



MIDLANDS STATE UNIVERSITY

FACULTY OF LAW

AN ANALYTICAL ANALYSIS OF ABORTION LAWS IN ZIMBABWE FROM A HUMAN RIGHTS PERSPECTIVE

**A Dissertation Submitted in Partial Fulfillment of the Requirement of the
BACHELOR OF LAWS HONOURS DEGREE**

By

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APPROVAL FORM

The undersigned certify that they have read and recommended to the Midlands State University for acceptance a research project entitled *An Analytical Analysis of Abortion Laws in Zimbabwe from a Human Rights Perspective* submitted by Petronellah Chin’ombe (R091879A) in partial fulfilment of the requirement of the Bachelor of Laws Honours Degree (HLLB) at Midlands State University.

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DECLARATION

I, PETRONELLAH CHIN'OMBE, do hereby declare that this dissertation is the result of my own investigation and research, except to the extent indicated in the acknowledgement, references and by comment included in the body of the report, and that it has not been submitted in part or full for any other degree at any other university.

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DEDICATION

To my late parents, Anthony J. and Chipso Chin'ombe for your unending love. The pain never ceases and the memories of you are still fresh. It is with great sadness and pain that you are not here to see the fulfilment of your wish in my life. To my dearest parents I say, rest in eternal peace till we meet again.

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LIST OF ACRONYMS

- 1. UDHR** **Universal Declaration of Human Rights**
- 2. I.C.C.P.R** **International Covenant on Civil and Political Rights**
- 3. CEDAW** **Convention on the Elimination of all forms of Discrimination
Against Women**
- 4. I.C.E.S.C.R** **International Convention on Economic, Social and Cultural
Rights**
- 5. CHARTER** **African Charter on Human and Peoples' Rights in Africa**
- 6. PROTOCOL** **Protocol to the African Charter on Human and Peoples' Rights
on the Rights of Women in Africa**
- 7. HIV** **Human Immuno-deficiency Virus**
- 8. AIDS** **Acquired Immuno Deficiency Syndrome**

CHAPTER ONE

1.1 INTRODUCTION

Abortion is an “unlawful and intentional killing and causing the expulsion from the uterus of a human foetus”.¹ At the heart of the abortion debate exists’ those who affiliate with the pro-life debate which is based mainly on the status of the embryo. The pro-life debate maintains that life and personhood begin at conception hence the right to life applies at conception and no other considerations can nullify this right.² It accords the foetus with the status of a person with rights and interests worthy of legal protection. Against this argument are those that maintain that the embryo is never a person and that a woman has a right to abortion at any point of the pregnancy.³ They state inter alia that forcing a woman to carry a foetus to term is an invasion of her bodily integrity, moral autonomy and her moral rights to be treated as a human being. Thus, abortion becomes a human rights issue because of the right of autonomy in decision making in private matters which entitles a woman to decide whether to carry the foetus to term without any interference from the government.⁴

In Zimbabwe, the Termination of Pregnancy Act [Chapter 15:10] under sections 4 permits abortion only on therapeutic (to save the woman’s life or preserve her physical health), eugenic (to prevent the birth of a child expected to suffer from serious mental or physical defects or deformities) and humanitarian (where the pregnancy resulted from rape or unlawful intercourse as defined by the law) grounds.⁵ It follows then that a pregnancy cannot be lawfully terminated on socio-economic grounds where the mother is seeking termination because of poverty or other reasons. The law of termination even lacks certainty in circumstances where the pregnant woman has a virus known as HIV⁶ and desires termination. Thus termination is only restricted to the provisions of section 3 of the Termination of Pregnancy Act⁷ which affirms protection to unborn

¹ Feltoe G,(2004) *A Guide to the Criminal Law of Zimbabwe,3rd ed*, Legal Resources Foundation

² Smit D van Zyl (1994), *Reconciling the Irreconcilable? Recent developments in German law on Abortion*, 2 Medical Law Review 302; Glanview Williams (1994) *The Foetus and the Right to Life*; 53 Cambridge Law Journal 71

³ Eileen McDonagh (2007), *The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMROY L.J. 1173

⁴ These rights are based in CEDAW article 12&16(1)(e);ICCPR art 3,6&17;UDHR art 2,3&12;ICESCR art 3&12

⁵ Feltoe G(2004), *A Guide to the Criminal Law of Zimbabwe,3rd Edition*, Legal Resources Foundation WO41/84 at pg 62, See also: Ncube W (1989); *Family Law in Zimbabwe*, Legal Resources Foundation WO41/84

⁶ Human Immunodeficiency Virus

⁷ [Chapter 15:10]

children by virtue of section 48(3) of the Constitution which prohibits abortion; but is only permissible in terms of an Act of Parliament.

1.2 BACKGROUND TO THE STUDY

Access to abortion is necessary to respecting women's reproductive freedom. Reproductive rights refer to those rights which protect the health and well-being of both men and women.⁸ Reproductive rights are most fundamental to women as they demand respect for their bodily integrity and decision-making requiring access to voluntary, quality and sexual health services. These rights connote the principle that a woman must be able to control her reproductive and sexual life and entitle a woman to decide whether to carry the foetus to term without any interference. Women's reproductive freedom spans a range of human rights including rights to bodily integrity, dignity, privacy, opinion and belief, equality and personal security and freedom. Thus a woman should be able to choose freely on whether to terminate a pregnancy or not and not be restricted only by conditional grounds for termination.

International and Regional Human Rights Instruments recognise a woman's right to enjoyment of these rights such as the right to control her fertility⁹. According to Article 12(1) of the International Convention on Economic, Social and Cultural Rights (ICESCR), the state is mandated to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. These rights are inclusive of reproductive rights. Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹⁰ provides for the rights to include, the right to control one's fertility and the right to decide whether to have children and the number and spacing of the children.¹¹ The Constitution itself accords women with reproductive rights under section 76(1) which provides for the right to health-care; and section 56(1) which provides for equality and non-discrimination and states that, "*all persons are equal before the law and have the right to equal protection and benefit of the*

⁸ Johnsen (1986); *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*; 95 Yale L.J. 599, 613

⁹ Article 16(1)(e) of Convention on the Elimination of all forms of Discrimination Against Women

¹⁰ Hereinafter called the Women's Protocol

¹¹ Article 12 (2) of the Women's Protocol

law”. Hence “every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their ... pregnancy¹²”.

Nevertheless, Section 48(3) of the Constitution of Zimbabwe provides that “an Act of Parliament must protect the lives of unborn children and that Act must provide that pregnancy may be terminated only in accordance with that law”¹³. The law that is operational in Zimbabwe is the Termination of Pregnancy Act. According to the Act¹⁴, the grounds upon which a medical practitioner may lawfully terminate pregnancy are when the pregnancy constitutes a threat to life of the mother or there is a serious threat of permanent impairment of mothers’ physical health; or there is a serious risk that the child will be born with a physical or mental defect which will permanently and seriously handicap him; or there is a reasonable possibility that the pregnancy resulted from unlawful intercourse(i.e. rape other than rape within a marriage and sex within a prohibited degree of relationship). Given this background, a termination of pregnancy which is not authorised by law under the Act and according to the Constitution is a criminal offence dealt with as such in the Criminal Law (Codification& Reform) Act¹⁵. Socio-economic grounds such as reasons of poverty or if the pregnant woman is infected with the HIV virus or where the pregnancy affects the mental health of the mother or any other reasons, are not regarded as grounds warranting lawful termination in Zimbabwe.

1.3 STATEMENT OF THE PROBLEM

The Termination of Pregnancy Act being the primary Act which provides for lawful termination of a pregnancy is restrictive on women’s reproductive freedom as it provides for conditional grounds upon which a pregnancy can be terminated. This infringes on the woman’s right to privacy, bodily integrity, equality, human dignity, personal freedom and security. Thus women lack the right to decide freely and responsibly on whether or not to carry the foetus to term and are forced to carry unwanted pregnancies to term.

However, Zimbabwe is signatory to various international and regional human rights instruments which provide women with reproductive freedom as it accords them with the right of autonomy

¹² Section 56(3) of the Constitution

¹³ See section 48(3) of the Constitution of Zimbabwe and section 3 of the Termination of Pregnancy Act.

