

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CONSTITUTIONAL & HUMAN RIGHTS DIVISION  
PETITION NO. E008 OF 2020**

**IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 10, 20, 26, 27, 28, 29, 43, 47, 48,  
50(1), 53 AND 56 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SECTIONS 4, 5 AND 6 OF THE FAIR ADMINISTRATIVE ACTION ACT,  
SECTIONS 158, 159 AND 160 OF THE PENAL CODE.**

**ANN KIOKO.....1<sup>ST</sup> PETITIONER**

**PEARLS & TREASURES TRUST.....2<sup>ND</sup> PETITIONER**

**KENYA CHRISTIAN PROFESSIONAL FORUM.....3<sup>RD</sup> PETITIONER**

**AND**

**KENYA MEDICAL PRACTITIONERS & DENTISTS COUNCIL.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF GENERAL HEALTH.....3<sup>RD</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF HEALTH.....4<sup>TH</sup> RESPONDENT**

**MARIE STOPES KENYA.....5<sup>TH</sup> RESPONDENT**

**KENYA PHARMACY & POISONS BOARD..... 1<sup>ST</sup> INTERESTED PARTY**

**THE CENTER FOR REPRODUCTIVE RIGHTS.....1<sup>ST</sup> AMICUS CURIAE**

**AMICUS BRIEF BY THE CENTRE FOR REPRODUCTIVE RIGHTS**

**INTRODUCTION**

The Center for Reproductive Rights, hereafter referred to as "the Center," expresses its gratitude for the Court's decision to allow it to participate in these proceedings as a friend of the Court. As a leading global legal advocacy organization, the Center employs the power of law to promote reproductive rights as a fundamental human right worldwide. The Center's Africa regional program is based in Nairobi, where it implements program initiatives in Kenya, Uganda, Tanzania, Rwanda, Malawi, Zambia, and Nigeria. Additionally, the Center engages in regional advocacy work with the African Union through the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). The Center's primary focus

in Kenya has been on improving maternal health and promoting Adolescents' Sexual and Reproductive Health and Rights (ASRHR). Additionally, the Center has been a leading force in advancing the right to safe abortion care in accordance with the Constitution, utilizing a range of strategies, including strategic impact litigation. Beyond Kenya, the Center has extensive experience in human rights litigation in Asia, Latin America, and Europe.

This brief aims to provide the Court with information on two critical themes:

A. Abortion as a reproductive healthcare service in Kenya, in which we will delve into the laws, policies, standards, and guidelines regarding abortion access in Kenya. We will also examine the adverse effects of unnecessary restrictions on safe abortion care and the government of Kenya's commitments to addressing maternal mortality and morbidity resulting from unsafe abortion.

B. The issue of pre-birth personhood and the assessment of whose right to life takes precedence. We will highlight the Constitution of Kenya's recognition of life beginning at conception and the provisions of relevant statutes such as the Penal Code, Births and Deaths Registration Act, CAP 149 Registration of Persons Act, CAP 107, and relevant court decisions. We will also discuss comparative jurisprudence from South Africa and Nepal and relevant regional and international decisions on the right to life in Europe and Latin America.

#### **A. Abortion as a reproductive health care service**

1. The Constitution of Kenya guarantees the right to the highest attainable standard of health to every person, which encompasses access to reproductive health care services. While Article 43 guarantees access to all healthcare services, Article 26 specifically guarantees access to safe abortion as the only healthcare service mentioned in the article, with limitations on when a woman can access abortion care.
2. To fulfill its obligation under Article 21(2), the government of Kenya has implemented several laws, policies, standards, guidelines, and manuals to facilitate access to abortion care. The Amicus aims to highlight specific provisions of these laws, policies, standards, guidelines, and manuals in the table below.

Issue	Laws/Policy /Guidelines	Relevant provisions
Right to Health including reproductive healthcare	<ul style="list-style-type: none"><li>• Constitution of Kenya 2010</li><li>• Health Act</li></ul>	Article 43(1) (a), Article 26(4), Article 21 (2)  Section 2, 6, 10, and 12,

Provision of safe and legal abortion and post abortion care services and information.	<ul style="list-style-type: none"> <li>• Sexual offences Act</li> <li>• The Standard &amp; Guidelines on Reducing Morbidity &amp; Mortality from Risky, Unplanned and Unintended Pregnancies, 2012</li> <li>• The Reproductive Health Policy 2022</li> <li>• National Guidelines on Management of Sexual Violence (2014)</li> <li>• National Post Abortion Care Reference Manual, 2020</li> <li>• National Post Abortion care standards</li> <li>• Ministry of Health Circular on Post-Abortion Care, 2013</li> <li>• National Guidelines for Quality Obstetrics and Perinatal care</li> <li>• WHO Abortion guidelines (2022)</li> <li>• Clinical Practice Handbook for Safe Abortion (2014).</li> </ul>	Section 35(2)
Disposal of Foetuses	<ul style="list-style-type: none"> <li>• The Health Act</li> <li>• National Guidelines for Safe Management of Health Waste</li> <li>• The National Obstetrics Guidelines</li> </ul>	Section 6 (3)

