

**IMPLEMENTING ARTICLE 26 (4) OF THE CONSTITUTION OF
KENYA; REGULATING ABORTION**

BY:

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DECLARATION

I, Mwai Samuel Maina do declare that this is my original work and has not been submitted for any award to any institution or anywhere else before. The sources I have used or quoted have been indicated and acknowledged by references.

Signed.....

Date

This thesis has been submitted with the approval of my university supervisor

Signed.....

Date

Dr. Agnes Meroka

DEDICATION

This thesis is dedicated to all those who have lost their lives in the process of abortion.

ACKNOWLEDGEMENT

I acknowledge the almighty God for the far He has brought me in life and particularly in my course.

I would like to convey my special gratitude to my supervisor Dr. Agnes Meroka for her wise counsel and guidance as I developed every aspect of this thesis. She was very instrumental in developing key areas and spent considerable time to correct and shape this piece of work. I am also grateful to all my lecturers at University of Nairobi for their academic and moral support in my course.

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ABSTRACT

This thesis sought to address implementation of Article 26(4) of the Constitution of Kenya which qualifies abortion on certain grounds. The objective was to determine the legal and regulatory considerations on Article 26(4) and offer recommendation on necessary legislation. The methodology applied qualitative method through review of documents and other secondary sources. The study revealed that abortion in Kenya is now a human right issue for regulation as opposed to restriction. The fact that most jurisdictions allow abortion in cases of saving life or where the life and health of the pregnant woman is in danger is an indicator of recognition of pregnant women human rights. The study concludes on the need on legislation to regulate Article 26(4) on qualification to abortion without limiting the right to life of a child. The study recommends that a legislation, policy and administrative measures in securing reproductive health care as a constitutional guarantee. Further social economic factors must be addressed to aid in reducing cases of unsafe abortion. Parliament should legislate on a comprehensive law on grounds that are permissible to qualify abortion in Kenya. The law should address the balance between the rights of the mother and that of the unborn child. The study recommended measures that must be taken speedily and efficiently in implementation of the Article in line with other provisions, more so in regard to the promotion, protection, respect for and fulfilment of human rights.

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Roe vs. Wade United States Supreme Court, 410 U.S 113(1973)

Winnipeg Child and Family Services Vs. G (D.F) Canada SC

LIST OF ACRONYMS AND ABBREVIATIONS

UN:	United Nations
CTPA:	Choice on Termination of Pregnancy Act
KNHREC:	Kenya National Human Rights and Equality Commission
WHO:	World Health Organisation
CEDAW:	Convention on Elimination of Discrimination against Women
CEHURD:	Center for Health, Human Rights and Development
ICPD:	International Conference on Population and Development
MPBD:	Medical Practitioners and Dentists' Board

CHAPTER ONE

GENERAL INTRODUCTION

1.0 Introduction to the Study

There has been a controversial issue worldwide concerning whether abortion should be legalized or not. Different actors have supported their position in different ways. Abortion can be said to be a process that involves challenging moral, political, religious, legal, medical and psychological spheres.¹ Abortion is defined by WHO as expulsion of dead foetus weighing less than 500g.² WHO divides abortion into; spontaneous abortion which occurs without outside intervention and induced abortion which occurs with outside intervention. It further refers unsafe abortion as a procedure for terminating unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking the minimal medical standards or both.³ According to the Kenyan laws, life starts at conception.⁴ Therefore abortion in Kenya means termination of pregnancy after conception and before birth thereby limiting the WHO definition. It is noteworthy however that the Constitution qualifies the act of abortion on certain grounds as discussed later in this chapter. According to WHO,

“Unsafe abortion mainly endangers women in developing countries where abortion is highly restricted by law and countries where, although legally permitted, safe abortion is not easily accessible.”⁵

Many answers have been posed for and against the practice. There are those who support abortion on human right grounds among other perspectives. They claim that it is one of the constituent of right to liberty. Others, who oppose the practice some also do so on human rights ground claiming that life begins at conception. They claim that abortion is violation of unborn child right to life notwithstanding any right that the mother might be having.

¹ Peter De Cruz, *Medical Law; Nutshells* (2nd edition Sweet & Maxwell) pp 137.

² World Health Organisation, *Safe Abortion: Technical and Policy Guidance for Health Systems* (World Health Organisation Geneva 2003).

³ World Health Organisation, *Unsafe Abortion; Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008, 2011*: (World Health Organisation Geneva 2011).

⁴ Constitution of Kenya, 2010, Article 26 (2).

⁵ World Health Organization. *The Prevention and Management of Unsafe Abortion. Report of a Technical Working*

Peter state that, Professor Dworkin argument in his work “Life’s Dominion”, is that; debate about abortion should be about holiness of life and not about human rights and any attempt to carry it out is an offence against sanctity of individual life.⁶

1.1 Background of the Study

In the world, each and every country, have particular cultural, legal, economic and health services context.⁷ These in turn influences women’s ability to avoid unintended pregnancy and mediates their response if they experience one. A nation’s legal framework majorly defines how this is to be.⁸ Further the Penal Code may severely restrict or allow abortions and in turn affecting its performance.⁹ In restrictive cultures the perpetrators are punished irrespective of the factors contributing to it unless expressly under the exceptions. In some other jurisdictions the issue of qualifying abortion is entrenched expressly or impliedly within the bill of rights in the supreme law.

Like any other political debate, the 2010 Kenyan Constitution came into force after being passed at a referendum which was hotly contested. There were those who were supporting the enactment of the Constitution and there was a group that criticized it. Those supporting the Constitution had a number of provisions justifying their support; notable was the platform of constitutional change, reforms and the establishment of equitable system and distribution of power.¹⁰ Those who were against the enactment of the Constitution had specific provisions, Article 26 (4) being one of the most controversial together with the inclusion of Kadhi courts in the Constitution. Religious groups and lobby groups opposed to any provision permitting abortion claiming that the provision would portray Kenya as an immoral state, hence encompassing a socially destructive society.¹¹ The qualification to abortion in the Constitution caused great anger in the religious majority and vowed to vote against the whole Constitution notwithstanding its merit. The Constitution was however passed by majority votes with Article

⁶ Peter De Cruz, pp 138.

⁷ Kahn K. et al, “WHO Analysis Causes of Maternal Death: A Systematic” (2006) Lancet 367, 1066-1074.

⁸ Rebecca J. Cook & Bernard M. Dickens, "Abortion Laws in Commonwealth Countries 13 (1979).

⁹ Berly Holmes, “Human Rights-Another Look at Abortion” (1990) Children by Choice Association.

¹⁰ Murray Christina “Kenya’s 2010 Constitution.” Neue Folge Band Jahrbuch des Offentlichen Rechts 61 (2013) 747-788.

¹¹ Ibid.

26 prohibiting abortion with qualification. The provision also provides that the life of a person begins at conception.¹²

The Article provides that abortion may be permitted on medical grounds or under any other provision of law. It states,

“Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other law.”¹³

This has been interpreted injudiciously (my opinion) to mean that the provision can be invoked as a good ground for enacting a law allowing abortion even in cases where the life or health of a mother is not at risk. Many pro-life argue that this is a deviation from the role of law in society which is supposed to protect lives.¹⁴

It is argued, according to doctors’ opinions worldwide, that all pregnant mothers are at risk.¹⁵ According to World Health Organization (WHO), health is defined as a state of spiritual, physical, social, emotional, mental, psychological well being of an individual but not merely lack of disease or deformity.¹⁶ Therefore pregnancy predispose a pregnant mother to so many risk, thus pregnancy by itself is a risk.

Further despite the fact that abortion in Kenya had been prohibited without qualification in the 1969 Constitution, it is reported that abortion as a practice has been in existence at private and secretive levels.¹⁷ The Penal Code also prohibits abortion.¹⁸ However it qualifies it on the grounds where life of the mother is at risk.¹⁹ The Parliament of Kenya is attempting to legislate on termination of pregnancy under the Reproductive Health Care Bill 2014. However the Bill does not adequately address the issue of qualifying abortion as contemplated by Article 26(4).

¹² Constitution of Kenya, 2010, Article 26 (2).

¹³ Constitution of Kenya, 2010 , Article 26 (4).

¹⁴ Kant Immanuel, "The Moral Law, trans." (*HJ Paton, London: Hutchinson* 1948).

¹⁵ Dodds S & Ankeny, “*Big Picture Bioethics: Developing Democratic Policy in Contested Domains ?*”(2016).

O'Brien E, Hayes & Carpenter, *The Politics of Sex Trafficking: A Moral Geography* (2013).

¹⁶ World Health Organization definition of health. Available at WHO website < <http://www.who.int/en/>> accessed on 12th June 2014.

¹⁷ World Health Organization Reports of 2005 and 2007 on maternal mortality. Available at < <http://www.sciencedirect.com/science/article/pii/S0140673607615724>> accessed on 14th July 2015.

¹⁸ Penal Code Chapter 63 laws of Kenya Section 158.

¹⁹ Penal Code Chapter 63 laws of Kenya Section 240.

The bill is mainly reiterating the provisions of the Constitution on termination of pregnancy without broader explanation. The Article contemplates that there are permissible grounds for qualifying abortion under human rights.

1.2 Statement of the Problem

The 1969 Constitution of Kenya prohibited abortion thereby providing a very restrictive regime. The only express qualification to abortion then was/is as provided in the Penal Code. The Code provides that abortion may be permitted to save the life of the mother if exercised in good faith. The Constitution of Kenya, 2010 has however changed this position. Article 26(4) of the Constitution of Kenya prohibits abortion but qualifies it under certain grounds. The grounds mentioned are in case of emergency treatment and when the life or health of the mother is at risk. The Article further stipulates that other grounds may be provided by Parliament. The intention of the Article is to safeguard, protect and promote human rights. For more than 6 years since the promulgation of the Constitution the parliament is yet to enact a legislation to actualize the grounds, procedure and circumstances contemplated by the article. Human rights and freedoms as provided in the Constitution cannot be enjoyed in absence of laws and regulations to enhance their implementation. As contemplated by the Constitution a woman has a right to terminate pregnancy on the grounds specified or any other that may be legislated. Sadly no such measures have been taken by parliament. The only legislation in place in relation to qualification to abortion in Kenya is the Penal Code. However the Penal Code has not been reviewed in regard to provisions of abortion to be in line with provisions of 2010 Constitution more so Article 26 (4). Further, the Reproductive Health Care Bill warrants a mention as it briefly proposes legal termination of pregnancy. The Bill however does not explain how abortion is to be regulated further than as provided in the Constitution. However, these legislations do not provide comprehensive provisions to regulate legal termination of pregnancy despite the practice going on in the country. Simply put, abortion has no specific guiding law in Kenya. It is however becoming a reality by the day. Women have been doing it quietly in a terrain that has no legislative machinery to facilitate legal termination of pregnancy. The Reproductive Health Care Bill 2014 if passed by parliament is also not comprehensive in legalizing and regulating abortion

in Kenya.²⁰ The Bill mainly reiterates Article 26(4) of the Constitution with an addition of consultation requirement between the pregnant woman and the medical practitioner. The Bill also allows a minor parent, guardian, or any other person with a parental responsibility in case the pregnant woman is a minor.

1.3 Research Questions

1. Is abortion a right in Kenya in light of Article 26(4) of the Constitution?
2. Why should abortion be regulated and not criminalized?
3. How can Article 26(4) on qualification to abortion be actualised?

1.4 Objective of the Study

1. To determine whether abortion in Kenya is a right
2. To examine why abortion in Kenya should be regulated and not criminalised
3. To determine actualisation of Article 26(4) on qualification to abortion

1.5 Theoretical Framework

In order to develop an in-depth understanding of abortion and issues surrounding it like on why and how to regulate abortion, the researcher discusses theories of regulating abortion as guided by the research questions and objectives of the study. The concept of abortion, regulation and its qualification enhance the complexity of reality and defines this research study. This study further aimed at understanding whether abortion in Kenya is a right. The study therefore examines the theories of human rights relating to abortion and theories justifying qualification to abortion. Many theories have been discussed in justifying or prohibiting abortion. However as this study considers implementation of Article 26(4) of the Constitution of Kenya; on regulating abortion, the study will limit itself to three theories. That is, the theory of natural rights, liberal feminism theory and social justice. However this section cursorily addresses how human rights come into existence and how they are recognized. This is to help in understanding the attendant contemporary issues of abortion and human rights.

²⁰ Reproductive Health Care Bill 2014, Part v.

Human rights are said to be rights and freedoms that individuals and groups have by virtue of being human.²¹ According to Cook human rights find its foundations in the struggle to recognize the core values for human existence.²² Much of what has come to be understood as human rights in the world today may be traced to the Universal Declaration of Human Rights (UDHR), 1948 as a result of massive abuses of human dignity, life and properties in the world wars. Since the adoption of UDHR, rights and freedoms have been codified in numerous other instruments universally, regionally and in domestic spheres.²³ However rights and freedoms are as old as human being. Scholars have tried to explain human rights in the context of religion, natural law, positivism, Marxism sociological approach among others.²⁴ Nevertheless the proponents of positivism have been more vocal when it comes to protection, promotion and fulfilment of rights.²⁵ They argue that realization of rights is attached to enactments of a system of law with sanctions attached.²⁶ Connections have been made between women's rights legislation and reproductive rights.²⁷ According to Beltran there is an increased acceptance of abortion through international declarations and interpretations as a human rights issue.²⁸

Jeremy Bentham is a key proponent of enactment of laws to legitimize rights.²⁹ He stated that rights are created by law and contended that nature creates imaginary rights.³⁰ With this, states and their institutions have an obligation to enact and enforce legislation on human rights. According to Article 2 of the International Covenant on Civil and Political Rights, states parties are required to respect and ensure enforcement or compliance with all the rights recognized in the Covenant and to take the necessary steps in giving effect to those rights.³¹ Similarly International Covenant on Economic, Social and Cultural Rights 1966, states are obliged to take

²¹ Donnelly J., *International Human Rights* (Cornell University Press 2010).

²² Cook J. (Ed.), *Human Rights of Women: National and International Perspectives*. (University of Pennsylvania Press 2012).

²³ Ngwena G., "Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa" (2010) 32 *Human Rights Quarterly* 783, 787-797.

²⁴ Donnelly (2010).

²⁵ Donnelly (2010).

²⁶ Bentham J., *A Fragment on Government*. (The Law book Exchange, Ltd. 2001).

²⁷ Reichenbach L., *The Global Reproductive Health And Rights Agenda: Opportunities and Challenges for the Future*. In: Reichenbach L, Roseman MJ (eds) *Reproductive Health and Human Rights: The Way Forward*. (Philadelphia: University of Pennsylvania Press 2009) pp. 24-25.

²⁸ Beltrán Puga , "Paradigmatic Changes in Gender Justice: The Advancement of Reproductive Rights in International Human Rights Law" (2012) 3 *Creighton International and Comparative Law Journal*, pp 150-151.

²⁹ Bentham (2001).

³⁰ Waldron J., *"The Dignity of Legislation"* (1999) (Vol. 2). Cambridge University Press.

³¹ International Covenant on Civil and Political Rights, 1966.

steps with a view to achieving progressively the full realization of the rights by all appropriate means as recognized in the Covenant.

According to Merry, legislations on human rights in general provide a context in which human rights are implemented and interpreted.³² Rebouche argues that human rights are formally promoted and protected through international and domestic laws.³³ He holds that this notion was strengthened by adoption of the Universal Declaration of Human Rights. Donnelly claims that human rights law places an obligation on the state to act in a particular way and also prohibits the state from engaging in specified acts and activities.³⁴

Human rights are characterized to be natural, inherent, inalienable, universal, interdependent and indivisible. However some of these characteristics are debatable as different critics have provided different understandings. Important to this study are the characteristics of human rights being inalienable, indivisible and interdependent. According to Rebouche inalienability means that rights cannot be taken away from human unless under clearly defined legal circumstances.³⁵ Indivisibility holds that each and every right is important and they depend on each other hence they are mutually reinforcing.³⁶ In the case of *Lakshmi Dhikta & Others v. Government of Nepal*,³⁷ it was stated that termination of pregnancy is part of reproductive rights which cannot be separated from women. Court held that dehumanizing women right or health negatively affects the woman's right thereby denying her life of dignity and self will.

The theory of natural law will guide the study on whether, why and when abortion may be permissible. It will also answer the question whether a woman has any right, morally or otherwise to terminate the life of unborn child. On the other hand, liberal feminism will consider the basis of a woman exercising the right to terminate pregnancy. Social justice theory guides this study by considering factors that qualify abortion. It discusses situations in the society that predispose women to unwanted pregnancy coupled with other factors. This ultimately helps in developing grounds in which termination of pregnancy may be permitted. The natural rights

³² Merry S., (2006) "Human Rights and Transnational Culture: Regulating Gender Violence through Global Law" (2006) 25 Osgoode Hall Law Journal pg 55.

³³ Rebouché R., "Abortion Rights as Human Rights." (2016) 25 (6) *Social & Legal Studies*, 765-782.

³⁴ Donnelly J., *Universal Human Rights in Theory and Practice*. (Cornell University Press 2013).

³⁵ Rebouché R., (2016).

³⁶ Donnelly J., (2013).

³⁷ *Lakshmi Dhikta & Others v Government of Nepal, Writ No. 0757, Jestha, 2066 (2009) (Supreme Court of Nepal): 6-8.*

theory mainly tries to protect the life of the unborn child. It holds that human beings are guided by human nature based on morality. The liberal feminism builds on the choice and right of a pregnant woman to terminate unwanted pregnancy. The natural rights theory and the liberal feminism varies in that liberal feminism holds on the freedom of a woman to choose whereas natural rights theory is of the view that it is wrong for a human being to disregard what is morally acceptable. In relation to this study liberal feminism is of the view that a woman has a right to terminate unwanted pregnancy. Chambers states that liberal feminism advocates for repeal of laws criminalizing women interest on patriarchal and moralistic grounds.³⁸ She argues that such laws are not in line with liberal feminism as they limit women options which should be guided by their senses and values. To the contrary, the natural rights theorists' advocates for protection of unborn child. However the liberal feminism and natural rights theories strengthen each other when it comes to saving the life of the mother. These theories guides the study in developing the circumstances under which abortion occur and thereby enable developing of recommendations on implementing Article 26(4).

1.5.1 Natural Law Theory

Natural law theory is defined as a legal theory that recognizes law and morality to be deeply connected and considered to be inherent in nature and has universal application in determining whether human conduct is right or wrong.³⁹ Natural law theorists hold that human laws are defined by morality, as opposed to an authority figure, like a king or a government.⁴⁰ Therefore, we humans are guided by our human nature to figure out what the laws are, and to act in conformity with those laws.⁴¹ However, according to Sen an essential role of a government is to protect the rights of an individual.⁴² Nussbaum argues that the government is not there to grant rights and freedoms but to protect and safeguard rights and liberties that individuals already have.⁴³ Donnelly claims that as the state does not have a role in creation of human rights, the

³⁸ Chambers Clare, "Masculine Domination, Radical Feminism and Change" (2005) in *Feminist Theory* vol. 6 no. 3.