¹⁴ See section 3, 4 and 5 of the Act

¹⁵ [Chapter9:23]; Part II section 59 and 60 of the Code

regarding their fertility. Furthermore, it prohibits any form of discrimination against women in the enjoyment of these rights. In that regard, the Termination of Pregnancy Act, the Criminal Law (Codification & Reform) Act as well as Section 48(3) of the Constitution interferes with the right of autonomy and women are not able to exercise the right without interference from the State.

1.4 RESEARCH AIMS AND OBJECTIVES

The study seeks to:

- i.** Outline and provide an analytical analysis of the various schools of thought with regard to abortion;
- ii.** Make an evaluation of the Constitution of Zimbabwe, the Criminal (Codification and Reform) Act and the Termination of Pregnancy Act;
- iii.** Examine the various international and regional human rights instruments to which Zimbabwe is signatory to and
- iv.** Provide an overview of how the courts, internationally, regionally and domestically have interpreted the law of abortion.
- v.** Provide recommendations on how abortion laws in Zimbabwe can be realised in a human rights perspective.

1.5 LITERATURE REVIEW

The core of the pro-life debate is that life and personhood begins at conception. The right to life applies from conception and no other considerations can nullify this absolute right. The State has a primary duty which begins at conception to protect the unborn child against the mother. Thus termination of pregnancy has to be seen as illegal throughout the pregnancy. There can be no period where a third party or the pregnant woman herself could decide without restriction to terminate the pregnancy. Hence the legal regulation of the termination of pregnancy strikes at the innermost core of human life and touches fundamental questions of human existence.¹⁶

¹⁶ Smit D van Zyl (1994), *“Reconciling the Irreconcilable? Recent developments in German law on Abortion”* 2 Medical Law Reviews 302; Glanview Williams,(1994), *“The Foetus and the Right to Life”* 53 Cambridge Law Journal 71; Davis e’tal (1997), *“Fundamental rights in the Constitution: Commentary and Cases”* Juta & Co. ltd

The pro-choice school of thought provides that the liberty of the woman is at risk in the most fundamental manner possible, for a woman carries a child to full term and is subject to anxieties and physical constraints and pains which only she must bear. Such conditions are too intimate and personal for the State to insist that it has an exclusive control over the decision making process. Accordingly, women's destiny must be shaped to a large extent on their own conception of the spiritual imperatives and their place in the society. Pregnancy involves the pregnant woman from beginning to end thus in the early stages of the pregnancy the pregnant woman has to be fully involved in all decisions relating to the pregnancy. Only an advanced foetus should be protected by the State.¹⁷ In other words, the personal autonomy of the woman should be emphasized and the view that the State can trump the liberty of a woman in such circumstances should be rejected. Even if the foetus has an inherent right to life, autonomy in decision making supersedes this right. Issues of personal morality are best left to individual discretion and the government should not interfere. In this, the woman has to be vested with decision making to terminate a pregnancy because it has profound psychological, economic and social consequences for the pregnant woman.¹⁸ This approach is adopted by various feminist theories on the abortion debate.¹⁹

Ronald Dworkin's views are based on the ideology that the central issue is not whether the foetus is a form of life or whether indeed it is a person, but whether it is the bearer of constitutional rights.²⁰ He therefore observes that a woman is the bearer of constitutional rights and if a foetus were really a person, States would prescribe abortion in the same manner that murder is prescribed. He contends that the moral and constitutional arguments in the abortion debate purport to deal with the right or lack thereof of the foetus itself. Dworkin designates the responsibility of the State to protect individual citizen rights as a derivative responsibility whereas the responsibility to protect common values and public morality is merely a detached

¹⁷ *Roe v Wade* 410 U.S. 113 (1973) ; Johnsen (1986) *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 Yale L.J. 599, 613

¹⁸ Laurence H Tribe, (1990) "Abortion: The Clash of Absolutes" ,New York Norton; Devenish GE,(1999) *A Commentary on the South African Bill of Rights*, LexisNexis Butterworths

¹⁹ Further study on the matter, see: Charles G Ngwenya (2010) "Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa" 32 Hum. Rts. Q. 783; Reva B Siegel (2006-2007) "Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression" 59 Emory L. J. 815

²⁰ Ronald Dworkin (1992) "Unenumerated Rights: Whether and How Roe should be overruled", 59 University of Chicago Law Review 381; Ronald Dworkin (1993) "Life's Dominion: An argument about Abortion, Euthanasia and Individual Freedom", New York; Alfred A. Knopf pp 273;

responsibility. Hence, Dworkin argues that the State has a detached justification for the regulation of abortion based on the fact that abortion is regarded as being morally wrong as it offends against the sanctity of life in general.²¹

The state is obliged to respect the right of choice by refraining from interference through legislation, policy or practice²². To interfere with the right of any woman to decide whether or not to bear a child and to fail to take steps to provide access to acceptable medical procedures deprives her of the right to control her life, and therefore constitutes inequality and discrimination against women. Forced motherhood is inequality.²³ When the State does not accord women with a choice on whether to have an abortion or not, it becomes inequality as women are the ones who carry the pregnancy and will be deprived of an equal enjoyment of rights with men.²⁴ Abortion is not a privilege for which women must seek indulgence from men, but a fundamental right based on sex equality to which women must have access through adequate funding and permissive abortion legislation.²⁵

1.6 RESEARCH METHODOLOGY

The debate on abortion constitutes various schools of thought thus the researcher analysed the various doctrines for pro-life vs. pro-choice and the school of thought referring to the obligation of the state to protect human life. Various international and Regional Human rights instruments to which Zimbabwe is signatory to was resorted to so as to make an evaluation of the Termination of Pregnancy Act [Chapter 15:10] and section 48(3) of the Constitution from a human rights perspective. Reference was made to secondary sources of data which entails use of the internet, textbooks, journals, articles and case law which has dealt with the issue of abortion.

²¹ Even if the foetus does not have a right itself, the State has a detached interest in fostering the sanctity of human life by protecting potential life and regulating abortion particularly in the late stages of the pregnancy.

²² Helleiner A et al, (2007) *Human rights, plural legalities and gendered realities: Paths are made by walking*, SEARCWL at 343

²³ The equality argument suggests that women are not equal in falling pregnant as social norms prevent this nor are they equal in bearing the consequences of pregnancy and raising children. Hence they must be given the choice on whether or not to take the pregnancy to term.

²⁴ The laborious process of satisfying the conditions in the Act has opened doors to “backstreet” terminations which are often performed by unskilled persons in unhygienic surroundings. The right to life of women and their right to quality of life should be applied to the lives of women who die particularly from unsafe induced abortions.

²⁵ Davis D et al (*op. cite note16*) at 63

1.7 CHAPTER SYNOPSIS

CHAPTER ONE

Chapter one introduces the topic and comprises of the introduction, background to the study, the statement of the problem, research aims and objectives, the literature review, research methodology and the chapter synopsis.

CHAPTER TWO

This Chapter outlines the various schools of thought with regards to the issue of abortion and provides an analysis of the various doctrines pertaining to abortion.

CHAPTER THREE

This Chapter provides a critical analysis of the abortion laws in Zimbabwe from a human rights perspective.

CHAPTER FOUR

This Chapter evaluates the international and regional human rights instruments to which Zimbabwe is signatory to and provides an analysis of how abortion has been interpreted internationally and regionally against the framework of abortion laws in Zimbabwe.

CHAPTER FIVE

This Chapter provides the conclusion and recommendations on how abortion laws in Zimbabwe can be realised in light of the human rights perspective.

CHAPTER TWO

2.0 RATIONALE FOR ABORTION LAWS

There are various arguments and theories surrounding the debate on abortion. Pro-life proponents have advocated for the protection of the foetus at all costs whilst feminists have argued that reproductive rights are to be advanced in most cases. This chapter will focus on the various debates and theories advanced in the debate on abortion.

2.1 PROTECTION OF THE UNBORN'S INTERESTS

The view that is argued by these proponents is that the foetus is a person with rights and interests worthy of legal protection. They claim that fetal life should be protected at all costs and are based in religious arguments about the sanctity of life thereby asserting the rights of the foetus.

