days, while the English's law has undergone very clarified modifications. In England change was brought by the Abortion Act of 1967's enactment, which laid down certain conditions under which, if two registered doctors agreed about the conditions, an abortion may be performed. Among these conditions, include pregnancy's risk to the physical or mental health of her existing children. In simple words, Kenya's basic position is that abortion is illegal. Under the Penal Code any person who with intent to procure the miscarriage of a woman, regardless of whether she is or is not pregnant ("with child") unlawfully administers to her or causes her to take any poison or any "noxious thing", or alternatively uses force

of whatever kind, or other means whatever applied, is guilty of a felonious crime and is punishable by imprisonment for fourteen years.[14]

There is a further provision that any woman who is with child and with the intent to procure her own miscarriage, unlawfully, administers to herself any poison or such like thing(s) or alternatively uses any force or other means whatever or permits another to administer any such things to her is guilty of a felonious crime and liable to imprisonment for a period of seven years.[15]

Finally it is provided that any person who unlawfully supplies to or procures for any person anything which he knows is intended to be illegally used to procure the miscarriage of a woman, while it does not matter whether she is or is not with child, is guilty of a felony and liable to imprisonment for a period of three years.[16]

The wording of these provisions is so wide that they can possibly net every act done with some relation to an abortion other than those that clearly belong to therapeutic abortion exception. The punishments are at the same time very severe, which was intended as a measure to sanctify human life, which it is not yet settled as to when it in effect begins!

The changing life styles either on social, economic and moral have in our society and others usually reflected in the law. In some countries, to be particular, prohibiting abortion laws have been relaxed, to cater for increasing demands on abortion.

In Kenya, the most recent available statistics showed that during the first half of 1978 some 1,424 patients were admitted at Kenyatta National Hospital alone, to the gynaecological wards suffering from the consequences of septic abortions.[17] It was also observed that between the 1973 and mid-1978 period, the hospital's figure of patients admitted as a result of failed illegal abortions rose by 100 per cent. On a nation wide scale, there are no official

statistics on abortion rate. Without going into reasons that might be responsible for lack of proper documentation, one need only judge from the current frequency of abortion reports in the local press and the current debate in the letters page of the daily newspapers[18] to deduce that this practice (though still held illegal by the law letters), is on the increase. In fact several deaths have come as a result of the back street abortion clinics or undertakings.

Taking all the above into consideration the need to re-examine the law relating to abortion in Kenya viz-viz the prevailing problems; social and economical and others that will be enunciated at another level of this thesis and suggest reforms where necessary must with certainity be a noble exercise.

CHAPTER TWO

THE ABORTION DEBATE: RIGHTS V. MORALS & RIGHTS

Introduction:

"Babies are not like bad teeth to be jerked out just because they cause suffering. An unborn baby is a baby nevertheless," said Mrs. Jill Knight.[1]

In the course of the same year, 1966, Dr. Thomas S. Szasz, a psychiatrist, wrote: "There ought to be no special laws regulating abortion. Such an operation should be available in the same way as, say, an operation for the beautification of a nose: the only requirement ought to be the woman's desire to have the operation, her consent, and the willingness of a physician to perform the procedure."[2]

These adverse statements are characteristics of the two basic issues that are central in the abortion debate, as shall be seen hereafter. This debate, shall center on the legal question as to whether time has come when the abortion prohibiting laws of Kenya should be liberalised (or relaxed) or should they be left the way they are?

In so doing a brief analysis of the issue of rights, individuals versus society's, that are often heard when legalization of abortion is debated, has been found necessary.

Further, the writer shall address himself to the question, "What should be the public policy, regarding abortion in a system that claims and prides itself for its dedication to individual freedom?"

Inalienable Rights:

Adopting Gary Glenn's[4] words analysing inalienable rights, freedom is the power to dispose of one's "whole property" restrained by those laws that govern his society. It does not include the right or the rightful power to alienate inalienable rights, because the rightful

power to be free restrains what one can consent to do on himself. The concept of inalienable rights here shall mean natural rights or vice versa. Without going into a deep analysis, it is submitted that natural rights are not defensible.

In Betham's view,

> "There are no such things as natural rights - no such things as rights anterior to the establishment of government - no such thing as natural rights opposed to, in contradiction to, legal...."[5]

This analogy is taken as correct because unless "natural rights" have been recognized by legislators or judicial pronouncements, they otherwise stand unenforceable legally.

Natural rights, if taken to be inalienable rights, can and have provided a fertile ground for political rights. The way they do so has both serious practical as well as theoretical problems. These contracting problems come into right when such civil systems or governments attempt to justify the retention of hanging laws.[6]

Another negation or "contradiction" of the inalienable rights claim surfaces, and often does, when any given civil order allegedly foundend on inalienable rights principle send its soldiers to war. Such incidents are justified by the reasoning that they are necessary for the preservation of their country, though, looked from the view of an innocent citizen, these acts would undoubtedly appear to contradict the said "inalienable right to life". But, to a large number of inalienable rights theorists, the capital criminal facing a capital punishment is

> "like a lion or a tiger, one of those wild savage beasts with whom men can have no society or security."[7]

The idea here is that beasts do not have any inalienable rights. But what other explanation can be offered for this capital criminal loosing his "inalienable" right to life?

Hobbes and Locke were of the view that these rights belong equally to all human beings.[8] These can either be protected by the individual or the government, though at times, some conditions have made securing them an impossibility. The general tendency with our civil systems is that where and when such rights conflict, it is the right of the innocent that is preferred.

The sending of soldiers to war or even the risks undertaken by personal body guards are justified in a different way. Though, the soldiers and body guards are obviously neither guilty nor a malignant to society, their inalienable rights rely upon the security of their society. When a given civil order sends men to war or for conquest it "justly" risks the security of their "inalienable" rights on the justification that such is necessary to preserve its ability to secure everyone's inalienable rights, which includes the soldiers'.[9] So far so good, but, the unsumountable problem comes where soldiers are sent out on the negligent whims of a "misadviced leader."

