

A CRITICAL ANALYSIS OF THE LAW GOVERNING ABORTION IN UGANDA

(The Penal Code Act Cap 120, the Constitution of republic of Uganda (1995),

Case Law and the Doctrine of Precedent)

BY

SSEBUGWAWO ABDALLAH

LLB/35896/133/DU

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INTERNATIONAL UNIVERSITY.

Handwritten signature and text:
My Address: Mr. MARY
HOD Law School -

JUNE 2015

DECLARATION

I, **SSEBUGWAWO ABDALLAH** do here by declare that this is my original work and not ever been submitted or presented to any University or institute for the award of a diploma or degree.

Name **SSEBUGWAWO ABDALLAH**

Signature.....

Date.....**30-JUNE-2015**

APPROVAL

This is to certify that this research was carried out under my supervision and approved as student's work.

MR. BUKENYA SILVESTER.

Signature



Date

30/06/2015

DEDICATION

I dedicate this work to my Late Mother ANNET WANYANA and my Daddy Mr. Kamya Nkalubo Ahmed, to my friends Gakyalo Fabian, Gaswaga Julius, Assimwe Joshua, Nabatte Sarah, Kiryowa Jonathan and my supervisor Mr. Bukenya Silvester for the care and their help and courage that has enabled me to take on this course successfully.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the study

The question of abortion in Uganda has remained a complex issue: with medical, social, legal, moral, religious and social dimensions. This problem seems to be rooted in the social experience and prevailing social philosophies of the people; rather than simply within statute books and judicial decisions. The society's concern to protect girls and women may be expressed in a variety of abortion laws ranging from criminal prohibition to liberal accommodation.

In Uganda, abortion law is prohibitive in nature and as such; the right to abort in this respect seems to be nonexistent. The 1995 Constitution of the Republic of Uganda, provides thus; 'No person has the right to terminate the life of an unborn child except as may be authorized by law' (Article 22(2)). Article 22(2) essentially protects the sanctity of life by protecting the unborn. To adequately protect this life, practical legal measures have been put in place by the penalties in the penal code that provides as follows.

"Any person who, with intent to procure miscarriage of a woman whether she is or is not with a child, unlawfully administers to her or causes her to take any poison or other noxious thing or use any force of any kind or uses any other means whatever is guilty of a Felony. The law also prohibits any woman being with a child, with intent to procure miscarriage to administer to herself any poison or other noxious substance" (Section 141 of the penal code cap120).

Furthermore, 'any person who unlawfully supplies to or procures any person anything knowing that it is intended to be unlawfully used to procure the miscarriage of a

woman whether she is or is not with a child is guilty of a Felony' (Article 22(2) of the 1995 constitution of republic of Uganda).

Article 22(2) of the constitution of Uganda is deterrent and ensures adherence to the law regarding abortion. In Uganda however, abortion may be justified in instances where there is danger to the mother (Article 22(2). This situation is permissible under Ugandan law as illustrated in the case of R Vs Nakakawa Brenda (1986) where a doctor performed an abortion to save a mother's life.

In spite of the law criminalizing abortion; abortion is still on the rise in Uganda.

According to Jagwe- Wadda (1978), in the 1990s, it was estimated that 2000 persons were treated for abortion complications annually and by 2003, the estimated figure rose to 8500. According to Jagwe Wadda it is estimated that 297,000 induced abortions are currently performed in Uganda each year. Abortions in Uganda occur at a rate of 54% amongst women aged 15-49 years. This implies that the law on abortion in its current state is redundant and thus calls for reform. It also means that the causes of criminal abortion are outside the law and mere legal reforms cannot sufficiently provide a solution to this problem.

When looking at abortion in Uganda, three major perspectives can be considered. These are: the interests of the unborn child, the interests of the mother and the interests of society. It is upon these interests that two major groups in the abortion debate have their roots. The pro-life advocates such as Christian Beenfiedt contend that elective abortion unjustly takes the life of a defenceless human being who has a right to life (Pope John Paul II: Crossing the Freshold of Hope) .They argue that an

unborn child is a human being from the time of conception and that abortion is killing an innocent human being without legal due process.

On the other hand, the pro-abortion advocates such as Andrew Bernstein (Bohannon, 2008) argue that the right to abort applies only to human beings because they survive by reason. Bernstein further argues that there is a difference between a potential and an actual human being, whereby he views a foetus not as an actual human being, but as a potential human being that survives by the sustenance provided by its 'host'.

He therefore he further argued that a foetus has no rights to life: to grant such a right would make its host, the pregnant mother, a slave (Bohannon, 2008). He concludes that abortion laws infringe on the constitutional right of the mother to personal liberty and privacy.

The constitutional right to abortion however was first observed in the American case of Roe & Wade (1957) whereby the American Supreme Court recognized, that a right of personal privacy or a guarantee of certain areas or 'zones of privacy', existed under the American constitution and that was broad enough to encompass a woman's decision whether to terminate her pregnancy or not.

In the above case, they argued that permissive abortion law would reduce maternal death emanating from illegal abortion, which is dangerous to those who abort secretly and yet necessary in pregnancies resulting from rape and incest. They further argued that the foetus is only a potential human being, because it lacks the manifestation of personality and adult characteristics at birth or at least at viability.

The pro-abortion group therefore views the foetus as a “thing”. They argue that the foetus has no defined human rights and can be disposed of at will by the mother. One of the common slogans for justifying abortion is that every child should be a wanted child. To the pro-abortion group, if a pregnancy is unwanted, then the baby should also be unwanted and that it should be killed before birth to prevent a life of an unhappy life on either party. The legal framework in Uganda today does not seem to be in position to settle the above fundamental issues, which hinge on differences in belief, opinion, and biases; regarding the value of life at various stages. It should be noted however that Uganda’s abortion law seems to reach the limits of its powers of discrimination when the right to life is in question.

There is therefore a need to understand the cause of this problem so as to suggest viable solutions. It is important to establish whether people do view abortion as a crime and whether their understanding influences their attitude on this crime. With the view that the nature of the law relating to abortion in Uganda is ineffective due to its failure to resolve the problem of criminal abortion, the focus of this research has been put on adults between the ages of 18-36 years. This research has then attempted to make recommendations thereof.

1.2 Statement of the Problem

The law in Uganda is prohibitive in nature with regard to abortion. Under the 1995 constitution as amended; “no person has a right to terminate the life of the unborn child except as authorised by the law” Article 22(2) of the constitution of Uganda (1995).

Furthermore, under the Penal Code, any person who procures in the crime of abortion is guilty of felony. The penal code prohibits any woman being with a child, with intent to procure miscarriage to administer to herself any poison or other noxious substance (Section 142 of the penal code cap 120).

In Uganda women experience many unwanted pregnancies. According to Dr.Nanungi Hellen of Suubi Health Center, the above is evident especially among school girls, housemaids, young women, unmarried women, widows and prostitutes. Other unwanted pregnancies are as a result of extra marital affairs.

This research has found that unwanted pregnancies are attributed to some of the following: delayed marriages, barriers to contraceptive use in Uganda by both women and men particularly due to their side effects, inconsistent or wrongful use of contraceptives which results into pregnancy even when being used, and the women's vulnerability which compromises their ability to avoid unwanted intercourse. The above mainly result from cultural norms in Uganda; that make women submissive. According to Dr .Arinaitwe Moses, a Doctor and a counselor at Mulago hospital; he argued that in most cases, pregnancy occurs in any of the above circumstances, it is considered unwanted hence the need to procure an abortion irrespective of the knowledge that it is illegal (Dr. Arinaitwe Moses; Interview 02/04/15). Thus inspite of the criminal rules prohibiting abortion, illegal abortion is still on the increase in Uganda. This also implies that the law on criminal abortion in its current state may be an ineffective device against abortion.

There is therefore a need to critically analyze the effectiveness of abortion law in Uganda and also to assess the punitive measures it imposes. There is also the need to discover the loopholes in this law in order to find out the possible ways of improving upon it.

1.3 Objectives of Study

1.3.1 General Objectives

The broad objectives of the study is to critically analyse the adequacy of Uganda's abortion law in curbing the practice of abortion.

