Interpreting article 26(4) of the Constitution of Kenya 2010: Implications for Abortion Law, Policy and Practice

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Dedication

Primarily, I dedicate this work to my mother Timina Luvandwa who sacrificed her meagre earnings to take me through all levels of education from Primary to the University. Secondly, I dedicate this work to the Kenya Human Rights Commission (KHRC) for an opportunity that helped shape my knowledge and skills in the human rights law and sector, and made me the person I am today.

Thirdly, I dedicate this work to the Centre for Human Rights, University of Pretoria, for offering me this invaluable scholarship to study, which would otherwise have remained a dream.

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Whereas I have acknowledged these invaluable inputs, any faults in this study are mine and therefore are not attributable to the parties cited above.

SUMMARY OF THE DISSERTATION

The dissertation is about interpreting article 26(4) of the Constitution of Kenya 2010that provides grounds for access to abortion. The dissertation highlights existing gaps in knowledge and new developments that warrant reflection and reforms.

It begins by reviewing the historical development of abortion laws and policies, and explores the discourse around women's position in the society from the pre-colonial, through to the independent Kenya. The influence of religion and culture on abortion is also discussed.

The dissertation further explores Kenya's international obligations on health with a focus on access to abortion services by women. Kenya already enacted the Treaty Making and Ratification Act, giving effects to article 2(6) of the Constitution that makes international laws particularly those relating to reproductive health part of her domestic laws.

The study makes a comparative analysis of abortion jurisprudence; how abortion has been legislated and adjudicated in other jurisdictions that have almost similar architecture as Kenya. The study finds that article 26(4) of the Kenya Constitution, has an expansive interpretation that can adequately provide for women's access to abortion. Nonetheless, a holistic interpretation which incorporate other articles of the Constitution together with international human rights law remains critical.

Furthermore, the study finds it imperative for Kenya to enact a legislation that will operationalise article 26(4), which will expand grounds to access abortion, and also to reinstate Standards and Guidelines including Training Curriculum for health care service providers. Finally, the study finds that the continued existence of a 1970 Penal Code is a limiting factor for women wishing to access abortion. It also constitutes a hindrance to health care professionals with competencies to provide abortion service due to its criminalising effect.

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List of Abbreviations and Acronyms

AA	Abortion Act
APHRC	African Population Health and Research Centre
CAT	Convention Against Torture
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
CRR	Centre for Reproductive Rights
CTOP	Choice on Termination of Pregnancy Act
ECOWAS	Economic Community of West African States
ESCR	Economic Social and Cultural Rights
ICCPR	International Convention on Civil and Political Rights
ICPD	International Conference for Population and development
IHRL	International Human Rights Law
KLRC	Kenya Law Reform Commission
KMPDB	Kenya Medical Practitioners and Dentists Board
MOH	Ministry of Health
MSI	Marie Stopes International
NCCK	National Council of Churches of Kenya
NGO	Non-Governmental Organisations
NHS	National Health Service
OAPA	Offenses Against Persons Act
OAU	Organisation of African Unity
PAC	Post Abortion Care
POA	Plan of Action
RCOG	Royal College of Obstetricians and Gynaecologists
SGBV	Sexual and Gender Based Violence
RHRN	Right Here, Right Now
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States
USA	United States of America

WHO World Health Organisation

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 Introduction

According to the World Health Organisation (WHO) 'unsafe abortion is a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking minimal medical standards or both'.[1] Unsafe abortion accounts for over 4.7% to13.2% of maternal deaths annually, leaving millions with severe injuries and permanent disabilities.[2] Additionally, it is estimated that, 553 million dollars is spent annually in treating major complications arising from unsafe abortion[3].

The gravity of unsafe abortion, and the cost of treating complications, coupled with human rights implications, has compelled stakeholders to seek liberalisation of abortion laws. In the last few decades, the world has witnessed a steady shift towards expanding grounds for access to abortion.[4] As greater access to abortion is being realised, new laws are identifying a woman's fundamental human rights to access her reproductive health rights.[5]

However, despite the shift towards liberal abortion laws that seek to remove specific criminal sanctions against abortion, many jurisdictions in Africa including Kenya,[6] are yet to reform restrictive and punitive laws and policies notwithstanding the various reports on death resulting from unsafe abortion .[7] More so, it is unfortunate that even where the laws and policies provide limited access to abortion, women have not reaped the full benefits of the law.[8] The lack of clarity and misinterpretation of existing laws continue to perpetuate stigma, leading to much more suffering for women than even in jurisdictions that have total criminalisation.[9]

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[1] Wold Health Organisation.

[2] L Say et al 'Global causes of maternal death: a WHO systematic analysis' (2014) 2(6) *Lancet Glob Health.*

[3] M Vlassoff et al 'Economic impact of unsafe abortion-related morbidity and mortality: evidence and estimation challenges' Institute of Development Studies (2008) (IDS Research Reports 59)

[4] S Sheldon 'The decriminalisation of abortion: An argument for modernisation' (2016) 36 *Oxford Journal of Legal Studies* 334–365.

[5] Ziraba et al 'Unsafe Abortion in Kenya: A cross-sectional study of abortion complication severity and associated factors' (2015) BMC pregnancy and child birth 1; see M Berer 'Abortion law and policy around the world: in search of decriminalisation' (2017) 19(1) *Journal of Health Human Rights* 13.

[6] AL Laila 'An overview of abortion in Kenya: Law, policy and guidelines'<https://www.academia.edu/8739498/An_Overview_on_the_Law_on_Abortion_in_Kenya (accessed 15 February 2019)

[7] G Yilak 'The burden of unsafe abortion in Sub-Saharan Africa in particular Ethiopia: A review' (2011) Degree Thesis ACIPH-Hawassa University.

[8] Kenya National Commission on Human Rights 'A report of the public inquiry into violations of sexual and reproductive health rights in Kenya' (2012).

[9] C Ngwena 'Taking women's rights seriously: Using human rights to require state implementation of domestic abortion laws in African countries with reference to Uganda' (2016) 60 *Journal of African Law* 110–141.

1.2 Background

1.2.1 Legal and Policy Frameworks

The question of unsafe abortion in Kenya has continued to invoke a lot of discussion as women continue to procure abortion using unsafe methods and unqualified providers. At the centre of this debate is the constitutional provisions on abortion under article 26(4) of Kenyan Constitution, 2010, which permits abortion in certain circumstances, and the Penal Code of 1970 which criminalises abortion.[10] For the first time in Kenyan history, the Constitution explicitly envisages an enabling law that would permit abortion when 'in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law'.[11]

The Constitution addresses the unabated death toll caused by unsafe and illegal abortion, by specifying conditions under which abortion could be legally procured. The interpretation of article 26(4) has continued to invoke debate on how to implement abortion laws amid strong opposition from religious, social and cultural groups. Article 26(4) provides:

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

Two questions emerge from this provision; One is what are the implications of article 26(4) of the Constitution on abortion? The other question is how does the article deal with unsafe abortions in Kenya? This is the research puzzle that this study seeks to address. There is lack of clarity in the law as to what extend can abortion services be offered and accessed within the provisions of the law. Access to abortion in Kenya is restricted, however, the Constitution through article 26(4), creates exceptions,[12] but those opposed to abortion have interpreted it as a total criminalisation with very narrow exception.

Under the article, for the first two exceptions to be invoked, it must follow that a single trained and accredited health professional gives an opinion for termination. The assumption is that, a woman seeking abortion will seek the services of an accredited health professional. In reality, however, women seeking abortion in Kenya rarely go to trained health professionals due to stigma created by criminalisation.[13]

Article 26(4) also allows termination of pregnancy, where permitted under any other law. It is critical to observe the fact that the part 'or if permitted by any other written law' is interpreted to clarify that apart from grounds listed under this part, which are

[10] Kenyan Penal Code of 1970, Sections 158, 159 and 240.
[11] Constitution of Kenya 2010 Art, 26(4). http://www.klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/192-26-right-to-life(accessed on 12 January 2019)
[12] As above
[13] J Wambui 'Implementing reproductive health and abortion provisions in the Kenya Constitution 2010' (2018) 23(6) *Journal of Humanities and Social Science* 62.

minimum conditions for safe and legal abortion, an opportunity abodes for further legislation and expansion of grounds. Besides article 26(4) that protects women and girls, article 43(2)(a) of the Constitution guarantees access to the highest standards of health including reproductive health.

Abortion is also regulated under the penal code. Section 240, allows abortion, when determined to be an act of 'good faith' particularly to save life of a woman and the unborn. However, sections 158, 159 and 160 strictly criminalises abortion by providing respectively that:

> Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years.
>
> Any woman who, being with 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 imprisonment for seven years.
>
> Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years.

Kenya still holds on to these laws in spite of the fact that the *Rex v Bourne* case decided in England in 1938, repealed them.[14] Whereas the ruling expanded the interpretation of health as a ground for abortion to include mental or psychological or physical health of the woman, [15] the penal code is yet to be reformed or interpreted to mirror Bourne.

Therefore, section 158, other than indicating unlawful acts, does not define nor list acts that are lawful, resulting into a state of confusion particularly on the part of service providers and women seeking the service. As far as section 158-160 are prohibitive, they water down the exceptions under article 26(4), though this is a subject for courts interpretation under the new Constitutional dispensation.

Similarly, section 158 of the Penal Code prescribes a 14-year jail term for a woman who unlawfully terminates her pregnancy or she is liable for seven years imprisonment where she allows another person to terminate her pregnancy. In addition, the Code provides for a 14-year jail term for any person who is convicted of an intent to unlawfully terminate a woman's pregnancy, regardless of whether she is actually pregnant.[16]

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[14] *R v Bourne* 1938 3 All ER 612.
[15] The Offences against the Person Act 1861 (24 & 25 Vict c 100).
[16] The Penal Code at section 158, Cap 63.

Medical professionals are also affected by punitive provisions retained in the doctors' medical codes of conduct.[17] Medical professionals who perform abortion contrary to the law are liable for additional professional penalty of suspension or erasure from the register of doctors.[18]

In 2017, an important piece of legislation was enacted; the Kenyan Heath Act 2017.[19] This Act is critical in terms of interpreting grounds under article 26(4). It is noteworthy that the Act incorporates the WHO definition of health. The definition expands interpretation of article 26(4) in terms of looking at the health of a woman in a holistic way. This Act further defines a medical practitioner as:

> A health professional with a medical training at the proficiency level of a medical doctor, nurse, midwife or a clinical officer, who has been educated and trained to proficiency in skills needed to manage pregnancy-related complications in women, and who has a valid license from a recognised regulatory authority to carry out the procedure.

The Act further recognises the importance of having medical procedures in a safe and hygienic environment or facility that is legally recognised. The facility envisioned by the Act is the one that has required health professionals with the right infrastructure and commodities or supplies. This is critical to those accessing abortion services because the Act not only helps in taming quack doctors and unhygienic conditions, but also ensures that the health facilities give necessary supplies.[20]

Besides legislation covering access to abortion in Kenya, the Ministry of Health (MOH) has developed several policies and guidelines that provide for access to abortion services and care while guiding medical professionals on how to offer the services. One such policy is the National Guidelines on the Management of Sexual Violence in Kenya, made pursuant to section 35(3) of the Sexual Offences Act, which allows termination of pregnancy as an option in case of pregnancy from rape.[21]

Under the right of survivors of sexual violence, the Guidelines provide that, 'sexual violence survivors have a right to 'access termination of pregnancy and post abortion care in the event of pregnancy from rape.'[22] These guidelines were revised in 2014 and maintained the provision allowing survivors of sexual violence the right to 'access termination of pregnancy and post-abortion care in the event of pregnancy from rape.'[23]

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[17] The Medical Practitioners and Dentists Board, The Code of Professional Conduct and Discipline at 16, KMPDB Circular No. 4/79 (5th ed May, 2003).
[18] http://medicalboard.co.ke.
[19] The Health Act 2017/No. 21 of 2017
http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/HealthActNo.21of2017.pdf(accessed 20 February 2019).
[20] As above.
[21] MOH National Guidelines on the Management of Sexual Violence in Kenya 2nd (ed) (2009).
[22] As above.
[23] MOH National Guidelines on Management of Sexual Violence in Kenya 3d (ed) (2014).

The Post Abortion Care Guidelines (PAC), are yet another vital guideline created by MOH.[24] They provides a framework on how post abortion services can be accessed and provided at health centres. The PAC guidelines define PAC as 'the care given to a woman who has had unsafe abortion, spontaneous, or legally induced abortion... and it includes emergency treatment of spontaneous or induced unsafe abortion.' The PAC services are further recognised by the National Guidelines for Quality Obstetrics and Perinatal Care as to constitute emergency treatment of complications from spontaneous or induced abortion.[25]

The Health Act 2017 further defines emergency medical treatment as 'necessary immediate healthcare that must be administered to prevent death or worsening of medical situation.'[26] While section 7(3) of the Act provides that health providers who fail to provide emergency treatment commit an offence, Section 12(2) mandates providers to offer emergency medical treatment, removing any doubt that conscientious objection could not be exercised in emergencies in Kenya.

In spite of the above legal frameworks, the Penal Code remains the *de facto* abortion law in Kenya, as all interpretations are skewed towards Penal Code because article 26(4) is yet to be operationalised. There is no legislation so far that has been enacted to provide for the interpretation of the exceptions created in article 26(4).

1.2.2 International Human Rights Framework

At the international level, and in accordance with the Constitution of Kenya 2010, all international treaties that have been ratified by Kenya are part of her domestic laws including those seeking to advance reproductive health rights particularly access to abortion.[27] Kenya voluntarily ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[28] Maputo Protocol is the only legal instrument in the international human rights system that explicitly provides for right to abortion.[29]

The Protocol identifies sexual and reproductive health for women and girls to include, 'the right to control their fertility, the right to decide the number of children and the spacing of children, the right to choose any method of contraception, and the right to have family planning education.'[30] Moreover, the African Commission in the exercise of its mandate has placed a duty on member states to 'protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and

[24] 'Health ministry approves post abortion care guidelines' *The Star* 26 February 2019. See; https://www.the-star.co.ke/news/2019/02/26/health-ministry-approves-post-abortion-care-guidelines_c1900701 (accessed on 26 February 2019).
[25] http://guidelines.health.go.ke/#/category/27/91/meta (accessed 1 June 2019).
[26] http://www.kenyalaw.org/lex/actview.xql?actid=No.%2021%20of%202017 (accessed 10 August 2018).
[27] Constitution of Kenya 2010 Art 2(6)
[28] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa OAU Doc CAB/LEG/66.6 (2003) entered into force 25 November 2005. (accessed 14 August 2018).
[29] As above
[30] Maputo Protocol (no 27 above)

where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.'[31]

However, Kenya entered a reservation while still being governed under the old Constitution. The New Constitution 2010, effectively makes the above reservation inconsistent with its provisions on health particularly reproductive health rights.[32] As noted above, the MOH through its Guidelines allows abortion in cases of rape or defilement.[33] These Guidelines reflect one of the grounds for abortion spelled out in the Maputo Protocol of which Kenya is a state party.[34]

Stakeholders' call on the Attorney General to clarify the status of the reservation to Maputo Protocol and the continued existence of Penal code and the implication of article 26(4) have not borne fruit.[35] This is despite the existence of a Constitutional that any law at domestic level that does not accord with the Supreme law is null and void.[36] The penal code which is an inferior law to the Constitution remains un-repealed to accord with the Supreme law despite calls from stakeholders including United Nations (UN) Treaty Bodies.[37]

The adoption of Standards and Guidelines on Reducing Maternal Mortality and Morbidity from Unsafe Abortion (Standards and Guidelines), and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies (the Training Curriculum) by MOH, was seen as a first step in these reforms.[38] The Standards and Guidelines were modelled in accordance with the 2012 WHO Safe Abortion Guidance.[39] However, on the 3rd of December, 2013 and the 24th February, 2014, the Kenya's Director of Medical Services withdrew the Standards and Guidelines and the Training Curriculum respectively under unclear circumstances.[40]

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[31] General Comment No. 2 on article article 14(1)(a)(b)(c)(f) and article 14(2)(a)(c) of the Protocol. See, http://www.achpr.org/instruments/general-comment-two-rights-women/ (accessed 04 May 2018).
[32] 'What you need to know about the Maputo Protocol' *The Star* 27 April 2015.
[33] MOH National Guidelines on the Management of Sexual Violence (no 19 above).
[34] General Comment No 2 (n 31 above).
[35] http://www.knchr.org/Portals/0/PressStatements/2018(accessed on 12 February 2018).
[36] The Constitution of Kenya 2010, art 2(4)'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid'.
[37] Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) Concluding Observationhttp://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT_CEDAW_NGO_KEN_28991_E.pdf (12 February 2018).
[38] Kenya Ministry of Medical Services. Standards and guidelines for reducing morbidity & mortality from unsafe abortion in Kenya. Kenya Ministry of Medical Services, Nairobi; 2012.
[39] World Health Organisation safe abortion: Technical and policy guidance for health systems. Geneva: 2012. See, http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf [12 January 2018].
[40] 'Safe' abortion debate is rekindled after Health Ministry withdraws guidelines' *The Daily Nation 21* March*2016* See, https://www.nation.co.ke/news/Abortion-debate-haunts-health-and-legal-system/1056-3126104-psd5l5z/index.html (accessed in 10 February 2018).

