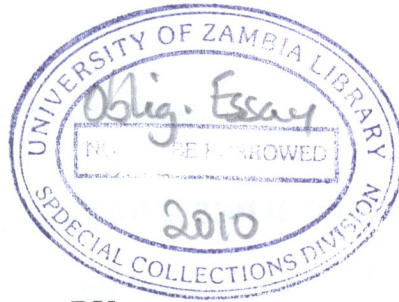


THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

BENTHAM'S UTILITY PRINCIPLE OF THE GREATEST HAPPINESS OF THE
GREATEST NUMBER: With reference to current abortion law.



BY

EVELYN MULENGA

25014650

UNZA

2010

THE UNIVERSITY OF ZAMBIA

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SCHOOL OF LAW

**BENTHAM'S UTILITY PRINCIPLE OF THE GREATEST HAPPINESS OF THE
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By EVELYN MULENGA, 2010

DECLARATION

I, **EVELYN MULENGA, COMPUTER NUMBER 25014650** do declare that the contents of this dissertation are entirely based on my own findings and that I have not in any respect used any persons work without acknowledging the same to be so. I therefore bear the absolute responsibility for the contents errors and omissions. This paper has not been submitted for any academic awards to the best of my knowledge.

..... *ya*

EVELYN MULENGA

..... *9/4/2010*

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DATE

(SUPERVISOR)

**BENTHAM'S UTILITY PRINCIPLE OF THE GREATEST HAPPINESS OF THE
GREATEST NUMBER: With reference to current Abortion Law**

By

EVELYN MULENGA (25014650)

A directed research essay submitted to the School of Law of the University of Zambia in
partial fulfilment of the requirement for the award of the Degree of Bachelor of Laws (LLB)

**SCHOOL OF LAW
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LUSAKA**

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DEDICATION

To my husband Gabriel, My children Chibwe and Mulenga. I also dedicate this paper to my father and mother.

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LIST OF ABBREVIATIONS

TOP	Termination of Pregnancy
MOH	Ministry Of Health
MSI	Marie Stopes International
ZDHS	Zambia Demographic Health survey
WHO	World Health Organisation
WLSA	Women and Law in Southern Africa
IRCAR	International Reference Centre for abortion Research
ALRA	Abortion Law Reform Association

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CHAPTER ONE

1.1. INTRODUCTION

Abortion in Zambia which initially was a concern of women has become a topical issue. The subject of abortion is charged with emotion, superstition and religious beliefs; it involves social political and economic issues in every country. According to the Jehovas Witnesses, women who have abortions come from every race and nationality, from a variety of religious backgrounds, and from every level of income, education, and age between puberty and menopause.¹ Due to legal, social and religious disapproval abortion is often carried out secretly and often unsafely. In Zambia unsafe abortions account for about thirty percent of all maternal deaths related to pregnancy.² This has raised concern by various stake holders, who are advocating that such deaths are unnecessary as they could easily be prevented. Thus this dissertation sets out to determine whether the law on abortion as it stands today satisfies the idea of Bentham's utility principle of the greatest happiness of the greatest number.

1.2. DEFINITION OF ABORTION

Zambian Penal Code³ and the Termination Of Pregnancy Act⁴ do not define abortion but, however, it is defined in the Osborn's Concise Law Dictionary as "a miscarriage or expulsion of a human foetus before gestation is completed"⁵. And gestation is defined in the same dictionary as "the time which elapses between the conception and the birth of the child, it is usually about nine months of thirty days each". In general the term abortion refers to the termination of pregnancy before the foetus becomes capable of independent living as a child.

¹ Awake, 'Abortion, Why is it such an issue? June 2009, Watch Tower Bible and Tract Society, pg 3

² Central Statistics office, Ministry of Health, Zambia demographic health survey 2007 Report.

³ Chapter 87 of the Laws of Zambia

⁴ Chapter 304 of the Laws of Zambia

⁵ Osborn's Concise Law Dictionary,(9th Ed),2001

However it must be noted from the outset that there are two types of abortion, namely, spontaneous and induced abortions. The former is usually known as a miscarriage.

At the 1969 meeting of the World Health Organisation's (WHO) scientific Group on Spontaneous and Induced Abortion, induced abortions were described as those initiated by deliberate action undertaken with the express intention of terminating the pregnancy; all other abortions are considered as miscarriages even if an external cause is involved. A spontaneous abortion, better known as miscarriage in one that occurs naturally as a result of certain pathological conditions often beyond the control of the pregnant woman or the physician.⁶ This dissertation is not concerned with this kind of abortion.

1.3. CONTEXT/BACKGROUND

Abortion in Zambia unlike in other jurisdictions like the United States, Japan, India, China⁷ and Britain is not completely liberalised (i.e. available on whatever grounds). In Zambia abortion can either be legal or illegal depending on the circumstances. The Termination Of Pregnancy Act⁸ chapter 304 of the laws of Zambia which is the principal Act regulating abortion has been in place since 1972 (i.e. 37 years to be precise). This Act permits the procurement of abortion under provided conditions and anything outside these conditions is criminalised. Women who are barred from procuring a legal abortion usually resort to not only illegal but also unsafe methods.

⁶ WHO 1970 quoted in David H.P(ED):Abortion Research; International Experience, London,(1974)pg 4

⁷ H.J. Osofsky, The abortion experience, psychological and medical impact. (New York: Hamper and Row Publishers, 1973), pg 556

⁸ Chapter 304 of the Laws of Zambia

Unsafe abortion remains a major challenge in Zambia. With a maternal mortality of 591 per 100,000 live births, it is estimated that up to thirty percent of these deaths could be a result of unsafe abortion. The Ministry Of Health (MOH) also estimates that about twenty three percent of incomplete abortions were in girls younger than 18 years. Hospital based studies show that thirty to fifty percent of acute gynaecological admissions are currently as a result of abortion complications .In 1993, the MOH indicated that over 16,000 maternal hospital admissions nationally were due to abortions performed in the community by non-professionals.⁹

The situation of unwanted pregnancy and its consequences continues to be a devastating phenomenon in the country. Unplanned pregnancy is prevalent and common in Zambia. Recent studies show that overall figure of sixteen percent of births are unwanted while twenty six percent are mistimed. The prevalence of unwanted pregnancy culminating into increased incidences of unsafe abortion has resulted in severe consequences of morbidity and mortality. This translates to over seventy percent of abortion complications being unsafe and six per thousand women die of abortion most likely due to unsafe abortion.¹⁰

Nevertheless, the issue of women dying from pregnancy related complications, including unsafe abortions is not only a sad issue for the families but obviously a developmental challenge for the country. The permanent Secretary of MOH, Dr Mtonga who was speaking when she launched Marie Stopes International (MSI) Zambia, noted that the problem of high unsafe abortion morbidity and mortality was worrying to the government. She said though the

⁹ Government of the republic of Zambia, Ministry Of Health, Standards and Guidelines for reducing unsafe abortion morbidity and mortality in Zambia, May 2009, pg vii

¹⁰Government of the republic of Zambia, Ministry Of Health Standards and guidelines for reducing unsafe abortion morbidity and mortality in Zambia, may 2009, pg ix

maternal mortality ratio had improved from 729 to 591, according to the 2007 Zambia Demographic Health Survey (ZDHS), the country still needs to reduce that ratio further. she stated that:

“We still need to ensure that not a single woman dies from pregnancy related condition. What is saddening is that in Zambia, of all the women that die from pregnancy related conditions, about thirty percent of them are because of unsafe abortions”.¹¹

1.4. OBJECTIVE

The objective of the research is to determine the extent to which abortion provisions in the penal code moderated by the Termination Of Pregnancy Act fulfils Bentham’s utility principle.

1.5. STATEMENT OF THE PROBLEM

Bentham, the social and legislative reformer, knows that laws must serve the totality of the individuals in the community. According to Bentham the individual is an end in himself; every man counts for one, and the aim of the law is the creation of conditions which make possible the maximum freedom of each individual so that he may pursue what is good for him. Thus good and evil are linked to pleasure and pain and the task of law is to serve the good and avoid the evil, that is to serve utility. He believed that the ultimate end of the law is to him the greatest happiness of greatest number.¹²

¹¹ Times Of Zambia, June 10, 2009 pg 3, see also Zambia Daily Mail June 6, 2009, pg2

¹² W. Friedmann, Legal Theory 5th edition. (New Delhi: Universal Law Publishing House Pvt Ltd ,2005), pg 313

When Bentham's principle is applied to Abortion Law in Zambia questions arise. In Zambia the termination of pregnancy Act chapter 304 of the laws of Zambia has been in place since 1972. The Act permits the procurement of abortion under some conditions. Anything outside these conditions is criminalised. However the rise in reports of foetuses being dumped almost every month has shown the concern by the various stakeholders to question the role of the law in society. At the same time, where an act declared 'criminal' continues to be widely practiced with little enforcement by the authorities, and where the harmful effects of keeping this crime on the books appear to outweigh those objectives which were originally sought by the law makers, the question of repeal or revision inevitably arises.¹³ Such is a dilemma posed by abortion legislation. And this has prompted this research to be carried out to find out whether the Law on abortion is satisfying Bentham's utility principle of the greatest happiness for the greatest number.

1.6. RESEARCH QUESTIONS

What is the meaning and value of Bentham's utility principle?

To what extent does the law permit abortion?

Does the law on abortion satisfy Bentham's utility principle of the greatest happiness for the greatest number?

¹³ Osofsky, 'The abortion experience', pg 338

1.7. METHODOLOGY

The research is qualitative. Data collection relied primarily on desk research, text on the matter generated locally as well as internationally, and legislation both national and from other jurisdictions. The study also relied on interviews with key stake holders, that is judicial and medical personnel.

1.8. CHAPTER OUTLINE

The study is divided into five chapters. Chapter one provides a basic introduction to the research and also provides the definition of abortion. It looks at the research questions and the methodology used in the research. Chapter two discusses Bentham's utility principle of the greatest happiness of the greatest number. The chapter begins with a brief introduction of who Bentham is, then what influenced his ideas and finally looks at the principle of utility itself and his contribution to the legal theory. Chapter three gives a comparative view of the legal aspect of abortion this includes the historical development of the law on abortion as well as the extent to which the available law permits abortion. The chapter then analyses legislation on abortion from some selected jurisdictions. Chapter four analyses the law on abortion in relation to Bentham's utility principle and in doing so looks at the public views on abortion. Such views on abortion are derived from the field work, namely interviews with judicial and medical personnel as well as research findings in other research works on the same subject of abortion. Chapter five will set out to give the conclusion and recommendations of the study.