1.3.2 Specific objectives

- i) To analyse the law relating to abortion in Uganda.
- ii) To investigate whether the law on criminal abortion is adequate.
- iii) To determine the effectiveness of this law in curbing abortion in Uganda.

1.4 Research Questions

Below are the three main research questions:

- i) What are the laws governing abortion in Uganda?
- ii) How adequate are these laws in curbing abortion?
- iii) How effective are these laws in curbing abortion?

1.5 Scope of Study

This study has focused on how adequate the law is in curbing abortion in Uganda. It mainly focuses on international and domestic laws by critically analyzing how these deals with the issue of abortion. This research is limited only to issues pertaining to the legal conceptions on the practice of abortion in Uganda. The study examines

whether Ugandan law permits abortion and if so, to what extent. It also analyses the grounds upon which the law permits abortion. In other words; the study questions whether there are any defenses available for abortion victims in Uganda.

1.6 Significance of the Study

According to Dr.Arinitwe of Mulago hospital, abortion is a health risk to women who carry it out as evidenced by the reports on post abortion complications in the hospital (interview; 20/05/2015 Dr.Arinitwe Moses). The study has helped to establish why there is persistent increase in abortion despite the law prohibiting the act. It has also established how the law can be used to reduce the demand for abortion. The study is further significant in that it will help establish whether laws in Uganda are adequate and effective in curbing the practice of abortion.

1.7 Theoretical Framework of the Study

1.7.1 The Religious Perspective.

The theory of ‘‘ensoulment’’ states that from the moment of conception the foetus is a human being because God has conferred on it a soul which gives it humanity.–Those who subscribe to the religious theory justify their views by referring to the prophet Jeremiah’s book where God says “Before I formed you in the womb I knew you, and before you were born I consecrated you: and appointed you a prophet to the creations” (Jeremial 30:14).

According to Eduardo (A Global Review Vol. 11, 1993); God sees the unborn as his children. It therefore follows that life is not conferred at birth and thus; according to him, abortion murders God’s children. In a speech delivered by mother Theresa of

Calcutta in 1994 at the National Prayer Breakfast in Washington, DC, she expounded on the religious view point thus:

“The greatest destroyer of peace today is abortion, because it is war against the child, a direct killing of the innocent child: murder by the mother herself; and if we accept that a mother can kill even her own child, how can we tell other people not to kill one another? By abortion, the mother does not learn to love, but kills even her own child to solve her problems and by abortion, the father is told that he does not have to take on any responsibility at all for the child he has brought into the world. That father is likely to put other women into the same trouble, so abortion just leads to more abortion. Any country that accepts abortion is not teaching its people to love, but to use any violence to get what they want. This is why the greatest destroyer of love and peace is abortion”

(Free Encyclopaedia pg. 1 on abortion visited on 5th June 2015.

The conservative views lay at one extreme holding the person-hood of the foetus and that its right to protection exists from the moment of conception. The fact that different believers have different opinions on the approximate stage of development at which the foetus becomes a person is another reason why most people dispense with this concept altogether.

1.7.2 The Gender/ Feminist perspective

Jeremy of the Universal Church, argues that women have been marginalized for a long time by both the law and socio-cultural values (Morris A, 1987). Consequently, I undertake this study basing on the feminist's point of view particularly within the framework of feminist epistemology. It must be noted that for a long time now, several scholars have rarely had gender analysis on their agenda. A conference on Abortion held on 17th March 2012 at Kampala Serena Hotel also reflected that women

and their fundamental contribution to social and cultural life have been marginalized. Gender has been absent from our understanding and explanations of social phenomena; in favour of categories such as social class. The overriding assumptions regarding women's roles in society include the characterization that they are passive and emotional. Furthermore, there is a reference to human nature that renders social roles natural rather than a product of social and political manipulation by men and women. It is on this basis, for example, that John Locke believed people to be innately "reasonable". He also argued that because of their reproductive capacity, women were emotional and were unable to provide for themselves and thus "naturally" dependent on men (A.S. Banner, 2010). Property rights were crucial in Locke's ideas and due to women's natural dependence; he argued that they do not, then, possess property rights. Marriage according to Locke is a contract they entered in order to produce sons who can, then, inherit property. According to this thinking, the purpose of marriage is therefore to ensure men's lineage (Morris, 1987). He also believed that women's position in the family, as subordinate to men; was the natural consequence of their ethical disposition.

Even though these philosophers' ideas are Western-based, the same were partly transferred to Africa and Uganda in particular; through colonialism.

On the other hand, the feminists found that the theories of the social world and practices of research are andocentric thus,

"What we call science is not based upon universal criteria which are value free but upon male norms and, in particular, the mythical separation of reason for men and emotion to women" (Morris, 1987).

Feminists hence argue that women's position in Uganda is not a natural phenomenon; but a social, political and economic product that is perpetuated by the bias of "science".

Further, it has been observed that; "From an andocentric perspective, women are seen as passive objects rather than subjects in history; as acted upon rather than actors. Andro-centricity prevents us from understanding that both males and females are always acting, although in very different ways. Even in primitive societies women in one way or the other participated in decision-making although most anthropological literature did not go deep in this analysis. It was, therefore, recognized that there was a need for studies of the functioning of African women before the advent of European colonial exploitation.

There was therefore a need to conduct research based on feminist epistemology. This values women's experiences as a starting point in research; for, women occupy a marginalized position within Ugandan society. There is therefore a need to place women at the centre and move away from the bias of male-centred bias although men have not been totally left out and instead have been used as a useful source of information. It is necessary to understand the fundamental contribution which women make to cultural, political and economic life and to understand women's knowledge of the subject.

According to feminist theory, criminal abortion is seen as the right of self determination of a woman and her freedom to choose on how to determine or pursue her life in all aspects of human endeavours; including a right to control or determine her reproductive rights (Mbiti, 1977). According to Jennifer Okumu Wengi a human rights activist, to abort is a right of self determination of a woman and her ability to

choose or plan for her life and that right should be for everyday life as well as for the future. The woman should be able to decide whether to have children at all or whether to space them or how many children she should have. According to this theory, if a woman is pregnant, when she is not ready for it, then she should have a right to an abortion.

If she wants children, she should be able to determine how to bring them up. Further, this theory asserts that integrity and self realization should be regarded as other considerations with birth law. It is only when she realizes what she has decided on or what she planned to achieve that a woman should give birth. The theory based on a woman's right to terminate a pregnancy under the guise of a right of self determination, integrity and self realization, fails to talk about the application of the concept yet the law on abortion tries to balance the right of the mother against those of the unborn child.

The concept of self determination works on the principle of fundamental freedom but it should not interfere with the balancing of social values. Anti-abortion movements from the feminist point of view are seen as the existing tendency to view the foetus as an independent person. To them, it occurs at the cost of reducing a woman to little more than a material environment. On the contrary, feminists view the developing foetus as having great intrinsic value, but it cannot be viewed as part of the woman's body. This view can be illustrated by the extremist's view taken by Mary Anne Warren.

“Whether or not it would be indecent for a woman in her seventh month to obtain an abortion just to avoid to postpone a trip to Europe, it would not, in itself, be immoral and therefore it ought to be permitted. The foetus lacks the qualification of person-hood, like consciousness, the capability to decide and to communicate and cannot be said to have any more right to life. Hugo Van Engen draws attention to the fact that anti abortion views are dogmatic principles that are rigid, while the situation asks for pliability i.e. compromise. The feminists’ view however, is dominated by the views that the woman is totally free and has a right to decide independently if she wants a baby or not; and that the foetus should be considered as a biological Larva (Heidensohn F, 1992).

1.7.3 The scientific perspective

The scientific perspective asserts that abortion is based on the “Viability question”. Viability is defined as “the capability of developing and surviving independently” (Heidensohn F: 1992) The legal age of viability of a foetus is 24 weeks (S.12 of Human Right Act) but many foetuses survive birth at an earlier age. In the medical point of view, an induced abortion can be explained in a lay man’s terms as the expulsion of a pre-viable foetus.

