UNIVERSITY OF NAIROBI

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ABORTION IN KENYA: ADEQUACY OF THE KENYA'S LEGAL FRAMEWORK IN PROTECTING THE UNBORN CHILD

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DECLARATION

The work contained in this thesis is my original work and has not been previously been presented for an award of a degree in this university or any other institution of higher learning. The thesis contains no material previously published except where cited.

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DEDICATION

To my husband Gabriele, and my children; Damian, George and Amanda, for your unwavering and dedicated support throughout this journey. I shall forever remain grateful.

To all women and men of good will who stand by their principals and refuse to bend to political correctness. May you have your fill to the brim.

And to my beloved country Kenya, that we may always enact and enforce laws that are just and fair to all particularly the marginalized and the most vulnerable.

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ABBREVIATIONS

UK	United Kingdom
USA	United States of America
CRC	Convention on the Rights of the Child
UDHR	Universal Declaration of Human Rights
DNA	Deoxyribonucleic Acid
FIDA	Federation of Women Lawyers (Kenya)
ESCEC	Economic and Social Committee of the European Communities
EC	European Community
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ICRC	International Committee of Red Cross
ICCPR	International Covenant on Civil and Political Rights

ABSTRACT

Abortion is recognised as an emotive, sensitive and even divisive issue. Following the decision in the US case of *Roe v Wade*, abortion has persistently remained a controversial issue in today's society. In Kenya, for instance, the prolife and prochoice are often fighting for what each side believes to be the correct position with regard to the abortion question. While the prochoice argue in favour of the pregnant woman's autonomy based in law, the pro-life work to disproof that fact in order to advocate for the protection of the unborn child as well as the long term psychological welfare of the woman. This controversy is exacerbated by the inconsistency that exists in Kenya's legal framework on abortion. For instance, Article 26 (4) of the Constitution prohibits abortion but provides for exceptions, such as "emergency treatment," "if the life or health of the mother is in danger," and "if permitted by any other written law." Section 240 of the Penal code only provides the "health or life" exception but introduces an important threshold to check the opinion of the doctor contemplated under Article 26 (4) of the Constitution: "good faith" and "with reasonable care." However, insofar as sections 158-160 of the Penal Code remain prohibitive, the enforcement of the constitutional exceptions is rhetoric. In addition, sections 211 and 240 of the Penal Code have not been harmonized to reflect the spirit of Article 26 (2) of the Constitution on when life begins. The inconsistency arising from these provisions imply that the unborn child is not adequately protected under the Kenya's law. Best practices from UK draw the argument that having severe penalties to contain clandestine abortions in Kenya cannot be the only solution; there is need for more thresholds, such as the provision of the opinion of two other registered medical practitioners and more importantly seeking alternative options such as adoption as is increasingly occurring in the USA.

Key terms: Abortion, right to life, foetus, personhood, conscientious objection, good faith, opinion of a trained medical practitioner.

CHAPTER ONE: INTRODUCTION

1.0 Introduction

This chapter introduces the study by giving a background to the question of abortion in Kenya. It also discusses the impact of abortion on global demographic and economic trends as a justification for reforming the law to reduce the rate of induced abortions. The chapter proceeds to give a statement of the problem, objectives, justification, conceptual framework, methodology and the theoretical framework.

1.0.1 The Right to Privacy and the Abortion Controversy

The abortion legal discourse today can generally be associated with the genesis of the "right to privacy" in the US Supreme Court's finding in *Griswold v. Connecticut*.[1] The plaintiff in this case was convicted of violating a Connecticut law that prohibited the use of contraceptives as she had given medical advice to married persons on the means of preventing conception.[2] On appeal, the Supreme Court held that the said law was unconstitutional and that it violated the "right to privacy."[3] The Court stated, *inter alia*, that the marital relationship lay within a "zone of privacy" and a law which sought to achieve its goals by the means having a maximum destructive impact upon that relationship violated the "right to privacy" of the marital relation.[4] The application of the principle was further expanded in subsequent Supreme Court decisions, for example in *Eisenstadt v Baird*,[5] to include contraceptive decisions made by unmarried individuals. The

[1] *Griswold v Connecticut* 381 US 479 (1965).
[2] Ibid 480.
[3] Ibid 487.
[4] Ibid at 499.
[5] *Eisenstadt v Baird* 405 US 438 (1972).

dictum of Justice William Brennam in the latter case highlights the nature of the right to privacy thus;

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[6]

Based on the "right to privacy" principle, the question of abortion emerged in the 1973 US Supreme Court's landmark decision in *Roe v Wade*.[7] Decided on 22nd January 1973 simultaneously with another case, *Doe v Bolton*,[8] the Court, by a 7-2 vote, ruled that the right to privacy extended to a woman's decision to have an abortion, but that right must be balanced against the State's two legitimate interests in regulating abortions: protecting prenatal life and protecting women's health.[9] Arguing that these interests became stronger over the course of a pregnancy, the Court resolved this balancing test by tying State regulation of abortion to the trimester of pregnancy. The trimester framework was later rejected by the Court while affirming *Roe*'s central holding that a person has a right to abortion until viability.[10] It was further held that

[6] Ibid 453.
[7] *Roe v Wade* 410 US 113 (1973).
[8] *Doe v Bolton* 410 US 179 (1973).
[9] *Roe v Wade* 410 US, 152-53.
[10] Ibid; The word "viable" was defined in *Roe* as being "potentially able to live outside the mother's womb, albeit with artificial aid", with the Court stressing that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."

the word "person" in the Fourteenth Amendment did not include the unborn; thus, denying the unborn the constitutionally protected right to life.[11]

On the same day *Roe* was decided, the Court also decided *Doe v Bolton*, stating that the two cases were to be read together.[12] Two important principles emanated from the Court's decision in Doe. First, the decision created an unlimited definition of maternal "health", that the medical judgment may be exercised in the light of physical, emotional, familial, psychological, and the woman's age. All these factors relate to health.[13] This definition was so broad that there would never be a time when a woman could not find an abortionist willing to perform an abortion to protect her "health." The definition further constituted a total shift of discretion to the abortionist. Secondly, it was held that only the abortionist should make the "medical judgment" that "an abortion is justified."[14] The Court determined that, requiring independent examinations of a woman by two additional licensed doctors "unduly restrict[s] the woman's right of privacy," and that the expertise of one doctor is sufficient.[15] The risk of this is that an assessment can be carried on based on a subjective view informed by either the abortionists or the patient's personal rather than an objective view of whether the abortion is necessary.

In a nutshell, *Roe v Wade* and *Doe v Bolton* prompted a serious debate that continues today, on such issues as whether and to what extent abortion should be legal, who should decide the legality of abortion, and what the role should be of religious and moral views in the political sphere. In particular, the decision in *Roe v Wade* culminated into pro-abortion and anti-abortion camps that exist today.

[11] *Doe v Bolton* 158.
[12] Ibid 165.
[13] Ibid 180.
[14] Ibid.
[15] Ibid 198-99.

However, the contention over Article 26 of the Constitution of Kenya largely bears a religious perspective, particularly with regard to when the right to life begins. According to Gadaffi, the anti-abortion debate in Kenya dates back to the Roman Catholic Church's circular letter (*Humanae Vitae*)[16] of 1968 which condemned both sterilization and abortion.[17] As expressed in the letter:

> In truth if it is sometimes licit to tolerate a lesser evil in order to avoid a greater evil or to promote a greater good, it is not licit, ever for the gravest reasons, to do evil so that good may follow therefrom...even when the intention is to safeguard or promote individual, family or social well-being.[18]

Gadaffi considers this as a natural law school argument, which has a significant bearing in the enactment of Article 26 (2) and (4) of the Constitution of Kenya. Both provisions seek to deter abortion.

1.0.2 Global and Regional Impacts of the Decision in *Roe v Wade*

Following the decision in the US case of *Roe v Wade*,[19] abortion has persistently remained a controversial issue in today's society. Many countries in the world have enacted laws permitting abortion either under any or exceptional circumstances. According to the United Nations (UN), abortion is permitted by most countries to save a woman's life, preserve a woman's physical or mental health, in case of rape or incest, because of foetal impairment, for economic or social

[16] *Humanae Vitae* is a Latin phrase which means "Of Human Life." It is a circular letter written by Pope Paul VI regarding married love, responsible parenthood and the continued rejection of most forms of birth control, and issued on 25 July 1968 to all Roman Catholic churches.
[17] Yohana Gadaffi, 'The Place of Natural Law in Kenya's Jurisprudence' (2014) 2 (6) *Journal of Research in Humanities and Social Sciences* 39, 43.
[18] *Humanae Vitae*, n 14.
[19] *Roe v Wade* 410 US 113 (1973).

reasons, or on request.[20] However, some of those laws do not explicitly define the exceptions, leaving it to the judgment of the medical practitioner performing or approving the abortion. In some instances the matter is left to the sole discretion of the pregnant woman.

Consequently, the rate of abortion has been considerably high. While the drafters of the laws focused on the privacy of the woman, they were not mindful of the fate of the unborn child and the impact the laws will have on the world population. According to Boquet, there have been more than 1.72 billion reported cases of induced abortions worldwide since 1973 when the land mark case of *Roe v Wade* opened the door for legalisation of abortion.[21] In the USA alone, there have been over 56 million reported induced abortions.[22] This means that more than 3,300 abortions are carried out daily and 137 abortions every hour in the USA.[23] The situation in China is even worse. Steven Ertelt [24] states that more than 13 million induced abortions occur there annually. Indeed since the government implemented the controversial family planning policy in 1971, the official data from the health ministry indicates that Chinese doctors have performed more than 336 million abortions and 196 million sterilizations. This translates to more than the entire population in USA and almost one quarter of the population in Africa.[25]

In Europe, policy makers believe that maintaining societal population without systematically relying on mass immigration needs a considerable number of families with three children.

[20] United Nations, "World Abortion Policies" (2011) Department of Economic and Social Affairs.
[21] Fr. Shenan Boquet, "Abortion & faith" Apr 1, 2013 <http://www.lifesitenews.com> accessed 19 November 2015.
[22] Steven Ertelt, "Abortion Statistics: United States Data and Trends" (Washington DC, January 18 2013).
[23] Ibid.
[24] Steven Ertelt, "China Sees 13 Million Abortions a Year: 91% Percent of Pregnant Teens Have Abortions" (Washington DC, January 28, 2015) <http://www.lifenews.com> accessed 19th November 2015.
[25] According to the 2013 World Population Data Sheet, Africa's population was about 1.1 billion as of 2013, comprising about 15% of the total world population.

However, the reality is that only a minority of families are in favour of having three children.[26] It seems that children are today seen as restricting the ability of families to maintain a certain standard of living.[27] With the liberalization of contraceptives and abortion in most European countries, many couples reject the idea of having an unplanned child.[28]

Various factors have contributed to this situation; decline in religious practice, increasing materialism and the unrelenting propaganda about overpopulation.[29] The compounded result of this is fertility decline and the subsequent decline in population. In 1985, for example, the population of Europe (excluding Russia) stood at was 492 million, which was 10% of the world population and equal to the population of Africa.[30] By 2025, it is estimated that Europe's population will be reduced to 6%, which will be a third of Africa's population. The main reason for this downward trend is that the European Community (EC) is experiencing a fall in its birth rate with a relatively stable death rate. The average number of children (total fertility rate) for all member states except Ireland is less than two children. Ireland is the only country with a relatively young population in Europe, with a median age of 27.7. Denmark and the former Federal Republic of Germany (FRG) have the oldest population.[31] Around half of all households in the EC are either one or two person households, while households having five or more children constitute only 13.3% of the total.[32] With this trend, policy makers in Europe have been

[26] See generally Economic and Social Committee of the European Communities (ESCEC), *The Demographic Situation in the Community* (Brussels 1986).
[27] Ibid.
[28] Seamus Grimes, '*Fertility Decline in Western Europe*' (1994) 4 (1) *PRI Review*. Retrieved from <http://www.ppp.org/content/fertility-decline-in-western-europe?_e_pi_=7%2CPAGE_ID10%2C5302794447> accessed on 19 November 2015.
[29] See for example, Ehrlich Paul R, *The Population Bomb* (Sierra Club/Ballantine Books, 1968)
[30] See generally Commission of the European Communities, *Europe 2000 – Outlook for the Development of the Community's Territory* (Brussels 1991).
[31] Grimes (n 27).
[32] Ibid.

concerned with, inter alia, the fall in the number of young people entering the labour market.[33] Some countries like Germany have increased the retirement age because of this. It is estimated that by 2025, Europe will have to open is frontiers to young Africans and Asians because of its aging population with France being the main receiving State.[34] Evidence attributes this to the irreconcilable dilemma between the ingrained pattern of individual freedom in respect to fertility regulation, the widespread desire of women for paid employment and the need of society to reach replacement fertility levels. This trend is what is expected in Kenya in the next two or more decades.

In Italy, for example, the Minister of health pointed out in May 2015 that the country's population is declining.[35] Recent statistics show the lowest recorded number of births per thousand since Italian unification, and the number dying each year is greater than the number being born.[36] In 2010, for instance, the abortion rate in Italy was estimated at 10 per 1000 women of childbearing age.[37] This means that around 20 to 25% of all pregnancies in Italy end in abortion. Further, the depressed south of Italy has the lowest birth rate, and therefore economic stagnation is the imminent result.[38] It may seem an obvious statement, but there are fewer children in Italy because people do not want to have children.[39] The children they might have had have been aborted or they never came to be in the first place because of contraception.

[33] Ibid.
[34] Ibid.
[35] Fr Alexander Luice-Smith, "Italy's Shortage of Babies Shows that Legalising Abortion was a Disastrous Move" (16 Feb 2015) Available at <http://www.catholicherald.co.uk/commentandblogs> accessed on 19 November 2015.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid.

In an attempt to counteract this crisis, the Australian Government in 2004 offered $3,000 baby bonus for every baby born.[40] This played a significant role in halting the nation's declining fertility rates.[41]

The impact of this trend is the shrunken economic growth. Generally, countries with birth rates that are significantly below the replacement rate (2.1 children) face the challenge of decreased workforce, decreased consumption, and decreased ability to defend their borders.[42] A populous country tends to grow faster if more emphasis is laid on development issues like education, employment and security, among others. The best approach to this end is to embrace legal reform. A question that should inform any campaign for lawful abortion is whether it will be just both to the unborn child and the nation at large.

1.0.3 The Nature and Extent of Abortion in Kenya

In Kenya, the promulgation of the Constitution, 2010, introduced a new legal dimension of abortion. Prior to this reform, Kenya's law on abortion was very restrictive, allowing abortion only to save the life of the pregnant woman. Section 71 of the repealed Constitution prohibited the "intentional deprivation of the right to life of any person." Since abortion is defined as the intentional expulsion of an unborn child from the uterus, this constitutional provision was protective of the unborn child. However, this position was not guaranteed as section 214 of the

[40] "Global consequences of the falling birth rate" <http://www.life.org.nz/abortion/abortionkeyissues/impactonsociety2> accessed on 19 November 2015.
[41] Ibid.
[42] Bill Saunders, "UN Calls for Population Control as Global Birthrates Decline." Washington, DC 11 May 2011. Available at <http://www.lifenews.com/2011/05/11/un-calls-for-population-control-as-global-birthrates-decline/> accessed on 19 November 2015.

Penal Code[43] provides that a person becomes capable of being killed when it has completely proceeded in a living state from the body of its mother.

Article 26(4) of the Constitution, 2010, permits abortion where, in the opinion of a trained health professional, there is need for emergency, or the life or health of the mother is in danger, or if permitted by any other written law. While the intention of this provision might have been to curtail backstreet illegal operations, the same has not been achieved. The debate on abortion remains unsettled with cases of abortion being on the rise. Evidence indicates that there are still a considerable number of abortions being done in the guise of "emergency" or the "opinion of a trained health professional."[44] In 2012, the rate of induced abortion in Kenya was estimated at 464,960, translating to a national rate of 48 induced abortions per 1000 women aged 15-49 years and an induced abortion ratio of 30 abortions per 100 births.[45] The earlier and only abortion incidence study conducted in Kenya was a public hospital-based study in 2004, which estimated the rate of abortion to be 45 per 1000 women of reproductive age (15-49 years).

It would seem, thus, that, while succinctly restricting abortion, the new Constitution opens doors for unlimited access to abortion. The exceptions in Article 26(4) may be interpreted by some to mean that abortion on demand is now legal under the 2010 Constitution. Further, since the enactment of the Constitution, no new legislation has been made to offer clarification and provide guidance on the operation of these exceptions. The provisions of the Penal Code have not been redefined to reflect the language of the Constitution and other laws, such as the Criminal Procedure Code. Thus, the rate of abortion is rapidly increasing, putting the life of the

[43] The Penal Code, Cap 63 of the Laws of Kenya (Revised ed. 2009) [hereinafter The Penal Code].
[44] United Nations, "World Abortion Policies" (2011) Department of Economic and Social Affairs.
[45] Republic of Kenya, *Incidences and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study* (Nairobi, Kenya: African Population and Health Research Center, Ministry of Health, Kenya, IPAS, and Guttmacher Institute 2013) 7; Ministry of Health, "Incidence and Complications of Unsafe Abortion in Kenya" (August 2013) Key Findings of a National Study, p. 17.

unborn child at risk. Accordingly, an in-depth study into the efficacy of the laws in relation to abortion is important to establish a basis for harmonisation.

1.1 Problem Statement

With the current constitutional position on abortion being unclear, incidences of induced abortion even in public hospitals are likely to abound. Section 214 of the Penal Code is inconsistent with Article 26(2) of the Constitution, which provides that life begins at conception. In addition, sections 158-160 of the Penal Code refers to the "unlawful" procurement of abortion, implying that there are circumstances under which abortion may be lawfully provided. Although this rhymes with the abortion exceptions under Article 26(4) of the Constitution, the provisions do not define what might constitute a "lawful" abortion—they are simply prohibitive. Section 240 of the Penal Code can be read as creating a lawful exception: when "a surgical operation…upon an unborn child" is performed "in good faith and with reasonable care" for the "preservation of the mother's life." Yet, the provision offers no guidance as to what circumstances may constitute the preservation of the woman's life; and there is no post-independence Kenyan High Court case law that authoritatively interprets this provision and makes clear the content of this exception. Accordingly, Kenya's legal framework on abortion seems unclear and subject to varied interpretations and leaving many health care providers and members of the public unsure of its content.

A further gap in the law is seen in Article 26(4) of the 2010 Constitution on the "opinion of a trained health professional. There is no clear definition as to what the standard qualifications of a 'trained health professional' are and difficulties may arise in differentiating between a legitimate licensed health care provider and a "quack" doctor – a growing problem the Kenyan Government

has struggled to address across the entire medical sector. This is evident in the Post Abortion Care Trainer's Manual, which states that the "life or health of the mother" exception presents a "loophole" used by people "to procure abortion on the pretext that the woman's life is in danger."[46] In an attempt to explain this exception, the Post Abortion Care Trainer's Manual acknowledges that it is difficult to define what it means in different situations as the woman may sometimes not be in danger.[47]

This uncertainty means that Kenya's legal framework on abortion does not adequately protect the unborn child. This position has, however, not been tested and the study therefore seeks to evaluate the legal implications of abortion in Kenya, particularly with regard to Article 26(4) of the Constitution. In particular, the study intends to establish whether the legal framework in relation to abortion in Kenya adequately promotes and protects the right to life of the unborn child, notwithstanding the legal limitations of the right in certain circumstances. While doing this, the consistency of Article 26 (2) and (4) with sections 158, 159, 160, 211, 214 and 240 of the Penal Code is examined to draw gaps for harmonisation.

1.2 Research Questions

Q1 How adequately does the Kenya's legal framework protect the rights of the unborn child?

