



# ZIMBABWE · LAW · REVIEW

Volume 3

1985

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Zimbabwe Law Review Volume 3 1985 No. 1 & 2

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**TERMINATION OF PREGNANCY IN ZIMBABWE:  
A MEDICO LEGAL PROBLEM**

I.C. CHIKANZA\* and W. N. CHINAMORA\*\*

**1. INTRODUCTION**

It is a commonplace fact of human life that women with unwanted pregnancies will often resort to illegal abortions and consequently jeopardise their health. Induced abortions are undoubtedly a major health hazard in the Third World. These have an estimated mortality contribution of 4-70% to all maternal deaths.<sup>(1)</sup>

In Zimbabwe the exact extent of this problem is not known but this paper attempts to assess its extent and where this is not possible, to draw some conclusions from the available data in the literature from other Third World countries. Unfortunately, no proper studies on the problem of pregnancy termination have been conducted in Zimbabwe and the reasons for this gap in research are manifold and it is beyond the scope of this paper to delve into them.

From a medical perspective, abortion is defined as the termination of pregnancy before the foetus has attained viability or is capable of extra-uterine existence<sup>(2)</sup> and this may either be induced or spontaneous; this distinction inevitably has a lot of medical as well as legal significance.

On the one hand an induced abortion is the deliberate interference with pregnancy with the intention of terminating it, by a pregnant woman herself or by another person. This can be legal or illegal, depending on the laws of the given country. A spontaneous abortion on the other hand, is one that is not induced even if external factors like trauma or disease are implicated. The medical diagnosis of an induced abortion in most cases, requires a statement by the woman concerned or a member of her family, or by the abortionist, and in the absence of such statement, or evidence of manipulation of the cervix, it is virtually impossible to differentiate an induced abortion from a spontaneous one. This fact, therefore, poses a lot of problems when one is trying to work out vital statistics on abortions and for the criminal prosecution of abortionists.

At law, the crime of abortion is committed by "unlawfully and intentionally killing and causing the expulsion from the uterus of a human foetus."<sup>(3)</sup> Thus, the crime seeks to protect potential human life

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1. Population Reports, Series F, Number 7, July 1980.
2. World Health Organisation (W.H.O.) Technical Report Series 461, 1970.
3. Hunt, South African Criminal Law and Procedure, Vol. II (Common Law Crimes) Juta 1970, p.308. Feltoe, A Guide to Criminal Law of Zimbabwe, p.38.

from the time of conception to the time of live birth. In Zimbabwe the common law on abortion has been greatly affected by statute and doctors can only lawfully terminate a pregnancy on the grounds and under the conditions stipulated in the Termination of Pregnancy Act.<sup>(4)</sup> However, it has and might still not be possible to ascertain the real impact the Act has had on illegal abortions, due to lack of vital statistics before the enactment of this legislation.

The statistics are essential in any developing country, such as Zimbabwe, not only to aid the future planning of health services but because where the abortion laws of a country are restrictive, there is likely to be an increase in the rate of illegal abortions. This also has a bearing on the increase and decrease in the abortion mortality rates and ratios. Noteworthy is that, an increase in illegal abortion rates of necessity increases the complication (morbidity) rates and imposes a great demand and burden on the health services. Therefore, before any country considers legislation on abortion it should examine carefully the available health facilities and services and most of all, the financial resources available. This should be so, because such law cannot function in a vacuum, but only in a given socio-economic context.

## 2. SOCIO-LEGAL ASPECTS

Where the law on abortion is restrictive and makes most abortions illegal with only certain limited abortions by exceptions, it merely drives desperate pregnant women into frantically procuring medically unsafe illegal abortions. A traditional illegal abortion using clandestine methods has been the last resort of a woman determined to terminate her pregnancy. Unfortunately, these clandestine procedures, often performed by untrained persons, frequently end up with the woman suffering adverse consequences as far as her physical health is concerned and even more so, suffering adverse mental consequences because of the psychological trauma arising from an unlawful abortion.

It has been pointed out repeatedly that all that legislation which penalises abortion achieves is to deny the poor access to medically safe procedures, as they cannot afford costly services privately.<sup>(5)</sup> Medical advances and to a considerable extent, social and cultural attitudes under modern conditions have rendered abortions safe.