1.3 Problem Statement

About nine years after Kenyans with a clear majority of 67% adopted a new Constitution,[41] Parliament is yet to enact legislation that operationalises article 26(4). The Constitution progressively identifies a woman as a person with rights and agency and not a mere object of reproduction. It is however, disappointing that Kenyan women are yet to enjoy these rights in a dispensation where an outdated Penal Code imposes heavy penalties. As argued:

> Laws that criminalise abortion but without concomitantly articulating clearly the grounds for lawful abortion… unduly deter healthcare providers from providing health services to women even where abortion is lawful. Equally, such laws create misperceptions about abortion as conduct that is criminal at all times.[42]

The above quote captures the problem bedevilling Kenya and a motivation for this study. The absence of laws guaranteeing access to abortion in Kenya is no longer an issue. However, the deliberate failure to implement existing laws and policies is the biggest threat to women reproductive health.[43]

The withdrawal of the Standards and Guidelines and the Training Curriculum has made it difficult for young women and girls to exercise their right to access abortion services. Furthermore, it has resulted to inaccessibility of trained health workers and those available are hesitant to provide the service due to fear of criminal sanctions.

Most recent events have confirmed this point of view. On 14th of November 2018, the KMPDB banned one of the largest international charity organisation providing access to safe and legal abortion service, the Marie Stopes Kenya (MSK).[44] The charitable organisation provided at its clinic emergency Comprehensive Post-abortive Care that is legal and provided for in the Constitution. Although, the ban was lifted following weeks of outcry by human rights organisations, KMPDB still placed strict conditions

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[41] 'Kenya votes "Yes" to new constitution' *Reuters* 5 August 2010 https://www.reuters.com/article/us-kenya-referendum/kenya-votes-yes-to-new-constitution-idUSTRE6743G720100805.

[42] C Ngwena 'Reforming African abortion laws to achieve transparency: arguments from equality' (2013) 21(3) *African Journal of International and Comparative Law* 398-426.

[43] Ngwena (n 7 above).

[44] 'Marie Stopes banned from conducting abortions in Kenya' The Star 16 November 2018. See: https://www.the-star.co.ke/news/2018/11/16/marie-stopes-banned-from-conducting-abortions-in-kenya_c1852035 (accessed 12 December 2018)

on MSK.[45] The conditionality included referring all cases received for emergency to the nearest public hospitals.[46]

The devolution of health care service provision to quasi-autonomous County Governments has aggravated the situation further.[47] County Assemblies and service providers are interpreting the Constitutional provisions liberally whilst others restrictively, placing absolute ban on abortion.[48] Although, the function and mandate of developing policies and guidelines remain with the national government the reluctance to give clarity on abortion laws continues to cause more harm.

1.4 Research Aims and Objectives

1.4.1 Main Aim

This study seeks to interrogate in detail the law governing abortion in Kenya, in an attempt to clarify and interpret the meaning of article 26(4) and its implications for abortion law, policy and practice including the Penal code. The main objective being to generate knowledge that promotes a clear understanding of the provisions of article 26(4).

1.4.2 Objectives

This aim will be explored through addressing the following objectives:

a) to examine and interpret the circumstances under which abortion can be legal in Kenya under the Constitution and other laws;
b) to review the current laws on abortion in Kenya vis-à-vis Article 26(4) of the Constitution in a bid to call for legal reforms that are consistent with the Constitution;
c) to examine the legal and policy contestations towards the legalisation of abortion in Kenya such as the question as to when life begins; and finally,
d) to provide mechanisms through which the quest of liberalisation of abortion in Kenya is achievable in a bid to avert unsafe abortions that continue to threaten lives of women.

1.4.3 Research question/s:

[45] 'Kenya lifts ban on Marie Stopes abortion services after warning lives are at risk' *The Guardian* 21 December 2018. See, https://www.theguardian.com/global-development/2018/dec/21/kenya-lifts-ban-marie-stopes-abortion-services-after-warning-lives-are-at-risk (accessed 27 December 2018).
[46] Campaigners in Kenya challenge Marie Stopes abortion ban in court' Reuters 30 November 2018. See: https://www.reuters.com/articlearticle/us-kenya-abortion/campaigners-in-kenya-challenge-marie-stopes-abortion-ban-in-court-idUSKCN1NZ22W (accessed in 27 December 2018).
[47] TC Okech 'Devolution of public healthcare services in Kenya and its implication on Universal Health Coverage' (2017) 7 *IOSR Journal of Pharmacy* 09-23.
[48] See https://www.kelinkenya.org/wp-content/uploads/2018/11/UPDATED-LEGAL-FRAMEWORK-ON-ABORTION.pdf.

This study is underpinned by the following research questions:

1. What are the exceptions in Article 26(4) and how broad do they cover access to abortion.
2. What are the implications of Article 26(4) of the Constitution on the legal and policy frameworks on abortion in Kenya?
3. Is the lack of clarity and the interpretation of Article 26(4) of the Constitution a hindrance to safe abortion in Kenya or is it insufficient in addressing unsafe abortions in Kenya?
4. What legal reforms are required to align laws such as the Penal code with the spirit of the Constitution?
5. What is the relationship between the rights of the woman and those of the unborn and how does the law address this contestation?
6. What legal and policy mechanisms should be developed to enhance safe abortion in Kenya?

1.5 Research Methodology

The research methodology will comprise of analysis of relevant published literature through desktop review. Research will review relevant existing legal frameworks and policies on abortion. The study will employ the use of qualitative method to give information on a variety of data. Qualitative method of study will involve collection and analysing information to give reasons, opinion and motivations.

The research will adopt purposive sampling to identify relevant texts, statutes, articles, journals and internet materials. The same purposive sampling will identify information regarding regulation on abortion inside the materials selected for in-depth analysis. This process will yield information and data best suited to explain abortion regimes and how Kenya can benefit from it as pressure mounts for reform.

The principle of non-discrimination and substantive equality to all people is the center of human rights.[49] It is the responsibility of states to address both *de jure* and *de facto* discrimination within its jurisdiction.[50] To achieve this status the state is called upon to not only remove all barriers but also to put in place concrete and identifiable steps to ensure attainment of an empowered women.[51]

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[49] Committee on Economic, Social and Cultural Rights (ESCR Committee), *General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art 3)*, (34th Sess., 2005), *in* Compilation of General Comments and General 17 Recommendations Adopted by Human Rights 18 Treaty Bodies, para 7, UN Doc HRI/GEN/1/ 19 Rev9 (Vol I) (2008). See; S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 S Afr J on Hum Rts 163, 163-164 166.

[50] Human Rights Committee, Concluding Observation: Jordan, para. 7, U.N. Doc. CCPR/C/JOR/CO/4 (2010).

[51] Human Rights Committee, General Comment No 28: art 3 (The equality of rights between men and women), (68th Sess, 2000), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, para 3, UN Doc HRI/GEN/1/Rev9 (Vol I) (2008) (emphasis added).

It is on the above premise that this study will proceed to critically analyse and review article 26(4) using the concept of equality and non-discrimination, while also linking it with the state's obligations under international human rights law (IHRL). The study further explores courts' jurisprudence and decisions, aiming to bring out valuable lessons. Kenya can learn from these jurisprudence and decisions' formal or substantive contribution to access to abortion.

1.6 Significance of the Study

The adoption of the 2010 Constitution that came with article 26(4), was seen as a reprieve in terms of reducing unsafe abortions in Kenya. Yet, a lack of clarity on grounds for abortion as provided under the article, together with the existence of a restrictive Penal Code has made it difficult for women to access abortion services that are legally provided for in the Constitution.

This study is justified on various grounds. First, it seeks to examine in detail the legal and policy mechanisms in Kenya on abortion. The aim being to interrogate the interpretation of all abortion laws in Kenya. Second, there exists scarce literature on the examination of abortion laws, and specifically the interpretation of article 26(4). Cases of unsafe abortion in Kenya are rampant leading to the loss of lives. Whilst NGOs have tried to push for reforming abortion laws, the effectiveness of the current laws has not received scholarly attention. This study seeks to fill this research gap by providing all the stakeholders involved with information on the subject under study.

1.7 Literature Review

This study reviews the work of scholars, commentators, human rights organisations reports on legislating abortion, by exploring the gradual growth and inclusion of abortion in constitutions, and adoption of regulatory regimes, and the discussions on procedural justice that gave way to liberal access.

The study reviews literature written on liberal abortion regimes and their imperatives under the Constitution. Although literature that speaks directly to article 26(4) barely exists, available literature is based on the Penal code and the question of protecting the unborn. In addition, available literature covers abortion in the narrow ground of a woman's life or health is in danger without expounding more on what is meant by 'health' and 'danger'.[52]

The debate on abortion is largely canvased within the question of 'at what stage does life begin' and 'protection of the unborn'. What has been missing in the debate is a woman's right to dignity, autonomy, equality and non-discrimination, together with IHRL that Kenya has signed and are effectively part of its domestic laws.[53]

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[52]http://erepository.uonbi.ac.ke/bitstream/handle/11295/93657/Muhia_Abortion%20in%20Kenya.pdf?sequence=3&isAllowed=y(accessed on 4 January 2019).

[53] Constitution of Kenya 2010, Art 2(5)(6).

First, this study reviews a 2015 research work that aims at testing the adequacy of Kenyan legal framework to protect the unborn.[54] The study concludes that there exist inconsistencies in abortion laws, particularly between article 26(4) and the penal code.

According to the study, article 26(2), claims life begins at conception, whereas the interpretation of the penal code in section 214, is that the unborn is not capable of being killed, unless it dies after birth'.[55] It is against these contradictions in the law that the study concludes the unborn is inadequately protected.

Similarly, the study under review posits that, whereas article 26(4) allows abortion under certain circumstances, section 240 of the Penal Code only provides the health or life exception. While arguing in favour of the Penal Code, the author believes that it introduces an important threshold to check the opinion of the doctor contemplated under article 26 (4) that is 'good faith' and 'with reasonable care'.

One of the fundamental gaps in information that this study seeks to fill is the argument that life begins at conception. Although article 26(2) provides that life begins at conception, this study clarifies that the protection of life from conception is directly at odds with IHRL, which does not envisage or contemplate 'right to life' protection to the unborn.

The Universal Declaration on Human Rights (UDHR), deliberately fails to include prenatal protection as a right in the Declaration, where the word 'born' has been used to mean already out of the woman's womb.[56]

In addition, the International Covenant on Civil and Political Rights (ICCPR) declines to acknowledge that its provisions on right to life can be interpreted as covering the unborn or the foetus.[57] Attempts to have an amendment to article 6(1) to provide that 'the right to life is inherent in the human person from the moment of conception, this right shall be protected by law', was rejected by the drafters, for the same reasons advanced by the UDHR.[58]

The Committee on the Elimination of Discrimination against Women (CEDAW Committee), mandated with interpretation, monitoring the implementation and compliance of states to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has also given its interpretation. The Committee has clarified that in circumstances where a question arises on the position of a woman and that of unborn, the fundamental principles of equality and non-

[54] SW Muhia, 'Abortion in Kenya: Adequacy of the Kenya's Legal Framework in Protecting the Unborn Child' Masters Degree Thesis, University of Nairobi School of Law 2015.
[55] *Republic v John Nyamu & 2 others* [2005] eKLR.
[56] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
[57] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999 171.
[58] UN. GAOR Annex, 12th Session, Agenda Item 33,96,113,119, U.N, Doc. A/C.3/1.654.

discrimination demands that a pregnant woman be given priority over an interest in prenatal life.[59]

Moreover, in the case of *LC v Peru*, CEDAW Committee found the government of Peru in violation of the rights of a pregnant girl by not granting access to abortion services, when she prioritised the foetus over the girl's health. The 13-year- old girl had been repeatedly raped leading to her pregnancy, and she was desperate and psychologically traumatised.[60]

Regional human rights bodies have upheld the same position by rejecting the argument that life begins from conception. Drafters of African Charter on Human and Peoples Rights (African Charter),[61] were cautionary in the way they framed the Charter, including its language that avoided a possible interpretation that would be construed as protecting a right to life from conception.[62] Article 4 of the Charter states that human beings are inviolable and that 'every human being shall be entitled to respect for his life and the integrity of his person'.[63]

According to the Maputo Protocol, the right to life can only be claimed at birth. The Protocol calls on states 'to protect the reproductive health rights of women to terminate pregnancy in cases of incest, rape and whenever the continuation of a pregnancy endangers the mental and physical health of the pregnant woman'.[64]

Similarly, European Convention on Human Rights (European Convention), in article 2(1) of provides '… everyone's right to life shall be protected by law.'[65] The European Commission on Human Rights (European Commission in *Paton v United Kingdom*, found that the right to life in Article 2 of the European Convention on Human Rights does not extend to the unborn.[66]

Existing literature can miss critical information by failing to canvas some of the landmark Supreme Court decisions on the subject. For instance, in *Lakshmi Dhikta v Nepal*, Supreme Court of Nepal found unborn cannot exist without a mother, therefore unborn interests cannot supersede the protection of a woman's physical and mental well-being. The Court held that, 'unborn assumes status of a child only when born

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[59] The Convention on the Elimination of All Forms of Discrimination Against Women *adopted* Dec 18 1979, art. 12, GA 34th Sess Supp No. 46, UN DOC A UNTS. 13 (*entered into force* Sept. 3, 1981). See Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20th Session, 1999), *in Compilation of Genetral Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 11,UN Doc HRIGEN/1/Rev 9(Vol II)(2008*)

[60] *LC v Peru*, UN Committee on the Elimination of Discrimination of Women (17 October 2011) CEDAW/C/50/D/22/2009 (2011).

[61] African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 1520 UNTS 217.

[62] F Viljeon, 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 313-314 325

[63] Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights ('Banjul Charter')*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[64] Maputo Protocol (n 27 above).

[65] European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221, ETS 5.

[66] *Paton v United Kingdom* ECHR (13 May 1980)

alive'. The Supreme Court's ruling was alive to the fact that a woman has fundamental human rights, which would be violated by the action of extending a right to the unborn. The Nepal Supreme Court in its ruling cited with approval the jurisprudence of the US Supreme Court in the *Roe v Wade*,[67] and the Constitutional Courts of South Africa[68] and of Austria which held that held that the unborn could not be recognised as a person.

Other studies in the country have documented the existing opportunities within the Constitution of Kenya that seek to promote reproductive health, particularly access to abortion, while highlighting challenges. Jane Wambui, in her recent study on 'Implementing reproductive health and abortion provisions in the Kenya Constitution', draws a link between articles 26(4), 43(1)(2), to article 2(5)(6).[69] This study is significant to abortion debate because it discusses access to abortion using a human rights based approach. It further posits that interpretation of article 26(4) must be done in consultation of other articles with imperatives on health and human rights.

However, Wambui's study lacks a comparative analysis of how other countries with similar historical context to Kenya have succeeded in liberalising their laws beyond exceptions. The Kenyan Constitution came with an expanded bill of rights that bears similarities with the South African Constitution of 1996. The enactment of the Choice Act in South Africa offers abortion services on request in the first trimester and applies reasonable restrictions as the pregnancy advances. This study helps in drawing comparative lessons for Kenya.

Moreover, Wambui does not discuss the historical context of Kenya and how the colonial system, emboldened an already patriarchal set up. The arrangement has perpetuated inequality between women and men both in social, cultural and economic structure, including laws and policies where women's rights are not seriously considered.

The IHRL provides the best protection framework for women rights to abortion. Although Wambui has acknowledged that Kenya is a monist state under the new Constitution, her work has not covered substantially commitments of Kenya under IHRL as far as abortion is concerned.