Q2 How have other jurisdictions attained the balance between the protection of unborn child and the "right to privacy" of the mother?

Q3 How can Kenya's legal framework be reformed to adequately enhance protection of the rights of the unborn child?

[46] MOH, "Post Abortion Care Trainer's Manual" at sections 1, 33 and 1, 36.
[47] Ibid at section 1, 36.

1.3 Research Objectives

The overall and specific objectives of this study are as follows:

1.3.1 Overall Objective

The study seeks to assess the adequacy of the Kenyan legal framework on abortion in promoting and protecting the rights of the unborn child.

1.3.2 Specific Objectives

1. To assess whether the Kenya's legal framework adequately protects the unborn child.
2. To find out how the rights of the unborn child have been balanced with the right to privacy of the woman in other jurisdictions.
3. To provide appropriate suggestions on how the legal framework can be reformed to enhance protection of the rights of the unborn child.

1.4 Research Hypothesis

The hypothesis of this thesis is that the Kenya's legal framework on abortion does not adequately protect the right to life of the unborn child with a consequence that their rights are violated.

1.5 Justification of the Study

The information generated by this study may contribute additional knowledge for research, academic and other institutions working on Kenya's legal framework on abortion in Kenya particularly in relation to the right to life under Article 26 of the Constitution. By identifying inadequacies in the legal framework, the study may assist in the enactment of a law that will harmonise the provisions of the Constitution, the Penal Code and the Criminal Procedure Code

to eliminate the current inconsistencies. This will provide an effective legal platform where the rights of the unborn child in Kenya are expressly recognized and also effectively protected. In particular, the study's findings may inform the re-definition of the proposed Reproductive Health Care Bill 2014, section 2 of which defines termination of pregnancy as the separation and expulsion by medical or surgical means of the *contents of the uterus* of a pregnant woman before the foetus has become capable of an independent life outside the uterus. This definition deliberately rejects the human status of the unborn by use of the word "contents of the uterus."[48]

In addition, realization of Kenya Vision 2030's[49] social pillar depends on a cohesive and just society. This *inter alia* entails minimising vulnerabilities through prohibition of retrogressive practises. In so far as abortion poses a threat not only to the life of the unborn child but also the life of the mother and thus negatively impacting society at large, it may be deemed to be retrogressive. Seen in the light of the global demographic implications on the economy being experienced in the developed countries, unless the legal framework is reviewed it is likely that Kenya may not have the critical population mass necessary for achievement of the Vision 2030 and the Sustainable Development Goals 2015.

Finally, the study seeks to propose legal reform for harmonization of the Kenyan law to conform with international instruments which without exception advance the protection of the unborn children's rights.

[48] "An Abortion Law, *labeled the Reproductive Health Rights Bill, 2008*, is a Legal Challenge" <http://www.hlikenya.org/tp40/page.asp?ID=161552> accessed 24th Feb 2015.
[49] Kenya Vision 2030, A Globally Competitive and Prosperous Kenya, October 2007

1.6 Conceptual Framework

The term "abortion" is generally not new in the realm of constitutional development. However, its eminence in the recent past is attributable to the controversy in its legality vis-à-vis the feminists' fight for women rights.[50] Although the contours of this fight have been clearly delineated under the auspices of affirmative action[51] and gender equality, abortion remains a topic to define.

Etymologically speaking, the word abortion is derived from the Latin infinitive "*aboriri*" which means "*perish"*; literally translated as the loss of foetal life.[52] The term generally refers to the unsought and spontaneous, untimely ending of a pregnancy.[53] It may be divided into spontaneous and induced abortion. Spontaneous abortion is referred to as "miscarriage,"[54] if it occurs before the child might have been expected to live.[55] On the other hand, induced abortion refers to any procedure, or the resulting event or process, by which the normal course of development of the child before birth is purposely interfered with. The procedure is often done with the intention of preventing the continuation of normal development and subsequent normal birth. This definition is broad enough to include both the causing of untimely birth by drugs or other methods, and

[50] Jane Wambui Njagi, 'The State and Sexual Politics: An Analysis of Abortion Discourses in Kenya' (DPhil thesis, The University of Waikato, New Zealand 2013) 3.
[51] The Constitution of Kenya, 2010, article 27(6).
[52] Osinachi (n 74) 13.
[53] Grisez G Germain, *Abortion: The Myths, Realities, and the Arguments* (New York and Cleveland: Corpus Publications, 1970) 5.
[54] Ibid 7. In some medical uses, "miscarriage" refers to a spontaneous delivery between 12-14 weeks of pregnancy and 20-26 weeks; earlier, the same event is called "abortion" and later "premature birth" if the child is born alive or "still birth" if it is born dead. In a legal context, "miscarriage" usually refers to abortion at any stage of pregnancy. Physicians use the expressions "missed abortion" and "threatened abortion" to refer to medical problems that are not relevant to induced abortion.
[55] Grisez (n 3) 7.

surgical attacks on the unborn at any stage of their development, the opinion of the medical practitioner notwithstanding.[56]

Within the Kenyan Context, termination of pregnancy is not permitted 'on demand' except as provided for in law.[57] Article 26 (2) of the Constitution sets the foundational basis for protection of the unborn child by providing that the life of a person begins at conception to natural death. This is a clear and unequivocal affirmation that an unborn child is a human person thus capable of enjoying all human rights and fundamental freedoms. These human rights and freedoms, as stipulated under Article 19(3) (a) belong to the individual and are not granted by the State. The child therefore is a distinct and separate individual from the woman carrying it. As such like every individual person, the unborn child is equal before the law and has the right to equal protection and benefit of the law[58].

It follows therefore that such life cannot be intentionally taken away except to the extent authorized by the Constitution or other written law[59]. Such law must follow due process as envisaged in Article 50 which gives everyone a right to be heard before being condemned. Equally such life regardless of its stage in development has inherent dignity the must be respected and protected.[60] This affirmation is buttressed by prohibitions to abortions found in sections 158, 159, 160, 211 and 240 of the Penal Code which shall be examined in detail in Chapter 4. In addition the Children Act Chapter 141 Laws of Kenya recognizes and accords protection of rights to children without limitation to age. A "child" under the Children Act means any human being under the age of eighteen years.

[56] Ibid.
[57] Medical Practitioners and Dentists Board, The Code of Professional Conduct and Discipline (6th ed. Revised in January 2012) 43.
[58] Article 27(1) & (4)
[59] Article 26(3)
[60] See Article 28

The foregoing is in keeping the study's Natural Law approach to life as expounded by among others Ronald Dworkin, John Finnis, Lon Fuller, St. Thomas Aquinas, St. Augustine, Aristotle and Plato. In general these theorists consider the foetus to be a person from the time of conception, regardless of appearance, age, and other changes.[61] Therefore according to Finnis, drawing a line dividing foetal development where personhood begins is irrelevant.[62] Similarly pitting the right to privacy of a woman against the right to life of an unborn child is unjustifiable.

By dint of Article 2(5) & (6) of the Constitution Kenya is bound to observe and domesticate best practises found in international instruments relating to human rights, and to perform them in good faith. As discussed hereinafter international instruments in the broadest and most inclusive terms possible provide for and recognize the inalienable and equal rights of all human persons before and after birth without limitation to age, race, sex or disability. Examples of these instruments include the Universal Declaration of Human Rights Nations, Convention on the Rights of the Child (1989), 1966 International Convention on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, The 1979 Convention on the Elimination of All Forms of Discrimination Against Women, Geneva Conventions on protection of mother and child, and the African Charter on the Rights and Welfare of the Child.

However, the exceptions provided for under Article 26(4) of the Constitution read together with sections 214 & 240 of the Penal Code along with the varying decisions made by the Kenyan courts appear to completely negate the very protection intended for the unborn child; and therein lies the problem. Article 26(4) for example provides that abortion may be permitted if in the opinion of a trained health practitioner there is need for emergency treatment or the life of the

[61] John Finnis, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson" (1973) 2 Phil. & Pub. Aff. 117, 145.
[62] Ibid.

mother is in danger or if permitted by any other law. In addition although one may argue that the Constitution overrides provisions of section 214 of the Penal Code which recognises a person only after they have proceeded from the womb, nevertheless as seen in the study the section has been relied upon in court decisions acquitting health professionals charged with performing abortions.

Section 240 permits abortions in certain 'lawful' circumstances. The problem is that these circumstances are neither defined giving room to subjective opinions with little regard to the rights to life of the unborn.

Who a trained health professional is, what amounts to an emergency or threat to the life of the mother are also not defined. Advances in preventative medicine in maternal care are not factored in. This implies that any subjective reason may be used to terminate the life of the unborn child. Additionally the social and mental health implications of abortion *vis-a-vis* encouraging a mother to carry the child to term are not adequately addressed in the Kenya's legal framework.

Compounding the problem is the proviso, *'or if permitted by any other law.'* As the study shows, if effected, this is the singular most effective threat to rights of and protection accorded to the life of the unborn child. The Reproductive Health Bill 2014 for example, not only redefines an unborn child terming it as '*products of the uterus*' thus diminishing its value as a human person but also allows unlimited access to abortion; abortion on demand.

In light of the above problems the study proposes a radical review of both the constitution and the subsidiary legislation to align them with the international instruments. To this end, it is proposed that the proviso under Article 26(4) be repealed as it is not in conformity with other

provisions of the constitution. Sections 214 and 240 of Penal Code need to be amended to ensure that the rights of the mother are not pitted against the rights of the child.

Finally it is important to examine jurisdictions such as Chile[63] and the Dominican Republic where abortion is not permitted in view of respect for *all* human life and medical advancement of maternal healthcare, in order to draw best practises.

1.7 Theoretical Framework

This study mainly uses Dworkin's Natural Law theoretical approach to the prochoice-prolife arguments on abortion because it provides a balance between the right to life of the unborn child and the autonomy of the pregnant woman. While this study is basically an assessment of the law and not based on morality, it seeks to strike a balance between the pro-choice and pro-life by unearthing the inadequacies of the law. This latter assessment is guided by the legal positivist theory.

1.7.1 Natural Law Theory

Natural law theory presupposes that what "is" law is based on a higher law dictated by reason and thus is also what the law "ought" to be.[64] The central thesis of natural law is that there are certain principles of human conduct, awaiting discovery by human reason, to which man made law must conform if it is to be valid. Cicero argues that true law is right reason in agreement with nature, applies to all men and is unchangeable and eternal.[65] Natural law theory is thus based on the fact that law is universal, eternal and unchanging and that there is only one source of law and

[63] Current laws against abortion are codified in the Penal Code articles 342 to 345 under the title "Crimes and Offences against Family Order, Public Morality and Sexual Integrity
[64] M D A Freeman, *Lloyds Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001) 3.
[65] W J Hosten, A B Edwards, F Bosman & J Church, *Introduction to South African Law and Legal Theory* (1995) 43-72, p. 46.

that the enforcer of this eternal law is God.[66] The theory is advanced by different proponents, such as Plato, Aristotle, St. Augustine and St. Thomas Aquinas.

Freeman argues that the import of natural law lies in the assertion that there are objective and moral principles which depend upon the nature of the universe and which can be discovered by reason.[67] Aquinas, as informed by Aristotle and Plato, argues that by nature all human being are equal. This is the foundation for protection of the human at its earliest stage of formation.[68] Aquinas offers no defence for abortion as being permissible at any stage in pregnancy. The basis is the ensoulment of the human at conception, which means acquisition of a soul by the embryo.[69]

Commenting on the principle of reciprocity, Lon Fuller believes that the pro-abortion position is inconsistent because the advocate is supporting certain moral principles about the treatment of others that he would not wish to have followed in their actions toward him.[70] According to Hare, people should do unto others what they are glad would be done to them.[71] Since they are glad that they were conceived, not aborted, and not killed as infants, they too ought to conceive, not abort, and not kill infants.[72] Thus it is from the Natural Law Theory that the human rights and equality of persons discourse has developed as we know it today.

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[66] Omony John Paul, *Key Issues in Jurisprudence: An In-depth Discourse on Jurisprudence Problems* (Law Africa Publishing 2010) 17.
[67] Freeman (n 47) 91.
[68] Thomas Aquinas, *Summa Theologica*. Ed. Kevin Knight. "Summa Theologica." Trans. Fathers of the English Dominican Province 1920, available at <http://www.newadvent.org/summa/> accessed on 20 October 2015.
[69] Available at <http://embryo.asu.edu/pages/st-thomas-aquinas-c-1225-1274#sthash.5h3DHABb.dpuf> (Accessed 20th October 2015).
[70] Harry J Gensler, "A Kantian Argument Against Abortion" in *Philosophical Studies* 49 (1986); Lon Fuller, "A Reply to Critics" in *The Morality of Law Life and Learning XI* 96 (New Haven: Yale University Press, 1964, 1969) p. 187-242; Robert S Summers, "Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law" (1978) 92 *Harvard Law Review* 433.
[71] R M Hare, "Abortion and the Golden Rule" in *Philosophy and Public Affairs* 4 (1975) 201-222.
[72] Ibid.

Finnis argues that the foundation of equality of the unborn with the born is based on their humanity whose origins are their genome which is uniquely human.[73] Once this capacity begins it is distinguishable say to that of a carrot or cat and regardless of its state of development.[74]

Arguments against abortion in Kenya arise largely from natural law thesis.[75] The pro-life, for instance, argue that abortion should be prohibited because it is against one of the commandments of God which forbids taking away of human life.[76] They further argue that life begins at conception and that as such, abortion should be outlawed because it essentially amounts to killing another human. This argument informs Article 26 (2) of the Constitution, which provides that the life of a person begins at conception. Sections 158-160 and 228 of the Penal Code equally espouse the spirit behind the outlawing of abortion. All these provisions against abortion, including Article 26 (4), flow from the fact that abortion is generally regarded as immoral in the Kenyan society.

According to Dworkin, pro-life objections to abortion are twofold: "derivative" and "detached."[77] A derivative objection to abortion, also called the "rights approach," emanates from the recognition and protection of the rights and interests of human beings.[78] It requires governments to protect the unborn child from being killed because it possesses rights and interests.[79] In other words, an unborn child is viewed from this approach as a claim holder or rights bearer. In contrast, a detached objection to abortion explains that human life is intrinsic,

[73] "Equality and the Life Issues: A Scorecard" (26 March 2011) <http://faithandreason.com> accessed 20 October 2015.
[74] Ibid.
[75] Gadaffi (n 17) 42.
[76] Ibid.
[77] Kibrom Isaak Teklehaimanot, 'Tragedies of Unsafe Abortion in International Law: The Case of Eritrea' (Master of Law Thesis, University of Toronto 2001) 5.
[78] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993) 11.
[79] Ibid.

innate value, sacred in and of itself, and that the sacred nature of this human life begins when its biological life begins. As the name suggests, it focuses on the value of the foetus as the earliest developmental stage of a human entity, which depends on an individual's orientation such as morality, religious belief or other background.[80] The detached approach points out that abortion is wrong in principle as it goes against the sacred nature of human life even at a pre-natal stage.[81] Both approaches are similar as they give emphasis mainly on the rights approach. Dworkin, however considers the detached approach as more effective than the rights or derivative approach.

Based on this distinction, Dworkin argues that if the issue of abortion centres on whether an unborn child is a person with interests and rights, then the debate is irresolvable.[82] He believes that when the prolife group objects to abortion, considering that the unborn has rights and interests, the group should not compromise on the life of the unborn child for any justification.[83] According to Rudy, even the most prolife groups permit abortion if the life of the pregnant woman is in danger.[84] Such a compromise is, according to Dworkin, inconsistent with the basic principle of the pro-life, protecting the unborn child's right to life.[85] In other words, Dworkin is advocating for a balance. To him, one can hold that an unborn child has a right not to be killed and at the same time hold it wrong for the government not to protect that right under criminal law.[86] The same is true when pro-choice group assumes the unborn child not to be a "person" at

[80] Ibid 2.
[81] Ibid.
[82] Ibid 10.
[83] Ibid 14.
[84] Katy Rudy, *Beyond Pro-life and Pro-choice Moral Diversity in the Abortion Debate* (Boston: Beacon Press 1996) at 24-25.
[85] Dworkin (n 61) 14.
[86] Ibid.

any stage of pre-natal development for whatsoever exceptional cases.[87] The Government cannot generally derogate from its basic responsibility of protecting the interests of everyone in the community, especially the interests of those who are most vulnerable and cannot protect themselves.[88]

To Dworkin, the detached approach is the only platform in which both the pro-choice and pro-life groups can compromise on some exceptions without necessarily contradicting their firm convictions.[89] Unlike in the case of the derivative approach, such combination of views is not only consistent but is also in keeping with the freedom of conscience in today's pluralistic democracies.[90]

According to Dworkin, both the pro-choice and the pro-life follow the detached approach despite their *prima facie* advocacy for rights.[91] He stresses that the groups with different views rely on 'rights approach' to achieve their agendas. For Dworkin, the substratum of abortion is not whether the right of an unborn child outweighs the right of a pregnant woman or vice versa, but whether the claims of the pregnant woman are predicated on intrinsic value that outweighs the intrinsic value of the unborn child.[92] Kingston also argues that both the pro-choice and the prolife often fail to recognize the unique notion of pregnancy and the relationship between woman and the unborn child.[93] While the pro-choice focus on the right of privacy of a pregnant woman, the

[87] Ibid 34.
[88] Ibid.
[89] Ibid 14-15.
[90] Ibid.
[91] Ibid 21.
[92] Ibid 34.
[93] James Kingston, "Human Rights: The Solution to the Abortion Question" in Conor Gearty & Adam Tomkins eds., *Understanding Human Rights* (London: Mansell 1996) 456, 475.

pro-life group advocates for the right to life of the unborn child without having regard to the unique linkage between the woman and the unborn child.[94]

On their part, Trakman and Gatien criticize Dworkin's detached approach arguing that it complicates the issue of abortion more than the derivative approach. This is because the detached approach mainly relies on religious and moral values.[95] Their arguments are threefold. Firstly, rights are a central tenet of abortion law, and to reject rights is to pass over a structure of rights that serves as a common ground in deciding abortion cases.[96] Secondly, preferring intrinsic values to rights is to force the pro-choice to engage in balancing between the value of the unborn and the woman's autonomy, which is potentially self-defeating.[97] Thirdly, in the absence of rights, courts would be engaged in prioritizing intricate and delicate social interests and values in deciding abortion cases.[98] Thus, both the derivative and detached approaches should be combined to address the multi-dimensional nature of abortion discourse.[99]

1.7.2 Legal Positivism

The term "positivism" denotes a system of philosophy that entails the study of things as they are without regard to the social, political, and psychological background.[100] Legal positivism therefore entails an examination of the law as it is.[101] Its primary idea lies in the derivation of "positum" emphasizing that the law is something laid down or posited.[102] According to Leslie Green, whether a society has a legal system depends on the presence of certain structures of

[94] Ibid.
[95] Leon Trakman and Sean Gatien, *Rights and Responsibilities* (Toronto: University of Toronto Press 1999) 150.
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Omony (n 49) 48.
[101] Ibid.
[102] Ibid.

governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law.[103] What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs.[104] The fact that a policy would be just, wise, efficient or prudent, is never sufficient reason for thinking that it is actually the law; and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it.[105] According to positivism, law is a matter of what has been posited (ordered, decided, practiced, or tolerated). Thus, in a more modern idiom, positivism is the view that law is a social construction.[106]

The legal positivist's concern is with the "is" of the law and not the "ought" of the law. The said proponents argue that if normative rules reflect no more than subjective opinions, they cannot be deduced from physical reality. Their definition of law approach therefore excludes value judgment and moral considerations. Austin formulated thus:

> The existence of law is one thing, its merit or demerit is another.[107]

In light of this, an examination of whether Kenya's abortion law adequately protects the unborn is a positivist model analysis. This theory shifts the scales from the natural law consideration of law from the divine and moral perspective to the law as it is. Central to the positivist school is the concept of sovereignty. It describes the sovereign as a person or group of persons to who is rendered habitual obedience by the bulk of the population but who does not render such obedience to anyone. This by extension implies that, once a person, body or entity has been

[103] Green, Leslie, "Legal Positivism" in the Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/legal-positivism/> accessed 20th October 2015.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Omony (n 49) 48.

accorded sovereign power, the same should not be transferred to any different body, person or entity. Thus where there is a conflict between two persons, entities or bodies as to who/which is supreme, the one accorded sovereignty by law takes precedence. Article 2 (1) of the Kenyan Constitution (2010) makes the Constitution supreme law of the republic of Kenya which binds all and, per paragraph 2 thereof, its validity is not subject to challenge by or before any court or other state organ.

