



MIDLANDS STATE UNIVERSITY

FACULTY OF LAW

A CRITICAL ANALYSIS OF THE IMPACT OF THE CONSTITUTION [AMENDMENT NO. 20] ON THE REGULATION OF ABORTION IN ZIMBABWE

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

By

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APPROVAL FORM

The undersigned certify that they have read and recommended to the Midlands State University for acceptance a research project entitled **a critical analysis of the impact of the Constitution [amendment no. 20] on the regulation of abortion in Zimbabwe** submitted by Claude E. T. Bare (R104281B) in partial fulfilment of the requirement of the Bachelor of Laws Honours Degree (HLLB) at Midlands State University.

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DECLARATION

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

.....

STUDENT SIGNATURE

...../...../.....

DATE

DEDICATION

I dedicate this dissertation to the strongest, smartest, and wisest person I know; me.

ACKNOWLEDGEMENTS

First and most importantly I would like to thank the creator of the Universe and all that is in it, GOD, for giving me the opportunity and ability to do and accomplish this dissertation and subsequently my LLB. JAH; I declare my allegiance to you.

As I reach the finish line of this LLB race, which is the start line of a new race. I acknowledge that the race I have just completed would not have been possible without the support of my family, mentors, and friends.

I would like to gratefully and sincerely thank my Supervisor Dr. Tinashe Madebwe for his guidance, understanding, patience, and most importantly, his friendship during the writing of my dissertation. He encouraged me to not only successfully complete this work but to grow as a critical and independent thinker. I am not sure many graduate students are given the opportunity to develop their analytical minds and self-sufficiency by getting guidance of such passionate and intelligent mentorship. Thanks Doc.

I especially thank my mom Thelma McCullagh, my late dad Claude Bare (also) and my late grandmother Ellen McCullagh. You have sacrificed so much for me and provided unconditional love and care. Thank you for encouraging me in all of my pursuits and inspiring me to follow my dreams.

To my support unit, words are short to express my deep sense of gratitude thank you, Herbert M, John M, Milton B, Gift B, Daniel B, Bryan P, Tendai B, Mutsa B, Rutendo B, Tina B, Linda B, Amanda P, Clayton B, Tafie M, Mr & Mrs Bwerazuva, Denzel M, Peter M, Tapfuma M, Sandra T, Danny K, Stan C, Nyasha C, David D, Benedicta D, Narrelle D, Maria M, Omen M.... eish, you are just too many. So if you also part of the team but didn't make it on this list check for your name in my next, LLM and LLD thesis.

Now, owing to the liberty permitted by this Acknowledgement section I would like to address a minor issue that is not related to my dissertation but may be helpful to someone. I know all Zim lawyers are good at written English but spoken English for

some 'eeeeeeeeee'..., broken English is a 'no no' for lawyers so let's sort that out.

ABSTRACT

This dissertation sought to critically analyse the impact of the Constitution [Amendment no. 20] on the law regulating abortions in Zimbabwe, taking into account that the Constitution provides for the protection of reproductive rights and adopts the concept of Constitutionalism. The study brought to attention crisis that the prolife Abortion law conflicts with abortion practices in reality as there are high numbers of abortions being performed in society and this is an indication of the existence of a legal problem. Further, the study established that the turn to constitutionalism and the protection of reproductive rights make the prolife abortion law untenable. Therefore, it has being recommended that the Abortion law be changed to provide for choice.

Chapter one

1.1 Introduction

The termination of pregnancy debate, popularly known as the prochoice versus prolife debate is long standing. The crux of this debate is the right of a foetus to live versus the right of a woman's autonomy which includes her right to choose whether to carry a pregnancy to term. This debate has become interestingly topical in Zimbabwe with the turn to the 2013 Constitution¹. This dissertation will analytically examine the termination of pregnancy regulation in Zimbabwe, in light of the new constitutional turn.

1.2 Background of the study

Abortion is a contentious issue in Zimbabwe as a result of its regulation by a highly restrictive law. Abortion is regulated by the Termination of Pregnancy Act [Chapter 15:10] which became responsible for its regulation in the country in 1977 after it codified the common law position and even extended the scope under which the restriction could be waived. In addition to the common law circumstance that permitted abortion to save the mother's life² the Act also permits abortion where there is a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he/ she will permanently be seriously handicapped³ ; and where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse such as incest or rape⁴. However, to be able to exercise this right one should have the required medical fee and satisfied the demands of the rigorous procedure that ought to be adhered to⁵. In complement to this, the Criminal Law (Codification and Reform) Act [Chapter 9:23] makes any termination which falls out of the scope of the Termination of Pregnancy Act a criminal offence⁶.

¹Constitution of Zimbabwe [Amendment No. 20].

² See Section 4(a) of the Termination of Pregnancy Act.

³See Section 4(b) of the Act.

⁴See Section 4(c) of the Act.

⁵Section 5 of the Act, outlines the conditions under which a pregnancy may be terminated.

⁶See Section 60 of the Criminal Law (Codification and Reform) Act.

