

Obligatory Essay on

ABORTION : SHOULD IT BE LEGALIZED IN ZAMBIA?

By

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DECLARATION

I, KABWE YVONNE CHITI, COMPUTER NUMBER 20010044 do declare that the contents of the directed research paper are entirely based on my own findings and that I have not in any respect used any person's work without acknowledging the same to be so.

I therefore bear the absolute responsibility for the contents errors and omissions therein.

Date...13/02/05..... Signature........

DEDICATED TO.....

My mother Mrs. Beatrice Delia Kabwe, my late father Mr. Fred Kabwe, my two sisters Sylvia and Ivy.

I love you all,

Chiti

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ABSTRACT

Generally, the law in Zambia, namely the Termination Of Pregnancy Act, 1972 makes abortion an offence. Although there are exceptions to this rule, it appears that these have been open to abuse as abortions seem to be conducted on demand without any penal sanctions being meted on violators of the law. In other words the law on abortion appears to be ineffective and this necessitated a study of whether the law on abortion should be totally liberal and abortion treated as a woman's right. As such it was imperative to consider the two opposing arguments of abortion particularly, the views of those against abortion as contrasted to those who support abortion. Therefore, a research was conducted in order to discover the general Zambian view on abortion. This was in an effort of determining whether most people would wish to have a law that treated abortion as a woman's right or one that would protect the foetus' right to life. This course of action was taken in light of the fact that laws are ideally supposed to reflect the will of the people.

It is in line with these views as well as the authors' that the recommendations directed to the legislature and policy makers have been made in reforming the law on abortion.

CHAPTER ONE

INTRODUCTION

Abortion. The mere mention of the term in public or otherwise is likely to elicit some kind of reaction from a person/s. If there has ever been a topic which has caused controversy in the legal, medical, religious, political, philosophical, to mention just a few disciplines, it is that of abortion. The debate over the subject is one that is highly charged with emotion and tends to be bitter.

Abortion, once regarded as “a secret and loathsome crime, a medical disease, a tragic transformation of human weakness”¹ and considered immoral is now being justified by draftsmen at law. Abortion in such countries is now regarded as a constitutional right of the woman.

Since different scholars have shown an interest on the subject, and hence view the process of abortion differently, there is no universal definition of abortion. However, attempts have been made to define abortion based on the different and combined disciplines.

Definitions of Abortion

In its accepted medical usage, abortion refers to the “termination of pregnancy before the foetus has attained viability (i.e. independent existence)”². Viability however has been open to a wide range of definitions but usually it is considered in terms of the duration of the pregnancy and/or, the weight of the foetus or occasionally its length. With regard to the definition of abortion above, the viability is usually the duration of twenty-eight weeks.

Legally, abortion is defined as “any untimely delivery voluntarily procured with intent to destroy the foetus.”³

¹ Noonan T. J Jr; *The Morality of Abortion: Legal and Historical Perspectives*, p 4 (1970)

² International Planned Parenthood Foundation (IPPF) Report on Induced Abortion, p.5 {1972}

³ Hall, *Abortion in Africa*, p.4 (1974)

The World Health Organization {WHO} has defined abortion in terms of “foetal death” which is “death prior to the complete expulsion or extraction from its mother of the product of conception, irrespective of the duration of gestation.”⁴

Furthermore, foetal deaths have been divided into “early” (upto nineteen weeks; gestation), “intermediate” (twenty to twenty seven weeks) and “late” (twenty-seven weeks and onwards). Generally, the term early foetal death is synonymous with ‘abortion’ and late foetal death with ‘still birth.’

According to the Concise Oxford Dictionary, abortion is “a miscarriage of birth especially if deliberately induced or illegally done.

Despite the differences in definition, the term abortion is generally taken as the elimination or the termination of pregnancy by design and not by natural or spontaneous processes.

At this point, it is important to stress that abortion is not always induced and this in effect means that abortion is of different types and it would be appropriate to consider the different types of abortion.

Types of Abortion

The different types of abortion are categorized in accordance with their descriptive and diagnostic stages or the definitions.⁵

Spontaneous abortions are what are commonly referred to as miscarriages in the layman’s term. These abortions occur “naturally,” unintentionally and without deliberation and are

⁴ Moore-Cavaar, E. International Inventory on Induced Abortion p.3 (1974)

⁵ IPPF Report, Supra note 2 at 10

regarded as such even if they are caused by external factors such as trauma, accidents or disease.

Artificial, induced, provoked (*aborto provocado*) abortions are the kind initiated by a deliberate action with the intention to terminate the pregnancy. One author⁶ distinguishes this kind of abortion to what she terms as therapeutic or clinical abortion which she regards as the kind performed when the woman's life and, or her mental and physical health are endangered and the procurement of abortion is seen as the 'cure' for the pregnancy.

She further distinguishes this from "back street", extra legal, criminal, illegal and quasi-legal abortion which she defines as the kind of induced abortion performed under unsafe, and unsanitary conditions by physicians or those who may have minimal knowledge on how to conduct an abortion. These abortionists operate outside the law and face clear and tacit sanctions of the law. These kinds of abortions tend to differ from legal abortions which are those performed within the limits of the law.

The first type of abortion is termed spontaneous or natural while all the latter type are called induced abortions, which are the kind that this work will focus on.

Techniques used in abortion

The techniques used and the effects which go with procuring an abortion vary and the methods used will now be considered in brief.

It should be emphasized that the kind of technique used is directly related to the age of the foetus and the dangers accompanying the technique.

For first trimesters (pregnancies under twelve weeks), it is usual for the embryo to be sucked out using a metal or plastic vacuum pump which can be electric or custom made

⁶ Moore-Cavaar, *Supra* note 4, at 6

respectively. This kind of operation is done at a hospital or clinic immediately the woman is admitted and it takes place within a short space of time. Shortly afterwards, the woman is discharged. Medically, a woman procuring an abortion of this kind is regarded as being in a low risk group.⁷

For second trimesters (pregnancies between twelve and twenty-four weeks), the foetus is dismembered and extracted from its mother by using forceful things such as the injection of saline so as to induce the abortion. Once saline is injected, the foetus will be expelled between twelve to thirty hours later.⁸

This operation is more complicated than the first and so its normal to have the woman spend at least a night in the hospital.

For the high risk group (pregnancies between twenty-four and thirty-six), or the third trimester, pregnancies can only be terminated by a major operation such as a hysterectomy {cutting of the uterus or womb to remove the developing foetus}. As expected, this operation is most complicated of the two and the risk of death is much higher.

In addition, the operation tends to be emotionally traumatic for the patient and can be upsetting even to the nursing staff because at such a late stage, the foetus is at an advanced stage of development and the nurses have to deal with the task of disposing a foetus, which is visibly human.

Origin, causes and the laws of abortion

According to the research conducted by Simapungala⁹ and Chewe,¹⁰ abortion was one of, if not the earliest method of dealing with unwanted pregnancies widely used in ancient times. This is inclusive of African, Western and Eastern parts of the world. Usually, the

⁷ IPPF report, supra note 2 at 12

⁸ Ibid

⁹ Simapungala, W. C; Abortion –The Zambian Experience,p2 (1977)

¹⁰ Chewe A. K; The Effectiveness of the Abortion Law in Zambia, p.10 (1996)

act of was resorted to in cases of pregnancies outside marriage, rape and incest so as to avoid embarrassment

However, as Christianity emerged and started spreading from the West to Africa and other parts of the world, the act of abortion came to be regarded as immoral and eventually as illegal.

The laws of such Christian nations would reflect this attitude and prohibit abortion. Laws cannot possibly be enacted without moral considerations and valuations of human beings.¹¹ This is contrary to the view taken by the English jurispudent John Austin and other positivists who seek to have a purity of the law by purging it of moral values and ethics.

As a result of this ,the British Act of 1861 namely the Offences Against the Person Act which applied to the then Northern Rhodesia, prohibited abortion and made it an unlawful offence punishable by life imprisonment.

This provision was incorporated into the Penal Code (sections 394 and 151).Thus abortion was illegal no matter the circumstances in which a woman found herself pregnant. However as time went on, the strict laws on abortion began to be made flexible. There were a number of reasons for this change in attitude towards abortion.

To start with, there was the situation where a mother was put in a very discomfoting position of having to choose between saving her own life or that of the unborn child as a result of medical complications.

A number of theologians and lawmakers decided that in such a situation , it would not be right to impose a legal obligation on the mother to prefer her child's life over her own.¹² According to them , if she made the choice of self sacrifice, it was in obedience to a higher law of love than common morality or law could enforce.

¹¹ Noonan; Supra note 1 at 5

¹² Ibid

Another reason for such a change in attitude towards abortion was a situation where physicians diagnosed that there was a substantial chance that the baby would be born with a deformity. This was often the diagnosis during and after the second world war as a result of radio active substances used for warfare that affected mothers-to-be and also because of drugs such as Thalidomide and viral infections like rubella or German measles.

Instances of rape and incest as viewed from ancient times were also considered as justifiable reasons for termination of pregnancies as a woman had to give birth to a child literally forced upon her out of violent act.

The other reason which prompted a change in law was as a result of a number of infants found dead; killed by the mother who did not want the child. Others were abandoned and would usually turn out to be delinquents.

Despite the statutory exceptions granted in performing abortions in instances such as those earlier attributed to, some physicians tended to stretch the exceptions and performed operations unnecessary to save life but necessary in their view to keep a mother sane or give her s peace of mind.¹³ Furthermore, some accredited hospitals performed these operations and were not criminally punished accordingly. This caused inconsistency and lack of uniformity in the medical practice.

To top it all, doctors who performed these abortions were troubled by their own conscious as they knew the restraint of the law. As a result, physicians and other people felt the need to have a change in the law.

The landmark case was that of **R v Bourne**,¹⁴ and it changed the law on abortion dramatically. In that case, a physician, Bourne, operated on a fourteen year old girl who

¹³ Ibid p5

¹⁴ (1938) 3 ALL ER 615

had been raped by soldiers and become pregnant as a result. The operation was performed free of charge and Bourne was charged under section 58 of the Offence Against the Person Act, 1861 for unlawfully procuring abortion on the girl. Mac Naughten J directed the jury that it was for the prosecution to prove beyond any reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of the girl. It was held that a surgeon need not wait until the person was in peril of immediate death, but it is his duty to perform the operation if on reasonable grounds and with adequate knowledge, he was of the opinion that the probable consequence of the pregnancy would be to make the patient a physical or mental wreck. The accused was thus acquitted.

This was a case that led to the enactment of the Abortions Act of 1967 in England and abortion was legal in certain instances such as those outlined in the Bourne case. Zambia followed suit and on 13th October 1972, abortion was legalized on certain conditions by enactment of the Termination of Pregnancy, 1972.

As often is the case, this was as a result of the case of **The People vs Gulshan, Smith, and Finlayson**¹⁵ where three doctors were charged with conspiring to procure an abortion contrary to sections 394 and 151 of the Penal Code, 1931 Cap 37 of the Laws of Zambia. According to the doctors the woman was emotionally unstable and when making the judgment on whether the abortion was unlawful or not the English case of **R v Bourne** was adopted.

As a result of these developments in law, the position to have an abortion was taken a step further in England and other developed nations.

A number of individuals now began to view abortion as a right which should be available at the personal option of a woman and this was seen as a way of maximizing the woman's freedom and planning of her life. According to them, contraceptives were not enough to remove the curse of the law which permitted abortion only under certain

¹⁵ HP No.11 of 1971

circumstances.¹⁶ Many women lacked the knowledge and resented the effort involved in taking contraceptives. In other words, a sexual revolution was emerging which could only be successful if abortion was allowed under both ordinary and extra ordinary circumstances.