The above view, however, does not consider whether or not the foetus is in fact a person and thus lacks the emotional argument. Other views such as the religious or feminist views are increasingly becoming heated arguments. In this research, I have examined the feminist view and tried to find out whether it affects the attitude and perceptions of abortion in Uganda.

1.8 Literature Review

Lule Hannington writes that the Ugandan constitution provides every individual with a degree of personal autonomy over important personal decisions, intimately affecting him or her private life. He supports his assertion by quoting Blackman J. in ROE & WADE;

“Our constitution embodies a premise that certain private sphere of individual liberty will be kept largely beyond the reach of government, a similar respect for individual decision making is a matter of fundamental personal importance reflected to every individual a degree of personal autonomy over private lives”.(Blackman J. 1977).

Marshall (1957) supports a woman’s right to terminate pregnancy under a guise of the constitutional right of choice, pregnancy and liberty. The description of this sphere of autonomous decision making as a matter has some difficulty of which relevant decisions are “fundamental”. A decision to breach a contract or commit bigamy is a personal decision and may well be a vital one.

Since private life for this purpose is just that area of individual activity that ought to be free from interference, the notion of privacy or impact on private life does not advance this discussion so much (S.178 penal code act cap 120). Marshall merely writes on the right of autonomous decision-making, but does not talk much about the application of this concept in societies like Uganda. The law relating to criminal abortion in Uganda tries to resolve the various interests pertaining to the abortion issue. That is, balancing the rights of the mother against those of the unborn child.

The law on criminal abortion therefore in its current state may not be an effective device against abortion and thus a need for its reform. David H, (1989) writes that abortion is a notion, with divided interests, between fundamental choices of competing rights (David H.1989) .

The government's interest is in protecting human rights, while a woman's right is to make one of the larger decisions of her life i.e whether to have a child. David asserts that a mother's decision to regulate fertility is a private matter and therefore, it is for the woman with the advice of her doctor to decide in the absence of other competing interests, whether to have an abortion or not. Hence, a decision to undergo an abortion at last in the early stage of pregnancy should not be made subject to the whims of others.

The above assessment however fails to consider the rights of the foetus rather it tends to amplify a woman's right to privacy and choice.

The law on criminal abortion in Uganda however is aimed at striking a balance between the interests of the mother visa-a- vis those of the foetus. The foetus has got a right to live and therefore requires adequate legal protection. The work of David does not clearly address itself to the nature of the problem on criminal abortion because it is lop-sided and may not contribute to the assessment of the problem in Uganda.

David's assertion is an expression of foreign social values and is influenced by the views and the opinions of the western feminist movement. His ideas are different from the situation we are in, and our life patterns. Uganda's biggest challenge is poverty together with ignorance of where to find the required measures, however, Uganda's impact of women liberation movements seems to be weak in that there is lack of literature to sensitize the masses of their views on abortion and its effect. There is also a class difference between the literate and illiterate whereby; the latter dismiss such views of the educated women that seem to have lost touch with-African tradition.

In Uganda, children have always been of great value to society for different reasons. Female children were and still are a source of bride wealth, and male children do inherit family property and ensure the continuation of the family lineage. They offer protection of family property from non-family members, and are a source of labour in rural communities. The above shows the importance of every child brought into the world to a family. Mbiti emphasized not only the importance of marriage but also of children in this way: 'To die without getting married and without children is to be completely cut from human society, to become disconnected, an outcast and to lose all kinds of lines with mankind'. (Mbiti J.S: 1977)

Furthermore, in a recent survey on demographic and health 2013/4 in Uganda, it was discovered that there is still a very high demand for children in some societies, even among women with six or more children. Recent demographic studies in the past five years show that, Uganda has the highest level of unmet need for family planning which is at 45% such that, every five births in five years were unplanned in 2010 and five pregnancies in 2010 ended in abortion (Amnesty Report, 2004).

The reason for the high fertility rate includes the need to strengthening bonds with the husband which makes a woman feel proud. The implication of the above study appears to be that since children are so valuable to society, the majority of couples would struggle to have many children as opposed to the use of family planning in order to limit a number of children or commit abortion to get rid of a child.

In the above respect Karugaba writes that:

'Abortion should be legalized though it may not reduce the number of abortions, but the complications may be reduced' (The New Vision, 19th May 2014.p.11)

In the proceeding quotation, Doctor Karugaba recognizes health reproductive rights and intimates that if a woman tries to enforce her right through crude means; for fear of sanctions, she may have complications. However, if she was given good conditions to procure a miscarriage, then there is likelihood that she would be fine. Reproductive rights especially cannot be merely legislated against. This was confirmed by Karugaba, when he said;

‘If a person has decided to have an abortion, she will have it at any costs in spite of the counselling and if you deny her the good facilities, she will do it in any place’ (The New Vision, 19th may 2014.p.11).

Reproductive rights therefore would be enforced at all costs, as long as the woman deems it fit, despite the sanctions attached thereto. It follows that reproductive rights should be granted without legal reservations. This means that a woman should have a right or be able to plan for herself and for the child. She should be able to decide whether to have children at all or whether to space them or how many children she should have. If a woman is pregnant, and she was not ready for it, then she should have a right to carry out an abortion (Article 22(2) constitution of Uganda).

Wengi (1980) asserts that self determination is not the only consideration with birth law but should be coupled with integrity and self realization. This means that she realizes what she has decided on or what she planned to achieve, Wengi gave an example of a woman’s integrity when interfered with like in rape. Under such circumstances, a woman should have a right to decide not to have a baby, hence abortion. She supports a woman’s right to terminate a pregnancy under the guise of a right of self-determination, integrity and self realization, but she fails to talk about the application of the law, the rights of the unborn child and the society as a whole.

Therefore Wengi's argument of self determination in respect of unwanted pregnancies is only female biased and thus inapplicable in Uganda which mainly has society based values. Wengi's perception of the concept is based on sensation of gender balance.

Therefore, this research is not based on this, but it addresses peoples' perceptions of the crime and whether these perceptions do influence peoples' attitudes in criminal abortion with a view of finding a viable solution to the problem.

This research does not ignore human conduct and the details surrounding human relationship with the law and how it influences perceptions. To this end in order to appreciate the study, abortion should be well understood within the premises of whether people in Kampala do understand its danger and whether this affects their participation in the practice.

1.9 Methodology and Chapterisation

In order to answer the research questions a qualitative study was adopted in order to analyse the law on abortion in Uganda. Secondary methods of data collection in the library were carried out by analyzing documents, print media such as Newspapers e.g. The East African, The Monitor and The New Vision and journals, like the Gut marcher Institute reports and magazines.

The research has also been carried out to get their views on abortion, courts of Law such as Mengo is been visited in order to get the incidents of cases of abortion reported and prosecuted.

interview methods was employed in the initial stage because they give an in depth understanding of the study, Local council officials, probation officers and Non Government Organizations' (NGO'S) have been contacted. There are people who give birth and since they do not want the child/ children, they take them to Babies homes and nongovernmental organizations. The research report is composed of six chapters. Chapter one deals with the introduction, which contains a statement of the problem, literature review, objectives of the study, hypothesis, methodology and a discussion of theories on criminal abortion. Chapter two focuses on how adults in Kampala understand abortion and how their understanding influences their participation in this practice. Chapter three focuses on abortion and Uganda's Penal code. Chapter four deals with Uganda's domestic law on criminal abortion. Chapter five deals with critical aspects of Abortion law. Chapter six focuses on recommendations and chapter seven on conclusion of the study.

CHAPTER TWO

UNDERSTANDING THE PHENOMENON OF ABORTION

2.1 Background.

This chapter deals with how adults in Kampala understand abortion and how their understanding influences their perception and attitudes towards it.

2.2 Understanding Abortion in Uganda.

The following results were acquired from academic text books, Law Reports, News papers and related Novels. Most adults in Kampala understood abortion as the termination of the pregnancy before its due date of birth either at the doctor's advice or at their own initiative, where by the latter is most common. Not only do Ugandans know about abortion; but they also understood that it is illegal since most persons who carry it out do it clandestinely. Its clandestine nature is however blown out of cover by the complications that arise there from, for example over bleeding, secondary infertility and sometimes death.