The other studies around abortion in Kenya are found under the advocacy carried out by human rights organisations and medical associations.[70] In 2010 a human rights

[67] In the *Roe v Wade* case, the United States Supreme Court decided that it could not recognize the foetus as a human life

[68] *Christian Lawyers Association of South Africa and others vs. Minister of Health and Other.* The case was about a legal challenge to the Choice on Termination of Pregnancy Act, where the petitioners claimed that the Act violated the constitutional guarantee of the right to life of all persons, in this petition the Constitutional Court of South Africa held that "the foetus cannot be treated as an individual person ..."

[69] J Wambui 'Implementing reproductive health and abortion provisions in the Kenya Constitution 2010' (2018) 23 (6) *IOSR Journal of Humanities and Social Science.*

[70] https://www.omicsonline.org/open-access/advocacy-towards-changes-on-laws-governing-access-to-safe-abortion-in-kenya (accessed on 7 January 2019).

organisation documented consequences of Kenya's restrictive legal and policy regime. The report gives a rights perspective of the effects of the ban on abortion in Kenya .[71]

According to the report, the restrictive laws not only overburden women, but are also attributed to the high maternal death toll and has made it difficult for quality care provision at healthcare facilities in the country. One particularly important highlight from the report is the demonstration of the consequences of the restrictive laws on healthcare providers, which inhibit their ability 'to effectively and ethically comply with the dictates of their profession: to save the lives and protect the health of their patients'. The report documents the huge financial cost on an already struggling healthcare system, as a result of the number of patients seeking post-abortion care.

A similar study conducted by the MOH and other stakeholder in 2012, painted a similar picture of high cost of treating complications from unsafe abortions.[72] The study found that unsafe abortion remained one of the leading causes of maternal mortality and morbidity in the country.[73] The study's findings also revealed significant resources the government spends treating complications from unsafe abortion, which could have otherwise been avoided if safe abortion is provided.

The study estimated that half a million induced abortions occurred in 2012. This translates into an induced abortion rate of 48 abortions per 1000 women aged between 15 and 49 years.[74] The study's finding on access to PAC puts at 37% the number of women who showed severe complications (such as high fever, sepsis, shock, or organ failure).

Similarly, the study found that young women and girls aged 10 and 19 and constituting 45% including divorced women at 56% suffer severe complications of unsafe abortion. The percentage of women who reported to the provider that they had interfered with the continuation of the pregnancy was 58%. The report further revealed a very low usage of contraceptives by women who turned up for PAC, which stood at 70%.

The study's recommendations are critical in the full implementation of the Constitution 2010, particularly article 26(4) as key to resolving the high rates of unsafe abortions and its complications. The training of providers is critical to provision of safe services and implementation of the standards and guidelines developed by MOH. The study paints a picture of unmet needs for contraceptives, and recommends that efforts are made to ensure women seeking PAC receive counselling on contraception use and promotion of access to quality abortion-related care.

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[71] Centre for Reproductive Rights, '*In harms's way: The impact of Kenya's restrictive abortion law'* (2010). See, https://www.reproductiverights.org/our-regions/Africa/Kenya (accessed 8 February 2019).
[72] https://aphrc.org (accessed on 10 February 2019)
[73] African Population and Health Research Center, Ministry of Health, Kenya, Ipas, and Guttmacher Institute. (2013). Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study, Nairobi, Kenya
[74] As above

As evidenced in the preceding paragraphs, most of the existing literature has tended to concentrate on bringing out the effects or impact of criminalisation of abortion including cost implication. However, none has attempted to interpret the new legal framework on abortion introduced by the Constitution.

The incorporation of abortion in the Constitution can be better understood by interrogating or tracing constitutional decisions, its evolution across a period of time, and its influence across jurisdictions. Reva Siegel's work helps the study trace the critical path to the gradual growth and appreciation of constitutional values in relation to women and the unborn in various constitutional decisions on abortion in developments between the 1960s and 1970s.[75]

Siegel's work illustrates the shift from criminal abortion laws to a regime of laws that allow greater freedom to women's access to abortion services contingent to receiving counselling services for informed decision.[76] The decline of the conflict of rights in the context of the woman and the unborn is a crucial postulation in Siegel's work.

Siegel tracks over time and different jurisdictions when courts have rejected the view of abortion as a 'zero-sum' game. Allowing unborn claim to a right means taking away the woman's right and vice versa. States can legitimately restrict abortion to protect life, 'while helping women avoid unwanted pregnancies, or have a healthy child.[77] It is achievable to strike a balance by respecting women's autonomy and the unborn right.[78]

Ruth Rubio-Marin has commented and written about constitutional values through country specific case studies.[79] According to Rubio-Marin, the 'constitutionalisation' of abortion in constitutions has escalated the stakes in the abortion debate as the courts have been called upon to choose between two competing interests, making it difficult to have consensus resulting into polarisation.

Constitutional Courts have struck a balance between protection of the unborn and a woman's fundamental rights to dignity and autonomy as constitutional values worthy of protection. According to Rubio-Marin, judicial and legislative frameworks have endeavoured to vindicate contested constitutional values.[80] Rubio-Marin's analysis of the cases brings out a shift that identifies a woman as an actor worth of making independent, legal and informed decisions.

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[75] R Siegel 'The constitutionalisation of abortion' in RJ Cook et al '*Abortion law in transnational perspective: Cases and controversies*' (ed) (2014) 15-35.
[76] DP Kommers 'Autonomy, dignity and abortion' in T Ginsburg & R Dixon (eds), *Comparative constitutional law* (2011) 441–58.
[77] R Siegel 'Pro choice life: Asking who protects life and how-and why it matters in law and politics' (2017) 93 *Indiana Law Journal* 207.
[78] M Rosenfeld & A Sajó *Oxford Handbook of Comparative Constitutional Law* (2012) 1057.
[79] B Baines & R Rubio-Marin (Eds) *The gender of constitutional jurisprudence* (2004).
[80] Siegel (n 72 above).

Charles Ngwena's work on abortion law regimes in Africa, particularly the colonial influence on African abortion laws, lays a foundation for critical analysis of their continued existence and why the former colonial power has since abandoned them.

In Ngwena's article 'Taking women's rights seriously, using human rights to require state implementation of domestic abortion laws in African countries with reference to Uganda',[81] he articulates the failures by states to implement their own existing abortion laws to the detriment of women who cannot access the service that is violation of human rights. Equally important, the article proposes a normative rights based framework that could be used to ensure accountability on the part of states in implementing abortion laws they have adopted.

A judicial methodology in constitutional abortion law is critical to advancement of human right based approach to adjudication of abortion related cases. Verónica Undurraga posits that judges should always go beyond the abstractive world of law and be more pragmatic in their ruling. Undurraga calls for objective assessment of the impact of criminalisation on the woman and whether the protection being afforded on the unborn is worth the sacrifices the law demands of women.[82]

Similarly, Joanna Erdman in her work insists on the importance of procedural justice and liberal access to abortion reform. The opaqueness of the legality of abortion laws has hindered access and provision of the service by medical professionals. In Kenya, the chilling effect of a likelihood of a life sentence imposed by the courts has resulted in unavailability of the service, even when a woman is legally entitled. This theory posits that 'legality of a service is a precondition for accessibility', knowledge of one's right is equally pertinent to women seeking the service and service provider's willingness to offer.[83]

Finally, criminalisation of abortion breeds stigma not only on the part of women seeking the service, but also service providers. Rebecca Cook puts into perspective the impact of stigma caused by criminalising abortion and stereotypes against women on access and provision of service to women and medical professionals.[84]

1.8 Outline of Chapters

I. Chapter One: Introduction

The Chapter gives an overview of the study, outlining the rationale of seeking an interpretation of article 26(4) of Kenya Constitution. Similarly, this Chapter gives compelling reasons why the study is relevant and timely. It also highlights existing

[81] Ngwena (n 7 above).
[82] V Undurraga 'Proportionality in the constitutional review of abortion law'(2014) in RJ Cook et al '*Abortion Law in Transnational Perspective: Cases and controversies*' (ed) (2014) 77-97.
[83] J Erdman 'The procedural turn: Abortion at the European Court of Human Rights' in RJ Cook et al (eds) *Abortion law in transnational perspective: Cases and controversies* (2014) 121-142.
[84] As above

gaps in knowledge and new developments that warrant reflections and reforms and definition of terms.

II. Chapter Two: Historical development of abortion law in Kenya

The Chapter reviews the historical development of abortion laws and policies. The discourse around women's position in the society from the pre-colonial, to the colonial era to the independent Kenya. The Chapter finds that although patriarchy existed long before the advent of colonialism, colonisation oversaw the embedment of patriarchy into the formal lives of people that included social, legal and policy structures.

III. Chapter Three: Kenya's International Human Rights Obligations on Abortion

This chapter explores Kenya's international obligations on health particularly on access to abortion services by women. The Chapter finds that Kenya already enacted the Treaty Making and Ratification Act.[85] The enactment gives effects to article 2(6) of the Constitution, laying down procedures for the making and ratification of treaties.

The Constitution provides that all international laws, treaties and conventions, among other instruments, which Kenya has ratified, are Kenya's laws. This chapter therefore, finds that Kenya has active obligations to the UN Covenant on Economic, Social and Cultural Rights (CESCR), the CEDAW and the African Charter on Human and Peoples Rights (African Charter) and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

IV. Chapter Four: Comparative Analysis or Jurisprudence

The Chapter makes a comparative analysis of jurisprudence on how abortion has been legislated and adjudicated in other selected jurisdictions. The discussions within this Chapter contains lessons and best practices that Kenyan stakeholder can utilise to reform its abortion law, policies and practices.

Kenya inherited its current abortion legal regime from its coloniser, the chapter finds that Britain already abandoned its 1861 laws on abortion and enacted the Abortion Act of 1967 that is more liberal. Moreover, the chapter find that in 1938 British Constitutional Court in the *Bourne* case, made a landmark ruling, which has been cited in many jurisdictions especially in commonwealth countries.

The Chapter also shares lessons from the USA, Colombia, Germany and South Africa that have liberal abortion regimes recognising rights and agency of women. The chapter reviews *R v Wade* highlighting its significance to Kenya particularly its recognition of women's right to privacy. A mention of Germany has been given for its balance between protection of the interests of the unborn and offering of 'decisional autonomy' to women over pregnancy termination.

[85] http://kenyalaw.org/lex/actview.xql?actid=No.%2045%20of%202012 (accessed in 27 December 2018).

V. Chapter Five: Critical analysis and interpretation of Abortion laws in Kenya

This chapter provides a detailed analysis and interpretation of article 26(4) and other related abortion laws. The chapter finds that article 26(4) has an expansive interpretation that can adequately provide for women's access to abortion. Nonetheless, according to this chapter there is a need for a holistic interpretation that incorporate other articles of the Constitution together with IHRL. Furthermore, there is need for legislation operationalising the article expanding ground together with comprehensive policy, standards and guidelines.

VI. Chapter Six: Study Findings, Conclusion and Recommendations

This final chapter contains the Study Findings, Conclusion and Recommendations. It concludes that article 26(4), has the best foundation elements for access to abortion for women in a rights based approach. However, the absence of a legislation that operationalises the article limits its functionality. The continued existence of the Penal code is another limiting factor on the effect of the article, plus the absence of Standards and Guidelines. The chapter calls for enactment of a legislation on abortion, reinstatement of policy, standards and guidelines and the repeal of the Penal code.

CHAPTER TWO

Historical Development of Abortion Law in Kenya

2.0 Introduction

This Chapter reviews pre-colonial, colonial, and the post-colonial history that entrenched and institutionalised patriarchal structure as well as a modern neo-patrimonial State arrangement. The Chapter reveals that the social structures established during the colonial period prescribed controls on women's bodies. In this Chapter, also, are highlights of how the independent and subsequent governments retained the British constructs of gender stereotypes and discriminatory roles, where women were given certain roles associated with a weaker sex. Women played a peripheral role in matters to do with politics, economics, religion and culture. This arrangement disproportionately affected the emancipation of women as far as their participation in national polity, particularly control of their sexuality.

The highlight of the Chapter is the systemic marginalisation of women, who have been relegated to the periphery of the society as far as socio-economic and political decisions are concerned. This is manifested in the deliberate and perpetual failure to find urgency and priority in gender issues, specifically women's reproductive health.[86] To sum up, the Chapter discusses the historical state's ambivalence on

[86] 'Fourth time unlucky as gender Bill flops' *The Standard Digital* 28 February 2019.

matters to do with abortion and failure to clarify abortion laws even when faced with an opportunity to do so.

2.1 Social-cultural Background

The earliest inhabitants of Kenya were hunters and gatherers of Bantu origin, who were later joined by herders. The Arabs followed, when they arrived at the coastal part of Kenya they intermarried with Bantus, creating a union that saw the emergence of the Swahili culture along the coastal region.

Kenya is currently home to different ethnic communities with diverse cultures and religions. Indigenous communities comprise of forty-two ethno-linguistic groups comprising of three major African linguistic groups; Bantu, Nilotes and Cushites, with the Kenyan-Asians being the latest addition. In addition to the country's ethnic diversity, there exists Asian, European and other immigrants from many nations across the world. Despite the different tribes holding onto their unique cultures ranging from circumcision to marriages, they cherish solidarity. The different language speaking ethnic groups with diverse cultural orientations are merged to form a unique Kenyan culture with the slogan '*harambee*', a swahili word meaning 'pulling together'.[87]

2.2 Reign of Customary Practices and Law

Pre-colonial history of Kenya reveals a mixture of an agrarian and pastoralist society in which strict, but often diverse, customs evolved in the different tribal communities. The different cultural practices and norms developed into unwritten laws that later underwent transformations at the advent of colonialism and capitalism.[88]

The customary laws have played a role in the maintaining cultural norms that have, for many years, defined women roles in the family and society in many African countries including Kenya. Although customary laws have often been confined to a particular social context covering similar issues, they have mostly been applied across communities, for instance on issues of access to land or property, marriage, inheritance and divorce.

The custom debate is an important one to the Kenyan woman and her reproductive health because it has, for a long time, defined women's identity within society, arbitrated upon family relationships, determining women's entitlements and access to resources. The unwritten customary law and practices have a direct link to suppression of women rights in Kenya. The men who enjoy patriarchal power control customary practices.

[87] https://www.knbs.or.ke/population/(accessed on 20th May 2018).
[88] http://www.kenyalawresourcecenter.org/2011/07/genesis-of-african-customary-law.html (accessed on 24/06/2018).

Incidentally, pre-colonial Kenyan societies were governed by patriarchal structures where women occupied disadvantaged positions with their interests not prioritised. Such societies maintained and perpetuated the practices that insubordinate women because they found utility in customary practices.[89] Due to its accessibility and localised nature, customary law was popularly used as informal justice system.

2.3 The Colonial Era

Long before the scramble for Africa, Western explorers and missionaries roamed Africa and already had contacts with Africans. African stories were already being constructed by the early visitors on the Continent. The Europeans positioned the their culture as a model through which a universal culture was carved out, the effect was that other cultures were framed as inferior.[90]

The African story told presented the continent as dark, backwards and primitive without a history. The narrative set the base for depicting African culture as inferior to the white's, a justification for imposition of European culture.[91] The Continent was depicted by early travellers and explorers 'tales of their experiences as erotic' and 'porn-tropics for the European imagination'. Women were placed lower in the hierarchical order.[92]

Kenya came under the British colonial rule at the onset of 1895, with a declaration in 1920 which made Kenya to be administered both as a colony and a protectorate.[93] The colonial reign lasted until 1963, when Kenya became independent.[94] The colonial rulers superimposed their governance systems over the indigenous systems of governance.[95] In an attempt to ensure smooth administration of both the political and economic sectors of the Kenyan colony and avoid resistance from the already existing tribal powers, the colonisers sought a hybrid system where tribal chiefs were incorporated in the new order as allies.

The Britons introduced an indirect rule policy, where two sets of racially stratified legal systems ran parallel to each other. One system served Africans and the other non-Africans. This saw the introduction of Native Tribunals, apparently run by traditional authorities, where it applied 'native law and customs' to Africans. The other tribunal was presided over by British magistrates and judges who served the non-Africans using the English laws.

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[89] C Albertyn "The stubborn persistence of patriarchy'? Gender equality and cultural diversity in South Africa' (2009) 2 *Constitutional Court Review* 165.

[90] C Ngwen*a What is Africanness? Contesting nativism in race, culture and sexualities* (2018).

[91] S Tamale (Ed) African sexualities (2011) *Pambazuka Press*. See: DS Mupotsa and S Tamale (ed.) 'African sexualities' (2012) *A Reader International feminist journal of politics* 14:3 438-440.

[92] SL Gilman 'Black bodies, white bodies: Toward an iconography of female sexuality in late nineteenth-century art, medicine, and literature' (1985) 12 1 *Critical Inquiry* 204-242.

