WOMEN'S REPRODUCTIVE AUTONOMY VIS-À-VIS ABORTION IN ZAMBIA

BY

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APRIL 2011.
DECLARATION

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ABSTRACT

This research paper looks at reproductive rights from the women’s perspective. The research is necessitated by the fact that women’s reproductive autonomy is intrinsically valuable for women and for the welfare of humankind. Reproductive autonomy refers to a women’s control over her body and her choice to indulge in sex and terminate an unwanted pregnancy. This is central to women’s welfare both because childbearing takes place in women’s bodies and because they are generally expected to take primary responsibility for child rearing, thus control over their reproduction should be a basic need and right. But unfortunately, such autonomy is a low priority for most societies due to the fact that issues related to reproductive rights are the most vigorously contested rights worldwide. Women’s loss of reproductive autonomy is so longstanding and so central to so many cultures and beliefs that recognizing it can be difficult. In Zambia, factors that have affected women’s reproductive autonomy most strongly are poverty, and belief systems that devalue such autonomy. In addition, the fact that society and men claim a stake in women’s reproductive capacity has resulted in legislative and social regulation of sexuality and reproduction. Therefore, premised on this, this research has examined abortion and the various statutes that have been enacted in Zambia namely, the Penal Code Act, The Termination of Pregnancy Act, the Constitution and the significant role they play in shaping women’s choice. This has been compared to the policies at International level and countries like South Africa, Canada and the United States of America have been looked at. The paper has also looked at factors that affect women’s reproductive autonomy and also digs deeper into the question of what such a commitment of fully granting women their reproductive autonomy might entail.
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I would like to earnestly thank Ms. Iwatula my supervisor who took the thorough task of reading, correcting and offering important critic and suggestions on the content and nature of the research.

I am eternally grateful to my mother Josephine, my brother Okias and sister Jane who paid for my education, may God bless you abundantly for the sacrifices you have made for me and the good seed you have planted in my life. My sincere gratitude goes to the rest of my siblings Henry, Norah and Sibeso for being there for me all the time and providing for my needs. May God richly bless you.

Special thanks to Goldfridah, Jackie, Tinta and Ng’andwe for being true friends, the Mukozombas for caring about me, the Njungu family for being there for me, Mr. Chirwa for helping me by availing his computer during my research and Mr. Samsungwa for lending me study materials each semester.

I also thank Kevin for selflessly helping me with this research whenever I needed his help and Newton for providing me with some data for chapter four of the research.

Last but not least I would like to thank all those I have not expressly mentioned here but helped me in one way or the other. You guys are the best and may God bless you.
DEDICATION

This is dedicated to God almighty for having sustained me throughout my life and to my Mother Josephine Siluka, thank you for your prayers, provision and love.
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CHAPTER ONE: THE CONCEPT OF WOMEN’S REPRODUCTIVE AUTONOMY

1.0 INTRODUCTION

Reproductive rights have been recognized worldwide as a basic right to which individuals are entitled. International instruments such as the United Nations Convention on the Elimination of all Forms of Discrimination against Women\(^1\) and a number of UN conferences have held that these rights are inviolability and have called on states to uphold them. In so far as women are concerned, these international instruments have advocated for increased women’s reproductive autonomy including a right to abortion and sexual autonomy. While some countries such as South Africa and Canada have given full effect to these rights, many others including Zambia are yet to do so. This research has sought to bring out all the factors which prevent women from effectively enjoying reproductive rights in Zambia. In other words, it asks what needs to be done in order to ensure that women enjoy full reproductive rights in Zambia.

1.1 THE CONCEPT OF WOMEN’S REPRODUCTIVE AUTONOMY.

The concept of reproductive autonomy brings in issues of reproductive health and rights. The question of reproductive rights is not subject to a single or universal definition and as such understandings differ from one society to another. However, according to the World Health Organization:

"Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence."\(^2\)

Reproductive health on the other hand refers to a state of complete physical, mental and social well-being in all matters relating to the reproductive system and to its functions and processes.\(^3\) It

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\(^1\) Entered into force on 3\(^{rd}\) September, 1981.


implies that people are able to have a responsible satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Men and women should be informed and have access to contraceptives as well as other methods of their choice for regulation of fertility which are consistent with the law.

The United Nations Convention on the Elimination of all forms of Discrimination Against Women which Zambia has ratified, in article 12 provides for equal access to health care services for men and women and additional health care for women to carter for pregnancy and post-pregnancy. Unfortunately it does not fully capture the concept of reproductive autonomy which is very crucial for women to protect themselves against forced pregnancies and childbirth and gender-biased sexual practices.

The International Conference on Population and Development program of action (ICPD) and the Beijing platform for action recognize sexual and reproductive rights as human rights thereby, affirming them as an inalienable, integral and indivisible part of universal human rights. It is recognized that despite the major biological differences between men and women, they both have these rights. Chapter VII of the ICPD Program of Action therefore calls upon States to strive to ensure that couples and individuals enjoy full reproductive rights and thereby attain their reproductive goals. In particular, States are to adopt policies that prevent unwanted pregnancies and reduce the incidence of high-risk pregnancies, morbidity and mortality; that make quality services affordable, acceptable and accessible to all who need and want them; that increase the participation and sharing of responsibility of men in the actual practice of family planning; and that protect and promote the rights of adolescents to reproductive health education.

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5 Entered into force on 3rd September, 1981.

6 Article 12(1) and (2) of Convention on the Elimination of all forms of Discrimination against Women.


9 M. Munalula, Women, Gender Discrimination and the Law. Page 176
and care, and greatly reduce the numbers of adolescents’ pregnancies. Governments are therefore urged to identify and remove all major barriers that prevent couples or indeed individuals from enjoying reproductive rights to their full potential.

In spite of this, a lot of women in Zambia have not been able to enjoy these rights to the maximum because of the existence of certain factors which are inherent within the Zambian society itself. This research has brought out all these factors.

1.2 STATEMENT OF THE PROBLEM

Despite the fact that Zambia is a signatory to various UN Conventions which guarantee reproductive rights to women, the extent to which these rights are actually enjoyed by Zambian women is by and large limited. This is especially the case with regards to abortion. In Zambia most women do not have access to hospital facilities nor do they know the provision of the law. Even, in cases where women know about the circumstances provided by the law (such as risk to the life, physical or mental health of the pregnant woman) in which abortion can be permitted, it may be hospital policy not to permit abortion or provide contraceptives as is the case of catholic and other missionary hospitals, often the sole health providers in rural areas. Thus the decision whether to have abortion or not is not for the woman to make, but that of the doctor or health institution which performs it. Commenting on Women’s lack of reproductive autonomy, Professor Chanda stated that,

"Reproductive autonomy is very controversial within the Zambian context because the understanding of sexual relations and expectations with regard to heterosexual relations are completely contrary to such a right. When, how and with whom to have sex is not controlled by women. Different parties, the state, society, spouse, intimate partner extended family, alangizi (marriage counselors) all claim legitimate interest in a woman’s body and in her reproductive capacity and sexuality and it is usual for such interest to take priority over those of the woman herself.”

10 M. Munalula, Women, Gender Discrimination and the Law. Page 178


Furthermore, the fact that abortion is not legalized in Zambia means that women do not fully exercise reproductive autonomy this is so because the Penal Code\textsuperscript{13} prohibits and punishes abortion, the Constitution\textsuperscript{14} protects the right to life of the foetus and the Termination of Pregnancy Act\textsuperscript{15} only allows abortions in very strict circumstances. This research has sought to bring out the legal, social and cultural factors that prevent women from enjoying full reproductive autonomy/rights in Zambia.

1.3 RESEARCH OBJECTIVES

The objectives of this research are;

a. Determine whether the Zambian law particularly the law on abortion enhances or restricts women’s reproductive autonomy.

b. Discuss the factors that have lead women to be less autonomous especially when it comes to their reproductive capacity.

c. Suggest what needs to be done in order to ensure that women have full reproductive autonomy in Zambia

In order to effectively achieve the above objectives the study sought to answer the following questions.

1.4 SPECIFIC RESEARCH QUESTIONS

a. Does the law on abortion in Zambia require to be maintained or changed so as to enhance women’s reproductive autonomy?

b. What are some of the policies being used in other jurisdictions?

c. What factors affect women’s reproductive autonomy?

d. What effect do the arguments for and against abortion have on the quest for enhancing women’s reproductive autonomy?

e. What can be done to promote women’s reproductive autonomy?

