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The criminalisation of abortion in Uganda: Understanding Article 22(2) of the Constitution of Uganda in light of its drafting history

Abstract: Article 22(2) of the Constitution of Uganda (1995) provides that "[n]o person has the right to terminate the life of an unborn child except as may be authorised by law." It is different from the approaches taken in some African countries such as in Somalia, Kenya and Eswatini where the constitutions expressly provide for some of the grounds on which a pregnancy can be terminated. Parliament has not yet enacted legislation to give effect to Article 22(2). Hence, sections 130–132 of the Penal Code Act (1950) still criminalise attempts to procure abortion; procuring miscarriage; and supplying drugs to procure abortion. However, section 207 of the Penal Code Act allows abortion as a "surgical operation" to save the life of the mother. The Supreme Court of Uganda has explained different rules of constitutional interpretation. Referring back to the drafting history of the Constitution is one of those rules. There are different rules of constitutional interpretation the reliance on which could lead to a different outcome when interpreting Article 22(2). In this article, I rely on the drafting history of the Constitution to argue that Article 22(2) should be interpreted as permitting abortion for the purpose of saving a woman's life even if it is not done as a surgical operation. Thus, I disagree with the Constitutional Court's decision in *Human Rights Awareness Promotion Forum and Others v Attorney General* (2025), in which the Court held that the drafting history of Article 22(2) suggests that abortion is only legal if committed as a surgical procedure to save the life of a mother. I also argue that abortion on other grounds such as where a foetus has serious abnormalities and that the pregnancy was as a result of a criminal act such as rape, defilement or incest has to be legalised by Parliament expressly. Thus, the argument that Article 22(2) should be interpreted as legalising abortion on common law grounds is not supported by its drafting history.

Keywords: abortion, termination of pregnancy, saving life of a woman, grounds, Article 22(2), supplying drugs

1. Introduction

The Constitutional Court of Uganda observed that "abortion is a very controversial matter which attracts strong views from both sides of the divide."[1] It went ahead to explain those strong views.[2] Article 22(2) of the Constitution of Uganda (1995) provides that "[n]o person has the right to terminate the life of an unborn child except as may be authorised by law." Its drafting history shows that the Constituent Assembly delegates decided not to expressly mention the grounds on which a woman may be permitted to terminate a pregnancy. They empowered Parliament to provide for those grounds. Thus, Article 22(2) does not mention the grounds on which a pregnancy can be terminated. It is different from the approaches taken in some African countries such as in Somalia,[3] Kenya,[4] and Eswatini,[5] where the constitutions expressly provide for some of the grounds on which a pregnancy can be terminated. Parliament has not yet enacted legislation to provide for the circumstances in which a woman can terminate her pregnancy. Hence, sections 130–132 of the Penal Code Act (1950) still criminalise attempts to procure abortion[6]; procuring

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[1] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

[2] Ibidem, 105–106.

[3] Article 15(5) of the Constitution of Somalia 2012 provides that "Abortion is contrary to Shari'ah and is prohibited except in cases of necessity, especially to save the life of the mother."

[4] Article 26(4) of the Constitution of Kenya 2010 provides that "[a]bortion 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."

[5] Section 15(5) of the Constitution of Eswatini 2005 provides that "[a]bortion is unlawful but may be allowed[:] (a) on medical or therapeutic grounds including where a doctor certifies that[:] (i) continued pregnancy will endanger the life or constitute a serious threat to the physical health of the woman; (ii) continued pregnancy will constitute a serious threat to the mental health of the woman; (iii) there is serious risk that the child will suffer from physical or mental defect of such a nature that the child will be irreparably seriously handicapped; (b) where the pregnancy resulted from rape, incest or unlawful sexual intercourse with a mentally retarded female; or (c) on such other grounds as Parliament may prescribe."

[6] Section 130 provides that "[a]ny person who, with intent to procure the miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means, commits a felony and is liable, on conviction, to imprisonment for a term of fourteen years."

miscarriage[7]; and supplying drugs to procure abortion.[8] However, section 207 of the Penal Code Act allows abortion for surgical reasons.[9] Relying on the drafting history of the Constitution, I argue that Article 22(2) permits abortion for the purpose of saving a woman's life even if such abortion is not conducted as a surgical operation. This implies that sections 130–132 of the Penal Code are unconstitutional if they are interpreted to criminalise the acts therein to facilitate abortion for the purpose of saving a woman's life. It is also argued that abortion on other grounds such as where a foetus has serious abnormalities or where the pregnancy was as a result of criminal acts such as rape, defilement or incest, has to be legalised by Parliament expressly.[10] Hence, they are not permitted based on reading Article 22(2) in the light of its drafting history. Thus, the argument that Article 22(2) should be interpreted "expansively" to allow abortion on common law grounds is not supported by the drafting history.[11] Likewise, it is also not supported by the Supreme Court's understanding of the "cut-off" year for English common law to be directly applicable in Uganda. This so because the case of *Rex v. Bourne*[12] in which the English court defined the word "life" expansively to include "health" or "mental health" was decided in 1938 yet the cut-off year for English law to be applicable in Uganda is 1902.[13] Hence, the view that the case

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[7] Section 131 provides that "[a]ny woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means, or permits any of those things or means to be administered to or used on her, commits a felony and is liable, on conviction, to imprisonment for a term of seven years." For the interpretation of a similar provision in the Zambian Penal Code, see *Violet Zulu v The People* (HPA/20/2025) [2026] ZMHC 14 (16 January 2026).

[8] Section 132 provides that "[a]ny person who unlawfully supplies to or procures for any person any thing, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, commits a felony and is liable, on conviction, to imprisonment for a term of three years."

[9] Section 207 provides that "[a] person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his or her benefit, or upon an unborn child for the preservation of the life of the mother, if the performance of the operation is reasonable, having regard to the state of the patient at the time, and to all the circumstances of the case."

[10] For a contrary view, see Charles Ngwena, "Taking Women's Rights Seriously: Using Human Rights to Require State Implementation of Domestic Abortion Laws in African Countries with Reference to Uganda," *Journal of African Law*, no. 60 (2016): 110–140 where it is argued that abortion on several grounds is permissible under common law.

[11] This argument is made by Ngwena (Ibidem).

[12] *Rex v. Bourne* [1939] 1 K. B. 687; 3 All E. R. 615 (1938).

[13] In *Professor Isaac Newton Ojok v Uganda* (Criminal Appeal 33 of 91) [1993] UGSC 32 (18 June 1993) pp. 11–12, the Supreme Court held that "[i]t would therefore be appropriate to ascertain how far this court may refer to the English common law. It is clear that

of *Rex v Bourne* "would form part of body of common law applicable to Uganda"[14] ignores that above cut-off year and is not accurate. Before discussing the drafting history of the Constitution, it is important to briefly illustrate the rules of constitutional interpretation. This will demonstrate that relying on the drafting history of the Constitution is not the only rule of constitutional interpretation. It is just one of the rules.

2. Rules of constitutional interpretation

The Supreme Court and the Constitutional Court of Uganda have explained different rules of constitutional interpretation. For example, in *Attorney General v Kabaziguruka*,[15] the Supreme Court referred to its previous decisions and those of the Constitutional Court and summarised the eight rules of constitutional interpretation. It held that:

> [1] The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency [...] [2] In determining the constitutionality of a legislation, its purpose and effect must be considered. Any legislation is always animated by an object the Legislature intends to achieve [...] [3] The rule of harmony, completeness and exhaustiveness has to be taken into account. This rule is to the effect that the entire Constitution has to be read together as an integral whole, with no particular provision destroying the other

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the Judicature. Act (34 of 1962) provided in Section 2(2)(b) that the common law could be applied as it existed on 11th August 1902. The Judicature Act (Chapter 11 of 1967) in Section 3(2)(b) does not have that date in 1902. But in Section 3(5) the common law is defined as meaning those Parts of the law of Uganda, other than the written law, the applied law, the customary law observed and administered by the High Court as the common law and doctrines of equity respectively, immediately before the commencement of the Act namely 14th June 1967. In that case presumably the common law which had become the law of Uganda must have been the common law as on the 11th August 1902, or as modified. For under Section 3(3) of the Act of 1967 (the same as the proviso in Section 2(2) of the Act of 1962), the common law is to be in force only in so far as the circumstances of Uganda and its people permit, and subject to such qualifications as circumstances may render necessary. This provision has enabled the courts in Uganda to observe the modifications of the common law since 1902, and if the common law of 1902 is found wanting, it has not been adopted."

[14] *Human Rights Awareness Promotion Forum and Others v Attorney General*, para. 107 (Justice Luswata).

[15] *Attorney General v Kabaziguruka* (Constitutional Appeal 2 of 2021) [2025] UGSC 1 (31 January 2025).

