

Morality of Abortion in the Context of the Constitution of Kenya (2010) and the Right to Life¹

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Abstract

Abortion is one of the most contentious contemporary moral issues in the world in general but in Kenya in particular. Arguments have been presented by scholars for or against abortion. Those who argue in support of it have given what they think are compelling reasons as to why abortion is a matter for one to decide (pro-choice). At the same time, those who argue against it have also presented arguments to demonstrate that indeed, abortion is an act of killing, it is evil, and therefore must not be done (Pro-life). Thus, it is either the woman (mother) has a right to make a choice as to whether they should carry out abortion at will or, the sanctity of life is respected right from the very beginning of it and, as a consequence, abortion must not be done. The constitution of Kenya (2010), in article 26, sections (1) and (2) lays emphasis on the need to respect human life and therefore prohibits and criminalizes abortion. However, the same article in Sections(3) and (4) goes further to provide circumstances under which abortion is permitted. The same Kenyan law, therefore, prohibits and at the same time permits abortion in certain circumstances. So, are good and evil determined by circumstances or are they objective and universal? Moreover, medical professionals and practitioners have a duty under their professional code to save life by all possible means. The questions that beg, and which this paper attempts to address, are: what is abortion? Is abortion legal in Kenya or is it not? If, legal, is it at the same time moral to procure abortion in the circumstances contemplated in Article 26 of The Constitution of Kenya, (2010)? At what point does human life begin? Can human life be terminated intentionally under any conditions? The paper argues that abortion is legal in Kenya but it is not moral. Being evil, it must not be done under any conditions whatsoever since good and evil acts are founded on the moral obligation where reason dictates that good ought to be done.

Key words: abortion, morality, constitution of Kenya, right to life

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I. INTRODUCTION

The main objective of this paper is to discuss the application of the general principles of morality to the particular situations that require moral interventions. More significantly, the paper focuses on the morality of abortion as spelt out in the Constitution of Kenya, 2010, under article 26. It goes without saying that the article expresses a conflict between the morality and legality of abortion. The paper demonstrates that contrary to the thinking of many people, the constitution of Kenya (2010) legalizes abortion, although it is morally evil. The conflict between the law and the dictates of right reason is evident in the manner article 26 is expressed in its four sections. The first two sections (1) and (2), taken together, recognize and appreciate the fact that human life begins at conception. They also affirm that (human) life is a basic and fundamental right by stating that *every person has the right to life*. Hence, life must not be taken away at will for whatever reasons. At the same time, the other two sections, (3) and (4), taken together, give grounds for a justified abortion; that is during emergencies and if expert opinion is given to that effect. This implies that if a pregnancy threatens the mother's life, the right thing to do is to terminate it for the sake of saving the life of the mother. The two sets of this

¹ This paper was presented at a Globethics.Org International conference at The Catholic University of Eastern Africa, Nairobi in November 2019.

particular article stand in contradiction with each other. The question that remains unanswered is: do emergencies take away the innocent person's right to life, that of the fetus? If yes, is it then true that every person has the right to life? If no, is it morally good that abortion be carried out in the circumstances outlined in the four sections of article 26? The article begins by discussing the meaning of abortion and its varied forms. This is followed by an explanation of the possible causes of abortion or rather reasons why abortion is normally preferred. Furthermore, the three different kinds of abortion are dealt with in details. Over and above that, the aspirations and anticipations of article 26 of the constitution of Kenya (2010) are elaborated in a discussion that tackles the beginning of life and the right to life. On top of that, the correct moral position on abortion is given. In the end, a conclusion is reached that although the constitution legalizes it, abortion is an act of killing and intrinsically evil. It must not be done under any circumstances whatsoever.