³⁹ Kant Immanuel, "The Moral Law, trans." (*HJ Paton, London: Hutchinson* 1948).

⁴⁰ John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press 1980).

⁴¹ Black's Law Dictionary (accessed at <http://thelawdictionary.org/natural/> on 4th February 2016), The Stanford Encyclopedia of philosophy and the free dictionary accessed at <http://www.thefreedictionary.com/Natural/Law/Theory> on 3rd February 2016.

⁴² Sen Amartya, "Well-Being, Agency and Freedom: The Dewey Lectures 1984." (1985) 82 (4) *The Journal of Philosophy*, 169-221.

⁴³ Nussbaum M. *Hiding from Humanity: Disgust, Shame, And The Law*. (Princeton University Press 2009).

protection and enforcement of human rights mainly relies on the functional organ of the state in which it expresses its will.⁴⁴

Natural law theory states, one may never directly intend to kill an innocent human being.⁴⁵ According to natural law theorists, it is morally unacceptable and under no circumstances a woman who has a right to life terminate the right to life of the unborn child so that she can live.⁴⁶ The most widely discussed in this, is the question about the appropriateness of abortion or about laws against abortion based on a natural rights theory. That is to say, there are rights of mother (right to life and liberty) and that of the unborn child (right to life). In modern legal systems, abortion has been qualified in different grounds especially if it involves risk to life and health of the mother.⁴⁷ As Peter argues, abortion in such cases is qualified even in the most restrictive countries.⁴⁸ This is meant to prevent grave permanent injury to the physical or mental health of a pregnant woman. Shawn writes that abortion can be performed in order to save the life of the mother.⁴⁹

Some proponents argue that the life of the mother outweighs the life of the unborn child, mainly because it is not known whether the child will be born alive and it is unfair to let a pregnant mother die when she can be saved. This is widely upheld as a good ground for permitting abortion. According to Peter, the approach in most commonwealth countries is treating foetus as having no right.⁵⁰ However Shawn has a different view as he contends that abortion is all about value that should be attached to human life.⁵¹ How then is it that our Constitution provides that life of a person begins at conception and then qualify abortion? Does it mean that there are some rights which are more valuable than others? As Shawn argues abortion discussion involves conflicts between the moral interests of unborn child and those of the mother. He further contends that for a foetus to have rights, he/she must have moral value or status, an aspect which is controversial in bioethics.⁵² These rights will conflict at times and in such cases, as natural

⁴⁴ Donnelly J., *Universal Human Rights in Theory and Practice*. (Cornell University Press 2013).

⁴⁵ Omony John Paul; *Key Issues in Jurisprudence* (1st edition, 2005), referring to natural law propositions as argued by Aquinas and Cicero.

⁴⁶ <<http://www.catholic.culture.org/culture/library/view>> accessed on 17 November 2012.

⁴⁷ The discussion on abortion qualification in other jurisdictions is in Chapter Three of this thesis.

⁴⁸ Peter pp 222-223.

⁴⁹ Shawn, Pattinson; *Medical Law and Ethics*; (Sweet & Maxwell, 2006) pp 209-211.

⁵⁰ Peter pp 152.

⁵¹ Shawn, (2006) p 209.

⁵² Shawn, (2006) p 210.

theorists contends; the lower right must give way to the higher right. When right to life of a foetus, and mother's right to liberty conflict, liberty must give way to life, because life is the ultimate right. The right to life is the right to all other rights; if you don't have life, you cannot enjoy other rights as human rights are only available to humans.⁵³ Hall and other scholars build upon the centrality of health, life, and liberty.⁵⁴ Hall argues that securing health care is a constitutional guarantee.⁵⁵

Amidst all these claims, natural law human rights approach presupposes that there are certain moral truths that apply to all people, regardless of any other basis or factor. According to Aquinas et al people are under an obligation to obey natural law.⁵⁶ He proposed that other laws made by humans should be made in such a way that they do not conflict with natural law.⁵⁷ Donnelly holds that natural law theory has acquired a secular dimension with time to explaining human rights in reference to the nature of man.⁵⁸ Ashcraft claims that John Locke had argued that man was by nature free and existed freely.⁵⁹ Sen observed that in a state of nature, everyone has the right to everything and there are no limits to the right of natural liberty.⁶⁰ Natural law theory can therefore be applied in justifying resistance to unjust laws. However, according to Nussbaum without an adequate legal framework on rights, a state cannot effectively protect rights and liberties of its citizens.⁶¹ Codification of human rights is a continuous process for their enjoyment as some rights are not specifically expressed in our laws.

1.5.2 Liberal Feminism Theory

Feminism can be defined as a social movement and an ideology in support of the idea that a larger share of scarce resources should be allocated to women.⁶² According to Oxfords English

⁵³ www.news.bbc.co.uk.1994. gunman kills two women at abortion clinic and BBC 2003e accessed on 17th November 2012.

⁵⁴ Hall M. and others, *Health Care Law and Ethics* (1998), pp 98

⁵⁵ Hall, (1998) pp 96 -98.

⁵⁶ Aquinas T., Regan R. & Baumgarth W., *On Law, Morality, and Politics*. (Hackett Publishing 2003).

⁵⁷ Aquinas, (2003).

⁵⁸ Donnelly J., *Universal Human Rights in Theory and Practice*. (Cornell University Press 2013).

⁵⁹ Ashcraft R., "Locke's State of Nature: Historical Fact or Moral Fiction?" (1968) 62 (03) *American Political Science Review*, 898-915.

⁶⁰ Sen Amartya, "Human Rights and Capabilities" (2005) 6 (2) *Journal of Human Development*, 151-166.

⁶¹ Nussbaum M., *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press 2009).

⁶² Cook J. (Ed.), *Human Rights of Women: National and International Perspectives*. (University of Pennsylvania Press 2012).

Dictionary, feminism is the advocacy of women rights based on the theory of equality of sexes.⁶³ Feminist believe that women should enjoy the same rights in society as men and that they should share equity in society's opportunities. The society should not control how or what goes on in the woman body.

Within feminism there are a number of approaches in fighting for women rights. Notable is the liberal feminism theory. Liberal feminist hold that democratic states ensure freedom for women through law. Liberal feminist posits that women should not be tied by or subjected to patriarchal paternalistic and moralistic laws. The argument here is that such laws push women to act or behave into socially preferred ways of life. Their choice to choose what is good for them is therefore limited. This thereby denies them their sense of their self-interest and values.⁶⁴ According to Nussbaum referring to liberal feminist proposition, this can be remedied by creation of systems and institutions that promote women's autonomy.⁶⁵ They advocate for social change through construction of legislation and regulation. Liberal feminist claim that women needs and interests are only legitimated by provision of a basic conditions in which they live. Liberal feminist claim that women needs and interest are only legitimated by provision of basic conditions in which they live.

This theory of liberal feminism guides this study as majority of those who advocate for qualification of abortion do so on the basis of equalizing the rights of women to those of men by giving a woman choice on her body. According to Claire Paromey, 1973 was the year that awakened the fight for gender rights.⁶⁶ She argues that liberal feminists acquired vigour through a judgment made by the US Supreme Court in the famous case of *Roe vs. Wade*.⁶⁷ The verdict of the court found on the constitutional right to privacy,

"...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁶⁸

⁶³ Oxfords Law Dictionary, Oxford University Press 2nd edition.

⁶⁴ Chambers Clare, "Masculine Domination, Radical Feminism and Change" (2005) vol 6 no. 3 in *Feminist Theory*.

⁶⁵ Nussbaum M., (2009).

⁶⁶ Claire Paromey, *Abortion and Women's Rights: Unification of Pro-Life and Pro-Choice through Feminism* (1975)

⁶⁷ United States Supreme Court, 410 U.S 113(1973).

⁶⁸ Ibid.

This is argued on the basis that as the society does not control what goes on in a man's body, it should equally allow a woman to decide on her body as a way of equalizing her with man. Epstein, states that the differences brought about by abortion outcomes between women and men can better be understood by differences in the preferences of women and men but not by violence against women and sex discrimination.⁶⁹ They hold that legislation and regulations should not violate a woman's individual rights and freedoms.⁷⁰ Feminism discussion over abortion is not mainly on the moral question of abortion, or the integrity issues of people who support or are against abortion; but it is about the position of abortion within the cultural perspective. They take this discussion to claim that all people are created equally and should be treated equally. Liberal feminism claims that no one should be denied equality of opportunity because of gender.⁷¹

Accordingly, liberal feminists have tried to push for social change by enacting legislations and regulations that are not discriminatory. According to Tabitha Griffith,⁷² her argument is grounded on the notion of women having innate worth, inalienable rights, and valuable ideas that can be geared towards development of the society.⁷³ Feminists have tried to advocate for equality of both men and women with equal rights and respect in all spheres in the society, for both and equal respect. According to Epstein, the theory behind liberal feminism requires individuals to use their own efforts and available measures in enhancing equality of all men in the eyes of the law, in all spheres of life.⁷⁴ This theory advocates for activities and measures of empowering women and raising their issues. This is illustrated by participants in the Women's Suffrage Parade of 1913 in US that took a liberal feminist approach by using their democratic right to protest to promote women's rights. For example in 1920 after wide protests by women activist, the U.S. Congress ratified the 19th Amendment to the Constitution, which recognised the right to vote by every adult person including women. For them, they do not consider the right to terminate pregnancy on the basis of socio-economic perspective but rather than on the basis of equality.

⁶⁹ Epstein Richard, 'Liberty and Feminism.' In McElroy (2002): 30–42.

⁷⁰ Young Iris, "*Pregnant Embodiment.*" *Body and Flesh: A Philosophical Reader.* Ed. Donn Welton. Malden (Massachusetts: Blackwell Publishers Ltd, 1998) 274-290.

⁷¹ Young (1998).

⁷² Tabitha Griffith (2014).

⁷³ <<https://www.opendemocracy.net/5050/saoyo-tabitha-griffith/why-are-women-in-kenya-still-dying-from-unsafe-abortion>> accessed on 23rd January 2016.

⁷⁴ Epstein (2002).

Paromey argues that abortion should be considered within the social, economic and cultural reasons in a given society.⁷⁵ She reinforces this by stating that without the right to choose what is rightful to a woman; women are restricted into their 'patriarchal' role as mothers and home keepers. Paromey finds that according women an opportunity to choose what is rightful enables them to bypass the greater issues of patriarchy thereby enabling them to be productive and capable mothers within our society.⁷⁶ According to Peterson a woman who is incapable of upbringing a child would choose to terminate a pregnancy.⁷⁷ Considering it in this perspective it may be said that social reasons like fear of upbringing a child single handedly can validate the right of a woman to terminate pregnancy.

Such feminists argue that the state has a negative obligation not to interfere with what goes on the life of a woman.⁷⁸ They further argue that the state should protect women from traditions and cultures that are inconsistent with the above stated women rights through legislation. Thus, the state should not legislate on laws that may violate such rights of women. Hall contends that recognition of a woman rights to an abortion implicitly encompasses the right to be free of state restriction on medical decision making. He compares health care with other basic need such as food and shelter that no one should be denied.⁷⁹ As Mason argues, the health of a woman is at risk if she is in constant need of terminating pregnancy.⁸⁰ More important is that the mental health of a woman carrying unwanted foetus will suffer more if she is forced either by law or other circumstances to carry it to terms. Holmes posits that abortion by itself in the society have been perceived as a private issue.⁸¹ It has not widely been recognized as a human rights issue for women. The liberal feminists' claims that pregnant women would overwhelm choose an abortion process. This is further explained by Hazel Catherine Lakin arguing in a feminist perspective that abortion should be permitted as it constitutes a woman's rights to information and to choice.⁸² Liberal feminists argue that abortion as in the case of any other right should be available to all women. They contend further that allowing abortion only on medical ground is a form of

⁷⁵ Paromey, (1977).

⁷⁶ Paromey, (1977).

⁷⁷ Peter De Croc; *Medical Law*; Nutshells pp 137.

⁷⁸ Young (1998)

⁷⁹ Hall (1998) pp 96 -98.

⁸⁰ Mason J., *Medico- Legal Aspects of Reproduction and Parenthood* (Dartmouth Publishing Company Limited 1990) 145.

⁸¹ Berly Holmes, *Human Rights-Another Look at Abortion*.

⁸² Hazel Catherine Lakin.

discrimination on one part of those who would wish not to carry foetus to terms but are medically fit.

Growing human rights pressure and concerns of maternal death has led states to loosen their strictness on the abortion issue. Some jurisdictions have allowed termination of pregnancy under feminist theory, claiming that, it is a woman issue to decide on her body.⁸³ To them as Holmes argues, it is a woman's concern to decide on issues affecting her body and her personality as a person and not the society. Like other rights empowering women emancipation, they claim that if a woman can be tied by laws on carrying her foetus without her wish, this will amount to discrimination of certain aspect of women as a gender. Sommers concur, giving an example of education system that discriminates girls and denies them education opportunities that are equal to that of boys as disproportionate.⁸⁴

On the other hand critics claim that freedom is not absolute and is of limited value. Nussbaum argues that some women may choose to limit and disadvantage social arrangements even in cases where enabling conditions have been created.⁸⁵ Nussbaum further argues that some people opt for preferences due to limits placed or in some cases for less than their entitled share if the attractive options are limited.⁸⁶ Meyers holds that a woman may still choose to undergo clitorrectomy in situations where an enabling condition is created by law.⁸⁷ Nevertheless, Mason argues as a human right issues should not simply only be argued on the feminist position. It should further be understood in the sociology and public interest issue.

1.5.3 Social Justice Theory

Social justice holds that states have an obligation to enhance equality and non-discrimination in the society.⁸⁸ Social justice as a theory is not basically advocating for equality in the society on women rights. However, this social justice may also be understood in the context of right to sex and gender equality. According to Dixon R & Nussbaum, in a just society all people are entitled

⁸³ The Canada legal system has allowed abortion basing on the rights of a woman to exercise her liberty on whether to carry a foetus to term or not.

⁸⁴ Sommers, (2000) 20–23, 178

⁸⁵ Nussbaum M., *Hiding from Humanity: Disgust, Shame, and the Law*. (Princeton University Press 2009).

⁸⁶ Nussbaum M., (2009).

⁸⁷ Meyers D., *Gender in the Mirror: Cultural Images and Women's Agency* (New York: Oxford 2002).

⁸⁸ Beltrán Puga, (2012).

to common humanity and equitable treatment.⁸⁹ Beltran argues that women vulnerability in the society predisposes them to many factors that may lead to unwanted pregnancy.⁹⁰ These may include barriers rooted on the social, economic, cultural and legal factors. Accordingly, human rights defenders calls for a just society and respect for women. According to Guttmacher Institute states are obligated not to enact laws that criminalize acts without considerations of social factors prevailing in the society.⁹¹ Dixon & Nussbaum claims that abortion laws should aim at regulating the practice as opposed to restricting women on social grounds.⁹² Beltran holds that state should enhance policy and regulations that enhance access to liberties, rights, opportunities which includes health services.⁹³ Further Rawls claims that state should go further to allocate fair share of benefits to the disadvantaged or vulnerable members of the society. Such regulations should put into consideration the biological differences between men and women in reproduction.

It is becoming increasingly difficult to rely on social justice solely without addressing reproductive rights. Therefore Ramcharan contends that reproductive rights being part of women rights should be addressed as reproductive justice.⁹⁴ This justice is said to be an approach linking sexuality, health and human rights to social justice.⁹⁵ Cook holds that reproductive rights of a woman are an integral part of the community.⁹⁶ As such the conditions placed must be just and favourable. Soohoo applies social justice theory to fight injustices that are created to devalue and dehumanize women as a group.⁹⁷ However this notion has been criticized by pro-life arguing that allowing termination of pregnancy based on social justice also denies an unborn child right to life.⁹⁸

⁸⁹ Dixon R & Nussbaum M., “Abortion, Dignity and A Capabilities Approach” In: Baines B, Barak-Erez D, Kahana T (eds) *Feminist Constitutionalism* (Global Perspectives. New York: Cambridge University Press 2012), pp. 64–82.

⁹⁰ Beltrán Puga, (2012) 148–162.

⁹¹ Guttmacher Institute, *Making Abortion Services Accessible in the Wake of Legal Reforms: A Framework and Six Case Studies*. (New York: Guttmacher Institute 2012) pp. 1–49.

⁹² Dixon R & Nussbaum M (2012) pp. 64–82.

⁹³ Beltrán Puga (2012) 148–162.

⁹⁴ Ramcharan B., *Contemporary Human Rights Ideas: Rethinking Theory and Practice* (Routledge 2015).

⁹⁵ Klugman B., “Effective Social Justice Advocacy: A Theory-Of-Change Framework For Assessing Progress” *Reproductive Health Matters*, (2011) 19(38) 146-162.

⁹⁶ Cook R. (Ed.), *Human Rights of Women: National and International Perspectives*. (University of Pennsylvania Press 2012).

⁹⁷ Soohoo C. & Stolz S., “Bringing Theories of Human Rights Change Home” (2008) 77 *Fordham L. Rev.* 459.

⁹⁸ Sumner L., *Abortion and Moral Theory* (Princeton University Press 2014).

1.6 Literature Review

A number of scholars have written on abortion as a topic but many have dealt with the issue in the perspective where abortion is restricted and then qualified in that its application may or may not render one guilty or otherwise. Majority others have written on the social perspective of abortion and the challenges associated with the practice. Mutua et al carried out a research on the incidences of termination of pregnancies that are induced by women.⁹⁹ In their study they found that majority of abortion incidences are not reported except in cases where there are complications.¹⁰⁰ Also Luchters et al have written on the consequences of unintended pregnancy by sex commercial workers being termination of pregnancy.¹⁰¹

1.6.1 Abortion

Abortion is defined by Merriam Webster dictionary

“as the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or foetus.”

According to Gargaro, allowing performance of abortion on demand liberates women from men who want sex without commitments, responsibility, promises, or the rituals of romance.¹⁰² Human Rights Watch considers abortion as a human rights issue where they argue that abortion has always been a highly emotive issue and exciting deep and diverse opinions everywhere.¹⁰³ According to them equitable access to safe abortion services is a human rights that women are entitled to. They debate this by providing that in jurisdictions where abortion is safe and legal, women choose freely on whether to have it or not; whereas in states where abortion is criminalised and unsafe, women do not have an option and are thus forced to carry unwanted pregnancies to term or are subjected to serious health consequences including death.¹⁰⁴

⁹⁹ Mutua M., Maina W., Achia O. & Izugbara O. (2015). Factors Associated with Delays in Seeking Post Abortion Care among Women in Kenya. *BMC Pregnancy and Childbirth*, 15(1), 241.