> but each sustaining the other [...] [4] A constitutional provision containing a fundamental human right is a permanent provision intended to apply for eternity; therefore, it should be accorded dynamic, progressive, liberal, and flexible, construction; keeping in view the ideals cherished and approved of by the people, as well as their social, economic, and political cultural values so as to extend the benefit of the same to the maximum possible [...] [5] Where words or phrases are clear and unambiguous, they must be accorded their primary, plain, ordinary or natural meaning [...] [6] Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous, a liberal, generous, or purposeful interpretation should be given to it.[16]

Rule 7 of the Constitutional interpretation, on which this article relies, is to the effect that "The history of the country and the legislative history of the Constitution is also relevant and useful guide to constitutional interpretation."[17] Rule 8 states that where necessary, a court interpreting the Constitution has to consider the National Objectives and Directive Principles of State Policy which are included in the Constitution.[18] The Court also held that "[i]n interpreting provisions of the Constitution, regard shall also be had to the obligations under international treaties to which Uganda has acceded as a dualist State by virtue of ratifications."[19] The Constitutional Court has also considered the religious beliefs of Ugandans when interpreting the Constitution. For example, in *Human Rights Awareness Promotion Forum and Others v Attorney General*[20] the Constitutional Court held that Article 22(2) of the Constitution cannot be interpreted as permitting "abortion on demand" as doing otherwise would be contrary to the teachings of Christianity and Islam.[21] This is so because "Christian and Islamic teachings dominate Uganda's moral discourse."[22] Thus, there are different rules of constitutional interpretation. The reliance on one of them could lead to a different outcome when interpreting Article 22(2). For example, international human rights bodies such as the Committee on Economic, Social and Cultural Rights[23]

[16] Ibidem, 22–23.

[17] Ibidem, 23.

[18] Ibidem.

[19] Ibidem.

[20] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

[21] Ibidem, 124, 148.

[22] Ibidem, 148.

[23] E/C.12/UGA/CO/1 (CESCR 2015) para. 35: "The Committee recommends that the State party revise its abortion legislation, including by considering decriminalizing

and the CEDAW Committee,[24] have called upon Uganda to provide for more grounds on which abortion could be permitted. Thus, if one follows the rule of constitutional interpretation to the effect that "[i]n interpreting provisions of the Constitution, regard shall also be had to the obligations under international treaties to which Uganda has acceded as a dualist State by virtue of ratifications," the inevitable outcome is that Article 22(2) should be interpreted to comply with Uganda's international human rights obligations as explained by the treaty enforcement bodies. For example, this is the approach that the minority followed in *Human Rights Awareness Promotion Forum and Others v Attorney General*[25] when they held that Uganda has an obligation in international and regional human rights instruments to ensure that women and girls have access to abortion on grounds including rape, incest, sexual assault, and where the continued pregnancy endangers the life, mental and physical health of the mother, or the foetus.[26] However, there are instances in which the Constitutional Court has expressly refused to follow the jurisprudence of international human rights treaties when interpreting the Constitution. For example, in *Women's Probono Initiative v Attorney General*,[27] the petitioners argued that polygamy was unconstitutional and contrary to Uganda's international human rights obligations. In dismissing this argument, Justice Margaret Tibulya, writing for the unanimous Constitutional Court, held that:

> I noted the petitioner's submission that the Human Rights Committee in paragraph 24 of General Comment No. 28 to the Intonational [sic] Convention on Civil and [P]olitical [R]ights

abortion and providing for exceptions to the general prohibition on abortion in certain cases. It should also raise awareness on the legal exceptions among women and medical health-care personnel and ensure women's access to abortion and post-abortion care services without discrimination in order to combat the prevalence of unsafe and illegal abortions."

[24] The CEDAW Committee called upon Uganda to "address the high mortality rate" in the country by, among other things, "adopting the legislation envisaged in Article 22 (2) of the Constitution, on the termination of pregnancy, in order to legalize abortion in cases of rape, incest, risk to the life or health of the pregnant person and severe fetal impairment, ensuring that abortion is decriminalized in all other cases and lifting the moratorium on the implementation of the Standards and Guidelines on Reducing Maternal Morbidity and Mortality from Unsafe Abortions." See CEDAW/C/UGA/CO/8-9 (CEDAW 2022) para. 42(a)(iii).

[25] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

[26] Ibidem, 101–105.

[27] *Women's Probono Initiative v Attorney General* (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025).

> (ICCPR), stated that polygamy is incompatible with the principle of equality of treatment with regard to the right to marry. Based on the law and the jurisprudence cited above, it is my view that the committee's opinion is flawed. In any event the Human Rights Committee's opinion is not binding on this court.[28]

In *Human Rights Awareness Promotion Forum and Others v Attorney General*[29] the majority held that international law does not obligate Uganda to provide "abortion on demand" since Uganda made a reservation when ratifying the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).[30] Article 14(2)(c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa requires states parties to take appropriate measures to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." At the time of ratifying the Protocol, the Ugandan government made a reservation on Article 14(2)(c) to the effect that "[t]he State is not bound by this clause unless permitted by domestic legislation expressly providing for abortion."[31] The effect of this reservation is that Article 14(2)(c) is subject to domestic law on abortion. This view has also been expressed by the Constitutional Court. In *Human Rights Awareness Promotion Forum and Others v Attorney General*,[32] in his separate decision concurring with the lead majority decision, Justice Kawuma observed:

> It is correct to argue that as a state party to the respective international and regional human rights instruments, Uganda is obligated to fulfil the requirements of such arrangements. The "right

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[28] Ibidem, para. 43. For a detailed discussion of this case, see Jamil Ddamulira Mujuzi, "The Constitutionality of Polygamous Muslim Marriages in Uganda: A Comment on *Women's Probono Initiative v Attorney General* (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025)," *Jurnal HAM*, no. 17 (2026): 21–34.

[29] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

[30] Ibidem, 232.

[31] See https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_WOMEN_IN_AFRICA.pdf (accessed 21 November 2025).

[32] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

> to abortion" is however not recognized in any international and regional human rights instruments [...].[33]

Likewise, in her separate decision concurring with the majority decision, Justice Mugyeni demonstrated that although Ugandan courts refer to international human rights treaties and jurisprudence when interpreting the Constitution, Uganda is not a party to any international human rights treaty that provides for the right to abortion. She also held that since Uganda made a reservation on the provision on abortion when ratifying the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Uganda does not have an obligation under that treaty to increase the grounds on which abortion is permissible. She also added that customary international law does not provide for the right to "safe abortion."[34] However, the minority decision interpreted the effect of the reservation differently. They held that:

> Respondent's counsel correctly pointed out that by placing a reservation on Article 14(2)(c) of the Protocol, the GOU [Government of Uganda] may not be bound to pass a law authorising or regulating abortion and related practices. However […], the reservation did not restrict the other provisions in Article 14 including the State's obligation to promote and respect women's right to determine whether to have children, the number of children and spacing of children, that are quite relatable to the right to abortion. When posting the reservation, the GOU clearly indicated that the reservation did not restrict any rights permitted by domestic legislations which by implication, would mean the exception in Article 22(2) of the Constitution, and the defence against a penal charge for abortion. Also, by implication, the reservation would not limit the obligations of the GOU under other international and regional instruments for which no reservations were made, as well as the rights to life and health of women as guaranteed by the Constitution.[35]

Thus, mere reliance on international law does not necessarily mean that a court will interpret legislation or the Constitution "in line" with international law. If one takes the approach of harmonisation, there is room for the argument that prohibiting a woman from terminating a pregnancy in cases such as rape, incest or where the pregnancy threatens her mental

[33] Ibidem, 232.
[34] Ibidem, 147–164.
[35] Ibidem, para. 106.

well-being contrary to her rights to human dignity and freedom not to be treated in a degrading manner. Indeed, this is the approach that the minority followed in *Human Rights Awareness Promotion Forum and Others v Attorney General*[36] when they held that a blanket ban on abortion violates the rights to life, human dignity and not to be treated in a degrading manner.[37] They added that the blanket ban did not violate the right to freedom from discrimination.[38] On the other hand, the majority interpreted Article 22(2) in light of the constitutional provisions on the rights of women, the right to a family, the right to life, freedom from discrimination and the rights of children.[39] They held that declaring sections 130–132 and 207 of the Penal Code Act unconstitutional would lead to "abortion on demand" and hence contrary to the above human rights. The facts and issues before a court will guide the court in deciding which of the above rule(s) of constitutional interpretation to invoke. Thus, not all rules are applicable in all cases. Although I am aware of these other rules of constitutional interpretation, in this article, I demonstrate how a court could rely on the drafting history of the Constitution to interpret Article 22(2). In other words, I rely on what some scholars have referred to as "intentionalism"[40] or "originalism."[41] There are cases in which the Constitutional Court[42] and the Supreme Court[43] have invoked the drafting history of the Constitution when interpreting constitutional provisions. This does not mean that this is the only

[36] Ibidem.

[37] Ibidem, 118–132.

[38] Ibidem, 133–142.

[39] Ibidem, 113–115, 133–136.