Importantly, there is evidence that suggests that the prolife law has not stopped the incidence of abortions in society⁷. The number of women turning to illegal abortion is so high that, as far back as 2003, government estimated abortion performance to be at an annual rate of 80000 incidences⁸. Government in full acknowledgement of this crisis and in a bid to remedy it has implemented a post-abortion care policy that deals with the treatment of abortion victims⁹. However this policy has failed to effectively remedy the crisis. To this end, a study in Zimbabwe revealed that most women are afraid to seek post-abortion care because of fear of the illegal status of abortion in the country¹⁰.

It is against this background that a new constitutional dispensation came into force in 2013. The 2013 Constitution of Zimbabwe signifies a turn towards a constitutional democracy because among other elements it has increased the protection of fundamental rights. It aspires to constitutionalism and this is evident in its establishment of a Constitutional Court to ensure constitutional law protection and development. More importantly for present purposes, the Constitution provides in section 76(1) that reproductive rights should be protected¹¹. Further, section 48 (3) the Constitution provides that, “An Act of Parliament must protect the lives of unborn children, and the Act must provide that pregnancy may be terminated only in accordance with the law”. Notably, no Act has been constructed in response to this provision. The only Act that regulates pregnancy termination is the Termination of Pregnancy Act that predates the Constitution.

1.3 Statement of the problem

In the absence of the creation of a new Act which will give effect to section 48(3) of the Constitution, abortion regulation will continue to be given effect by the Termination of Pregnancy Act to the extent of its consistency with the Constitution. However, the adoption of the 2013 Constitution symbolically represents a turn to constitutionalism. Notably, it becomes problematic in that constitutionalism aspires to the rule of law which aspires to individual rights. Therefore, in a constitutional

⁷ The termination of pregnancy law as regulated in the Termination of Pregnancy Act.

⁸ Centre for Reproductive Rights ‘Laws and Policies Affecting Women’s Reproductive Lives Implementation, Enforcement, and the Reality of Women’s Reproductive Lives’ (2003) Reproductive Rights in Zimbabwe 8

⁹ United Nations Population Fund ‘The Cairo Consensus at Ten: Population, Reproductive Health and Global Effort to End Poverty’ (2004) *State of the world population*59.

¹⁰ *ibid*

¹¹ See section 76 (1) of the Constitution.

democracy subscribing to constitutionalism choice should not be suppressed and abortion should not be outlawed.

1.4 Research aims and objectives

1. To discuss the conflict between the law regulating abortion and practice of abortion in reality in Zimbabwe.
2. To explore the impact of the constitution on the conflict between the law and practice of abortion in Zimbabwe.
3. To conclude and proffer recommendations to the Zimbabwean approach on choice.

1.5 Methodology

The researcher undertakes to employ a descriptive approach by assessing the conflict between the law and practice and discussing the reality of abortion in Zimbabwe. In addition, doctrinal analysis will be used in terms of which the researcher will assess doctrine, notably constitutionalism and its constituent elements. Further, a comparative approach will be relied on to the extent that it may be necessary.

1.6 Literature review

There is not much literature on abortion in Zimbabwe but in other jurisdictions, as in Zimbabwe, abortion is a contested issue. Accordingly, the contestation of abortion is a long-standing debate that boils down to two issues which are, the protection of the right of the woman to choose or the right of the foetus to live respectively referred to as the prochoice versus the prolife debate.

Prolife advocates argue that government has a duty and responsibility to protect and preserve human life regardless of viability, intent and quality of life concerns¹². They are also of the perspective that life begins at conception. Therefore, abortion is murder and should in all circumstances be prohibited. Conversely, prochoice advocates' believe that individuals have unlimited autonomy with respect to their own

¹²Tom Head, Pro-Life vs. Pro-Choice,<http://civilliberty.about.com/od/abortion/tp/Pro-Life-vs-Pro-Choice.htm>. (Accessed 1 September 2015).

reproductive systems as long as they do not breach the autonomy of others¹³. Therefore, whether to have an abortion should be a woman's choice for the first two trimesters as within this period a foetus does not have a life of its own but is merely part of the woman's body.

The motion one defends with regard to the debate depends on the rights they choose to uphold. However, certain trends are apparent where constitutionalism is pursued regardless of the type of Constitution. The trend reflects the observance of certain rights and freedom that appeal to some kind of liberty right. These rights and freedom entail: 1) the right to be free from social coercion on personal matters of personal importance, such as procreation, 2) the freedom to follow ones conscience on reasonable disputable moral matters, 3) freedom from involuntary servitude which encompasses the right to refuse to provide help or even critically needed assistance by others, 4) freedom from body invasion and injury¹⁴.

Certainly, it is not the set of codified or un-codified principles that a state refers to as its Constitution that determines whether that state will successfully transition to a constitutional democracy based on constitutionalism¹⁵. However, it is apparent that, in instances where constitutionalism is pursued, by its very nature, the idea of constitutionalism entails protection of the right to have an abortion.

