

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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entitled

.....A CASE STUDY OF ABORTION LAWS IN ZAMBIA:.....

.....A WOMAN'S PRIVATE RIGHT.....

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A CASE STUDY OF ABORTION LAWS IN ZAMBIA:

A WOMAN'S PRIVATE RIGHT

BY

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AN OBLIGATORY ESSAY SUBMITTED TO THE UNIVERSITY OF ZAMBIA,
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Special dedication to my mother, to the memory of my father,
and to my brothers and sisters, all to whom I am bonded
forever by blood and love.

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CHAPTER ONE

INTRODUCTION

1. STATEMENT OF THE PROBLEM

This study is concerned with the law on abortion in Zambia. Abortion is the termination of pregnancy before the unborn child or foetus attains the capacity for life outside the womb.¹ The practice of abortion has been received with mixed perceptions in many jurisdictions. These range from a prscription of abortion, to liberalisation of abortion laws, to legalisation of its practice. Underlying such positions are mixed issues of law and morality. The issues revolve on compromising public rights requirements in favour of abortion.

Public rights concern against abortion are based on the immorality of the practice of abortion, that it is immoral to 'kill' human life and deprive society of its potential most worthy members. Private rights concern on abortion are based on considerations for the capacity, health, safety and psychological well-being of an expectant mother who cannot cope with an undesirable pregnancy.

Zambia's Termination of Pregnancy Act 1972 Cap 554 reflects the dichotomy between public rights on abortion. It attempts at effecting a compromise by not completely proscribing abortion, and yet authorises

abortion only on stated and stringent grounds. The effects have been startling. Many expectant mothers have lost lives in their attempts to procure abortion through unorthodox ways. In the event, more lives, i.e. that of the mother and the unborn child, are lost. Moreover, many 'backyard' medical practitioners receive unjust enrichment by charging willing expectant mothers exorbitant fees for procuring abortion outside of the grounds authorised by the Act.

In view of the foregoing, this study examines, as its objective, the law relating to abortion in Zambia. It proposes to inquire into the public rights concern on abortion as against the private rights concern. Both the act leading to a pregnancy and the decision to terminate a pregnancy are respectively private and personal - should the law not be limited in its application, so as not to transgress in the realm of privacy, in such issues as termination of pregnancy? Specifically, this study will discuss the Termination of Pregnancy Act, together with Penal Code provisions related to abortion, namely, S.S. 151, 152, 153, S. 221 will be referred to in trying to show the inherent contradictions in the law of abortion; reference will also be made to relevant decided cases.

This is necessary because the Termination of Pregnancy Act lays down the criteria for a lawful termination

of pregnancy. This criteria is seemingly weighted between satisfying public rights and private rights in relation to abortion. The Penal Code, on the other hand, contains in SS; 151, 152 and 153 provisions for penalising an unlawful termination of pregnancy. In this respect, under section 221 (1) of the Penal Code, a person who causes a child capable of being born alive to die by any wilful act with the intent of destroying the life of such a child before it has an existence independent of its mother, is guilty of child destruction. Section 221 (2) requires that pregnancy for a period of 28 weeks or more is prima faice evidence that a child was capable of being born. The implication here is that a child whose life is destroyed when it is less than 28 weeks old is at least not capable of being born - what effect does this have on abortion under the Termination of Pregnancy Act, particularly when S. 221 (1) of the Penal Code stipulates that any person who has destroyed the life of a child capable of being born alive is not guilty of child destruction if the act which caused the death of the child was done in good faith only for the purpose of preserving the life of the mother. Two problems arise here, which will be elaborated on when we come to discuss the inherent problems in the law:

1. The term abortion is not defined by the Act. Therefore, if it is to be taken as the termination of a pregnancy before the foetus attains the capacity for life outside the womb, then it will encompass child destruction as well, so where do we draw the line between abortion and child destruction.
2. If child destruction is encompassed by the term abortion, and can therefore also be termed a termination of pregnancy and can be done by any person who feels it is necessary to preserve the life of the mother, how do we reconcile this with the provision in the Termination of Pregnancy Act which stipulates that a panel of 3 qualified doctors² is necessary to decide on the necessity to preserve the life of the mother. There is therefore an apparent contradiction in the law of Zambia which this study attempts to highlight and resolve.

2. SIGNIFICANCE OF STUDY

In recent times cases of abortion and attempted abortion have been increasingly prevalent.³ Although we have no proper statistics to support this contention due to the fact that abortion cases are hardly, if ever,

reported to the police, discussions with the appropriate persons at the University Teaching Hospital revealed that there is an increasing number of women who go to the hospital to terminate their pregnancies legally and there is an equally increasing number of women who go to the hospital after they have already procured their own abortion but due to complications, are rushed to the hospital to seek proper medical attention. It is also common knowledge that this latter category of women who are rushed to the hospital due to complications are told to report the matter to the police before they can be attended to but this is the most that the police can have on the matter as a follow up tends to be in vain; records with the private practitioner are destroyed.⁴ All this happens inspite of restrictions imposed by the Termination of Pregnancy Act and the related provisions in the Penal Code. Frequency in the practice of abortion has necessitated that the topic be revisited in a fresh perspective.

Clearly the Termination of Pregnancy Act, ever since its enactment in 1972 requires a new appraisal in the light of new behavioral patterns in Zambia. But this ought to be done in the context of the public rights and private rights, issues on abortion in order to reflect, on an informed basis, the position that the law in Zambia ought to take on abortion.

What is beyond doubt though, is the fact that there has developed permissiveness in sexual practices in Zambia today. This is hardly surprising. Apart from the restriction in the Penal Code, on copulation of persons below 16 years of age, there is no legal prohibition of copulation in Zambia for unmarried persons above the age of 16. Coupled with this is a new awareness on the part of adolescents towards copulation by family planning programmes in schools and other institutions. These are meant to prevent unwanted pregnancies. But they also raise an implicit assumption that together with permissiveness in sexual attitudes, society must avoid undesirable pregnancies. Perhaps, abortion laws should be liberalised to get rid of such pregnancies when preventive means have not been employed or have failed to work.

Given the foregoing factors, it is hoped that this study will contribute, perhaps modestly, both to the solution of the problems herein indicated, and to the literature on abortion. The merit of this study lies in appraising the law in the light of new factors such as sexual permissiveness, family planning and apparent discrepancies in the law on abortion in Zambia.

3. REVIEW OF LITERATURE

Professor Muno Ndulo, in his article - "Abortion and the Law"⁵ tries to show how much the Termination of

Pregnancy Act, 1972 has done to liberalise the grounds on which a legal abortion can be granted.

We quite agree with Professor Ndulo in that the shortcoming of the Act is that it does not go beyond allowing the granting of an abortion for pregnancies occasioned out of will. It makes no mention of pregnancies that are as a result of rape, incest and other related instances which would really be justified to terminate legally.

In our view however, Professor Ndulo does not look at the technical problems in the basic law governing abortions. Whereas the Termination of Pregnancy Act allows an abortion where it is approved and performed by 3 medical practitioners, the Penal Code sees the termination of pregnancy as being legal where it is performed by any person in good faith and to preserve the life of the mother. Although this provision relates to child destruction it is still categorised under the Termination of Pregnancy.

Therefore our work will go further than Professor Ndulo's article in that it will bring out inherent contradiction in the law of abortion in Zambia.