[93] P Karari "Modus operandi of oppressing the "Savages" (2018): Kenyan British colonial experience," (2018) 25 1 *Peace and Conflict Studies* 2.

[94] As above

[95] E Cotran 'The development and reform of the law in Kenya' (1983) 27(1) *Journal of African Law* 42-61.

2.4 Ramifications of British Rule on Customary Laws and Practice

The colonial rule dismantled what was African and oriented Africans to perceive things from a European standpoint. This saw the African culture and values either criminalised or stigmatised and regarded as backward. A pre-colonial Kenyan society was built around a family unit characterised by a vibrant extended family, strongly networked to larger kin groups.

Although women and children were lumped together as weaker members who needed protection and guidance from older male members of the community, their interests were well protected. Whenever a misfortune befell a household and a father died, the deceased's property would be passed on to the eldest son or male relative with an obligation to take care of the deceased's wife and children.

The arrival of colonial powers alongside a system of capitalism and individualism, had an impact on African customary norms and practices. The British imposed a colonial State law whose interaction with customary law and practices lead to a further marginalisation of women. The colonial regime revitalised and emboldened an already patriarchal setting of tribal communities. Although the pre-colonial Kenya was predominantly patriarchal, protective mechanisms for women including widows and children existed. The adoption of the western culture, however, changed all that.

2.5 The Influence of Religion

Religion has traditionally played a significant role in discourse surrounding 'sex' and 'sexuality' especially when the woman is in question. The Roman Catholic, Greek Orthodox, and Protestant Churches conform to the Mosaic Law, also known as the Ten Commandments. Christians generally have a strong opposition to abortion and believe that abortion is equivalent to murder and it is a sin punishable by eternal fire. However, the Mosaic Law[96] does not identify abortion as killing of a human.[97]

> When two men fight, and one of them pushes a pregnant woman so that her fruit be expelled, but no harm (ason) befall (her), then shall he be fined as her husband shall assess, and the matter placed before the judges. But if harm (ason) befall (her), then shall you give life for life.

The above quote from Hebrew recognises the mother as an independent life because the penalty for her death is murder. 'Whereas a foetus is not considered a separate life from the mother, due to the fact that the penalty for an accidental miscarriage is a monetary fine.' There is no scriptural evidence that life begins at conception.

According to the Bible's Old Testament, the mere fact that there is a union between the sperm and the ovum is not a quantifier that the product is a living human being. The foetus is not a living person with a soul until after drawing its first breath. The Bible is quoted to say 'He breathed into his nostrils the breath of life and it was then

[96] A Spero 'A talmudic overview of abortion' (1990) *Midstream* 20-22.
[97] L Bronner, 'Is abortion murder? Jews and Christians will answer differently (1997–98), http://lilith.org/articlearticles/is-abortion-murder (accessed on 14 February 2019).

that the man became a living being'.[98] The act of breathing in was taken as evidence that the man was now a living thing.

Similarly, quoting the Old Testament 'The spirit of God has made me, and the breath of the Almighty gives me life'.[99] This is yet another scriptural confirmation that life can only begin at a point when something takes breath and not before. 'Thus says the Lord God to these bones: Behold, I will cause breath to enter you, and you shall live'.[100]

According to the Bible, the foetus is looked at in terms of a property and not a living being, simply because, the law awards a man a fine for anyone who causes miscarriage, in contrast, the law prescribes death penalty for anyone who causes death of the pregnant woman.[101] Therefore, the Bible has no explicit writing on the issue of life beginning at conception or a foetus being considered a living being. However, the Bible is clear that only after taking a breath is when a living being becomes a life.[102]

Kenya is considered to be a 'religious' country where issues of abortion are canvassed through highly emotional moralistic lenses. The approach is that abortion is a sin, and forbidden in the Bible, and that women procuring it commit murder, as it encourages moral decadence and promiscuity.[103] Christians commands up to 80% of the total population with Protestants leading followed by the Catholics.[104]

The Catholic congregation forms the highest number of Christians in Kenya, over a quarter of Kenyan population comprise of Roman Catholics. The National Council of Churches (NCCK) in Kenya brings together the Protestants churches. Whatever this outfits says regarding life and even contraception becomes the law among their followers. In Kenya, Churches control a sizable number of schools and health facilities in rural areas.

The different faiths have varied doctrines of what a woman should be and should not. The Catholics strictly follow church's moral teachings. These teachings have in many cases been drawn not from the Bible but what they refer to as, natural law, 'the innate sense of morality that they believe is written on people's hearts and can be divined by human reason'.[105] The Catholic teaches that the idealised vision of a woman should be that of unblemished, virginal and loving.[106]

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[98] The Bible Old Testament the book of Genesis 2:7.
[99] The Bible Old Testament the book Job 33:4.
[100] The Bible Old Testament the book Ezekiel 37:5.
[101] The Bible Old Testament the book of Exodus 21:22-23.
[102] J http://www.thechristianleftblog.org/blog-home/archives/10-2012 (21 June 2018)
[103] 'Anti-abortion: Catholic Church declines to hold requiem Mass for Caroline Mwatha' *The Sta*r 22 February 2019. See, https://www.the-star.co.ke/news/2019/02/22/anti-abortion-catholic-church-declines-to-hold-requiem-mass-for_c1898757 (accessed 25 February 2019).
[104] https://www.knbs.or.ke/religious-affiliation/ (21 June 2018).
[105] http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c3a1.htm.
[106] R Hamilton '*The liberation of women: A study of patriarchy and capitalism*' (1978).

Unlike the Catholics who look upon priests to offer guidance to congregations, Protestants promote the role of men in a family relationship as spiritual heads and authority. They often quote bible verses like, '…but I want you to understand that the head of every man is Christ, and the head of the woman is man, and the head of Christ is God'.[107]

In the Islamic faith, all human beings are equal before Allah. However, the division of roles or rather expectations of men to head household and women to take up primary role of child bearing negates the claim 'all human beings are equal before Allah'.[108]

The growth of religious doctrines, practices and teachings in Kenya during the colonial era, strengthened existing patriarchal structures institutionalising the idea of male dominance in all decision-making structures. The fusion between the long standing cultural practices coveting large families and religious teaching that a woman's body belongs to her husband practically reduced a woman into a vessel of reproduction.

Culture and religion placed high expectations on the woman in terms of bearing children at all cost without a consideration of her welfare. A woman carried blame for whatever happened to the pregnancy or even a failure to conceive, despite the fact that in some cases men turned out to be the problem.

2.6 History of Criminalisation of Abortion

As noted earlier, pre-colonial Kenya was governed by customs, traditions and norms that formed the 'unwritten laws' commonly known as customary laws. These laws offered guidance on issues that concerned family relations such as property inheritance, marriage, as well as sexuality. Women were allowed to access abortion under certain circumstances though not openly talked about. This is a great departure from the current criminalised and stigmatised abortion environment.

In the pre-colonial Africa, including Kenya, social limitations on abortion were never a common phenomenon. History shows that abortion was tolerated and not a hidden practice.[109] The first technologies used to procure abortion in the Continent are traceable to the Ancient Egypt.[110] The pre-colonial communities used abortion to regulate population size, but most importantly to control pregnancies that resulted from rape or involving young and unmarried women.[111]

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[107] The bible New Testament the book of 1 Corinthians 11:3.

[108] NA Shah 'Women's human rights in the Koran: An interpretive approach' (2006) 28 4 *Human Rights Quarterly* 868-903.

[109] V Lema &P Njau '*Abortion in Kenya: Traditional approach to unwanted pregnancy*' (1990).

[110] G Devereux *A Study of abortion in primitive societies* (1976) .

[111] T Braam and Z Dangor '*Giving sexual reproductive choice a regional voice*' SADC Research Project Reproductive Rights Alliance 2002.

Laws criminalising abortion never existed in the precolonial Kenya. The current domestic laws have their roots in the 18th century Europe.[112] The crime and punishment approach to regulating abortion transplanted to Kenya by Britain, 'disproportionately affects women's reproductive health, right to life, a dignified life and right to agency'.[113]

It is also critical to note that Britain has since repealed and liberalised abortion laws whereas Kenya maintains a hold on the laws to the detriment of women.[114] Africa, particularly Kenya, remains entrapped in 'history by analogy' where western civilisation and legal practices have erased and replaced what was Africa.[115] The impact of these laws to the African continent, and Kenya in particular, is evident in the burden of unsafe abortion leading to high maternal mortality and morbidity including women left with disabilities.[116]

The British influence saw the copy-pasting of the Offences against the Person Act of 1861, to Kenya's penal code provisions on abortion. Kenya was bequeathed section 58 and 59 of the Act. These sections made it an offence for a woman to 'unlawfully' procure an abortion and punish any person who supply a woman with means to unlawfully procure an abortion.[117]

The drive behind criminalistion of abortion by colonial laws was not only aimed at protecting the unborn but also served a dominantly patriarchal political class and economy.[118] The laws intentionally omitted the role of men in reproductive health, particularly the gestation period, making it a woman's pre-occupation.[119]

It is critical to note that framers of the colonial law ensured that it is stigmatising by using phrases like 'illegal', 'criminal', 'unlawful' and 'not permitted': the net effect is negating women quest for autonomy and agency over their bodies. By asking for access to abortion or procuring one, women would be branded as criminals, prostitutes or murderers[120].

British abortion law's use of the adjective 'unlawfully' to criminalise abortion was interpreted to mean that there was not total ban. The understanding was that not all

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[112] C Ngwena 'Access to abortion: Legal developments in Africa from a reproductive and sexuality rights perspective' (2004) 19 *SA Public Law* 328-349.
[113] BM Knoppers, et al 'Abortion law in Francophone countries' (1990) 34(4*) American Journal of Comparative Law* 889.
[114] *R v Bourne* [1938] 3 ALL ER 615, [1939] 1 KB 687, Crown Court of England and Wales
[115] ENW Kisiang'ani 'Decolonising gender studies in Africa' (2004) in Bibi Bakari et al (Eds) *African Gender Scholarship; Concepts, Methodologies and Paradigms* CODESRIA 24-36.
[116] C Ngwena 'Conscientious objection to abortion and accommodating women's reproductive health rights: reflections on a decision of the Constitutional Court of Colombia from an African regional human rights perspective' (2014) 58 *Journal of African Law* 183-209.
[117] https://www.legislation.gov.uk/ukpga/Vict/24-25/100/contents (accessed on 15 August 2018).
[118] RJ Cook and B Dickens 'Human rights dynamics of abortion law reform' (2003) 25 *Human Rights Quarterly* 1 at 8–9.
[119] RJ Cook and S Howard 'Accommodating women's differences under the women's anti-discrimination convention' (2007) 56 *Emory Law Journal 1039* at 1070–83.
[120] RJ Cook Stigmatised meanings of criminal abortion law in RJ Cook et al (eds) 'Abortion law in transnational perspective: Cases and controversies' (2014) 347 at 351.

abortions were illegal, circumstances existed where in which abortion could be procured 'lawfully'. The lawful circumstance was generally to save the life of the pregnant woman, otherwise 'therapeutic defence'. However, beyond the immediate need to get a woman out of danger, it was not clear if abortion services were available lawfully under other circumstances.[121]

2.7 Post Independence

At independence, Kenya unlike other most African countries, was the first country to enter the transition to lower fertility, and was seen as to 'hold up good prospects as a new regional model'. 'More generically, Kenya had been the *Enfant Cherie* (highly favoured) of Western countries, a similar position held by Nigeria before the 1967-70 *Biafra War*.[122] Kenya experienced relative political stability during this period that was accompanied by socio-economic growth. The country attracted foreign investment and aid flow.

However, in early 1980s and after an aborted coup against the government of former President, Daniel Toroitich Arap Moi, things started souring. In order to have a strong hold on power and silence critics, the one-party State started crackdown on critics and was accused of high profile assassinations, corruption, dictatorship, and curtailed clamour for democracy. The growing disillusionment with the new government plummeted Moi's popularity.[123]

The leaders in post-independence Kenya supplanted inherited colonial systems and institutions that benefited a few individuals ensuring their survival and continued hold onto power. The resultant system, commonly referred to as 'neo-patrimonialism', favoured 'vertical distribution of resources' which gave rise to patron-client networks based around a powerful individual or party'.

Apart from being behind misuse of aid and state budget, neo-patrimonialism affected policy making particularly that which concerned women rights and freedoms. The country eventually fell out of favour from the then West and no longer enjoyed their favour. Despite this development, Kenya had a well-educated elite making the country remain a better option compared to her neighbours.

As discussed in the preceding paragraphs, Kenyan societies at independence were guided by traditional values and societal norms. Sexuality and sexual practices were more or less considered 'taboos'. Advocating for sexual rights, safe abortion and reproductive choice was not a common discussion. The debate on abortion in the post-independent Kenya is better understood by exploring the controversy around family planning.

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[121] C Ngwena 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783, 787-797.
[122] A Kulczycki *Abortion in Kenya: The tyranny of silence* (1999).
[123] A Thompson *An introduction to African politics* (2004). See, G Erdmann and U Engel *Neopatrimonialism revisited beyond a catch-All concept, legitimacy and efficiency of political systems* (2006) GIGA working papers 16. See www.giga-hamburg.de/workingpapers (accessed on 1 July 2019).

A few years after attaining independence, Kenya faced the challenge of a steadily growing population. Now the young nation's overreliance on donor funding meant that the population growth was not good for economic growth hence pressures from international donors. In 1967, Kenya became the first country in Africa to adopt a population policy, after recording the highest natural population increase in the world at 4.1%.[124]

The debate about family planning for a long time remained a sensitive one, largely because of religious leaders opposition coupled with society's preference of large families. The National Council of Churches of Kenya (NCCK) have had a soft stance on the issue accepting the need for family planning.[125] In order to ensure continued donor aid, President Jomo Kenyatta introduced family planning services in government hospitals. However, the strategy failed due to lack of political will to convince Kenyans that the nation's economic growth depended on the lowering population.

In 1980s, the population of Kenya soared to the global highest growths rates of 3.8%. Faced with prospect of a shrinking economy, it was time for retired President Moi's government to reassure development partners of his commitment to tame the ever-increasing population. Moi reformed reproductive health sector by massively expanding the available infrastructure, which included the setting up of a National Council on Family Planning.

2.8 The Rise of the Abortion Question in Kenya

The increased commitment to family planning by the government of President Moi, worried Catholic bishops who perceived it as a move to legalise abortion. They argued that, 'nothing would more effectively destroy the moral fabric of our people than to legalise abortion'.[126]

In these early years of independence, government officials shied away from taking up family planning debate but chose to have private sector take the lead. Public discourse on access to abortion remained episodic and highly emotive. However, the low prevalence of contraceptives among young persons aged between 15 and 24 in the 1980s resulted to high rate of unwanted pregnancies a fact that made abortion more acute and visible.

Like many other countries, the debate on abortion was first driven by medical professionals, who had to deal with abortion under the punitive laws. In 1990s, at the peak of calls for multiparty system of governance, only senior public officials came

[124] RS Robinson 'Population policy adoption in Sub-Saharan Africa: An interplay of global and local forces' (2016) 13 (1) *Population horizons* 9–18.
[125] http://www.ncck.org/newsite2/(8 August 2018).
[126] C Chiweni et al 'The evolution of population policies in Kenya and Malawi' (2005) *Population Research and Policy Review*.

out publicly to advocate for reforming abortion laws. Led by senior officials at the MOH, they appealed for legal provisions of abortion service on health grounds.

Further, in 1991, the Kenya Law Reform Commission (KLRC) indicated that existing law might have been obsolete and made recommendations to the effect that abortion be legally permitted in case of rape.[127] There was call from senior MOH officials on improving post-abortion care.

2.9 A History of Ambivalence

Since the country's independence in 1963, Kenya has never taken a position on abortion. The government's position on abortion has been complex and often contradictory.[128] Successive governments have chosen to be ambivalent, opting for less controversial reproductive health issues. The seemingly 'strategic' position is informed by politics of populism, where those in power avoid culturally and religious sensitive issues that would upset their political masses.

This fence-sitting approach and failure to articulate a clear and consistent standpoint on abortion issue, has been sustained by neo-patrimonial politics and patriarchy. The two influence the interaction of gender debates and political practices that have come to shape the process of dealing with abortion. Public policy and discussion in Kenya, since independence, have significantly been shaped by neo-patrimonial politics. In order to secure their political seats or hold onto power, politicians have served the interest of tribal patriarchs and religious leaders who have always been anti-women's rights particularly access to abortion.