II. ABORTION

2.1 Definition

Abortion is generally the removal of the living but non-viable fetus from the mother's womb. That is to say, abortion is a termination of a pregnancy at a time when the fetus cannot be able to survive on its own, outside the womb. Non-viability means that the fetus cannot be able to live apart from in the mother's womb. To subject it to other conditions other than the mother's womb is to expose it to death. To do this willingly would therefore be morally evil. In essence, it is not morally wrong to remove a fetus from the mother's womb if it endangers the mother's life, if the fetus can still live outside the womb. Thus, "to deliver a viable fetus before its time is not wrong in itself... But to deliver or expel a non-viable fetus is abortion."² Such fetus would then die immediately or soon after its detachment from the mother's womb; the only place where it can survive. In this sense, abortion should not be confused with premature delivery of a viable fetus since the former "... is the expulsion of a fetus from the womb before it is viable...before it can live outside the mother."³ As Judith Boss puts it, abortion "...involves the intentional termination of a pregnancy resulting in the death of the fetus."⁴ According to Austin Fagothey, "abortion has to do with the killing of infants before birth or by birth."⁵

2.2 Possible Causes of Abortion

Normally, the reasons advanced for abortion are many. Some women may abort because of their unpreparedness to bear children, or because they have a reputation to protect, or even for medical reasons. More so, abortion may be preferred due to the fact the mother may be under age or the mother could have conceived out of a rape ordeal and would not want any memories to do with the ordeal. So, the presence of the child, if left to mature and be born, will be a constant reminder of the otherwise torturous act. According to Colin McGinn, "...the parents may be teenage sweethearts unprepared for the responsibilities of parenthood....Worse, the mother-to-be could be a victim of rape, and the father in prison for raping her..."⁶ As a consequence, the potential mother may not want anything to do with those bad memories of rape and she decides to do away with the pregnancy to avoid psychological torture.

In addition, due to improved scientific technology, it may be found that the fetus has physical deformities and the parents may not want to have it grow to maturity. McGinn continues to argue that it might be that the fetus has a severe medical defect, mental or physical, which would make its life and that of the mother and father unrelieved misery, only for the child to die at an early age.⁷ One may therefore not see the reason why they should let it be born yet it won't live for long. What is more is that they make a deliberate choice to terminate it.

When all is said and done, "the primary reasons women seek abortions are that having a child would interfere with their education, work, or ability to care for dependants and that they could not afford to have baby now."⁸ Above all, "poverty seems to be one of the factors most closely associated with abortion, in the United

² Austin Fagothey, *Right and Reason: Ethics in Theory and Practice* (California: The C.V. Mosby Company 1953), 296.

³ Milton A. Gonsalves, *Fagothey's Right and Reason: Ethics in Theory and Practice*, 9th ed. (Toronto: Merrill Publishing Company 1985) 250.

⁴ Judith Boss, *Analyzing Moral Issues*, Fifth Edition (New York: McGraw-Hill, 2010), p. 73.

⁵ Fagothey 296.

⁶ Colin McGinn, *Moral Literacy: How to Do the Right Thing* (Indianapolis, Cambridge: Hackett Publishing Company), 1992.

⁷ Colin McGinn,...

⁸ Elliot Turiel, Carolyn Hildebrandt, and Cecilia Wainryb, "Judging Social Issues: Difficulties, Inconsistencies, and Consistencies," in *Monographs of the Society for Research in Child Development* 56, no. 2, 1991.

states as well as worldwide.”⁹ Abortion is therefore used as a means of birth control and family planning. It is seen by its practitioners as a solution to unplanned or unexpected pregnancies. Advocates of abortion argue that it is safe if done under recommendations of World Health Organization, which takes cognizance of the period of the pregnancy as well as the fact that it must be done by a person with expertise in the same. It is inferable from this that the focus has shifted from the nature of the act of abortion to whether it is carried out in a safe way. Yet, the bone of contention is whether abortion is morally justifiable under any circumstances whatsoever. These varied reasons for abortion reduce it into three different types.

2.3 Types of Abortion

Abortion can be categorized into three main types, depending on the reasons for the abortion, which can also have different moral implications, namely; accidental abortion, direct abortion, and indirect abortion.