Furthermore, with the population growing at rapid rates , there was a felt need to curb the 'danger' and control fertility.

Thus cultural, social and economic changes brought about the need to liberalise the law on abortion. Laws were enacted in these Western countries accordingly. Any woman who felt need to terminate a pregnancy was now free to do so without any fear of facing the sanction of the law.

In Zambia, the position as taken in 1972 by the enactment of the Termination of Pregnancy is still maintained. Abortion is illegal, subject to certain conditions. However the activity is one that appears to be widely practiced by any Zambian woman who so wishes, without any special circumstances surrounding the need to terminate and this occurs without sanctions being meted on her or the carrying out the abortion.

As a result of these circumstances, the author of this work has been prompted to consider a number of questions. What factors have led to the increase in abortions in Zambia? Has the general Zambian public changed its views on abortion and is there need to reform the law on abortion?

Scientifically it is stressed that when a research is being conducted, personal beliefs and feelings must be set aside. Although this is a goal that I aim for I do not believe it is entirely possible in a social research especially with a controversial topic such as abortion to take a totally objective view. There is therefore bound to be traces of bias on the subject and this is best revealed at this stage. Despite this being the case, at the same time, it does not mean my views are perfect and are therefore subject to contrary opinion

¹⁶ Noonan, Supra note 1, at 7

CHAPTER TWO

THE ABORTION CONTROVERSY

As indicated in the preceding chapter, the subject of abortion is one that is highly controversial. When one closely follows and examines the argument between those in favor of abortion and those against it, it is clear that the debate evolves mainly around one fundamental issue, namely, the beginning of human life. From this point, other equally important issues such as the rights of the foetus versus the rights of the woman emerge.

Socio-economic factors, population control, genocide, quality of life, civil rights, crime are just some of the many phrases used in the abortion controversy.

It will, therefore be the main focus of this chapter to analyze the various argument for and against abortion. In this chapter those in support of abortion will be referred to as pro-abortionists whilst those against it are called anti-abortionists.

The Moral Arguments On Abortion

It can be safely stated that the anti-abortionists' appeal against laws that liberalize abortion are firmly rooted in religious, ethical and moral grounds. Anti-abortionists argue that when abortion becomes a matter of personal choice, it signals the abandonment of the respect for life.¹⁰

In effect, the focus is on the sanctity of life and the felt need to protect the foetus which is seen as a voiceless human being, against destruction.

Christianity takes the lead on the aspect of sanctity of life and uses the Holy bible as its authority for holding the view to the effect that all life is sacred and sacrosanct.

¹⁰ Sarvis B. & Rodman H; *The Abortion Controversy* (2nd ed) .23 (1974)

Accordingly, Christians see life as a divine gift from God and belonging to him. As such, no person has any right to take the life of another.

To this effect, Genesis 9: 5-6¹¹ states that we are made in God's image and whoever sheds the blood of another human being will have to account to God who is the giver of life.

As one of the ten commandments from God, Exodus 20:13¹² declares "Thou shall not murder"

These teachings from the Old Testament are reinforced by those of Christ in the New Testament who said "love your neighbor as yourself" Mathew 22:39¹³.

Jesus' example of self-sacrifice is the Christian valuation of life made in view of this commandment of love. The foetus is thus seen as a human neighbor, his life has parity with one's own.¹⁴ Preference for one's own interests to the life of another seems to express cruelty and selfishness irreconcilable with the demands of love.

The biblical scriptures are taken very seriously by the Catholic Church and any recourse to abortion whatever the medical reason is absolutely rejected as denying the unborn child the right to live.¹⁵ The only exception is where there is a high risk that both mother and the unborn child will lose their lives if an abortion is not carried out.¹⁶

¹¹ The Holy Bible (1984)

¹² Ibid

¹³ Ibid

¹⁴ Noonan J. T. JR; The Morality of Abortion – Legal & Historical Perspectives, p.58 (1970)

¹⁵ Kulusika S. E.; The Rights Of The Foetus: An Overview, Zambia Law Journal, Volume 36, p. 120 (2004)

¹⁶ Ibid

Islamic beliefs an abortion appear to be similar to those of Christians. Life is a sacred gift from Allah (God) and given to all human beings and there is a strict command not to take anyone's life or else the murderer will face the retribution of 'Qisas'¹⁷

However Moore¹⁸ in her research claims that the Islamic view on abortion is divided in two parts with one view holding the position that the foetus is unformed and without a soul for the first one hundred and twenty (120) days of pregnancy and that this makes abortion permissible within that period of time. The opposing view is more in line with what has been outlined earlier, that is to say, that even if the foetus is considered as soulless before 120 days, it is preparing to live and should therefore not be destroyed. Thus abortion is a religious crime and punishment will vary according to the age of the foetus and the nature of the surrounding circumstances.

With Hinduism, the doctrine of *ahimsa*- 'non-injury' or 'non-harming' has long been cited in opposition to abortion and infanticide. There is generally a bias against abortion based on the three sacraments relevant to the gestation period as well as on the laws of man which are the earliest of the *Dharma sastras* (instructions of the sacred law)¹⁹

Buddhists also generally prohibit the killing of life and this is parallel to the religions' emphasis on compassion. Therefore, abortion is unacceptable and this is taken very seriously to such an extent that even a thought which entertains the taking of life produces an obstacle to *Moksha* which is the deliverance for *Samsara*, the cycle of rebirth.²⁰

Chewe²¹ in her paper on abortion law discloses that in African traditions, children were generally regarded as a sign of wealth and instances of abortion were rare due to the fact that early marriages were quite common and there was thus no such thing as an unwanted child. It was only when there was a pregnancy out of wedlock or as a result of rape or

¹⁷ Ibid

¹⁸ Moore C. E.; International Inventory On Induced Abortion, p. 13 (1974)

¹⁹ Ibid

²⁰ Ibid, p. 14

²¹ Chewe A. K.; The Effectiveness of Abortion Law In Zambia; p.19 (1996)

incest that abortion was resorted to. Even under these circumstances, the act was conducted in secrecy. This indicates then that abortion must have been regarded as an evil act.

With the coming of missionaries, African traditions slowly, became fused with Christian and Western ideologies and to this day, abortion is still regarded as an evil act by most African traditions.

From what has been discussed above, it is quite clear that the major religions of the world condemn abortion.

For Christians, the underlying basis is that human life begins at conception and the foetus is thus a human being created by God and thus should not be killed by anyone.

Such a stance has come under attack by pro-abortionists. According to them, personhood at conception is a mere religious belief and not a provable biological fact. They point to the fact that religions differ on the definition of a person and as such will never reach consensus on the definition of 'persons' or when abortion is morally justified. For instance, they say that Mormon and some fundamentalist churches believe in personhood at conception; Judaism holds that it begins at birth whilst ensoulment theories vary widely within Protestantism.²² With much vigor, they go further in their arguments by stating that if fertilized ova were considered persons, we would require them to carry passports, be counted in the census and be registered and buried, including all spontaneously aborted foetus.²³ Indeed, they conclude that if abortion were considered by society to be murder, they would be millions of women behind bars.

At this point, the alleged disparity in the concept of personhood by the different faiths indeed appears to weaken the anti-abortionists' argument. However, anti-abortionists still firmly believe that the foetus is a human being who should be given the protection of

²² <http://www.wcla.org/articles/procom.html>

²³ Moore, *supra* note 9, at p. 30

the right to life just as any other human being. It is thus important at this point in time to look at how the foetus is conceived as a human being by anti-abortionists and in the process examine this with the pro-abortionists emphasis on the woman's right to control her own body.

The Foetus as A Human Being

The anti-abortionists insist that life is a continuous process. They point to similarities of human development; a zygote, embryo, foetus, infant or senior citizen. All are human beings and it is wrong to destroy any of them. They are all weak and must be protected by the law.²⁴

Bottles containing human foetuses at four, six, eight etc weeks have been openly displayed at anti-abortion demonstrations to show that a foetus is a human being with a heart beat, fingernails etc and has the ability to experience pain just like any other human being.

It is a scientific fact that when the male and female gametes fuse, a single fertilized cell, the zygote is formed and this contains the genetic material which determine the physical attributes of a person who might one day form part of the human race provided of course implantation in the uterus occurs and the pregnancy lives up to full term.

It is this point which anti-abortionists stress makes abortion wrong and equivalent to murder.

Noonan says;

"At conception, the new being receives the genetic information which determines his characteristics, which is the biological carrier of the possibility of human wisdom which makes him a self-evolving

²⁴ Sarvis & Rodman, Supra note 1, at p. 21

being. A being with a human genetic code is man"²⁵

This is reinforced by the Catholic Churches view against abortion as best expressed in the words of Pope Pius XII who said,

*"The unborn child is a human being in the same degree and by the same title as its mother. Moreover, every human being, even the child in its mother's womb, receives its right to life directly from God, not from its parents, nor from any human society or authority..... innocent human life, in whatever condition it is found, is immune from the very first moment of existence, to any direct deliberate attack... The life of an innocent human being is inviolable, and any direct assault or aggression on it violates one of those fundamental laws without which it is impossible for human beings to live safely in society"*²⁶

With further scientific advancements such as electroencephalogram (EEG) used to detect brainwaves and ultra sound scanning and fetoscopy which are used to monitor the development of the foetus and detect any congenital abnormalities,²⁷ it has been revealed that the embryo has a heart beat, arms and legs appearing as lateral buds by the fourth week.

During the second week, a professor in medicine has dedicated that at such a stage "even the layman could now identify it not merely as a mammal, but as human, or at least a higher primate"²⁸

The EEG show that electrical brainwaves have been recorded at forty-three (43)days²⁹ and anti-abortionists state that if the absence of a brainwave on an EEG indicates death,

²⁵ Noonan J, Supra note 5 at 57

²⁶ Chandrasekhar, Abortion in a Crowded World; p. 1 (1974)

²⁷ Kulusika, Supra note 6 at 124

²⁸ Ibid

²⁹ Time Magazine and Rand McNally's Atlas of the Body p139,144(1980)

why will pro-abortionists not accept that the presence of a brainwave is the confirmation of life?

In the ninth week, and twelfth week, its sensitive to touch, heat, light and noise and all body systems are known to be working. It weighs 28.35 grams and is between 6-7 cm long at this time.³⁰

Further scientific revelations confirm that the foetus yawns, smiles, sucks its thumb, makes a fist and gets hiccups at fourteen- twenty two weeks and all these are recent observations in Scientific development.

By the forth month the foetal muscular movements become strong and can be felt by the mother and this is commonly referred to as quickening.³¹

The foetus continues to grow in its mother's womb until normally the ninth month from conception when birth occurs. At this point, its weight is usually between 3 kg and it is about 51 cm long.

All these findings may have a positive influence on people's attitudes on how the foetus needs to be viewed as a human being. For instance its quite common to hear of how a woman who contemplates abortion changes her mind to proceed with the operation once she gets to see an ultra sound scan of the growing foetus.

However as one scholar correctly points out, such findings appear not to convince lawmakers that the foetus deserves legal recognition or status as any other natural person may enjoy.³²

In line with this is the pro-abortionists argument which dismisses the notion of human life beginning at conception. They in turn emphasize the differences between the stages of

³⁰ Kulusika, supra note 6 at 124

³¹ Ibid

³² Ibid

prenatal development and state that a foetus is a foetus and not a human being.³³ In their opinion, a hydatidiform mole starts as a fertilized egg, ends up as a mass of cells and could in no way be described as a person. Similarly, a blue print is not a house, an acorn is not an oak and DNA is not a person.