Regulation of trained health professionals (Doctors, Nurses, Midwives, Clinicians)	<ul style="list-style-type: none"> <li>• Code of professional conduct for Doctors 6<sup>th</sup> edition</li> <li>• Code of professional conduct for clinical officers (2012)</li> <li>• Ethics and advisory policy for clinical officer's 1<sup>st</sup> Edition (2016)</li> <li>• Standards of Nursing education ad practice</li> <li>• Code of ethics and conduct and scope of practice for Nurses in Kenya</li> <li>• Code of Ethics (2019) for pharmacists.</li> </ul>	
Health Care referrals	<ul style="list-style-type: none"> <li>• 2014 Kenya Health Sector referral implementation guidelines</li> </ul>	
Protection of access to medical records	<ul style="list-style-type: none"> <li>• Constitution of Kenya 2010</li> <li>• Health Act No 21 of 2017</li> <li>• Access to Information Act No 31 of 2016</li> <li>• Data Protection Act No. 24 of 2019</li> <li>• Kenya National Patients' rights charter</li> <li>• Health information Policy (2014 -2030)</li> </ul>	<p>Article 31 (c), Article 35</p> <p>Section 11</p> <p>Section 6 (1) (d)</p> <p>Section 3</p>

3. The Amicus notes that before the 2010 Constitution, access to safe abortion in Kenya was mainly regulated by the Code of Professional Conduct for Doctors, the Sexual Offences Act of

2006, and the Penal Code sections 158, 159, 160, and 240, which criminalized abortions performed outside the law. With the enactment of the 2010 Constitution, the issue of what constitutes a lawful abortion was resolved. The High Court has interpreted the Constitution, the Penal Code, the Sexual Offences Act, the Health Act, and relevant policies, standards, and guidelines on at least two occasions to clarify the law on abortion in Kenya.

4. The Amicus notes that the judgments in Nairobi High Court Petition 266 of 2015, FIDA Kenya & 3 Others vs. The Attorney General and Others<sup>1</sup>, and Malindi High Court Petition E009 of 2020, PAK & Salim Mohammed vs. The Attorney General & 3 Others<sup>2</sup> in which the High Court has clarified the law on abortion in Kenya including the application of the penal code to abortion as a healthcare service may be persuasive to the court in protecting the rights to reproductive healthcare services and ensuring women's full enjoyment of the rights guaranteed under Articles 27, 28, 29, 31, and 46 of the Constitution.
5. Restrictions that are not justified under Article 24 of the Constitution weaken the protection provided by it. Imposing more limitations on access to abortion services would set back the progress made by women and girls in their ongoing struggle for equality and acknowledgement of their fundamental right to reproductive health. It is crucial to identify and demonstrate which interests would be deemed compelling or otherwise strong enough to outweigh women's right to access comprehensive reproductive healthcare, including abortion care, in accordance with the Constitution.
6. The amicus submits that the consequences of restricting access to abortion in violation of the Constitution would be immediate and unavoidable. As restrictions are implemented or threatened, numerous women and girls would be unable to access safe and legal abortion services. Some may resort to terminating their pregnancies outside of medical facilities, potentially putting themselves and anyone who assists them at risk of criminal investigation and prosecution. Others may attempt unsafe or ineffective methods of abortion. The fear of being arrested or prosecuted could discourage those in need of medical assistance from seeking it, jeopardizing their well-being and safety.
7. As a member of the global community, Kenya has made several legal and political commitments to advance reproductive rights and eliminate preventable maternal morbidity and

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<sup>1</sup> Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR.

<sup>2</sup> PAK & another v Attorney General & 3 others (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (24 March 2022)

mortality caused by unsafe abortions. These include the African Union "Agenda 2063", Goal 17 on gender equality which prioritises women's and girls' empowerment and addresses violence and discrimination against them.<sup>3</sup>The United Nations Sustainable Development Goals (the "**SDGs**"), which under goal 3 target 3.7, calls on countries "*by 2030, to ensure universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programs.*"<sup>4</sup>

8. The revised "Maputo Plan of Action 2016 – 2030" contributes to reduction of maternal mortality and morbidity, expanding contraceptive use (to include adolescents, amongst other objectives), reducing levels of unsafe abortion, ending forced child marriage, eradicating female genital mutilation, preventing gender-based violence, and ensuring access of adolescents and youth to sexual reproductive health and rights.
9. The Amicus argues that in safeguarding reproductive rights in Kenya, the Court should prioritize the protection of Kenyan women and girls regardless of their religion or lack thereof. The Court should not advocate for the beliefs and practices of any particular faith, but rather for positions based on law and policy. It is essential for the Courts to establish standards that are inclusive and effective for every woman and girl in Kenya, regardless of their religious beliefs, practices, or affiliations.

### **The Question of Pre-Birth Personhood**

10. The right to life is a fundamental human right that serves as the cornerstone of all other human rights. International human rights law recognizes this fundamental right as starting at birth, and international and regional human rights bodies, as well as courts worldwide, have made it clear that any prenatal protections must be consistent with women's human rights. However, a recent trend to extend the right to life before birth, particularly from conception, poses a significant threat to women's human rights in both theory and practice. These efforts, often rooted in ideological and religious beliefs, seek to deny women access to the full range of reproductive health services that are necessary to protect their fundamental rights to life, health, dignity, equality, and autonomy, among others. By granting prenatal legal personhood, these attempts aim to confer rights on a zygote, embryo, or fetus that would be equal to or greater than the rights of women. In many cases, these measures seek to prohibit any procedure that terminates

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<sup>3</sup> African Union Commission, *Agenda 2063: The Africa We Want*, September 2015, p. 8.