Sanford H. Kadish's⁶ article on abortion is to the effect that holders of the view that abortion is

immoral should not ignore the fact that abortion laws do not work to stop abortion, except for those too poor and ignorant to avail themselves to black-market alternative, and that the consequence of the retention of abortion laws is to sacrifice more lives of mothers than the total number of fetuses saved by the abortion laws.

We are cognisant of the fact that abortion laws, rather than reducing the danger inherent to the expectant mother seeking abortion, seem to augment it and that these laws do not operate uniformly on people of all works of life. What we are proposing therefore, is that abortion laws be legalised so that mothers' lives are not at risk in the hands of desperate money makers. Hospitals should be made accessible to all abortion seekers without restricting themselves to specified grounds thereby causing those whose reasons do not fall within the specified grounds to seek abortions elsewhere.

Edwin M. Schur in his book Crimes Without Victims⁷ has his primary focus on how present abortion laws operate in the United States.

He states that due to the fact that abortion is often undertaken to prevent serious family disorganisation and economic hardship or to cope with major threats to the pregnant woman's physical or

psychological health, abortion should be "viewed as a mechanism of social control." But under the laws of the various American States abortion is generally only permitted when it is medically necessary to save the mother's life. As a result abortion seekers have diverted to illegal channels thus establishing an economic base for illicit operations.

We quite agree with the author that abortion should be viewed as a mechanism of social control and that restricting abortion leads to health hazards on the pregnant woman.

While this is in an American setting, we feel it is not different from the Zambian setting. We will go further than what has been written by the author by elaborating on what is meant by abortion being a mechanism of social control.

Permissiveness in sexual practices has developed in Zambia today but coupled with this is the fact that society must avoid unwanted pregnancies.

Therefore, it is suggested that by liberalising abortion laws it could be possible to get rid of such unwanted pregnancies where preventive measures, that is, contraceptives, or natural planning methods, have not been employed, or have failed to work.

In his study on Abortion, William P. Hawkinson in his book Abortion: An Anthropological Overview "why propose to legalise Abortion laws"⁸ notes that in very diverse cultures throughout recorded time, abortions have always been sought, often successfully, whether or not abortion has been approved by the society. The most common reasons for abortion are conceptions resulting from proscribed sexual unions, for example, conception occurring prior to tribal initiation rites at a given age, premarital conception or extramarital conception. Other reasons for employing abortion are for the purposes of spacing births for ecological and economic reasons and maintaining the size of the family.

We are in agreement with the author in his proposals as to why abortion is employed in societies.

We go further to state that since the enactment of the Termination of Pregnancy Act in 1972 there have been new behavioral patterns in Zambia and economic changes that have resulted in families having to be maintained in small numbers. Therefore, the law in Zambia ought to view abortion from a new perspective, in the light of new developments.

Mr. W.C. Simapungula writing on Abortion - The
Zambian Experience,⁹ takes an objective view of

the subject of abortion from the legal point of view. In so doing he examines the Termination of Pregnancy Act 1972 and its shortcomings.

He states that the requirement of 3 doctors is impossible to apply in rural areas where it is practically difficult even to find one doctor. He also notes that the Act is silent on the consent of an expectant mother to undergo abortion and therefore it is possible for a doctor, under honest belief that the life of the mother is in danger to perform an abortion on her without her consent. Mr. Simapungula acknowledges the fact that many abortions are done outside the legal framework.

The shortcoming of his essay however is that, it does not make any suggestions as to how the problems in the Act can best be solved, he merely states the problems - not the solutions.

5. METHOD OF STUDY

This study will make use of both library research and empirical research to support the former. Both research will be carried out at the University Teaching Hospital Gynaecology Clinic Library in Lusaka. Records of the gynaecology clinic will be examined and supplemented by necessary interviews with appropriate persons at the clinic.

5. ORGANISATION OF STUDY

This study is divided in five chapters. Chapter II explores the law relating to abortion in Zambia and attempts at highlighting problems inherent in this law. Chapter III examines the issue of public rights and private rights as against abortion while Chapter IV provides an analysis of the effectiveness of the law on abortion in Zambia. Finally, Chapter V will be a conclusion. It summarises the main aspects of this study and contains recommendations and suggestions for improving the law on abortion to suit new attitudes and perception on abortion in Zambia.

CHAPTER 1 - FOOTNOTES

1. Muna Ndulo "Abortion and the Law" Zambia Law Journal Vols. 3 and 4 (1971 and 1972) p. 153.
2. S. 3 (1) of the Act.
3. Mr. Henry Hanawinga - Senior Prosecutions Officer. Force Headquarters, Lusaka.
4. Ibid Footnote 3.
5. Footnote 1.
6. Sanford H. Kadish "Overcriminalization - Abortion" in Crime and Justice, Vol. 1 (New York : Basic Books Inc (Publishers), 1977) p. 406.
7. Edwin M. Schur Crimes Without Victims (Prentice Hall, Inc. Englewood Cliffs Vol. 1, 1965).
8. William P. Hawkinson "Abortion : An Anthropological Overview" in Liberalisation of Abortion Laws: Implications (North Carolina : Carolina Population Centre) 1976 p 123.
9. W.C. Simapungula - "Abortion - The Zambian Experience" Obligatory Essay 1978.

CHAPTER TWO

THE LAW RELATING TO ABORTION IN ZAMBIA

1. INTRODUCTION

The basic law governing acts of abortion in Zambia is embodied in the Termination of Pregnancy Act, 1972, and the Penal Code, Cap 146 of the Laws of Zambia. The Termination of Pregnancy Act prescribes criteria and circumstances in which an act of abortion may be lawfully procured. The Penal Code provides for penalties on persons who unlawfully procure abortion.

Although the Termination of Pregnancy Act and the Penal Code were meant to be complementary, there are, nevertheless, legal policy inconsistencies between them. It is in this context that this chapter discusses the law on abortion in Zambia. It examines the factors and policy which prompted the enactment of the Termination of Pregnancy Act and then proceeds to discuss the salient features of the Act itself, the provision of the Penal Code on abortion and problematic legal policy issues which are inherent in the Law of abortion in Zambia.

2. THE TERMINATION OF PREGNANCY ACT

It is appropriate first of all to consider the policy issues which both prompted and underlay the enactment

of the Termination of Pregnancy Act in order to understand and appreciate the current law on abortion in Zambia.

(a) Policy Underlying the Termination of Pregnancy Act.

In the preparatory stages of the Termination of Pregnancy Bill (herein after referred to as the Bill) extensive consultation took place within the medical fraternity to solicit wide-ranging views on abortion. Specifically, the Medical Council of Zambia asked all registered medical practitioners in Zambia to make comments, and to indicate any possible changes to the proposed legislation. The form which the Bill finally took can thus be taken as a consensus of views on abortion by medical practitioners in Zambia.

The purpose for which the Bill was formulated was outlined in positive terms by the then Minister of Health, Mr. Alexander Chikwanda during the second reading of the Bill in the National Assembly. Basically, the Bill was intended to:

- (i) amend and clarify the law relating to termination of pregnancy in Zambia, and

- (ii) provide for a stricter control of termination of pregnancy by requiring two registered medical practitioners and a specialist in the branch of medicine pertaining to the patient's illness before concluding that an abortion ought to be terminated.

These purposes of the Bill will now be examined separately in order to bring to light the policy issues that dogged the Bill and the wide ranging views in the subject as expressed in the debates in the National Assembly.

