CONSTITUTIONAL BUT CRIMINAL: AN ANALYSIS OF THE AMBIGUOUS ABORTION LAW IN KENYA THROUGH THE PRISM OF INTERNATIONAL HUMAN RIGHTS

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DECLARATION

I hereby declare that I have read and understood the regulations governing the submission of qualification for **LLM Coursework & Dissertation Human Rights Law**, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed by: Signed by candidate **9th February 2024**

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ABSTRACT

Upon the inauguration of the Constitution of Kenya in 2010, women's reproductive health rights seemed poised to witness progressive guarantees that would be in line with international human rights standards – this has not been the case. On the one hand, the Penal Code of Kenya effectively criminalises abortion. Conversely, Article 26(4) of the Constitution of Kenya, 2010 provides an exception to the general rule criminalising abortion. Article 26(4) of the Constitution of Kenya provides that abortion is permissible only if a qualified health professional deems an emergency treatment necessary, or when there is a discernible threat to the life of the mother, or if sanctioned by any other written law. Unfortunately, sections 158, 159 and 160 of the Kenyan Penal Code, which proscribe abortion, have not been amended to be in line with the Constitution of Kenya, 2010. The discordant legal framework has induced ambiguity and confusion regarding abortion law in Kenya. This thesis critically explores the evolution of abortion law in Kenya and analyses how the Courts have, in light of the ambiguity in the legal framework, adjudicated abortion cases. It examines what, if at all, are the human rights implications of criminalising abortion. Relying on comparative research methodology, the thesis examines the abortion laws in South Africa and Ireland to provide insights on how Kenya can develop its abortion laws to better protect the rights of women and girls and adhere to its human rights obligations. Ultimately, the thesis argues that the inherent ambiguity within Kenya's abortion laws perpetuates the violation of women's and girls' rights and thus ought to be amended.

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List of Acronyms and Abbreviations

AU African Union

CEDAW Convention on the Elimination on All Forms of Discrimination Against Women

CoE Committee of Experts on Constitutional Review

COK Constitution of Kenya, 2010

CRC Convention on the Rights of the Child

CTOPA Choice on Termination of Pregnancy Act, 1996

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic Social and Cultural Rights

OAPA Offences Against the Person Act, 1861

HRC Human Rights Committee

SA South Africa

TMB Treaty Monitoring Bodies

UN United Nations

USA/US United States of America

WHO World Health Organisation

CHAPTER 1: INTRODUCTION

1. Background

The discourse on abortion remains a controversial topic the world over. In Kenya, the key controversy relates to the legislature's failure to provide a clear and coherent legislative framework on the regulation of abortion. Instead, the legal regime governing abortions in Kenya is ambiguous, an ambiguity that has pernicious effects on the human rights of women, girls and healthcare providers. Article 26 of the Constitution of Kenya, 2010 (hereinafter '*COK*') provides that:

> 26. Right to Life
>
> 1) Every person has the right to life.
> 2) The life of a person begins at conception.
> 3) A person shall not be deprived of a life intentionally, except to the extent authorized by this Constitution or other written law.
> 4) Abortion is not permitted unless in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.[1]

In essence, article 26(4) of COK leaves room for the provision of abortions under some circumstances. In contrast, Sections 158, 159 and 160 of the Penal Code criminalise abortion and all related offences in Kenya.[2] The interaction between article 26(4) and the Penal Code is that abortion in Kenya is, under certain emergency circumstances, Constitutional, but is generally a criminal offence. However, there is no clear definition of what 'emergency circumstances' entails - leaving a gap in the law in this area. Without clarity on what 'emergency circumstances' means women, girls and medical practitioners could find themselves in breach of the Penal Code. There is thus a need to provide clarity

[1] Constitution of Kenya, 2010 art. 26.

[2] Penal Code CAP. 63 (Kenya) s 158, "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." s 159, "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." s 160, "Any person who unlawfully supplies to or procures for any person any thing 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."

on the meaning of emergency in article 26(4) of the COK and how it relates to the Penal Code.

Aside from the ambiguous legislative framework on abortion in Kenya, there was recent progressive jurisprudence on abortion law. On 23rd September 2019, a girl (*PAK*) was arrested and charged with the offence of 'procuring an abortion contrary to section 159 of the Penal Code.'[3] A health worker was similarly arrested and charged with 'procuring an abortion under section 158 of the Penal Code' and 'supplying drugs to procure abortion contrary to section 160 of the Penal Code.' Soon thereafter, *PAK & another v Attorney General & 3 others* [2022] KEHC 262 (KLR) (hereinafter '*PAK*') was instituted in the High Court of Kenya at Kilifi.[4] The petition was founded on grounds that various fundamental constitutional rights of the petitioners (*PAK* and the health worker who were criminally charged) had been violated.

The relationship between the abortion provision of the Penal code and article 26(4) was one of the issues to be determined by the High Court.[5] On 24th March 2022, the Court rendered its judgment and held *inter alia,* that abortion is a fundamental right but not an absolute right under article 26(4) of the COK.[6] The court acknowledged that there was a *lacuna* in abortion law in the Kenya and consequently made a declaration for Parliament to enact a comprehensive legal framework on abortion in line with article 26(4) of the COK.[7] The legislators in Kenya have not yet adhered to the Court Orders, thus maintaining a state of ambiguity in the country's abortion laws. This thesis aims to offer guidance on resolving this ambiguity and presents recommendations for refining the legal framework pertaining to abortion in Kenya.

The judgment in *PAK* highlights how ambiguous abortion laws in Kenya results in pernicious criminalisation of women, girls and health care workers who procure abortions.[8] The inherent ambiguity in the law has led to a *de facto* criminalisation of abortion because of how the Penal Code is enforced in practice. Criminalising abortion

[3] *PAK & another v Attorney General & 3 others* (2022) [2022] KEHC 262 (KLR) (HCK) [1]-[10].
[4] ibid.
[5] ibid [49].
[6] ibid [164].
[7] ibid.
[8] hlr, 'PAK v. Attorney General' (2022) 136 Harvard Law Review.

results in the violation of various women's rights *inter alia* the right to be free from discrimination, the right to privacy and dignity, the right to health, the right to life, the right to be free from cruel, inhuman and degrading treatment.[9] All these rights are guaranteed in chapter 4 (Bill of Rights) of the COK.[10] Research indicates a nexus between criminalisation of abortion and women resorting to procuring clandestine abortions that compromise their health and life.[11] Women resorting to unsafe abortion procedures has consequently resulted in high mortality rates.[12] States are required to take proactive measures to lower mortality rates resulting from abortion. Safeguarding the rights of women in the context of abortion requires an extensive legal framework.[13] By doing so, States not only address public health concerns but also ensure protection of women's reproductive health rights.

The decision of *PAK* came three months before the historic decision in *Dobbs v Jackson* (hereinafter '*Dobbs'*) which was decided on 24th June 2022, where in a 6-3 decision the US Supreme Court overturned the *Roe v Wade* (hereinafter '*Roe'*).[14] In *Roe,* the Court recognised that the right to privacy extends sufficiently to include a woman's choice to determine whether or not to end her pregnancy.[15] In *Dobbs,* the US Supreme court was relentless on disparaging the *Roe* decision from the onset terming it as "egregiously wrong and on a collision course with the Constitution from the day it was decided."[16] Just as the US Supreme Court gave the constitutional right to abortion in *Roe*, it took it away in *Dobbs*.[17] The Court in *Dobbs* held that, "the Constitution does not confer a right to abortion."

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[9] Johanna B Fine, Katherine Mayall and Lilian Sepúlveda, 'The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally' (2017) 19 Health and Human Rights 69, 71.
[10] Constitution of Kenya, 2010 Chapter 4; See arts. 26, 27, 28, 29, 31, 43.
[11] Christina Zampas and Jaime M Gher, 'Abortion as a Human Right—International and Regional Standards' (2008) 8 Human Rights Law Review 249, 250.
[12] UN Committee on the Rights of the Child, 'Concluding Observations, CCPR/CO/83/KEN, 24 March 2005: Kenya.'
[13] Charles Ngwena, 'Access to Legal Abortion : Developments in Africa from a Reproductive and Sexual Health Rights Perspective' (2004) 19 SA Publiekreg = SA Public Law 328, 331.
[14] *Dobbs v Jackson Women's Health Organization* 142 S. Ct. 2228 (2022).
[15] *Roe v Wade* (1973) 410 U.S. 113.
[16] *Dobbs v. Jackson Women's Health Organization* (n 14) [2237].
[17] ibid [2242]The Court stated that: "We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely- the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."."

The joint dissenting opinion of Justice Breyer, Justice Sotomayor and Justice Kagan vehemently opposed the majority decision and asserted:

> We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals-yes, including women- to make their own choices and chart their own futures.[18]

The dissenting Justices reiterated the importance of the right to privacy and autonomy of a woman to make their own choices. The *Dobbs* decision was described as "the first time in history that the Supreme Court has taken away a fundamental right."[19] The US Supreme Court's decision to regress on abortion rights has been broadly castigated as a violation of human rights.[20] A joint statement by the "UN Human Right experts on Supreme Court decision to strike down Roe v. Wade" immediately denounced the *Dobbs* decision.[21]

Dobbs reversed precedent that stood for close to half a century and eliminating a right firmly rooted in personal liberty: the right to abortion.[22] The Court in *Dobbs* effectively demolished the "federal floor protecting abortion" in the USA.[23] The Center for Reproductive Rights (hereinafter *'CRR'*) termed the *Dobbs* decision as a "global outlier.[24] CRR noted that courts in various countries globally, including Kenya, have increasingly affirmed strong safeguards for reproductive autonomy, rooted in national constitutional provisions and international human rights principles, fostering a global trend in

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[18] ibid [2320].
[19] Center for Reproductive Rights, 'Supreme Court Case: Dobbs v. Jackson Women's Health Organization' (*Center for Reproductive Rights*) <https://reproductiverights.org/case/scotus-mississippi-abortion-ban/> accessed 3 October 2023.
[20] Center for Reproductive Rights, 'Legal Analysis: What Dobbs Got Wrong' (2023) 13 <https://reproductiverights.org/wp-content/uploads/2023/03/Legal-Analysis-What-Dobbs-Got-Wrong-3.15.23.pdf> accessed 3 October 2023.
[21] The Working Group on discrimination against women and girls, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and Special Rapporteur on violence against women, its causes and consequences, 'Joint Web Statement by UN Human Rights Experts on Supreme Court Decision to Strike down Roe v. Wade' (*OHCHR*) <https://www.ohchr.org/en/statements/2022/06/joint-web-statement-un-human-rights-experts-supreme-court-decision-strike-down> accessed 3 October 2023.
[22] Center for Reproductive Rights, 'Legal Analysis: What Dobbs Got Wrong' (n 20) 1.
[23] Yvonne Lindgren, 'Dobbs v. Jackson Women's Health and the Post-Roe Landscape Constitutional Issues in Family Law' (2022) 35 Journal of the American Academy of Matrimonial Lawyers 235, 281.
[24] Center for Reproductive Rights, 'Legal Analysis: What Dobbs Got Wrong' (n 20) 13.

liberalising abortion.[25] The prevailing legal ambiguity in Kenya places the rights of women and girls in jeopardy, underscoring the imperative for a transparent legislative framework. This lack of clarity, mirroring a similar situation in the US, heightens the potential of judicial outcomes akin to that witnessed in *Dobbs*.

In this thesis, I argue that the Kenyan legislature should adopt an approach to the regulation of abortion which furthers the rights of women and girls as well as the COK's core principles and national values. The national values of the Republic of Kenya are encapsulated under Article 10 of the COK and include, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.[26] These values should be taken into consideration in interpreting article 26(4) of the COK and in implementing abortion laws in Kenya. Notably, article 259(1) of the COK provides that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of rights. The interpretation should also permit the development of the law and contribute to good governance.[27] This requires a purposive approach in interpreting the provision of the COK.

In addition to interpreting article 26(4) in a manner that furthers women and girl's rights as well as the COK's values, the thesis will argue in favour of an abortion legal regime that is transformative. In *the Matter of Speaker of the Senate & another* [2013] eKLR, the Supreme Court of Kenya lauded the transformative nature of the COK and noted that, "the avowed goal of today's Constitution is to institute social change and reform through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy."[28] In 'Legal Culture and Transformative Constitutionalism,' Karl Kare notes that, "Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."[29] Creating clarity

[25] Center for Reproductive Rights, 'The Constitutional Right to Reproductive Autonomy: Realizing the Promise of the 14th Amendment' (2022) 13 & 44–45 <https://reproductiverights.org/wp-content/uploads/2022/07/Final-14th-Amendment-Report-7.26.22.pdf> accessed 11 December 2023.
[26] Constitution of Kenya, 2010 art. 10(2)(b).
[27] Constitution of Kenya, 2010 art. 259(1).
[28] *In the Matter of the Speaker of the Senate & another Advisory Opinion Reference 2 of 2013* [2013] eKLR (Supreme Court of Kenya) [51].
[29] Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal of Human Rights 146 [147].

on the abortion laws in Kenya will impact the human rights of women and in turn effect social change in the country.

Moreover, as a member state to the United Nations (UN) and the African Union (AU) Kenya should strive to adopt policies to align with its reginal and international law obligations.[30] States are obligated to safeguard the rights of women under international human rights law.[31] States are not forbidden from implementing measures that regulate abortions but such measures should not violate the girl or woman's right to life or any other human right under international law.[32] There is need to enact comprehensive laws and policies to actualize the provision on abortion under article 26(4) and to eliminate any ambiguity on the laws on abortion in the country.

2. Research Questions

The thesis will address the following questions:

1. What was the legal position on abortion prior to the Constitution of Kenya, 2010?
2. What are the existing legal provisions and restrictions regarding abortion in Kenya?
3. Is the law on abortion in Kenya sufficient?
4. How have Courts addressed the right to abortion in Kenya?
5. What are the human right implications of failing to enact laws that align with article 26(4) of the Constitution of Kenya, 2010?
6. How, if at all, has international human rights law been utilized to foster progressive laws on abortion in Kenya?
7. What are the possible recommendations of improving the abortion laws in Kenya while maximizing on the utility of international human rights law?

[30] United Nations, 'United Nations' (*United Nations*) <https://www.un.org/en/about-us/member-states> accessed 29 July 2023. Kenya was admitted as a United Nations member state on 16 December 1963; 'Member States | African Union' <https://au.int/en/member_states/countryprofiles2> accessed 29 July 2023. Kenya was admitted as member of the African Union (formerly 'Organization of African Unity') on 25 May 1963.
[31] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) UNTS, vol. 1249, p. 13 art. 3.
[32] UN Human Rights Committee (HRC), General Comment No. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/36.

3. Objective

The objective of this thesis is to critically analyse the conundrum created by the ambiguity on the law on abortion under Article 26(4) of the Constitution of Kenya, while examining the issue from an international human rights perspective. It aims to provide insights into the legal provisions and restrictions surrounding abortion, the judicial interpretation of the human rights implications in abortion cases, and the implications of this conundrum on the legal discourse, and human rights landscape in Kenya, with reference to relevant international human rights standards.

4. Significance

The thesis will shed light on the compliance of the Kenyan legal framework on abortion in accordance with international human rights standards. It will contribute to the existing literature on the right to life, abortion laws, constitutional interpretation, and human rights, bridging the national and international discourse on this topic. The findings will provide guidance to policymakers, legal practitioners, and human rights advocates, ensuring that Kenya's legal framework aligns with its international human rights obligations.

5. Methodology

This thesis argues that the wording in article 26(4) of the COK is ambiguous. It is argued that article 26(4) of the COK should be interpreted in a manner that will ensure the enactment of a comprehensive legal framework on abortion which will advance the rights of women and girls to the fullest extent possible. In order to address the research questions listed above, the thesis primarily utilizes two research methods namely the doctrinal and comparative methods.