[40] See for example, Cheryl Boudreau, Mathew D. McCubbins and Daniel B. Rodriguez, "Statutory Interpretation and the Intentional(ist) Stance," *Loyola of Los Angeles Law Review*, no. 38 (2005): 2131–2146 (the authors argue, *inter alia*, there is difference between legislative intent and statutory meaning).

[41] Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford: Oxford University Press, 2007), 82.

[42] See for example, *Hon. Fox Odoi & 21 Others v Attorney General & 3 Others* (Consolidated Constitutional Petition 14 of 2023; Consolidated Constitutional Petition 15 of 2023; Consolidated Constitutional Petition 16 of 2023; Consolidated Constitutional Petition 85 of 2023) [2024] UGCC 10 (3 April 2024); *Innocent Ngobi Ndiko and Others v Attorney General and Others* (Constitutional Petition No. 23 of 2020) [2025] UGCC 11 (18 August 2025); *Kagimu v Attorney General & 2 Others* (Constitutional Petition 32 of 2018) [2025] UGCC 4 (27 May 2025); *Saleh Kamba & Anor v Attorney General & 4 Ors* (Constitutional Petition No. 16 of 2013) [2014] UGCC 5 (21 February 2014).

[43] See for example, *Male H. Mabirizi v Attorney General & Karuhanga & 5 Others v Attorney General & Uganda Law Society v Attorney General* (Constitutional Appeal 2 of 2018; Constitutional Appeal 3 of 2018; Constitutional Appeal 4 of 2018) [2019] UGSC 102 (18 April 2019); *Attorney General v Susan Kigula & 417 Ors* [2009] UGSC 6 (21 January 2009).

rule of constitutional interpretation. It is just one of the rules and it has its own weaknesses or limitations as some scholars have demonstrated.[44] Likewise, although case law[45] and legislation in some African countries have "expanded" the grounds on which a woman can be allowed to terminate a pregnancy in additional to saving her life,[46] such case law and legislation is not applicable to Uganda and Ugandan courts are not required to refer to it in interpreting the Constitution. At most, as the Supreme Court has held, such case law is persuasive and not binding.[47] The same applies to the decisions of the European Court of Human Rights[48] and the Court of Justice of the European Union.[49] This explains why, although in *Human Rights Awareness Promotion Forum and Others v Attorney General*,[50] the petitioners and the Court cited cases and laws from countries such as Kenya, Colombia, Poland, Ghana, Ethiopia, the United Kingdom, the United States of America and Rwanda in which courts or governments have increased the grounds on which abortion is allowed, the majority of the judges did not rely on that case law and legislation to declare the relevant provisions of the Penal Code Act prohibiting abortion as unconstitutional. As the Court held, it was "not persuaded that legalisation of abortion by other jurisdictions should be blindly followed by Uganda

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[44] See generally, Frank B. Cross, *The Failed Promise of Originalism* (Stanford: Stanford University Press, 2013); Morgan Marietta, *A Citizen's Guide to the Constitution and the Supreme Court: Constitutional Conflict in American Politics* (London: Taylor and Francis, 2014); Mark J. Boone and Mark D. Eckel (eds.), *Originalism in Theory and Law: Comparing Perspectives on the Bible and the Constitution* (London: Bloomsbury Publishing, 2024).

[45] Section 243 of the Penal Code of Malawi is similar to section 207 of the Penal Code Act of Uganda and provides that "A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case." In *S (on the Application of HM (guardian) on behalf of CM (minor)) v Hospital Director of Queen Elizabeth Central and Another* (Judicial Review Cause 3 of 2021) [2021] MWHC 385 (15 June 2021), the High Court of Malawi held that saving a woman's life includes saving her mental or physical health.

[46] See for example, Section 4 of the Termination of Pregnancy Act (Zimbabwe); section 3 of the Abortion and Sterilization Act 2 of 1975 (Namibia); Article 3 of the Ministerial Order for Conditions to be Satisfied for a Medical Doctor to perform an Abortion (Ministerial Order 2 of 2019) (Rwanda).

[47] See for example, *Ssebanakita v Fuelex (U) Limited* (Civil Appeal 4 of 2016) [2017] UGSC 90 (6 October 2017) (Indian case law); *Aharikundira v Uganda* [2018] UGSC 49 (3 December 2018) (Nigerian case law).

[48] *Attorney General v Susan Kigula & 417 Others* [2009] UGSC 6 (21 January 2009).

[49] *Humphrey Nzeyi v Bank of Uganda and Attorney General* (Constitutional Appeal No. 01 of 2021) [2025] UGSC 20 (14 May 2025).

[50] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

without considering the unique social, constitutional and cultural context of Uganda."[51] We now turn to the discussion of the drafting history of Article 22(2) of the Constitution.

3. The drafting history of Article 22(2) of the Constitution

3.1. Introductory remarks

In 1988, the Ugandan government started the process of enacting a new constitution to replace the 1967 Constitution. As a result, it established the Constitutional Commission. The Commission was headed by Mr Benjamin Odoki and that is why it was also known as the "Odoki Commission." The Odoki Commission travelled to different parts of Uganda and gathered peoples' views on the issues they wanted to be addressed in the new constitution. The Commission included these views in its report. In its report, the Odoki Commission wrote that in pre-colonial Uganda, the right to life was respected and that "[a]bortion was either unknown or very severely punished."[52] On the issue of the rights of children, the Odoki Commission wrote that "[m]any views strongly condemned abortion and wanted it to be severely punished by law. Other views, especially from women, wanted the issue to be nationally debated in order to reach a consensus decision on the issue."[53] However, in its recommendations, the report was silent on the issue of abortion. The above extracts from the report show that Ugandans were not unanimous on the issue of abortion. Although "many" opposed it, some thought that the issue should be debated. However, the report is silent on the exact views each group advanced to justify their positions. It is also silent on the exact number of people who opposed increasing the grounds on which abortion could be permitted. It is not clear whether those who opposed or supported abortion included religious leaders or human rights activists respectively. The Draft Constitution, which was prepared by the Odoki Commission for debate and eventual promulgation by the Constituent Assembly, was also silent on the issue of abortion. Clause 52, the provision on the right to life, was limited to the circumstances in which the death sentence could be imposed and executed.[54] We now turn to the Constituent Assembly

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[51] Ibidem, 117.

[52] *Report of the Uganda Constitutional Commission: Analysis and Recommendations* (1992) para. 7.18(a).

[53] Ibidem, para. 7.142(c).

[54] Clause 52 of the Draft Constitution provided that: "(1) No person shall be deprived of life intentionally except in execution of a sentence of a court of law in a fair trial in

debates in which the issue of abortion was discussed before including Article 22(2) in the Constitution.

3.2. The Constituent Assembly debates

The Constituent Assembly dealt with the Draft Constitution in two stages. The first stage dealt with the "general debates." This was before the delegates embarked on debating specific provisions of the draft constitution (the second stage). During the "general debates," the delegates explained the issues their constituencies expected them to address. At this stage, only three delegates made submissions on the issue of abortion. The limited number of submissions on this issue at this stage could be attributed to the fact that the Draft Constitution did not include a provision on abortion. The first delegate argued that the people he represented asked him to emphasise that even before birth, people have rights that have to be protected by the government and that is why abortion is prohibited.[55] The second one argued that the "culprits" of "illegal abortion" should be given "very stiff penalties."[56] However, the delegate did not clarify what he meant by these terms. The final one submitted that the issue of abortion was "controversial" and asked members to discuss it.[57] However, since the "general debates" were not meant to discuss specific draft provisions, the issue was not discussed then. It was discussed during the second stage. It is important to note that the few submissions made during the general discussion showed that the debate on abortion was likely to be heated. This was indeed the case during the second stage.

As mentioned above, although clause 52 of the Draft Constitution provided for the right to life and the circumstances in which it could be taken away, it was silent on the issue of the right to life of an unborn child. During the debates on clause 52, one of delegates wanted to know whether the right to life included "antenatal – life of unborn babies."[58] He added that it was not clear whether the provision permitted abortion.[59] In response, one of the delegates argued that the provision dealt with abortion

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respect of a criminal offence under the law of Uganda of which he has been convicted. (2) No law shall be made by Parliament depriving any person of the right to life except in very grave circumstances acceptable in a just and democratic society."

[55] *Proceedings of the Constituent Assembly (Official Report)* (1994–1995), 511 (Mr. Wanendeya).

[56] Ibidem, 622 (Mr. Zziwa).

[57] Ibidem, 920 (Prof. Kajubi).

[58] Ibidem, 1876 (Dr. Kabayo).