The security of such a civil system that risks the life of its own soldiers can be likened to the perfectly healthy white blood cell which, as biologically explained, goes out to defend the body against the invading disease. It is common knowledge that, while the healthy cell may be destroyed by the disease, it will certainly be destroyed if the disease destroys the body. This is because the security of the white cell depends upon the whole body's well-being.

My contention is that these cases do not constitute an alienation of rights just because the given circumstances have made it impossible to secure or protect each and everyone's inalienable rights. In an attempt to qualify "inalienable" rights Gary Glenn wrote that

> "....the distinction between "alienation" and "refusal or inability to protect" may seem a semantic quibble, since the effect is likely to be the same. It is not a semantic quibble unless the distinction between actions based on

> necessity and actions based on mere whim or desire is trivial. If this distinction is not trivial, then the fact that inalienable rights can sometimes not be protected is unacceptable only from the point of view of those who desire ethnical standards which admit of no exceptions in practice or which do not require judgement." 10

It is partly due to the foregoing that this doctrinaire understanding or misunderstanding of inalienable rights is possibly the source of the now prevailing confusion regarding the abortion liberalisation or legalization debate in Kenya today. Therefore, it is no wonder that on a given day and in the same newspaper readers - letters column, one finds two letters based on natural rights but presenting differing attitudes towards abortion.[11]

Most find it impossible, in the logical sense, to understand how the inalienable rights can possibly be alienated. This is because it is practically possible to achieve the effect of alienating the said inalienable rights by not protecting them. The moral doctrine of inalienable rights can be said prohibits a society from violating or in other words, "alienating", inalienable rights. This can reasonably be said to mean that, the refusal to protect them must be a matter of necessity, and not merely an arbitrary act of personal will. It would suffice to add John Locke's analysis when he said that, man by nature has:

> "an uncontrollable liberty to dispose of his person or possessions, yet has not liberty to destroy himself, or so much as any creature in his possession, but where some nobbler use than its bare preservation calls for it."12
> (emphasis added)

Locke by denying individuals the unlimited right to consent establishes the fact that inalienable rights require limited right or power, either in individuals or the government, or in both. In an observation of the relationship between right and power, as far as the inalienable rights' theory is concerned, is in other words to say that a man does not have power over his own life which means that a man's potentia to kill himself is absolutely in contradiction

to what is right by nature. The root of this right can be said to be the law of nature as understood in view of the necessity and importance of a limited government.

Hesitatingly, it is suggested that, as power and right to the extent discussed herein, can be said to be the same, though not necessarily identical, "political power" then, can be taken "to be a right of making laws...."[13]

Therefore a political order can and has at times evolved from a natural rights (inalienable) basis. Thus not equally surprising that the abortion debate (which is in a narrow sense about what attitude the law should take in relation to abortion) has arisen in a civil society in the name of the Kenyan contemporary society, that holds human life sacred.

Leading the debate on a right to abortion is the basic argument, inter alia, that a woman has a right to do with her body as she wishes. The accompanying appendage is that the society in general or others have no right to impose on her its (their) idea of what she should do with her body.

In the abortion debate, like in any other debate, there are basically two opposing views, and possibly some neutrals.

The major and main issue is whether the present abortion prohibiting laws can be liberalised or not. The terms "liberalisation" and "legalization" are going to be used interchangeably, though they do not necessarily mean the same. The "liberalised" abortion proposals suggest additional exceptions to the general principle against abortion.

In putting the case for abortion in Kenya, it is necessary that the various arguments usually used in favour or against abortion are stated and consequently analysed.

In proving that abortion is wrong it is necessary to establish that the fetus or zygote is a human being with all the rights thereof, as well as the incidento ones. On the same plane, it is necessary that a pro-abortionist should show that abortion is not murder and immoral but a necessary priori in bettering the welfare of the people of Kenya.

Since most suggestions as to when a fetus becomes human are arguable and unconvincing, it has been found necessary to pay homage to the analytical intelligence of Glenn's words that

> "The least arbitrary time seems to be conception or implantation. But one then has to believe that a few cells lacking any of the visible signs of humanity are nevertheless human. This is not very persuasive since, however, the evidence of our senses may sometimes mislead us, that evidence is nevertheless difficult to ignore. Moreover it can only be ignored on the basis of a theological teaching regarding ensoulment. If that teaching were sufficiently persuasive, there would not be an argument for a right to an abortion beyond that historically recognised....by law." 15

This arguable characteristic of anti-abortion arguments as suggested in above can also be confirmed by the fact that anti-abortionists do squirm when asked whether the government would rightly order them to do abortions. Therefore, they are trapped by their own net. Reasonably and logically they cannot be saying, that the government should have the right to prohibit abortions without simultaneously saying, that the same has the right to require them.

Therefore, for their relief, the government should take a neutral position on the issue. Such a neutrality is a political manifestation of the moral view that, although one believes abortion is wrong, he should also believe that he does not have the moral right to impose his values on the others.

By "government neutrality", it is meant that it should not have abortion prohibiting laws, because it would not be neutral.

Strict neutrality would be in a case where government does not act, that is, neither prohibits nor permits abortion. This has its own difficulties because in general, what is not prohibited in our legal system is permitted.

The idea of liberty and freedom implicit above is that of John Stuart Mill.[16] Mills valuable words as partially paraphrased by Dutton[17] renders some light in that,

> "The modern conviction, the fruit of a thousand years of experience, is that things in which the individual is the person directly interested, never go right but as they are left to his own discretion; and that any regulation of them by authority, except to protect the rights of others, is sure to be mischievous."

Then, if, as in Mill's idea, both the pro- and anti-abortionists were doing what they want regarding things which are only affecting them, and at the same time nobody's values are imposed on another who succintly disagrees with them, it can be said that everyone is free.