The doctrinal method could be described as the examination of pertinent legal rules and principles that shape the foundation of legal reasoning.[33] The thesis analyses primary sources such as the Constitution, legal statutes, court decisions, and relevant legislation

[33] Mkhululi Nyathi, 'Re-Asserting the Doctrinal Legal Research Methodology in the South African Academy: Navigating the Maze' (2023) 140 South African Law Journal 365 [367].

in Kenya. The doctrinal method will enable the thesis to speculate future developments on abortion law in Kenya.

Additionally, the thesis utilizes the comparative methodology which contemplates comparisons of systems rather than mere legal precepts.[34] It involves seeking answers to various aspects of the law. Comparative methodology facilitates the construction of theories based on the diverse experiences of different jurisdictions.[35] In this thesis, the comparative method will be used to assess the best practices and lessons from other jurisdictions. The thesis will consider how other jurisdictions have addressed abortion laws with a particular focus on Ireland and South Africa. These jurisdictions have been chosen for three reasons. First, they share a similar legal heritage - common law. Second, the jurisdictions all have comprehensive laws that foster equality rights for women and girls. Third, these jurisdictions have robust jurisprudence on women's rights *vis a vis* abortion. The thesis will conduct a comparative examination of international human rights treaties, conventions, and reports to analyse the compatibility of the Kenyan legal framework on abortion with international standards.

6. Synopsis

The dissertation is divided into 5 chapters:

Chapter 1

Introduction

This chapter will provide a background for the study and set out the salient point to be addressed in the thesis. It will establish the current position on abortion laws. It will outline the questions to be examined in the paper and briefly set out the objective of the paper.

Chapter 2

Historical Development on the Laws on Abortion in Kenya.

This chapter focuses on the legal position of abortion prior to the COK. It will examine jurisprudential development in common law, international, regional and national

[34] P Ishwara Bhat, 'Comparative Method of Legal Research: Nature, Process and Potentiality' (2015) 57 Journal of the Indian Law Institute 147 [149].
[35] ibid.

legislation prior to 2010. The chapter will analyse abortion cases to determine the manner in which courts developed their abortion jurisprudence in the country.

Chapter 3

Human Rights implications of criminalising abortion in Kenya

This chapter examines the effects of criminalising abortion from a human rights perspective. It will examine literature addressing abortion from an international human rights context. It will highlight human rights directly impacted as a result of the current laws on abortion. It will assess the manner in which the Kenyan courts have utilized international human rights law to determine abortion cases.

Chapter 4

Comparative Study on Abortion Laws

This chapter focuses on the laws and policies in the comparative jurisdictions. It will analyse the key court cases that had a significant impact on abortion laws. It will examine the manner in which the courts have interpreted abortion laws in Kenya, South Africa and Ireland and the manner in which international laws have impacted the decisions of the courts. The chapter examines three key issues: legal framework on abortion in the three States, rights of the foetus in relation to abortion and conscientious objection as an obstacle to abortion. Lessons are drawn from the achievements and shortcomings in the abortion laws in Ireland and South Africa to examine how Kenya could avoid similar pitfalls and the insights that could be drawn from the two countries.

Chapter 5

Conclusion and Recommendations

This chapter will reiterate and summarize the salient points of the dissertation and provide the concluding remarks. By examining the conundrum of abortion under Article 26(4) of the Constitution of Kenya through an international human rights lens, this paper seeks to provide a comprehensive and informed understanding of the issue. It will offer valuable recommendations for policymakers, legal practitioners, and stakeholders involved in shaping the legal framework, public policy, and human rights discourse pertaining to abortion in Kenya, ensuring compliance with international human rights

standards. Ultimately, the study aims to contribute to a more inclusive, rights-based approach to addressing the complex and sensitive issue of abortion.

CHAPTER 2: HISTORICAL DEVELOPMENT OF THE LAWS ON ABORTION IN KENYA

1. Introduction

As a point of departure, it is trite that the reproductive autonomy among African women has historically been curtailed.[36] During the colonial period, women were generally marginalized and subjugated. Writing in the context of Kenya, Thomas notes that, 'by 1930s, officers were more interested in controlling African women than elevating their status.'[37] It is thus no surprise that Kenya's restrictive abortion laws have been inherited from colonial laws.[38] In order to understand the current legal framework and approach to abortion in Kenya, it is important to examine the historical development of abortion law and its relationship with women's rights and roles in society – this is the task of this chapter – a critical analysis of abortion law from the time of colonial rule, under the 1963 Independence Constitution and under the COK.

The chapter has three sections. First, the chapter commences by examining Kenya's abortion law in the colonial era and highlights the common law imposed by Britain on Kenya.[39] The analysis of the law under colonial rule is important because these laws were ultimately adopted upon Kenya's independence in 1963. Second, the chapter considers the key abortion laws in Britain and the jurisprudence that emerged during the colonial period when British law was applied in Kenya.[40] The chapter then highlights how abortion laws developed after Kenya attained its independence from Britain in 1963. It analyses how the common law was utilized in conjunction with the independence Constitution to determine abortion cases in Kenya.

The third and final part of the chapter will focus on abortion laws after the promulgation of the COK on 8th August 2010. This part of the chapter will primarily focus on two

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[36] Christine Horne, F Nii-Amoo Dodoo and Naa Dodua Dodoo, 'The Shadow of Indebtedness: Bridewealth and Norms Constraining Female Reproductive Autonomy' (2013) 78 American sociological review 503, 503.

[37] Lynn M Thomas, 'Imperial Concerns and "Women's Affairs": State Efforts to Regulate Clitoridectomy and Eradicate Abortion in Meru, Kenya, c. 1910-1950' (1998) 39 The Journal of African History 121, 144.

[38] Eunice Brookman-Amissah and Josephine Banda Moyo, 'Abortion Law Reform in Sub-Saharan Africa: No Turning Back' (2004) 12 Reproductive health matters 227, 228.

[39] Laurence Juma, 'Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes' (2001) 14 St. Thomas Law Review 459, 477.'

[40] These cases include, *R v Bourne* [1939] 1 K.B. 687; [1938] 3 All E. R. 615; *Reg v Newton & Stungo* [1958] Crim LR 469 (1958).

progressive decisions rendered by the High Court of Kenya: *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 and *PAK & another v Attorney General & 3 others* (2022) [2022] KEHC 262 (KLR) (HCK). These cases highlight the legal conundrum brought about by the ambiguous wording of article 26(4) of the COK. The analysis of the cases will explore the manner in which the High Court of Kenya has interpreted the Constitution to advance abortion law in the country. Additionally, it will briefly discuss the Reproductive Healthcare Bill 2019 which Kenya's attempt to introduce comprehensive reproductive health legislation.

2. Colonial Era

When the British colonized various countries around the globe, including several African countries, they imposed the common law to govern their colonies.[41] The common law was implemented in Kenya at the onset of, and throughout the British colonial rule.[42] Consequently, prior to Kenya's independence in 1963, the applicable law relating to abortion originated in Britain.[43] Thomas notes that cases of reported abortion in Kenya 'date back to the earliest period of colonial Kenya.'[44] Codified abortion law can be traced as far back as the year 1803, when the Malicious Shooting or Stabbings Act, 1803 ('Lord Ellenborough's Act') was enacted.[45] Lord Ellenborough's Act made inducing an abortion a criminal offence, punishable by death.[46] Section 2 of Lord Ellenborough's Act provided an exemption in instances where it could be demonstrated that the woman is not yet

[41] 'Entering and Exiting the British Empire' <https://www.britishempire.co.uk/timeline/colonies.htm> accessed 26 June 2023. Britain had full jurisdiction over Kenya once it became a British protectorate.
[42] Michael Nyongesa Wabwile, 'The Place of English Law in Kenya' (2003) 3 Oxford University Commonwealth Law Journal 51, 51.
[43] Juma (n 39) 477. The 1902 East Africa Order in Council 'gave powers to the commissioner to make ordinances for peace order and good government of all persons in the protectorate.'
[44] Thomas (n 37) 123.
[45] Edward Veitch and RRS Tracey, 'Abortion in the Common Law World' (1974) 22 American Journal of Comparative Law 652, 652.
[46] Malicious Shootings or Stabbings Act 1803 (43 George 3 c.58: Lord Ellenborough's Act) s 1, "The act provides *inter alia*, "If any person or persons shall wilfully, maliciously, and unlawfully administer to, or cause to be administered to or taken by any of his Majesty's subjects, any deadly poison, or other noxious and destructive substance or thing, with intent such his Majesty's subject or subjects thereby to murder, or thereby to cause and procure the miscarriage of any woman, then being quick with child; then, in every such case the person or person so offending, their counsellors, aiders and abettors, knowing of any privy to such offence, shall be and are hereby declared to be felons, and shall suffer death as in felony without clergy…"

quick with child.[47] Prior to the enactment of this law, abortion was not criminalised under common law, if the same was induced before quickening.[48]

2.1. The Offences Against the Person Act

When Kenya was a colony of Britain, the applicable law on abortion was the Offences Against the Person Act, 1861 (OAPA).[49] OAPA, Stern argues, is the basis upon which modern laws on abortion emanates.[50] Section 58 of OAPA prohibited attempts of abortion.[51] Section 59 of the same statute prohibited procuring and causing abortion in the following terms:

> Whosoever shall unlawfully supply or procure any Poison or other noxious Thing, or any Instrument or Thing whatsoever, knowing that the same is intended to be unlawfully used or employed with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.[52]

Section 58 of OAPA was interpreted and developed in *R v Bourne* and the language was subsequently applied in section 240 of the Kenyan Penal Code (discussed in section 3 of

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[47] ibid, s 2.
[48] Loren G Stern, 'Abortion: Reform and the Law' (1968) 59 Journal of Criminal Law, Criminology & Police Science 84, 84 'Quickening' can be defined as, "the last stage of gestation usually sixteen to twenty weeks after conception, when the woman feels the first fetal movement."
[49] Offences Against the Person Act 1861 (OAPA).
[50] Stern (n 48) 85.
[51] ibid, s 58 "Every Woman, being with Child, who with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, and whosoever, with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof shall, at the Discretion of the Court, to be kept in Penal Servitude for Life -or any other Term not less than Three Years, or to be imprisoned, for any Term not exceeding Two Years, with or without Hard Labour and or with or without Solitary Confinement."
[52] ibid, s 59.

this chapter).[53] The OAPA eliminated any exemption in cases where abortion is induced prior to quickening and treated abortion at any stage with the same gravity.[54]

In 1929, the Infant Life (Preservation) Act was enacted providing further statutory prohibition of abortion in Britain and implicitly on its colonies.[55] Section 1 of the Infant Life (Preservation) Act, 1929 essentially reiterates the provisions of OAPA but introduces an exemption to when saving the life of the mother to wit, "Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child, was not done in good faith for the purpose only of preserving the life of the mother."[56] These laws were put in place to ensure that the life and health of the mother is protected. These abortion laws, which were applicable in the British colonies, were first adjudicated by the Courts in the 1930s as shall be discussed below

2.2. Termination in Good Faith

R v Bourne [1939] is arguably the first landmark case on abortion under common law jurisdiction. The principle of 'termination in good faith' established in *R v Bourne*, discussed below, had a major impact on how abortion law was interpreted in common law jurisdictions.[57] In England 1938, Aleck Bourne, a distinguished gynaecologist, who after consultation with other doctors and the parents of a patient, performed an abortion on a fourteen years old girl who was a victim of rape. He was subsequently prosecuted under section 58 of the OAPA.[58] The court acknowledged that section 58 of OAPA, unlike the Infant life (Preservation) Act, did not have a proviso for abortion that could be done in good faith to preserve the life of the mother.[59] However, McNaughten J construed the word "unlawfully" used in section 58 of OAPA, to imply exemptions to criminalisation of abortions, in reasonable circumstances.[60] The prosecution in the case had to prove

[53] *R v Bourne* [1939] 1 K.B. 687; [1938] 3 All E. R. 615 elucidated on section 58 of OAPA; Rebecca J Cook and Bernard M Dickens, 'Abortion Laws in African Commonwealth Countries' (1981) 25 Journal of African Law 60, 62.
[54] Veitch and Tracey (n 45) 653.
[55] Infant Life (Preservation) Act 1929.
[56] ibid, s 1.
[57] The principles established in *R v Bourne* [1939] was considered in *Mehar Singh Bansel v R* [1959].
[58] *R v Bourne* [1939] 1 K.B. 687; [1938] 3 All E. R. 615.
[59] ibid.
[60] ibid.

beyond reasonable doubt that the abortion was not conducted in good faith and in the interest of protecting the physical and mental health of the girl.[61] While directing the jury on what to consider in the case McNaughten J noted:

> The law is not that the doctor has to wait until this unfortunate woman is in peril of immediate death and then at the last moment snatch her from the jaws of death. He is not only entitled, but it is his duty, to perform the operation with the view of saving her life.[62]

Bourne was ultimately found to be innocent and acquitted. *R v Bourne* is a landmark case in the developing jurisprudence on abortion law by introducing legal therapeutic abortion in England and other common law jurisdictions.[63]

In *Reg v Newton & Stungo* [1958] Ashworth J adopted the good faith principle.[64] The doctor conducted the procedure on account of preserving the mental health of the mother.[65] The mother died as a result of an abortion and the doctor was charged with "unlawfully using an instrument with intent to procure a miscarriage."[66] He was additionally charged with manslaughter on the grounds of negligence. Ashworth J noted:

> Health meant not physical but mental health as well. there might be cases of a woman going to a doctor in a state of great emotional upset, distraught, and verging on the fringe of insanity. If in such a case the doctor said, 'If I let this go on and I let her proceed to deliver she will be a mental wreck, if not dead,' and he then relieved the woman of her pregnancy, he committed no crime.[67]

The common law principle established in *R v Bourne* was adopted in the Kenyan case of *Menhar Singh Bansel v R* [1959] where the appellant was a surgeon charged and convicted

[61] ibid.
[62] ibid, 693-93.
[63] Veitch and Tracey (n 45) 654.
[64] *Reg v Newton & Stungo* [1958] Crim LR 469 (1958) 1 The British Medical Journal 1242.
[65] ibid.
[66] ibid.
[67] ibid.

for manslaughter by the trial court.[68] The case was as a result of the death of a young sikh woman named Pavanjit Kaur, on 24th February 1959.[69] The appellant performed surgery on her to terminate her pregnancy that resulted in her death. The crown argued that termination was for a purpose other than to preserve the life of the mother or 'to save her from serious prejudice to her health.'[70] The trial court found that the accused performed the operation for a purpose contrary to the 'good faith' principle established in *R v Bourne*.[71] On appeal to the East African Court of Appeal, the Court confirmed that the operation was conducted for some other purpose, not done in good faith, and was essentially an 'illegal operation.'[72] *Menhar Singh Bansel v R* [1959] is an example of how the principle of 'termination in good faith' applied in Kenya.[73] As will be seen in the discussion that follows, the approach to abortion under colonial rule continued after Kenya obtained its independence in 1963

3. Post-Independence Kenya

After Kenya obtained its independence in 1963, common law prevailed in the new Republic. Common law was used in tandem with the Constitution of Kenya, 1963 (Independence Constitution). Justice J B Ojwang argues that, "the common law, by its design and conventions, is not to be alienated from the principles of the constitution and the interpretive approaches of constitutional law."[74] As mentioned in chapter 1 of this thesis, the Kenyan Penal code as read together with the Independence constitution, criminalised abortion and the related offences.[75] This essentially meant that women's reproductive freedom was not obtained during this period. Prior to the Constitution of Kenya, 2010, the only saving grace for anyone charged with an abortion crime was common law principles, codified in Section 240 of the Penal Code which provides:

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[68] *Mehar Singh Bansel v R* [1959] Crim Appeal 115 (1959) EALR 813 832. The East African Court of Appeal, which served as an appellate court, had jurisdiction over Kenya, Uganda and Tanganyika (Tanzania). The court is now defunct.
[69] ibid 814.
[70] ibid 814.
[71] ibid 817."
[72] ibid 832.
[73] ibid 832.
[74] Jackton Boma Ojwang, 'The Constitution and the Common Law, in Common Clause: The Kenya Case' (2017) 2017 East African Law Journal 72, 74.
[75] Jean Baker and Shanyisa Khasiani, 'Induced Abortion in Kenya: Case Histories' (1992) 23 Studies in family planning 34, 35.

