

Access to Legal Abortion by Rape Victims as a Reproductive Health Right: Case study Swaziland and Ethiopia.

Dissertation submitted in partial fulfilment of the requirements for the degree

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DECLARATION

I, SIMANGELE DAISY MAVUNDLA, do solemnly declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other people's works have been used, they have been duly acknowledged. I accordingly present this work in partial fulfilment of the requirements of the award of the Master of Laws Degree in Human Rights and Democratisation in Africa, University of Pretoria, Republic of South Africa.

I take full responsibility for all shortfalls, shortcomings and inaccuracies if any, in the manuscript.

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DEDICATION

To my mother Thembi Promise Dlamini

To my friend Nosipho Pearl Mazibuko

ACKNOWLEDGEMENTS

I would like to express my appreciation to my friend Nosipho Pearl Mazibuko, who continues without ceasing to support and encourage me in my endeavours. Without her love and persistent support under extremely difficult circumstances, it would have been totally impossible for me to hang onto the end of this course.

To the many Non Governmental Organisations in Swaziland, Ethiopia, across Africa and around the globe that continue to strive to advance women's rights in the beautiful continent of Africa, my heart goes out to you. The struggle for freedom of women from rape; women's right to reproductive health; and a woman's right to abortion in case of rape are challenges we cannot afford to give up. These are ideals for which we must be ready and prepared to fight for until women achieve true liberty, autonomy over their bodies and their dignity is restored.

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ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human on Peoples' Rights
AI	Amnesty International
AU	African Union
CDC	Constitution Draft Commission
CEDAW	Convention on the Elimination of All Form of Discrimination Against Women
CFRR	Centre For Reproductive Rights
CRC	Convention on the Rights of the Child
EC	Emergency Contraceptive
EWLA	Ethiopian Women Lawyers' Association
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
IPAS	Africa Alliance for Women's Reproductive Health and Right
MDGs	Millennium Development Goals
MOH	Ministry of Health
NAF	National Abortion Federation
SASO	Swaziland AIDS Support Organisation
SNNPR	Southern Nations, Nationalities and Peoples Region
SWAGAA	Swaziland Action Group Against Abuse
UN	United Nations
UNDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
WHO	World Health Organisation
WLSA	Women and Law Southern Africa
Women's Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

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CHAPTER ONE

Introduction

1.1 Background of the Study

Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.¹

It is stated that sexual and reproductive health is a corner stone of development.² However, in practice such rights are not clear-cut as society has ascribed cultural practices and traditions towards gender roles. Culture and tradition which is attributable to the socialization process between men and women has seen to it that women are socialized differently from men. Culture is part of socialization just as socialization is part of culture.

There are various cultural perceptions about how women should be treated and how they should respond to the treatment. In most cultures women are taught to adhere to their husbands' dominance to show respect under patriarchy. Patriarchy is "a form of social organization in which the father is recognized as the head of the family".³ This has led to women attaining an inferior legal status to that of men. Another perception that is affecting women's progression is gender. Gender can be defined as the set of characteristics, roles and behaviour patterns that distinguish women from men which are

¹ International Conference on Population and Development (ICPD) Programme of Action, 1994: Fourth World Conference on Women: Action for Equality, Development, and Peace, Beijing Declaration and Platform for Action, U.N. Doc. A/CONF. 177/20 1995 94

² In both meetings which took place in 1994 and 1995 on sexual and reproductive rights was one of the subjects of major concern in the International Conference on Population and Development held in Cairo and the fourth World Conference on Women held in Beijing.

³ Russell, Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment (1990) 3

constructed not biologically, but socially and culturally.⁴ Gender violence on the other hand, refers to a wide range of acts of aggression directed at a person based on their sex.⁵ Overwhelmingly, however, women rather than men are the major victims of violence. It is stated that the most common form of gender violence in Southern Africa including Swaziland, is violence against women.⁶ The violence against women often takes the form of sexual harassment, rape, physical assault, and various forms of battery.⁷

As a result of the above prejudices against women, a number of international, regional and sub-regional measures have been taken to try and ameliorate the situation through treaties and declarations. For example, article 4.2(a) of the African protocol on the Rights of Women,⁸ provides that 'states parties shall take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public'.

In addition to that, article 14.2(c) of the Protocol calls upon state parties to ensure that the right to sexual and reproductive health of women is respected and promoted by taking all appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the unborn child.⁹

Amongst other treaties, there is the Convention on the Elimination of All Form of Discrimination Against Women (CEDAW)¹⁰ which provides in article 5(a) that state parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the

⁴ Women and Law in Southern Africa Research and Educational Trust (WLSA); *Family in transition; the experience of Swaziland* (1998) 77

⁵ Women and Law in Southern Africa Research and Educational Trust (WLSA); *Multiple jeopardy; domestic violence and women's search for justice in Swaziland* (2001) 7

⁶ As above

⁷ Above

⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol), adopted in Maputo, 25 November 2005

⁹ Women's Protocol as above

¹⁰ The Convention on the Elimination of All Form of Discrimination Against Women, adopted in December 1979 and came in force in September 1981

elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Reproductive rights are, therefore about the sense of freedom that women will not be raped or abused in any way because they are women.¹¹ It means freedom from unwanted pregnancy, sexual discrimination and harassment.¹² It is argued that it is about an intrinsic feeling of fulfilment, contentment, satisfaction and joy in being well, healthy, happy and being alive.¹³ Article 14(2)(c) of the Protocol on the Rights of Women (Women's Protocol) directs states to take all appropriate measures to promote the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape and incest among other things.¹⁴

Ethiopia has taken steps towards meeting the obligations imposed under article 14 of the women's Protocol.¹⁵ This came in 2004, when the Ethiopian Parliament promulgated one of Africa's most progressive abortion laws. Under the revisions, the new penal code expanded the indications for abortion, adding rape, incest, foetal abnormality and a woman's physical or mental disabilities.¹⁶ The Parliament also approved abortion for minors who are physically or psychologically unable to care for a child.¹⁷ This is a particularly significant change for Ethiopia, where the Ethiopian Society of Obstetricians and Gynaecologists estimates that 45 percent of those who seek abortions are younger than 18.¹⁸

However, Swaziland is still using legislation such as the Crimes Act which dates back to 1889 and the Protection of Girls and Women's Act of 1920 for regulating sexual offences. Section 3 of the 1920 Act prohibits unlawful carnal connection by any man with a girl under the age of 16 years, or any form of immoral or indecent acts by any person with a girl of such an age. The solicitation or enticement of such

¹¹ WLSA above n 4 198

¹² As above

¹³ Above

¹⁴ Women's protocol above n 8

¹⁵ As above

¹⁶ <http://www.ipas.org/Ethopia.htm> accessed 13. June 2009

¹⁷ As above

¹⁸ Above

a girl to commit any such acts is also made an offence.¹⁹ However, it is submitted that, it is a defence if the girl is either a prostitute or the offender is a boy under 16 years of age. Article 2 of the Act defines unlawful carnal connection to mean carnal connection otherwise than between husband and wife.

On the other hand the Crimes Act provides for prohibition of a spectrum of crimes.²⁰ Part V deals in part with the protection of girls against sexual exploitation. Section 41 of the 1889 Act prohibits a parent or guardian from making a girl available for unlawful sexual intercourse with any man other than the procurer. This section also makes it an offence for a parent or a guardian to be a party to or to permit or receive any consideration for the defilement, seduction or prostitution of such a girl. Section 42 of the same Act prohibits any person within or outside Swaziland from exposing girls to brothels, prostitution and any other forms of sexual exploitation within or outside Swaziland. The penalties stipulate under these provisions include a term of imprisonment for life coupled with whipping where the girl involved is under the age of 12 years.

On the other hand, section 43 makes it an offence for any person to conspire with any other person to have a girl defiled or immorally dealt with. The sentence will depend on whether the girl is between 12 and 16 years of age or below 12 years of age. In the former the sentence is a thousand Emalangeni (official name of Swaziland's currency) or five years imprisonment and in the latter, one thousand Emalangeni or life imprisonment, plus whipping. It goes without saying that these laws are very much outdated and there is an urgent need to reform them. This study will investigate the gaps that are there and concentrate on the reform of abortion laws in Swaziland.

Currently abortion in Swaziland is a criminal offence which is punishable by the law. The Constitution of Swaziland prohibits abortion in general in terms of section 15, a provision which deals with the right to life. Swaziland has a fairly new Constitution which ought to have dealt with the issue through the collection of submission and views process which was carried out by the Constitutional Review

¹⁹ Section 3 of the Girls' and Women's Act No.39 of 1920

²⁰ The Crimes Act No.6 of 1889

Commission; however, it is not that simple. According to Maseko,²¹ the conditions under which the Constitution of 26th July 2005 was written cannot be said that the process was designed to give birth to a credible democratic constitution reflecting the genuine aspirations and views of the Swazi people.

The Constitution Draft Commission (CDC) function was to draft a constitution suitable for the Kingdom of Swaziland. At that time, organisations called for an open, all-inclusive process based on the free and popular will of the entire people but such calls fell on deaf ears.²² In this regard it is stated that organisations dealing with abuse were not allowed an opportunity to state their case or influence the constitution in any way. They were locked out of the process of constitutional review.

Section 15 of the Constitution goes on to stipulate some exceptions. It is provided that abortion is unlawful but may be allowed;

“ (a)On medical or therapeutic grounds including where a doctor certifies that-

(i)Continued pregnancy will endanger the life or constitute a serious threat to the physical health of the woman;

(ii)Continued pregnancy will constitute a serious threat to the mental health of the woman;

(ii)There is a serious risk that the child will suffer from physical or mental defect of such a nature that the child will be irreparably seriously handicapped;

(b)Where pregnancy resulted from rape, incest or unlawful sexual intercourse with a mentally retarded female; or

(c)On such other grounds as Parliament may prescribe”.

It is submitted that the provisions of the Constitution merely restate the common law position because there is no policy accompanying the assertions of the Constitution .and as things stands victims of rape have not yet been allowed access to legal and safe abortion.

²¹ T Maseko ‘The drafting of the Constitution of Swaziland, 2005’ (2008) 8, *African Human Rights Law Journal* Juta Law

²² As above

Cook and Dickens state that historically western customary law, such as the Anglo-Saxon Common law, derived many offences from religious concepts of sins, and treated deliberate termination of pregnancy as an offence.²³ It is provided that in 1803 English Law changed and for the first time made abortion an offence only when undertaken unlawfully.

The 1803 legislation was intended to protect women procuring a miscarriage by seeking or self-administering any potentially harmful procedure, it made abortion a crime only if when undertaken unlawfully. In 1828 and 1837 statutory amendments were made which incorporated the offence into the Offences Against the Person Act of 1837, section 58 of which remains the foundation of the abortion prohibition in many jurisdictions of the common law world and beyond.²⁴ The section provides that:

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent and whatsoever, with the intent to procure the miscarriage of any woman whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony.