<sup>4</sup> *Ibid.*, ¶ 3.7.

a pregnancy, while in other cases, they attempt to justify restrictions on access to in vitro fertilization and contraception. Regardless of the approach taken, these strategies aim to prevent women from making autonomous decisions about their fertility and disregard their basic human rights.

11. The amicus submits that there are several steps that States can and should take to promote a legitimate interest in prenatal life while simultaneously respecting women's fundamental rights. When States prioritize the protection of the right to life before birth without considering women's rights, inconsistencies in the law arise that undermine women's fundamental rights, while providing little meaningful protection to prenatal life or existing children.
12. The amicus submits that international and regional human rights treaties protect the right to life without specifying when life begins. Authoritative sources for interpretation, such as the history of negotiations and the jurisprudence of the bodies responsible for interpreting and monitoring compliance with human rights treaties, make it clear that these protections do not extend to the period before birth. Additionally, these sources recognize that protecting an absolute right to life before birth could potentially conflict with human rights protections for women.
13. Furthermore, treaty monitoring bodies consistently highlight the significance of protecting women's rights through general comments, concluding observations, and decisions in individual cases. These bodies assert that in order to ensure women's fundamental rights to life and health, among others, States must eliminate obstacles that prevent them from fully enjoying these rights, such as denying access to safe and legal abortions.

## **International Human Rights Standards**

### **Universal Declaration of Human Rights**

14. Article 1 of the Universal Declaration of Human Rights states that “all human beings are born free and equal in dignity and rights.”<sup>5</sup> Significantly, the history of negotiations indicates that the word “born” was used intentionally to exclude a prenatal application of the rights protected in the Declaration.<sup>6</sup> The drafters of the Declaration rejected a proposal to delete “born,” and

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<sup>5</sup> Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res.217a (III), Article 1, U.N. Doc. A/810 (1948).

<sup>6</sup> U.N. GAOR 3rd Comm., 99th mtg., ¶¶ 110-124, U.N. Doc. A/PV/99 (1948).

the resulting text of the Declaration conveys intentionally that the rights of the Declaration are “inherent from the moment of birth.”<sup>7</sup>

### International Covenant on Civil and Political Rights

15. The International Covenant on Civil and Political Rights (ICCPR) rejects the proposition that the right to life, protected in Article 6(1), extends to prenatal life.<sup>8</sup> The drafters of the ICCPR specifically rejected a proposal to amend this article to provide that “the right to life is inherent in the human person from the moment of conception, this right shall be protected by law.”<sup>9</sup> The Human Rights Committee, which interprets and monitors state compliance with the ICCPR, has further clarified that the ICCPR’s right to life protections may be violated when women are exposed to a risk of death from unsafe abortion as a result of restrictive abortion laws.<sup>10</sup> In the case of *K.L. v. Peru*, the Committee established that the denial of a therapeutic abortion, where continued pregnancy posed a significant risk to the life and mental health of the pregnant woman, violated the woman’s right to be free from cruel, inhuman, or degrading treatment.<sup>11</sup> The Human Rights Committee reaffirmed this decision in the case of *L.M.R. v. Argentina*, when it held that the denial of a legal abortion for a rape victim inflicted physical and mental suffering, violating the woman’s right to be free from torture or cruel, inhuman, or degrading treatment, and her right to privacy.<sup>12</sup>

### Convention on the Rights of the Child

16. Although the Preamble of the Convention on the Rights of the Child (CRC) provides that “the child, by reason of his physical and mental immaturity, needs special safeguards and care,

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<sup>7</sup> Id

<sup>8</sup> International Covenant on Civil and Political Rights, art. 6(1), G.A. Res. 2200a (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>9</sup> U.N. GAOR Annex, 12th Session, Agenda Item 33, ¶¶ 96, 113, 119, U.N. Doc. A/C.3/L.654.

<sup>10</sup> U.N. GAOR Annex, 12th Session, Agenda Item 33, ¶¶ 96, 113, 119, U.N. Doc. A/C.3/L.654. 7 See, e.g., Human Rights Committee (H.R. Committee), Concluding Observations to: Argentina, ¶ 14, UN Doc. CCPR/CO/70/ARG (2000); Bolivia, ¶ 22, UN Doc. CCPR/C/79/Add.74 (1997); Costa Rica, ¶ 11, U.N. Doc. CCPR/C/79/Add.107 (1999); Chile, ¶ 211, U.N. Doc. a/54/40 (1999); El Salvador, ¶ 14, U.N. Doc. CCPR/CO/78/SLV (2004); Ecuador, ¶ 11, U.N. Doc. CCPR/C/79/Add.92 (1998); Gambia, ¶ 17, U.N. Doc. CCPR/CO/75/GMB (2004); Guatemala, ¶ 19, U.N. Doc. CCPR/CO/72/GTM (2001); Honduras, ¶ 8, U.N. Doc. CCPR/C/HND/CO/1 (2006); Kenya, ¶ 14, U.N. Doc. CCPR/CO/83/KEN (2005); Kuwait, ¶¶ 466, 467, U.N. Doc. A/55/40; GAOR 55th Sess., Supp. No. 40 (2000); Lesotho, ¶ 11, U.N. Doc. CCPR/C/79/Add.106 (1999); Mauritius, ¶ 9, U.N. Doc. CCPR/CO/83/MUS (2005); Morocco, ¶ 29, U.N. Doc. CCPR/CO/82/MAR (2004); Paraguay, ¶ 10, U.N. Doc. CCPR/C/PRY/CO/2 (2006); Peru, ¶ 15, U.N. Doc. CCPR/C/79/Add.72 (1996); Peru, 20, ¶ U.N. Doc. CCPR/CO/70/PER (2000); Poland, ¶ 8, U.N. Doc. CCPR/CO/82/POL (2004); United Republic of Tanzania, ¶ 15, U.N. Doc. CCPR/C/79/Add.97 (1998); Trinidad and Tobago, ¶ 18, U.N. Doc. CCPR/CO/70/TTO (2000); Venezuela, ¶ 19, U.N. Doc. CCPR/CO/71/VEN (2001); Vietnam, ¶ 15, U.N. Doc. CCPR/CO/75/VNM (2002).