2.3.1 Accidental Abortion

Accidental abortion refers to the kind of abortion whereby the mother happens to have a miscarriage of her pregnancy without playing a role in its occurrence, yet no one else plays a positive role to make it happen. This kind of abortion is also called spontaneous abortion due to the fact that no one either directly or indirectly wills it. It is the unintended removal of an embryo or fetus before the 24th week of gestation. This distinction is important in the sense that a pregnancy that terminates after t 24 weeks but before 37 weeks of gestation resulting in a live-born infant is a “premature birth” or a “preterm birth,” hence, not an abortion since the fetus can lie outside the womb. This does not amount to abortion in the strict sense of the term since the fetus has the ability to live in other favourable circumstances outside the womb, for instance, in incubators. It just occurs and for that reason no one can be blamed for it.

Accidental abortion is contrasted to purposely induced abortion. Gonsalves avers that “a spontaneous miscarriage is nobody’s fault.”¹⁰ It comes about without deliberate intervention. It is evident that accidental abortion is non-moral. The act in question has no moral significance; it has no quality of being good or evil. It is not a human act. The act is neither intended, nor done willfully and, there is no guilt attached to it. Thus, no one takes responsibility for it for it is not in our power to do or not do the act. In the strict sense, accidental abortion is not an abortion since the fetus dies rather than killed. What about direct abortion?

2.3.2 Direct Abortion

Direct abortion is the kind of abortion whereby one directly wills the death of the fetus for whatever motive they may have. The reasons may range from pursuing one’s education, maintaining one’s reputation, unpreparedness for parenting, etc. It is also referred to as “induced abortion” due to the fact that deliberate steps are taken to bring pregnancy to a halt.

This kind of abortion can be further categorized into two maintypes; therapeutic abortion, and direct abortion for nonmedical reasons including those alluded to above. Therapeutic abortion happens when the mother’s life is put in the danger of death by the pregnancy and the only option to save the mother is by removing the fetus by killing it. The motive in this case is to save the mother’s life which is otherwise in danger, since both lives (that of the fetus and that of the mother) cannot be saved. The intention, therefore, is to prevent harm to the mother’s health; be it physical or mental. What this means is that it is either the mother’s life is saved by killing the fetus or both will die. Those people who support this kind of abortion argue that instead of losing two lives, it is better to save one by terminating the other. The life of the mother is preferred to that of the fetus. In that case, most people would consider abortion a good intervention intended to save the mother’s threatened life. In many cases this would seem the right thing to do in the circumstances yet it is intrinsically evil.

That being so, in spite of the good intention in view of saving the mother, the death of the fetus is directly willed and chosen as a means for the good end. The implications here are that one can use any means, good or bad, to attain a good end. Yet, we know beyond doubt that three essential components must all be present in order for any human act to be morally good. In other words, the act itself (to be performed) must be good or indifferent; the motive for performing that act must also be good while the circumstances must be equally good. Circumstances are good if they are necessary for the performance of that act and bad if the act can be done with or without them. Yet in this case, the act to be performed, which is the removal of the living but non-viable fetus from the mother’s womb, is evil in itself; it is intrinsically evil. This is in spite of the fact that the motive, to save the mother’s life, is good; and the circumstances are equally good, that is, should this act not be done, the mother will die together with the fetus, which would be bad. The goodness of circumstances is

⁹ Boss, p. 74.

¹⁰ Gonsalves 250.

determined by the possible consequences should action not be taken; if bad, then they are good, if nothing bad is going to happen, the circumstances are bad and, therefore, unnecessary for the act.

That being the case, “that the killing is direct is evident if the child is cut up, crushed, or poisoned within the womb. It is also direct killing if the child is expelled before it is viable...”¹¹ One of the three necessary components of a morally good act is evil and renders the whole act evil, since all components must be good in order for it to be good. Furthermore, the decision contradicts the moral principle that states that the (good) end does not justify the (use of bad) means. One cannot use bad means to attain a good end and then justify the means by the good end. Good means must be used for the attainment of a good end, for the reason that good must be done always.

Direct abortion may be done for other reasons other than therapeutic; for instance, job related reasons, poverty, reputation, if only to mention but a few. This type of direct abortion is also called “elective” or “voluntary” abortion in that it is performed at the request of the woman for non-medical reasons. Nonetheless, direct abortion, whether for therapeutic (medical) reasons or not, is evil by whatever standards since it is the direct taking away of innocent human life. The reasons given, be they lack of money, fear of losing a job, need for freedom, leisure, dislike for children, do not matter. The end, however good, does not justify the use of bad means for its attainment. We may not do evil so that good may come of it. Good must be done always, notwithstanding the consequences. No one has the right to take away another’s life for whatever reasons given that human life is sacred.

