

**Prevention of Unsafe Abortion through Legal Reform,
International Human Rights law and National
Implementation in Ethiopia**

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LL.M in Public International Law

May, 2006

Acknowledgements

My special gratitude goes to my advisor Ms Ingunn Ik Dahl, who was relentlessly there to assist me. Her scholarly questions and comments are of paramount importance for the formulation and progress of this thesis.

I am really grateful for the Norwegian Quota Scholarship Program for giving me the great opportunity to come to Norway and study. My gratitude also goes to the academic and administrative staff of the Faculty of Law of University of Oslo.

My special thanks also goes to the staff of Ethiopian Women Lawyers Association, and Ethiopian parliament who helped me access relevant documents and researches relevant to the thesis.

I would like to thank my family for the moral support they have provided me.

Last but not least, I want to thank my fellow classmates for the great time we had together.

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Abbreviations

ICCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
AJRH	African Journal of Reproductive Health
MOH	Ministry of Health
FDRE	Federal Democratic Republic of Ethiopia
ICESCR	International Covenant on Economic Social and Cultural Rights
ICPD	International conference on Population and Development
ESOG	Ethiopian society of Obstetricians and Gynaecologists
ACHPR	African Charter of Human and peoples' Rights

INTRODUCTION

The International community took vows to recognize and deal with unsafe abortion as a major public Health problem in the early 1990's. The International Conference on Population and Development Programme of Action 1994, sometimes referred to as the Cairo Consensus, is remarkable in its recognition that reproductive health and rights, as well as women's empowerment and gender equality, are cornerstones of population and development programmes.

The program of action underscores, where abortion is legal it should be safe (Paragraph 8.25). It recognizes the problem of unsafe abortions all over the world and the multiplicity of factors contributing to the safety of an abortion procedure. Every year, around 19 million unsafe abortions occur worldwide. Out of these, around 70, 000 are the cause for maternal mortality every year. The problem and devastation coming out unsafe abortion is mostly the concern of developing countries, where there is poor reproductive health facility and a restrictive abortion law. The linear correlation between unsafe abortion and prohibited law was identified by the Fourth World conference on Women, on Beijing Declaration and platform for action in that countries were demanded to consider reviewing laws containing punitive measures against women who have undergone illegal abortions ;(paragraph 107(k)).

Unsafe abortion as a major cause of maternal mortality and jeopardizing the physical health of women can be considered as a multiple violation of the rights of women . Yet there is no global human right instrument explicitly putting forward, in an obligation form, demanding states to liberalize their abortion laws so as to save lives claimed by the problem every year and everyday. The issue of abortion is one of the most controversial issues of our time for the growing recognition of women's rights and advancement of technology on the one hand and religious, moral and competing rights issues on the other.

The African human rights system has recently come up with a protocol which clearly obligates state parties to allow medical abortion in certain conditions. This is a pioneer and welcome introduction in the face of the continent which is plagued by unsafe abortions. The scenario depicts the evolution of international law from recognizing the relations of the national criminal codes and the prevalence of unsafe abortion to demanding state action via international enforcement mechanisms.

Three main issues are treated in this thesis; the first one is to search for the international legal foundations of reproductive autonomy and the right to access to safe and legal abortion. Nevertheless this writer doesn't wish to dwell on deep contentions of pro-life and pro-choice positions regarding the right to abortion.

The second issue is to look at the evolution and the level of development of international law in obligating the states to reform their law into liberal one, so as to prevent unsafe abortions and its consequences. The African Human rights system is taken to consideration.

The third issue is to examine the transcending nature of international law, and national implementation, in the face of national realities, rights, economic and customary and moral issues. The criminal law reform process in Ethiopia recently is chosen to illustrate this issue. Ethiopia is a party to prominent international treaties like ICCPR, ICESCR, CEDAW and The ACHPR. Unsafe abortion is a second cause for maternal mortality in Ethiopia next to tuberculosis, and estimates indicate that as much as 52% of hospital beds in maternity wards are occupied by women who have complications because of it. It has been attempted to answer how a legal reform could contribute positively or negatively to prevention of unsafe abortion and other issues in connection to that.

Chapter one discusses the notions of reproductive health and autonomy, the sources, scope and the emerging trend of the rights. An endeavor has been made to search for the international legal foundations of access to safe and legal Abortion.

Chapter two is dedicated to identify the regional prevalence, causes and consequences of unsafe abortion in sub-Saharan African. Analysis of the regional human right documents including the revolutionary additional protocol is made in light of the problems.