In the case of *Bourne* of 1938, the court decided that there can be exceptions to the general rule in the prohibition of abortion. In this case the judge directed the jury that a person would not act unlawful for terminating a pregnancy in order to preserve a women's life or her physical or mental health. The jury acquitted the defendant physician for terminating the pregnancy of a 15 year old rape victim he feared would become a mental wreck by continuation of pregnancy and child birth.²⁵

²³ RJ Cook and BM Dickens 'Human rights dynamics of abortion law reform: Woman's rights' (2006) *A Human Rights Quarterly Reader*, Ed Lockwood 562-3

²⁴ As above 562

²⁵ As above *R v Bourne*, [1938]1 King's Bench 687 (Central Criminal Court): (n 23 above) 563

In light of the above, it is a contention of this paper that victims of rape should be afforded the opportunity to lawfully terminate pregnancy resulting from such rapes regardless of their physical or mental health, considering the fact that currently in Swaziland rape is prevalent. The extent of sexual abuse in Swaziland is not known as there are no available national statistics. However, a recent UNICEF²⁶ study reveals that:

- approximately 1 in 3 females experience some form of sexual violence as a child;
- 1 in 4 females experiences physical violence as a child;
- among 18 to 24 year old females, nearly 2 in 3 had experienced some form of sexual violence in their lifetime. Some were abused repeatedly.

There is a lot of myth in the Swazi society as to why men rape women and rape victims' conducts. Rape myths are seen as stereotyped, incorrect and prejudicial beliefs about sexual assault, victims, and perpetrators, which serve to downplay the perpetrator's responsibility and criminality while shifting blame towards the victim.²⁷ Amongst other myths on rape in the Swaziland society, it is believed that rape is about sex. This is a myth and not true as rape is an act of violence which uses sex as a weapon. Rape is motivated by aggression and by the desire to exert power and humiliate.

Another myth is to the effect that the victim in some way may precipitate the offence through arousing the male in some provocative manner.²⁸ This erroneous belief has a serious impact on how people view the crime, the rapist and the victim. It also affects the survivor's view of herself. She often accepts self-blame since she has not succeeded in controlling the male's behaviour and has somehow provoked it. And there is the issue of women asking to be raped. Again this is false as rape is a crime which has devastating effects upon the survivor.²⁹

²⁶ National Study on Violence against Children and Young Women in Swaziland, October 2007; available at http://www.unicef.org/swaziland/sz_publications_2007violenceagainstchildren.pdf.

²⁷ J Temkin and B Krahe *Sexual assault and the justice gap: a question of attitude* (2008) 34

²⁸ As above 33

²⁹ Above

Another issue that is tackled by this study is the fact that Swaziland is a patriarchal society. It looks at how does a patriarchal society influences social life. It is stated that Patriarchalism raises important questions about women themselves.³⁰ Many women internalized the culture of Patriarchalism, holding that it was their job to obey and to serve men and accepting arguments that their aptitudes were inferior to those of men.³¹ This is attributable to the fact that patriarchal family structure rest on men's control of most or all property, starting with land itself; marriage is based on property relationships and it was assumed that marriage, and therefore subordination to men, was the normal condition for the vast majority of women.³² It is not disputed that the law plays the role of vehicle through which subordinate status of women in society is presumed natural or normal and in a country like Swaziland such will be socially reproduced.³³

On the other hand, abortion is a taboo in the Swazi society and looks at the foetus as an innocent child who does not deserve to be killed no matter what are the social circumstances of the to be mother. It is said that most incest victims will endure almost any amount of abuse rather than subject their fathers or relatives to the punishment prescribed by the law due to the fear that a word from her loose the full vengeance of the law upon her father, her family and herself.³⁴ This is said to account for the phenomenon of women withdrawing charges against men.³⁵

Ethiopia's situation is quite remarkable as they have been able to overcome the insurmountable problems and reformed their abortion laws. This came in 2005 when a new penal code was adopted to bring the criminal law into accord with the democratic principles contained in Ethiopia's Constitution and international conventions that Ethiopia is a party to.³⁶ The aim of this paper is to look at the two countries laws on abortion and see if there are any lessons to be learnt and then draw conclusions from

³⁰ [http://history-world.org/Women In Patriarchal Societies.htm](http://history-world.org/Women%20In%20Patriarchal%20Societies.htm) accessed on 13 June 2009

³¹ As above

³² Above

³³ Above n 30

³⁴ Women and Law in Southern Africa Research and Educational Trust (WLSA); *Charting the Maze: Women in pursuit of justice in Swaziland* (2000) 169

³⁵ As above

³⁶ Proclamation No. 414 of 2004: The Criminal Code of the Federal Democratic Republic of Ethiopia, article 551

it. This is possible because both African countries are conservative in the sense that they both have unique cultures and traditions which influences the way of life of their population. Yet Ethiopia has been able to move towards the liberalisation of abortion laws where pregnancy is as a result of rape.

1.2 Statement of the problem

The study investigates the impediments caused by criminalisation of abortion in cases of forced pregnancy as a result of rape. It focuses on the premise that restrictive abortion laws and practices in such cases has devastating impact on women's lives as they are likely to engage in unsafe abortion. The Protocol on Women's Rights has called upon states to take measures to promote the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape and incest. On the other hand provisions of the Swaziland Constitution decree abortion illegal.

Pro-life organisations have argued that pleasure has its consequences,³⁷ however, here we are talking about the rights of people who have been violated, assaulted, undignified and robbed of their sexuality and as a result of such conduct have become pregnant. It is argued that rape as is comes with an emotional scare that will never heal³⁸ and in such a situation a constant reminder in a form of a child that has been forced in a woman's womb is indeed not at all welcomed. It is also argued that it is not in the best interest of that child to be born of a mother who lacks the capacity to bond with the child.

1.3 Objectives and scope of the research

The study intends to investigate the impediments caused by the criminalisation of abortion in cases of forced pregnancy as a result of rape. It focuses on the premise that restrictive abortion laws and practices in such cases has devastating impact on women's lives as they are likely to engage in unsafe abortion.

³⁷ Cook (n 23 above) 563. See also Petchesky, *Questions for Feminism; Abortion and Woman's Choice* (1986)

³⁸ As above

The main objective of the study is to:

- Determine rape and abortion in Swaziland in relation to cultural norms and traditional beliefs on the issue of access to legal abortion by rape victims.
- To examine the role of man in a patriarchal Swazi society in influencing women's conduct and way of life.

Other specific objectives of the study are:

- To investigate as to whether the Constitution of Swaziland criminalises abortion even for rape victims
- To examine what is preventing access to legal abortion in the case of rape victims in Swaziland.
- To examine what it entails to have abortion decriminalised for rape victims in Ethiopia.
- To advocate for victims of rape in Swaziland to access abortion without having to undergo stringent question and to follow impossible line of procedures before they can be granted abortion through law reform in relation to Ethiopia as a best practice.

1.4 Value and relevance of the research

The study is of value and relevance because of several attempts made in international, regional and sub-regional fora to decriminalise abortion and place women's obstructed access to safe reproductive health care services, and women's common resort to abortions that are unsafe abortions on the human rights agenda. If this goal is to be attained, researchers, scholars, legal practitioners and academic writers have to dedicate time in order to advocate for the changes in the laws, lobby governments to take appropriate measures as to promote the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape and incest as envisaged by article 14(2) (C) of the Protocol on Women's Rights and engage the populace on debates around the issue.

1.5 Research questions

The high rate of rape statistics does not create a conducive environment to women and girls. Africa has the world's most restrictive abortion laws. However in this paper will try to address the following issues:

- a) What are the social attitudes and stigma attached to abortion; and why is there organized opposition to safe abortion in Swaziland and Ethiopia.

- b) Whether religious dogma and ignorance surrounding the issue of access to abortion are blocking access to abortion by rape victims;
- c) Why in health systems there is lack of abortion policies and services and lack of political will to save women's lives;

1.6 Literature review

The focus of most commentary has not been on the essence of states obligations to take all appropriate measures to promote the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape and incest as envisaged by article 14(2)(C) of the Protocol on Women's Rights. Cooks and Dickens write on Human Rights Dynamics of Abortion Law Reform in general proposing that abortion law associates enforcement of repressive legislation with non-democratic governments and authoritarian religious institutions that are scornful of egalitarian rights talk.³⁹ These words are echoed by the writing of Graber,⁴⁰ who provides that legislative and judicial repeals of abortion laws on the books had a dramatic and immediate egalitarian impact on access to legal abortion services. Reliance also, is made to Petchesky's work on Abortion and woman's choice.⁴¹

There will be reference to the researches conducted by Woman and the Law in Southern African, Swaziland wing to give an insight into Swaziland's social structure and behaviour.⁴² Finally, Davis⁴³ investigated the subordination of women, their inherent lack of reproductive knowledge and control, and their inability to secure medical abortions as the result of three kinds of victimization: gender, social class, and patriarchal ideology.

³⁹ Cook (n 23 above) 560

⁴⁰ MA Graber *Rethinking abortion; Equal choice, the constitution, and reproductive politics* (1996) Princeton University Press, New Jersey.

⁴¹ Petchesky (n 37 above)

⁴² Above n 3

⁴³ NJ Davis *From crime to choice; the transformation of abortion in America* (1985) Greenwood Press

1.7 Methodology

The methodology includes a literary review, examination and analysis of relevant international (global and regional) instruments and domestic statutes and policies. Field investigation, such as visit to relevant IGOs or NGOs working in the two states, is also conducted. Organisations identified as knowledgeable on the issue and working in the related areas are selected. Analysis of data obtained and collected during interviews was conducted and reconfirmed by the researcher. Therefore, the study shall predominantly be literature review, based on library research as well as the Internet. Formal and informal interviews will be conducted with key organisations in Swaziland and as well as in Ethiopia. Also, prior data gained by the researcher when working for SWAGAA will be utilised. The research adopts a critical and analytical approach. The study will also borrow where relevant from the feminist paradigm.

1.8 Limitation of the study

The study is limited due to the fact that the researcher will be based in Ethiopia, therefore writing from outside Swaziland and that might lead to more or less attention given to Swaziland. Another form of limitation is attributable to the fact that the researcher in this case is a student and might be constrained by resources in keeping in touch with key organisations in Swaziland. The study does not purport to investigate the fact that pregnancy should be by choice and not by chance; this paper would only address access to legal abortion by rape victims. Also, the enquiry as to when does life begin will not be undertaken in this study.

1.9 Synopsis of the study

The study is divided into six chapters. Chapter one focuses on the circumstances (context) and gives an overview of the organizational structure. Chapter two, deals with the role played by patriarchy towards rape in the social context of Swaziland. Chapter three looks at access to abortion by rape victims as an internationally recognised reproductive health right. Chapter four looks at the law on abortion in Swaziland while chapter five addresses the law on abortion in Ethiopia. Chapter six is about conclusion and recommendations.