Let us now examine the various reasons used in building up a case for abortion in Kenya.[18]

Arguments for Abortion:

It has been argued that a woman has a right to do with her body as she sees fit. That, no one, least of all government has a right to tell her what she may or may not do with her body. That prohibitive abortion laws are adverse to this basic principle. Hence, as a logical consequence, such laws are not based on human rights. That they are an unreasonable and illogical infringement on a woman's liberty, and should be abolished.

This has not been without criticisms from those who believe that the right over one's body need have some exceptions, because

without such, the argument shall be seen as a claim of an unlimited or absolute right over herself, if no one else is affected.

But Judith Thomson, the most congent defender of abortion in the legal-philosophical writings I have come across, gave no room for mitigating the woman's right over her body. In her war for abortion she observes that there is

> "No doubt the mother has a right to decide what shall happen in and to her body; everyone would grant that.... or should we add to the mother's right to life her right to decide what happens in and to her body, which everybody seems to be ready to grant.... that if a human being has any just, prior claim to anything at all, he has a just prior claim to his own body. And perhaps this needn't be argued for her anyway...."[18b]

Thomson continue wondering as to what it means, "to have a right to life". In so doing, she poses the provocative question: Whether a right to life includes having a right to be given at least the bare minimum one needs for continued life?

To answer this one cannot help citing the fact that blood donation or kidney or heart transplant or treatment and other "omens", though at times very necessary for saving life, cannot be compulsorily granted. Therefore the right to life other than the right not to be killed unjustly is an illusionary claim.

Assuming or taking that the fetus is not "someone else", such a right would obviously do away with the antiabortion legislations.[19]

Legalization as distinguished from liberalisation by the fact that the former assumes that there are no limits on what the people through their representative governments have the right to do, while the latter takes some limits.

This case for abortion in Kenya is intended to advocate and if possible achieve the legalization of abortion. This is due to the

fact that a society founded on inalienable rights (natural) cannot settle the abortion debate - controversy on the basis of the allegedly unlimited right to dispose of one's body. Doing so, could subvert and contradict its own foundation.

The majority of the teenage youths interviewed in Nairobi had a stereotyped reply:

> "If two people are going to have a baby that neither person really wants, it is all right for the girl to have an abortion."

The figures given earlier for illegal abortions that reach up in Kenyatta National Hospital only clearly shows that our society is plagued by a high rate of illegal abortion plus its attendant risks. These illegal abortions are in most cases followed by serious health complications because of the lack of surgical and medical skills by those questionable abortionists. For instance, a school girl who finds herself pregnant and faced by a glaring and a seemingly misunderstanding society usually finds herself resulting to the services of a backstreet abortionist. As the skilled gynaecologist is out of her reach unlike the few with financial means, she obviously results to the most cheapest means of abortion. The well trained gynaecologist who has the necessary know how of so doing with the least chance of injuring her health find herself legally handicappted to assist her, or at times cannot risk the hefty punishment of the law for a few pounds (shillings).

It is an undisputable fact that the health risk of abortions performed under proper and approved medical conditions is lower than that of these backstreet abortionists. Therefore if abortion was legalized the present inflicted costs to the health of most of our girls would be minimized.

Another important convincing argument is contraceptive failure. At times the contraceptive methods used have been found

inadequeate as fertility regulators. Secondly, the human nature being what it is, it would be unrealistic to expect that precautionary measures to prevent conception will always be taken before sexual intercourse, even though pregnancy is not intended.[20] At the same time, it is common knowledge that the contraceptive methods are not in themselves hundred per cent "pregnancy proof". Therefore despite the gigantic researches undertaken in modern medical sciences, there is yet to be developed a fool proof contraceptive method that will be easily available and acceptable by our people.

It is due to this very fact that one can never forget to articulately ponder the question: if a woman, who has the will and determination to avoid pregnancy, did resort conscientiously to the use of a given contraceptive method prescribed to her by a competent physician and did become pregnant, should she, the child, or her society be forced to bear the resulting consequences of contraceptive failure?

Yet, at the same time some are allergic to some of the contraceptive methods and others fear to use others for their unknown side effects.

In general, the society has an interest in preventing the birth of the unwanted children. These unwanted children at times lack parental love and care at their infancy years, as a result of which they become social misfits due to the psycological problems they suffer for want of either parental or societal love and care. Likewise most parents who are forced by circumstances beyond their control to bring forth such children are highly vulnerable to mental disorders. For example, a British study, following the liberalisation of abortion law demostrated that "the stress of bearing an unwanted child" could lead to psychiatric symptoms. This was the case mostly with the single girl without support and whose community take her pregnancy as a disgrace. In contrast, the same study demostrated that

very little, if any, psychiatric disturbance could be detected in parents whose pregnancy was terminated.

Pregnancies that come as a result of some dubious sexual relationships have also had very embarrasing results at times. In this category falls the case of soldiers in a foreign mission or the highest religious leader in a given denomination embarrasing his fanatics. For example,

> "the situation of mixed blood children fathered but abandoned by foreign servicemen. Many of the mothers are bar-girls, prostitutes, or maids. In view of the women's need to continue their trades for a living and in view of the expected shame brought upon their families by the begetting of "half-breed" children, the difficult of identifying the natural fathers, and the near impossibility of compelling the latter to pay for the support of the children because of jurisdictional and distance problems, it may be assumed that, had legal abortions been available, they would have been obtained. Denial of such an opportunity has produced many tragedies."22

Trully, this is a dilemma that faces society, as rightly depicted above. It is a known fact that such children are plenty of mothers who have lived in the neighbourhood of a foreign military camp. Most of these are found at the coast and of those mothers who have been frequent visitors to whitemen infested night spots.[23]

The physically conspicous species reminds Kenyans, as it similarly happens in Vietnam, of the shameful widespread prostitution. Further, it becomes more serious when one knows that it is partly an abandoned responsibility of the foreign soldiers (mostly of American and British origins) who get entry due to the politically controversial presence of foreign military bases at Kenya's coast.