¹⁰⁰ Ibid

¹⁰¹ Luchters S, Bosire W, Feng A, Richter M L, King'ola N, Ampt F, et al. (2016) A Baby Was an Added Burden: Predictors and Consequences of Unintended Pregnancies for Female Sex Workers in Mombasa, Kenya: A Mixed-Methods Study. Accessed on 14th May 2017 at <PLoS ONE11(9):e0162871.doi:10.1371/journal.pone.0162871>

¹⁰² Gargaro Carolyn, "What is a Pro-Life Feminist?" Problems of Death: Opposing Viewpoints Series. (1997) Greenhaven Press. <<http://www.gargaro.com/lifefem.html>> accessed on 11/20/14.

¹⁰³ Human Rights Watch website available at <https://www.hrw.org/> accessed on 14th February 2015.

¹⁰⁴ Cook R. (2012).

According to Human Rights Watch Report approximately 13 percent cases of maternal deaths worldwide are caused by unsafe abortion in a year.¹⁰⁵ Mohammed et al also reports that unsafe abortion is still a major cause of maternal death in Kenya.¹⁰⁶ They found in their report that majority of these cases occurs in an environment that is not suitable for conducting such acts.¹⁰⁷

Human Rights Watch claims that abortion as a human right revolves around a number of rights and freedoms. These rights are as discussed in chapter two of this study. These rights include right to life, right to security of person, right to be free from cruel, inhuman, or degrading treatment, rights to health and reproductive health care, rights to non-discrimination and equality, right to liberty, right to privacy, right to information, right to decide the number and spacing of children, right to enjoy the benefits of scientific progress, right to freedom of thought and religion.¹⁰⁸

1.6.2 Grounds for Qualifying Abortion

Abortion debate is an issue that has been of concern worldwide for a long time. What matters is the way grounds of abortion are handled in different jurisdictions. Even in the most restrictive jurisdictions there is at least a consensus that there are circumstances in which abortion may be permitted. Therefore the puzzle that states need to address on how to reasonably regulate abortion practices.

Sociological explanations provide that there is justification of termination of a child right to life for social reasons. Societal reasons argue on how easy it is to have an abortion rather than how hard it is to be a single parent.¹⁰⁹ According to a report by Center for Reproductive Right the understanding of the exception of abortion for health reasons includes a right not to be forced to carry to term a pregnancy resulting from rape as it is a potential threat to a woman's mental

¹⁰⁵ Human Rights Watch website available at <https://www.hrw.org/> accessed on 14th February 2015.

¹⁰⁶ Mohamed S., Izugbara C., Moore A., Mutua M., Kimani-Murage E., Ziraba A. & Egesa C. (2015). The Estimated Incidence of Induced Abortion in Kenya: A Cross-Sectional Study. *BMC Pregnancy and Childbirth*, 15(1), 185.

¹⁰⁷ Ibid.

¹⁰⁸ Human Rights Watch website. This information is also clearly discussed in Chapter two of this thesis on human rights perspective.

¹⁰⁹ Grant G., *The Triumph of the Will. A Time to Choose Life: Women, Abortion, and Human Rights.* (Toronto Stoddart Publishing Co 1990), 9-18.

health and that of her immediate family.¹¹⁰ According to them this is mainly interlinked with economic theory.¹¹¹

Amidst these human rights tensions and claims, there exist public interest rights and culture of certain societies. In a democratic society, as Peterson argues interference with individuals rights is permissible to protect the rights and freedoms of others.¹¹² The theory holds that if law tries to impose private interests upon the society, this may amount to an addition to injustices already committed against the majority who differ to such practices. The question that arises is should morality be observed and deny a woman her private rights? In reply to that some scholar argues that the status of a foetus is important in determining permissibility of abortion. According to Peterson, the full moral status of a foetus is granted from the moment of conception and the no status position provides that an unborn child does not have any value until it is born.¹¹³ However, there is a different view that a foetus has limited rights in that they cannot supersede that of the mother.¹¹⁴ With this it can be said that abortion cannot be left as a right of each and every woman to exercise as she wishes and also cannot be prohibited in all circumstances. Singer dismisses prolife advocates as misleading because not all human life is valued equally as there is justification for killing in war or capital punishment.¹¹⁵ The question that arises; is it the foetus fault the mother's health is in danger or how then can deprivation of the child killing be justified?

Another question that is posed by the Article is whether or not, if abortion can be performed when the life of a mother or child is at risk, then can it be done against the mother's wishes or consent? According to Keown, medics have been recommending and practicing abortion according to criteria established by them and not guided by any law or rules.¹¹⁶ It is important that in case a doctor recommends abortion to a woman he/she should seek prior consent of the woman before the operation.

¹¹⁰ Center for Reproductive Rights. 2010. In Harm's Way: The Impact of Kenya's Restrictive Abortion Law. Centre for Reproductive Rights: New York. Pp 4-70.

¹¹¹ Peter pp 221.

¹¹² Peterson Kerry Anne et al, *Abortion Regimes* (1993) pp 229.

¹¹³ Peterson pp 230.

¹¹⁴ Turner B. (2013). Human Rights Watch. *The Statesman's Yearbook: The Politics, Cultures and Economies of the World 2014*, 77-77.

¹¹⁵ Singer Peter; *Rethinking Life and Death; the Collapse of our Traditional Ethics* (Cambridge University Press 1940).

¹¹⁶ John Keown, *Abortion, Doctors and the Law*, (Cambridge University Press 1988).

As a result of the constitutional provision for qualification of abortion on medical grounds, the doctors, health institutions, legal forces, life insurance companies and other stakeholders might be seen devising new forms and methods of legitimizing abortion. This requires the medical lawyers to work and research more in resolving the demands that might be posed by the Article. Further parliament must legislate as demands arise and in the case of Kenya the Constitution requires.

Mason cites the following as grounds in which abortion is permissible;

- Save the life of the pregnant woman
- Avoid damage to the health of pregnant woman
- Obviate adverse effect on the existing family
- Forestall the birth of a defective infant¹¹⁷

He also found out that most claims supporting abortion are mainly argued on health ground but few cases are actually connected to health as the real ground.¹¹⁸ Ziraba et al argues that majority of unsafe abortions are associated with social economic reasons.¹¹⁹

The above findings are that laws authorizing qualification of abortion are in instances when there is a risk to the woman's physical or mental health and also in cases where continuation of the pregnancy or childbirth is likely to put the life of a woman at risk. Further this qualification may occur where there is convincing knowledge that the child will be born with a condition of such gravity as to endanger the woman's physical or mental health.¹²⁰ Further discussion on the grounds permissible for terminating pregnancy is discussed in chapter three of this study. The chapter analyses the grounds provided for termination of pregnancy and gives a direction on some of the grounds that are applicable in Kenya considering its social, economic, cultural and political context. This study therefore recommends considerations of these grounds by parliament when legislating on regulation of abortion.

¹¹⁷ Mason, (1990) pp 106.

¹¹⁸ Peter pp 211-225.

¹¹⁹ Ziraba A., Izugbara C., Levandowski A., Gebreselassie H., Mutua M., Mohamed F., & Kimani-Murage W. (2015). Unsafe Abortion in Kenya: a Cross-Sectional Study of Abortion Complication Severity and Associated Factors. *BMC Pregnancy and Childbirth*, 15(1), 34.

¹²⁰ Douwe Korff; The Right to Life; a Guide to the Implementation of Article 2 of the European Convention on Human Rights; Human Rights Handbook no. 8 accessed at <<http://www.coe.int/human-rights/>> on 17th November 2012.

1.6.3 Legislating on the Grounds for Abortion

It is the government's duty to maintain law and order in the society. This requires enactment of laws that are practically enforceable. According to Ziraba et al unsafe abortions are mainly caused by social economic reasons.¹²¹ These laws should be enacted as facilitative instrument rather than coercing what happens in the society. According to Article 26(4) of the Constitution the expressed ground for permitting abortion is in case of emergency or if the life or health of the mother is in danger. Beyond that point, an abortion may be carried out only if parliament enacts a law to authorize it. The legislative body is in the process of legislating in the area under the reproductive health care bill. However this law is very scanty as far as the Article 26(4) is concerned. Some scholars state that it is rare for women to argue their abortion cases on human rights grounds alone.¹²² This is because they are broader based and poses more threats to the rights of others.

The question that may arise under the Article is whether a pregnant woman has a legal right to access emergency care and the protection that might be given to her by the provision. This requires the definition of what constitutes emergency. Does this mean a situation requiring immediate treatment in order to prevent life or what it is to be prevented? And if so, who is competent to consent to emergency abortion? These are some of the areas that the Constitution requires parliament to address.

In any provision where one person has right, there must be a duty holder. The Constitution under Article 20 and 21 places a duty on the state and all persons to promote, protect and fulfil the human rights and freedoms provided in the Chapter.¹²³ Utilitarian argues that the permissibility of abortion depends on the distress that will be inflicted to the mother and the unborn child. They further argue that because the child is incapable of consciousness then the state should protect the rights of the mother more. Does a woman have a duty to carry a harmful or unwanted pregnancy and then risk her life or her health? Singer concedes to this by stating that the killing of a foetus is permissible if the parent to be does not need it especially if "disabled."¹²⁴ Immanuel

¹²¹ Ziraba et al (2015).

¹²² McClain Linda, *The Place of Families: Fostering Capacity, Equality and Responsibility* (Cambridge Harvard University Press 2006).

¹²³ Constitution of Kenya, 2010 Chapter IV.

¹²⁴ Singer Peter, *Practical Ethics*, (Cambridge University Press 1993) pp 171-174.

Kant, duty based theory granted moral status only to agents.¹²⁵ However this can be dismissed as failing to grant a foetus status and becomes a position of supporting infanticide and the killing of the mentally disabled adults.

Another question that requires address is; is the Constitution shifting the role of interpretation of Constitution from the judiciary to medical officers? According to some scholar qualifying abortion and placing it at the mercy of medical officers is shifting judicial role to medical personnel. The Article does no more than state the circumstances in which it will be performed. This is left to the opinion and judgment of the doctor. The question that arises is, will the doctor rely on his/her clinical knowledge or will be driven by moral judgment? Mason contends that the risks to the health of a woman who carries a baby to the end of the term and undergoes labour are more than that of an early termination, which justifies termination of pregnancy on legal grounds.¹²⁶ As Sheldon argues, according to medical officers, all pregnancies affect mother's health wise. Further, she states that it is principally seen as a matter for the medical professional. The question that arises is, how can this be done lawfully with enough evidence apart from that of the medical doctor?

Peter argues that abortion as an issue surrounds the merits of protection of a person, and at what point in the pregnancy is right to life, can be legally protected and where a woman has a right to decide what happens in and to her body and whether there is a link between abortion and infanticide.¹²⁷ This can be viewed in a situation where a foetus that has been aborted survives. The question that arises then is does one have the right to kill a living abortus, if she had a right to expel it from her womb? Is this right exercisable even after abortion?

Scholars like Mason, argues that there is no legal objection to abortion, as most or all victims if charged of this offence will argue on health grounds and thus the discussion must be based on morality as it has been distorted when trying to balance rights of foetus and the rights of the mother.¹²⁸

¹²⁵ Kant Immanuel, "The Moral Law, trans." (*HJ Paton, London: Hutchinson 1948*).

¹²⁶ Mason pp 107-117

¹²⁷ Peter; Medical Law pp 137 & 138.

¹²⁸ Mason pp 116 & 117.

What roles will private morality play in interpreting of this provision? Glover and Savulescu argue that it is wrong to abort an abnormal foetus so that it can be followed by a normal one.¹²⁹ George Grant argues that failing to protect an unborn child is a decay of the liberal tradition of justice.¹³⁰ He contends that it is not right to attribute a different moral status to a foetus.

1.6.4 Research Gap and Considerations in Addressing Article 26(4)

From the literature reviewed it is evident that majority of writers have written on abortion but on the social perspective. Further those who have written on the legal perspective may not have adequately addressed the issues surrounding Article 26 (4). Article 26 (4) of the Constitution of Kenya states that abortion may be qualified in case of emergency or when the health or life of the mother is in danger or if provided by any other legislation. The Constitution thus acknowledges that in enhancing enjoyment of human rights abortion need to be qualified on certain grounds. This thus gives parliament power to enact legislation to cover other grounds for abortion. There is no such law that has been enacted by parliament. Even the Reproductive Health Care Bill pending in parliament does not address fully the concerns raised by the Article. The law should address who is competent as a qualified medical practitioner to authorize abortion, the circumstances in which the process is to be carried out, the place and the procedure to be followed.

As different authors poses on abortion puzzle, solutions are more difficult to find than one would expect. The hindrances should not only be resolved in letter of the law but also the spirit and the practical puzzle. The literature reviewed above lacks legal clarification on lawful abortion guidance and specification. For example Mason discusses the grounds on which abortion may be permitted; however, he does not outline the procedures and the practical enforcement of such grounds. This is a major obstacle in ensuring provision of safe abortion services if permitted under the law.

According to the literature reviewed, abortion in most cases is criminal and illegal but exceptions to it render it impossible to hold someone of having committed this crime. Most of these

¹²⁹ Glover, (1977) & Savulescu (2001).

¹³⁰ Grant G., *The Triumph of the Will. A Time to Choose Life: Women, Abortion, and Human Rights.* (Toronto Stoddart Publishing Co 1990), 9-18.

exceptions are not on human rights grounds but on medical application and discretion but driven towards saving life or prevent grave permanent injury to the health of the mother. This medicalisation exception of abortion has led to keep off cases pertaining to abortion as an offence even in cases not protected by law. Further most abortion is performed in private spheres under clandestine means.¹³¹ Therefore, abortion seems to be a combined effort but that teamwork law and regulations are yet to be made in Kenya. It can therefore be said that there remain some long-standing and controversial questions, grievances and issues that might surface when parliament will be enacting other grounds that may permit abortion.

1.7 Hypothesis

Article 26(4) of the Constitution will escalate acts of unsafe abortion in absence of proper legislation.

1.8 Research Methodology

The researcher employed qualitative method of narrative variety for data collection. According to Borg & Gall, qualitative method is concerned with collecting and analyzing information on underlying reasons, opinion and motivations.¹³² This study relied on desk research by using secondary data as source of information by mainly reviewing on the existing literature and legal framework. The data was studied and analysed in order to get relevant information to this study. The researcher relied on purposive sampling in selecting relevant books, statutes, articles, journals and internet materials. The same purposive sampling was employed to select information regarding regulation of abortion inside the materials selected for in-depth analysis. The purpose of this was to obtain data that best enriches and explains regulation of abortion and grounds on which it may be qualified.

The study employed systematic content analysis to study and report on the legal content of cases reviewed. In this, the researcher collected documents and cases on abortion, systematically read them noting consistent features and thereby developed an inference. The researcher also

¹³¹ Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010).

¹³² Borg W. & Gall D., *Educational Research: An Introduction*. (5th edition London. Routledge 2008).

employed comparative analysis approach in order to obtain information on how other jurisdictions regulate abortion. In this the study employed purposeful sampling to select the jurisdictions examined in order to determine the best practice on abortion regulation. In reviewing these jurisdictions legal and policy framework, the researcher was able to understand the circumstances in which abortion is regulated. This information complemented the Kenyan scenario and offered a better understanding of the research problem. This data was collected through documentary review of literature and review of legal frameworks in such countries. For example the researcher analysed the Choice on Termination of Pregnancy Act to understand the extent of legal qualification of abortion in South Africa. The constitutional provisions were analyzed together with laws relevant to the study.

The report of the Constitutional Review Commission was also reviewed to understand the inclusion of the Article in the Constitution. The study also reviewed the Reproductive Health Care Bill to establish whether the Bill proposes to actualise Article 26 (4) of the Constitution. Library research, journals and review of newspapers and articles was also sought where the researcher visited the University of Nairobi Law Library, Jommo Kenyatta Memorial Library, International Commission of Jurists (Kenya Chapter) Library and Lexis nexis online library. The information that was gathered was subjected to descriptive analysis basing on the objective of the research. The information and data reviewed and analysed was used to reach conclusions as well as recommendations offered in this study.

1.9 Justification of the study

The Kenyan society is not well equipped in regard to regulation of abortion. Women are faced with the challenge of unclear legal qualification to abortion. This study is important in enhancing legislation of law to regulate abortion in Kenya. The recommendations of the study may also help in developing policy frameworks to resolve issues that escalate cases of unsafe abortions in the society. The findings may be applied by government agencies, health sector, stakeholders and the general community in improving provision of reproductive health rights.

On academic context, the study represents a modest attempt to understand the concerns whether abortion provision in the Constitution is a human rights issue and if so the reason why it should be regulated and not criminalised. The study is thus important in evaluating the relevance and

necessity of regulating abortion in a jurisdiction like Kenya. This research can also be used as reference material by other scholars hence it can open up other relevant discussions or areas for further research.

1.10 Scope and Limitations of the Study

This study is guided by literature by various writers as well as legal documents and instruments dealing with abortion regulation. Although the researcher mentions and analysis other instruments on human rights, the study mainly limits itself to the Constitution and national legislations in regard to termination of pregnancy. The study also makes use of decided cases and authoritative writings on reproductive health rights. Although the study borrowed some knowledge of how abortion was regulated in Kenya before promulgation of the 2010 Constitution, it mainly dealt with the situation after promulgation as the provision in question was introduced by the Constitution.

The researcher attempts to expound on the research problem by drawing a comparative analysis from jurisdictions in Africa and outside Africa. The study therefore draws a comparative analysis of abortion regulation in USA, United Kingdom and South Africa.

1.11 Chapter Breakdown

Chapter one: General Introduction

This chapter outlines the constitutional provision permitting abortion on medical grounds and grounds in which it is permissive. It further explains authors understanding of abortion and general reasons why abortion should be regulated and not criminalised. It gives the general understanding of researcher in regard to the gap occasioned by the provision and as discussed by different authors.

Chapter Two: Is Abortion a right in Kenya and how should it be regulated?

This chapter gives the reader an in-depth meaning and nature of abortion in human rights perspective and how it should be regulated in Kenya. The Chapter is separated into two sections. The first section discusses the perspective of abortion in Kenya before 2010 Constitution and

attempts to examine why it was included in the bill of rights chapter. The section also gives a discussion on the different rights that may support or discredit legislation on the qualification to abortion as a human right. The second section provides a detailed discussion on how abortion is regulated and should be regulated in Kenya.