\textsuperscript{13} The Penal Code, Chapter 87 of the Laws of Zambia.

\textsuperscript{14} The Constitution, Chapter 1 of the Laws of Zambia.

\textsuperscript{15} The Termination of Pregnancy Act, Chapter 304 of the Laws of Zambia.
1.5 RATIONALE OF THE STUDY

The study comes at a time when a lot of girls and women in Zambia are dying due to unsuccessful attempts to abort. According to report by News Network, unsafe abortions in Zambia today contribute to 30% of all maternal deaths.\(^\text{16}\) Lack of effective contraception, stigma around abortion, gender inequalities and archaic colonial laws often result in women resorting to unsafe methods in a bid to terminate pregnancies. This exposes them to unqualified people who end up performing the abortion negligently, resulting in a lot of health complications and even death. This research is therefore important because it acts as a guide to policy makers and that maternal morbidity and mortality rates can be reduced if the problem of abortion is confronted head on. In particular there is need to further liberalize the laws on abortion so as to ensure that these cases are dealt with by qualified persons. In the words of the Chief Justice of the Supreme Court of Canada,


\[
\text{"forcing a woman by threat of criminal sanctions to carry a fetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and this is a violation of her security of her person."}^{17}
\]

1.6 METHODOLOGY

The study employs the qualitative methodology of research. Information will be drawn from desk research as well as field investigations. Desk research will come from secondary data in the form of books which have exhaustively analyzed the issues relating to this topic, law journals, dissertations and the internet. A few cases have been used to illustrate issues concerning women’s reproductive autonomy, particularly when it comes to abortion.


1.7 BACKGROUND TO ABORTION

Abortion was one of, if not the earliest method of dealing with unwanted pregnancy widely used in ancient times.\(^{18}\) Usually the acts of abortions were resorted to in cases of pregnancies outside marriage, rape and incest so as to avoid embarrassment. However, as Christianity emerged and started spreading from the western countries to Africa and other parts of the world, the acts of abortion came to be regarded as immoral and eventually illegal.\(^{19}\) These Christian values began to be reflected in the laws of such nations and eventually abortion was prohibited.

As a result of this, in 1861 Britain enacted an Act called the Offences Against the Person Act.\(^{20}\) This Act prohibited abortion and made it an unlawful offence punishable by life imprisonment. The Act applied to Northern Rhodesia by virtue of the English Extent of Application Act. Thus, the aforementioned provision of the British Act was incorporated into the Penal Code. Consequently, abortion became illegal. However as time went on the strict laws on abortion began to be made flexible. There were a number of reasons for this change in attitude towards abortion.

Firstly, there was a situation where the mother was put in a difficult position of having to choose between saving her own life or that of the unborn child due to medical complications.\(^{21}\) A number of doctors and lawmakers decided that in such a situation it would not be right to impose legal obligation on the mother to prefer the life of the unborn child over her own.

Secondly, instances of rape and incest as viewed from ancient times were considered as justifiable reasons for termination of pregnancy as a woman had to give birth to a child literally forced upon her.\(^{22}\) And thirdly, if there was a substantial chance that the baby would be born deformed, then such a case would warrant an abortion.

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\(^{19}\) Y.C Kabwe, Abortion Should it be Legalized in Zambia. Obligatory essay, 2005. Page 4

\(^{20}\) Offences Against the Person Act of 1861.

\(^{21}\) Y.C Kabwe, Abortion Should it be Legalized in Zambia. Page 5

\(^{22}\) Y.C Kabwe, Abortion Should it be Legalized in Zambia. Page 5.
As a result of this it was felt by doctors, policy makers and other people thought that the law concerning abortion should be changed.

The case of R v. Bourne\textsuperscript{23} significantly changed the law concerning abortion in Britain. In that case doctor Bourne was charged under section 58 of the Offence Against the Person Act for unlawfully procuring an abortion on a fourteen year old girl who became pregnant after she had been raped by soldiers. The judge directed the jury that no person ought to be convicted of the crime of abortion unless the jury are satisfied that the act was not done in good faith for the purpose only of preserving the life of the mother. It was therefore held that, a surgeon need not wait until the person was in peril of immediate death but it is his duty to perform the operation if on reasonable grounds and with adequate knowledge, he was of the opinion that the probable consequence of the pregnancy would be to make the patient a physical or mental wreck. Dr Bourne was thus later acquitted.

This case led to the enactment of the Abortion Act of 1967 in England and abortion was legal in certain instances such as those outlined in the Bourne case.

In Zambia, the change of the law on abortion can be said to have been influenced by the landmark decision in the case of The People v. Gulshan, Smith and Finlayson\textsuperscript{24} where three doctors were charged with conspiring to procure an abortion contrary to sections 256 and 132 of the Penal Code which provisions are equivalent to sections 394 and 151 of the current Penal Code. In deciding this case the reasoning in R v. Bourne was followed. Thus in 1972, Zambia enacted the Termination of Pregnancy Act\textsuperscript{25} which legalized abortion in certain circumstances very similar to those found in the English Act. This Act therefore paved the way for abortions in Zambia but it should be noted that the law has not been completely liberalized as it only permits abortions in certain circumstances.

\begin{footnotesize}
\begin{enumerate}
\item[23] (1938) 3 ALL ER 615.
\item[24] HP No.11 of 1971.
\item[25] The Termination of Pregnancy Act, Chapter 304 of the Laws of Zambia.
\end{enumerate}
\end{footnotesize}
1.8 CONCLUSION

This chapter has given the general introduction to the research paper. It has also given the research objectives and the specific research questions, rationale of the study and the methodology. It has dealt with the concept of women's reproductive autonomy by looking at some international instruments such as International Conference on Population and Development and Convention on the Elimination of all forms of Discrimination Against Women which Zambia has ratified, to illustrate that the latter does not fully capture the concept of women's reproductive autonomy. It has also shown that abortion is related to reproductive health and has discussed the history of the law of abortion.
CHAPTER TWO: A COMPARATIVE STUDY OF ZAMBIA LAW ON ABORTION WITH OTHER JURISDICTION

2.0 INTRODUCTION

The preceding chapter gave a general introduction to the research paper, examined the concept of women’s reproductive autonomy, and also looked at some international instruments such as Convention on the Elimination of all forms Discrimination against Women (CEDAW)\(^{26}\) and International Conference on Population and Development (ICPD)\(^{27}\) which deal with abortion as a health issue. The chapter also gave a brief background to the law on abortion in Zambia as traced from England.

This Chapter will look at the legal framework relating to abortion in Zambia. According to section 2 of the Termination of pregnancy Act, 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, and includes any written law or rule relating to the procurement of abortion Act.\(^{28}\) Thus, this chapter will consider the provisions of the law found in the Constitution of Zambia, the Penal Code and Termination of Pregnancy Act and this will be compared to jurisdictions with more liberal laws on abortion such as South Africa, Canada and the United States of America.

2.1 ABORTION LAW IN ZAMBIA

Abortion has a variety of definitions. Some scholars have defined it as the deliberate ending of a pregnancy at an early stage\(^{29}\) or a miscarriage or expulsion of a human foetus before gestation is completed.\(^{30}\) It is however important to bear in mind that abortion can be spontaneous that is not induced but merely occurs naturally. In such a case no legal liability arises on the part of the

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\(^{26}\) Entered into force on 3\(^{rd}\) September, 1981.

\(^{27}\) 13th September, 1994.

\(^{28}\) Section 2, Termination of Pregnancy Act ,Chapter 304 of the laws of Zambia.


woman. However, this is not the meaning of abortion intended for this paper. The meaning adopted here is that relating to induced abortions. Hence, for the purpose of this research abortion is defined as when a woman decides to end her pregnancy before its full term, by medical or surgical means.\textsuperscript{31}

In Zambia, there are a number of pieces of legislation that deal with abortion. These statutes are aimed at regulating abortions. The first piece of legislation considered here is the Constitution of Zambia.

The Bill of rights in the Constitution contains provisions that protect the right to life. Article 12(2) of the Constitution provides that;

\begin{quote}
"A person shall not deprive an unborn child of life by termination of pregnancy except in accordance with the conditions laid down by an Act of Parliament for that purpose."
\end{quote}\textsuperscript{32}

Therefore, as shown from the above provision, the Zambian constitution places importance on the life of the unborn child by protecting its right to life. The Penal Code takes this protection to a higher level in that it punishes abortion and any activities related to achieve the aim of abortion. This is evidenced in the following provisions of the Penal Code.