Also in Uganda, people view abortion as inhuman and should not be accepted in society. According to them this would be depriving society of a human being. This attitude is mainly influenced by the Christian belief which looks at abortion as murder of the unborn child.

Largely abortion is highly stigmatized such that when women get complications, it's really hard for them to look for medical attention immediately. The high rate of abortions among students now 65%; is a result of fear of dropping out of schools since it has been school policy that once found pregnant such girls are dismissed. In

some institutions like the Islamic University in Uganda for example, if a female student is found pregnant, and she is not married; such a person is subjected to a dead year. In this case no girl wants to lose so much of her time; hence abortion. The Fear of parents since a daughter would be a bad example to other girls in the family, in the community thus disgrace to the family hence leading to abortion.

This is clearly expressed by the Bakiga custom of throwing a girl over the cliff that becomes pregnant out of wedlock.

For the prostitutes it is mainly because they may have many children already or they are not sure about the paternity of the child or pregnancy will take them out their trade hence abortion.

For the unmarried women, these may include both students and those that are not yet married. Traditionally becoming pregnant out of wedlock is stigmatized by society that such girls are looked at as losers, irresponsible, outcasts and bad influence to fellow girls both in households and the village at large. Therefore instead of being ridiculed, they do procure an abortion.

In Uganda however, procuring abortion is illegal, therefore the doctors who procure abortions clandestinely, it is suspected that such doctors who procure these abortions could easily be fake or are general practitioners that are not specialized in gynecology matters thus the resulting complications and referrals to other bigger hospitals where there is specialization for further management.

Self induced abortion, the women usually, swallow pills that sometimes deliver the intended results, however in most cases the fetus comes out in halves, sometimes they die and does not come out hence a need for medical attention from the referral hospitals to manage the complications (Arinaitwe Moses, interview 20 June 2015).

The traditional herbalists also administer some herbs that the women drink and then the fetus comes out. The above method has been found out to be the highest cause of abortion complications (Mulago Hospital: Annual Report on Abortion, 2014)

2.3 Attitude& perception.

From the above views abortion is viewed as evil. This is further echoed in some articles that have been published by persons who articulated their concerns.

According to Nuwangira Ambrose, Abortion is Inhuman whatever the Reason. (The new vision Friday December 19th 2008) abortion is inhuman for whatever reason. He stated that much as abortion has been portrayed as the most fundamental right of women in the 21st century that is a right to self determination, to terminate unwanted / unplanned pregnancies, the innocent is not considered such innocent developing children should be given a chance irrespective of the circumstances in which it was conceived.

Ambrose further contends that in a need to advocate for preserving women's rights, the abortion activists are doing it at the expense of preserving a life. From the scientific point of view, the Foetus heart begins to beat at 18 days and abortion is usually carried out at seven weeks and murder is causing the heart beat of a person to stop, therefore in stopping the heart beat of a fetus is causing death thus murder. Ambrose argues that no matter the circumstances abortion is not a solution; for it becomes worthless to dig a pit to fill another pit but rather government should implement policies to ensure meaningful potions for pregnant and parenting women. However Ambrose assumes that government is aware of all the parenting women who would wish to carry out the abortion. Actually according to Ambrose, women that

carry out abortions do it clandestinely irrespective of the government plans (Ambrose Nuwagira, 2008)

Paul Kokoski, ^{argues} that activists support abortion as a woman's right to control her own body, a fetus is not part of the mother's body but a separate distinct human being with its own heart beat, brain waves and DNA.

He further argues that instead, we must welcome every new life into the world, regardless of the circumstances, as if it were our own, for lives and life of our unborn children are inseparable. He concludes by quotation of Ronald Reagan that 'I have noticed that everybody is looking at abortion as a remedy for avoiding responsibility of raising the child, Kokoski, argues that in cases of defilement, rape, incest where abortion has been procured for mercy to avert the psychological scars of the victims and no painful reminder, abortion should be done. However he argues that killing another being can never be an act of mercy.

He states that besides the psychological torture of being raped, there are suicidal tendencies which haunt each and every person who has ever had an abortion, and this would essentially mean that the rape victims still have two episodes of psychological torture.

James Taylor (1973) therefore concludes that two wrongs do not make a right, he argued that in all worst case scenario like the above (rape, incest and defilement) "they should go on and deliver the child and possibly raise him or her, or hand the child to foster homes for adoption, what Taylor does not look at however that in circumstances the women do not have the financial capacity to give their children the ideal care at the time they conceive, therefore cannot care for the said the child and

that adoption in Uganda is not so strong that one would be sure that her child will be cared for adequately”

J.W Bush (2005) stated that in no case should abortion be promoted as a method of family planning. All governments and relevant inter government organizations were urged to strengthen their commitment to women's health, to deal with the health concerns reduced recourse to abortion through expanded and improved family planning services.(Breaking the Silence: The Global Gag Rule's Impact on Unsafe Abortion)

Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion. Women who have unwanted pregnancies should have ready access to reliable information and compassionate counseling. Any measure or changes related to abortion within the health system can only be determined at the national level or local level according to national legislative process.

Rebecca Kadaga, the speaker of Parliament (2013, National Assembly) emphasized that the government should legalize abortion according to the Maputo protocol; stating that government should take all appropriate measures to protect the reproductive rights of women by authorizing medical abortions in cases of sexual assault, rape, incest and where continued pregnancy would endanger the mental physical health of the mother or the life of the fetus.

Further, Dr. Sylvia Tamale, a doctor at Mulago Hospital (New Vision Wednesday December 31st 2014 pg1 2). Stated that women all over the world are losing their lives because of unsafe abortions, therefore abortion should be legalized.

The above view and attitude was supported by the President Obama(2014) in which he lowered the bar on organizations that supported abortions imposed by the Bush government.

The US Democrats took abortion as a method of family planning, a matter of choice to evade parenthood and a means of population control.

On the other hand Hon Kasibante (2013) argued that he viewed human life and dignity in high regard but can never say that abortion should never be allowed under any circumstances. He cited circumstances such as rape where victims should be assisted to abort if they wish so.

The catch phrase here is that if the 'women choose', it does not mean that whoever is raped must abort, but if they want to have the babies, they can, other than forcing those who would rather not, to carry it on.

Ntanga Amos, a journalist at Uganda Media Association, urged that although he respected the views of no abortion in whatever circumstances, it would be oppressive to have their thinking enacted the law of the land.

According to Nash (Tibamanya Mwene Mushanga: 1992.) clinical experience shows that if a woman wants to terminate a pregnancy, she will use whatever means she considers necessary to do so. Therefore restrictive laws only deny her the possibility of procuring safe abortion under medical supervision which tantamount to forcing her

to seek unsafe abortions. It is further stated that over 75% of induced abortions today are done for elective, non medical reasons like if a woman not feels that it's the right time to have a baby (Tibamanya Mwene Mushanga,1992).

2.4 Abortion and the Law.

When I visited Mengo court in Kampala on the 14th may 2015. I found out that no incidents of abortion had ever been filed for prosecution since March to May this is because victims of abortion do corrupt government official especially the police to kill such cases.

On the 15th day of May 2014 when I visited Kawempe police station I discovered that there is no crime in relation to abortion has been reported because such cases some times are hidden by the victim's family. However it was a view of a senior officer that abortion statistics have not been recorded since 2014 until today. With regard to the numbers indicated in the health reports and reported cases which are a large margin which means that law if effectively should be applied as a way to curb abortion a police officer stated that they only find fetuses in polythene bags without any trace(Senior woman Nakanwagi Teddy, Family section,kawempe police station).

CHAPTER THREE

ABORTION & UGANDA LAW

This Chapter seeks to look at the historical origins of the law of abortion in Uganda. It also outlines and discusses the law governing abortion today in great details than was done in the introductory chapter; stating the international instruments on the crime of abortion as a preliminary step to a critique of this law.