CHAPTER TWO

Patriarchy in Swaziland and the Role It Plays Towards Rape

2.1 Introduction

In this chapter focus is on the role played by patriarchy in the Swazi society in ensuring that women are not treated on equal footing with men and how such increases their vulnerability to rape.

Women in conservative Swazi society have a status inferior to that of men: all their lives they are minors; on marriage they become aliens in the patriarchal homesteads of their husbands, subjected to restrictions in behaviour and language, and to humiliations and jealousies associated with a polygamous society; they are excluded from active participation in the ancestral cult and their kin live in separate and often distant homesteads.⁴⁴

Patriarchy refers to a form of social organization in which the father is the supreme authority in the family, clan, or tribe and descent is reckoned in the male line, with the children belonging to the father's clan or tribe, or a society, community, or country based on this social organization.⁴⁵ According to Walby,⁴⁶ a society where women are dominated by men has distinguished six locations of patriarchal relations: sexuality, the household, male-on-female violence, paid employment, cultural institutions, and the state. The author reveals that these are not mutually exclusive sites of exploitation; historically, the state has tolerated male-on-female violence within the household.

Swaziland is a patriarchal society where power is vested in men and as a result males dominate in all spheres of life including within family where they are given status as heads of the household and

⁴⁴ H Kuper (1947) 120 cited in Women and Law in Southern Africa Research and Educational Trust *Charting the maze*, (n 34 above) 75

⁴⁵ <<http://dictionary.reference.com/browse/patriarchy>> accessed 22.September 2009

⁴⁶ S Walby *Patriarchy, structure and gender inequality* (1990) Oxford, Blackwell Publishers

decision-makers, all of which gives them control over members of their families.⁴⁷ Aphane⁴⁸ argues that with patriarchy deeply entrenched; the legal situation of women is obviously a far cry from that of men, both in law and in practice. Patriarchalism raises important questions about women themselves. Many women internalized the culture of Patriarchalism, holding that it was their job to obey and to serve men and accepting arguments that their aptitudes were inferior to those of men.⁴⁹

It is alleged that the situation or the environment itself is very hostile to organisations and individuals who advocate for positive transformation on issues of women's rights; as the dictates of patriarchy had it, women themselves are used as gatekeepers, jealously guarding the status quo to hand it over to the next generation in its unadulterated form.⁵⁰ Another heavy blow is that woman's biological role as bearer of children has traditionally led to inequality between men and women.⁵¹ Women are in many cultures considered the property of their husbands or male relatives and their role in society is principally as childbearing instruments; for example, in the Swazi society, a valuable woman is one who spends her time and labour bearing children, looking after their daily needs and that of her husband.⁵² Traditional inequalities entail that these women have limited control over their reproductive functions; they often have limited access to health services and in numerous countries women are not allowed access to family planning services.⁵³

2.2 Men's view of rape in general

In the case of Swaziland, rape is seen as canal connection with a woman without her consent.⁵⁴ The common law definition of rape is unlawful and intentional sexual intercourse⁵⁵ by a male with a female

⁴⁷ WLSA Family in Transition (n 4 above) 33

⁴⁸ D Aphane Vula indzawo: The evolution of women's rights in Swaziland (2007) 1 *Open Space* 49

⁴⁹ Women In Patriarchal Societies; The Origins Of Civilizations 1992: [http://histoy-world.org/women In Patriarchal Societies.htm](http://histoy-world.org/women%20In%20Patriarchal%20Soceties.htm) accessed 22.September2009

⁵⁰ Aphane (n 48 above)

⁵¹ WLSA *Family in transition* (n 3 above) 91

⁵² As above

⁵³ Above 201

⁵⁴ WLSA *Multiple jeopardy* (n 5 above) 62

⁵⁵ Intercourse is limited to penile penetration of a vagina.

without her consent.⁵⁶ Rape is one of the many acts of sexual violence which constitute crimes of violence.⁵⁷ Ukweli alleges that sex is used as the means of exercising power over the victim. “The goal for the offender is gaining control, degrading, and humiliating the victim”.⁵⁸

The high level of sexual abuse in Swaziland as revealed by the UNICEF survey; that among 18 to 24 year old females, nearly 2 in 3 had experienced some form of sexual violence in their lifetime and some were abused repeatedly is an indication of the vulnerability of women and girls in Swaziland. The survey further revealed that approximately 1 in 3 females experience some form of sexual violence as a child. If this statistics is something to go by, then it is a cause for a concern that the government of Swaziland should do something about it. One of the primary findings of the survey was that 75 percent of the perpetrators of sexual violence in Swaziland are well known to the victims. Sexual violence was mostly committed by husbands and boyfriends, men and boys from the victim’s neighbourhood, or male relative. Such behaviour is attributable to the domination give to males by patriarchy over their female counterpart.

In an ideal world it would be expected that the law takes its full course in such a scenario. However, the odds against women in court are quite heavy because of stereo types and myths and negative attitudes about rape victims. This is due to the fact that rape occurs among people who know one another rather than strangers.⁵⁹ This refutes the myth that is normally held by certain people’s attitudes that women should avoid strangers because they may rape them.⁶⁰ This point is further endorsed by Temkin and Krahe’ who provide that official crime records as well as victimisation surveys reveal that the most common form of sexual assault involves some degree of previous acquaintanceship between the

⁵⁶ D Hansson & D Russell, Made to fail: The mythical option of legal abortion for survivors of rape and incest (1993) 9 *South African Journal on Human Rights* 500

⁵⁷ Ukweli: *Monitoring and investigating sexual violence* (2000) 5

⁵⁸ As above

⁵⁹ WLSA *Multiple Jeopardy* n 54 above

⁶⁰ As above

perpetrator and the victim, that many victims are too frightened or overpowered to fight back and that, as a result, physical injuries are often not present as evidence to support the victim's claim.⁶¹

According to a study done by WLSA, men believe that there is no rape amongst lovers because there was a relationship.⁶² This was revealed in an interview at the remand centre where most of them pleaded innocence and said that their lovers set them up. To them this is sex between two consenting adults and should not be called rape at any point.⁶³ However, this point of view is erroneous as it does not correspond to the definition of rape as it does not address itself to the issue of relationship but the definition talks about force, which means that even among lovers there can be force and this is against the law, and it is rape.

On another note Swaziland Action Group Against Abuse (SWAGAA) revealed that young girls who are sexually violated ended up being married away by the perpetrators as soon as the police start investigation of the crime.⁶⁴ Also, abduction of young girls is not uncommon in Swaziland and such a practice is hard to defeat as the perpetrators quickly marry their victims as it is believed that the resultant marriage legitimises the prior act of rape after all it is impossible that a man can rape his wife.⁶⁵

There is a thin line between coercing women and girls into sex and consent. Women and girls are coerced into submitting to sex when they unwillingly resign themselves to intercourse, and that it usually occurs if the complainant is threatened or has been inspired by fear to allow intercourse.⁶⁶ It suffices to say that the courts also have a problem in dealing with this fine line of separation between the two concepts. The courts require that the burden of proof be beyond reasonable doubt, the benefit of doubt is usually given to the perpetrator.⁶⁷

⁶¹ Temkin (n 27 above)

⁶² WLSA *Multiple Jeopardy* (n 59 above)

⁶³ As above 63

⁶⁴ Interview with Bheki Vilane, SWAGAA's Programme Officer Counselling, conducted on the 9 July 2009

⁶⁵ As above

⁶⁶ WLSA *Multiple Jeopardy* (n 63 above)

⁶⁷ As above 64

WLSA further reveals that most of the perpetrators at the remand centre were using this provision of the benefit of the doubt by claiming that the women they raped are their girlfriends or lovers.⁶⁸ The perception of men towards marital rape is that they expected their wives to have sex with them regardless of whether they want to or not.⁶⁹

There are societal myths which continue to aid men's wrongful perception of rape and rape victims. These myths are lethal in the sense that they shift the blame to the victim and exonerate the perpetrator. For example, *The Times of Swaziland* told its readers that the reason why women get raped is because they wear short skirts.⁷⁰ *The Times of Swaziland* said, 'When a woman or girl dresses half-naked she is saying through her action "I am available to any man that needs me". When you dress seductively you are exposing yourself to the danger of being raped.'⁷¹

The Times of Swaziland has since changed its tune. The about-turn came on (25 January 2008) in an editor's comment after a gang of men were sentenced to a total of 103 years in jail for raping 11 girls aged six to 11 years old. Dogs and knives were used to threaten some of the girls into submission. According to Rooney rape in this country has become a fashion and unless the courts take a stern stand against it by imposing heavy sentences, it is bound to continue to wreck this already fragile HIV AIDS ravaged country.⁷² The rapists got what they deserved but no matter how many years they spend behind bars, nothing can replace the harm and damage that has been caused to the lives of the innocent young survivors.⁷³ Society has a role to play in ensuring others do not experience such suffering. We owe it to the future generation to create a safe environment they can call home.⁷⁴ Newspapers and the media generally have an important role in this regard. Women and children who get raped are victims and are in no way responsible for the rape.

⁶⁸ WLSA *Multiple jeopardy* (n 54 above)

⁶⁹ As above

⁷⁰ Richard Rooney, Associate Professor, Journalism and Mass Communication, University of Swaziland, 2005-2008. <http://swazimedia.blogspot.com/2007/09/times-peddles-ignorance-on-rape.html> accessed 10 September 2009

⁷¹ As above

⁷² Above

⁷³ Above

⁷⁴ Above

2.3 Marital Rape

Marital rape is a very real and serious problem. While there are a number of perpetrators of rape behind bars on conviction of rape there is none behind bars for committing marital rape. Although men continue to force married women to engage in sex this is not considered rape by the law because for rape to occur the act must be unlawful.⁷⁵ The law recognises sexual intercourse between husband and wife as lawful. Thus, the husband cannot be said to have raped his wife; the rationale being that in a marriage a woman gives irrevocable consent to sexual intercourse.⁷⁶ This factor alone has led to women having no say and not allowed to have control over their bodies. As a result, women are constantly put in a lot of pressure to have sexual intercourse and to having more children even when they do not want to or worse when it is detrimental to their health.⁷⁷ Such a view is attributable to the belief by men that the bodies of their wives and their whole being belong to them to do with as they please.