Section 151 of the Penal Code states that;

\begin{quote}
"Any person who, with intent to procure a miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years."
\end{quote}\textsuperscript{33}

Furthermore, section 152 provides that;

\begin{quote}
"Every woman being with child who, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any such thing or means whatever, or permits any such or means to be administered or used, is guilty of a felony and is liable to imprisonment for seven years."
\end{quote}\textsuperscript{34}


\textsuperscript{32} Article 12(2), the Constitution, Chapter 1 of the laws of Zambia 1996.

\textsuperscript{33} Section 151, Penal Code Act, Chapter 87 of the Laws of Zambia.

\textsuperscript{34} Section 152 , Penal Code Act, Chapter 87 of the Laws of Zambia.
And section 153 states that;

"Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or not with child, is guilty of a felony and is liable to imprisonment for three years." 35

Section 221 goes further to punish any willful acts that may cause a child to die before it is born. The section provides that, any person who, with intent to destroy the life of a child capable of being born alive, by any willful act causes a child to die before it has an existence independent of its mother, is guilty of felony, to wit, of child destruction, and is liable on conviction thereof to imprisonment for life:

Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother. 36

These provisions show that abortion is prima facie not permitted in Zambia and in fact it is punishable by the law. The seriousness of the offence is seen in the number of prison years that are supposed to be slapped on the offenders, more especially the life imprisonment that is to be given upon conviction of the offence of child destruction. On the other hand, notwithstanding this position, the Termination of pregnancy Act has eased the situation a bit in that under certain circumstances such as those provided hereunder abortions can be permitted.

In section 3 (1) the law provides that, subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if he and two other registered medical practitioners, one of whom has specialized in the branch of medicine in which the patient is specifically required to be examined before a conclusion could be reached that the abortion should be recommended, are of the opinion, formed in good faith-

(a) That the continuance of the pregnancy would involve-

35 Section 153, Penal Code Act, Chapter 87 of the Laws of Zambia.

36 Section 221(1), Penal Code Act, Chapter 87 of the Laws of Zambia.
(i) Risk of 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; or

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

2.2 IMPLICATIONS OF ZAMBIA’S ABORTION LAW

A critical look at Zambia’s Termination Of Pregnancy Act will reveal that;

a) The procedural requirements to obtain an abortion, as set forth in the law, are especially troublesome. This is due to the fact that abortion can only be done with the approval of three doctors. Hence, without the trio’s opinion that there will be some form of risk to the pregnant woman, a woman will not have an abortion. This therefore takes away the choice or decision of abortion from the woman and places that decision in the hands of doctors.

b) The system regulating access to abortions is manifestly unfair. It contains so many potential barriers to its own operation that the exception it creates will in many circumstances be practically unavailable to women who would prima facie qualify. For instance, some provisions in very broad terms allow doctors not to perform abortions so long as they have a conscientious objection. This has led to hospitals such catholic or missionary hospitals, often the sole health service provider in rural areas to have policies that do not permit abortion.

37 Section 3(1)(a), Termination of Pregnancy Act, Chapter 304 of the Laws of Zambia.

38 Section 3(1)(b), Termination of Pregnancy Act, Chapter 304 of the Laws of Zambia.

39 Section 3(1)(b), Termination of Pregnancy Act, Chapter 304 of the Laws of Zambia.

40 Section 4(1) and Section 4(3), Termination of Pregnancy Act, Chapter 304 of the Laws of Zambia.

41 M. Munalula, Women, Gender Discrimination and the Law. Page 185.
c) This has further led to varying levels of abortion availability. In that the middle class and affluent women have better chances to obtain an abortion than women in rural areas. Consequently, it can also be said to result in inequalities or class discrimination between women of the upper class and lower class.

Therefore, a woman is only eligible for abortion if she meets the above criteria and the abortion has to be performed by three registered medical practitioners. Although, the above provisions appear to be somewhat fairly liberal when compared to certain countries, in terms of promoting women’s reproductive autonomy there are some impediments as shown from the above implications of the Termination of Pregnancy Act in Zambia and furthermore they are nowhere as liberal as those found under jurisdictions that have totally liberalized laws like South African, Canada and some parts of the United States of America.

2.4 POSITION OF THE LAW ON ABORTION IN SOUTH AFRICA.

In 1996 South Africa enacted the Choice on Termination of Pregnancy Act\textsuperscript{42} and by enacting this piece of legislation; the South African parliament replaced one of the most stringent abortion laws in the world with one of the most liberal laws in the world. To understand the spirit of the Act regard has to be given to the preamble.

The preamble of the Choice on Termination of Pregnancy Act provides that, “the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies.... That the decision to have children is fundamental to women’s physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy; as well as sexuality education and counseling programmes and services.......and to provide every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs.”\textsuperscript{43}

\textsuperscript{42} Act No. 92 of 1996

\textsuperscript{43} The Preamble, of the Choice on Termination of Pregnancy Act., 1996.
From the preamble of the Choice on Termination of Pregnancy Act (herein after called the 1996 Act) it is evident that it was enacted in order to promote women's rights/reproductive autonomy. Giving South African women total control over their reproductive capacity. This is evident in the substantive provisions of the Act.

Section 2 (1) of the 1996 Act provides that, a pregnancy may be terminated-

(a) Upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;  

(b) from the 13\textsuperscript{th} up to and including the 20\textsuperscript{th} week of gestation period if a medical practitioner, after consultations with the pregnant woman, is of the opinion that-(1) the continued pregnancy would pose a risk of injury to the woman’s physical or mental health or (2) there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or (3) the pregnancy resulted from rape or incest; or (4) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or

(c) After the 20\textsuperscript{th} week of gestation period if a medical practitioner, after consultation with another medical practitioner or registered midwife is of the opinion that the continued pregnancy-(1) would endanger the woman’s life (2) would result in severe malformation of the foetus or (3) would pose a risk of injury to the foetus.

Therefore, in South Africa, any woman of any age (with the exception of children below the age of sixteen years) can get an abortion by simply requesting with no reasons given if she is less than 13 weeks pregnant. Although, the constitution does not explicitly enumerate the right of women to abort this is inferred from some clauses of the constitution such as clause 12 (2) (a) and (b) which guarantee the citizens of South Africa the right to bodily and psychological

\footnote{Section 2(1)(a) of the Choice on Termination of Pregnancy Act.,1996.}

\footnote{Section 2(1)(b) of the Choice on Termination of Pregnancy Act.,1996.}

\footnote{Section 2(1)(c) of the Choice on Termination of Pregnancy Act.,1996.}
integrity which includes the right to make decisions concerning reproduction and to security in and controlled over their body. 47 Furthermore, If she is between 13 and 20 weeks she can have an abortion if she meets the conditions set out in section 2 (1) (b) above. If she is more than 20 weeks pregnant, she can still get an abortion if she meets the criteria set out in section 2(1) (c) shown above. A woman under the age of 18 will be advised to consult her parents, but she can decide not to inform or consult them if she so chooses. 48 A woman who is married or in a life-partner relationship will be advised to consult her partner, but again she can decide not to inform or consult him/her. 49

It can be concluded from the above that women in South Africa have total control over their bodies with regards to keeping or terminating a pregnancy because that decision lies solely in their hands. The only time when other people can make that decision on behalf of a woman is when the woman is severely mentally ill or has been unconscious for a long time 50. In such a case, consent of a life-partner (only if male), parent or legal guardian is required 51 or curator personae 52 will be needed.

In comparison to Zambia it can be stated that women in South Africa have more control over their bodies than Zambian Women due to the fact that, In South Africa a woman can simply request for an abortion without giving any reasons if the pregnancy is less than 13 weeks whereas in Zambia the decision to have a legal abortion at any given time rests on the opinion of the doctors and not the woman.

48 Section 5 (3) of the Choice on Termination of Pregnancy Act.1996.
50 Section 5 (4) a and b ,of the Choice on Termination of Pregnancy Act,1996.
51 Section 5 (4) (b) (1), of the Choice on Termination of Pregnancy Act,1996.
52 Section 5 (4) (b) (2),of the Choice on Termination of Pregnancy Act,1996.
2.5 POSITION OF THE LAW ON ABORTION IN THE UNITED STATES

In most states in the United States of America abortion has been legal for women since the Supreme Court decision in Roe v. Wade\textsuperscript{53} of January 22, 1973. That decision established that a woman has a right to self-determination (often referred to as a "right to privacy") covering the decision whether or not to carry a pregnancy to term, but that this right must be balanced against a state's interest in preserving fetal life. This decision was cemented by the supreme court decision in the case of Planned Parenthood of Southeastern Pennsylvania v. Casey.\textsuperscript{54} In that case the Court stated that;

State restrictions on abortion violate a woman’s rights to privacy in two ways. First compelled continuation of a pregnancy infringes upon a woman’s right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labour and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this court has held to violate the constitutional principle of bodily integrity in other contexts.