CHAPTER TWO

2.0. THE MEANING AND VALUE OF BENTHAM'S UTILITY PRINCIPLE

2.1. INTRODUCTION

This chapter discusses Bentham's utility principle of the greatest happiness of the greatest number. The chapter begins with a brief introduction of who Bentham was, then what influenced his ideas and finally looks at the principle of utility itself and his contribution to the legal theory.

2.2. WHO WAS JEREMY BENTHAM?

Jeremy Bentham was the intellectual leader of English utilitarianism. In fact, Bentham was the leader of philosophical radicalism of thought. He was born in a well to do family on February 15, 1748 in Red Lion Street, Houndsditch, London. His father was a learned lawyer and wanted his son to follow his profession. From the very childhood Bentham was scholarly and pedantic, instead of taking interest in games he read the classics. At the age of three, he started learning Latin. He also learnt Greek and French. He received his early education at Westminster School in 1715, and later on was admitted to Queen's College, Oxford, from where he graduated at the age of 16 and completed the degree of M.A in 1766. Bentham had an instinctive interest in science.

In 1763 Bentham entered Lincoln's Inn to begin the study which was to be his life-long pursuit. In 1772, after having studied law, he was called to the bar. The practice of law was not to his taste. He left the profession and devoted himself to the study of jurisprudence and

legal philosophy. His aim was to reconstruct the entire English legal system. He inherited a fortune in 1776, and was relieved of the necessity of pursuing a regular profession. At the age of 23 he read Priestley's book 'Essay on Government' and was impressed by the statement that 'the happiness of the majority of its members is the standard by which a state should be judged.' In 1785, Bentham visited Russia where his young brother was organising a model colony in Ukraine. In 1808 he met James Mill. He was made a French citizen in 1792. He became a radical democrat at the age of 60.

Bentham died at Queens Square Place, Westminster on June 6 1832, at the age of 84 when his fame was at its peak. Thus his active interest in public affairs covered the period from the American Revolution to the Reform Bill 1832, which got royal assent a day after his death. Doyle says, "He was venerated by a group of disciples, as a patriarch, a spiritual leader, almost a God with James Mills his St Paul." He was a prolific writer and his collected works comprising 22 volumes. His writings cover a wide range of interest including ethics, theology, psychology, logic, economics, penology etc.¹⁴

Ebenstein William in his book "*Political thought in Perspective*" says "Bentham is the greatest single reformer in English history, particularly in the field of law. His main contribution to political science was not that he invented a new principle of political philosophy, but that he steadily applied an empirical and critical method of investigation to problems of government and administration." He is not only a political philosopher but he is also a psychologist, and above all a moralist.¹⁵

¹⁴ S.C Pant, History of Western Political Thought, (Lucknow: Prakashan Kendra, 2001), pg 136-137

¹⁵ Cited in S.C Pant, History of Western Political Thought, (2001), pg 137

2.3. BENTHAM'S WRITINGS

Bentham was a prolific writer and his writings cover a wide range of interest including ethics, theology, psychology, logic, economics, penology etc. Besides several essays which were published in London Review and Western Review, he wrote unaccountable letters and many voluminous books of which "*Introduction to the Principles of morals and Legislation*", "*Theory of Legislation*" and "*Discourse on civil and Penal Legislation*"¹⁶ are most relevant to issue of abortion.

2.2. INFLUENCES ON BENTHAM

Bentham lived and wrote at a time when the people of England did not enjoy any political rights. The lot of labourers, prisoners etc. was quite miserable. The emergence of Britain as a leading colonial power had resulted in a new outlook. But it was the American war of independence and the French Revolution of 1789 which exercised maximum influence on him and greatly influenced his philosophy and thought.

Among the political thinkers who influenced Bentham, Hume and Priestley exercised profound influence on him. He drew the concept of utility mainly from Hume's Treatise of humane nature and Priestley's Essay on Government. Even though Professor Hallowell says that Bentham is indebted to the French philosopher Helvetius for his concept of 'utility', Bentham himself admits that he borrowed the idea of utility from Priestley.¹⁷ When he was still a boy, he read Priestley's Essay on government and was very much impressed by the

¹⁶ P. Gropa, Political Science Theory, 6th edition(New Delhi: Cosmos Bookhive (P) Ltd, 2000) pg196, see also Pant, 'History of Political Thought', pg136-137

¹⁷ Gropa, "Political Science Theory" pg 197

statement that the happiness of the majority of its members is the standard by which a state should be judged. Bentham himself observed,

It was by that pamphlet and this phrase (*the greatest happiness of the greatest number*) in it that my principles on the subjects of morality, public and private were determined. It was from that pamphlet and that page of it that I drew that phrase, the words and the importance of which have been so widely diffused over the civilised world. At the sight of it I cried out as it were in an inward ecstasy like Archimedes on the discovery of the fundamental principles of hydrostatics.¹⁸

He was also greatly influenced by Mill. Bentham's love for democracy and democratic institutions bear testimony to this influence.¹⁹

2.2. THE PRINCIPLE OF UTILITY AS PROPOUNDED BY BENTHAM

As Professor Jones says, "Bentham's principle is shortly stated. It is that of various possibilities open to us in any given case, we ought to choose that which will produce the greatest happiness i.e., pleasure to the greatest number". Bentham found a number of obscurities, fictions and formalities in English law and judicial procedure. Knowing full well that the English Common Law was based upon customs and traditions and could not be changed, easily, he argued that "the law of today must be shaped, by the legislator of today in accordance with the need of today, and that the sole criterion of these needs must be the greatest good of the general number of men." That is to say the laws old or new, should be judged by the usefulness or utility which they render to the masses. To Bentham happiness consisted in the presence of pleasure and the absence of pain.²⁰

¹⁸ Pant, "History of Western Political Thought" pg138

¹⁹ Grora, "Political Science Theory" pg197

²⁰ Pant, "History of Western Political Thought" pg 138

Bentham himself holds:

By the principle of utility is meant that the principle which approves or disapproves of every action whatsoever according to the tendency it appears to have to diminish the happiness of the party whose interest is in question; or, what is the same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of action of a private individual, but of every measure of government.²¹

And 'utility, itself Bentham defines as:-

that property in any object, whereby it tends to produce benefit, advantage, pleasure, good or, happiness (all this in the present case comes to the same thing), or what comes again to the same thing to prevent the happiness of mischief, pain, evil, or unhappiness, to the party whose interest is considered: If the party be the community, in general, then the happiness of the community: if a particular individual, then the happiness of that individual.²²

According to Bentham all human actions are guided by the notion of *utility*. We prefer to do only those actions which may bring for us happiness.²³

Bentham has summed up his philosophy in the following words:

Nature has placed man under the empire of pleasure and pain. We owe to them all our ideas, we refer to them all our judgments, and all the determination of our life. He who pretends to withdraw himself from this subjection knows what he says. His only object is to seek pleasure and to shun pain...These eternal and irresistible sentiments ought to be the great study of moralist and the legislator. The principle of utility subjects everything to these two motives.²⁴

²¹Pant, "History of Western Political Thought" pg139

²² Pant "History of Western Political Thought" pg 139

²³ Pant "History of Western Political Thought" pg 139

²⁴ A. Singh, Introduction to Jurisprudence 1st edition. (New Dehli: Wadhwa and Company,2001) pg 15

According to Bentham, the purpose of law is to bring pleasure and avoid pain. Pleasure and pain are the ultimate standards on which a law should be judged.²⁵ The goodness and badness of an act was to be determined on the basis of these pleasures and pains. Thus an act was good or right if it produced a surplus of pleasure over pain and bad or wrong if it produced more pain than pleasure. Bentham made the principle of utility or ‘the greatest happiness of the greatest number’ as the sole criteria for judging all actions. He asserted it was the duty of the legislators and moralists to sum up all the values of all the pleasures on the one side, and those of all the pains on the other. The balance, if it be on the side of pleasure will give the good tendency of the act upon the whole, while respect to the interests of that individual person; if on the side of pain, the bad tendency of it upon the whole.²⁶

This formula for calculating the degree or amount of pleasure that a specific action is likely to cause is what has come to be known as the *felicific calculus*, the *utility calculus*, the *hedonistic calculus* and the *hedonic calculus* and this is the formula that will be used to measure whether abortion law in Zambia satisfies Bentham’s principle of utility later in chapter four. This chapter will only look at the elements of pleasure and pain in this calculation.

2.6. THE HEDONIC CALCULUS

In Bentham’s principle of utility there are seven things which should be taken into account when assessing the pain and the pleasure in relation to everything individual and they are as follows: The value of pleasure and of pain depends upon:-

²⁵Singh, “Introduction to Jurisprudence”, pg 15

²⁶Grora, “Political Science Theory”, pg 198

1. Its intensity: How strong is the pleasure?
2. Its duration: How long will the pleasure last?
3. Its certainty: How likely that the pleasure will occur?
4. Its propinquity or remoteness: How soon the pleasure will occur?
5. Its fecundity: The probability that the action will be followed by sensations of the same kind: that is, pleasures, if it be a pleasure: pains, if it be a pain.
6. Its purity: The probability that the action will not be followed by sensations of the opposite kind: that is, pain, if it be a pleasure: pleasures, if it be a pain.
7. Its extent: How many people will be affected?²⁷

A legislator and moralist should take into account the above mentioned circumstances that influence the sensibilities. Bentham held that the ultimate end of the legislator should be happiness of the people and in matters of legislation, general utility should be his guiding principle. The science of legislation consists therefore, in determining what makes for the good of the particular community whose interests are at stake, while its art consists in contriving some means of realisation.²⁸

2.6.1. Sources of Pleasure and pain

There are four distinguishable sources from which pleasure and pain can flow. Considered separately they may be termed the physical, the political, the moral, and the religious: and inasmuch as the pleasures and pains belonging to each of them are capable of giving a binding force to any law or rule of conduct, they may all of them be termed sanctions.