Fuller criticises legal positivism on the basis that the analytical positivist sees law as a one-way projection of authority, emanating from an authorised source and imposing itself on the citizen.[108] It does not discern as an essential element in the creation of a legal system any cooperation between the lawgiver and the citizen. According to Fuller, legal positivism is basically focused on who can make the law.[109] In light of this, the decision in *Roe v Wade*[110] is consistent with a positivist philosophy. This case takes the position that abortion should be tolerated and emphasises the idea of "freedom of choice" of the woman. The decision's focus is on "who decides" and not on whether or not human life is destroyed or whether or not there may be any legal duty to protect that life.

Those who oppose abortion emphasize that there is a fundamental right to life of the unborn child that the courts and society have a duty to protect. They do not support the notion of the isolated independent woman who is free to dispose of the unborn child as she desires. According to Noonan, "*Roe v. Wade* is premised on a society of isolated individuals.[111] This argument is warranted because the proclaimed abortion right is based on the right of privacy, and the

[108] Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 630.
[109] Ibid.
[110] *Roe v Wade* (1973) 410 US 113.
[111] T John Noonan Jr, *A Private Choice* (New York: Free Press 1979) 21.

paramount value expressed is the self-determination of the woman.[112] In *Planned Parenthood v Casey*, the US Supreme Court stated in connection with a spousal notification law, which was struck down as unconstitutional, that "the marital couple is not an independent entity with a heart and mind of its own, but an association of two individuals with a separate intellectual and emotional makeup."[113] Based on that definition of marriage, the Court concluded that "a husband has no enforceable right to require a wife to advise him before she makes her personal choices."[114]

This reasoning is replicated under section 20(a) of the proposed Reproductive Health Care Bill, 2014 which states that termination of pregnancy may take place *only* with the consent of the pregnant woman. This provision emphasises the primacy of the woman in unilaterally making the decision to abort to the exclusion of her spouse, or generally, the male partner. Dr. Carson criticises this approach comparing it with the US slavery laws; that just as the slave laws allowed white slave owners to think they had a right to do whatever they wanted with their black slaves so too do the abortion laws pit a woman against her unborn child making her view it as the enemy and giving her the right to do whatever she wishes regarding its life.[115]

1.7 Literature Review

This study considers among others, the works of Njagi,[116] on the historical background of Article 26 of the Constitution of Kenya; George and Lee,[117] Tooley,[118] and Puppinck[119] on the right to

[112] Thomas W Strahan, "The Natural Law Philosophy of Lon L Fuller in contrast to *Roe v Wade* and Its Progeny" XI *Life and Learning* 87, available at <http://uffl.org/vol11/strahan11.pdf> accessed on 21 October 2015.
[113] *Planned Parenthood v. Casey*, 505 U.S. at 898.
[114] Ibid.
[115] Dr. Ben Carson, interview on NBC 'Meet the Press', New York Times, 25 October 2015
[116] Jane Wambui Njagi, 'The State and Sexual Politics: An Analysis of Abortion Discourses in Kenya' (DPhil thesis, The University of Waikato, New Zealand 2013).
[117] Robert P George and Patrick Lee, 'The Wrong of Abortion' in Andrew I Cohen and Christopher Wellman (eds), *Contemporary Debates in Applied Ethics* (New York: Blackwell Publishers 2005) 17.

life and the legal status of the unborn child in relation to abortion; Osinachi,[120] and Bachiochi,[121] on the magnitude of abortion complications.

In brief, George and Lee argue that human beings have a special value that makes them subjects of rights by virtue of what they are, not by virtue of some feature that they acquire some time after they have come to be.[122] Thus, the embryo or foetus is human, having the genetic makeup characteristic of human beings. Although not mature, it is a *complete* or *whole* organism fully and actively programmed, from conception onward, to develop to the mature stage of a human being, and, unless prevented by disease or violence, will actually do so in the mother's womb.[123]

According to Puppinck, if the foetus or the embryo was nothing, or nothing more than an insignificant element produced by the body of the woman, like the hair, there would be no need of a law to regulate abortion.[124] In contrast, Tooley points out that the right to life belongs to persons, and not to every human organism.[125] He further argues that, to have a right to life, a thing must be self-conscious.[126] Thus, since foetuses and infants are not self-conscious and do not have a concept of self, they do not possess a right to life. While acknowledging the human embryo or foetus as human in the genetic sense, Warren[127] argues that the foetus or embryo lacks those characteristics an entity must have in order to be considered a person. These characteristics

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[118] Michael Tooley, "Abortion and Infanticide," in *Rights and Wrongs of Abortion* ed. Marshall Cohen, Thomas Nagel and Thomas Scanlon (Princeton: Princeton University Press 1974); first published in *Philosophy and Public Affairs* 2 (1972) 37-65.
[119] Grégor Puppinck, "Abortion and the European Convention on Human Rights" (2013) 3(2) Irish Journal of Legal Studies 142-193.
[120] Louis-Kennedy Osinachi Ilobinso, *Policy on Abortion in the Nigerian Society: Ethical Considerations* (Master Thesis in Applied Ethics, Linkopings University 2007).
[121] Erika Bachiochi, "How Abortion Hurts Women: The Hard Proof" (June 2005) Crisis magazine.
[122] George and Lee (n 100) 17.
[123] Ibid.
[124] Puppinck (n 102) 163.
[125] Tooley (n 101).
[126] Ibid 63.
[127] Mary Anne Warren, "On the Moral and Legal Status of Abortion," in Feinberg, *The Problem of Abortion*, p. 102-19.

include consciousness, reasoning, self-motivated activity, the capacity to communicate an indefinite variety of types of messages, and the presence of self-concept.[128] If this line of argument were to be adopted, it would therefore be debatable whether an infant, not being fully self-conscious or self-motivated and having no capacity to communicate should have any right to life at all.

Osinachi acknowledges the complications associated with induced abortion, specifically because many abortions are performed by medical quacks who disguise themselves as registered practitioners.[129] The complications include psychological disturbances, frequent abdominal pains, infertility and death.[130] This is actually a replica of Kenya's induced abortion incidences. Similarly, Bachiochi argues that abortion harms women physically, psychologically, relationally, and culturally.[131]

An in-depth review of this literature forms part of Chapter two of this study. It is, however, worth noting that, although the above authors present an important discourse on the question of abortion, they fail to provide an examination of the legal standing of abortion. For example, Njagi explores the evolution of Article 26(2) and (4) of the Constitution, but omits the adequacy and legal implications of the provisions. This shall be explicitly pointed out in Chapter two.

1.8 Scope of the Study

This study is basically limited to assessment of the adequacy of the Kenya's legal framework on abortion. It particularly focused on Kenya's Constitution (2010), the Children Act and the Penal

[128] Ibid. See the same argument in English Jane, "Abortion and the Concept of a Person," (1975) 5 *Canadian Journal of Philosophy* 233-43, reprinted in Feinberg, *The Problem of Abortion* 151-60.
[129] Osinachi (n 103) 26.
[130] Ibid.
[131] Bachiochi (n 104).

Code. International human rights instruments are also analysed to give an indication on how the status of the unborn child is presented from the international law perspective and the degree to which Kenya's laws are aligned to the said instruments. The Conventions analysed include the Universal Declaration of Human Rights, the ICCPR, the Geneva Conventions and the Declaration on Human Cloning.

1.9 Research Methodology

Kothari describes research methodology as a systematic process of solving a research problem.[132] This study adopted a qualitative methodology of study which involves the use of both primary and secondary sources of data. Higgs and Cherry define qualitative methodology as a range of strategies that rely on qualitative or non-mathematical judgments.[133] Miles and Huberman perceive qualitative research as being mainly concerned with words, observations, stories, visual portrayals, meaningful characterisations, interpretations, and other expressive descriptions, as opposed to focusing on numbers.[134] Among the primary sources used in this study were statutes and case law while secondary sources included books, specific journal articles, publications and reports compiled by experts, newsletters and online sources.

The study further used a quantitative methodology to provide recent world, regional and national statistics on the rate of abortion. According to Mulili, a quantitative study is based on statistical

[132] C R Kothari, *Research Methodology: Methods and Techniques* 2nd Revised Edition (New Age International Publishers 2004) 8.
[133] J Higgs and N Cherry, 'Doing qualitative research on practice' in J Higgs, D Horsfall and S Grace (eds.), *Writing Qualitative Research on Practice* (Rotterdam, Netherlands, Sense Publishers 2009); see also T H Schram, *Conceptualizing and Proposing Qualitative Research* (2nd ed. Upper Saddle River: NJ Pearson Education 2006); S B Merriam, *Qualitative research: A guide to design and implementation* (San Francisco: Jossey-Bass 2009) 8.
[134] M B Miles and A M Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (2nd edn, Sage, Newbury Park, CA 1994); Kothari (n86) 107.

rules and formulas.[135] The need to reform Kenya's legal framework on abortion was justified by reference to demographic trends in jurisdictions which have legalised abortion under certain circumstances. The rationale was that abortion legalisation is a threat to sustainable population and economic growth in the world and Kenya in particular.

The study also adopted a comparative approach to determine what best practices Kenya can borrow from other jurisdictions in protecting the unborn child. Cruz describes a comparative methodology as an explicit comparison of the rules or institutions of two or more jurisdictions in order to ascertain similarities and differences.[136] It entails a comparison of foreign systems with the domestic system, discovering or examining the best mechanisms for improvement of the domestic system.[137] Noting the importance of comparative analysis, Mbondenyi correctly states that comparative approach assigns primacy to comparison; it sees the systems in the eyes of interdependence and interconnectedness in their various facts and stages of development.[138]

Kenya is a commonwealth state with most of its laws having been adopted from England. This study, therefore, examined UK's diverse legal framework on abortion, which includes the 1967 Abortion Act as amended by the 1990, Human Fertilisation and Embryology Act, the 1861 Offences Against the Person Act, the Abortion Regulations 1991, and the Abortion (Amendment) (England) Regulations 2002. The wide abortion jurisprudence in UK's abortion was useful in deriving the arguments presented in this study. The exceptions to abortion provided for in Article 26 (4) of the Kenyan Constitution are partly similar to those stated in section 1 of the UK Abortion Act, 1967. In addition, the language employed in sections 158-160 of Kenya's

[135] Benjamin Mwanzia Mulili, 'Towards the Best Corporate Governance Practices Model for Public Universities in Developing Countries: The Case of Kenya' (DBA Thesis, Lismore NSW, Southern Cross University 2011) 107.
[136] P de Cruz, *Comparative law in a changing world* (2nd ed. London: Cavendish Publishing 1999) 10.
[137] Ibid 7.
[138] Morris K Mbondenyi, 'Investigating the Challenges in Enforcing International Human Rights law in Africa: Towards an effective Regional System' (PhD Thesis, University of South Africa, June 2008)78.

Penal Code is similar to that in sections 58 and 59 of UK's Offences against the Person Act, 1967.

1.10 Chapter Breakdown

This thesis is divided into five chapters. Chapter one provides the introduction of the study which includes, inter alia, the statement of the problem, the study objectives, the literature review, theoretical framework, and research methodology.

Chapter two is a literature review on abortion. It provides a general overview of the legal aspects on abortion and demonstrates how the term is defined in the Kenyan context. The chapter focuses on the right to life of the unborn child under the Kenya's legal framework. It largely responds to Question 1 of the study's research questions.

The Chapter three evaluates Article 26(4) of the Kenyan Constitution and other laws. It also establishes how the right to life of the unborn child is protected under international human rights law. The main purpose of this chapter is to establish whether Kenya's legal framework adequately protects the unborn child.

Chapter four entails a comparative study of UK abortion laws in order to draw important mechanisms for improvement of Kenya's legal status of abortion. The chapter further seeks to establish if there are any lessons that Kenya can draw from the experience of UK.

Chapter five provides the conclusion and suggestions for legal reform.

CHAPTER TWO

LITERATURE REVIEW

2.0 Introduction

Hart describes literature review as the selection of available documents, both published and unpublished, on the topic, that contain information, data and evidence to express certain views on the nature of the topic and the effective evaluation of these documents in relation to the research.[139] The present literature review is based on these definitions, presenting to the reader existing arguments derived from multiple works, drawn from Kenya and other jurisdictions, in order to have a strong base to support the findings. The chapter covers the contentious legal status of the unborn and the right to life. The basis for this review is to draw a gap for this study.

2.1 The Inclusion of Article 26(2) and (4) in the Constitution 2010

According to Njagi, the church in Kenya has been an important player in influencing state interventions in the fields of reproductive health and abortion.[140] Gadaffi argues that, during the campaigns preceding the 2010 constitutional referendum, religious groups opposed the then proposed Constitution because it permitted abortion.[141] According to him, morality informs the formulation of the law governing abortion in Kenya.[142] This study is however a legal study premised on the current legal framework on abortion.

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[139] Chris Hart, *Doing a literature review: Releasing the Social Science Research Imagination* (SAGE Publications 1998) 13-19.
[140] Njagi (n 99) 164.
[141] Gadaffi (n 17) 42; see also Maya Zozulya, "Kenyan Abortion Laws: Concern and Controversy" 2010 Consultancy Africa Intelligence, available at <http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=390:kenyanabortion-laws-concern-and-controversy&catid=59:gender-issues-d> accessed 22 October 2015.
[142] Gadaffi (n 17) 42.

As noted by Njagi, the anti-abortion movement in Kenya is a flagship for Christian morality and ethics, firmly embedding the vast majority of Christians on the pro-life side of the debate.[143] It is worth noting that the amplitude of this movement has extended to public policy considerations of abortion in Kenya. This extension, as Njagi argues, is based on the fact that majority of Kenyans identify themselves as Christians, and as such, the discourse of foetal life as a sacred canopy used by anti-abortion actors receives general acceptance as it resonates within the larger society.[144] To sustain their discourse in the country, the actors have consistently sought to have their opposition to abortion entrenched in public policy.[145] This explains the debate preceding the inclusion of Article 26(2) of the Constitution.

During the 2004 National Constitutional Conference,[146] religious leaders successfully[147] resisted attempts by pro-abortion actors to have the draft Constitution provide for abortion and reproductive health rights.[148] Later on, when the abortion issue was reintroduced by the proposed Reproductive Health and Rights Bill (2008) which sought to have abortion legalised in specific circumstances, a pastoral letter was issued on 28th September 2008 by the Archbishop of Catholic Archdiocese of Nairobi warning the Government against passing the Bill.[149] The letter stated in part:

> Abortion is not merely the removal of some tissue from a woman's body. Abortion is the removal of a living "thing" that would become human if it were

[143] Ibid.
[144] Ibid 172.
[145] Ibid 173.
[146] The National Constitutional Conference was convened on 12 January 2004 to deliberate on and produce a draft Constitution which was to be subjected to a referendum. On 15 March 2004, delegates to the conference adopted the Draft Constitution of Kenya, 2004. The referendum was held on 21 November 2005 but the proposed new Constitution was voted down by a 58 per cent majority of Kenya's voters.
[147] Notably however, the Constitution 2010 while prohibiting abortion in principle left open the possibility for Parliament to develop legislation that could expand the lawful grounds for the procedure.
[148] Njagi (n 99) 173.
[149] Ibid.

> allowed to remain inside the woman's body. Abortion is the destruction of an unborn baby. Pregnancy is the period for this new human life to mature, not just to "become human". It already is human. This is why the Church considers abortion the killing of a human being, and why the Second Vatican Council called it an "unspeakable crime." I remind you all to maintain the utmost respect for human life, from the time of conception. Even under threat, never use your knowledge to do what is contrary to the laws of humanity.

Likewise, when in 2009, negotiations on a new Constitution resumed after the 2004 draft was rejected in a referendum, religious leaders and their anti-abortion supporters again insisted the inclusion of a clause specifying that life begins at conception. The leaders categorically stated that Kenya's Constitution ought to be clear on the protection of the sanctity of the human life and also state where life begins and ends.[150] With the already alluded to political position that religious leaders have enjoyed in the past and the fear that they may scuttle plans for a new Constitution, a clause meeting their demands was added.[151] As indicated by Njagi, the original draft Constitution by the Committee of Experts[152] made no reference to the definition of life or any provision with reference to abortion. But when the draft was handed to the Parliamentary Committee, the Catholic Church and the National Council of Churches of Kenya (NCCK) persuaded the politicians to include new subsections; one recognizing that life begins at

[150] Mathenge G, 'Church faults draft over right to life' *The Standard* (Nairobi, 22 November 2009). Retrieved from <http://www.standardmedia.co.ke/?incl=SendToFriend&title=Church%20faults%20draft%20over%20right%20to%20life&id=1144028797&cid=159&articleID=1144028797> accessed 3rd March 2015.

[151] Njagi (n 99) 174.

[152] The Committee of Experts was the main technical organ in the Constitutional Review process. It comprised of nine experts and two ex officio members who were nominated by the National Assembly and appointed by the President. The committee was mandated to finalize the Constitutional Review process and deliver a new constitutional dispensation for Kenya.

conception and the other stating clearly that abortion is not permitted, unless in the opinion of a registered medical practitioner, the life of the mother is in danger.[153]

Unsurprisingly, the inclusion of the clauses in the draft Constitution was, in a way, meant to appease religious leaders who had threatened to campaign against its adoption in the forthcoming referendum. The leaders, led by the NCCK and the Catholic Church, had threatened to reject the draft constitution if the Bill of Rights did not define that the life of a person begins at conception and ends at natural death.[154] Reverend Peter Karanja of the National Council of Churches, for example, warned:

> Should the harmonised draft remain as it is without defining when life begins, we shall explore legitimate options as stipulated under the Kenya Constitution Review Act, 2008 to seek amends. What is clear is that this issue needs to be taken seriously as it will definitely take centre-stage with regards to the referendum.[155]

In the aftermath of the 2008 post-election violence, the writing of a new Constitution was a predominant issue. Thus, the willingness of Kenyan Members of Parliament to give in to the religious leaders' wishes resulted from their unwillingness to sacrifice support from a rather large Christian constituency.[156] Njagi argues that, in agreeing to disagree with the Committee of Experts, the members of the Parliamentary Committee were executing the wishes of the political elite who were keen on having the new Constitution passed.[157] According to Njagi, the religious

[153] Njagi (n 99) 175.
[154] Ibid.
[155] Anyangu-Amu S, 'Clash over abortion rights in new Constitution' *Inter Press Service* (Nairobi, 14 January 2009). Retrieved from <http://ipsnews.net/africa/nota.asp?idnews=49984> accessed 2nd March 2015.
[156] Njagi (n 99) 175.
[157] Ibid.

leaders' request to have anti-abortion clauses in the draft Constitution for the first time acknowledged the acceptability of abortion in instances where pregnancies threaten women's lives.[158]

While Njagi offers useful information on the history of Article 26(2) of the Constitution, this study argues that the drafters of the Constitution had failed to foresee a likely conflict of the additional clause vis-a-vis the abortion provisions. It is further argued, whereas the Constitution prohibits abortion, the exceptions provided for under Article 26(4) defeat the spirit, goal and applicability of the said clause. The addition of the exceptions, therefore, remains a blanket decision made to counter opposition by the religious leaders. Indeed, this suppresses the implementation of the abortion restriction under the Constitution. The ramification of the "*if permitted by any other law*" proviso worsens the extent to which Article 26(2) applies to protect the unborn child. An explanation into this draws a gap between this study and Njagi's work.