Further if the State restricts a woman’s right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning-critical life choices that this court long has deemed central to the right to privacy. The decisions to terminate or continue a pregnancy has no less an impact on a woman’s life than decisions about contraception or marriage. Because motherhood has a dramatic impact on a woman’s educational prospects, employment opportunities and self determination, restrictive abortion laws deprive her of basic control over her life. For these reasons, the decision whether or not to beget or bear a child lies at the very heart of this cluster of constitutionally protected choices.

A State’s restriction on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the

\textsuperscript{53} (1973) 410 U.S 113.

\textsuperscript{54} (1992)505 US 833.
State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth and in most instances provide years of maternal care. The State does not compensate women for their services instead it assumes that they owe this duty as a matter of course. This assumption that women can simply be forced to accept the natural status and incidents of motherhood appears to rest upon a conception of women’s role that has triggered the protection of equal protection clause. The joint opinion recognizes that these assumptions about women’s place in society are no longer consistent with our understanding of the family, the individual or the Constitution.

Following the reasoning of the court in this case, some States within the U.S have made the law concerning abortion liberal whereby the decision to have an abortion is dependent on the woman. Thus, the position of women in the United States (most parts of the United States) is that they, as in South Africa, have greater autonomy over their reproduction capacity compared to other jurisdictions with restricted laws.

2.6 POSITION OF THE LAW ON ABORTION IN CANADA

Canada is one of the few nations with no legal restriction on abortion. Prior to 1969 abortions where illegal and attracted a sentence of life imprisonment. Section 287 of the Criminal Code stated that, “everyone who, with intent to procure the miscarriage of a female person, uses drugs, instruments or manipulation of any kind, for the purpose of carrying out their intention, is guilty of an indictable offence and liable to imprisonment for life.”

However, in 1969 an amendment to the Canadian Criminal Code provided for abortions performed in hospitals with the approval of three-doctors (Therapeutic Abortion committee), who would have to certify that the pregnancy would be likely to endanger the life or health of the pregnant woman. Abortion rights advocates also protested that the choice should be made by the woman, not a panel of doctors. But what drastically changed the position the law in Canada were the cases of Morgentaler V Her Majesty the Queen, Dr Morgentaler began performing

55 Section 287 of the Canadian Criminal Code.
57 (1988) 1 S.C.R 30 @ 37.
abortions at his clinic without approval of a Therapeutic Abortion Committee in contravention of the law. In 1973, he publicly stated that he had performed five thousand abortions without the permission of the three doctor committee, even going so far as videotaping himself performing operations. The Québec government took him to court twice and both times juries refused to convict him despite his outright admission of breaking the law. The government appealed one acquittal and the appeal court overturned the jury’s verdict. Morgentaler was sentenced to 18 months in jail. Public outcry over the appeal court’s decision caused the Federal Government to pass a law (commonly known as the Morgentaler Amendment) preventing appeal courts from overturning a jury’s not-guilty verdict. Morgentaler was again acquitted at a third trial, causing the Quebec Government to declare the law enforceable.

Upon his release from prison in Quebec, Morgentaler decided to challenge the law in other provinces. Over the next 15 years, he opened and operated private abortion clinics across the country in direct violation of the law. Following a fourth acquittal in 1984, the Federal Government appealed the decision. Morgentaler appealed to the Supreme Court of Canada. In a landmark decision, the court declared in 1988 the entirety of the country’s abortion law to be unconstitutional.

The court also noted that, forcing a woman by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations and the law asserts that the woman’s capacity to reproduce is subject, not to her own control but to that of the State were essentially a breach of the woman’s right to security of the person which is guaranteed under Canada’s Charter of Rights and Freedoms. The section in issue provides that:

“Everyone has the right to life, liberty, and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

Furthermore, the Court stated that, the right to liberty guarantees a degree of personal autonomy over important decisions intimately affecting a person’s private life. The decision whether or not to terminate a pregnancy is essentially a moral decision and in a free and democratic society, the conscience of the individual must be paramount to that of the state.

58 Section 7 of the charter of Rights and Freedoms.
As such, the provision which restricted abortion was held to violate the principles of fundamental justice and was struck down, leaving Canada with a legislative vacuum to this day. Early attempts to fill the legislative vacuum failed politically, and no government has since dared to touch the issue. Consequently, women in Canada have total power in making a decision concerning abortion because as already alluded to there is no law whatsoever restricting abortions in that country.

Thus, in comparison to Zambia, South Africa, the United States of America and Canada have far more liberal laws on abortion which enhance women’s reproductive autonomy than Zambia. In other words women in Zambia do not fully enjoy their reproductive autonomy like the women in the above mentioned countries do. This proposition is evident when one takes a closer look into the implication of the aforementioned Termination of Pregnancy Act or the TOP Act.

In conclusion, this chapter has discussed the legal framework governing the law on abortion in Zambia. This has been compared to jurisdictions with more liberal laws than Zambia and it has been concluded that Zambian women do not enjoy full reproductive autonomy especially when it comes to making a decision on abortion as much as their counterparts do in South Africa, Canada and the United States of America. This is so because a closer look at the Termination of Pregnancy Act reveals that whole system regulating abortions is somewhat troublesome and takes the decision out of the woman’s hands.

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CHAPTER THREE: FACTORS CONTRIBUTING TO WOMEN’S LACK OF AUTONOMY

3.0 INTRODUCTION

The preceding chapter concluded that women in Zambia do not enjoy full reproductive autonomy especially when it comes to abortion as compared to their counterparts in countries with more liberal laws. Therefore, this chapter highlights some of the factors inherent within the Zambian society that have affected and impinged on women’s autonomy.

Autonomy refers to the ability to act and make decisions without being controlled by anyone else. And it is very crucial to women. The chapter is written bearing in mind that the reproductive behavior of couples and individuals is in practice traditionally shaped by implicit societal norms, beliefs, and rules. Thus, since one of the functions of the law is to serve the needs of society, to some extent the law is informed by these.

It should be noted that women’s loss of reproductive autonomy is so longstanding and so central to many cultures and beliefs that recognizing it can be difficult. In Zambia, factors that have affected women’s reproductive autonomy most strongly are inter-alia lack of financial/economic independence, poverty, lack of education, and traditions and belief systems that devalue such autonomy. For example, the most influential of these are probably the biblical sources that depict women’s origin in Adam’s rib as a mark of their subservient nature and traditionally, women are taught that men are always the head of a house. It is these kinds of social and cultural norms which still maintain discrimination against women that make it difficult for women to achieve true equality with men and also the much desired reproductive autonomy.

The first factor that will be considered in this paper is;

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61 S. Wehmeier et al, Oxford Advanced Learner’s Dictionary. Page 89
3.1 LACK OF GOOD EDUCATION

It is known world over that education is associated with empowerment. It is believed that education enhances women’s power to make autonomous decisions. Although the government has stated its commitment to eliminating gender imbalances and discrimination in education much remains to be done. There is a gender disparity in the number of enrolment for girls after grade four. The rate of school drop-out is much higher among girls becoming more prominent in secondary school, due partly to early marriages and pregnancies.63 The government acknowledges that these gender disproportions are more obvious in rural areas.64 In Zambia the official total literacy estimates among adults in 2002 were 77.2 per cent, which breaks down to 84.6 per cent men and 70.2 per cent for women.65 This shows that a large a number of women in Zambia are illiterate when compared to men.

However, highly educated women are more likely to take part in decision making in their own health care and reproductive capacity.66 They can decide on the number and spacing of their children instead of leaving this decision solely in the man’s hands, they also have considerably small families as compared to those with no education who have about twice the number of children as women with more years in school.67 This can be seen from the study conducted in 2002 by USAID under the Measure Communication Project depicting a relationship between women’s education and family size.

The study is shown by the table below.


Average number of children per woman by education level.  

The chart shows that Zambian women with secondary level of education have smaller family sizes. This is because they are capable of making autonomous choices as regards their reproductive capacity. However, the situation is different with women without or little education who must first ask their husband about contraceptives before using them because they feel they will be in trouble if they do not ask their spouse or boyfriends. Munalula observes that it was always the practice for women to obtain the consent of a spouse before gaining access to contraceptives. Thus, women have less power in decision making over reproductive issues.