2.1.1 Nasciturus Fiction/Rule²⁶

The nasciturus rule states that an unborn child in the mother's womb is deemed to have been born. Therefore it is argued to have acquired legal personality prior to the date of its actual birth if this would be to its advantage.²⁷ The rule is subject to the eventuality that the child is indeed subsequently born alive. The rule is said to have been developed by the Romans as a reason to protect the interests of the unborn child in matters of inheritance. If a father bequeathed his estate to his children and died at a time when his wife was pregnant, the unborn child would not share in the inheritance.²⁸ In *Exparte Administrators Estate Asmall*²⁹ the nasciturus rule was used to give effect to a testator's intention that all his children should benefit from his estate, including a child born posthumously.

Nonetheless, in matters concerning abortion, the nasciturus rule is rather considered a fiction than a rule. In Roman Dutch common law, it is accepted that legal personality only begins at

²⁶ It is derived from a Roman Dutch principle *nasciturus pro iam nato habetur quotiens de commodo eius agitur* (which means the unborn can be regarded as already having been born when it is to its advantage).

²⁷ Van Heerden, Cockrell & Keightley e`tal(1999) *Boberg's Law of Persons and The Family, 2nd Edition*; Juta & Co. Ltd at pg30; Cronje` and Heaton J(2003) *The South African Law of Persons, 2nd Edition*, Lexis Nexis Butterworths, Durban

²⁸ Van Heerden, Cockrell & Keightley e`tal(*ibid*) at pg30

²⁹ 1954(1) PH G4 (N); a similar application of the rule was applied in *Exparte Boedel Steenkamp* 1962(3) SA 954 (0)

birth and not at conception. Although the nasciturus rule is used as a means of protecting the interests of the foetus, the problem with its application in matters of abortion is that it relies for its application on the subsequent live birth of the foetus. In *Christian League of Southern Africa v Rall*³⁰, the court held that the unborn foetus is not a legal person in our law and further that the nasciturus rule does not confer any legal personality on the foetus stating that there is no room for the extension of the nasciturus rule to protect the foetus against abortion.

Thus, there does not appear to be a strong basis for accepting the argument that under the nasciturus rule, the foetus enjoys protection from abortion. If there is any protection to be found, it has to be derived from the law as the nasciturus remains more of a fiction in matters of abortion than a rule of law. It can be properly concluded that legal subjectivity always begins at birth and that the nasciturus fiction remains a fiction and should preferably not be applied in matters regarding abortion.³¹

2.1.2 Rights Talk

Foetuses are believed to be rights bearers who deserve legal protection. One approach places the abortion debate squarely within the right to life and proceeds on the basis that the foetus has such a right and should enjoy constitutional protection.³² The real arena for the rights debate rests primarily on the right to life of the foetus. It is compatible to argue as a conceptual matter that foetuses are entities that can have rights. However, it makes sense to speak of foetuses as having rights as a matter of policy or morality than regarding them as having rights in law.³³

Sinclair assisted by Heaton³⁴ is critical of foetuses having rights and contends that foetuses are not ordinarily bearers of rights in our law. Similarly, Ronald Dworkin rejects the idea of a foetus as a rights bearer but rather argues that the issue is the interest that is attached to the sanctity of life and the potential for human life. He suggests that it is this reason that gives rise to the States' interest in the regulation of abortion and not fetal rights. He therefore observes that a woman is the bearer of rights. Further highlighting that if a foetus were really a person, states would

³⁰ 1981(2) SA 821 (O)

³¹ Davel CJ and Jordaan RA(2000) *Law of Persons: Students' Textbook 3rd Edition*; Juta & Co. Ltd at pg19

³² Bix B(2006) *Jurisprudence: Theory and Context; 4th Edition*; Thomson Sweet & Maxwell at pg 126-127

³³ Bix B(2009) *Jurisprudence: Theory and Context; 5th Edition*; Thomson Sweet & Maxwell at pg 133

³⁴ Sinclair JD assisted by Heaton J(1996) *The Law of Marriage Volume 1*; Cape Town Juta & Co. Ltd pp196-197

prescribe abortion in the same manner that murder is prescribed.³⁵ In *Christian Lawyers Association of South Africa v The Minister of Health*³⁶ the court was of the view that the right of life was not violated in legalising abortion as the foetus was not a legal person with rights or interests worthy of protection.

Thus, a foetus can be said to have moral rights but it is different from saying that foetuses do have such rights. A foetus can have the right to life but it is only relevant to the question of a woman's moral or legal right to abort. In this regard, it is compatible to believe that foetuses are capable of having rights, but there are circumstances where these rights are not protected because the other party has countervailing rights. Whatever rights foetuses are said to have are overridden by the conflicting rights of the mother to control her body.

2.2 THEORIES FOR REPRODUCTIVE FREEDOM

Many feminists have advanced arguments with regards to the issue of reproductive rights in abortion debates. Most feminists argue that a woman should be able to exercise her reproductive rights as a foetus is not a legal person with interests worthy of protection.

Petchesky³⁷ argues that the mother is a bystander in the development of the pregnancy and consequently is denied her humanity as a moral being, capable of exercising will and judgement in decision making. She contends that there are various ideas that underlie the feminist idea of reproductive freedom. The first idea is derived from the biological connection between women's bodies, sexuality and reproduction. It is based on individual rights, claims to liberty and privacy. It is an extension of the general principle of "bodily integrity" or "bodily self-determination" to the notion that women must be able to control their bodies and reproductive capacities without any interference from the State.

The second idea is based on the historical and moral argument based on the social position of women and the needs that such a position generates. It states that in as far as women, under the existing division of labour between the sexes, women are the most affected by pregnancy since

³⁵ Ronald Dworkin(1993) "Life's Dominion: An argument about Abortion, Euthanasia and Individual Freedom", New York; Alfred A. Knopf pp 273;

³⁶ 1989(4) SA 1113(T) South Africa's compliance with the requirements of reproductive freedom provided for in CEDAW is of great importance in this regard.

³⁷ Petchesky R (1984) "Abortion and Women's Choice" in Bonthuys E & Albertyn C(2007) *Gender, Law and Justice*; Juta & Co ltd at pg364

they are the ones responsible for the care and rearing of children. It is women who must decide about contraception, abortion and childrearing. She argues that forcing women to carry foetuses to term is an invasion of their bodily and moral autonomy and their equal rights to be treated as human beings.

The other set of argument is based on women's social and economic position as a group and is located within the equality right.³⁸ The equality argument also places women within the actual contexts of their lives suggesting that they are not equal in choosing to fall pregnant nor are they equal in bearing the consequences of pregnancy and raising children. Hence they must be given a choice about whether or not to take the pregnancy to term.

Dworkin's approach to abortion is to determine whether a foetus is a person with constitutionally protected rights. In his jurisprudence, if the foetus were a person, then the state would be empowered to protect the foetus from abortion as well as to protect the woman's health.³⁹ This has been described by Ronald Dworkin as a "clash of absolutes"⁴⁰ in which there is no basis for common debate. Rejecting the proposition that a foetus has constitutional personhood, he proceeds to suggest that the State therefore has no justification for banning abortion.

Acknowledging several constitutional foundations for reproductive choice, he acknowledges that constitutional law must be able to govern the society as numerous rights may simultaneously be affected by public policy. Dworkin argues that any regulation that significantly increases the risk that a woman will be denied a fair opportunity to control her own reproductive life is inconsistent with the best interpretation of what the Constitution requires.⁴¹ However, he argues that the state should be able to prohibit women from intentionally waiting until late in the pregnancy to abort because this behaviour suggests indifference to the moral and social meaning of their act and insults the sanctity of human life.⁴² Thus he rejects the idea of a foetus as a rights bearer whose

³⁸ For further reading on the matter see: Cornelia T.L. Pillard (2006-2007) "Our other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy" 56 *Emory L.J.* 941

³⁹ Ronald Dworkin (1996) *Freedom's Law: The Moral Reading of the Constitution*; Cambridge: Harvard University Press

⁴⁰ Laurence H. Tribe (1990) "Abortion: The Clash of Absolutes", New York Norton

⁴¹ Ronald Dworkin (1993) "Life's Dominion: An argument about Abortion, Euthanasia and Individual Freedom", New York; Alfred A. Knopf pp 273; Robertson J.A.(1994) "Autonomy's Dominion: Dworkin on Abortion and Euthanasia"; 19 *Law & Soc. Inquiry* 457

⁴² Ronald Dworkin(1992) "Unenumerated Rights: Whether and How Roe should be overruled" 59 *University of Chicago Law Review* 381

interest should be protected by a third party, arguing that the issue at stake is the interest attached to the sanctity of life and the potential for human life.⁴³ Dworkin therefore takes a limited pro-choice position as he concludes that the foetus is not a constitutional person.

