

# An Assessment of Ethiopian Law of Abortion: A Human Rights Approach

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## Introduction

Abortion is an argumentative issue over years by those who favor its criminalization by stating that it is killing a life basing their arguments mainly on religion and moral grounds while on the other hand the rights of women to their autonomy, liberty and privacy is raised by the proponents of the right to abortion.

This paper deals assesses the status of the right to abortion in Ethiopia in light of the debates and the human rights of women as enshrined in the constitution as well as in international human rights instruments. I chose this title as there are women suffering from the prohibitions of the criminal code to abortion upon request and forced to go through illegal and unsafe abortions which endanger their health seriously which is even resulting the death of very many, as researches show.

In doing so the paper is classified into four sections the first dealing with the debates and the second is dealing with the status of human rights instruments towards the right to abortion and the third one analyses the Ethiopian law while the last section is left for conclusions and recommendations.

## I. Debates Against and In Favor of Abortion

There is a long standing debate on the issue of abortion starting from earlier periods of time as to its liberalization or criminalization. There are two way arguments that strictly support the criminalization of abortion in all circumstances basing their arguments mainly on religious and moral grounds considering abortion as killing of a human person on the one hand and that group of argument which argues for the liberalization of abortion considering it as an autonomous decision of the pregnant woman on her body basing their argument on her right to liberty and privacy.

The proponents of the criminalization of abortion believe that the fetus is a living human being. According to the proponents the fetus has got its own special existence differing from the life of the mother as it has got full genetic constitution which makes it a separate being. Therefore, aborting such an alive being is against moral and shall be made a criminal act.<sup>1</sup> In fostering this argument the justifications provided include killing the fetus denies both the conceived child and the society at large from getting its contributions and benefits in the future, parents eager to adopt will not have chance to adopt, it also has got both physical and psychological harm on the mother and the father and it is wrong method of birth control and against the medical ethics of not harming others.<sup>2</sup>

Nowadays according to the thoughts of a number of religious scholars, philosophers and physicians the life of human being starts at the conception of the fetus or shortly thereafter and hence they defy abortion. The Catholic Church believes that nobody can accurately identify when a fetus becomes a living person. Hence it should be acted as if it occurs at the time of conception. This is vigorously held belief in other Christian groups too. Based on this abortion is always an evil as it equates murder. It is also considered erroneous in Islam and the degree of evil increases as the pregnancy progresses. In addition to the religious arguments the medical professionals argue that life begins within the womb as some books point to conception as the beginning of life.<sup>3</sup>

The arguments raised opposing to abortion are not as such supported by a certain sort of logical proof. Most of them are based on some religious beliefs and books of the medical science profession. The Christian religious thought is challenged in that there is no any section (verse) in the bible considering conception as the beginning of life and abortion is wrong rather there is a consideration of a pregnant woman who is struck during a dispute and if such a woman loses the child she is carrying, then the perpetrator of the crime is required to pay a monetary damage. And from this it is understandable that the act is considered as assault rather than murder committed on the fetus.<sup>4</sup> And the medical assertion life begins at the conception is challenged with the argument of viability. The viability of a fetus starts at a later time of the period of the pregnancy around 22<sup>nd</sup> to 26<sup>th</sup> weeks of pregnancy before birth and therefore we cannot talk about life at the time of conception.<sup>5</sup> Hence, the argument

<sup>1</sup> Maurice Okechukwu Izunwa and Sylvia Ifemeje Right To Life And Abortion Debate In Nigeria: A Case For The Legislation Of The Principle Of Double-Effect 2 Nnamidi Azikiwe University Journal of Int'l Law and Jurisprudence 111, 117 (2011)

<sup>2</sup> John E. Ferguson Jr., Reproductive Rights 63 (2009)

<sup>3</sup> Id. at 63 - 64

<sup>4</sup> Id. at 51

<sup>5</sup> Lisa McLennan Brown, Feminist Theory And The Erosion Of Women's Reproductive Rights: The Implications Of Fetal Personhood Laws And In Vitro Fertilization, 13 Journal Of Gender, Social Policy & The Law 87, 93 (2005)

of the proponents of the criminalization of abortion is one sided which considers the fetus as an alive person forgetting the alive woman's right to liberty. So it is privileging only the conceived child which may even not be born alive or healthy.