It is submitted that under the present social and material conditions, abortion should now pass from the realm of criminal law to that of social welfare, health and fertility control. But, at the moment in Zimbabwe, abortion is by and large under the domain of criminal law.

### (1) Classification of Abortion Laws

Abortion laws can be divided into various categories. These different categories will be examined with a view to assessing the

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4. No.29 of 1977.

5. International Planned Parenthood Federation News (I.P.P.F.) Sept - Oct. 1970.

percentages of the world population governed by these respective laws and to see where Zimbabwe's laws fall in relation to other categories.

(a) Illegal abortion

Abortion here, is criminal without any exceptions and Indonesia and the Philippines are examples of countries with such laws, and hence, about 8% of the world's population live under these conditions.<sup>(6)</sup>

(b) Restrictive abortion

Here, abortion can only be carried out to save the life of a pregnant woman, as for instance in Venezuela and some African countries, and about 13% of the world's population live under these laws.<sup>(7)</sup>

(c) Conditional abortion

Abortion is permissible only to the extent that it is necessary to save the life of the pregnant woman or, to preserve her health, for medical and humanitarian reasons, or where the pregnancy has resulted from rape, or where there is a likelihood that the foetus has been impaired. About 16% of the world's population<sup>(8)</sup> including Zimbabwe live under these laws.

(d) Liberal abortion: These have two subdivisions

(i) "On request" without restrictions

The position is that abortion with no restrictions has to be done within a specified time, usually in the first three months of pregnancy, as for example in the United States and Singapore. The decision rests entirely with the woman concerned and her doctor, and in circumstances where the life or health of the woman is threatened by the continuance of the pregnancy, abortion can be done beyond the gestational period stipulated by law. About 36%

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6. Population Reports Series E, Number 3, 1976. Articles 256-258 of the Philippines Revised Penal Code prohibits and punishes induced abortions whether intentional or unintentional, with or without consent and Article 259 penalises a physician or midwife, who taking advantage of scientific knowledge or skill, causes or assists in causing abortions.

7. Ibid.

8. Ibid.

of the world's population live under such laws.(9)

(ii) Social reasons

The question of whether you are single or married, whether you are from a wealthy family or not and the family health is considered when evaluating a pregnant woman's health for the purpose of determining the desirability of an abortion, for example in the United Kingdom, Japan and China. Thus about 24% of the world's population are governed by these laws.(10)

(e) No law on abortion

Then there is some 3% of the world's population who live in countries where the laws are silent on the issue of abortion, for example in Saudi Arabia.(11)

3. ZIMBABWE: THE LEGISLATION

In this country abortion laws fall under the category of conditional abortions, and hence, abortion can be carried out only under the grounds laid down in Act No.29 of 1977 which provides that:-

"Subject to the provisions of this Act, a pregnancy may be terminated -

(a) where the continuation of the pregnancy so endangers the life of the woman concerned or so constitutes a serious threat of impairment of her physical health that the termination of the pregnancy is necessary to ensure her life or physical health, as the case may be; or

(b) where there is a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will permanently, be seriously handicapped; or

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9. Population Reports Series E. op cit. It was held in the United States Supreme Court case of Planned Parenthood of Missouri v Danforth, (1976). 428 US 52, that abortion can be performed prior to the end of the first 12 weeks of pregnancy by a duly licensed, consenting physician in the exercise of his clinical medical judgement, if the woman gives her free and informed consent, but the husband or guardian's consent is not necessary, since "it is the woman who physically bears the children and who is the more directly and immediately affected by the pregnancy, as between the two [she and her husband] the balance weighs in her favour."

10. Population Reports Series E. supra.

11. Ibid.

- (c) where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse."<sup>(12)</sup>

Thus, the common law ground of necessity is now obsolete. In terms of the Act, a certificate from two doctors, who do not belong to the same medical practice, is required before permission is given to perform the abortion, by a medical superintendent of a government hospital,<sup>(13)</sup> or failing him, the Secretary for Health.<sup>(14)</sup>

Therefore, "no person may terminate a pregnancy otherwise than in accordance with the provisions of this Act"<sup>(15)</sup> and any person who does "shall be guilty of an offence and liable to a fine not exceeding five thousand dollars, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment."<sup>(16)</sup>