The current antiabortion law has been criticized for encouraging inequality and effecting some discriminatory measures. It discriminates against the financially poor because the rich and

affluent, either get the services of skilled high-cost physicians who after receipt of a fortune can undertake the illegal operation or in the alternative, fly out of the country. They can and are said to be so doing in order to take advantage of the liberalised abortion laws of a foreign country. It is no longer secret that any person who can afford to pay the high cost fee asked by the skilled physicians gets an abortion any time in Nairobi, as well as in the other leading towns.

The poor who in reality are in a more ardent need of abortion services than the rich usually have no option but to stay at their rural homes or overcrowded urban bed-sitter rooms and face the embarrasing consequences of either childbirth or "high-risk", "illegal operations".

The justification by doctors for charging high fees is the fact that, they equally face a serious risk of being prosecuted if found out. Hence, liberalisation of these laws would check against such. Some find this argument unsatisfactory, since it is not only abortion prohibiting laws in the entire Kenyan legal system that are inherently discriminatory in effect.

But, all in all, this raises the politically disturbing issue of justice and equality under the law.

Presently, in international forums, the equality of sexes is recognized as a basic human right.[24] It is argued that since the man's role in procreation is restricted to the preliminaries, the woman who carry an overwhelmingly large responsibility in child bearing should be left free to decide when to do so.

Then if that is the case,

> "equality of the sexes demands that women be left every possibility of determining whether they will bear the burdens of rearing children. Freedom in this respect

> has been made a reality only as a result of the recent intervention of relatively simple contraceptive techniques. Abortion now has become a safe additional way of preventing unwanted childbirths and cannot be considered superfluous, if only because in practice no contraceptive is 100 per cent effective. Therefore, prohibition of abortion by qualified personnel is an unreasonable interference with women's freedom and equality."23

Therefore, to alleviate the society from desperation, it is only reasonable to join the bandwagon of states[26] that are broadening the meaning of equality between women and men to include the right to have abortion.

Kenya, undoubtedly, has one of the highest birth rates in the world. Without being accused of advocating for the "cutting down" of the people to reduce the allegedly bursting demographic problem, legalization of abortion can not only help in lowering the population growth, but even its attendant and incidento problems, that are scouraging the welfare of the people. Controlling population growth by abortion is trully not the best way, But taking the urgency of the population problem, if the words of our political leaders is anything to go by, relaxing the abortion laws surely supplement the other morally noble methods of curbing population growth. This has not been without criticisms, as in so doing the state has been accused, in advance, of using the physician to solve a problem of its own. Trully, this is not strictly of a medical but of a national, economic and political nature.

Most antiabortionists consider that a liberalised abortion law is unsuitable for controlling population growth. They argue that the accepted health and mortality risks that goes with it, which unless applied with care and a full awareness of the possible social and medical consequences might be fatal to the society. This is due to the fact that some women might erroneously depend entirely on abortion rather than the already widely approved family

planning's contraceptive methods, to control family sizes. Thus fearing that this can lead to an undesirable impact on the present family planning campaigns.[27]

Going back to Thomson's[28] defence for abortion, the right to live that is generally granted to those already born, does not also grant a right that other people, who have no special responsibility for that life, should get off their way and provide the necessary means at the cost of a great inconvenience to themselves.

In a valuable reply to her, John Finnis said that it is wrong and pointless to conduct the debate about abortion as an ordinary debate about competing rights. To Finnis, abortion is wrong. He argues that acts that take life in any circumstances, to which he adds suicide, deny the fundamental value of life, and so are wrong quite independently of any theory of rights.

Another factor is that even if argued that abortion is not impermissible, it is not as well argued that, it is not always permissible. For instance, Thomson rightly states that a sick and desperately frightened fourteen-year-old school girl, pregnant due to rape, may of course choose abortion, and that any law which rules this out must then be an insane law.

Similarly, to make it clear, it would be indecent of the woman to request an abortion, and indecent in a doctor to perform it, if she is in her seventh month, and wants the abortion just to avoid the nuisance of entering a beauty contest.

Let us now turn briefly to examine the case presented by the antiabortionist "Crusaders".

Some arguments against abortion:

The liberalisation or legalization of abortion has been

opposed by some on the grounds that it would not reflect "wananchi's" attitude towards life. No known customary law in Kenya that condones abortion. Instead customary law had it that whoever was responsible for a girl's pregnancy was ordered to compensate her parents, where he did not marry her.[29]

Therefore argued that the legalization would be reflecting the wishes of the legislating government and not of the people. Given the present cry for a legalization of abortion that is being seen and heard in the press and female forums, one would find himself/herself persuaded to state unhesitantly that our Kenyan society has undergone tremendous change. Adding the thousands of cases that reach government hospitals, this argument that no known customary law that did condone abortion is found to be misconstrued. This is supported by the fact that any system of law should be based upon the conscience of the given society.[30]

In the same vein, it is added that, it is the impulse of the contemporary society that should and is sought for, rather than the motivations of the long gone society that are lost in antiquity. This necessitates the words of Dugnit, a legal philosopher, that

> "the foundation of social norms in general, and of the juridical norm in particular, can be only the consciousness of the individuals...."[31]

As a projection of the conscience of the individual, liberalisation or legalization without medical indications has been seen by opposers of abortion as an exceptional case of the state interferring by force of law in right of treatment which traditionally constitutes, diagnosis, indication, therapy, which otherwise should be the exclusive domain of the physician, as well as his full responsibility.

This is usually backed by the argument that the principle of

respect for human life from the time of conception and further on "socialist humanism" and medical science, he believes that abortion is biologically, medically, psychologically and socially harmful. This can only be explained that, in learning his professional course, he has cultivated his conscience to dearly value the human right to motherhood. itself to be above the individual right to abortion in given cases according to a fixed criteria.

But to this, one can only say that since abortion on social grounds and other non medical reasons is only a right that does not necessarily have a corresponding duty. The pro-abortionists, if legalized should not also expect to have a law that is binding the medical personnel as well as all pregnant women to be compelled unwillingly to perform or undergo abortions, whatever the case. Trully it would be equally unreasonable to force a doctor to perform an abortion contrary to his expressed conscience.