In the contrary the proponents of the right to abortion of the pregnant woman argue that though there should a certain sort of protection to the fetus the state cannot compel women to carry fetuses as they have rights over their own bodies. The bases of this argument are autonomy, bodily integrity and self ownership. The first priority shall be given to the health and interest of the pregnant woman which is needed by the fundamental right to life and liberty. And Based on this the government is not in a position to tell women what they can and cannot do with their bodies. If the government is going to tell so liberty will diminish and in effect the ability for one to be a full citizen is diminished.<sup>1</sup>

Further than this if laws do not bestow women the fundamental decision making about their sexuality and reproductive lives; we will not have any room to talk about the right to equality of women. Adding some liberal ideas, liberal feminists, expand the idea of formal equality which promote individual autonomy and privacy by stating: "Although modern legal authorities are skeptical of the argument that separate standards actually can result in equality, they nonetheless have embraced the importance of personal autonomy and privacy in the reproductive rights arena by upholding a woman's right to end her pregnancy."<sup>2</sup> Therefore, in ensuring women's right to equality the woman's right to end her pregnancy is a part which is a manifestation of her right to liberty.

According to the proponents of liberalization from the pragmatic point of view, one of the biggest dangers in making abortion illegal is driving women to illegal and unsafe abortions which endanger their life to death.<sup>3</sup> Therefore there is a need to liberalize abortion for the sake of the life and health of the pregnant woman as abortion is inevitable though there is strict penal law.

In conducting abortion the thing that is removed from the womb of the pregnant woman is cells before forming a child. These cells don't have their own separate existence and cannot live independently out of the womb of the pregnant woman. Therefore we can't consider a fetus as a separate person legally rather than being a potential person. Hence we can't call abortion murder as there is no human being murdered. The one has got the real personality and susceptible to the inevitable difficulties is the pregnant woman whose personality begs for her right to bodily integrity which further protects privacy which in effect comes up with freedom from unwanted bodily invasion by the fetus being forced by the state.<sup>4</sup> Thus, abortion is a private matter which must be left to the directly affected person, the pregnant woman.

Therefore the arguments raised by the proponents of liberalization of abortion and the protection of the right to abortion of women promote the right to bodily integrity of women, their right to privacy, their right to equality by making the decision that fits their interest. In addition to this its liberalization protects women from invasion of their body by the fetus that they don't want; it also protects women from undertaking illegal and unsafe abortions which are endangering to the life and health of the pregnant woman. Here the priority is given to the living person, the pregnant woman, than the anticipated person the fetus.

From the discussions made above it is explicable that there are two opposite extremes those who sought the absolute criminalization of abortion on the one hand and for its liberalization in all circumstances on the other. Hence, according to my view, the point that should be taken by the legislature is the one which addresses the issue at hand in the middle way, i.e. there should be the liberalization of abortion in all circumstances for the protection of autonomy, liberty and privacy of the pregnant woman until the time to be considered viability starts under the medical profession. And in further periods it should be construed strictly for the sake of the protection of the interest of the anticipated person, the fetus. Thus this could be the middle way that can make a better solution keeping the competing interests the two extremes.

## II. Women's Right to Abortion Under International Human Rights Instruments

Human rights protections have developed to resist governmental intrusion in private life and choices, women's reproductive choices.<sup>5</sup> Differing international human rights instruments has their own stand on the issue of abortion rights of women as dealt hereunder.

### A. International Bill of Rights

Here in this sub-section the instruments to be dealt in connection to women's right to abortion are the UDHR<sup>6</sup>

<sup>1</sup> *Supra* note 2. pp. 51 - 52

<sup>2</sup> *Supra* note 5. pp. 89

<sup>3</sup> *Supra* note 2. pp. 53 - 54

<sup>4</sup> *Supra* note 5. pp. 107

<sup>5</sup> R.J. Cook, B.M. Dickens, Ethical and legal issues in reproductive health: Human rights and abortion laws 65Int'l J. of Gyn. & Obs. 81, 81 (1999)

<sup>6</sup> Universal Declaration of Human Rights, 10 December 1948, *Adopted and proclaimed by General Assembly resolution 217 A (III)*. Hereafter UDHR

and ICESCR<sup>1</sup>. The UDHR, the pioneering human rights instrument, in the cumulative readings of its articles 1, 3 and 12 it can be deduced that every human being is born free and equal, has the rights to life, liberty, security of person and privacy. Therefore, it can be inferred that these provisions bestow a woman the right to be protected from any danger to her life including the danger coming from a fetus in her womb, and has got the autonomy and privacy to decide on her body whether to have a baby or not including the fetus.