Regrettably, the effort to ascertain the impact of the Act on induced illegal abortions has been fraught with difficulties for the following reasons:-

- (a) As mentioned earlier, there are no vital statistics on illegal abortion in Zimbabwe, because the secrecy that surrounds these abortions and the difficulty in diagnosis precludes any reasonable assessment of their frequency and prevalence.
- (b) The analysis of the records at Harare Hospital, gave some inconclusive results (as will appear more fully below under "Extent of illegal abortions").
- (c) There are no figures to compare with before the passing of the Act, and the efforts of the Commission of Inquiry into the Termination of Pregnancy (1976)<sup>(17)</sup> were unrewarded and it concluded that it could not put forward any accurate figures. Before the Act, in Bulawayo there had been a steady rise in the number of medically induced abortions, from 36 in 1962 to 125 in 1975<sup>(18)</sup> but no figures are available for this period from Harare Hospital. The Committee was unable to give figures on the so-called "back-street" abortions.

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12. Section 4.

13. Section 5.

14. Section 6.

15. Section 3.

16. Section 12.

17. Report of the Commission of Inquiry into the Termination of Pregnancy 1976, by W.A. Pittman et al.

18. Ibid. These figures are from the medical records of the Bulawayo Central Hospital.



The legislation in Zimbabwe and other African countries and the strong conservative traditions especially in French-speaking Africa, limit the amount of reliable research on illegal abortions.<sup>(19)</sup> For instance, in order to assess the psychological effects of illegal abortions accurately requires a properly chosen control group who are given the right to abortion. The permission for and refusal for abortion has to be allocated at random. Furthermore, no one can freely be interviewed on the methods used to illegally terminate a pregnancy for fear of the criminal law implications. Then there are the competing interests such as the generally shared moral, religious and ethical views of the community and the outcry to protect the unborn child. Be that as it may, it is generally considered that illegal abortions are becoming an increasing problem, especially in the urban areas,<sup>(20)</sup> and this could well be the situation in Zimbabwe.

We should also consider other pertinent issues and the shortcomings of the Termination of Pregnancy Act. It is submitted that the so-called "statutory rape" is not covered by the Act as a ground for lawful abortion, since "unlawful intercourse" is defined to mean "rape, incest, or unlawful intercourse in contravention of paragraph (d) of section 3 of the Criminal Law Amendment Act [Chapter 58]"<sup>(21)</sup>

It is submitted that a good case could be made out that the law ought to be widened to include statutory rape as a ground for abortion. If it is permissible where a 35 year old woman has been raped, surely it ought to be permissible where a girl under 16 has been "raped", because in the one case, the woman has not consented and in the other, the girl is incapable of consenting.<sup>(22)</sup>

#### 4. HEALTH HAZARDS OF ILLEGAL ABORTIONS

Illegal abortions contribute a lot to the mortality figures, and in Zimbabwe, as in other Third World countries, this is difficult to measure because of the lack of precise data. The reasons for this are probably two-fold:-

1. It is difficult to differentiate between an illegal abortion and a spontaneous one.<sup>(23)</sup>

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19. Population Reports, Series E, op cit.

20. International Planned Parenthood Federation (I.P.P.F.) News, 1977 - "Abortion in Africa" by J.K.G. Mati, pp.74-79.

21. In terms of this provision, it is a criminal offence if any person "unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl in circumstances which do not amount to rape". Note: paragraph (a) which makes it an offence if one "unlawfully and carnally knows or attempts to have unlawful carnal knowledge of a girl under the age of sixteen years", is not included.

22. Section 3(a) Criminal Amendment Act (Chapter 58).

23. W.H.O. has ruled that all septic abortions must be considered induced. (W.H.O. Report op cit.).

2. Many of the cases presented at clinics and rural hospitals are treated as out-patients and are therefore not recorded in the hospital records.

With both legal and illegal abortions, but invariably with the latter, complications like pelvic infection, sterility, endometritis and renal failure result, and death is not uncommon. Evidence is now accumulating in literature from the U.S.A. that illegal pregnancy termination may precipitate serious psychoneurotic, or psychotic reactions in susceptible individuals.<sup>(24)</sup> Incomplete abortion is the most frequent complication of illegal abortions.