2.2 The Right to Life and Conception under Article 26(2)

The right to life is guaranteed under the Constitution of Kenya.[159] Article 26(3), however, provides that a person shall not be deprived of life intentionally, except to the extent authorized by the Constitution or other written law. This accords with Article 24(1), which provides grounds on which a right or fundamental freedom in the Bill of Rights can be limited. The debate on abortion often emanates from the controversy surrounding the right to life and the status of the unborn at conception.

[158] Ibid 176.
[159] The Constitution of Kenya 2010, article 26(1).

Grisez argues that life proceeds from life, and human-life from human-life, in a continuous process.[160] A new individual emerges from an existing individual; and, relative to parents, the individuality of the offspring must be admitted to begin at conception.[161] Once conception has occurred, a cell exists which cannot be identified with either parents. While the dual unity of the sperm and the ovum are continuous with the duality of the two parents, the unity of the fertilised ovum is continuous with that which develops from it.[162] Thus, the proper demarcation between the offspring and parents is conception, and so the new individual begins with conception. From this viewpoint, then, it can be effectively argued that the foetus or embryo is a living human individual from conception until birth. Accordingly, it remains undisputable that the killing of the unborn only prevents life from beginning.[163] This is consistent with the position taken by Article 26(2). Grisez's work is very instructive in this study, particularly with regard to the theoretical analyses of the status of the unborn child. This study however focuses on the right to life of the unborn child from the legal perspective.

Warren on the other hand argues that the human embryo or foetus is human in the genetic or biological sense, but is not a person to enjoy rights.[164] According to her, a foetus lacks those characteristics an entity must have in order to be considered a person. These characteristics include, inter alia, consciousness, reasoning, self-motivated activity, the capacity to communicate an indefinite variety of types of massages, and the presence of self-concepts.[165] She says that to be a person, an entity need not posses all of these traits, but that it must possess

[160] Grisez G Germain, *Abortion:The Myths, Realities, and the Arguments* (New York and Cleveland: Corpus Publications, 1970) 274.
[161] Ibid.
[162] Ibid.
[163] Ibid 279.
[164] Mary Anne Warren, "On the Moral and Legal Status of Abortion," in Joel Feinberg, *The Problem of Abortion*, 2d ed. (Belmont, Cal: Wadsworth, 1984), 102-119.
[165] Ibid; See the same argument in English Jane, "Abortion and the Concept of a Person," (1975) 5 *Canadian Journal of Philosophy* 233-43.

at least some of them. In support of this, Warren asserts that the above characteristics belong to the concept of personhood.[166] Thus, in her view, the unborn possess none of these traits and therefore cannot be considered persons capable of enjoying the right to life. Conversely, this study argues that since Article 26(2) of the Kenyan Constitution provides that life begins at conception, anything done to harm the unborn child is harming life and should be forbidden. The right to life of the unborn child should be adequately protected under the law.

Like Warren, Tooley[167] adopts a "no-person" description of an unborn child. He argues that the right to life belongs to persons, and not to every human organism. Accordingly, he argues that to have a right to life, a thing must have certain psychological traits.[168] He further asserts that:

> An organism possesses a serious right to life only if it possesses the concept of a self as continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity.[169]

He calls this the "self-consciousness requirement" and concludes that, since foetuses and infants are not self-conscious and do not have a concept of self, they do not possess a right to life. While this study is limited to inadequacies of the law, it is argued that a human foetus has the potentiality of exercising the functions referred to in those traits, that is, it has the internal resources to develop itself to the stage where it will perform such functions. Thus, just as the law protects rights and fundamental freedoms of every person, the same protection should be

[166] Ibid 112.
[167] Tooley (n 101) 37-65; see also Michael Tooley, *Abortion and Infanticide* (New York: Oxford 1983).
[168] Ibid.
[169] Ibid 63.

extended to the unborn child. Finnis supports this assertion by arguing that the unborn child is a person from the time of conception regardless of appearance, age, and other changes.[170]

Further, George and Lee argue that human beings have the special kind of value that makes them subjects of rights by virtue of what they are, not by virtue of some attribute that they acquire some time after they have come to be.[171] Like sleeping or reversibly comatose human beings, foetuses possess, albeit in radical form, a capacity or potentiality for higher mental functions as beings with a rational nature.[172] They are the kind of being, members of a biological species, which, if not prevented by extrinsic causes, in due course develops by active self-development to the point at which capacities initially possessed in root form become immediately exercisable.[173] Each human being comes into existence possessing the internal resources and active disposition to develop the immediately exercisable capacity for higher mental functions, provided that this development is not prevented by adverse effects, in this case abortion.[174]

In furtherance of their position, George and Lee describe the embryo or foetus, first, as distinct from any cell of the mother or father because its growth is internally and distinctly directed to its own survival and maturation.[175] Secondly, the embryo or foetus is *human*, having the genetic makeup characteristic of human beings. Thirdly and most importantly, the authors argue that, although not mature, the human embryo is a *complete* or *whole* organism fully and actively programmed, from conception onward, to develop to the mature stage of a human being, and,

[170] John Finnis, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson" (1973) 2 Phil. & Pub. Aff. 117, 145.
[171] George and Lee (n 100) 17.
[172] Ibid.
[173] Ibid 18.
[174] Ibid.
[175] Ibid 14.

unless prevented by disease or violence, will actually do so in the mother's womb.[176] It is worth noting that a child is brought out of the bodily unity and bodies of the mother and the father. The parents are in a certain way prolonged or continued in their offspring. In other words, there is a natural unity of the parents with their child, different from how other children are; the unity between the embryo or foetus and the mother is closer than with a born child. In this regard, George and Lee assert that we ought to pursue our own good and the good of others with whom we are united in various ways.[177] If that is so, then the closer someone is united to us, the deeper and more extensive our responsibility to that person will be.[178] George and Lee provide useful information on the distinct nature of the unborn child from the mother. Based on this, this study argues that, being vulnerable and unable to defend themselves, foetuses may therefore be considered among the minority and marginalized in the context of Article 21(3) of the Constitution of Kenya and therefore warranting active protection both by the State and individuals.

According to Shaffer, science establishes irrefutable proof that human life begins at conception and the genetic makeup which defines a human being is fixed at that point.[179] It demonstrates that, from conception, the unborn child is physiologically and genetically separate from the pregnant woman within whom it exists.[180] Thus, because of this distinctiveness, the unborn cannot be considered as part of the woman, but remains an independent human being meriting its own protection in law.[181] Shaffer argues that, at 56 days or 8 weeks (about the earliest time abortions are performed), the child is a fully functioning human being with organs and body

[176] Ibid.
[177] Ibid 5.
[178] Ibid.
[179] Shaffer Martha, 'Foetal Rights and the Regulation of Abortion' (1994) 39 (1) McGill Law Journal 58, p. 75.
[180] Ibid.
[181] Ibid.

systems in place.[182] The features are very clear that one can see even the creases on the child's open hand. These features are unique and only require some time, 13 or 14 years, to mature.[183] By 9 weeks, the child is very active and can be seen sucking a thumb.[184] These descriptions not only demonstrate that a foetus looks clearer as pregnancy progresses, but also affirm the similarities between infants, who are indisputably legal persons, and the developing foetus. While the author justifies the personhood of the unborn child as scientifically proven, this study argues that since scientific evidence shows that the unborn child is a person, the law should provide adequate protection without discrimination.

According to Larsen, embryos begin development following the fusion of definitive male and female gametes during fertilization.[185] Whether produced by fertilization or cloning, the human embryo possesses all the genetic material needed to inform and organize its growth.[186] From the moment of conception, the zygote has the same DNA as a fully-grown adult human being and will naturally develop in its own distinct direction unless deprived of a suitable environment or prevented by accident or disease.[187] The direction of growth is not extrinsically determined, but is in accordance with the genetic information within the embryo. In light of this, life is a continuum from conception to death, a notion that qualifies the unborn child as biologically human and hence a legitimate right-bearer. This is clear in the following extract:

> A foetus is a human being with the right number of chromosomes like you and me. As a medical doctor, to say otherwise would be misleading. In fact, the foetus

[182] Ibid 76.
[183] Ibid.
[184] Ibid.
[185] William James Larsen, *Essentials of Human Embryology* 2nd ed. (Churchill Livingstone 1998) p. 1.
[186] Ibid.
[187] Ibid 2.

> is not a part of the mother since he/she is genetically distinct from the mother. A woman just has that privilege of sheltering another human being.[188]

Larsen's work is important in this study as it lays down a scientific basis under which the personhood of the unborn child is established. However, this study presents a legal justification of the status of the unborn child under international human rights law and the law on abortion in Kenya. The study, for example, argues that since the law recognises the right to life of every person without any limitation of age, the right to life of the unborn child should be balanced with the so-called "right to privacy" of the mother.

Article 19(3) (a) of the Constitution of Kenya provides that rights and fundamental freedoms in the Constitution belong to the individual and are not granted by the State. The right to life therefore is inherent in all persons from conception as stipulated in Article 26(2), which states that life begins from conception, to natural death. Article 26(2) therefore affirms and recognizes the humanity of a foetus legally according it the status of a human person and, hence, amenable to the right to life. Insertion of this provision in the Constitution is in keeping with the words of Blackstone, thus;

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in the contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But at present it is not looked upon in quite so

[188] As cited in Njagi (n 1) 179.

> atrocious a light, though it remains a very heinous misdemeanour. An infant *en ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes…[189]

2.3 The Foetus as a Right Bearer and Woman's Right of Autonomy

A second major issue involved with abortion is the question of woman's rights versus the rights of the foetus. Osinachi argues that the function of rights is to protect the interests of the right bearers, linking this to the subordinate position that the foetus has no interests in the relevant sense and therefore cannot sensibly be regarded as a bearer of rights.[190] Admittedly, the moral foundation of rights is to be traced to the protection or furtherance of the interests of the right bearers. According to him therefore, the tie between rights and interests is so close that it is inappropriate to use the language of rights where there are no such interests to be protected or furthered.[191] Thus, there cannot be duties to beings which do not have interests in the sense of concerns, and only such beings can be the bearers of rights.[192] Osinachi argues that the foetus, certainly at an early stage, does not have interests in the relevant sense, and cannot therefore have the right to life, as it cannot sensibly be regarded as having any rights at all. However according to him, the foetus in the late stage of its development has experiences that may be described as wants, desires, likings, preferences and concerns and can therefore properly be regarded as a right bearer.[193] This study, however argues that since Article 26(2) and international human rights law portrays the unborn child as a legitimate right bearer, the law on

[189] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769) (4) 198.
[190] Osinachi (n 103) 33.
[191] Ibid 34.
[192] Ibid.
[193] Ibid.

abortion should strike a balance between protecting the unborn child and the autonomy of the woman.

Omondi argues that a woman should be permitted to exercise the maximum possible control over her own body, and that should not exclude carrying a foetus to term.[194] According to her, women are autonomous and have the moral right to decide for themselves what to do with their own body.[195] It is a legal right, which should not be fettered because the foetus lacks the ability to reason.[196] Omondi notes that women should not be forced to have babies they do not want and they deserve a choice to end their pregnancy plus having a safe and legal way of doing so.[197] If a woman cannot choose to terminate an unwanted pregnancy, she is denied the right to the possession and control of her own body.[198] According to Omondi, one of the most sacred rights of common law is the right to choose and if a woman cannot do this then their most important possession is taken away.[199] Omondi thus argues that abortion is not only a woman's right; it is a woman's choice. It is however argued under this study that scientific evidence proves that the unborn child is a human being deserving legal protection. The autonomy of the woman should therefore not be enjoyed to the detriment of the unborn child.

Hewson contends that denying a woman the right to an abortion is unethical, because it serves to subordinate women to a reproductive end.[200] She stresses that the prospect of a woman's forced suffering as the result of pregnancy is a moral issue in and of itself. Additionally, Hewson argues

[194] Elizabeth Awuor Omondi, "The Abortion Conflict in Kenya and the Moral and Medical Issues Involved" (2015) 1 *Kenya Journal of Law and Justice*, p. 48.
[195] Ibid 49.
[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] B Hewson, "Reproductive autonomy and the ethics of abortion" (2001) 27(5) Supplementary 2 Journal of Medical Ethics 10-15

that a foetus' right should not interfere with a mother's right to autonomy. Furedi contends that women do not have abortions for abstract reasons; they have them because pregnancy is intolerable.[201] Both Furedi and Hewson assert that pregnancy subjects a woman to a condition that is not bearable. In contrast to Furedi and Hewson, this study argues that the impact of abortion both on the right to life of the unborn child and the society as a whole outweighs the grounds for abortion. This justifies the need to provide for adequate protection of the unborn child under Article 26(2).

Holding the woman's "right to abortion" constant, a question arises as to whether the father has a say in the abortion debate. Hales argues that the mother and father have equal obligations toward their child once it is born.[202] The challenge, however, is the distribution of rights and duties before the child is born, particularly during the pregnancy of the mother.[203] Since Article 45 (3) of the Constitution provides that the father and mother have equal rights, it may be concluded that fathers also have a right of say with regard to abortion. On the face of it, this seems absurd because men clearly cannot get pregnant and therefore cannot have a right to abortion.[204] Hales argues that the motivation for wanting a right to abortion is because a mechanism is wanted to avoid future duties and burdens.[205] The father, too, is facing future duties.

However, according to Hales, the father can decide that he cannot afford another child; that he is not psychologically prepared to be a parent; and that a child would hinder the lifestyle he wishes

[201] A Furedi, "Issue for service providers: A response to points raised" (2001) 2(27) Supplementary 2 Journal of Medical Ethics 28-32.
[202] Steven D Hales, "Abortion and Father's Rights" in James M Humber and Robert F Almeder (ed.) *Biomedical Ethics Reviews: Reproduction, Technology, and Rights* (Totowa: Humana Press 1996) 5-26, 6.
[203] Ibid.
[204] Ibid 7.
[205] Ibid 7.

to pursue.[206] Unfortunately, the decision in *Roe v Wade* implies that he is completely subject to the decisions of the mother. If she decides to have the child, she thereby ensures that the father has certain duties, which are impossible to avoid. Conversely he cannot enforce his right to the child should the mother opt to abort. If there is any conflict between the mother and the father, the mother's wishes prevail.

According to Petchesky, the fact that the foetus is in her body ensures that she has final say over it.[207] Hales argues that the father is in this regard ill-treated.[208] Even if biology prevents men and women from having absolutely identical means to exercise their rights, it remains that what should be done is to try to achieve equal opportunity to exercise rights as much as possible.[209]

Hales justifies this argument that although the mother undergoes the burden of pregnancy, she is guaranteed the benefit of paternal support.[210] The father, by contrast, has the benefit of not hailing to suffer the burden of pregnancy and childbirth, and instead shoulders the burden of necessarily having to help support the child once it is born.[211] Each party has their respective burdens and benefits, and these benefits and burdens are distributed more or less evenly. Thus the equality principle is satisfied. Thus the law gives the mother the right to abort at any time but denies the father's right to have a say. In *Planned Parenthood v Casey* (1992), the US Supreme Court stated in connection with a spousal notification law, which was struck down as unconstitutional, that "the marital couple is not an independent entity with a heart and mind of its

[206] Ibid 10.
[207] Rosalind Pollack Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* (New York: Longman 1984) 354-356.
[208] Hales (n 211) 9.
[209] Ibid.
[210] Ibid 20.
[211] Ibid 20.

own, but an association of two individuals with a separate intellectual and emotional makeup."[212] Based on that definition of marriage, the Court concluded that "a husband has no enforceable right to require a wife to advise him before she makes her personal choices."[213] It stated that "the Court's power lies in its legitimacy, a product of substance and perception, that shows itself in the people's acceptance of the judiciary as fit to determine what the Nation's law means and to declare what it demands." This statement exposed one of the weaknesses of legal positivism, which emphasizes the notion of who has the power or authority to decide the law.

Grisez asserts that killing the foetus for the sake of personal gain (be it material or psychological or otherwise) reveals an attitude towards human life that is not in keeping with its inherently immeasurable dignity.[214] This dignity has found constitutional backing in Article 28 which states that, '*every person has inherent dignity and the right to have that dignity respected and protected*.'[215] Grisez considers abortion, even where it is premised on justifiable "shifty" excuses, as a deep-seated prejudice against unborn children.[216] Thus, the argument for abortion, even within certain exceptions, seems to gain what little plausibility it has from the supposition that the unborn child is like a product coming along a production line, which, if it fails to meet all specifications, is put into scrap by an inspector.[217] In this regard, Grisez argues that:

> Even psychologically, I doubt the wisdom of a woman who has been raped disposing of a child conceived of the attack. Her problem is largely to accept herself, to realize that she is not inherently tainted and damaged by her

[212] John T Noonan Jr, *A Private Choice* (New York: Free Press, 1979) 21.
[213] Ibid.
[214] Grisez (n 143) 343.
[215] supra
[216] Ibid 469.
[217] Grisez G Germain, "Toward a Consistent Natural-Law Ethics of Killing" (1970) 15 The American Journal of Jurisprudence, An International Forum for Legal Philosophy 96.

> unfortunate experience. The unborn child is partly hers, and she must accept herself in it if she is really to overcome her sense of self-rejection. To get rid of the child is to evade this issue, not to solve it. A woman who uses such an evasion may feel temporary relief but may be permanently blocked from achieving the peace with herself she seeks.[218]

According to Puppinck, if the foetus or the embryo was nothing, or nothing more than an insignificant element produced by the body of the woman, like the hair, there would be no need of a law to regulate abortion.[219] Thus to him, abortion is a derogation of the right to life and cannot, therefore, constitute a right in itself; it cannot become an autonomous right. As derogation, the scope of abortion should be limited by the principle to which it refers; and if such principle is unclear or inconsistent, then the platform for clandestine abortions comes into play. In his separate opinion under *Vo v. France*, President Costa explains in this regard that:

> I believe (as do many senior judicial bodies in Europe) that there is life before birth, within the meaning of Article 2 [of the European Convention on Human Right], that the law must therefore protect such life, and that if a national legislature considers that such protection cannot be absolute, then it should only derogate from it, particularly as regards the voluntary termination of pregnancy, within a regulated framework that limits the scope of the derogation.[220]

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[218] Grisez (143) 343.
[219] Puppinck (n 102) 142-193; see also Daniel P Fenwick, *Recognition of Violations of Women's Human Rights under the European Convention on Human Rights in the Context of Restrictive Abortion Regimes* (Master of Jurisprudence thesis, Durham University 2010).
[220] Jean-Paul Costa, Separate opinion under *Vo v. France*, [G.C.] No. 53924/00, 8 July 2004 at para. 17 [emphasis added], quoted in Puppinck (ibid) 163.

Puppinck notes that, from a more fundamental point of view, the above position is in respect of the principle that a positive right can only pursue a good *per se*.[221] It cannot be aimed at the realisation of a wrong, even if this wrong is permitted by law in consideration of its supposed inevitability or necessity,[222] which in the Kenyan context is the "need for emergency treatment" or "the life or health of the mother."[223] Put in a more emphatic way, killing an unborn child, even within the limited exceptions, in a pretext of avoiding unnecessary "inconvenience"[224] reveals an attitude towards human life that may be far-fetched from its inherently immeasurable dignity envisaged by Article 28 of the Constitution. In this context, the woman in all cases is the duty bearer with the obligation to protect and preserve the life within her. This study however, argues that where the woman has failed to protect the right bearer (unborn child), the law should be in place to shield the innocent.