<sup>11</sup> *K.L. v. Peru*, H.R. Committee, Comm’n No. 1153/2003, U.N. Doc. CCPR/C/85/d/1153/2003 (2005).

<sup>12</sup> *L.M.R. v. Argentina*, H.R. Committee, Comm’n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).



including appropriate legal protection, before as well as after birth,”<sup>13</sup> the history of negotiations makes clear that this language is not intended to extend Convention protections, including right to life protections, prenatally. To the contrary, the negotiations explicitly note that this language is not “intend[ed] to prejudice the interpretation of Article 1 or any other provision of the Convention,” where Article 1 defines “a child” for the purposes of the Convention as “every human being below the age of 18 years.” Proponents of the amendment calling for safeguards before birth further clarified that “the purpose of the amendment was not to preclude the possibility of abortion.”<sup>14</sup>

17. The Committee on the Rights of the Child, which interprets and monitors state compliance with the CRC, supports the understanding that the CRC does not protect a prenatal right to life. The Committee has not issued any comments suggesting that there is a right to life before birth; instead, the Committee has expressed concern about maternal mortality in adolescent girls stemming from unsafe abortion<sup>15</sup>—a violation of their right to life—and urged states to reform punitive abortion legislation and ensure access to safe abortion services, irrespective of the legality of abortion.<sup>16</sup>

#### Convention on the Elimination of All Forms of Discrimination against Women<sup>17</sup>

18. The jurisprudence of the Committee on the Elimination of Discrimination against Women (CEDAW Committee), which interprets and monitors state compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), makes clear that the fundamental principles of Non-Discrimination and equality require that the rights of a pregnant woman be given priority over an interest in prenatal life. In the case of *L.C. v. Peru*,

<sup>13</sup> Convention on the Rights of the Child, adopted Nov. 20, 1989, ¶ 9 of pmbi., GA Res. 44/25, annex, U.N. GAOR 44th Sess., Supp. No.49, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990)

<sup>14</sup> Question of a Convention on the Rights of the Child: Rep. of the Working Group, U.N. Comm’n on Human Rights, 36th Sess., U.N. DOC. E/CN.4/L.1542 (1980). See also Rep. of the Working Group on a Draft Convention on the Rights of the Child, U.N. Comm’n on Human Rights, 45th Sess., at 11, U.N. Doc. E/CN.4/1989/48 (1989)

<sup>15</sup> Committee on the Rights of the Child (CRC Committee), General Comment No. 4: Adolescent Health and Development in the Content of the Convention on the Rights of the Child (33rd Sess., 2003), ¶ 31, U.N. DOC. CRC/GC/2003/4 (2003).

<sup>16</sup> See, e.g., CRC Committee, concluding Observations to: Chad, ¶ 30, U.N. Doc. CRC/C/15/Add.107 (1999); Chile, ¶ 55, U.N. DOC. CRC/C/CHL/CO/3 (2007); Palau, ¶ 46, U.N. DOC. CRC/C/15/Add.149 (2001); Uruguay, ¶ 51, U.N. Doc. CRC/C/URY/CO/2 (2007) ); CRC Committee, General Comment No. 15: The right of the child to the enjoyment of the highest attainable standard of health, (62nd Sess., 2013), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 70, U.N. Doc. CRC/C/GC/15 (2013).

<sup>17</sup> Convention on the Elimination of All Forms of discrimination Against Women, adopted Dec. 18, 1979, art. 12, G.A. Res. 32/180, UN GAOR, 34th Sess., Supp. No. 46, U.N. DOC. A/34/46 U.N.T.S. 13 (entered into force Sept. 3, 1981). See also Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 24: Article 12 of the Convention (women and health), (20th Session, 1999), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 11, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008).

the CEDAW Committee found that the government had violated a pregnant girl's rights by prioritizing the fetus over her health by postponing an essential surgery until the girl was no longer pregnant. The girl's continued pregnancy posed a substantial risk to her physical and mental health, and the CEDAW Committee held that the denial of a therapeutic abortion and the delay in providing the surgery constituted gender-based discrimination and violated her rights to health and freedom from discrimination.<sup>18</sup> The CEDAW Committee has further expressed concern that women's rights to life and health may be violated by restrictive abortion laws.<sup>19</sup>