(b) Amendment and Clarification of the Law
Previously in Existence

The Minister of Legal Affairs and Attorney-General (F. Chuula)¹ showed how the Bill tried to amend and clarify the law by explaining that the Bill was not authorising murder and mutilation; to the contrary, it was dealing with actual existing law, that is, case law on the matter and the provisions of the Penal Code which in fact outlaws abortion as such. He contended that it was the decisions of the courts in the matter of abortion and other related decisions followed in this country

which were intended to be codified by this Bill. It was difficult, he stated, for doctors to have to search for decisions of judges before they would in fact do their work. Now Parliament was called upon to regularise that position so that everyone in the country was aware, through an Act of Parliament what exactly the law on abortion was.

In support of the Bill, Mr. Robertson² stated that at the moment the country had nothing other than the 3 sections in the Penal Code: Sections 151 to 153 and so the situation needed to be clarified. Another Member of Parliament³ went on to say, although the Termination of Pregnancy was already legal under Cap 146, the Penal Code, the present law was somewhat confused and left the whole situation in the hands of one doctor.

There were a number of objections from Members of Parliament who opposed the passing of the Termination of Pregnancy Bills. They argued on the basis of the right of the foetus to life. They contended that abortion by any definition meant the destruction of a human individual which if left alone would develop into a human being like anybody else. They

also argued that there was substantial legislation on abortion without having to enact more legislation on the same subject matter, and that there would be no uniformity in the interpretation of the Bill in hospitals.

(c) Control of Termination of Pregnancy

The Minister of Health explained that whereas under the then existing law, if medical grounds were pleaded as a justification for the termination of pregnancy and the parents or the husband of the woman were available and signed documents the termination would be effected; the proposed law would be more restrictive than before in that now it would require three (3) doctors, one of whom should be a specialist, to establish that there were genuine medical grounds for the termination of pregnancy. In this way there would be no wholesale termination of pregnancies.

The Minister further considered that in the event of emergency cases, such as where a woman was bleeding severely, then one medical practitioner in good faith, could terminate the pregnancy - clause 3 sub-clause 4. But otherwise, if there was no immediate danger, care

was to be taken to ensure that another 2 doctors do also sanction the abortion - intended to prevent abuse of the law.

It was a proposed legal requirement in the Bill, therefore, that termination of pregnancies only be undertaken in hospitals.

The Bill was finally passed, after much debate, and came to be known as the Termination of Pregnancy Act, 1972. Whereas it does not completely proscribe abortion, it lays down stated and stringent grounds on which abortion can be effected. The Act allows a pregnancy to be terminated where:-

- (a) the continuance of the pregnancy would involve:
 - (i) risk to the life of the pregnant woman or
 - (ii) risk of injury to the physical or mental health of the pregnant woman or
 - (iii) risk of injury to the physical or mental health of any existing children of the pregnant woman; greater than if the pregnancy were terminated.

- (b) that there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be obviously handicapped .

The act states that the above mentioned grounds should be recommended and be done in good faith by a panel of three registered medical practitioners as already discussed. What this stipulates is that when a pregnancy is terminated as legally required, the person on whom the abortion is effected shall not be guilty of an offence under the law relating to abortion.

3. THE PENAL CODE PROVISION

S. 2 of the Termination of Pregnancy Act, 1972 stipulates that "the law relating to abortion means sections one hundred and fifty one, one hundred and fifty-two and one hundred and fifty three of the Penal Code

These sections provide for penalties on persons who unlawfully procure abortion. The term 'abortion' however has not been defined in the Penal Code; rather, the word 'miscarriage' is used.

Essentially, the salient provisions of the Penal Code relating to abortion are that, it is an offence for:-

- (a) any person to attempt to procure miscarriage of a woman, whether or not she is without child.⁴
- (b) any woman with child to attempt to procure her own miscarriage or to permit anything to be administered to her.⁵
- (c) for any person to supply or procure for any person anything, knowing it is intended to be unlawfully used to procure the miscarriage of a woman.⁶

A close examination of the Penal Code and the Termination of Pregnancy Act, 1972 reveals that there are problems in the law relating to abortion in Zambia. These problems will now be examined.

4. PROBLEMS IN THE LAW

The Termination of Pregnancy Act and the Penal Code, inspite of their being meant to be complementary have got legal policy inconsistencies. Apart from the problems in the law that are apparent by comparing the Act and the Penal Code, other problems are realised by carefully examining the Act and the Penal Code separately.

Basically, the problems relate to:-

- (a) The Penal Code's lack of definition of abortion.

(a) The Penal Code's lack of definition of abortion

A close examination of the Penal Code reveals that, whereas it defines at what stage an act or omission, by a woman resulting in the death of her child, is to be called infanticide, that is, when the child is under the age of 12 months, (after it is born)⁷ and whereas child destruction is said to be committed when the child is capable of being born alive, i.e., pregnancy for a period of twenty-eight weeks or more, the Penal Code does not state at what stage an act or omission resulting in the death of the child can be said to be an abortion. Assuming that the law views abortion the same way that the medical quarter views it, then it can be well stated without doubt, that the term abortion applies before the period of twenty-eight weeks. After this period, it is explicitly stated that termination of pregnancy is child destruction because after this period a child is said to be capable of being born alive, what implication does this have on abortion?

Clearly, it would be presumed that no criminal sanction should follow from an act or omission that would result in the death of a child before the pregnancy is twenty-eight weeks because before then the child is presumed not to be capable of being born alive. On the other hand, if abortion is not to be limited to the period before twenty-eight weeks but an act or omission that results in the death of the child, up to the time the pregnancy is carried to term, where then would we draw the line between abortion and child destruction. Would abortion be assumed to encompass child destruction as well - what problems would this have on charges to be brought against a woman who causes the death of her child before it is born?

This is one of the biggest problems which needs to be clarified by the law.

- (b) the necessity of preserving the life of the mother - reconciling the Penal Code and the Termination of Pregnancy Act,
- (c) outcome of the rigid adherence to the stringent grounds that are stated in the Termination of Pregnancy Act.

- (d) the Termination of Pregnancy Act not catering for new behavioral patterns in Zambia that have occurred since its enactment.
 - (e) Restrictive discriminatory effect of abortion laws against the poor.
- (b) The Necessity of Preserving The Life of the Mother - reconciling the Penal Code and the Termination of Pregnancy Act.

Child destruction under the Penal Code which can also be referred to as a termination of pregnancy since it is conducted before the pregnancy comes to term, is said to be legal if it is conducted by any person⁸ who is of the opinion that it is necessary to preserve the life of the mother.

By the same token the Termination of Pregnancy Act allows a termination of pregnancy which is necessary to preserve the life of the mother to be conducted by a panel of three doctors.

The key point here is the preservation of the life of the mother. Whereas in one case the decision that the life of the mother has to be

preserved is taken by any person in the other case it has to be taken by a panel of three doctors. This is definitely a monstrous contradiction in the law.'

(c) Outcome of Rigid adherence to the stringent grounds stated in the Termination of Pregnancy Act

The grounds upon which an abortion can lawfully be effected have already been discussed. It is noted however, that legal prohibition on abortion has not put a stop to the demand for abortion. Rather, by restricting abortions and allowing them to be performed only under stringent grounds, hospitals and individual medical practitioners are inhibited from performing the operation. Rape cases, for instance are not catered for under the present abortion Laws, nor are pregnancies that result from incest.