The 1938 *R v Bourne* case that was decided in England, transformed abortion laws in the country.[129] The case was the first case that challenged clauses under which abortion was provided legally within England law. The statute harbours similarity with the Kenya's Penal Code Sections 158–160 inherited from Britain.

The *Bourne* case involved a doctor who offered abortion service to a minor who had been raped. In the case, a high court judge interpreted the existing law to mean that a 'lawful' miscarriage can be procured 'if done in good faith for the purpose only of preserving the life of the mother'. The court ruled that any action taken in the interest of saving a woman's life is lawful.

In effect, the *Rex* case meant that mental and physical health being of the woman was indeed an exception to the criminalisation of abortion in England. Unfortunately, the post independent Kenya failed to rise up to the occasion to reform its abortion law it was bequeathed by Britain. The expectation of many is that Kenya operating under the common law principle, would automatically adopt the authoritative interpretation of that law. The ruling should have percolated into its system prompting re-alignment.

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[127] http://www.klrc.go.ke (8 August 2018).
[128] L Thomas *Politics of the womb; women, reproduction, and the state in Kenya* (2003) 9.
[129] *Bourne* (no 12 above).

In 1959, the then East African Court of Appeal[130] reaffirmed the *Rex* Case ruling in the case of *Mehar Singh Bansel v R.*[131] This was an abortion case which was appealed from the Supreme Court of Kenya. The Supreme Court had earlier on ruled that 'lawful abortion is that which is conducted with a good medical reason,' interpreted by the court as done 'for the purpose of saving the patient's life or preventing severe prejudice to her health.[132]

Similarly, Kenya Medical Professional Conduct and Discipline (Code of Conduct), reflects the same understanding that: 'there is room . . . for carrying out termination when in the opinion of the attending doctors it is necessary in the interest of the health of the mother or baby'.[133] The Code of Conduct, offers medical practitioners guidance in their work. The Code does not however, provide an interpretation of who should perform abortion procedure. The Code identifies trained medical doctors, leaving out health care practitioners such as trained midwives, nurses and clinical officers to provide abortion services.

Unfortunately, to-date there has not been an interpretation or definition of the content of 'preservation of the mother's life' as provided in the penal code, despite the fact that Kenya has chosen to retain the colonial law. Nevertheless, the Attorney General once advised that, though it has not been specifically tested in courts, it was probable that the extended definition of 'unlawful' given in *Bourne's* case would now apply in Kenya. The failure to have court's interpretation leaves the matter unclear.

In 2004, the MOH developed National Guidelines on Management of Sexual Violence in Kenya.[134] The Guidelines are designed to give general information about management of sexual violence in Kenya. The Guidelines focus on the provision of services that address all the needs of a sexual violence survivor, including medical, psychosocial, humanitarian and/or legal. Mental and physical health of the mother is listed as a ground for accessing legal abortion, other include rape or incest.

The clamour for a new Constitution from late 1990s shifted the reproductive health debate to whether abortion should be legalised. The 2005 draft constitution which was rejected at a referendum that year, and the Constitution promulgated in 2010, expressly prohibited abortion with exceptions of circumstance where a woman's life would be endangered if a pregnancy were to be carried to term.[135] Both gave Parliament powers to enact legislation that would provide more information and possibly expand the grounds.[136]

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[130] The defunct East African Court of Appeal was a court of appeal from decisions of the National Courts on both civil and criminal matters.

[131] *Mehar Singh Bansel v R (1959) EALR 813*

[132] As above.

[133] See http://medicalboard.co.ke/resources/Code-of-Professional-Conduct-and-Discipline-6th-Edition.pdf (accessed on 12 May 2018).

[134] See http://www.endvawnow.org/uploads/browser/files/national_guidelines.pdf (accessed in 10 May 2018)

[135] Draft Constitution of Kenya (2004) Part II, section 34(3).

[136] *The East African Standard* 26 October 2005.

However, before the Constitution was adopted, a Committee of Experts on the 2009 draft constitution included right to life under the Bill of Rights section. The inclusion of right to life did not go well with religious groups, who demanded inclusion of a clause indicating that life began at conception. In order to strike a balance, the Committee of Experts included the religious leader's recommendations, but also included the sentence that abortion could be lawful if in the opinion of a single registered medical practitioner that the life of a pregnant woman is in danger.[137]

2.10 Conclusion

The modern Kenya bears great influence of its coloniser, from the cultures, religion, politics as well as legal and policy frameworks transplanted by the Britons. Despite a strongly entrenched patriarchal system, with conservative cultural and religious groups, the wheel of reforms for rights of women kept rolling. The decades long constitutional reforms marked a turning point for women reproductive rights particularly access to abortion, when the Committee of Experts included clauses on reproductive health rights and its subsequent adoption by Parliamentary Select Committee as a Draft Constitution.

[137] The Committee of Experts was tasked to harmonise the perspectives and opinions of Kenyans reflected in the various draft constitutions that have been drawn over the years.

CHAPTER THREE

Kenya's International Human Rights Obligations on Abortion

3.0 Introduction

This chapter explores Kenya's international obligations on health particularly on access to abortion services by women. The Chapter finds that Kenya already enacted the Treaty Making and Ratification Act. The enactment gives effects to article 2(6) of the Constitution, laying down procedures for the making and ratification of treaties. The Constitution provides that all international laws, treaties and conventions, among other instruments, which Kenya has ratified, are Kenya's laws. This chapter therefore, finds that Kenya has active obligations under the UN Covenant on Economic, Social and Cultural Rights (CESCR), the CEDAW and the African Charter on Human and Peoples Rights (African Charter) and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

IHRL recognises the right of every person to the highest standards of health, including reproductive health, approached in a wholesomeness as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'[138] Further, it is dependent on and critical for the realisation and the exercise of other rights such as the right to equality and non- discrimination, privacy and the prohibition against torture.[139]

The growth of strong IHRL standards and norms that recognise abortion as a human rights imperative has significantly influenced jurisprudence and law reform at domestic levels across the globe. The IHRL offers robust jurisprudence than what is available from domestic precedent, giving room for more expansive interpretations and more authoritative defence for progressive principles.[140] At national level, High Courts have relied on international human rights standards in determining whether their domestic laws and practices adequately secure women's reproductive autonomy.

Following independence, Kenya adhered to a dualist system whose effect was that international treaties and obligations did not take immediate effect and required implementation through domestic legislation. However, under the new Constitution of 2010, article 2(6) provided that any treaty or convention which is duly ratified 'shall form part of the law of Kenya', this implies that instruments such as the ICCPR, ICESCR and CEDAW are part of Kenyan laws.

Therefore, Kenyan courts are effectively under an obligation to conform to international standards and norms, failure to comply, international responsibility may

[138] http://www.who.int/about/definition/en/print.html.(acccessed February 2019)
[139] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.
[140] South Africa Litigation Center Litigation Manual Series 'Dismantling the gender gap: Litigating cases involving violations of sexual and reproductive health rights (2013).

be imposed on it. While interpreting the law, Kenyan courts are required to canvas international instruments that Kenya has ratified and those that form part of the general rules of IHRL. The import of this requirement is that there are non-traditional sources of law that could affect the judicial process and participation of the people in that process. Although international legal frameworks have not explicitly referred to abortion within human rights treaties, decisions and interpretations from Treaty Bodies or Committees overseeing the implementation of the instruments have clarified how treaty provisions should be implemented in relation to abortion.

3.1 Regional Human Rights Instruments

The African Charter covers a range of rights including health, not only does it protect rights of individuals but also peoples making it a unique international human rights system. The Charter also imposes duties and obligations to member states.[141] Right to health in the Charter is enshrined in article 16.[142] The Maputo Protocol is one of the instruments adopted under the Charter that specifically protects the right to health including reproductive health. It also prohibits violence against women, including sexual violence, discrimination and harmful practices.

Although Kenya ratified the Maputo Protocol, she entered into a reservation on article 14(2)(c), which contains provisions calling on African states to ensure women can access abortion services in cases of incest, sexual assault and rape; and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.[143] However, Kenya still has an obligation to implement this provision since the new constitution renders the reservation inconsequential. The African Commission further has recognised that inadequate access to safe abortion and post-abortion care could result in violations of the rights to privacy, confidentiality, and freedom from discrimination and cruel, inhuman, or degrading treatment.[144]

The African Union at the Special Session of Ministers of Health in Maputo, Mozambique in September adopted Maputo Plan of Action, where Kenya committed to reduce incidence of unsafe abortion in the country. Kenya committed to adopting strategies such as the training of service providers on the provision of comprehensive abortion care services and on the prevention and management of unsafe abortion.

Similarly, and most recent, the Africa Commission has also expressed concerns on the maternal mortality situation in Kenya emanating from unsafe abortions. In their concluding observations following the states review in 2016, the commission called

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[141] African Charter (n 66 above)

[142] African Charter, art 16(1)(2) 'Every individual shall have the right to enjoy the best attainable state of physical and mental health. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.'

[143] Maputo Protocol (n 27 above)

[144] African Commission on Human and Peoples' Rights, General Comment No. 2 on Art 14.1 (a), (b), (c) and (f) and Art 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

on Kenya to fast track the law on abortion and resolve some of the obstacles impeding the passing of the law by sensitising religious leaders on the consequences of unsafe abortion and finalising the draft standards and guidelines on abortion.[145] This has clearly not been acted on and the statistics of unsafe abortions, complications, injuries and deaths continue to soar.

3.2 International Human Rights Treaties

The Maputo Protocol is the only legally binding international instrument that explicitly declares abortion as a human right.[146] However, other IHRL instruments have developed jurisprudence via the various Committees that directly respond to abortion. These include the rights to life, health, reproductive autonomy, freedom from cruel or inhuman treatment and the right to equality and non-discrimination.

In 1994, at the United Nations International Conference on Population and Development (ICPD) meeting in Cairo, states committed to considering the consequences of unsafe abortion on women's health, and to deal with the health impact of unsafe abortion as a major public health concern.[147] As part of the states that made the commitment, Kenya is expected to be accountable to this commitment by putting in place measures that will ensure access to abortion services.

In 1995, at a Fourth World Conference on Women, there was a further commitment by states to 'consider reviewing laws containing punitive measures against women who have undergone illegal abortions'.[148] The subsequent ICPD Programme of Action (PoA) placed an obligation and a duty on states as far as protection of reproductive rights is concerned on all legally binding treaty bodies.[149]

Kenya ratified CEDAW in 1985, which became part of her laws after the promulgation of the Constitution in 2010. According to the CEDAW Committee, which was charged with the responsibility of monitoring the implementation of CEDAW instrument, states have a number of obligations that are critical in the realisation of the convention's objectives. First, is ensuring the absence of discriminatory laws against women; second is to improve the *de facto* position of women; and third, to address prevailing gender relations and the persistence of gender stereotypes. The Committee has clarified that states must take measures to ensure that the life and health of women is prioritised over protection of the unborn.[150]

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[145] http://www.achpr.org/states/kenya/reports/8th-11th-2008-2014/(accessed June 2018)
[146] Medical Board (n 21 above).
[147] United Nations Population and Development, Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994 (1994) (ICPD).
[148] The Beijing Declaration and The Platform for Action, Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, para. 106K, U.N. Doc. A/CONF.177/20 (1996).
[149] As above
[150] LC v *Peru*, CEDAW Committee, CommunicationNo. 22/2009, para. 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011).

During the 2017 review, the CEDAW Committee made specific recommendations to Kenya that included amending the penal code and decriminalisation of abortion, particularly in cases of rape, incest, severe foetal impairment and risk to the health or life of the pregnant woman. Secondly the CEDAW Committee recommended that Kenya should ensure women can access high-quality post-abortion care, especially where complications arise from unsafe abortions and reinstate the abortion guidelines.[151] As a state party to CEDAW, Kenya has a responsibility on the commitment not to criminalise women for seeking healthcare services, and to remove punitive provisions imposed on women who undergo abortion in order to comply with CEDAW.[152]

Kenya ratified ICCPR in 1976. The Convention guarantees freedom from discrimination under article 2(1).[153] The Human Rights Council (HRC) has interpreted article 6(1) on right to life, imposing an obligation on states to inform HRC of 'any measures taken by the states to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.'[154]

Similarly, in order to comply with the ICCPR, states have the responsibility to update HRC on any laws and practices that are likely to hinder women from enjoying rights guaranteed in the Convention, particularly the right to privacy and others protected under article 17 including laws that compel or impose a legal duty to doctors to keep records and report cases of women who have undergone abortion. Additionally, Kenya has an obligation to report to the HRC on measures taken to reduce the high maternal mortality rates related to unsafe abortion in the country during its Universal Periodic Review (UPR) cycles.

3.3 Conclusion

The protection and promotion of sexual and reproductive health has evolved overtime from the era of denial and violation. Reproductive rights are now grounded in a range of fundamental human rights guarantees, protected in both human rights instruments as well as international and regional human rights treaties. The IHRL has provided a forum where SRH issues have been discussed. There is now greater awareness among international human rights systems that reproductive rights form part of existing human rights provisions in international treaties. This has in turn provided an opportunity for holding states accountable to treaties and other consensus documents documents.

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[151] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations on the sixth periodic report of Jordan*, 9 March 2017, CEDAW/C/JOR/CO/6.

[152] Committee on the Elimination of Discrimination against Women, *General Recommendation 24, 'Women and Health'*, U.N. Doc. A/54/38/Rev.1, 1999, Para 14. See, the *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Colombia*, 02/05/1999, A/54/38.

[153] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[154] Human Rights Committee, *General Comment No. 28: Equality of rights between men and women* (article 3), para. 10, U.N. Doc. CCPR/C/21/Rev.1/ Add.10 (2000).

CHAPTER FOUR

Comparative Analysis of Jurisprudence on Abortion Laws

4.0 Introduction

In an effort to offer an interpretation of article 26(4) of the Kenyan constitution with special attention to lessons from the Abortion Act, this Chapter makes a comparative analysis of jurisprudence on how abortion has been legislated and adjudicated in other jurisdictions. Additionally, the Chapter deduces comparative lessons for Kenya from approaches adopted in Britain specifically through the *Bourne* landmark case that definitively expanded grounds for abortion to include physical and mental health of a woman. This study believes that the discussions that will ensue in this Chapter offers best practices for Kenya. The *Bourne* case has been cited in many jurisdictions especially in commonwealth countries making it important to review Kenya'.

The influence of German and United States constitutional law and jurisprudence is critical to this study as it shaped the rights-based approach to abortion discourse at the resultant laws. *Roe v. Wade* has been reviewed based on its recognition of women's right to privacy. The study has also featured Latin America because of the most innovative and progressive judgments from international human right tribunals, Supreme Courts and Constitutional courts that constitutionalised and judicialised abortion rights.

A special focus is on Colombian Supreme Court for leading the pact in liberalising abortion laws. The Court highlighted the link between right to life and health care, as guaranteed by the recently adopted laws. The study will reveal that Colombian jurisprudence is particularly helpful to Kenya.

4.1 Why Comparative Analysis

The comparative analysis of jurisprudence, particularly from Western countries is pertinent to Kenya and Africa in general because their abortion laws borrow largely from the West. Furthermore, these bequeathed laws have had and continue to constitute a significant influence on the restrictive features of Kenya's abortion law. The Penal Code's sections 158, 159 and 160 prohibits abortion, and only provides exception when conducted to save the life of the mother.

A comparative study will further, serve as a compelling and rational appeal to policy- and decision-makers to review statutes that are out of synch with best practices from peers. Evidence shows that judicial systems that appreciate or share same thoughts on

human rights are most likely to churn out jurisprudence that can be adopted and applied far and wide.[155]

Similarly, extensive comparative analysis helps to illustrate how a broad relative perspective helps in bringing to the fore the roles of Courts and legislature in shaping abortion policies. Kenya's abortion discourse stands to benefit from this comparative analysis from its authority, and also failures and loopholes in other jurisdictions. Comparative analysis afford jurisdictions an opportunity to adopt what is similar, persuasive and authoritative enough, and drop what is not compatible.[156]

4.2 Abortion Law in Africa

In order to strike a better comparative analysis of abortion laws, it is critical to have an understanding of the roots of existing abortion laws in Africa and then Kenya. As already discussed in Chapter one, a majority of African countries got their abortion laws from Europe. The abortion laws came with the colonisers; Anglophone Africa got her laws from the 1861 English Offences Against the Person Act and to some extend the ensuing English court interpretations.