3.1 Historical origin of the Law of Abortion

When talking on abortion you can't leave out English law, being that it also apply to all common wealth countries we therefore apply it in case of lack of remedy, we apply it. Abortion basically deals with fetuses which; if procured from the womb would not be capable of living. The practice of abortion is probably as old as life itself and has been viewed through the centuries by different civilizations and people in different ways. The church has always opposed it rigidly on moral grounds, upholding the doctrine of the sanctity of life.

Abortion first became a statutory offence in Uganda by an act of Parliament of George III in 1803. This It was the Lord Ellen Borough's Act which made it a felony to administer a substance to unlawfully procure a miscarriage of a woman quick with child (Okumu Wengi Jennifer ,1980). It was not clear whether a woman acting upon herself was liable, but she would appear to have fallen within the scope of the Act's language. The 1803 Act was superceded though with little effect by Lord Lansdowne's Act of 1828. This Act presumed the basis of the earlier Act and resolved some of its uncertainties (Okumu Wengi Jennifer, 1980).

The Offences against the Persons Act was enacted in 1837, replacing the 1828 Act but it did not separate women from the act and was not clear on a woman acting on herself. The Act covered anyone “unlawfully” administering a noxious thing and “unlawfully” using an instrument or other means intending to procure a miscarriage. It did not indicate or suggest when a miscarriage would lawfully be procured (Okumu Wengi Jennifer 1980).

In 1846, the Criminal Law commissioner commenting on the 1837 Act drew up other laws to recommend the addition of a provision to the prohibition section to the effect that;

“No Act specified in the last proceedings article shall be punishable when such act is done in good faith with intention of saving the life of the mother whose miscarriage is intended to be procured” (S.141 of the penal code Act cap 120).

When the 1837 Act was replaced by the 1861 Act, this provision was not added, the provision relating to abortion in the 1861 Act read as follows;

“Every woman being with a child who with intent to procure her own miscarriage, shall unlawfully administer to herself, poison or other noxious thing or shall unlawfully use any instrument or other means whatever the intent to procure the miscarriage or any woman, whether she be or be not with child, shall unlawfully administer to herself or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any or instrument or other means whatsoever with the like intent, shall be guilty of a felony and being convicted thereof shall be liable to imprisonment for life”(S.142 of the penal code cap 120.)

The 1861 Act remained dominant until the enactment of the new crime of child destruction. An appropriate version was introduced legally to justify a lawful decision not to preserve an infant's life. Nearly a century passed before the 1846 recommendation was applied to develop the law as in *R Vs Bourne*

Section 312 of Lord Macaulay's Indian Penal Code, 1860; provided for the punishment of procuring a miscarriage, that miscarriage be not caused in good faith for the purpose of saving the life of the woman, this provision represents a development of the Uganda 1961 Act, and it specified a condition under which procuring a miscarriage was "Lawful". In The case of *R Vs Bourne*, was the first time English Law addressed the issue of when abortion would be lawful (Morris A: Women, Crime and criminal justice (1987) Oxford, Basil Blackwell).

In *R Vs Bourne*'s case a young girl of 14 years (a minor) was raped by a number of soldiers in the most terrifying circumstances-and as a result she became pregnant. Her case was brought to the attention of Doctor Allan Bourne an obstetrical surgeon. The girl may have been of adequate physique for child bearing but her obstetrician was satisfied that the pregnancy experience would cause serious injury to the girl; of both physical and mental nature. Bourne, therefore; with the consent of the parents, operated on the child to terminate the pregnancy. Bourne announced his course of action to the authorities but was prosecuted for having violated Section 58 of the 1861 Act (Morris A: Women, Crime and criminal justice (1987))

Bourne's defence was that the operation was not unlawful. He was called upon as a witness on his own behalf and stated that after he had made careful examination of the

girl and had informed himself of all the relevant facts, he had come to the conclusion that it was his duty to perform the operation. In his opinion, the continuance of the pregnancy would probably cause serious injury to the girl; injury so serious as to justify the removal of the pregnancy at a time when the operation could be performed and or done without any risk to the girl.

In his summing up, the Judge referred to the provision in the Child Destruction Act (Morris A: Women, Crime and criminal justice (1987)) and to the word “unlawfully” in the charge and directed that the word was not meaningless and in his opinion imparted the meaning expressed by the provision.

In the Subsequent Act, the position of the law was that the onus of proof rested on the crown to satisfy beyond reasonable doubt that the defendant did not procure the miscarriage of the girl in good faith for the purpose of preserving her life. He then defined the words “for the purpose of preserving the life of the mother”, he said these words ought to be construed in a reasonable sense and that if a doctor is of the opinion on reasonable grounds and with adequate knowledge and skills that the probable consequences of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the Jury is entitled to take the view that the doctor, who under these circumstances, and in his honest belief, operates, is operating for the purpose of preserving the life of the mother.

The Jury in this case acquitted the accused and the prosecution had no right of appeal. This case is celebrated in English common Law Criminal Jurisprudence for its development of the law to acknowledge the legality of the therapeutic abortion. It has

developed the general understanding in the law that a Surgeon acting in good faith in the honest belief that the women's life or physical or mental health are endangered by continuation of her pregnancy; may lawfully terminate the pregnancy; even when the only enacted law on abortion prohibits it.

The position of the law as stated in the celebrated Bourne's case above, has been a subject of Criminal Law on abortion in many Countries and has been adopted.

This sums up the provision in Uganda's constitution which states that "No person has a right to terminate the life of the unborn child except as authorized by law" (s.22(2) of the penal code Act).

It follows that since Uganda was colonized by Britain, the application of English laws have been embedded into Uganda's legal system. The provisions of our Uganda's law are almost similar to the ones contained in the offences against the Person's Act of 1861; the exception thereto in Uganda's Penal Code and in R Vs Bourne case. The offences against Person's Act cover anyone who unlawfully administers a noxious thing and unlawfully using instrument or other means intending to procure a miscarriage. It does not however indicate or suggest when a miscarriage would be procured.

3.2 Analysis of the Law

3.2.1 International Instruments on Abortion.

The Government of Uganda has ratified all major regional and international human rights treaties. Although it has not domesticated the majority of these treaties, the Ugandan Government is nonetheless legally bound to respect, protect, and fulfill the

rights of the unborn in international and regional conventions that it has signed or ratified. Although these instruments are not applicable in Uganda, it is deemed to respect them. These are below are some of the international instruments Uganda has ratified.

3.2.1.1 Human Rights Act 1998.

Article 2 of the human rights act provides for a right to life. Every one's right to life shall be protected by law. No one shall be deprived of his life intentionally save in execution of a sentence of court following his conviction of a crime whose penalty is provide by law. The supremacy of this right is confirmed by the fact that it is non derogible, even in times of national emergency. That the words 'everyone's right to life' shall be protected; enjoins a contracting party not only to refrain from taking life in a manner contrary to the article but also to take appropriate steps to safe guard life. However, it is not clear whether termination of an unborn child's life can amount to breach of article. 2. The words 'every' and 'life' in article. 2 have been found by their nature to concern persons already born and cannot therefore be interpreted as providing to a foetus, an absolute right to life. The above does not mean, however that Article. 2 can never protect the right of the fetus, it merely means that the Article does not cover the rights of a fetus at all; and recognizes a right to life of fetus with certain limitations. The European courts of law have not to date decided which of the two scenarios above is the correct one.

What is clear however is that high contracting parties are permitted to have domestic laws in place which allow a fetus to be aborted in order to protect the physical or mental health of a mother or even to protect a mother from social hardships. This

discretion merely acknowledges that national authorities enjoy a wide margin of appreciation in matters of moral choice, particularly in areas such as abortion; which touches on matters of belief concerning the nature of human life.

3.2.2 Regional Instruments

3.2.2.1 Banjul Charter

This charter was also ratified by Uganda and it is therefore applicable to Uganda's laws. The Banjul charter in article 4 provides that human beings are inviolable. "Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrary deprived of his right".

The provision does not directly refer to a fetus. The Banjul protocol does not specifically provide for the protection of the life of the fetus. The question is therefore whether a fetus is a human being at that point and whether this law protects its right which is the basis of the pro-life and pro-abortion movements.