1.7 Synopsis of chapters

Chapter one provides a prologue, background to the study, statement of the problem, outlining the research aims and objectives, overview of the literature or current legal framework on the subject, the research methodology as well as a synopsis of chapters. Following from this, chapter two will discuss the conflict between the law and practice of abortion in reality taking into account that the law precludes abortion but in practice abortion is being performed at an alarming rate in Zimbabwe.

Chapter three will explore the impact of the Constitution on the conflict between the law and practice of abortion in Zimbabwe. And, this will be followed by chapter four the concluding chapter, which contains a summation of the findings of the study. It

¹³Ibid.

¹⁴ L Shrage *Abortion and Social Responsibility: Depolarizing the Debate* (2003) 41.

¹⁵H. Barnett *Constitutional and Administrative Law* (2003) 6

also sheds light on the conclusions drawn from the study. This chapter ends by recommendations on the way forward.

Chapter Two

2.1 Introduction

Prior to abortion being regulated in terms of the Termination of Pregnancy Act, abortion was regulated at common law. This chapter explores the relevant regulatory framework on abortion laws and its impact on practice in Zimbabwe.

2.2 The regulatory framework of abortion in Zimbabwe

Across the world, abortion regulatory frameworks typically assume one of three forms. Abortions will be all prohibited, all permitted, or prohibited but permitting special instances that are specified in the law. These instances may be, when the continuation of the pregnancy poses a threat to the woman's life or, when the pregnancy is a result of unlawful intercourse such as rape or incest and any other conditions specified in terms of the law.

Zimbabwean law permits abortion under stringent circumstances. The legislative regulatory framework on abortion which originated from common law consists of the Termination of Pregnancy Act and Criminal Law (codification and reformed) Act.

2.2.1 Common Law position

Abortion regulation in Zimbabwe originated in common law where abortion was not permitted under any circumstance except when it was necessary to preserve the life of a woman¹⁶. There was no distinction between early abortions and late abortions.

It is not clear if the law was based on protection of a future human or on the protection of women from harmful practices¹⁷. What is clear though is that it was not based on protecting the foetus as if it was a human being thus distinguishing the crime of abortion and murder. According to Roman Dutch common law legal status of personhood was gained at the live birth of a child¹⁸.

2.2.2 Statutory law position

¹⁶S v Ncube HB 119/2003.

¹⁷J McGill *Abortion in South Africa: How We got Here, the Consequences, and What is Needed* (2006)200.

¹⁸Cronje and Heaton *The South African Law of Persons* (1999) 9.

The Termination of Pregnancy Act replaced the common law regulating abortion¹⁹. As the principal Act regulating abortion, the Termination of Pregnancy Act clarifies and extends the grounds under which abortion was, and continues to be regulated. The Act prohibits any abortion that fails to fall within the circumstances defined within section 4 of the Act²⁰. Accordingly, abortion is permitted to save the woman's life²¹, where there is a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he/she will permanently be seriously handicapped²²; and where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse such as incest or rape²³.

Even after a woman's case falls within the defined circumstances, there is another hurdle to cross. The Act provides strenuous conditions under which permitted abortions are to be performed²⁴. Termination of pregnancy shall only be carried out by a medical practitioner in a designated institution with the written permission of the superintendent thereof. For the first two circumstances laid out in section 4 (a) and (b), the superintendent must be satisfied that two medical practitioners of different practices have confirmed the need for the termination. For unlawful intercourse the superintendent may grant permission only after a Magistrate issues a certificate. The Magistrate will first establish whether the matter was first reported to the rightful authorities then assess the application in light of the evidence produced. Lastly, the Magistrate should then establish on a balance of probabilities that the pregnancy is indeed a result of unlawful intercourse. This procedural aspect is so complicated to the extent that it seems to retract the right to terminate a pregnancy that was already restrictively provided for in the Act.

The challenges realised in the application of the law were perceived in the case of *Mapingure* where a victim of rape failed to get an abortion due to complications arising from the strenuous procedural requirements even though she qualified to get one in terms of section 4(c) of the Act²⁵. It was observed that the termination

¹⁹This position that the common law regulating abortion died to the act was up held in various cases including, *S v Ncube* HB-148-88 and *S v Mapuranga* HB 242-86.

²⁰See Section 3 of the Termination of Pregnancy Act.

²¹ See Section 4(a) of the Act.

²²See Section 4(b) of the Act.

²³See Section 4(c) of the Act.

²⁴See Section 5 of the Act.

²⁵*Midred Mapingure v Minister of Home Affairs and OTHERS* SC 22/14

conditions are complex and the normal procedure of termination of pregnancy is prone to administrative delays, one of the reasons being the different functions of the various offices that are involved in authorising the termination. Safe abortions have a time limit and the older the pregnancy is; the more unsafe it becomes to terminate. Therefore, a procedure that is likely to delay into a period which is unsafe for a woman to abort is a procedure that infringes on the right to have an abortion. The law in terms of the Act poses a threat to even those whose circumstances entitle them. With this regard, the Termination and Pregnancy Act is a highly restrictive piece of legislation that bans the choice of a woman to terminate her pregnancy.