It is obvious that in this kind of abortion the expulsion of the fetus is intentional and directly willed. It is the thing desired; the will-act. The death of the fetus is what is intended. It is a form of murder. It is our position, therefore, that there is no significant moral difference between abortion done for therapeutic reasons and abortion done for any other reasons. In both cases, the death of the fetus is the desired object, it is directly willed and, ipso facto, intrinsically evil.

2.3.3 Indirect Abortion

Apart from accidental and direct abortions, the other type of abortion known as indirect abortion. This is the abortion whereby the death of the fetus is not the intended but the unavoidable effect of a morally good or indifferent act. That is to say that from one and the same act, two effects follow; one of them good and the other evil. The good effect is, more often than not, the intended; while the evil effect is the unintended but unavoidable. The latter, therefore, comes not as a means for the former but rather simultaneous with it. For example, a pregnant woman may be diagnosed with uterus cancer and the doctor advises that unless the cancerous uterus is removed, the woman will die together with the fetus. In the circumstances, if the cancerous uterus is removed for the intention of saving the mother’s endangered life that would be morally permissible. What transpires from the above is that the act itself, the removal of the uterus, is neither bad nor good. In essence, the act in question is morally indifferent. On the other hand, the motive for the removal of the fetus is to save the mother’s life, which is good, while the circumstances are also good; that is, if the uterus is not removed, the mother will die. These circumstances are therefore, necessary (and therefore good) for the removal of the uterus. So to speak, all the three components or determinants of morality are good and therefore render the whole act morally good.

Besides, from that one and the same act of the removal of the uterus, two effects follow. Hence, if we apply the principle of double effect, we realize that the death of the unborn child is only indirect, so that it is merely permitted and not willed as a means or an end. For we know for sure that the act is morally neutral, the motive is to save the mother while the circumstances point to the danger the mother is exposed to by the pregnancy. Yet, the evil effect that flows simultaneously with the good effect from that one and the same act is not intended. The intended effect is the saving of the mother while the unintended is the death of the fetus. The death of the fetus is not used as a means for the attainment of the good intended, the saving of the mother. In this case, it would be morally permissible to go ahead and remove the uterus of the mother. In any case, “the fetus is not directly attacked, and its death, even if certain to follow, is an incidental and unavoidable by-product in the performance of a legitimate act.”¹² The death of the fetus is foreseen (known that it will happen) but not willed yet it cannot be avoided. So, what does the Constitution of Kenya say about abortion?

III. ARTICLE 26 OF THE CONSTITUTION OF KENYA (2010)

During the struggle for constitutional change in Kenya that culminated in the adoption of a new constitution in 2010, the beginning of life was one of the contentious issues that Kenyans grappled with. This was an important debate given the fact that it could inform the legality or illegality of abortion. The constitution

¹¹Gonsalves, 297.

¹²Gonsalves 251.

process therefore gave prominence to a discussion about the beginning of life. The *Bomas* draft¹³ had initially defined life as beginning at birth. After contestations from Religious leaders and a section of the political divide, it was eventually resolved that life begins at conception as stated in section (2) of Article 26. It was therefore arrived at as a result of consensus that life begins at conception; and not so much whether it is true. Central to the debate on the beginning of life was the question of abortion. The reason for this was that stakeholders wanted to understand whether terminating a pregnancy on medical grounds amounted to abortion and, they wanted this to be clearly spelt out in the constitution. Our critical question is, “when does life begin?”

3.1 The Beginning of Life

The debate on the beginning of life has been contentious since time immemorial. Some people argue that it begins at conception, others that it begins at birth, while others still maintain that life begins at some point during gestation. Be that what it may, there is abundant evidence to demonstrate that human life begins at conception. This is to mean that life is a process that begins at the point of fertilization to the point of cessation of life. If this were not true, there would be no guarantee that the thing to be born out of the conception after the fusion of male and female gametes would be a human being. Obviously, human beings would be giving birth to several and any beings only to sample later after birth and separate humans from non-humans. Additionally, there would still be no reason why that being born a human being would always exist as a human being throughout its existence.

