

The Doctrine of Foetal Personhood: Implication for the Liberalization of Abortion Laws in Sub-Saharan Africa

Flora Alohan Onomrerhinor, PhD* and Elizabeth A. Iyamu-Ojo, PhD**

Abstract

Since the ICPD conference in 1994, liberalization of abortion laws has continued to be a significant part in reproductive health discuss due to its implication on intentional health care services. The politics and law of abortion reform across Sub-Saharan Africa turn, repeatedly and predictably, on the question of foetal personhood: whether the foetus is understood by law to be a rights-bearing person, and at what point that status begins. In Sub-Saharan Africa where legal regimes range from highly restrictive to comparatively liberal, assertions of foetal personhood have been said to influence statutory drafting, judicial interpretation, and legislative politics even in countries undergoing incremental liberalization. Using conceptual and comparative legal analysis, this paper examines the doctrinal roots and varieties of foetal personhood as one of the theoretical foundations that underpins the conservative stance of most legal provisions and judicial interpretation of extant laws on the subject. It finds that the doctrine has practical effects on efforts to liberalize abortion laws in the region and reframing foetal personhood in legal and policy discourse can enable reforms that prioritize pregnant persons' bodily autonomy and public health over foetal rights. The paper concludes with normative and pragmatic recommendations for policymakers, advocates, and judges seeking to advance safe, rights-based access to abortion while navigating personhood claims.

Keywords: *Personhood, Abortion, Foetus, Liberalization, Africa*

1. Introduction

Abortion law reform in Sub-Saharan Africa has been uneven but significant in the last two decades, with 21 countries expanding legal grounds for abortion due to the influence of the provisions of article 14(2) of the Maputo Protocol which encourages states to allow abortion on the grounds of sexual assault, rape, incest and foetal anomaly or in situations where pregnancy endangers the mental health of the mother.¹ Some countries have liberalized their laws with measurable public-health benefits such as improved safety of abortions and increased quality and reach of post-abortion care,² while others retain colonial-era criminal provisions that permit abortion only to

*LLB, LLM, PhD, BL. Associate Professor, Department of Jurisprudence and International Law, Faculty of Law, University of Benin, Benin City, Edo State, Nigeria, P. M. B 1154, E-mail: flora.alohan@uniben.edu. GSM: +234 703 442 8226, +234 807 044 4028

**LLB, LLM, PhD, BL. Senior Lecturer, Department of Public Law, Faculty of Law, University of Benin, Benin City, Edo State, Nigeria, P. M. B 1154. GSM: +234 803 268 7289.

¹ Bankole A. and others, 'From Unsafe to Safe Abortion in Sub-Saharan Africa: Slow but Steady Progress' *Guttmacher Report* (December 2020) <<https://www.guttmacher.org/report/From-unsafe-to-safe-abortion-in-Sub-Saharan-africa>> accessed 25 September 2025

² Ibid

save the woman's life.³ The normative contest or controversial debates surrounding abortion sometime turn on when human life acquires rights that compel legal protection and the doctrine of foetal personhood is at the heart of such debates. The doctrine or theory of foetal personhood defines the foetus as a legal person. It asserts that the foetus is a rights-bearing person from conception or some early developmental threshold.⁴ If accepted in law, this can have significant impact on the liberalization of abortion laws.

This paper explores this doctrinal battleground. It examines the roots and varieties of foetal personhood as one of the theoretical foundations that underpins most legal provisions and judicial interpretation of extant laws on the subject and their legal and policy consequences in Sub-Saharan Africa. The paper is divided into six parts. This part provides an overview of the paper. The next part clarifies the concept of personhood and x-rays doctrinal varieties of personhood. The third part examines the doctrine of foetal personhood and the different approaches to the doctrine. It analyses conceptual approaches that carry different legal consequences. The fourth part comparatively discusses the impact of foetal personhood on the liberalization laws in Sub-Saharan Africa. It analyses strategic considerations for advocates and policymakers pursuing liberalization. The fifth part offers recommendations for law and policies that protect pregnant persons while engaging honestly with personhood claims. The final part concludes the paper.