Further, the Termination of Pregnancy Act is supported by the Criminal Law (Codification and Reformed) Act which criminalizes all abortions that are performed outside the scope of the Termination of Pregnancy Act²⁶. However, abortion is distinguished from murder by the Criminal Procedure and Evidence Act [Chapter 9:07] which states that a fetus becomes a full person for the purposes of a charge of murder when it first breathes, whether or not it is entirely separated from the body of its mother and whether or not it has an independent blood circulation²⁷.

2.3 The practice of abortion in reality

Notwithstanding the existence of laws regulating abortion, these laws are not practically being relied on. As far back as 1990 the Minister of Health said, on record, that about 60 000 abortions mostly domestically arranged or self-induced were occurring in Zimbabwe every year and about 600 persons dying every year as a result of complications following illegal abortions²⁸. So high has the abortion rate been in Zimbabwe that government has since implemented a post-abortion policy that caters for the treatment of women who undergo abortion²⁹.

Despite this, reports state that most women in Zimbabwe are afraid of accessing post-abortion care because of the legal status of Abortion thereby exposing them to maternal mortality and injury on their health³⁰. Where in 1990 it was reported that

²⁶See Section 60 of the Criminal Law (Codification and Reform) Act.

²⁷See section 303 of the Criminal Procedure and Evidence Act [Chapter 9:07].

²⁸G Feltoe *A Guide to Zimbabwean Criminal Law* (2004) 61.

²⁹United Nations Population Fund 'The Cairo Consensus at Ten: Population, Reproductive Health and Global Effort to End Poverty' (2004) *State of the world population*59.

³⁰United Nations Population Fund 'The Cairo Consensus at Ten: Population, Reproductive Health and Global Effort to End Poverty' (2004) *State of the world population*59.

about 60000 illegal abortions were being carried out annually and about 600 hundred of them dying in the process³¹, by 2003 that number of estimated annual illegal abortions had risen to 80000³². It is not unreasonable to consider that the trend persists.

Importantly, legal restrictions on abortion and the lack of reliable and reputable health services for women who want an abortion have exposed women to risk. This is particularly true of those women who are young, poor, and living in rural areas. These women are disproportionately exposed to the risks attaching to unsafe abortions than those who are well off and living in urban areas as the opulent may even go to parts of the world where abortion is legal³³. This is because, in Zimbabwe those that can afford may seek the services of medical practitioners who exorbitantly charge to carry out the illegal abortions³⁴ or travel to other jurisdictions that have liberal abortion laws to have the abortions performed there. It has been reported that a considerable number of Zimbabwean women travel to South Africa for the purpose of having abortions there where legal and safe abortions are accessible³⁵. According to an IRIN report the restrictive abortion laws have resulted in the thriving and growing abortion 'black market' in Zimbabwe, where back street terminations are often performed by unskilled personnel in unhygienic surroundings³⁶.

2.4 Conclusion

The abortion law in Zimbabwe operates in a realm non-reflective of the practice in reality. The legal restrictions on abortion do not affect its incidence. The discrepancy between law and the reality is an indication of a legal position being significantly violated and a piercing call for some sort of intervention in the abortion law in Zimbabwe. It is in this context that the 2013 Constitution of Zimbabwe was introduced which *prima facie* should address this legal gap because it aspires to

³¹See Note 28.

³²Center for Reproductive Rights 'Laws and Policies Affecting Women's Reproductive Lives Implementation, Enforcement, and the Reality of Women's Reproductive Lives' (2003) Reproductive Rights in Zimbabwe 8.

³³I. Shah, Eahman and N Ortayli 'Access to Safe Abortion: Progress and Challenges since the 1994 International Conference on Population and Development (ICPD)' (2014) ICPD Beyond 2014 Expert Meeting on Women's Health - rights, empowerment and social determinants 30th September - 2nd October, Mexico City; International Conference on Population and Development (ICPD) 9.

³⁴This is a practise that has being exposed in many abortion trials. An example is in the case of *S v Joseph Ncube* HB119/03, where the illegal abortion was performed by a registered medical doctor for a fee.

³⁵'Let women enjoy legal right to abort' Daily News 5 October, 2014.

³⁶<http://www.irinnews.org/report/53659/zimbabwe-abortion-figures-underscore-need-for-more-reproductive-health-education> (accessed 18 September).

constitutionalism and gives women the right to reproductive health care. As such, the following chapter explores the impact of the Constitution on this rift.

Chapter Three

3.1. Introduction

The 2013 Constitution aspires to constitutionalism and provides for the protection of reproductive rights and in this light may have an impact on the laws governing abortion by addressing the legal gap between the law and the practice in reality. This chapter explores the impact of the Constitution on the on the law regulating abortion in Zimbabwe.

3.2. Measuring the impact of the Constitution

The 2013 Constitution has two features that contradict the current status *quo* with respect to the law regulating abortion. First, there is the category of features that relate to the impact of the Constitution with regards to constitutionalism. Secondly, there is the category of rights that are expressly provided for in the Constitution which seemingly contradict this prolife position.