There has been a response from the anti-abortionists on holding such a view. According to one Professor in Philosophical and Religious Studies,³⁴ there is a distinction between a human being and a person which raises an equally important and necessary distinction namely that between potentiality and actuality. He goes on to say that despite the disregard of this distinction in science, the distinction is important philosophically in relation to the right of the foetus. His argument is that the one cell master DNA molecule of a human zygote already has in it **potency** or **potentially** all of the physical characteristic features that are determined to become **actualized** given the appropriate environment for its development. He further points out that an adult human being may have the capacity for reason and moral decision making but may not actually be using these capacities when for instance he is asleep or in a coma.

In such circumstances, we would be slow to conclude that such a being is neither human nor a person and has lost his/her rights.

So in effect, the foetus despite its so called lack of 'actuality' is still a "person to be" or a person with potential" or a "potential person"

With respect to the scientific findings which support the anti-abortionists view that the foetus should be regarded a human being capable of feeling pain and so on, the pro-abortionists have attacked this with their "own findings" to the effect that the brain structures and nerve cell connections that characterize the thinking and feeling parts of the brain are not completed until between the 7th and 8th months of gestation. Further, they state that only after 30 weeks do the brain waves show patterns of waking

³³ Rodman & Sarvis, supra note 1 at 21

³⁴ Prof. Dillon-Malone C; Towards a Consistent Ethic of Human Rights ;Zambia Law Journal, Volume 35, p44 (2003)

consciousness when pain can be perceived. The reflex actions that are present before this stage do not indicate the ability to feel pain and they conclude by stating that with all this borne in mind, its rare that abortions can ever occur after 24 weeks.³⁵

They even go to extremes of pointing out that other non-persons, such as dogs, cows, pigs etc. have nails, heartbeats, brainwaves and the capacity to feel pain just like a foetus and yet these factors alone do not prevent the destruction of such entities.³⁶

However when one considers the growing number of animal rights groups especially in the Western world where some laws make it a crime to kill animals and proponents of these groups attack those who wear fur coats and so on, it is rather ironic that there is a law which in effect does not regard a foetus (who is quite capable of becoming part of the human race and worthy of more dignity than an animal) as not worthy of the protection of the right of life.

Going back to the pro-abortionists arguments, they further attack the display of aborted fetuses by anti-abortionists, as an unfair means of trying to invoke sympathy for the foetus.³⁷

They state that is emotionally threatening to see the similarity between a foetus and adult beings and that those who are not trained in medicine would be equally upset see an eyeball or a segment of intestine in a bottle or projected on a screen. Disgust, they stress should not be confused with moral objection to the procedure of abortion; most would not want to see an appendectomy performed but that does not mean all people oppose surgery³⁸

They continue by stating that we should not be surprised to find a human foetus resembling man or woman. A dead human also looks very much like any adult health

³⁵ <http://www.wcla.org/articles/procon.html>

³⁶ Moore, supra note 14 at p. 30

³⁷ Ibid

³⁸ Ibid

human but that does not prevent doctors from cutting into it, as is the case with an autopsy, since the person is no longer there just as the person is not yet there in the case of a foetus.³⁹

All in all, pro-abortionists don't perceive the foetus as a human being. As earlier indicated, in their view if that were the case, even spontaneous abortions would mean that the aborted foetus has to be accorded personhood and rights and duties that befall any average adult human. That to them appears to be a tedious, irrational notion of doing things. In relation to miscarriages, they point to the fact that sentiments that accompany the death of the foetus are not the kind that would be shared for the death of the living child and that the foetus is an unnamed 'it' till birth and as such can not be perceived as personality until at least the fourth month of existence when movements in the womb manifest a vigorous presence demanding joyful recognition by the parent.⁴⁰

However, Noonan points to the fact that feelings are not reliable guides in determining humanity for others. He says many groups of humans have had difficulty in feeling that persons of another tongue, colour, religion, sex are as human as they are.

He elaborates further by stating that we tend to mourn the loss of a 10-year old boy a lot more than the loss of his 1-day-old brother or his 90-year-old grandfather. The difference felt and grief expressed vary with potentialities extinguished or the experience wiped out. In addition these feelings do not point to any substantial difference in the humanity of baby, boy or grandfather.⁴¹

To the above rationale, one can only add the point that when a woman experiences a miscarriage, it is the norm for close friends and relatives to offer words of sympathy and encouragement. If the growing foetus is not to be regarded as a (potential) human being as is the case in countries liberalizing abortion, why then bother to offer such words/of consolation?

³⁹ Ibid.

⁴⁰ Noonan J. *Supra* note 16 at 53

⁴¹ Ibid

And as one anti-abortionist further observes, why are soon to be parents proud to show off ultrasound scans of their growing foetus?⁴²

However, since it has been exhibited by judicial decisions that the foetus is still not recognized in law as any other human being entitled to rights and duties, it would be important at this point in time to consider the definition of a person.

The British philosopher John Locke defined a person as “ a thinking intelligent being that has reason and reflection and can consider and can consider itself as itself the same thinking thing in different times and places.”⁴³ Such a definition clearly refers to a normal healthy adult human being since such a definition implies the person has to be actively self-conscious, rationale, and capable of forming human relationships. This in itself has serious implications for the legal status of a child the disabled, the very old and senile as well as those that are terminally ill.⁴⁴ Such a restrictive definition of who is a person appears to be what has been favored by law makers especially in developed countries in order to justify the intentional destruction of human life.

One only has to think of the legalization of euthanasia in some countries in the West in this respect.

Despite the above proposed definition of a person one scholar still feels that there is still has not been any determination of what is a person in law and that once this issue is resolved and the foetus is shown to be encompassed within the definition of a person, it will be necessary to further determine at what stage of the life span of the foetus does it become a person.⁴⁵

⁴² <http://www.abortabortions.com>,p4

⁴³ Dillon-Malone;supra note 25,45

⁴⁴ Ibid at 44

⁴⁵ Kulusika, supra note 6 at 125

However this as earlier noted, is also a debate able issue as pointed out by the pro-abortionists in terms of the differences in religions.

A Woman's Right

The United states supreme Court decision in **Roe vs Wade**⁴⁶ entirely altered the abortion aspect in the United states. The court ruled that a state could not intervene in the abortion decision between a woman and her physician during the first three months of pregnancy. During the second trimester when abortion is more hazardous, the states' interest in the health of the woman permits the enactment of regulations to protect maternal health, such as statutes specifying where abortions may or may not be performed. Beyond such procedural requirements, however, the decision is still the woman's and her physicians. After the foetus has reached viability, corresponding to approximately the last three months of pregnancy, the state can exercise an interest in promoting potential human life.

From the **Roe vs Wade** decision, other countries also followed suit and liberalized abortion law and these will be examined in the next chapter. Feminist groups are in the forefront of the pro-abortionist view which holds that restrictive abortion laws are man-made laws intended to keep women in their place of child bearing and rearing. Such women say that they are going to define and create their own roles and control their own lives. In doing so, implies the ability to control one's body.⁴⁷

They insist that a woman should have the right to choose whether or not to terminate a pregnancy since democracy is based on the premise that people have the right to choose. They go on to state that it is a woman's right to control her reproductive capacity and determine the timing and extent of her own fertility and that this will in turn ultimately lead to what one supporter of abortion calls the "century of the wanted child".⁴⁸ Legal abortion they claim, will decrease the number of unwanted children, battered children,

⁴⁶ 410 U.S. 113 (1973)

⁴⁷ Sarvrs & Rodman; Supra note 1 at 2

⁴⁸ Ibid, at 24

abuse cases and possibly subsequent delinquency, drug addiction and a host of social ills believed to be associated with neglectful parenthood.⁴⁹

To such a view, the anti-abortionists respond by stating that society would do better by making substitute provision for unwanted children with adequate institutions and benefits to enable each child have a loving home. They point to the fact that they have been many women who initially don't want a child when they discover their pregnancy and that these tend to change their minds and love the child when it is born. They further say adoption and not abortion should be the solution especially bearing in mind the fact that there is a lack of adoptable babies due to increased legalized abortions.⁵⁰

It is thus quite cruel to kill a child who some infertile loving couple somewhere are willing and waiting to adopt.

And to this observation the pro-abortionist off handedly says that as sad as their plight of infertile couples may be, women should never be forced to bear children for them and that the baby shortage has had some positive benefits to older, non-white and handicapped children now being adopted rather than having to live in institutions.⁵¹

They go on to say that even if regret may be experienced by some women, this is not enough reason to deny the choice to abort to all women.

Pro-abortionists attack the anti-abortionist view that the foetus is a separate and distinct human being by making the observation that the foetus is totally dependent on the body of the woman for its life support and is physically attached to her by the placenta and umbilicus.⁵² The health of the foetus is directly related to the health of the pregnant woman and that if the foetus is considered a human being at conception then this gives the foetus even more rights than a born person enjoys namely the right to use another person's vital support system. **No one** they stress has the right to receive a woman's

⁴⁹ Moore, Supra note 9 at 32

⁵⁰ <http://www.wcla.org/articles/procon.html>;p.5

⁵¹ Ibid

⁵² Ibid

blood, etc without her consent. It is only at birth that the woman and foetus become separate.

Because the foetus is not viable (capable of independent existence) and hence absolutely dependent on its mother, it cannot be given personality.

However Noonan claims that viability does not just depend on the length of life but also on the anatomical and functional development and that these vary in different women.⁵³

Dependence, he correctly points out does not depend with viability, If the foetus is seen as entirely dependant on someone's care in order to continue existence, the same can be said for a one, two, three and even five year old child who is absolutely dependant on another's care for its existence and which if uncared for would die as surely as the early foetus detached from the mother.

Going back to the initial discussion on the woman's right, proponents of abortion try to strengthen their arguments by observing that the original reason for passing restrictive abortion laws (especially with regard to the United States) was not to protect the foetus nor was it for the protection of public morality but that they were meant to protect women from a then dangerous surgical procedure a procedure; they say more dangerous than childbirth. But because now childbirth is more risky than hospital abortion, then the law should be changed to favor the woman accordingly.⁵⁴

Whilst anti-abortionists concede to the fact that initially common law did not consider abortion a crime before quickening, the law changed in such a manner as to protect the foetus in light of the new medical data which revealed the non-distinctiveness in the stages of foetal development.

⁵³ Noonan, *supra* note 5 at 52

⁵⁴ Moore, *supra* Note 9 at 32

Since such medical information discloses the possibility of a new and distinct human life at conception, then destruction of such a life even at such an early stage is wrong and amounts to a criminal offence punishable at law.

From all that has been said above, the argument between pro-abortionists and anti-abortionists as earlier pointed out seems to be the dispute on the beginning of human life. If only the anti-abortionists could fully convince pro-abortionists that life begins at conception, I think the argument would come to an end. The difficulty with the anti-abortionists arguments lies in the fact that they deal "in a dimension of existence unknown or unexplored by their fellow citizens" as one author points out.⁵⁵ Because the foetus is unseen and voiceless it is rather difficult to convince people that indeed it is a human being worthy of protection to life. This is unlike pro-abortionists who have an adult woman to speak for herself in her fight to be entitled to have an abortion.