Developing Dworkin's argument, Hadley⁴⁴ notes the need for a humanitarian approach suggesting that few feminists argue for abortion in the third trimester of the pregnancy. This is so because most feminists desire a world in which women do not have to resort to terminations because they have real control over their fertility and because they do not have to worry about the social and economic factors that make it difficult to carry the pregnancy to term and raise the child. Feminists seek to protect the integrity of women's judgements about abortion arguing that women are best placed to make these decisions and should be given the space and respect necessary to make these without fear or coercion.

McDonagh⁴⁵ is in contrast with those concerned with the woman's right to choose whether or not to terminate a pregnancy and essentially makes the case on abortion to centre on the continuation of the pregnancy. She therefore argues that abortion does not require an explanation and hence, to remain pregnant a woman must consent to the use of her body by the foetus. She argues that an unwanted pregnancy is much like a rape or a kidnapping, an invasion and extended overwhelming control over a woman's body which under the right to self-defence, she is entitled to repel.⁴⁶ It is because of this uninvited bodily invasion that entitles the woman to assistance by the State in resisting the foetus. She makes it clear that the conditions under which one became pregnant and desires abortion are irrelevant to the question of abortion.

Further she asserts that there is a tendency in literature and debate on abortion to assume that unless the woman was raped, pregnancy is a volitional and voluntary act. Thus, in asserting her argument, she concedes personhood to a foetus in order to focus on what the fertilized ovum

⁴³ Ronald Dworkin (1993) *op. cite* note 41 at pp 67

⁴⁴ Hadley (1996) "*Abortion: Between Freedom and Necessity*" at pg 76-77; for further reading also see an article by Nancy J Hirschmann (2003-2004) "*Abortion, Self-defense and Involuntary Servitude*" 13 *Tex.J. Women & L.* 41

⁴⁵ Eileen McDonagh (1996); *Breaking the Abortion Deadlock: From Choice to Consent*, New York Oxford University Press in Binion G (1988-89) "*Reproductive Freedom and the Constitution: The Limits on Choice*" 4 *Berkeley Women's Law Journal*, p12-41; Eileen L McDonagh (1998-1999) "*My body, My Consent: Securing the Constitutional Right to Abortion Funding*" 62 *ALB .L. Rev* 1057 ; also see an article by Nancy J Hirschmann (2003-2004) "*Abortion, Self-defense and Involuntary Servitude*" 13 *Tex.J. Women & L.* 41

⁴⁶ A similar argument is offered in Thomson J (1971) "*A Defense of Abortion*" 1 *Philosophy & Public Affairs* at pg 56-58

does and not what the fertilized ovum is.⁴⁷ In her view, a woman's right to self-defence against a foetus is the same as her right to repel anyone's invasion of her bodily integrity. She sees an unwanted pregnancy as a civil and criminal wrong against a pregnant woman rather than where a pregnancy is often considered as a "gift from God".⁴⁸

Neff shares the view that pregnancy is an entirely physical phenomenon but regards the foetus and the pregnant woman as an indivisible whole. This approach precludes anti-choice forces from treating the foetus as having separate interests from those of the pregnant woman which the State ought to protect. She argues that if the State acknowledges the separation, there is a need to determine the status of the foetus as a person in all aspects of the law (my emphasis added).⁴⁹

2.3 THE DEVINS THESIS

Neal Devins⁵⁰ argues that the issue of abortion is not premised on the issue of choice or that of protection of the rights of the unborn child. He focuses his attention to the roles of the elected branches of the State in the formulation and shaping of the policies governing the legality of abortion and its availability. The main thrust of his argument on abortion rights is based on the courts, the legislature and the executive. He argues that the three branches of the state are interrelated thus the focus of the prolife and prochoice proponents is misplaced as they ought to look further on the legislature and the executive as well. Devins places the debate on abortion within the context of the *trias politica*⁵¹ principle and concludes that constitutional decision making involves all the three branches and the courts only help to define but not control the constitutional interpretation.⁵² Thus, he observes the role of the court and suggests respectively that legislatures should be afforded greater input on the abortion issue such that the court's constitutional decisions eventually follow those of the dominant lawmaking majorities.

⁴⁷Eileen McDonagh (1996) (*op. cite note 45*) at pg 5

⁴⁸Eileen McDonagh(*ibid*) at pg 30

⁴⁹ Neff is cited in the Article by Susan E Looper-Friedman (1994-1995)"*Keep your Laws off my body*": *Abortion Regulation and the Takings clause*; 29 New Eng .L. Rev 253

⁵⁰ Devins N(1996), *Shaping Constitutional Values*; Baltimore: Johns Hopkins Press

⁵¹ Trias politica principle is the model for the governance of a State which is divided into separate distinct branches which are independent of each other, with different powers and areas of responsibility which are not in conflict with the other branches. This comprises of the legislature, executive and the judiciary.

⁵² Devins N *op. cite note 50* at pg 55

2.4 Conclusion

It is argued that a foetus is not a legal person with interests worthy of legal protection. Further, the nasciturus rule on which anti-abortion proponents seek to rely on is only acceptable in matters of the law of succession. In abortion matters it is inapplicable as the rule relies on the subsequent live birth of the foetus for its application. Though critical of McDonagh's view on how abortion affects reproductive freedom, it is agreeable that the reasons why a pregnant woman would desire an abortion are irrelevant. It is submitted that the acceptable arguments in relation to abortion is that which advances the reproductive freedom of women. This is because it requires a woman to make reproductive decisions independent of any interference. It is further submitted that legislation remains the most influential in granting or taking away the reproductive freedom that women ought to exercise.

CHAPTER THREE

3.0 ANALYSIS OF THE ABORTION LAWS IN ZIMBABWE

3.1 INTRODUCTION

A critical analysis of the main legislative provisions that are of relevance to abortion in the Constitution, the Criminal Law (Codification and Reform) Act and the Termination of Pregnancy Act will be provided. It will be argued that the focus of the legislation in question is mainly on the protection of the unborn child to the detriment of the pregnant woman. It will be submitted that the legislation has literally forced women to carry pregnancies to term except only in defined terms of the law by criminalising abortion in a bid to protect the life of the foetus. As a result, the criminalisation of abortion in Zimbabwe seems to impinge on various human rights of the pregnant woman. Consequently, it will become clear that women in Zimbabwe are denied the right to exercise their reproductive freedom when it comes to termination of pregnancy.

3.2 A critical analysis of the abortion laws in Zimbabwe

3.2.1 The Constitution of Zimbabwe Amendment (No.20) Act, 2013 on abortion

In Zimbabwe, the Constitution is the supreme law of the land. It provides for the protection of the unborn child under Section 48(3) which states that:

“An Act of Parliament must protect the lives of unborn children and that Act must provide that pregnancy may be terminated only in accordance with that law”.

This section accords the foetus with the right to life. From the onset foetuses are regarded as entities with rights worthy of constitutional protection. The Constitution confers a legal duty on the state to protect the foetus against termination. Dworkin (1992) provides an insightful analysis to the constitutional right to life of the foetus and contends that the state has a detached interest in regulating abortion which is derived from the interest of the state in potential human life flowing from its interest in protecting the sanctity of life in general.⁵³ Arguably, the analysis offered by Ronald Dworkin that the state is justified in fostering the sanctity of human life by protecting potential life and regulating abortion is upheld in this regard.