Chapter Three: Comparative Analysis on how abortion is regulated

This chapter provides a comparative analysis on how abortion is regulated in other jurisdictions. This discussion provides best practice on how abortion should be regulated in Kenya and not criminalised. The chapter discusses USA, Britain and South Africa as study reference on how abortion is regulated in such jurisdictions. Legal challenges associated with the provisions are addressed and grounds on which abortion have been permitted.

Chapter Four: Summary, Conclusion and Recommendation

This chapter summarizes the discussion on the topic basing on the findings of the study. The researcher draws his own conclusions from lessons and gives recommendations to the necessary legislation to address the problem.

CHAPTER TWO

IS ABORTION A RIGHT IN KENYA AND HOW SHOULD IT BE REGULATED

2.0 Introduction

In this chapter the researcher examines the position of abortion and its qualification in Kenya in the context of human rights. The purpose of this chapter is to demonstrate that abortion in Kenya is now a legally protected right by dint of wholesome reform in constitutional provisions. This chapter therefore supports this position by reviewing credence on the rights and freedoms in the Constitution of Kenya, 2010. Thereafter the chapter considers regulation of abortion under Article 26(4) within the context of human rights. The Constitution sets out permissible grounds in which abortion may be qualified. This deviates from position set out earlier by the former Constitution of Kenya. It is on human rights ground that this chapter reviews the various rights and competing interests between holders and bearers that affect termination of pregnancy. Human rights are entitlements that individuals and groups have by virtue of being human.¹³³ Human rights and freedoms are recognized by international treaties, domestic laws, human rights documents and other authoritative instruments. The chapter is divided into two sections. The first section deals with the question whether abortion in Kenya is a human right and the second section deals with regulation of abortion.

SECTION ONE: IS ABORTION A RIGHT IN KENYA?

2.1 Qualification to Abortion in Kenya

Abortion leads to many deaths of women in Kenya.¹³⁴ Many factors may have contributed to these deaths.¹³⁵ The purpose of this section is to deal with the legal framework on grounds allowing termination of pregnancy. In attempting to address the puzzle of abortion this section

¹³³ Brookman-Amisshah E. & Moyo J., “Abortion Law Reform in Sub-Saharan Africa: No Turning Back” (2004) 12 (24 Supplement) *Reproductive Health Matters* pp 227–234.

¹³⁴ Center for Reproductive Rights, *In Harm’s Way: The Impact of Kenya’s Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010).

¹³⁵ Center for Reproductive Rights 2010.

considers the legal and practical position of abortion and its qualification in Kenya. Article 26(4) of the 2010 Constitution of Kenya provides that,

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

Therefore the provision establishes that a pregnant woman may terminate the life of unborn child as required within the realm of law. Sober interpretation of this article is to the effect that abortion in Kenya is not on demand nor fully restricted but should be regulated.

Even before the constitutional provision on abortion in Kenya, the Penal Code¹³⁶ provisions prohibited abortion but qualified it on various grounds. The Penal Code was amended in 1973. s. 158-160 of the Code provides that,

“Any person who, with intent to procure the miscarriage of a woman, unlawfully administers to her any noxious thing or uses any other means is subject to punishment by imprisonment of up to 14 years.”¹³⁷

Further, it provides if any pregnant woman who takes such steps with respect to herself or consents to it is subject to seven years’ imprisonment. The Penal Code also provides that it is also unlawful for any person to supply anything knowing that it is intended to be unlawfully used to procure a miscarriage. If such a person is found guilty by a court, he/she is liable to punishment by imprisonment of up to 3 years.¹³⁸

In respect to qualification the Penal Code under other provisions states that abortion may be qualified in order to save the life of a pregnant woman. Section 240 of the Code provides that,

“A person is not criminally responsible if performed in good faith and with reasonable care and skill a surgical operation upon an unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable having regard to the life of the pregnant woman.”¹³⁹

¹³⁶ Penal Code Chapter 63 laws of Kenya.

¹³⁷ Penal Code Section 158.

¹³⁸ Penal Code Section 160.

¹³⁹ Penal Code Section 240.

It is clear that the Code provides that there is lawful abortion if the operation is performed to preserve the mother's life. However, this section is silent on how to undergo about it. Further the law has not been reviewed to be in line with the supreme law as provided in Article 26 (4).

On the other hand the Sexual Offences Act¹⁴⁰ mandates issuance of medical treatment orders by courts to victims of sexual offences. This can be interpreted to mean that in cases of offences provided under the Act i.e. rape, incest, defilement inter alia medical treatment can be performed within the legal realm. According to KNHREC Report¹⁴¹ it argued that application of this provision has been problematic since it lacks clear support in law and has not been fully utilized by medical practitioners. The report argues that medical practitioners are more inclined to their Code of practice.

The Medical Practitioners and Dentists Act prohibit medical practitioners from engaging on any offence under the Act or in the Penal Code.¹⁴² Similarly, the Medical Practitioners and Dentists' Board Code of Professional Conduct and Discipline (MPDB Code) places sanction on any doctor who performs unlawful abortions.¹⁴³ The sanction may include suspension of licence or erasure from the register of doctors. Though the MPDB Code is not thorough on the issue of abortion, it gives an exception of when a lawful abortion can be performed. This is when the mother's life is physically or mentally in danger. Chapter IV of the MPDB Code specifically in s. 1 provides that when a doctor is performing a lawful abortion, he/she is supposed to consult with at least two senior and experienced colleagues. This opinion is supposed to be in writing and the operation be conducted openly in a hospital.

The understanding of allowing abortion when the life or health of a mother is at risk was made clear in the widely recognized English case *Rex v. Bourne*.¹⁴⁴ This case has influenced grounds for qualifying abortion in most Commonwealth countries, including the East African Court of

¹⁴⁰ Sexual Offences Act no. 3 of 2006.

¹⁴¹ Kenya National Human Rights and Equality Commission Report on Making Bill of Rights Operational; Policy, Legal and Administrative Priorities and Considerations, 2011 available at http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf, accessed on 12th July 2014.

¹⁴² Medical Practitioners and Dentists Act Chapter 253, section 20.

¹⁴³ Medical Practitioners and Dentists' Board Code of Professional Conduct and Discipline, available at Medical Practitioners and Dentist Board website < http://medicalboard.co.ke/resources_page/publications/> accessed on 15th July 2015.

¹⁴⁴ [1939] 1 K.B. 687.

Appeal in *Mehar Singh Bansel v. R*¹⁴⁵ which was an abortion appeal from the Supreme Court of Kenya. The Court affirmed the *Bourne* decision on qualification to abortion.

This Bourne case has had a profound and lasting impact on the legal regimes of former British colonies and Commonwealth countries. Most colonies, Kenya included, had and continues to have an abortion provision as that in the Offences against Person Act in England and other common-law principles.¹⁴⁶ For example the Offences against Persons Act of England provisions on abortion are similar to sections 141-143 of Uganda's Penal Code.

Therefore, Kenya and most of commonwealth countries are inclined on the holding in the case of 1938 English *Rex v. Bourne*¹⁴⁷ decision in determining whether an abortion performed for health reasons is lawful.

There is a concern in on whether the provision is opening up termination of pregnancy on other grounds by parliament or it is a cardinal or an essential way of broadening access to safe abortion. Ngwena asserts that the International and regional human rights standards have established that access to safe and legal abortion and post-abortion care is essential to protecting women's most fundamental human rights and freedoms.

This can only be addressed by legislation that considers all factors surrounding performance of abortion in Kenya. This study therefore discusses human rights perspective of abortion in Kenya and also considers how abortion is regulated in other jurisdictions. According to Ngwena in CEHURD it does not matter whether domestic laws are liberal or restrictive, what is important is the state regulating and allowing it to operate within the implicit human rights obligation in an effective manner.¹⁴⁸ Karua assertion is that whether abortion is regulated by law or not, this does not deter women in carrying out the process.¹⁴⁹

¹⁴⁵ (1959) E.A.C.A.

¹⁴⁶ Ngwena G., "Reforming African Abortion Law to Achieve Transparency: Arguments from Equality" (2013) 21 *African Journal of International and Comparative Law* 398.

¹⁴⁷ Ngwena G., "Social Justice in Health: using Human Rights to Realize Access to Safe, Legal Abortion in Uganda" (2014) 1 *Kampala Center for Health, Human Rights and development* 7-8.

¹⁴⁸ Ngwena G., "Access to Legal Abortion: Legal Developments in Africa from a Reproductive and Sexual Rights Perspective" (2004) 19 *SA Public Law* 328, 344-348.

¹⁴⁹ Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010) Pp 44-45.

According to a report on pro-life conference held by youths in Nakuru,¹⁵⁰ the debate of abortion is always a heated issue that needs to be addressed soberly. Accordingly, it is important to visit the issue often in order to create awareness to the community. Further as the Article provides that parliament is to make legislation to give direction to the Article, no such legislation has been made so far. However attempts have been made through Reproductive Health Care Bill. This Bill is inadequate in addressing the concerns raised by the provision. It is therefore important that an in-depth knowledge be brought to the limelight. It is important that the legislation to be made clearer and be implemented in a manner that meets majority acceptability. Further it is prudent to broadly understand Article 26(4) not in isolation but in a manner that complements the spirit of the Constitution and human rights wholly. According to Wanjohi the ambiguity and complication in which the Constitution was drafted and passed will continue to create confusion and complications and may offer a room in liberalizing abortion.¹⁵¹ It is on this notion that it becomes increasingly important to consider whether termination of pregnancy is a human rights issue in Kenya.

2.2 Abortion and Human Rights

The fundamental rights and freedoms are conceived as ‘inherent’ and as not ‘granted by the state’. The inclusion of rights in the Constitution is to enhance recognition by the state. This is important in its legislation, implementation and enforceability. Human rights are said to be universal, interdependent, inalienable and indivisible.¹⁵² Although these characteristics are also contentious they enjoy greater acceptability. Rights are interdependent, for one to enjoy one right it relies on one other or many others. Denial or infringement of one right may adversely affect other rights. Right to life depends on the right to health, right to health requires right to education, information, employment, political participation inter alia.¹⁵³ Abortion issue is one such act that may affect or effect rights guaranteed in the Constitution. The state is also obligated in implementation of these rights holistically. That is to say those rights provided in our domestic

¹⁵⁰ An abortion Conference held by youth accessed at <http://eacj.org/component/content/article/23-abortion-feature-articles/104-abortion-in-kenya.html> on 4th February 2014.

¹⁵¹ An abortion Conference held by youth accessed at <http://eacj.org/component/content/article/23-abortion-feature-articles/104-abortion-in-kenya.html> on 4th February 2014.

¹⁵² Universal Declaration of Human Rights, 1948.

¹⁵³ Ngwena G., “Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa” (2010) 32 *Human Rights Quarterly* 783, 787-797.

laws and those international instruments that Kenya has ratified as she committed herself in fulfilling those international obligation.

According to Japhet Biegon one of the realities confronting the implementation of Bill of Rights is the paucity of literature and lack of clarity on their meaning.¹⁵⁴The Kenyan Constitution in Chapter Four came with it a wide range of human rights and freedoms. It however brought with it contemporary thinking on derogations and limitation clauses. It is important to note that these limitations cover all circumstances that a right may be limited. In terms of limitations, the Constitution moves away from sweeping claw-back clauses present in the former Constitution.¹⁵⁵ Instead the Constitution sets up a general limitations clause under Article 24 with clear criteria that have to be met by each limitation before it can be allowed to stand.¹⁵⁶ However Article 26 by itself recognises that there are circumstances when the right to life of unborn child can be limited. This therefore provides an avenue of legislating on legal and otherwise on the issue of abortion.

The Constitution further provides for duty of the state and other person to ensure that human rights are observed, protected, promoted and fulfilled.¹⁵⁷ In every case where one has a right the other has a duty. The question that arises is whose right is to be protected? Which is more important than the other? Is it that of the mother or that of the unborn child. This section examines the context of legislating and implementing Articles 26 (4) on legal termination of pregnancy in line with human rights instruments. The rights on the part of a woman inter alia include reproductive rights. Article 43 (1) of the Constitution emphasizes on the right to reproductive health. One of the contentious issues is on balancing the reproductive rights guaranteed by Article 43 coupled by Article 26(4) on qualification to abortion with that of the right to life of a child as Article 26(2) provides that life starts at conception. This section demonstrates the link between abortion and human rights by discussing a number of rights that revolve around termination of pregnancy. The rights discussed are the right to life. right to

¹⁵⁴ Japhet Biegon, Judiciary Watch Report, *Judicial Enforcement of Socio-Economic Rights under the New Constitution: Challenges and Opportunities for Kenya* (The Kenyan Section of the International Commission of Jurists vol 10 2011) pp14-15.

¹⁵⁵ Japhet Biegon, Judiciary Watch Report, (2011) pp 3-6.

¹⁵⁶ Constitution of Kenya, 2010 Article 24.

¹⁵⁷ Constitution of Kenya, 2010 Article 21 and 22.

information, right to liberty and security, reproductive health rights, right to privacy, moral rights and public interest and social cultural rights affecting a woman right to reproductive health.

2.2.1 Right to Life

The protection of the right to life is premised on the prohibition of arbitrary (or unlawful) deprivation. The debate surrounding abortion revolves around the saving the life of a mother and that of a child. Article 26(1) of the Constitution provides that everyone has a right to life and no one should be deprived this right arbitrary. The Article further provides in clause 2 that life starts at conception but qualifies it in clause 4. It is within this context that controversies occur on enjoyment of rights between a pregnant woman and the foetus she carries. According to Peter some scholars have argued that only when a foetus is born alive it does have the full protection of the civil and criminal law.¹⁵⁸ Does this automatically dismiss the right to life of unborn child? Referring to the holding by Sir George Baker in *Paton Vs. Bpas*,¹⁵⁹ he held that the foetus was (is) said to lack the legal personality necessary to make it a ward of court. According to Singer the status of a foetus is important in determining the permissibility of terminating pregnancy.¹⁶⁰ He argues that those who attribute the full status position must consider abortion to be morally equivalent to murder and this may not be the case. His assertion is that a woman is not under moral obligation to die or carry unwanted pregnancy so that a child survives. Referring to morality his thought is that it is not morally right to force a woman to carry to term such a pregnancy. He further asserted that this depends on the viability of a foetus. If the foetus is incapable of existing outside the woman womb then it has not acquired the status of a person and thus the woman has a right to terminate it at all.¹⁶¹

Is this the position in Kenya? This holding may not be automatically applicable in Kenya; as the Constitution provides that the life of a person starts at conception. If unborn child has a life, then termination of it through any method can then be equated to shooting or poisoning an already

¹⁵⁸ Peter de Cruz, *Medical Law-Nushells*, 2nd edition; (Sweet & Maxwell) pp 132-145.

¹⁵⁹ *Paton Vs. Trustees of BPAS*, 1978 All E.R.2 987 (1978).

¹⁶⁰ Singer Peter, *Rethinking Life and Death: the Collapse of our Traditional Ethics*. (Oxford University Press 1994) pp 83.

¹⁶¹ Singer Peter (1994).

born child or an adult member of the society. If an unborn child has status, as Jarvis poses, is the ‘unborn child’ capable of valuing his/her existence?¹⁶²

What about those jurisdictions that attribute no status on a foetus? In this they may have a different direction. The question that may be raised in this regard is, should women die at birth? As discussed in chapter three below, in America and in South Africa, a woman rights (including other rights like privacy and choice) takes priority over the right of a foetus to life. Qualifying abortion, the two jurisdictions emphasizes on the right of a woman to choose what goes on her womb.¹⁶³ According to Peterson abortion is not simply a matter of the woman’s consent, and enactment of abortions cannot be explained to protect and uphold the moral interests of others.¹⁶⁴ According to J. K Mason¹⁶⁵ an unborn child has rights but they are incapable of being expressed or exercised by them. However the Constitution under Article 20 and 21 places the duty to protect rights and freedoms to the state and all persons. State is under a duty to protect the right to life from violation by third parties and to take positive measures to protect life through the prevention of death. The state is also obligated to investigate cases in which right to life has unlawfully been deprived. In *Diagle Vs. Tremblay*¹⁶⁶ a foetus was stated as to have no rights as “it” is incapable of being described as a person. However this case was contradicted in *Winnipeg Child and Family Services vs. G (D.F)*¹⁶⁷ where the Supreme Court expressed the importance of continued detention of a mother in order to protect her unborn child. In *GianKaur vs. State of Punjab*¹⁶⁸ the Supreme Court of India in rejecting suicide attempts held that no individual including the owner of life had the right to terminate that life.

The above ruling presupposes rights of an unborn child, hence personhood status. According to Pope Pius XXII

¹⁶² Thomson Judith Jarvis, *A Defence of Abortion*” I Philosophy and Public Affairs (1971) pp 17

¹⁶³ Rebecca J. Cook & Bernard M. Dickens, *Abortion Laws in Commonwealth Countries* 13 (1979).

¹⁶⁴ Peterson Kerry Anne et al, *Abortion Regimes* (1993) pp 228.

¹⁶⁵ Mason J. K., *Medico-Legal Aspects of Reproduction and Parenthood*, (Dartmouth Publishing Company Limited, 1990). pp 98-100.

¹⁶⁶ (1990) LRC 578.

¹⁶⁷ Canada SC.

¹⁶⁸ (1996) 2 LRC 264.

“...an innocent human life, in whatever condition it may be is from the first instance of its existence, to be preserved from any direct attack.....”¹⁶⁹

A pregnant mother also is under a duty to protect unborn child according to Article 26(2) of the 2010 Constitution. Therefore the major problem in abortion question seems to be a legislation balancing the rights of different stakeholders. In such, law seems to balance the rights in favour of the mother in case of conflict but to limited grounds. According to Mwaura pro-life proponents accord full human standing to the foetus without also assigning positive value to women’s life and well-being.¹⁷⁰ On the contrary pro-choice disregards such right to life or potentiality.

2.2.2 Reproductive Rights

Article 43(1) (a) of the Constitution provides that,

“...every person has the right to the highest attainable standard of health which includes the right to health care services, including reproductive health care.”¹⁷¹

This can be interpreted to mean that everyone is entitled to access good physical and mental health facilities and services. How can the right to the highest attainable standard of health by a pregnant woman be realised? Underlying this right is need to understand the motive behind sexuality and reproductive health. Reproductive rights in Kenya will majorly be addressed by the Reproductive Health Care Bill if passed by parliament. However it should be noted that abortion issue also revolves around this broad right. Though it is contentious whether a woman has a right to her body, Mutio states that most women lack access to comprehensive reproductive health information and service.¹⁷²

This legal provision appears perhaps as the most progressive development on reproductive rights as far as abortion is concerned. According to WHO, safe abortion is a reproductive rights

¹⁶⁹ Quoted from Roman Catholic teachings on morals. See *Catechism of the Catholic Church*, (London Burns And Oates, 1999); Batchelor Edward, *Abortion, the Moral Issues* (New York Pilgrim Press, 1982).