The physical or natural sanction “comprises such pains and pleasures which we may experience, or expect, in the ordinary course of nature, not purposely modified by any human interposition.” The moral or popular sanction “comprises such pains and pleasures as we

²⁷ Felicific calculus, Wikimedia Foundation, http://en.wikipedia.org/wiki/felicific_calculus,22/01/2010

²⁸ Pant, “History of Western Political Thought” pg 139-140

experience, or expect, at the hands of our fellows, prompted by feelings of hatred or good will or contempt or regard in a word according to the spontaneous disposition of each individual.” Bentham has also styled this sanction as the sanction of public will or of honour or the sanction of the pains and pleasures of sympathy. The political sanction comprising “such pains and pleasures as we may experience, or expect, at the hands of the magistracy, acting under law” This might with equal property, be termed as the legal sanction. The religious sanction comprising “such pains and pleasures as we may experience, or expect from the immediate hand of a superior invisible being, either in the present life, or in the future”²⁹

To make the above mentioned four sanctions more clear. Bentham says, “A man’s house is destroyed by fire. Is it by reason of his own imprudence? (for instance, from his neglecting to put his candle out) If so, it is a punishment of the nature sanction. Is it by the direction of the magistrate? If so, it is punishment of the political sanction. Is it owing to the ill will of his neighbours who withhold assistance? If so, it is a punishment of the popular sanction. Is it supposed to have been occasioned by the immediate act of God’s displeasure, manifested on account of some sin committed by him, or through the distraction of the mind, occasioned by the dread of such displeasure? If so, It will be a punishment of the religious sanction,” or in the vulgar parlance, a judgment of God.³⁰

Bentham distinguished pleasures and pains into two kinds i.e. simple and complex. The simple ones are those which cannot any one of them be resolved into more. While the complex ones are those which are resolvable into divers simple ones. According to him

²⁹ Pant, “The History of Western Political Thought” pg 140

³⁰ Pant, “The History of Western Political thought” pg 140

simple pleasures to which human nature is susceptible are of fourteen kinds: The pleasures of sense, The pleasures of wealth, The pleasures of skill, The pleasures of amity, The pleasures of a good name, The pleasures of power, The pleasures of piety, The pleasures of benevolence, The pleasures of malevolence, The pleasures of memory, The pleasures of imagination, The pleasures of expectation, The pleasures of association and The pleasures of relief.

The pleasures of sense are the pleasures of taste including whatever pleasures are experienced in satisfying the appetite of hunger and thirst, the pleasure of intoxication, the pleasure of the organ of smelling, the pleasures of touch, pleasures of the ear; independent of association, pleasures of the eye; independent of association, pleasures of the sexual sense, pleasures of health and pleasures of novelty; or the pleasures derived from the gratification of the pleasures of curiosity; The pleasures of wealth are pleasures which a man is apt to derive from the consciousness of possessing any article or articles which stand in the list of instruments of enjoyment or security, and more particularly at the time of acquiring them; The pleasures of skill, as exercised upon particular objects, are those which accompany the application of such particular instruments of enjoyment to their use; The pleasures of amity, or self recommendation, are the pleasures that may accompany the persuasion of a man's being in possession of the good will of such or such assignable person or persons in particular; or of being upon good term with him or them, and as a fruit of it of being in a way to have the benefit of their spontaneous and gratuitous services; The pleasures of a good name are the pleasures that accompany the persuasion of a man's being in the possession of a good will of the world about him; that is of such members of society as he is likely to have concerns with; and a means of it, either their love or their esteem or both, and as a fruit of it, being in the way to have the benefit of their spontaneous and gratuitous services; The pleasures of power are the pleasures that accompany the persuasion of a man's being in a condition to dispose people, by means of their hopes and fears, to give him benefit of their services; that is, by the hope of some service, or by the fear of their disservice, that he may be in the way to render them; The pleasures of piety are the pleasures that accompany the belief of a man's being in possession of the will or favour of the supreme being; and as a fruit of it, of being in a way of enjoying pleasures to be received by God's special appointment, either in this life or in future; The pleasure of benevolence are the pleasures resulting from the view of any pleasures supposed to be possessed by the beings who may be objects of benevolence; to which the sensitive beings are acquainted with; under which are commonly included, supreme being, human being and other animals. These may also be called the pleasures of sympathy or pleasures of social affections; The pleasures of malevolence are the pleasures resulting from the view of any pain supposed to be suffered by beings who may become objects of malevolence; to which may be included human beings and other animals. These may also be called the pleasures of ill-will; The pleasures of memory are the pleasures which after having enjoyed such and such pleasures, a man will now and then experience, at recollecting

them exactly in the order and in the circumstances in which they were actually enjoyed; The pleasures of imagination are pleasures which may be derived from the contemplation of any such pleasures as may happen to be suggested by the memory. These may accordingly be referred to any one of the three cardinal points of time, present, past or future; The pleasures of expectation are the pleasures that result from the contemplation of any sort of pleasure, referred to the time in the future and accompanied with the sentiment of belief; The pleasures dependent on association are the pleasures which certain objects or incidents may happen to afford, not of themselves but merely in virtue of some association they have contracted in the mind with certain objects or incidents which are in themselves pleasurable. Such is the case, for instance with the pleasure of skill, when afforded by such a set of incidents as compose a game of chess. This derives its pleasure quality from its association partly with pleasure of skill, as exercised in the production of incidents pleasurable of themselves and partly from its association with the pleasures of power and The pleasures of relief are the pleasures which a man experiences when, after he has been enduring a pain of any kind for a certain time, it comes to cease.³¹

Similarly Bentham held that simple pains were of twelve kinds: Pains of privation, Pains of sense, Pains of awkwardness, Pains of enmity, Pains of ill name, Pains of Piety, Pains of benevolence, Pains of malevolence, Pains of memory, Pains of imagination, Pains of expectation and Pains dependent on association.

The pains of privation are the pains that may result from the thought of not possessing in the time present any of the several kinds of pleasures; The pains of sense are the pains of hunger and thirst, the pains of taste, the pains of the organ of smell, the pains of touch, the pains of the hearing, the pain of sight; independent of the principle of association; The pains of awkwardness are the pains which sometimes result from the unsuccessful endeavour to apply any particular instruments of enjoyment or security to their uses, or from the difficulty a man experiences in applying them; The pains of enmity are the pains that may accompany the persuasion of a man's being obnoxious to the ill-will of such or such an assignable person or persons in particular or of being upon ill terms with him or them and in consequence of being obnoxious in certain pains of some sort or other of which he may be the cause; The pains of ill name are the pains that accompany the persuasion of a man's being obnoxious or in a way to be obnoxious to the ill-will of the world about him; The pains of piety are the pains that accompany the belief of a man's being obnoxious to the displeasure of the Supreme Being and in consequence to certain pains to be inflicted by his special appointment either in this life or in the future; The pains of benevolence are the pains resulting from the view of any pains supposed to be endured by other beings.

³¹ J. Bentham, *An Introduction to the Principles of Morals and Legislation*. (London: Oxford Clarendon Press, 1789) Chapter 5

These may also be called the pains of sympathy or social actions; The pains of malevolence are the pains resulting from the view of any pleasures supposed to be enjoyed by any beings who happen to be the objects of a man's displeasure. These may also be called pains of ill-will; The pains of the memory may be grounded on any one of the above kinds. These correspond exactly to the pleasures of the memory; The pains of the imagination may also be grounded on any one of the above kinds. In other respect they correspond to the pleasures of the imagination; The pains of expectation may also be grounded on any one of the above kinds. These may also be termed pains of apprehension and The pains of association correspond exactly to the pleasures of association.³²

However, it must be noted on the outset that when applying the hedonic calculus to abortion law in chapter four, this research will restrict itself to the seven elements discussed on pages 12 to 13 as circumstances which are to be considered in estimating a pleasure or a pain.

Nevertheless, Bentham's idea found itself in what is now known as *utilitarianism* which is interpreted to mean an idea that the moral worth of an action is determined solely by its utility in providing happiness or pleasure as summed up among all the people.³³ And other writers who subscribe to the idea of utilitarianism are John Stuart Mill, his own student, who revised and expanded the principle of utility,³⁴ like Bentham's formulation, Mill's utilitarianism deals with pleasure and happiness. However, John Stuart Mill made a clear distinction between happiness and pleasure. Bentham treats all forms of happiness equally, whereas Mill, argues that intellectual and moral pleasures are superior to mere physical forms of pleasures. Therefore,

³² Bentham, "An Introduction to the principles of morals and Legislation" chapter 5

³³ Utilitarianism, Wikimedia Foundation http://en.wikipedia.org/wiki/utilitarianism#Biological_explanation, 22/01/2010

³⁴ Jeremy Bentham, Wikimedia foundation, http://en.wikipedia.org/wiki/Jeremy_Bentham, 22/01/2010

Mill's contribution to Utilitarianism is the argument for the qualitative separation of pleasures.³⁵

Among the past advocates of utilitarianism is Henry Sidgwick, an English utilitarian philosopher, born in 1838 and died in 1900. He was a utilitarian on the lines of John Stuart and Jeremy Bentham. He adopted a position which may be described as ethical hedonism, according to which the criterion of goodness in any given action is that it produces the greatest possible amount of pleasure. Sidgwick subscribes to the principle that no man should act so as to destroy his own happiness.³⁶

While among the modern-day advocates of utilitarianism is Peter Albert David Singer, an Australian philosopher, born in 1946. Singer specialises in applied ethics, approaching ethical issues from a secular preference utilitarianism perspective. Singer states that arguments for or against abortion should be based on utilitarian calculation which weighs the preferences of a mother against the preferences of the foetus. In his view a preference is anything sought to be obtained or avoided; all forms of benefit or harm caused to a being correspond directly with the satisfaction or frustration of one or more of its preferences.³⁷

³⁵ John Stuart Mill, Wikimedia Foundation, http://en.wikipedia.org/wiki/John_Stuart_Mill, 22/01/2010

³⁶ Henry Sidgwick, Wikimedia Foundation, http://en.wikipedia.org/wiki/Henry_Sidgwick, 22/01/2010

³⁷ Peter Singer, Wikimedia Foundation, http://en.wikipedia.org/wiki/Peter_Singer, 22/01/2010

2.7. CRITICISM OF BENTHAMITE UTILITARIANISM

Bentham's theory of utility has been severely criticised. In the first place it is alleged that Bentham's theory of utility does not attach any importance to the moral and immoral actions of a person, and judges their actions purely on materialistic grounds. According to Professor Marry if we take away conscience as Bentham does, there is no such thing as a moral or immoral action, though there may remain acts that are generally useful or the reverse. As there is no individual conscience, so there is no collective conscience. The culprit does not feel the censure of the community. Bentham takes a very narrow view of the human nature and treats the individual merely as a sensual creature. Happiness lies not in increasing and attaining the desires but in controlling and limiting them and acquiring a status in which pleasure and pain have no meaning.

Secondly, it is alleged that Bentham ignored the value of society and simply thought in terms of each individual's happiness. His theory of utility is based on wrong premises in so far as it treats the individual as the centre of all actions and completely ignores the importance of the society. Bentham completely forgets that human beings are social animals and must depend on the society.

Thirdly, his theory is considered as impracticable, because it is well nigh impossible to achieve greatest happiness of the greatest number of the people. In actual practice the happiness is confined to a few rather than the greatest number of people. It is really impossible to measure pleasure or pain in purely mathematical terms. Further, the

concept of pleasure differs from person to person and place to place and hence it becomes all the more difficult to realise it in actual practice.