2. Conceptual Clarifications

2.1 Personhood and the Doctrinal Varieties of Personhood

Personhood is a concept that refers to being recognized as a person. It implies that an individual possesses rights, responsibilities and full moral status within a society.⁵ It is a philosophical, ethical and legal status that is distinct from merely being human and is often debated in relation to concepts relating to consciousness, rationality, self-awareness and the capacity for autonomous decision making.⁶ Personhood is a controversial subject in discussions on the ethics of abortion, euthanasia and human uses of animals.⁷ In reproductive health context, personhood is perceived in relation to moral status and rights, that is, it is primarily concerned with the rights and responsibilities an individual is afforded that necessitates according it full moral consideration. In relation to reproductive rights, a prominent and contentious debate surrounds personhood in discussions about abortion and the moral status of a foetus.⁸

Oncological personhood refers to fundamental qualities an individual possesses that defines their being and essence such as consciousness, reason, freewill and soul.⁹ It focuses on the intrinsic

³ Meghan Gallagher, Michelle Hawks-Cuellar and Caroline Moreau, 'Restrictive Abortion Laws in Sub-Saharan Africa: A Legacy of Colonization' <<https://paa.confex.com>> accessed 25 September 2025

⁴ Amanda Gvozden, 'Fetal Protection Laws and The 'Personhood' Problem: Towards A Relational Theory of Fetal Life and Reproductive Responsibility' [2022] (112) *Journal of Criminal Law and Criminology*; 406

⁵ Elizabeth Martin and Robert Hine, *Oxford Concise Medical Dictionary* (9th edn, Oxford University Press 2015)

⁶ Ibid.

⁷ Ibid

⁸ EBSCO, 'Personhood' <<https://www.ebsco.com/research-starters/history/personhood>> accessed 1 October 2025.

⁹ Onwuatuegw, I.N. 'The Personhood in African Conception: A Synthesis of the Normative and Ontological Approaches to Personhood' [2025] (8) *Advance Journal of Arts, Humanities and Social Sciences*; 26

nature of a person such as consciousness, rationality and moral spirit as opposed to normative personhood which emphasizes moral qualities and social roles.¹⁰ The latter focuses on what makes a person in a moral and social sense with emphasis on achievements, community participation and the acquisition of moral values. The ontological approach posits that the essence of personhood fundamentally resides within the individual. The ontology of personhood is a subject of debate particularly in African philosophy, where it is seen as a dynamic process shaped by both individual's inherent qualities and their social relationships.¹¹

Personhood is conceived as dynamic and contingent on both intrinsic qualities and responsible participation within the community.¹² In the African context, personhood in its truest form harmonizes the nature and the nurture of the individual within the community. Thus, according to Onwuaturuegwu, a synthesis of both the ontological school and the normative school is imperative to adequately conceptualize personhood, as adherence to the postulations of the normative school risks neglecting the individual's intrinsic qualities while strict adherence to the ontological school also risks undermining the significance of morality and communal experiences.¹³

The philosophical claim that the foetus is a human being with moral worth equivalent to post-natal persons is often derived from metaphysical or religious premises and is sometimes translated directly into legal personhood as evident in some moralistic statutory provisions or even constitutional amendments. This is not surprising though, as the law is an instrument of societal protection and the promotion of societal values. In legal and political contexts, understanding the ontology of personhood is relevant as it informs discussions about autonomy and capacity especially in cases of supported decision making for individuals with cognitive impairments.¹⁴ In addition, the relevance of the concept of personhood in this context can be seen in its ability to influence how decisions are made regarding individuals, particularly in areas like personalized medicine by emphasizing the individual's intrinsic worth rather than just biological or market value.¹⁵

2.2 Legal Personhood

Legal personhood is the status of being a subject of rights and duties under the law, allowing an entity, whether a human being or a non-human entity to possess a distinct legal existence and

¹⁰ Rosenblad I. and Wheelahan L. 'The Ontology of Personhood and a Realist Critique of the policy Discourse Based on Skills' [2025] (46)(3) *British Journal of Sociology of Education*; 375

¹¹ JO Chimakonam and LU Ogbonnaya, 'The Ontology of Personhood' In Cham Palgrave (ed), *African Metaphysics, Epistemology and New Logic* (Macmillian, 2021)

¹² Onwuaturuegwu, I.N. 'The Personhood in African Conception: A Synthesis of the Normative and Ontological Approaches to Personhood' [2025] (8) *Advance Journal of Arts, Humanities and Social Sciences*; 26

¹³ Ibid 27

¹⁴ Istace T. and Assche K.V. 'From Risk-Making to Rights-Holding: Ontological Personhood and Best Interpretation in Disorders of Consciousness' [2025] (16)(3) *Neuroscience*; 135

¹⁵ Feiler T. 'The Ontology of Personhood: Distinguishing Sober from Enthusiastic Personalized Medicine' [2019] (32)(2) *Studies in Christian Ethics*; 254

capacity to engage in legal actions or receive legal protection.¹⁶ Legal personhood is a foundational concept of western legal thought that has become highly topical in discussing controversial subjects like legal status of animals, corporations, fetuses, natural objects and artificial intelligence.¹⁷