> A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case.[76]

It is noteworthy that section 240 of the penal code is inconsistent with article 26(4) of the COK in that it only allows abortion to 'save the mother's life' and excludes the other constitutionally permitted grounds.[77] Moreover, the reported cases on abortion related offences in Kenya seem to primarily be prosecuted when the abortion or attempt of the procedure results in the death of the mother. In *Jane Auma Kweyu v Republic* [2009] eKLR, the appellant was charged and convicted in the lower Court for 'attempting to procure an abortion' under section 158 of the Penal Code.[78] The Appellant, who ran a clinic with her husband, argued that the complainant gave birth and the baby passed away two weeks later in hospital.[79] The Court of Appeal found that there was no evidence to support the charge of 'attempt to procure an abortion.'[80] The Court having found the appellant to have been wrongfully charged under section 158 of the Penal Code set aside the sentence and the conviction.[81]

In *R v Jackson Nyamunya Tali* [2014] eKLR the High Court of Kenya at Nairobi found the accused, a certified nurse, guilty of causing the death of a woman while assisting her to procure an abortion and consequently sentenced him to death.[82] On appeal, the Court found that the prosecutor had failed to produce evidence confirming that the deceased death was as a result of an attempt to procure an abortion.[83] The Court also found that the prosecutor failed to prove the offence of murder at the required standard of 'beyond

[76] Penal Code CAP 63 s.240.
[77] Constitution of Kenya, 2010 art. 26(4).
[78] *Jane Auma Kweyu v Republic Criminal Appeal 79 of 2009* [2009] eKLR.
[79] ibid [2].
[80] ibid [5].
[81] ibid [6].
[82] *Republic v Jackson Namunya Tali Criminal Case 75 of 2009* [2014] eKLR.
[83] *Jackson Namunya Tali v Republic Criminal Appeal 173 of 2016* [2017] eKLR.

reasonable doubt.' Consequently, the Court of Appeal quashed the conviction imposed by the trial court.

These cases indicate a trend of medical practitioners being the primary targets in abortion related cases. Sections 158, 159 and 160 of the Penal Code are used to intimidate medical practitioners from offering abortion services to women and in instances where the abortion procedure results in death, the practitioners are often charged with murder as opposed to the lesser offence of manslaughter. Police officers take advantage of legal ambiguities and the stigma associated with abortion to harass, ensnare and extort healthcare providers and women subjecting them to discrimination and threats of criminal prosecution.[84]

4. Abortion law in the epoch of the COK

Kenya promulgated a new Constitution on 27th August 2010 which has been hailed as transformative.[85] The Supreme Court of Kenya noted that the proclaimed objective of the COK is, "to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy."[86] The professed aim of the COK is manifest in the preamble. This transformative nature, is partially true as is relates to abortion law provided for under article 26(4) of the COK.

The inclusion of the abortion clause in the COK was robustly opposed by the clergy prior to the promulgation of the COK.[87] The Parliamentary Select Committee on the Review of the Constitution (PSC) framed the article on the right to life to state that, "life begins at conception."[88] The PSC argued that this would ensure that this inclusion would receive support for the draft constitution from the religious faction.[89] Notably, the Committee of Experts on Constitutional Review (CoE) acknowledged that there are varied opinions on

[84] Center for Reproductive Rights, 'A Decade of Existence: Tracking Implementation of Article 26(4) of the Constitution, Revealing Progress, Reversals and Betrayal of a National Compromise' (2020) Track Report 13 <https://reproductiverights.org/a-decade-of-existence-revealing-progress-reversals-and-betrayal-of-a-national-compromise/> accessed 14 May 2023; See *FIDA* & *PAK* cases discussed below.
[85] *In the Matter of the Speaker of the Senate & another Advisory Opinion Reference 2 of 2013* (n 28) [51].
[86] ibid [51].
[87] Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review,' (2010), 10.
[88] ibid, 111.
[89] ibid, 111.

when life begins.[90] They noted that Muslims believe that life commences at "ensoulment" which is 40 days after conception whereas Christians are of the notion that life begins at "quickening."[91] The CoE also noted that traditionalists believe that, "life begins at birth," and scientists have wide-ranging opinions.[92] All this information should have been interrogated and taken into account during the drafting of article 26(2) of the COK.

The final report by the CoE highlighted concerns raised by medical practitioners. It was pointed out that the wording prohibiting abortion would be problematic since, "abortion may be spontaneous (miscarriage)."[93] The medical practitioners also advised the CoE that there are instances where the life of the mother is not in danger but she would face serious ramifications if an abortion was not conducted.[94] They also noted that abortion could occur as a result of an operation on a woman's reproductive organs.[95] The CoE also addressed the restriction of limiting abortion to be performed by only medical practitioners.[96] This provision was perceived to have potentially damaging ramifications for indigent rural communities which have no access to proper medical facilities with certified practitioners.[97] The CoE also sought to ensure that emergency contraception was not prohibited by the wording of the provisions.[98] In a bid to ensure that they catered for the concerns raised by the medical practitioners and religious groups, the CoE drafted article 26 of the COK in an ambivalent manner. The ambiguity of article 26, more particularly, 26(4) was a salient issue in the two cases discussed below.

4.1. *The FIDA* Case

Article 26(4) was first brought under judicial scrutiny in *Federation of Women Lawyers (Fida -Kenya) & 3 other v Attorney General & 2 others; East Africa Centre for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* [2019]

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[90] ibid.
[91] ibid, 111. 'Quickening' is discussed earlier in this chapter and was used as the threshold for an acceptable period to procure an abortion in common law.
[92] ibid, 111.
[93] ibid.
[94] ibid.
[95] ibid. The medical practitioners gave examples of medical operations that could prompt an abortion. These examples include, "tumors which present as what appears to be a pregnancies or ectopic pregnancies which, if not terminated, could result in infertility or even death."
[96] Ibid, 111.
[97] ibid.
[98] Ibid.

eKLR.[99] This case is heralded as a landmark decision in abortion law in Kenya. The petition involved *JMM*, a fourteen years old teenager who had been forced into sexual relations with an older man which resulted in her pregnancy. She was later on referred to a 'doctor' who informed her of the option of terminating the pregnancy. She opted to procure an unsafe abortion which went awry. The botched abortion resulted in multiple health complications for the teenager, who was forced to undergo costly medical treatments. She, unfortunately, succumbed to her health complications and died during the pendency of the petition.

The crux of the petition, filed on the teenager's behalf, was to contest the withdrawal of the, "2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortions in Kenya and the National Training Curriculum for the Management of Unintended, Risk and Unplanned Pregnancies (Policy documents and guidelines)."[100] The policy documents and guidelines aimed to harmonize various facets of care aimed at preventing abortion, employing a multi-sectoral approach as the guiding principle.[101] These two policy documents and guidelines were withdrawn by the Director of Medical Services (DMS).[102] In closing, the Court stated that, "the general rule is that abortion is illegal."[103] The Court noted the exception to the general rule and reiterated the wording of article 26(4).[104] Additionally, the court found that if a pregnancy is as a result of rape or defilement, article 26(4) of the COK may be invoked.[105] The Court also found that withdrawing the policy documents and guidelines by the DMS was *ultra vires* and a violation of the COK.[106]

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[99] *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. Hereinafter the '*FIDA Case*'.

[100] Ministry of Medical Services, 'Standards and Guidelines for Reducing Morbidity & Mortality from Unsafe Abortion in Kenya' (2012). The Ministry of Medical Services, in compliance with article 26(4) of the COK, adopted this policy document and sought to amalgamate all facets of care in the prevention of unsafe abortions in Kenya.

[101] ibid [iv].

[102] The Director of Medical Services at the Ministry of Health wrote a letter on 3rd December 2013 addressed to the various stakeholder in the medical profession and religious bodies withdrawing the Standards and Guidelines for Reducing Morbidity & Mortality from Unsafe Abortion in Kenya and the National training curriculum for the Management of Unintended, Risky and Unplanned Pregnancies.

[103] *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)* (n 99) [397].

[104] ibid [397].

[105] ibid [398]-[399].

[106] ibid [401]-[402].

The *FIDA case* was the first real attempt to fill the *lacuna* created by the wording of article 26(4).[107] The five-judge bench examined the meaning of conception and analysed the intersection between when life begins and the "right to be deprived of life intentionally, except to the extent authorised by the Constitution or other written law."[108] The Court opined that the drafters of the COK viewed abortion as, "intentional deprivation of life."[109] The analysis of article 26(4) by the Court was in its capacity as an exception to the general rule prohibiting abortion in Kenya.[110] The Court noted that article 26(4) provides an avenue for parliament to legislate abortion laws.[111] The Court examined the Sexual Offences Act, 2006 and the Penal Code, CAP 63 to demonstrate exemptions to the general rule on abortion in Kenya, 'where statutes permit.'[112]

The 'National Guidelines on Management of Sexual Violence in Kenya were established in accordance with article 35(3) of the Sexual Offences Act.[113] The 'National Guidelines outlined the process of clinical management of sexual violence. The Court noted that despite the criminalisation of abortion provided for in the Penal Code, the principle of implied repeal should be applied since the Penal Code predates the Sexual Offences Act and the COK.[114] The Court found that, as an exception, abortion is permissible under article 26(4) of the COK and section 35(3) of the Sexual Offences Act.[115]

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[107] ibid.
[108] ibid [297].
[109] ibid [303].
[110] Under the COK the general rule is that abortion is not permitted. Article 26(4) provides the exception to the general rule.
[111] *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)* (n 99) [304]-[305].
[112] ibid [367]. s 35(3) of the Sexual Offences Act No. 3 of 2006 provides, "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."
[113] The National Guidelines on Management of Sexual Violence in Kenya (hereinafter 'National Guidelines') was initially published in 2005. It was later revised in 2009 and subsequently in 2014.
[114] *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)* (n 99) [364]-[377].
[115] ibid.

4.2. The Reproductive Healthcare Bill

The Reproductive Healthcare Bill, 2019 (hereinafter the 'Bill') was the second attempt to enact comprehensive and progressive reproductive health laws in Kenya.[116] In 2014, there was an attempt to enact the similar Bill.[117] The Bill essentially aimed to *inter alia* realise the abortion provision in Article 26(4) of the COK. The Kenyan legislators once again rejected the Bill which would have provided a framework to address the prevailing challenges facing reproductive health in Kenya.[118] Soon after the Bill was rejected, the High Court of Kenya at Malindi rendered a judgment that reaffirmed the right to abortion in the country as discussed below.[119]

4.3. *The PAK* Case

Barely a year after the judgment of the *FIDA* case had been rendered, a constitutional petition was filed in the High court of Kenya at Kilifi relating to abortion rights.[120] In *PAK,* the court was focused on the confluence of sections 158, 159 and 160 of the penal code, article 26(4) of the COK and Kenya's international law obligations.[121] Similar to the *FIDA* case, the crux of the *PAK* case was to attempt to shed light on the legal flux of the constitutional but criminal abortion law in Kenya.[122]

PAK was a high school minor who fell pregnant sometime in 2019.[123] She subsequently experienced some complications and went to Chamalo Medical Clinic for treatment on 19th September 2019.[124] Salim Mohammed, a registered clinical officer, who attended to her informed her that she had experienced a spontaneous abortion.[125] Salim performed a manual vacuum evacuation on *PAK*, granting her some relief.[126] On 22nd September 2019, both *PAK* and Salim were arrested and charged under section 159 and 158 of the

[116] Reproductive Healthcare Bill 2019.
[117] See Reproductive Healthcare Bill 2014.
[118] Stephanie Musho, 'Kenya's Reproductive Health Crisis Will Not Be Solved by Morality' *Nation* (3 December 2022) <https://nation.africa/kenya/blogs-opinion/blogs/-kenya-s-reproductive-health-crisis-will-not-be-solved-by-morality-4042454> accessed 11 December 2023.
[119] *PAK & another v Attorney General & 3 others* (n 3).
[120] *ibid.*
[121] ibid.
[122] *PAK & another v Attorney General & 3 others* (n 3) [49].
[123] ibid [2].
[124] ibid [2]-[3].
[125] ibid [3]-[4].
[126] ibid [3]-[4].

penal code respectively.[127] The petition was filed, by and on behalf of the petitioners (*PAK* and Salim Mohammed) on 20th November 2020.[128]

Some of the key issues for determination include:

> whether there is a lacuna in the statutory scheme to operationalize article 26(4) of the COK, whether sections 158, 159 and 160 of the penal code are unconstitutional and whether the constitutional rights of the petitioners were violated…[129]

On the first issue the court found that, the convergence of onerous abortion laws, in tandem with the dearth of efficacious legislations effectively enshrining the tenets espoused in Article 26(4) of the COK not only jeopardizes the welfare of women and girls, but also subjects them to perilous hazards that often results in clandestine abortion practices.[130] Additionally, this dichotomy engenders a climate of ostracization towards those seeking abortions, thus transgressing their right to life and the highest conceivable standards of health.[131]

In addressing the second issue, the court found that the primary objective underlying the inclusion of the Penal Code sanctions pertaining to abortions, in the absence of comprehensive legislative or policy framework, is to avert the possibility of, "arbitrary, unfair and unreasonable considerations," influencing the Director of Public Prosecutions' decision to initiate prosecution.[132] Nyakundi J further noted that the Penal Code, which proscribes abortion as a criminal offense, should be construed in congruity with the foundational principles of rights and freedoms enshrined in the COK.[133] He argued that criminalisation of abortion under the Penal Code, in the absence of a legislative and administrative framework delineating the modalities for women to access "therapeutic

[127] ibid [5]-[11].
[128] ibid.
[129] ibid [49].
[130] ibid [66].
[131] ibid [66].
[132] ibid [103].
[133] ibid [108]-[110].

abortion" in line with the exception envisaged in article 26(4), represents an encroachment upon the exercise of reproductive rights accorded to women.[134]

The Court, while considering the impugned sections of the Penal Code further noted that in the absence of persuasive evidence demonstrating a direct conflict with explicit constitutional provisions, the court did not have the competence to declare a law as unconstitutional.[135] However, the Court made a declaration for parliament to 'enact abortion law and policy framework' that is in line with article 26(4).[136] Further, the court held that healthcare providers offering abortion services in good faith and in accordance with the COK shall not be guilty under the provisions of the Penal Code.[137] Finally, the court held that sections 158, 159 and 160 of the Penal code have procedural and substantive defects which fail to align with the exceptions outlined in article 26(4) of the COK.[138]

These progressive judgments further enrich the jurisprudence on abortion law in Kenya. The judgments essentially nullify the police's unfettered discretion to apprehend and detain both patients and medical service providers on mere suspicion of violating residual Penal Code provisions on abortion.[139] That said, no legislation has been passed. The tragic irony evident in the historical analysis above is that legislation established to avert women's fatalities in the 19th century morphed into agents of mortality for African women in the 20th and 21st century.[140]

5. Conclusion

This chapter explored the historical development of abortion law in Kenya. Abortion law was codified as far back as 1803 where Britain established a pioneering statute addressing abortion.[141] The enactment of the 'Miscarriage of Woman Act' in England

[134] ibid [101].
[135] ibid [109].
[136] ibid [164].
[137] ibid.
[138] ibid.
[139] *PAK & another v Attorney General & 3 others* (n 3) [136]-[140].
[140] Brookman-Amissah and Moyo (n 38) 229.
[141] Stern (n 48) 84. In the era preceding 1803, the prevailing common law in England deemed induced abortion prior to quickening to have to no criminal liability.

effectively abrogated the long-standing common law tenet that regarded abortion as illegal exclusively after quickening.[142] Thereafter abortion law progressively developed by virtue of the OAPA in 1861 which, according to Cook and Dickens, arguably established the 'basic law on abortion in the Commonwealth world.'[143]

The chapter then examined the colonial period in Kenya and focused on the case law that progressed the development of abortion law in the Commonwealth countries. *R v Bourne* established the principle of 'termination in good faith' under sections 58 and 59 of the OAPA.[144] The chapter then analysed the development of abortion law through the Kenyan courts' jurisprudence and illustrated how the courts implemented the 'termination in good faith' principle established in *R v Bourne*.[145]

Finally, the chapter delved into abortion law under the COK. This section primarily focused on the *FIDA* and *PAK* cases, two landmark cases that brought article 26(4) under scrutiny. These two cases sought to fill the *lacuna* created by the ambiguous wording of article 26(4) of the COK by establishing the parameters under which abortion may be conducted in Kenya.[146] These progressive cases on abortion law notwithstanding, abortion remains illegal in the country as the Reproductive Healthcare Bill never materialized into law.[147] As will be explored in the next chapter, the persisting restriction of reproductive freedom in Kenya has various human rights implications.