Fourthly, it is alleged that Bentham's principle is in fact inapplicable, because Bentham does not provide us with any yardstick to find out whether pleasure has been achieved or not and if achieved to what extent.

Fifthly, it is alleged that Bentham is guilty of over simplification. By saying that everybody does always aim for pleasure, Bentham oversimplifies the human motives. Men are not moved by one motive but by many diverse ones, and that there is not one satisfaction (pleasure) present in varying amounts, but many qualitatively different satisfactions.

Sixthly, Bentham has wrongly asserted that the people always act under the influence of pleasure and pain. Many a time people become addicted to bad habits and act without bothering for the pleasure or the pains resulting from their actions.³⁸

Despite these shortcomings the importance of Bentham's theory of utility cannot be denied. Professor Dunning sums up its importance thus:

A political society, they say, is nothing more or less than a group of living human beings actuated by motives that are familiar in the experience of

³⁸ Grora, "Political science Theory" pg 199-200

everybody. Its actions are determined, not by agreements or compacts, made by past generation or conceived to have been made unconsciously by the present. But like all other human actions, by the considerations of pleasure and pain, the happiness and woe of individuals. All institutions, traditions, customs and ceremonies of whatever antiquity, dignity or good repute, are worse than useless unless they promote directly and immediately the greatest happiness of the greatest number of men. When in place of the abstractions, fancies and mysteries of the idealists and obscurantists, these simple and convincing propositions are presented, the inevitable reaction from the bearer is that of approval and acceptance.³⁹

5. BENTHAM'S CONTRIBUTION

Bentham's contribution to the legal theory is epoch-making. His period is known as the "Benthamite era" in the legal history of England. He introduced legal positivism and treated legal theory as a science of investigation which should be approached through scientific method of experimenting and reasoning. John D. Finch has observed: "the transition from the peculiar brand of natural law doctrine in the work of Blackstone to the rigorous positivism of Bentham represents one of the major developments in the history of modern legal theory".⁴⁰

Bentham laid the foundations for the predominant trend in modern legal philosophy of testing every legal action or principle in terms of the maximisation of pleasure and the minimisation of pain. In other words, he saw law as a balance of interests. This is particularly evident in Bentham's proposals on the reform of criminal law. For example, Bentham argues against the punishment of homosexuality because he thinks that the difficulties in tracing and accurately

³⁹ Grora, "Political science Theory" pg 200

⁴⁰ Singh, "Introduction to Jurisprudence" pg 16

defining the offence, as well as the relatively small harm done to the society by non-punishment, outweigh the interests of the community in punishment.⁴¹

His contribution to Criminal Jurisprudence was widely hailed, it remained everlasting.

Professor Sabine says

Bentham's jurisprudence, which was not only the greatest of his works but one of the most remarkable intellectual achievements of the nineteenth century, consisted in the systematic application of the point of view just sketched (promotion of happiness) to all branches of the law, civil and criminal and to the procedural law and the organisation of the judicial system⁴²

The principle of utility propounded by Bentham exercised profound influence on the legislators and statesmen in the nineteenth century. It provided them the yardstick by which they could measure the usefulness of a particular law. In the words of Ivor Brown the principle has "an immense value because it denied the infallibility of the supreme person who endeavours to foist his own morality or his own type of happiness upon others whom he believed to be the pitiful dupes of ignorance."⁴³

⁴¹ Friedmann, "Legal Theory" pg 316

⁴² Pant, "History of Western Political Thought" pg 146

⁴³ Grora, "Political Science Theory" pg 199

CHAPTER THREE

3.0. A COMPARATIVE VIEW OF THE LEGAL ASPECT OF ABORTION

3.1. INTRODUCTION

This chapter focuses on the legal aspect of abortion. This includes the historical development of the law on abortion as well as the extent to which the available law permits abortion. Since Zambia is part of the global village it is necessary that the chapter looks at legislation on abortion from some selected jurisdictions.

Abortion legislation continues to be in a state of flux, for instance, during 1973 eight countries in Europe, Africa, Asia and North and South America liberalised abortion statutes or their interpretations while three countries of central Europe tightened permissive legislation with more restrictive administrative criteria. With the aim of presenting a summary of the current status of the world wide abortion legislation, the staff of the International Reference Centre for abortion Research (IRCAR) reviewed available information resources on one hundred and three countries, including Zambia. According to their findings, they grouped abortion statutes into three major groups namely⁴⁴:

- Illegal with no exceptions permitted;
- Conditional /legal if any one or the combination of six specified medical/and or social conditions prevail; and
- Elective/legal with abortion on request, provided the pregnant woman requests termination within a legally specified time period.

⁴⁴ Kalis, M.G. and David, H.P.: "Abortion legislation: A summary International Classification; 1974" quoted in David H.P. (ED) pg 13-14

The six conditions or situations for legal abortion are as shown in the table below

CONDITION	DEFINITION
MEDICAL	
Absolute	Life threatening for the pregnant woman
Relative	Threatening the woman's health (without Definition)
Physical/Mental health	Danger to the woman's physical/mental health (with mental health specified in the statute)
Eugenic	Danger of foetal abnormality
SOCIAL	
Juridical	Usually encompassing pregnancy resulting from rape or incest
Social/economic	Threatening the well being of the woman and/or her family in terms of health or total life situation

The categorisation of law is based on national or regional subunit statutes and/or court decisions.⁴⁵

3.2. ABORTION LAW IN ZAMBIA

The Zambian legislative framework on the termination of pregnancies is defined by three Acts. These are the Republican Constitution,⁴⁶ Chapter 1 of the Laws of Zambia, the Penal Code⁴⁷ Chapter 87 of the Laws of Zambia and the Termination of Pregnancy Act 1972⁴⁸ Chapter 304 of the laws of Zambia. The republican Constitution makes allowance for the termination of pregnancies, provided such is done within the laid down conditions of the law.⁴⁹ On the other hand, the Penal Code makes provision for legal abortions and criminalises unsafe and illegal abortion methods.⁵⁰ The Termination of Pregnancy Act⁵¹ is the principal legislative Act on the termination of pregnancy and it was enacted in 1972. The Termination of Pregnancy Act provides for legal termination of pregnancies within defined spheres.

3.2.1. Historical development of the law on abortion in Zambia

Zambia like most independent African states, had retained the legislation introduced by the colonising country, Britain. The earliest English abortion statute, the Law of 1803, made induced abortion a crime that was punishable by death. However, in the middle of the nineteenth century in 1861 Britain passed the Offences Against The Person Act which by

⁴⁵ Kalis, M.G. and David, H.P.: "Abortion legislation: A summary International Classification; 1974" quoted in David H.P. (ED) pg 13-14

⁴⁶ Chapter 1 of the laws of Zambia

⁴⁷ Chapter 87 of the laws of Zambia

⁴⁸ Chapter 304 of the laws of Zambia

⁴⁹ The constitution of Zambia, chapter 1, Art. 12(2)

⁵⁰ The Penal Code, chapter 87, s. 151-153

⁵¹ Chapter 304 of the laws of Zambia

virtue of section 58, made abortion punishable by a maximum penalty of life imprisonment. And it is on this law that most of the statutes prohibiting abortion in the former British Empire were based.

In Zambia the law governing abortion is to be found in the Termination of Pregnancy Act of 1972. It is interesting to note that the Act came into effect after the high court decision in *The People v Gulshan, Smith and Finlayson*.⁵² And on the basis of the aforementioned it could safely be concluded that the decision to amend and clarify this area of the law was influenced by the holding in the case. The facts of the case were briefly that three doctors were charged with conspiring, contrary to section 394 of the Penal Code, to procure an abortion contrary to section 151 of the Penal Code, and with attempting to procure an abortion contrary to section 151 of the Penal Code.

The charges were founded on the visits made by one Rosalind Gailliards, an unmarried expatriate administrative assistant at Mkumbi International College, to their surgery. In August 1970, she visited the surgery and Dr Gulshan told her that she was pregnant. She asked for termination on the ground that she could not afford to have a baby as she had to go to the United States on the expiration of her contract to get married. He advised her to see other doctors. She then saw Dr Smith and Dr Finlayson. Eventually the pregnancy was terminated by Dr Gulshan. The reason given on the termination form signed by all three doctors was “emotionally unstable and cannot cope with this pregnancy”.

⁵²(HP) No. 11 of 1971

In November, she again was pregnant and underwent the same procedure with the same doctors. The reason given on the termination forms was “threatens to do anything to get rid of the pregnancy which she could not cope with”. At the trial the substantial reason given by Dr Smith and Dr Finlayson turned out to be personality disorder. The three doctors who pleaded not guilty, stated that they acted in good faith after careful observation that the girl could not cope with the pregnancy. Independent doctors were called by the prosecution: Dr Hassim said he would have done the same. Dr Mphalele said he would have done the same for the reasons given on the form concerning the first termination but not for the reasoning given on the form concerning the second termination as he did not know the underlying facts.

The chief Justice pointed out that section 151 of the Penal Code is identical with the relevant parts of section 58 of the United Kingdom Offences Against the Persons Act of 1861. The Chief justice, in answering the question as to what unlawful abortion is, adopted the judgment of Justice Macnaghten in the leading English case of *R v Bourne*.⁵³ According to the learned judge, the case established the following proposition:

- Abortion may be lawful or unlawful if it is unlawful it is a crime;
- A mere desire for termination, no matter how strong or determined, is not by itself a reason for termination;
- A doctor is not justified to terminate a pregnancy merely because he has a bona fide belief even on adequate grounds that the pregnant woman will self induce abortion or will go to a backstreet abortionist or even that the person may commit suicide;
- The burden of proving the procurement of abortion or attempt thereof is on the prosecution;
- This constitutes a precedent for stating that the bona fide object of avoiding the practicality of certain physical or mental breakdown of the mother will afford an excuse.

⁵³ (1938)3 All ER 615

The Chief Justice stated “In my view I would lay down the law as being that an abortion is lawful where it is done in good faith, and with reasonable grounds and adequate knowledge to save life or prevent grave permanent injury to the physical or mental health of the mother”. This statement of the law also follows that laid down by Justice Ashworth in *R v Newton and Stungo*⁵⁴, a case that applied the rule laid down in Bourne’s case too.