During the nineteenth century and the beginning of the twentieth century, legal personhood was conceived in terms of the holding of rights and/or the bearing of duties. Essentially, the traditional conception of personhood, which Kurki termed the orthodox view defined legal persons, as entities that have the capacity to hold rights and duties.¹⁸ Within this view, Kurki identified five sub-theories: the rights-and-duties approach, according to which a legal person is an entity that holds at least one right and bears at least one duty; the rights-or-duties approach, according to which a legal person is an entity that holds at least one right or one duty; the capacity-for-rights approach, which does not require that an entity actually has rights and/or obligations, but which links legal personhood with the capacity to do so; the capacity-for-legal-relations approach, which links legal personhood not to atomistic legal positions, but to the capacity of participation in a system of relations between legal persons; and the Kelsenian approach, according to which the legal person is nothing other than a personified set of legal norms.¹⁹

There are natural persons with limited capacity such as those with incapacitating conditions. They often require a legal representative to act on their behalf. This limits their ability to exert their will within a legal relationship directly.²⁰ They are often used to exemplify situations of conditioned or limited personhood. This refers to situations where certain individuals or entities are not granted the full scope of legal rights and capacities typically associated with personhood.²¹ For instance, the fiction theory equates personhood with the ability to exercise certain rights. It similarly compares legally incapacitated natural persons with juridical persons, given how both fictional subjects of law and natural persons suffering from this incapacity or limited capacity cannot by themselves, exert their will within a legal relationship and instead require a representative to exercise the rights granted to them by law.²²

Historically, limited personhood was manifested through practices like slavery, the subjugation of married women, and guardianship laws for people with disabilities, where rights are restricted or held in trust, thereby limiting their agency and status as full legal persons.²³ The practice of slavery treated human beings as property rather than full legal persons, denying them fundamental rights. In common law, the doctrine of coverture subsumed a married woman's property and legal identity

¹⁶ VAJ Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019)

¹⁷ Koops E. J. and Jaquet-Chiffelle D. 'New (Id)entities and the law: Perspectives on legal personhood for 'non-humans' Future of Identity in the Information Society (No. 507512) October 2008 suggest granting legal personhood to artificial intelligence, potentially for specific tasks or to address issues of liability, comparing it to corporations or animals.

¹⁸ Folková Z. 'Beyond Dualism(s): A New Approach to Legal Personhood in Contemporary Legal Theory' [2024] (4) *Acta Universitatis Carolinae – Iuridica*; 43

¹⁹ Ibid

²⁰ Adriano E.A.Q. 'Natural Persons, Juridical Persons and Legal Personhood' [2015] (8) *Mexican Law Review*; 101

²¹ VAJ Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019)

²² Adriano E.A.Q. 'Natural Persons, Juridical Persons and Legal Personhood' [2015] (8) *Mexican Law Review*; 101

²³ VAJ Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019)

into that of her husband, limiting her legal personhood.²⁴ The historical subjugated status of women in various Western jurisdictions has often been regarded as explainable in terms of their lack of full legal personhood. Even now, married women in some jurisdictions are still treated the same way.

Contemporary doctrines of guardianship, even when intended to protect the individuals, can limit their ability to act independently, effectively conditioning their personhood by requiring a male representative for legal and financial matters. While the Convention on the Rights of Persons with Disabilities²⁵ aims for full recognition of individuals with disabilities as legal persons, the practical application of guardianship and the interpretation of "will and preferences" can still lead to restrictions on their personhood and agency.²⁶ Recent developments in disability law require that persons with disabilities be empowered to make their own decisions through so-called supported decision-making. However, even if decisions made on their behalf are expected to reflect their will rather than best interests, such expression of their will is done on their behalf due to their limited capacity.²⁷

Perhaps, the most common form of conditioned personhood involves corporations, which are granted legal rights and responsibilities but do not possess the same inherent qualities or full range of abilities as natural persons.²⁸ For example, the doctrine of corporate personhood, recognizes corporations as legal entities that can have a particular constitutional right or protection.²⁹

Traditional legal concepts of personhood can sometimes be inconsistent, leading to denial of rights for some individuals or groups and challenges in addressing issues like the legal status of fetuses or the rights of animals.³⁰ As a result, traditional concepts have been challenged during the last decades through the global development in positive law extending or proposing the extension of legal personhood to new kinds of entities such as natural entities, animals, fetuses and artificial intelligence.³¹

Legal personhood has been expanded to cover non-human entities. It was described by Wise as the 'capacity to hold at least one legal right.'³² Although Wise did not explicitly provide a standalone definition for legal personhood, he argued that it should be extended to non-human animals who possessed the capacity to hold certain fundamental rights, such as bodily integrity

²⁴ Ibid

²⁵ United Nations Convention on the Rights of Persons with Disabilities, Treaty Series, vol. 2515, 2006, A/RES/61/106.