[142] ibid.
[143] Rebecca J Cook and Bernard M Dickens, 'Abortion Laws in African Commonwealth Countries' (1981) 25 Journal of African Law 60, 61.
[144] ibid 61.
[145] *Mehar Singh Bansel v R* [1959] Crim Appeal 115 (1959) EALR 813 832.
[146] *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)* (n 112); *PAK & another v Attorney General & 3 others* (n 4).
[147] *PAK & another v Attorney General & 3 others* (n 3) [53].

CHAPTER 3: THE HUMAN RIGHTS IMPLICATIONS OF CRIMINALISING ABORTION IN KENYA: HUMANITY DENIED?

1. Introduction

It has been argued that the "law and legal institutions" across the globe have been instrumental in perpetuating the patriarchal system in society that subjugates and oppresses women.[148] Historically, women have been relegated to second class citizens and lived in a society that stifles their inherent human rights. "To deny people their human rights is to challenge their very humanity."[149] This quote embodies the reality lived by girls and women for centuries. Their human rights have been undermined and out right denied. One of the ways in which the law has been used to regulate and control women's sexual reproductive rights is by criminalising abortion.[150]

As mentioned in chapter 1 of this thesis, Sections 158, 159 and 160 of the Penal Code criminalise abortion in Kenya.[151] These provisions create a paradox *vis a vis* article 26(4) of the COK which allows abortions in exceptional circumstances. Because of the uncertainty about the scope of application of article 26(4), for example, the meaning of 'emergency', the *de facto* position is akin to a complete criminalisation of abortion. Kerr argues that criminalising abortion holds no legitimate purpose other than as a tool to oppress women's rights and compromise their inherent autonomy.[152] This chapter argues that criminalisation of abortion undoubtedly has an impact on various human rights including, the right to life, right to health, the right to privacy, the and the right not to discriminated against.[153] This chapter discusses the effect of criminalising abortion on these human rights by analysing international, regional and domestic laws on abortion. To achieve this, the chapter examines various cases to illustrate how the courts have interpreted the effects of criminalising abortion on women's rights. This chapter explores

[148] Lynne Henderson, 'Law's Patriarchy Review Essay' (1991) 25 Law & Society Review 411, 411.
[149] Nelson Mandela at a joint meeting of the United States Congress, Washington DC (1990). United Nations, 'Building on the Legacy of Nelson Mandela' (*United Nations*) <https://www.un.org/en/exhibits/page/building-legacy-nelson-mandela> accessed 22 August 2023.
[150] Henderson (n 148) 412.
[151] Penal Code CAP. 63 (Kenya).
[152] Katherine Kerr, 'Queensland Abortion Laws: Criminalising One in Three Women' (2014) 14 QUT Law Review 15, 15.
[153] Amnesty International, 'She Is Not a Criminal: The Impact of Ireland's Abortion Law' (2015) EUR 29/1597/2015 98 <https://www.amnesty.org/en/documents/eur29/1597/2015/en/> accessed 22 August 2023.

the interrelation between the various human rights and examines how they are impacted by restrictive abortion laws in Kenya.

2. Life on the Line: Abortion Laws and the Right to Life

Central to the tapestry of human rights is the fundamental right to life. Grimes *et al.* argue that: "Women have always had abortions and will continue to do so."[154] Whether it is sanctioned or not, studies have established the prevalence of abortions in Kenya.[155] The World Health Organisation (WHO) established that roughly "70,000 women die annually from complications related to unsafe abortions."[156] The WHO defines 'unsafe abortion' as, "a procedure for terminating an unintended pregnancy carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards or both."[157] Unsafe abortions mainly impact developing countries, including Kenya.[158] A WHO study conducted in 2013 indicates that in Kenya, there are 266 deaths for every 100,000 safe abortions.[159] These figures illustrate the grim reality faced by a multitude of girls and women. Criminalising abortion does not abolish the practice, it simply makes access to the procedure more dangerous for girls and women. Studies place a nexus between criminalisation of abortion and abortion safety."[160]

The sanctity of life, as a human right, has preeminent position in society. This chapter will focus on girl's and woman's right to life and not delve in to the debate on the 'foetus' right to life.'[161] Women resort to clandestine abortions to circumvent the restrictions of the law, which in some instances results in the loss of the life of the mother.[162] Article 26(1) of the

[154] David A Grimes and others, 'Unsafe Abortion: The Preventable Pandemic' (2006) 368 The Lancet (British edition) 1908, 1917.
[155] Abdhalah Kasiira Ziraba and others, 'Unsafe Abortion in Kenya: A Cross-Sectional Study of Abortion Complication Severity and Associated Factors' (2015) 15 BMC Pregnancy and Childbirth 34.
[156] Christina Zampas and Jaime M Gher, 'Abortion as a Human Right - International and Regional Standards' (2008) 8 Human Rights Law Review 249, 250.
[157] Technical Working Group on the Prevention and Management of Unsafe Abortion (1992: Geneva, Switzerland and World Health Organization Maternal Health and Safe Motherhood, 'The Prevention and Management of Unsafe Abortion: Report of a Technical Working Group, Geneva, 12-15 April 1992' (World Health Organization 1993) WHO/MSM/92.5. Unpublished <https://apps.who.int/iris/handle/10665/59705> accessed 28 August 2023.
[158] Grimes and others (n 154) 1908.
[159] Ministry of Health (Kenya) and others, 'Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study' (2013) 25.
[160] Zampas and Gher (n 156) 250.
[161] Foetal rights will be discussed in Chapter 4 of the Thesis.
[162] Zampas and Gher (n 156) 255.

COK guarantees the right to life to wit: "Every person has the right to life."[163] In *PAK*, the Court adopted the definition of the right of life as delineated in *S v Makwanyane*.[164] In *S v Makwanyane* the Constitutional Court of South Africa stated that the right to life is "antecedent to all other rights in the Constitution" and noted that right to life encompasses the right to dignity.[165] Similarly, in *PAK,* the court acknowledged that having restrictive abortion laws violates other fundamental rights including the right to dignity and health which in turn infringes the right to life.[166] The *FIDA* case, established that in Kenya, 'the general rule is that abortion is illegal.'[167] One exception to this general rule is in instances where 'life of the mother is in danger.'[168] This shows that the drafters of the COK and the Kenyan Courts are cognisant of how the criminalisation of abortion poses a threat to the right to life of women and girls. Unfortunately, this awareness is not present in the Penal Code.

There is a legal framework at the international, regional and national level protecting the right to life. Kenya has ratified various international human right treaties that address the right to life including: "International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR), Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC)."[169] International law forms part of Kenyan law by virtue of article 2(5) of the COK which provides that, "the general rules of international law shall form part of the law of Kenya."[170] Additionally, article 2(6) provides that, "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this

[163] Constitution of Kenya, 2010 art. 26(1).
[164] *PAK & another v Attorney General & 3 others* (n 4); See *S v Makwanyane* (CCT3/94) [1995] ZACC 3.
[165] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3 [325].
[166] *PAK & another v Attorney General & 3 others* (n 3) [66].
[167] *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)* (n 99) [397].
[168] Constitution of Kenya, 2010 art 26(4).
[169] UN General Assembly, International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1974) UNTS, vol. 999, p. 171; UN General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) UNTS, vol. 993, p.3 ;UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) UNTS, vol. 1249, p. 13; UN General Assembly, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS, vol. 1577, p.3.
[170] Constitution of Kenya, 2010 art 2(5).

Constitution."[171] It is important to point out that the general principle in international law is that, 'states are only bound to the extent that they allow themselves to be bound' by treaties and conventions.[172] Once a state binds themselves to a treaty and its provisions, they become obliged to comply with the provisions of the instrument.[173] Kenya therefore has international law obligations in accordance with the provisions in articles 2(5) and 2(6) of the COK.

In international law, the right to life is categorically provided for in article 6(1) of the ICCPR: "Every human being has the inherent right to life."[174] The right to life, and its significance is implicitly provided for in other international instruments. The ICESPR has addressed the impact of abortion to the life of girls and women.[175] The Committee on Economic Social and Political Rights noted that, "denial of abortion leads to maternal mortality and morbidity which in turn constitutes a violation of the right to life." The Committee urges states to, 'lower maternal and morbidity rates' by preventing unsafe abortions by liberalizing restrictive abortion laws.[176] The CEDAW committee has similarly addressed the issues of maternal mortality and morbidity resulting from clandestine abortions and framed it as a "violation of women's right to life."[177] Kenya needs to ensure that its laws align with its international obligations and the international human rights principles to curb maternal mortality.

At the regional level, Kenya has ratified the "Protocol to the African Charter on Human and People's rights on the Rights of Women in Africa (Maputo Protocol)." The Maputo

[171] ibid art. 2(6).
[172] Anjori Mitra, 'We're Always Going to Argue about Abortion: International Law's Changing Attitudes towards Abortion' (2017) 1 New Zealand Women's Law Journal 142, 145.
[173] ibid.
[174] UN General Assembly, International Covenant on Civil and Political Rights (1966) UNTS, vol 999, p.171 art 6(1).
[175] UN Committee on International Covenant on Economic Social and Political Rights General Comment (ICESPR) General Comment No. 22 (2016), The Right to Sexual and Reproductive Health, art 12 ICESPR E/C.12/GC/22 [28].
[176] ibid.
[177] UN Committee on the Elimination of Discrimination Against Women (*CEDAW), Report of the Committee on the Elimination of Discrimination Against Women*, 20th and 21st sessions (1999), supplement No. 38 A/54/38/Rev. 1 [56] "In this regard, the Committee notes that the level of maternal mortality due to clandestine abortions may indicate that the Government does not fully implement its obligations to respect the right to life of its women citizens."

Protocol is lauded as the only instrument to explicitly address women's right to abortion.[178] Article 14(c) of the Maputo protocol requires:

> States Parties shall take all appropriate measures to:
>
> Protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental or physical health of the mother or the life of the mother or the foetus.[179]

It is noteworthy that Kenya has placed a reservation on article 14(c) of the Maputo protocol for being "inconsistent with the Laws of Kenya on health and reproductive rights."[180] The main issue with article 26(4), is the convoluted wording of the article and its conflict with the Penal Code, which unequivocally criminalises abortion. The lack of clarity in the abortion law in Kenya is inadvertently perpetuating unsafe abortions that ultimately compromises the right to life of Kenyan girls and women. However, not all clandestine abortions result in death. In some instances, it is the health of girls and women that becomes compromised.

3. The Erosion of Health amidst Abortion Restrictions

Unsafe abortions have been noted as a 'public health problem' in Kenya.[181] As discussed above, the right to life is linked to the health of the person. The World Health Organisation (WHO) defines health as, "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." Health in the abortion context requires governments to abolish restrictive abortion laws and establish laws and policies that will ensure accessible reproductive health. Zampas and Gher argue that governments should also, "take positive measures to avoid women's exposure to the health risks of unsafe

[178] African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2003) art. 14.
[179] ibid.
[180] African Union, African Commission on Human &Peoples' Rights, Commissioner and Special Rapporteur on the Right of Women in Africa: Status of Implementation of the Protocol of the African Charter on Human and People's Rights on the Right of Women in Africa (Maputo Protocol), 18 March 2016.
[181] Ministry of Health (Kenya) and African Population and Health Research Centre, 'The Costs of Treating Unsafe Abortion Complications in Public Health Facilities in Kenya' (2018).

abortions and to ensure pregnant women's access to abortion when their health is at risk."[182]

Criminalising abortion results in women resorting to clandestine abortion operations that jeopardizes their health. Improved legal access to abortion is linked to better reproductive health.[183] The right to health is recognized in international legal instruments. Article 12 ICESCR provides that: "The States parties to the present Covenant recognize the right of everyone to the enjoyment of the highest standard of physical and mental health." Article 12 2(a) of ICESCR provides for the right to 'maternal, child and reproductive health.' The ICESCR essentially developed an 'international legal infrastructure' to manage and foster the right to health.[184] The 'Committee on Economic Social and Cultural rights (CESCR)' has been instrumental in modernizing and developing the right to health at the international level.[185] General comment 14 of the ICESCR recognizes the right to health as 'indispensable for the exercise of other rights.'[186]

Similarly, CEDAW addresses the right to health in article 12 where states parties are obliged states to:

> take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.[187]

Unlike the Maputo protocol discussed previously, CEDAW does not explicitly address abortion. However, the CEDAW committee elaborated on article 12 of CEDAW and acknowledged that during pregnancies and childbirth, there is a correlation between women's right to health and their unassailable right to life.[188] It can be deduced that in so

[182] Zampas and Gher (n 156) 268.
[183] Grimes and others (n 154) 1912.
[184] Lance Gable, 'Reproductive Health as a Human Right' (2010) 60 Case Western Reserve Law Review 957, 978.
[185] ibid.
[186] UN, Committee on Economic Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health art. 12 ICESCR, E/C.12/2000/4.
[187] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 24,* art 12 CEDAW (1999), A/54/38/Rev. 1 chap. I.
[188] ibid.

far as abortion is concerned, there is an inevitable nexus between the right to life and the right to health.

The impact of strict abortion laws on a woman's health was addressed in *KL v Peru* (2005) by the Human Rights Committee (HRC).'[189] The case involved a 17 years old, pregnant with an anencephalic foetus who was forced to carry the pregnancy to term.[190] *KL* had been informed of the risks of the pregnancy to her health, life, and that of the foetus and she opted to terminate the pregnancy.[191] Despite Peruvian law allowing abortions when the life of the mother is in danger, her request to terminate the pregnancy was denied by the director of Achbishop Loayza National Hospital.[192] She was therefore forced to carry the pregnancy to term and thereafter had to breastfeed the baby for a period of 4 days before the baby succumbed to its health complications.[193] This whole experience traumatized *KL* and sent her into a deep depression which required psychiatric treatment.[194] A complaint was subsequently filed before the HRC alleging a violation of a variety of *KL's* fundamental human rights.[195]

The HRC held that by failing to provide abortion services for the teenage girl, the Peruvian government had violated its domestic laws and several international human rights laws.[196] These laws included articles 7, 17, and 24 of the ICCPR.[197] The *KL* case marked the first time a State was held responsible by a UN human rights body for its lack of commitment to guaranteeing an individual's access to abortion services.[198] The decision also highlighted the human rights implications of stifling access to abortion.