[59] Ibidem, 1876 (Dr. Kabayo).

because by terminating a pregnancy "you take a decision to kill a life."[60] Although these issues were raised, clause 52 was initially adopted without dealing with the issue of abortion.[61] In other words, it only focused on the right to life generally and the circumstances in which it could be "violated." Six days after the adoption of clause 52, the Chairperson of the Legal and Drafting, Professor Kanyeihamba, informed the Constituent Assembly that some of the delegates had approached the Committee and asked that clause 52 should be reopened so that they introduce a provision dealing "with the right to terminate the life of the unborn child."[62] He added that his committee "advised against that Amendment having explained very fully the circumstances why it was rejected but the […] members insisted that they would bring it to the Plenary Session."[63] Since the delegates had other substantive provisions to deal with,[64] the amendment was only introduced for discussion four days later when the delegates were debating the clause on the rights of children.[65]

The proposed amendment, introduced by Dr. Miyingo, was to the effect that "[n]o person has a right to terminate the life of the unborn child, except on medical grounds or when the life of the mother is at risk."[66] This will be referred as the first proposed amendment. After that amendment was read-out, the Chairperson of the Constituent Assembly submitted that the version in his possession was different from that the delegate had tabled. His version was to the effect that: "[n]o person has the right to terminate the life of an unborn child, except on medical grounds or when the life of the mother is at risk or both." In other words, the amendment was "dropping the words 'or both'."[67] In response, Dr. Miyingo clarified that:

> Mr. Chairman, "or both" had been put by the technical staff because we had put in words "and/or" which they said was not acceptable in legal terms. So, they had included both to cater for medical grounds and then the life of the mother. But after consideration, we found that even if we left out "both," it would still carry the meaning. So, "both"... is removed.[68]

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[60] Ibidem, 1876 (Mr. Waswa).
[61] Ibidem, 1895 (2 September 1994).
[62] Ibidem, 1974 (Prof. Kanyeihamba, 8 September 1994).
[63] Ibidem, 1974 (Prof. Kanyeihamba).
[64] Ibidem, 1974–2028.
[65] Ibidem, 2029 (12 September 1994).
[66] Ibidem, 2029 (Dr. Miyingo).
[67] Ibidem, 2029 (Chairperson).
[68] Ibidem, 2029.

The Legal and Drafting Committee confirmed that the words "or both" had been deleted.[69] This will be referred to as the second amendment. The Chairman asked Dr. Miyingo to explain why the amendment was necessary. Dr. Miyingo argued that the amendment was necessary because there was a need to protect the life of an unborn child. He added that:

> [W]e are trying to promote and protect the rights of the child, we must, therefore […] discourage all measures that seem to interrupt and stop the delivery of a child into this world. Hon. Delegates, you will all realise that the biological processes that lead to the formation of the child are not accidental. The acts that lead to the formation of the child are mutually agreed upon by two people and whom nature and God favour and they get a gift out of it. Then, it is really absurd […] for one to turn around and destroy the very gift of their labour. (*Laughter*) […] [W]e are not advocating that we should not have family planning or we should not have birth control. In fact, we are advocates of family planning. All we are saying is that abortion should not be the way to control or to plan the family. We know there are many other ways which we support, like the pill, the coil and the natural means of birth control and we support these.[70]

He added that although the amendment was meant to protect the life of an unborn child, there were exceptions. In particular, "the life of the unborn child should not be interrupted unless there are medical grounds which indicate that either the mother or the unborn child is at risk."[71] He explained that there were "many reasons why abortion should not be encouraged." He mentioned religious and moral reasons.[72] He added that permitting people to terminate pregnancies "indiscriminately" had the potential of leading to depopulation and the "killing" of many future leaders.[73] He added that the amendment was needed to "protect these [unborn] persons whose life can terminated by people who are just selfish to themselves."[74] He argued that some countries were facing declining populations and that Uganda should avoid following that route.[75]

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[69] Ibidem, 2029 (Mr. Wacha).
[70] Ibidem, 2030 (Dr. Miyingo).
[71] Ibidem, 2020 (Dr. Miyingo).
[72] Ibidem, 2030 (Dr. Miyingo).
[73] Ibidem, 2030 (Dr. Miyingo).
[74] Ibidem, 2030 (Dr. Miyingo).
[75] Ibidem, 2030 (Dr. Miyingo).

After the above "motivations," the Chairperson asked other delegates to make submissions on the proposed amendment. Some supported it whereas others opposed it. Those who supported it argued that it was necessary because abortion was mostly committed by secondary school students who feared being expelled from schools, would lead to the killing of "people with potential," and that the unborn child had not "committed any crime."[76] Another delegate argued that although he supported the amendment, he disagreed with the view that abortion was mostly committed by schoolgirls. According to him, statistics showed that it was mostly committed by married women.[77] Another delegate argued that before he decided whether or not to support the amendment, its sponsors had to first clarify what they meant by their arguments that a woman could terminate the pregnancy when her life was at risk and or on "other medical grounds."[78] He wanted them to explain the meaning of "other medical grounds." The co-sponsor of the Amendment explained the above phrase in the following terms:

> [C]urrently doctors have been conducting abortions. I am informed they have not been doing it under the Law as part of treatment. That is called therapeutic abortion. When you feel that the mother, by continuation of that pregnancy, is seriously at risk; we have got medical conditions – like if somebody has got a severe heart failure. The continuation of that pregnancy will end up in the death of the mother and of course, the child. So, that is a medical ground for a doctor to conduct an abortion. Two, when there are some congenital abnormalities in the foetus and you feel that this foetus will not be born and be a useful person. We have got some genetic abnormalities, some syndromes which occur in a foetus and which fortunately enough we can now detect with the current technology which is available.[79]

Another delegate, Prof. Nsibambi, supported the above amendment but added that the provision should be strengthened to prohibit abortion generally and to include another ground on which abortion could be permitted to the effect that "except where the said pregnancy is a result of rape when the life of the mother is at stake."[80] This is referred to as the third proposed amendment. However, the Chairperson of the

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[76] Ibidem, 2031 (Mr. Romushana).
[77] Ibidem, 2031 (Mr. Tumwine).
[78] Ibidem, 2031 (Mr. Eresu Elyanu).
[79] Ibidem, 2032 (Dr. Mugyenyi).
[80] Ibidem, 2032 (Prof. Nsibambi).

Constituent Assembly argued that Prof. Nsibambi's proposed amendment did "not make sense in terms of legal drafting."[81] He asked one of the delegates, who was a lawyer, to suggest the best way in which Prof. Nsibambi's proposed amendment could be better integrated in the earlier version suggested by the Legal and Drafting Committee (the first proposed amendment). The delegate, instead of integrating Prof. Nsibambi's proposed amendment with the one of the Legal and Drafting Committee, added a new ground on which abortion could be allowed. His proposed amendment was to the effect that: "[n]o person has a right to terminate the life of an unborn child except on medical grounds or when the life of the mother is at risk or when the conception was a result of a criminal act."[82] He added that for a woman to be allowed to terminate a pregnancy, "the conception should not have been out of rape [only] but also other criminal acts like defilement and something like that."[83] This is referred to as the fourth proposed amendment. The Chairperson of the Constituent Assembly fine-tuned the fourth proposed amendment.[84] He explained that the general rule was that abortion was prohibited and that the fourth proposed amendment created two exceptions to that rule.[85] However, the mover of the fourth amendment clarified that it created three and not two exceptions. These were that a pregnancy could be terminated on any of the following three grounds: medical grounds; when the life of the child is at risk; or when conception was a result of rape or another criminal act.[86]

After the fourth amendment was clarified, the Chairperson of the Constituent Assembly asked the mover of the third amendment, Prof. Nsibambi, to explain why rape had to be expressly mentioned in the Constitution.[87] Prof. Nsibambi explained that rape was dehumanising and humiliating and that there was a risk that the victim could be infected with HIV.[88] The Chairperson of the Constituent Assembly asked delegates

[81] Ibidem, 2032.

[82] Ibidem, 2032 (Mr. Kirenga).

[83] Ibidem.

[84] Ibidem, 2032–2033. He fine-tuned it to read as: "No person has the right to terminate the life of an unborn child except: (a) on medical grounds or when the life the mother is at risk; (b) in the case of rape or criminal conduct." He explained the rationale behind the suggested changes: "Then you would have two legs to it. The (a) and (b) both being exceptions in their own right."

[85] Ibidem, 2033.

[86] Ibidem, 2033 (Mr. Kirenga).

[87] Ibidem, 2033.

[88] Ibidem. He explained: "As you all know, rape is dehumanising; it is also humiliating. Worse still, because of the problem of rape, it is more dangerous these days for obvious reasons. The scourge of AIDS, as you know, has already done a lot of harm to this country. That is why I am asking Hon. Members to include rape as a condition under which termination of pregnancy should be allowed."

to support or oppose Prof. Nsibambi's proposed amendment. Some of the delegates opposed the third proposed amendment on the ground that terminating a pregnancy on the basis of rape was unjustified as "the aim of the rapist is not to get a child,"[89] it was not always easy to determine that the pregnancy was a result of rape[90]; allowing the termination of pregnancy on the ground of rape would be tantamount to "giving free license to our youngsters to engage in sex before marriage" because they know the abortion was permissible[91]; and that one could not rule out the possibility of some girls and women who had consensual sex to falsely allege that they were raped in order to justify the termination of pregnancies.[92] The third proposed amendment was also opposed on the ground that cases of rape and defilement were covered in the first proposed amendment.[93]

Those who supported the third proposed amendment argued that rape could be proved both "medically" and legally"[94]; and that rape and defilement were on the increase especially in politically instable areas where girls and women had been abducted and defiled or raped by rebels.[95] Others supported the third proposed amendment on condition that it had to be amended to addressed their concerns. For example, one of the delegates argued that it had to be made more specific. He submitted that although he supported abortion on the ground of rape, he opposed it on the ground of "any criminal act." He argued that the "addition make[s] the provision too wide" and included many criminal acts such as adultery.[96] In response to this concern, the mover of the fourth proposed amendment, who had added the words "any criminal act" to the third proposed amendment clarified that by "any criminal act," he meant defilement.[97] Thus, the provision was to be amended to provide for "rape or defilement." This is referred to as the fifth proposed amendment.