²⁶ Adriano E.A.Q. 'Natural Persons, Juridical Persons and Legal Personhood' [2015] (8) *Mexican Law Review*; 101

²⁷ Kurki V.A.J. 'On Legal Personhood: Rejoinders, Reflections and Restatements' [2021] (44) *Varia*; 1 <<http://journals.openedition.org/revus/7425>> accessed 29 September 2025

²⁸ Pollman E. 'Corporate Personhood and Limited Sovereignty' [2021] (74) *Vanderbilt Law Review*; 1727

²⁹ Ibid

³⁰ Hermansson J. 'Structuring Concepts of Legal Personhood: On Legal Personhood as a Cluster Property' [2023] (51) *Varia*; 1 <<http://journals.openedition.org/revus/9933>> accessed 29 September 2025

³¹ Ibid

³² Wise S.M. 'The Struggle for The Legal Rights of Non-Human Animals Begins-The Experience of the Non-Human Rights Project in New York and Connecticut' <<https://animallawconference.org/wp-content/uploads/2019/10/Steven-Wise-The-Struggle-for-the-Legal-Rights-of-NonHuman-Animals-Begins-Animal-Law-Vol.-25.3.pdf>> accessed 30 September 2025.

and liberty which are central to human rights.³³ Kurki's bundle theory conceived legal personhood as a cluster of separate but interconnected incidents or properties, rather than a monolithic concept, suggesting a more flexible and potentially expanded approach.³⁴

Dyschkant argued that lawmakers and judges have not been applying the concept of legal personhood correctly. To him, they should divorce the idea of humanity from the legal definition of personhood.³⁵ According to him, the term legal person has long been associated with humanity and even the paradigm of artificial persons and corporations, relies upon analogizing to humanity. He stated that some humans which have been attributed legal personhood status, have comparable abilities to exercise rights and duties as many animals, whereas, other humans have no such abilities at all.³⁶ He implied that one can have the attributes of legal personhood without being a human being, and one can be a human being without being a legal person.³⁷ The solution he proposed is to divorce the capacities-focused definition of legal personhood from the species-based definition of humanity.³⁸

Potential approaches to legal personhood include proposals recognizing all human beings from birth to death as natural persons, acknowledging artificial entities like corporations as juristic persons, and extending personhood to non-human entities such as animals or artificial intelligence, either through current legal developments or proposed by philosophers like Visa Kurki's Bundle Theory. These approaches can be categorized by their anthropocentric focus (human-centred) or their emphasis on capacities, accountability, and consciousness to determine personhood for a wider range of entities.³⁹

A major challenge with some of the proposals for the expansion of legal personhood is the consideration for such expansion. For example, applying individualized or gradual qualities as the main basis for legal status can be difficult as law requires general categorizations and using past instances, such as the status of women or slavery, can risk distorting the understanding of modern legal personhood.

In addition, there is the issue of moral and ethical questions with granting personhood to non-human entities. This raises significant ethical and political questions about moral responsibility and the restructuring of legal and governance systems. There is need for a more advanced and clearer understanding of human and non-human entities for purposes of personhood. This is crucial to developing scientifically informed conceptions of human and non-human minds to better inform legal personhood.

³³ Steven Wise, 'The Capacity of Non-human animals for Legal Personhood and Legal Rights' In R Corbey and A Lanjouw (eds) *The Politics of Species: Reshaping our Relationships with Other Animals* (Cambridge University Press 2013), 241

³⁴VAJ Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019)

³⁵ Dyschkant A. 'Legal personhood: How We Are Getting It Wrong' [2015] (5) *University of Illinois Law Review*; 2075

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

³⁹ Brunello Stancioli and Tomasz Pietrzykowski, *New Approaches to the Personhood in Law* (Oxford 2016), 158

2.3 Foetal Personhood

A foetus is generally perceived as an offspring of a human or other mammal in the stages of prenatal development that follows the embryo state. In humans, it is taken as beginning at eight weeks after conception. The Oxford English Dictionary defines foetus as the embryo of a mammal, especially a human, that is in the later stages of development within the uterus, typically from eight weeks after fertilization to birth when the main features of the adult form are recognizable.⁴⁰

There is no universally acceptable definition, biological, ethical, or philosophical, of when a human is considered a person. Foetal personhood is societally subjective and widely debated. There are varying perspectives about the personhood of a foetus.⁴¹ At the heart of the debate are questions about when personhood begins and what protections should be afforded to a foetus. From the pro-life perspective, life begins at conception and is worthy of protection, regardless of location. Pro-life advocates argue that denying foetal personhood is a denial of basic human rights which could be interpreted as discrimination based on characteristics such as location, age, or ability.⁴² Whereas, from the pro-choice perspective life begins at birth and viability outside of the womb should be the primary consideration in determining whether to attribute to it a personality distinct and separate from that of the mother. Therefore, only until a child can survive outside of its mother's body, should such a child receive personhood or protection under the law. They argue that labelling foetus as individuals with human personhood is dangerous and has serious implications for reproductive choice and reproductive self-autonomy.⁴³