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[189] UN Human Rights Committee (HRC) *K.L. v Peru* (1153/2003), CCPR/C/85/D/1153/2003, (2005) (hereinafter '*KL* case').
[190] ibid [2.1]- [2.6] "Anencephaly is a fatal birth defect, where the foetus lacks most or all of the forebrain."
[191] ibid [2.2].
[192] ibid [2.3].
[193] ibid [2.6].
[194] ibid [2.6].
[195] ibid [2.7].
[196] ibid [6.1]- [9].
[197] ibid [7] art. 7(1) "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", art. 17)1) "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks to his honour and reputation" & art. 24(1) "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national, or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."
[198] Zampas and Gher (n 11) 271.

Regionally, the right to health is guaranteed in article 16 of the African Charter on Human and Peoples' Rights (Banjul Charter) in the following terms, "every individual shall have the right to enjoy the highest attainable state of physical health."[199] Notably, both regional and international legal instruments acknowledge the mental facet of health in their provisions. Article 16 of the 'Banjul Charter' was considered in *Purohit and Another v The Gambia* (2003) where the African Commission on Human Peoples' Rights noted the importance of the right to health in the following terms:

> Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all other fundamental human rights and freedoms. This includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.[200]

Additionally, article 14 of the Maputo protocol extensively sets out provisions guaranteeing the reproductive health rights of women in Africa and provides that, "States parties shall ensure the right to health of women including sexual and reproductive health is respected and promoted."[201]

In Kenya, the right to health is constitutionally guaranteed in the COK. Article 43(1)(a) of the COK has adopted the international standards *vis a vis* the right to health to wit: "Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care."[202] Gable argues that the human rights paradigm serves as a fundamental instrument in guaranteeing attainment of reproductive health and upholding reproductive rights.[203] Though the general rule in

[199] 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), art. 16.
[200] *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR) [80].
[201] African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2003) art. 14.
[202] Constitution of Kenya art, 2010 43(1)(a).
[203] Gable (n 183) 959.

Kenya is that abortion is illegal, protecting a woman's health serves as one of the exceptions provided for in article 26(4).[204]

Article 21 of the COK places an obligation on the state to, "observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights" which includes article 26(4).[205] This provision was vital in determining a fundamental issue in the *FIDA* case. The court found that, "withdrawing of the 2012 Standards and Guidelines and the Training Curriculum" essentially stifled the applicability of article 26(4) and amounted to a violation of girl's and women's reproductive health rights.[206]

Unsafe abortion endangers women's health in developing countries such as Kenya. Significant progress has been made in recognizing the correlation between human rights and reproductive health and some states have acknowledged the value of utilizing rights-based initiatives to cultivate reproductive health advancements.[207] Even as the ethical discourse on abortion prevails, studies have indicated that "access to safe and legal abortion on demand has a positive impact on women's reproductive health."[208] Ngwena stresses the significance of domesticating laws to the 'optimal human rights efficacy.'[209] It is incumbent upon Kenyan legislators to ensure that domestic law is developed to actualize the protection to women's health as intended by articles 26(4) and 43(1) of the COK. Developing comprehensive abortion and reproductive health policies, laws and

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[204] *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)* (n 99) [304]-[305].

[205] Constitution of Kenya, 2010 art. 21 "Implementation of right and fundamental freedoms (1) it is a fundamental duty of the State and every State Organ to observe, respect, protect, promote and fulfil the right and fundamental freedoms in the Bill of Rights. (2) The State shall take legislative, policy and other measures including the setting of standards, to achieve the progressive realization of the rights guaranteed under article 43. (3) All State Organs and all public officers have the duty to address the needs of vulnerable groups in society, including women, older members of society, persons with disabilities, children, youth, member of minority or marginalized communities, and members of particular ethnic, religious or cultural communities. (4) The State shall enact and implement legislation to fulfil its international obligations in respect of human right and fundamental freedoms."

[206] *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)* (n 99) [402].

[207] Gable (n 183) 996.

[208] Grimes and others (n 154) 1917.

[209] Charles G Ngwena, 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 Human Rights Quarterly 783, 864.

establishing well equipped medical facilities will give women the autonomy to decide on matters relating to their own bodies.

4. Privacy and Autonomy under Siege amidst Criminalisation of Abortion

The struggle to secure women's access to reproductive healthcare encompasses more than just abortion. Rather, it delves into women's other core fundamental rights, including the rights to privacy and bodily autonomy.[210] A woman's right to autonomy is integrally linked to her right to privacy. Abortion is a critically private matter; it is vital for women's privacy to be guaranteed if they require such services to enable them to make decisions at their own behest. Ngwena argues that the failure to acknowledge the right to seek an abortion without the need for justification, or neglecting considerations for socioeconomic circumstances, conflicts with the fundamental purpose of a right aimed at safeguarding an all-encompassing and independent access to reproductive health.[211] In essence, to uphold the right to privacy and bodily autonomy, it is imperative to adopt a comprehensive interpretation of article 26(4), encompassing abortion procedures justified by socioeconomic considerations.

A study conducted in Maputo revealed that some women intentionally avoid public facilities and opt for clandestine abortion operations in a bid to protect their privacy.[212] In the American case of *Griswold v Connecticut* (1965) while addressing the constitutional right to privacy the court noted that: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion so fundamentally affecting a person as the decision whether to bear or beget a child."[213]

Similarly, the right to privacy was recognized as an integral constitutional right in the landmark abortion case of *Roe v Wade* (1973) (hereinafter *Roe*).[214] The court found that a woman's decision to terminate her pregnancy falls within the purview of the right to privacy.[215] Critics like Chemerinsky and Goodwin highlight John Hart Ely's argument

[210] Erwin Chemerinsky and Michele Goodwin, 'Abortion: A Woman's Private Choice' (2016) 95 Texas Law Review 1189, 1193.
[211] Ngwena, 'Inscribing Abortion as a Human Right' (n 208) 844.
[212] ibid 841.
[213] *Griswold v Connecticut* [1965] 381 U.S. 479.
[214] *Roe v Wade* [1973] 410 U.S. 113.
[215] ibid.

where, in objection to the *Roe* decision, he argued that, "abortion and privacy are not mentioned in the Constitution and therefore no such right exists."[216] Such criticisms notwithstanding, there is general consensus that prohibiting abortion encroaches upon a woman's autonomy.[217]

Unlike the American Constitution, in Kenya the right to privacy is explicitly provided for in article 31 of the COK in the following terms:

> "Everyone has the right to privacy, which includes the right not to have-
>
> (a) their person, home or property searched;
>
> (b) their possessions seized;
>
> (c) information relating to their family or private affairs unnecessarily required or revealed;
>
> (d) the privacy of their communications infringed."[218]

The High court of Kenya embraced the significance of the right to privacy in abortion cases. In the *PAK* case, Justice Nyakundi reiterated the position of the court in *Roe* while addressing the right to privacy of a woman and reaffirmed its significance as a constitutional right.[219] Internationally, the right to privacy is expressly provided for in article 17 of the ICCPR to wit:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor unlawful attacks to his honour and reputation.
2. Everyone has the right to protection against such interference or attacks.[220]

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[216] Chemerinsky and Goodwin (n 209) 1224.
[217] ibid 1226; See 25.
[218] Constitution of Kenya, 2010 art. 31.
[219] *PAK & another v Attorney General & 3 others* (n 4) [73]-[75] "the US Supreme court reaffirmed the principle established in earlier cases to the extent that the constitutional right to privacy protected an individual's right to reproductive autonomy."
[220] UN General Assembly, International Covenant on Civil and Political Rights (1966) UNTS, vol 999, p.171 art 17(1) & (2).

CEDAW has observed the nexus between the 'right to privacy in health-care matters, and abortions and women's health.'[221] The right to privacy was also addressed by the HRC in general comment no. 28 obliging states to furnish the HRC with information on any laws and policies that may encroach on a woman's right to privacy as outlined in article 17 of the ICCPR.[222] The Court referred to general comment no. 2 of the African Commission on Human and Peoples Rights which provided that: "for women who have the right to therapeutic abortion, the practice of interrogation by healthcare providers, the police and/ or judicial authorities is a violation of their right to privacy and confidentiality."[223] Ngwena rightfully criticises article 14(2) of the Maputo Protocol to the extent that it does not holistically embrace women's autonomy and further that it sustains the historical perception of abortion as a criminal activity.[224]

The key takeaway from the foregoing international human rights laws and principles is that the right to privacy is integral in giving women a peace of mind and fostering a safe environment for her to exercise her reproductive autonomy. Criminalising abortion inadvertently limits a woman's right to privacy and impedes on her ability to decide whether she wishes to "bear or beget" a child.[225] Criminalisation of abortion in Kenya violates women's constitutional rights and imposes great indignity on them as persons deserving of equal respect and treatment.

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[221] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 24,* art 12 CEDAW (1999), A/54/38/Rev. 1 chap. I [12][d] "While lack of respect for the confidentiality of patients will affect both men and women, it may deter women from seeking advice and treatment thereby adversely affect their health and well-being. Women will be less willing, for that reason, to seek medical care for diseases for the genital tract, for contraception or for incomplete abortion and in cases where they have suffered sexual or physical violence."

[222] UN Human Rights Committee (HRC), CCPR General Comment No. 28 art. 3 (The Equality of Right Between Men and Women), 29 March 2000 CCPR C/21/Rev. 1/Add. 10 [20].

[223] *PAK & another v Attorney General & 3 others* (n 3) [79].

[224] Ngwena (n 181) 844 art. 14(2)(c) Maputo Protocol "States Parties shall take measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endagers the mental and physical health of the mother or the foetus."

[225] Chemerinsky and Goodwin (n 209) 1226.

5. Revealing Disparities in Abortion Laws: The Right to Equality and Non-Discrimination

In 2016, UN human rights experts addressing States during the 'International Safe Abortion Day' asserted that criminalisation of abortion amounts to discrimination of women in the following terms: "Criminalisation of abortion and failure to provide adequate access to services of termination of an unwanted pregnancy are forms of discrimination based on sex."[226] Criminalisation of abortion in Kenya, therefore amounts to "sex-discrimination" and a violation of women's constitutional rights. Any endeavour to eradicate sex-discrimination hinges on its direct confrontation of the perception of women's inferiority and deconstructing all underpinning establishments upholding this belief.[227]

In theory, all Kenyan men and women are equal under the COK. The distinction of formal and substantive equality was considered by the Supreme Court of Kenya *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.[228] The Court noted that Article 27 of the COK provided for both formal and substantive equality but held in a majority decision that substantive equality cannot be attained immediately.[229] In his dissenting opinion, Chief Justice Mutunga (as he then was) addressed the issue of equality under the COK in the following terms:

> Equality here is substantive, and involves undertaking certain measures, including affirmative action, to reverse negative positions that have been taken by society. Where such negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive.[230]

[226] Mitra (n 171) 171.
[227] Twiss Butler, 'Abortion Law: Unique Problem for Women or Sex Discrimination' (1991) 4 Yale Journal of Law and Feminism 133, 144.
[228] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.
[229] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012]eKLR [66].
[230] ibid [11.7].

He effectively urged the immediate enforcement of equality rights as guaranteed under the COK. Article 27 of the COK extensively sets out provisions on equality and non-discrimination as follows:

> "27. Equality and freedom from discrimination
>
> 1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
> 2) Equality includes the full and equal enjoyment of all right and fundamental freedoms.
> 3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
> 4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
> 5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
> 6) To give full effect to the realisation of the right guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
> 7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
> 8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."[231]

[231] Constitution of Kenya, 2010 art. 27.

Ironically, the preceding article (article 26(4)) has extensively been impugned in the High Court of Kenya for being manifestly discriminatory in nature.[232] Notably, article 27 of the COK is in congruence with regional and international human rights instruments *vis a vis* equality and non-discrimination. The application of CEDAW in Kenya is established by operation of Article 2(6) of the COK, following Kenya's accension of the convention on 9th March 1984. Article 1 of CEDAW defines "discrimination against women" as:

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[233]

CEDAW's definition of "discrimination against women" is considerably broad and factors in the historical disadvantaged position of women. In the context of abortion, Ngwena argues that, ultimately, abortion law that enforces prescribed childbearing roles is a form of discrimination.[234] The CEDAW committee has also noted that a States' denial to legally facilitate delivery of certain reproductive health services to women constitutes an act of discrimination.[235] They gave an example of cases where health providers conscientiously object to providing these services, measures should be established to guarantee the appropriate referral of women to alternative healthcare providers.[236] CEDAW has urged states to review laws that criminalise abortion and to set up legislation that promotes equality and is more accommodating to women's reproductive health rights.[237]

Ngwena brilliantly argues that, allowing abortion only when a woman's life is in danger, "gives scour to patriarchal and religious assumptions about the childbearing role of

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[232] See *PAK & another v Attorney General & 3 others* (n 4); *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)* (n 99) .
[233] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) UNTS, vol. 1249, p. 13 art. 1.
[234] Ngwena, 'Inscribing Abortion as a Human Right' (n 208) 844.
[235] UN Committee on the Elimination of Discrimination Against Women (*CEDAW*), *General Recommendation No. 24,* art. 12 CEDAW (1999), A/54/38/Rev. 1 chap. I [11].
[236] ibid.
[237] ibid.

women in society and condones gender discrimination."[238] Article 2 of the Maputo protocol places an obligation on States to tackle every manifestation of discrimination against women by employing appropriate legislative, institutional and other means.[239] Abortion has been positioned as a socioeconomic right in the Maputo protocol, essentially necessitating the integration of abortion services into comprehensive healthcare services while emphasizing the imperative to eliminate discriminatory practices.[240]

In congruence with CEDAW's general recommendation 24, the High Court of Kenya acknowledged that unjustifiable denial of abortion services to girls and women constitutes a violation of their right to non-discrimination.[241] Cook and Dickens argue that in cases where therapeutic intervention is required, men are not met with legal impediments or the threat of criminal consequences for accessing safe medical services, whereas women often grapple with legal and practical barriers while seeking therapeutic abortion.[242] The legal restrictions imposed by article 26(4) of the COK as read together with sections 158, 159 and 160 of the Penal Code are manifest of the discrimination endured by Kenyan girls and women seeking safe abortion services in the country.[243] While analysing these provision in the *PAK* case the Court acknowledged that:

> there is merit in the idea that the penal code sanctions on abortions without transformative legislative/ policy framework may result in arbitrary, unfair and unreasonable considerations in initiating a prosecution by the Director of Public Prosecutions.[244]

Article 27(1) of the COK provides for "equal protection and equal benefit of the law." The abortion laws in Kenya are evidently discriminatory towards one sex. Recognizing that

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[238] Ngwena, 'Inscribing Abortion as a Human Right' (n 208) 846.
[239] African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2003) art. 2.
[240] Ngwena, 'Inscribing Abortion as a Human Right' (n 208) 853.
[241] *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)* (n 99) [402].
[242] Rebecca J Cook and Bernard M Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 Human Rights Quarterly 1, 37.
[243] *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)* (n 99).
[244] *PAK & another v Attorney General & 3 others* (n 3) [103].

abortion pertains exclusively to women's healthcare needs, the divergent treatment constitutes a form of gender discrimination. True healthcare equality for women will only be achieved when abortion is standardized as regular medical procedure.[245]

6. Conclusion

As it stands, the conflicting positions regarding the criminality and constitutionality of abortion in Kenya has an impact on several human rights highlighted in this chapter. The High Court of Kenya has made valiant attempt to fill the legal lacuna and made a declaration for: "Parliament to enact abortion law and public policy framework in terms of article 26(4) of the Constitution to provide for the exceptions as stipulated in the Supreme Law."[246] Sifris and Belton argue that simply decriminalising abortion will not suffice in guaranteeing women's reproductive health, there is need to establish access to proper services and abolish any impediments to access of such services.[247]

Enacting abortion legislation would, however, be a progressive step made in accordance with article 27 of the COK to promote equality in the country and ultimately guarantee the human rights of girls and women in Kenya. Such legislation, as discussed in this chapter, should, to the fullest extent possible, further the rights to life, health, privacy, bodily autonomy and equality. The next chapter examines abortion laws in different jurisdictions to make a comparative analysis with Kenya's current legal position on abortion.