The right to health, under the ICESCR, is in need of the government's action to take appropriate measures in ensuring that women can make about their reproductive lives which include decisions on the continuation of pregnancy and protect women from the peril of illegal and unsafe abortion, which may result in adverse effects on their health and life<sup>2</sup>. This issue is further advanced by the Committee on Economic, Social and Cultural Rights in its General comment 14 which states that "the right to health contains freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference."<sup>3</sup> Hence, it is vivid that the right to health of a pregnant woman extends to her autonomy in deciding whether to continue being pregnant or abort the child in her womb.

#### **B. Other Instruments Under the UN**

The first instrument to be stated here is the CEDAW<sup>4</sup> from the point of view of the equal right to health of the pregnant woman as provided under article 12 of the convention and the equality of women to decide the number and spacing of children as provided under article 16 of the same. Gender equality is a fundamental principle in international human rights law. And therefore any kind of discrimination made in the enjoyment of rights by women is against this principle. The threat to such principle is discrimination, as per the provision of the convention, including legislative acts that have effect on the enjoyment of rights of women.<sup>5</sup>

Such laws may include any law which prohibits women from passing through certain medical procedures and criminalize if they are found passed through the procedures. One of the prohibitions could be the prohibition of women from abortion, which is a form of gender discrimination. This is because it is only women who pass through the sufferings and pains of pregnancy which are not experienced by men.<sup>6</sup> Therefore, any law which is made denying abortion is discriminatory as it is prohibiting women from exercising their autonomy the decision they are going to make on the fate of the fetus which they hold in their womb and push them to go through illegal and unsafe abortion. Therefore such prohibition is against the sense of article 12 of CEDAW which begs for the equal treatment of women with men in the access to health services.

The other issue to be raised under the CEDAW is women's right to decide whether to have a child or not. Such a decision is the ultimate decision of the pregnant woman as it is a decision on her body. Therefore the government shall not intervene on the rights of the pregnant woman rather than having an advisory role.<sup>7</sup> In furthering this it is provided under Article 16 (1) of the convention which avows that "States Parties shall . . . ensure, on a basis of equality of men and women . . . (e) the same rights to decide freely and responsibly on the number and spacing of their children..." therefore, it is discernible from this provision that women have the ultimate equal power to decide whether to have or not to have a child including the pregnant woman who wants to abort the fetus.

The other documents to be states within the Umbrella of UN are International Conference Documents, such as *ICPD Programme of Action*<sup>8</sup> and *Beijing Platform for Action*.<sup>9</sup> The former one called upon governments to deal with the health impact of unsafe abortion as a key public health concern and recognized the need for greater safety and availability of abortion services.<sup>10</sup> In addition to this it also recognized the basic right of all couples to decide freely and responsibly the number spacing and timing of children free of discrimination, coercion and violence.<sup>11</sup> Hence, this document has made abortion the decision of the pregnant woman and the services shall be provided by the government to undertake it in safe manner. The latter one, on its side, declares that: "The human rights of women include their right to have control over and decide freely and responsibly on

<sup>1</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, Adopted by *General Assembly resolution 2200 A (XXI)*. Hereafter ICESCR

<sup>2</sup> Center for Reproductive rights, *Safe and Legal Abortion is a Woman's Human Right*, 2 (2011), [www.reproductiverights.org](http://www.reproductiverights.org)

<sup>3</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*. paragraph. 8 (2000)

<sup>4</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979 Adopted by *General Assembly resolution 34/180*. Hereafter CEDAW

<sup>5</sup> *Supra* note 13 pp. 3

<sup>6</sup> See *id*

<sup>7</sup> *Id.* at 4

<sup>8</sup> *Programme of Action of the International Conference on Population and Development*, Cairo, Egypt, 5-13 September 1994 (1995). Hereafter *ICPD Programme of Action*.

<sup>9</sup> *The Beijing Declaration and The Platform for Action, Fourth World Conference on Women*, Beijing, China, Sept. 4-15, 1995, (1996). Hereafter *Beijing Platform for Action*

<sup>10</sup> *Supra* note 13

<sup>11</sup> *Supra* note 19 paragraph 7.3

matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”<sup>1</sup> This document also recognized the basic rights of freely deciding on the number, spacing and timing of children<sup>2</sup> which implicitly includes the right to abortion.

### C. Instruments Under the Auspices of African Union

Concerning our issue at hand a notable document is Optional Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa in whose article 14(1) (b) provided for the right to health of women including access to safe and legal abortion at least in some conditions. It has given the mandate to decide whether to have children or not to the women.<sup>3</sup>

The human rights instruments and documents discussed in this section advocate for the protection of the rights of women for abortion from two perspectives. The first perspective is the right to health of women. Based on which women shall be entitled with the right to abort the fetus so long as they are not in need of it because of the issue of their health status. And further than if it is not made legal and protected right they may tend to undergo illegal and unsafe abortion which may endanger their health seriously and even may lead them to death. The second perspective is the autonomous nature of decision making on one’s own body and having an equal opportunity to decide on the number, spacing and the timing of children. Further than this, it is the right of the woman to decide to have a child or not.