But then in law, when one thinks of a murder trial where the deceased is not there to speak for himself, the judge or jury tend to make a verdict on whether the accused is guilty or not according to the evidence advanced by the prosecution and this is especially the case with circumstantial evidence when the accused is not caught red handed committing the crime but only that pieces of evidence are put together to draw a conclusion.

So while indeed people tend to be easily convinced by what they see rather than what they cannot see, with the advancement of scientific advancements such as the ultra sound scan and so on gaining momentum it is quite possible in future that pro-abortionists can be fully convinced on the humanity of the foetus.

Having exhausted the moral arguments on the rights of the foetus to be considered as human, the two opposing groups have taken other factors into consideration on the issue of abortion and these will be discussed at length at this point.

⁵⁵ Sarvis and Rodman, *supra* note 1 at 24

Physical and Psychological Effects

Once more, there is a dispute on the physical and psychological effects of abortion. Advocates of abortion claim that abortion is actually beneficial to the woman who wants it and on the other hand, anti-abortionists claim that abortion has harmful and psychological effects.

Pro-abortionists claim that a legal abortion is actually less risky than childbirth to the health of a woman especially if done in the early stages of the pregnancy.⁵⁶ It is only if the laws on abortion are highly restrictive that abortion tends to be harmful as the woman will resort to all (harmful) means of terminating the pregnancy such as self induced abortions and back-street abortions which may led to her death.

They claim that if at all there any physical side affects, they are minimal and normalize after a while. Late abortions which are more harmful to the woman are caused by restrictive abortion laws they claim. So abortion laws should be liberalized so that women can be aware of the harmful effects of late abortions and get easier access to an early abortion.

In terms of emotions, the woman experiences immediate relief that the problem has gone away. Although they do acknowledge that some woman may experience regret and depression after an abortion,⁵⁷ they emphasize that this is not a reason to deny all woman access to an abortion.

Examples of woman who have experienced such regret and guilt feelings include the woman in the Roe vs Wade decision which altered the legal position of abortion in the United states. Jane Roe whose real name is Norma McCorvey ended up working at an abortion clinic after wining her case but is till haunted by images of her work. She is now an active opponent of abortion had has described the experience of working at a abortion clinic in the following words:

⁵⁶ Moore, Supra note 9 at 32

⁵⁷ <http://www.wcla.org/articles/procon.html>

*"I've seen the blood of a dead baby pour out onto the floor of the operating room. I have seen the tiny parts of babies (hands, feet, torsos, heads) pulled piece by piece from their mother's womb... I'm not afraid to say abortion is murder, plain and simple"*⁵⁸

Furthermore, she alleges that her lawyer Sarah Weddington only used her to legalize what she calls the violent slaughter of innocent babies.

Weddington who fought so hard for the right for women to have abortions however still insists that Roe vs. Wade was a victory for women's rights around the world, despite the fact that her former client now believes it was the worst thing she ever did.

Unfortunately, Weddington is undergoing treatment for breast cancer and it has been revealed that she had an abortion at the age of 21. This, abortionists insist is one of the physical effects of abortion.

There is a link between the termination of a first pregnancy and developing breast cancer later in life because an abortion cuts short a pregnancy, leaving the woman's breast tissue in a dangerously stimulated but undifferentiated state. According to scientific studies there is a reported fifty percent increase of breast cancer among women under forty-five who have had induced abortions.⁵⁹

This is supported by evidence from Russian, Estonia and Soviet Georgian women which reveals that breast cancer incidents have arisen among women since these countries have one of the world's highest abortion rates. The same is the case with New Zealand.

It is not uncommon to hear of how abortion causes subsequent infertility and miscarriages. Researchers report that 3 to 5 percent of women who have undergo an

⁵⁸ <http://www.abortabortions.com>

⁵⁹ <http://www.afterabortin.info>

abortion are left inadvertently sterile. Furthermore, Ectopic pregnancies, Pelvic Inflammatory Disease (reported in up to 30% of all cases)⁶⁰ are associated with abortion.

Cervical damage is likely to result from previously induced abortions and increases the risk of premature birth and complications of labor during later pregnancies by 300 – 500 percent.⁶¹ Psychologically, anti-abortionists claim that abortion is harmful in that it causes what they call Post-Abortion Syndrome (PAS) which is a harmful psychological condition related to Post-Traumatic Stress Condition Disorder (PTSD) a psychiatric disorder first recognized amongst Vietnamese veterans who exhibited symptoms such as flashbacks, denial, loss of memory of the event and generally people who had experienced a traumatic event such as rape or domestic violence were recognized as likely to have PTSD. Researchers on PAS such as A. Speckhard and V. Rue insist that PAS is a condition arising from abortion and is related to PTSD because the woman who has had an abortion tends to have similar symptoms such as those exhibited by the Vietnam veterans as outlined above. Remorse, lowered self-esteem, insomnia, and a general hostility and hatred towards men especially, develops. Despair and depression are common as well as suicide attempts.

To mask the emotional turmoil, there is recourse to drugs and alcohol usually leading to sexual promiscuity.

However, PAS has been dismissed by the medical profession such as the American Psychological Association (APA), as being non-existent. But anti-abortionists still insist that it does exist.⁶²

The problem with all these arguments is that there has never been one united investigation on the physical and psychological effects of abortion. If both sides of the

⁶⁰ Postabortal pelvic Infection Associated with Chlamydia Tracomatis and Influence of Humoral Immunity by Allan Osser, MD, American Journal of Obstetrics and Gynaecology November 1984, p. 669 -703

⁶¹ <http://www.afterabortion.info>

⁶² Ibid

camp came together and did this, then it would be possible to establish the real effects if any, of abortion.

Parallels between Abortion and Discrimination

According to those who opposes abortion, there is no difference between abortion and other forms of discrimination such as slavery, apartheid, sexism etc.

The say that in terms of slavery, the USA had decided in 1857 that according to the US constitution, black people were not legal persons. They were the property of the owner and he could buy, sell or even kill them and abolitionists had objected stating that the decision was immoral and discriminated against an entire class of persons based solely on their skin colour. But those who supported slavery argued that those who had a moral objection to slave ownership didn't have to own slaves themselves because no one was forcing them to. Furthermore, it was said that the abolitionists should not force their morality on the slave owner and that he has the right to choose to own slaves if he so wishes.

Similarly, Roe vs Wade decided that unborn people were not legal persons and that they therefore had no human rights. The mother was the legal owner of her own body and had absolute legal right to keep or destroy her unborn baby. Anti-abortionists argued against this state of affairs saying that it is immoral as there is discrimination in the sense that an entire class of living people are denied human rights solely on the basis of age (too young) and place of residence (the womb).⁶³ But pro-abortionists argue that those who have a moral objection to abortion don't have to have abortions but should not force this moral decision on others just as was the argument in the slavery era.

Matters of apartheid and racism are also used in the same vein as is the case of discrimination in the work place or Islamic countries where women are discriminated against on the basis of gender.

⁶³ <http://www.prochoiceforum.org.uk>

Opponents of abortion see abortion as a genocide and attempt by people in power to eliminate the poor especially those in third world countries but proponents are of the view that restrictive laws actually cause poor women to undergo unsafe illegal abortions resulting in high mortality rates. So abortion needs to be offered on a voluntary basis because a woman who does not want to have a baby is still going to find means of terminating the pregnancy nonetheless.

Population control

Pro-abortionists are of the view that abortion is one of the major ways the overpopulation crisis can be overcome. The lack of inability to control women's fertility has led to socio-economic problems and an increase in the number of children is what has led to poverty and oppression in the world they claim

However others claim that we do not have an overpopulation problem as such but rather problems in the distribution of population and resources.⁶⁴

By concentrating on stabilizing population through extensive contraception, abortion and sterilization programs, the real problems are overlooked.

Indeed this appears to be valid argument when one looks at the large gap between developed and underdeveloped countries.

Less developed countries such as Zambia are constantly said to be rich in Natural resources. However despite this being the case, it's rather strange that to this day, poverty continues to haunt the country. Besides looking at the large gap between developed countries and underdeveloped ones, we only have to look at the gap within our own country between the rich and the poor people. People who are rich are known to earn huge amounts of money and this has been a subject much talked about especially in the

⁶⁴ Sarvis and Rodman, *supra* note 1 at 2

political arena. Members of parliament in Zambia have come under attack by the majority of Zambians due to the fact that they earn huge allowances while some people go to bed hungry.

Least I go out of topic, it is enough to point out that indeed in most 'overpopulated' poor countries, the problem is not really the overpopulation but rather the distribution of resources which if properly done could cater for everyone to their satisfaction.

Other considerations

A physician is trained to preserve life, not to destroy it is the cry of anti-abortionists. Abortion is contrary to the medical ethics in the Hippocratic Oath, both in its original version and modern reformulations such as the World Medical Associations 1948 Declaration of Geneva which states "I will maintain the utmost respect for human life, from the time of conception." However, pro-abortionists claim that physicians are also concerned with the quality of life and the preservation of the mental and physical health of a woman. But if the physical and psychological effects that come with abortion are valid, then can we say the quality of life is ensured?

Moral Decay

Opponents of abortion also believe that legal abortion encourages promiscuity and that sexual misbehavior should be punished (she had her fun, now let her pay for it). In addition they say in light of readily available contraceptives, there should be no unwanted pregnancies and therefore no need for abortion. But if women know that abortion is legally available, they do not bother with contraception.⁶⁵

Proponents of abortion on the other hand respond by stating that such an attitude towards sex stems from the belief that sex is bad and must be punished and that motherhood should never be punishment for having sex.

⁶⁵ <http://www.wcla.org/articles/procon.html> p4

Does the punishment fit the crime they ask. Would you think cancer a suitable punishment for heavy smokers? Maiming car accidents for those who fail to fasten their safety belts?

Conclusion

To these questions I would say that for every action every human being takes, he or she has to bear the responsibility. It is only when this attitude is instilled in all people that the issue of problems such as abortion can be sorted out.

With the instrument of the law, I believe the ultimate goal is to try and instill such responsibility. Laws exist for several functions among which include keeping and maintaining order in society. If laws are enacted in such a manner as to give individuals complete 'liberty', the result inevitably would be chaotic. Other people's rights would be encroached on and these rights include those of the foetus.

Anti-abortionists have said that the abortion mentality leads to disrespect for all forms of human life and in effect moral ills such as euthanasia and infanticide.

When this argument was first advanced in the USA, it was dismissed as unlikely. But in recent times, we have heard of a number of countries that legalize euthanasia. Slowly, this practice will come to be accepted by the world at large just as was the case with abortion unless serious measures are taken to address the issue.

Finally, the fact that even pro-abortionists call abortion a problem in their arguments and encourage contraceptive use shows that to some extent, they know that the practice is not morally correct. These are all issues to be discussed in greater detail in chapter five.

CHAPTER THREE

THE EFFECTIVENESS OF THE LAW ON ABORTION IN ZAMBIA

This chapter considers the use of the law on abortion by the police, the courts and hospitals, and whether or not the current law on abortion in Zambia is effective.

However, it is observed that in countries that have liberal laws on abortion, the rate of women who undergo abortion actually tends to be quite high.

It is reported that about two thirds of the worlds women live in countries with liberal or fairly liberal abortion laws whilst the remaining one third are in countries with strict abortion legislation.

Jurisdictions with Liberal Abortion Laws

Canada is one country where there is no law whatsoever restricting abortion and most abortions are actually funded by government health insurance.⁶⁶ By the year 1999, there had been over 100,000 abortions performed every year in that country meaning that for every 1000 women, there were 16 who had undergone an abortion, a rate which has strangely been described as “reasonably low” by pro-abortionists.