[245] Ronli Sifris and Suzanne Belton, 'Australia: Abortion and Human Rights Special Section on Abortion and Human Rights' (2017) 19 Health and Human Rights Journal 209, 212.
[246] *PAK & another v Attorney General & 3 others* (n 3) [164][d].
[247] Sifris and Belton (n 240) 214.

CHAPTER 4: COMPARATIVE STUDY OF ABORTION LAWS

1. Introduction

In the realm of reproductive health rights, few things elicit as much debate and legal scrutiny as abortion. As the discourse on abortion and its place in society rages on, different countries have enacted laws on reproductive health rights that are in tandem with the dominant religious beliefs and traditional customs of the people. The general global trend indicates more liberal abortion laws and regulations.[248] In the past three decades, the abortion landscape has witnessed a significant transformation with more than 60 nations relaxing their abortion laws, while only four nations have opted to curtail legal justifications for abortion.[249] Consequently, approximately 815 million more women of reproductive age reside in countries where the legal framework on abortion has been broadly liberalised.[250] With the recently decided *PAK* case where abortion was affirmed as a fundamental constitutional right, Kenya is seemingly among the countries that have joined the global wave of liberalization of abortion laws.[251] That said, as explained in the previous chapters, there is prevailing ambiguity in abortion law in Kenya which requires clarification and implementation of comprehensive laws that effectively guarantees women's reproductive health rights.

This chapter is a comprehensive comparative study on abortion laws focusing on two countries, South Africa and Ireland. Against the backdrop of changing social norms and legal paradigms, this chapter aims to dissect the intricate tapestry of abortion laws in these two jurisdictions. These countries have been selected for various reasons. First, South Africa (hereinafter 'SA') is recognized as having one of the most liberal abortion laws globally.[252] In addition, both Kenya and SA are African States with a shared history of inheriting the common law abortion rights during colonization. Both Kenya and SA have laws that recognise socio-economic rights in relation to women's reproductive health rights.[253] Second, Ireland's abortion laws will be examined because of their

[248] Center for Reproductive Rights, 'Abortion Rights Aer Advancing Across the Globe' (CRR 2023) 1 <https://reproductiverights.org/abortion-rights-advancing-across-globe/> accessed 27 September 2023.
[249] ibid.
[250] ibid.
[251] *PAK & another v Attorney General & 3 others* (n 4).
[252] C Ngwena, 'Conscientious Objection and Legal Abortion in South Africa: Delineating the Parameters' (2003) 28 Journal for Judicial Science 1, 2.
[253] Constitution of Kenya, 2010 art. 43(1); s.2(1)(iv) The Choice on Termination of Pregnancy Act 92 of 1996 & s.27 Constitution, 1996.

similarities with Kenya's abortion laws as it pertains to their criminalisation and origins from the common law (OAPA).[254] The recent liberalisation of abortion law in Ireland will offer pertinent insights into the potential development of Kenya's abortion legislation.

This chapter is divided into three core sections. First, the chapter will highlight the statutory legal framework in these countries and analyse key judicial decisions that have impacted abortion rights in these jurisdictions. Second and third (respectively) the chapter will explore the key contentious issues at the heart of abortion discourses: the rights of the unborn and its impact on women's reproductive health rights and conscientious objection as an obstacle to abortion rights. By examining the shortcomings and achievements in both SA and Ireland's abortion laws the work in this chapter will inform the recommendations for the development of Kenya's abortion regime in Chapter 5.

2. Legal Framework on Abortion

In Kenya, abortion rights are explicitly endorsed in the constitution under the "right to life" clause in the bill of rights.[255] The abortion rights of women in Kenya are further buttressed by article 43(1)(a) of the COK which guarantees their reproductive health rights.[256] However, no legislation has been enacted to realise and regulate abortion rights in the country in accordance with article 26(4) of the COK. The lack of proper statutory implementation of article 26(4) perpetuates the uncertainty in regards to the legality of abortion in Kenya.

Currently, access to abortion under article 26(4) is subject to meeting defined medical criteria. Ngwena argues that article 26(4) as it is constituted, essentially renders the health care professionals as the "gatekeepers to access abortion rather than the women seeking abortion."[257] This assertion was affirmed by the High Court of Kenya in the *FIDA*

[254] David Cole, 'Going to England: Irish Abortion Law and the European Commnuity' (1993) 17 Hastings International and Comparative Law Review 113, 115.
[255] Constitution of Kenya, 2010 art. 26(4).
[256] Constitution of Kenya, 2010 art. 43(1).
[257] Charles G Ngwena, 'Developing Regional Abortion Jurisprudence: Comparative Lessons for African Charter Organs' (2013) 31 Netherlands quarterly of human rights 9, 27.

case.[258] The upshot of this restrictive interpretation is that abortion in Kenya is illegal, unless, in the opinion of medical professionals, the same is determined to have attained the prerequisite criteria set out in article 26(4).[259] This effectively enshrines the historical approach of criminalising abortion as the predominant regulatory framework, making permitting abortion an exception rather than the rule.[260]

Conversely, both SA and Ireland, do not have abortion rights explicitly enshrined in their constitutions. However, in SA's case, there are constitutional provisions that implicitly guarantee abortion rights in the country. Within the framework of the right to "bodily and psychological integrity", every individual is empowered to make decisions regarding their reproduction autonomously.[261] Much like article 43(1)(a) of the COK, section 27 of the 1996 South African Constitution affirms reproductive health care as a fundamental right.[262] The underlying message in section 27 is that the state must recognize abortion as a right and not a privilege.[263] Liberal access to abortion in SA is not only enshrined as a Constitutional imperative but endorsed statutory legislation.[264]

South Africa's abortion regime has a robust protection of reproductive rights within the Constitution of the Republic of South Africa, 1996 and the Choice on Termination of Pregnancy Act, 1996 (CTOPA).[265] The CTOPA recognizes reproductive health as a fundamental human right, anchored in the constitutional values.[266] The CTOPA also authorises second trimester abortions if the woman's health is at risk, there is substantial risk of severe foetal abnormalities, pregnancy stemming from rape or incest, or if continuing the pregnancy would substantially impact the social or economic

[258] *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)* (n 99) [397].
[259] ibid [304].
[260] Ngwena, 'Developing Regional Abortion Jurisprudence' (n 252) 27.
[261] Constitution 1996 s. 12(2).
[262] ibid s. 27.
[263] Ngwena, 'Access to Legal Abortion' (n 13) 347.
[264] Charles Ngwena, 'An Appraisal of Abortion Laws in Southern African from a Reproductive Health Rights Perspective Symposium Article - Part 5: Law and Medicine' (2004) 32 Journal of Law, Medicine and Ethics 708, 715.
[265] Cathi Albertyn, 'Claiming and Defending Abortion Rights in South Africa' (2015) 11 DIREITO GV Law Review 429, 430.
[266] Ngwena, 'Access to Safe Abortion as a Human Right in the African Region' (n 336) 407 See s.1 of the Constitution 1996.

circumstances of a woman.[267] Moreover, third trimester abortions are permitted under section 2(c) of the CTOPA if the ongoing pregnancy poses a threat to the woman's life, results in server foetal malformation, or poses a risk of injury of the foetus.[268]

The CTOPA also sets out provisions that allow midwives and nurses to perform abortions during the first trimester.[269] This is essentially a tacit acknowledgement that a shortage of doctors authorized to perform abortions would create barriers to accessing the services.[270] The CTOPA emphasizes the significance of consent for abortion procedures.[271] It goes as far as recognizing the consent of a pregnant minor who wishes to procure an abortion.[272] The abortion laws in South Africa are undoubtedly progressive.

On the other hand, Ireland has historically maintained some of the most stringent abortion laws globally.[273] Ireland's abortion regime has its roots in the common law that criminalised abortion.[274] The profound impact of Catholicism in Irish society, coupled with the tumultuous political period in Ireland, brought about the proposal and resounding approval of the 8th amendment of the Irish constitution.[275] On 7th October 1983, the Constitution of Ireland was amended to recognize the 'life of an unborn' while also acknowledging the life of the mother.[276]

In sum, this meant that the right to life was guaranteed under the Irish Constitution from conception. The ratification of article 40.3.3 (8th Amendment) of the Irish Constitution effectively prohibited abortion on account of protecting the life of the unborn.[277] According to the HRC, article 40.3.3 subjected women to a systematic violation of their

[267] ibid s. 2(1)(b).
[268] ibid s. 2(1)(c).
[269] Ibid s. 2(2).
[270] Ngwena, 'Access to Safe Abortion as a Human Right in the African Region' (n 263) 408.
[271] ibid s. 5(1) & (2).
[272] ibid s. 5(3).
[273] Amnesty International, 'Ireland Need to Strengthen the National Human Rights Framework to Lift Restrictions on Abortoin, and to Secure Accountability for Past Abuses. Amnesty International Submission to the UN Universal Periodic Review, May 2016' (2016) EUR 29/3504/2015 5.
[274] OAPA 1861 s58 & s59.
[275] Fiona de Londras, 'Fatal Foetal Abnormality, Irish Constitutional Law, and Mellet v. Ireland Commentary' (2016) 24 Medical Law Review 591, 594.
[276] The Eighth Amendment of the Constitution Act, 1983 (Ireland) Article 40.3.3.
[277] Constitution of Ireland art. 40.3.3.

fundamental human rights including the right to life, health, equality, privacy and autonomy, dignity, and freedom from cruel, inhuman or degrading treatment.[278]

This amendment perpetuated the restrictive abortion laws (OAPA) that had been in place in Ireland since its independence in 1922.[279] The restrictive nature of the 8th Amendment infringed on women's reproductive health rights and effectively forced women living in Ireland to travel out of the country to obtain safe abortion procedures (as will be highlighted in the cases below). The ramifications of the 8th amendment would be experienced on numerous occasions until it was ultimately repealed at the tail end of 2018 when the Health (Regulation of Termination of Pregnancy) Act was enacted.[280]

2.1. *X* and the Right to Abortion

The impact of Ireland's restrictive abortion laws was exemplified in *Attorney General v X and Others* (hereinafter "*X*") where the Supreme Court of Ireland was tasked to interpret the 8th Amendment which had been invoked to prevent a 14-year-old girl from traveling to England for an abortion.[281]

In December 1991, *X* was raped and discovered the pregnancy in January 1992.[282] She informed her parents of the rape and intimated that "she wanted to kill herself by throwing herself down the stairs."[283] *X* and her parents were distressed and made the decision to travel to the England to terminate the pregnancy.[284] On 7th February 1992, the Attorney General obtained an *ex-parte* interim injunction which was subsequently confirmed by a judgment delivered on 17th February 1992.[285] The injunction by the High Court effectively prevented *X* from travelling out of Ireland for 9 months.[286] The Attorney

[278] UN Human Rights Committee (HRC) *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016); UN Human Rights Committee (HRC) *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017).
[279] Sydney Calkin and Ella Berny, 'Legal and Non-Legal Barriers to Abortion in Ireland and the United Kingdom' (2021) 5 Medicine Access Point of Care 1, 2.
[280] The Health (Regulation of Termination of Pregnancy) Act 2018; Anna Carnegie and Rachel Roth, 'From the Grassroots to the Oireachtas: Abortion Law Reform in the Republic of Ireland' (2019) 21 Health and Human Rights Journal 109, 111.
[281] *Attorney General v X and Others* [1992] ILRM 401 [1992] 1 IR 1.
[282] *ibid [3].*
[283] ibid [71].
[284] ibid [71]-[73].
[285] ibid [7].
[286] ibid [7].

General utilized the provisions of the 8th Amendment to obtain the injunction and prevent *X* from terminating her pregnancy.

The Supreme Court held that when the life of the mother is at risk if an abortion is denied, then the life of the mother is justifiably prioritised over the life of a foetus.[287] The injunction preventing *X* from travelling to obtain an abortion was ultimately set aside in a 4-1 decision (Hederman J. dissenting).[288] According to de Londras, this case effectively established the test for authorizing abortion procedures in the country.[289]

The *X* case aptly illustrates the polarizing nature of the abortion discourse. The judgment of the High Court placing the injunction and the Supreme Court setting aside the injunction evoked outcry almost in equal measure.[290] The pro-choice versus pro-life factions were, once again, at logger heads. For Smyth, the *X* case exemplified "mechanisms of patriarchal control" which are often utilized by the legal justice system to regulate women's reproductive health rights.[291] Following the decision of the Supreme Court in the *X* case, further amendments were made to the Irish Constitution to simultaneously safeguarded foetal life within Ireland's own jurisdiction while acknowledging the right to travel abroad to access legal abortion services.[292]

2.2. The *A, B, C* of Abortion Rights in Ireland

The restrictive abortion laws in Ireland were examined in *A, B, C v Ireland* (hereinafter '*A, B, C*') before the 'European Court of Human Rights' (hereinafter ECtHR).[293] Similar to the *X* case, the right to travel out of Ireland to procure an abortion was at the crux of the case. The applicants were three women, *A, B, C,* who travelled to England to obtain safe abortion

[287] ibid [37].
[288] ibid [14].
[289] Fiona de Londras and Máiréad Enright, *Repealing the 8th: Reforming Irish Abortion Law* (1st edn, Bristol University Press 2018) 4 <https://www.jstor.org/stable/j.ctv47w44r> accessed 5 October 2023.
[290] Ailbhe Smyth, 'The "X" Case: Women and Abortion in the Republic of Ireland, 1992' (1993) 1 Feminist Legal Studies 163, 166–167.
[291] ibid 163–164.
[292] Thirteenth Amendment of the Constitution Act, 1992: "Provided that Article 40.3.3 (the right to life of the unborn) would not limit freedom to travel between Ireland and another state." Fourteenth Amendment of the Constitution Act, 1992: "Provided that Article 40.3.3 (the right to life of the unborn) would not limit freedom to obtain or make available information relating to services lawfully available in another state."
[293] *A, B and C v Ireland* [2010] ECtHR [GC] 25579/05.

services.[294] The Court found that A travelled to obtain an abortion for "health and well-being", B travelled for "well-being" and C travelled "because she feared her pregnancy constituted a risk to her life."[295] The applicants argued *inter alia* that Ireland's abortion laws violated the European Convention on Human Rights (ECHR).

All three applicants alleged a violation of article 8 of the ECHR (right to respect for private and family life).[296] In considering the allegations made by *A* and *B,* the court stated that it did not consider that the prohibition in Ireland of abortion for health and well-being reasons exceeds the margin of appreciation accorded to Ireland.[297] The court was of the view that the challenged proscription in Ireland achieved a just equilibrium between the privacy rights of A and B and the rights asserted on behalf of the unborn.[298]

The Court held that Ireland failed to implement a "legislative or regulatory regime" to effectuate Article 40.3.3 of the Constitution of Ireland.[299] This failure by the Irish government denied C the opportunity to determine whether or not she was eligible to obtain abortion services in Ireland, and consequently violated her privacy rights.[300]

The *A, B, C* case underscored the uncertainty brought about by the ambiguity of Ireland's abortion laws and the need to have a comprehensive legal framework in place.[301] The Court noted that the criminalisation of abortion under sections 58 and 59 of OAPA 1861 conflicted with the exemption set out in the Eight Amendment of the Constitution of Ireland.[302]

In finding that *C's* right under Article 8 of the ECHR had been violated by the Irish government's failure to implement legal framework in line with the Article 40.3.3, the

[294] ibid [13]-[26] *A* and *B* were Irish national and *C* was a Lithuanian national.
[295] ibid [125].
[296] *A, B and C v. Ireland* (n 294) [167].
[297] ibid [241].
[298] ibid [230].
[299] ibid [267].
[300] ibid.
[301] ibid [253] In analysing Article 40.3.3 the court stated: "While a constitutional provision of this scope is not unusual, no criteria or procedures have been subsequently laid down in Irish law, whether in legislation, case-law or otherwise, by which that risk is to be determined, leading to uncertainty as to its precise application."
[302] ibid [254].