### European Convention on Human Rights

19. Article 2(1) of the European Convention on Human Rights provides: "Everyone's right to life shall be protected by law."<sup>20</sup> The European Commission on Human Rights, in *Paton v. United Kingdom*, held that the Convention language "tend[s] to support the view that [Article 2] does not include the unborn,"<sup>21</sup> and acknowledged that recognition of an absolute right to life before birth would "be contrary to the object and purpose of the Convention."<sup>22</sup> In *Vo v. France*, the European Court of Human Rights, which interprets and monitors compliance with the European Convention, affirmed that "the unborn child is not regarded as a 'person' directly protected by Article 2 of the Convention and that if the unborn do have a 'right' to 'life,' it is implicitly limited by the mother's rights and interests,"<sup>23</sup> including her rights to life, health, and privacy.<sup>24</sup> The Court reiterated this holding in *A, B and C v. Ireland*,<sup>25</sup> and noted that "[a] prohibition of abortion to protect unborn life is not...automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mothers right to respect for her private life is of a lesser stature," such that restrictions on abortion must be consistent with women's fundamental rights.<sup>26</sup>

<sup>18</sup> *L.C. v. Peru*, CEDAW Committee, Comm'n No. 22/2009, ¶ 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011).

<sup>19</sup> See, e.g., CEDAW Committee, Concluding Observations to: Belize, ¶ 56, U.N. Doc. A/54/38/Rev. 1, GAOR, 54th Sess., Supp. No. 38 (1999); Chile, ¶ 228, U.N. Doc. A/54/38/Rev. 1, GAOR, 54th Sess., Supp. No. 38 (1999); Colombia, ¶ 393, U.N. Doc. A/54/38/Rev. 1, GAOR, 54th Sess., Supp. No. 38 (1999); Dominican Republic, ¶ 337, U.N. Doc. A/53/38/Rev.1, GAOR, 53rd Sess., Supp. No. 38 (1998); Paraguay, ¶ 131, U.N. Doc. A/51/38, GAOR 51st Sess., Supp. No. 38 (1996).

<sup>20</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1), adopted Nov. 4, 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5 (entered into force Sept. 3, 1953)

<sup>21</sup> *Paton v. United Kingdom*, App. No. 8416/79, ¶ 9, 19 Eur. Comm'n of H.R. Dec. & Rep. 244 (1980). 33

<sup>22</sup> *Id.* ¶ 20

<sup>23</sup> *Vo v. France*, App. No. 53924/00, Eur. Ct. H.R., ¶ 80 (2004).

<sup>24</sup> *Id.* ¶ 65.

<sup>25</sup> *A, B and C v. Ireland*, App. No. 25579/05, Eur. Ct. H.R., ¶¶ 237-238 (2010).

<sup>26</sup> *Id.* ¶ 238.

African Charter on Human and Peoples' Rights and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

20. Article 4 of the African Charter on Human and Peoples' Rights states that "human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person."<sup>27</sup> Drafters of the African Charter specifically rejected language protecting a right to life from the moment of conception.<sup>28</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) does not address when life begins, but it implicitly reinforces the understanding that the right to life accrues at birth, providing that States must take measures to "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the [pregnant woman] or the life of the [pregnant woman] or the fetus."<sup>29</sup>

**Comparative Jurisprudence from national courts**

21. High Courts in every region of the globe have considered the question of who is accorded a right to life within a given legal system, particularly in the context of laws on abortion. Landmark decisions from high courts around the world assert that, while States have a legitimate interest in the value of prenatal life, there is no prenatal right to life. Taken together, these decisions reinforce the standards set by international and regional human rights bodies that the right to life does not exist before birth, and that any steps a State takes to protect prenatal life must be consistent with women's fundamental rights.
22. Several high courts have addressed whether constitutional rights, including the right to life, extend prenatally in the context of laws on abortion, and have concluded that these rights accrue only at birth. In interpreting the Slovak Constitution's right to life provision— "Everyone has the right to life. Human life is worthy of protection even prior to birth"<sup>30</sup> —the Slovak Constitutional Court asserted that it is "beyond any doubts that the concept of everyone [in this provision] should be understood as everybody who is born [such that the] capacity to have

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<sup>27</sup> African Charter on Human and Peoples' Rights adopted June 27, 1981, art. 4, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

<sup>28</sup> Compare Frans Viljoen, *The African Charter on Human and People's Rights / The Travaux Préparatoires in the Light of Subsequent Practice*, 25 Hum. Rts. L.J. 313, 314 (2004) (noting that the drafters of the African Charter relied largely on the American Convention on Human Rights), with Draft African Charter on Human and Peoples' Rights, art. 17, O.A.U. Doc. CAB/LEG/67/1 (1979) (adopting the language of art. 4(1) of the American Convention on Human Rights but replacing "moment of conception" with the "moment of his birth").

<sup>29</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, adopted July 11, 2003, art. 14(2)(c)

<sup>30</sup> Constitution of the Slovak Republic, 460/1992 Coll. as amended, art. 15(1) (Slovk.).

rights arises by birth and ends by death.”<sup>31</sup> The Supreme Court of Nepal,<sup>32</sup> Colombia’s Constitutional Court, and South Africa’s High Court,<sup>33</sup> Transvaal Provincial Division<sup>34</sup> similarly held that there is no constitutional right to life before birth.