3.2 FORCED MARITAL SEX/MARITAL RAPE.

Marital rape in Zambia is not criminalized by the Penal Code. It is also very common in our culture and communities. Unfortunately, most women consider this to be normal and even view

68 Demographic and Health Surveys 1995-1999( Calverton, MD; Macro International)

69 A. Chanda, Women’s Sexual and Reproductive Rights and HIV/AIDS transmission in Zambia. Page 79

70 M. Munalula, Women, Gender Discrimination and the Law. Page 173.

it as a normal wear and tear of marriage. However, marital rape has serious consequences, for instance a woman can get pregnant against her will and even be exposed to even high risk pregnancy and in this era of HIV/AIDS she could be bruised and therefore be put at a high risk of contracting HIV if the husband has the virus.

Information collected from the Central Statistical office (CSO). On attitudes among women concerning marital rape revealed that 52 percent of females aged between 40-44 expressed the opinion that a man is justified in beating his wife for refusing to have sex compared to 42 percent of females aged 15-19. The picture is different among women with higher education, with those who think that the man is justified at only 8 percent compared to 54 percent among women with primary education. Thus, as already alluded to, the fact that spousal rape is not criminalized in Zambia is largely responsible for the notion that women should have a subservient role to that of men. Furthermore, it is also believed once a man and woman get married, it is implied that the women has consented to have sex with her husband whenever he wants it and at his terms.

So women usually suffer in silence and are exposed to complications of carrying children they did not plan for because abortions are only carried out under somewhat strict circumstances found in the Act,( because a woman who does not meet the criteria will not have an abortion). Kalunga Lutato observes that;

“Hansard reading reveals that one reason forwarded by the minister of Health when presenting the Termination of Pregnancy Bill was to provide for stricter control over terminations of pregnancy.”

This has however impinged on women’s autonomy because they cannot have an abortion based on reasons other than those stated in the Act which are that there must be a risk to the life of the

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76 K. Lutato. Abortion; Should it be available as a right. obligatory Essay.2008
pregnant woman, injury to her physical or mental health or that the child would suffer from physical or mental abnormalities.  

3.3 LACK OF FINANCIAL/ECONOMIC DEPENDENCY AND POVERTY.

Poverty leads to financial and economic dependence. In order for one to truly be in control of their life there is need for them to be financially and economically independent. In this respect there is a connection between independence and concept of autonomy. Being independent means that one has the freedom to organize their own life, make own decisions without needing help from other people. By implication therefore if one has to get permission from someone every time they want to do something then they are not independent. According to Correa and Petchesky:

“The terrain of reproductive and sexual rights can be defined in terms of power and resources; power to make informed decisions about one’s fertility and sexual activity and resources to carry out such decisions safely and effectively.”

Most women are not financially/economically independent; they usually rely on their husbands or relatives for financial support. This dependency strengthens women’s traditional deference to men in decision making that exists in the Zambian society. Consequently, in most cases since it is the man who controls the finances he dominates over the women and solely makes such important decisions such as the number of children a couple should have. The woman in most cases will just comply and this makes her lack autonomy even over her own reproductive capacity.

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77 Section 3(1)(a) and (b), Termination of Pregnancy Act, Chapter 304 of the Laws of Zambia.

78 S. Wehmeier et al, Oxford Advanced Learner’s Dictionary. Page 789


3.4 CONTENT OF PRE-MARITAL COUNSELING

Zambia has Seventy-Three tribes and in almost all traditions in Zambia a young woman has to pass through pre-marital counseling before getting married. During this time a young woman is taught how to keep a marriage and that the man is the head of the home. He is the one who decides everything in the home and she must do everything to make him happy and comfortable. She should please her husband sexually and should never say no to his sexual advances. Therefore, it can be inferred from the afore going that these traditions and customs involve domination of a man over a woman. This is the reason why in spite of legal norms ensuring equality of the sexes in labor and social life which the constitution guarantees, in the bill of rights. On the ground one finds that family relations still remain quite unequal. Such traditions violate a woman’s sexual rights and autonomy.

3.5 LOBOLA

*Lobola* or bride price is widely practiced in Zambia. It is a practice in which a man intending to marry is required to pay substantial amount of money to the family of the girl he wants to marry. Professor Chanda observes that;

“The action takes away a woman’s control over her own body and makes her subject to her husband’s command especially over issues relating to sex. She has no right to say no to her husband’s sexual advance even where saying no could save her life.”

Therefore, the woman accepts sex simply because she has been paid for. *Lobola* now has been commercialized and the woman’s family will ask for a lot of money. This result in the husband thinking that he now owns the woman and the woman feels she is owned and in most cases will

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82 Part III of the Constitution of Zambia.


stay in a marriage even if she is being abused.\textsuperscript{85} The woman will stay in the marriage because she is scared that if she divorces, custom requires that upon divorce part of that lobola should be paid back to the husband. In most cases the woman and the family cannot afford to pay back that money so the family would rather advise the woman to stay in the marriage so as to avoid paying back the money.

3.6 THE URGE TO REPRODUCE

A study by Professor Chanda revealed that the sources of the urge to reproduce in women range from internal desire to have children to external pressure from husbands and the society at large.\textsuperscript{86} If a woman has a baby because she wants a baby then she is exercising her reproductive rights. But Perhaps it is more so from the pressure of the extended family especially of the husband that women want to prove that they are fertile and also because in our society once people get married the whole society will soon expect them to have children and this puts pressure on the couple.

The emphasis of society on procreation in marriage is illustrated by the requirement that an inspection is carried out by traditional counselors who conduct pre-marital counseling (locally called alangizi and bashibukombe) after the wedding night.\textsuperscript{87} This is done in order to inspect if the man is impotent but according to Professor Chanda’s research respondents admitted that this puts pressure on the woman.\textsuperscript{88} And in most cases they unwittingly make decisions which are not in their best interest since where couples do not have children, the blame is put on the woman. For example, A respondent in Kapiri Mposhi got pregnant with her seventh child against medical advice because her husband threatened to take another wife that would keep bearing children if she was unwilling to do so.\textsuperscript{89} In this situation the woman could not make autonomous


\textsuperscript{86} A. Chanda, Women’s Sexual and Reproductive Rights and HIV/AIDS transmission in Zambia. Page 77

\textsuperscript{87} A. Chanda, Women’s Sexual and Reproductive Rights and HIV/AIDS transmission in Zambia. Page 77

\textsuperscript{88} A. Chanda, Women’s Sexual and Reproductive Rights and HIV/AIDS transmission in Zambia. Page 77

\textsuperscript{89} A. Chanda, Women’s Sexual and Reproductive Rights and HIV/AIDS transmission in Zambia. Page 78.
decision over her body when the pregnancy endangered her life. It coerces women to reproduce against their will and violates their reproductive choice.

3.7 GENDER VIOLENCE

The health and reproductive rights of women are very closely linked to their social and legal status, and violence against women is a dangerous threat to their rights and health. Convention on the Elimination of all Forms of Discrimination against Women's General Recommendation 19 on violence against women calls to ensure that measures are taken to prevent coercion in regard to fertility and reproduction. With regards to autonomy in reproduction issues it found that the decision to become pregnant is imposed on the women by mothers in law or other people. Women respond because they do not want their husband to resort to violence. Still in certain cases husbands or boyfriends take the sole decision that the wife or girlfriend should abort. Again women will go along with the decision because they do not want violence to be used on them.

3.8 SEXUAL CLEANSING.

Although this practice has been outlawed by the Penal Code Amendment. Sexual cleansing is still generally a concern because certain groups of people still practice it. This is a practice whereby a widow has sex with another man following the death of her husband. The cleansing is meant to purge the husband’s spirit from his wife. This may affect adolescent girls as well as women since there is minimum marriage age for women or girls under customary law. A woman has no say over whether to be cleansed or not and this is an infringement of her sexual


92 Section 157, Penal Code Act, Chapter 87 of the Laws of Zambia.


and reproductive rights. Professor Chanda observes that, in Solwezi, North Western Province of Zambia sexual cleansing is required after initiation and coming out ceremonies. The young boys and girls are expected to have experimental sex to cleanse them. While the boys have an alternative of using the trunk of a banana tree to cleanse themselves, the girls have none and are required to have sex with a man whom is usually older and more sexually experienced. The practice was highlighted by almost all chiefs as a major concern. This practice therefore impinges on women’s reproductive autonomy.