3.2.2.2 Maputo Protocol

This protocol was also ratified by Uganda and is therefore applicable to its laws.

According to Article 3 (1) (b), of the Maputo protocol; every woman has a right to dignity inherent in a human being and to the recognition of her human and legal rights. Furthermore, the article states that "every woman shall have the right to respect as a person and to the free development of her personality".

In addition, Article 3(9) defines harmful practices to mean all behavior, attitudes and /or the practices which negatively affect the fundamental rights of women and girls such as their right to life, health, dignity, education and physical integrity.

The pro-abortionists would perceive refusing women to carry out an abortion, a practice that negatively affect their health in as far as it forces them to procure unsafe abortion thus leading to adverse complications. Article 14(1) & (2) of the Maputo protocol provides that state parties shall ensure that the right to health including sexual and reproductive health is respected and promoted.

This includes:

- a) The right to control their fertility,
- b) The right to decide whether to have children, the number of children and their spacing.
- c) The right to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest and where continued pregnancy endangers the mental and physical health of the mother or the fetus.

The article expressly protects the right of the women to have an abortion in situations of sexual assault. However in Uganda's domestic law, it has not been fully enacted. It only permits abortion in time of endangering the life of the mother.

CHAPTER FOUR

ABORTION & NATIONAL LAWS

This chapter deals with abortion and National laws on abortion on a national level.

4.1 Domestic Laws

Under the laws of Uganda, according to Article 22(2) of the Constitution of Uganda 1995; “no person has a right to terminate the life of the unborn child except as may be authorized by the law”. The effect of the provision above is that abortion is prohibited. However, the provision creates exception to the general rule. i.e, There are circumstances in which the law may authorize the termination of the life of an unborn child.

Furthermore, the Uganda Penal Code criminalizes conduct related to termination of life of an unborn child. Under the Penal Code “any person who, with intent to procure a 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 forces of any kind, or uses any other means whatever is guilty of a felony” (S.212 of the Penal Code). Under the above provision, it is irrelevant whether the woman was or was not pregnant at the time of the unlawful actions. Under the same provision, the offender is liable to imprisonment for 14 years.

Ugandan law also prohibits any woman who being with child, with intent to procure her own miscarriage, to administer to herself any poison or other noxious substance. Also “any person who unlawfully supplies to or procures for any person anything, knowing that it is intended to be unlawfully used to procure the marriage of a woman whether she is or is not with a child is guilty of a felony”(S.212 Of the Penal Code

Act). It is therefore also a crime to supply to or procure for any person, any material, knowing that it is going to be unlawfully used to procure the miscarriage of a woman.

In addition, under the penal code “any person who, when a woman is about to deliver a child , prevents the child from being born alive, through any unlawful act or omission, is guilty of an offence and is liable to imprisonment for life (S.141 of the penal code cap 120)

The above section is intended to fill the gap between abortion (and that which deals with the fetus that could not survive outside the mother’s womb) and homicide. It provides for conviction of a person who destroys a child in the process of birth, in circumstances where it could not be proved that the child had completely proceeded in a living state from its mother’s body, so as to be in law, capable of being killed. The offence under section 212 of the Penal Code Act cap 120, talks about the actual destruction of the child; whereas abortion is constituted by any act that attempts to procure a miscarriage.

One can therefore safely state that there is an obvious overlap between the acts of killing an unborn child and procuring a miscarriage.

However, medical termination of pregnancy in good faith, with reasonable care and skill by a physician; in order to save the mother’s life is not illegal. This position as expounded in the case of R Vs Bourne is the only permissible situation under Uganda/s abortion laws.

4.2 Abortion as a crime

As already noted; under the Laws of Uganda, a person is not criminally liable for an act or omission which occur independent of the exercise of his will or for an event

which occurs by accident. It follows therefore, that “mens rea” which is the guilty intent in the offence, is also an essential ingredient in the offence of abortion. The ‘mens rea’ of a person charged with illegal abortion should be the intention of the woman. The intent becomes criminal by reason of the instruments which are put to use and in this case it is not necessary to prove any further intent.

In *Mahr Sign, Bansel Vs R*, where the deceased died by reason of injuries inflicted upon her by the accused in the course of an illegal abortion, the deceased was seven months pregnant when she had some disagreement with her husband and presumably had attempted to procure her own miscarriage.

She went to a doctor who examined her, called in an anaesthetist and performed an operation on her to terminate her pregnancy in his own office, and using his own facilities instead of taking her to the hospital a few hours after the operation, the patient died by reason of injuries inflicted upon her by the accused doctor in the course of the illegal operation.

The object of the determination of the pregnancy was not for the preservation of the life of the mother.

The case for the defense was that the operation by the accused was done in the honest belief that it was very necessary for the preservation of the life of the deceased. The Court convicted him basing itself on the “intent” principle; that is the intent to procure a miscarriage of a woman by unlawfully administering to her noxious drugs. As already stated, in such a case; it does not matter whether the woman is or is not with a child.

A woman cannot be convicted of administering drugs or noxious substance to herself with intent to procure her own miscarriage, unless she is in fact with a child (M.D.A

Freeman: Lloyds Introduction to Jurisprudence, 6th Edition, 1988). However, even if she is not pregnant, she may be convicted of conspiracy to procure an abortion.

This was held in the case of *R Vs White Church* basing on the authority in *R Vs Socket* that she may be convicted of aiding and abetting others in administering to a woman a drug or same noxious substance to her in order to procure a miscarriage. The material element of the crime is an "overt act" to use means with the necessary intent to procure a miscarriage of a woman. The intent therefore becomes criminal by reasons of the unlawful design for which the drugs or instrument are applied. A mere guilty intention to procure an abortion is not sufficient to constitute a crime. There must be an overt act leading to the perpetration of the crime or the 'actus reas'. The 'actus reas' in the offence of abortion is the act of administering the noxious substance or the use of an instrument to procure the miscarriage of a woman.

In order to constitute the statutory offence of unlawfully procuring a miscarriage, the thing supplied or administered must be proved to be noxious. Although it need not be proved to be an abortion. According to the case of *R Vs Brown* a woman who takes a substance which in fact is harmless believing it to be a noxious substance and with intent to procure her miscarriage; does not commit an offence. In some cases it has been said that, a substance which procures a miscarriage has to be clearly a noxious substance.

As long as the administering of the noxious substance is done, it is immaterial whether the woman to whom it is administered is pregnant or not. This is the case because the necessary intent has already been manifested and the intent has been put into force by supplying the noxious substance. Theoretically, for purposes of the law

of abortion, any substance having any usual pharmacological effect might be regarded as noxious. It has been established that to be relevant, the drug must be known to have abortifacient properties; otherwise it would be hard to prove intent. Procuring in law means getting possession from another. Court applied this definition in *R Vs Mills* the words “unlawfully administering” as used in the statement of the law of abortion.

To ‘administer’ is to give or furnish a woman with means to procure a miscarriage, the one who administers does not have to use force or be present to constitute administering, the word “administer” does not have a strict legal and technical importance but in its general use, it has a commonly accepted meaning to give.

The fact that the medicine administered by the accused is followed by illness and miscarriage is evidence that the substance supplied is noxious. The offence of administering a noxious substance is complete if the intention of procuring abortion exists only in the mind of the person administering it (Paul Ramsey: 1963 ELS). As already discussed, whether or not the use of means other than poison or noxious substance to procure a miscarriage constitutes the crime of abortion, depends upon the intent with which such mere Administered.

Uganda’s legislation has not come up with any statute outlining circumstances under which abortion is authorized. It is however noted that under the above sections of the penal code, the word ‘unlawfully’ is used. This then raises a question, whether there are circumstances when procurement of a miscarriage is lawful. Is it possible that there are circumstances in which Ugandan law authorizes the termination of the life of an unborn child? In Uganda “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 for 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 the circumstances of the case" (Paul Ramsey: 1963 ELS).