ECtHR stated that Ireland's actions "resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman's life and the reality of its practical implementation."[303] The Court acknowledged the importance of clarifying ambiguous abortion laws to ensure the rights of those procuring, and carrying out an abortion are protected.

Ireland's restrictive abortion laws were criticised by the UN and regional treaty monitoring bodies (TMB) including the Committee Against Torture (CAT), the HRC and the Commissioner for Human Rights Council of Europe.[304] In *Mellet v Ireland*, the HRC noted that criminalization of abortion in Ireland contravenes international human rights law.[305] It was determined that Ireland firstly violated article 7 of the ICCPR by subjecting the applicant to "torture or to cruel, inhuman or degrading treatment or punishment."[306] The applicant's privacy rights under article 17 of the ICCPR were also found to have been violated.[307] Finally, the HRC found that equality rights provided for in article 26 of the ICCPR had been violated and that the applicant had been discriminated on the basis of sex.[308]

Two years after the *A, B, C* case, the laws proscribing abortion in Ireland and the lack of clear legislative and regulatory framework for medical professionals, resulted in the death of Savita Halappanavar.[309] Savita's death was as a result of septic shock during a "prolonged miscarriage at a hospital in Galway."[310] The doctors refused to terminate her

[303] ibid [264].
[304] UN Committee Against Torture (CAT), Concluding Observations of the Committee Against Torture: Ireland, 17 June 2011, CAT/C/IRL/CO/1 [26]; UN Human Rights Committee (HRC), Concluding Observations of the Human Rights Committee: Ireland, 30 July 2008, CCPR/C/IRL/CO/03 [13]; UN Human Rights Committee (HRC), Concluding Observations of the Human Rights Committee: Ireland, 14 August 2014, CCPR/C/IRL/CO/04 [11]; Council of Europe: Commissioner for Human Rights, Report by Thomas Hammarberg Commissioner for the Human Rights of the Council of Europe, 15 September 2011, CommDH (2011)27.
[305] UN Human Rights Committee (HRC) *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016) The case involved a woman who was denied an abortion in Ireland despite being informed that "the foetus had congenital heart defects." She travelled to Liverpool to terminate the pregnancy and was denied post termination care in Dublin. She logged a complaint under the 'International Covenant on Civil and Political Rights' to the Human Rights Committee (HRC).
[306] ibid [7.6].
[307] ibid [7.7].
[308] ibid [7.11].
[309] de Londras and Enright (n 289) 13.
[310] ibid.

pregnancy because the heart of the foetus was still beating.[311] This incident underscored the 'chilling effect' of ambiguous legal framework on abortion considered in *A, B, C*.[312] Her death was considered a defining moment to revolutionising the abortion laws in Ireland to be more liberal and in line with international human rights principles.[313]

Scholars, advocates and human rights activists pushed Ireland's abortion laws to be amended and for the 8th Amendment of the Constitution of Ireland to be repealed.[314] The immediate response after the uproar caused by Savita's death was the introduction of the 'Protection of Life During Pregnancy Act, 2013' (PLDPA).[315] The PLDPA entered into force on 1 January 2014. The statute effectively gave life to the holding of the Supreme Court in the *X* case allowing abortions "when there is, in the opinion of a doctor, a substantial risk to the life of the mother."[316]

The PLDPA loosened the restrictive abortion laws in Ireland but abortion, and the related offences remained generally criminalised.[317] However, the PLDPA fell short in creating a coherent legal framework that would enable women access to legal abortions.[318] Instead, it introduced numerous barriers within the legal system, impeding women's ability to exercise their abortion rights under the law.[319] There was a vote to effectively repeal the 8th Amendment on 25th May 2018 and to have it replaced by the 36th Amendment which provides that: "Provision may be made by law for the regulation of termination of pregnancy." [320] This was a further step towards decriminalisation of abortion in Ireland.

On 20th December of 2018, The Health (Regulation of Termination of Pregnancy) Act 2018 was signed into law and came into effect on 1st January 2019.[321] This legislation was enacted to regulate abortion rights and procedures in Ireland but it is nonetheless far

[311] Máiréad Enright, 'Four Pieces on Repeal: Notes on Art, Aesthetics and the Struggle Against Ireland's Abortion Law' (2020) 124 Feminist review 104, 110.
[312] ibid.
[313] ibid.
[314] de Londras and Enright (n 289).
[315] Protection of Life During Pregnancy Act 2013.
[316] *Attorney General v X and Others* (n 281) [37].
[317] Fiona de Londras and Mima Markicevic, 'Reforming Abortion Law in Ireland: Reflections on the Public Submissions to the Citizens' Assembly' (2018) 70 Women's Studies International Forum 89, 90.
[318] Amnesty International (n 153) 23.
[319] ibid.
[320] de Londras and Markicevic (n 338) 89.
[321] The Health (Regulation of Termination of Pregnancy) Act 2018.

from ideal. While critiquing the legislation, de Londras argues that it decriminalises abortion for pregnant women but maintains legal consequences for doctors and individuals assisting women obtain abortions outside the framework of the Act.[322] Although begrudgingly, Ireland has undoubtedly taken a step in the right direction in the abortion rights discourse.

A common issue that emerges in constitutional protection of women's reproductive rights in Kenya, South Africa and Ireland is foetal rights as will be discussed below. Ireland's experience illustrates the need for a well-defined legal framework on abortion to prevent the violation of women's rights while SA's stance demonstrates how a country with comparable constitutional commitments and similar socio-economic backgrounds to Kenya can foster policies that advance women's rights.

3. Abortion Rights and the Rights of the Unborn

In a nuanced interplay, article 26 of the COK (right to life) acknowledges the right to abortion with a parallel recognition of the foetal right to life. Foetal rights are provided for under article 26(2) of the COK.[323] The contention therefore becomes whether the rights intrinsic to life come into effect upon conception. Article 26(2) (foetal right) and article 26(4) (abortion rights) creates a legal quagmire. Intentionally signalling ambiguity on the legality of abortion could substantively erode the foundation of any given abortion right.[324] The interpretation of article 26, particularly the two competing provisions (article 26(2) and article 26(4)) was a contentious issue during the drafting and long after the promulgation of the COK.[325] Ngwena argues that article 26 is susceptible to 'restrictive interpretation' when dealing with judges or healthcare providers with an ideological stance against abortion. The *FIDA* case marked the Court's endorsement of a conservative

[322] Fiona de Londras, '"A Hope Raised and Then Defeated"? The Continuing Harms of Irish Abortion Law' (2020) 124 Feminist Review 33, 33; See s. 23 of the Health (Regulation of Termination of Pregnancy) Act 2018.
[323] Constitution of Kenya, 2010 art. 26(2) "The life of a person begins at conception."
[324] Ngwena, 'Developing Regional Abortion Jurisprudence' (n 252) 26.
[325] Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review' (2010) 110–111<https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf> accessed 12 November 2023.

interpretation of the COK emphasizing that "life begins at conception."[326] In reinforcing the constitutional protection of the foetus the Court stated that:

> It is telling, in our view that the drafters of the Constitution deemed it fit to deal with the said subject under the Article dealing with the right to life. To our mind that was not by inadvertence. It is our view that the drafters of the Constitution considered abortion as an intentional deprivation of a life.[327]

Essentially, the Court was of the view that since life begins at conception, and any arbitrary deprivation of life, including abortion amounts to a violation of the right to life guaranteed in the COK. Similar to the position in Kenya and Ireland, the rights of the foetus have been an issue of contention in SA. The right to life of the unborn was the crux of the case in *Christian Lawyers Association of SA and others v Minister of Health and others*.[328] In affirming the validity of the CTOPA and citing the Constitution 1996, the Court highlighted the absence of explicit legal status or protection for the foetus, indicating that the drafters seem to have deliberately excluded such protection from section 28 which specifically protects the rights of the child.[329]In essence, Justice McCreath found that the deliberate omission of express protection of the 'unborn life' in the 1996 Constitution signifies the intention of the drafters not to accord them any distinct rights. The Court ultimately held that the foetus was "not a legal persona" in the South African context.[330]

The constitutionality of the CTOPA was considered in *Christian Lawyers Association of South Africa v Minister of Health*.[331] In upholding the validity of the statute, the Court found that the CTOPA is not in conflict with section 11 of the Constitution 1996 which guarantee's the right to life. In its judgment, the Court refrained from embarking on a philosophical or theological discourse of whether a foetus is a person.[332] It found that

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[326] *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)* (n 99) [301].
[327] ibid [303].
[328] *Christian Lawyers Association of SA and others v Minister of Health and others* 1998 (11) BCLR 1434 (T).
[329] ibid 1441–1442.
[330] ibid 1443.
[331] *Christian Lawyers Association of SA and others v Minister of Health and others* (n 317).
[332] *ibid 1438.*

there is no express provision in the constitution that affords a foetus legal protection.[333] As discussed earlier, this approach is a marked departure from the approach in Ireland and Kenya.

The Court in *Christian Lawyers Association of South Africa v Minister of Health* acknowledged the importance of upholding women's rights enshrined in various sections of the Constitution including the right to equality (section 9), the right to freedom and security of person, which encompasses the right to make decisions concerning reproduction and maintain control over one's body (section 12).[334] It also considered other fundamental rights including healthcare rights guaranteed in section 27 (discussed above) of the Constitution 1996.[335] The upshot was that the CTOPA was in compliance with the constitution.

Soon after the enactment of the CTOPA, it became apparent that the legislation had a substantial impact on reducing mortality related to abortion, resulting in an estimated 91.1% decline in deaths from unsafe abortions between 1997 and 2002.[336] Further reductions in the mortality rates was similarly witnessed in the subsequent amendments to the CTOPA in 2004 and 2008.[337] However, even with the liberalization of abortion laws and relative ease of accessing abortion facilities, many women in SA encounter significant obstacles in obtaining legal abortion services.[338] Accordingly, there is still room to improve on the implementation of the CTOPA.[339]

In contrast, until 2019, the 8th Amendment stood as a constitutional guardian of foetal rights, effectively establishing a-near-absolute ban on abortion in Ireland.[340] Historically interpreted restrictively, the 8th Amendment subordinated women's constitutional rights to life of the unborn and confined them within the constitutional role of 'mother.'[341] This

[333] ibid 1443.
[334] ibid.
[335] ibid.
[336] Rachel Jewkes and Helen Rees, 'Dramatic Decline in Abortion Mortality Due to the Choice on Termination of Pregnancy Act' (2008) 95 South African Medical Journal 250.
[337] Ramprakash Kaswa and Parimalaranie Yogeswaran, 'Abortion Reforms in South Africa: An Overview of the Choice on Termination of Pregnancy Act' (2020) 62 South African Family Practice 5240, 1.
[338] ibid 4.
[339] Albertyn (n 260) 448–449.
[340] Fiona de Londras, '"A Hope Raised and Then Defeated"? The Continuing Harms of Irish Abortion Law' (2020) 124 Feminist Review 33, 34.
[341] de Londras and Enright (n 301) 2; Attorney General v X.

approach was critiqued by scholars like Ngwena for perpetuating traditional gender roles.[342]

Despite judicial innovation', the restrictive nature of the 8th amendment fostered a contentious relationship between the mother and the foetus.[343]

The dynamics of foetal rights and abortion rights remains a contentious topic, notably in Kenya and Ireland, whereas the South African judicial stance accentuates the absence of explicitly constitutionalised foetal rights. These nuanced distinctions underscore the delicate equilibrium between women's autonomy, and reproductive health rights and foetal rights considerations within diverse jurisdictions. The following section briefly examines another obstacle to abortion rights typically employed by healthcare providers; conscientious objections.

4. Conscientious Objection and Abortion Rights

In the abortion context, conscientious objection is defined as the refusal to partake in abortion procedures on the basis of deeply held convictions, which may stem from religious, moral, philosophical, ethical or personal ideologies.[344] In International Law it is enshrined in article 18 of the ICCPR.[345] Regionally, article 8 of the Banjul Charter guarantees the freedom of conscience.[346] In medicine, conscientious objection allows healthcare providers to abstain from participating in medical practices that go against their personal beliefs.[347] Conscientious objection is widely acknowledged as a prevalent clinical practice.[348] It is particularly conspicuous in the realm of reproductive health

[342] Ngwena, 'Developing Regional Abortion Jurisprudence' (n 252) 31.
[343] de Londras (n 274) 594.
[344] Becky Self, Clare Maxwell and Valerie Fleming, 'The Missing Voices in the Conscientious Objection Debate: British Service Users' Experiences of Conscientious Objection to Abortion' (2023) 24 BMC Medical Ethics 1, 1.
[345] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p.171 Art. 18(1) "Everyone shall have the right to freedom of thought conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."
[346] 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), art. 8.
[347] VM Lema, 'Conscientious Objection and Reproductive Health Service Delivery in Sub-Saharan Africa' (2012) 16 African Journal of Reproductive Health / La Revue Africaine de la Santé Reproductive 15, 16.
[348] ibid 18.

services, with abortion standing out as the primary focal point as far as objections, reflecting the polarising nature of these services.[349]

In Kenya, Article 32 of the COK guarantees the right to "freedom of conscience, religion, belief and opinion."[350] In addition, conscientious objection and its regulation was provided for in the '2012 Standards and Guidelines for reducing morbidity and mortality from unsafe abortion in Kenya.'[351] It acknowledged that individuals have the right to freedom of conscience, religion, belief and opinion but noted that the same should not impede others access to necessary care.[352] According to the 2012 Standards and Guidelines, if a healthcare provider, holds moral or religious objections to abortion, they are obligated to promptly refer eligible clients seeking abortion services, to a colleague prepared to provide the service. 28

South Africa, similarly grapples with the issue of conscientious objection. Besides the challenge to constitutional validity of the CTOPA, opposition materialized through invocation of the right to conscientious objection.[353] Healthcare providers, including doctors, nurses and midwives sought to dissociate themselves from abortion-related procedures.[354] Despite the absence of a conscientious objection provision in the enacted CTOPA, it is essential to note that the omission was deliberate, given that the draft bill incorporated a conscientious objection clause.[355] Similar to Article 32 of the COK, Section 15(1) of the 1996 Constitution implicitly guarantees the right to conscientious objection and provides that, "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."[356] A study conducted by Favier *et al.* revealed that the prevalence of

[349] ibid.
[350] Constitution of Kenya, 2010 art. 32.
[351] Ministry of Health (Kenya), 'Standards & Guidelines for Reducing Morbidity & Mortality from Unsafe Abortion in Kenya' 12.
[352] ibid.
[353] Charles G 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, 193.
[354] ibid.
[355] ibid.
[356] Constitution 1996 s. 15.

conscientious objectors in SA has led to a notable increase in illegal abortions, notwithstanding the progressive and inclusive approach of the CTOPA.[357]

The landscape of access to abortion in Ireland has undergone a profound transformation since January 2019, marking a clear departure from the conditions that prevailed before.[358] There was a significant increase in reported abortion services with 6666 reported cases in 2019 contrasted with 32 reported cases in 2018.[359] In 2022, the reported abortion cases had increased to 8156, indicating the incremental demand for legal abortion services in Ireland.[360] However, conscientious objection by healthcare providers has similarly been a barrier to abortion services in Ireland.

The Health (Regulation of Termination of Pregnancy) Act 2018 explicitly affirms the right to conscientious objection, without any corresponding acknowledgement of conscientious provision of abortion services.[361] Section 22(3) of the Health (Regulation of Pregnancy) Act is similar to Kenya's 2012 Standards and Guidelines and requires a healthcare provider (doctors, nurses and midwives) who has a conscientious objection to abortion to facilitate the necessary arrangements for the transfer of care of the pregnant woman to enable her to access intended abortion services.[362]

Conscientious objection impacts abortion practices in Kenya, SA and Ireland. It is a necessary right, particularly in the context of abortion. It ensures that both factions of the abortion discourse are catered for.