¹⁷⁰ Center for Reproductive Rights, *In Harm’s Way: The Impact of Kenya’s Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010) pp 36.

¹⁷¹ Constitution of Kenya, 2010.

¹⁷² Center for Reproductive Rights, (2010) pp 19-20.

element of the right to reproductive health.¹⁷³ Reproductive health is also defined by International Conference on Population and Development (ICPD);

“...as a state of complete physical, mental and social well being and not merely the absence of disease or infirmity in all matters relating to the reproductive system and to its functions and processes.”¹⁷⁴

This definition seems to assert the independence of one making choice in decisions regarding his/her reproductive life.

According to a report by Center for Reproductive Health Rights (Failure to deliver) there are several violations of women rights to reproductive function.¹⁷⁵ The report states that these violations include lack of access to family planning services and information, discrimination, abuse and neglect during delivery inter alia. With such women would be in a position to search and access routine medical care.

According to KNHREC governments should avail affordable functioning public health care facilities to the citizens.¹⁷⁶ According to Otieno this right is hardly realised in Kenya with inadequate maternal health care facilities and lack of skilled birth attendants, and the discrimination against women in access to maternal health care.¹⁷⁷ Though Article 43 recognises right to the highest attainable standard which includes reproductive health care this has not be actualised. Article 27 further requires that no one should be discriminated on any ground (including sex, gender, and pregnancy among others). The Article also recognises that, “equality includes the full and equal enjoyment of all rights and fundamental freedoms.” Article 27 (3) states that, “women and men have the right to equal treatment.” Equality as a concept in Article 27 is founded on the notion that it is essentially wrong and unacceptable to discriminate against people on the basis of their very nature like reproduction. This therefore means that state laws

¹⁷³ World Health Organisation, “Unsafe Abortion; Global and regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008” (Geneva 2011).

¹⁷⁴ Kenya Demographic and Health Survey (KHDS) 2008-2009.

¹⁷⁵ Center for Reproductive Rights, (2010) pp 2-32 .

¹⁷⁶ Kenya National Human Rights and Equality Commission Report on making bill of rights operational; policy, legal and administrative priorities and considerations available at <http://www.knchr.org/Portals/0/Reports/MAKING THE BILL OF RIGHTS Operational.pdf>.> accessed on 14th July 2014.

¹⁷⁷ Center for Reproductive Rights, In Harm’s Way: The Impact of Kenya’s Restrictive Abortion Law (Centre for Reproductive Rights New York 2010) pp 5-6.

and policies should not be framed in a way that it places a specific gender in a restrictive position. As Beltran claims women in a society are faced by many challenges due to their very nature.¹⁷⁸ In order to address such challenges state should come up with policies and laws to address such disadvantages.

One of the international instruments protecting right to health though not specific to women is International Covenant on Economic, Social and Cultural Rights.¹⁷⁹ The Convention in Article 12(1) provides that, “everyone has a right to the highest attainable standard of physical and mental health.” Further Article 12 of CEDAW guarantees women the right to equality in health care and access to services in connection with pregnancy, confinement and to post-natal treatment.¹⁸⁰

The most elaborate instrument in Africa on the rights of women health is the Protocol to the African Charter on Human and People’s Rights on the Rights of Women.¹⁸¹ However, the Protocol is not binding to those states that have not ratified it. The Protocol requires that right to health of women including sexual and reproductive health be promoted and respected. The Protocol further guarantees women the right to control their fertility, choice to have children among other.¹⁸² Unfortunately Kenya ratified this protocol with reservations in Article 14 which is specific to abortion.¹⁸³ These international instruments provide standards in which states should strive to achieve. States are obligated to implement provisions of these instruments as far as they undertake to be bound by them through adoption and ratification. Reproductive health rights constitute a number of areas which include family planning services, birth control and contraceptives, pre-natal and post natal services among others. All these require state to come up with legal, policies and administrative measures to promote reproductive health care as recommended by Maputo Protocol.

¹⁷⁸ Beltran Puga, (2012) 149-160.

¹⁷⁹ International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁸⁰ Convention on the Elimination of All Forms of Discrimination Against Women 1979.

¹⁸¹ African Charter on Human and Peoples Rights adopted 27th June 1981 OAU Doc CAB/LEG/67/3 rev 5, 21 (1982) 58 International Legal Materials.

¹⁸² Protocol to the African Charter on Human and People’s Rights on the Rights of Women.

¹⁸³ Muthoni Muriithi, An analysis of the Protocol to the African Charter on Human and People’s rights on the rights of women in Africa (in Kombo, Sow & Mohamed „Journey to equality: 10 years of the Protocol on the Rights of Women in Africa , 2013) http://www.equalitynow.org/sites/default/files/MaputoProtocol_JourneytoEquality.pdf accessed on 23rd June 2017.

According to KNHREC qualification to abortion must be read within the context of Article 43(2) which prohibits denial of emergency medical treatment.¹⁸⁴ According to Otieno¹⁸⁵ deaths caused by pregnancy complications can be reversed if the government, donors, international development agencies and other stakeholders come together in protecting these deaths on human rights ground. His assertion is that these deaths revolve around human rights perspective. This requires that right to health of women especially sexual and reproductive health be promoted and respected.

2.2.3 Right to Information

The right of access to information by every citizen is guaranteed under the provisions of Article 35 of the 2010 Constitution. Though distinct from freedom of expression in Article 33 the facet of the rights are important in the qualification to abortion discussion. Right to information enables women and enhances their knowledge about reproductive health. This enables them make informed decisions.¹⁸⁶

Access to Information Act emphasizes on the right to access information especially in cases where that information is required for the exercise or protection of any right or fundamental freedom.¹⁸⁷ Access to information on reproductive rights and health facilities include right to access information on family planning and safe abortion services. The KNHREC asserts that failure to facilitate access to information not only results in human rights infringement but also denies women access to services necessary to ensure they enjoy the full range of reproductive health services.¹⁸⁸ Karanja argument is that abortion should be qualified on this ground and

¹⁸⁴ Kenya National Human Rights and Equality Commission Report on making bill of rights operational; policy, legal and administrative priorities and considerations available at <http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf> accessed on 14th July 2014.

¹⁸⁵ Center for Reproductive Rights, In Harm's Way: The Impact of Kenya's Restrictive Abortion Law (Centre for Reproductive Rights New York 2010) pp 68-71 .

¹⁸⁶ World Health Organisation, Unsafe Abortion; Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008 (Geneva 2011).

¹⁸⁷ Access to Information Act no. 31 of 2016 s. 4)

¹⁸⁸ Kenya National Human Rights and Equality Commission Report on Making Bill Of Rights Operational; Policy, Legal and Administrative Priorities and Considerations available at <http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf> accessed on 14th July 2014.

women should access information and services they need to conceive by choice.¹⁸⁹ This study finds that an informed society will enable a woman to resort to methods of family planning and birth control and avoid risks associated with unwanted pregnancy.

2.2.4 Right to Privacy

Article 31 of the Constitution of Kenya provides for the right to privacy. Though not implicit in its implementation the Article presupposes privacy of body and family. The right has not been expressly provided in the context of abortion in Kenya either by law or through court interpretation.

In South Africa the constitutional right of privacy encompasses the right to make reproductive choices. In light of this the state is not supposed to coerce individuals in making a decision whether to accept life sustaining treatment. Just like in South Africa, in USA abortion in *Rowe vs. Wade* has mainly been discussed on the right to privacy.¹⁹⁰ In *Rowe vs. Wade* the court stated that the recognition of women's rights to an abortion implicitly encompasses the right to be free of state restrictions on medical decision making. The discussion on these two jurisdictions is well outlined in the next chapter.

In the *Huaman vs. Peru's* Case on abortion,¹⁹¹ the Human Rights Committee found that the state through its restrictive laws on abortion and refusal to allow a medical intervention to terminate the pregnancy interfered arbitrary in her private life and therefore violated Article 17 of the ICCPR. Hall argues that right to privacy constitutionally encompasses the right to choice of reproductive choices, from state coercion, and decision whether to accept life sustaining treatment.¹⁹² Considering the stigmatization associated with termination of pregnancy it is important to deal with this right in a context in which it will not compromise public interest and cultural factors. The understanding is that Kenya as a country may be different from USA where court qualified abortion on the ground of privacy.

¹⁸⁹ Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010) pp 15-17 .

¹⁹⁰ United States Supreme Court, 410 U.S 113(1973)

¹⁹¹ U.N Human Rights Committee Comment , U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

¹⁹² Mark Hall et al, *Health Care Law and Ethics* (1998) pg 280.

2.2.5 Moral Rights and Public Interest

An issue that also has been widely addressed by scholars writing on abortion is on when does human life begins. In Kenya this issue is resolved by the Constitution by stating that life begins at conception.¹⁹³ Is it therefore morally right to kill a child in order that a woman may live or a woman to die so that a child can live? Most of those who oppose abortion support their argument on natural law and moral norms, that it is sinful to kill a human life.¹⁹⁴ One of the most important roles of law is regulating what is deemed right or wrong in the society. This defines what good or bad behaviour is in the society.

Just as the case is in other jurisdictions, abortion in Europe remains a contentious issue.¹⁹⁵ Article 8 of the European Convention on Human Rights and Freedoms provides that everyone has a right to respect of his/her private and family life. However, the Article further provides that this right can be limited by the societal interests, national security, public safety or the economic well-being of the country or for protection of health and/or morals.¹⁹⁶

Is it that abortion is solely a matter of rights of women? What is the position of societal interests and the rights of others-public interest? Most societies in Africa are rooted in their cultures and customs, morals and values. These have greatly influenced the type of laws made in these jurisdictions. Moral legislations have been made either restrictive or prohibitive on private acts like prostitution, pornography and abortion. Although this is the case in majority of states in Africa, Article 26(4) seems to be that abortion requires to be regulated in enhancing rights and freedoms in Kenya.

Referring to Lord Chief Justice Coleridge statement, Mason asserts that every legal duty is founded on a moral obligation.¹⁹⁷ He contends that the legal realms of abortion must be considered within the moral perception of abortion. What if the life of the mother is in danger due to child illness, who has a legal and moral right to decide under the Article the treatment to be given i.e. treat the child or the right of the mother to abort. Hall poses by asking, what if the

¹⁹³ Constitution of Kenya, 2010 Article 26(2).

¹⁹⁴ Kant Immanuel, "The Moral Law, trans." (*HJ Paton, London: Hutchinson 1948*).

¹⁹⁵ Peter, *Medical Law & Ethics* 133-141.

¹⁹⁶ European Convention of Human Rights and Freedoms, Article 8.

¹⁹⁷ Mason J. K., *Medico-Legal Aspects of reproduction and parenthood*, (Dartmouth Publishing Company Limited, 1990).

child requires surgery and the mother equally has to be operated and she is objecting?¹⁹⁸ In support of qualifying abortion resulting from rape Njonjo asks, “If Kenya was purely governed by strict morals the rape would not have occurred in the first place.”¹⁹⁹ He further argues that despite strict rules, morals and religious values, many women in Kenya are still undergoing the process and in some cases exposes them to complications. Ocholla terms a situation where a pregnant woman who conceives as a result of rape being turned away by a doctor as unethical.²⁰⁰ This holds that there are important concerns and issues that need to be addressed when legislating on qualification to abortion. These concerns are not limited to a woman side but also the society at large.

2.2.6 Right to Liberty and Security

The right to personal liberty is guaranteed in International Human Rights Instruments²⁰¹ and Article 28 and 29 of the 2010 Constitution. Everyone has a right to liberty and to be protected by state from external or social insecurity. Holmes assertion is that when a woman is denied freedom to exercise her choice by reason and conscience, they do not have liberty and security of person as their right to privacy and family is infringed.²⁰²

As with the right to life the most important element in violation of the right to personal liberty is that of arbitrariness. This embodies the right to be free from torture, cruel and inhuman treatment or punishment as guaranteed in Article 29 (e) and (f).²⁰³

According to KNHREC prohibition of abortion services in cases like where a woman is raped offends the right to be free from inhuman and degrading treatment-liberty and security.²⁰⁴ According to KNHREC right to liberty and security of the person is infringed where a state fails

¹⁹⁸ Mark A. Hall et al, *Health Care Law and Ethics*.

¹⁹⁹ Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010) pp 12

²⁰⁰ Center for Reproductive Rights, (2010) pp 26.

²⁰¹ Universal Declaration of Human Rights, Article 3 & 9; American Convention on Human and People's Right, Article 7; European Human Rights and Freedoms, Article 4 and African Charter on Human and People Rights, Article 6.

²⁰² Berly Holmes, *Human Rights-Another Look at Abortion* (1990) Children by Choice Association.

²⁰³ Constitution of Kenya, 2010.

²⁰⁴ Kenya National Human Rights and Equality Commission Report on Making Bill Of Rights Operational; Policy, Legal and Administrative Priorities and Considerations available at http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf.> accessed on 14th July 2014.

in its obligation to improve services for treatment of unsafe abortion.²⁰⁵ It is the obligation of the state to take all measures, legislative or administratively to ensure that people enjoys rights and freedoms guaranteed in the bill of rights to the maximum. A state can therefore provide mechanism to address a wrong that have been committed against the victim which may include termination of a pregnancy resulting from rape.

2.2.7 Social Cultural Factors

The above discussed rights directly or indirectly are part of, related or touch on social economic rights. Though right to reproductive health falls directly under social economic rights, there are other rights that need to be discussed separately from it. This is based on different social cultural factors and circumstances affecting women in regard to pregnancy. Meyers claims that some communities do not allow a pregnant woman to terminate pregnancy.²⁰⁶ She further argues that some communities excommunicate such a woman from their society. According to KNHREC report, there are social-cultural dimensions that inform decisions to seek termination of pregnancy. The report cites lack of education and employment as contributing to young women and girls into early pregnancies.

Challenges of upbringing a child singlehandedly may contribute to termination of pregnancy. Holmes assertion is that access to adequate food and shelter can be jeopardized if she is unable to raise it and determining the number of children that can be managed by such families.²⁰⁷ Njonjo assertion is that a woman has a right to terminate a pregnancy if she has no means to support the child.²⁰⁸

Holmes posits that some scholars have attributed right to abortion within social justice.²⁰⁹ He argues that social justice is not what is administered when all else fails. In such circumstances his argument is that rights are only rights when they can be exercised in an unfettered way. Holmes predicts a time when the role of a woman of childbearing will be valued to a point of creating a conducive environment that women will be able and willing to give birth at the right time and to

²⁰⁵ *ibid.*

²⁰⁶ Meyers D., (2002). *Gender in the Mirror: Cultural Images and Women's Agency*. (New York: Oxford 2002)

²⁰⁷ Berly Holmes, *Human Rights-Another Look at Abortion* (1990) Children by Choice Association.

²⁰⁸ Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010) pp12.

²⁰⁹ Holmes Beryl, *Human Rights- Another Look at Abortion*. (1990) Children by Choice Association.

wanted babies.²¹⁰ She argues that this can only be realized if social justice is upheld by the state and the society at large. The society or the environment where a woman is at the time of pregnancy contributes to a decision whether or not to terminate pregnancy.

2.3 Conclusion on abortion in Human Rights Perspective

In consideration of the rights discussed in this section, it is shown that formulation of grounds for termination of pregnancy on human rights involves various competing interests. Importantly the rights discussed need to be considered on the understanding that rights are interdependent. This provides that for the enjoyment of right to life or right to health all the other rights discussed must be promoted. For example for the enjoyment of right to reproductive health a woman need to be informed on the issues of family planning and contraceptives services. The constitutional frameworks on these rights have been explored in terms and extent to which they may be considered in actualizing Article 26(4). The Constitution allows legal grounds for qualifying abortion based on human rights. The legislation to be enacted in regard to the Article must meet the minimum constitutional requirements in observance of all these rights.

This touches on theories of competing rights as discussed by Peter.²¹¹ His argument is that human rights being entitlements that human beings have by virtue of being human are said to be interdependent. Thus the discussion of abortion within the context of human rights can be viewed in the same manner. The Constitution simply requires regulation of abortion practices in Kenya as it recognizes that there are cases where the rights of women may be violated or threatened if unnecessarily restricted.

It is thus evident that abortion may be performed on human rights grounds by recognizing the right of a woman to health, to privacy, to information and dignity. Accordingly Njonjo states that laws preventing women to terminate pregnancy thereby preventing them to make decisions on their pregnancy is disregard over basic rights on their body.²¹² However this discussion on human rights may not be complete without ascertaining the position of unborn child and in such the question of personhood becomes relevant. Further if abortion is qualified on these grounds is

²¹⁰ Holmes Beryl, (1990).

²¹¹ Peter, Medical Law & Ethics 132-145.

²¹² Center for Reproductive Rights, In Harm's Way: The Impact of Kenya's Restrictive Abortion Law (Centre for Reproductive Rights New York 2010) pp 13.

it not inviting full qualification of abortion being performed on demand and thereby having an effect on the society? This may not be the case as the Constitution requires regulation of the practice. Legislation without considerations of practice and impact is prone to constraints and problems. This study therefore set out to analyze why abortion in Kenya need to be regulated and not criminalised. This means moving away from a more restrictive position to permissible environ. The next section therefore discusses how abortion is and should be regulated in Kenya in line with Article 26 (4).

SECTION TWO: REGULATION OF ABORTION IN KENYA

This section discusses on how abortion is regulated in Kenya. It further provides considerations that need to be addressed in implementing Article 26 (4) in regulating abortion.

2.4 Regulating Abortion in Kenya

According to ICJ (Kenya Section) Report on rule of law, in modern society, law has at least four main functions.²¹³ Firstly law prescribes activities that are permitted and what are ruled out. The report states that it is within this purpose that law ascribes to minimum interaction between individual and the larger society. However this study found that when abortion laws are too restrictive, this purpose may be beaten by those with resources by attending private clinics and travelling outside the country.

Secondly, the report states that it tames naked force and directs the maintenance of order.²¹⁴ In this it allocates the exercise of physical coercion or penalties to achieve the social ends that the law serves. However according to WHO statistics, in Kenya it is indicated that 5000 women die out of abortion related complications.²¹⁵ Further the report indicates that 7000 abortions are performed in Kenya each year despite the laws in place.²¹⁶

Thirdly, law disposes of trouble cases as they arise. In this law is supposed to be dictated by justice, fairness and equality. Karua argues that the law in place has failed miserably to curb the

²¹³ International Commission of Jurists (Kenya Chapter) Rule of Law; 1999 Report.

²¹⁴ Ibid.

²¹⁵ World Health Organisation, Unsafe Abortion; Global and regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008 (Geneva 2011).