Although none of the African countries has an absolute ban on abortion providing access under limited and strict circumstances, access remains aspirations to women even where they meet the legal exceptions. All African states permit access to abortion to save a woman's life.[157] At least twenty-nine states permit abortion to preserve a woman's health, with nine including mental health as a ground,[158] and one limiting it to physical health.[159]

Similarly, eighteen states allow abortion in cases of rape or incest,[160] whereas, fifteen permit it in cases of foetal impairment.[161] Since the continent attained self-determination, no domestic Court has authoritatively made an interpretation of abortion laws in a way that promotes rights of women to access abortion services.

4.3 Jurisprudence from Western Countries

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[155] H Botha 'Comparative law and constitutional adjudication: A South African perspective' (2007) 55 *Jahrbuch Des Ö entlichen Rechts Der Gegenwart* 569–598.

[156] C Ngwena 'Developing regional abortion jurisprudence: Comparative lessons for African charter organs' (2017) 31(1) *Netherlands Quarterly of Human Rights* 9-40.

[157] Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Dijbouti, Equatrial Guinea, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Maldives, Morocco, Mozambique, Namibia, Niger, Rwanda, Seychelles, Sierra Leone, Swaziland, Togo, Zimbabwe. See Center for Reproductive Rights, World's Abortion Laws (2012).

[158] Algeria, Botswana, Gambia, Ghana, Liberia, Namibia, Seychelles, Sierra Leone and Swaziland. See Center for Reproductive Rights, World's abortion laws (2012).

[159] Zimbabwe See Center for Reproductive Rights, World's abortion laws (2012).

[160] Benin, Botswana, Burkina Faso, Burundi, Cameroon, Ethiopia, Ghana, Guinea, Lesotho, Liberia, Mali, Namibia, Seychelles, Rwanda, Sudan, Swaziland, Togo and Zimbabwe; See Center for Reproductive Rights, World's Abortion Laws (2012).

[161] Benin, Botswana, Burkina Faso, Chad, Ethiopia, Ghana, Guinea, Lesotho, Liberia, Namibia, Niger, Seychelles, Swaziland, Togo and Zimbabwe; See Center for Reproductive Rights, World's Abortion Laws (2012).

The liberalisation and strengthening of criminal abortion regimes in western countries stemmed largely from the discourse on the usefulness and the harm that comes with imposition of restrictions on a women's agency in decisions concerning motherhood. The abortion discourse in the 1970's did not result in a consensus as a section of courts insisted on the need for protecting fundamental human rights of a pregnant woman about motherhood, while others were of the opinion that governments' intervention in controlling the decision of a pregnant woman to terminate pregnancy was necessary to protect the unborn.
States have been called upon to remove barriers to abortion services, including ensuring full implementation of existing abortion laws. States ought to broadly interpret and implement abortion laws to promote and protect women's fundamental human rights. Decisions by courts have gone further to reiterate state's responsibility to ensure that these rights can be enjoyed by making abortion services available and accessible to poor women at the most convenient locations.[162]

4.3.1 The Great Britain Jurisprudence

In Great Britain, abortion is legal under most circumstances in England, Wales and Scotland based on the Abortion Act (AA) 1967.[163] The AA vindicates abortion as lawful activities that were constituted as a crime under the Offenses Against Persons Act (OAPA).[164] The OAPA was enacted during the reign of Queen Victoria, where women rights were unheard of; right to own property, right to vote and issues of women sexuality were unthinkable.

The enactment of the AA mitigated the retributive effects of the OAPA through the therapeutic exception.[165] The AA legalised abortion with conditions that the service must be offered by registered medical practitioner, authorisation must be by two doctors, acting in good faith and on grounds that continuance of the pregnancy:

(a) would involve a greater risk to the life of the pregnant woman than the termination of the pregnancy;
(b) or that it would involve a greater risk of injury to the physical or mental health of the pregnant woman than the termination of the pregnancy;
(c) or that it would involve a greater risk to the physical or mental health of any existing children of the pregnant woman's family than the termination of the pregnancy;
(d) or 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.

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[162] Ngwena (n 40 above).
[163] Abortion Act 1967 (as amended), s1.
[164] Offences Against the Person Act 1861.
[165][165] PH Addison 'The impact of the abortion Act 1967 in Great Britain' *Delivered to the Canadian Medical Association on* 11 *June* 1969.

Doctors have been given an important recognition and role to play as gatekeepers in access to abortion.[166] The AA further places restrictions on places where abortion procedure should be offered.[167]

Although there has been agitation for reforming the AA, it was amended once in 1990.[168] The upper time limit for abortion under section 1(1)(d) was extended. This rendered abortion potentially lawful until term in the presence of a substantial risk of serious foetal anomaly. In the amendment to section 1(3)(a), requirement for seeking a second opinion was struck out. However, as mentioned above, the abortion legal infrastructure is still rooted in the OAPA, which is archaic and requires an overhaul.

Furthermore, three decades before the enactment of the 1967 Act, a challenge to the scope of the OAPA had been mounted in the *Bourne* case. Bourne was prosecuted for unlawfully terminating pregnancy of a 15-year-old girl gang-raped by a contingent of soldiers. He was charged under section 58 of the OAPA.

In his ruling, the trial judge held that performance of abortion procedure in order to not only save life of a pregnant woman but also her physical or mental health was within the lawful parameters under the Act.[169] The substance of the ruling was that the interpretation created an explicit life, physical and mental health exception to the criminalisation of abortion.[170]

The *Bourne* case was pivotal in the development of abortion law across the Commonwealth countries. It effectively expanded the interpretation of sections 58 and 59, which provided a limited therapeutic exception of saving the life of the mother. The expansive interpretation considered preserving the physical and mental well-being of the woman as grounds for abortion. The decision in the case was subsequently adopted in most common law jurisdictions.[171]

The judgment is a highly persuasive authority that gave clarity while expanding the interpretation of the health ground for abortion in England. It is significant to Anglophone Africa, as it addressed the same law that was transplanted to African colonies. As such, the decision provided an important transition from the ninetieth to twentieth century interpretation and development in legal responses to abortion.[172]

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[166] S Sheldon '*Beyond control: Medical power and abortion Law*' (1997).

[167] Except in an emergency, under section 1(3) any treatment for the termination of pregnancy may only be performed in NHS hospitals or places approved by the Government.

[168] A new section 3a provided a specific power to approve a 'class of places' for the performance of medical abortions; section 5(2) clarified that both the AA and OAPA are engaged in the context of selective reduction of a multiple pregnancy; Section 5(1) extended the AA to offer protection from prosecution under the Infant Life Preservation Act 1929 (ILPA) In addition to the various other drafting problems with the AA discussed below, it is noteworthy that this section is worded so as apparently to offer protection only to the doctor and not to other healthcare professionals involved in the termination.

[169] *Buorne* (n 12 above))

[170] RJ Cook & BM Dickens Abortion laws in commonwealth countries (1979) 13.

[171] RJ Cook & BM Dickens 'Human rights dynamics of abortion law reform' 25 *Human Rights Quarterly* 1–59.

[172] M Thomson 'Abortion law and professional boundaries' (2013) 22(2) *Social & Legal Studies* 191–210

West African Court of Appeal (The court, which is now defunct, at the time of the decision it served as an Appellate Court with civil and criminal jurisdiction) unanimously adopted that judgment.[173] In East Africa, the East African Court of Appeal(currently defunct), upheld the common law standards for legal abortion, where a doctor had been convicted to manslaughter after a woman died following abortion procedure. The case involved a surgeon who was convicted of manslaughter in Kenya following an abortion-related procedure in which the woman died.

The standard, reflected in the *Bourne* case which held that "abortion is permissible if the doctor holds the honest belief that an abortion is necessary to save the life of the mother or prevent "serious prejudice to her health."[174] The East African Court of Appeal affirmed the Kenyan court's conclusion that had convicted the doctor for manslaughter.

In 1977, the Kenya government commented on *Bourne* case in relation to its applicability affirming that the case could be applied in the country though it was yet to be tested in the courts.[175] The Attorney General, in further comments, indicated that 'legal grounds for abortion in Kenya included preservation of the woman's life and her physical and mental health and cases of rape or incest, depending on the effect of the crime on a woman'.[176] However, this discussion never translated into any meaningful reforms to existing abortion laws in the country.

4.3.2 Jurisprudence from The United States of America

In 1973, the United States Supreme Court nullified a nineteenth century criminal law prohibiting abortion except to save a woman's life. The court also did away with a twentieth century law that permitted abortion based on indications that are more expansive. In *Roe v Wade,* the Supreme Court recognised the "right to privacy" that protected a pregnant woman's liberty to choose whether or not to have an abortion.[177]

In dealing with the issue of competing constitutional values, the court set 'trimester framework' that allowed the state's restrictions on abortion to protect the unborn only at the point of viability. Therefore, the state has legitimate reason to regulate women's abortion decision as gestation period advances.[178] The above approach helped mediate the apparent competing interest by allowing women to have autonomy in deciding whether they want to keep pregnancy in the early periods of gestation while setting conditions to be met as the pregnancy advances.

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[173] *R v Edgal, Idike and Ojugwu* (1938) WACA 133, decision of the West African Court of Appeal.
[174] *Mehar Singh Bansel v R* (n 126 above).
[175] Letter from Attorney General to Commonwealth Secretariat, Legal Division (April 26, 1977), Ref. No. 5067/12 II (98).
[176] Letter (questionnaire response enclosed) from Attorney General to Commonwealth Secretariat, Legal Division (Oct. 7, 1976), Ref. No. 5057/12 II(58).
[177] *Roe v Wade* 410 US 113 (1973).
[178] Siegel (n 78 above).

Although the trimester's approach was abandoned in *Planned Parenthood of Southern Pennsylvania v Casey*, with State's interest in protecting the unborn being reinstated throughout the gestation period. The State cannot unduly overburden women to carry pregnancy to term.[179]

In the case of *Doe v. Bolton,* the Court found four provisions invalid and a violation of the 14th amendment. The provisions included the requirement for the procedure to be done in an accredited hospital, the requirements for a hospital abortion committee's approval, the corresponding confirming of two other physicians, and the residency requirement in Georgia.[180]

Similarly, the US Supreme Court in the case of *Stenberg v Carhar* held that a prohibition on "partial birth abortions" which included the most commonly used method for performing pre-viability second semester abortions, dilation and extraction, unduly burdened a woman's right to choose an abortion. It also held that the prohibition would subject physicians who performed the procedure to a "fear of prosecution, conviction and imprisonment," which further imposed an undue burden on a woman's right to choose an abortion.[181]

4.3.3 The German Constitutional Court

The German Federal Constitutional Court decision of 1975 was a big contrast to the US Supreme Court, as it dropped an earlier decision that decriminalised abortion holding that it violated the Basic Law.[182] According to the Court, 'the life which is developing in the womb of the mother is an independent legal value which enjoys the protection of the Constitution.'[183]

The Court's thinking at this particular time was that life existed and that the state had a duty to protect the unborn. The Court therefore made a conclusion that, 'legal order may not make the woman's right to self determination the sole guideline of its rule making'. 'The state must proceed, as a matter of principle, from a duty to carry the pregnancy to term.'[184]

Despite the criminalisation, the Court left a leeway for women to access abortion when faced with ill health or faces difficulties other than normal pregnancy 'burden'. The Court pronounced itself on the kind of expectation that government can put on a woman, which should not be beyond a burden she can bear. The Court differentiated what is normal condition of pregnancy that any woman can bear, which government can exert by law, and extraordinary burdens of motherhood, such as those posing a

[179] *Planned Parenthood of Southern Pennsylvania v Casey* 505 US 833 (1992).
[180] *Doe v. Bolton*,
[181] Stenberg v. Carhart
[182] BVerfGE 1 (1975), translated in JD Gorby and RE Jonas 'West German abortion Decision: A contrast to *Roe v Wade*' (1976) 9 *John Marshall Journal of Practice & Procedure* 605.
[183] Cook and Dickens (n 172 above).
[184] *Bourne* (n 12 above).

threat to a woman's life or health, which the court ruled were 'non-exertable' by law.[185]

4.4 Jurisprudence from Africa

4.4.1 The Republic of South Africa

By extension and interpretation, the Constitution of the Republic of South African protects women's right to make decisions concerning their reproductive health rights. The constitution protects rights of South African Women to 'to bodily and psychological integrity'.[186] Like the Kenyan Constitution, section 27(1)(a) of the South African Constitution provides that 'everyone has the right to have access to health care services, including reproductive health care...'[187]

In 1996, South Africa became the second country in African country to allow access to abortion on request after Tunisia which liberalised its abortion law in 1965. This was occasioned by the first democratic election of 1994, where the country enacted the Choice Act replacing the Abortion and Sterilisation Act.[188] The Abortion and Sterilisation Act Enacted in 1975, granted abortion only under strict conditions making access difficult.

The abortion law respects women's right to choose. Women and young girls irrespective of their marital status can access abortion services on request during the first trimester, and in certain circumstances, an extended access to the first 20 weeks.[189] The third party cumbersome authorisation and vetting have been lessened. Moreover, there is no requirement for authorisation for a gestation period, which is from 13 weeks to the 20th week, once a medical practitioner performing the abortion and in consultation with the pregnant woman confirms that she meets grounds for abortion.[190] However, there is an imposed gestational limit, and where it is higher, there are often further conditions before the procedure can take place.

The Act requires health workers to counsel a minor to consult with a parent, guardian or a family friend before the termination of a pregnancy. However, parental or guardian consent is not a mandatory requirement.[191] If the minor for personal reasons chooses not to inform anyone, access to termination of pregnancy services shall not be

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[185] No 183 above.
[186] Constitution of Republic of South Africa Section 12(2)(a).
[187] Constitution of Kenya 2010 art 43(1)(*a*).
[188] The Abortion and Sterilization Act No. 2 of 1975.
[189] Choice on Termination of Pregnancy Act 1996, sec 2. Section 2(1)(a).
[190] Choice on Termination of Pregnancy Act 1996, sec 2. Section 2(1)(c).
[191] Section 5(3). Note that this must be intended to apply only where the minor has otherwise the intelligence and maturity to understand the nature, purpose and inherent risks of a proposed abortion procedure so as to give informed consent. The Act is, however not explicit on this point and might be erroneously understood as implying that the consent of a parent is not required in all cases, regardless of the age and maturity of the minor.

denied.[192] This clause is important in cases where parents, guardians and close relatives sexually abuse children.

In 2004, the Choice Act was put under test in relation to protection and advancement of children rights. Through the case *Christian Lawyers Association v National Minister of Health*, [193] the plaintiffs sought an order declaring unconstitutional provisions that allowed under age, with capacity to consent, to access abortion services without parental consent.

The Court reaffirmed the Choice Act's provisions that make parental consent optional. The court rejected out the argument of using the age of a child to determine whether a child could give consent or not. The court held that the 'capacity to give informed consent is determined on a case-by-case basis by the medical practitioner, which would be based on the emotional and intellectual maturity of the individual concerned rather than on an arbitrarily predetermined and inflexible age'.

The safety of a woman is the prime concern of the Choice Act. This significant development ensures facilities wishing to offer abortion services observe the highest standards for performing the procedure.[194] The Act sets out regulations that establishes norms and standards, for instance anyone terminating a pregnancy must be competent to do so, and must have easy and ready access to supportive equipment and resuscitation. The Act requires that information must be provided to the woman on available alternatives to termination of unwanted pregnancies.

Further amendments to the Choice Act in 2008, made the service more accessible by allowing any health facility with a 24-hour maternity service to offer first trimester abortion services.[195] Similarly, registered nurses and midwives with training in termination of pregnancy are allowed to perform first trimester abortions. This is a significant provision that ensures that services are widely available and accessible. Limiting service provision to doctors in some jurisdictions has hindered service availability due to scarcity of doctors.

4.5 Jurisprudence from South America

4.5.1 The Colombia's Constitutional Court's Decision

The Colombian Constitutional Court's decision in case C-355/2006 has been hailed as one that recognised the link between equality and non-discrimination and access to abortion services. The Court explicitly and in an expansive manner interpreted the notions of equality and non discrimination, by interrogating state's obligations under international human rights treaties. The decision followed a challenge on the constitutionality of Colombia's abortion law, which categorically prohibited abortion

[192] R Mhlanga 'Abortion: developments and impact in South Africa' *British Medical Bulletin* 12 January 2003
[193] 2004 SACLR LEXIS 20.
[194] Mhlanga (n 200 above).
[195] C Macleod et al 'Cracks in reproductive health rights: Buffalo City learners' knowledge of abortion legislation' (2014) *Health SA Gesondheid*.

filed by Colombian lawyer Mónica Roa, who argued that the Constitution of Colombia requires exceptions to the prohibition of abortion that protect a woman's fundamental rights to life, health, privacy, and dignity.[196]

The decision is firmly grounded in rights to life and equality and non discrimination. By analysing and interpreting the breadth of discrimination, the Court laid bare a range of rights that criminalisation of abortion implicated.