⁵³ Ronald Dworkin (1992) *op cite note 42*

Nevertheless, it is submitted that regulating abortion should meet minimum standards which recognize the rights of the pregnant woman. The constitutional question that seems to be ignored is the extent to which the state's interest in protecting the foetus ought to be justified. According to Ngwena (2010)⁵⁴, laws that seek to liberalize abortion but also recognise the right to life of the foetus, have the effect of inscribing into domestic law a maternal and fetal rights conflict at the cost of clarifying the woman's right to abortion. It is evidenced that the Constitution in undertaking its duty to protect the life of the foetus, impinges on the civil rights of the pregnant woman when it denies her an opportunity to exercise her reproductive choice. The law legitimizes religious and moral assumptions about the sanctity of fetal life as a sufficient justification for compelling a woman to carry a pregnancy to term against her wishes.⁵⁵

However, it is argued that such a justification for the infringement of the pregnant woman's rights should not be led until the fundamental proposition of our law that rights and obligations accrue only from birth, is expressly altered to accommodate the foetus. It is submitted therefore that although the law recognises the legal rights of a foetus, this should not be a ground for infringing the rights attached to the pregnant woman. In any event, section 51 of the Constitution provides that every person has inherent dignity in their private life and the right to have that dignity respected. It is submitted that where a woman decides and chooses to terminate a pregnancy, according her that right respects and protects her human dignity. Hence there is no reason why the reproductive choice of the pregnant woman should not be respected.

It is submitted in this regard that the Constitution is unfavourable to women with regards to according them with reproductive freedom. The stringent approach the provision of the Constitution has towards abortion deprives women of a voice regarding their fertility. It simply takes away the ability of a woman to have control over her body, which is critical to her exercise of civil rights. Denying women the freedom to choose and act on decisions concerning their reproduction treats them as a means to an end and strips them of their human dignity.⁵⁶ It is argued then that the right to life ought not to be the sole constitutional focus on the abortion

⁵⁴ Charles Ngwena (2010); *Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa*; 32 Hum. RTs Q. 783 at 835

⁵⁵ *ibid* at pg 846

⁵⁶ Such an argument was also raised by Wilson J in the case of *R v Morgentaler* (1998) 44 DLR (4th) 385 at 491

debate.⁵⁷ The rights of the pregnant woman to bodily integrity, liberty and security of person, human dignity, equality and non-discrimination ought to be accorded due weight in any Constitution and the state has a duty to protect these rights.⁵⁸ It is argued hereon that whatever rights the foetus is said to have, are overridden by the rights of the pregnant woman in the exercise of her reproductive freedom with regards to fertility.

3.2.2 The Termination of Pregnancy Act [Chapter 15:10] and abortion

This is the Act of Parliament that governs the lawful termination of a pregnancy in Zimbabwe. Section 3 of the Act explicitly provides that:

“No person may terminate a pregnancy except in accordance with the Act”.

The grounds upon which a pregnant woman is eligible for the termination of the pregnancy are explicitly mentioned under Section 4 which provides that pregnancy can only be terminated:

- (a) where the continuation of the pregnancy so endangers the life of the woman concerned or so constitutes a serious threat of permanent impairment of her physical health that the termination of the pregnancy is necessary to ensure her life or physical health, as the case may be; or
- (b) where there is a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will permanently be seriously handicapped; or
- (c) where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse

Any other reason for termination other than that which is provided for under section 4 constitutes a criminal offence. Women are restricted entirely to the conditions set out in the Act to be eligible for lawful termination of pregnancy.

It is necessary in this regard to submit the analysis offered by Ngwena⁵⁹ with regards to the provisions of section 4. He submits that the requirement of “endangering” the woman’s health imports a notion of medicalization of abortion that has the capacity of reinforcing the present

⁵⁷ Reva B Siegel (2007) *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*; 56 EMROY L.J. 815, 835-36

⁵⁸ Sylvia A. Law, (1984) *Rethinking sex and the Constitution*, 132 U. PA.L. Rev 955 at 962 advocates for a test that focuses on the impact of sex-differential regulations and argues that in the reproductive arena, the state has an interest which it should balance with the duty to protect the foetus.

⁵⁹ C Ngwena (2010) (*op. cite note 54*) at 849-50

impediments to abortion. He states that, to determine whether the woman's health is endangered in health care settings where abortion services are provided ordinarily requires a medical diagnosis to be made by doctors before a woman can be certified as eligible for abortion. However, he argues that the danger to the life of the woman must not be viewed through a sanitized medical lens which depends on a prior medical diagnosis but rather it should be viewed through a holistic reproductive lens which renders visible unsafe abortion as a significant cause of maternal mortality.⁶⁰

As regards the requirement of abortion being offered as a result of unlawful intercourse, Ngwenya (2010) applauds the state in recognizing the inhumane and degrading nature of requiring a woman to continue a pregnancy that is a result of unlawful sex. However, he argues that the problem with such a condition for permitting abortion is that the state tends to add little to broaden access to abortion.⁶¹ For example, Banda (2005)⁶² argues that in many settings rape is rarely accompanied by regulations or guidelines which facilitate timely access to abortion and when such regulations and guidelines are present, they are often conceived in conjunction with national laws that import medicalization as well as judicialization of rape as a ground for abortion. She submits that the result is that the victims of rape end up being put through a system that paradoxically treats them as if they are defendants who have to be acquitted before they can be permitted to have an abortion, in that they have to meet certain forensic and judicial standards for proving the fact of rape.⁶³

An example in Zimbabwe is the case of *Ex parte Miss X*⁶⁴ in which a pregnant woman who had alleged that her pregnancy was a result of rape applied to the magistrate in terms of the Act for a certificate which would have allowed her to have the pregnancy terminated. However, since the Act is couched in such a manner that allows the magistrate to exercise discretion, the magistrate

⁶⁰ Ibid pg 850

⁶¹ Ibid pg 848

⁶² Banda F (2005), *Women, Law and Human Rights: An African Perspective*, Oxford Hart Publishing at 173-76; further reading see: Desiree Hansson & Diana E.H Russellm (1993), *Made to Fail: The Mythical Option of Legal Abortion for Survivors of Rape and Incest*, 9 S. AFR. J. ON HUM. RTs 500,506; K.I. Teklehaimanot & C. Hard Smith,(2004), *Rape as a legal Indication for Abortion: Implications and Consequences of the Medical Examination Requirement*; 23 MED & L. 99,94-98

⁶³ ibid

⁶⁴ 1993 (1) ZLR 233(H)

declined to issue the certificate because he was not satisfied that there was a reasonable possibility that the pregnancy was the result of rape. Interesting to note, is part of the judgment by Chidyausiku J (as he then was) where he justified the procedural delay in how Miss X's matter was handled. He stated that the delay was not of the magistrate's making and placed the blame solely on Miss X for her failure to pursue the matter more "vigorously and timeously"⁶⁵ Thus, it becomes evident that such grounds for permitting abortion frequently fails women as it is fraught with administration delays⁶⁶ which is even judicially justified. Furthermore, the Act does not even provide for a right of appeal against the decision of a magistrate and it does not specifically provide for review of the decision of the magistrate.

Further, the default judgement issued in the case of *Mildred Mapingure v The Minister of Home Affairs, Minister of Health and Child Welfare and Minister of Justice, Legal and Parliamentary Affairs*⁶⁷ by Bere J shows how the law is still oppressive with regards to women's reproductive freedom. The summary of the facts of the case are that, Mapingure was raped and intended to have the pregnancy terminated but for her to lawfully terminate the pregnancy within the provisions of the Act, she needed a police report confirming that indeed she had been raped. However, as a result of the delays from the police side she was unable to terminate the pregnancy within the required legal time frame and when she finally acquired all the documentation needed, it was already unsafe for termination to be performed. On appeal, the Supreme Court handed a judgement which overlooked the loss of autonomy in respect of termination of pregnancy.⁶⁸ The court rather found that the obligations of the state authorities did not extend to the duty to initiate that Mapingure obtain the certificate of termination. The court left the issue of autonomy in decision making open. It is evident from the Mapingure case that the court overlooked the laborious process of satisfying the conditions provided for in the Act as being the cause of the delay in granting her permission to have the pregnancy aborted. The end result therefore is that women are not even permitted to have an abortion in Zimbabwe even where they meet the

⁶⁵ *Ex parte Miss X*(ibid) at pg 240 Para F

⁶⁶D Hansson and D E.H Russell(1993) (*op. cite note 65*) at 506

⁶⁷HH-452-12(unreported case) , see also www.financialgazette.co.zw/abortion-pro-life-or-pro-choice; Mureriwa Isaiah: Case Note of *Mildred Mapingure V Minister of Home Affairs and 2 others* at www.essaydepot.com/.../Mureriwa-Isaiah-Case-Note-Of-Mildred.