Although there is a widespread use of contraceptives by those who try to prevent unwanted pregnancies, women who became pregnant as a result of contraceptive failure are still not allowed to undergo an abortion. Therefore, women who become pregnant as a result of rape, incest or contraceptive failure are subjected to the same penalties as a woman who becomes pregnant out of her own will. One of the obvious ways to adhere, at least in a legal sense, wider availability of abortion

services is to reform the law outright. This can be done by including among the indications for abortion, additional reasons such as:

where the pregnancy is a product of rape
or incest or of contraceptive failure.⁹

A discussion with the appropriate persons in the Gynaecology Clinic at the University Teaching Hospital reveals that doctors do perform abortions on rape victims just on humanitarian grounds but the victim has first to prove beyond reasonable doubt that she was actually raped. Therefore, although the hospital does perform abortions in such cases, they are illegal because such circumstances are not provided for under the law. The legal abortions are thus kept at a minimum. The overall result of this is that abortion seekers are diverted to illegal channels and an economic base is thus established for illicit operations. Thus we find that illegal abortions are performed inspite of the availability of sympathetic well-trained professionals. The illegal abortionists are usually amateurs who use highly dangerous methods and very rudimentary or sterile techniques but due to the desperate situation the woman finds herself in, she is hardly in a position to choose the kind of service she will receive. The need for secrecy

results in complications which cannot be treated, and hence high morbidity and mortality rates occur. The need for secrecy also results in police action against abortions being impeded. We cannot ignore the fact therefore that:

abortion laws do not work to stop abortion except for those too poor and ignorant to avail themselves of blackmarket alternative, and that the consequence of their retention is probably to sacrifice more lives of mothers than the total number of foetuses saved by the abortion laws.¹⁰

(d) The Termination of Pregnancy Act does not cater for new behavioral patterns in Zambia

There have been new behavioral patterns and economic changes in Zambia that have resulted in families having to be maintained in small numbers. Whereas in the 1970's when the Termination of Pregnancy Act was enacted, it was still the pride of families to be in large numbers so as to show how wealthy the family was, the new social and economic changes that have resulted since, like families being called upon to tighten their belts due to the fallen standards of living, it has to be appreciated that due to the fact

that a number of unwanted pregnancies do occur, abortion laws should be liberalised so as to space births for ecological and economic reasons and maintaining the size of the family. Thus, abortion should be viewed as a mechanism of social control rather than as a means of perpetuating immoral activities. Abortion laws should therefore go along with the changes in society instead of being restrictive and static.

(e) Restrictive discriminatory effect of abortion Laws against the poor.

Whereas abortion laws are meant to apply uniformly to people of all walks of life, it has been discovered from extensive research that it applies mainly to those people who cannot avail themselves to illegal abortionists. Those who can afford illegal abortionists have their abortions performed at will. The law therefore operates to deny abortion to many who need it and ends up being applied unequally between the rich and the poor.

Hence the observation that restrictive abortion laws de facto descriminate against the poor making it difficult or impossible for this class of persons to secure safe abortions merely because

their reasons do not fall within the specified grounds as stipulated in the Act.

If law has to be applied, let it be applied uniformly and equally to persons of all walks of life instead of being rigid and paying a blind eye to the fact that its rigid application is discriminating between persons of different classes.

5. CONCLUSION

This chapter has highlited, adequately, it is hoped, the problems in the law relating to abortion in Zambia. The main problems that have been identified are that:

1. there is need for a comprehensive definition of abortion so that abortion may clearly be distinguished from child destruction.
2. there is no reconciliation of the Penal Code provision and the Termination of Pregnancy Act on when it is necessary to preserve the life of the mother when she is with child.

If the provision in the Penal Code is to be maintained, then there should be a way of proving that the termination was really necessary to preserve the life of the mother by the person conducting the termination, or alternatively, the Termination of Pregnancy Act would have to be altered to provide for only one doctor to prove this. Moreover, whilst in one case any person can form this opinion, in the other case it is formed by 3 doctors. As the law is, there is inherent contradiction on this subject matter.

3. Whilst cases of rape and incest are not covered by the law practice of medical profession shows that termination of pregnancies are conducted on the basis of rape. The law is therefore lagging behind; it requires reform.
4. There are bad side effects of stringent abortion laws: it promotes backyard abortionists and high mortality rates.
5. There is need for family planning. Sizes of families have to be maintained to a minimum. Population control means that undesired pregnancies must be done away with.

6. Restrictive abortion laws are discriminatory by their nature. Abortions are still carried out by people who can afford to pay exorbitant prices to illegal abortionists but the poor people cannot afford this. The laws are not uniform in their application.

Basically, these are the problems that have been identified in the abortion laws in Zambia.

CHAPTER TWO - FOOTNOTES

1. In Official verbatim report of the Parliamentary Debates on the 4th Session (resumed) of the 2nd National Assembly 25th July to 3rd August, 1972, Lusaka: Government Printers, p. 153.
2. Ibid, p. 157.
3. Ibid, p. 158.
4. S.151 of the Penal Code.
5. S. 152 of the Penal Code.
6. S. 153 of the Penal Code.
7. S.208 of the Penal Code.
8. S.221 of the Penal Code.
9. John M. Paxman (ed) Law and Planned Parenthood (England: Stephen Austin and Sons Limited, 1980) P. 54.

10. Sanford H. Kadish "Overcriminalization - Abortion" in Crime and Justice Vol. 1 (New York: Basic Books (published 1977) p. 410.
11. This is a widely held view and has been observed by:
 1. The Royal Commission on Human Relationships - Final Report Vol. 1, (Canberra Australian Government Publishing service, 1977) p.77.
 2. Sanford H. Kadish footnote 8. p. 412.
 3. Edwin M. Schur Crimes Without Victims (Prentice - Hall, Inc. Englewood Cliffs N.I., 1965).
12. Daniel Callahan Abortion : Law Choice and Morality (London: The Macmillan Co., 1970) p. 289.

CHAPTER THREE

THE LAW OF ABORTION, PUBLIC AND PRIVATE RIGHTS CONTRASTED.

1. INTRODUCTION

The law of abortion is generally predicated on the rights of the community or public rights. Such interests and rights pertain to issues on the right to life of the unborn child, that society should not be deprived of the services of the unborn child through acts of abortion. On the other hand, we have the interests and rights of an expectant mother who procures an abortion. This is on the basis that such a woman also has certain rights which must be reflected in the law of abortion. Inevitably, the argument turns on to the relationship between law and morality. This Chapter is intended to elucidate on the interests and rights of the community, the interests and rights of the expectant mother in relation to the law of abortion. In this context, the Chapter singles out for discussion, the right to life, in relation to abortion law; the moral issues underlying the law of abortion; abortion law in relation to public and private rights.

2. THE RIGHT TO LIFE

The genesis of the argument against abortion lies in every person's entitlement to the enjoyment of the

right to life. Indeed, the Zambian Constitution guarantees the protection to life in plain terms: "No person shall be deprived of his life intentionally."¹ However, it is worth noting that the right to life is neither sacrosanct nor absolute. The Zambian Constitution itself places exceptions to the right to life. Thus, one's life may be taken away in such circumstances as execution for a crime like murder.