Similarly, the Court interpreted at length the constitutional value of life and legal right to life. In its decision, the Court ruled that while the legal right to life applied only to born human beings, the constitutional value of life protected the foetus before birth.

However, the Court held that while the state could protect the foetus before birth, it could do so only in a manner that respected the rights of women, such as the right to life and the right to health. It is important to underscore the fact when the Colombian Constitutional Court's decision, recognised the state's interest to protect the unborn, it emphasised the need to ensure such measures are taken in ways compatible with the rights of women that include right to life. The Court quoted the international treaties, particularly the CESCR.[197]

Similarly, the Court while recognising the existence of constitutional value of life, including that of the foetus, drew a distinction between the value of life and the claimed legal rights to life. According to the Court's decision, the legal right to life is limited to a born human being, while the constitutional value of life could be protected before a foetus has been born.[198]

The Constitutional Court underscores the principles of human dignity, proportionality, autonomy and with an emphasis on human rights standards set by international treaties and instruments that includes the right to health.

The verdict of the Court was that article 122 of the Colombian penal code was constitutional 'with the understanding that abortion is not criminal' when:

> … the continuation of the pregnancy presents risks to the life or the health of the woman, as certified by a medical doctor; b) when there are serious malformations of the foetus that make the foetus not viable, as certified by a medical doctor; and c) when the pregnancy is the result of any of the following criminal acts, duly reported to the authorities: incest, rape, sexual abuse, or artificial insemination or implantation of a fertilised ovule without the consent of the woman.

4.5.2 Conscientious Objection

Three years after the 2006 decision, in 2009, another petition was filed at the Colombian Constitutional Court seeking for further interpretation owing to the

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[196] Decision of the Colombian Constitutional Court: Case C-355/2006

[197] GA res 2200A (XXI), adopted 16 December 1966 and entered into force 3 January 1976.

[198] RJ Cook 'Excerpts of the Constitutional Court's ruling that liberalised abortion in Colombia' (2007) 15(29) *Reproductive Health Matters* 160-162.

difficulty faced in implementing an earlier ruling. The court gave the most definitive guidelines on applicability of the 2006 ruling. The petitioner was a Colombian national, filed a *tutela* (an appeal for legal protection) on behalf of his partner who was 19 weeks pregnant. The court reviewed the case of a woman who sought legal therapeutic abortion from her healthcare provider due to serious foetal malformation that made it unviable.

Although the provider authorised the procedure, they sought a judicial order to this effect before carrying out the abortion. The judge refused to grant the order, stating that he conscientiously objected on grounds of his personal beliefs.

In response, the Constitutional Court provided guidance taking into account the implications of the right to conscientious objection to health and lives of women. The Court seized the opportunity to reiterate gravity of failure to set clear standards clarifying who can conscientiously object and how it can create serious obstacles in preventing maternal deaths.

The decision of the Constitutional Court clarified that judicial officers could not use conscientious objection to refuse to decide or consider a case concerning abortion. The Court effectively set up critical jurisprudence by reaffirming that conscientious objection is restricted to those who are directly involved in abortion procedure. The Court also issued clear guidelines that included measures to be taken in order to lodge one's right to conscientious objection.

4.6 Lessons Learnt from Comparative Law

The Kenyan social context today bears close resemblance with what Britain experienced at the time of the debate on the 1967 abortion law. The current concern for Kenya is the massive social inequality in accessing health in general and seeking abortion services. Women from richer families can access abortion in private hospitals more often on request, but those from informal settlements and rural areas do not have such privilege, they are at the mercies of quack doctors operating illegal backstreet abortions clinics.

The above comparative analysis provides vital applicable lessons to Kenya. First and foremost, Britain jurisprudence provide significant lessons in terms of broad interpretation of health. Health has been defined as to cover preserving the physical and mental well-being of the woman as grounds for abortion should be explicitly captured in laws, policies and practices. The liberalisation of abortion laws in Britain, transformed abortion access, where today a majority of terminations are happening early into pregnancy.[199] It is reported that cases of mortality related to abortion are unheard of in Britain. This is attributed to the fact that procedures for termination of

[199] A total of 211 in 2014 80 per cent of abortions in England and Wales, and a similar proportion in Scotland, occurred at under 10 weeks (compared to 77 per cent in 2012 and 58 per cent in 2003). This figure conceals some marked regional variation, with 89 per cent of terminations in North Staffordshire but only 54 per cent of those in the Vale of Glamorgan occurring at under ten weeks. Department of Health, 'Abortion Statistics'

pregnancy have been made safer to a point of being void of risk than carrying a pregnancy to term.[200]

Secondly, is the diminished stigma that is often associated with abortion, by liberalising abortion laws, Britain has almost successfully eliminated stigma which has resulted in abortion being viewed as a normal healthcare service in the country. Since the enactment of the abortion law which decriminalised abortion, the stigma that surrounded abortion no longer exists. Abortion is viewed and treated as a normal or routine healthcare service.[201]

In the United States of America, *Roe* case was significant in the 1970s, however, it turned out to be a negative approach to legislating access to abortion. Kenya may not rely on this jurisprudence in the contemporary context, because it is highly vulnerable to regressive laws and actions that can further restrict existing grounds for access to abortion. The adoption of restrictive legislations in the US is clear testimony of how such jurisprudence has restricted access to abortion in practice.[202] An example is the recent Executive Order signed by the US President Donald Trump restricting funding for abortion services under the infamous GAG Rules (Mexican City Policy).[203]

Similarly, several US jurisdictions have imposed restrictions on access to abortion drugs, and implemented regulations that target abortion clinics.[204] Other restrictions include mandatory waiting period before receiving the procedure.[205]The *Roe* Case decision creates a weak regime of obligation to a state to provide only formal access to abortion that can result in barriers to practical access to abortion services. *Roe* case does not compel the state to remove any obstacles to women accessing abortion services. In addition, the state is not obligated to refrain from creating further obstacles. The state is at liberty to re-introduce further limitations and make access very difficult. Therefore, the jurisprudence cannot promote women's rights to abortion as systemic discrimination and iniquities can persist, hence not a model for Kenya.

The most important lesson from Germany for Kenya is that despite the strong position towards protection of the unborn, the Federal Constitutional Court recognised a woman's ultimate responsibility to decide whether to terminate a pregnancy or not.[206] Federal Constitutional Courts left it upon the pregnant woman to make the decision, even after prescribing counselling sessions, thereby underscoring the importance of autonomy.

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[200] See Royal College of Obstetricians & Gynaecologists (RCOG), 'The care of women requesting induced abortion' (Evidence-based Clinical Guideline No 7, 2011).
[201] Sheldon (n 2 above)
[202] See Guttmacher Institute, '*Legislation Enacted: Monthly State Update: Major Developments in 2012*', available at: http://www.guttmacher.org/state center/updates/index.html#FOCA (accessed 14 November 2018).
[203] The 1973 'Helms Amendment' to the Foreign Assistance Act prohibits the use of US funds from paying 'for the performance of abortion as a method of family planning.'
[204] Oklahoma's HB 1970 (Medical Abortion Law) and HB 2381.
[205] Virginia's HB462 of 2012 and Texas' HB15 of 2011.
[206] S Walther *Thou Shalt Not (But Thou Mayest): Abortion after the German Constitutional Court's 1993 Landmark Decision* (1993) 36 GERMAN YB INT'L L 385 - 390.

The South African jurisprudence provides unique lessons for Kenya, especially the enactment of a stand-alone legislation anchored on human rights principles as reflected in the Constitution's Bill of rights. Article 26(4) of the Constitution of Kenya provides the minimum grounds for access to abortion, but a legislation would provide clarity expanding grounds to reflect the 21st century reality.

The second lesson from South Africa, concerns the issue of timing of access to abortion services. Controversy on what time should a woman be allowed to abort and protection of the interest of the unborn still looms. As seen above, Choice Act grants a woman total autonomy to terminate her pregnancy on request during the first 12 weeks (first trimester).

The third lesson is dealing with the controversial issue of consent. There is need to consider legislating on ensuring that consent from third parties is not a requirement for termination of a pregnancy. Kenya is facing serious challenges with teen pregnancy, where the future and the lives of young girls are at jeopardy.

Final lesson from South Africa is the lesson on ensuring accessibility and availability of trained human resource. The Choice Act provides for trained midwives, nurses and clinical officers to provide abortion services through the first trimester. In 2008, an amendment to the legislation saw the expansion on the types of facilities able to provide safe abortion services, and allow registered nurses to provide the services after training and certification.

Regarding Colombian Supreme Court, the jurisprudence created on equality and non discrimination is most significant to Kenya. Article 27 of the Kenyan Constitution provides for equality and non discrimination, but without exhaustive protection grounds, meaning the list could be added through judicial review. The IHRL regime that Kenya has ratified provides for equality and non discrimination. The continued criminalisation of access to abortion in the Kenyan penal code violates rights to equality and non-discrimination and has direct implications on other rights, including rights to life, and privacy which are protected under the Kenyan Constitution. Repealing of the Penal code will enhance Kenya's compliance and contribute to reduction of stigma associated with criminalisation of abortion.

Finally, the 2009 Colombian and 2014 United Kingdom Supreme Court's ruling on conscientious objection can provide crucial lessons to Kenya, by ensuring rights of women to access abortion is not curtailed by health professionals, including those that might indirectly be involved in the procedure from invoking right to Conscientious objection. England Supreme Court ruled that two Catholic midwives were not covered and could not invoke right to conscientious objection in performing their supervisory duties in cases of abortion.[207]

By borrowing from these two jurisdictions, Kenya, through its legislation and policies, can set up clear guidelines for healthcare providers opting to invoke conscientious

[207] As above

objection, as it poses significant challenges to women's access to not only abortion services but also other health services including family planning.

4.7 Conclusion

The Courts played and continue to play a critical role in shaping abortion laws, from the 19th century throughout the 1970s to date. Although there were variations in courts' interpretations across different epochs and geography, attention was directed at incrementally giving women greater agency and autonomy over motherhood decisions even where government showed legitimate duty to protect unborn life.

In all jurisdictions studied, termination of pregnancy is lawful to protect life and physical and mental health of a woman. Even jurisdictions that criminalise abortion agree that abortion can be permitted for the sake of mother's health or when there is a real risk or serious damage to the physical or mental health of the mother.

The jurisdictions under the study allow termination of abortion in the first trimester on request and only impose conditions to be met as gestation approaches viability; this is the case in South Africa, England and United States of America. They prescribe additional circumstances under which women are permitted to access abortion services like in case of rape or incest, serious foetal deformity and for economic or social conditions.

CHAPTER FIVE
Critical Analysis and Interpretation of Abortion Laws in Kenya

5.0 Introduction

This Chapter examines the abortion context in Kenya, and the existing legal, and policy frameworks and practices. The Chapter identifies the current state of affairs and recent developments that have destabilised existing status quo and the standoff thereof. At the centre of discussion will be article 26(4) of the Constitution. The Chapter critically analyses the importance and impact of article 26(4) introduced by the Constitution that has tipped the balance. The analysis of article 26(4) will be based on equality and non-discrimination as provided for under article 27.

Similarly, this study strives to give an interpretation that is rooted in IHRL and the domestic legal and policy framework. The analysis is imperative as it can serve as useful information, to support broader national advocacy work to repeal restrictive and discriminatory abortion laws.

The Constitution introduced positive discrimination against women and children. However, a number of legal provisions that are open to discriminatory interpretation remain *de facto* laws, despite their inconsistency with the new law. For instance, the inherited 1970 British Penal code criminalise access to abortion.

Finally, the chapter discusses inconsistencies between provisions in different laws, policies and guidelines on access to abortion, notably in the Penal code, the Constitution, the Health Act of 2017, the Guidelines on Management of Sexual Violence, the Medical Practitioners Code of Conduct and the Post-Abortion Care. The scope of protection of article 26(4) from criminal liability, for instance, has resulted into confusion and uncertainty for both women seeking abortion and medical practitioners offering the procedure.

5.1 Interpreting Article 26(4)

Kenya, like many other jurisdictions in Africa, does not impose an absolute ban on abortion, since article 26(4) restricts access to abortion but lists minimum legal grounds under which abortion is lawful. The first exception is when 'in the opinion of a trained health professional, there is need for emergency treatment' It is important to underscore the fact that it only requires a single trained medical professional treating a patient to give an opinion for abortion treatment.

Further, the article is alive to limitations of human resources particularly in informal settlements and rural areas. This is a progressive position compared to other jurisdictions that make it mandatory for a further medical opinion from a senior

medical professional. The definition of who is a trained medical professional is provided by the Health Act.[208]

The Final Report of the Committee of Experts (CoE) on Constitutional Review that drafted the 2010 Constitution indicated that:

> The requirement that abortion could be performed by medical practitioners alone also raised concerns. It would mean that women in poor rural communities without such services would be unable to procure abortions with potentially serious or fatal repercussions for some poor women. There was also need to ensure that the language used by the Parliamentary Select Committee did not outlaw methods of fertility control, such as emergency contraception. The CoE accordingly amended the draft to include language that would enable appropriate medical intervention to be available when necessary.

This expanded definition has the effect of ensuring that abortion is available to women in informal settlement and rural areas where doctors might not be available. It addresses the issue of intersectional inequality and discrimination where poor women have failed to access same services as their counterparts from urban and rich backgrounds. Inclusion of midwives is an important criterion for availing the services to women at the village levels, while nurses and clinical officers could be accessible at local dispensaries.

Article 26(4) provides for the right to emergency treatment for women with indications of abortion. The Constitution, in article 43(1)(a)(b) emphasises this provision by restating that '... a person shall not be denied emergency medical treatment.' Additionally, emergency treatment can be broadly interpreted to include access to treatment for women, including victims of Sexual and Gender Based Violence (SGBV). Victims of sexual violence, often 'require comprehensive, gender-sensitive health services in order to cope with the physical and mental health consequences to aid their recovery from an extremely distressing and traumatic experience'.[209]

Indeed, as defined in the Health Act 2017, emergency medical treatment refers to 'necessary immediate health care that must be administered to prevent death or worsening of medical situation.' Section 7(3) of the Act, affirms that health providers who fail to provide emergency treatment commit an offence. Whereas, the right to exercise one's religion and beliefs are safeguarded by the Constitution, section 12(2) of the Health Act 2017 mandates providers to offer emergency medical treatment.

Further on, the PAC Guidelines provides a framework on how these services can be provided and accessed at health centres.[210] The PAC services constitute emergency

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[208] Health Act 2017 (n 19 above)

[209] World Health Organisation (WHO), Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008, sixth ed., Geneva: WHO, 2011. See also, Guttmacher Institute, In brief: Facts on abortion in Africa Also seewww.guttmacher.org/pubs/IB_AWW-Africa.pdf (accessed 12 February 2019).

[210] 'Health ministry approves post abortion care guidelines' Emmanuel Wanjala 26 February 2019, Also see; https://www.the-star.co.ke/news/2019/02/26/health-ministry-approves-post-abortion-care-guidelines_c1900701 (accessed on 26 February 2019)

treatment of complications from spontaneous or induced abortion .[211] Therefore, the fact that health is interpreted as a human right under article 43 of the Constitution, access to comprehensive PAC should not be criminalised for both service providers and women accessing the service. This is a life-saving procedure whose unavailability directly violates the right life, right to equality and non discrimination.