Thus, in case individual consciences are contrary to the will of the majority; the two cannot be collectivised without some violation of one or the other. Then given as the case, freedom - loving systems should genuinely be characterised by giving priority to the autonomy of conscience over state demands in case of social - political conflict. Such can be done, inter alia, by liberalisation of the abortion laws in Kenya.

Therefore, it can reasonably be said that, although one may believe that a liberalised abortion law is wrong, public office cannot rightly be used for enforcing one's personal views.

In opposing the case for abortion, it has been said that early scholastics may be excused for not knowing or ignoring that after fertilization there exists more than formless, homogeneous matter. This is due to the fact that there are too many unsettled

biological myths that confused their judgement.

The coming of the piercing eye of the electron microscope and the mechanical brain of the modern computer, has made it unnecessary for the present day researchers to depend on "overt signs of sensation and movement" in the womb to indicate whether life is present[33] Therefore the historical Roman demand that the soul be infused in suitably organized matter need not disqualify the human zygote from humanity.

Thus to many a modern researcher the fetus is a living organism with a vital principle and a physical body, with a complex structure which functions on a continuum toward full human maturity.

Strictly, as far as the abortion debate is concerned, this question of human origins is relevant for establishing the morality involved in abortion.[34]

But, the contrasting sides in the abortion debate are only an engaging joust over the meaning of human "potentiality".

The antiabortionists accuse pro-abortionists for allegedly failing to attend adequately to the claim that the mother's duty not to abort herself is not an incident of any special responsibility which she assumed or undertook for the child. Therefore this is a straightforward incident of an ordinary duty everyone owes to his neighbour. Yes this is a morally weighty argument when one fails to notice its non-existence when the said anti-abortionists do not move an inch to save their starving neighbours.

If considered together with the "traditional" condemnation of therapeutic abortion which Thomas Aquinas and others believe does not flow from the basis that the mother and child are equally persons

in whom the value of human life is to be realized and not directly attacked. Yet the same traditional rule as observed from our prohibitive abortion laws provides for a few exceptions, to the basic principle.

For example, the case where a mother needs medical treatment in order to ~~safe~~ save her life even though such treatment will be fatal to the unborn child. This is because of inter alia, the reason that, her body is her body, after all.

The Religious argument:

Religious doctrines have been used to support the retention of anti-abortion laws.

Like Aquina's moral language, the christian teachings (in particular) about killing doubtless gets its peremptory sharpness primarily and as historically rooted, from the divine injunction, revealed as: "Do not kill the innocent and just."[35]

That being the christian basis, one can only wonder how far the religious doctrines have been embodied in our legal system. Despite the alleged declaration of the constitution of Kenya of the freedom of worship, implicitly including the separation of the church from the state, it is self-evident truth that religion continues to have a strong influence on the law. The Catholic church's stand on contraceptives in Kenya is a case in hand.

But as Edward Kennedy, in what has been described as his best speech given, in a pluralist state said that:

> "the real transgression occurs when religion wants government to tell citizens how to live uniquely personal parts of their lives.... In such cases - cases like prohibition and abortion - the proper role of religion is to appeal to the conscience of the individual, not the coercive power

of the state."[36]

In brief, I concur with the foregoing words. The re-affirmation of the catholic church's view was clarified in 1968 by Pope Paul VI, when he declared that the direct interruption of the generative process already begun and above all directly willed and procured abortions even if for therapeutic reasons are to be absolutely excluded as licit means of regulating birth.[37]

The separation of the church from the state where possible need to be strictly observed. The individual right of worship has to be enhanced in Kenya to avoid the declaration of a one denominational country, like Ayatollah Khomeini's Iran and the recent developments in Sudan. The Kenyan society is made up of various different interest groups which for peace, love and unity must be accommodated. It is not inherently a christian society nor can it be said to belong to any religious grouping.

In fact, even the christian theological schools do not have identical interpretations of what should be the christian faith.

The English Common Law of England did not prohibit abortions that were undertaken before foetal movements are felt by the mother, that is, about the fourth or fifth month of pregnancy, at which time, life was presumed to start, until the year 1803.

This same predominantly christian community liberalised its abortion laws as early as 1938 when the Bourne case necessitated the clarifying of the law. As by an Act of Parliament to clarify and liberalise the then existing abortion laws, the British community passed a legislation in 1967. Due to the foregoing one is left wondering whether the christian argument against abortion is not a case of the outsider who wails more than the bereaved.

Sexual morals and others:

Actually, a large number of the proponents of restrictive abortion laws are at times found to rely on the interest of protecting morals of the people. These seem concerned primarily with sexual morals. The idea is that criminal sanctions against abortion could contribute to the prevention of sexual relationships that are themselves considered immoral. This argument depends on certain factual assumptions. That the abortion restricting laws do deter any kind of sexual relationship. That once a woman has got pregnant without the availability of abortion, she is likely to learn from her mistakes. Many Kenyans today do not agree that sexual intercouse by young unmarried persons is necessarily immoral. While at the same time, many abortions are desired by women who have not become pregnant as a result of sexual intercourse that could be considered illegal by any standards.

Similarly, many of the people in Nairobi to be particular, would not agree that the criminal law's notion of forcing an unwanted child on a woman is an appropriate or even a morally accepted way of punishing her for possible loose of sexual morals.

To many, sexual intercourse is no longer a taboo to the unmarried people. It is instead an integral and essential part and parcel of our lives when consumated at the right time. But when is the right time? This is rather a difficult issue that cannot easily be settled by legislation.

Yet, no matter what we say or do against premarital sexual intercourse, our youth will continue falling into the accompanying pitfalls.

So let us not eat our words. Let us face the reality.

Other anti-abortionists express the fear that the real effect of liberalising or legalizing abortion will come later. They are certain that after five years of a liberal abortion law's application that their concern will not so much be the loss of the life of the unborn but the dimunition of value and dignity in the socially deprived among these already born. These include, the adult living in an iron lung, of the aged woman in a wheelchair, the lunatic in an asylum, the recluse, the hermit and they are even tempted to add, the scholar, the thinker. They argue that, to most people, the humanity of each of these individuals either never registers or registers only at inferior levels.