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[357] Mary Favier, Jamie MS Greenberg and Marion Stevens, 'Safe Abortion in South Africa: "We Have Wonderful Laws but We Don't Have People to Implement Those Laws"' (2018) 143 International Journal of Gynecology & Obstetrics 38, 42.
[358] Calkin and Berny (n 278) 3.
[359] Department of Health, 'Health (Regulation of Termination of Pregnancy) Act 2018: Annual Report on Notifications 2019' (Government of Ireland 2020) <https://www.gov.ie/en/publication/b410b-health-regulation-of-termination-of-pregnancy-act-2018-annual-report-on-notifications-2019/> accessed 13 November 2023; Department of Health, 'Fifth Annual Report on the Protection of Life During Pregnancy Act 2013' (Government of Ireland 2019) <https://www.gov.ie/en/publication/d65673-fifth-annual-report-on-the-protection-of-life-during-pregnancy-act-2/> accessed 13 November 2023.
[359] Department of Health, 'Health (Regulation of Termination of Pregnancy) Act 2018: Annual Report on Notifications 2022' (Government of Ireland 2023) <https://opac.oireachtas.ie/Data/Library3/Documents%20Laid/2023/pdf/DOHdoclaid220623_111159.pdf> accessed 13 November 2023..
[360] Department of Health, 'Health (Regulation of Termination of Pregnancy) Act 2018: Annual Report on Notifications 2022' (n 360).
[361] Health (Regulation of Termination of Pregnancy) Act 2018 s. 22.
[362] ibid s. 22(1) & (3).

5. Conclusion

The global discourse on abortion has remained contentious and witnessed gradual evolution globally with states grappling with the complexities of adopting legal frameworks that reflect their cultural, religious and social norms.[363] This has been the case in Kenya, SA and Ireland. The examination of abortion laws in Kenya, SA and Ireland reflects how the reform of abortion laws in these countries has been shaped by legal, cultural and societal factors.

Kenya (as discussed in chapter 2) has seen incremental shifts from its restrictive abortion laws to a slightly more liberalized regime.[364] SA has been a trailblazer in abortion laws globally; at least on paper.[365] Ireland has, albeit begrudgingly, enacted more liberal abortion laws; Health (Regulation of Termination of Pregnancy) Act 2018 which permits abortion in certain circumstances.[366] The statute effectively repealed the 8th Amendment of the Irish Constitution which enshrined restrictive abortion laws in the country.[367]

The constitutional frameworks in Kenya, SA and Ireland play a pivotal role in shaping the abortion laws in the respective States. SA has distinguished itself by emphasizing reproductive autonomy as a fundamental right, diverging from Kenya and Ireland where there is a task of striking an equilibrium between maternal rights and rights of the unborn. This chapter highlighted distinct approaches to recognizing or limiting the rights of the unborn, with Kenya and Ireland historically prioritizing foetal rights, in contrast to SA's focus on prioritizing women's rights. The analysis of the ways in which the different countries treat conscientious objection of abortion, further exposed the moral and ethical dimension to the discourse on abortion.[368] It examines healthcare professionals' rights to abstain from participating in abortion procedures based on personal or religious beliefs and adds complexity to the discourse.[369] It is clear from the analysis that conscientious

[363] Vinod Parmar, 'Abortion Rights - A Comparative Study India, USA & South Africa' (2020) 3 Issue 3 International Journal of Law Management & Humanities 895, 895–896.
[364] Ngwena, 'Developing Regional Abortion Jurisprudence' (n 328) 25–29; *FIDA* case & *PAK* case discussed in chapter 2 of this thesis to examine Kenya's judicial contribution to liberalization of abortion laws in the country.
[365] Ngwena, 'Conscientious Objection and Legal Abortion in South Africa' (n 247) 2.
[366] de Londras (n 331) 33.
[367] Health (Regulation of Termination of Pregnancy) Act 2018.
[368] Ngwena, 'Conscientious Objection and Legal Abortion in South Africa' (n 233) 5; Ngwena, 'Conscientious Objection to Abortion and Accommodating Women's Reproductive Health Rights' (n 239).
[369] Ngwena, 'Conscientious Objection and Legal Abortion in South Africa' (n 247).

objection poses an ongoing challenge to ensuring access to legal and safe abortion services for women while respecting healthcare provider's rights across Kenya, SA and Ireland. No country has come up with a perfect solution to balancing the competing interests which arise in claims related to conscientious objection to abortion. In the pursuit of aligning its abortion laws with the stipulations of Article 26(4), Kenya should critically evaluate the successes and shortcomings of SA and Ireland and strive to avoid similar pitfalls encountered by these jurisdictions. In Chapter 5, I make recommendations on how Kenya can develop a comprehensive legislation on abortion.

CHAPTER 5: CONCLUSION & RECOMMENDATIONS

> The currents and the eddies of right and wrong, which you find plain sailing, that I can't navigate, I am no voyager. But in the thickets of the law, oh there I'm a forester.[370]

1. Introduction

The law on abortion in Kenya has judiciously been decided by the High Court; it is generally illegal but permissible on the grounds set out in article 26(4) of the COK.[371] There has been limited progress in addressing the issue of unsafe abortions in Kenya which persist despite the constitutional safeguards.[372] There have been two main cases determined by the Kenyan Courts addressing abortion laws in the country. In both instances, the Courts have maintained relatively conservative interpretations of article 26(4) which constitutionalises abortion rights in Kenya.[373] However, unless article 26(4) is effectively enforced to clearly elucidate the legal position for both women seeking abortions and the healthcare providers offering the services, the uncertainty regarding abortion rights in the country will persist.[374] Despite the historic decisions in *FIDA* and *PAK* interpreting the legal position of abortion in the country, no significant action has been undertaken to implement the orders of the Courts.

The ambiguity of article 26(4) of the COK and the ramifications it has on the human rights of women enkindled my thesis and I sought to determine the following questions:

1. What was the legal position on abortion prior to the Constitution of Kenya, 2010?
2. What are the existing legal provisions and restrictions regarding abortion in Kenya?
3. Is the law on abortion in Kenya sufficient?

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[370] Robert Bolt, *A Man for All Seasons: A Play in Two Acts* (Random House 1962).
[371] *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)* (n 99) [397].
[372] Center for Reproductive Rights, 'A Decade of Existence' (n 84) 3.
[373] See *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)* (n 99) [397] & *PAK & another v Attorney General & 3 others* (2022) [2022] KEHC 262 (KLR) (HCK).
[374] Ngwena, 'Developing Regional Abortion Jurisprudence' (n 252) 26.

4. How have Courts addressed the right to abortion in Kenya?
5. What are the human right implications of failing to enact laws that align with article 26(4) of the Constitution of Kenya, 2010?
6. How, if at all, has international human rights law been utilized to foster progressive laws on abortion in Kenya?
7. What are the possible recommendations of improving the abortion laws in Kenya while maximizing on the utility of international human rights law?

I attempted to answer these questions and utilized doctrinal and comparative approaches. The doctrinal method followed a two-step process, commencing with the identification of the sources of law and progressing to the interpretation and analysis of the text.[375] I used the doctrinal research methodology to systematically outline the legal framework governing abortion in Kenya. This included an examination of the COK, statutes, cases, international and regional law principles governing abortion in Kenya to determine the "objective reality."[376] I further utilized the doctrinal approach to analyse and explore the connection between these laws, clarify the challenging aspects, and possibly, anticipate forthcoming developments.

In addition to examining legal doctrines, I employed a comparative approach in chapter 4 and scrutinized abortion laws in other common law jurisdictions, focusing on SA and Ireland. I selected these two countries for their contrasting stances on abortion rights. Ireland has historically had largely restrictive abortion laws. SA on the other hand, apart from also being an African State, has one of the most liberal abortion laws in the world. These two countries were ideal picks considering the "fence-sitting" stance Kenya has taken on abortion, particularly with the ambiguous wording of article 26(4) of the COK. Analysing the legal framework of SA and Ireland was instrumental in highlighting the intricacies of having a more liberal abortion regime as opposed to a proscriptive one.

The objective of this thesis was to critically analyse the conundrum created by the ambiguity on the law on abortion under article 26(4) of the COK, while examining the issue from an international human rights perspective. It aimed to provide insights into

[375] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 110.
[376] ibid.

the legal provisions and restrictions surrounding abortion, the judicial interpretation of the human rights implications in abortion cases, and the implications of this conundrum on the legal discourse, and human rights landscape in Kenya, with reference to relevant international human rights standards. Ultimately, the thesis addressed the implications of maintaining ambiguous abortion laws and how it violates the fundamental human rights of women and girls in Kenya. The key findings, conclusions and recommendations are outlined below.

2. Key Findings and Conclusions

The findings revealed that abortion in Kenya is constitutional but generally illegal. Sections 158, 159 and 160 of the Kenyan Penal Code criminalise abortion whereas article 26(4) of the COK provides grounds where abortion is permissible. It was illustrated that there is no law that has been enacted to implement the provision of article 26(4) resulting in the violation of various women's rights including: the right to life, the right to health, the right to privacy and autonomy, the right to equality and non-discrimination.

In chapter two, I traced the evolution of abortion laws in Kenya, commencing with the colonial period and illustrated how the laws that were ultimately adopted from Britain evolved. I analysed the development of abortion laws in the common law. This included examining the OAPA, 1861 and the subsequent interpretation of sections 58 and 59 of the statute in *R v Bourne,* which introduced "therapeutic abortion."[377] The findings demonstrated that upon independence in 1963, Kenya adopted the British laws without making any amendments. The OAPA, 1861 only allowed abortion to "preserve the life of the mother" and the same was enshrined in sections 158, 159 and 160 of the Kenya Penal Code which were a reiteration of Sections 58 and 59 of the OAPA. An analysis of the case law revealed that medical practitioners were the main targets of abortion related offences. Finally, recent jurisprudence by the High Court of Kenya has recognized abortion as a fundamental right, albeit not absolute. The decisions in the *FIDA* case and the *PAK* case emphasized the significance of implementing article 26(4) to ensure women's reproductive health rights are guaranteed. Ultimately, I concluded that the current law on abortion in Kenya is insufficient.

[377] *R v Bourne* [1939] 1 K.B. 687; [1938] 3 All E. R. 615.

Chapter three analysed the human rights implications of criminalising abortion in Kenya. I examined international, regional and domestic laws and highlighted how they addressed abortion vis a vis women's fundamental human rights. The findings demonstrated that the conflicting positions of constitutionalizing and criminalising abortion have serious ramifications on women's fundamental human rights. The study demonstrated Kenya's shortcomings in implementing its international human rights obligations in regards to abortion. The findings revealed that there is need to enact and enforce comprehensive abortion laws that would ensure that women's rights are adequately guaranteed.

In chapter four, I examined the historical development of SA and Ireland's abortion laws. Thereafter I conducted a comparative analysis with Kenya's position primarily focused on constitutional framework on abortion, foetal rights and conscientious objection to abortion. One interesting finding is that foetal rights emerged as a contentious issue in Kenya, SA and Ireland. Additionally, conscientious objection emerged as a barrier to enforcing abortion rights in all three countries, further perpetuating the human rights violations endured by women seeking abortion services.

3. Recommendations

Corollary to the foregoing analysis outlined in chapters one to four of this thesis and the findings thereafter, I shall provide a few recommendations on the way forward for Kenya's abortion laws. It is imperative for Kenya to enhance the protection of women's reproductive health rights and align with its international human rights obligations. The Kenyan parliament should enact a comprehensive reproductive health statute which provides for abortion and is in harmony with the provisions of article 26(4) of the COK. The abortion legislation should clarify any ambiguities conflicting provisions between the Kenyan Penal Code and the COK, particularly as it relates to sections 158, 159, 160 of the Penal code and article 26(4). The exceptions to the general rule which criminalises abortion in Kenya should be aptly articulated in the legislation to provide clarity for both women and healthcare providers and foster an accessible healthcare regime.

In order to align the legislation with article 26(4) the following outline is a comprehensive framework detailing the essential elements that the statute should entail. The ensuing recommendations aim to guide the development of the legislation in accordance with the constitutional provisions.

3.1. Repealing sections of the Penal Code

The Kenyan Penal Code should be amended by repealing sections 158, 159 and 160, which impose severe restrictions for abortion related offences, and are in conflict with article 26(4) of the COK. In order to safeguard the constitutional rights of women, foster gender equality and ensure a just and equitable legal system, the repeal of these sections is not only warranted, but essential to pave way for a transformative abortion legal framework.

3.2. Clear and Permissive Abortion Legislation

To enhance clarity, the legislation should delineate the circumstances under which the termination of pregnancy is permissible and consider the implementation of a trimester system similar to the one used in SA.[378] This approach would strategically regulate abortion procedures based on specific gestational periods, fostering a more nuanced and informed reproductive healthcare framework.[379]

The definition of an "Emergency" in the context of the abortion legislation should align with the Health Act No. 21 of 2017 to mean "necessary immediate health care that must be administered to prevent death or worsening of a medical situation."[380] Harmonizing the definition ensures consistency centred on immediate healthcare aimed at preventing death and exacerbation of a medical condition.

Rather than exclusively focusing on abortion provision in emergencies, the legislation should be expanded to incorporate socioeconomic factors as a ground for abortion. Acknowledging the intricate link between a woman's capacity to make decisions about

[378] Act 92 of 1996 s. 2.
[379] Ramprakash Kaswa, 'Barriers to Access Second-Trimester Abortion: A Case Report' (2021) 63 South African Family Practice 5028, 1.
[380] The Health Act No. 21 of 2017.

her reproductive health and diverse socioeconomic factors, underscores the commitment to a more holistic and compassionate approach to reproductive rights.44

The legislation should establish explicit provisions that unequivocally guarantee post-abortion care that is free from any discriminatory practices to promote comprehensive and unbiased reproductive healthcare. The inclusive approach emphasizes the importance of providing compassionate and equitable support to individuals seeking post-abortion support and it acknowledges the diverse circumstances surrounding abortion.

The legislation should emphasize the imperative for consent and confidentiality throughout the reproductive healthcare process. This will accentuate the human rights principles of individual autonomy and privacy, cultivating a healthcare landscape that consistently upholds and protects the rights of individuals seeking reproductive healthcare services.44

3.3. Access and Non-discrimination

The legislation should ensure that the abortion services are accessible to all individuals without facing discrimination on any ground including race, ethnicity or socioeconomic status. This will reflect a commitment to social justice, dismantle barriers and ensure accessible reproductive healthcare for all individuals and in turn align with international human rights principles of equality.

3.4. Conscientious Objection

Additionally, the abortion laws should incorporate provisions that accommodate the right to conscientious objection, while judiciously balancing it with the fundamental right to abortion. The right to conscientious objection should be available upon request of the procedure. In instances where a healthcare provider exercises this right, the patient should promptly be provided with an alternative qualified healthcare provider willing to carry out the abortion to ensure access to impartial reproductive healthcare.[381]

[381] Self, Maxwell and Fleming (n 344) 2.

Conclusion

As a parting shot and drawing lessons from the decision in *Dobbs* which took away the federal right of women to abortion services in the US, there is need for a more robust and constructive debate and research on this subject. The research should focus on the responsibility that doctors and other healthcare providers have towards pregnant women who seek abortion services and the rights of the unborn foetus. This would assist judges is deciding abortion cases based on a sound understanding of women's rights, as opposed to narrow views informed by their own biases or sheer zealotry.

This dissertation sought to analyse the ambiguous abortion law in Kenya, particularly the clash between the criminalisation of abortion under the Penal Code and the constitutional exceptions to abortion under article 26(4) of the COK. Through this analysis, I aimed to enrich the literature elucidating how the absence of clear, enacted and harmonized abortion laws in Kenya ultimately perpetuations the violation of women's fundamental human rights, offering insights into potential reforms that alight with constitutional provisions.

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