⁶⁸ *Mapingure v The Minister of Home Affairs and 2 others* SC406/12

criteria for eligibility set out in the Act as it is couched in a very restrictive manner which is retrogressive in the reproductive freedom of women.

It is also argued that the Act does not even deal with the issue of the mental health of the pregnant woman; neither does it deal with the issue of an HIV positive pregnant woman desiring to have an abortion. The threat of a woman's health is confined to "physical" health and there is no mention of "the mental" health of the woman. According to Ngwena (2010), when interpreted broadly, the risk to the mental health of the pregnant woman has the potential to effectively facilitate abortion on socio-economic grounds. He submits that health is not a mere absence of pathological disorder but it embraces social well being as well.⁶⁹ Rebecca Cook (2006) arguably contends that the psychological distress that is caused by being compelled to become a mother is detrimental to the woman's health.⁷⁰

It is also clear from the provisions in the Act that if the pregnant woman has full blown AIDS⁷¹, the pregnancy would pose a threat to her physical health and she would be entitled to have the pregnancy terminated on that ground. However there is no convincing evidence that in her HIV positive condition the continuation of the pregnancy will pose a threat to her physical health or that of the foetus.⁷² The eugenic ground of a serious risk that the child will be born with a physical defect which will permanently and seriously handicap him or her is not even applicable in the circumstances⁷³ as the risk of the mother transmitting the virus to the child is questionable considering the medical technology of preventing such transmission. In effect, only the grounds explicitly stated in the Act are the only permissive grounds regarded for one to have a lawful termination.

According to Rebecca Cook et al⁷⁴ the social circumstances of the pregnant woman are relevant to determining whether or not to carry the pregnancy to term. However, it is submitted that there is nowhere in the Act where there is leeway for a woman to exercise her own reproductive choice

⁶⁹ Charles Ngwena (*op. cite note 54*) at 836

⁷⁰ Rebecca J Cook e'tal (2006) *Legal Abortion for Mental Health Indications*; 95 INT'L GYNECOLOGY & OBSTETRICS 185

⁷¹ Acquired Immuno Deficiency Syndrome

⁷² Legal Forum, Vol.1 Number 6 December 1989; *Can a pregnant mother with AIDS have a lawful abortion?* Pg 19 at 23 by Geoff Feltoe; see also: G. Feltoe(2006) *Commentary on the Criminal Law (Codification and Reform) Act,2004*, Legal Resources Foundation WO41/84

⁷³ *ibid*

⁷⁴ Rebecca J Cook e'tal (*op. cite note 72*)

freely and voluntarily except for the defined grounds. Maja K Eriksson⁷⁵ argues that if a right is arguably necessary to the freedom of an individual (that is, to have the power to direct his/her own life) it is to be considered fundamental. In other words, it is essential to secure women's reproductive rights since the ability to decide freely and in an informed manner is the first step in enabling women to exercise their choices.⁷⁶ The state must therefore confront the biological differences between women and men in a way that will make the legal system responsive to promoting women's reproductive rights regardless of the biological differences.⁷⁷

It is submitted therefore that the law should not offer conditional exercise of reproductive choice, which in actual fact is given restrictively. Women's reproductive freedom should be understood within a wider context inclusive of the physical, social, religious and economic conditions. The woman's reproductive choice and all the other rights such as that of dignity and bodily integrity are literally trampled by the Act. It is submitted hereupon that the restrictive criteria for legal abortions push women into unsafe abortions which sometimes result in the death of the women as they are mostly performed by unskilled and unprofessional persons. To most women who find themselves in such predicaments, the right of choice has been taken away from them arbitrarily by the law.⁷⁸ It is argued therefore that, although the country has made positive gains in terms of women's equality rights, when it comes to reproductive freedom in terms of the Act, women are yet to be given the power to exercise their own decisions on whether to carry the foetus to term or not.

3.2.3 The Criminal Law (Codification and Reform) Act [Chapter 9:23] on abortion

Section 60(1) of the Criminal Law (Codification and Reform) Act criminalises abortion. In terms of section 60(1);

⁷⁵ www.book.google.co.zw/books/about/Reproductive_Freedom.html?id=GQK>If 7C 5 BWC & redir-esc=y, Maja Kirilova Eriksson(2000) *Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law*; Martinus Nijhoff Publishers at pg166

⁷⁶ A/ CONF.157/ PC/61/Add.9 p.8 also see the study on the Interrelationship of the Status of Women and Family Planning, UN Doc. E/CN; 6/575/Rev.1,31

⁷⁷ Sylvia A. Law; (1984)*op. cite note 60* at 962

⁷⁸ www.financialgazette.co.zw/abortion-pro-choice-or-pro-life/;Article by Tabitha Mutenga; Abortion: Pro-life or Pro-choice. 24 February 2014; See also: Rebecca Cook (1998); *Human Rights Law and Safe Motherhood*, 5 EUR.J. Health .L 357,366

“Any person who intentionally terminates a pregnancy or terminates a pregnancy by conduct which he or she realises involves a risk or possibility of terminating the pregnancy shall be guilty of unlawful termination of pregnancy”.

Thus, it is a criminal offence to terminate a pregnancy other than by that which is provided in law. The defences that a woman who has terminated a pregnancy can raise are that the pregnancy was terminated as a result of a caesarean section or it was terminated in accordance with the Termination of Pregnancy Act. It is noteworthy to state that the offence of unlawful termination of pregnancy is classified as a crime against a person. This further strengthens the submission that the law in Zimbabwe regards a foetus as a person with rights worthy of protection.

It is argued that criminalising abortion to prevent persons from making reproductive decisions including those which relate to abortion is inappropriate. The use of criminal law for regulating abortion encourages the linking of unwanted pregnancies to a negative value that discriminates against pregnant women. Although the state permits exceptions to their criminal prohibition of abortion, their retention of abortion within the criminal law framework fundamentally denies women of any moral agency.⁷⁹ Reva B Siegel⁸⁰ has argued that criminalization of abortion is a telling manifestation of the singular power of patriarchy and the marginal and subordinate status of women as physiological beings who are expected, as well as required, to bear children in a gendered society. She argues that a woman has a societal obligation to bear a child and that she can only be excused from that when it is no longer medically practicable. She submits that this gives preference to patriarchal and religious assumptions about the childbearing role of women in the society and this condones gender discrimination.⁸¹

Further, Rebecca Cook⁸² (1992) contends that part of the challenge of protecting the reproductive rights of women even in democracies is that, although women are not necessarily numerical minorities, they are frequently political minorities whose voices are often silent or more significantly, are being silenced by patriarchal and religious institutions. Reva B Siegel (1995)

⁷⁹ Ellen Willis (1983), *Abortion: Is a Woman a Person?* In Snitow A et al eds.(1983), *Powers of Desire: The Politics of Sexuality* 460 at 473; see also Rebecca J Cook & Susannah Howard (2006-2007); *Accommodating Women's Differences under the Women's Anti-Discrimination Convention*; 56 EMROY L.J. 1039

⁸⁰ See article by Reva B Siegel(2007) *op. cite note 59*

⁸¹ Reva B Siegel (1992) *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stanford L.Rev. 261, 347-51; see also the article by Reva B Siegel.(2007) *op. cite note 59*

⁸² Rebecca J Cook (1992); *International Protection of Women's Reproductive Rights*; 24 N.Y.U.J. Int'l L & Pol'y 645

argues in that regard that there is gender bias in the regulation of abortion. She contends that “laws prohibiting abortion single out women for an especially burdensome and invasive form of public regulation, which reflects and enforces stereotypical understanding of women’s roles by compelling women to become mothers and subjecting women, especially poor women to unsafe and life-threatening abortion procedures”.⁸³

In light of these arguments, it is submitted that as pregnancy involves the pregnant woman from beginning to end, the law has to be gender sensitive with regards to abortion as pregnancy is a unique condition only applicable to the female species. Consequently, the state should regulate abortion in a way that respects the rights of women. Whatever sex role differences that exist between men and women, the state should not entrench or aggravate these role differences by using the law to restrict women’s bodily autonomy and life’s opportunities in ways that the state does not restrict the men’s.⁸⁴ Women should be given an opportunity to exercise their reproductive choice in deciding for whatever reason, whether or not to carry the foetus to term before the law takes away such a right by criminalizing abortion. Thus, criminalizing abortion should not be done at the expense of the pregnant woman’s right to choose whether or not to carry the pregnancy to term.