##### 5. FINANCIAL BURDEN OF ILLEGAL ABORTIONS ON HEALTH SERVICES

Illegal abortions often lead on to the need of medical treatment. And, as the extent of illegal abortions is largely unknown in Zimbabwe, it is difficult to ascertain the financial burden they impose on health services, but information from other Third World countries is of assistance in formulating what effect they could be having on the health service in Zimbabwe.

Generally, it is the complications of abortions that impose an economic burden on the health services in terms of hospital stay, drugs, and blood transfusions. Though the cost of illegal abortions falls on the individual, a great proportion of it, undoubtedly, requires expenditure of hospital and public funds.

Paying for the abortion fee itself creates a personal hardship for the poor, as the cost of an illegal abortion can vary from nothing to US\$300.00.<sup>(25)</sup> In Zimbabwe, charges ranging from Zim.\$2.00 to Zim.\$10.00 are charged by traditional n'angas and midwives for the herbal abortion. A general practitioner Dr. X<sup>(26)</sup> who has now left the country for Nigeria is said to have been charging up to Zim\$62.00 while a doctor in Harare is said to have been charging Zim\$200.00 for an illegal abortion. Other non-medical abortionists practising somewhere in Highfield are said to be charging up to Zim.\$15.00. In some countries traditional midwives and other non-professional abortionists accept payment in kind at times.<sup>(27)</sup>

Apart from the fact of the hospitalised patient utilising drugs, hospital food, laboratory services and blood, there are also indirect costs from loss of workdays, loss of female services to her family and husband for the period of hospitalisation and permanent loss if she dies.

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24. W.H.O. Report op. cit. Enkblad, M. (1955), Ewing, J.A., "Therapeutic Abortion and Prior Psychiatric History" - A Journal of Psychiatry 130(1): 37, 1973.
  25. Population Reports, Series F, op cit.
  26. Names have been withheld for professional reasons.
  27. Population Reports, Series J, Number 22, May 1980, Simpson, Herbert M. et al, "Traditional Medicines and Family Planning".

The Commission of Inquiry into the Termination of Pregnancy (1976), as earlier noted, failed to ascertain the exact extent of illegal abortions. The evidence at the time indicated that unwanted pregnancies were less among Africans in rural areas, although they were not uncommon. In European areas, illegal induced abortions occurred in a number of cases, but the Commission was unable to ascertain the extent.

Owing to lack of national statistics on illegal abortions, Table A and Table B below, compiled from data from the medical records at Harare Hospital for 1979 and 1980 might give some insight into the extent of the problem.

TABLE A

<u>1979</u>	<u>No. of</u> <u>Abortions</u>	<u>Deaths</u>
1. Septic abortion with excess bleeding.	0	
2. Septic abortion with damage to pelvic tissue.	0	
3. Septic abortion with renal failure.	3	
4. Septic abortion with shock.	0	No information
5. Septic abortion with embolism.	1	appears in the
6. Septic abortion without complication.	2499	records.
7. Septic incomplete abortion.	140	
8. Illegally induced: with sepsis	6	
with pelvic damage	1	
without complications	2	
with renal failure	1	
Total abortion related admissions	<u>2653</u>	
Total admission for Pregnancy delivery =	<u>15129</u>	

TABLE B

<u>1980</u>	<u>No. of Abortions</u>	<u>Deaths</u>
1. Septic incomplete abortions.	274	3
2. Spontaneous abortion with excessive bleeding.	1	1
3. Spontaneous abortion with pelvic tissue damage.	1	
4. Spontaneous abortion with renal failure	1	
5. Spontaneous abortion with shock	2	
6. Spontaneous abortion with embolism	2	
7. Spontaneous abortion without complications	2163	1
8. Illegally induced: with sepsis.	5	1
with damage to pelvic tissue.	1	
without complications	5	
with renal failure	-	
Total abortion related admissions	<u>2455</u>	
Total admission for pregnancy delivery	= <u>16699</u>	

The above figures show that the admissions for illegally induced abortions (including septic abortions) increased by about 95.7% from 1979 to 1980 at Harare Hospital. The abortion ratio<sup>(28)</sup> for Harare Hospital in 1980 was 147 per 1,000 pregnancies and 175 per 1,000 pregnancies in 1979.