²¹⁶ World Health Organisation, (2011).

rampant cases of abortion performed.²¹⁷ Why are abortion performed yet existence of laws restricting it? According to Peter, the intention of 19th century abortion laws was to save women from quacks and unsafe and experimental surgery.²¹⁸

Fourthly, law redefines relations between individuals and groups as the conditions of life change. Abortion qualification in the Constitution if permitted emerges as a threat to the relation between law and morality on one hand and also a standpoint between the rights of a mother and that of the child. However a sober regulation can address the situation.

2.4.1 Qualifying Abortion in Kenya within the Constitution

The researcher sought to determine the issue of abortion on one hand and its qualification on the other hand. This was to enable understanding the legal grounds that abortion may be permitted and if not why. The constitutional provision allows room for enactment of legislation providing other grounds for allowing abortion.

Through review of literature on abortion qualification, this study provides that if the certification is done by any trained health professional as the Constitution provides, without proper regulation, this may open up and be used as a defence in procuring on demand abortion. From practical standpoint, abortion will be excused on the ground that it was on health or emergency case. A trained health professional would say that at the time, a lady was constrained and could even have lost her life. This is supported by WHO definition of health where it states that the condition of being healthy does not only mean absence of disease or illness.²¹⁹

It bears emphasis that the study found out that life, health and social factors are provided as the main legal grounds for allowing termination of pregnancy. However, in reality most abortions are performed in the context of social economic reasons. Due to unwanted pregnancies, Peter

²¹⁷ Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010) pp 16.

²¹⁸ Peter, *Medical Law & Ethics* 132-145.

²¹⁹ World Health Organization (WHO), *Unsafe Abortion: Global and Regional Estimates Of Incidence Of Unsafe Abortion And Associated Mortality in 2003* (WHO, Geneva 2007b).

states that most unmarried young ladies prefer to terminate pregnancy instead of carrying the burden alone.²²⁰

According to Karanja, abortion qualification should not only be when the life and health of the child is at stake. His assertion is driven by a situation where a woman may want to carry the baby to term but the pregnancy may not be welcomed by the woman's family or community. He states that unsafe abortion has led to significant short and long-term illness and injury, high cost to treat complications, negative impact on family, children, and communities and increasing cases of death.²²¹ Ocholla argues that abortion may also be carried out where the citizenship will be questioned. He gives an example of some cultures which do not accept a child born out of wedlock.²²²

What is the contemplation of Article 26(4)? According to Gwena a great number of countries have prohibited abortion but allowed the practice on a number of grounds.²²³ This comparative discussion is provided in the next chapter. This explanation has it that there are circumstances when abortion may be qualified on certain grounds as contemplated by the Constitution. Mason assertion is that some laws conflicts with pregnant women's rights, particularly their right to choose abortion.²²⁴

Most scholars agree that when a state prohibits abortion in the first place with or without qualification, it limits or automatically rules out exercise of women's rights. The study also noted that when pregnancy termination is carried out, some scholars equate it to homicide especially in explicit qualifications that do not threaten the life and health of the mother.

2.4. 2 Legislating Article 26(4) of the Constitution

According to KNHREC it is reported that data from a nationally representative sample of both public and private sector hospitals and health facilities, found that nearly 465,000 induced

²²⁰Peter, *Medical Law & Ethics* 132-145.

²²¹ Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010) pp 16.

²²² Center for Reproductive Rights (2010) pp 25.

²²³ Ngwena G., "Social Justice in Health: Using Human Rights to Realize Access to Safe, Legal Abortion in Uganda" (2014)1 *Kampala Center for Health, Human Rights and development* 7-8.

²²⁴ Mason J., *Medico-Legal Aspects of Reproduction and Parenthood*, (Dartmouth Publishing Company Limited, 1990).

abortions occurred in Kenya in 2012.²²⁵ It further reported that most of these induced abortions are unsafe. This is a worrying number in a country where Constitution contemplates legislation in the area.

The important thing to note is that abortion has not been carried out mainly on lawful ground and as such Article 26 (4) as it is qualifying abortion on medical ground does not resolve the conflicts that have been there. However the Article came in to uphold human rights more so of women whose life or health may be threatened by laws that were there before the 2010 constitutional dispensation. The study reveals that most abortion in Kenya have been carried out by women who are afraid of giving birth or fear of nurturing such children for social or economic reasons. Put differently the prospects of carrying out abortion by informal forces-quacks is real than ever before.²²⁶ From the report made by various bodies (KNHREC and WHO, inter alia), the practice has even been carried out by registered and qualified practitioners in their private practice.

According to WHO, any pregnant woman who is in persistent need of procuring abortion is psychologically distressed. This in the long run affects her entire health. This is in agreement with Mason assertion that everyone in constant need of aborting is psychologically unhealthy.²²⁷ This is supported by WHO definition of health which includes psychological illness. According to Otieno a woman will pretend to have suicidal or psychiatric intentions and doctors may believe her position.²²⁸

Karua reports that research has it that a woman who is determined to terminate pregnancy will still do it even in cases where they are risking their lives without concerns of the law or religion. She accuses morality, religion, political and cultural spheres as having failed to resolve the issue

²²⁵ Kenya National Human Rights and Equality Commission Report on Making Bill of Rights Operational; Policy, Legal and Administrative Priorities and Considerations available at [http://www.knchr.org/Portals/0/Reports/MAKING THE BILL OF RIGHTS Operational.pdf](http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf).> accessed on 14th July 2014.

²²⁶ Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010) pp 45-47.

²²⁷ Mason J., *Medico-Legal Aspects of Reproduction and Parenthood* (Dartmouth Publishing Company Limited, 1990).

²²⁸ Center for Reproductive Rights, (2010) pp 25.

of abortion in Africa.²²⁹ She advocates for a more liberal legislation that facilitates and promotes human rights.

Does prohibition act as deterrence to those who would wish to procure abortion on demand? According to deterrence theory punishment in criminal law is applied in deterring others from committing such or similar offences. Can arrest and prosecution of those who have abortions act as deterrence to others? Is it worthy to punish anyone who willingly without justifiable course terminates pregnancy? The study revealed that this may not be the case with laws prohibiting abortion related offences. Most scholars state that women who terminate pregnancy are necessitated by other factors but not the law in place.²³⁰ According to KNHREC report, higher rates of unsafe abortion are caused by poor women's health, poverty, gender based violence and poor access to medical services.²³¹

According to Otieno,²³² the reasons why women result to abortion are not on exercise of human rights basis. He argues that women result to unsafe abortion because they lack information about reproductive and sexual health and rights, lack of reproductive health counselling and services, lack of access to safe affordable and acceptable contraceptives and restrictive legal and policy environment.²³³

According to Otieno, though not supporting the current restrictive laws on abortion, he states that if abortion is made available on demand it will lead to a moral decayed society. His argument is that this may eventually lead to women seeking abortion as an alternative to family planning.

The controversies of the provision started even before the actual drafting. There were two antagonistic groups over the issue of abortion being provided for in the Constitution. The pro-life led by religious leaders fought very hard not to have such a provision in the Constitution. This did not auger well by the pro-choice led by women activists. Their reasoning was that a woman should not be discriminated by reason that they are the one to be forced to carry unwanted

²²⁹ Center for Reproductive Rights, (2010) pp 45.

²³⁰ See Karua discussion in Center for Reproductive Rights, (2010) pp 45-47.

²³¹ Kenya National Human Rights and Equality Commission Report on Making Bill of Rights Operational; Policy, Legal and Administrative Priorities and Considerations available at http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf.> accessed on 14th July 2014.

²³² Center for Reproductive Rights, In Harm's Way: The Impact of Kenya's Restrictive Abortion Law (Centre for Reproductive Rights New York 2010) pp 68-69.

²³³ Center for Reproductive Rights, (2010) pp 69.

pregnancy to term. They further argued that this has mainly been propelled by the patriarchal society. They wanted a constitutional provision allowing women to terminate pregnancy on demand. To appease the two groups this may be the reason why the drafters of the Constitution allowed development and growth of the Constitution with a controversial provision. The pro-life were rewarded by prohibiting abortion. On the other hand the pro-choice (feminist) were rewarded by qualifying abortion in cases of emergency or where the life or health of a mother is in danger and any other ground that may be provided by parliament. Accordingly, Constitution in itself is not exhaustive, it only gives direction. The argument is that any controversy that is posed by the provision may be resolved by parliamentary regulation.

The parliament by virtue of Article 26(4) is mandated to enact a law allowing other grounds for terminating pregnancy other than those expressly mentioned in the provision. According to Mason such a law made in contemplation of Article 26(4) must be morally obligated. Kenya like most African countries is rooted on its cultures and secondly on the effect of such a law in our country. In his study on grounds for abortion, Peter identified that hopes for the future, social and health needs has mainly influenced states in enacting abortion laws.²³⁴ He also found that abortion is sometimes legitimized on the basis of economic reasons. Most scholars attribute unsafe abortion to restrictive laws. According to Gwena the high death rate of abortion cases in Uganda are caused by unsafe abortion carried out by persons lacking the necessary skills or an environment that does not conform to minimal medical standards as required by WHO.²³⁵

Mason emphasizes that knowledge on laws and rights in place influences a woman in determining whether to carry pregnancy to term or not but it cannot prevent a woman who is in constant need of seeking abortion from carrying out the process.²³⁶ This is in agreement with Karua assertion that restrictive laws do not prevent termination of pregnancy.²³⁷

A critical study of practical history in Kenya reveals that, notwithstanding the position of the law, women are procuring abortion necessitated by reasons within their reach and others that are

²³⁴ Peter, *Medical Law & Ethics* 132-145.

²³⁵ Ngwena G., (2014): *Social Justice in Health: using Human Rights to Realize Access to Safe, Legal Abortion in Uganda* (2014) 1 *Kampala Center for Health, Human Rights and development* 7-8.

²³⁶ Mason J., *Medico-Legal Aspects of Reproduction and Parenthood*, (Dartmouth Publishing Company Limited, 1990).

²³⁷ Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010) pp 45-46.

beyond their control. While saving life of the mother is the main feature of qualifying abortion the practical puzzle is that abortion is carried out in private spheres. In Kenya case it has been carried out due to other reasons beyond risk and health of the mother.

As Karua argues abortion in Africa and Kenya in particular is carried out clandestinely and outside ordinary health facilities.²³⁸ The findings of the study established that unsafe abortion in Kenya has always been on increase whether restrictions are placed on law or not. According to Ocholla abortion is heightened by social, economic, cultural, demographic and psychological conditions prevailing in the society.²³⁹

Abortion has been part and parcel of human survival where ladies procure it mainly on economic and social grounds. Most of these cases occurring in circumstances that are implicit within the definition of WHO on unsafe abortion.²⁴⁰ This is in agreement with Mason assertion that abortion is carried out in an environment that is not conducive for the same and in most cases carried out by personnel that are not qualified in the process.²⁴¹ Gwena argument is that if abortion is decriminalized it leads to reduction of unsafe abortion and that culminates to maternal death reduction as the process will be carried out under the recommended manner by WHO.²⁴²

According to Mutio, unsafe abortion takes the highest percentage in Africa despite the laws of the land, professional ethics, rules and regulations and training and practice.²⁴³ The researcher found out that abortion has become lived reality for most women without caring the position of the law. According to KNHREC report, the Kenyan human rights system in its undiluted form gets contaminated by provisions that are controversial.²⁴⁴ The report argues that provision that life starts at conception by its very nature denies women the valued rights to reproductive rights

²³⁸ Center for Reproductive Rights, (2010) pp 45.

²³⁹ Center for Reproductive Rights, (2010) pp 23.

²⁴⁰ World Health Organisation, "Unsafe Abortion; Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008" (2011) Geneva.

²⁴¹ Mason J., *Medico-Legal Aspects of Reproduction and Parenthood*, (Dartmouth Publishing Company Limited, 1990).

²⁴² Ngwena G., "Social Justice in Health: using Human Rights to Realize Access to Safe, Legal Abortion in Uganda" (2014)1 *Kampala Center for Health, Human Rights and development* 7-8.

²⁴³ Center for Reproductive Rights, (2010) pp 18.

²⁴⁴ Kenya National Human Rights and Equality Commission Report on making bill of rights operational; policy, legal and administrative priorities and considerations available at <http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf> accessed on 14th July 2014.

and cancels all the other rights like right to dignity, privacy, right to information and liberty inter alia.

This study isolated factors widely held grounds of abortion and why it escalates as it does. This study also outlined how and why abortion has become a way of life in Kenya. Importantly, the researcher was able to establish that incidences of high rate of unsafe abortion are not only about restrictive laws in the country. This culminates to high rate of unsafe abortion.

The Article can be applied positively in resolving unsafe abortion cases. According to Karua unborn child rights cannot supersede or be equated to that of a pregnant mother. The reasoning is that a pregnant woman has a right to terminate the life of unborn child. However it is argued that decriminalization of abortion by itself is not enough to fight unsafe abortion. The stigma associated with the process is the main challenge. This therefore means that the issue needs to be addressed not only by law but also other reproductive policies. According to Benson as it is discussed in the next chapter, the CTPA in South Africa did not substantially resolve the puzzle of unsafe abortions.²⁴⁵ Gwena recommends that the practice may not auger well with laws that are restrictive.²⁴⁶

According to Ocholla, there is a symbiotic relationship between the rights of the child and that of the mother. A mother has a moral obligation to protect and safeguard the rights of the unborn child. However, in situations when the woman may be carrying unwanted pregnancy the state has an obligation to protect the life of and wellbeing of the unborn child without compromising the rights of the mother. This is in contrast with Holmes findings where he stated that most scholars attribute a no status position to unborn child.²⁴⁷ Scholars have pointed to the exclusion of foetus rights in the first trimester.

Controversies and contradictions created by Article 26(4) on human rights of a pregnant mother to reproductive rights, life, health of the mother and that of a child to life overlaps contributing to the likelihood of legislation conflicting with Article 26(2). There is a feeling of inequities in

²⁴⁵ Benson J. et al., Reduction in Abortion-Related Mortality Following Policy Reform: Evidence from Romania, South Africa and Bangladesh' (2011) 8 *Reproductive Health* 39, available at <www.reproductive-health-journal.com/content/pdf/1742-4755-8-39.pdf> (accessed 10 October 2014)

²⁴⁶ Ngwena G., "Social Justice in Health: using Human Rights to Realize Access to Safe, Legal Abortion in Uganda" (2014) 1 *Kampala Center for Health, Human Rights and Development* 7-8.

²⁴⁷ Holmes B., Human Rights: Another Look At Abortion. *Children by Choice Association. Disponible <en: http://www.aic.gov.au/media_library/publications/proceedings/16/holmes.pdf> accessed 18th April 2015.*

human rights application concerning practice as well as access to it. This application may be tapped by pregnant women in need of terminating pregnancy and resonate with certain rights in the Constitution. Further, as Gwena argues an unborn child may not be in a position of articulating his rights and thus be interfered without penalization.²⁴⁸ This provision is susceptible to manipulation. However in supporting liberalization of laws on abortion as in 1999, Prof Julius Meme stated that, the then laws in Kenya were colonial and too restrictive.²⁴⁹ He was basing his argument on the experience he encountered in Kenyatta National Hospital.²⁵⁰ The study found that the provision is a sensitive issue that requires sober parliament intervention.

Distressing as all these issues partakes the abortion question; nothing illustrates the appropriate path of conducting safe abortion within the law. Abortion in Kenya has always been prohibited yet it has been occurring in private spheres. According to WHO Report, there is high prevalence of unsafe abortions despite strict criminal sanctions on those who procure abortion.²⁵¹ This study revealed that most abortions in Kenya are performed as a matter of choice and mainly carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards as required by WHO.²⁵² The WHO figures on unsafe abortion is that they cause 30% of all maternal deaths.²⁵³ According to Charles Njonjo the high rate of abortion in Kenya is as a result of lack of reproductive health education and access to contraceptives.²⁵⁴

As Njonjo stated, the abortion debate need to be addressed by sober mind with an objective atmosphere.²⁵⁵ He adds that in carrying out the discussion the voices and opinions of women should be raised and heard. However, the emphasis of the study is that rights of an unborn child should not be disregarded wholly.

²⁴⁸ Ngwena G., "Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa" (2010) 32 *Human Rights Quarterly* 783, 787-797

²⁴⁹ Mayles International Conference of Midwives Report of 1999.

²⁵⁰ Ibid.

²⁵¹ World Health Organization (WHO), *Unsafe Abortion: Global and Regional Estimates of Incidence of Unsafe Abortion and Associated Mortality in 2003* (WHO, Geneva 2007b).

²⁵² World Health Organisation, *Safe Abortion; Technical and Policy Guidance for Health Systems* (2012).

²⁵³ World Health Organisation, *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008* (2011).

²⁵⁴ Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law*. Centre for Reproductive Rights (New York 2010) pp 12-13.

²⁵⁵ Center for Reproductive Rights, (2010) pp 12-13.

The study reveals that, although the drafters of the Constitution may have intended well, the practice requires an appropriate regulation. In absence of an elaborate legislation it would be appropriate to state that the Constitution invested much authority of a judicial nature to health practitioners. According to Peter,

“...the ease in which a doctor can plausibly claim that the grounds for abortion are satisfied, prosecution is highly unlikely.”²⁵⁶

According to Henkin the Constitution has clearly placed power in the mind and hands of doctors. In that sense abortion is primarily a matter for medical profession and decision of termination is within the competence of medical practitioner. The study reveals that there is a high possibility that there will be variations in the way doctors will interpret the health or life of a mother being risked by pregnancy. According to Nyikai the best strategy to adopt is commitment in improving the reproductive health and reduction of mortality and morbidity affecting women.²⁵⁷ He gives cases of avoiding unwanted pregnancies by providing contraceptives and post-abortion services as close as possible to the community.²⁵⁸

Mwaura thinks that pro-choice and pro-life justification on why abortion should be and why not is based on ethical aspect of respect for human life.²⁵⁹ He attributes this to the endless debate. Pro-choice is on two considerations; that of moral status of the foetus and pregnant woman’s moral rights to self-determination. Martha Karua contends that abortion problem must be tackled with sobriety and commitment to seek solution and actual analysis of facts if we have to avoid similar incidences.²⁶⁰ She proposes reproductive policies, legal framework and service delivery be reviewed as a matter of urgency.

If qualification to abortion is to be carried out considerably within the law and the practice be effective, it must be done with the consent of the pregnant woman and in case of incapability to procure such consent due to her condition a spouse or close relative should be consulted. Further such lawful cases should be carried out in approved clinics and be attended by qualified and

²⁵⁶ Peter, *Medical Law & Ethics* 132-145.