However, rape is rape, regardless of the relationship between the rapist and the victim. It can be a total stranger; someone you recognise by sight, but have never really communicated with; someone you know superficially, a neighbour or a colleague; a friend, a boy-friend or a former boyfriend; a live-in partner, or a former partner; someone you are married to or have been married to in the past.⁷⁸ Unfortunately, the traditional idea that it is impossible for a man to rape his wife and that somehow, in taking marriage vows there is a hand over of any say over one's own body and sexuality, basically denied one the right to say 'no', is still prevalent amongst wives as much as amongst their husbands.⁷⁹ Waterman provides that the marital rape exemption originated at common law with a statement made in the seventeenth century by Lord Matthew Hale⁸⁰ who declared that "but the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and

⁷⁵ WLSA *Multiple Jeopardy*(n 54 above) 65

⁷⁶ As above

⁷⁷ Above

⁷⁸ <http://www.hiddenhurt.co.uk/Articles/maritalrape.htm> accessed on 27 June 2009

⁷⁹ As above

⁸⁰ Sir Matthew Hale, a former Chief Justice of the Court of King's Bench in England, seminal treatise, the *History of the Pleas of the Crown*, which was first published in England in 1736

contract the wife hath given up herself in this kind unto her husband, which she cannot retract”⁸¹ For over 300 years Hale’s statement alone served as a justification for spousal immunity involving rape charges, and was the origin for judicial recognition of the marital rape exemption.⁸² This is despite the fact that marital rape has been a pervasive socio-cultural problem that encompasses both physical violence and the psychological trauma of being raped by someone who has taken marriage vows to love and honour his or her spouse.⁸³ Hale’s statement also, serves to maintain the position of men in our society as dominators and women as their property.⁸⁴ It must be noted that Hale’s statement has since been criticised on the basis that Hale cited no authority for his statement, and because in actuality the common law does not support an absolute spousal exemption.⁸⁵

It must be noted that over the years Hale’s comment has been chipped at by the courts to allow for exceptions to it. For example in the Virginia case of *Weishaupt v Commonwealth*⁸⁶ the court held that ‘the true state of English common law was that marriage carried with it the implied consent to sexual intercourse; but that consent could be revoked. The court stated that Hale’s statement was not law, common or otherwise. At best it was Hale’s pronouncement of what he observed to be custom in 17th century England.⁸⁷ The court further concluded that English common law never recognised an absolute irrevocable marital exemption that would protect a husband from rape charges in all circumstances. Nonetheless, Hale’s statement has traditionally been accepted as the origin for the marital rape exemption.⁸⁸

It is provided that such a statement which proceeded from Sir Hale and was later adopted into law remains the foundation upon which the marital immunity is enjoyed by men in many jurisdictions of the

⁸¹ SF Waterman ‘For better or worst: Marital rape’ (1988) 15, *Northern Kentucky Law Review* 611

⁸² As above

⁸³ ML Woolley ‘Marital rape: A unique blend of domestic violence and non-marital rape’ (2007) 18 *UC Hastings College of the Law, Hastings Women’s L. J.* 269

⁸⁴ WLSA Trust *Multiple jeopardy* (n54 above) 33 and WLSA *Charting the maze* (n 34 above) 75

⁸⁵ JE Hasday ‘Contest and consent: A legal history of marital rape (2000) 88 *California Law Review* Rev 1373

⁸⁶ Hasday above, *Weishaupt v Commonwealth* (1984) 227 Va

⁸⁷ As above

⁸⁸ Above

common law world and beyond.⁸⁹ The more compelling reason why it is not acceptable that this immunity should not obtain in Africa is the fact that marital rape has since been made a criminal act in the United Kingdom in 1991.⁹⁰ It is submitted that the Hale's immunity no-longer exists and that the law should declare that a rapist remains a rapist subject to criminal law, irrespective of the relationship with his victim⁹¹ Another measure point is that the common law is evolving in the light of changing social economic and cultural development and that Lord Hale's proposition reflected the state of affairs in these respect at the time it was enunciated i.e. 1736.⁹²

Marriage in modern times is regarded as a partnership of equals, and no-longer one in which the wife is a subservient chattel of the husband.⁹³ A closer look at Hale's proposition involves that by marriage a wife gives consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time.⁹⁴ Any reasonable person must surely regard that concept as quite unacceptable.

The European Court for Human Rights⁹⁵ in declaring the marital immunity obsolete looked at the essentially debasing character of rape which is so manifest that the result of the decisions of the court could be said to be at variance with the object and purpose of the Convention. It was said that the abandonment of an unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the convention the very essence of which is respect for human dignity and human freedom.⁹⁶

⁸⁹ Cook (n 23 above)

⁹⁰ *R. v. R* [1991] 1 All England Law Reports 747

⁹¹ As above

⁹² Above

⁹³ Hasday (n 86 above)

⁹⁴ Woolley (n 83 above)

⁹⁵ *C.R. v. The United Kingdom* ECHR (22 November 1995)

⁹⁵ Cook (n 23 above)

⁹⁶ Above para 42

The time has come to criminalize marital rape throughout the world, and the tools to do so are available now more than ever. This will also breathe life into the eradication of the concept of non-indifference on gender equality and roll back cultures of impunity.⁹⁷ The strengths of the judicial and legislative approaches can only be a part of a larger strategy in the prohibition of marital rape. Therefore, societal awareness rising on the prohibition of marital rape and its ill effects on women should be put on the fore. Eradicating forms of traditional practices all of which violate female dignity to which blind adherence to these practices and state inaction with regard to these customs and traditions have made possible large-scale violence against women.⁹⁸ These abuses are to a great extent compounded by women's social and economic inequality.⁹⁹

Marital rape continues to be a pervasive problem in many countries including Swaziland, and many strides of progress towards its criminalisation and effective prosecution, is often shielded by the veil of family and marital privacy.¹⁰⁰ If our goal is to promote a society where women are free to control access to their own bodies, then the repeal of any spousal exemption is essential to every woman's guarantee of liberty and justice.¹⁰¹ The abolishment of the marital rape exemption is necessitated by the fact that law sometimes operates both as an educational tool and as a deterrence measure. In theory then, an unknown number of husbands will be deterred from raping their wives by the abolishment of the exemption, while an unknown number of other persons will come to recognise marital rape as a criminal act. Men need to realise that they are going to be held responsible for their behaviour that violates a woman's right to her own body.¹⁰² The only way to promote this goal is to remove the marital rape exemption thereby, making an important statement about the relative position of women in society

⁹⁷ Criminalizing marital rape: a comparison of judicial and legislative approaches <http://www.thefreedictionary.com> accessed 27th June 2009

⁹⁸ As above

⁹⁹ AK Njoroge: The Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples' Rights, Djibouti February 2005

¹⁰⁰ Woolley (n 83 above) 269

¹⁰¹ As above

¹⁰² Above

which is the assertion of the right of married women to the physical integrity of their bodies, and of the right to choose what uses their bodies will be put to.¹⁰³

2.4 Summary

In this chapter patriarchy is revealed as social organisation that perpetuates domination of women by men in almost all spheres of their lives. In Swaziland the very existence of the social organisation of the society is premised on the domination of females by males. Stereo types, myths and negative attitudes continue to shift and exonerate men who rapes from the act blaming the victim for what happened to her. Women suffer rape in the hands of people they know as opposed to strangers. Marital continues to a problem that married women are subjected to but it received little attention in teams of legislation reforms. Due to the debasing character of rape, a rapist should be regarded a rapist regardless of his relationship to the victim.

¹⁰³ Woolley (n 100 above)

CHAPTER THREE

Access to Legal Abortion by Rape Victims as an Internationally Recognised Reproductive Health Right

3.1 Introduction

The previous chapter looked at perceptions on rape and rape victims. This chapter investigates the perception of abortion among rape victims and at international and regional instruments liberalising abortion for rape victims. This is done in a bid to help clarify the issue of restrictive abortion laws and to urge governments to liberalise their own national laws on the issue.

Wherever the word abortion is mentioned the temperature rises. It is subject to heated discussions and controversy because it involves philosophical, religious, ethical, social, economic, population, legal and human rights issues.¹⁰⁴ According to Cooks, the historical fashioning of restrictive abortion laws in western countries, and their transmission and retention in other regions through patterns of European colonisation, have resulted in an imbalance in their impact between economically developed and still developing countries.¹⁰⁵

Very few countries with restrictive abortion laws make exceptions for rape and incest survivors.¹⁰⁶ From an anti-abortion perspective such an exception is viewed as too liberal, since it condones the termination of unwanted pregnancies which do not pose a significant danger or risk to a woman's physical health.¹⁰⁷ Human reproduction is often viewed through a gendered lens that blames women both for a couple's infertility and for unplanned pregnancy.¹⁰⁸ There is a lot of debate going on between

¹⁰⁴ OW Giorgis, *Legal considerations of women's reproductive rights and abortion in Ethiopia* Dec. 25 and 26/2001

¹⁰⁵ Cook (n 23 above) 560

¹⁰⁶ Hansson (n 56 above) 514

¹⁰⁷ As above

¹⁰⁸ Cook (n 23 above) 563

pro-choice and pro-life organizations on the issue.¹⁰⁹ The pro-choice advocates deem the body of a woman to be hers to do with it whatever she likes. To have a child or terminate her pregnancy is the women's choice. It is her life! It is her human right and her reproductive right.¹¹⁰

On the other hand, Pro-lifers, by contrast base their argument on the sanctity of life. To them, nobody has right to destroy life; and a baby has life from the date of conception. Under this argument, a woman's reproductive rights become immaterial.¹¹¹ Women are seen as creators of life, so when a woman who is the carrier of life wants to end it, she must be very desperate.¹¹² Hence, if a woman wants to terminate her pregnancy, nothing, not even the possibility of death, can stop her from doing it.¹¹³ If safe abortion is not available, they resort to unsafe ones.¹¹⁴

The punitive approach that mandates continuation of pregnancy a woman has voluntarily risked through sexual intercourse has persisted, despite its common cruelty and ignorance of the many circumstances in which women's capacity to resist spousal or other intercourse is so compromised as not to constitute their genuine choice.¹¹⁵ Nevertheless, some criminal laws hold to this view that rape, to which incest is often allied, is an exception that justifies abortion. Again the gendered view remains, however, that womankind is disposed to seduction and deception of men, and that an allegation of rape is easily made and difficult to defend.¹¹⁶ It does not have to be like that considering the fact that an unwanted pregnancy can be as devastating on top of the initial rape.