23. In considering the scope of constitutional protections, courts have acknowledged that recognition of a prenatal right to life could create an impermissible conflict between the rights of the pregnant woman and those of the zygote, embryo, or fetus.<sup>35</sup> The Supreme Court of Nepal explained, for example, that: [a] fetus is able to exist only because of the mother; if we grant the fetus rights that go against the mother’s health or well-being it could create a conflict between the interests of the mother and the fetus, and even compel us to recognize the superiority of the fetus, a situation that would be against the mother. It is not possible to put the mother’s life at risk to protect the fetus.<sup>36</sup> While acknowledging a legitimate interest in protecting prenatal life, these courts have distinguished this interest in the value of prenatal life from a legally constructed right to life and emphasized that efforts to protect this legitimate interest must be consistent with women’s fundamental rights.
24. In South Africa, the High Court, Transvaal Provincial Division asserted that in evaluating the constitutionality of prenatal protections, “proper regard must be had to the rights of women as enshrined in the Constitution,” including women’s rights to life; privacy; health; equality; freedom and security of the person, including reproductive and bodily autonomy; respect for human dignity; and freedom of religion, belief, and opinion.<sup>37</sup>
25. To ensure that efforts to protect prenatal life do not jeopardize women’s fundamental rights, the Colombian Constitutional Court ruled that Colombia’s restrictive abortion law must be expanded to permit abortion in certain circumstances. The Court held the law to be unconstitutional because it “entails the complete pre-eminence of the life of the fetus and the absolute sacrifice of the pregnant woman’s fundamental rights.”<sup>38</sup> The Court further explained that “[this law] extinguishes the woman’s fundamental rights, and thereby violates her dignity

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<sup>31</sup> *Nález Ústavného súdu Slovenskej republiky, sp. zn.* [Decision of the Constitutional Court of the Slovak Republic, No.] PL. ÚS 12/01-297 (Dec. 4, 2007), at 4 (emphasis added) (unofficial translation on file with the Center for Reproductive Rights) [hereinafter *Slovak Constitutional Court Decision*].

<sup>32</sup> *Lakshmi Dhikta v. Government of Nepal*, Writ No. 0757, 2067 (2007) (Supreme Court of Nepal), at 3 (unofficial translation on file with the Center for Reproductive Rights) [hereinafter *Lakshmi Dhikta v. Nepal*].

<sup>33</sup> *Women’s Link Worldwide*, C-355/2006: Excerpts of the Constitutional Court’s Ruling that liberalized Abortion in Colombia, 21 (2007) [hereinafter *Colombian Constitutional Court Decision*].

<sup>34</sup> *Christian Lawyers Association of South Africa v. The Minister of Health* 1998 (11) BCLR 1434 (T) at 24 – 25 [hereinafter *Christian Lawyers Association of South Africa*].

<sup>35</sup> See, e.g., *id.* at 30 – 31; *Slovak Constitutional Court Decision*, *supra* note 3, at 10.

<sup>36</sup> 8 *Lakshmi Dhikta v. Nepal*, *supra* note 4, at 2.

<sup>37</sup> *Christian Lawyers Association of South Africa*, *supra* note 6, at 30 – 31.

<sup>38</sup> *Colombian Constitutional Court Decision*, *supra* note 5, at 49.

by reducing her to a mere receptacle for the fetus, without rights or interests of constitutional relevance worthy of protection.”<sup>39</sup>

26. The amicus submits that it is imperative that women's rights are not overshadowed by an interest in protecting prenatal life. Legal rights, such as the right to life, are usually only attributed after birth. While there may be a valid interest in safeguarding prenatal life, fetuses are generally not considered as possessing legal rights. As mentioned earlier, recognizing legal rights before birth could potentially result in a clash of rights, particularly if the interest in protecting prenatal life clashes with the rights and interests of women..
27. Furthermore, prenatal protections must not perpetuate discrimination against women, as Non-Discrimination is one of the founding principles of human rights law. The Committee on the Elimination of Discrimination against Women has noted that the proposition “that protection of the foetus should prevail over the health of the mother” is grounded in stereotyped roles for women and constitutes gender-based discrimination in violation of a woman’s rights.<sup>40</sup>

#### Convention on Elimination of All forms of Discrimination Against Women(CEDAW)

28. The jurisprudence of the CEDAW Committee, which interprets and monitors state compliance with the CEDAW, makes clear that the fundamental principles of Non-Discrimination and equality require that the rights of a pregnant woman be given priority over an interest in prenatal life. In the case of *L.C. v. Peru*, the CEDAW Committee found that the government had violated a pregnant girl’s rights by prioritizing the fetus over her health by postponing an essential surgery until the girl was no longer pregnant. The girl’s continued pregnancy posed a substantial risk to her physical and mental health, and the CEDAW Committee held that the denial of a therapeutic abortion and the delay in providing the surgery constituted gender-based discrimination and violated her rights to health and freedom from discrimination.<sup>41</sup>

#### European Convention on Human Rights (ECHR)

29. The European Court of Human Rights (ECtHR) has held severally that fundamental rights and freedoms accrue at birth. For example, in *X v United Kingdom*, the court held that a foetus could not have an absolute right to life under the European Convention on Human Rights (ECHR), as this would mean that the “unborn life” of the foetus would be regarded as being of a higher value than the life of the pregnant woman. Further, in *Evans v United Kingdom*, at

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<sup>39</sup> d. at 50.

<sup>40</sup> Rebecca J. Cook, Interpreting the ‘Protection of Life’ 4 (2010), [http://www.gire.org.mx/publica2/SeminarioAborto\\_300810\\_Cook\\_eng.pdf](http://www.gire.org.mx/publica2/SeminarioAborto_300810_Cook_eng.pdf).