3.3 Conclusion

In conclusion, it is submitted that there is need for a human rights based approach in Zimbabwe regarding abortion laws. It can be argued that the abortion laws are patriarchal in nature and they seem to ignore the rights of the pregnant woman that are infringed in protecting the foetus. It is evident from the above that, the abortion laws in Zimbabwe literally forces women to carry unwanted pregnancies to term. It is argued that the law against abortion is unfavourable for women as they resort to illegal terminations, thereby depriving women of the right to life and

⁸³ Reva B Siegel(1995), *Abortion as a Sex Equality Right: It’s Basis in Feminist Theory*, in *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*, 43 at 64-65, the same argument is advanced by Sylvia A Law(*op. cite note 60*) and Laurence H Tribe(*op. cite note 40*)

⁸⁴ Reva B Siegel(2007) (*op. cite note 59*) at 835-36Ibid at 819;Ruth Bader Ginsburg(1985) *Some Thoughts on Autonomy and Equality in Relation to Roe v Wade*, 63 N. C. L. Rev. 375 argues that abortion rests on gender equality grounds and statute does not go beyond that which would have the goal of facilitating the political development of abortion rights

even health-care. Pregnancy is unique to women as much as vasectomy is to men.⁸⁵ Thus it is only fair to respect and understand women in desiring to have an opportunity to make reproductive choices without interference from the state. Therefore, abortion should not be restricted to conditional requirements because the reasons for wanting an abortion vary and are irrelevant to the reproductive freedom of a woman. Conclusively, it is submitted that the abortion laws in Zimbabwe literally insult the dignity of pregnant women and significantly denies women of a fair opportunity to control their own reproductive life.

⁸⁵ The argument finds support from various feminists such as Sylvia A Law (*op cite note 60*); Reva B Siegel (*op cite note 59*); Rebecca J Cook (*op. cite note 72*) and Eileen McDonagh (*op. cite note 45*)

CHAPTER FOUR

4.0 EVALUATION OF THE INTERNATIONAL AND REGIONAL HUMAN RIGHTS BASED APPROACH REGARDING ABORTION

4.1 INTRODUCTION

This Chapter will examine the various international and regional human rights instruments to which Zimbabwe is signatory to. These comprise of the Convention on the Elimination of all forms of Discrimination against Women⁸⁶, the International Covenant on Civil and Political Rights⁸⁷, the International Covenant on Economic, Social and Cultural Rights⁸⁸, the African Charter on Human and Peoples' Rights⁸⁹ and the Protocol to the African Charter on Human and Peoples' Rights to the Rights of Women in Africa.⁹⁰ The South African Choice on Termination of Pregnancy Act 92 of 1996 will also be referred to in analysing the right to abortion from a human rights based approach. An analysis of how abortion has been interpreted by the courts internationally and regionally by evaluating the framework against the abortion laws in Zimbabwe will be provided.

4.2 INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

4.2.1 Right to human dignity and bodily integrity

CEDAW is the primary international human rights instrument that provides for reproductive rights. It reinforces principles which are inherent in the ICESCR and the ICCPR. Currently, the term abortion is absent from the main text of CEDAW. However, the right to abortion is consistent with reproductive rights which are rooted in the principle that human dignity demands the inviolability of the human body.⁹¹ Article 4 of the African Charter provides that "*human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right*". Article 4 of the Women's

⁸⁶ Hereinafter referred to as CEDAW

⁸⁷ Hereinafter referred to as the ICCPR

⁸⁸ Hereinafter referred to as the ICESCR

⁸⁹ Hereinafter referred to as the African Charter

⁹⁰ Hereinafter referred to as the Women's Protocol

⁹¹ Anlka Rahman, (1994); *A View Towards Women's Reproductive Rights Perspectives on Selected Laws and Policies in Pakistan*, 15 WHIRLER L. REV. 981 quoted in (1997) South Africa's 1996 Choice on Termination of Pregnancy Act: Expanding Choice and International Human Rights to Black South African Women 30V and J TransnatL 863

Protocol provides that every woman shall be entitled to respect for her life and the integrity and security of her person. The Women's Protocol further provides under Article 3 that "*every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.*" Section 51 of the Zimbabwean Constitution respectfully provides for the right to human dignity.

It is submitted that the decision on whether to terminate a pregnancy concerns both reproduction and control over one's body. It is argued therefore that denying a woman to freely make decisions concerning her reproduction strips her of dignity and treats her as a person unworthy of self-respect and self-worth. The consequences of an unwanted pregnancy forced to term impacts on the woman negatively on her quality to life. Human dignity is explicitly protected by Article 5 of the African Charter which in essence entails that everyone is to be treated with respect and concern including bodily integrity. Bodily control is an essential element to the realisation of dignity.

In so far as the abortion laws in Zimbabwe are concerned, it can be safely argued that women are seen as beings in need of protection. It is further argued that women are thus regarded as vulnerable, weak and incapable of making sound decisions on their own regarding their fertility. In *R v Morgentaler*⁹², Wilson J asserted that "the right to reproduce or not to reproduce is one such right which is properly perceived as an integral part of modern women's struggle to assert her dignity and worth as a human being". In light of this submission, it is submitted that giving women the right to control their bodies and fertility upholds these fundamental rights and respectfully accords women with human dignity.

4.2.2 Reproductive rights and the right to health

The provision for reproductive rights of women is provided under Article 16(1) (e) of CEDAW which ensures that women have "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights". Further Article 12(1) mandates States parties to "...take appropriate measures to eliminate discrimination against women in the field of health-care in order to ensure on a basis of equality of men and women, access to health-care services including

⁹² (1998) 44 DLR (4th) 385 at 491

those related to family planning”. In Zimbabwe, Section 76(1) of the Constitution provides for the right to health including reproductive health-care services.

According to Article 12 (1) of the ICESCR, on the right to health it mandates state parties to the Covenant to “recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. The Women’s Protocol under Article 14(1) (a) and (b) provides that

“States parties shall ensure that the right to health of women including sexual and reproductive health is respected and promoted. This includes the right to control their fertility and the right to decide whether to have children, the number of children and the spacing of children”.

Reproductive health implies the ability to reproduce, to regulate fertility and ensures that those women can go safely through pregnancy; whereas reproductive autonomy encompasses the decisions on how to regulate fertility, whether or not to have sex, children, the number and spacing of the children and whether to carry a pregnancy to term.⁹³ It is argued therefore that reproductive health and reproductive autonomy are inextricably linked because reproductive autonomy is required for women to enable them to reproductive health. The African Commission in the case of *Purohit and Another v The Gambia*⁹⁴ noted that the enjoyment of the right to health is vital to all aspects of a person’s life and well being as it is crucial to the realisation of all other fundamental human rights and freedoms.

It is submitted therefore that the right to health is inclusive of the right to control one’s fertility; and autonomy refers to the right to decide on the method of fertility control. It can be argued in light of these provisions that the language can easily be construed as protecting the right of a woman to decide to terminate a pregnancy or not. This is so because abortion can provide an effective method of family planning and controls the number and spacing of the children. Thus it is essential for the state to provide safe legal abortion services for those women who wish to terminate their pregnancy to safeguard their health.

⁹³ Fathalla M; *Reproductive Health: A Global Overview Analysis* NYACAD, SCI, 28 June 1991 at 1 quoted in Cook R (1995); *Human Rights and Reproductive Self-determination* 44 The American University LR 975 at 1002

⁹⁴ 2003(AHRLR) 96 (ACHPR 2003) at para 80

4.2.3 Equality and non-discrimination

The obligation of states therefore is to eliminate discrimination against women and ensure their enjoyment of reproductive rights on an equal basis with men. CEDAW defines discrimination against women to mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women...⁹⁵ of human rights and fundamental freedoms. Fundamental human rights such as liberty and security of the person, privacy, human dignity, health and equality and non-discrimination support by way of inference a woman's right to terminate a pregnancy. It can be argued that the lack of access to effective means of birth spacing and fertility control violates a woman's right to liberty and security of the person. Further, failure to provide access to safe and legal methods of birth control and abortion services endangers women's lives as they resort to illegal methods. Women who resort to backstreet abortions often suffer from grave physical and mental complications.