Justice Ashworth directed the jury thus: The law about the use of instruments to procure miscarriage is this: such use of an instrument is unlawful unless the use is made in good faith for the purpose of preserving the life or health of the woman; when I say, I mean not only her physical health but also her mental health. But although I say it is unlawful unless...I must emphasise and add that the burden of proving that it was not used in good faith in is on the crown. The three doctors were acquitted because the prosecution failed to prove beyond reasonable doubt that the procurement of the abortion was unlawful. The Termination of Pregnancy Act, therefore, amends and clarifies the law established by the Gulshan case

3.2.2. The main provisions of the Termination of Pregnancy Act

The Termination of Pregnancy Act (TOP) 1972 has its provisions identical with those of the British Act as enumerated at page 34 below. According to the TOP Act, an abortion in Zambia can be conducted under the following circumstances: Where the pregnancy constitutes a risk to the life of the pregnant woman; where the pregnancy constitutes a risk of injury to the physical or mental health of the pregnant woman; where the pregnancy constitutes a risk of injury to the physical or mental health of any existing children of the pregnant woman to such extent that the risk is greater than if the pregnancy were terminated

⁵⁴ (1958)CRL 462

and where the pregnancy constitutes a substantial risk so much that the child to be born would suffer from such physical or mental abnormalities as to be seriously handicapped.⁵⁵

The question to be asked is what was the intention of the legislature in enacting such a law? The intention of the legislature was to make termination of pregnancies restrictive. Quoting the Minister of Health then during the parliamentary debates of the TOP Bill, honourable Mr Chikwanda, explained during the debates that ‘...those people who have been saying that we want to allow for wholesale termination of pregnancies are wrong because the Bill seeks to restrict such practice. This Bill does not aim at allowing every woman who wants to terminate a pregnancy to do so’.⁵⁶ The Minister further explained that ‘...this Bill does not lay much emphasis on social grounds because social grounds can be over-stressed. The main emphasis is on medical grounds. My duty as Minister of Health is just to provide for a law which will allow abortions where they are medically warrantable to be carried out within the framework of the law.’⁵⁷ This Bill contrary to the unenlightened opinions held by the Honourable member for Senanga East Mr Noyoo and the Honourable member for Libonda Mr Mundia does not open the floodgates for termination of pregnancy upon demand. There is nothing in the Bill which says so. I do not want to be a celebrated sociologist like the Honourable member for Wusakili / Chamboli Mr Malama and delve into the social grounds for terminating a pregnancy. I think that at the moment the safest thing for me is to make law which allows for genuine medical grounds and which will make easy termination of pregnancy in cases of emergencies so that the overall purpose of my ministry, that of preserving human life can

⁵⁵ The Termination of Pregnancy Act, chapter 304, s.3

⁵⁶ Zambia, National Assembly, Debates (25th July to 4th August, 1972), col. 167.

⁵⁷ Zambia, National Assembly, Debates, col. 168.

always be in the forefront.’⁵⁸From the forgoing, one reason forwarded by the then minister of health was to provide stricter control over terminations of pregnancy.

MSI Zambia whose mission is to ensure individuals’ human right to have children by choice not by chance, states in its fact sheet that self – induced abortion is common in Zambia. The reality is that thousands of Zambian women undergo self induced abortions every year. Most turn to untrained providers or self administer the abortion putting their lives at risk and threatening their future health and fertility. Nevertheless, the Zambia Demographic Health survey of 2007 reports that deaths from unsafe abortion account for about thirty percent of all maternal deaths related to pregnancy.

3.3 ABORTION LAW IN OTHER JURISDICTIONS

Abortion is as controversial abroad as it is in Zambia. Many governments struggle to strike a balance between the rights of a pregnant woman and the rights of unborn foetuses. In 1995, the Beijing Platform for Action (Beijing Platform) expressly called upon governments to re-examine restrictive abortion laws that punish women. By linking women’s health to abortion law reform, the Beijing Platform affirmed what has become increasingly clear to governments and advocates worldwide: removing legal barriers to abortion saves women’s lives, promotes their health, and empowers women to make decisions crucial to their well-being. This is provided for in paragraph 8.25 of the Programme of Action of the International Conference on population and Development, which states:

All governments and relevant intergovernmental and non-governmental organisations are urged to strengthen their commitment to women’s health, to deal with the health

⁵⁸ Zambia, national Assembly, Debates, col. 169

impact of unsafe abortion as a major public health concern...In circumstances where abortion is not against the law, such abortion should be safe. In all cases, women should have access to quality services for the management of complications arising from abortion...consider reviewing laws containing punitive measures against women who have undergone illegal abortions.⁵⁹

While the Beijing Platform's directives on abortion are narrow, they provide vital support to advocates seeking abortion law reform in their countries. The Beijing mandate also reflects a global trend towards abortion law liberalization- a trend that first gained momentum in the late 1960s and continues to this day. Currently, 70 countries, representing more than 60% of the world's population, permit abortion without restriction as to reason or on broad grounds.

Twelve years after Beijing, advocates for abortion law reform can continue to point to the global commitment, declared in 1995, stopping unsafe abortion. They can also highlight the examples of 17 countries that have removed legal restrictions on abortion in the last 12 years.⁶⁰

This research will now look at some selected jurisdictions and their law on abortion among these are Britain, The United States, South Africa and Zimbabwe.

⁵⁹ Isis International, Beijing Declaration and the Platform for Action, Fourth World Conference on Women, Beijing, china, Sept.4-15, 1995, para. 106(k)1. U.N. DOC. A/CONF.177/20 (1995).http://reproductive rights.org/sites/default/files/document/pub_bp_abortionlaws10.pdf,27/01/2010

⁶⁰ Isis International, Abortion Worldwide: Twelve Years of Reform, http://reproductiverights.org/sites/default/files/documents/pub_bp_abortionlaws10.pdf,27/01/2010

3.3.1. BRITISH ABORTION LAW

3.3.1. 1. History of British abortion law

As stated at the beginning of this chapter, the earliest English abortion statute was the law of 1803, which made induced abortion a crime punishable by death. In 1861 Parliament passed the Offences Against The Person Act. Section 58 of the Act made abortion a criminal offence punishable by imprisonment from three years to life even when performed for medical reasons. In 1929 the Infant Life Preservation Act amended the law stating it would no longer be regarded as a felony if abortion was carried out in good faith for the sole purpose of preserving the life of the mother. The Act made it illegal to kill a child 'capable of being born alive', and enshrined 28 weeks as the age at which a foetus must be presumed to be viable. Importantly the Act allowed a doctor to perform an abortion legally if he/she was 'satisfied that the continuance of the pregnancy was liable to endanger the health of the expectant mother'.⁶¹

However, during the 1930s, women's groups and MPs were deeply concerned about the gross loss of life and damage to health resulting from unsafe, illegal abortion. The Conference of Co-operative Women was the first organisation to pass a resolution (1936) calling for the legalisation of abortion. In 1936 the Abortion Law Reform Association (ALRA) was formed by people who believed that abortion legislation was unsatisfactory; its aim was to campaign for the legalisation of abortion.⁶² Two years later in 1939 the *R v Bourne*⁶³ case set the scene for a change of policy on abortion. In this case a gynaecologist Alex Bourne performed an

⁶¹History of UK abortion Law, Education For choice, <http://www.ef.c.org.UK/foryoungpeople/factsaboutabortion/HistoryofUKabortionlaw,02/02/2010>

⁶² History of Abortion Law in the UK, Joomla!shack, http://www.abortionrights.org.UK/index.plip?option=com_content&task=view&id=18&temid=44,02/02/2010

⁶³ (1938) 3 ALL ER 615

abortion on a fourteen year old victim of multiple rape, under the purpose of saving her life. In consequence of this he was charged with unlawfully procuring the abortion of the girl. He argued that no distinction could be drawn between the purpose of saving the girl's life and the preservation of the girl's mental health. In his summary to the jury, Justice Macnaghten made two points, "life depends on health", and, "it may be that if health is gravely impaired death results". He declared that only the physician has the responsibility of deciding this danger. "The law is not that the doctor has to wait until this unfortunate woman is in peril of immediate death and then at the last moment, if successful, snatch her from the jaws of death". Justice Macnaghten instructed the jury that it could rightly decree that Bourne had operated "for the purpose of preserving the life of the woman" if in the light of this information it believed that childbirth would have made this girl "a physical or mental wreck". The jury took only forty minutes and handed down a not guilty verdict. This case set a legal precedent for performing an abortion to preserve a woman's mental health.⁶⁴

In 1958 in the case of *R v Newton and stungo*⁶⁵ an abortion which had been done to serve the health of the woman was held to be lawful within the Offences Against The Person Act of 1861, section 58.

In the fifties ALRA campaigned for Bills to legalise abortion and support for reform grew. Though fertility control became more wide spread with the growth of the women's movement and availability of contraceptive pills during the 1960s, illegal abortion was still killing, or ruining the health of many women. ALRA led the campaign in support of David Steel MP's private members Bill to legalise abortion. In 1967 The Abortion Act (sponsored by David

⁶⁴ History of UK abortion law, Education For Choice, <http://www.efc.org.UK/foryoungpeople/factsaboutabortion/HistoryofUKabortionlaw,02/02/2010>

⁶⁵ (1958) C.R.L. 462

Steel) became law, legalising abortion under certain conditions; it came into effect on 27 April 1968.

3.3.1.2. The main provisions of the British abortion act 1967

The Abortion Act 1967 provided a defence for doctors performing an abortion on any of the following grounds: To save the woman's life; to prevent grave permanent injury to the physical or mental health of the woman; under 28 weeks to avoid injury to the physical or mental health of the woman; under 28 weeks to avoid injury to the physical health of the existing children; and if the child was likely to be severely physically or mentally handicapped⁶⁶. The Act also required that the procedure must be certified by two doctors before being performed.