Nevertheless, “...the exact moment of these two events are important in respect to human beings.”¹⁴ The two important events being referred to here are *life* and *death*. According to Lenaola and Mutugi, “with advances in medicine, science and technology, there are interventions that make the determination of the exact moment of the beginning of life increasingly difficult...some of these advances portend ethical concerns.”¹⁵ They argue further that “prior to various medical interventions, it was generally agreed that life begun at birth when the offspring was visible.”¹⁶ But with technology, “it is possible to see the baby before birth and even find out its sex.” The thinking here is that these evidences adduce to the fact that life may be beginning before birth. It is not the case that life begins at birth. This kind of interpretation seemingly considers a person a fully developed fetus in the physical sense.

Other thinkers “believe that life begins at fertilization, when the DNA from the female and male gametes fuse and create a unique entity with a novel genetic composition”¹⁷. That being the case, ethical termination of pregnancy after screening for sex or genetic diseases, would be permissible as long as it is before the identified gestational stage when life begins.

The obvious implications of the two opposing views concerning the beginning of life are that depending on when life is deemed to begin, deliberate termination of pregnancy at various stages of gestation may or may not be considered murder. In point of fact, “if life begins at fertilization, then aborting such an identified deformed embryo would be murder.”¹⁸ On the contrary, “if life does not begin at fertilization but later...foeticide would only be termination of pregnancy only after the time acknowledged as when life begins.”¹⁹ Foeticide is the deliberate killing of fetuses.

3.2 Right to Life

Accordingly, Article 26 (1) categorically states that “every person has the right to life,” implying that everyone else has a duty to protect it. Section (2) of the same Article states that “the life of a person begins at conception.” This also means that right from the moment of conception there is life. Contrarily, section (3) states that “a person shall not be deprived of life intentionally, except to the extent authorized by this constitution or other written law” signifying that there could be conditions for deprivation of life; while section (4) holds that “abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law,” specifying conditions for abortion.

¹³The *Bomas* draft refers to the final document of the harmonized collective views of the people of Kenya who had assembled at the *Bomas* of Kenya that was subjected to a Referendum in 2005 but was voted against.

¹⁴Marion Mutugi and Isaac Lenaola, *Bioethics of Medical Advances and Genetic Manipulation*(Nairobi: Longhorn Publishers, 2018), 171.

¹⁵Mutugi and Lenaola, 171.

¹⁶Mutugi and Lenaola, 171.

¹⁷ Mutugi and Lenaola, 171.

¹⁸Mutugi and Lenaola, 172.

¹⁹ Mutugi and Lenaola, 172.

It can be deduced that the first two sections (1) and (2) of the said Article are in contradiction with the other two sections (3) and (4) of the same Article. The first two clearly define the beginning of life and states the fact that every human person is entitled to the right to life, which is inalienable. They imply further that no one has the right to take away an innocent person's life. On the flip side, the other two sections provide grounds under which abortion is acceptable, that is, during emergencies. Thus, the meaning of sections (1) and (2) taken together contradicts the meaning of sections (3) and (4) taken together. It is factual that where there is a contradiction there cannot be truth; for a contradiction simply means that something can be true and not be true at the same time and in the same sense. Truth is one and immutable yet a contradiction implies that there can be two or more truths about any one subject. In this case in point, this would mean that abortion can be good and not good at the same time at different circumstances. That is, if done under emergencies it is good but if there are no compelling conditions the act is evil.

However, abortion is the deliberate taking away of an innocent human life. How possible is it that one directly wills evil, even if in response to an emergency, and that act be said to be good? Being founded on the moral obligation, which is the foundational principle of good and evil, one and the same human act cannot be good and evil at the same time. Any free act which is in conformity with the moral obligation is good while an act which is not in conformity to the moral obligation is evil. Practical wisdom dictates that good (ought to) be done and evil avoided. This must be the case irrespective of time and circumstances.