<sup>41</sup> CEDAW decision in *L.C v. Peru*.

paragraph 46, the ECtHR decided that in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation to be decided by the individual member states. The court noted that, under English law (as was made clear by the UK courts in *Evans v Amicus Healthcare Ltd*), an embryo does not have independent rights or interests and cannot claim—or have claimed on its behalf—a right to life. The ECtHR did not see this as a contravention of the right to life under the ECHR.<sup>42</sup>

30. The Abortion Act 1967, legalized abortion in Great Britain, which includes England, Scotland, and Wales, while the Abortion (Northern Ireland) Regulations 2020/503 (the “**Northern Ireland Regulations**”) legalized abortion in Northern Ireland. These statutes provide the legal grounds for permitting abortion, such as necessity, a risk to the mother’s physical and mental health and serious abnormalities of the child. Arguably, any abortions performed outside these laws may amount to a criminal offence. These offences include, among others, child destruction and administering drugs or using instruments to procure abortion. Furthermore, the UK law does not attribute rights to unborn fetuses. In other words, legal personality begins at birth in the UK. In the context of abortion, English law is unequivocal that legal personality begins at birth as per *Paton v British Pregnancy Advisory Service Trustees*.<sup>43</sup>

### The Inter-American Court

31. The Inter-American Court has interpreted the provision setting the contours of the right. In 2000, the Constitutional Chamber of Costa Rica’s Supreme Court of Justice held that human life begins at fertilization, and that zygotes, embryos, and fetuses are thus entitled to all human rights, including a right to life. As a result, in vitro fertilization was banned in Costa Rica, even though abortion remained legal when a pregnancy posed a risk to the woman’s life or health. In 2012, the Inter-American Court of Human Rights struck down Costa Rica’s prohibition of IVF to protect the right to life prior to birth, finding that where there are prenatal protections, they must be “gradual and incremental, according to [life’s] development.”

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<sup>42</sup> X v. United Kingdom and *Evans v. Amicus Healthcare*.

<sup>43</sup> *Paton v British Pregnancy Advisory Service Trustees*.

32. The Inter-American Court of Human Rights determined that recognizing a protection to life from conception is not equivalent to granting personhood to pre-natal life. It explained, “the historic and systematic interpretation of precedents that exist in the Inter-American System confirms that it is not admissible to grant the status of person to the embryo.” In addition, looking at comparative law, the Inter-American Court found that “the regulatory trends in international law do not lead to the conclusion that the embryo should be treated in the same way as a person, or that it has a right to life.”<sup>44</sup>
33. The amicus submits that although some countries recognize the value of prenatal life, only a handful include constitutional or legislative protections for a prenatal right to life. The Irish Constitution, for instance, “acknowledges the right to life of the unborn ... with due regard for the equal right to life of the mother.”<sup>45</sup> In its clause protecting the right to life, the Kenyan Constitution states that “[t]he life of a person begins at conception.”<sup>46</sup> Where national laws do include protection of life before birth, these protections generally operate alongside recognition that this right is not absolute. This is often done by permitting abortion where necessary to safeguard the rights of a pregnant woman. The Supreme Court of Ireland has clarified that in balancing the equal rights of the pregnant woman and the “unborn,” the woman has a right to an abortion where the pregnancy poses a risk to her life.<sup>47</sup> The Kenyan constitutional protection of the right to life contains an explicit clause stating that abortion, although generally not permitted, is allowed where the life or health of the pregnant woman is at risk, there is need for emergency treatment, “or if permitted by any other written law.”<sup>48</sup> Importantly, under international law, a right to life before birth cannot be absolute. International human rights standards provide that any rights or protections accorded to prenatal life are necessarily limited by the rights of women,<sup>49</sup> and a fundamental principle of international law states that governments cannot invoke their domestic law to justify non-compliance with treaty obligations.<sup>50</sup>

### **Restricting women’s reproductive rights does not promote life.**

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<sup>44</sup> Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica.

<sup>45</sup> Ir. Const., 1937, art. 40.3.3.

<sup>46</sup> Constitution, art. 26(2) (2010) (Kenya) [hereinafter Constitution of Kenya].

<sup>47</sup> Attorney General v. X and Others, [1992] 1 I.R. 846P (Ir.).

<sup>48</sup> Constitution of Kenya, supra note 9, at art. 26(4).

<sup>49</sup> See, supra, International and Regional Standards on the Right to Life Fact Sheet

<sup>50</sup> Vienna Convention on the Law of Treaties, art. 27, adopted May 23, 1969 (entered in to force Jan. 27, 1980)

34. Efforts to promote a right to life before birth often simultaneously aim to restrict access to both contraception and abortion. These actions are couched in rhetoric espousing the value of life, but they often serve the opposite purpose, driving rates of maternal mortality and morbidity higher. Evidence demonstrates that the legal status of abortion does not affect the incidence of induced abortions.<sup>51</sup> Instead, restrictive abortion laws contribute to higher rates of unsafe abortion with attendant risks to the life and health of the pregnant woman.<sup>52</sup> Lack of access to contraception, including emergency contraception, leads to higher rates of unintended pregnancies and higher rates of induced abortion.<sup>53</sup> Arguments for recognizing a right to life before birth have not addressed this crucial paradox.