The effect of Section 224 of the penal code is that if the life of the unborn child is terminated, in order to save the life of a woman, such procuration of miscarriage is not a crime. In the Bourne case, Mc Naughten gave a wide meaning to the phrase 'for the purpose only of preserving the life of a mother'. Wherein the case of a young girl, not quite 15 of age, was pregnant as a result of rape. A surgeon, of the highest skill, in one of London's hospitals, openly, and without fee performed the operation of abortion. He was charged with unlawfully procuring an abortion. It was held that, on the charge of procuring abortion, it is for the prosecution to prove beyond reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of a mother. That the surgeon did not have to wait until the patient was in peril of immediate death; but it was his duty to perform the operation if, on reasonable grounds and with adequate knowledge, he was opinion that the probable consequence of the pregnancy would be to make the patient a physical and mental wreck.

In the above case the judge carefully distinguished between the act of the professional abortionist and an operation openly performed by a qualified surgeon. He held that where an operation is performed by a person of no skill, with no medical qualifications, such a person will be guilty of unlawfully procuring an abortion.

4.3 Preparatory and Inchoate offences of abortion

The abortion laws upon termination of a woman's pregnancy, the law relating to abortion acquires that such instruments intended in procuring abortion, conspiracy to commit a crime should be got as first evidence.

The aspect of conspiracy which raises problems peculiar to abortion arises from the fact that under Ugandan law, a woman acting alone is guilty of committing a crime of abortion herself only if she is with a child. The issue must therefore, be asked whether a woman who is not in fact pregnant can be convicted of conspiring with another. In *R Vs White Church* the influence that she could also be convicted of being an accessory to another's attempt to abort is further confirmed in *R Vs Socket*.

Attempt to abort as an offence in relation to abortion

A traditional crime such as unlawful abortion has two elements namely; the wrongful act: actus rea and the wrongful mind: mens rea; causing and evidenced by the wrongful act. A person is not punished merely for possessing a malicious capable intention. It is a common law offence itself, to attempt to commit an indictable offence. The mens rea and actus reas of the offence of "attempt" is an act going beyond mere preparation which falls short of the full offence; but which is proximate to the offence of attempt. The line between criminal attempt and mere preparation cannot be stated in the abstract; but is a matter of determination of the facts of each case.

In *R Vs Collins*, it was held that placing one's hand in another's pocket intending to steal the contents therein but failing because the pocket is empty cannot be criminal larceny or theft; but also that it cannot be criminal attempt either. The reasoning

being that there cannot be any more than preparatory step towards an end which cannot be achieved. This means that it is impossible to forward an act which cannot be done.

In the later case of *R Vs Ring* the Court stated that in *R Vs Collins* was wrongly decided. Attempting to pick from an empty pocket is convictable although the Court gave no reason for considering the earlier case incorrect. The case of *R Vs Ring* was taken to represent the law. This case was followed in Malaysia in *Munah Bin Ali Vs Public Prosecutor* where *Thamason C.H* in the Court of Appeal said;

“That a person could be convicted of attempted abortion even where it was not proven that the woman was with child. This may accord to the good sense of the community since it was clear that the defendant was in the fact attempting abortion

However, in *Haughton & Smith*, Court held that for a person to be charged for attempted abortion, the woman must be “with child”. This was decided in 1975 in England.

In Uganda, in order to convict a person for attempted abortion it does not matter whether the woman was with child or not. The Law states that “Any person who with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administer to her or cause her to take any poison or other noxious things or uses any forces of any kind, or uses any other means whatsoever, is guilty of a felony

4.4 Incitement

Incitement or solicitation at common law is committed when one person counsels procures or commands another to commit a crime, whether or not in any way be the solicitation. If the incitement cause the proposed crime to result; the one who is

incited becomes an accessory to that crime and may be charged as such incitement requires a recipient to the counseling and what is counseled must be an offence. It is possible in principle for a person to counsel another to carry out an act and the counselor's ignorance of the law in theory is no defence. If a person incites another to do carry out an act he thinks is an offence, conviction for incitement may be possible even though the act counseled or incited is not actually an offence.

These governing principles reduce the significance of the statutory language where a woman, falsely believing her to be pregnant, incited another to terminate her pregnancy, whether she is pregnant, or not; the woman would accordingly be convictable for incitement.

Since the counselor believed and intends it to be a crime, this proceeding discussion is authoritatively in spirit of Section 21 of the Penal Code Act that deals with incitement to commit an offence. It goes in line with Section 143 of the Act on supplying drugs to procure abortion as much emphasized in Section 141 of the Act.

4.5 Cases when Abortion is permitted

Medical termination of a pregnancy in good faith, with reasonable care and skills, by a physician in order to save the mother's life is not illegal in Uganda (Article 22(2) of the constitution of Uganda). Prosecutions in Uganda will not normally be commenced against the provider of abortion services in good faith with the best interest of the woman in mind. Despite the uniqueness of each case, what is needed is a record which shows that a reasoned medical judgment was made. In the case of *Osgood Vs Dian*, it was held that good faith is difficult to prove. However, for purposes of abortion, a doctor in this task was in most cases provided to record data necessary to establish good faith. Referral letters and case histories can also be an important source

of legal protection. If a full case history is available, it is most likely that legitimate health reasons for termination of pregnancy will be contained in that history. It may also confirm the existence of the same professional consensus on the medical advisability of abortion in given patient's case.

The situation above suggests that the doctor is operating for purposes of preserving the life of the mother; it also includes preserving the long life of the mother. Ugandan courts of law have interpreted Section 224 of the Penal Code to embody aspects such as rape and incest pregnancies. Under this Section it is not illegal to perform a surgical operation upon any person, or upon an unborn child for the purpose of preserving the mother's life. This stands only if the performance of the operations is reasonable; having regard to the patient's state at that time, and to all the circumstances of the case.

However, such operations must be performed in good faith and with reasonable skills; the ambit of Section 224 is rather broad such that a pregnancy resulting from rape or incest could be terminated under this Section. A doctor can perform an abortion after a health care decision. Whereas women have their re-productive rights, the law on abortion has tried to restrict them to health conditions (S.224 (2) of the penal code). The basic obligation of the doctor is to have in his clinical judgment what is best for the health of the patient and to decide this on health grounds only.

Where health consideration forms the basis of the judgment and still it is made in good faith; the doctor can proceed, with the operation ((S.224 (1) of the penal code). However, "health" as most people do define it today, includes a broad range of factors

such as age, familiar situations, and psychological problems and so on. The World health organization's defines "health" as:

"A state of complete physical mental and social well-being and not merely the absence of disease or infirmity" (**Article 22 of the constitution of Uganda**)

The above not a conclusive definition, but a working administrative definition in light of this topic. However, the US Supreme Court in its decision in *US Vs Vultch* elaborated on a similar definition and as a result condoned an expanded reading of the District of Columbia abortion law. The Court pointed out with approval to the Webster Dictionary definition of health as;

"The state of being sound in body and mind"

Court also observed that if the definition is viewed in this light, the term 'health' presents no problem in vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.

Later in *Doe Vs Bolton* the Supreme Court added that;

"The medical judgment (whether to perform abortion) may be exercised in light of all factors physical, emotional and the woman's age; relevant to the well-being of the patient".

4.6 Punishments to the offence

According to the Uganda's penal code the crime of abortion is a felony, in view of the facts that an abortion is highly offensive to public morals, and directly opposed to the public interest since it is also an act against the life of a child. A felony is an offence which is punishable without proof of previous conviction; with death or imprisonment

for three years or more. A person who attempts to procure abortion is liable to imprisonment for four years, while a woman procuring her own miscarriage is liable to imprisonment for seven years and anybody who supplies or procures for any person drugs to procure abortion is liable to imprisonment for three years.(S.234 of the penal code).

CHAPTER FIVE

CRITIQUE OF THE LAW RELATING TO ABORTION.

5.1 Definition of Life and Health

The law in Uganda permits the medical termination of pregnancy in good faith with reasonable care and skills by a physician in order to save the mother's life. However, the law does not make any attempt to define what is meant by life the concept of life remains elusive. While Uganda's law talks about the mother's life, the Laws of other countries, talks about saving the mother's health. The concept of health also remains elusive. Determining when health is endangered by pregnancy is to be left to individual doctors.