2.4 Consequences of Abortion

Seemingly, the socio-cultural contexts in which a woman lives may be very detrimental in her life following an abortion.[225] Motivated by the economic setbacks that might beset them in future, some girls and women opt to seek help from midwives or medical personnel who, in disguise of being registered, run small clinics offering abortion services. The explanation given by many of them is that the law provides for exceptional circumstances under which they are to perform abortions. In practical sense, abortion to them seems permissible, having an express constitutional backing. The one who suffers most is the teenage girl or woman who remains

[221] Puppinck (n 102).
[222] Ibid.
[223] See The Constitution of Kenya 2010, article 26(4).
[224] "Inconvenience" here includes the burden of additional children, being shunned by the society as a result of rape or incest, or keeping with current trends, as well as any health complications.
[225] See Major B *et al*, "Abortion and mental health: Evaluating the evidence" (2009) 64(9) American Psychologist 863-890.

shrouded within societal condemnation. The stigma surrounding them often makes them to engage in secret dealings with the midwives or 'quack' doctors, just to hide from the face of the community. Any resultant complication may therefore not be revealed, leading to long suffering and even death. FGD11 (Trans Nzoia, Kenya) states:

> The [community] will always uphold the person who gave birth with [more] respect than the person who aborted, who is deemed not to have morals. She is bad company and [the community] will advise [others] not to interact with [her].[226]

FGD17 (Bungoma) also narrates:

> When they see her with [other girls], they will say she will influence [them] and [the other girls] will also start having abortions. They discourage [other girls] from [interacting with her].[227]

In her long testimony, T (not her real name) from Ethiopia says that:

> Abortion has serious pain, I thought I was dying but I survived. After the procedure I went home and slept for many days. My family was disturbed by my sickness and asking me now and then what happened to me. I lied to them; I have to mention some other disease. I suffered for many days, I lost weight and my mind is also considerably affected. I did not tell to anybody that I have had an abortion even my girl friends because I thought they may undermine me, gossip

[226] Heather M Marlow, Sylvia Wamugi, Erick Yegon, Tamara Fetters, Leah Wanaswa, and Sinikiwe Msipa-Ndebele, "Women's perceptions about abortion in their communities: perspectives from western Kenya" (2014) 22 (43) Reproductive Health Matters 149, 153 [extract].
[227] Ibid [extract].

> about me or may tell for someone who knows me. I kept the secret for myself. I would rather die rather than give birth while living in my mother's house…. In such low economic condition my family may throw me out of home and also as the society believe giving birth before marriage as a taboo, they will dishonour the new born.[228]

The above image is not divorceable from the experience of most Kenyan girls and women who have gone through the same tragedy. Their experience is, in fact, worsened by the complications associated with abortion. Bachiochi argues that abortion both harms women's wellbeing and that it is antithetical to a genuine feminism, one that recognizes and celebrates the uniqueness of women as women.[229] She argues that abortion harms women physically, psychologically, relationally, and culturally.[230] According to her, women who have had abortions suffer an increased risk of anxiety, depression, and suicide.[231] Many states including Kenya surprisingly do not require that abortion-related complications be reported to their health departments.[232] Nevertheless, a review of available data reveals that thousands of women are injured each year from short-term complications such as haemorrhaging, uterine perforation, and infection.[233] In addition few if any health institutions provide post-abortion counselling. Therefore, according to Bachiochi, while carrying and giving birth to an unplanned child may take self-sacrifice women who have aborted, and those who have merely lived during this long era of abortion, have

[228] Fasika Ferede Alemu, *Minors' Awareness about the New Abortion Law and Access to Safe Abortion Services in Ethiopia: The Case of Marie Stopes International Ethiopia Centers in Addis Ababa* (Master Thesis in Medical Anthropology, University of Amsterdam 2010) 58-59.
[229] Bachiochi (n 104).
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Ibid.

sacrificed far more.[234] Bachiochi's work, though brief, provides a reflection of the social implications of abortion in exclusion of the legal and moral aspects of the practice. This study however is limited to the assessment of the law on abortion in Kenya to establish whether it adequately protects the unborn child.

Hopkins *et al* analyse the current anti-abortion discourse in terms of post-abortion syndrome (PAS), particularly the "avoidance phenomenon," which asserts that all women will continue to psychologically re-experience their abortion in a negative way.[235] These re-experiences can manifest themselves through "intense psychological distress at exposure to events resembling the abortion experience.[236] PAS is said to emerge out of the trauma of an abortion and can follow a woman for the rest of her life.[237] A renowned abortionist, Dr. George Tiller[238] concedes that likelihood of infertility subsequent to an abortion is very real. This raises doubts about the justification for abortion, often based on imminent mental risks and other health problems on the mother. Walberg argues that no matter the circumstance, even in cases of rape, abortion is never the right choice for any woman. Instead, it re-victimises the sexually assaulted victim by making her an accessory to ending a human life.[239] The fear, guilt, pain and anxiety associated with the procedure may become overwhelming with time.[240] The woman may, for example, experience flashbacks, nightmares or become obsessed with babies; and most women are said to experience

[234] Ibid.
[235] Hopkins N, Reicher S and Saleem J, "Constructing women's psychological health in anti-abortion rhetoric" (1996) 44 The Sociological Review 539, 546. doi: 10.1111/j.1467-954X.1996.tb00436.x.
[236] Ibid.
[237] Gordon Kelly, *"Think About the Women!" The New Anti-Abortion Discourse in English Canada* (MA in Political Science Thesis, Canada: University of Ottawa 2011) 45.
[238] Br J Obstet Gynecol 2000 Source: Fertility and Sterility, Vol 79, Issue 4, April 2003. National Library of Medicine
[239] Ibid 46.
[240] Ibid 47.

anxiety over fertility, with some fearing that they will never become pregnant again.[241] Consequently, the women experience a deep feeling of regret and also love for the child that should have been. While Walberg offers useful information justifying the need to reduce incidences of induced abortion, this study argues that the impact of abortion can be checked if the law is reformed to ensure define the exceptions under Article 26(4) of the Constitution and further introduce thresholds to limit medical discretion.

2.5 Conclusion

The controversy of abortion in Kenya cannot be divorced from a right-to-life discourse. Despite the current legal limitations in Kenya, the right to life is profound and any decision to take it away ought to be in accordance with rules of justice and fair play. Put differently, a decision cannot pursue a wrong, even if this wrong is partly or fully permitted by law in consideration of its necessity. Besides, it can be rightly concluded that, from the foregoing review, none of the Kenyan authors has delved into the adequacy of Article 26(4) of the Constitution of Kenya vis-à-vis the other abortion laws. Further, some of the authors take a philosophical or moralistic stand of the right to life and the status of the foetus. In order to address these gaps, the next chapter unearths the inadequacy of the Kenyan abortion law, especially with regard to Article 26.

[241] Ibid.

CHAPTER THREE

A CRITIQUE OF THE LAW RELATING TO ABORTION IN KENYA

3.0 Introduction

From the literature review in the previous chapter, it is apparent that abortion is a controversial issue in many countries and Kenya, in particular. According to Baraza, many governments have struggled to strike a balance between what they believe women want and the rights of foetuses.[242] A question, however, arises as to whether the law on abortion in Kenya adequately establishes this balance. This chapter therefore discusses Kenya's legal framework on abortion and establishes whether it adequately protects the unborn child. The right to life of the unborn child under international law is also discussed. The purpose of this chapter is to confirm the hypothesis that the law on abortion in Kenya does not adequately protect the unborn child as a right bearer.

3.1 The Law against Abortion in Kenya

Termination of pregnancy is not permitted 'on demand' in Kenya except as provided for in law.[243] Under section 158 of the Kenya's Penal Code, any person who, with intent to procure miscarriage of a woman, unlawfully administers to her or causes her to take any poison or noxious, or uses other means whatever, is guilty of a felony and is liable to fourteen years imprisonment. Medical practitioners who perform an unlawful abortion face an additional professional penalty of suspension or erasure from the Register of Doctors as mandated by the

[242] Nancy Baraza, 'No Other Country has Slapped a Blanket Ban on Abortion' *Daily Nation* (Nairobi, 5 May 2010), available at <http://www.nation.co.ke/oped/Opinion/No-other-country-has-slapped-a-blanket-ban-on-abortion/-/440808/912806/-view/printVersion/-/upmgn0z/-/index.html> accessed 22 October 2015.

[243] Medical Practitioners and Dentists Board, The Code of Professional Conduct and Discipline (6th ed. Revised in January 2012) 43.

Medical Practitioners and Dentists Board of Kenya.[244] In *Johnson Jefa Kalama v Republic*,[245] the accused was charged jointly with another with the offence of conspiracy to commit a felony contrary to section 393 of the Penal Code in that on 30th September 2004 together they conspired to procure miscarriage on a woman. They faced a second charge of attempt to procure abortion contrary to section 158 of the Penal Code. On 17th February 2011, the High Court at Malindi upheld the conviction.

Similarly, in *Jane Auma Kweyu v Republic*,[246] the accused was charged and convicted of the offense of an attempt to procure an abortion contrary to section 158 of the Penal Code. She was sentenced to 4 years and appealed against both the conviction and sentence. Although the pregnant woman testified that it was the appellant who tried to procure the abortion but failed, the court held that the appellant could not be convicted due to the fact that she was not a doctor (sic) but rather it is the owner of the clinic who ought to have been charged.

Section 159 of the Penal Code provides that any woman who, *being with a child*, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony and is liable to seven years imprisonment. In *Elnora KulolaIlongo v Republic*,[247] the appellant had been tried on a charge of procuring abortion contrary to section 159 of the Penal Code. The particulars of the charge were that the appellant being with child and with an intent to procure her own miscarriage, unlawfully administered to herself a poison called Aspirin and Fansidar. The trial court had found her guilty

[244] Ibid 22.
[245] *Johnson Jefa Kalama v Republic*, Malindi Criminal Appeal No. 20 of 2010.
[246] *Jane Auma Kweyu v Republic*, Bungoma Criminal Appeal No. 79 of 2009.
[247] Criminal Appeal no 43 of 2007.

of the offence. However, the appellate court overturned the conviction on the ground that the evidence which was used to find the appellant guilty did not meet the high threshold of guilt beyond reasonable doubt required in criminal cases.

The case is, however, illustrative of the fact section 159 of the Act is in force and that where applicable, a person will be readily charged under the section. The phrase "being with a child" invites a discussion on what the term "child" means under the law of Kenya and whether the law adequately protects the unborn child.

3.2 The Status of the Unborn Child as a Right Bearer

Section 2 of the Children Act, 2001, defines a child as any human being under the age of eighteen years.[248] This is similar to the definition provided for in section 105 of UK's Children Act 1989. The definition does not state any limitation as to when the child starts being called a human being or individual. It merely states "under the age of eighteen," implying an unborn child falls within the ambit of a "child" whose life deserves protection under the Children Act.

Section 214 of the Penal Code, however, seems to negate this argument by providing that a child becomes a person capable of being killed when it has proceeded in a living state from the body of its mother, whether it has breathed or not and whether it has an independent circulation or not, and whether the navel-string is severed or not. The provision appears to imply that a child, who has not proceeded from the mother's body, the term of pregnancy notwithstanding, is not a living human being and can be lawfully killed or aborted. This contradicts sections 158-160 above, which clearly state that a pregnant woman is one 'with child'. Section 214 further seems to imply

[248] The Children Act Chapter 141 of the Laws of Kenya 2001 (Revised 2010) section 2; see also the Constitution of Kenya (2010) Article 260.

that an unborn child is dead and cannot be accorded the right to life unless it has proceeded out of the mother's body in a living state. This contradiction is reflected in *Republic v John Nyamu & 2 others*.[249] The three accused persons in this case were charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The accused persons were alleged to have jointly murdered an unintended female person number 1912 weighing 3012 grams and male person number 1913 weighing 2232 grams. The court held per section 214 of the Penal Code that the supposedly aborted foetuses in question were "born dead" and therefore were not capable of being killed. The court was of the opinion that for a child to become a person the most important ingredient is "when it has completely proceeded in a living state from the body of the mother." Without that, the foetus is not capable of being killed and therefore cannot claim the right to life.[250] The accused persons were, therefore, acquitted.

The court's decision in this case clearly indicates how Kenyan law is inconsistent in defining the conceived but unborn persons. While the judge properly applied section 214 to the facts before her and the charge as framed, it can be argued in the alternative that the judge misdirected herself by omitting to consider sections 181(2), (3) of the Criminal Procedure Code, which provide that:

> (2) When a person is charged with the murder or manslaughter of a child or with infanticide, or with an offence under section 158 or section 159 of the Penal Code (relating to the procuring of abortion), and the court is of the opinion that he is not guilty of murder, manslaughter or infanticide or an offence under section 158 or section 159 of the Penal Code (Cap. 63), but that he is guilty of the offence of

[249] *Republic v John Nyamu & 2 Others* [2005] eKLR.
[250] Ibid at 11.

killing an unborn child, he may be convicted of that offence although he was not charged with it.[251]

(3) When a person is charged with killing an unborn child and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 158 and 159 of the Penal Code, he may be convicted of that offence although he was not charged with it.[252]

It is not clear why the prosecution in the *Nyamu* case chose to charge the accused persons under section 203 which relates to murder and not sections 158-160 of the Penal Code. It is noteworthy however that Article 26(2) the Constitution overrides section 214 of the Penal Code by clearly articulating that life begins at conception.

Under Article 27 (1) of the Constitution, every person is equal before the law and has the right to equal protection and benefit of the law. Additionally, the State should not discriminate directly or indirectly against any person on any ground, including, inter alia, age or birth. The constitutional reference to "birth" under Article 27 (4) implies that an unborn child forms part of "every person" and should not be denied protection through abortion. Read together with Article 26 (2) on when life begins, the provision recognizes the unborn as a person entitled to the right to life and equality. The Internal Code of Medical Ethics of 1949, which is part of Kenya's Code of Professional Conduct and Discipline, provides that a doctor must always be in mind of the obligation of preserving human life from conception.[253]

[251] Criminal Procedure Code Cap 75 of the Laws of Kenya [Rev. 2012] section 181(2).
[252] Ibid section 181(3).
[253] Code of Professional Conduct and Discipline, 2012, p. 33.

Moreover, under Article 28 of the Constitution, all persons have inherent dignity and the right to have that dignity respected and protected. It follows therefore that failure to protect the life of the unborn child amounts to violation of the said Article. It can be argued therefore that Article 26 (4) contradicts Article 28 insofar as it permits, in its proviso, destruction of the life of the unborn. Besides, the fact that the Constitution of Kenya is the supreme law of the Republic and that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, qualifies the supremacy of Article 26 (2) over section 214 of the Penal Code.[254]

Section 214 of the Penal Code is also in conflict with section 228 of the Penal Code (titled "Killing unborn child"), which provides that:

> Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a felony and is liable to imprisonment for life.

This inconsistency implies that concept of the unborn child as a right-bearer is not adequately addressed under the Kenyan law. The law prohibits abortion but provides unclear and unlimited exceptions, giving the health practitioner wide and unfettered discretion to decide what constitutes lawful abortion.

[254] Constitution of Kenya 2010, Article 2 (1) and (3).

3.3 Lawful Abortion in Kenya

Although the pro-choice have in the past termed Kenya's law on abortion strict and prohibitive, the phrase "unlawfully" used in these provisions indicates that there were circumstances in which abortion was lawful even before promulgation of the 2010 Constitution. It is only that the law as it then stood was not clear on what constituted a "lawful" abortion. Section 240 of the Penal Code can be read as creating a lawful exception when a surgical operation "upon an unborn child" is performed "in good faith and with reasonable care" for the preservation of the life of the mother. However, the section offers no explanation as to what circumstances may constitute the preservation of the mother's life. There is also no post-independence Kenyan case that interprets this provision to clarify the content of this exception.

Article 26 (4) of the Constitution allows abortion where, in the opinion of a trained health professional, there is need for emergency treatment or the life of the mother is in danger or if permitted by any other law.[255] In applying this Article, doctors are required by the Medical Board to undertake non-judgmental counselling in which they should consider health broadly in consonance with the right to health, consumer rights and the right to information as provided in the Constitution.[256] The proviso "if permitted by any other law" opens doors for further exceptions or a law that legalizes abortion in Kenya and in an unlimited manner.

The Kenyan law also does not define what constitutes emergency treatment or danger to the life or health of the mother and regulations to contain abortions on demand. Some medical providers

[255] Code of Professional Conduct and Discipline, 2012, p. 24.
[256] Ibid.

understand the law solely in light of the Constitution and the Penal Code and their personal understanding of what constitutes the exceptions entrenched therein.[257]

The Kenyan law does not expressly provide for rape as a ground for abortion. The Ministry of Health's 2009 National Guidelines on the Management of Sexual Violence state that termination of pregnancy as an option in case conception occurs as a result of the rape may be allowed but the woman has discretion.[258] The recommendation is that if she opts for termination, she should be treated with compassion.[259] It is however important to note that the above guidelines are not law and may even be construed to be a contradiction of both the Penal Code and the Constitution.

It is worth pointing out that the law on abortion also seems inconsistent insofar as the "good faith" and "reasonable care" thresholds under section 240 of the Penal Code have not been aligned with the "opinion of a trained health professional" clause under the Constitution. As a result, this leads to varied interpretations of the law, leaving many doctors and members of the public unsure of its content. From the wording of Article 26 (4), it is the opinion of the trained health professional that shall inform whether or not abortion should be carried out. What constitutes emergency treatment or danger to the life or health of the mother is not defined in law or under any guidelines. The medical practitioners therefore have greater latitude to decide what is constitutional. In addition, the provision does not require a second or third opinion for a procedure to be performed.

[257] Center for Reproductive Rights, *In Harm's Way: The Impact on Kenya's Restrictive Abortion Law* (Centre for Reproductive Rights, 2010); see also
[258] Ministry of Public Health & Sanitation, "Management of Sexual Violence in Kenya" (2009) 13, available at
[259] Ibid.

Under the 2003 Code of Conduct and Discipline in Kenya, the attending practitioner was strongly advised to consult with at least two senior and experienced colleagues, obtain their opinion in writing and perform the operation openly in hospital if he considers himself competent to do so in the absence of a Gynaecologist.[260] The 2012 Code of Professional Conduct and Discipline, however omits the requirement of the opinion of two senior and experienced colleagues. Thus, the medical practitioner under the current legal framework enjoys wide, unchecked or uncontrolled discretion.

Medical practitioners may, however, argue that performing what is considered legitimate by a proviso in the Constitution is a risk as it will invite severe sanctions in event of the death of the mother. For instance, in *Republic v Jackson Namunya Tali*,[261] the accused was charged person with the offence of murder contrary to section 203 as read together with Section 204 of the, *Penal Code*. A pregnant girl died of massive virginal bleeding in whilst after attending the accused person's clinic. The court held that the exculpatory evidence presented was inconsistent with the innocence of the accused. The court argued that evidence had established malice-aforethought, an essential ingredient of murder under section 206 of the Penal Code on the part of the accused. He was sentenced to death.