3.2.1 Constitutionalism and Prolife

Besides codified Constitutions being praised for bringing the supreme law into one clear and accessible document they have been esteemed for their symbolic status. Symbolically Constitutions resemble an adoption of constitutionalism³⁷. Worth mentioning is that codified Constitutions generally follow national uprisings or some sort of a State system disturbance and are designed to effect transformation to a new era that addresses the problems and shortfalls of the contested era³⁸. The adoption of constitutionalism is significant because it is due to its value that successful transformation depends and for this reason codified Constitutions are viewed as symbols of constitutionalism. Markedly, it is not the set of rules in the single document called the Constitution that brings the desired transformation hence the existence of countries that thrive without codified Constitutions such as the United Kingdom. Arguably, the value of Constitutions is based on them establishing

³⁷ T. Madebwe 'Constitutionalism and the new Zimbabwean Constitution' (2014) Vol 1 *Midland State University Law Review* 6.

³⁸ M. Ryan *Unlocking Constitutional and Administrative Law* (2ed) (2007) 13.

constitutionalism. Therefore, the value of the adoption of the 2013 Constitution is based on its aspiration to Constitutionalism.

Constitutionalism is a theory that regulates the conduct of the government in upholding individual rights³⁹. It defines the inseparable connection between an individual and his/ her rights concerning the role of the government in carrying out its business of legislating, interpreting and enforcing the law. However, it is important to understand that the adoption of, or turn to a codified Constitution does not necessarily mean that Constitutionalism has been adopted. It is possible for a document identified as a Constitution to be implemented yet not attain or be practically relied on in pursuing constitutionalism. Though, where Constitutions aspire to constitutionalism there are some essential qualities that ought to be observed in that legal system, and these qualities should be binding on the governments, private bodies and individuals of their respective countries. Thus Constitutionalism means that where present these essential elements must be seen to regulate the conduct of all the State arms, institutional bodies and individuals.

Importantly there are two core defining qualities of constitutionalism which are the separation of powers and the observance of rule of law. Generally, separation of power means that the functions of the State must be divided by the three arms of the State to avoid concentration of power in one arm of the State⁴⁰. Parliament makes the law, the judiciary interprets the law and the executive enforces the law. The aim of separation of powers is to provide for efficient checks and balances of the different arms of the State so as to ensure the protection of the basic rights of individuals and groups. In a Constitutional democracy based on constitutionalism the validity of the laws made by Parliament is determined by the consistency of the laws and the principles of constitutionalism. The execution of the law should be determined by its validation by the judiciary. Importantly, separation of powers encourages judicial activism as a means of checking the other arms of governments to ensure the protection of individuals' rights. On the other hand, rule of law encourages minority protection and an advanced protection of human rights which include the right to autonomy. The application of rule of law realises the closest impact of constitutionalism on the abortion law.

³⁹ F Venter *Constitutional Comparison* (2005)24.

⁴⁰ I Currie and J De Waal *The New Constitution and Administrative Law* (2001) 18.

First, the Constitution explicitly provides for the rule of law. An argument can certainly be made for this being a reference to a simple interpretation of the rule of law as rule by law. However, it is more likely the case, based on experience with other jurisdictions with codified Constitutions, that this is a reference to the Diceyan version of the rule of law. Dicey argues that the rule of law is attained when: there are no arbitrary exercises of power, something attainable when there are clear laws which are understood and can be complied with;⁴¹ everyone is equal before the law and afforded equal protection;⁴² anyone whose rights are infringed can challenge this⁴³. Effectively, the rule of law aspires to a liberal society that protects the interests of every individual. The tenets of rule of law are self realization, self autonomy, freedom of choice, wide application and protection of personal rights and non interference over the enjoyment of those rights by government, society and/ or a democratic majority⁴⁴. In this light, no written law may be enforced by the government unless it conforms to certain unwritten, universal principles of fairness, morality, and justice that transcend human legal systems⁴⁵.

Second, and consistent with the rule of law, a concerted effort has been made, in the Zimbabwean Constitution, to afford minorities' protection. This is rooted in the recognition of the fact that citizens have rights and, human rights are inherent in human beings. One is entitled to these rights by virtue of being human and even the Constitution does not give those rights but just expressly mentions some. Humans have the freedom of choice and liberty of autonomy. On the basis of this reasoning the Constitution clearly protects every individual and minority, including the minority who intend to carry out or perform abortions. In several respects therefore, what the Constitution does is akin to what was done in South Africa. For instance, in *S v Makwanyane* where the Constitutional Court of South Africa expressed that minority protection is essential where constitutionalism is aspired⁴⁶. A turn to constitutionalism is always coupled with the aim to protect the rights of the minorities and others who

⁴¹A V Dicey *Introduction to the Study of the Law of the Constitution* (8th Ed) (1915)20.

⁴²A V Dicey (note 41 above)20.

⁴³A V Dicey (note 41 above) 23.

⁴⁴<http://www.aristideshatzis.net/p/the-paradox-of-liberal-democracy.html> (accessed on 10 October 2015).

⁴⁵<http://legal-dictionary.thefreedictionary.com/Rule+of+Law> (accessed 10 October 2015).