Biologically, once an embryo implants into a mother's uterus and pregnancy begins, that foetus becomes a biological person in development and as the foetus grows, its unique biological code develops as well.⁴⁴ The predominance of human biological research confirms that human life begins at conception. When the sperm and egg unite, they create a new cell with its own DNA, distinct from both the mother and father's genetic makeup. This single cell carries all of the information necessary to develop into a fully formed human being.⁴⁵ This seems to suggest that personhood is always inherent in a human foetus at all stages of development, since the foetus begins its existence as a potential human person at fertilization and does not become a person at a particular stage of development following fertilization. It follows that the foetus is in continuous development of potentialities and a human being, since he/she has been a person since he/she began to exist at fertilization.⁴⁶

⁴⁰ Elizabeth Martin and Robert Hine *Oxford Dictionary of Biology* (7th edn, Oxford University Press, 2015)

⁴¹ McKenzie Hammons, 'What Is Fetal Personhood and What Does It Have to Do with Abortion Laws?' <<https://preborn.com/fetal-personhood-and-abortion-laws/>> accessed 27 September 2025

⁴² Ibid

⁴³ Ibid

⁴⁴ Jacobs S.A. 'The Scientific Consensus on When a Human's Life Begins' [2021] (36)(2) *Issues Law Med*; 221

⁴⁵ Fred de Miranda, 'When Human Life Begins' (June 2004) *American College of Paediatrics* <<https://acpeds.org/when-human-life-begins/>> accessed 28 September 2025

⁴⁶ Jacobs S.A. 'The Scientific Consensus on When a Human's Life Begins' [2021] (36)(2) *Issues Law Med*; 221

There are multiple conceptual approaches to foetal personhood that carry different legal consequences. The attribution by law of rights and duties to the foetus has gained a lot of attention in the 21st century and fundamentally affects the legality of abortion.⁴⁷

3. Approaches to Foetal Personhood

The concept of foetal personhood is one of the most contested issues in legal and moral philosophy, especially in debates on abortion law.⁴⁸ The question is usually whether, and to what extent, the foetus should be accorded recognition as a “person” with legal rights. Jurisdictions have adopted varied approaches, ranging from strict recognition of the foetus as a rights-bearing entity to more nuanced positions that balances foetal interests against women’s reproductive autonomy.

3.1 The Absolutist or Natural Law Approach

The absolutist or natural law perspective holds that life begins at conception and, as such, the foetus enjoys the same legal and moral status as a person that has already been given birth to.⁴⁹ In many African states where religion such as Christianity, Islam or the African Traditional Religion (ATR) exerts strong influence on law, this approach is reflected in restrictive abortion regimes. For example, section 228–230 of the Nigerian Criminal Code Act⁵⁰ criminalizes abortion except where necessary to save the life of the mother. Nigerian courts have not yet directly recognized foetal personhood as equivalent to constitutional personhood, but the assumption that can be implied from criminal statutes is that foetal life is deserving of protection from conception. Similarly, in *Paton v British Pregnancy Advisory Service Trustees*,⁵¹ the English Court of Appeal rejected a husband’s claim to restrain his wife’s abortion but nevertheless recognized that the foetus has some moral value deserving of respect, even if not full legal personality.

3.2 The Relational or Conditional Personhood Approach

This approach recognizes the foetus as having a form of “contingent” or “incremental” personhood, whose value increases with gestational development. It underpins the viability test used in the United States Supreme Court’s decision in *Roe v. Wade*.⁵² In 2022, this decision was overturned in *Dobbs v. Jackson Women’s Health Organization*.⁵³ Although it did not address the foetal personhood, it could provide the necessary foundation for restrictive or prohibitive abortion laws that supports the doctrine. Significantly, there has been major developments in foetal personhood doctrine in some States in the United States following the Supreme Court’s decision in *Dobbs*

⁴⁷ Craddock J.J. ‘Personhood After Dobbs’ [2015] (74)(4) *Catholic University Law Review*; 536

⁴⁸ *Ibid*

⁴⁹ *Ibid*

⁵⁰ Cap. 38, Laws of the Federation of Nigeria, 2010.

⁵¹ [1979] QB 276.