[89] Ibidem, 2033 (Mr. Okalebo). He argued that "the aim of a rapist is not to get a child. So […] we cannot begin discriminating as to the cause of life. The objective of this Article is to protect life regardless of its cause and we cannot begin ascertaining as to how and when life came in a proper manner – whether by rape or not. So, Mr. Chairman, when we begin doing this, we shall find difficulties in implementing the Law because we shall first of all go up to the root of how that life came into existence. If we were to protect life of an unborn child, let us not look at how it came into being but protect the life of a child. So, this Amendment […] is not effective. It is not proper as it goes ahead to destroy the very objective of protecting life."

[90] Ibidem, 2033 (Mr. Loote).

[91] Ibidem, 2034 (Rev. Father Batanyende).

[92] Ibidem.

[93] Ibidem, 2035 (Mr. Chebet Maikut).

[94] Ibidem, 2033 (Prof. Nsibambi).

[95] Ibidem, 2033 (Mrs. Lagada).

[96] Ibidem, 2034 (Mr. Njuba).

[97] Ibidem, 2034 (Mr. Kirenga).

In light of this argument, the Chairperson of the Constituent Assembly asked delegates to express their opinions on this additional amendment which proposed to replace the words "any criminal act" with defilement.[98] The delegates opposed replacing "any criminal act" with defilement on the ground that it would be too restrictive as there were other criminal acts, such as incest[99] and concealment[100] that could lead to pregnancy. In other words, "substituting the words ['any criminal act'] with defilement will be narrowing it too much."[101] Another delegate argued that he was opposed to specifying any grounds of abortion in the Constitution. As he put it:

> I believe we are supposed to make the fundamental law. I would have thought or I would like to recommend to the Movers of the Motion that we make a generic constitutional provision for parliament to make laws governing the unborn child. If we go into details, we are pre-empting medical technology whereby these days babies are even made in a test tube in a laboratory. How do you govern such a situation? [...] I believe that the women who bear these children have a right to their bodies. They are the final custodians. They make the child, they have the right to dispose of it. It is a matter of choice.[102]

He added that it was better for the delegates to make "a generic or omnibus Constitutional Provision governing the unborn child."[103] This is referred to as the sixth proposed amendment. By suggesting that the provision should not specify any ground(s) of abortion, it had the effect of affecting all the first five proposed amendments. One of the delegates opposed the sixth proposed amendment on the ground that sexual relationship being a "joint venture" between a man and woman, the woman had no "right" to terminate the pregnancy without consulting with the man.[104] In partial support of the sixth proposed amendment, one of the members of the Legal and Drafting Committee argued that:

> [W]hen this matter came before the Legal and Drafting Committee we advised that abortion essentially was not a Constitutional matter. Our view was that this matter has been covered by the Penal

[98] Ibidem, 2034.
[99] Ibidem, 2034 (Mr. Masika).
[100] Ibidem, 2035 (Mr. Mayanja).
[101] Ibidem, 2035 (Chairperson of the Constituent Assembly).
[102] Ibidem, 2035 (Mr. Awori).
[103] Ibidem.
[104] Ibidem, 2035 (Brig. Kyaligonza).

> Code, although the Penal Code does not cover the exceptions – the exceptional grounds of medical abortion. We were of the opinion that if the matter came before Parliament, these exceptions could be provided for. That still [...] is our opinion. (*Applause*).[105]

After the above submission, the Chairperson of the Constituent Assembly asked delegates to finalise their submissions on the fifth proposed amendment.[106] In their submissions, however, they addressed both the proposed fifth and sixth amendments concurrently. Thus, the delegates invoked the sixth proposed amendment as the reason to object to the fifth proposed amendment. For example, one delegate argued that he opposed the fifth proposed amendment because stipulating the grounds of abortion in the constitution would be "too restrictive" and that it was better to allow Parliament to provide for "exceptions" to the general rule prohibiting abortion.[107] Another delegate also argued that she opposed the fifth amendment on the ground that the people she represented would not support abortion simply because a woman was raped. According to her, even in cases of rape, "abortion is still abhorrent and the rights of the unborn child should also be protected."[108] She suggested that the issue should be "deferred" and allow Parliament to deal with it carefully after considering submissions from different stakeholders.[109] Since many submissions had been made on the fifth amendment, the Chairperson of the Constituent Assembly informed the delegates that time was running out as they had other provisions to consider. He asked them to either endorse the fifth amendment or the sixth amendment subject to further deliberations on the latter. The majority rejected the fifth amendment. This meant that the debate on the sixth amendment had to continue.[110] At this stage, there was no suggestion to specifically discuss the first to the fourth amendments. This could be explained by the fact that they had been integrated into the sixth amendment. When the Chairperson of the Constituent Assembly opened the floor for discussion on the sixth amendment, one delegate introduced what we refer to as the seventh proposed amendment. He argued that:

> [T]he Amendment I wish to move is a reflection of what a number of [d]elegates have said regarding whether we should go into

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[105] Ibidem, 2035 (Mr. Wacha).
[106] Ibidem, 2036.
[107] Ibidem, 2036 (Mr. Komakech).
[108] Ibidem, 2037 (Ms. Byanyima).
[109] Ibidem.
[110] Ibidem, 2037.

> detail as to the circumstances to justify abortion […] [W]e heard Dr. Mugyenyi indicating to us what he understood by "on medical grounds" [in the second amendment]. And to me it sounded extremely wide or too permissive depending on the [d]octor's opinion and sympathy and what he thinks is useful life to this world. So… I am moving that instead of specifying the grounds in this Article [clause], we say that Parliament shall or may make a Law to this effect. The clause should read, "No person has the right to terminate the life of an unborn child except as may be authorised by Law." So, that we give Parliament opportunity to study […] and specify circumstances under which abortion may be permitted.[111]

The above proposed amendment was seconded and the Chairperson asked delegates to make submissions on the same issue. As mentioned above, the issue of abortion was being discussed under the provision on the rights of children. One delegate explained that under the provision on the rights of children, a child had been defined as a person below the age of 18 years. He wondered whether an unborn child was included in the definition of a child "because when we count years, we count them from the date of birth."[112] Another delegate suggested that it would have been more appropriate to include the provision on abortion under the clause dealing with the "general right to life" instead of under the provision dealing with the rights of children.[113] The Chairperson of the Constituent Assembly responded that the above-mentioned submission (on dealing with the issue of abortion under the provision on the right to life) "raises a debatable situation whether the unborn foetus has a right to life as a person or we say, that it is an unborn child and therefore must be protected because childhood starts from conception until delivery. It is not very, very clear."[114]

The view that the provision on abortion should be included under the clause dealing with the right to life was supported by another delegate, who also argued that it was better to include a provision in the constitution to empower Parliament to enact legislation specifying the grounds on which a woman could be allowed to terminate her pregnancy. This was so because it was impossible to "exhaust [all] the exceptions" in the constitution.[115] He added that whichever exception was included in such

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[111] Ibidem, 2037 (Mr. Mulenga).
[112] Ibidem, 2037 (Mr. Zziwa).
[113] Ibidem, 2037 (Prof. Nabudere).
[114] Ibidem, 2038.
[115] Ibidem, 2038 (Mr. Ssekweyama).

legislation "would just serve as defence after the woman has aborted."[116] It was suggested that instead of "wasting time" discussing whether the provision on abortion should be included under the clause dealing with the rights of children or the one dealing with the right to life, it was better for the delegates to discuss the seventh proposed amendment and, if adopted, leave the issue of where it was to be placed to the Technical Committee.[117] This proposal was not opposed by any delegate. Thereafter, the delegates discussed the seventh amendment. The first delegate argued that he supported it because by including it in the Constitution, the Constituent Assembly "will have killed two birds with one stone. We shall have not given permission to anybody to carry abortion and at the same time we shall have left the responsibility to Parliament to authorize any other lawful abortion."[118] Another one also supported it because abortion was a "contentious" issue and it was better to leave it to Parliament to deal with it after consulting widely with other stakeholders.[119] After the above two submissions, the Chairperson of the Constituent Assembly stated that:

> [T]here has been an Amendment moved because this amendment drastically alters the original by knocking off those exceptions. If we pass this one then we do not proceed with the one which has been moved. In fact, it will have taken it over. Now the Question is that the Motion amending the original one by Hon. Mulenga as now it reads: "No person has the right to terminate the life of an unborn child except as may authorised by Law."[120]

The Chairperson asked the delegates to approve or reject the seventh amendment. They approved it. After that approval, he added that the adoption of the seventh amendment meant that the delegates had "disposed off [sic] the original amendment."[121] The duty was on the Technical Committee to determine where to place it "without changing the text as we have approved."[122]

A subsequent attempt to require the Technical Committee, before deciding where to place the provision on abortion, to first determine whether or not a foetus was a child, was opposed by the Chairperson

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[116] Ibidem.
[117] Ibidem, 2038 (Mr. Katureebe and the Chairman of the Constituency Assembly).
[118] Ibidem, 2038 (Dr. Nyeko).
[119] Ibidem, 2038 (Mr. Katureebe).
[120] Ibidem, 2038.
[121] Ibidem.
[122] Ibidem.

of the Constituent Assembly on the ground that it would have required the delegates to discuss the previous amendments which had provided for the grounds on which abortion was permissible.[123] The Chairperson's view was not opposed by any delegate. Thus, the seventh amendment was adopted. The Technical Committee decided to place it under Article 22 (dealing with the right to life). It was emphasised that legislation was a prerequisite for Article 22(2) to be put in effect because although the provision was enacted, "[n]obody is now going to ask for abortion anyhow, but we have got to wait for Parliament to pass the law in respect of that."[124] It was also emphasised that abortion was not to be used as a method of population control as this was prohibited by the UN population agency.[125] One of the delegates also argued that under Article 22(2), Parliament has the discretion whether or not to enact the law "legalising" abortion.[126] The delegates also agreed that there were contradictory legal and medical definitions of the terms "unborn child." That is why they did not define it in the constitution.[127]

When the provision was adopted, some national newspapers reported that the Constituent Assembly had "allowed" abortion, whereas others reported that it had "rejected" abortion.[128] Several months after the provision had been adopted, one delegate asked the Chairperson of the Constituent Assembly to reopen it and delete the words "except as may be authorised by law" so that it is amended to provide that "[n]o person has a right to terminate the life of an unborn child."[129] He motivated as to why he had moved that amendment as follows:

> [F]ar too often, the provision under the law has been abused [...]. [I]t is a well-known fact that today there are activities going on by both qualified and unqualified practitioners in the area of healers who have terminated the lives of the unborn child. We feel that every child, God's creation, should be given an opportunity to life. It is not the fault of the child [...] that some people find themselves

[123] Ibidem.

[124] Ibidem, 2134 (Mr. Atubo).

[125] Ibidem, 2215 (Mrs. Zziwa).

[126] Ibidem, 2217 (Mr. Mayanja-Nkangi). He argued that: "First, no one may take the life of a foetus. Second; anybody may take a life of a foetus if Parliament says so. Third; nobody may do so, if Parliament does not say so. Now, you see, we have got three statements, this assembly is noncommittal, it is living the whole thing to be debated by Parliament. And the words used are 'Parliament may not', 'Parliament shall'. It is not a mandatory duty on Parliament to legislate either way [...]."

[127] Ibidem, 3428, 3435–3436.

[128] Ibidem, 2217–2218 (Mrs. Zziwa).

[129] Ibidem, 5328 (Mr. Pinto).

> with what they call unwanted pregnancies. It is also on record that there are many children who were born in circumstances, let us say, where young girls were still in school and others out of wedlock who grow to be very useful citizens of this country.[130]

Before the motion could be debated, the Chairperson of the Constituent Assembly informed the delegates that it had been moved contrary to procedure and asked its mover to comply with the procedure and come back to the Assembly.[131] However, before he could do so, the Chairperson of the Constituent Assembly permitted delegates to express their opinions on the proposed amendment. Two delegates made submissions and they both opposed the proposed amendment. The first one argued that removing the last words from the clause would have created the impression "that the unborn child has the right to terminate the life the mother."[132] The second one, a medical doctor, argued that the amendment was advancing "really unlawful reasons."[133] She clarified further that:

> [T]he reason currently under the law which allows the termination of the life of an unborn child have been explicitly given […] those are the only reasons under the law where a Doctor and not only one doctor, and not even a foot doctor, but a consultant obstetrician, not these one-degree doctors you see floating all over the place, consultant obstetrician under the law! Two of them are the ones who are supposed to certify that a child's life can be terminated because the life of the mother is at risk. If you do not do it, it means both the mother and the child will die. So, you will have committed a double murder even as a doctor. So, Mr. Chairman, the reasons Hon. Pinto is giving are as a result of a lot of problems in all societies – unwanted pregnancies, many of them are wanted because nobody reports rape. They get them, then at the end of it, they decide they cannot carry it on, and they go to a doctor, and they actually, commit murder. It is an offence to abort an unborn child [...].[134]

In the light of the above "medical advice,"[135] the movers of the motion took "wise counsel of the previous speaker and willingly" withdrew it.[136]

[130] Ibidem, 5328 (Mr. Pinto).

[131] Ibidem, 5328 (the mover had not gathered enough signatures necessary to reopen a provision that had been adopted).

[132] Ibidem, 5328 (Mr. Byaruhanga).

[133] Ibidem, 5329 (Dr. Wandera-Kazibwe).

[134] Ibidem, 5329.

[135] Ibidem, 5329 (Chairperson of the Constituency Assembly).

[136] Ibidem, 5329 (Mr. Pinto).

Thus, the status quo was maintained. Article 22(2) should be understood as permitting abortion where it is necessary to save the life of the mother. This is the case irrespective of the fact that some people could oppose it on religious grounds. This view is also supported by the submissions the delegates made during the making of other constitutional human rights provisions. For example, during the discussion on the limitations on the rights under the Bill of Rights, one of the delegates argued that human rights were not absolute and that is why the Constituent Assembly "could not legalise abortion unconditionally."[137] He added that "certain quarters," such as the Catholic Church, were "still not happy with us for having conditionally consented to abortion."[138] It is important to take a close look at Article 22(2) in light of its drafting history.

4. Analysing Article 22(2) in light of its drafting history

There are two possible arguments that could be made about the drafting history of Article 22(2) and in particular on the ground(s) that may be invoked to justify abortion. First, that since the delegates decided against expressly mentioning those grounds in the Constitution, until Parliament enacts legislation to specify such grounds, abortion remains illegal irrespective of the circumstances. The second argument is that in principle, all the delegates supported abortion to save the life of a woman. However, they disagreed on other grounds that should be invoked to justify it. This view is supported by the following factors. First, during the debates, there was no objection to the argument that abortion should be permissible to at least save the life of the mother. This was the case during the debates on the first to the seventh proposed amendments and also during the failed attempt to reopen the clause on abortion. Second, the majority of the delegates did not oppose the argument that abortion should be permitted in case where the foetus had severe abnormalities. However, delegates were divided on whether abortion should be allowed in case the pregnancy was as a result of a criminal act. The author supports the second view above. This is so because the debates above confirm the view that when Parliament enacts legislation on abortion, it is required to ensure that at least one ground is included: saving the life of the mother. The debates on Article 22(2) show that by "life," the delegates meant preventing the mother from dying because of the pregnancy. The drafting history of Article 22(2) also shows that the term "person" therein refers to both the pregnant woman and to the person assisting her to terminate the

[137] Ibidem, 4738 (Mr. Sebidata).
[138] Ibidem.

pregnancy, such as a medical doctor. This is evidenced by the fact that the submissions focused not only on the circumstances in which a woman can terminate the pregnancy but also who should assist her in doing so. The fact that sections 130–132 prohibit the acts therein raises the question of how they should be interpreted to comply with Article 22(2) as understood in the light of its drafting history.

As mentioned above, sections 130–132 of the Penal Code Act prohibit the acts mentioned therein if committed "unlawfully." However, section 207 of the Penal Code Act allows abortion as a surgical operation to save the life of the mother. The Penal Code Act came into force in 1950 and the Constitution was promulgated 45 years later. The drafters of the Constitution were aware of the fact that the Penal Code prohibited abortion. However, they also explained that in practice, the doctors were "lawfully" terminating pregnancies to save lives. This was presumably under section 207 of the Penal Code Act. There was consensus during the debates on Article 22(2) of the Constitution that legislation enacted by Parliament to "operationalise" Article 22(2) should permit abortion for the purpose of saving a woman's life. Thus, implied in Article 22(2) is that it permits abortion for the purpose of saving a woman's life. Hence, Parliament's delay in amending sections 130–132 to expressly provide that the acts therein are allowed to save the life of a woman, leaves the issue in the hands of the courts to interpret sections 130–132 to comply with Article 22(2). In doing so, courts have to be guided by the drafting history of the Constitution. In *Human Rights Awareness Promotion Forum and Others v Attorney General*,[139] the majority held that although the Penal Code Act was enacted in 1950, the drafters of the Constitution were aware of it. After referring to the drafting history of Article 22(2) to substantiate the view that it is Parliament to enact legislation dealing with abortion,[140] the Court held that:

> It is […] crystal clear that abortion is not allowed in Uganda except under the circumstances that Parliament **may** authorise […]. [T]he impugned sections [130–132 and 207 of the Penal Code Act] are in consonance with Article 22(2) of the Constitution. Otherwise, how else would one put into effect that Article if there was no law criminalising abortion? The arguments of counsel for the Petitioners in the 1st petition are quite misleading. One would think that abortion is legal under the Constitution of Uganda. They advanced their arguments in a way that overshadowed the fact that

[139] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

[140] Ibidem, 129.