⁴⁶*S v Makwanyane and Another* 1994 (3) SA 868 (A).

cannot protect their rights adequately through the democratic process. Therefore, everyone is equal before the law and anyone can challenge any decision.

Importantly, the turn to constitutionalism in this manner has significant implications for the previously subsisting prolife position in Zimbabwean abortion law. First, and in a most basic and general sense, a prolife position as embodied in the Termination of Pregnancy Act is inconsistent with the rule of law, a central pillar of constitutionalism. Drawing from the above, this is because the Termination of Pregnancy Act singles out a class of society, those who want to have abortions, and infringes on this class's liberty of autonomy. Hence, application of rule of law, a staple of constitutionalism necessarily makes the prolife position carried in the Termination of Pregnancy Act untenable.

Second, and following from this, a prolife position is also untenable to the extent that it flies in the face of the apparent drive to protect minorities embodied in the Constitution. Instead, the prolife position embodied in the Termination of Pregnancy Act is seemingly reflective of Zimbabwean pre-Constitution society's needs in a manner that limited individuals' exercise of their right to choice. Certainly, society generally seems to carry this perspective. However, in a post-Constitutional Zimbabwe in which minority rights are protected extensively, such a position is no longer tenable to the extent that this position precludes a minority class of people from deriving the benefits of the rights which have been bestowed upon them in the Constitution. Beyond this, the position is problematic to the extent that it threatens the principle of equal protection and further singles out a minority of underprivileged women who desire to have abortions as they are exposed to a greater risk of unsafe abortions being performed by unskilled people. It has been established earlier that most opulent women exercise their options of travelling to jurisdictions where safe abortions are accessible and legal or having their illegal abortions carried out by medical doctors at an inflated charge. In practice, the prolife law does not treat people equally as its existence burdens the minority of the underprivileged women more than it does their opulent counterparts.

3.2.2 Rights in the Constitution

The Constitution specifically protects reproductive rights and this seemingly precludes prolife abortion laws. A turn to prolife abortion regulation will limit the

reproductive rights provided for in the Constitution⁴⁷. In the Declaration of Rights the Constitution calls for the legislation of an Act that must protect the lives of unborn children and this also has an impact on the law regulating abortion.

Section 76 (1) of the Constitution empowers every citizen and permanent resident of Zimbabwe with the right to basic health care services, including reproductive-health-care services. While this is not defined in the Constitution, reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes⁴⁸. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide, when and how often to do so. Reproductive rights may include some or all of the following: the right to legal and safe abortion; the right to birth control; freedom from coerced sterilization, abortion, and contraception; the right to access good-quality reproductive healthcare; and the right to education and access in order to make free and informed reproductive choice. Reproductive rights are a subset of sexual and reproductive health and rights. With regards to the role of the Constitution peculiarly and affirmatively addressing women's rights expansion and protection, the inclusion of reproductive rights in the Constitution seems to deliberately empower women with the right to reproductive anatomy.

Clearly, reproductive rights can reasonably be interpreted to refer to a satisfying and safe sex life and the right to family plan. Therefore, sex should be separated from reproductive intent. In addition, no contraceptive is absolutely efficient and all contraceptives can fail⁴⁹. Therefore, abortion is a useful backup to contraception. Hence, the right to reproductive health care is inseparable from the right to have an abortion.

Additionally, the Constitution seems to depart from the current law on abortions by highlighting the need for the re-legislation of the abortion laws. If regard is given to reproductive rights when interpreting the need to re-legislate, the Constitution seems to advocate choice to a significant extent. However, the isolated interpretation of

⁴⁷ See section 76 of the Constitution.

⁴⁸ <http://www.un.org/popin/unfpa/taskforce/guide/iatfreph.gdl.html>(accessed 18 September 2015).

⁴⁹ L. Speroff and P. D. Darney *A Clinical Guide for Contraception* (2010)230.

section 48(3) seems prolife and may pose problems if insufficiently explored. Section 48(3) reads, “An Act of Parliament must protect the lives of unborn children, and the Act must provide that pregnancy may be terminated only in accordance with the law”. This provision is enunciated in the Declaration of Rights under the right to life. The Constitution illustrates that it does not prohibit all abortions giving room for an Act of parliament to define the extent under which the law will protect unborn children. Notably, this Constitutional provision cannot be interpreted to be referring to the Termination of Pregnancy Act that predates it. Nonetheless, in the absence of the enactment of a new law in terms of this section, the Termination of Pregnancy Act remains the primary source for abortion regulation.

Important to note is that if not thoroughly construed, section 48(3) may cause problems because it has the potential to reincarnate the restrictive nature of the Termination of Pregnancy Act even if new legislation should be crafted to regulate abortion. This is so because this section calls for the protection of the lives of unborn children. Since Constitutions usually just set up the framework of law and leave the details for Acts of Parliament, the Constitution does not define at what stage of pregnancy the foetus would be regarded as an unborn child. This provision may even be used by prolife advocates to protect the lives of foetuses of all stages. It appears that there are two competing rights, the right of the unborn child to live and the right of autonomy of the woman who carries the unborn child. It is necessary to establish a means of balancing these two rights.