However, these figures only give a rough idea of what might be happening country wide since they are not truly representative of the situation for the following reasons:-

- (a) not all abortion cases are admitted at Harare Hospital and some do not require the doctor's assistance and some escape detection, while others are diagnosed as spontaneous.
- (b) not all women deliver at Harare Hospital and with the limited data it is difficult to estimate what is happening on a national scale.

The illegal abortion mortality ratio<sup>(29)</sup> for Harare Hospital for 1980 is 2,44 per 1,000 abortions, and in Ghana it is 53 per 1,000 abortions.<sup>(30)</sup>

It is submitted that there is likely to be an increase in the incidence of illegal abortions in the urban areas of Zimbabwe because:-

- (1) urban migration brings with it loss of traditional cultural values, such that sexual promiscuity, particularly among youngsters, will be on the increase;
- (2) the rise in the standard of education and living will be accompanied by a need to limit family size and there might be an increased need for abortion in the future;
- (3) the free education scheme will result in a delay in marriage and hence an increased likelihood of young women getting pregnant, and since pregnancy in schoolgirls is a ground for expulsion there will inevitably be an increased demand for abortions; and

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28. Number of abortions relative to the number of pregnancies in a given period, usually one year, per 1,000 pregnancies.

29. Number of in-hospital patient deaths due to abortion per 1,000 abortions.

30. Population Reports, Series F, op cit I.P.P.F. estimated an abortion rate of 65 per 1,000 women in Latin America.

- (4) contraceptives are not readily available to girls below the age of eighteen years<sup>(31)</sup> and therefore, the risk of getting pregnant still remains acute and there will still be an ever increasing demand for abortions.

Thus, with the present position of the abortion laws in Zimbabwe, where certain conditions have to be satisfied before an abortion can be lawfully done, illegal abortions are going to be the solution for unwanted pregnancies. Worse still, as one society becomes more sophisticated, the demand for abortions is likely to rise.

#### 7. WHAT SHALL WE DO?

The critical question in Zimbabwe is, should we legalise abortion? It is recognised that the strategies recommended for reform of the law and improvement of abortion-related services cannot be applied universally, as each country must determine its own policies.<sup>(32)</sup>

But before we can think of amending the abortion legislation we should consider the following factors:-

- (1) Availability of finance.
- (2) Availability of trained medical personnel to perform abortions.

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31. It had been thought that, supplying contraceptions to under-eighteen girls is an offence, since it is unlawful to conduce to the seduction and immoral acts or promiscuity of a minor. The Children's Protection and Adoption Act (Chapter 33) via section 8(1) provides "Any person who causes or conduces to the seduction, abduction, or prostitution of a child, or young person, or the commission by a child, or young person of immoral acts, shall be guilty of an offence." And, section 2 defines "child" as "a person under the age of sixteen years" and "young person" as "a person who has attained the age of sixteen years but has not attained the age of eighteen years." However the position is still unclear as it is unlikely that a doctor who prescribes contraceptives to a girl under the age of 18 will be found guilty of causing or encouraging unlawful sexual intercourse of the girl. Our courts are likely to follow the recent English case of Gillick v West Norfolk and Wisbeck Area Health Authority: [1985] 3 ALL ER 402 (H.L.), where it was held inter alia that a doctor who in the exercise of his clinical judgment gave contraceptive advice and treatment to a girl under 16 without her parents' consent did not commit an offence under the relevant legislation, because the bona fide exercise by the doctor of his clinical judgement negated the mens rea aspect of the offence.

32. International Planned Parenthood Federation Open File (1979) Publication: "Human Problem of Abortion".

- (3) Availability of adequate medical facilities (i.e. buildings and equipment) accessible to all who need the services.<sup>(33)</sup>
- (4) Education network-scheme to inform and educate the nation on the services and how to utilise them appropriately.
- (5) The maximisation of the availability of other contraceptive procedures.
- (6) Whether, if legalised, abortion will lower the birth rate and the rate of admissions for illegal abortions.

The other crucial question is; would we rather have unwanted pregnancies and dumped children, or we would prefer unfettered termination of unwanted pregnancies? If we opt for liberalized abortion laws, are we going to erode our moral and cultural values? It is suggested that rather, we should take the view that in a country that is striving to achieve socialist goals, culture is dynamic and not stagnant and inevitably changes occur in the material conditions of society. In the light of these continuing changes there is a need for abortion laws which are consistent with the new social realities.