The UN Commission on the Status of Women has issued a report affirming international commitments to end violence against women and girls and provide access to sexual and reproductive health services for survivors. As part of the 'agreed conclusions', the Commission called for access to emergency contraception and safe abortion for survivors of sexual violence.[212]

The above provision is very vital in promoting women's right to health, and therefore withholding this service, not only violates the Kenyan Constitution, but also violates articles 2(2) and 3 of ICESCR and ICCPR respectively, which protect women against any form of discrimination.[213] The Covenant prohibits any discrimination in access to healthcare and underlying determinants of health which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.[214]

Further, the Constitution, in article 43(1)(a)(b), provides that 'every person has the right to the highest attainable standard of health. This standard includes the right to reproductive health care. The Constitution goes further to prohibit any service provider from denying anyone emergency medical treatment. The Constitutional provisions are on line with the CEDAW Committee observation that 'states which refuse to legally provide for the performance of certain reproductive health services for women are in violation of the principle of non-discrimination on the ground of sex'.[215]

The IHRL obligates Kenya to adopt the most expansive interpretation of health that recognise 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.[216] Article 12(1) of ICESCR provides for the right to health, which should be implemented within the principle of equality and non discrimination.[217]

The second exception is when 'the life or health of the mother is in danger'. Although the Constitution does not define Health, the Health Act 2017 defines health in a similar

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[211] http://guidelines.health.go.ke/#/category/27/76/meta (accessed 12 January 2019).
[212] Report on the 57th Session of the Commission on the Status of Women, Agreed Conclusions 22 and 34(iii), March 2013.
[213] Arts 3 of the ICESR and ICCPR when read together.
[214] Committee on Economic, Social and Cultural Rights, *General Comment 14, 'The right to the highest attainable standard of health'*, U.N. Doc. E/C.12/2000/4, 2000, Para 18.
[215] Committee on the Elimination of Discrimination against Women, *General Recommendation 24, 'Women and health'*, U.N. Doc. A/54/38/Rev.1, 1999, Para 11.
[216] Art 12(1) of the ICESCR.
[217] Committee on Economic, Social and Cultural Rights, *General Comment 16, 'The equal right of men and women to the enjoyment of all economic, social and cultural Rights' (Art. 3 of the Covenant)*, U.N. Doc. E/C. 12/2005/4, 2005, para 29.

manner as the WHO. Therefore, it follows that keeping in mind the definition of health, the Constitution permits abortion in situations where a pregnancy, in the opinion of a trained health professional, endangers the life or mental or psychological or physical health of the mother.
As a state party to ICESCR, Kenya has committed '...to protect mothers for a reasonable period before and after childbirth'.[218] This indication is also well enunciated in the case of *Bourne* Case, which nuanced circumstances that would make a woman a mental wreck. Therefore, an attempt to interpret the health circumstances under which a doctor can authorise an abortion, should consider the relativeness to the risk of giving birth.

The 1938 *Bourne* case decision, which held that an abortion was legal if a doctor gave an opinion that continuing the pregnancy would 'make the woman a physical or mental wreck', confirmed that the grounds for a lawful abortion extended not only to saving the woman from death but also to considering her physical and mental wellbeing.

Similarly, an expanded interpretation of the article should be similar to the Britain's Abortion Act that approached the concept of wellbeing further. It indicated that an abortion was lawful if 'the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman'.

Regarding mental health impacts, evidence from the USA and Britain are clear that aborting an unwanted pregnancy has no adverse psychological squealer, compared to carrying that pregnancy to term. Any abortion carried out under health grounds is always lawful, provided the authorising doctor is acting based on good faith and reliance on medical evidence.

A third ground for access to abortion under the Constitution, is where abortion is permitted by 'any other law'. Section 35(3) of the Sexual Offences Act provides that; 'the Minister responsible for Health shall prescribe circumstances under which a victim of a sexual offence may at any time access treatment in any public hospital or institution'.

Similarly, the National Guidelines on the Management of Sexual Violence in Kenya, 2nd Edition, developed by MOH provided that: 'if survivors of sexual violence present with a pregnancy, which they feel is as a consequence of the rape, they should be informed that in Kenya, termination of pregnancy may be allowed after rape'

Although reference has been made to the Penal Code as the 'any other law', it is significant at this point to clarify that the Constitution under sections 6 and 7 of the 6th Schedule, requires that, the provisions of the Penal Code must be read with the necessary 'alterations, adaptations, qualifications and exceptions' to ensure alignment the Constitution. Moreover, the Constitution already allows access to abortion

[218] ICESCR Art 10(2)

abortion where, in the opinion of a trained health professional there is need for emergency treatment, or that the life or health of the mother is in danger.

Kenya is a signatory to international instruments including the Maputo Protocol which is part of domestic law and a reference can be made to while adjudicating abortion cases. Although Kenya entered a reservation on article 14 (2)(c) of the Protocol, that protects and guarantees, 'the right to safe abortion in cases of sexual assault, rape, incest and when the pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus', the provisions still applies to Kenya under the new Constitution 2010.

The fourth ground for abortion though not explicitly covered under the article, but referred to by other laws is in cases of incest or rape. In essence, the article should be interpreted in a manner that accommodates and protects rights of victims of rape or incest who are unable to access abortion and often experience compound discrimination on the grounds of sex. The 2014 National Guidelines on Management of Sexual Violence by the MOH, already provides for termination of pregnancy resulting from rape or incest. The law should further be interpreted in a way that would help save lives.

Moreover, expansive interpretation of this article should identify rape or incest as forms of violence against women. The violence is in itself a form of discrimination against women, simply because it denies women equal rights and freedoms based on equality with men.[219] The IHRL obligates Kenya, 'to provide appropriate specialised services for women who have been subjected to violence'.[220]

According to the Committee Against Torture, 'the criminalisation of abortion has a serious effect on the mental health of women victims of violence who are subjected to continuing violations, placing them under traumatic stress with the risk of developing long-term psychological problems.[221] Similarly, Inter-American Commission, one of the three global human rights Commissions, through its CEDAW, observed that 'states not only commit acts of violence against women by failing to refrain from it, but also by perpetuating or condoning an act of violence'. Therefore, forcing a woman to keep a pregnancy that resulted from rape or incest or prohibiting access to abortion amounts to perpetuation of violence.

Besides, Kenya is a state party to the Maputo Protocol, which provides for access to abortion in case of rape or incest. The MOH's National Guidelines on Management of Sexual Violence, read together with the Maputo Protocol and other commitments made by Kenya on IHRL becomes critical in interpreting article 26(4).

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[219] Committee on the Elimination of Discrimination against Women, *General Recommendation 19, 'Violence against women'*, 1992, Para 1.

[220] Inter-American Convention on the Elimination of Violence against Women (Convention of Belém do Pará), articlearticle 8(d).

[221] Committee against Torture, *Concluding Observations on Nicaragua*, U.N.Doc. CAT/C/NIC/CO/1, 2009; see also Concluding Observations on Chile, El Salvador and Nepal.

Finally, it is expected that while interpreting article 26(4), one is alive to the supremacy of the constitution.[222] Any law that is inconsistent with the constitution is invalid to the extent of the inconsistency.[223] Therefore, the importance of this provision is that any law speaking to article 26(4), whether a legislation, customary or penal code must conform to constitutional values and rights.[224]

It is important to acknowledge that the Constitution took deliberate efforts to expand a woman's rights and therefore interpretation of article 26(4) must not restrict or seek to limit constitutional rights already protected by the constitution, but expand these rights and provide clarity for ease of their enjoyment in accordance with article 24 of the Constitution.

5.2 Conclusion

Broad interpretation of article 26(4), that includes article 43, the Health Act 2017 and Health Guidelines developed by MOH, provides the best framework for expanded access to abortion in Kenya. Similarly, this interpretation must be grounded in IHRL that Kenya has ratified forming part of domestic laws. It is critical that a legislation is enacted to operationalise the article by clarifying the grey areas while expanding the grounds further.

[222] Constitution of Kenya 2010 art 2(1) 'the constitution is the supreme law of the Republic and binds all persons and state organs at both levels of government'.
[223] Constitution of Kenya 2010 art 2(4) states that any law, including customary law that is inconsistent with the constitution is void to the extent of inconsistency and any act or omission in contravention of the constitution is invalid.
[224] Constitution of Republic of Kenya 2010 art 2(4) states that any law, including customary law that is inconsistent with the constitution is void to the extent of inconsistency and any act or omission in contravention of the constitution is invalid.

CHAPTER SIX

Summary, Conclusions and Recommendations

6.0 Introduction

This Chapter summarises the study and draws conclusions based on the lessons, suggesting the way forward for reforms to remedy the impasse. Ideally, the Chapter contains a summary, conclusions and recommendations developed from the findings of the study.

6.1 Summary

Following the comparative review and subsequent interpretation of article 26(4), it is evident that the Constitution succeeded in framing the abortion issue as a matter of protection of human dignity, equality and non-discrimination against women, rather than a conflict between the women's right to autonomy and the life of unborn. Furthermore, the Constitution identifies abortion as a serious public health concern that should be treated with utmost care by health professionals.

The 2010 Constitution constitutionalised abortion and therefore, should provide more information on operationalisation of the article through legislation and accompanying policy guidelines. Although the Health Act is not ambitious in terms of women rights to access safe and legal abortion, it has provisions that lay critical foundation for interpretation of article 26(4) in areas such as defining a medical professional, expanding health definition, providing for post-abortion care and conscientious objection.

The study finds jurisprudence from the United States, Britain, Germany, Colombia and South Africa very compelling and persuasive enough to act as a guide or model for Kenya on reforming its abortion laws and policies. Despite the never-ending opposition based on the moral, cultural and political conflict provoked by abortion, the study reveals that the last four decades have seen positive trends in terms of the acknowledgement of women's position in making decisions concerning their motherhood. The world is moving towards pragmatic and objective legislation on abortion.

Kenya has not been an exception simply because it has, for the first time, codified abortion in its Constitution. Furthermore, comparative studies show that the German and US Courts have created authoritative jurisprudence that has located the regulation of abortion within a framework of respect for dignity. The two highest courts in these countries have showed that it is possible to innovatively develop constitutional frameworks that accommodate opposing normative perspectives by prioritising choice so that the woman's dignity is preserved and is not unnecessarily overburdened.

The focus on dignity provides the best opportunity to reconcile conflicting interests by simultaneously protecting interest of women claim to autonomy and bodily integrity and the interest in the unborn. According to this study, courts have made decisions that have protected human dignity in a way that during the first trimester, a woman's right to autonomy and bodily integrity are prioritised and this guarantees access to termination on request. On the other hand, as pregnancy advances and the foetus nears viability, dignity will demand that the prioritisation of the unborn is considered and exceptions are included in case of threat to health and life of woman.

The US Supreme Court in *Roe* case affirmed that right to privacy as protected in the 14th amendment includes a woman's right to decide whether to terminate her pregnancy or not. Therefore, the state had a duty to respect the decision of a pregnant woman and her doctor to terminate a pregnancy at any time before the foetus is viable.

Although in 1975, the opinion of the German Federal Constitutional Court held that the government had a duty to protect the unborn throughout the life of pregnancy; it still provided grounds for pregnancy termination.[225] Further, the same German Court, in 1993, reconsidered its earlier position framing it in a manner that recognised and acknowledged women's 'decisional autonomy'. That Court revised its position by dismissing criminal sanctions as not the way to protect foetal life. The court called for support to women who choose to carry pregnancy to term.

On its part the Colombian Constitutional Court, admitted that the state may have legitimate interest in protecting the unborn, ruling that 'the interest did not flow from a constitutional right to life but from a 'constitutional value of life', which does not derive the same level of protection as that granted to a pregnant woman'.[226] This judgment emphasises that interest of protecting the unborn should not subordinate the pregnant woman to the unborn in a way that reduces a woman into a mere 'reproductive instrument'. The ruling included a cautionary statement to legislator who choose to protect the unborn through criminalisation that must be cognisant of fundamental rights guaranteed to women by both domestic Constitution and international human rights instruments.

Further, a challenge to the constitutionality of the Choice Act in South Africa was rejected by the court where it ruled that the Constitution conferred fundamental rights on persons, not on prenatal life. The court reiterated that any efforts towards protection of the unborn must strike a balance against the constitutional rights guaranteed a pregnant woman.

The study findings, following the comparative analysis particularly of South African and Colombian jurisprudence, indicate that apart from article 26(4) that boldly attempts to expand ground for access to abortion, other provisions within the Constitution can be interpreted using a human rights approach to secure the right to abortion. Indeed, a pregnant woman can find utility for access to abortion in articles

[225] Ngwena (no 7 above).
[226] Women's Link Worldwide, 20–21.

within the Constitution particularly articles 2(5)(6), that provides that treaties and conventions ratified by Kenya become part of her laws.[227]

Further, the Constitution provides for right to equality and non discrimination, right to life, the full and equal dignity of women, right to privacy,[228] and freedom from torture, inhumane and degrading treatment.[229] It is the constitutional implication on rights of women, though not directly referring to abortion, that respond to the principle of human rights being indivisible and interrelated.

The Colombian Constitutional Court approach that called for a consideration of other constitutional rights when interpreting and applying abortion laws including international human rights provides the best jurisprudence for Kenya. Whereas it is important for Kenya to draw from respected jurisprudence in other jurisdictions, it would be naive to think that this will be a silver bullet simply because abortion laws are also shaped by informal rules and practices that will always create barriers to constitutional guarantees.[230]

It is equally important to understand the underlying setbacks that may include spirited religious opposition, failure to develop and implement Standards and Guidelines and disseminating to intended users. Unaffordable abortion services for poor rural women coupled with inaccessible health centres have often limited enjoyment of these constitutional guarantees. In the United States, there are pushbacks such as imposition of mandatory waiting periods and counselling. It is critical that deliberate efforts are in place in terms of envisioning how the law can be practically implemented.

In conclusion, article 26(4) gives Kenyan legislators the mandate to develop a legislation that provides more clear information on regulation of abortion through the clause '…or if permitted by any other written law'. The grounds listed by the Constitution should be seen as the minimum conditions under which abortion should be legal in Kenya. Parliament and the judiciary are at liberty to enact a law or make an interpretation that provides for additional conditions for legal abortion.

It is expected that the legislation or any other law will not limit access to abortion but expand grounds. Already the National Policy Guidelines on Management of Sexual Violence and the Sexual Offences Act of 2006 provides that in cases of rape or incest women can access abortion. Even as Kenyan women wait for Parliament to enact an abortion legislation, article 26(4) qualifies access to abortion as a human right particularly when read together with other articles in the constitution.

Furthermore, access to abortion is strengthened by article 43(1)(a), that provides, 'every person has the right to the highest attainable standard of health care services,

[227] Maputo Protocol (n 26 Above).
[228] Constitution of Kenya 2010, Art 31.
[229] Constitution of Kenya 2010, Art 29(d)(f).
[230] Ngwena (no 40 above).

including reproductive healthcare'. This provision becomes stronger when read within the context of article 43(2). The article prohibits denial of emergency medical treatment that includes the right to healthcare services. This provision elevates reproductive health, obligating government to provide these services.

The existence of article 2(6) of the Constitution strengthens article 26(4) and access to abortion by women in the sense that it incorporates treaties and convections ratified by Kenya into Kenyan domestic laws. Kenyan courts have enough case laws to refer to while interpreting rights to abortion, and opportunity to implement international law at national level.

On the other hand, the judiciary has at its disposal expansive interpretation of the right to health by United Nations Treaty Body Committees, particularly the ESCR Committee, the CEDAW Committee and the African Commission. Article 20(3), compels courts to adopt an interpretation of the law that most favours the enforcement of a fundamental right or freedom.

The study findings also indicate that the withdrawal of Standards and Guidelines developed to facilitate the operationalisation of article 26(4), which continue to negatively impact on provision of services and access to abortion by both medical practitioners and women. On 12th June 2019, in a landmark ruling, the High Court quashed the withdrawal of the guidelines, reinstating them, but implementation remains a challenge amid a notice of appeal by the government being served to the petitioners.[231]

6.2 Recommendations

Based on the study findings, article 26(4) has far-reaching implications on the Kenya's reproductive health sector, particularly maternal health; it falls short of calling for a 360 degrees reform. Legal and policy frameworks on abortion will require reforms to accord with the spirit and letter of the Constitution. The anticipated reforms should be shaped by the following considerations:

1) The need to realign all legal and policy framework relating to abortion with international human rights standards and the Constitution, which should include repealing the penal code, and lifting reservation on the Maputo Protocol.
2) The Constitution of Kenya makes room for enactment of a legislation allowing abortion in other circumstances. There is, therefore, an opportunity to broaden the scope of legal abortion in Kenya beyond the High Court ruling[232];
3) The need to set out circumstances that would require emergency care under articles 26(4) and 43(2). This will ensure clarity while at the same time fully

[231] Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR
[232] As above.

implement the post abortion Guidelines in accordance with the Health Act, 2017;

4) The urgent need to reinstate Standards and Guidelines and Training Curriculum on abortion for health care professionals that were withdrawn by MOH;
5) The need to develop of clear guidelines for referrals in cases of conscientious objection by medical personnel;
6) The need for health professional's regulatory bodies for doctors, clinical officers and nurses should review their Code of Professional Conduct and Discipline to align them with the Constitution and international human rights standards.

6.3 Recommendations for Future Research

The study further recommends more research on the likely impact of conscientious objection on access to abortion by women in Kenya. Christians constitute up to 80% of the Kenyan population, with Roman Catholics taking up a large fraction of this population. As reforms pick up momentum, information from this study can be critical in informing the development of guides covering who can object to abortion procedure and what mechanisms for referrals are in place.

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