In balancing these rights there is a need to determine the rights of an unborn child as referred to in section 48(3). The Constitution recommends the use of international instruments in interpreting provisions of the Declaration of Rights⁵⁰. Therefore, it is recommended that the United Nations Declaration of the Rights of the Child⁵¹ be referred to in defining the right of the unborn child. The relevance of this instrument is captured in its stipulation that a child by reason of his/ her physical and mental immaturity has right to specific care ‘before’ as well as after birth. However, this instrument does not comprehensively establish the rights of the unborn child.

⁵⁰See section 46(1)(c) of the Constitution.

⁵¹ See Article 6 of the Convention of the Rights of the Child 1989.

Importantly, the Universal Declaration of Human Rights regards humans as those with reason and conscience⁵². This upholds the position of St Thomas Aquinas that abortion is not murder until the fetus has a brain and is capable of self awareness and understanding⁵³. Arguably an unborn child is considered a human whose life is worth protection only after its member system has developed to a certain stage. In line with St Thomas Aquinas's argument a fetus can only be regarded a human being only after it develops a brain and that would be around the 20th week of pregnancy⁵⁴. Hence, prior to the fetus developing a brain the fetus is not a human but part of the woman's body and cannot be regarded an unborn child for the purpose of conferring rights. Thus, the State does not bear a legitimate interest on a fetus before its 20th week.

Therefore, prior to the 20th week of pregnancy the fetus has no rights and within this period a woman may unlimitedly exercise her reproductive rights by choosing to have an abortion if she so desires. However, after the fetus has developed a brain, after the 20th week the fetus may be identified as an unborn child and the Constitution seems to provide for the protection of that life. Hence, the Constitution by providing for reproductive rights makes the prolife law untenable but limits choice after the 20th week to protect the life of the unborn child.

3.3 Conclusion

Prior to the adoption of the 2013 Constitution, the position on abortion regulation was prolife in nature completely outlawing abortion save for the exceptions provided in the Termination of Pregnancy Act. The Constitution impacts this law to the extent of making a prolife approach to abortion untenable. The next chapter explores what this impact means for law and practice abortions in Zimbabwe.

⁵²See Article 1 of the Universal Declaration of Human Rights 1948.

⁵³T Aquinas *Summa Theologica* (1920) 28.

⁵⁴Ibid.

Chapter four

4.1 Conclusion(s)

Prior to the 2013 Constitution Zimbabwean law regulating abortion was prolife with the Termination of Pregnancy Act outlawing abortion save for very restrictive exceptions. As noted in chapter two this prolife approach did not align with practice. Further, in chapter three it became apparent that, to the extent that this position does not align with constitutionalism ideals in the Constitution, and explicit rights in the same Constitution, this pro-life position is non-reflective of the individuals' needs. Effectively therefore, it would appear that the turn to the 2013 Constitution made the prolife abortion law untenable. Against this backdrop, a few recommendations can be made.

4.2 Recommendations

It has been established that the abortion law position does not align with the constitutional position and these two opposing positions cannot coexist. The constitutional law being the supreme law must therefore prevail and the abortion law must be changed. There are two recommendations which are in line with the incidences where the Constitution directly impacts the law by upholding constitutionalism and protecting reproductive rights. It is recommended that the abortion law be changed by Parliament through repeal or by the process of judicial review.

4.2.1 Constitutionalism

Turning to constitutionalism means applying the rule of law and observing minority protection. Hence, everyone is equal before the law and everyone should be protected by the law including the minorities. Unlike democracy which carries the risk that it could result in laws that reflect the concerns of the majority through their elected legislature, constitutionalism draws special attention to the needs of everyone, and especially protects the rights, interests and concerns of the minority. Constitutionalism guards against what Madison terms majority tyranny over the

minority⁵⁵. Constitutionalism binds States that subscribe to it to ensure minority protection. The Abortion prolife law fails to accommodate the concerns of the minority and infringes on their liberty and freedom of autonomy. The negative effect of failure to protect the minority's concerns is reflected in the conflict between the abortion law and practice in reality.

Where there is a turn to constitutionalism there is a duty on the State to ensure that no law defeats the pursuit of constitutionalism⁵⁶. Zimbabwe's Termination of Pregnancy Act is in conflict with constitutionalism and there is room to clearly depart from it and make an Act that will align with the state's seeming pursuit of constitutionalism. It is therefore recommended that the Termination of Pregnancy Act be repealed. Following this, and in line with the directive in the Constitution there is need to create a new Act that gives effect to the Constitution⁵⁷.