It is submitted further that, in view of the Legal Age of Majority Act<sup>(34)</sup> which has progressively changed the law to place women on an equal status with men upon attaining the age of 18, the present abortion law is not consonant with the trend of times. The individual should have an incontrovertible right to decide whether or not to have children. Zimbabwe should take the American view that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child."<sup>(35)</sup>

There is no doubt all over the world that various forms of contraception have been accepted and continue to be widely used to prevent conception. If a woman, in Zimbabwe, having taken all the precautions with a strong desire of preventing pregnancy, becomes pregnant whilst on contraception, this would obviously constitute an unwanted pregnancy upon failure of the particular method of contraception.<sup>(36)</sup> The paradox is that the Act does not cover this type of pregnancy for the purposes of lawful abortion, but the pregnancy is obviously accidental and unwanted.

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33. Prof. F. Ross, Lecture on Health Services, 1981.

34. No. 15 of 1982.

35. Griswold v Connecticut, (1965) 381 U.S. 479.

36. These contraceptive methods have inherent failure rates that are calculated as the number of accidental pregnancies per hundred women years, or by the formula -  

$$\frac{\text{Number of accidental pregnancies}}{\text{Number of months exposure}} \times 1,200$$

It is submitted that the law should be changed to legalise abortion. The law should recognise the right of women to decide for themselves the number and spacing of their children. It is common knowledge that restrictive abortion laws do not prevent women from resorting to clandestine and dangerous methods which result in high rates of injury and mortality. Restrictive abortion laws result in discrimination between the rich and poor, since the rich can either travel abroad for safe abortions in more liberal countries or procure safe illegal abortions in Zimbabwe.

The Zimbabwean legislation can thus, be intelligently formulated and applied as a tool of social change in view of the fact that the present law is unenforceable, because society has changed and the cultural mores no longer have a firm grip on individuals. In fact, the present law does not take into consideration the reasons or circumstances that prompt people to have abortions. The reality is that most people terminate pregnancies because they do not wish to bring into the world a child they will not be able to provide for, out of poverty.

It is submitted, that the decision whether or not to have an abortion must be left to the woman concerned while the performance of the abortion must be left to the medical judgement of her doctor. The State may only regulate the abortion procedure in ways that are reasonably related to maternal health, but not limit the grounds for abortion, and what is "reasonably related to maternal health" must of necessity depend on the particular facts of each particular case. The State's interest should be in ensuring that abortion is done in circumstances that guarantee maximum safety to the patient, and factors such as the following would have to be considered:-

- (a) The performing doctor;
- (b) the abortion facility itself;
- (c) the availability of after-care; and
- (d) adequate provision for any emergency or complication that might arise.

It should be noted that recent medical advances have perfected the techniques for interruption of pregnancy, thus considerably minimising the danger of abortion. Noteworthy also, is that the majority of the world's population live under jurisdictions which enable women to have access to abortion, and that a 100 percent effective contraceptive method has not yet been developed and contraceptive failure may be due to the ignorance of the couple concerned or to misuse of the methods. Abortion law can be drafted as part of the maternal and child care legislation, with particular emphasis on the fact that women who have had abortions should be given full information about available family planning services.

## 8. CONCLUSION

In conclusion, the Parliament of Zimbabwe is enjoined to reform the abortion law, in view of the foregoing, and cultural considerations should not stand as stumbling blocks in the way of progressive changes.

The Government has declared the policy of transformation towards a socialist society under the guiding principle of Marxism-Leninism. It is submitted, therefore, that the current limitations on the right to abortion are not compatible with scientific socialist principles of egalitarianism of the sexes and the right of women to determine freely and responsibly the size of their families, since women play the most crucial role in the human reproduction. For demographical reasons as well, the law has to be revised considering the population growth rate.

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#### ACKNOWLEDGEMENTS

We would like to extend our sincere gratitude to Mr. Geoffrey Feltoe, a Senior Lecturer in the Law Department of the University of Zimbabwe, for his invaluable comments, criticisms and suggestions. We are also obliged to the Secretary for Health for allowing this paper to be published.





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