The most uniformly recognized definition of health is that, health is a state of complete physical, mental and well being and not merely the absence of disease or infirmity. But to be realistic, the World Health Organization definition may seem to be nothing, more than vague. Working of administrative definition and in that light may contribute little to legal debate.

However, the United States Supreme Court in its decision in *US & Vultch* elaborated on a similar definition and as a result condoned an expanded reading of the district of Colombia abortion law. The Court pointed out with approval to the Webster Dictionary definition of health as the "state of being sound in the body and mind" and then observed that the term health presents no problem in vagueness. Indeed whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely when surgery is considered. By applying the sense of these definition of health broadly, where are

thought to be rather narrow grounds for abortion have been greatly expanded. This is not clear as to what is included in the ambit of preserving life or health.

5.2 Good Faith

The law on abortion further presents another problem in as far as good faith is concerned. A doctor may terminate a pregnancy and claim that he did it in good faith. It may be very difficult to prove whether he did or did not do it in good faith. Good faith tends to give the doctor a very wide discretion to decide when to carry out a termination of pregnancy, though the law in Uganda may be restrictive. In essence it has got permissive qualities.

5.3 The Bourne Case

Courts in East Africa have always followed the ruling in the Bourne case and in the case of Bansi Vs R the Court of Appeal referred to the Bourne case as reflecting the prevailing law. However, there is a sense in which the Bourne judgment is of law authority, as it arose in a trial only at first instance, that is, it has not considered in the more ratified atmosphere of an Appeal Court. And the case was determined by Court not required to give reasons for its decision. The strength of a case as an authority depends firstly on its Court or origin. However, one may argue that a case's strength as an authority depends not simply upon the respect subsequent courts and legal literature pay it. The Bourne case has been applied in East Africa.

5.4 Failure of the Prosecution

Under the laws of Uganda, an individual is presumed innocent until proved guilty and or until he pleads guilty. Thus, the onus is upon the state to prove the guilty of an

accused party, although a private individual may initiate criminal proceedings and prosecute the case to its conclusion. In Law, the prosecutor is the state and not the individual. Mostly all criminal cases including abortion are handled by police prosecutors on behalf of the state. However, the prosecution is ill-equipped to play its role as far as abortion legislation is concerned.

However, all these illegal abortions have taken place without being detected by the Police.

This is testimony that abortion in Uganda is a complex issue to deal with, unless it is studied focusing on the perception and attitudes of the people so that a remedy can be got. The prosecution department needs to be strengthened and well equipped above all there is a need for more trained manpower.

5.5 The Role of Sanction

It does not necessarily follow that the deviant behaviour of an individual must not be criminally prohibited nor does it follow that the formal existence of such prohibition actually charges individuals conduct and Criminal prohibition.

Similarly, hospital reports show that more than one in five pregnancies in Kampala end up with self induced or spontaneous abortion (Demographic and Health Survey 1988/9 Ministry of Health Entebbe Uganda. Department of obstetrics, Makerere University, Kampala, Clinical Report for the years (1968-69), Makerere University Pinter, 1972.). Induced abortion is illegal in Uganda; but in practice it is very common. It follows that despite its restrictiveness, the Law, has failed to control illegal abortion.

5.6 Requirement for a Physician

The requirement that termination of pregnancy to save the life of the mother should be carried out by a physician (section.223), ensures a high standard of medical expertise.

.Abortion is however not a very sophisticated procedure.

Legislation requiring special qualification of such practitioners (obstetrician or gynecologist) provides a source for a number of contending arguments. The argument in favor of ensuring high standards is compelling, especially since complications from routine procedures may always arise. Nevertheless, the judgment can be overstated and the emphasis upon excellence at times may not only condemn the safe and beneficial practices; but also disregard existing realities. If it were required that all medical procedures be performed by only the most highly skilled, few could be undertaken at all and the requisite skill would be more and more difficult to develop.

Child birth itself which in many countries presents a great hazard to female health than pregnancy termination; is not generally controlled by a special legal requirement, that physician attend to the birth. Moreover, physicians delegate their staff to perform of many procedures for which they remain medically and legally responsible. So other alternatives may be responsible where abortion is concerned. Traditional birth attendants for instance he told me in an interview that they could easily carry out an abortion (Dr.Arinaitew,22 May 2014). One advantage in involving non-doctors would be their ability to provide pre and post abortion care and counseling which is comparable to or better than that, a busy physician can offer. This secures better and perhaps more confidence in overall patient management in case of any complications.

5.7 Non-Representation of the Foetus

I also observed that when criminal trials for abortion are to be conducted, the Foetus who should have been the defendant is not present; but rather the case involves the state as the prosecution verses the mother.

The state is not well equipped when representing a person who is dead, given the fact that the right to life and liberty of a Foetus is considered to be at conception not after birth or in between. Therefore, the state should improve on its prosecution department in terms of training manpower with adequate knowledge about the rights of the unborn.

5.8 Non appearance or Representation by the Father

In many of the trials, it is the woman who is put in the dock; together with those who in any case, assist, aid, abet or do participate in committing abortion. In most cases however, the father of the unborn child is not called upon nor is he represented at the trial. In such cases however, the interests of the state, the mother, the unborn and the would be father should be equally and well represented or taken care of if the crime is to be well understood.

CHAPTER SIX

RECOMMENDATIONS

This chapter deals with the recommendations in relation to the law of abortion in Uganda.

6.1 Recommendations

The law in Uganda should be amended to create a right to make the choice whether to abort or not to abort. There is need to reform the abortion laws so that abortion has a direct provision in the constitution and the circumstances for legal abortion should be clearly stated in supporting laws, to change the current situation, there is also need for clear provisions for the reproductive rights of women.

In case of any suggested amendment to the abortion provisions, it should steer clear of the demand for blanket legalization of abortion and concentrate on broadening and clarifying the grounds for legal abortions. , like “ a medical officer should terminate a pregnancy when the life of a woman is in danger, when there is risk of serious and irreparable fetal malformations or when the pregnancy is a result of rape, incest, defilement or sexual intercourse without consent with a physically or mentally disabled female”.

Furthermore it is very unfortunate that abortion has been looked at largely as a crime by the implementers of abortion laws. and that there There is a need for legislators to intervene and look at the public health side of the problem. The law should be made to help rather than to punish. There is need for proper and effective application of the laws relating to abortion. The police should be given more power and equipment to investigate and arrest criminals in relation to abortion cases.

There is therefore a need to revise the laws on abortion to ensure safe abortion

CHAPTER SEVEN

CONCLUSION

7.1 Conclusion

Uganda's laws about abortion are murky and confusing. "Abortion is illegal except where permitted by the law, leaving medical service providers and the general public the idea that abortion is completely illegal in the country does not help that members of the police force periodically arrest service providers for carrying out criminal abortion even when none of the people arrested face prosecution".

The Law on abortion lacks clarity. It permits the care and skills by a physician in order to save the mother's life and in cases of-necessity. This is the only case under Uganda Law when abortion is permitted. However, the Law does not make any attempt to define what is meant by life, health and necessity. This gives doctors wide discretion; which may be abused.

The prosecution in Uganda is ill-equipped to play its role as far as abortion legalization is concerned. This is the case because abortions are carried out in secrecy and are rarely reported to Police or any other authorities. It is usually in cases where the mother comes to light. The prosecution lacks expertise, staff and technical tools to enforce abortion legislation. This implies that the law relating to abortion is rarely put into practice. In spite of criminal rules prohibiting abortion, illegal abortion is on the increase in Uganda; which means that the Law on criminal abortion in its current state may not be an ineffective device against abortion and therefore there is need to reform the law.

The question however still is: even if the law relating to abortion were adequate, how effective is it in curbing abortion in Uganda? Legislation of abortion is necessary but a insufficient step towards improving women's health, the availability of modern contraception can reduce but can never eliminate the need for abortion and direct costs of treating abortion complications is a burden to the impoverished health care systems thus a need for safe abortion.

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