This ambivalent position of the law reflects the lack of consensus on the legitimacy of the moral claim of a foetus' right to life. While on the one hand the right of a foetus is rigorously asserted by some portions of the community, it is rigorously denied by others of equal honesty and respectability.² The law itself has provided that a child becomes a person capable of being killed only when it has completely proceeded in a living state from the body of its mother.³ Evidence required by the law to show that a child was prima facie capable of being born alive is that the pregnancy must have been conceived for 28 weeks. Implicitly, therefore, below this period, a foetus has no right to life; it is not capable of being born alive in the eyes of the law. This argument is important because opponents of the abortion law reform, arguing on the basis of

the foetus' right to life argue for the sanctity of human life from the moment of conception and consider that abortion cannot be justified to save the mother's life. This faction asserts that abortion laws are retained due to the fact that "the unborn foetus has an independent claim to life equivalent to that of a developed human being even in the early stages of development."⁴

Another faction argues that destruction of ~~for~~ the foetus for the mother's mere health or for economic or social reasons or even to preserve the beauty of the mother is tantamount to murder and in appealing to Parliament to change its laws on abortion and make them restrictive, state that:

"the house should take the lead in showing the nation that life is in precious commodity."⁵

Christian views on the issue are divided. Catholics, for instance, condemn all abortions completely. Other churches differ on the extent to which the law should prohibit abortion. Some accept abortion in limited circumstances, others favour the removal of legal sanctions.⁵

There are equally eminent views from individual scholars and moralists on the subject of abortion.

Professor Ramsey has stated that: "the value of a human life is ultimately grounded in the value God is placing on it."⁷ His point is twofold:-

1. The sanctity of human life is not a function of the worthy any human being may attribute to it.
2. A man's life is entirely an ordination, a loan, and a stewardship. His essence is his existence before God and to God and it is from Him.

In this formulation, man must respect his own life and the life of others not only because it is grounded in God but equally important because God has given man life as a value to be held in trust and used according to God's will.

Father Gerard P. Kelly has put it that "Only God has the right to take the life of the innocent; hence, the direct killing of the innocent, without the authority of God, is always wrong."⁸

Central to both Catholic and Protestant theology is the principle that God is the Lord of life and death - another way of saying that no man can take it upon himself to place himself in total mastery over the life of another.

3. MORAL ISSUES AND PUBLIC RIGHTS

A 'moral policy' is any culturally, philosophically or religiously chosen, given or accepted way of devising, relating or ordering moral rules.⁹

It is noted that the legal question on abortion directly raises the problem of the position society as a whole should take toward abortion, and "this position, as reflected in state or national laws or the attempts to change those laws, will have much to do with shaping the moral attitudes of individuals on abortion" it seems nonetheless true that the prohibitions and permissions of the law affect the private conscience even if only indirectly, by way of quiet conditioning and sanctioning.¹⁰ "It should be noted that one's moral evaluation of abortion will have a considerable impact on one's evaluation of abortion indications and abortion laws."¹¹

There are a number of moral and social struggles that come into play in abortion law, namely:-

1. That of individuals trying to bring about some personally coherent, satisfactory position on the moral legitimacy of abortion.
2. That of society as a whole trying to get to some legal solutions which preserves those

rights and values which society needs preserved for its own welfare; to mention but a few.

The discussion that will ensue hence forth will centre on the public rights to the services of the unborn child and the moral issues underlying the law of abortion.

There are rights and values which society needs preserved for its own welfare, society feels that it has a tremendous interest in encouraging the birth of more wanted children. These wanted children are seen as assets to the society. One cannot determine the possible future of the unborn child, but one can only presume that the child could one day become useful to the society. According to moralists, society is not static, it is dynamic, the new generation has to take over from the old generation. How would this happen if the unborn children kept on being killed before viability in the name of being unwanted. Society feels it should not be deprived through acts of abortion services of the unborn child, who may have the potential to lead the society one day.

Therefore it has been emphatically argued that abortion is a moral and not a medical problem. The moral question

that looms, is: Even if it could be known in advance (which might be difficult) that a potential child would suffer some disastrous deprivations, would this entail the conclusion that such a child ought not to exist at all?¹² The most difficult moral problem relates to abortion for the sake of the child - would it be meaningful to say, morally, that a potential human being ought to be aborted in the interests of that human being. On the other hand, the question asked is whether one ought to deny a potential human being the chance to develop merely on the basis of statistical probabilities whose chances are that they would not be perfectly formulated and capable of projecting accurately into the distant. The proponents of abortion argue that it is better not to take chances of bearing a child with disastrous incapacibilities, but the opponents of abortion refute this by questioning who has the freedom to decide for the potential human being in question, as no one is in a position to say whether a conceptus, given a chance would choose not to live. Moralists perceive that due to the fact that the conceptions cannot make a choice whether or not to live does not entail someone else to make that decision for it.

So far, the discussion on the law of abortion in this study has focused on the interests of the public against

abortion and the moral issues underlying the law of abortion. It is now intended to examine the interests and rights of the expectant mother, on the basis of her right to privacy and personal liberty.

6. THE RIGHT TO PRIVACY

There are popular demands for increased protection of privacy which have generated a variety of legal responses. One Supreme Court has declared "The constitutional right to privacy, a right broad enough to protect abortion and the use of contraceptives."¹³ Much as we acknowledge the fact that social and moral issues are taken into account when formulating abortion laws, we see the expectant mother who is affected by these abortion laws as having notable rights which are supposed to be recognised by society. In Zambia there is no provision relating to a woman's right of privacy that enables her either implicitly or explicitly, the right to decide whether or not to have an abortion, particularly an early abortion. Infact, a number of interviews conducted with persons who preferred to remain anonymous, reveals that they are of the view that a woman really has no private rights in the actual sense and therefore we cannot argue that a woman should be allowed to abort on the basis of non-existent rights. However, it is

this on-going misconception that this study attempts to rectify.

The denial of the right to privacy is further shown by an examination of the Termination of Pregnancy Act which stipulates the grounds upon which a pregnancy may be terminated. This Act reveals that it is actually not the woman who acknowledges that the grounds have been satisfied, but the three doctors who are assigned to ascertain this. In other words, the woman is not given the right to decide whether there is risk to her life or injury to her physical or mental being. May be the least she can do is to assert that she is apprehensive of the pregnancy, The rest is left to the doctor to decide whether or not as a result of her pregnancy a woman's health is actually in danger. There may be arguments to the effect that the woman may actually initiate the process of examining whether her life is in danger, but in the final analysis it is the doctors who decide whether she has satisfied the conditions laid down in the Act. Where then do the woman's private rights lie? If a woman really feels that her capacity, health and physical wellbeing cannot cope with an undesirable pregnancy, what right has the doctor to refute this assertion and require her to carry her pregnancy to term?

Indeed Lawrence Lader vehemently puts forward the argument that the laws that force a woman to bear a child against her will are the sickly heritage of feminine degradation the neglect of man-made laws to grant the choice of motherhood not only condemns women to the level of brood animals, but disfigures the sanctity of birth itself. By making birth the result of blind impulse and passion, our laws ensure that children may become little more than the automatic reflex of a biological system the complete legalisation of abortion is the one just and inevitable answer to the quest for feminine freedom, all other solutions are compromises.¹⁴

Having stated that a woman has the right to enjoy her rights and fundamental freedoms, it follows that she has the right to choose whether or not to have an abortion. She with assistance of her doctor is best placed to assess the need for an abortion. The doctor's role will come into play from the fact that he weighs up the circumstances, advises on the risks and ensures proper medical practice. Then it is left to the woman, upon being counselled, to consider the options free of pressure. Whether or not to have an abortion is a medical question to be decided like all other medical questions by the patient and her doctor."¹⁵

The object of asserting that a woman has private rights is to make a woman the master of her own body. Since it is contended that abortion is a private right, it should be seen to fall within the ambit of human freedom.