3.3.1.3. Later laws

The 1967 Abortion Act made abortion legal up to 28 weeks gestation. Amendments to the 1967 Abortion Act were introduced in Parliament through the Human Fertilisation and Embryology Act (HFE) 1990⁶⁷, which lowered the time limits from 28 weeks to 24 weeks for most cases to reflect alleged improvements in medical technology justifying the lowering. The HFE Act 1990 also removed restrictions for late abortions in cases where it was necessary to

⁶⁶ Abortion Act 1967, s.1

⁶⁷ The Human Fertilisation and embryology Act 1990, chapter 37

save the life of the mother, where there was evidence of extreme foetal abnormality or where there was a grave risk of physical or mental injury to the woman.⁶⁸

1967, members of parliament have since introduced a number of private member's bills to change the abortion law. Four resulted in substantive debate (1975, 1977, 1979 and 1987) and declared its support as is. In May 2008, MPs voted to retain the current legal limit of 24 weeks. Amendments proposing reductions to 22 weeks and 20 weeks were defeated by 304 to 233 votes and 332 to 190 votes respectively.⁶⁹

As already discussed above the law regulating abortion in Britain is the Abortion Act 1967 as amended by the Human Fertilisation and Embryology Act of 1990. This law is interpreted very broadly; Some doctors believe that women are the best people to make decisions about their own pregnancy and will recommend any woman who requests an abortion on the grounds that her mental health will suffer by being forced to continue with a pregnancies which is unwanted; Some doctors claim that since abortion is statistically safer than carrying a pregnancy to term and giving birth, that abortion always represents a lesser threat to a woman's health than pregnancy, and any woman requesting an abortion should have one on health grounds.⁷⁰ Education For Choice, a registered charitable organisation in the UK says the

⁶⁸ The Human Fertilisation and Embryology Act 1990, chapter 37

⁶⁹ Abortion in the United Kingdom, Wikimedia Foundation,
http://en.wikipedia.org/wiki/Abortion_in_the_United_kingdom,02/02/2010

⁷⁰ More on UK abortion, Education For Choice,
<http://www.efc.org.UK.Foryoungpeople/factsaboutabortion/moreonUKabortion,02/02/2010>

reality of the Abortion Act 1967 is that it was not passed to give women rights, but to respond to a public health problem of women dying each year and many more being injured.⁷¹

3.3.2. ABORTION LAW IN THE UNITED STATES

Abortion in the United States has been legal since the 1973 *Roe v Wade*⁷² Supreme Court decision, but the effective availability of abortion varies strongly by state.⁷³

3.3.2.1. Roe v Wade

In September 1969, while working as a carnival side-show, Norma L. McCorvey discovered she was pregnant. She returned to Dallas, where friends advised her to assert that she had been raped, because then she could obtain a legal abortion. Texas' anti-abortion laws allowed abortion in the cases of rape and incest. However, this scheme failed, as there was no police report documenting the alleged rape. She attempted to obtain an illegal abortion, but found the site shuttered and closed down by the police. Eventually, she was referred to Attorneys Linda Coffee and Sarah Weddington.

In 1970, Attorneys Linda Coffee and Sarah Weddington filed suit in a U.S District court in Texas on behalf of Norma L. McCorvey (under the alias Jane Roe). At the time, McCorvey was no longer claiming her pregnancy was a result of rape, but she later acknowledged she had lied earlier about having been raped. The defendant in the case was Dallas County

⁷¹History of UK abortion law, Education For Choice,
<http://www.efc.org.uk/foryoungpeople/factsaboutabortion/Historyofukabortion,02/02/2010>

⁷² 410 U.S. 113 (1973)

⁷³ Abortion in the United States, Wikimedia Foundation,
http://en.wikipedia.org/wiki/Abortion_in_the_united_states,27/01/2010

District Attorney Henry Wade, representing the state of Texas. Although McCorvey was still hoping the courts would rule in her favour in time for her to end her pregnancy, she told her Attorneys, "Let's do it for other women".

"Rape" is not mentioned anywhere in the court documents and was never a consideration in *Roe v Wade*. Norma McCorvey's affidavit does not include the word "rape". The district court ruled in McCorvey's favour on the merits that Roe did have a basis to sue, but declined to grant an injunction against the enforcement of the laws barring abortion. The district court's decision was based upon the Ninth Amendment. *Roe v Wade* ultimately reached the U.S. Supreme Court on appeal.⁷⁴

The court issued its decision on January 22, 1973, with a 7 to 2 majority vote in favour of McCorvey. The Supreme Court deemed abortion a fundamental right under the United States Constitution, thereby subjecting all laws attempting to restrict it to the standard of strict scrutiny. The Supreme Court declined to adopt the district court's ninth Amendment rationale, and instead asserted that:

The right of privacy, whether it be found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

The court ruled that though states did have an interest in protecting foetal life, such interest was not "compelling" until the foetus was viable (placing viability at the start of the third trimester). Thus, all state abortion laws that forbade abortion during the first six months of pregnancy were thereby invalidated. Third trimester abortions, on the other hand, were only

⁷⁴ Roe v Wade, Wikimedia Foundation, http://en.Wikipedia.org/wiki/Roe_v_wade,27/01/2010

legal if the pregnancy threatened the life or health of the mother. However, “the health of the mother” was defined in *Doe v Bolton*⁷⁵ case in such broad terms, that any prohibition to the third trimester abortions were essentially eliminated. According to Justice Harry blackmun’s majority opinion, a woman’s health includes her “physical, emotional, psychological, familial well being and should include considerations about the woman’s age.”⁷⁶

A central issue in the *Roe* case (and in the wider abortion debate in general) is whether human life begins at conception, birth, or at some point in between. The Court declined to make an attempt at resolving this issue, noting:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.⁷⁷

3.3.2.2. Later judicial decisions

In a 5-4 decision in 1989’s *Webster v reproductive Health Services*⁷⁸, Chief Justice Rehnquist, writing for the court, declined to explicitly overrule *Roe*, because “non of the challenged provisions of the Missouri Act properly conflict with the Constitution”, in this case, the court upheld several abortion restrictions, and modified the *Roe* trimester framework.⁷⁹

⁷⁵ 410 U.S. 179 (1973), a case decided on the same day as *Roe v Wade*

⁷⁶ *Roe v Wade*, Wikimedia Foundation, http://en.wikipedia.org/wiki/Roe_v_wade,27/01/2010

⁷⁷ Abortion in the United States, Wikimedia Foundation, http://en.wikipedia.org/wiki/abortion_in_the_united_states,27/01/2010

⁷⁸ 492 U.S. 490 (1989)

⁷⁹ *Roe v Wade*, Wikimedia Foundation, http://en.wikipedia.org/wiki/Roe_v_wade,27/01/2010

In 1992, in the case of *Planned Parenthood v Casey*⁸⁰, the supreme Court, upheld the right to legal abortion, and emphasised that the right to abortion was grounded in the general sense of liberty and privacy protected under the Due Process Clause of the Fourteenth Amendment to the United States Constitution: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁸¹ But a 24-hour waiting period was put in place, as well as an informed consent requirement, a parental consent provision, and a record keeping mandate. States were also given more discretion as to when viability begins (i.e. overturning *Roe*’s strict trimester formula).⁸²

The Supreme Court continues to grapple with cases on abortion. On April 18, 2007 it issued a ruling in the case of *Gonzales v Carhart*⁸³, involving a federal law entitled the Partial-Birth Abortion Ban Act of 2003 which President George W. Bush had signed into law. The United States Supreme Court upheld the 2003 partial-birth abortion ban by a narrow majority of 5-4. The law stipulated that anyone breaking the law would get a prison sentence up to two years. This decision meant the first time the court has allowed a ban on any type of abortion since 1973.⁸⁴

Despite the legal wrangling which is documented in the cases above, in practical sense, very little has changed in the way of abortion law since *Roe* was first decided. Abortion is still

⁸⁰ 505 U.S.833 (1992)

⁸¹ Abortion in the United states, Wikimedia Foundation,http://en.wikipedia.org/wiki/Abortion_in_the_united_states,27/01/2010

⁸² U.S. Abortion Law, Loxafamosity Ministries,
http://www.abort73.com/abortion_facts/us_abortion_law,27/01/2010

⁸³ 550 US 124 (2007)

⁸⁴ Abortion in the United States, Wikimedia Foundation
http://en.wikipedia.org/wiki/Abortion_in_the_united_states,27/01/2010

legal in all fifty states. The definition of “health” (which justifies late-term abortions) is still broadly defined and there are no significant barriers in place to keep a woman from aborting. So far, *Roe* has carried the day.⁸⁵

3.3.3. ABORTION LAW IN SOUTH AFRICA

Abortion in South Africa was legal for very limited reasons until 1997, when the Choice on Termination of Pregnancy (CTOP) Act No.92 of 1996⁸⁶ was passed, providing abortion on demand for a variety of cases.⁸⁷

In South Africa, any woman of any age can get an abortion by simply requesting with no reasons given if she is less than twelve weeks pregnant. If she is between thirteen and twenty weeks pregnant, she can get the abortion if: Her own physical or mental health is at stake; the baby will have severe mental or physical abnormalities; she is pregnant because of incest; She is pregnant because of rape; she is of the personal opinion that her economic or social situation is sufficient reason for the termination of pregnancy, and furthermore if she is more than twenty weeks pregnant, she can get the abortion only if her life or the fetus' life is in danger. A women under the age of eighteen will be advised to consult her parents, but she can decide not to inform or consult them if she so chooses. And 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

⁸⁵U.S. Abortion Law, Loxafamosity Ministries, http://www.abort73.com/abortion_facts/us-abortion_law,27/01/2010

⁸⁶ Choice on Termination of Pregnancy Act No. 92 of 1996

⁸⁷ Abortion in South Africa, Wikimedia Foundation, http://en.wikipedia.org/wiki/Abortion_in_south_Africa,30/01/2010

inform or consult him. An exception is that if the woman is severely mentally ill or has been unconscious for a long time, consent of a life-partner, parent or legal guardian is required.⁸⁸

3.3.3.1. Invalidated CTOP Amendment Act NO. 38 of 2004

South Africa's Choice on Termination of Pregnancy Act No. 92 went into effect in February 1997, guaranteeing safe abortion care and replacing the restrictive Abortion and Sterilisation Act No.2 of 1975.⁸⁹ The 2004 Choice on termination of Pregnancy amendment Act⁹⁰ was added to ensure widespread availability of termination or abortion services, on procedural grounds.⁹¹

The CTOP Amendment Act NO.38 of 2004 Empowered provincial Members of Executive Councils (MECs) of health, instead of the national minister, to designate abortion-providing facilities and make abortion-related regulations in their provinces; Allowed suitably trained registered nurses to perform first-trimester procedures: Previously only doctors and midwives were allowed to conduct abortions; and makes it a crime for a termination to occur at any undesignated facility.