### **The law defines legal personhood, not human life.**

35. In general, laws define legal personhood—a term used to determine who is accorded rights and protections within a legal system separately from moral, ethical, and religious perspectives on when life begins.<sup>54</sup> Courts have observed that the task of the judiciary is to interpret the law in accordance with their legal traditions, and not to engage in moral or spiritual discourse.<sup>55</sup> Many courts that have addressed abortion, for instance, have observed “that the judicial task is not to resolve conflicts about biological facts or moral or spiritual values [about when life begins], but to make determinations of law, according to legal traditions and contexts, guided but not governed by social effects.”<sup>56</sup>

### **Legal Consequences of Recognizing Prenatal Personhood**

36. The rights and entitlements that accompany legal personhood virtually always accrue at birth. Recognizing legal personhood at any stage of prenatal development could have wide-ranging, and often unintended, consequences throughout the legal sphere, which could lead to further human rights violations and other legal inconsistencies:

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<sup>51</sup> World Health Organization (WHO), *Unsafe Abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality* in 2008 6 (6th ed., 2011).

<sup>52</sup> *Id.*; Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health Anand Grover, Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶ 21, U.N. Doc. A/66/254 (Aug. 3, 2011).

<sup>53</sup> Guttmacher Institute, *Abortion Worldwide: A Decade of Uneven Progress* 37 (2010).

<sup>54</sup> See, e.g., *Wartelle v. Women’s and Children’s Hosp., Inc.*, 705 So. 2d 778, 780 (1997); *Christian Lawyers Association of South Africa v. The Minister of Health*, 1998 (11) BCLR 1434 (T).

<sup>55</sup> Rebecca J. Cook, *Human Rights Dynamics of Abortion Law Reform*, 25 *Hum. Rts. Q.* 1, 25 (2003) (discussing the role of courts in answering moral and ethical questions).

<sup>56</sup> *d. at* 26.



### Complicating Criminal Laws:

37. Granting legal personhood status before birth would mean that zygotes, embryos, and fetuses are included as victims throughout the penal code, opening the door to criminal investigation and prosecution of women who suffer miscarriages or stillbirths.<sup>57</sup>

### Limits on Women's Behavior and Autonomy:

38. Recognizing legal personhood in utero could lead to restrictions on the behavior of pregnant women. Pregnant women could be sanctioned for child abuse or endangerment if they engage in behavior that is deemed risky to the fetus, such as riding in a car without their seatbelt fastened or drinking alcohol at any gestational stage.

### Reproductive Technologies:

39. Recognizing legal personhood as beginning at fertilization could have significant consequences for women seeking fertility treatment. For example, women undergoing in vitro fertilization could be required to implant all fertilized eggs to avoid the destruction or freezing of some embryos. This practice could lead to higher rates of multiple pregnancies and jeopardize both the health of women and fetal development.

### Registration:

40. Vital registration, such as a census used to determine the funding and distribution of services and resources or a death registry, could be seriously impacted if zygotes, embryos, or fetuses were counted as legal persons. Pregnant women who miscarry could be required to register the miscarriage through death registries.

### **The Kenyan experience**

41. The Constitution of Kenya and its laws recognize the rights of women, the fetuses they carry during pregnancy, and children after birth. These protections are extended to the expectant woman. For instance, Section 2 of the Births & Deaths Registration Act defines the term "birth," and the Registration of Persons Act stipulates registrable persons. It is worth noting that fetuses do not possess fundamental rights and freedoms independently of expectant women.. In addition, fetuses do not enjoy independent rights and freedoms from the pregnant

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<sup>57</sup> See, e.g., Jason Foster, Woman faces charge of killing unborn child during August suicide attempt, Herald Online, Feb. 21, 2009, [www.heraldonline.com/2009/02/21/1152282/woman-faces-charge-of-killing.html](http://www.heraldonline.com/2009/02/21/1152282/woman-faces-charge-of-killing.html).

women. The laws of Kenya do not confer pre-natal rights, a position affirmed severally by the High Court of Kenya.

42. In *Republic v. John Nyamu & 2 others* [2005] eKLR, the Court discussed the import of section 214 of the Penal Code in relation to section 203 of the same. In this case, the state, charged a doctor and two nurses, under sections 203 and 204 of the Kenya Penal Code, with murdering unidentified fetuses. The High Court noted that section 203 of the penal code provides that “[a] person who, with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” The Court further noted that section 214 of the Penal Code provides the following: A child becomes a person capable of being killed when it has completely proceeded in a living state from its mother whether it has breathed or not, and whether it has an independent circulation or not and whether the navel-string is severed or not. In this case, the Court held that for a child to become a person the most important ingredient is “when it has completely proceeded in a living state from the body of its mother.”<sup>58</sup>

## **Conclusion**

43. The Amicus submits that in protecting reproductive rights in Kenya, the court should guard Kenyan women and girls irrespective of religion or lack of it, from parochial position that advocates for any faith’s beliefs and practices and not positions of law or policy. The courts must set standards that work for every woman and girl in Kenya irrespective of religious beliefs, practices or affiliations.
44. Guided by the foregoing legal instruments, comparative analysis, and caselaw, CRR respectfully requests the court to take these submissions into account as a testament of the organization’s commitment to achieve equal protection in Law of reproductive rights for all women and girls in Kenya and globally.

Dated at **Nairobi** this.....**24th**.....day of...**February** .....2023



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<sup>58</sup> *Republic v. John Nyamu & 2 others* [2005] eKLR.

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