Therefore a woman should not be denied the right and freedom of choice to control what is within her body. "A woman's right to abortion is an absolute right. Abortion should be available for any woman without insolent inquisition or ruinous financial charges, for our bodies are our own."¹⁶

The right of a woman to be the master of her own body is the most important right. But "this most important right to control what takes place within our own body has so far been denied us. This is our citadel, our responsibility, our mental, emotional and physical being."¹⁷

A woman's right to privacy is also unduly infringed upon owing to the fact that the Penal Code stipulates that a child is deemed to be capable of being born alive when the woman's pregnancy is said to be twenty-eight weeks or more. However, when a pregnant woman engages in an act or omission that results in the death of the foetus, she is subjected to penal servitude. The issue to be considered is why the

woman should be subjected to penal servitude when the foetus that she has destroyed is not capable of being born alive at the time that she kills it. And secondly, if the law itself neither gives an absolute nor sacrosanct right to life but gives instances when one may be deprived of the right to life, why should the woman not abort in exercise of her right to privacy?

Although pregnancy is not, in the case of married women a private affair, however, as in all cases of pregnancy, it is the expectant mother who suffers the physical, psychological, emotional and health stress in pregnancy. She must therefore have a right to make an unilateral decision to terminate a pregnancy where she feels that she cannot cope with it.

On this basis, it is submitted that Zambian law must follow the decision of a U.S. court in the case of

Paton and Trustees of PPAS.¹⁸

The Case of Paton Trustees of PPAS¹⁸ dealt with the rights of the husband, the mother and the child.

For purposes of our discussion, we will be confined to the rights of the unborn child. The court tries to decide what rights if any, the unborn child possesses. The accused, having applied for and obtained the necessary medical certificates entitling her to an abortion, was stopped from going ahead with the abortion by her husband who sought an injunction. Relying on the Abortion Act 1967, the court having stated that the husband had no legal right to do so, went on and rejected any suggestion that the unborn child might have any rights, stating that "the foetus cannot, in English law, have any rights of its own, at least, until it is born and has a separate existence from the mother.

It may be argued that the state has the right to protect unborn children because if every woman was to kill the foetus within her before the period of twenty-eight weeks on the assertion that it was not yet capable of being born alive then the nation would eventually come to a standstill, there would be no population growth and therefore no younger generation to take up the positions of the older generation. In reply to this argument it is contended that:-

1. There definitely would not be an instance where all the women would want to unduly

terminate their pregnancies before the twenty-eight weeks.

2. No one has entered into a contract with the state and therefore obliged to produce children in order to contribute to the nation's growth.

It is noted that emphasis is on the period before twenty-eight weeks because from the Penal Code it is implied that an unborn child is not considered to be capable of being born alive before the period of twenty-eight weeks, whereas at twenty-eight weeks and after, the Penal Code expressly states that then, the unborn child is said to be capable of being born alive.

7. PERSONAL LIBERTY

This aspect is more or less inter-related with the woman's private rights. A woman should be given the right to choose. The individuality and human integrity of the woman give her a strong claim to control her fertility and regulate her future; she need not be committed by her sexuality to a pre-determined social role.¹⁹ She should choose for instance, whether or not she wants to carry her baby to term

and thereby contribute to the nation's population. She should be in a position to choose whether or not she wants to carry her baby to term and then end up giving it up for adoption. The state should not come in and say it has provided such a facility and therefore it expects every woman who does not wish to take care of her child to utilise the facility.

There must be an awareness of the general rule that "a person has the right to be himself."²⁰ This is of considerable relevance to the claims of those asking for abortion on request in that "the key element in this claim is a putative right of women to make their own decision, uncoerced by males or the state, about whether they should have an abortion or not."¹⁸

True, the state should be aware of maintaining the population but it should also strike a balance between a normal 'manipulable' population and a population explosion. If all the expectant mothers were left to carry their babies to term and medical facilities were close to perfection and there was a near population explosion, what guarantee is there that the state would not sooner pass legislation to the effect that every woman should only be allowed to bear one child?

There are people who have argued that the woman's choice should end or be restricted to whether or not she should get pregnant - that if she consciously gets pregnant then she should not have a choice in termination - the state should in such cases, prescribe conditions for abortion.

It is counter-argued however, that when a woman elects to engage in sexual intercourse, it does not mean she desires to be pregnant and when she gets pregnant, though out of having had voluntary sexual intercourse, out of choice, she should be allowed to exercise that same choice to decide whether or not to keep the pregnancy. The state, by prescribing conditions for termination of pregnancy in essence interferes with the woman's choice. The state would have had a basis for prescribing conditions after a woman for pregnant, if it decided on behalf of the woman, when to get pregnant. But to decide on behalf of the woman that she should keep her pregnancy would be like imposing a penal servitude on her for having engaged in copulation. But, penal servitude should be imposed on offenders; a woman does not contravene any provision of the law by engaging in sexual intercourse and therefore is not an offender - there is no legal prohibition of copulation in Zambia for unmarried persons above the age of 16. Hence, it is

submitted that a woman who consciously gets pregnant out of exercising her choice, should 'consciously' terminate her pregnancy, again, by exercising her choice and this choice should not be impeded upon by the state.

8. CONCLUSION

Having considered the different aspects discussed above, we contend that decisions on abortion should in the final analysis be left up to the women themselves. Whatever view one may hold on the issue of the morality of abortion, it cannot be established that it poses a clear and present danger to the common good. In these circumstances therefore, society cannot be said to have the right decisively to interpose itself between a woman and the abortion she wants. Regulatory laws of a minimal kind would then seem to be in order, since society would be affected by the number, kind and quality of legal abortions.

Decisions on abortion should be private. The woman should be allowed to make her own moral choice on abortion and be allowed to implement that choice.

FOOTNOTES CHAPTER 3

1. Art 14 (1) of the Constitution of Zambia Cap 1.
2. Sanford H. Kadish "Overcriminalisation - Abortion" in Crime and Justice Vol. 2 (New York : Basic Books Inc. Publishers, 1971) p. 411.
3. S.208 of the Penal Code.
4. Ibid footnote 2, p. 410.
5. In: Official Verbatim report of the Parliamentary Debates on the 4th session (resumed) of the 2nd National Assembly 25th July to 3rd August, 1972 Lusaka : Government Printers, p. 154.
6. Royal Commission on Human Relationships Final Report Vol. 1 (Canberra: Australian Government Publishing Service, 1977)
7. Paul Ramsey "The Morality of Abortion" in Life or Death: Ethics and Options (Seattle: University of Washington Press, 1968), p.71.
8. Gerard Kelly, Medico-Moral Problems (Dublin: Clanmore and Reynolds, 1955) p. 165.
9. David Callahan Abortion : Law, Choice and Morality (London: The Macmillan Company, 1970) p. 341.
10. Ibid footnote 9, p. 12
11. Ibid footnote 9, p. 305

12. Ibid footnote 9 p.452
13. Roe v Wade U.S. Supreme Court Reports 35 LE and 2n 147 (1973).
14. Lawrence Lader Abortion (Indianapolis: Bobbs - Merrill, 1966) p. 167
15. Harriet F. Pilpel "The Abortion Crisis" in The Case for Legalised Abortion Now (Berkeley: Diablo Press, 1967) p.110.
16. Stella Brown in the Review of the Abortion Problem, Journal of the American Medical Association, Vol 128 (1945) p. 472.
17. Marga Marines "A Woman Views Abortion" in The Case for Legalised Abortion Now. Footnote 15. p.59.
18. (1978) 2 ALL ER 987
19. Three studies of Abortion Laws in the Commonwealth, Commonwealth Secretariat, Marlborough House, London, 1977 p.51.
20. Footnote 9, p.332.