Chapter three is dedicated to display the interplay of international law and national law. In this chapter, sources of law in Ethiopia and the legal regime governing reproductive health are discussed. The modalities of implementation of international law and the constitutional guarantees given to reproductive rights are discussed. The regulation of abortion in the 1957 penal code of Ethiopia and its implementation are discussed .The points for reform of the law are taken in to consideration and finally the new law is examined in light of the different international commitments and obligations.

Conclusion is the last part of the thesis.

Chapter One

1 Reproductive Health and Autonomy

1.1 *The notion of reproductive health and reproductive autonomy.*

Health is a fundamental human right indispensable for the exercise of other human rights.¹ Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity². Health is generally defined as a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity.³ This definition could invite wide interpretation as to the non physical aspects of health. However, the purpose of this section is not to dwell in a deep analysis as to what is meant by the concept of health. Reproductive health is specific to matters relating to the reproductive system and its functions and processes.

Reproductive autonomy represents the notion that men and women in principle are entitled to control their reproductive lives. It could be illustrated as persons have the independence and the means to exercise decisions as to whether to have sex, whether or not to have children, the number and spacing of children, and whether or not to carry a pregnancy to a term.⁴ The realization of these composite rights as reproductive autonomy usually raises critiques of moral, religious or legislation based background. The exercise of reproductive rights like many other rights takes more than the willingness of the state to incorporate the rights in legislations. Thus economic and infrastructure factors too have great significance. Reproductive autonomy in such a context is then considered not only to mean having the legal options, but also the economic means and social conditions that make it possible to effectuate one's choice in reproduction

The Cairo program which is influenced by the WHO's definition of health explains *reproductive health as people are able to have a satisfying and safe sex life and that they*

¹ CESCR General comment 14 Para 1

² Ibid

³ WHO's conceptualization of health

⁴ Cynthia Grant Bowman & Akua Kueyehia, *Women and Law in Sub-Saharan Africa* pp 222

have the capability to reproduce and the freedom to decide if, when and how often to do so.⁵ Implicit in the last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as other methods of their choice of regulation of fertility which are not against the law, and in the right of access to appropriate health care services that will enable women to go safely through pregnancy and child birth and provide couples with the best chance of having a healthy infant.⁶

The principle of reproductive autonomy has different significance for women than it does for men .The biological characteristics of women and the socially prescribed roles as child bearers and care takers of families require women to bear reproductive responsibilities.⁷

Reproductive health (autonomy) is broader than the rather narrow concepts of fertility control and family planning.⁸ Reproductive autonomy is in principle a right for both men and women. In reality though, the burden of reproduction both for biological and social reasons, is particularly heavy on women.⁹ In most countries, the neglect of women's reproductive rights severely limits their opportunities in public and private life, including opportunities for education and economic and political empowerment.¹⁰

Therefore policies, laws and decisions on reproductive matters have serious repercussions on other freedoms and rights of women.

⁵ Report of the international conference on population and development, U.N .Doc A/CONF.171/13,at Para 7.2(1994)

⁶ Ibid

⁷ Cynthia Grant Bowman& Akua Kueyehia Women and Law in Sub _Saharan Africa ,pp 222

⁸ Cook, Dickens and F.Fathalla, Reproductive health and human rights, women and international human rights law vol.3p.9(emphasis added)

⁹ Ibid p.15

¹⁰ Beijing Declaration and Platform for Action(Fourth world conference on women) Para 98

1.2 Sources and Scope of the Right in International law

The right to reproductive and sexual freedom is a currently developing right. The articulation of it in different international and regional documents is still a continuing process. The purpose of this section is to discuss the existing international human right documents including soft laws to examine the extent to which the right is incorporated and where the trend of development is leading.

The right to reproductive choice does not exist *expressis verbis*. Rather the term is used for reasons of ease and represents a short hand way of referring to the 'rights to decide freely and responsibly on the number and spacing of one's children and to have access to information, education and the means to enable one to exercise these rights.¹¹ These later rights are expressly articulated in international human right documents. In effect when one refers to reproductive autonomy in international law, there is no clearly expressly mentioned right as reproductive autonomy which leaves doubt on the understanding of the term. Cook¹² holds that right to reproductive self-determination is a composite right which includes the following components right: (a) freedom from discrimination; (b) the right to liberty and security; (c) the right to marry; (d) the right to found a family; (e) the right to access to health care; (f) rights to information and education; (h) the rights to benefit from scientific progress.¹³ This is a non-exhaustive broad interpretation of the right. There is similar interpretation taken by Dixon Mueller.¹⁴ The degree of connection of the elements outlined with reproductive autonomy could vary.