²⁵⁷ Center for Reproductive Rights, *In Harm’s Way: The Impact of Kenya’s Restrictive Abortion Law*. Centre for Reproductive Rights (New York 2010) pp 22.

²⁵⁸ Center for Reproductive Rights, (2010) pp 22.

²⁵⁹ Center for Reproductive Rights, (2010) pp 36.

²⁶⁰ Center for Reproductive Rights, (2010) pp 46.

accredited personnel. Some of these proposals have been incorporated in the reproductive health bill.

The findings of the study on regulation of abortion in Kenya raised a number of issues that are cross-cutting and strategies that may be applicable in legislating on Article 26(4) of the Constitution. In consideration of this knowledge the researcher found it important to carry out a comparative study on how abortion is regulated in other jurisdictions. In the next chapter the study reviews jurisdictions of USA, Britain and South Africa.

CHAPTER THREE

COMPARATIVE ANALYSIS OF ABORTION REGULATION

3.0 Introduction

In an attempt to understand how Article 26 (4) should be implemented the researcher in this chapter examines how abortion is regulated in other jurisdictions. The jurisdictions discussed in this chapter are USA, Britain and South Africa. In this the researcher examines a comparative study in different jurisdiction of legal framework of abortion and its qualification. Britain has been selected for analysis due to the landmark case of *Rex vs. Bourne*²⁶¹ that provided for qualification of abortion to protect a woman from becoming a physical or mental “wreck”. This case has been cited in many jurisdictions especially in commonwealth countries. Further Britain has a number of laws dealing with abortion as discussed later in this chapter. USA is selected due to its liberal nature and unique path on promoting rights of women. The study also found it important to review the case of *Roe vs. Wade*²⁶² as one of the cases that qualified abortion on the basis on woman right to privacy.

This study reveals that abortion is legalized in a number of western countries and this has been done mainly on basis of upholding woman’s rights.²⁶³ However, the practice in Africa has been widely opposed on morality grounds.²⁶⁴ There are a number of countries in Africa that have legalized abortion on the basis of right to a woman on her privacy while others have done this on the freedom of choice and non-discrimination.²⁶⁵ However, this study discusses South Africa as the only case in Africa because of its boldness in enacting law on termination of pregnancy among other milestone.

Abortion qualification grounds are based on a number of contentious and controversial explanations. Arguments have been made for and against it in most jurisdictions. The pro-choice

²⁶¹ [1939] 1 K.B. 687.

²⁶² United States Supreme Court, 410 U.S 113(1973).

²⁶³ Kahn K. et al, “WHO Analysis Causes of Maternal Death: A Systematic” (2006) *Lancet* 367, 1066-1074.

²⁶⁴ Center for Reproductive Rights, *A Technical Guide To Understanding The Legal And Policy Framework on Termination of Pregnancy in Uganda* (2012).

²⁶⁵ Center for Reproductive Rights, *In Harm’s Way: The Impact of Kenya’s Restrictive Abortion Law* (Centre for Reproductive Rights New York 2010) pp 25.

have strongly defended decriminalization of abortion in a number of grounds while the pro-life opposes abortion in all grounds. According to a report by Kenya National Human Rights and Equality Commission (KNHREC) Report²⁶⁶ criminalization of abortion in developing countries is very strict. The Report argues that criminalizing abortion does not serve much purpose as it only worsens the situation by pregnant women procuring unsafe abortion. Quoting the KNHREC Report,

“There is overwhelming evidence that where abortion is criminalized, cases of unsafe abortion are high. Consequently, in those countries, abortion related deaths and injuries register in the high percentile.”²⁶⁷

3.1 World Perspective on Regulation of Abortion

This section discusses the approaches of comparative jurisdictions to grounds for abortion. Countries discussed herein are United States of America and United Kingdom as representation of countries outside Africa. In Africa the study draws comparison from the jurisdiction of South Africa. The study further considers a general perspective of abortion across board. Further Human Rights Committee has been instrumental in pressuring states in amending their laws especially where there are restrictive laws against abortion in certain grounds. In some jurisdictions, the findings are that additional grounds have been allowed in procurement of abortion. Apart from protection of the mother’s life and her physical or mental health others provided are; economic or social reasons, in cases of rape or incest, in case of incurable and serious foetal deformity and the woman choice on request. Some jurisdictions have granted pregnant women power (rights) on their body and life. This has been realized through such countries initiative or through pressure from women activist or the international community.

²⁶⁶ Kenya National Human Rights and Equality Commission Report on Making Bill Of Rights Operational; Policy, Legal and Administrative Priorities and Considerations available at http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf.> accessed on 14th July 2014.

²⁶⁷ Kenya National Human Rights and Equality Commission Report 2014.

3.2 Regulation of Abortion outside Africa

3.2.1 Grounds of Abortion in America

America is one of the most liberalized countries and great advocator of women rights. In America abortion is legalized in many grounds, more important is on reproductive health rights. According to Finer L. B, in America, grounds of abortion include to save the life of the mother if in danger, to protect physical health, to protect mental health, foetal impairment, economic or social reasons, rape or incest and on request by a party.²⁶⁸

Abortion in United States of America has mainly been discussed within the realm of human rights. However, it should be noted that specific regulation is dealt with at state level. This means individual states in America are the one mandated in regulating abortion. Feminist have fought on convincing the states that it is only a pregnant woman who has a right to choose what goes on her body. Feminist theorists argue that abortion issue affects a woman more than the society. According to Finer, abortion in America is liberalized countrywide though states are left to make laws and policies on grounds for permitting the process.²⁶⁹ According to the United States Supreme Court in *Roe v. Wade*,²⁷⁰ the issue of abortion should be discussed within the realm of the right to privacy. In 1973, the United States Supreme Court in *Roe v. Wade*²⁷¹ struck down the Texas and Georgia criminal abortion laws as a violation of women's right to privacy. In the case the appellant, a pregnant and unmarried woman argued that her wishes to have a legal abortion performed by a licensed medical practitioner, was infringed. She also argued that the Texas statutes improperly invaded the right of a pregnant woman to choose to terminate her pregnancy. The law in question as in most jurisdictions legalized abortion where the life of the mother was threatened by the continuation of the pregnancy.

In her response the State of Texas was arguing that life begins at conception and not at birth. The argument was that a state was under a duty to protect the life of a person and in this case that of unborn child. The court in this matter took a bold move and ruled in favour of the woman. The

²⁶⁸ Finer L. and Henshaw S., *Disparities in Rates of Unintended Pregnancy in the United States*, 1994 and 2001. (2006) 38 (2) Perspectives on Sexual and Reproductive Health 90-96.

²⁶⁹ Ibid.

²⁷⁰ United States Supreme Court, 410 U.S 113(1973).

²⁷¹ Ibid.

reasoning of the court in its judgment was that unborn child cannot be recognized as a person in the whole sense. Further, court concluded that the life of a woman cannot be equated with that of unborn child who has no status of a person. It held that the state is obligated in protecting the life and health of a mother. The court stated that a pregnant woman has a choice in consultation with a doctor to either terminate or not terminate pregnancy in the first trimester. In effect the state is not supposed to coerce her unwanted pregnancy. However the court went ahead to find that a state has mandate to provide regulations on who performs it and where it is performed to preserve and protect maternal health. However court observed that the state has an interest in protecting the potentiality of human life. The holding was that this interest grows with time as a pregnant woman advances in pregnancy. Therefore a pregnant woman may be compelled in later stages to a carry the child to term.

The court referred to this compelling point as foetus having reached viability. That is to say it is capable of having meaningful life outside of the mother's womb. In such circumstances the state is supposed to regulate abortion logically and biologically justly. A law on abortion must distinguish termination of pregnancy performed early in pregnancy and those performed later. Contrary to this, the court concluded that it may only amount to violation of the woman's right to privacy recognized in the fourteenth Amendments to protection of personal liberty.

With the liberalization of abortion laws in America the practice has continued both publicly and in private capacity. According to a report of New England Journal of Medicine in 2008, 32% of pre-term abortions were chemically induced by use of drugs.²⁷² Notable was by use of RU drug which was legalized in 2000.

3.2.2 Regulation of Abortion in Britain

Generally abortion in England is prohibited under the Offences against the Person Act.²⁷³ This is clearly provided under s. 58 and 59 of the Act. Section 58 provides,

“Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any

²⁷² New England Journal of Medicine 2008 Report.

²⁷³ Offences Against the Person Act 1861.

instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable. . .”²⁷⁴

Section 59 of that Act provides,

“Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable...”²⁷⁵

However, in England abortion is legalized on certain grounds. *Rex v. Bourne*²⁷⁶ was the first case to address the grounds upon which an abortion could legally be provided in England. In the *Bourne* decision, a physician was acquitted of the offence of performing an abortion in the case of a woman who had been raped. The court ruled that the abortion was lawful because it had been performed to prevent the woman from becoming “a physical and mental wreck”, thus setting a precedent for future abortion cases performed on the grounds of preserving the pregnant woman’s physical and mental health. Judge Macnaghten reasoned that the use of the word “unlawfully” in the provisions criminalizing abortion in the English Offences against the Person Act. His reasoning also stated as not including saving the life and health of the mother. He then reasoned that a life exception had always been implicit in the provisions criminalizing abortion and found that a “reasonable view” of preserving a pregnant woman’s life included preserving her mental and physical health. As Rebecca argues, In essence, *Bourne* created an explicit life, mental and physical health exception to the criminalization of abortion.²⁷⁷

²⁷⁴ Offences Against the Person Act 1861.

²⁷⁵ Ibid.

²⁷⁶ [1939] 1 K.B. 687.

²⁷⁷ Rebecca Cook & Bernard Dickens, *Abortion Laws in Commonwealth Countries* (1979) 13.

This is also the case in Wales and Scotland since the enactment of the Abortion Act 1967.²⁷⁸ The Act provides that a person shall not be guilty of an offence under the law relating to abortion when,

“a pregnancy is terminated by a registered medical practitioner, if two registered medical practitioners are of the opinion, formed in good faith;

- a) “ that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
- b) that the termination of the pregnancy is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
- c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated
- d) That there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.”²⁷⁹

By the time this legislation came into place, it was considered as one of the most liberal laws regarding abortion in Europe. In most of the grounds, abortion is supposed to be carried out within the 1st trimester. However section 1(1) d of the Abortion Act provides that abortion can be carried out at anytime if there is likelihood of a child being born with disabilities. One of the other ground qualifying abortion is if the mother’s health is at risk. This is in cases of likelihood of physical or mental risk that may seriously damage the mother.

It can be concluded therefore that sections 58 and 59 of the Offences against the Person Act 1861, and any rule made in connection to it on termination of pregnancy, anything carried out with intent to procure a woman's miscarriage is unlawful unless authorized by section 1 of the Abortion Act 1967. Thus section 1 of Abortion Act provides the grounds for termination of the pregnancy within the legal framework. This is the main position in a number of other European countries though each country has its own laws in regulating abortion.

²⁷⁸ Abortion Act of England 1967.

²⁷⁹ Abortion Act of England 1967.

3.3 Regulation of Abortion in Africa

Most African countries are deeply rooted to their cultures. Within this cultural context lie the moral obligations of respect for human life. According to Gwena, African abortion laws have historically been highly restrictive, being replicas of the laws of the colonizing countries.²⁸⁰ Citing Ugandan laws as an example, Gwena states that these laws have been retained from Britain yet in such a country it has been repealed.²⁸¹ As he claims these law criminalized abortion and saving the life of the pregnant woman is expressly or implicitly the only recognized exception. According to Ngwena, African countries have highly restrictive laws on abortion yet they have been associated with high levels of unsafe abortion.²⁸² The Africa Union's Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights (2007-2010) was constituted with an objective of reducing the incidences of unsafe abortion.²⁸³ What are the other grounds for abortion and what causes these unsafe abortions in Africa?

3.3.1 Regulation of Abortion in South Africa

South Africa is one of the countries in Africa that has a unique history in political, social and economic spheres and in some cases differing a lot with other African Countries. The grounds for abortion in South Africa mainly revolve around the argument on the rights of women as outlined in the South African Constitution²⁸⁴ and the Choice for Termination of Pregnancy Act.²⁸⁵

Section 12(2)(a) of the Constitution of South Africa states that, "Everyone has the right to bodily and psychological integrity." This can be interpreted to include the right to make decisions concerning reproduction. Further, section 27(1)(a) states;

²⁸⁰Ngwena G, Social Justice in Health: using Human Rights to Realize Access to Safe, Legal Abortion in Uganda; (2014)1 *Kampala Center for Health, Human Rights and development* 7-8.

²⁸¹ Ngwena G (2014) 6-20.

²⁸² Ngwena G (2014) 7.

²⁸³ African Union, Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health 2007-2010 (Maputo Plan of Action) (2006)<<http://pages.au.int/carmma/publications/plan-action-sexual-and-reproductive-health-and-rights-maputo-plan-action>> accessed on 10 May 2014.

²⁸⁴ Constitution of South Africa, 1996.

²⁸⁵ Choice for Termination of Pregnancy Act of 1996, laws of South Africa.

“...everyone has the right to have access to health care services, including reproductive health care.”

Similarly, the preamble requires protection of the right of persons to make decisions concerning reproduction and to achieve security in and control over their bodies. It also provides that both men and women are entitled the right to have access to safe, effective, and acceptable methods of fertility control of their choice. Further it provides that women have a right of access to appropriate health care services to ensure safe pregnancy and childbirth. It also makes the State responsible for providing reproductive health to all, contraception and termination of pregnancy services, as well as safe conditions under which the right of choice can be exercised without fear or harm.

The Republic of South Africa also passed an abortion law referred to as the Choice of Termination of Pregnancy Act (CTPA), 1996.²⁸⁶ The purpose of the Act is stated as to determine the circumstances in which and the conditions under which pregnancy of a woman may be terminated. It lays down circumstances in which abortion is to be performed. The law further defines the medical personnel authorised to perform an abortion; defines the point at which an abortion can be carried out; provides for consent in cases where the abortion is requested by a woman of sound mind and in the case of minors or persons with low mental acuity; defines where an abortion can be performed; makes provision on the requirement to make information on safe abortion accessible; provides for confidentiality of the person upon whom an abortion has been performed; and provides penalties in cases where abortion is performed by unqualified personnel.

According to this South African legislation any woman can procure abortion on request (on demand) with no reasons given under the CTPA, within the first trimester. However, between 13 and 20th week of pregnancy she can only procure if;-

- a) “her own physical or mental health is at stake,
- b) the baby will have severe mental or physical abnormalities,
- c) she is pregnant because of incest,
- d) she is pregnant because of rape, or

²⁸⁶ Choice on Termination of Pregnancy Act, No. 96 of 1996 Section 2, South Africa. available at: <<http://www.info.gov.za/gazette/acts/1996/a92-96.htm>> last accessed on 6 May 2014

- e) she is of the personal opinion that her economic or social situation is sufficient reason for the termination of pregnancy.”

Any subsequent termination of pregnancy can only be performed if her life or the foetus' life is in danger or there is likelihood to be serious birth defects.

Though the CTPA allows termination of pregnancy on the above grounds, it further provides that it can only be done in accordance to its provisions. A legal abortion must be performed by a physician in a government hospital or other approved medical institution (state designated institution) with the permission of the hospital superintendent. This process must be approved by two independent physicians (besides the physician performing the abortion), one of whom must be a psychiatrist if abortion is sought on mental health grounds or a district surgeon if the pregnancy resulted from unlawful intercourse. This is like in cases of rape and incest. To entrench professionalism in the process, the law further requires that one of the consenting physicians must have practiced medicine for duration of not less than four years. However the law outlaws such physicians entering into consent to carry out the process if it does not qualify within the provisions of the CTPA. For the case of rape, incest or intercourse with a mentally retarded woman a certificate of court of the rank of a magistrate must be acquired. Before issuance of such a certificate the magistrate must however be satisfied that the alleged act occurred.

In the process of implementation of the CTPA, the Act faced a court challenge as being unconstitutional. An anti-abortion organization in the case of *Christian Lawyers Association v Minister of Health*²⁸⁷ filed a case challenging the validity of the Choice on Termination of Pregnancy Act. The organisation argued that the Act violated the right to life as guaranteed in section 11 of the Bill of Rights. The argument was that, in authorizing the taking of life, the law infringed the right to life of human beings and in this case that of the unborn child. The organization understanding and argument was that life begins at conception. The organization was claiming that Section 11 of South Africa's Constitution, providing that 'everyone has the right to life,' their interpretation was that the term "everyone" includes an unborn child. The Transvaal Provisional Division of the High Court however dismissed the suit. It held that affording the foetus or embryo legal personality or protection, and that to interpret "everyone" as

²⁸⁷ 1998 (11) BCLR 1434 (T).

encompassing a foetus would give the term person a different meaning from that which it bears everywhere else in the Constitution. Moreover, the Court concluded that to afford the foetus the status of a legal person might impinge on the rights of women that are expressly guaranteed in the Constitution. The holding of this court is found to be similar to that of the Supreme Court of United States in the case of *Roe vs. Wade*. The Supreme Court of United States of America found a similar holding that unborn child cannot be recognized as a person in the whole sense.

It is noteworthy, as Ngwena argues abortion in South Africa used to be performed before legalization but in secretive way and in legal grounds for the cases of those abortions permitted on other grounds.²⁸⁸ Ngwena further argues that although the Act in theory legalized abortion under a broad series of indications, in effect, very few legal abortions compared to unsafe abortions have been performed after its enactment.²⁸⁹ Estimates has it that less than 1,000 legal abortions are carried out each year.²⁹⁰ Most abortions (around 200,000 an year), are estimated to be performed illegally.²⁹¹ Some of these unsafe abortions results in hospitalization due to incomplete abortion and complications.²⁹²

3.4 Conclusion on Comparative Analysis on Abortion Regulation

In an attempt to get the downright truth of abortion regulation in Kenya the researcher sought to know how abortion in other jurisdiction has been managed. In reviewing literature and legal framework in other jurisdictions the researcher realized that the issue of abortion is still debatable and a contentious issues worldwide including those countries that have legalized it. Cases of illegal and unsafe abortion are still rampant. Abortion in such jurisdictions however are either allowed on human rights ground, medical, privacy or other related factors. Further he also realized that even in the most restrictive countries, abortion is still procured in private affairs. However there are stringent laws prohibiting abortion in some jurisdictions. It is notable that however restrictive laws may be, abortions are carried out in all jurisdictions. However, it is

²⁸⁸ Ngwena G., "Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa" (2010) 32 *Human Rights Quarterly* 783, 787-797.

²⁸⁹ Ngwena G., "Reforming African Abortion Law to Achieve Transparency: Arguments from Equality" (2013) 21 *African Journal of International and Comparative Law* 398.

²⁹⁰ Victoria Balogun and Ebenezer Durojaye, "The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights" ((2011) 11 (2) *AHRLJ* 368,373.