3.9 CONCLUSION

This chapter has dealt with factors that affect and impinge women’s reproductive autonomy in Zambia. The reason for this is that Zambia is a culture of men and therefore traditions and societal norms are designed in such a way that men dominate over women. This is why in most cases men are more educated than women and therefore end up financially and economically better off than women, who end up being dependant on them. This consequently makes women lack autonomy in many matters especially reproductive issues.


CHAPTER FOUR: THE DEBATE ON ABORTION

4.0 INTRODUCTION

Abortion is a very controversial topic. Consequently, it is a topic that brings about a lot of mixed feelings and beliefs in people. It revolves around pro-life/anti-abortionist and pro-choice/arguments. With the central theme being women's rights verses the right of the foetus. This chapter will therefore explore some of these arguments. The discussion includes both secular and moral views on the topic of abortion. And bearing in mind that one of the functions of the law is to serve the needs of society, the aim is to find out whether these arguments can have an influence in shaping the law on abortion in Zambia.

4.1 WOMEN'S RIGHTS ARGUMENTS IN FAVOUR OF ABORTION

The first issue raised by those in favour of abortion is that women should have a right to control their own body. They contend that women have a moral right to decide what to do with their bodies(bodily autonomy). If women are not allowed to abort an unwanted foetus they are deprived of this right. The right to abortion is vital for individual women to achieve their full potential and banning abortion only puts women at risk by forcing them to use illegal abortion. A woman should not be regarded just as a container for the foetus but her rights and needs should be considered as well as those of the unborn. This is premised on the fact that a woman should not be treated as a means to an end. The woman's right, as a person, to be treated as an end in herself, accords her the right to choose whether she will accept a pregnancy or not. The law needs to reflect this right. Moreover, pregnancy has an enormous effect on the woman involved. As Sarah Weddington put it to the US Supreme Court in Roe v Wade: A pregnancy to a woman is perhaps one of the most determinative aspects of her life. It disrupts her body. It disrupts her education. It disrupts her employment. And it often disrupts her entire family life.

100 (1973)410 U.S 113
Hence, if abortion rights are denied, then a constraint is imposed on women's freedom to act in a way that is of great importance to them, both for its own sake and for the sake of their achievement of equality.\textsuperscript{101} and if the constraint is imposed on the ground that the foetus has a right to life from the moment of conception, then it is imposed on a ground that neither reason nor the rest of morality requires women to accept, or even to give any weight at all.

4.2 Arguments Against Abortion

Opponents of this argument usually attack the idea that a foetus is 'part' of a woman's body. They argue that a foetus is not the same sort of thing as a leg or a liver: it is not just a part of a woman's body, but is (to some extent) a separate 'person' with its own right to life.\textsuperscript{102} A second objection to this argument is that people do not have the complete right to control their bodies. All people are subject to various restrictions on what they do with their bodies - and some of these restrictions (laws against suicide or euthanasia) are just as invasive.\textsuperscript{103}

Some pro-life advocates say that the right to life should always outweigh the right of an individual to equality or to control their own body.\textsuperscript{104} But others raise arguments that are specifically related to women's rights and say that abortion does not free women. They argue that abortion does not liberate women, but allows society not to cater to women's needs. What women need for equality is not free access to abortion but to be given what they need to survive financially and socially as mothers.\textsuperscript{105} Women need such things as inexpensive, readily available childcare workplace or school that acknowledges the needs of mothers, providing flexible


scheduling and maternity leave, state support that helps to reintegrate a woman into the workforce. These view such things as the real issues that should be addressed. One writer put it like this:

"There are women who are raped and become pregnant; the problem is that they were raped, not that they are pregnant. There are women who are starving who become pregnant; the problem is that they are starving, not that they are pregnant. There are women in abusive relationships that become pregnant; the problem is that they are in abusive relationships, not that they are pregnant."^{107}

According to these persons therefore, the problem is not abortion but factors such as rape, poverty and abuse which need to be addressed.

4.3 HUMAN RIGHTS ARGUMENTS

Women's rights advocates argue that access to legal abortion is essential for the mental and physical health of women as a gender, and that banning abortion puts women in danger. Many advocates go much further than this and say that not only should abortion be available, it should be available in all communities and at low (or no) cost, otherwise the poor, and those living in areas with a strong religious ethos, will suffer discrimination that puts their health at risk. This, they argue, would breach human rights.^{108} Illegal abortions are more likely than legal abortions to do permanent damage to women's reproductive organs.^{109} Illegal abortions can cause great damage to women. For example, in 2009 the University Teaching Hospital in Lusaka, admitted a woman who drunk battery acid in an effort to miscarry. She also pushed an object painfully in

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her vagina and into her uterus in the hope for a speedy and uncomplicated miscarriage. The result was that the miscarriage did not happen and it was not speedy or complicated.111 Abortion can damage the long-term physical and emotional health of women who have an abortion.

The World Health Organisation estimates that approximately one-third of maternal deaths are due to complications arising from illegally induced abortions. Each year an estimated 20 million unsafe abortions are performed worldwide, 95 per cent of these are performed in low-income countries.112 In Zambia it is estimated at 30 per cent.113

4.4 ABORTION AND PRIVACY

This secular argument is not concerned with the rights of the foetus but with whether law and morality have any business interfering in the matter at all. The debate here is regarding the extent of abortion regulation. Some pro-choice advocates argue that it should be illegal for governments to regulate abortion any more than other medical practices.114 Governments are expected to protect privacy in all cases lacking a compelling state interest because certain decisions should be reserved for the private lives of individual members of society and therefore moral theorists and lawmakers should not interfere.115 This argument is often applied to abortion, and says that the decision should be left to the woman who is considering an abortion.116 But the argument is seriously flawed. The reason some activities are said to fall into the private category is that they don’t harm anyone. And one of the biggest questions about abortion is just that: is the foetus a ‘person’? so this argument still brings us back to the problem of the rights of the foetus.


4.5 MORAL PERSONHOOD

One issue that is of critical importance in talking about abortion is the question, is the foetus a person or when does human life begin? Professor Dillone-Malone defined a person as a thinking, intelligent being that has reason and reflection and can consider itself the same thinking thing in different times and places.\textsuperscript{117} This definition is limiting and critics to this typically argue that the proposed criteria for personhood would certainly leave out certain human beings, such as reversibly comatose patients, brain damaged and human infants.\textsuperscript{118} Therefore, this definition should be extended further to include that a person is one who one has rights, and probably duties. With this, the important question central to the abortion debate can now be asked. When does a foetus become sufficiently human to have the right to life?

It is believed that a foetus gets the right to life at varying times from the moment of conception to the time the baby is born. Unfortunately there's no agreement in medicine, philosophy or theology as to what stage of foetal development should be associated with the right to life. Because of the difficulty of deciding at what stage a foetus becomes a being with the right to life, some people argue that we should always err in favour of an earlier date.\textsuperscript{119} While still others have come up with different ideas, some of them are now considered hereunder.

a) VIABILITY

As a matter of practicality many abortion laws lay down a stage of pregnancy after which abortion is unlawful (because the foetus has a right to life), and the dates chosen are usually based on viability. According to this theory life begins at the stage when the foetus could survive outside the womb.\textsuperscript{120}

\textsuperscript{117} C Dillone-Malone, Towards a Consistent Ethic of Human Rights, Zambia Law Journal, Volume 35, P44 & 45

\textsuperscript{118} www.wikipedia.org/wiki/abortion, accessed on 3\textsuperscript{rd} January, 2011.

\textsuperscript{119} BBC Ethics Guide. Abortion and Privacy, available at www.bbc.co.uk/ethics/abortion, accessed on 20\textsuperscript{th} December 2010.

\textsuperscript{120} R.C Carrier, Abortion in not immoral and should not be illegal, available at www.infidels.org/library/modern, accessed on 20\textsuperscript{th} December 2010.
b) CONCEPTION

The 'Catechism of the Catholic Church' states that the embryo must be treated as a person from conception and so do many others who oppose abortion. They say that once fertilized, the egg begins to develop into a separate and unique human being and also contains the full genetic code of a human being.121

Kulusika reiterates this point when he states that:

"The foetus becomes a moral person at the moment of conception because a human being's life span is a continuum and one stage of development can not be detached from the others without causing fatal disruption. It is meaningless to focus on viability as the sole stage where the foetus becomes a moral person and ignore the critical moment of conception."122

c) QUICKENING

This is when the foetus first moves in the womb. This happens about 16 to 17 weeks after fertilization. At this stage the foetus becomes neurologically active. It's a stage where the one unique feature, the cerebral cortex, that differentiates Humans from animals begins to develop.123

d) BRAIN ACTIVITY

Some people believe life begins at the first sign of brain activity. This is a logical point, as it marks a necessary state for many of the characteristics that some people think a 'moral person' has to possess. Richard contends that, there is no good reason to make abortion illegal before 20 weeks as there is no major nervous activity. In adults it is called state of death.124


Knowing where to draw the line is of paramount importance in this debate, especially for those involved in drafting laws regulating abortion. If a specific period is agreed upon it would then be easier to know when a foetus can be regarded as having the right to life. As matters stand now the foetus is not regarded as a human being while others regard it as a potential human being.