But in 2005, the South African chapter of the international anti-abortion group Doctors for Life challenged the amendment in the South African Constitutional Court. The Doctors for life argued that Parliament failed to fulfil its constitutional obligation to facilitate public consultation when it passed the CTOPS amendment. In 2006 the Constitutional Court

⁸⁸ Abortion in South Africa, Wikimedia Foundation, http://en.wikipedia.org/wiki/Abortion-in_south_Africa,30/01/2010

⁸⁹ Abortion and sterilisation Act No.2 of 1975

⁹⁰ Choice on termination of Pregnancy Amendment Act No. 38 of 2004

⁹¹ South Africa holds hearings about abortion law amendment, Ipas, http://www.ipas.org/library/news/news_item/south_Africa_holds_hearing_about_abortion-lawamendment,30/01/2010

Declared that the CTOP Amendment Act was unconstitutional on those grounds, but suspended the invalidation for 18 months during which time parliament would have to ensure proper public involvement.⁹²

The constitutional court ruling did not rule against the original Act, CTOP Act NO. 92 of 1996, and neither did it rule against the contents of the challenged Amendment NO. 38 of 2004.⁹³

The 1996 abortion law is now the most liberal in Africa, authorising the performance of abortions not only during the first trimester of pregnancy on request, but also through the twentieth week of pregnancy on very broad grounds, including socio-economic grounds. Since the passing of this Act, there has been a decrease in deaths from back street abortions.⁹⁴

3.3.4. ABORTION LAW IN ZIMBABWE

Prior to the enactment of the Termination of Pregnancy Act of 1977⁹⁵, abortion legislation in Zimbabwe was governed by Roman-Dutch common law, which permitted an abortion to be performed only to save the life of the pregnant woman. The Termination of pregnancy Act No.29 of 1977 extended the grounds under which a legal abortion could be obtained in

⁹² Abortion in South Africa, Wikimedia foundation,
http://en.wikipedia.org/wiki/Abortion_in_south_Africa,30/01/2010

⁹³ South Africa hold hearings about abortion law amendment, Ipas,
http://www.ipas.org/library/news/news_item/south_Africa_holds_hearing_about_abortion_lawAmendment,30/01/2010

⁹⁴ Abortion in South Africa, Wikimedia Foundation,
http://en.wikipedia.org/wiki/Abortion_in_south_Africa,30/01/2010

⁹⁵ Termination of Pregnancy Act No.29 of 1977

Zimbabwe. Under Zimbabwean law, though lawful terminations of pregnancy are possible, they are very limited in their scope and practical availability.⁹⁶

In terms of the Termination of Pregnancy Act chapter 15:10, a pregnancy can only be lawfully terminated: Where the life of the woman is endangered or there is a threat of permanent impairment to her physical health; where there is a serious risk that the child will be born with a physical or mental defect that will seriously handicap the child and where there is a reasonable possibility that the pregnancy was a result of unlawful sexual intercourse. "Unlawful intercourse" is defined by the Act as rape, incest or intercourse with a mentally handicapped woman.

However, a legal abortion must be performed by a medical practitioner in a designated institution with written permission of the superintendent of the institution. If the pregnancy resulted from unlawful intercourse, the superintendent is not to provide written permission unless a magistrate of a court in the jurisdiction where the abortion will be performed has furnished a certification of satisfaction that a complaint about the alleged intercourse was lodged with the police; that, on the balance of probabilities the unlawful intercourse has taken place; and that the pregnancy is the result of such intercourse; in the case of incest, that the prohibited degree of relationship exists between the complainant and the alleged perpetrator. When abortion is requested because the pregnancy poses a threat to the life or the physical health of the woman, or on grounds of foetal deformity, the superintendent of the institution is not to provide written permission unless he or she is satisfied that two physicians who are not members of the same practice have certified that the grounds for the abortion exist and that, in the case of foetal deformity, any prescribed investigation has been carried out. In the event

⁹⁶ Population policy data bank, UN Secretariat, <http://www.UN.org,30/01/2010>

that the medical superintendent declines the authority, an appeal is possible to the Secretary of Health. The process, especially where so-called unlawful sexual intercourse is alleged, obviously creates delays and potential complications often leading to the failure to obtain a lawful termination. Thus a lawful termination, which is one measure that can be used to resolve an unwanted pregnancy, is a strictly curtailed remedy.

So the majority of women who seek to terminate a pregnancy take the unlawful or extra-legal route. Even a woman whose sexual integrity has been violated by rape may find that a lawful termination of pregnancy is difficult to obtain in practice.

For example, the case of Miss X 1993(1) ZLR 233 (H)⁹⁷ chronicles the trials and tribulations and the perverse results of an application by Miss X to have her pregnancy lawfully terminated.

Miss X alleged that she had been raped on 20 November 1992. For a variety of reasons, all of them understandable and explicable, she only reported the rape case some 33 days later. This was after she missed her period and informed her husband that the rape had taken place. Although the magistrate who heard her application doubted that she had been raped, her allegation was accepted by the High Court when the matter went for review. The application seeking the termination was made around 12 February 1993 but was unsuccessful. The matter was resubmitted to the magistrate who took the step of referring it to the High Court for further consideration. However, it appears that there is a lacuna in the Termination of pregnancy Act, as it makes no provision for appeal or revision of the magistrate's determination. Nevertheless, the High Court exercised its inherent jurisdiction and reviewed the judgment of the court below on 2 June 1993.

⁹⁷ 1993 (1) ZLR 233 (H)

By the time six and a half months had elapsed since the rape and the pregnancy was well advanced. Chidyausiku J. Declined to reverse the finding of the magistrate; partly because he lacked the appellate jurisdiction to do so but also because the judge took the view that even if he had appellate jurisdiction, the pregnancy was now so far advanced that termination would not be the best option. The learned judge took the view that Miss X had failed to vigorously and within time pursue the issue of a lawful termination. This might suggest that Miss X and her female acquaintances received a clear message that the lawful route is a tortuous and probably ineffective route when in need of a termination. Thus women are prompted to commit the gendered crime of abortion to avoid unwanted and imposed pregnancies. Likewise women who find themselves pregnant in conditions that create gendered social problems in their natal and marital families will seek unlawful and risky terminations, which are criminal offences.

Thus despite the apparent availability of abortion the conditions that the law imposes on abortion means that many women and girls seek unlawful and, in many cases, unsafe abortions to avoid social rejection, and exclusion from access to resources. While there are no reliable figures readily available, the government has expressed concern about the level of illegal abortions in Zimbabwe. Studies indicate that complications from unsafe, illegal abortions are a major and growing public health concern. An estimated 70,000 illegal abortions take place every year in Zimbabwe, says a new report by the UN Children's Fund (UNICEF)⁹⁸

⁹⁸ZIMBABWE: Abortion figures underscore the need for more reproductive health education, IRIN Africa, <http://www.irinnews.org/report.aspx?reportid=53659,30/01/2010>

3.4. CONCLUSION

In Zambia abortion is regulated by the Termination of Pregnancy Act chapter 304, of 1972, which allows abortion only in limited situations. According to the legislature its intention was to restrict availability of abortion services. Similarly Zimbabwe has an Act which also restricts abortion. The result of having restrictive laws on abortion is that women have no option but to seek unprofessional services which contribute to thirty percent of maternal deaths in Zambia. On other hand Britain, the United States and South Africa have liberalised their laws on abortion with the result that there is a reduction in maternal deaths related to pregnancy. In 1995, the Beijing Platform for action (Beijing Platform) expressly called upon governments to re-examine restrictive abortion laws that punish women. By linking women's health to abortion law reform, the Beijing Platform affirmed what has become increasingly clear to governments and advocates worldwide: removing legal barriers to abortion saves women's lives, promotes their health, and empowers women to make decisions crucial to their well-being.

CHAPTER FOUR

4.0. ANALYSIS OF THE LAW ON ABORTION IN RELATION TO BENTHAM'S UTILITY PRINCIPLE.

4.1. INTRODUCTION

This research has been conducted to basically determine the extent to which the law on abortion in Zambia fulfils Bentham's utility principle. This chapter will analyse the law on abortion in relation to Bentham's utility principle. To do this it should be noted that the application of the law on abortion to the utility principle will depend on whether the particular law is restrictive or not. To determine whether the law on abortion in Zambia is restrictive or not the following was taken into consideration; the intention of the legislature, public views and interviews with key informants.

4.2. DETERMINATION OF WHETHER ABORTION LAW IS RESTRICTIVE OR NOT.

4.2.1. INTENTION OF THE LEGISLATURE ON ABORTION LAW.

The intention of the legislature in passing the TOP Act was discussed in chapter three. This was done by looking at the parliamentary debates, the Minister of health then, honourable Mr Chikwanda, explained during the debates that '...those people who have been saying that we want to allow for wholesale termination of pregnancies are wrong because the Bill seeks to restrict such practice. This Bill does not aim at allowing every woman who wants to terminate a pregnancy to do so'. The minister further explained that '...this Bill does not lay emphasis on social grounds. My duty as a minister of health is just to provide for a law which will allow abortions where they are medically warrantable to be carried out within the framework of the

law. This Bill, contrary to the unenlightened opinions held by the honourable member of Senanga East Mr Noyoo and the Honourable member for Libonda Mr Mundia, does not open the floodgates for termination of pregnancy upon demand.

From the foregoing, it can be deduced that the intention of the legislature in enacting the principal law on abortion was that the law be restrictive.

4.2.2. PUBLIC VIEWS ON THE LAW ON ABORTION

The public views on the law on abortion in Zambia are derived from the field work namely, interviews with key informants that is the police officers, doctors and judges as well as findings in other research works on the same subject of abortion.

4.2.2.1. Views of key informants

It must be stated from the outset that views of key informants can also be influenced by their religious beliefs. Religion has also taken a stance on abortion with different denominations having different views on the matter. The two police officers who were interviewed both said the law on abortion is restrictive and according to them it is justified to remain so and nothing should be done to change the law as they were happy with the way it is and were against the idea of liberalising it completely.⁹⁹ The female key informant recognising the high rate of deaths due to illegal abortions, was of the view that the government should only increase awareness of the option of adoption and the presence of childcare homes where the children could be taken if the mother cannot look after the baby for various reasons.¹⁰⁰ The female

⁹⁹Inspector I. Hatimbula and Sub-Inspector A. Mushanywa, 16/02/2010

¹⁰⁰Sub-Inspector A. Mushanywa, 16/02/2010

Judge interviewed was of the view that the law is restrictive and should remain so. According to her, one needs to take into account the jurisprudence of a particular state and the law will be influenced by the beliefs of the inhabitants for example in Moslem states the law applicable will be influenced by their Muslim beliefs. And since Zambia is a Christian nation, our law on abortion should take into account the Christian belief expressed in the Ten Commandments, that, life should not be taken away which meant that the law should remain restrictive. She was of the view that people should be sensitised of the option of adoption in order to avoid unsafe abortion. She went further to state that it is the duty of government to increase the social amenities which will help those people who cannot afford to look after a baby due to economic circumstances.¹⁰¹ Dr Mvula, a female consultant, expressed similar sentiments that the law on abortion is restrictive and she was of the view that as a catholic only when the life of the mother is at risk should abortion be allowed. She further stated that the government should concentrate on preventive measures which includes coming up with an education curriculum which incorporates sexual education at a tender age. She gave an example of England which teaches reproductive health in what can be equated to grade three here in Zambia. Other interventions that could also help reach out to rural areas are reproductive health programs through the radio and community home based care givers.¹⁰²