> abortion is illegal in this country. I would opine that if this Court grants the declarations sought by the Petitioners [...] it would be going on a collision course with the Constitution as decriminalising abortion would give women the freedom to abort indiscriminately contrary to the letter and the spirit of Article 22(2) of the Constitution.[141] (emphasis added)

In the above extract, the Court held that sections 130–132 and 207 of the Penal Code Act comply with the Constitution. Implied in this reasoning is that Parliament does not have to enact legislation operationalising Article 22(2). In his separate decision concurring with the lead majority decision, Justice Kawuma observed that the Penal Code Act was enacted in 1950 and the Constitution was promulgated in 1995. He added that, "[w]hereas the Act and the Constitution have severally been amended over time, the impugned provisions have not been touched since the coming into force of the Act."[142] He held further that "in Uganda, abortion is criminalised save on the bench marks outlined in section 207 of the Act."[143] He added that:

> Article 22 (2) of the Constitution is the anchor for section 207 of the Act since it is the only existing law on which the termination of the life of the unborn can be based. It provides for the only exception to the protection of the right to life envisaged in Article 22 of the Constitution [...] [S]ections 130, 131 and 132 of the Act are not inconsistent with or in contravention of Article 22 of the Constitution.[144]

Although the Court observes, and correctly so, that since 1950 the Penal Code Act has been amended several times, it ignores the fact the most Constituent Assembly delegates who made submissions on Article 22(2) of the Constitution expressed reservations about sections 130–132 and 207 of the Penal Code Act. They rejected all religious, cultural and moral arguments that were advanced to oppose abortion. That explains why they empowered Parliament to enact legislation to deal with abortion. They expected Parliament to be guided by science and research in the process of making legislation under Article 22(2). It is because of this that they also rejected an attempt by one of the delegates to reopen the debate on Article 22(2) and delete the words "except as may be authorised

[141] Ibidem, 130.
[142] Ibidem, 213.
[143] Ibidem, 219.
[144] Ibidem, 222.

by law." This raises the question of how courts could interpret sections 130–132 and 207 of the Penal Code Act to bring them in conformity with Article 22(2) of the Constitution.

There are two possible ways in which courts could intervene in this case. First, by interpreting sections 130 to 132 and bring them in conformity with the Constitution. This is under Article 274 of the Constitution which provides that:

> (1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.
>
> (2) For the purposes of this article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date.

Article 274 authorises courts to interpret existing law to bring it in conformity with the constitution. There are many cases in which courts have invoked Article 274 to interpret legislation to bring it in conformity with the Constitution.[145] What is common about these cases is that such legislation was being interpreted to bring it in conformity with constitutional provisions that did not need further steps to be operationalised. This is not the case with Article 22(2). It authorises Parliament to enact legislation to provide for the grounds of abortion. Since the drafters of Article 22(2) expected legislation to be enacted to allow abortion to save the life of a woman, nothing prevents courts from invoking Article 274 to hold that any of the acts committed under sections 130–132 for the purpose of saving the woman's life is lawful. In *Human Rights Awareness Promotion Forum and Others v Attorney General*,[146] the petitioners did not ask the Court to interpret sections 130–132 and 207 to and bring them

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[145] See for example, Jamil Ddamulira Mujuzi, "Construing pre-1995 laws to bring them in conformity with the Constitution of Uganda: Courts' reliance on Article 274 of the Constitution to protect human rights," *African Human Rights Law Journal*, no. 2 (2022): 520–547.

[146] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

in conformity with the Constitution. Instead, they asked the Court to declare these sections unconstitutional. This explains why only one judge raised the issue of Article 274 *ex mero muto*. Thus, in his separate decision concurring with the lead majority decision, Justice Kawuma found that sections 130–132 and 207 were not contrary to the Constitution. Hence, he did not find it necessary to interpret them to conform with Article 274. In light of the above submissions, it is still possible for courts to interpret sections 130–132 to bring them in conformity with the Constitution. Such an interpretation will not amount to "abortion on demand" or to allowing abortion "indiscriminately" – fears expressed by the majority in *Human Rights Awareness Promotion Forum and Others v Attorney General*,[147] as one of the reasons to reason that these sections did not violate the right to healthcare, to equality and to freedom from inhuman treatment.[148] It will be for the purpose of saving the life of the mother. It will also ensure that the right of an unborn child is protected "from conception until birth" as contemplated by the drafters of the Constitution.[149] Likewise, courts could interpret section 207 as allowing abortion even if it is not through a surgical operation. Since prohibiting a woman whose life is in danger from terminating a pregnancy threatens her life, sections 130–132 of the Penal Code Act could also be declared unconstitutional for being contrary to Article 22(1) of the Constitution which protects the right to life. Thus, Article 22(2) of the Constitution should be read in tandem with other relevant constitutional provisions. This raises the question of the meaning of the right to life under the Constitution.

It has been mentioned above that the debates on Article 22(2) show that by "life," the delegates meant preventing the mother from dying because of a pregnancy. The question is whether it is possible for "life" to be interpreted broadly to include instances where it is violated even if the victim has not died? Article 22(1) of the Constitution protects the right to life.[150] Article 22(2) should not be read in isolation of other relevant constitutional provisions.[151] Most of the submissions on the circumstances in which a woman can terminate a pregnancy were made during the debates on Article 22(2). A few were also made when the delegates were dealing with other constitutional provisions. For example, one of the delegates, while

[147] Ibidem.

[148] Ibidem, 161.

[149] Ibidem, 177.

[150] Article 22(1) states that "[n]o person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court."

[151] See also Ngwena, *Taking Women's Rights Seriously,* 121 (he suggests that Article 22(2) should be interpreted in the light of eight other constitutional provisions).

discussing the provision on the grounds on which the right to life could be limited or derogated from, argued that "there may be circumstances because of health when a woman [foetus] could be aborted for example for health reasons."[152] Terminating a pregnancy "for health reasons" is broader than terminating it to save the life of the woman (saving her from dying). The drafting history of Article 22(2) suggests that the delegates had the latter situation in mind. Many delegates understood the right to life in the constitution to mean the right to be alive (not to be killed unlawfully).[153] However, some of them understood the right to life to mean the right to live a life worth living. That is, the right not to live a "miserable life" or a life without the basic necessities of life.[154] It was also explained that the right to life means the right to access basic "social services" such as quality medical care.[155] In other words, it does not mean "just surviving but a good life meant for first class citizens anywhere in the world."[156] The Constitutional Court has held that the right to life under Article 22(1) of the Constitution is broad enough to include the right to "livelihood."[157] Thus, a person should not be deprived of the necessities of life. The above discussion creates room for the argument that abortion is permissible to save the life of the mother in its limited and broad senses. This interpretation is also in line with English case law and international human rights law.[158] That does not suggest that courts should rely on English case law as the basis for their conclusion. As explained above, the 1938 English decision of *Rex v Bourne* is not applicable to Uganda as part of common law. Rather, they should rely on the drafting history of the Constitution. Adopting a flexible interpretation of "life" under Article 22(2) read with Article 22(1) creates room for the argument that a pregnancy could be terminated if its continuance will severely affect the mental or physical health of the mother. This is because such life is not worth living.

Another issue that emerges from the drafting history of Article 22(2) and over which the court was divided in *Human Rights Awareness Promotion*

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[152] Proceedings of the Constituent Assembly (Official Report) (1994–1995) 4378 (Prof. Kanyeihamba).

[153] Ibidem, 618, 838, 852, 1440, 1875, 1890–1891, 4378, 4385, 4827, 4844, 5761 (when the right to life was discussed in the context of the death penalty) and 2173–2176 (when the right to life was discussed in the context of the state of emergency).

[154] Ibidem, 1835 (when the right to life was discussed in the context of the duty of the state to provide services to the citizens).

[155] Ibidem, 2443 (Mr. Ssemakula-Kiwanuka).

[156] Ibidem, 289 (Mr. Bagena).

[157] *Attorney General v Salvatori Abuki* (Constitutional Case 2 of 1997) [1997] UGCC 10 (13 June 1997); *Male Mabirizi & Others v Attorney General* (Constitutional Petitions No. 49 of 2017) [2018] UGCC 4 (26 July 2018).