It can be argued therefore that the inability of women to freely secure legal abortions impacts on their personal freedom and social equality as well. MacKinnon⁹⁶ argues that forced motherhood is sex inequality because to interfere with a woman's right whether or not to carry a foetus; and failure to take steps to provide access to acceptable medical procedures deprives her of the right to control her life and therefore constitutes gross inequality and discrimination against women. Section 56 of the Constitution provides for equality and non-discrimination for all. This is in line with various regional and international human rights instruments.⁹⁷ The submission advanced therefore is that women are supposed to be treated fairly in a manner that respects their fundamental rights. Equal protection of the law has to be afforded to both men and women in reproductive issues and there should be no limitations placed on women for the enjoyment of their rights especially in abortion.

4.2.4 General Recommendation 19 and 24 and non-discrimination

Though the term abortion is absent from the main text of CEDAW, General Recommendation 24 written in 1999 by the twentieth session of CEDAW mentions abortion and encourages states to

⁹⁵ Article 1 of CEDAW and art 2

⁹⁶ Catherine MacKinnon (1987); *Feminism Unmodified: Discourses on Life and Law*, 251

⁹⁷ Article 3 of the ICESCR, art 3 of the ICCPR; article 2 of the Women's Protocol

legalize and improve women's access to it.⁹⁸ General Recommendation 19 in addressing the issue of violence against women encourages state parties to ensure that measures are taken to prevent coercion in regard to fertility and reproduction and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services regarding fertility control.⁹⁹ It is noteworthy that in 1998, the CEDAW committee recommended that Zimbabwe “reappraise the law on abortion with a view to its liberalization and decriminalization against the backdrop of the government citing illegal abortion as a major cause of maternal mortality” in its report.¹⁰⁰

It is submitted that the CEDAW committee in interpreting Article 12 has implicitly associated restrictive abortion laws with discrimination on the basis of gender and have advocated for states to construct a remedial framework that recognises a positive duty to provide universal access to abortion services.¹⁰¹ Thus it is submitted that members of the committee that monitor state compliance with CEDAW have adopted a position that restrictive abortion laws are always discriminatory because abortion is a procedure that only women undergo and should be accorded to them. It is also submitted that in the case of *Roe v Wade*¹⁰² the court focused on the right of the woman to make reproductive choices without interference by the state. The court merely required the state not to interfere with a formal right to abortion

4.2.5 Restrictive abortion laws

In light of these submissions, it is also noteworthy that burdensome certification requirements restrict women to enjoy their fundamental rights freely. In the regional context, Concluding Observations of the Human Rights Committee in respect of Zambian abortion laws said that the requirement that three physicians must consent to an abortion may constitute a significant

⁹⁸ CEDAW, Report of the Committee on the Elimination of Discrimination against Women, General Recommendation 24 U.N. DOC. A/54/38/Rev. 1(Aug.20,1999)

⁹⁹ CEDAW, Report of the Committee on the Elimination of Discrimination against Women, General Recommendation 19 U.N. DOC. A/47/38/Rev. 1(Jan.29,1992)

¹⁰⁰ Consideration of Reports of States Parties: Zimbabwe (159) UN GAOR, Comm. On Elimination Of Discrimination Against Women, 18th Session, 159

¹⁰¹ Charles Ngwena (*op. cite note 54*) at pg 788

¹⁰² *ibid*

obstacle for women wishing to undergo legal and safe abortion.¹⁰³ This restrictive nature of abortion laws deprives women of an enjoyment in reproductive freedom. In Zimbabwe the same burdensome certification requirements are provided for under the Termination of Pregnancy Act¹⁰⁴. It is submitted therefore that medicalization of abortion impinges on pregnant women's bodily integrity as they will undergo a series of medical exam to determine eligibility

4.3 The South African Choice on Termination of Pregnancy Act 92 of 1996

The Act embraces a human rights based approach towards abortion. It promotes women's reproductive rights and affords them with freedom of choice with the right to choose whether to have an early, safe and legal termination of pregnancy. Section 2 of the Act provides broad grounds from twelve to twenty weeks on which a pregnancy can be terminated upon the request of the pregnant woman. Section 2 (1) of the Act particularly provides that a pregnancy may be terminated at the request of the pregnant woman during the first twelve weeks of the pregnancy. Further, Section 5 (2) of the Act emphasizes the importance of the consent of the pregnant woman. It is submitted that the Act respectfully shifts away from abortion with its connotation of criminality, to a woman's right of choice with respect to reproduction. The Act recognizes that women are best placed to make decisions regarding termination according to their individual beliefs and protects their right to make decisions concerning reproduction and control over their bodies

4.4 Conclusion

It is submitted in conclusion that the regional and international legal framework advocates for respect and protection of women's rights where they desire termination of pregnancy. Zimbabwe also provides for these fundamental rights and freedoms of women in the Constitution. However, the restrictive nature of the abortion laws deprive women who desire to terminate their pregnancy of an enjoyment and exercise of these rights accorded in the regional and international human rights instruments. The South African Choice on Termination of Pregnancy Act advances

¹⁰³ Concluding Observations of the Human Rights Committee: Zambia adopted 20 July 2007, U.N GAOR, Hum. Rts. Comm, 90th Session 18 U.N. DOC. CCPR/C/ZMB/CO/3 (2007); the Zambian Termination of Pregnancy Act of 1977[Cap 304] section 3(1) provides for the certification requirements.

¹⁰⁴ See Section 5

the right of autonomy in decision making when it relates to termination of a pregnancy. It clearly respects the right of choice on whether to carry a pregnancy to term or not.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The analysis of the abortion laws operative in Zimbabwe undertaken in this paper evidently shows that termination of a pregnancy has been viewed around matters of public policy expressing moral values some of which are grounded in religious beliefs. The strongest argument against termination of a pregnancy is that fetal life should be protected at all costs and that abortion should be prohibited and permitted in extremely limited circumstances. The Constitution of Zimbabwe asserts these religious and moral arguments which advance the sanctity of life on the basis of the rights of the foetus. Legislation regulating abortion in Zimbabwe infringes on various human rights accorded to women such as the right to bodily integrity, human dignity, the right to health as well as equality.

In light of the analysis proffered, it evidently becomes clear that the law governing abortion is patriarchal in nature. It raises gender stereotypes against women which suggest that the “naturalness” of motherhood is the ultimate ideal role of women. Women remain discriminated against with the criminalisation of abortion as they are limited to exercise the right of choice on an equal basis with men. The notion limits the ability of individual women to make decisions on whether to carry a pregnancy to term as it profoundly insinuates that women are by nature less capable of autonomous action. Thus Legislation remains the only barrier that is retrogressive to the realisation of autonomy as a right in abortion matters.

The suggested recommendations therefore provide a platform for possible improvements on the laws governing abortion in Zimbabwe.

5.2 Recommendations

In light of the above analysis proffered in this research, the following recommendations are:

- 5.2.1 Decriminalisation of abortion is necessary to uphold the fundamental reproductive human rights accorded to women. A paradigm shift is needed in the regulation of abortion from

the model of crime and punishment to a more reproductive health model which offers women with an exclusive right of autonomy regarding their bodies.

- 5.2.2 The Principal Act that governs abortion offers conditional grounds for termination of a pregnancy. There is need for the amendment of the Act so as to broaden and allow access to termination of pregnancy.
- 5.2.3 There is need for the State to take positive steps to provide to both women and providers of abortion clear and enabling guidelines for implementing access to safe and legal abortion by enacting policies that regulate abortion. Liberalisation of abortion law is likely not to be followed by practical implementation as various perceptions are rooted in religious and moral assumptions; hence the right to abortion might only remain as “paper rights”. Even where abortion has been decriminalised or the grounds for abortion have been broadened, the historical criminalisation and stigmatisation of abortion can become barriers to effective implementation.
- 5.2.4 It is also recommended that the Termination of Pregnancy Act governing termination of pregnancy in Zimbabwe should be amended and developed in line with the South African Choice on Termination of Pregnancy Act 92 of 1996 which has shifted away from abortion with its connotation of criminality, to a woman’s right of choice with respect to reproduction including the right to choose to terminate a pregnancy for whatever reason.

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