In the Netherlands, abortion is freely available on demand. However, the country has the lowest rate of abortion in the world with about 6 abortions per 1000 women per year as of 1999. This is attributed to the fact that there is an extensive public education on contraception, family planning and sexuality in Holland. Despite such an existing state of affair pro-abortionists still see abortion as an essential back stop to contraception which is not seen as not being 100 percent effective.⁶⁷

⁶⁶ <http://www.prochoiceactionnetwork-canada.org/civilize.html>

⁶⁷ Ibid

Sweden is another country where abortion is available on demand and there were 19 abortions per 100 women per year by 1999 making the rate of abortion three times higher than that of Holland and only 20 percent less than that of the United States which had the highest rate of abortion with 1.3 million American women having abortions every year by 1999. This is 24 abortions for every 1000 women.

It is clear from the above that the figures are high and this is a problem which even pro-abortionists have acknowledged in the sense that they stress that it is unnecessary for such an advanced and democratic country like the U.S to have high rates of abortion. This brings back the question of whether abortion laws are ideal. If they are so ideal and essential, why are the pro-abortionists concerned about having an undesirable high rate of abortion in the US. Why care in the first place if an abortion is just like any other ordinary surgical procedure and the foetus is not to be considered as a human being. Forging ahead, its time now we looked at the current laws regulating abortion in Zambia.

Abortion Laws In Zambia

The laws dealing with abortion in Zambia are the Termination of Pregnancy Act 1972⁶⁸, The Penal Code⁶⁹, and to some extent the Constitution of Zambia (1991) (as amended 1996)⁷⁰ by its recognition of the child's right to life and protection against the arbitrary deprivation of its life.⁷¹

Before 1972, the Penal Code was the law mostly used in dealing with abortions cases. To this date as will be later shown, the Penal Code is still extensively and exclusively used by the police in dealing with abortion cases.

Sections 151, 152, 153, and 221 deal with different situations under which persons may be found guilty of felonies in relation to abortion. Under section 151, any person who with intent to procure the miscarriage of a woman by unlawfully administering or causes

⁶⁸ Chapter 304 of the Laws of Zambia

⁶⁹ Chapter 87 f the Laws of Zambia

⁷⁰ Chapter 1 of the Laws of Zambia

⁷¹ Article 12(2)

her to take any poison is guilty of a felony. Section 152 deals with the situation where a woman unlawfully administers to herself any poison intended to bring about an abortion whilst the third situation is where any person unlawfully supplies poison or anything to be used to procure a miscarriage. (S.153). Section 221 deals generally with any acts that are intended to bring about an abortion. However the law in the Penal Code is quite contradictory with other laws as will be seen in brief in chapter five.

The Termination of Pregnancy Act 1972

As earlier indicated in Chapter one, the Termination of Pregnancy Act was enacted as a response to the ruling in the case of **The People vs Gulshan, Smith & Finlayson**.⁷² The facts of the case were that three doctors were charged with conspiring to procure an abortion contrary to sections 151 and 394 of the Penal Code. The Charges arose when one Rosalinen Gulllaird , an unmarried expatriate and administrative assistant at a certain college visited the accused's surgery. In August, 1970 she thought she was pregnant and so she wished to verify that fact, and if possible, have the pregnancy terminated. Dr.Gulshan confirmed her suspicions where upon she asked for termination because according to her, she could not afford to have the baby and that she had to go back to the United States to get married after her contract finished . She later saw Dr. Smith and Dr. Finlayson as advised by Dr. Gulshan. At a later time , she went back to the hospital and had her pregnancy terminated by Dr. Gulshan. The reason advanced on the termination form signed by Dr. Gulshan was "emotionally unstable and cannot cope with the pregnancy", In November the same year, she had another pregnancy terminated and the reason this time was "threatens to do anything to get rid of the pregnancy which she cannot cope with" At the trial, the substantial reason given by the doctors turned out to be personality disorder. The doctors pleaded not guilty stating that they had acted in good faith. Two other doctors were called and they confirmed the reasons for terminating the pregnancy. In answering the question "what is unlawful abortion?" The learned Chief Justice adopted the judgment of **Mac Naughten J. in R Vs Bourne**.⁷³

⁷² (HP) No. 11 of 1971

⁷³ (1938) 2 All ER 615

He thus 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 the life and prevent grave permanent injury to the physical or mental health of the mother.”

Furthermore it was held that the murder of proving that the procurement of an abortion was unlawful beyond any reasonable doubt fell on the prosecution.

Because the prosecution failed to prove beyond reasonable doubt that this was the case with the three doctors they were all acquitted.

Shortly after this ruling in 1971, the Zambian Parliament enacted the Termination of Pregnancy Act on Friday 13th October, 1972 after much debate. According to Kaunda⁷⁴ most members of parliament greatly opposed passing the bill arguing that the foetus has an inviolable right to life. The then Minister of legal Affairs and Attorney General, Mr. F. Chanda settled the MPs feelings by stating that the enactment of the act would actually make the law more strict since it would require three doctors of which one was a specialist to determine genuine medical grounds for an abortion and that this was more restrictive than the then existing law which allowed for termination of a pregnancy if the parents or the husband of the woman were available and signed a consent form.

The health of the woman was still given primary consideration during the debate and thus finally the bill was enacted into statute law.

After the enactment of the Act, some organizations and in particular the catholic church raised strong oppositions against the provisions of the Act arguing that the circumstances under which an abortion could be performed were so wide and open to abuse and that there would be serious repercussions brought on by the new law.⁷⁵

⁷⁴ Kaunda S, Abortion law In Zambia, Is it Adequate (1998) p14.

⁷⁵ Declaration of the Zambia Episcopal Conference on Abortion (1972) p6

Contrary to what most people think, (including the author initially), the provisions of the Act are indeed wide and have been subject to abuse to such an effect that abortion is not even illegal in Zambia under the Act.

Section 3 of the Termination of Pregnancy Act provides that:

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

- a) that the continuance of the pregnancy would involve:-
 - i) risk to the life of the pregnant woman
 - ii) risk of injury to the physical or mental health of the pregnancy woman; or
 - iii) risk of injury to the physical or mental health of any existing children of the pregnant woman, greater than if the pregnancy were terminated, or
- b) that there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped

It has been said that the provisions of the Act make abortion a liberal procedure in Zambia. As such the manner in which the Act is used by medical practitioners at UTH will be considered.

The UTH Situation

There is need to remember the fact that the subject of abortion is a very sensitive and controversial one. As such, obtaining information at the University Teaching Hospital (UTH) proved to be a rather difficult task. Medical personnel such as nurses who deal with matters of abortions were not free in divulging certain information and did not wish to have their names disclosed despite the assurance that the research was for purely academic purposes. As regards instances where abortions were performed at the hospital, the information given was quite adequate although the writer was not given an opportunity to make copies of the data on premise that such information was confidential. However when it came to the issue of abortion cases that were illegally

performed outside the hospital but were brought there as a result of complications on the part of the woman who had undergone such an abortion the statistics were inadequate.

The sister-in-charge found in the gynaecological ward CO3 disclosed that she could not be helpful in giving the correct and exact number of illegally performed abortions conducted by either the woman herself or unskilled persons because most women came into the ward claiming to be having a miscarriage (spontaneous abortion). Due to the heavy bleeding and obvious discomfort of such women, the main concern for the medical personnel is to attend to this situation as quickly as they can and they are not concerned with putting the woman under inquisition as to whether or not she has undergone a back-street or self induced abortion.

The only way to know that a woman has had a back street abortion is if she discloses this herself and only a few women can make such an admission. Another way of knowing this fact is if in the process of examining the woman foreign objects are found inside her cervix or vagina. A woman who is determined to have an abortion goes to many lengths to achieve her goal and as such lethal chemicals, detergents, salty solutions, traditional herbs and excessive dosages of medicine are among the many things she may take orally or by insertion in the vagina in order to terminate the pregnancy. Sticks and hang wires are also common devices used in an attempt to terminate a pregnancy.

Thus of the most time doctors and nurses find these objects when examining the patients and conclude that a self induced abortion was attempted.

The problem now comes to recording and filing this information. According to the sister in charge, most nurses (especially inexperienced ones) would simply record such a case as a spontaneous abortion and that even for the few that were properly recorded as illegal abortions, a lot of time would be required before the statistics could properly be compiled since both spontaneous and illegally induced abortions were recorded in one and the same book. The only information she could disclose was that an average, the

ward attends to an average of 3-4 cases of illegally induced abortions where sticks and such other objects were discovered upon examination

On the particular day the interview was being conducted, it was revealed that she had just been dealing with a case of a middle aged woman who had a stick stuck in her womb while attempting to terminate a pregnancy and that was the third similar case she had handled on that day.

On account of these figures (3-4 abortions), it means that on average, there are between 21 – 28 illegally abortions dealt with in a week and that is 84 – 112 cases per month and 1,008 – 1,344 per year. This is an alarmingly high rate that needs immediate adequate attention through the instrument of the law. When asked why such cases are not reported to the police, it was revealed that the main concern for the medical personnel was just to help save the life of the mother and not further complicating her life by reporting her to the police. If anything, there was a call to totally liberalize the law on abortion in Zambia so that women who do not want to keep a pregnancy should do so on demand.

Despite the advocacy for a totally liberalized abolition law, it has been discovered in the process of the research that the current Zambia law on abortion is actually quite liberal.

One doctor spoken to says that there is actually no need to liberalise the law because it is liberal enough as it stands. He pointed out that under the provisions of the Act, in particular section 3(1) (a) (ii) an abortion can be conducted under several circumstances. He gave the example of a pregnant university student who might come to the hospital claiming that she cannot cope with the pregnancy as it would disturb her work at school and plans for the future. In such a case she would claim that she is going through bouts of depression because of her circumstances and in such a case, the doctor would perform the abortion. He could then justify his actions by pointing to the sections that have just been outlined.

In the author's opinion, it appears that the doctor cannot be entirely blamed for taking such a course of action. In saying so, the provisions of the Act have been considered. Terms such as "risk of injury to the mental or physical being of the pregnant woman or the foetus..." have not been defined in the Act and as such the provision is open to abuse since the determination of the matter appears to be a subjective one left in the hands of the doctor. In the example the doctor gave during the interview, alternative methods could be given to the woman in dealing with her issue and such methods include, referring her for effective psychological counseling before the drastic step of an abortion is taken. This is a better alternative than abortion since the process is psychologically traumatizing as was seen in the previous chapter. All these are matters to be considered in chapter Five.

Under the Act, there is need to have three doctors present before an abortion can be carried out and one of these should be a specialist. However from the interview conducted with one doctor, it appears that this rule is not strictly adhered to. Rather, all that is obtained are the signature of three doctors. The provision that notice has to be given to the Permanent Secretary of Ministry of Health was not even mentioned during the interview and thus it would be safe to state that this provision is not followed at all.

This being the state of affairs at UTH, it is not surprising to find the number of abortions that are performed at the hospital are higher than they would be in if the law was strictly adhered to as was initially intended during enactment. Thus between the years January 2002 and September 2005, there have been 512 abortions that had been conducted. The procedure is done at a prescribed fee of K10,000 and this fee has seen an increase in the number of abortions performed. Between August 2003 and March 2005, the fee was K200,000 but after seeing a decrease in the number of patients at the hospital, administrative policy demanded that it be reduced to the current fee of K10,000 and hence the recent increase.