This decision raises questions. First, it may be argued the nurse was charged for murder and not under sections 158-160 of the Penal Code. Secondly, it may be argued that the Court considered the gravity of offence, in which case the accused person could be charged with manslaughter, and had no option but to raise the bar of sentence. Thirdly, should the abortion have been successfully carried out and the woman survived, would the doctor have been charged? In short,

[260] Medical Practitioners and Dentists Board, 'The Code of Professional Conduct and Discipline' MPDB Circular No 4/79 (5th ed. May, 2003) 16.
[261] High Court Criminal Case No. 75 of 2009.

this case raises confusion as to what provisions should be used to prosecute medical personnel. In *Republic v Fred Onyango Orimba*,[262] the accused was charged with the offense of murder contrary to section 204 of the Penal Code. A pregnant woman died whilst in his clinic and the post mortem results concluded that she died of excessive bleeding due to an incomplete abortion. The court, however, argued that the prosecution failed to establish connection between the death and acts of the accused and therefore acquitted the accused.

The issue of establishing nexus between the abortion and the accused has been addressed in Migori Criminal Case No. 44 of 2014 where the accused with the offense of murder contrary to s. 240 read with S. 158 of the Penal Code. In the case a pregnant woman died whilst procuring an abortion. On 17th July 2015, the Court held that the prosecution must establish a connection between the act of the abortion and the accused having performed it for a conviction to stand. It had failed to do so and the accused was acquitted.

In a nutshell, case law in Kenya demonstrates that whereas the constitution may provide lee way for a woman to procure an abortion, it is still a criminal offense to do so and if a woman dies in the process, the abortionist may be convicted of murder. In addition, there is no clear indication as to who a trained health professional is under the Constitution. The law assumes that any woman who intends to carry out an abortion understands and is able to identify a trained health professional.

As a result many who are approached are largely medical quacks operating illegal clinics or chemists. For instance, recent investigations by The Standard Newspaper uncovered some medical practitioners who own chemists, nursing homes and clinics in Nakuru town,

[262] *Republic v Fred Onyango Orimba*, Nairobi Criminal Case No. 83 of 2009.

clandestinely selling abortion pills and offering abortion services.[263] To get these services, one is required to part with between Ksh.15, 000 and Ksh.20, 000 for a 'package' of 'safe pills'.[264] In another episode, a doctor, who requested anonymity, accused medical interns at a Nyeri hospital of providing abortion services to hopeless women.[265] The women are required to pay for a low-cost room, around Ksh.500, within the seedy lodgings in Nyeri town where the hospital administration cannot get wind of their actions.[266] An upfront fee of Ksh.8, 000 is charged by the interns before they offer a service.[267] They, however, disappear into thin air without paying attention to patients who suffer from complications.[268]

Further, according to the said newspaper, there are many clinics offering abortion services secretly to avoid law enforcers.[269]

3.4 Sex Selection as a Ground for Abortion

Sex selective abortion is the practice of terminating a pregnancy on the basis of the sex of the foetus.[270] It is unclear under the Kenyan law whether termination of pregnancy by a health professional on the basis of sex selection is legitimate and within the purview of 'opinion of a trained health professional.' The law neither addresses the issue of sex selection abortion nor provides sanctions for it. However, in light of the provisions of sections 158 & 159 of the Penal Code which outlaw all abortions, it may be concluded that such abortions are equally outlawed.

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[263] Vincent Mabatuk, 'Rogue Medical Practitioners Operate with Amazing Ease in Nakuru' *Standard Digital* (17 August 2015).
[264] Ibid.
[265] Lydiah Nyawira, 'Doctors in Central Kenya Carrying Out Abortions in Hotel Rooms' *Standard Digital* (17 August 2015).
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] British Medical Association, "The Law and Ethics of Abortion" (November 2014) *BMA Views*, p. 7, available at <http://bma.uk.org/-/media/files/pdfs/> accessed on 23 October 2015.

Under the Code of Professional Conduct and Discipline, sex selection is unconstitutional and not permitted in Kenya.[271] According to the Medical Board, it is unethical for practitioners to engage, support or encourage such a practice.[272] It could be argued that abortion on grounds of disability is unconstitutional because the constitution of Kenya expressly prohibits discrimination of persons on such grounds.[273]

3.5 The Unborn Child as a Right Bearer under International Law

International law forms part of Kenya's law by dint of Article 2 (6) of the Constitution of Kenya. Kenya has acceded to, signed or ratified a number of human rights instruments and, hence, is bound to fulfil their pronouncements. The Vienna Convention on the Law of Treaties states categorically that a treaty in force is binding upon the parties to it and must be performed by them in good faith.[274] Kenya is therefore required, under Article 21 (4) of the Constitution, to enact and implement a legislation to fulfil its international obligations in respect to human rights and fundamental freedoms. This includes having a legal framework that promotes the right to life for all without limitation or qualification as to age or birth. Based on this, the following section discusses the right to life of the unborn child under international human rights law. The purpose is to establish whether the said instruments embrace the right to life of the unborn and if so whether Kenya's legislation has aligned itself to the instruments.

[271] Ibid 25.
[272] Ibid.
[273] Article 27 (4) (5)
[274] The Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980, reprinted in United Nations Treaty Series, Vol. 1155, p. 331, available at <http://www.refworld.org/docid/3ae6b3a10.html> accessed 20 August 2015.

3.5.1 The Universal Declaration of Human Rights (UDHR)

Although the universality of the UDHR[275] is rhetoric, it is the parent instrument for most human rights treaties. At the time of drafting of the Declaration in 1948, abortion was not a major issue and very few countries permitted it and only on serious grounds, namely when necessary to prevent the death of the mother. The drafters avoided any direct reference to the unborn but rather preferred the use of the broadest and most inclusive language in describing human rights subjects. The Declaration's Preamble, for instance, recognizes the inherent dignity and the "equal and inalienable rights of *all members of the human family*" as the foundation of freedom, justice and peace in the world. Article 3 also states "that *everyone* has the right to life" while Article 6 provides that *everyone* has the right to recognition everywhere as a person before the law. Under Article 7, "*all* are equal before the law and are entitled without any discrimination to equal protection of the law."

The language used in these provisions implies that the right to life, recognition or equality applies to all human beings without limitation to age or to the born. It would, therefore, be difficult to argue that the living but-not-yet-born does not form part of the provisions. The proviso "all members of the human family" under the Preamble, for example, refers to all members of the human species. Similarly, the "everyone" and "all" of Articles 3, 6 and 7 refer to every living member of the human family. Thus, the fact that the UDHR has not limited the right to equality, recognition and life from the moment of birth may be considered to be an affirmation that they apply right from conception.

[275] International Legal Materials <http://www.un.org/Overview/rights.html> accessed 20 August 2015.This Declaration was adopted in 1948 by the UN General Assembly.

It is worth pointing out that the UDHR is the epicentre of the other international and regional human rights instruments.

3.5.2 The Convention on the Rights of the Child (1989)

The Convention[276] was preceded by the 1959 Declaration of the Rights of the Child,[277] which affirms in its Preamble the rights of the unborn child:

> Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, [and] Whereas the need for such special safeguards has been...recognised in the Universal Declaration of Human Rights and in the statutes of specialised agencies and international organisations concerned with the welfare of children..., the General Assembly...calls upon men and women as individuals...and national Governments to recognise these rights and strive for their observance by legislative and other measures progressively taken....

Paragraph 9 of the Preamble to the Convention restates the proviso "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Article 1 defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Applying the rules of interpretation of the Vienna Convention on the Law of Treaties concerning the ordinary meaning of words in their context, and the context of the treaty including the

[276] Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990.
[277] Declaration of the Rights of the Child, General Assembly resolution 1386 (XIV), 20 November 1959, 14 UN GAOR Supplement (No 16) at 19, UN Document A/4354, available at <http://www.cirp.org/library/ethics/UN-declaration/> accessed on 20 August 2015.

preamble, there is a strong ground for maintaining that the Convention, by virtue of the phrase "every human being" and the negotiations leading to Article 1, does guarantee protection to the unborn child. Thus, the possibility that protection extends to the unborn child is premised in the language of paragraph 9 of the Preamble.

In addition, the repetition of the word "every" in Article 6 (1) of the Convention stresses on the fact that it is the child in Article 1 ("every human being") and the Preamble ("before as well as after birth") who "has the inherent right to life" and whose "survival" is entrenched in Article 6 (2). It is the unborn as well as the born child that is being referred to here. Thus, whereas Articles 1 and 6 do not explicitly approve a right to life for the unborn, the weight of these Articles taken together with the Preamble endorse the claim that the unborn child is entitled to legal protection under the Convention and any legislation as contemplated in the Preamble.

An argument therefore stands that the Convention provides a distinct preference for life for both the born and unborn child as opposed to the right to abort. Article 24 (2) (d) of the CRC requires States Parties to ensure prenatal care for mothers. This strongly affirms the argument that the obligations assumed by States Parties in respect to the child's inherent right to life extends to the unborn child.

However despite the foregoing, the Committee charged with the implementation of the CRC (hereinafter the CRC Committee) has stated that laws restricting or permitting abortion are within the discretion of individual states to enact.[278] In 1997 for example the CRC Committee urged States Parties to amend discriminatory laws on abortion affecting disabled unborn children. It further urged states to study factors which lead to practices such as infanticide and

[278] Manfred Nowak, *Commentary on the United* 15 *Nations Convention on the Rights of the Child, Article 6: the Right to Life, Survival and Development* (Boston MA: Martinus Nijhoff Publishers, 2005), pp. 26-27.

selective abortions, and to develop mechanisms to address them.[279] All these are a clear support of the protection of the unborn child.

3.5.3 The 1966 International Convention on Civil and Political Rights (ICCPR)

Under Article 6 paragraph (1) of the Convention,[280] "every human being has the inherent right to life." Similar to the UDHR, the scope of the clause "every human being" is not defined but neither is it limited on grounds of age or birth. Certainly, the ordinary meaning of the clause is unequivocal. Although there is no mention of abortion or the unborn child under the ICCPR, Article 6 (5) specifies that a pregnant woman should not be subjected to the death sentence, implicitly recognizing the right to life of the unborn child, or at least the value of its life. The bar to execution is a clear expression of a shared consideration that the unborn child is a distinct and separate human being who deserves protection and merits official recognition and intercession. The centrality of this ban points to one foundation, namely, to spare the life of an innocent human being. There is no qualification or exception to this and the woman need not file an appeal or take any other action to benefit from the exemption. The basis of this in criminal justice is that the guilty shall be punished and the innocent shall not. Arguably, it is the unborn child's protection that is envisaged under Article 6 (5) and the sentence may well be imposed although it may not be carried out.

In his study of international efforts to abolish capital punishment, Schabas argues that the exclusion of pregnant women was added in the Convention in consideration of the interests of

[279] Ibid 29.
[280] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

the unborn child.[281] Schabas argues that, although the drafters of the Convention studiously avoided pronouncing themselves on the contentious issue of when the right to life begins, the Convention protects the life of the unborn child.[282]

Article 4 of the Convention stresses on the significance of Article 6 to the effect that not even "in time of public emergency threatening the life of the nation" may a state derogate from any part of the article. This provision rhymes with Article 10 (2) of the International Covenant on Economic, Social and Cultural Rights, which provides in part that "special protection should be accorded to mothers during a reasonable period before and after childbirth." Article 12 (2) of this Covenant also calls upon States Parties to take steps necessary for the reduction of stillbirth rate and infant mortality and for the healthy development of the child.

3.5.4 The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Considered as the Bill of Rights of women, the Convention[283] generally gives voice to the notion that women's rights are human rights. It does not mention abortion and seems regard the unborn as worthy of protection and consideration. Under Article 4 (2), the Convention says that adoption by States Parties of any measures aimed at protecting maternity should not be considered discriminatory. Article 11 (2) requires States Parties to take appropriate measures to prohibit, subject to the imposition of sanctions, dismissal on the basis of pregnancy or of maternity leave; to introduce maternity leave with pay or with comparable social benefits; and to provide special

[281] William A Schabas, *The Abolition of the Death Penalty in International Law* 2nd ed. (Cambridge UK: Cambidge University Press 1997) 122-23.
[282] Ibid.
[283] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981.

protection to women during pregnancy in types of work proved to be harmful to them. Although this last part of the provision has not included the term "unborn" to read "to be harmful to them or to their unborn children," the protective impact of the provision implies the vulnerable nature of the pregnant woman and the need to support her in protecting both her and the unborn child from workplace risks. Thus the Convention is not only telling the Party States what can be done to protect the pregnant woman; it is also making an implied emphasis on what can and cannot be done to the unborn.

3.5.5 The Declaration on Human Cloning

Under this Declaration, Member States are called upon by the UN General Assembly to adopt all measures necessary to protect human life in the application of life sciences and to prohibit all forms of human cloning which are inconsistent with human dignity and the protection of life.[284] In addition, Member States are required to adopt necessary measures to prohibit the application of genetic engineering techniques that may be contrary to human dignity and also to prevent women from exploitation in life sciences. These requirements are a clear affirmation of the importance of human life even its earliest stages.

3.5.6 Protection of Expectant Mothers under the Geneva Conventions

The Geneva Conventions and their Protocols also provide evidence of a widespread international commitment to protect unborn human beings. For instance, expectant mothers are included in Articles 14, 16 and 23 of the 1949 Fourth Geneva Convention (Protection of Civilian Persons in

[284] Declaration on Human Cloning, adopted 84-34 on March 3, 2005 by the UN General Assembly acting on the recommendation of the Sixth Committee (Legal), contained in its report A/59/516/Add.1, the retrieved from <http://www.un.org/press/en/2005/ga10333.doc.htm> accessed 20 August 2015.

Time of War)[285] as part of those who shall be the object of particular protection and respect; who shall be included in hospital and safety zones; and who shall benefit from free passage to civilians in occupied territory of "essential foodstuff, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases." Under Article 38, alien pregnant women are guaranteed preferential treatment granted to pregnant women who are nationals of the occupied state. Article 89 provides that expectant mothers and children shall be given additional food.[286]

In addition, Article 70 of Additional Protocol I to the Geneva Conventions (1977) includes pregnant women among those persons to be given priority in the distribution of relief consignments, as they are among the groups accorded privileged treatment under the Fourth Geneva Convention.[287] Under Article 76 of this Protocol, the death penalty does not apply and should not be executed on pregnant women and mothers having dependent infants. In similar terms, Article 6 of Additional Protocol II (1977) to the Conventions prohibits the execution of the death penalty on pregnant women and mothers of young children.[288] The unborn child is in this case included as part of the beneficiaries of the special support and protection guaranteed under the foregoing provisions.

From the foregoing it is evident that international instruments not only recognise the rights of the unborn but have also emphasised measures to protect and to preserve them alongside their mothers. Regionally in Africa, there are several instruments which also address this issue.

[285] Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 ICRC Treaties and Documents Fourth Geneva Convention (1949) (Hereinafter the Fourth Geneva Convention, 1949)
[286] See also the Fourth Geneva Convention (1949) Articles 50 and 132.
[287] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 ICRC Treaties and Documents, Article 70.
[288] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 ICRC Treaties and Documents

3.5.7 African Charter on Human and Peoples' Rights

This regional instrument is similar to the UDHR. The African Charter on Human and Peoples' Rights (1981), which entered into force in 1986, says nothing directly about abortion or the rights of the unborn but uses inclusive language in certain provisions. Under Article 3, every individual is equal before the law and is entitled to equal protection. Article 4 states that human beings are inviolable and are entitled to respect for their life and integrity of person. No one should be arbitrarily deprived of this right. In Article 18, State Parties are required to ensure elimination of discrimination against women and also ensure the protection of the woman and the child.

3.5.8 African Charter on the Rights and Welfare of the Child

This is another regional instrument touching on human rights. Article 30 of the 1990 Charter[289] requires States Parties to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law, and in particular to ensure that a death sentence is not imposed on such mothers. Under Article 5 of this Charter, every child has an inherent right to life, which should be protected by law. States Parties are called upon to ensure, to the maximum extent possible, the survival, protection and development of the child. The Charter adopts a definition of the term "child" similar to that in section 2 of Kenya's Children Act, 2001.[290]

[289] African Charter on the Rights and Welfare of the Child (1990), OAU Doc CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.
[290] Ibid., Article 2.

3.6 Conclusion

This Chapter argues that Kenya's abortion law is inconsistent and widens the latitude for abortion on various levels. Firstly neither statute nor case law adequately addresses the Natural Law and in particular the Dworkinian approach to the rights of the child as a rights holder/claim bearer with relation to the mother as the duty bearer and the state as the enforcer of such duty.

Secondly, the linkage to right of life of the unborn child vis-a-vis right to choose by a woman is at best weak, ill-explained and often appears to pit one against the other. This is demonstrated by the inconsistent outcomes in the Kenyan case laws. The rationale and value of child's right to life both in line with international instruments and the Constitution is inadequately articulated. The resultant effect is that both statute and case law fail to sufficiently interrogate consequences of abortions, options available to abortion as well as mechanisms of enforcement.

Thirdly, threshold of the 'opinion of a trained health practitioner' is not defined. This implies that any opinion at all is admissible as a ground to recommend an abortion. This negates the constitutional safeguards on protection of right to life.

Fourthly qualifications of the said medical practitioners are not defined. Thus any person purporting to be a trained health professional can lay claim to expertise on matters so grave as to life and death. The resultant effect has been proliferation of botched abortion cases and numerous deaths of women.

Fifthly, the Kenyan law lacks conscientious objection clause, which, as noted, protects doctors who are not willing to perform an abortion.

In conclusion, it is submitted that the language of Article 26 (4) read in its entirety does not adequately protect the unborn child. On the contrary, provisos thereto in all likelihood allow proliferation of abortions on demand and with inclusion of the clause, 'or permitted by any other law'; likelihood of enactment legislation that will allow unlimited access to abortion may not be a far-fetched possibility in the near future.

In the next chapter an in-depth comparative analysis of the Kenyan and UK abortion laws will be carried out to establish adequacy or otherwise of the former's legal regime in the protection of the unborn child as well as provide a basis for proposed reform. Particular areas of focus will include the issue of medical discretion cum the "good faith" and conscientious objection provision. In addition effectiveness in the enforcement of abortion laws in Kenya will be examined.

CHAPTER FOUR

ASESSMENT OF UNITED KINGDOM'S ABORTION LAWS

4.0 Introduction

As discussed under chapter three, Kenya's legal framework on abortion has not been harmonised since the Constitution 2010 was promulgated. This implies that the current laws are inconsistent and do not adequately balance the right to privacy of the woman and the right to life of the unborn child. This chapter examines UK's abortion laws in comparison with the Kenya's legal regime. The purpose of this chapter is to add value to the suggestions made in this study.

Kenya is a commonwealth state and the spirit of her law is principally derived from England under section 3(1) (c) of the Judicature Act.[291] For instance, the language employed in sections 158, 159 and 160 of Kenya's Penal Code is similar to that in sections 58 and 59 of UK's Offences against the Person Act, 1861, which applies to England, Wales and Scotland. Further, the substance of Article 26(4) of Kenya's Constitution is a restatement of some of the grounds for abortion in the UK, save that the latter establishes important thresholds to mitigate ulterior motivations likely to inform medical opinions.

4.1 The Law Relating to Abortion in the UK

The basic piece of legislation criminalising abortion in Britain is the 1961 Offences against the Person Act under which a doctor or a pregnant woman who unlawfully attempts to procure a miscarriage can be convicted.[292] Section 58 of the Act provides that:

[291] Judicature Act (Cap 8 of the Laws of Kenya), section 3(1). However, the application of the borrowed law is limited within the dictates of Kenya's circumstances and inhabitants.
[292] Abortion Act, 1967 (as amended in 1990) s 6.

> 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 instrument or other means whatsoever with the like intent, and whoever, 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, shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof with the like intent shall be liable to be kept in penal servitude for life.[293]

Section 59 prescribes that:

> Whoever 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 misdemeanour, and being convicted thereof shall be kept in penal servitude.