I believe that there is a limit as to how far anything can be done. Taking the countries that liberalised abortion as early as 1952 when Yugoslavia did so and any noticed developments, one would not accept the above argument. The pro-abortionists are not at the same time calling for right of abortion on demand without even the slightest restrictions or conditions.

Finally, it is also argued that Kenya being a less developed country, by legalization of abortion, it would be constraining further, the few and scarce medical facilities existing. It is a fact that a relaxation of the law would result in a significant increase in the number of abortion cases demanding attention.

Seriously, taking the number of illicit abortions that, nevertheless, reaches hospitals and the rise in number of hospital patients, as the population increases, the relaxation would in no way add to the already existing medical burden. One thing is clear that those who seek abortion services in approved hospitals will get to safe hands. These should henceforth be expected to advice them on the various contraceptive methods available, other than abortion.

At the same time, as abortion is expected to supplement the existing family planning institution. This is likely to lower the present rising birth rate, thus resulting in a lower population which will obviously lessen the demand for medical facilities, if other factors remain constant.

By liberalising abortion, Kenya would stand to benefit from the simple abortion methods developed in some countries, which takes a medical doctor very few minutes.

It is necessary to discuss the role of the law in deciding whether or not to legalize abortion.

The fetus once conceived is recognized as a man because it has man's potential for rationality. The criterion for humanity, should therefore be simple and all-embracing: because if it is conceived by human parents, it is human.

The Kenyan law should be made more responsible to such changing sociological conditions as congestion, overpopulation, privacy, sexual matters, and welfare burdens.

The entire body of the common law which Kenyans owe much for their legal system is composed of several compromises, amongst conflicting human interests.

Such interests are resolved in terms of social interests which in turn, make up the public policy. Just as to Pound, natural rights are determined empirically by social conditions, so do individual wishes change, as times change. Hence, there should be a strong emphasis on "engineering" the law to fit the contours of sociology.

Therefore, this survey on the case for abortion in Kenya, viz-a-viz the legal system should be seen as necessary in

ascertaining just what claims and wants or demands have pressed or are now pressing for recognition and satisfaction with a view to having the law to reconcile and compromise, to harmonize these overlapping or conflicting interests. Thus, it is logical that there is more social interest in enhancing the enjoyment of the born rather than the unborn.

The moral aspirations of the criminal law should be minimal. It should seek to establish and maintain only that minimum of "actualized morality" that is necessary for the healthy functioning of the social order. Therefore, it is only capable of enforcing what is minimally acceptable, and in another way, socially necessary.

Without getting involved in a Hart-Fuller-Devlin type of wrangle[38], the law, if mindful of its nature is required to be tolerant of many evils that morality condemns.

The general position which is rightly applicable to Kenya that describes the reality of the day is at best provided by the words of Rudy Gerber that,

> "Apart from the question of law or no law, the trauma of the abortion movement is that it is a species of mass momentum which no delicate moral or legal arguments can halt. The silent majority has long had a way of ignoring moral and philosophical subtleties when it wishes to. An age heir to the tradition of social Darwinism will fare no better in this regard than the pre-Darwinsm eras of revolutionary France or Elizabethan England or Nero's Rome regarding slavery, corporeal punishment, or child labour. The morality of the masses has always been convenience, and its only remedy has been via the disasters of revolution, violence, and war, which seemingly constitute its harshest but surest correctives." [39]
> (Emphasis mine).

On the assumption that a case for abortion in Kenya has been made out in the above, it is now necessary to give a brief outline for the suggested (possible) liberalising legislation probable attitude.[40]

CHAPTER THREE

RECOMMENDATIONS

After making up the case for abortion in Kenya, it is now necessary to recommend a few things. These recommendations should be considered with the utmost respect and concern in drafting, debating and in enacting an abortion legalization statute.

In so doing, the catastrophical problems that have necessitated the abolishing of the prohibitive abortion laws will hopefully be mitigated. Thus, it will be impossible for the same to come back through the "back door".

The following are my recommendations:

1. The law should be clear for the easy understanding by physicians, legal and other non-legal people who might get near its purview of operation.
   Therefore, the law should clearly state;
   (a) the status of hospitals, clinics, physicians and other necessary facilities in which abortion may be performed. As qualified physicians are at times in inadequate supply, many procedures be undertaken by auxiliary health personnel.

   (b) the girl's age, citizenship, residence, or possibly marital status. This is partially necessary in order to prevent Kenya from becoming an "abortion capital" of this African region and at the same time dissipating scarce public health resources to foreigners.

   (c) The law should not require parental consent where an unmarried minor faced with pregnancy or abortion, objects to parental notification. To provide for such

a requirement may very well impell her to resort to a "back-street" abortion thereby untroubled by legal requirements. Thus, bringing into effect the same evils, that are attendant to "back-street" abortion back. It is undisputable that, in such times of personal crisis, a woman's most valuable person cannot be her threatening parents.

2. The law should provide that:

(a) Where a live fetus results from an induced termination of pregnancy all appropriate efforts should be made for its survival. That should be the law, notwithstanding the woman's expectation and intention not to become a mother, since then the rights of the child should not be "submerged" in favour of her rights. This would act as a check against the legalization of abortion laws being abused.

(b) A given formula for estimating, the duration of pregnancy be followed. Possibly, it can be calculated - from the last day of the last normal mensturation of the pregnant woman. Since early abortions are safer than late ones, the late abortions should be availed more care and skills. Similarly, the late abortions be permitted on the basis of social or socio-economic indications, the preservation of the woman's life and health be given more priority.

(c) There should be some follow-up procedures and counselling services. Use of contraceptives and other more convenient facilities be encouraged.

(d) Where the foetus was conceived by unlawful intercourse such as rape or incest, abortion be allowed on the woman's request. Rape need not be proved, but only that the woman genuinely believes she has been outraged resulting in pregnancy.