Enforcement by the Police

When a similar research on abortion was conducted five years ago by Kaunda⁷⁶, it was discovered that between 1995 – 1997, there was a total of 38 reported cases of abortion at a national level and out of these, 17 were taken to court. Unfortunately, it was not revealed how many cleared and uncleared cases they had been at the time.

Nonetheless, an important fact that one observes is that there has been an even greater decrease from that time to the year 2003. Table 1 and 2 show the number of cases that have been reported to the police and taken to court at national level.

Figures 1 and 2 show how the trend has increased though still at a low level.

Table 1

Reported abortion cases at national level (2000 – 2003) (Police Force Headquarters)

Year	Reports	Arrests	Carried forward	Withdrawn	Total
2000	0	-	-	-	0
2001	2	-	0	0	2
2002	16	15	5	2	11
2003	8	-	0	0	8
Total	26	15	5	2	21

Table 2

Abortion cases taken to court at national level (2000 – 2003)

Year	Convictions	Aquittals	Withdrawn	Pending	Total
2000	0	-	-	-	0
2001	0	0	1	1	2
2002	5	0	2	2	9
2003	1	0	1	6	8
Total	6	0	4	9	19

Figure 1

⁷⁶ Kaunda, Supra note 10, at 22

CASES REPORTED FROM 2000- 2003 AT NATIONAL LEVEL

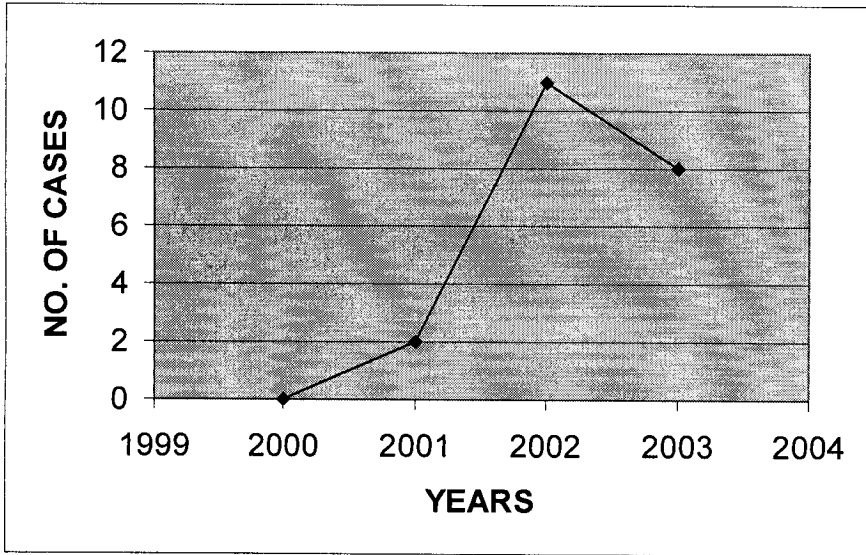
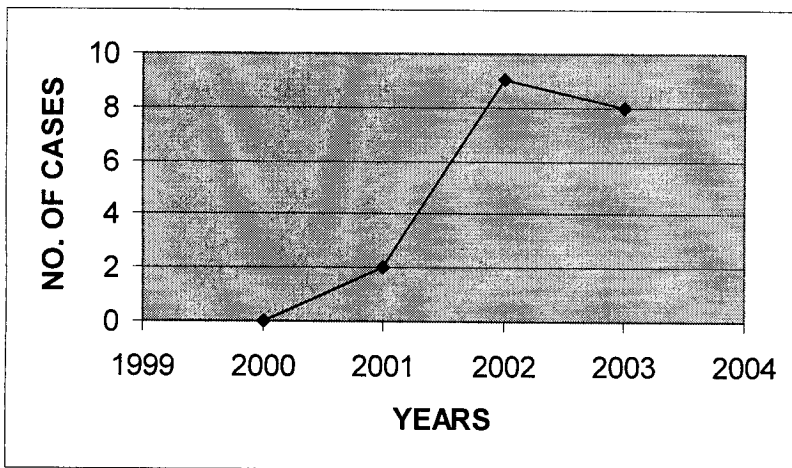


FIGURE 2

CASES TAKEN TO COURTS AT NATIONAL LEVEL (2000- 2003)



An Analysis Of The Information Obtained From The Police

The statistics in table 1 reveal that there has been an increase in the number of abortion cases reported between the years 2000 and 2003 although there had been a slight decrease after 2002.

In 2001, there were only 2 cases reported and this is 9.5 percent of the total number of cases reported between 2000 and 2003.

In 2002, there was a rapid increase in reported case as the number rose from 2 to 11 which is 52.3% of the total. Finally, in 2003, the number decreased slightly to only 8 which is 38% of the total. All these cases were reported at national level and the manner in which the trend occurred is displayed in figure 2. Unfortunately, the figures for the individual provinces in particular Lusaka could not be displayed as they had not been properly recorded at Lusaka central Police. It was only in 2003 that each stage of the case was properly recorded and attended to.

The decrease in the number of cases that were handled between 1995 and 2003 can probably be linked to the fact that while there has been large number of illegally obtained abortions handled at UTH, there have still not been reported to the police as has been discussed

Another explanation for the decreased could be due to the fact that most people are now aware that an abortion is easily obtained at UTH and hence seeing no need to go for a back street abortion.

For the few cases that have been reported at different police stations, Mr. Moonga an officer at Victim Support Unit (VSU) at Central Police revealed that usually information that a particular woman has had an abortion would leak in a neighborhood especially in congested compounds. This is where a foetus is dumped in a pit latrine. Concerned friends and neighbors would then report the matter to the police who thereupon would carry out investigations. As such Mr. Moonga stated that it was quite difficult to learn of abortion cases. Other than neighbors reporting the matter to the police, close friends and relatives of the woman who has undergone an illegal abortion would report the culprit to the police. In few instances, the embittered boyfriend of such a woman would be the one to report the matter and at times, the pregnant woman herself would claim that her

boyfriend is pressuring her into having an abortion in which case he would be charged with procuring an abortion.

However most cases are withdrawn where the complainants have come from relatives or boyfriends to the woman said to have attempted an abortion.

The reason for such a withdraw is that at the time of reporting the matter to the police, the person is overwhelmed by psychological factors such as bitterness and anger and they wish to induce fear into the person who has had the abortion.

However once the complainant realizes the seriousness of the crime, he or she decides not to go ahead with assisting the police with the investigations.

Another reason for withdrawals is Zambia's slow court system with its endless series of adjournments. When the complainants realize how long the matter takes to be handled by the police before being taken to court, they easily get discouraged and hence the withdrawal.

When asked what law the police use in dealing with abortion cases, it was discovered that the Penal Code was the law used. The police claim that the Termination of Pregnancy Act is rarely used because it is specifically meant for doctors who use it as a defence in the event of being accused of conducting an illegal abortion.

Therefore when it was queried if they have never been instances when a doctor has been implicated in an abortion a case and thus the need to refer to the Act in order to assess whether the doctor conducted the abortion within the provisions of the law or not Officer Moonga said he personally had never dealt with such a case before. This fact would be difficult to determine as the records at hand were at a national level and it would not be possible to know who has been implicated.

Situations at the Courts

The data gathered as regards the handling of abortions cases in court was obtained at Police Force Headquarters and Table 2 and Figure 2 reveal that there has been inefficiency in the manner in which the cases are handled. Between the years 2000 and 2003, there was a total of 19 cases referred to court and out of these 9 were still not cleared. This is 47.3 percent of the total. The inefficiency is illustrated when one compares the records between the number of reported cases in 2003 and those taken to court in the same year.

8 cases were taken to court in that year and of those, there had only been one conviction whilst six were still pending. The remaining one case had been withdrawn. Other than the court procedure being slow another reason why people probably withdraw cases is due to the fact that matters are not dealt with in a short period of time.

Credit can be given to the courts for the year 2002 when out of the 7 cases that were handled there, 5 had been dealt with and cleared whilst only 2 were pending. That is 71.4 percent of the cases that were handled there.

CONCLUSION

In this chapter it has been discovered that Zambia's law on abortion is not directly used by the police and that it has been subject to abuse by the doctors who use it. Furthermore, medical personnel and the police have failed in working together when one considers the high rate of illegal abortions that are handled at UTH but are never reported to the police. There is therefore need to consider how this problem can be addressed and these are issues be considered in chapter five.

CHAPTER FOUR

THE GENERAL VIEWS ON ABORTION

This chapter considers the results that emerged after a research was carried out for purposes of obtaining the general public's opinion on the subject of abortion. To this effect questionnaires and interviews were distributed and conducted respectively among a randomly selected group of the Zambian public. These included students, people employed in both the private and public sectors, and also doctors and other medical personnel from the University Teaching Hospital and local clinics.

It is important to stress that the sample selected represents only a small fraction of the entire Zambian population and as such does not reflect all the people's opinion on the topic of abortion. Nonetheless, what the research aimed to achieve is give an insight of how people generally regard abortion even if only to a limited extent. In the same vein, the kind of law regulating abortion which people desire to have is revealed.

Thus the general objective of the research was to determine the public's general attitude towards abortion while the specific objectives of the research were as follows;

- a) to determine whether or not abortion should be available as a woman's personal legal right
- b) to determine whether or not the foetus has a right to life requiring constitutional protection
- c) to determine whether or not there should be a revision of the law on abortion

There were a total of fifty(50)questionnaires initially distributed, but unfortunately only thirty-three(33) were answered and this is the total figure reflected in the tables below. Of these, twenty-five(25) were distributed among "general members of the public"(students, and those in industrial sector) while eight(8)were specifically for those in medical field.

TABLE 1 .PEOPLE IN SURVEY

SEX	GENERAL PUBLIC	MEDICAL PERSONNEL	TOTAL	PERCENT (%)
MALE	12	1	13	39.4
FEMALE	13	7	20	60.6
TOTAL	25	8	33	100

Note: Tables 2-4 represents the general public's opinion only

TABLE 2. ATTITUDE TOWARDS ABORTION

ATTITUDE	FREQUENCY	PERCENT(%)
MURDER	12	48
WOMAN'S RIGHT	3	12
OFFENCE TO GOD	8	32
OFFENCE TO SOCIETY	2	8
TOTAL	25	100

TABLE 3.CIRCUMSTANCES JUSTIFYING ABORTION

CIRCUMSTANCE	FREQUENCY	PERCENT(%)
NONE	6	13.3
WOMAN'S HEALTH AT RISK	26	58
CHILD ABNORMALITIES	6	13.3
FINANCIAL PROBLEMS	4	8.9
ILLEGITIMACY	1	2.2
WOMEN BELOW AGE 16 AND SINGLE	2	4.4
TOTAL	45	100

TABLE 4. FEMALES WHO WOULD GO FOR ABORTION IF LEGALLY AVAILABLE ON DEMAND

	FREQUENCY	PERCENT(%)
YES	2	15.4
NO	11	84.6
TOTAL	13	100

TABLE 5. ABORTION AS WOMAN'S LEGAL RIGHT

	GENERAL PUBLIC	MEDICAL PERSONNEL	TOTAL	PERCENT(%)
AGREE	5	2	7	21.2
DISAREE	20	6	26	78.8
TOTAL	25	33	33	100

TABLE 6. BEGINNING OF HUMAN LIFE

	GENERAL PUBLIC	MEDICAL PERSONNEL	TOTAL	PERCENT(%)
CONCEPTION	19	8	27	82
BIRTH	6	0	6	18
OTHER	0	0	0	0
TOTAL	25	8	33	100

TABLE 7 FOETUS' RIGHT TO LIFE AND CONSTITUTIONAL PROTECTION

	GENERAL PUBLIC	MEDICAL PERSONNEL	TOTAL	PERCENT(%)
AGREE	20	7	27	82
DISAGREE	5	1	6	18
TOTAL	25	8	33	100

TABLE 8 . CURRENT LAW ON ABORTION

	GENERAL PUBLIC	MEDICAL PERSONNEL	TOTAL	PERCENT(%)
RESTRICTIVE	11	6	17	58.6
LIBERAL	7	1	8	27.6
TOO RESRICTIVE	2	0	2	6.9
TOO LIBERAL	1	1	2	6.9
TOTAL	21	8	29	100

***Note:** The total figure of people sampled was 29 because some people among the general public were not fully aware of the current law on abortion

TABLE 9. REVISION OF ABORTION LAW: KIND OF LAW TO EXIST

	GENERAL PUBLIC	MEDICAL PERSONNEL	TOTAL	PERCENT(%)
LIBERAL	7	1	8	24.2
MORE RESTRICTIVE	12	3	15	45.5
LEFT UNCHANGED	5	4	9	27.3
ABOLISHED	1	0	1	3
TOTAL	25	8	33	100

Other Considerations

The reader may have observed that most of the respondents in the medical category were female. It is imperative to stress that this trend was not a deliberate move initiated by the author as this would create an obvious bias. The reason for this trend was due to the fact that most of the men did not respond to the questionnaires given to them.