4.6 POTENTIAL VERSUS ACTUAL

Some people argue that the foetus has the right to life because it is a 'potential human being'. The 'potential human being' argument gives the right to life to the unborn from the very earliest stage of development - the moment when the egg is fertilized. This argument renders irrelevant any concerns about what sort of being the foetus is at any particular stage of its development.

The foetus is a potential human being, because if the pregnancy runs its full course, it will be born as a human baby; the question is whether being a potential human being gives the foetus any rights.

The opponents to this theory argue that as a general rule potential properties are not the same as actual properties, or that potential rights are the same as actual rights. Therefore, potential beings don't have the same rights as actual beings and these two ought to be differentiated because many of the rights of a potential person are only potential rights - they only become actual rights when the person becomes an actual person. For example, Children are potential adults, but that doesn't give them the same rights or obligations as adults. A 10-year-old is a potential voter, and has the potential right to vote, but he or she doesn't get the actual right to vote until he or she reaches his or her 18th birthday and becomes eligible to vote. And another

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example: the heir to the throne is a potential king, but he doesn't have the rights of a king until the present monarch dies.\textsuperscript{129}

4.7 RESPONSIBILITY OF THE MOTHER

Another argument that is advanced is that human beings should take responsibility for the consequences of their actions. If you voluntarily act in a way that brings about the existence of a person or a foetus, then you have a responsibility to maintain the life of that person or foetus.\textsuperscript{130} So abortion is wrong where the mother had sex of her own free will. While it is true that a woman has the right to choose whether or not to become pregnant, she makes that choice before engaging in sex. To make that 'choice' after a pregnancy is underway, merely as a matter of birth control, is an immoral act.\textsuperscript{131} Therefore, just as the newborn has a specific claim against his parents due to the fact that they created him in all his helplessness, so too does he have a claim against them before he is born, for the same reason.\textsuperscript{132} Mona Charen states that;

\begin{quote}
"The woman has a duty of care to the foetus/moral person therefore she should allow the resulting foetus/moral person to be born. She should not abort the foetus/moral person. This argument works well even if you don't accept that a foetus is a moral person, which is why both terms have been used."\textsuperscript{133}
\end{quote}

The situation of course can be different where a woman has not willingly taken the risk of getting pregnant, for example, she has been raped. In this case the woman does not have any responsibility for the foetus and so it seems that abortion is not wrong. This makes it clear that the vital plank of the argument is not the rights of the foetus, but the duties of the mother.

\textsuperscript{129} BBC Ethics Guide. Abortion and Privacy, available at www.bbc.co.uk/ethics/abortion , accessed on 20\textsuperscript{th} December 2010.

\textsuperscript{130} BBC Ethics Guide. Abortion and Privacy, available at www.bbc.co.uk/ethics/abortion , accessed on 20\textsuperscript{th} December 2010.

\textsuperscript{131} BBC Ethics Guide. Abortion and Privacy, available at www.bbc.co.uk/ethics/abortion , accessed on 20\textsuperscript{th} December 2010.


\textsuperscript{133} BBC Ethics Guide. Abortion and Privacy, available at www.bbc.co.uk/ethics/abortion, accessed on 20\textsuperscript{th} December 2010.
4.8 ABORTION AND DISABILITY

Some societies ban abortion almost completely while others permit it in certain cases. For instance, in Zambia some of the following have been allowed: abortion for the sake of the mother's health including her mental health or that of existing children. Secondly, abortion is allowed where the child would have serious physical or mental abnormalities if it were to be born.

Some people dislike this argument because allowing this as a reason for abortion is offensive to disabled people; because it implies that they, and their lives, are less worthwhile than the lives of 'normal' people. A similar provision in the United Kingdom was criticized by the Disability Rights Commission in the following words:

"The Section is offensive to many people; it reinforces negative stereotypes of disability ... whether or not people with disabilities are upset by this argument is irrelevant. They say that the argument is wrong because it attacks the principle that all human beings are equally valuable in their own ways. They say that it is just plain wrong to say that one life is less valuable than another."

The Disability Rights Commission believes the context in which parents choose whether to have a child should be one in which disability and non-disability are valued equally.

Other pro-life, campaigners have objected to this argument on the grounds that it permits eugenic abortion - abortion to eliminate disabling genes from the human. This is now regarded as a most serious breach of human rights and a criminal act. However, most opponents of abortion agree that abortion for the sake of the mother's health can be morally acceptable if there is a real risk of serious damage to the mother. Abortion for social reasons is usually least acceptable to opponents.

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134 Section 3(1)(a), Termination of Pregnancy Act, Chapter 304 of the laws of Zambia.

135 Section 3(1)(b), Termination of Pregnancy Act, Chapter of the laws of Zambia.


4.9 FREEDOM AND EQUALITY

The women's liberation movement sees abortion rights as vital for gender equality. They say that if a woman is not allowed to have an abortion she is not only forced to continue the pregnancy to birth but also expected by society to support and look after the resulting child for many years to come.\(^{138}\) And the social and economic ruin that can ensue from an untimely motherhood is a serious harm as well. They argue that only if women have the right to choose whether or not to have children can they achieve equality with men: men don't get pregnant, and so aren't restricted in the same way.\(^{139}\) Furthermore, they say, women's freedom and life choices are limited by bearing children, and the stereotypes, social customs, and oppressive duties that go with it.\(^{140}\) They also regard the right to control one's own body as a key moral right, and one that women could only achieve if they were entitled to abort an unwanted foetus. No woman can call herself free until she can choose consciously whether she will or will not be a mother.\(^{141}\)

In America the landmark decision in Roe V Wade\(^{142}\) is said to not only protect rights of bodily integrity and autonomy, but has enabled millions of women to participate fully and equally in society.

4.9.1 RELIGION AND ABORTION

Almost all the religions in the world have taken strong positions on abortion. The issue is of a major religious concern because it encompasses profound issues of life and death, right and wrong, human relationships and the society at large.


\(^{142}\) (1973) 410 U.S 113.
It is argued that people involved in an abortion are usually affected very deeply not just emotionally, but often spiritually, as well. They often turn to their faith for advice and comfort, for explanation of their feelings, and to seek atonement and a way to deal with their feelings of guilt.\textsuperscript{143} Because abortion affects heart as well as mind, and because it involves life and death, many people find that purely intellectual argument about it is ultimately unsatisfying. For them it's not just a matter that concerns a human being and their conscience, but something that concerns a human being and their God.\textsuperscript{144}

The theologian Stanley Hauerwas puts it like this:

"It may be that issues such as abortion are finally not susceptible to intellectual 'solution.' I do not mean to suggest that we cease trying to formulate the problem in the most responsible manner possible, but rather that our best recourse may be to watch how good men and women handle the tragic alternatives we often confront in abortion situations...For no amount of ethical reflection will ever change the basic fact that tragedy is a reality of our lives. A point is reached where we must have the wisdom to cease ethical reflection and affirm that certain issues indicate a reality more profound than the ethical."\textsuperscript{145}

Some pro-life Christians support their views with Scripture references such as that of Luke 1:15; Jeremiah 1:4–5; Genesis 25:21–23; Matthew 1:18; and Psalm 139:13–16. Roman Catholics in particular believe that human life begins at conception as well as the right to life, so abortion is considered immoral and a violation of the Fifth Commandment: "You shall not kill" (Exodus 20:13).\textsuperscript{146}

The old testament says little about abortion and contrary to the prolife views above it seems to place less importance on the sanctity of foetus life this is seen in the penalty it imposes on someone who causes a woman to miscarry as compared to the penalty of life for life which

\textsuperscript{143} BBC Ethics Guide. Abortion and Privacy, available at www.bbc.co.uk/ethics/abortion, accessed on 20\textsuperscript{th} December 2010.