⁵² 410 U.S. 113 (1973) (in *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992 The Supreme Court reaffirmed the central holding of *Roe v. Wade* but changed the viability standard to the ability to live outside of the womb without extreme medical intervention.)

⁵³ 142 S. Ct. 2228 (2022).

Case. In 2024, the Alabama Supreme Court ruled in *LePage v. Center for Reproductive Medicine*⁵⁴ that frozen embryos must be considered 'Unborn Children' in the state of Alabama and that its *Wrongful Death of a Minor Act*⁵⁵ applied to all unborn children without limitation, including unborn children who are not located in the uterus at the time they are killed.⁵⁶ This decision and President Trump's January 2025 Executive Order accords the foetus some level of right or recognition for the purpose of legal protection in the United States.

In Sub Saharan African contexts, South Africa provides a striking example. Under the Choice on Termination of Pregnancy Act,⁵⁷ abortion is permissible on request up to 12 weeks, under specified conditions up to 20 weeks, and only in limited circumstances thereafter.⁵⁸ The South African Constitutional Court in *Christian Lawyers Association v Minister of Health*⁵⁹ rejected the argument that abortion violated the constitutional right to life of the foetus, holding that the Constitution does not extend "personhood" to the unborn. This indicates a legal framework where the foetus acquires protection incrementally but not equal to that of the pregnant woman.

3.3 The Non-Personhood or Woman-Centric Approach

The non-personhood or woman-centric approach to foetal personhood rejects the attribution of independent legal personhood to the foetus.⁶⁰ It treats reproductive rights as primarily a question of women's autonomy, dignity, and health and gives the woman the right to make the reproductive choice of whether or not to terminate a pregnancy. The African Commission on Human and Peoples' Rights has endorsed this in its interpretation of the Maputo Protocol (Article 14(2)(c)), which requires states to authorize medical abortion in cases of sexual assault, rape, incest, and where pregnancy endangers the mental or physical health of the mother. The Commission's decision in *P.A.O. v Attorney General of Botswana*,⁶¹ while not directly about abortion, reaffirmed the principle that reproductive health rights form part of enforceable human rights under the African Charter,⁶² thereby prioritizing women's rights over foetal claims.

3.4 The Balancing or Intermediate Approach

This approach is adopted in jurisdictions that recognize foetal interests without conferring full legal personhood. The idea, is to strike a balance between the right of the foetus if any, and the reproductive rights and autonomy of the pregnant woman. This intermediate approach weighs whatever legal consequences of recognizing the foetus against women's rights. In *Vo v France*,⁶³

⁵⁴ Alabama Supreme Court SC-2022-0579 decided 16 February 2024.

⁵⁵ Alabama Code § 6-5-391 (2024)

⁵⁶ Ibid

⁵⁷ No. 92 of 1996.

⁵⁸ Adebimpe R. J. 'Foetal Personhood in the Jurisprudence of Abortion in International and Comparative Law' [2020] (10)(2) *Bahir Dar University Law Journal*; 147

⁵⁹ 1998 (4) SA 1113

⁶⁰ Keane H. 'Foetal Personhood and Representations of the Absent Child in Pregnancy Loss Memorialization' [2009] (10)(2) *Feminist Theory*; 153

⁶¹ (Comm. 0003/2015)

⁶² African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev.5, 21 I. L.M. 58 (1982).

⁶³ (2004) 40 EHRR 12.

the European Court of Human Rights (ECtHR) held that the question of when life begins falls within the “margin of appreciation” of member states, thereby allowing national variation while acknowledging that the foetus has some interest worthy of protection. In African jurisprudence, courts in Ghana and Kenya have grappled with constitutional rights to life in contexts that suggest a similar balancing logic. For example, in *FIDA (Kenya) & Others v Attorney General & Others*,⁶⁴ the High Court emphasised the constitutional rights of women to health and reproductive autonomy under the Kenyan Constitution 2010, indirectly limiting absolutist interpretations of foetal personhood.

The legal treatment of foetal personhood in Sub-Saharan Africa oscillates between absolutist and relational approaches, with progressive constitutions (like South Africa and Kenya) leaning toward conditional or woman-centric frameworks, while countries like Nigeria and Malawi continue to reflect restrictive, absolutist regimes rooted in colonial criminal codes and religious morality.