Ninety-four percent (94%) of the people in the survey were Zambian nationals while the remaining four percent(4%) were of foreign origin.

Data analysis

It is clear from the above that most of the people in the survey do not favor the view of having abortion treated as a woman's personal right. This is as revealed by the 78.8% majority as compared to the 21.2% minority in Table 5. In addition, most people seem to believe that human life begins at conception (82%) while only a few (18) believe it is at birth. It is probably for this reason that the same number of people (82%) would wish to have the foetus' right to life protected under the constitution while a similar number to that above (18%) are opposed to such an idea.

Fifty-eight percent (58%) were of the view that abortion is justified in cases where the woman's physical or mental health were at risk while 13% thought abortion is never justifiable.

A more restrictive law on abortion seems to be desired (45%) by the people in the sample while only twenty-four percent (24%) wish to have a liberal kind of law.

Conclusion

These results have revealed the general attitude of some people on abortion as well as the kind of law which they would wish to regulate the practice. Looking at the statistics it is obvious that most of the people have a negative attitude towards abortion and this includes doctors who have said a practitioner who regularly performs abortions tends to lose his or her respect among fellow practitioners. This negative attitude among these people and Zambians generally can be traced to the inherent African custom of regarding children as a value and blessing.

Accordingly it is submitted that the legislature consider the views of the Zambian people when enacting important laws such as those on abortion as it is rather sensitive and touches on moral and cultural aspects.

CHAPTER FIVE

AN OVERVIEW OF THE STUDY

The law on abortion in Zambia namely, the Termination of Pregnancy Act,1972 was enacted for purposes of allowing abortion on strict medical and psycho-social grounds. Thus, abortion is generally illegal in Zambia. However abortions are carried out on a wide scale , and the reasons under which they are conducted are not the ones that were intended by the legislature. The law on abortion is therefore ineffective.

In the author's view, when a law does not appear to be working or if it operates in isolation, it is the best to do one of two things namely, either to do away with that kind of law altogether or alternatively, to put up measures for reform in such a way as to ensure that the law is effective. Since it has been submitted that the current law on abortion is ineffective, a critical and comprehensive assessment of whether the law on abortion should be totally liberalized and abortion treated as a woman's personal right was necessary. The chapter therefore considers the results of the research and also recommendations for reform as well as future prospects. There is then a conclusion submitted .

DISCUSSION

Chapter one revealed to us that the law allowing abortion in the West emerged in an effort of dealing with cases in which a woman's mental or physical health were highly endangered. However, as time went on, the situation got out of hand and the law on civil liberties, particularly that of personal liberty was used to advocate for a woman's right to abortion. With the sexual revolution, there was an obvious decline in morals and any law that restricts sexual behavior was and is regarded as an unjustified imposition on the sacred sphere of personal liberty. Therefore laws that regulate (d) abortion were/are totally rejected since intercourse cannot be freely engaged in without preparation unless a woman is willing to risk being forced to bear a child.

Abortion is thus seen as the only way an individual can have control over her sexual freedom.

But what has to be considered is the fact that such freedom is being obtained at the expense of another person's right to life. In addition, if people are given the right to engage in behavior that has foreseeable consequences and yet do not take responsibility for their actions, then one of the law's purposes of regulating conduct among people in a given society is clearly not working. Irresponsible sexual conduct needs the regulation of the law since a human life is the result. If this human life was absent the law would not be involved in people's sexual conduct.

Chapter two was dedicated to discussing the controversy surrounding abortion and it was discovered that anti-abortionist's views lean towards the naturalist school of thought in the sense that they are deeply rooted in religious, ethical and moral reasons. The foetus is regarded as a human being and part of life's continuous process. In contrast, the advocates of abortion take a positivist view in the sense that they wish to exclude moral and religious elements when considering how the law on abortion should be enacted. They emphasize on a woman's right to do as she wishes with her body and this includes terminating an unwanted pregnancy

In the course of this research, it has been discovered that most people (including the author, initially) have inadequate information regarding the foetus. For instance, the scientific fact revealing that the genetic material that determines an individual's physical characteristic occurs at conception was a fact not known to many people interviewed during the research as well as those who answered the questionnaires regarding abortion. Most people seem to believe that this only happens between the second and fourth month. Therefore the fact that the foetus has other significant attributes which liken it to a fully grown adult in just the fourth week of pregnancy is also something most people probably not aware of.

Like most people, the author has always thought abortion to be morally wrong but the reasons behind such a position have never been fully appreciated. However after conducting this research, it has been realized just how much the foetus' right to life needs constitutional protection. The fight against abortion is not one that should be handled casually because it is an issue that involves the lives of potential people who will one day constitute society if given the chance.

It is said that where fundamental human rights are concerned, there is no right which is higher in hierarchy than the other. Nonetheless when one considers what should be given paramount importance between personal freedom and the right to life, it is clear that the latter overrides the former since it is from this right that the other rights emanate.

With the latest medical technology such as ultra-sound scan, the fetoscopy and several others used to monitor foetal development as discussed in chapter two, how is it possible to ignore the foetus as a human being and still insist on the woman's right to abort. As the proponents of abortion have correctly pointed out the original purpose for passing restrictive abortion laws was not to protect the foetus but to protect women from a surgical procedure considered more dangerous than childbirth. Accordingly since childbirth is now considered more risky than hospital abortion, it has been stressed that abortion should be allowed to protect the woman.⁷⁷ What they forget to do is point to the fact that the early laws that made abortion an offence before viability were made due to inadequate medical information about the developing foetus. Since there has been an advance in such information which has enlightened society on just how unique and alive the foetus really is, the law should accordingly be enacted in such a manner as to protect its life against arbitrary deprivation.

It has been said that liberal abortion laws that view abortion as a woman's personal right are intended to purge the law of moral values and ethics in society. However taking such a course of action is never ideal because the results usually tend to be chaotic. Morality has always had an impact on the law in the sense that the law has been

⁷⁷ *Post* p22

profoundly influenced both by conventional morality and the ideals of a particular group⁷⁸. Law cannot be talked about in complete isolation of morality and the ideals of justice. Justice happens to a sub-sector of morality and a purpose which every legal system attempts to achieve. Justice has a number of principle features among which include the concept of equality before the law. Whenever a law is arbitrary in nature and makes reference to irrelevant factors such as weight, colour, beauty etc, then such a law is unjust. It is because irrelevant factors were being taken into account that slavery was and still is justified in some societies. Similarly, race and religion played a dominant role in the laws of apartheid South Africa and Nazi Germany. It is the same with the case on abortion in light of the fact that age is used as a form of discrimination against the foetus as correctly pointed out by other anti-abortionists.⁷⁹

Other than these factors the fact that there is a likelihood of harmful and psychological effects occurring after a woman undergoes an abortion is something that the legislature need to consider when drafting the law on abortion.

In chapter three, the effectiveness of the Termination of Pregnancy Act of 1972 was considered as well as the manner in which the law was enacted. It was discovered that quite a number of illegal abortions are dealt with at UTH. Unfortunately, these cases are never reported to the police by medical staff and similarly, there is no effort made on part of the police to try and investigate such cases at the hospital. This attitude on the part of medical personnel is attributed to the fact that there is no legal duty imposed to report the cases. As such, it is imperative that in future, the law be enacted in such a manner as to impose a legal duty to report such cases.

The law on abortion in Zambia as it currently exists is rather a subjective piece of legislation open to abuse and this was not the intention of the legislature when framing the law as was seen in chapter three.

⁷⁸ Hart. H. The Concept of Law, p 151(1975)

⁷⁹ Post, p 27

However, the framers of the law overlooked a number of important factors such as the failure to specifically define what constitutes 'injury to physical and mental health'. As a result, a number of abortions have been carried out on irrelevant and unreasonable grounds. Furthermore, the requirement that three doctors confirm that an abortion is necessary is a provision that is not strictly complied with because doctors merely give their signatures and do not sit down to seriously consider the issue especially in the event of an emergency. The provision that notice be given to the Permanent Secretary of Ministry of Health is unrealistic and a practice that has hardly ever been complied with. Finally bearing in mind the fact that the Act were enacted in 1972 when biomedical and similar technology was not as advanced, there is need to amend the law as it is an old piece of legislation which cannot apply in the current scientific world.

In chapter four, the intention was to consider the views of the general public on the matter of abortion. This is because jurisprudential studies of the law have shown that the question of what the law ought to be is an important question of morality since it is ultimately based on value judgments of persons within a particular society which are properly reached after the exercise of reason⁸⁰. Thus there was a need to consider peoples views on the subject of abortion in Zambia. The law should accordingly be enacted in line with such views.

As revealed in chapter four, most people regard abortion as murder or an offence against God or society. These are the views of a small group of people but they are nonetheless still a part of the Zambian population whose opinions need to be considered when the law on abortion is being enacted instead of transporting Western laws without regard any to the cultural views of the Zambian people. As such the next section will dwell on recommendations that the author hopes will be helpful in achieving such an objective.

RECOMMENDATIONS/PROPOSALS

There are basically five recommendations that have been made in the paper in an effort to help end the problem of abortion .

⁸⁰ Austin, C; Essential Jurisprudence,(2000) p19

1. Public Education About The Foetus and Its Right To Life

It has been discovered in the course of this research that some people do not regard the foetus as a human being entitled to the right to life. As such, it is submitted that comprehensive programmes to teach both men and women on the foetus' uniqueness as a human being should be embarked on. This could be by way of letting people know that it is actually at conception that one's physical characteristics are determined. There is also need to increase the availability of advanced biomedical machines such as the ultra-sound scan at local health centers in order for the expectant mother to be convinced of just how alive the unborn foetus.

2. Improved Access To Counseling Services

There is need to ensure that a woman who contemplates an abortion receives proper counseling. The possibilities of Post Abortion Syndrome (PAS) need to be told to such women. Other than the psychological effects, women need to know of the possible physical effects of the abortion such as the likelihood of breast cancer in later life, infertility, ectopic pregnancies, pelvic inflammatory disease, as well as cervical damage.