¹⁰⁹ Petchesky (n 37 above)

¹¹⁰ As above

¹¹¹ Giorgis (n 104 above)

¹¹² As above

¹¹³ Above

¹¹⁴ Above

¹¹⁵ Cook (n 23 above) 564

¹¹⁶ As above

3.2 How Rape Victims View the Issue of Abortion

Abortion is a very complex issue. It is an issue that touches upon values that have been shaped by culture, religion, relationships and the entire context in which people live.¹¹⁷ Abortion is defined as the termination of pregnancy after the fertilisation of the egg or embryo has entered into the womb of the women and before the fetus becomes viable.¹¹⁸ In Swaziland where religious and cultural beliefs are still predominating, abortion is strictly prohibited by the family, church, policy and other institutions.¹¹⁹ Abortion has been condemned by religion and is labelled as sin and immoral and punishable by law.¹²⁰ In traditional cycles, especially in the rural community, where childbirth is seen as the normal duty of a woman, any means of fertility rate control and abortion is not tolerated at all.¹²¹

It must be noted that like in Swaziland, Ethiopia also has a strong religious and cultural influence when it comes to the subject matter abortion. However, matters relating to abortion are not to be decided on the basis of absolute moral conviction of a society and the stigma attached to abortion does not serve to reduce the incidents of abortion which are still high.¹²² Cheryl Alexander provides that rape victims often are blamed for having attracted the crime and are treated as if they were the offender by the police, medical personnel, the courts, and, not infrequently, well meaning family and friends.¹²³ Moreover, personal testimonies of rape victims suggest that some of the psychological trauma experienced by the victim can be attributed to such attitudes and treatment.¹²⁴

¹¹⁷ World Health Organisation, (1995) 4 *World Health Series* 4

¹¹⁸ M Roba , 'Tripartite interest in abortion: The woman, the father and the fetus under Ethiopian law', unpublished LLB thesis Addis Ababa University 2000 9: Definition used by the medical profession

¹¹⁹ WLSA (n 4 above) and (n5 above)

¹²⁰ Cook (n 23 above) 562

¹²¹ Roba (n 118 above) 12

¹²² As above

¹²³ CS Alexander The Responsible Victim: Nurses' Perceptions of Victims of Rape (1980) 21 *Journal of Health and Social Behavior*, John Hopkins University School of Hygiene and Public Health March):22-33: Available on <http://www.jstor.org/stable/2136691> accessed: 24 September 2009

¹²⁴ As above

There is abundant clinical evidence regarding the physical and psychological suffering of rape victims, many of whom experience guilt, extreme depression, insomnia, exaggerated fears, and problems in resuming heterosexual relations.¹²⁵ Conceiving of rape as a crisis event has psychological consequences that can be increased or diminished by the responses of health providers. If they are correct, then it is important to understand how health providers react to rape victims, and how their own characteristics, those of the victim, and those of the crime itself affect that reaction.¹²⁶

Moral arguments that life begins as soon as the egg is fertilised are very real as victims of rape believe that accession. This was revealed by three Marie Stopes clients randomly selected from a clientele of 70 patients.¹²⁷ Client one provided that she got pregnant as a result of rape. She explained that she has been to the public health institution and her pregnancy confirmed. When she explained about her desire to abort, her wish was turned down.

When asked about her decision to visit Marie Stopes for their services; she provided that it has not been easy because even though she was raped, abortion is forbidden by God, but there is nothing she can do than to terminate the pregnancy as she is poor and have to means to feed the child. The other two interviewees also alluded to the moral underpinning that God was pretty clear when he said “thou shall not kill”.¹²⁸

3.4 Victims of Rape need access to emergency contraception no matter where they go for treatment

While rape is widely unreported, there is a need to see to it that emergency contraceptives (EC) which can be taken within 72 hours of unprotected intercourse are made available to rape victims. However, neither Catholic facilities nor Christian Health Institutions provide EC, although some of these facilities

¹²⁵ Above

¹²⁶ As above

¹²⁷ Interviews conducted with three of Marie Stopes International clients on the 23 September 2009 in Addis Ababa (Piyasa)

¹²⁸ Interviews available on request from researcher

treat rape victims.¹²⁹ In view of the psychological consequences of conceiving after being raped, every non pregnant woman or girl of child bearing age should be offered emergency contraceptive(EC).¹³⁰ This should be the law. Since EC is only available for a limited amount of time, it is vital that rape victims be able to use EC as soon as possible. This is especially crucial where it is not clear whether abortion is allowed or not in cases of rape and unsafe clandestine abortion is a serious threat to the lives and health of women.¹³¹

Most of the time rape victims suffer rape and end up pregnant because their doctors could not prescribe emergency contraceptives which must be taken within 72 hours. They forget about informed consent of their patients. Informed consent as to what happens to her body. They need to be asked 'do you want to prevent pregnancy or have your rapist's baby'. Since doctors provide a crucial public benefit to a diverse society and we cannot condone it when they impose their own religion on patients on whom they are professionally obligated to serve.

Due to the prejudices and beliefs that some doctors have women and teenagers are left to choose between violating their own moral principles by terminating the pregnancy which would have been prevented if emergency contraceptive (EC) were given or suffer the consequences and deliver the child; a child conceived against their will as a direct result of the most traumatic ordeal that they have ever endured. Rape victims are generally morally opposed to abortion but they previously never had imagined that they would suffer rape resulting in pregnancy.

¹²⁹ Centre For Reproductive Rights (CFRR) Failure to Deliver: Violation of Women's Human Rights in Kenya (2007) Centre for Reproductive Right and Federation of Women Lawyers-Kenya. www.reproductiverights.org

¹³⁰ As above

¹³¹ Above

3.5 Liberalisation of Abortion Internationally

According to Hernandez,¹³² since 1968, the United Nations has recognised, and repeatedly restated, the right of individuals to decide freely and responsibly the number and spacing of their children. The Universal Declaration on Human Rights for the first time stipulated specific rights to privacy, health and equality regardless of sex. Although initially the Declaration was an aspirational statement, it is now recognised as the standard of recognised rights.¹³³ In addition, the Civil Covenant and the Economic Covenant, both based on the Declaration, also expressly protect these rights. Similarly, the Women's Convention, which focuses on the right to equality on the basis of sex, protects such rights and which provides the foundation for reproductive rights.¹³⁴

Consequently, reproductive rights have also been incorporated into the international development agenda. The adoption of the United Nations (UN) Millennium Development Goals (MDGs) in 2000, where governments agreed that addressing women's reproductive health is key to promoting development. In the document produced at the 2005 World Summit, leaders from around the world made an explicit commitment to achieving universal access to reproductive health by 2015.¹³⁵ The MDGs provides another vehicle for advancing women's reproductive rights.

The Beijing Platform declares that:

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.¹³⁶

¹³² BE Hernandez, 'To bear or not to bear: Reproductive freedom as an international right' (1991) *Brooklyn Journal of International Law*.325

¹³³ As above 326

¹³⁴ CEDAW (n10 above)

¹³⁵ United Nations General Assembly, 2005 *World Summit Outcome*, U.N. Doc A/Res/60/1 (2005)

¹³⁶ ICPD (n1 above)

It is accordingly a human rights infringement when women who have suffered the violation of rape are compelled to endure pregnancy against their will by the coercion of criminal sanctions.¹³⁷ The Platform further condemns “torture...sexual slavery, rape, sexual abuse and forced pregnancy.”¹³⁸ Forced pregnancy describes both forced initiation of pregnancy, and forced continuation of pregnancy.¹³⁹ The Rome Statute constituting the jurisdiction of the International Criminal Court (ICC) similarly recognises forced pregnancy as a crime against humanity.¹⁴⁰ This was in reaction to preceding evidence, presented before tribunals addressing humanitarian outrages in conflicts in the former Yugoslavia and Rwanda, of systematic rape as part of “ethnic Cleansings”, when women pregnant by rape were denied abortion due to religious influence.¹⁴¹

Recognition of forced pregnancy, however initiated, exposes the coercion women suffer to continue pregnancies against their will, by criminal laws and other means. The re-conceptualisation of criminal abortion laws as human rights violations when they deny women’s choice shows that restrictive laws and governmental policies can be disrespectful of women’s wishes, interests, health, and bodily integrity as are rapists.¹⁴² Those who support and enforce such laws and policies similarly enforce their will upon women by their power of domination, in order to advance their own social, spiritual, or other purposes.¹⁴³

However, modern thinking on abortion laws directs policy and legislation away from the historical preoccupation with criminalisation and punishment, towards the protection and promotion of women’s health and prevention of unsafe abortion.¹⁴⁴ The Cairo Programme recognises the importance of human rights in protection and promotion of reproductive health.¹⁴⁵ The Cairo Programme explains that

¹³⁷ Cook (n23 above) 565

¹³⁸ Beijing Platform of Action (n2 above)

¹³⁹ above (n137)

¹⁴⁰ Rome Statute on the International Criminal Court, U.N. Doc A/Conf. 183/9 (1998) art 7(1)(g)

¹⁴¹ As above

¹⁴² Above 566

¹⁴³ As above

¹⁴⁴ Above

¹⁴⁵ ICPD (n 1 above)

reproductive health is a state of complete physical, mental and social well-being and is not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. At Cairo, governments agreed to take steps to make it easier for couples and individuals to take responsibility for their own reproductive health by removing unnecessary legal, medical, clinical and regulatory barriers to information and to access to family-planning services and methods.¹⁴⁶

The Cairo Programme emphasis that in no case should abortion be promoted as a method of family planning. All governments and relevant intergovernmental and non-governmental organisations are urged to strengthen their commitment to women's health... to reduce the recourse to abortion through expanded and improved family planning services. Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion.

No law precludes abortion undertaken in the honest belief that it is necessary to save the woman's life.¹⁴⁷ Further, where legislation prohibits abortion undertaken 'unlawfully' courts widely acknowledge that a procedure undertaken to preserve a woman's physical or mental health against serious threats is lawful.¹⁴⁸ Even when women resort to illegal abortion, their right to health care entitles them to proper post-abortion treatment. This is in accordance with the 1999 Cairo+5 Conference which does not distinguish legal from illegal abortion in providing that governments should in all cases provide for the humane treatment and counselling of women who have had recourse to abortion.¹⁴⁹

Article 12 (1) of the International Covenant of Economic, Social and Cultural Rights (CESCR)¹⁵⁰, member states recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. In monitoring the Covenant the committee on Economic Social and Cultural Rights

¹⁴⁶ As above

¹⁴⁷ Cook (n23 above) 569

¹⁴⁸ *R v Bourne* (n25 above)

¹⁴⁹ ICPD (n 2 above)

¹⁵⁰ The International Covenant on Economic, Social and Cultural Rights (CESCR), adopted 16 Dec. 1966, G.A. Res. 2200

has developed General Comment 14 on the Right to health, which explains that the right requires the following interrelated features of health care services, namely their:

Availability (health care services have to be available in sufficient quantity); accessibility (services including information, have to be physically and economically accessible to everyone without discrimination); acceptability (services have to be culturally appropriate, that is, respectful of the cultures of individuals, minorities and communities, and sensitive to gender and life-cycle requirements); and adequate quality (services have to be scientifically appropriate and of sufficient quality).¹⁵¹

At regional level, the African Charter on Human and Peoples' Rights provides for the equality of all people and for the right to health.¹⁵² Even though the African Charter does not expressly touch upon the right of rape victims to access legal abortion such a right is implicit in the sense that in article 18 it categorically provides for the elimination of every discrimination against women and also ensures the protection of the rights of the woman and the child as stipulated in international declarations and conventions. Also, the Women's Protocol in article 14 gives women the right to medical abortion in cases of sexual assault, rape, incest.¹⁵³ Unfortunately, Swaziland has yet to ratify the Protocol.