4.2.2.2. Findings of other research works

Four research works were looked at which include dissertations done in 2005 and 2008 as well as a thesis completed in 2008. Chiti Yvonne Kabwe conducted a research in 2005 where the general view of the public on abortion was determined through questionnaires and individual interviews of randomly selected groups of the Zambian public which included

¹⁰¹Judge B. Phiri, 28/02/2010

¹⁰²Dr L. Mvula,(01/03/2010

students, people employed in both the private and public sectors and also key informants such as doctors and other medical personnel from the University Teaching Hospital and local clinics. Her conclusion was that abortion in Zambia is generally illegal.¹⁰³ Kalunga Lutato carried out a survey in 2008 to get an idea of the public's sentiments on the issue of elective terminations and the survey was restricted to the University of Zambia students only. Having concluded that the law on abortion is restrictive the results was that out of the 145 students surveyed 95.39% considered themselves to be religious, yet the percentage in favour of choice on terminations was 57.89%. This showed that the issue of religion is not as much of a deciding factor as one would think it would be.¹⁰⁴ Mileji Kaumba Joseph in his dissertation of 2008 acknowledged that abortion is not legalised in Zambia. His findings of the field investigations on public views on abortion revealed that; the majority of the sixty people were of the view that abortion should be legalised and some of these people hold this view despite belonging to a religious grouping which is very conservative on the matter like the Catholic Church. He went on to state that what it implies is that people will do what they feel is good for their immediate well being using any means available to them even if some rules be it legal or religious are against such act.¹⁰⁵ Furthermore, Joyce Shezongo-Macmillan, in her thesis completed in 2009 expresses similar sentiments on the law on abortion that it is restrictive. She puts it this way "the scope of the TOP Act is limited by the fact that abortion is criminalised by section 151 of the Penal Code."¹⁰⁶

¹⁰³ Chiti Y.K. ; Abortion :should it be legalised in Zambia? 2005, (Obligatory Essay, University of Zambia, School of Law), pg47

¹⁰⁴ Kalunga L. ; Abortion: Should it be available as a right? 2008, (Obligatory Essay, University of Zambia, School of Law, chapter 4

¹⁰⁵ Mileji K.J. ; Abortion: A religious and legal perspective, 2008, (Obligatory Essay, University of Zambia, School of Law), pg 38-40

¹⁰⁶ Shezongo-Macmillan J. ; The dilemma of women's sexual and reproductive rights in Zambia, 2008, (Thesis, University of Zambia, School of Law), pg 35

4.3. ANALYSIS OF ABORTION LAW IN RELATION TO BENTHAM'S UTILITY PRINCIPLE

In order to apply Bentham's Hedonic calculus to the law on abortion in Zambia it was first necessary to determine whether the law is restrictive or not. And from our discussion above it has been concluded that abortion law in Zambia is restrictive. The theory of hedonic calculus was discussed in detail on page 12-13. The different aspects of the calculus tells you how much pleasure and pain one experiences when he takes a certain action. We are going to take into consideration three different situations which include an adolescent who is at school and gets pregnant, unmarried woman who gets pregnant, and a woman of above 35 years of age who also gets pregnant. It must be stated that in all the three situations the pregnancy is unwanted. And according to the Zambian law on abortion these women are precluded from procuring a lawful abortion in a safe environment. But when we apply Bentham's Hedonic calculus to the three situations we will be able to determine whether the Zambian law on abortion which is restrictive and has restricted these women from procuring an abortion is satisfying Bentham's utility principle by weighing on one side how much 'pleasures' are derived from getting an abortion even though its illegal under the Zambian law and on the other side how much 'pains' are derived from following the law and not having an abortion.

Situation no. 1

Consider an adolescent who is at school and gets pregnant:

Calculus:	Have an abortion	Don't have an abortion
Remoteness	The relief is immediate	Any benefits or pleasures are a

		long way away
Purity	May lead to a temporary depression	Could fail exams and later not get a good job- as a result have poor quality of life mother and child
Richness	More choices and freedom in life	Joy of being a mother
Intensity	A person without a child can enjoy a wide range of intense pleasures	A child itself may cause equally intense pain
Certainty	The freedom from the pain of unwanted child is certain	It is uncertain what pleasures continuing with the pregnancy might bring
Extent	The adolescent and her immediate family are most directly affected	Having a baby will affect vast number of people
Duration	The freedom might last a long time even for the rest of the adolescent's life	The child will bring pain for a life time

Situation no.2

Consider an unmarried woman who gets pregnant:

Calculus:	Have an abortion	Don't have an abortion
Remoteness	The relief is immediate	Any benefits or pleasures are a long way away

Purity	May lead to temporary depression	Could lose her job or miss out on promotion or advancement in education- Have a poor life mother and child
Richness	More choices and freedom in life	Joy of being a mother
Intensity	A woman without a child can enjoy intense pleasures	An illegitimate child itself might cause equally intense pain
Certainty	The freedom from the pain of unwanted child is certain	It is uncertain what pleasures continuing with the pregnancy might bring
Extent	The woman and her immediate family will be most affected	Vast number of people will also be affected
Duration	the freedom might last a long time even for the rest of the woman's life	The illegitimate child will bring pain for a lifetime

Situation no.3

Consider a married woman who is over 35 years old:

Calculus;	Have an abortion	Don't have an abortion
Remoteness	Relief is immediate	Any benefit or pleasures are a long way away
Purity	May lead to temporary depression	Suffer from high levels of depression and lower levels of happiness
Richness	More choices and freedom in life	Joy of being a mother

Intensity	A person without unwanted child can enjoy a wide range of intense pleasures	Unwanted child may cause intense pain, creates unnecessary hardships and burden on the mother to provide and take care of another life which she is not be ready to do.
Certainty	The freedom from the pain of unwanted child is certain	It is uncertain what pleasures continuing with the pregnancy might bring
Extent	The mother and her immediate family are the most directly affected	Having unwanted child will affect vast number of people
Duration	The freedom might last a long time even for the rest of the woman's life	The unwanted child will bring pain for a life time

From the above three tables it can be deduced that regardless of a woman's place, station, qualification or age the scale balanced is in favour of the negative or unhappiness that comes from restricting abortion. The above analysis illustrates an ethical case for abortion that is having an abortion will cause most pleasure and least pain. Since utilitarianism in general is based on the empirical evidence that supports the wide spread of happiness amongst a great number of the populace, when this is applied to abortion, as illustrated in the three tables above, we can see that abortion is completely ethical entity that provides the greatest amount of happiness for the greatest amount of people. As a result, since the Zambian law on abortion is restricting some women from procuring a lawful and safe abortion it can be deduced that the law is not satisfying Bentham's utility principle. However, it must be recognised that the researcher is writing from a utilitarian perspective. And Utilitarianism

does not measure intent, only the consequence or outcome of the decision. The idea of utility is to maximise happiness and minimise unhappiness. So while to many of the people this idea about abortion seems irrational, they have to look at it from the Utilitarian perspective.

CHAPTER FIVE

5.0. CONCLUSION AND RECOMMENDATIONS

5.1. CONCLUSION

Abortion is a very controversial subject to discuss. Many governments struggle to strike a balance between the rights of the pregnant woman and the rights of the unborn foetus. It remains one of the crucial philosophic, religious and medical dilemmas of our time. Although abortion was and is still widely practiced, nearly all societies have tried to control and regulate it, whether through social mores, moral conventions religious taboos or government laws and regulations. In this paper an attempt was made to discuss it in the utilitarian perspective.

The paper was intended to discuss Bentham's utility principle of the greatest happiness of the greatest number with reference to current abortion law in Zambia. The research had three main questions to determine the meaning and value of Bentham's utility principle; to determine to what extent the law in Zambia permits abortion and finally to determine whether the law on abortion satisfies Bentham's utility principle of the greatest happiness of the greatest number. It has been concluded that Bentham equates good with pleasure and right with conduciveness to pleasure. Bentham is not merely describing what is good or right but also prescribing that we should attain it. For him, the purpose of the law is to serve utility. In doing so, what he is really doing is proposing the acceptance of the ethics of the greatest happiness of the greatest number principle.

Bentham believes that, in order to persuade someone to a particular moral view point, all you need to do is to show that it promotes happiness. For Bentham, the greatest happiness principle is the only absolute or universal rule. Since this is the only rule that promotes happiness, he argues, it ought to be followed. He suggests that from something that is universally desired it follows that we ought to aim at it. It is important to note that Bentham excludes ideals from his account of what people want. Bentham believes that the interests of individuals comprising a community automatically promote the interests of the community.¹⁰⁷

It has also been concluded that abortion law in Zambia is restrictive as it is only available in limited circumstances outside those circumstances it is criminalised. Women who are barred from procuring a legal abortion usually resort to not only illegal but also unsafe methods. And unsafe abortion remains a major challenge in Zambia. With maternal mortality of 591 per 100,000 live births, it is estimated that up to thirty percent of these deaths could be the result of unsafe abortion.

And finally it was concluded that the law on abortion does not satisfy Bentham's utility principle of the greatest happiness of the greatest number. And for those living under restrictive abortion laws, unsafe and harmful procedures remain the only option; killing an estimated 70,000 women every year. Considering the high death rates due to illegal unsafe abortion it is imperative that the law is more liberal which will be in line with the call upon governments by the Beijing Platform for Action of 1995 to re-examine restrictive abortion laws that punish women.

¹⁰⁷ S.P. Sinha Jurisprudence Legal Philosophy(St Paul: West Publishing Company, 1993) pg 189 - 190

5.2. RECOMMENDATIONS

There are three recommendations that have been made in the paper in an effort to end the problem of illegal abortions.

- a) The law on abortion should be reviewed in order to address societal change: this is because the law on abortion has been in place for 32 years and a lot has changed since its enactment. The main intentions of the reformer should be to decrease the incidence illegitimate children, decrease the deaths through illegal abortions, decrease illegal abortions and decrease the number of unwanted children.
- b) Increase welfare facilities: The government should put up enough welfare homes where those who do not want the responsibility of a child may leave the child. And make it easy for childless couples to adopt these children.
- c) Expansion and strengthening of reproductive health services: the government should put in place a program to increase and improve sexual and reproductive health services and the accompanying information and education on sexual and reproductive health (these could include use of radio and drama clubs to disseminate the information)

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APPENDIX

Guide for key informants' interviews – Doctors, Prosecutors and Judges.

1. Personal data of the informant-

Position.:,

Qualification:,

Age:,

Sex:



2. Views on abortion law

- a) What do you know about the law on abortion?
- b) Do you think the law governing abortion is restrictive or liberal?
- c) Do you think women should be able to choose whether or not to carry a pregnancy to full term?
- d) Do you think women who illegally procure an abortion deserve to be punished?
- e) What changes do you envisage to improve the law on abortion?