[158] Ngwena (n 8 above), 117.

Forum and Others v Attorney General[159] is whether Article 22(2) obliges Parliament to enact legislation providing for the circumstances in which abortion is permissible. One of the issues before the Court was "whether the omission by the State to formulate and pass a law regarding termination of pregnancy is in contradiction of Article 22(2)."[160] In *Human Rights Awareness Promotion Forum and Others v Attorney General*,[161] the minority decision referred to the drafting history of Article 22(2) and to the circumstances in which "may" should be interpreted "shall" and held that:

> The Constitution of Uganda is the supreme law through which the State has undertaken to govern the people on principles of unity, peace, equality, democracy, freedom, social justice and progress. Therefore, the implementation of constitutional provisions for example through subsidiary legislation, should be treated as very important. Specifically, Article 22(2) prohibits termination of the life of the unborn child but equally provides that termination is possible, if authorised by law. I am persuaded that such a law is not yet in place, and the thrust of my analysis has been that the absence of a law, or at least criminalization of abortion, has a negative impact on a wide range of constitutional rights of women and girls, as a definite group. Largely, women of Uganda can only exercise those rights in the context of this petition, only if there is in existence a law that regulates abortion. I am therefore prepared to interpret the word "may" used in Article 22(2) as a mandatory directive to Parliament to pass such a law.[162]

On the other hand, the majority, also after referring to the drafting history of the Constitution,[163] held that under Article 22(2) of the Constitution, Parliament has the discretion whether or not to enact legislation operationalising Article 22(2).[164] In doing so, it has to consult with Ugandans because "in Uganda abortion is a moral, societal/cultural and spiritual issue that requires the participation of the people of Uganda to determine which direction this country should take as regards that very controversial matter."[165] In other words, Parliament has the "liberty to

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[159] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

[160] Ibidem, 13.

[161] Ibidem.

[162] Ibidem para. 161.

[163] Ibidem, 106–113.

[164] Ibidem, 113.

[165] Ibidem, 124.

authorise" some "exceptions" to the general rule that Article 22(2) prohibits abortion.[166] The majority also referred to the drafting history of Article 22(2) and held that the word "may" should not be interpreted as "shall" because while the Constituent Assembly delegate who suggested that Article 22(2) should be included in the Constitution gave the delegates a choice to choose between the words "shall" and "may," they chose "may." Against that background, the Court held that:

> [I]n that context [...] the deliberate choice to use the word "may" in Article 22(2) of the Constitution when both words "may" and "shall" had been proposed by the mover of the motion, showed the intention of the framers not to make it mandatory or compelling. Rather, it was left to the discretion of Parliament to prescribe the exceptions when it deems it necessary [...]. [I]nterpreting Article 22(2) in the way the Petitioners are urging this Court to do would be reading into it what the delegates never envisaged.[167]

In his separate decision concurring with the lead majority decision, Justice Kawuma observed held that:

> The mandate to enact laws is a preserve of the Parliament of Uganda vide Article 79 of the Constitution. At the time of the promulgation of the Constitution in 1995, the Constituent Assembly was aware of the existence of section 207 of the Act. Article 22(2) is clear and unambiguous and must be given its primary, plain and ordinary meaning that termination of the life of the unborn must be in compliance with the existing law being section 207 of the Act.[168]

He added that he found "nothing in it [Article 22(2)] to suggest that it was making reference to a law to be enacted."[169] He concluded that "[i]f the Constituent Assembly had wished for a fresh law to be made in regard to the termination of the life of the unborn, it would have clearly and expressly indicated so" by using the word "shall" instead of "may."[170] In his view, Article 22(2), unlike other constitutional provisions, does not obligate Parliament to enact legislation. The same view was expressed by Justice Mugenyi who held that Parliament has the discretion to determine how to give effect to Article 22(2). In other words, it connotes

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[166] Ibidem, 128.
[167] Ibidem, 139.
[168] Ibidem, 229.
[169] Ibidem, 230.
[170] Ibidem, 231.

a "permissive duty." This could be done by not amending sections 130–132 and 207 of the Penal Code Act, by amending those sections or by enacting new legislation.[171] In my view, although the word "shall" is not used in Article 22(2), the drafting history of the Constitution strongly suggested that the delegates expected Parliament to enact legislation providing for the circumstances in which more grounds on which a pregnancy can be terminated. This explains why they decided against mentioning some of the grounds in Article 22(2) because they wanted Parliament to study the question, consult Ugandans and enact legislation. They knew that section 207 of the Penal Code Act allowed abortion as a surgical procedure to save the life of the mother. However, they thought that section 207 was insufficient. They did not expect Parliament to maintain the "status quo" – that is, retaining only one ground under section 207. It is true, as the majority held, that during the debates on Article 22(2) the draft amendment included both the words "may" and "shall" and that the delegates chose to include the word "may" in Article 22(2). However, the Constituent Assembly debates are silent on why the word "shall" was not used. In other words, the debates are silent on why the delegates preferred the word "may" over "shall." Therefore, it borders on exaggeration for the Court to observe that the word "shall" was excluded deliberately. Hence, there is room for argument that failure or unwillingness by Parliament to enact legislation contemplated under Article 22(2), thirty years after the coming into force of the Constitution, is contrary to the drafting history of Article 22(2). Put differently, it amounts to dereliction of the duty imposed under Article 22(2). When enacting legislation on abortion, Parliament has to strike a balance between the rights of women and those of the unborn children. It also has to have regard to religious, family and cultural interests. This is what the drafters of Article 22(2) contemplated. That is why they deferred that obligation to Parliament.

5. Conclusions

Article 22(2) of the Constitution of Uganda provides that "[n]o person has the right to terminate the life of an unborn child except as may be authorised by law." Unlike other provisions of the constitution which specifically provide that the law operationalising them has to be enacted by Parliament,[172] Article 22(2) is silent on the source of the law. The

[171] Ibidem, 179–186.

[172] See for example, Articles 12(2); 15; 16(4); 80(1)(c); 87(3); 87A; 144(1)(c); 148A; 189(2); 191; 203(3)(c); 235A; and 237.

Constitution recognises both written and unwritten laws.[173] The drafting history of the Constitution shows that the drafters expected Parliament to enact the law giving effect to Article 22(2). As Justice Luswata held in *Human Rights Awareness Promotion Forum and Others v Attorney General*[174]:

> I consider that the provision [Article 22(2)] is clear and unambiguous. In Uganda, abortions can only be carried out in accordance with the law. I am unable to read into Article 22(2) that such law is contained in the Constitution. The reasonable interpretation would be that such law is one that is passed by the competent authority under the Constitution. Both parties submitted that such authority is the Parliament of Uganda. I agree.[175]

As illustrated above, there majority decision also held that it is Parliament to enact legislation under Article 22(2). Thus, it is Parliament to provide for the circumstances in which abortion may be permitted.[176] Hence, the argument that Article 22(2) "gives constitutional legitimacy to legislative instruments and common law that permit abortion"[177] is not supported by the drafting history of the Constitution. However, Parliament has not yet enacted legislation. This partly explains why sections 130–132 of the Penal Code Act still criminalise attempt to procure a miscarriage, procuring a miscarriage and supplying drugs to procedure a miscarriage, respectively. The minority decision in *Human Rights Awareness Promotion Forum and Others v Attorney General*[178] was to the effect that Parliament was obliged to enact legislation under Article 22(2).[179] The drafting history of Article 22(2) shows the delegates were of the view that abortion should be permitted to save the life of the mother. In the absence of legislation operationalising Article 22(2), courts can rely on the drafting history of Article 22(2) to conclude that it allows abortion on the basis of saving the life of the mother even if it is not conducted under section 207 of the Penal Code. Relying on part of the drafting history of Article 22(2),[180] Justice Luswata held that:

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[173] Article 274.

[174] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

[175] Ibidem, para. 155.

[176] Ibidem, paras. 156–162.

[177] This argument was made by Ngwena (n 10 above), 117.

[178] *Human Rights Awareness Promotion Forum and Others v Attorney General* (Constitutional Petitions No. 25 of 2020 and No. 10 of 2017) (14 November 2025).

[179] Ibidem, paras. 156–165.

[180] Ibidem, paras. 162–163.

> Article 22(2) should be understood as serving a dual purpose: to protect foetal life and at the same time, recognizing the constitutionality of the law that permits abortion. I would thereby reject the notion of an absolute right to foetal life, that must unconditionally be protected by the State. Therefore, any abortion law that aligns to the tenets of the Constitution of Uganda, should equally consider the fundamental rights of pregnant women that are directly or by implication, enshrined in the Constitution.[181]

The drafting history of the Constitution does not support the view that Article 22(2) provides for "an absolute right to foetal life." The legislators made it clear that Parliament was to enact legislation providing for the grounds on which a woman can terminate a pregnancy in addition to saving her life. It is recommended that courts may have to interpret sections 130–132 and 207 of the Penal Code Act to bring them in conformity with Article 22.

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