(e) Where persons who owe legal duties to patients but have conscientious objections to participation in abortion procedures, such will be accorded immunities from legal liability. Similarly, provide penalty for those who coerce, or otherwise use unlawful means to compel a woman to undergo an abortion against her will. Though, this should not include services such as delivering meals or assisting in routine management, as post-operative care should be a general hospital service.

(f) The termination of a pregnancy other than due to natural occurrences by a person who is not, for instance, a registered medical practitioner be a punishable offence.

3. There be a provision that it is legal to abort if:

(a) the continuation of pregnancy would endanger, either the physical health of the woman, or would be a serious threat to the mental health of the woman, Therapeutic

(b) a serious risk exists that if the child were born it would suffer from a severe mental or physical handicap, or it would be a risk to the physical or mental health of the mother's other existing children. Eugenic

(c) Pregnancy is as a result of contraceptive failure. There should be a clear distinction in law between abortion and contraception. The fact is that legal definitions unavoidably, at times, interact with stages of biological progression.

4. The law should not provide for any approval committee, other than the medical practitioners' body. This would provide privacy, avoid humuliating and degrading procedures, while at the same time minimize society's costs of abortion.

In so doing, the necessary in satisfying these recommendations, we shall be removing abortion control from the realm of criminal law and taking it into the realm of welfare law, which includes fertility control and female health. To achieve this it is suggested that abortion should henceforth be administered by an independent statute of its own which would, among others, include the foregoing recommendations, post abortion counselling services at society's expense as well as provide for social-cultural constraints based on an individual's ethnicity.

Further, it is suggested that these recommendations should be contained in regulations other than in the substantive enactment. The fact is that our society is not stagnant, therefore as rational circumstances evolve, regulations can more easily be changed to reflect them than can statutes.

In conclusion, I wish to state that, to set artificially high standards for the delivery of overall health care, seems unrealistic and indefensible in creating a service genuinely intended to relieve harzards or oppressive pregnancies that our Kenyan society has decided to terminate.

This is because, the allocation of health care resources to achieve optimal social benefit and justice is and ought to be a continuing concern of our Kenyan Government and the national organizations representing health professionals.

CONCLUSION

Abortion being the termination of a pregnancy before the fetus has attained viability falls into two categories: induced and spontaneous.

Though at times the difference(s) between the two is impossible, our main concern is induced abortion, which is the type done willingly, despite the fact that it is still restricted by the laws of the land.

These restrictive laws of Kenya like a large part of the Kenyan legal system owe their origin to the colonial era. In England, the origin of Kenyan restrictive abortion laws, had abortion as an offence long before 1861. But in 1938 in R. v. Bourne, Macnaghten, J. after examining the rather unclarified law ruled in favour of therapeutic abortion as well as clarified the law. As an authoritative as well as persuasive decision, it did not go long before the events that followed it culminated in the English liberalising their laws in 1967.

Surprisingly, the Kenyan courts adopted the Bourne ruling in Mehar Singh Bansel v. R without later taking any judicial recognition of the English 1967 legislation.

As above, it is not a misnormer to say that the present abortion laws are responsible for untold suffering in Kenya. This is partly because non-surgical abortion is very common and rampant particularly among the youthful women. These restrictive provisions are so wide that they can net every act done relating to abortion, other than therapeutic and carries very severe punishment.

There is a need to legalize abortion in this country, as indications are that, the practice is on the increase and often result in health complications.

As the pro-abortion feelings gain momentum, the anti-abortionists have raised their unfounded fears, as a result of which a debate has become inevitable. The issue of rights has as a result taken prominence, as correctly observed that a woman has a right to do with her body as she wishes. The apparently unjust law should be corrected to reflect the contemporary society's aspirations as well as relax the uneasiness and suffering caused by the present restricting laws. Further, this is necessary in order to avoid the discrimination effected against the poor who cannot afford high fees as well as abortion trips abroad, failure of contraceptives, birth of unwanted child, mental disorders from such and to supplement the Family Planning Association of Kenya in its efforts to keep the population problem low.

The equality of sexes, which has been held by international organizations to be a basic human right, demands that women be left every possibility of determining whether they will bear the burdens of rearing children. Therefore, prohibition of abortion by qualified personnel is trully an unreasonable interference with women's freedom and equality.

The opposition of a right to abortion by a few people who argue that legalising abortion would be contrary to wananchi's attitude, only shows a lack of understanding of the contemporary Kenyan society changed values, which the law ought to reflect. Just as most people no longer think that sex intercourse by young unmarried persons to be immoral, so as the proper role of the church should strictly be seen to be in appealing to the conscience of the individual, rather than the coercive power of the state. Going further would be tantamount to equiting sin to offence unnecessarily.

Finally, the truth is that, no matter what we say or do about legalising abortion or not, our youth and others will continue falling into the accompaying pitfalls. The trauma of the abortion movement is that it is a species of mass momentum which no delicate

moral or legal arguments can halt. Thus, sincerely, let us not eat our words. Let us face the reality by legislating for abortion, and therefore reform our outdated, traditional, and colonial abortion prohibiting laws.

FOOTNOTES

1 Lenin, V.: Lecture delivered at the Sverdlov University on 11th July 1919, reported in Mutunga, W. Commercial Law and Development in Kenya, International Law Journal of Sociology, (1980), p. 6.

2 Green, T.: The Smugglers, Arrow Books Ltd. London, (1969) p. 5.

CHAPTER ONE
FOOTNOTES

* See the legal definition below.

1. Tietze, C. Induced Abortion - a World Review, A population Council Fact Book, London, 1981, 4th Ed. p.1.

2. See for instance, United States National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research, U.S.A., Behrman, 1976.

3. (1939) 1 K.B. 687, (1938) 3 All E.R. 615.