### III. Analysis of Abortion Under Ethiopian Law

The first to be looked into is the FDRE constitution<sup>4</sup>. The constitution under its article 9(4) made international agreements ratified by Ethiopia integral part of the law of the land and therefore the binding international instruments stated in the above section are parts of Ethiopian law, i.e. ICESCR, CEDAW and Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Therefore Ethiopia is duty bound to enact its laws and act in accordance with those instruments. The non-binding instruments or documents have got persuasive power on the laws and executive acts of the country.

The other constitutional provision is article 35 in whose sub articles (4) stated that: “Laws, customs, and practices that oppress or cause bodily or mental harm to women are prohibited...” The former sub article begs for the prohibition of any law which oppresses women. Therefore this provision is to be interpreted in our case as any oppression made by any law on the rights of abortion of women is prohibited.

In light of the interpretation made as to the constitutional provision and the duties imposed on the state let us look at the provision dealing with abortion under the FDRE criminal code.<sup>5</sup> The criminal code governed the issue of abortion under articles 545 through 552. Among these the point of discussion here is article 551 of the criminal code which liberalized some acts as exception to the general rule of punishment of abortion. This provision provided that abortion is not punishable within the period of time accepted by the medical profession and if it is to save the life of the woman, to preserve physical and mental health, rape or incest, fetal impairment only. Other factors like economic or social reasons and availability on request are not included under the code saving economic reasons as mitigating circumstance.<sup>6</sup>

The issue worth dealing here is the non-availability of abortion upon request as an exception within the period of time accepted by the profession. This is because the constitution provided that any oppression by law is prohibited. But this criminal provision is coercing women to hold the fetus without their will and even in the absence of any serious damage to be caused either on the fetus or the mother as my argument is within the time period accepted by the medical profession, i.e. before the time of viability of the fetus. Therefore this criminal provision is standing against the constitution.

And even if we look at the provision in light of the international instruments dealt in the above section it is once again against those instruments as the instruments gave the mandate to decide whether to have that child or not to the pregnant woman. Here the proponents of the criminalization, though, raise the issue of the life of the fetus. But according to many medical evidences the viability is to be raised in the time of 22<sup>nd</sup> to 26<sup>th</sup> month of conception. Therefore, allowing abortion within this period is not to be considered as murder and shall be decided by the pregnant woman who is going to suffer all the pains of the pregnancy. And the government enacted a law which is against the provisions of the international instruments ratified.

<sup>1</sup> Rebecca J. Cook & Bernard M. Dickens, Human Rights Dynamics of Abortion Law Reform 25 Human Rights Quarterly. 11, (2003)

<sup>2</sup> *Supra* note 20, paragraph 223

<sup>3</sup> Magdalena Sepulveda Et.al., Human Rights Reference Handbook. 321 (2004)

<sup>4</sup> The Constitution of the Federal Democratic Republic of Ethiopia proclamation no. 1/1995. Hereafter the constitution.

<sup>5</sup> The Criminal Code of the Federal Democratic Republic of Ethiopia proclamation no. 414/2004. Hereafter the criminal code.

<sup>6</sup> Tsehai Wada, ABORTION LAW IN ETHIOPIA: A Comparative Perspective, 2 Mizan Law Rev. 26 (2008)

#### IV. Conclusion and Recommendations

##### Conclusion

In Concluding this paper there are a number of arguments in favor and against the right to abortion of women. The opponents of this right base their arguments on religious grounds while the proponents base their arguments on the autonomy and rights of women. Based on this I tried to assess the Ethiopian law of abortion and I find out that:

- The constitution prohibits any law that oppresses women
- The international agreements ratified by Ethiopia are in favor of the right to abortion of women.
- The criminal code, in contrary to the constitution and the human rights instruments, coerce women to hold and stay pregnant the fetus that they don't want even within the time accepted by the medical profession to abort.

##### Recommendations

Based on the conclusions I came up with I recommend that the provisions of the criminal code should be amended in a way that includes the demand (request) of the pregnant woman to abort the fetus within the period accepted by the medical profession as an exception to the general rule of punishment for abortion going in line with the international human rights instruments and the constitution.

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