CHAPTER FOUR
EFFECTIVENESS OF THE LAW ON
ABORTION IN ZAMBIA

1. INTRODUCTION

On analysing the effectiveness of the law on abortion, the term effectiveness is considered in two ways:-

Firstly, effectiveness of the law in protecting the health of an expectant mother. The present law on abortion is supposed to prevent deaths of expectant mothers by laying down stringent grounds on which a legal abortion may be carried out in a hospital.

Hospital is used here to denote any institution run as such by the Government or any other institution approved in writing for the purposes of the Termination of Pregnancy Act by the Permanent Secretary, Ministry of Health.¹ Secondly, effectiveness of the law on abortion is considered on the bases of preventing illegal abortions. In this context, analysis of the effectiveness of the law will be based on discussions which the writer conducted with appropriate authorities at the University Teaching Hospital; the Senior Prosecutions Officer at Force Headquarters and the State Advocate at the Ministry of Legal Affairs.

(a) Effectiveness In Protecting the Health
of Women

Effectiveness of the law in protecting lives of expectant mothers largely depends

on its administration. We have to therefore examine how the law is interpreted by the medical staff at the University Teaching Hospital. It was clear, after interviewing one doctor at the above mentioned hospital, that as a matter of medical policy, it is on very rare occasions i.e. when the pregnancy is in the advanced stage of being above 12 weeks that an abortion is denied to an expectant mother. When a pregnancy in the early stages, doctors do agree to terminate it on the request by an expectant mother. The reason for this was explained on the basis that every woman who requests for an abortion is taken to be mentally disturbed by the existence of her pregnancy and therefore when she explains her reason for wanting the termination of pregnancy, the respective doctor merely places her under any of the stated grounds in the Termination of Pregnancy Act. The reason for requesting an abortion, however must satisfy the doctor as falling under any of the grounds in the Act and therefore it should not be assumed that the doctors always grant abortions on request. When one doctor is satisfied that any of the grounds has been satisfied then the procedure of two other doctors approving the termination of pregnancy is followed.

Where the doctor feels that there are chances that the woman can be discouraged against having an abortion and that she is only requesting for an abortion due to distress, the doctor counsels her on the possibilities of having the child adopted on birth and also the disadvantages that will accrue to her health should she undergo an abortion. One thing that the doctor takes into consideration on recommending an abortion is the age of the woman and how many children she has had. If the woman is advanced in age and has had quite a number of children, then the doctor would not be reluctant to grant an abortion. But if the girl is still young and it is her first pregnancy and her only reason is that she cannot support the child, depending on the status of the girl, the doctor will first advise her on the possibilities of utilising the Adoption Society and on the possible hazards that might affect her health after aborting. If the girl insists and the doctor feels the pregnancy will actually endanger her mental health, then the doctor will recommend the abortion, provided the pregnancy is not in its late stages. There have been instances however, when the doctor has advised a woman not to abort on the basis of the hazards to her health but the woman has gone away only to come back in a serious condition; bleeding from having undergone an improperly performed abortion by an

illegal abortionist, or worse still, at times, the woman self-induces the abortion. The doctor in such cases, if of the opinion that the woman is in an inevitable state of abortion, has no choice but to evacuate the woman. an illustration of this is the case of The People v Mavies Mukumbuta.² The accused a student had an illegal abortion performed on her in New Kanyama Compound in Lusaka. Upon arriving home she fell sick and her mother reported the case to Kanyama Police post. The accused was then rushed to the hospital whereupon the doctor diagnosed that the accused was in a state of inevitable abortion - (i.e. there was nothing that could be done to save the pregnancy) and therefore they had to evacuate her. The accused who had been 8 weeks pregnant was arrested and charged with the offence of abortion under S.151 of the Penal Code, charged with the offence contrary to S. 152 of the Penal Code. She was then sentenced to 18 months simple imprisonment, suspended for two years.

There are instances where it is too late to save the woman who has procured a self-induced abortion like in the case of Harry Willard Bwanausi v The People.³ The appellant in this case was charged with manslaughter contrary to S.199 of Penal Code the allegation being that the deceased died while the appellant was attempting to perform an illegal abortion. The deceased was a married woman and the autopsy revealed that at the time of her death she was in the early stages of pregnancy, around 4 to 6 weeks.

The prosecution alleged that the appellant had introduced Dettol into the deceased's uterus by means of a Higginson Syringe and evidence that was given was designed to establish that the Dettol which was

found in the deceased's uterus had been introduced by the appealant immediately prior to the death and not by the deceased herself or some other person at any time previously.

Mr. Chuula counsel for the appealant pointed out that the doctor's evidence was to the effect that if Dettol had been introduced into the uterus immediately prior to the death he would have expected some of it to ooze out on death. There was no evidence that there was any Dettol on the deceased's clothes or on the examination couch. The only inference was that the woman had introduced the Dettols into her uterus herself. The conviction and sentence were set aside.

The two cases try to highlight the fact that illegal abortions are still carried on. If they are not performed by an illegal abortionist then they are performed by the women themselves.

The hospital does consider rape as a ground for abortion if the woman's story is plausible, but it should be noted, this depends on the individual doctor dealing with the case. At times the doctor may require a Police report on the matter but when the woman goes to hospital still in a state of shock from the rape and the evidence is more than clear that she was actually raped, then the doctor goes ahead and recommends the abortion, of course with the consent of two other doctors. This is to protect the health of the mother in that it is obvious that the woman is already mentally disturbed by the occasioning of rape on her and therefore delay with its attendant increased risk to health may follow. Therefore an abortion is immediately carried out to avoid implantation.

To give credit where it is due, it is submitted that the Law has done well so far in protecting the health of women by allowing abortions to be carried out only in hospitals but the issue of stringent grounds to be satisfied is yet another issue to be discussed.

We are of the opinion that the grounds stated in the Act are too narrow and do not cover instances where a woman has been raped or becomes pregnant out of incest. It should be acknowledged that "no woman should have to nature within her body a seed planted in callous violence. Compassion would seem to demand her speedy relief"⁴ and that the essence of the indication for legal abortion is the fact that "the woman genuinely believes she has been outraged and made pregnant in an act in which she was in no way a willing participant. The belief affects her disposition, physical tolerance of her condition and mental composition."⁵ With this in mind, the Law would do well to reconsider the plight of rape victims.

While hospital authorities acknowledged that they do consider rape cases in certain instances, they are merely working a step ahead of the Law because the Law does not provide for rape cases. The doctor, on recommending an abortion on a rape case is acting purely on "humanitarian grounds". An unfortunate women who becomes pregnant out of rape should not be subjected to the same penalties as a woman who becomes pregnant out of voluntary sexual intercourse. Going by the present abortion Laws therefore, unless a rape victim is 'vigilante' enough to seek immediate medical attention, knowing fully well that chances are that she might or might not be granted an abortion since

rape cases are not a ground for abortion. She is left with the undesirable alternative of an illegal abortion and given the dangers inherent in self-induced abortion, it is clear that the Act discriminates most severely against those unfortunate rape victims whose situation must be the most distressing." ⁶

Dr. Chikamata Head of Department at the Gynaecology clinic expressed his fear on this issue and said if the Law allowed abortion on the basis of rape then everyone would go to the hospital and say they wanted an abortion because they had been raped. These fears, however, may be dispelled by the fact that, in the same way that the panel of 3 doctors before recommending an abortion on the basis of good faith are of the opinion that one or more of the grounds specified in the Act have been complied with, they would have to form this opinion on the basis that rape has actually occurred.