As a rational being, man is conscious of the fact that there are acts that are good in themselves that ought to be done. Man is also aware that there are acts that are evil in themselves that ought to be avoided. The moral obligation, therefore, dictates that he performs acts by virtue of their moral goodness and that he refrains from acts because they are morally evil. Acts are neither good, therefore, because we either desire or do them nor are they evil because we do not desire or do them. Whether they are good or bad is independent of our response to them. It is possible to respond positively to an act that is evil in itself. It is equally possible to respond negatively to an act that is good in itself. This explains why we must take responsibility in whatever choice of action we choose to take. Our acts are free and freedom goes hand in hand with responsibility. Whatever we ought to do or (ought) not (to) do is in our power and so we have no excuse for doing or not doing them. We are obligated to do good at all times and to avoid evil in all circumstances. In this understanding, the question that begs is, does the constitution of Kenya legalize abortion?

To *legalize* means "to make good according to the law." Ideally, law borrows heavily from morality, and so, they both have the same ends; morality commands one to act virtuously but due to the fact that we hardly do so freely, law becomes helpful for purposes of enforceability. The law forces us to act morally even when we would not have done so due to the threats that come with it. When something is legal, it means that doing it would be good whereas failure to act in accord with the law would be bad and punishable. Truth be said, the Kenyan law, in article 26 legalizes abortion. Even though it specifies circumstances under which abortion should be carried out, it is clear that in sections (3) and (4) the death of the fetus is directly willed as a means to saving the mother's life. The death of the fetus is chosen for itself as a means to a good end. Thus, the right to life of the fetus, which is recognized as a human person in sections (1) and (2) is violated, deliberately, willingly, willfully and, with full knowledge that it is the desired act. In other words, the fetus is killed so that the mother can live.

Apart from being in contradiction with the moral obligation, from which all moral virtue flows, this act violates the golden ethical principle which states that the (good) end does not justify the (use of bad) means. Killing is intrinsically evil and it must not be done. Evil ought not to be done. Thus, there is no good motive or circumstances that can alter the morality of an intrinsically evil act. It is ipso facto, abundantly evident that the Kenyan constitution (2010) legalizes abortion. If an evil act can be permitted in some circumstances, nothing can stop it from being accepted in other circumstances. The contradiction in the four sections of article 26 are simply meant to accommodate abortion by creating avenues to justify its practice. So, should abortion be done under the circumstances contemplated in article 26 of the constitution?

3.3 Correct Moral Position

Being an intrinsically evil act, abortion should not be done in the above contemplated circumstances. It must not be done in those circumstances or even in any other circumstances whatsoever. An intrinsically evil act cannot be made good due to legislation. It cannot be made good due to its (good) motive or (good) circumstances.

A human being is a rational animal with an intrinsic worth that deserves respect and inviolability, right from the very beginning of life. The life of a human being begins at conception. If this were not true, there would be no guarantee that the thing to be born out of the conception after the fusion of male and female gametes (spermatozoa and ovum) would be a human being. Human beings would be giving birth to several and any beings only to sample later after birth and separate between what is human and what is not. Besides, there

would still be no reason why that being born a human being would always exist as a human being throughout its existence.

In point of fact, that which comes to be proceeds from the state of potency (not being there but that can be) to the corresponding state of act (the state of being). What this means is that immediately the spermatozoa fuse with the ovum, whatever is formed, the embryo, is a potential human being. This is the only way it can grow into a full-grown human being. The only other possibility is by the potentiality, for whatever reasons, failing to actualize. In other words, the potentiality can remain dormant (where we describe it as a privation, and by that virtue, evil). It is impossible that the product of the fusion of human gametes be something else.

The above granted, it is abundantly evident that abortion at whatever stage of embryonic development is a violation of an innocent person's right to life. It is murder most foul, an evil act that must be avoided at all times. Thus, procuring an abortion, whether for therapeutic reasons or any other reason (my life my choice) goes against the moral obligation which defines the human being on matters moral. Abortion is an act done freely and with full knowledge that what is being done is evil, and therefore, is against reason. It is an infringement of the human nature.