Section 1(1) of the Infant Life (Preservation) Act 1929 further makes it an offence to intentionally kill a child capable of being born alive, before it has a life independent of its mother; provided that no person shall be found guilty of that offence unless it is proved that the act which caused the *death of the child* was not done in good faith for the purpose only of

[293] Offences Against the Person Act, 1861, s 58, <http://www.legislation.gov.uk/ukpga/Vict/24-25/100/contents> accessed May 2, 2015.

preserving the life of the mother. This offence is punishable on conviction to imprisonment for life.[294] There is no similar provision under the Kenyan law on abortion.

The phrase "death of the child" in this case implies that, unless something causes it to die, an unborn child is in a living state. Ideally, it is only a living organism that dies, whether unicellular like an amoeba, or multi-cellular like a foetus which is developing or has gone through all the stages of development. This provision therefore qualifies the foetus' living status and mitigates the argument that a foetus cannot be accorded the right to life. In Kenya, the fact that a pregnant woman is exempted from a death penalty under section 211 of the Penal Code strongly affirms the above argument. The High Court in *Republic v Elizabeth Gatiri Gachanja & 11 others*,[295] while convicting the 8 of the accused of murder, sentenced all but the 5th accused to death penalty. The 5th accused was sentenced to life imprisonment on the grounds that she was pregnant. Thus special protection is accorded to the innocent unborn child of a convicted mother.

Although the language employed in the above provisions is prohibitive, a feature of its expression is the repeated use of the qualification "unlawfully" to describe the administration, supply or procurement of poison and the use of an instrument to procure miscarriage. It is important to note the acknowledgment by the provisions that a foetus is a human person, a child capable of being born. The term "unlawfully" however, also used in sections 158-160 of the Kenyan Penal Code, implies there is a possibility of "lawful" abortion. However, while the UK legal regime provides for what amounts to lawful abortion under the 1967 Abortion Act, the

[294] Infant Life (Preservation) Act, 1929, s 1, <http://www.legislation.gov.uk/ukpga/Geo5/19-20/34/section/1> accessed May 2, 2015.
[295]Nairobi Criminal case No. 40 of 2000, [2011} eKLR

Kenyan Penal Code does not explain what constitutes a "lawful" abortion – it is simply prohibitive.[296]

Section 58 of the 1961 Offences against the Person Act is similar to section 159 of Kenya's Penal Code. The penalty imposed under the Kenyan Penal Code is, however, lenient compared to the "penal servitude for life" under section 58 of the UK Act. Reference to "penal servitude for life" is construed under section 1 (1) of the UK Criminal Justice Act 1948 as imprisonment for life. Given the high rate of induced abortions in Kenya, it is suggested that the penalty under section 159 be reviewed to deter unlawful abortions.

Besides, the above UK statutes do not contain a defence to prosecution, and they do not distinguish between early and late pregnancy. However, while the 1961 Act remains operative throughout England, Wales and Northern Ireland today, subsequent law has carved out a series of exceptions rendering lawful conduct which would otherwise be an offence.

4.2 Lawful Abortion in the UK

The grounds upon which an abortion could legally be provided under the UK laws were first addressed in *Rex v. Bourne*.[297] Prior to the decision in this case, the English law on abortion was very similar to sections 158-160 of Kenya's Penal Code. The case related to a doctor who had performed an abortion on a 14-year-old rape victim and invited the police to prosecute him for his actions. According to the House of Lords, the term "unlawfully" under the Offences against the Person Act implies that there were circumstances in which procurement of miscarriage could be lawful in England. Borrowing an interpretation of the word "lawful" from another piece of law, Judge McNaghton advised that a procurement of miscarriage could be lawful where it was

[296] See the Penal Code, Cap 63 of Laws of Kenya, section 158-160.
[297] *R v Bourne* 3 All ER [1938] 615.

performed by a doctor acting in good faith for the purpose only of preserving the life of the mother.[298] In his directions, he stated:

> I think those words [that the law allows termination of pregnancy for preserving the life of the mother] ought to be construed in a reasonable sense and, if the doctor is of the opinion on reasonable grounds and with adequate knowledge of probable consequences, that continuing the pregnancy would be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates is operating for the purpose of preserving the life of the mother.[299]

The doctor was thus acquitted. The *Bourne* decision created a physical and mental health exception to criminalisation of abortion in the UK. It was affirmed in the 1959 East African Court of Appeal case of *Mehar Singh Bansel v R*.[300] This was an appeal case from the Supreme Court of Kenya's finding that a lawful abortion is one that is performed for "a good medical reason." Affirming the Kenyan court's conclusion, the East African Court interpreted this phrase to be "for the purpose of saving the patient's life or preventing severe prejudice to her health."[301]

The exception established in *Bourne* was later restated in the 1967 Abortion Act (as amended by section 37 of the 1990 Human Fertilisation and Embryology Act).[302] The effect of this legislation was not only to open room to right to abortion, but also to give wide discretion to the opinion of medical practitioners, who were dissatisfied and constrained by the laws as they stood. Section

[298] Ibid at 691.
[299] Ibid at 694.
[300] *Mehar Singh Bansel v R* [1959] EALR 813.
[301] Rebecca Cook and Bernard Dickens, 'Abortion Laws in African Commonwealth Countries' (1981) 25(2) Journal of African Law, p. 61; see also Rebecca Cook, Bernard Dickens and Farouk Muslim, 'Options for Reform of Abortion Law in Kenya,' citing *Mehar Singh Bansel v R* [1959] EALR 813 at p. 832.
[302] The 1967 Abortion Act applies to England, Scotland and Wales, but not in Northern Ireland, which maintains stricter abortion regulations.

5(2) of this Act provides that, for the purpose of the law relating to abortion, anything done with intent to procure the miscarriage of a woman is unlawfully done unless authorised by the provisions of the Act. It is worth noting that the judge did not address the issue of the preservation of the unborn child or possibility of alternatives to abortion, for example counselling of the woman and encouragement of adoption of the child. The law thus leans only in favour of "preservation of the woman" without any consideration of "preservation of the child." This creates the impression that one life is favoured over another, that both do not have equal rights and that their respective rights are diametrically opposed to each other.

Thus, abortion is lawful when performed 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 and mental health of the pregnant woman or any existing children of her family; or (b) that the termination 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; or (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."[303]

In determining whether the continuance of a pregnancy would involve a current risk of injury to health, section 1(2) of the 1967 Abortion Act provides that account may be taken of the pregnant woman's actual or reasonably foreseeable environment, suggesting that abortions can be performed on socio-economic grounds, regardless of appreciating the possibility that these may

[303] Abortion Act, 1967, section 1(1).

change favourably in future. This is not the case in Kenya, although the proviso "the life...of the mother is in danger" may be interpreted to include the socio-economic status of the mother.

Similar to the position obtaining in Kenya, UK law does not provide an explicit exception for pregnancies that are the result of rape or incest nor does it grant women the right to end an unwanted pregnancy. However in practice as there is no definition of what amounts to right or reasonable opinion formed in good faith, instances of right to abortion on demand have been on the increase since the 1960s.

The UK Act requires the Minister of Health in respect of England and Wales, and the Secretary of State in respect of Scotland, to make regulations regarding the certification of the doctors' opinions.[304] Thus, under Regulation 3(1) of the 1991 Abortion Regulations,[305] both doctors should certify their decisions either by filling an official document (form HSA1) or by providing the same information on signed and dated certificates. The signatures do not have to be on the same piece of paper – in fact, two different forms can be signed by the doctors. The form or certificate should specify the grounds upon which an abortion can be provided with both doctors agreeing, in good faith, that at least one and the same ground is met.[306]

A challenge arises where despite the good faith, both doctors are wrong. For example, Justine Beiber's mother, Pattie Mallette tells how doctors strongly recommended that she aborts Beiber on medical grounds. She declined and went on to give birth to a world famous, brilliant and gifted singer.[307]

[304] Ibid., section 2 (1) (a).
[305] Abortion Regulations, 1991, came into force on 1st April 1991.
[306] See the form in Regulation 3(ii) (d) of the Abortion Regulations 1991.
[307] Mallette Pattie and A.J. Gregory, *Nowhere but Up: the Story of Justin Bieber's Mom* (2012) Revell, 220.

In addition, the certificate of opinion should be given before the commencement of the treatment for the termination of the pregnancy to which it relates.[308] In the case of a pregnancy terminated on the basis of emergency ground under section 1(4) of the 1967 Act, the certificate can be given either before the commencement of the treatment for the termination or, if that is not reasonably practicable, not later than 24 hours after such termination.[309] The certificate or form, including the patient's notes, should be preserved by the practitioner who performed the abortion for a period of not less than three years from the date of termination.[310]

Notice of the termination and other related information must be given to the Chief Medical Officer within 7 days of the termination.[311] Although this procedure places the doctors under legal threat for theoretical impropriety, it is confined to notification of abortions done and omits abortions refused. Unfortunately neither in the UK nor in Kenya are there statistics on instances where mothers have refused to carry out recommended abortions and the notable outcomes. Any person who wilfully contravenes or wilfully fails to comply with the procedures under the 1991 Regulations is liable on summary conviction to a fine not exceeding one hundred pounds.[312] This is in addition to the erasure of his or her name from the medical register.[313]

There is no requirement in the UK law that the doctors examine the woman in person. There is also no requirement for intensive counselling to dissuade the woman from carrying out the abortion and offering her alternative options. The only requirement from the Department of Health is that both doctors should ensure that they have considered sufficient information specific to the woman

[308] Regulation 3 (2) of the Abortion Regulations 1991.
[309] Ibid., Regulation 3 (3).
[310] Ibid., Regulation 3 (4).
[311] Ibid., Regulation 4 (1).
[312] Abortion Act 1967, section 2(3).
[313] Similarly, in Kenya, doctors who perform an unlawful abortion face an additional professional penalty of suspensions or erasure from the Register of Doctors as mandated by the Medical Practitioners and Dentists Board (Medical Board), the statutory body created to regulate medical and dental practice in Kenya.

seeking a termination to be able to determine whether the she satisfies one of the lawful grounds under the Abortion Act.[314] The examination will, for example, include any risks to the physical or mental health of the woman. The extent of risk is a matter for the clinical opinion for each of the doctors.

4.2.1 The "Good Faith" Requirement: A Check on the Doctor's Opinion?

The threshold of "good faith" under the 1967 Abortion Act is a very significant determinant of the legality of abortion in Britain. In Kenya, Article 26(4) of the Constitution merely states "in the opinion of a trained health professional," meaning that an opinion informed by a clinical officer, nurse or doctor's ulterior motives can still fall within the ambit of the proviso. Similarly, the use of the phrase "good faith and with reasonable care and skill" in section 240 of the Kenyan Penal Code is not in reference to the opinion of the medical practitioner; it only shields one from criminal liability for performing a surgical operation upon an unborn child to preserve the mother's life. Moreover, whereas the Kenya Constitution envisages some of the grounds in section 1(1) of the UK Act, it fails to provide for a threshold defining the doctor's opinion.

In contrast, section 1(1) of the UK Infant Life (Preservation) Act 1929 renders killing a child during its birth criminal provided that no person shall be found guilty unless it is proved that the act which caused the death of the child was not in good faith for the purpose only of preserving the life of the mother. However, the test is, in principle, a very significant fact for the jury to determine on the totality of the evidence. For instance, in *R v Smith*, Lord Scarman in the Court of Appeal stated:

[314] Department of Health, Guidance in Relation to the Requirements of the Abortion Act 1967, 12 (May 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/313459/20140509__Abortion_Guidance_Document.pdf> accessed 2/6/2015.

> The Act that renders lawful abortions that before its enactment would have been unlawful does not depart from the basic principle of common law as described in *R v Bourne*, namely that the legality of an abortion depends on the opinion of the doctor. It has introduced the safeguard of two opinions; but, if they are formed in good faith by the time the operation is undertaken, the abortion is lawful. Thus a great responsibility is firmly placed by the law on the shoulders of the medical profession. If a case is brought to trial which is of questions of the *bona fides* of a doctor, the jury, not the medical profession, must decide the issue…. By leaving the ultimate question to the jury, the law retains its ability to protect society from an abuse of the Act.[315]

Thus, if there is evidence that either certifying doctor has not formed their opinion in good faith then the doctor performing the abortion is not protected by section 1(1) of the 1967 Act and has potentially committed an offence by terminating the pregnancy. This requirement implies an obligation to apply proper professional standards of health care and the absence of motivation based on ulterior or unprofessional purposes. This is difficult to prove as justification for ending life; is good faith compatible with ending innocent life? Personal involvement with the patient or the primary urge to earn a fee, for instance, may be ulterior in this sense; the pursuit of a social gain or other philosophy may equally be considered ulterior motivation.

The question of good faith is critical in criminal prosecution and, since abortion was historically a crime in England under the Offences against the Person Act, it requires proof beyond reasonable doubt of the accused person's guilty or improper intention. However, since the 1967

[315] Scarman LJ, *R v Smith* [1974] 1 All ER 376, 381; see also *Paton v British Pregnancy Advisory Service* (1989) QB 276.

Act contains no standard of 'good faith,' it is very difficult to proof beyond reasonable doubt that a doctor acted otherwise. In the 1948 English case of *R v Bergmann and Ferguson*, the court stated:

> You are not concerned with the question as to whether Dr Ferguson arrived at the right conclusion… You will have to consider whether… the [doctor] gave a dishonest opinion, did act in good faith, and was therefore advising something that was unlawful.[316]

To show that an opinion has been formed in good faith does not mean that authorising an abortion should be the right decision; it simply shows that the doctor has not been dishonest or negligent in forming that opinion.[317] To pass this test, the doctor's opinion must be based on special skill and trained insight.[318] Thus, a doctor performing or recommending an abortion in the belief that any woman seeking for it should be entitled would not be exercising medical judgment, or would not be making his or her assessment in good faith.

In the *Smith* case, a woman of 19 was referred to Dr Smith, a General Practitioner with a private practice in abortion services, seeking a termination. Dr Smith spent as little as 15 minutes with her and asked her why she did not want to continue with the pregnancy. The woman responded that she was not in love with the father and that she was scared of childbirth. Smith did not perform any medical tests on the woman nor ask of her medical history. He told her that if she could give him £150 in cash on that day, he could perform the termination the following morning. It however took the woman a while to get the money and Dr Smith booked her in for a

[316] *R v. Bergman and Ferguson* Unreported, Central Criminal Court, May 1948. See (1984) 1 *British Medical Journal*, 1008.
[317] British Medical Association, "The Law and Ethics of Abortion" (November 2014) *BMA Views*, p. 3, available at <http://bma.uk.org/-/media/files/pdfs/> accessed on 23 October 2015.
[318] Ibid.

termination the following week. Compounding the issue was the fact that Dr Smith, having recommended the termination, also tried to conceal his tracks. Evidence indicated that the register of the nursing home where the woman was admitted for the termination had been falsified and when the police initially asked Smith for his case notes and the relevant certification of this abortion, he initially denied having any of that information. Thus, there was a clear attempt to mislead, to conceal, and to perform the termination in a clandestine manner. The very large fee wanted in cash was a further indicator. Good faith was therefore absent.[319]

In a nutshell, what emerges from UK's abortion law is the centrality of medical discretion, subject to the important limitation that it is exercised in good faith which in turn is purely a subjective test. The latter factor provides a substratum to the current operation of the abortion law in England.

4.2.2 The Centrality of the Doctor's Discretion

In every area of law where the concept of good faith arises, it is associated with openness, fairness, and the exercise of discretion. In the UK abortion law, the idea of discretion is not only central but also very wide to the extent of being considered nebulous. The question of whether a woman's request to terminate her pregnancy comes within the purview of section 1(1) of the 1967 Abortion Act is for the doctors to decide. The proviso in section 1(2) of the Abortion Act, that "account *may* be taken of the woman's actual or reasonably foreseeable environment,"[320] is adopted in framing the scope of discretion in two ways. First, it means that the doctor can look much more widely than just the clinical picture, and can take account of all the woman's circumstances – not just as they are now, but as they might become as a result of the doctor's

[319] British Pregnancy Advisory Service, "Britain's Abortion Law: What it says, and why" (May 2013) 18, available at <http://www.reproductivereview.org/images/> accessed 23 October 2015.
[320] Abortion Act 1967, section 1(2).

decision. Second, the word 'may' is very fundamental: in the UK context, it means that the doctor *can* take the woman's actual or reasonably foreseeable environment into account, but need do so. Indeed in practise usually minimal questions are asked before termination takes place,[321] and these only for procedural expediency.

The placing of wide discretionary powers on the shoulders of the medical profession was an entirely deliberate choice by the legislators, who sought to carve out the very broad grounds of abortion. Thus, according to George Baker, in *Paton v BPAS*,

> Not only would it be a bold and brave judge who would seek to interfere with the discretion of doctors acting under the [Abortion] Act, but I think he would really be a foolish judge who would attempt to do any such thing, unless possibly, there is clear bad faith and an obvious attempt to perpetrate a criminal offence. Even then, of course, the question is whether that is a matter which should be left to the DPP [Director of Public Prosecutions] and the AG [Attorney General].[322]

The Kenyan Penal Codes prescribes penalties for those found guilty of procuring or attempting to procure an abortion or miscarriage. While this may be interpreted to mean that the law does not allow abortion on demand, the spirit of the provisions is watered downed by the Article 26(4) of the Constitution, which seems to open the door for termination on demand. Thus the Kenyan law on abortion is not prohibitive *per se*. The "good faith" ground provided for under section 240 of the Penal Code has not been harmonised with the Constitution 2010.

[321] British Pregnancy Advisory Service, "Britain's Abortion Law: What it says, and why" (May 2013) 16, available at <http://www.reproductivereview.org/images/> accessed 23 October 2015.
[322] *Paton v British Pregnancy Advisory Service (BPAS)* [1978] 2 All ER 987 at 992.

In contrast, the concepts of "medical discretion" and "good faith" in UK appear to make the law, as provided in the 1967 Act, more restrictive. Therefore, in theory, the UK law does not provide an absolute right to abortion, nor does it make abortion available on demand. It seeks to regulate the circumstances in which medical practitioners can legally perform abortions. For instance, there must be evidence that the pregnancy would threaten the woman's physical or mental health or that of her child. It is only with the "good faith" threshold that a woman is entitled to termination. In addition, the doctor's right to conscientious objection means that women do not have the right to demand that a doctor performs an abortion on her. The law makes it clear that the decision to abort rests with two doctors, according to their own judgment about the impact of abortion versus childbirth on the woman's physical or mental health. This, however, has limits: the doctors have to certify, in good faith, that one of the four broad grounds set out in the Abortion Act are met.[323]

Moreover, the procedure requiring a second opinion in the UK law provides evidence that abortion is performed only on the basis of a legally recognised indication. Apparently, there is no formal appeal procedure against the opinion of the doctors. The dual opinion seeks to regulate the circumstances in which medical practitioners can legally perform abortions. It should however not be a blanket opinion. There must be evidence that the pregnancy would threaten the woman's physical or mental health or that of her child or other grounds provided for in section 1(1) of the Abortion Act 1967. In Kenya, Article 26(4) of the Constitution 2010 provides for the opinion of a trained health professional but fails to explicitly define the criteria under which the opinion should be expressed.[324] In other words, the fact that the exceptions under article 26(4) are not

[323] Abortion Regulations, 1991, Regulation 3(1).
[324] Under the Medical Practitioners and Dentists Board, The Code of Professional Conduct and Discipline at 16, MPDB Circular No. 4/79 (5th ed. May, 2003), medical practitioners are strongly advised to consult with at least two

explicit means that the doctor has a wide discretion. Further, there is no provision as to who is a trained health professional under the Constitution of Kenya. The law assumes that any woman is able to identify a trained health professional.