4. Foetal Personhood and the Liberalisation of Abortion Laws in Sub-Saharan Africa

The debate on abortion in Sub-Saharan Africa is deeply tied to the question of foetal personhood. In most African jurisdictions, the law has traditionally adopted a conservative stance that recognizes the foetus as possessing a form of legal protection, often grounded in constitutional provisions on the right to life. For instance, Section 33(1) of the Nigerian Constitution provides that “every person has a right to life” without clarifying whether “person” extends to the unborn, leaving room for restrictive interpretations that implicitly confer personhood on the foetus.⁶⁵ Similarly, Article 26(1) of the Kenyan Constitution 2010 explicitly recognises the right to life of “every person” and Article 26(2) states that life begins at conception, thereby constitutionally entrenching foetal personhood.⁶⁶

This constitutional recognition of foetal personhood presents a significant obstacle to the liberalisation of abortion law across the region. In countries like Uganda, Tanzania, and Zambia, abortion remains heavily restricted except in narrow circumstances such as saving the life of the mother.⁶⁷ These restrictive laws are often justified on the grounds of protecting foetal life, thereby prioritising the foetus over women’s reproductive autonomy. The implication is that any legislative or judicial attempt to expand abortion access must grapple with entrenched constitutional and cultural notions of the foetus as a rights-bearing subject.⁶⁸ African states with liberal abortion laws, still grapple with challenges of conservative implementation of the law.⁶⁹

However, emerging African jurisprudence and scholarship are beginning to question the validity of the absolutist conception of foetal personhood in the context of reproductive rights discuss.

⁶⁴ [2012] eKLR

⁶⁵ Okeke G. N. ‘Foetal Rights and Women’s Reproductive Rights in Nigeria: Reconciling the Tensions’ [2017] (7)(2) *Nigerian Journal of Human Rights Law*; 45

⁶⁶ Centre for Reproductive Rights, *In Harm’s Way: The Impact of Kenya’s Restrictive Abortion Law*, (CRR 2014)

⁶⁷ C Ngwenya, *Abortion Law in Sub-Saharan Africa: Cases and Commentary*, (Pretoria University Law Press 2018)

⁶⁸ *Ibid*

⁶⁹ Nabaneh S. ‘Abortion Law in South Africa: Practices and Growing Conflicts’ in Charles Ngwenya, Ebenezer Duroye, Satang Nabaneh and Nakatha Murungi (eds), *Abortion Law Reform in Africa: A Reproductive Health and Rights Perspective*, (Pretoria University Law Press 2025), 12

Ngwena⁷⁰ for instance have argued that recognising the foetus as having an absolute right to life undermines the rights, dignity, and health of women, particularly in contexts where unsafe abortion is a leading cause of maternal mortality.⁷¹ This position accords with the judicial interpretation of section 11 of the Constitution of the Republic of South Africa in *Christian Lawyers Association of South Africa & Others v. Minister of Health & Others* (supra) where it was held that to enable the foetus to bear the right to life would contravene some of the women's constitutional rights that are clearly inalienable. The African Commission on Human and Peoples' Rights has also stressed that restrictive abortion laws are inconsistent with the African Charter on Human and Peoples' Rights, particularly article 16 which provides for the right to health and article 18(3) which calls for the elimination of discrimination against women.⁷²

The liberalization of abortion law in Sub-Saharan Africa therefore requires a delicate balancing act of respecting cultural and religious beliefs around foetal life while also prioritising women's reproductive rights and public health imperatives.⁷³ Reforms in South Africa and Mozambique, where abortion has been liberalised under specified conditions, illustrate that it is possible to adopt a rights-based approach without entirely dismissing the moral value attributed to foetal life.⁷⁴ Without a doubt, the debate on foetal personhood is central to any discussion on abortion law reform in Africa.

In recent times however, there have been instances of incremental liberalisation through courts/judicial reforms. Courts across the region sometimes provide openings for reform, particularly when constitutional rights are invoked. For instance, recent judicial decisions in Nigeria and Zimbabwe such as the 2025 Federal High Court ruling in Abuja, championed by the Reproductive Justice Initiative Foundation (RJIF), with support from the Centre for Reproductive Rights (CRR) affirmed that unplanned pregnancies from rape and incest violate the health rights of women and girls. It is hoped that this ruling will receive a similar affirmation at the Nigerian Supreme Court. Decisions like these, serves as a critical legal precedent recognizing the need for safe abortion for survivors of sexual violence and incest and potentially creates a pathway for accessing safe abortion services in these specific situations.⁷⁵ In Zimbabwe, a similar ruling addressed access to abortion in instances of marital rape and also, for minors. The above decisions suggest that constitutional adjudication can challenge restrictive statutory frameworks and counter absolutist personhood claims.

⁷⁰ Ngwena C. 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa' [2013] (31)(4) *Human Rights Quarterly*; 783

⁷¹ Ibid.