Chapter Four of The Constitution of Kenya deals with the Bill of rights, which is recognized as "an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies" {Art. 19 (1)}. The reasons given for "recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings" {Art. 19 (2)}. In effect, therefore, these rights belong to each individual by virtue of being human. They are natural and inalienable rights. This realization of full potential of a human being must not be hindered deliberately by anybody and under any circumstances whatsoever.

Of the fundamental rights and freedoms, the right to life is recognized as one of the unlimited rights. In actual sense, it comes first in the order of rights. Thus, article 26 states that every person has the right to life and maintains that the right to life begins at conception. In order that the article upholds the dignity of the human person as expressed through the moral obligation, a repeal of the other sections (3) and (4) is logically necessary. In this way, the constitution shall be consistent with the moral law and other primary principles of morality upon which morality is founded; and, as a consequence, life shall be protected by the law.

IV. CONCLUSION

From the argument above, we can deduce that different types of abortion bear different moral worth. For one, in accidental or spontaneous abortion we don't hold anybody responsible. However, when it comes to direct abortion, whether on medical reasons or any other motive, we affirm that it is morally wrong and impermissible for them to be performed. This is for the reason that in either case, the death of the fetus is taken as a means for the attainment of one's selfish end, yet man or human life should not be treated as a means. Nevertheless, with regard to indirect abortion, our position is that it is morally permissible since the evil effect that is unintended is only but an unavoidable outcome of the good act of treating the mother. Thus, the death of the fetus comes together with the healing of the mother. When all is said and done, our main concern in this article was to ascertain whether the constitution of Kenya (2010) legalizes abortion. The other main question was whether it is morally good for anyone to do abortion in the circumstances contemplated in the four sections of Article 26 of the constitution. Accordingly, we aver that the apparent contradiction of the first two sections of this particular article with the last two sections is a clear demonstration that abortion is legalized. In spite of that, abortion goes against right reason. It is a violation of the right to life of an innocent person (the fetus) and must not be done in the circumstances contemplated in article 26 or under any other circumstances whatsoever. Every person has the right to life, and the fetus is not an exception since life begins at conception. Its life must not be chosen for the sake of saving the mother's life, notwithstanding the reasons. Legalization of abortion, therefore, does not make it moral. Any direct or induced abortion is an act of killing and is evil. Evil must not be done either in itself or as a means to an end. As rational beings, human beings are under the strict moral obligation to act in accord with reason.

REFERENCES

- [1]. Fagothey, Austin. *Right and Reason: Ethics in Theory and Practice*. California: The C.V. Mosby Company, 1953.
- [2]. Gonsalves, Milton A. *Fagothey's Right and Reason: Ethics in Theory and Practice*, 9th ed. Toronto: Merrill Publishing Company, 1985.
- [3]. Mackinnon, Barbara. *Ethics: Theory and Contemporary Issues*. Wadsworth: Cengage Learning, 2007.
- [4]. McGinn, Colin. *Moral Literacy: How to Do the Right Thing*. Indianapolis, Cambridge: Hackett Publishing Company, 1992.

- [5]. Mutugi, Marion and Isaac Lenaola. *Bioethics of Medical Advances and Genetic Manipulation*. Nairobi: Longhorn Publishers, 2018.
- [6]. *The Constitution of Kenya, 2010*. Published by the National Council for Law Reporting with the Authority of the Attorney-General. / www.kenyalaw.org
- [7]. Gonsalves, Milton A. *Fagothey's Right and Reason: Ethics in Theory and Practice*, 9th ed. Toronto: Merrill Publishing Company, 1985.
- [8]. Boss, Judith. *Analyzing Moral Issues*, Fifth Edition. New York: McGraw-Hill, 2010.
- [9]. McGinn, Colin. *Moral Literacy: How to Do the Right Thing*. Indianapolis, Cambridge: Hackett Publishing Company, 1992.
- [10]. Turiel, Elliot, Carolyn Hildebrandt, and Cecilia Wainryb, "Judging Social Issues: Difficulties, Inconsistencies, and Consistencies," in *Monographs of the Society for Research in Child Development* 56, no. 2, 1991.

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