The African Union (AU) has developed Sexual and Reproductive Health and Rights; Continental Policy Framework, with the aim of a model for the harmonisation of national, sub-regional and continental efforts to promote reproductive health and reproductive rights in the continent.¹⁵⁴ The policy Framework considers the inadequacy of existing sexual and reproductive health and legislative

¹⁵¹ General Comment No. 14 UN CEDSCR Comm. Econ., Soc. & Cultural Rts 22^d Sess., U.N. Doc. E/C. 12/2000/4 (2000)

¹⁵² African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986

¹⁵³ The Protocol to the African Charter on Human And Peoples' Rights on The Rights of Women in Africa adopted by the AU on 11 July 2003

¹⁵⁴ Maputo Plan Of Action for the Operationalisation Of The Continental Policy Framework For Sexual And Reproductive Health And Rights 2007-2010

frameworks and urges member states to strengthen the existing laws, to adopt new sexual and reproductive laws taking into account African specificities and a better application of laws.¹⁵⁵

Laws and policies that unreasonably restrict safe abortion services would not comply with this performance standard.¹⁵⁶

3.6 Summary

Abortion is a complex issue that is touching upon sacred religious and cultural beliefs both in Ethiopia and in Swaziland. These beliefs have condemned abortion as immoral and made abortion punishable by law. It has been revealed that rape victims who conceived as a result of the rape, their psychological trauma can either be exacerbated or reduced due to the way they are being treated by services providers. Victims of rape in Ethiopia view abortion as a sin but do it as they have no other alternatives. Non pregnant woman or girl of child bearing age who suffers rape should be offered emergency contraceptive (EC) as a matter of policy to cut down on the number of women seeking abortion after a rape incident. International law sees the importance of human rights in protection and promotion of reproductive health and the rights of victims of rape to access legal abortion. A continental policy framework on sexual and reproductive health rights has been designed in Africa in order to harmonise national, sub-regional and continental efforts on these rights.

¹⁵⁵ As above

¹⁵⁶ Cook (n 23 above) 570

CHAPTER FOUR

The Law on Abortion in Swaziland

4.1 Introduction

This chapter looks at rape as a legal condition for access to legal abortion by rape victims as provided for by the Swaziland Constitution. The fact that the law is silent on the steps that need to be followed to access legal abortion is seen as rendering it vague and ineffective. Focus is also paid to what can be done to ensure that the law liberalising abortion for rape victims do not remain in statute books but is actually implemented.

4.2 The Law on Abortion

The Swaziland Constitution criminalises the termination of pregnancy in all but on medical or therapeutic grounds and where pregnancy resulted from rape, incest or unlawful sexual intercourse with a mentally retarded female; or on such other grounds as Parliament may prescribe.¹⁵⁷ While it appears that the Constitution has laid a strong foundation on the issue of access to abortion by rape victims, it still needs reinforcement through stand alone legislation that would draw inspiration from the Constitution. Such appearance has led many to think that finally abortion law reform has been brought about in Swaziland even though not through the amendment of criminal laws but in the unusual framework of a new Constitution.¹⁵⁸

Previously, there was no statutory law in Swaziland one could point out governing the performance of abortions. Instead, abortion was a matter of common law, which is patterned after Roman-Dutch common

¹⁵⁷ The Constitution of the Kingdom of Swaziland, 26th July 2005, section 15

¹⁵⁸ R Boland and L Katzive 'Developments in Laws on Induced Abortion: 1998-2007' (2008) 34 *International Family Planning Perspectives* 110-120

law.¹⁵⁹ Under this law, abortion is prohibited except in cases of necessity. There is some disagreement, however, as to what constitutes a case of necessity. The majority position of commentators is that a case of necessity exists only when an abortion is performed to save the life of the pregnant woman.¹⁶⁰ However, it is possible that a case of necessity need not be so serious and that an abortion could be performed in cases of serious threat to both physical and mental health, foetal defect and rape.¹⁶¹ There is no case law on this issue in Swaziland.

It suffices to state that a number of countries have permitted abortion on request based on the respect for women's human rights-mainly rights of Privacy and autonomy.¹⁶² While others like Swaziland consider the health and welfare of women, permit abortion on ground of rape and incest as exceptions to an otherwise restrictive law. The underlying notion behind laws that recognise rape as a factor for legal abortion is that the pregnant woman must not be responsible an act to which she has not fully consented.¹⁶³

Although each country's abortion law is written with specific goals in mind, the basic reason for permitting a rape exception to an otherwise criminalised procedure can be assumed to be ensuring that women who are pregnant because of rape have access to safe abortion services.¹⁶⁴ The laws are meant to protect rape survivors from the short and long-term physical and psychological consequences of the experience.¹⁶⁵ When national laws or accompanying regulations are vague or non existent regarding how the rape indication should be operationalised, medical and legal professionals tend to act more conservatively in order not to risk breaking the law.¹⁶⁶ It is submitted that currently in Swaziland the above position obtains. The law does not lay down any detailed steps that would facilitate proper

¹⁵⁹ Population Division, UN Department for Economic and Social Development, *Abortion Policies: A Global Review, Vol. III: Oman to Zimbabwe*, New York UN, 2002

¹⁶⁰ Population Division (n 159 above)

¹⁶¹ Above

¹⁶² KI Teklehaimanot and CH Smith 'Rape as a legal indication for abortion: Implications and consequences of the medical examination requirement'(2004) 23 *Med Law* 91-102

¹⁶³ As above

¹⁶⁴ Teklehaimanot (n 162 above)

¹⁶⁵ As above

¹⁶⁶ Above

implementation, making it difficult for women to actually obtain a legal abortion and for health professionals to know their obligations regarding medical examination and performing abortion procedures.¹⁶⁷

Abortion laws which simply specifies rape and incest as a ground for legal abortion may appear liberal due to their open and flexible nature, but in reality, experience in many countries show that the lack of specific guidance causes the abortion laws to remain on the books, without any effect in practice.¹⁶⁸ The lack of specific guidance may make it difficult for most health personnel to ascertain if the law permits them to perform an abortion or not.

In the absence of detailed provisions within the law, health personnel are often uncertain as to what role they must play, for example, if a pregnant rape victim presents at a hospital requesting a legal termination of pregnancy, the health personnel may question whether they are require to contact law enforcement officials before proceeding with medical examination and an abortion procedure.¹⁶⁹ Similarly, police may hesitate to help the woman obtain an abortion procedure before receiving proof of rape, which, in most cases, can be determined only through a medical examination and only immediately after the rape has occurred.¹⁷⁰

It must be noted that Attempts have been made in the past to make access to abortion by rape victims a reality. However such moves were met with resistance as James Hall reported that traditionalists who hold sway over public opinion in Swaziland, reject abortion as a woman's right over her body.¹⁷¹ It is stated that a submission in favour of legalised abortion was presented for the first time to the Swazi Parliament by Senator Mbho Shongwe who believes sharp gender inequalities in society have, among other things, saddled Swazi women with unwanted children while leaving fathers free to withhold

¹⁶⁷ TeKlehaimanot (n 162 above)

¹⁶⁸ As above

¹⁶⁹ (n 167 above)

¹⁷⁰ As above

¹⁷¹ Hall James, *Rights-Swaziland: Traditionalists, Reformists Lock Horns over Abortion.* <<http://ipsnews.net/africa/Focus/religion.shtml>>, accessed 29 April 2009, Copyright © 2005 IPS-Inter Press Service.

support was turned down.¹⁷² It is provided that the Senator revealed that girls are going across the border for abortions in South Africa where the operation is legal and that those that are not able to cross the border are having unsafe kitchen table abortions here.¹⁷³

There is no point in rejecting abortion while millions of women continue to die from it. It would be an achievement to see women have the right to abortion on demand in Swaziland. People think that if abortion laws are liberalized women would line up to do it.¹⁷⁴ That is not so. A woman who wants to carry the pregnancy to term would never terminate it whatever the law says and woman who wants to terminate her pregnancy would do it illegally if there are no legal means.¹⁷⁵ This is proven again and again. Liberalizing the laws would reduce the death of mothers. Organisations like the Swaziland Action Group Against Abuse (SWAGAA), which counsels survivors of rape and incest, and the Swaziland AIDS Support Organisation (SASO) have over years pushed for access of legal abortion by rape victims and are reported to have applauded the Senator for publicly raising the issue of abortion.¹⁷⁶

The problem is further compounded by the fact that some Member of Parliament in Swaziland continues to call upon the country's Christian fraternity to strongly denounce any laws that seek to give rights to abortion.¹⁷⁷ How can this be in a country like ours, where, the issue of abortion is aggravated by the fact that reports of young girls being raped and/or abducted are not uncommon? When they become pregnant they cannot have abortions legally as mentioned earlier. The rape itself is a violation of women's and girl children rights and getting pregnant is adding problems, which makes it worse.

It suggested that for the purposes of avoiding such problems, the abortion law must delegate to the Ministry of Health (MOH) the creation of detailed regulations or guidelines specifying the role of the

¹⁷² As above

¹⁷³ Hall (n 171 above)

¹⁷⁴ Giorgis (n 104 above)

¹⁷⁵ As above

¹⁷⁶ Hall (n 171 above)

¹⁷⁷ A Member of Parliament in Swaziland, Sivumelwano Nxumalo, made the remarks in February 2009 when the legislator was speaking to members of his constituency at Sigwe, South of the country: <<http://blackchristiannews.com/cgi-bin/mt/mt-tb.cgi/1571>> accessed 29 April 2009

health personnel and the steps they must follow before and after the abortion procedure.¹⁷⁸ Permitting detailed guidelines to be created through regulations rather than part of the law itself is a flexible approach that accommodates changing circumstances and can be quickly and easily enacted, amended or repealed as opposed to creating or changing a law which is a much more lengthy and a complex process.¹⁷⁹ More over, the Ministry of health in turn need to develop, disseminate the guidelines and monitor for their proper implementation in practice.

4.3 Summary

Any abortion law that permits abortion to rape victims needs to be assessed in light of its basic objectives. Abortion laws sometimes are too vague to properly be applied in practice, making it difficult for health personnel to determine when they should undertake medical examinations and whether they can legally provide an abortion for women who have been raped. This can be said is what is preventing victims of rape from accessing legal abortion in Swaziland as there are no guidelines on the issue.

Abortion laws which lay down medical examination as a requirement for access to legal abortion in rape cases, may be rendered ineffective in cases where a pregnant woman reports the rape much later, after she learns of the pregnancy. This is of particular importance considering the complex factors which hinder women from reporting their rapes. In order to be effective and ensure women access to abortion for all permissible reasons, laws should remove medical examination from the requirements tied to rape indications, and should clearly provide the Ministry of Health (MOH) or appropriate health body with the power to develop and formulate detailed guidelines regarding the roles and responsibilities of health personnel in relation to abortion. There is a need for proper dissemination and monitoring of implementation of the guidelines in practice.