In crafting such Act, guidance should be drawn from South Africa where the Choice on Termination of Pregnancy Act permits abortion, upon request, by a woman during the first 12 weeks of the gestation period of her pregnancy⁵⁸. The logic is apparently rooted in the desire to balance the reproductive right and the right to protect the unborn child. An unborn child is identified as a human capable of bearing rights when it, the foetus, develops a brain and this is about 20 weeks from the date of conception⁵⁹. At this stage, the State attains a legitimate interest in protecting the life of the unborn child and the unborn child also becomes competent to bear rights⁶⁰. Drawing from this, it is recommended that the prochoice law to be adopted should give effect to the life of the foetus after it has reached its 20th week from the day of conception⁶¹. The abortion prohibition in the Choice on Termination of Pregnancy Act of South Africa is however subject to three exceptions which are where the continued pregnancy: would endanger the woman's life; would result in a severe malformation of the fetus or would pose a risk of injury to the fetus⁶². These

⁵⁵ James Madison, <http://www.rense.com/general64/madi.htm> (accessed on 7 October 2015).

⁵⁶ *S v Makwanyane and Another* 1994 (3) SA 868 (A).

⁵⁷ See section 48 (3) of the Constitution.

⁵⁸ See Section 2 (1)(a) of the Choice on Termination of Pregnancy Act [No. 92 of 1996].

⁵⁹ T Aquinas *Summa Theologica* (1920) 28.

⁶⁰ *Ibid.*

⁶¹ This is in line with s48 (3) of the Constitution.

⁶² Section 2 (1)(c) of the Choice on Termination of Pregnancy Act [No. 92 of 1996].

exceptions are justifiable and acceptable as they cater for abortion necessities within the period prohibited period.

4.2.2 Rights

Ideally, rights in the Constitution should be interpreted in a generous and purposive manner while taking full account of changing conditions as the aim must be to make human rights provisions a practical reality for the people.⁶³ In this vein, while the right to have an abortion is not expressly mentioned in the Constitution, it is part of the right to reproductive health care which should be broadly interpreted to imply the right to have an abortion among other reproductive rights. By this logic therefore, the Termination of Pregnancy Act should be invalidated due to its inconsistency with the Constitution⁶⁴.

Further, the Termination of Pregnancy Act was enacted in 1977 by a colonial Legislature and the Legislature at that time consisted of representatives of the white minority, mainly men. The Legislature was therefore not representative of society. The Termination of Pregnancy Act to emerge from that house therefore fails to accommodate and account for developments in modern Zimbabwe most notably, the immense development in the protection of women's rights particularly in the past two decades. Importantly, problems such as this are not new. In addition, even when formulated in a different context, legislation can fail to fully ensure the protection of all individuals' rights as it is arguably based on a utilitarian approach which means it can reflect the interests of the majority.

In the light of this, it has long been acknowledged that in a constitutional democracy which aspires to constitutionalism, it is particularly important for the judiciary as the guardian of rights to guard against the tyranny of the majority. Indeed, it has previously been noted that the judiciary is a bulwark against public opinion and it is a check against the unconstitutional abuse and extension of power by the other branches of government⁶⁵. Therefore, in pursuance of protection of the right to have an abortion which is a minority right, the best approach seems to be invoking judicial

⁶³ Smyth v Ushewokunze & Anor 1997(2) ZLR 544 (S).

⁶⁴ See section 2 of the Constitution that states that any Act of parliament inconsistent with the Constitution should be declared invalid to the extent of its inconsistency.

⁶⁵ T. Goebel *A Government by the People: Direct Democracy in America, 1890-1940*(2002)84.

activism. The judiciary can in this instance ensure the protection of, and empower, the minority, a position which is necessarily prochoice⁶⁶.

Expectedly, the difficulty with this proposal is that it will inevitably encounter the counter-majoritarian dilemma. This is a reference to the conflict which arises when unelected judges overrule the law-making of elected representatives, thus undermining the will of the majority. Despite this, it is useful to note that; majoritarianism is based on the view that a democracy can be defined by only its procedural aspects. Conversely, the definition of democracy is contentious. The argument is often made that substantive rights must be protected in a democracy to truly have a democracy, even when those undermine the majoritarian nature of the democracy⁶⁷. In terms of this view, when judges enforce such substantive rights, such as those provided for in the Constitution, the judges are actually engaged in furthering democracy.

4.3 Final Word

In summation, before the Termination of Pregnancy Act, abortion was regulated at common law in an even more restrictive prolife fashion. Despite its prohibition abortions are still being performed in Zimbabwe and this reflects the conflict between the abortion law and practice. However, the adoption of the 2013 Constitution marks a turn to constitutionalism which necessarily incorporates aspects of the rule of law and specifically, calls for the protection of the rights of every individual including those constituting minorities. In addition, the Constitution provides for the protection of reproductive rights. Importantly, the impact of the Constitution, properly interpreted and applied, should be to permit abortion and make the previously subsisting prolife abortion law untenable. Thus, in the premise it is recommended that there be a turn to new legislation which is prochoice in nature. Accepting however, that law-making is a protracted process, a more immediate solution is for the judiciary to get more active with respect to minority protection generally and the protection of women's rights specifically. This would necessarily secure choice.

⁶⁶The judiciary can protect minorities by advocating for a change in the law as was done in *S v Makwanyane and Another* 1994 (3) SA 868 (A).

⁶⁷T.Goebel (note 65 above) 62.

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