\textsuperscript{144} BBC Ethics Guide. Abortion and Privacy, available at www.bbc.co.uk/ethics/abortion, accessed on 20\textsuperscript{th} December 2010.

\textsuperscript{145} BBC Ethics Guide. Abortion and Privacy, available at www.bbc.co.uk/ethics/abortion, accessed on 20\textsuperscript{th} December 2010.

basically means death where the woman dies. The book of Exodus which does not support an anti-abortion stance says that:

“When men strive together and hurt a woman with child, so that there is a miscarriage and yet no harm follows, the one who hurt her shall be fined according to as the woman's husband shall lay upon him, and he shall pay as the judges determine. If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.”

In conclusion, women are more affected by the abortion debate than men, both individually (if they are considering an abortion) and as a gender. There should be in place a system which shall balance the rights of the women and the foetus in the best way possible.

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147 Exodus 21:22-25
CHAPTER FIVE:

5.0 SUMMARY AND CONCLUSION

In discussing women's reproductive autonomy vis-à-vis abortion this paper started by looking at the concept of women's reproductive autonomy at the international plane and observed that the concept has not been fully captured by some important conventions such as the Convention on the Elimination of all forms of Discrimination Against Women.

Promoting women's reproductive autonomy entails making their reproductive rights a top priority. This may also include giving them access to have legal abortions. This will help to reduce illegal and unsafe abortions and the number of deaths caused by unsafe illegal abortions and the complications that result there from. Bearing this in mind, the paper further went on to examine the law dealing with abortions in Zambia. When compared to other jurisdictions like South Africa, Certain parts of America and Canada that have completely liberalized laws, it was found that Zambia lags behind in terms of promoting women's reproductive autonomy in that the choice of whether or not to have an abortion does not entirely rest on the woman but rather on the medical practitioner who performs it, that is if he is of the opinion that to continue the pregnancy would cause risk or injury to the physical/mental health of the woman or that the baby would be born with abnormalities then he will perform the abortion.

Furthermore, as we know law is informed by social norms. Therefore, it was imperative to look at other factors within the Zambian society which make women lack autonomy and these factors are traditions, customs, and social norms. Certain traditions/customs such as lobola can be modified in that it should not be commercialized so that women should not feel like they are commodities that have been paid for at a price. When it comes to factors such as financial/economic independence, these can be remedied if the government educates women or empowers them with life skills that will help them earn a living. Removing external limits on decision making creates genuine autonomy.

The paper also examined the arguments for and against abortion. This was in an effort to find out whether a foetus is a person deserving to have the right to life just like a woman, in which case
pushing for autonomous decisions concerning abortion would need to have regard to the rights of the foetus. Because saying that women should enforce their bodily autonomy regardless would go against such right, since rights of another being are at play.

In conclusion, women’s reproductive autonomy is of paramount importance to them. This is because child bearing takes place inside their bodies and they have the primary responsibility to take care of the children until they are old enough to take care of themselves. This should be a decision that a woman makes on her own and not something that is just forced upon her. Reproductive autonomy therefore entails just that-having the right to decide on one’s reproductive capacity and in this context; it also means the right to choose whether or not to terminate a pregnancy. This it has been shown is very important because reproductive health contributes enormously to physical and psychosocial comfort, to personal and social maturation of a woman because lack of autonomy in one’s reproductive capacity is associated with poor reproductive health which in turn is frequently associated with, abuse, exploitation, unwanted pregnancy, and death.

5.1 RECOMMENDATIONS

Having endeavored to fulfill the objectives of this research. The recommendations are hereby given as follows.

The first recommendation is that the law concerning abortion should be amended. As it stands now the law in Zambia is fairly liberal because it at least enables one to have an abortion within the specific legal limits. However, if women’s reproductive autonomy is to be promoted further perhaps Zambia should adopt the stance that South Africa and Canada have taken and make the choice of abortion to lie completely in the hands of the women through liberalizing the law further.

Secondly, there is need to cure the mischief in the Termination of Pregnancy Act. A legal abortion cannot be performed unless there are three medical practitioners and one of whom is specialized in that field. This procedural requirement is problematic in that in rural areas there are few health workers even in cities most clinics do not meet that requirement. So this is very
unfair to certain women because it means they cannot have an abortion simply because they live in a rural area or an area which does not have the required number of doctors to perform the procedure and cannot afford to travel to major hospitals like the University Teaching Hospital (UTH), which meets the standard. The solution to this problem can be twofold; firstly, this provision should be revised or alternatively, the government should train more gynecologists or midwives so that there will be enough health workers in all clinics around the country. Additionally, those who will be able to work in rural areas should be given more incentives.

Thirdly, in order to promote women’s reproductive rights it’s important to place women at the centre of development efforts as protagonists in their own reproductive rights rather than as objects of external interventions. The government takes little account into women’s social, economic, cultural and intimate realities of their reproductive lives and decision making powers. It is recommended that, the government should now take an interest in these matters and make sure that women are given what they need to survive financially and socially. In addition, the government should provide mothers with inexpensive, readily available and cheap childcare services, good workplace conditions or schools that acknowledge their needs. Furthermore, flexible scheduling, maternity leave and state support that helps to reintegrate a woman into the workforce should be provided.

The aim of these interventions is to enhance reproductive health and promote reproductive rights rather than population policies and fertility control. This can be achieved by the empowerment of women through their involvement in the development and implementation of these programmes and services as well as reaching out to the poor, the marginalized and the excluded.

Fourthly, the government should come up with programmes and policies that will address the issue of reproductive rights. This can be done through sensitization programs aimed at prevention of unsafe abortion, maternal mortality and morbidity. People should also be informed that there are certain limited legal circumstances under which a safe abortion can be done. This may be effectively done by the government working in collaboration with Non-Governmental

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Organisations which promote women’s reproductive rights such as Planned Parenthood Association of Zambia which promote reproductive rights.

Fifthly, the government should put in place certain legal, economic and social structures that will help women have a choice when they become pregnant instead of women being forced to have abortions due to certain pressure such as poverty or social pressure. Governments should look at the real issues concerning women as one scholar puts it; There are women who are raped and become pregnant; the problem is that they were raped, not that they are pregnant. There are women who are starving who become pregnant; the problem is that they are starving, not that they are pregnant. There are women in abusive relationships that become pregnant; the problem is that they are in abusive relationships, not that they are pregnant. It is only through addressing these issues through legal, economic and social structures that women’s rights will be protected and promoted.

In order to minimize the rate of teenage pregnancies among school going female children, the government can introduce subjects such as sex education in the school curricular so that young women can learn at a tender age the way their bodies work and their reproductive rights, not to engage in sex and most importantly the dangers of illegal/unsafe abortions.

Furthermore, the government should invest in the welfare of women. Women should be empowered economically and financially. If lack of finances and economic independence make them lack full reproductive autonomy then providing then with trades and skills that will help them become economically independent will go a long way.

In addition, education should be a top priority in the promotion of women’s reproductive rights. This is because educational opportunities for girls and women powerfully affect their status and the control they have over their own lives and their health and fertility.¹⁴⁶ The status of girls and women in society, and how they are treated or mistreated, is a crucial determinant of their reproductive health. Therefore, enrolment of girls should not just be emphasized at primary level

but it should be important at all levels and girls should be given better access to tertiary education as well.

Another recommendation is that certain traditions, customs and social norms that make women lack autonomy should be done away with. These are inter alia; sexual cleansing and the trend of commercializing lobola. The Penal Code section\textsuperscript{147} prohibiting sexual cleansing should be amended to include women and not only children. Furthermore, the trend of commercializing Lobola should be done away with so that women do not feel as though they have been purchased instead lobola should be a token of appreciation to the woman’s family. Apart from this, spousal rape should be made a crime along with other categories of sexual violence.

There is also need to harmonize the debate of the rights of a mother and those of the foetus, there should be a universally accepted stage at which to attach personhood to the foetus, for example, when the foetus attains viability. This will provide a threshold beyond which abortions should be regarded as legal for everyone. Of course this should be done taking into consideration the rights of the woman.

Last but not least, an internationally important issue such as women’s reproductive autonomy should have an internationally accepted standard. This can be done through organizations at the international plane fully capturing this concept in their documents. For instance, the Convention on the Elimination of all forms of Discrimination against Women should fully capture the concept of women’s reproductive autonomy in order to promote women’s rights. A protocol to the convention should be adopted which will encompass these rights and Zambia should then domesticate this piece of legislation.

\textsuperscript{147} Section 157, Penal Code chapter 87 of the laws of Zambia.
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