¹⁷⁸ Teklehaimanot (n 162 above)

¹⁷⁹ As above

CHAPTER FIVE

The Law on Abortion in Ethiopia

5.1 Introduction

This chapter looks at the Penal Code of the Federal Democratic Republic of Ethiopia¹⁸⁰ as well as at Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia.¹⁸¹ This will assist in showing how far the Ethiopian government have gone in ensuring legal abortion to rape victims and to see if Swaziland can learn from Ethiopia's experiences.

Many developing countries take a hard line on abortion. The recognition that abortion poses a severe health risk has not resulted in any major effort to modify restrictive laws or to mitigate women's suffering, that is why the Ethiopian situation warrant interrogation. According to a survey done by the World Health Organisation (WHO) 59% of Ethiopian women had experienced sexual abuse and sexual violence from partners, and 17% reported that their first sexual intercourse was forced. Gender based violence is common and generally goes unchallenged.¹⁸²

As is the case in many developing countries, availability of annual data on incidents of abortion is very difficult in Ethiopia. This is because of the criminality of abortion and the social stigma attached to the practice. In Ethiopia where religious and traditional beliefs are still predominating, abortion is strictly prohibited by the family, the church, policy and other social institutions.¹⁸³ Abortion has been condemned by religion and is labelled as sin and immoral and punishable by law; especially in the rural

¹⁸⁰ The Criminal Code (n36 above).

¹⁸¹ Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia, Ministry of Health, June 2006, Addis Ababa

¹⁸² Centre For Health And Gender Equality: *The Case for Comprehensive: Ethiopia The Importance of Comprehensive, Rights-Based Approaches to Sexual and Reproductive Health*, May 2009 available on <http://www.genderhealth.org/> accessed on 10th September 2009

¹⁸³ Roba (n 118 above) 9

communities, where childbirth is simply what the women should normally do; any means of fertility rate control and above all abortion is not tolerated.¹⁸⁴

Restrictive laws only drive women to undergo abortion illegally and in unsafe conditions. Nevertheless safe abortions for all cannot be achieved without legislative changes in the countries where they are prohibited.

5.2 The Criminal Code

It is noteworthy that Ethiopia's Criminal Code does permit the survivors of rape and incest to have legal abortion. This change of heart came with the promulgation of the Criminal Code of 2004 which repealed the Criminal Code of 1957. The Ethiopia law restricts women's rights to terminate pregnancy. Section 11 of the Criminal Code provides for crimes against life unborn; abortion. Article 545 criminalises the intentional termination of a pregnancy, at whatever stage or however effected, except as otherwise provided under Article 551.¹⁸⁵ The Criminal Code prohibits abortion whether procured by the pregnant woman herself or by other person with or without her consent.¹⁸⁶ Punishment for the crime depends on whether the abortion is procured by the pregnant woman herself or by another person.¹⁸⁷ More so, the Criminal Code provides for aggravating circumstances like when the said crime is committed by a professional, in particular, by a doctor, pharmacist, midwife, or nurse practicing his profession. In such a case the court is ordered to impose a sentence plus prohibition of practice, either for a limited period, or, where the crime is repeatedly committed, for life it prohibits¹⁸⁸

The following are conditions upon which pregnancy may be terminated where:

- a) the pregnancy is the result of rape or incest; or b) the continuance of the pregnancy endangers the life of the mother or the child or the health of the mother or where the birth of

¹⁸⁴ As above

¹⁸⁵ Criminal Code (n 36 above) article 545 (1)

¹⁸⁶ As above article 546

¹⁸⁷ Criminal Code (n1 85 above) articles 546 and 547

¹⁸⁸ As above article 548

the child is a risk to the life or health of the mother; or c) where the child has an incurable and serious deformity; or d) where the pregnant woman, owing to a physical or mental deficiency she suffers from or her minority, is physically as well as mentally unfit to bring up the child.¹⁸⁹

The law also provides for termination of pregnancy in the case of grave and imminent danger which can be averted only by an immediate intervention.¹⁹⁰ Article 552 provides that:

In the case of terminating pregnancy in accordance with sub-article (1) (a) of Article 551 the mere statement by the woman is adequate to prove that her pregnancy is the result of rape or incest.¹⁹¹

It is submitted that the above provision is the only ground that tends to liberalise access to abortion for rape victims. There is no need for the rape victim to report the incident to the police or to have had a formal charge with the courts. In short there is no need for the rape victim to produce evidence to the effect that she has is pregnant has a result of rape. According to Ipas Ethiopia (an International Organisation dealing with protection of women's health and advancing women's reproductive rights), when they were advocating for the reform of the law which took them over five years, the objective was to reduce cases of maternal mortality which were high at the time.

5.3 Guidelines for Safe Abortion Services in Ethiopia

The aim of the guide is to serve as a working document on the techniques and procedures that must be observed in providing safe termination of pregnancy services as permitted by the Criminal Code.¹⁹² The guide states that where the pregnancy is a result of rape or incest;

Termination of pregnancy shall be carried out based on the request and the disclosure of the woman that the pregnancy is the result of rape or incest. This fact will be noted in the medical record of the woman. Women who request termination of pregnancy after rape and incest are

¹⁸⁹ Criminal Code above article 551 (1) (a)-(d)

¹⁹⁰ As above article 551 (2)

¹⁹¹ Criminal Code above article 552 (2)

¹⁹² Guidelines (n 181 above) 4

not required to submit evidence of rape or incest and or identify the offender in order to obtain an abortion services.¹⁹³

It is submitted that the guide clarifies what is meant in the Criminal Code when it says the word of the woman would be enough in making the claim that she has been raped. The fact that a request for termination of pregnancy after rape or incest does not require the any production of evidence or identification of the suspect is really an important innovation in the law considering the fact that rape is associated with a stigma and so is abortion.

The guidelines further stipulate that the provider of abortion services has to secure an informed consent for the procedure using a standard consent form. The service provider shall not be prosecuted if the information provided by the woman is subsequently found to be incorrect. This proviso is of substance because if the service providers were to be intimidated by prosecutions they would be reluctant to provide such a service to those who need it the most for the fear of prosecution.

Further more, minors and mentally disabled women should not be required to sign a consent form to obtain an abortion procedure.¹⁹⁴ In fact they do not have to provide any excuse for their quest to terminate their pregnancy as the law looks at them and sees that they are likely to be unable to take of the resulting child due to social and economic reasons.

Doctors according to the Medical Ethics for Physicians Practicing in Ethiopia are obliged to intervene by terminating a pregnancy in order to save the endangered life or health of the woman.¹⁹⁵ This guideline for doctors has been in existence prior the review of the criminal code in 2004. It required only that the operation be performed by a physician in a health institution where appropriate facilities are accessible. There was no requirement that the health institution be government owned but it was enough that it had the necessary facilities. However, the guidelines had no legal force only served the purpose of medical courtesy.

¹⁹³ As above 11

¹⁹⁴ Guidelines (n 181 above) 12

¹⁹⁵ Medical Ethics for Physicians Practicing in Ethiopia: Medical Association of Ethiopia (1992) 19

Another important innovation brought about by the guideline for medical practitioners was that it was mandatory to treat a patient who was suffering from the effect of illegal abortion induced by her or another person. This practice offered meaningful assistance to women who were in the verge of losing their lives after engaging in unsafe abortion. The doctor was never to disclose the cause of her patient's condition to anyone else without her consent, unless compelled to do so by a court of law. However it was mandatory that the treating physician reported if an illegal abortion led to death to the relevant authority.¹⁹⁶

Even though the ground seems to have been levelled in terms of access to legal abortion by rape victims in Ethiopia there is still insurmountable problems in this regard. One major problem is the fact that Government hospital do not temper with intact pregnancy regardless of the cause of the pregnancy this was revealed by a Marie Stopes International Client, who stated that the government hospital only confirmed that she was pregnant but could not terminate the pregnancy. This is said despite the fact that the guidelines provides that termination of pregnancy as permitted by law can be conducted in public or private facility. According to Marie Stopes International who happens to be the highest service provider in this regard confirmed that public health centres were reluctant to temper with intact pregnancy as it has no motivation to them but will act if it is a case of induced abortion. This is a serious hindrance to the poor as government hospitals are relatively cheaper in terms of costs than private facilities.

5.4 Implementation of the Law on Abortion

Ipas conducted a survey on the availability and utilization of comprehensive abortion services in five regional states in Ethiopia from the period of July 2006 to June 2007,¹⁹⁷ after playing a proactive role in the process of the legal reform and the development abortion guidelines. Ipas trained and equipped 521 health providers from 61 hospitals and 192 health centres drawn from Oromia, Amhara, Southern

¹⁹⁶ As above 20

¹⁹⁷ T. Geressu et al; December 2007, *Availability and utilisation of comprehensive abortion services in five regional states in Ethiopia*, Addis Ababa, Ipas Ethiopia.

Nations, Nationalities and Peoples Region (SNNPR), Tigray regions and Addis Ababa City Administration to strengthen their capacities to provide comprehensive abortion services.¹⁹⁸

The outcome of the survey is that one hundred and forty three 70% of the health facilities that received training and support were currently providing the safe abortion services.¹⁹⁹ The remaining facilities are said to have not resumed services due to a number of reasons which includes absence of women seeking services, provider's attitudes and lack of support from managers.²⁰⁰ The Constitution of Ethiopia shield medical practitioner, a nurse or any other person employed in any capacity at a medical facility, from being obliged to participate in abortion if they are opposed to it in conscience. According to article 27, 'no one shall be subject to coercion or other means which would restrict or prevent his freedom to hold a belief of his choice'.²⁰¹

The survey further reveals that a total number of 9387 women received comprehensive abortion services from the reporting facilities during the period July 2006 to June, 2007 and of these women, 7908 (84%) were managed for abortion complications (Induced abortions) and the remaining 1478 (16%) received safe abortion services.²⁰²

However, Marie Stopes International who has been offering the service for over 14 years now in Ethiopia revealed that in 2008 alone they provided the service to 80 000 women desperate to terminate their unwanted pregnancies. This shows a huge difference in the number of women using health centres owned by government and private centres. Clients of Marie Stopes international revealed that the service that is being provided by Marie Stopes International was of high quality, valuable and needed by women who find themselves pregnant after they have suffered rape.

¹⁹⁸ As above 1

¹⁹⁹ Above 2

²⁰⁰ Above

²⁰¹ Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia of 21st August 1995

²⁰² Geressu (n 197 above) 3

Interviews with professionals providing the service of abortion in Ethiopia had the following out come; the number of clients they receive which is an average of 70 people per day; people are really benefiting form the service they are proving; there is a lot stigma surrounding abortion from public perception due to religious and cultural beliefs; abortion is also a crime, which explains why there is a lot of secrecy surrounding it; in the past they were receiving cases of induced abortion but now it has decreased as they see clients which intact pregnancy; public health centres do not do termination on intact pregnancy as it is not of benefit to them; they only attended to women suffering from induced abortion.²⁰³ It was further revealed that the public use their services secretly because of stigma associated with abortion because of religious and cultural beliefs; that they see all classes of people from the poor to the rich saying that people prefer Marie Stopes from the other service providers due to the fact that they have been around for sometime now and that the service they deliver is quality and relatively cheaper compared to the other service providers; and that they adhere to a strict code of confidentiality.²⁰⁴

The question is what interest does the legislation protect?²⁰⁵ Matters relating to abortion are not to be decided on the basis of absolute moral conviction of a society²⁰⁶. Moreover, the stigma attached to abortion does not serve to reduce the incidence of abortion which is still high. In fact abortion is done illegally by women desperate to terminate their pregnancy. Most of the time such abortions results in life threatening risks and most of the time death in unsuccessful attempts in the hands of unskilled quack doctors.