²⁹¹ *Ibid.*

²⁹² Ngwena G., (2013) 398.

lawful almost in all jurisdictions to terminate pregnancy to prevent “grave permanent injury” to the physical and mental health of a woman or in the event where continuance of the pregnancy would involve risk to the life of the pregnant woman. Most of those who oppose abortion to some extent agree that abortion can be morally acceptable for the sake of mother’s health or if there is a real risk or serious damage to the physical or mental health of the mother.

In most jurisdictions, additional situations where one is allowed to have an abortion performed on them are in cases of rape or incest, in situations of incurable and serious foetal deformity, where the pregnant woman, owing to a physical or mental deficiency or her minority, is physically or mentally unfit to bring up the child,²⁹³ or for economic or social conditions.²⁹⁴ In the most restrictive jurisdictions this study established that it translates to high level of unsafe abortions.

Reflecting on most jurisdictions that have qualified abortion on other grounds other than the one that are express in Article 26(4), termination of pregnancy is allowed in the 1st trimester. This is the situation in South Africa, England and United States of America as discussed earlier.²⁹⁵ However the situation in Kenya remains clear as provided in the Constitution on when life starts.

The economic and social ground considers the inconveniences and social pressure which may be faced by a woman during pregnancy and after birth.²⁹⁶ In this as Peter argues the woman is in a state of distress and child birth and continued pregnancy carry an inherent risk, so that they are just about always more risky than termination.²⁹⁷ However abortion for social reasons does not receive much support from opponents of abortion.

In some jurisdictions abortion is said to be lawful if there is foetal abnormality. According to Peter, this is where there is a substantial risk that the child will be born with serious physical disabilities. As already mentioned, abortion in the case of rape or incest in Kenya may already be provided for under the Sexual Offences Act. This provision is also express in jurisdictions like South Africa. In considering whether to make abortion available in the case of serious foetal

²⁹³ Federal Democratic Republic of Ethiopia (FDRE), *Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia* (FDRE Addis Ababa 2006) Pp 10.

²⁹⁴ Choice on Termination of Pregnancy Act, No. 92 of 1996, Section 2 (b) (iv).

²⁹⁵ See previous discussions in this Chapter on comparative view on qualification to abortion.

²⁹⁶ Peter, *Medical Law & Ethics* 136-142.

²⁹⁷ *Ibid.*

deformity, the case of *Huamán v. Peru* is instructive. Though in the holding it is reasonable to terminate foetus life where there is likelihood of serious birth defects. However this has been critiqued as having effect on the society on persons living with disability.

The finding in other jurisdictions is that a wide range of grounds for abortion have been provided. Even in these jurisdictions they still provide for a framework including the maximum duration of pregnancy after which the foetus cannot be aborted, regardless of the circumstances. What is left to deal with is Kenyan legislation confronting and providing clear grounds for abortion and giving Article 26(4) life. Each of these and perhaps more grounds will be brought to the fore when considering and implementing statute in respect of Article 26 (4) and therefore need to be further considered here. Further, the above discussion indicates that abortion is prohibited in most jurisdictions with major and minor qualifications. The greatest criticism in this is that whereas it is possible to enact laws on prohibition, is it possible to enforce these abortion laws in a free society. How can you force people to behave in their private sphere and in secrecy? How can it be done within the reach of law? What alternatives are available in legislating abortion laws by parliament?

Borrowing leaf from jurisdictions like South Africa where there is an elaborate law on qualifying abortion there is no legislation that can fully solve the issue of abortion. However to a large extent the issue of abortion in Kenya can be addressed better by enactment of an elaborative legislation. In order to address the problems and issues identified, the next chapter summarizes the findings and a conclusion is drawn. Further the chapter offers recommendations and areas for further study.

CHAPTER FOUR

SUMMARY, CONCLUSION AND RECOMMENDATIONS

4.0 Introduction

This chapter considers the summary, conclusion and recommendations developed from the findings of the study. The chapter outlines legislative, policy and administrative measures that will be employed in realization of Article 26(4) of the Constitution.

4.1 Summary

This study was carried out to determine whether abortion in Kenya is a right and why it should be regulated and not criminalised. The study was also to offer possible solution in legislating to actualize Article 26(4) of the Constitution of Kenya. Surprisingly, the study found that abortion qualification in the Constitution is based on a number of contentious and controversial arguments. However, the provision is taken as a milestone in the Constitution in promoting and protecting reproductive rights in Kenya. It is by far the boldest constitutional provision in enhancing reproductive health.

Nonetheless an elaborative legislation is required to enhance realization of the Article. The fact that most countries and jurisdictions allow abortion in cases of saving life or where the life and health of the pregnant woman is in danger is an indicator of recognition of human rights. Also; the study found that the inclusion of the Article was meant to promote human rights by offering a regime where abortion is regulated and not criminalized. The study further noted that in some instances the qualification to abortion in the bill of rights may aptly limit the life of the child.

Basing on the study findings, there is need for an explanatory law that will minimize the controversies created by the provision. This law will also enhance regulation of abortion and this may translate into reducing cases of unsafe abortions in Kenya. However the Constitution was a bit elaborate on the medical grounds when abortion can be carried out, the provision is set to clog or lack efficacy on prohibiting abortion if not soberly analyzed when making such regulations.

Risk to life and health of the mother expressly permitting termination of pregnancy in the Constitution is one of the grounds provided for by almost all jurisdictions. Regrettably this is not

the main causes of abortion in Kenya. According to Karua restrictive laws cannot in any way be used to change the practice of terminating pregnancies.

Concerns about social and economic reasons are employed as the main reasons for abortion. Economic and social ground considers the inconveniences and social pressure which may be faced by a woman during pregnancy and after birth hence driving her to terminate pregnancy. Although this may not be addressed adequately by legislation, the study realized that reproductive policies are relevant. Similarly according to a report carried out by Ipsos Synovate, most abortions in Kenya are carried out due to socio-economic reasons. Margaret Ireri the managing Director recommended that it is the high time the working conditions be made flexible by employers in order to enhance women to have a choice on having both a family and a career. Rape was also identified as one of key ground why abortion may be permitted. Though not expressly provided, abortion in cases of rape or incest in Kenya is impliedly provided for under the Sexual Offences Act. Also cited but with reservation is in the case of incurable and serious foetal deformity, where the pregnant woman, owing to a physical or mental deficiency or her minority, may be not in a position to bring up a child due to physical and mentally incapacity. However, some scholars argued that this is wrong as it disregards the rights of persons living with disabilities.

There were obvious and serious claims that recognition of the women right to decide independently in reproductive matters by the international human rights and authoritative interpretations of those instruments as including issue of abortion. Restriction of access to safe abortion by states is also seen as breaches of human rights. All these factors have been fronted as possible grounds for qualifying abortion.

The study revealed that most atrocities are committed by doctors at private capacity. Some of these doctors may not be qualified or they may carry out the practice under clandestine conditions. They play the pivotal role of carrying out unsafe abortions which in most cases lead to death. The study realized that they cannot be entirely left to the process without teamwork regulations. To resolve a range of these issues some jurisdictions have recommended that safe abortion within the law be conducted in approved government hospitals and through a procedure approved by at least two independent doctors.

Abortion has taken a dangerous and negative connotation. Abortion is endemic, going out of control, is used routinely as a form of release on unwanted or unplanned pregnancies. The study realized that practically it is used as a birth control measure. According to Ipsos Synovate Report most abortions are procured in private clinics and by quacks in the backstreet. In case authorization to terminate pregnancy is liberalized to doctors without regulation; this will increase the atrocities that may be committed and may erode the intention of the framers of the Constitution.

It can therefore be stated that carrying out of abortion has been attributed to social and economic pressures in the society. Because of the circumstances surrounding how abortion is in real life, it is important to state that being an economic and social problem it requires an economic and social solution. Social justice partly explains how this may be addressed. The intention of the provision may be implemented by considering the grounds stated in the Constitution bearing in mind the numerous cases of abortion in the country. Though the provision allows legislation on other grounds, it seems to be a sensitive and controversial issue that can be addressed by recommendations provided in this study.

4.2 Conclusion

This study is concluded basing on the purpose and objectives of the study. In light of that, the study concludes that Article 26(4) on qualification to abortion recognizes abortion as a human right issue and requires an explanatory legislation to regulate the practice based on the issues addressed by this research. From the findings of the study the most important step would be by parliament enacting a law on abortion primarily promoting the right to life. In the same context the law must promote the highest attainable standard of health which includes physical and mental health. As Ngwenya proposes, the government should enhance the highest attainable reproductive rights of women. This attempt is underway in the Reproductive Health Care Bill. However the Bill does not adequately address the issue of abortion.

Reflecting on the findings of the study it is evident that Article 26(4) on qualification to abortion is not an end in itself. The researcher realized that Article 26(2) providing that life starts at conception positions in Kenya is different from other jurisdictions when it comes to determination of viability of a person. Thus when legislating, the parliament should not take into

consideration the issue of when termination of a pregnancy may be carried out. The provision also may pose controversies with Article 43(1) on exercise of reproductive health rights.

It is disturbing that a great number of women lose their lives in the process of terminating pregnancy. This was attributed to the circumstances and procedure in which abortion is carried out in a regime that is not clearly regulated. Reflecting on exercise of human rights in other jurisdictions, the study found that enjoyment of rights by pregnant women is considered differently in various regions and states. This idea out-ruled the universality of application of such rights. It is within this context the researcher concludes that qualification to abortion is not only about exercise of women rights. The study further indicated that abortion is prohibited in most jurisdictions with major and minor qualifications. The greatest criticism in this is that, whereas it is possible to enact laws on prohibition, the puzzle is the possibility of enforcing these restrictive abortion laws in a free society.

The diagnosis of resolving abortion question is extremely complex but important in saving life and upholding the health of individuals in the society. The reason why Article 26(4) was placed in the main provision about life was to guarantee right to life. The study concludes that to carry out abortion in order to prevent “grave permanent injury” thereby saving the mother physical and mental risks or where the continuance of the pregnancy is endangering the life of the pregnant woman is acceptable in Kenyan society. Further, most opponents of abortion tend to agree that abortion for the sake of mother’s health can be morally acceptable if there is a real risk or serious damage to the physical or mental health of the mother. However, it was found that this practice needs to be regulated not to afford it as free for all. This study therefore found that the law should be enacted to protect both the life of the mother and that of the unborn child. Some scholars argue that it is not right to kill a child for other reasons other than in case of health or risk to life of a woman. Nonetheless the practice is different as most pregnancies are terminated on social economic reasons which are not yet provided by legislation in Kenya.

Right to life in broad sense depends on the realization of right to health. Again such a consideration must reflect the spirit and letter of the Constitution. Any such legislation must be in conformity with requirements of Article 26(4) and meant to promote the highest standard of health as required in Article 43 of the Constitution. Broad approaches also need to be adopted in policy reform and guidelines by medical practitioners. Borrowing rules and practices from other

jurisdictions, these guidelines should reflect on safe abortion services, pre-procedure care, procedures during termination, post-procedure care and arrangements of referral if need be.

For example abortion laws threaten life and the very foundation upon which it is supposed to protect. As such priority should be addressing human right as is critical to the abortion question. However, abortion should and cannot be a free-for-all-process in a country like Kenya. The Constitution in Article 26(2) clearly prohibits abortion. Therefore legislation alone is not enough to actualise the provision. It also requires administrative and policy measures to avoid cases of unwanted pregnancies.

The controversy caused by abortion issue in Kenya and the complexity caused by the Article is on balancing the rights of the woman and that of the unborn child. Article 20 & 21 obligates state to protect, promote, fulfil and respect the rights guaranteed in the Constitution. In line with Article 26(4) state is under a duty inter alia of protecting the life of the mother without compromising the right to life of unborn child. However the assumption of the Article is that there are cases where the rights of a child may be suspended to protect the life of the mother. The fact that most countries and jurisdictions, allow abortion in cases of saving life or where the life and health of the pregnant woman is in danger is an indicator of recognition of human rights of a pregnant woman.

The Constitution does not expressly mention the other grounds in which abortion may be qualified. However it states that other grounds may be provided for by a written law. What is required to address these controversies is a legislation that balances the rights of women and that of other stakeholders. Such a law should recognize the rights of women to reproductive health. The state should recognize the need to protect life and as was stated in the case of R Vs. Bourne to prevent a woman from becoming a physical and mental wreck. This law should address how abortion is conducted, of importance it is to clearly specify grounds in which abortion is permissible. In conducting such lawful abortion, the process should be done in approved clinics by licenced and approved medical practitioners. The law should outline a procedure in certifying such a process.

As findings of the study revealed, the article is very clear that abortion may be qualified when the life and health of a mother is at risk; a legislation should be done to provide on other

permissive grounds like cases of rape and how it should be addressed. Though impliedly provided under the Sexual Offences Act, rape was stated as a probable ground.

Consistency and direction by law is a solution to be in place. Short of that Article 26(4) in relation to abortion qualification will continue to be controversial. It is the high time that the law and policies prevails to prevent trauma and provide avenues for life affirming services or to introduce fundamental change.

As revealed by the study, abortion issue should be understood as a social and economic problem where solution can only be sought by addressing the social and economic factors leading to termination of pregnancy. It is important for the society to create conducive environment where women are willing and ready to give birth without worries associated to social economic reasons.

4.3 Recommendation

Recommendations are drawn from the study in regard to laws, policies and bold steps to be taken basing on the findings of the study. These recommendations are not exhaustive but are provided to enhance a move enabling framework for participation in problem identification, legislation, implementation and enhancement in abortion related issues. More so the study recommends the practical puzzle of qualification to abortion to be regulated.

4.3.1 General Recommendations-better life and health programmes

From the foregoing, the researcher recommends concrete measures of securing health care as a constitutional guarantee. While analyzing the data it was found that approaches to policy commitments, implementation and practice were a big problem in actualizing Article 26(4).

However it should be noted that apart from relevant legal provisions, policy measures and administrative actions must be taken in furtherance of such legislation. Solutions may be sought by constituting a national debate on the matter and balancing rights of different stakeholders. As Synovate Director recommended social and economic solutions must be sought. The director proposed Kenyan employers must take measures of relaxing the working conditions. The study also recommends that social economic factors such as poverty be addressed. Political factors

should be addressed to ensure they are not a threat to implementation of Article 26(4) due to the changing nature of society.

Other creative initiatives must also be devised to aid in reducing cases of abortion that are performed for socio-economic reasons. This will need better health and support services, improved methods of monitoring and evaluation of social and economic reason affecting pregnant women that would drive them to terminate pregnancy. This is by recognizing the special needs of young women who seek abortion-related care and developing programs to address those needs. The state must be willing to establish rescue centres and special care homes for such ladies in furtherance of constitutional requirements.

The government must remove education barriers and develop programmes for training women on contraceptives and family planning that will enable integrated reproductive health rights. This will allow for both healthcare providers and women to know all the grounds, wherein abortion is legal to the full extent of the law.

Promote teamwork regulations through sensitising people, education, training, community programmes and youth exchange actions, and particularly directed towards youths. The government should engage and educate communities about the risk of unsafe abortion, what is allowed under the Constitution and the detrimental effects of abortion. This will enhance informed decision even in cases where abortion is permitted by law.

4.3.2 Legal and Policy reforms

The main solution in addressing Article 26(4) is a legislation that aptly qualifies abortion to promote the life and health of a woman but put into consideration the right to life of a child without ignoring the society at large. The researcher recommends as the Article contemplates a comprehensive legislation to give effect to Article 26(4) in line with Article 43(1) and Article 26(2). This legislation will go on to resolve the controversies posed by the provisions. Further such law should be contemplated by a mechanism for monitoring to ensure compliance.

Parliament must not shirk its responsibility to comprehensively define emergency cases as required in the Article. Further such legislation must also clearly provide who is a trained health practitioner. The parliament must pass a law in regard to determination and approving a trained

health practitioner and the procedure and circumstances under which the process to terminate pregnancy may be carried out.

The law should address the balance between the rights of the mother and that of the unborn child. In this the law should be that termination of pregnancy should not be driven at killing the child if unwanted. Within this context a woman should not have right to kill a child incase a living abortus has likelihood of surviving outside the mother's womb.

Given the evidential and other complexities involved in the Article qualifying abortion, this legislation should be precise on the grounds and how the process should be carried out instead of leaving it to courts which may take a narrow view. The government should also consider the following policy tasks ahead

- (i) reproductive health rights policy
- (ii) Contraceptives and family planning programmes; this is by creating awareness and misinformation about family planning and contraception.
- (iii) Passing of the reproductive health care bill as it is or amending it to broadly cover the intention of Article 26 (4) and concerns raised in this study

Of importance is mainstreaming policies and legal reforms on the meaning of emergency or risk, and a clear guideline on the scope of those to be included as qualified medical practitioner. For example the law should provide that even if the woman is in danger, emergency treatment cannot be carried out without the woman's consent or that of a close relative or if the foregoing cannot be accomplished within a reasonable time a specified number of qualified medical practitioners have approved.

Speed and efficiency in implementation of the Article in line with other provisions more so in regard to the promotion, protection, respect for and fulfilment of human rights. The state should not shun away on these important obligations as outlined in Article 21.

The incorporation of international human rights instruments as stipulated under Article 2(5) and 2(6) in line with Article 21(4) of the Constitution of Kenya would greatly enhance the rights of women. CEDAW and Maputo Protocol require states to come up with comprehensive reproductive healthcare services. The government under the doctrine of *pacta sunt servanda*

should comply with its obligations in international law and all Kenya's law should be in line with rules and principles contained in those instruments.

The Penal Code provisions should be amended to encompass any grounds legislated by parliament as contemplated by Article 26(4). Though the code acknowledges the protection of women reproductive rights, termination of pregnancy should not be carried out in private clinics as it may not meet the spirit of the Constitution. Accordingly it is only government approved hospitals that should be licenced under a laid down procedure.

Government and other stakeholders should be fully involved in ensuring that the law and set policies are implemented as stipulated. These stakeholders may be very instrumental in raising concerns and measures of addressing social-economic reasons that drive women to terminate pregnancy. Government should also ensure that enough medical personnel are deployed to critical areas.

The study recommends development of practical solutions to address social and economic problem that drives women to terminate pregnancy. This is by providing homecare services, post natal assistance and rescue centers to needy mothers. The overriding objective should be promotion and protection of human rights as outlined in the bill of rights.

4.4 Recommendations for Future Research

The study further recommends more research on individual concerns to enhance provision of safe abortion services. A study should also be carried out in identifying the specific social and economic reasons that lead to termination of pregnancy. The study recommends that a similar study be undertaken by researchers to verify the appropriateness of the measures and progress of the recommendations made in this study once they are implemented.

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