⁷² African Commission on Human and Peoples' Rights (ACHPR) (2016). General Comment No. 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

⁷³ Harries J. and others, 'Delays in Women Accessing Post-Abortion Care in South Africa: A Qualitative Study.' [2019] (16)(1) *Reproductive Health*; 43

⁷⁴ Ibid

⁷⁵ Center for Reproductive Rights, 'Victory for Women's Rights: Nigerian Federal High Court Affirms Right to Safe Abortion for Survivors of Sexual Violence' <<https://reproductiverights.org/victory-womens-rights-nigerian-federal-high-court-affirms-right-safe-abortion-survivors-sexual-20RJIF>> accessed 29 September 2025

5. Recommendations

Historically, abortion laws have arguably been moralistic.⁷⁶ They were introduced because abortion was considered a sin and was meant to punish and deter individuals from receiving and providing abortion services.⁷⁷ True, abortion law did sometimes offer protection to women because abortion in times past was dangerous and many died from it.⁷⁸ But advancement in medicine and science have made the procedure safer. So, punitive abortion laws at present can only serve to protect the foetus.⁷⁹ Unfortunately, they do not always serve this purpose. There are empirical evidence to show that rather than discourage abortions, restrictive abortion laws often increase unsafe abortion in clandestine surroundings.⁸⁰ Whereas, liberalization reduces maternal mortality and unsafe abortions. Thus, even where sweeping liberalization is politically impossible, efforts can be made to pursue incremental statutory reforms and exceptions such as in cases of rape, incest, severe foetal anomaly, or threats to mental health. This can reduce harm and create legal precedents that pave the way for broader change. This seems to be the case in Nigeria.⁸¹ As already indicated, it is hoped that this will receive some attention at the Nigerian Supreme Court. The Maputo Protocol's language and General Comments that authorise abortion in certain circumstances can be deployed to support such targeted reforms.

In addition, although adopting a non-personhood or woman centric approach to foetal personhood may be difficult in patriarchal Sub-Saharan African countries, a potential approach to foetal personhood could be to adopt the intermediate approach. The focus here will be striking a balance between the right of the foetus if any, and the reproductive rights and autonomy of the pregnant woman. The doctrine of proportionality and rights balancing could be channelled to achieving this purpose. This doctrine advocate for interpretative approaches that place foetal interests within a proportionality analysis, where the state's interest in foetal protection must be balanced against a pregnant person's rights to life, health, privacy, dignity and equality. Such an approach allows courts to weigh competing rights rather than treating foetal personhood as absolute. This is particularly suitable where constitutions protect life without explicit gestational limits.

6. Conclusion

Foetal personhood remains a contested conceptual and doctrinal terrain. African legal responses range from restrictive criminal schemes which are often rooted in colonial codes and conservative social norms, to progressive statutory regimes that prioritise women's rights and public health. The

⁷⁶ Mufizal M. A. 'Moral Dilemmas in Abortion: Conflicting Duties, Rights and Consequences' [2025] (9)(7) *International Journal of Research and Innovation in Social Science*; 271

⁷⁷ Agnew A. J. 'A Philosophical Look into the Morality and Legality of Abortion' [2024] *Honors College Theses*; 967

⁷⁸ Kumbeni M.T. and others, 'The Role of Restrictive Abortion Laws on Modern Contraceptive Use in Sub Saharan Africa' [2025] (5)(7) *Public Health*; 10

⁷⁹ *Ibid.*

⁸⁰ Gbadamosi O. 'Abortion Law in Nigeria: Interrogating Reforms towards Liberalization' in Charles Ngwena, Ebenezer Duroye, Satang Nabaneh and Nakatha Murungi (eds), *Abortion Law Reform in Africa: A Reproductive Health and Rights Perspective*, (Pretoria University Law Press 2025), 188

⁸¹ Adejumo O. A. 'Demystifying legal restrictions on Abortion in Nigeria: Time to Change the Narrative' by [2024] 24 *AHRLJ* 559

choice between absolutist, relational, woman-centric or balancing approaches is ultimately political and normative, but law has tools that can be used to reduce harm while engaging competing values such as statutory reforms, progressive judicial interpretations of constitutional protection of the right to life, public-health evidence and regional human-rights instruments like the Maputo Protocol are mutually reinforcing pathways for liberalisation.

The doctrine of foetal personhood is a powerful normative and doctrinal force in debates about abortion law across Sub-Saharan Africa. In full foetal personhood jurisdictions, liberalization of abortion law is highly constrained. Legislators are reluctant to enact permissive statutes for fear of electoral backlash or religious opposition. In contexts where religious or strong faith-based movements are politically organised, personhood language can block reform coalitions. However, where laws and courts adopt balancing, proportionality, and health-centred reasoning, reform is possible and can yield measurable public-health benefits. The Maputo Protocol and comparative experiences from Ethiopia and South Africa provide persuasive legal and policy models that show that African states can protect women's rights and health while navigating contested moral terrain.