5.5 Is abortion a solution for rape victims?

Rape is a serious offence punishable by 10 or 15 years imprisonment under article 620 of the Criminal Code. Under article 587 of the Criminal Code abduction of women is prohibited and where the act of abduction is accompanied by rape, the perpetrator shall be liable to punishment. More so a conclusion of a marriage between the abductor and the abducted subsequent to the abduction shall not preclude

²⁰³ Outcome of an interview with Sr. Fanay, Marie Stopes International, 23 September 2009

²⁰⁴ Interview with Dr Petros Lemma as above

²⁰⁵ .Roba (n 118 above) 12

²⁰⁶ As above

criminal liability. However, if rape is used as a form of war, the penalty is life imprisonment or death. It is only sensible that, while the rapist is punished, the victims are not prevented from legally aborting the fruit of the offence. These provisions look very kin to curb the issue of rape, however, in reality many rape victims do not report such violation due to fear and some due to the fact that they want to forget about it move on with their lives.

‘Abortion in Ethiopia is viewed as one step towards ensuring impunity of rapists. Raped women when they discovered that they are pregnant, they simply terminate the pregnancy and avoid by all means confrontations with their rapist. They feel that once the offending result of rape has been dealt with they can try to move on with their lives’.²⁰⁷

There are so many young women reporting to the Ethiopian Women Lawyers Association [EWLA] about complications from abortion that has cost them permanent injury to the uterus that would make them unable to have babies or have the uterus removed altogether by qualified doctors because they were butchered by a hack abortionist before hand. Some as young as 17 are bed ridden after walking in to abortion "doctors" and failed to recover. There are so many who have died very young needlessly as a result of unsafe abortion.²⁰⁸ Hence children become the single parents of children. This is a case of unsafe and unwanted sex, unwanted pregnancy and the issue of unsafe abortion if they get one or an unwanted child results.²⁰⁹

Faced with the accidental occurrence of an undesired pregnancy, abortion is the only way a woman has to preserve herself against the physical aggression of a pregnancy.²¹⁰ In such a situation, considering the very peculiar biological situation of the embryo, its rights cannot prevail over those of the woman who

²⁰⁷ This revelation was confirmed by Dr Mesfin Haile, Project Director Marie Stopes International, Addis Ababa Ethiopia in an interview held on 23 September 2009

²⁰⁸ There are a number of such cases at the legal aid services of EWLA Confirmed in an interview with Director of Ethiopian Women Lawyers Association

²⁰⁹ Giorgis (n 104 above)

²¹⁰ Dr. S Nelson, Brazilian gynecologist, *The Museum of Menstruation and Women's Health*: <http://www.mum.org/>

carries it inside her body.²¹¹ For a pregnancy that is left to evolve under conditions of strong rejection, the implications of this fact for the child who will be born are also considerable and, therefore, should not be neglected.²¹² What need to be reformed are public attitudes towards abortion, and the all too common tendency to equate it with sin or murder.²¹³

5.6 Summary

Restrictive abortion laws only serves to drive women to undergo unsafe abortions as a resulting increasing the rate of maternal mortality. Safe abortion can only be achieved only if restrictive abortion laws are reviewed and reformed with the aim of liberalising abortion. The Criminal Code of Ethiopia prohibits abortion in general; however, under certain conditions abortion may be permissible. A major innovation in the Criminal Code is that in the case of rape or incest, no evidence is required for victims to access legal and safe abortion. The liberal nature of the law can as a response to reduce high levels of maternal mortality obtaining in Ethiopia. The guidelines for safe abortion in Ethiopia, tends to protect service providers from prosecution where rape claim tends to be false. Such a move encourages service providers to offer the service to those who need it without fear of prosecution. Even though abortion is not a solution for rape victims but it is part of a solution, as it reduces cases of unsafe abortion.

²¹¹ As above

²¹² Above

²¹³ Giorgis (n 104 above)

CHAPTER SIX

Conclusion and Recommendations

5.1 Conclusion

Given the prevailing and long history of male domination in the form of patriarchy in Swaziland and the corresponding subordinate status of women, it is hardly surprising that issues affecting women have been neglected in most spheres.²¹⁴ In this country, a significant number of women fall victim to patriarchal force. Those who dare to seek justice are subjected to further degradation at the hands of a male-dominated and victim blaming medico-judicial system.²¹⁵ Swaziland's violation of reproductive health rights is manifested in the high prevalence of rape all over the country the issue of early marriage, abduction, as well as marital rape. Yet, the Swaziland Constitution ensures the rights of women in every way.²¹⁶

Again international instruments that Swaziland has ratified are an integral part of the country's laws and all interpretations of any laws are guided by international principles. However, by virtue of section 238(2) which provides that international agreements shall be subjected to ratification and become binding on the government by an Act of Parliament; or a resolution of at least two-thirds of the members at a joint sitting of the two chambers of parliament, Swaziland is set apart as a monist system. This means that international instruments ratified by Swaziland are not directly applicable, unless an enabling legislation is put in place by parliament making it applicable. However, such should not stop calls for the government to conform to those instruments Swaziland is a party to. Internationally Swaziland is bound to comply after ratification has been performed.

²¹⁴ Hansson (n 56 above)

²¹⁵ As above 522

²¹⁶ The Constitution of the Kingdom of Swaziland (n 156 above) section 28 titled rights and freedoms of women

Therefore, Swaziland's being a party to the following important International Instruments that adhere to reproductive health rights is not just in vain; like the Universal Declaration of Human Rights [UDHR], the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against women (CEDAW), the Convention on the Rights of the Child (CRC) and many others. Swaziland is also a party to the African Charter on Human and Peoples' Rights (ACHPR); to the resolutions and Platform of Actions embodied in the 4th World Conference on Women of Beijing (1995); to the International Conference on Population and Development (ICPD) of Cairo (1994); to the Human Rights Conference of Vienna (1993) and many others that affirmed the importance of ensuring reproductive health rights.

The Constitution of Swaziland's aim in prohibiting abortion is to protect the right to life. However as we have seen from the Ethiopian experience restrictive abortion laws are perhaps the most widely violated laws in history. Women, the family, society, and the state all have a stake in this issue. Time and again it has been shown that a woman, who does not wish to carry her pregnancy to term, will abort it even at the cost of her own life. Hence, restrictive abortion laws, presumably set out to protect, bring about exactly the opposite. They are self-defeating and drive women to illegal and unsafe abortions. All too often, the consequences of incomplete abortions become the burden of already over-taxed health facilities.

It is clear that the existing legal exceptions found in the Constitution of Swaziland on the grounds of rape and incest can never be beneficial if there is no policy to guide the implementation of the provisions of the Constitution. Further, moral judgements should not be allowed to cloud professionalism. The blocking of pregnant rape survivors' access to legal abortion is an important aspect of secondary victimisation following the initial rape.

It is important that the issue of legal abortion for rape victims is brought to the attention of reform initiatives with the aim of reducing maternal mortality and restoring women dignity. Ethiopia has done it why cannot Swaziland. Ethiopia has taken a different dimension from other countries by retaining the prohibition on abortion while opening the doors for those saddled with unwanted pregnancies and a way out of their situation without risking their lives through engaging in unsafe abortion. One can argue that it is desirable for Ethiopia to remove the criminalisation of abortion altogether from the statutes

books as it forces women who are looking for the termination of their pregnancy to resort to telling an untruth (such as pregnancy as a result of rape) in order to access the service.

5.2 Recommendations

- There is a need to break the silence and speak about abortion; discussing it in the community; at grassroots level in schools; to all concerned and to use the mass media positively. This should be done in a bid to reform restrictive abortion laws as they drive women to undergo unsafe abortions which is one of the major causes of maternal mortality.
- There is a further great need to revolutionize attitudes towards abortion by all means possible, especially when it concerns rape victims. This will ensure that matters pertaining to abortion are not only decided on moral conviction of a society and the stigma attached to abortion will be reduced.
- Whenever abortion is permitted on the ground of rape, it is recommended that the Ministry of Health should be mandated to put in place a guidelines or policy that will guide parties concerned on how to go about implementing the law. This particularly goes to the government of Swaziland that they should hurry up in formulating these guidelines which will in effect guide professionals such as practitioners on service delivery.
- It is recommended that every non pregnant woman or girl of child bearing age who suffers rape should be offered emergency contraceptive (EC) regardless of the health facilities beliefs. This in effect should reduce the number of women who must resort to abortion after a rape incident.
- Governments, it is high time that they see that abortion is more than a medical issue or an ethical issue or a legal issue. It is above all a human issue; involving men and women as individuals; as couples and as members of societies. There is a need to take a stern stand by governments to stop women from dying from maternal mortality caused by unsafe abortion. This can only happen when abortion laws are liberalised.
- Governments should realise that there is no point in rejecting abortion while millions of women continue to die from it. When a law meant to protect the right to life ends up taking that very life protected, surely removal of that law is need. The criminalisation abortion is said to protect the right to life, however unsafe abortion is killing many as they can not have access to legal safe abortion.

- Governments should strive to promote a society where women are free to control access to their own bodies, guaranteeing their liberty and justice. This envisages a society where men and women have the same status in terms of equality before the law and in traditional institutions.
- Government response to rape should target broader aspect of perpetrators such as those who abducts rapes and consequently marry their victims in order to avoid prosecution. There is a need for laws which are proactive and responsive to the plight of women especially from rape because of its debasing character
- The marital rape exemption should be abolished in a bit to put women on equal footing with man.
- Early marriage of girls should be equated to rape as those children have no capacity to consent to sex or marriage in the eyes of the law.
- Swaziland should try and meet regional and international obligations by enacting legislation to give effect to reproductive rights contained in various regional and international instruments
- Swaziland should demonstrate sufficient political will in enacting new laws to promote women's status and to protect women from rape.
- Finally, it is recommended that Ethiopia should remove the criminalisation of abortion from the face of statute books as this forces woman to tell an untruth about their circumstances in order to have access to legal abortion. Ethiopian non governmental organisation working on women (human) rights issues might be forced to shut down as a new law coming into force 2010 prohibits them from sourcing for funding from outside that is over ten percent. It is recommended that the Government of Ethiopia further removes the above provision in the Charities and Associations Proclamation of 2009.

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