3. Increased Orphanage Facilities

There is need for the Government to open up more and improved orphanages and this is especially important when one considers the high number of street kids. Those who still do not want the responsibility of a child may leave these children at such institutions. There are plenty of childless couples who are willing to adopt children and they should be given such an opportunity by having access to children found in orphanages.

4. Expansion and Strengthening Of Family Planning Programmes

One of the reasons woman seek abortions is due to having a large number of children. As such there is need to educate women on the importance of family planning and the several methods of family planning need to be readily available at all hospitals and health centers so as to avoid unwanted pregnancies.

5..Reforming The Law on Abortion

The results of the survey in chapter four revealed that generally there was a rejection of treating abortion as a woman's personal right. From this therefore, it follows that the law should give effect to the moral values of the people and as such the foetus should be given constitutional protection of the right to life. Although article 12(2) of the Constitution of Zambia (1991 as amended in 1996) recognizes an unborn child as a person and affords it protection against arbitrary deprivation of life, this protection is not absolute as abortion is allowed under the Termination of Pregnancy Act, 1972, a law subjected to a wide range of abuse as seen above. The effect has been that the foetus has not been protected against arbitrary deprivation of life. In addition as pointed out by one scholar sections 208 and 221 of the Penal Code, 1931, Cap 87 of the Laws of Zambia contradicts the constitutional provision in the sense that when the respective sections are read in full it leaves one with the impression that the unborn child is not recognized as a person under the criminal law in Zambia⁸¹. There is therefore need to amend the Termination of Pregnancy Act and the Penal Code which are clearly in violation of the constitutional provisions. They should be enacted in such a way that abortion be allowed only in life threatening situations on the part of the pregnant woman since as the early law makers on abortion observed, it would clearly be unfair and an injustice to impose a legal obligation on the mother to prefer her child's life to her own. If she makes the choice of self-sacrifice it has to be in obedience to a higher law of love than common morality or the law could enforce⁸².

These life – threatening situations need to be clearly defined by the law makers and this can be done by considering what experienced medical doctors would call life – treating situations. The possibility of having a child born with a deformity as a provision that allows abortion needs to be eliminated because even the deformed child is entitled to the right to life. Similarly the provision of risk of injury to the woman's physical or mental health should be done away with because it would still be open to abuse in order to justify unnecessary abortions. Elimination of the provision relating to the welfare of the mother's other children also needs to be effected as it is an unreasonable provision

⁸¹ K ulusika supra, note 6 at 127

⁸² Noonan, supra at 4

because among other things, establishing whether the woman's other children would be affected by the pregnancy is a task which is almost impossible to achieve . Finally the law has to be enacted in such a way that those who undergo or perform illegal abortions face penal sanctions which may vary from imprisonment to rehabilitation depending on the circumstance of a given case.

Future prospects

Abortion is a serious problem that needs to be adequately addressed and the policy makers need to consider how to curb the activity and this can be by considering the recommendations that have been advanced. However with the poor economical situation existing in Zambia, it is not possible that the problem of abortion is one that can be immediately dealt with. As such a joint effort to help bring an end to the problem can start with medical personnel who should report cases of illegal abortion to the police and the police should be seen to do their work by further investigating such cases and these duties should have the force of law. A future researcher is also challenged to examine how policy makers and the legislature can be persuaded in drafting a law against abortion after conducting a large scale survey of people's view on abortion.

Conclusion

This paper was intended to consider whether the law on abortion should be legalized in Zambia. The research had three main objectives namely to determine whether or not abortion be available as a woman legal right ;to determine whether or not the foetus has a right to life and finally to determine whether or not there or there should be a reform on the law on abortion .

It has been concluded that the foetus does have the right to life, which requires constitutional protection, and that abortion should not be available as a woman personal right.

Finally, it was discovered that the current law on abortion has been formulated in such a manner that abortion is available on demand which it is believed was not the initial intention of the legislature. On the basis of all that has been discussed, there is need to have the law made more restrictive by considering the points that have been suggested in this work.

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- SARVIS,B AND RODMAN H; **The Abortion Controversy**, New York, MC GRAW. HILL Publishers, (1974)

WEBSITES

- [http: /www.wcla.org/articles/procom.htm/](http://www.wcla.org/articles/procom.htm/)
- <http://www.abortabortions.com>
- <http://www.afterabortion.info>
- <http://www.prochoiceactionnetwork-canada.org/civilize.html>

STATUTES USED

- The Penal Code, 1931,CAP 87 of The Laws of Zambia,
- The Termination of Pregnancy Act; 1972,CAP 304 of The Laws of Zambia.

Serial # []

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

Topic: Abortion: should it be legalised in Zambia?

Dear Respondent,

This information is intended for gathering data of an academic nature meant for research purpose.

You have been selected and are requested to participate in this survey by way of answering the questions in this questionnaire.

All the information that you will provide will be treated as confidential and I am therefore, asking for your co-operation by answering the questions honestly.

Instructions

1. For open- ended questions, a space has been provided for your answer. For example: Tribe: Tonga
2. For questions with alternatives, tick the most appropriate answer.

For example: (a) Male [] b. Female []

SECTION A

1. Please state your age (last birthday) []
2. Sex:
 (a) Male [] (b) Female []
3. Nationality (specify) []
4. Religion :
 a. Catholic [] b. Protestant []
 c. Muslim [] d. No religion (atheist) []
5. What field of medicine are you specialised in?
 (e.g general practice, obseries, gynaecology etc) []
6. How many years have you been specialised in this field?..... []

SECTION B

7. Do you think an ordinary woman understands the term "induced abortion?"
 a. Yes [] b. No []
8. If yes to question (7), can you please explain "
.....
.....
.....
9. It is claimed that abortion is legal under certain circumstances in Zambia?
 a. Agree [] b. not agree []
10. If Yes to question (9), can you briefly explain under what circumstances an abortion is allowed.
.....
.....
11. Is the current law on abortion.
 a. restrictive [] b. liberal []
 c. too restrictive [] d. too liberal []

12. Should the current law on abortion be;
- a. liberalised [] b. made more restrictive []
- c. left unchanged [] d. abolished []
13. Does a medical practitioner who regularly performs legal abortion []
tend to lose the respect of his fellow practitioners?
- a. Yes [] b. No []
14. Have you ever performed an abortion on a client? []
- a. Yes [] b. No []
15. Have you observed any harmful physical or psychological effects on a
woman who has undergone legal abortion ?
- a. Yes [] b. No []
16. If yes to question (15) , please describe the effects (if any) that you
observed.
-
-
-
17. Do you agree with the proposition that abortion be available to
women as a personal right? []
- a. strongly agree [] b. Agree []
- c. disagree [] d. strongly disagree []
18. If the law made abortion available as woman's personal right, would
you yourself carry out abortions? a. Yes [] b. No []
19. If yes to question (18) at what stage would you carry out the
abortion? []
- a. 0 - 12 weeks [] b. 12 - 24 weeks []
- c. 24 weeks or more []
20. Would you aid a client in obtaining an abortion even if it were
illegal? []
- a. Yes [] b. No []
21. At what stage do you think human life
begins? []

a. at conception [] b. at birth []

b. other (specify)

22. Do you view the unborn foetus as a human begin? []

a. Yes [] b. No []

23. Do you think the unborn foetus has a right to life? []

a. Yes [] b. No []

24. If yes to question (23) do you think the foetus' right to life should be recognised and protected under the constitution ? []

a. Yes [] b. No []

25. What penalty (sanction) if any, if do you think should be given to those who violate such a right?

26. Other comments.....
.....
.....

THANK YOU FOR YOUR COOPERATION

Serial # []

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

Topic: Abortion: should it be legalised in Zambia?

Dear Respondent,

This information is intended for gathering data of an academic nature meant for research purpose.

You have been selected and are requested to participate in this survey by way of answering the questions in this questionnaire.

All the information that you will provide will be treated as confidential and I am therefore, asking for your co-operation by answering the questions honestly.

Instructions

1. For open- ended questions, a space has been provided for your answer. For example: Tribe: Tonga
2. For questions with alternatives, tick the most appropriate answer.
For example: (a) Male [] b. Female []

SECTION A

- 1. Please state your age (last birthday)..... []
- 2. Sex:
 - a. Male []
 - b. Female []
- 3. Nationality []
- 4. Religion :
 - a. Catholic []
 - b. Protestant []
 - c. Muslim []
 - d. No religion (atheist) []
- 5. What is your occupation?(e.g student, doctor etc) []
.....

SECTION B

- 6. What do you understand by the term abortion? []
.....
.....
- 7. What is your general attitude towards abortions? []
 - a. It is murder []
 - b. It is a woman's personal right? []
 - c. It is an offence against God []
 - d. It is an offence against society []
 - e. Other (please specify)..... []
.....
- 8. It is claimed that abortion is legal under certain circumstances []
in Zambia, Is this true or false
a. True [] False []
If true to question (8), please answer questions 9 – 12. If No, proceed
to question 12 and ignore questions 9-12
- 9. Under what circumstances is abortion legal in Zambia []
(briefly explain)
.....
.....

10. Do you think that the current law on abortion is:

- a. restrictive [] b. liberal []
c. too restrictive [] d. too liberal []

11. Should the current law on abortion be;

- a. liberalised [] b. made more restrictive []
c. left unchanged [] d. abolished []

12. Under what circumstances do you think abortion should be performed? (you can tick more than one)

- a. No circumstances justify abortion []
b. where a women's physical health would suffer by having a child []
c. where the women's mental health would be seriously affected by having a child []
d. where the child may be born deformed []
e. where the mother has so large a family that another would cause financial hardship and worry []
f. where the child would be illegitimate []
g. where the mother is under 16 and unmarried []
h. under any circumstances []

13. Do you agree with proposition that abortion be available to women as a personal legal right?

- a. strongly agree [] b. Agree []
c. disagree [] d. strongly disagree []

14. Questions (15-17) apply to females only so ignore question (15 - 17) and proceed to question 18 if you are male.

15. If you were faced with an unwanted pregnancy, what course of action would you take? (Tick only one)

- a. undergo an abortion even if it were illegal []
b. keep the pregnancy, and look after the child []
c. give up the baby for adoption when it is born []

16. If abortion was legally available on request, would you yourself undergo an abortion if faced with an unwanted pregnancy?

- a. Yes [] No []

17. Have you ever had a legal abortion?

a. Yes [] No []

[]

18. Would you advise any woman to undergo an abortion?
(whether spouse, girl-friend of friend)

a. Yes [] No []

[]

19. Do you know of any close relative or friend who have
undergone a legal abortion?

a. Yes [] No []

[]

20. If you answered yes to either question(17) or (19) above,
did you observe any harmful physical or psychological
effects after the abortion?

a. Yes [] No []

[]

21. If yes to question (20), please describe the effects, if any
observed

.....
.....
.....

22. When do you believe human life begins

a. at conception [] b. at birth []
b. other (specify)

[]

23. At what stage of the pregnancy do you think that the genetic
material that determines an individual's physical characteristics
occurs?

a. at conception []
b. at 4 weeks []
c. at 8week []
d. at 12 weeks []
e. at 36 weeks []
f. if not know []

[]

24. Do you see the unborn foetus as a human begin?

a. Yes [] b. No []

[]

25. Do you believe the unborn foetus has a right to life?

[]

a. Yes [] b. No []

24. If yes to question (23), do you think the foetus' right to life should be recognised and protected under the constitution ? []

a. Yes [] b. No []

25. What penalty (sanction) if any do you think should be given to those who violate such a right?

26. Other comments.....

.....
.....

THANK YOU FOR YOUR COOPERATION