4.2.3 Sex Selective Abortion

Abortion solely on the basis of parental preference of foetal gender, where there are no health implications, for the foetus or for the woman, does not constitute any of the legal grounds for an abortion under the 1967 Act, and is therefore unlawful.[325] It would only be lawful to terminate a pregnancy where gender is a factor, where there is a substantial risk of the foetus being born with a serious sex-linked condition.[326] However given the wide interpretation of the term 'health of the mother' it is likely that whilst not expressly stating it, one can contend that the foetus' sex is a mental health factor. Sex selection abortion is unconstitutional in Kenya by virtue of Article 27(4) of the constitution which outlaws any form of discrimination against persons.

4.2.4 Conscientious Objection Clause

There is no provision under the Constitution of Kenya or any other written law on conscientious objection. The Code of Professional Conduct and Discipline (2012) only requires that, in case of conscientious objection or where proper services are unavailable for whatever reasons, the practitioner should record and refer the patient appropriately.[327] The law therefore does not expressly protect the medical practitioner who in conscience objects to carrying out abortions. The Code of Professional Conduct and Discipline 2012 provides that:

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senior and experienced colleagues who shall give their opinion in writing. This consultation is not mandatory and there existed no mechanism of enforcement to regulate terminations informed by the doctor's subjective intentions. The current Code of Conduct however provides for the opinion of a trained medical practitioner in line with the Constitution 2010.

[325] Abortion Regulations, 1991, Regulation 3(1).

[326] Ibid.

[327] Code of Professional Conduct and Discipline, 2012, p. 24, 43.

> It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing the act; and he shall be deemed to have caused any consequences which adversely affect the life or health of any person by reason of any omission to observe or perform that duty.

Thus, Article 26 (4) of the Constitution and section 240 of the Penal Code seem to provide a degree of protection to trained health professionals who offer abortion services but do not provide for conscientious objection clauses.

In contrast, the primary legal source of the right to conscientious objection in England is section 4(1) of the 1967 Abortion Act, which provides that no person is obliged, whether by contract or by any statutory or other legal requirements, to participate in a treatment that goes against their conscience. This objection does not, however, affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.[328] The burden of proof of conscientious objection in any proceedings in England rests upon the person claiming to rely on it.[329] Concerning the question of proving conscientious conviction on the general issue of induced abortion, the 1967 Act contains an evidentially aid relevant to any proceedings before a court in Scotland.[330] A similar provision has been restated in the Zambian Act of 1972, section 4(3) of which provides that:

[328], Abortion Act 1967, section 4(2).
[329] Abortion Act 1967, section 4(1).
[330] Abortion Act, 1967, section 4(3) provides: "In any proceedings before a court in Scotland, a statement on oath by any person to the effect that he has a conscientious objection to participating in any treatment authorized by this Act shall be sufficient evidence for the purpose of discharging the burden of proof imposed upon him by subsection (1) of this section."

> In any proceedings before a court, a statement on oath by any person to the effect that he has a conscientious objection to participating in any treatment authorized by this Act shall be sufficient evidence for the purpose of discharging the burden of proof [that he holds such objection].

Two legal questions arise from the conscientious objection clause: the meaning of "participating in treatment," and whether conscientious objection implies a duty to refer the patient to another provider. In *Regina v Salford Area Health Authority (Respondent) ex parte Janaway,*[331] Mrs. Janaway, a Catholic, was a receptionist at a general practitioner's office, and was asked to type a letter referring a woman seeking an abortion to a consultant. She refused, and was dismissed. She claimed that her refusal should have been protected under section 4 as participation in procuring an abortion but the Court disagreed. It was found that "participate" meant "actually taking part in treatment administered in a hospital…for the purpose of terminating a pregnancy."[332]

Participation is thus defined narrowly, extending protection only to the people refusing to perform the abortion itself. This means that the Abortion Act does not protect general practitioners who object to signing "the green form"[333] to refer patients for abortions. However, if they object anyway, they have a duty under the National Health Service (General Medical Service Contracts) Regulation 2004 to promptly refer women to a provider who does not have an objection.[334]

[331] *Regina v Salford Area Health Authority (Respondent) ex parte Janaway* [February 1, 1998] UKHL.
[332] Ibid.
[333] The "green form" is the certificate that must be signed by two registered medical practitioners for an abortion to be legal in the United Kingdom.
[334] Katie Casey, 'Liberalism's Fault Lines: Dividing the Public from the Private in US and UK Cases of Conscientious Objection to Abortion' (Master Thesis, University of Groningen 2014) 54-70.

4.2.5 Place of Termination

In Kenya, there are many clinics offering abortion services secretly to avoid the prosecution. Most of them are not registered or their licences have expired. Evidence indicates that some clinics continue operating even after being deregistered for violating the law.[335] Several life-threatening incidences are referred to Government facilities after attempts to abort in those clinics go awry.[336] Most of the clientele are teenagers in secondary schools and colleges. This problem is engendered by lack of a provision in law for the place of termination of pregnancy.

Unless performed in an emergency, section 1(3) of UK's Abortion Act requires that any treatment for the termination of pregnancy must be carried out in a hospital vested in the Ministry of Health or the Secretary of State under the National Health Service Act, or in a place approved by the Minister or Secretary of State. Independent sector hospitals or clinics which are outside the National Health Service must obtain the Secretary of State's approval and agree to comply with the Required Standard Operating Procedures set out in the Procedures for the Approval of Independent Sector Places for Termination of Pregnancy.[337]

4.2.6 Consistency of UK Abortion Laws

As established in chapter three, Kenya's legal framework on abortion is inadequate as most provisions are inconsistent. For instance, section 214 of the Penal Code is in conflict with Article 26(2) of the Constitution, which provides that life begins at conception. In contrast, the foregoing analysis reveals that UK's laws on abortion are consistent and where there is an amendment law

[335] Rael Jelimo and Osinde Obare, "Doctors in Kenya's public hospitals left to carry the ball after abortions" *Standard Digital* (17 August 2015), retrieved from <http://www.standardmedia.co.ke/m/article/2000173106/> accessed on 20 November 2015.
[336] Ibid.
[337] Interim Procedures for the Approval on Independent Sector Places for the Termination of Pregnancy, DH, August 2012.

or further legislation, a provision is inserted explaining how the new law will operate in conjunction with the existing laws. For instance, section 5 (1) of the UK Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990) provides that:

> No offence under *section 1(1) of* the Infant Life (Preservation) Act 1929 shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of... *the 1967 Abortion* Act [emphasis added].

This amendment was introduced purposely to harmonise the Infant Life (Preservation) Act 1929, which prohibits abortion, and the Abortion Act 1967. In light of this, sections 214, 228 and 240 of the Penal Code should be harmonised with the Constitution of Kenya to avoid any inconsistencies and to ensure protection of the rights of the unborn are consistently acknowledged and upheld.

4.3 Conclusion

In sum, Kenya's abortion law as compared to the UK law seems to contain several inconsistencies and varied interpretations. With the increasing rate of induced abortion, as previously indicated,[338] there is need to introduce checks and balances in the law. The UK law in contradistinction to the Kenyan law seems to legalize abortion and provide very few exceptions where it cannot be carried out. It may be deduced from case law cited in this chapter that in practise abortion is available on demand in the UK. The existence in law of thresholds such as "good faith", "opinion of two registered doctors" and conscientious abortion means are only procedural pre-conditions required for termination of the unborn child. Very little legal discourse is given to the rights of the foetus in the UK legal regime.

[338] According to the Population Council (supra) about 1/3 of children conceived in Kenya are aborted.

To this extent it can be concluded that whereas the Kenyan law exhibits inconsistencies in its quest to preserve all human life, it is stronger in so doing than the UK law. With the foregoing in mind, the next chapter will address several suggested proposals on how the Kenyan law on abortion can be reviewed in order to align it with international instruments whose underpinning is the Natural Law Theory on human rights, so as to ensure greater safeguard of the rights of the unborn without negating the rights of the woman.

CHAPTER FIVE

STUDY FINDINGS, CONCLUSION AND SUGGESTIONS

5.0 Introduction

This chapter provides the summary of the study, study findings, suggestions and conclusions as follows.

5.1 Findings of the Study

The study sought to examine the adequacy Kenya's legal framework on abortion, with particular focus on Article 26 (4) of the Constitution and other subsidiary legislation. In particular, the study sought to establish whether the law adequately promotes and protects the unborn child's right to life as envisaged under Article 26 (2) of the Constitution, despite the legal limitation of that right under Article 24.

The standard of adequacy of the Kenyan law is measured against Dworkin's Natural Law theory on abortion as articulated in chapter 1 as well as international instruments espoused in chapter 2 and both of which clearly and unequivocally advocate for protection of the unborn.

The study was informed by the argument that since the promulgation of the Constitution, the controversy on abortion has been unsettled with cases of abortions being on the rise. An analysis of the abovementioned provisions together with sections 158-160, 214 and 240 of the Penal Code affirms inconsistencies, which makes it difficult to implement the law. The main purpose of the study was to provide an in-depth appraisal of Kenya's legal framework on abortion to establish whether it actually prohibits abortion. In order to achieve this, the study was guided by

the following research question: How adequately does Kenya's legal framework provide for the protection of the unborn child?

The study found that Kenya's legal framework on abortion is unclear and inconsistent and, therefore, does not adequately protect the unborn. Article 26 (4) of the Constitution prohibits abortion except when, in the opinion of a trained heath professional, there is need of emergency treatment, the life or health of the mother is threatened, and if permitted by any other written law.

Viewed along section 240 of the Penal Code, the Constitution takes precedence negating the spirit and intent of Article 26(2) seeking to at all times protect the unborn child. This is because firstly the proviso in Article 26(4) the Constitution does permit abortion.

Secondly such abortion can be performed purely on the basis of a trained health professional's opinion. There is no measure of the standard of such opinion. What mounts to emergency and the conditions that affirm danger to the health or life of the mother may be purely subjective. In addition, the "if permitted by any other written law" exception in Article 26 (4) is detrimental and seems to invite a law that legalizes abortion. It also opens doors for more exceptions, meaning that a time will come when abortion under any circumstances will be lawful in Kenya. A question arises as to the rationale behind inclusion of this exception in the constitution. This study suggests that the proviso be removed.

Further, it has been revealed that the right to life of the unborn child is at stake. Article 26 (2) may be said to be incomplete. There is no other provision that gives it legal backing to protect the unborn child. This provision is also inconsistent with section 214 of the Penal code which states that a child is capable of being killed only when it has proceeded alive from the body of the mother. Section 211 of the Penal Code on the other hand exempts a pregnant woman from a

death sentence, evidencing the sanctity accorded by the law to the unborn child's life. The study argues based on Article 6 (5) of ICCPR that it is the innocent child that is protected from the death sentence and not the woman. The pregnant woman would have faced the capital sentence but for the unborn child. Thus, when read together, sections 211 and 214 are inconsistent. It is therefore proposed that Section 214 being inconsistent with the constitution be repealed.

The High Court's decision in *Republic v Jackson Namunya Tali* explains that the Penal Code has set a lower penalty limit and, in case the patient dies, the doctor has to be charged with murder instead. The manner in which the law has been enforced is also questionable. Besides, the study found that Kenya's law on abortion does not adequately set thresholds to check the opinion of the trained health professional.

To the extent that the Penal Code has not been harmonised with the Constitution, section 240 which provides for the "good faith" and "with reasonable care" clauses may be considered a stand-alone legislation. In addition, the limitation established by the Penal Code has been extended by the Constitution.

The Kenyan law also lacks the conscientious objection clause, which in the UK protects the interests of the doctor. The implication is that the Kenyan law compels a doctor whose belief system is against abortion to nevertheless carry it out. The Code of Conduct and Discipline only states that the doctor can refer the patient. It suffices to say that the Code is made by the Medical Board which can withdraw it just as the Ministry of Health withdrew the training guidelines. Having such a provision in law provides a firm legal protection for doctors and patients who object to an operation.

The study further found that the legal framework in other commonwealth jurisdictions, in particular the UK are inadequate in so far as protection of the rights of the unborn child are concerned. Rarely are those rights addressed and in most cases they are subservient to the right to autonomy of the woman.

The study indicates the arguments challenging the personhood of the unborn child are contested. In fact, most of them, as indicated in Chapter Two, are philosophical rather than scientific. For instance, some, like Tooley and Warren, argue that the unborn child is not a person because it lacks consciousness and ability to develop an interest. In contrast, science shows that a foetus is a human being right from fertilization. The genetic makeup of the child is distinct from the pregnant mother in whom the child exists.

The Preamble to the Convention on the Rights of the Child talks of special protection and support of the child *before* and *after* birth. Kenya being a party to this Convention has an obligation under Article 26 of the Vienna Convention on the Law of Treaties and Article 21 (4) to promote and implement the substance of this Convention. It can be implied that the inclusive language used in Articles 27 & 28 of the Constitution seek to abide to the international instruments. In addition, the language used in section 2 of the Children Act and Article 26 of the Constitution has not limited the definition of a child from birth. It is general, implying that it includes the unborn child.

5.2 Suggestions for Reform

In light of the foregoing findings, this study makes the following suggestions.

Firstly, as indicated hereinabove, Article 26 (2), 26 (4) of the Constitution are inconsistent with sections 211, 214 and 240 of the Penal Code. The study therefore suggests that these provisions are interrogated and harmonized to protect the unborn child, notwithstanding the "lawful" exceptions under the Constitution. The rationale for this has been explicitly provided under this study. For instance, Article 26 (2) of the Constitution states that life begins at conception while section 214 states that a child is not capable of being killed unless it has proceeded out of the mother alive. Section 211 exempts a pregnant woman from the capital penalty and instead subjects her to life imprisonment. It generally affirms that the unborn child is a person that deserves protection under the Constitution. The law should clearly state that a foetus or unborn child is a human being with equal rights as a born child. Both should be accorded equal protection of the law. These changes should also take into consideration Article 28 of the Constitution and the Convention on the Rights of the Child. The Dominican Republic for example has since September 18, 2009, through a constitutional amendment declared the right to life as "inviolable from conception until death."[339]

Secondly, the study suggests that a provision is included in the law on conscientious objection to protect doctors or women who are not willing to participate in the operation.

The sanctions in sections 158-160 may also be revised in accordance with the UK's more penalties. These changes will curb the increased incidences of abortions. In Chile enactment of restrictive abortion laws saw a reduction of maternal deaths occasioned by abortions from 118 to 24 per 100,000 live births between 1964 and 1979.[340]

[339] Article 37 of the Dominican Constitution *Amnesty International: Dominican Republic must decriminalize abortion*, *www.amnesty*.org/en. Published 23 October 2012. Accessed 23 November 2015
[340] United Nations Population Division. (2002). Abortion Policies: A Global Review. Accessed 23 November 2015

Thirdly, while the law provides for exceptions, there is no legal provision for a woman to sue the doctor for subsequent inability to have a child. Moreover, it is often assumed by the pro-choice that safe abortion is safe and has no long-term consequences. According to them, safe abortion means surviving a successful abortion. The long-term effects on the mother and alternatives to abortion are not adequately addressed either in law or in the medical guidelines. It is submitted seldom do pregnant women make fully informed choices before attempting to have an abortion. A Scandinavian study found that women with previous or existing Pelvic Inflammatory Disease had a decrease in fertility following an abortion.[341] It is suggested therefore that strict and clear laws relating to provision of information to the woman ought to be enacted.

Additionally, it is proposed that a law be enacted to provide that every government hospital be equipped with safe houses where pregnant women can receive counselling and emotional support throughout the pregnancy. In connection with this it is further suggested the law on adoption be reviewed to allow unwed mothers or those who for whatever reasons cannot or do not want to keep the baby can surrender him or her without questions being asked. This is the position obtaining in USA. The state of New York for example has the Abandoned Infant Protection Act[342] which allows a mother to drop off a baby she is unable, for whatever reason, to keep at any church, hospital, police or fire station without fear of prosecution. This if introduced in Kenya will go a long way in reducing incidences of abortion and at the same time increase infertile couples' opportunities for adoption.

[341] Acta/Obstetrics and Gyn. Scandinavia 1979; 58:539-42

[342] Enacted, in July 2000 to save the lives of unwanted, newborn infants. Later amended in August 2010, to provide additional incentive for any person who is going to abandon a baby to do so in a manner that does not harm the baby. The amendments provide that parents who abandon their infant in a safe way, as prescribed by the law, will not be held criminally liable. The 2010 changes also increased the time frame in which an infant could be abandoned under the Act. Previously, an infant could be abandoned only in the first five days of its life; now the law applies to infants 30 days old or younger.

Fourthly, the problem with Kenya's legal framework on abortion is that it is not entrenched under harmonized legislations like in the UK. UK has three laws dealing with abortion and no provision conflicts with another. The exceptions to abortion are contained in the 1967 Abortion Act, section 6 of which provides that the law relating to abortion in UK is the Offences Against the Person Act. In Kenya, it seems that Article 26 (4) was included in the Constitution without making any reference to either international instruments on human rights, other provisions of the Constitution or the Penal Code. It is therefore important that the foregoing proposed changes are made in a single, harmonized legislation.

Fifthly, the study has indicated, further, that the qualifications and discretion of the trained health professional, as stands in the Constitution are unchecked. It is therefore proposed that a stricter legal framework addressing this issue be enacted.

It is also suggested that the "*if permitted by any other written law*" proviso in Article 26 (4) be repealed to avert possibility of liberalizing and removing any limitations to abortions. This will also help contextualize and re-affirm the spirit of Article 26(2).

Finally, the study identifies as a gap for future study, evaluation of the impact of Article 26(4) of the Constitution on the incidence of abortion in Kenya as well as an in-depth examination of the rights of a father in the abortion question. This is important because abortion remains a serious problem affecting both men and women whom the constitution under Article 45 read together with Article 53 gives equal rights and duties.

5.3 Conclusion

In conclusion, the abortion controversy in Kenya cannot be separated from the right-to-life discourse. Although the pro-choice stand questions the legal status of the unborn child, the right to life is very profound in the protection of the unborn child. Whereas pro-choice proponents contend that the unborn child is not a person, international human rights law deem it otherwise and extensively and consistently recognise and advocate for the unborn child's rights. Article 26(2) of the Kenyan Constitution and section 181 of the Criminal Procedure Code confirm that conclusion. Thus, any decision to take away the right to life of the unborn child does appear to be in discord with the right to dignity under Article 28 of the Constitution. In other words, a decision cannot pursue a wrong, even if this wrong is partly or fully permitted by law in consideration of its necessity. Therefore following the Natural Law theory of law, such law may be deemed to be bad law.

Based on the analysis in chapter three of this study, the study concludes that Kenya's legal framework on abortion is inconsistent and therefore does not adequately protect the right to life of the unborn child. Thus, for a meaningful discourse and solution to be found in addressing the gaps found, it is paramount the rights of a woman be seen not as antithetical to those of the unborn child. Although it is submitted that the two are distinct and separate persons with equal rights to life, it cannot be denied that protection of the rights of one necessarily requires willingness to so protect on the part of the other. Adequate laws will serve to advance this position for the common good of both persons and society in general.

A comparative study of United Kingdom has established that whereas the UK law addresses various aspects of the law, it particularly focuses on procedure rather than objections to the

abortion itself. Indeed it may be said that the Kenyan law is more vigilant in ensuring protection of the unborn compared to the UK laws.

Finally, it is appreciated that whereas it is important to review amend legislation in order to enact just laws, such laws and regulations are insufficient in the long run to curb bad conduct even when effective means of enforcement are present. If the laws are to bring about significant, long-lasting effects, the majority of the members of society must be adequately motivated to accept them, and personally be transformed to respond.[343] It is the role of both the legislature and the judiciary to see to the achievement of this.

[343] Pope Francis, *Laudato Si* (Paulines Publications Africa 2015) note 211.

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