4. Davies, D.S. The Law of Abortion and Necessity, 2M.L.R. (1938) p. 126, at 131.

5. Cook, R.J. Development of Commonwealth Abortion Laws, I.C.L.Q. (1979) 28 p. 429.

6. Abortion Act 1967

7. (1959) E.A.C.A. 813

8. Id. p. 832.

9. Seidman, R.B. A Source Book of the Criminal Law of Africa: Cases, Statutes and Materials, Sweet & Maxwell, London, 1966, p. 324.

10. Id. p. 325.

11. For instance, the term "Mother Country" is a colonial misnormer used in reference to the imperialist country that had colonies by the colonial administrators and

others in the colonised lands.

12. Chapter 63, Laws of Kenya.

13. The Criminal Procedure Code, Chapter 75, Laws of Kenya, S.261.

14. Supra n. 12 S.158.

15 id. S. 159.

16 id. S.160

17 These statistical figures were taken by the writer of this thesis from Kenyatta National Hospital's records office. Since straight forward figures were not available a deductive method was used to arrive at the said figures.

18 See, for instance, Ogana, W. Evils of Abortion, Sunday Nation, Nairobi, January 22nd, 1984, p. 13,
True Love, Nairobi edition, June 1983, p.12;
Viva Magazine, Nairobi, Vol. 1 No. 6, June 1975, p. 26;
Daily Nation, Nairobi, January 3, 1984, p.7.

CHAPTER TWO
FOOTNOTES

1. Hansard (Parliamentary Debates), House of Commons. Vol.732, No. 60 of July 22 (1966), 1100.
   See also Abortion: Two Opposing Legal Philosophies (Rudy J. Gerber): The American Journal of Jurisprudence (1970) vol. 15; Notre Dame Law School.

2. Szasz, S.T. The Ethics of Abortion, Humanist, September/ October 1966.

3. Locke, J. Second Treatise, Ch. VI, p. 148

4. Glenn, D.G. Abortion and Inalienable Rights in Classical Liberalism, The American Journal of Jurisprudence Vol. 20 (1975) p. 62.

5. Bentham, J. Anarchical Fallacies, Works of Jeremy Bentham, John Bowning, ed., 11 vols. (New York: Russel & Russel, 1962), vol. 11, p. 501.

6. See For instance, in the United States of America, the death sentence as a criminal law's punitive measure is still retained by most states. Such exists in a society which in its preamble to its constitution and democratic foundation, unreservedly proclaims that: "We hold these truths to be self-evident, that all men are created equal,.... with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. -1 That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed."
   Supra n.4 pp.62.

7. Supra n.3 Ch. 11, pp.126.

8. Hobbes, T. Leviathan, Michael Oakeshott, ed., (Oxford: Blackwell, 1960), Part I, Ch.13 esp. pp.86-87.

9. Supra n.4 pp.66

10. Id. p. 66

11. See DAILY NATION, January 3rd, 1984, pp.7.

12. Supra n.3 pp. 123

13. id. Ch.I pp.122

15. Supra n.4 pp.70

16. Mill, J.S. The Subjection of Women (New York: E.P. Dutton, Inc. 1955), pp.234

17. Id.

18. See the next Chapter (III) for suggested legislation.

18B Dworkin, R.M. Philosophy of Law, A defence for Abortion, Oxford University Press, 1979 Ed. 112-127

19. See Sunday Nation, January 22, 1984. pp.13

20. Lee, T. Lee Osofsky's the Abortion Experience, International Status of Abortion Legalization, Oxford University Press, 1969, pp. 342.

21. Id.

22. Id. pp.345

23. See for instance The press reports in general, on the Murder of Monicah Njeri 1981 and Judy Kabura's, 1983 at Mombasa.

24. See U.N. Universal Declaration of Human Rights, Arti 2; (Intern. Covenant on Civil and Political Rights, Act. 3; Intern. Covenant on Economic Social and Cultural Rights, Act. 3; and Declaration on the Elimination of Discrimination against Women, Art. 1, 4, 6, 9 & 10) generally.

25. Poole, F.L. Law of Abortion in Ghana, University of Ghana Law Journal Vol. X, 1973, pp.110.

26. See generally the relevant legislations in Scandinavian, European socialist countries, several states of America, Japan. See Lee Supra no. 20 that "Complete freedom to obtain an abortion exists in the People's Republic of China, now that its women are accorded complete equality with men". pp. 347.

27. Smith, J.E. The Singapore Medical Association, The Politics of Family Planning in the third world, (George, Allen, Unwin Ltd.) 1973, pp.247.
In general, the members of the Association expressed similar views, while at the same time agreeing that there was need for reform of the ban on abortion.

28. Supra n. 18B pp.114-115.

29. Supra NO. 19.

30. Frankfurter, J. speaking for the majority in Bartkus v. Illinois 359 U.S. 121, 128 (1959).

31. Hall, Readings in Jurisprudence, 208, (1938), an extract from Duguit, 21 Col. Law Review 17 (1921).

32. See for instance K. Horton's views, International and Comparative Law Quarterly, vol. 28, 1979, pp.294-296. Also id, Abortion Law REform in the German Federal Republic pp.294.

33. Gerber, R. Two opposing Legal Philosophies, The American Journal of Jurisprudence (1970) vol. 15, Notre Dame Law School pp.5.

34. Id. pp.6

35. The Bible, RSVP Exodus 23:7; cf. 20:13, Deuteronomy 5:17, Genesis 9:6, Jeremiah 7:6 and 22:3. 1952 ed.

36. See Newsweek Magazine, October 17, 1983 pp. 31. Edward Kennedy, once a candidate for the American Democratic party Presidential nomination, was speaking to 5,000 students and townsfolk at Jerry Falwell's Liberty Baptist College in Lynchburg, va, U.S.A.

37. Bradley, D.C. A woman's Right to Choose, Modern Law Review, vol. 41, 1978 pp.365.

38. Hart, H.L.A. Positivism and the Separation of Law from Morals, 71 Harv. L.R. No. 4 (1958) pp. 593; cf. Fuller, L.L., A Reply to Professor Hart, id. pp. 630.

39. Supra n.33 pp.21

40. See Chapter III of this LL.B. Thesis.

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