(b) Effectiveness in curbing illegal abortions

The Law, in order to curb illegal abortions, has to be able to enforce the prevention of illegal abortions.

Due to the nature of this offence abortion cases are hardly reported to the Police. Most illegal abortions are done underground and no disclosures are made due to the desperation the woman finds herself in. Due to this desperate situation, there is need for secrecy on the part of the woman not to disclose the person who had performed an abortion on her. It is only when an abortion is unsuccessful and complications arise that a woman reports the matter to the Police.

If the abortionist is in the suburbs, and performs the abortion in kitchens and toilets, then it is easy for the Police to apprehend him: In the case of The People v Mavies Mukumbuta (Supra), the abortion was performed on the accused in a toilet by an old woman who was later apprehended when the accused fell sick and the matter was reported to Kanyama Police Post.

However, if the abortion is performed by a private qualified practitioner and complications later arise, the police make very little follow-up on the matter as usually there would be a "mysterious disappearance of the woman's treatment card from the private practitioner's surgery"⁷. There would therefore be no way of proving that it was in the particular private practitioner's surgery that the woman was treated and the matter would have to be dropped.

Lt. Colonel Kayukwa of the Ministry of Legal Affairs observed that since 1983 the only abortion case he had dealt with was that of The People v Mavies Mukumbuta in 1987. The only reason why this case came before the Police was because the mother of the accused feared for the life of her daughter and so reported the matter to the Police.

Mr. Henry Hanamwinga, the Senior Prosecutions Officer at Force Headquarters also acknowledged the fact of little or no cases on abortion being reported to the Police but he had proof to

show that abortions were still carried out by private practitioners. The reason why the Law would fail to take its course would be that, either there would be political figures involved in the case and it would therefore be withdrawn (due to the sensitiveness of this issue, no references were made) or there would be no proof of where the woman sought her medical attention: Harry Willard Bwanausi v The People (Supra)

It is noted that the few cases on illegal abortion that ever get to the police are simply dismissed by the Police as there are a number of drawbacks that inhibit the police from enforcing the Law against the illegal abortionists. Needless to say, a number of lives have been lost in the hands of these illegal abortionists due to the poor techniques that are employed in conducting the abortion.

To sum up, it is submitted that, while the Law is quite effective in protecting the health of the mother, this goes with limitations.

By denying the woman an abortion on the ground that she does not fall under any of the categories stipulated by the Act, the woman turns to the illegal abortionist.

This also goes for a rape victim who is denied an abortion on the basis that her story is not plausible enough and in any case, her case is not covered by any of the stated grounds in the Act - the woman turns to the illegal abortionist. Two things result:

The woman is made to avail herself to the most unhygienic and ill methods of performing abortions and this results in increased death tolls.

Therefore, while the Act tries to prevent deaths occasioned by abortion, it increases the number of deaths by denying the woman what this study is advocating for - her private right to abort.

Since women turn to the blackmarket for abortion, an economic base is established for the illegal abortionist and since it is 'quick' money more such illegal abortionists will come up and say they are able to perform abortions when in fact they are more than inexperienced to perform abortions; the result is death of the desperate women seeking abortion.

These illegal abortionists are hardly brought before the courts of Law and so the law is failing in its purpose of curbing illegal abortionists.

CHAPTER FOUR

FOOTNOTES

1. S. 2 of the Termination of Pregnancy Act. 1972
2. H.C.Z. Judgement (unreported) 1987.
3. S.C.Z. Judgement No.
Appeal Case No.
4. Three Studies of Abortion Laws in the Commonwealth.
(London Commonwealth Secretariat, 1977), P49
5. Footnote 4 P50
6. Muna Ndulo "Abortion and the Law" Zambia Law Journal Vols. 3
and 4 (1971 and 1972) P15
7. Footnote 3 P5

SUMMARY

Essentially, what this study has done is to examine in between the lines the law relating to abortion in Zambia and in so doing it has brought out the inherent contradictions that are apparent in the said law by comparing the provisions of the termination of pregnancy Act to those of the Penal Code. We have come up with the conclusion that the restrictive laws that we have cause more harm than they prevent by driving aborting underground, leading to malpractice and danger to health; that the law is ineffective to prevent abortion and denies abortion to many who need it and that it applies unequally and hence lacks uniformity.

This study identifies factors that those planning change to the present abortion laws in Zambia may need to consider, thereby enabling the study to inform and to serve, although it does not aim to instruct or direct.

Zambia faces a variety of needs and pressures that need to be considered in a study of this nature. Zambia is said to have 72 tribes and therefore it is inevitable that there will be different religions beliefs cultural traditions and popular expectations and these will fashion individual tribal responses to the issue of abortion and its legal regulation.

The Government has its own philosophy to resolve the theoretical conflict between serving the people and leading the people, in the field of abortion law and in all other fields and therefore it can best discharge its duties by being sensitive to the spiritual and pragmatic aspirations of those it serves by leading.

It is hoped that the data, analysis and commentary presented in this study will contribute to the fund of information, the pool of experience and the range of ideas available to those charged with the responsibility of managing or of advancing abortion laws in this country, if the laws are therefore not actioning what they are meant for but instead are enhancing what they are intended to protect, why can we not liberalise them altogether, after all, abortion is said to be a victimless crime.

Recommendation and suggestions

We recommend that :

1. Institutions of learning should include in their syllabuses education programs such as sexual behaviours and its consequences.
2. Contraceptive facilities should be made accessible to every woman who needs it without restricting it only to married women.
3. If a pregnancy is less than twenty-eight weeks then the expectant mother should not be estopped from deciding whether or not to have an abortion.

4. Although it is beneficial for family harmony to involve the partner's and/or parent's consent, 3rd parties', parental or spousal consent or notification should not, except in extreme circumstances be required as a matter of law.
5. In the alternative, it is suggested that if consent is to be taken into account, we may categorise women into groups:-
 - a) Those below 18, since they have not yet attained the age of majority may need parental consent before they may abort.
 - b) Those above 18 and single should be allowed to exercise their private rights in absolute terms since they have attained the age of majority and they are not attached to anyone in terms of matrimony.
 - c) Those above 18 and married, since Zambia is all out to save the institution of marriage, should get spousal consent before she can abort. This is not to say the married woman does not have her private right to abortion anymore, but that she has given up some of her rights upon getting married.
 - d) All mental patients need somebody to certify their undergoing an abortions.
5. By legally restricting the delivery of abortion services to hospitals, service within the community is jeopardized. The medical personnel in hospitals cannot cope with all the cases of abortion. Qualified private practitioners should be legally allowed to perform abortions so that abortion services may be accessible to all. Let those who can afford the charges given

by private practitioners avail themselves to them, after all, even with restrictive abortion laws there are women who can afford to go to private practitioners.

6. At the moment the hospitals can only perform abortions if they are less than twelve weeks due to inadequate machinery that is employed. Better equipped machinery should be introduced to cater for women who wish to have abortions when the pregnancy is above twelve weeks.
7. The grounds in the Termination of Pregnancy Act, 1972 should be widened to include rape and incest.

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