The purpose of this section is neither to spell out every detailed component of reproductive freedom nor to evaluate the relevancy, but to identify the most important

¹¹ Corinne A.A Packer, The right to reproductive choice, A study in international law, p.14

¹² Rebecca J. Cook is Professor and Faculty Chair in International Human Rights, and Co-Director of the International Programme on Reproductive and Sexual Health Law in the Faculty of Law at the University of Toronto.

¹³ Cook, Rebecca, putting "the universal" in to human rights, *populi* (1993), as cited by Packer supra note 11

¹⁴ Dixon Mueller, as cited by packer supra note 11., explains the right to reproductive freedom as including the freedom to marry or not, freedom to choose spouse, right to decide how many children to have and when to have them, entitlement to family planning services and the right to control one's body

legal backings for the right to reproductive choice in international law taking women as a point of reference. These rights may include rights relating to maternity and health, right to life, survival and security of the person, rights to non –discrimination and rights relating to information and education. Nonetheless it cannot be an exhaustive list of rights which are precondition to the exercise of the right to reproduction autonomy and health. Bearing this in mind, the Cairo program of action outlined reproductive rights to include:

*...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...*¹⁵

In light of the spelled out component rights attempt has been done to identify the sources of reproductive rights in international law.

Sources of International law are treaty, custom, general principles of law and judicial decisions and writings of publicists.¹⁶ Customary law evolves through time, becoming universally accepted through practice and *opinio juris*. The right to reproductive freedom might take a deep analysis to ascertain some of its component rights are supported by state practice and *opinio juris*. Clearly it contains controversial and sensitive issues like abortion therefore it is difficult to come up with customary international law principles in the arena.

International conventions and soft laws are the most important sources of understanding the right .

Soft law is the body of standards, commitments, joint statements, or declarations of policy or intention, resolutions adopted by the United Nations General Assembly or other multilateral bodies and conferences.¹⁷ The most important character of soft laws is that

¹⁵ Para 7.3 ICPD basis for actions

¹⁶ Art 38, the statute of International court of Justice

¹⁷ Cassese Antonio, International Law, 1st edition p.160

they are of not legally binding. Despite this, soft laws have proliferated these days for reasons that they are basically dealing with matters that reflect the new concerns of the international community¹⁸ and matters which are hard for states to reach convergence for various reasons.¹⁹

Although soft laws are not legally binding, they are expression of the consensus of the international community today, indicative of the trend of development of the obligations and future laws. In other words they lay ground for the gradual formation of customary rules or treaty provisions.²⁰

The universal declaration of human rights of 1948 has general provisions which assure equality, in terms of rights and dignity and non-discrimination for the enjoyment of the rights and freedoms.²¹ The right to a standard living of adequate for health and wellbeing and special assistance for motherhood and childhood are envisaged in art 25 (1 &2). The Right to found a family based on consent and non-discrimination is also one component of reproductive rights stated in the UDHR.²² Every individual is also protected from arbitrary interference in privacy.²³ It has been contended that access to abortion is a private right, and criminalizing it could be an infringement of the right to privacy.²⁴ The International Covenant of Civil and Political Rights (ICCPR) and The International Covenant of Economic, Social and Cultural Rights (ICESCR) of 1966 provide numerous rights which have direct and indirect impact on reproductive rights.

Amongst the rights spelt out in the ICCPR, the right to establish marriage and family based on free and full consent,²⁵ freedom of information (i.e. to receive and impart

¹⁸ Ibid

¹⁹ Ibid p.161

²⁰ Ibid

²¹ Art 1&2 Of UDHR

²² Art 16 of UDHR

²³ Art 12 of UDHR

²⁴ Bruggeman and Scheuten V. the FRG ,a case seen by the European commission, the applicants wanted to challenge the restrictions on abortion adopted by the German Bundestag, on the grounds that it is interference on the right to private life protected by article 8(1) of the European Convention of Human rights.

²⁵ Art 18 of CCPR general comment 19 Para 5 interprets the right to found family as the possibility to procreate and live together. Family planning methods formulated by states should not be discriminatory or compulsory.

information about reproductive matters is detrimental to one's realization of the right), right to life²⁶ right to life of an individual could be interpreted as entailing obligations to take measures as broadly as taking measures as broad as those calculated to prevent unintentional losses.²⁷ , right to security and integrity of the person (In one opinion this right could be applied to require governments to treatment of unsafe abortion and change their restrictive laws²⁸)²⁹ could be enlisted as rights relevant for exercise of reproductive autonomy.

The covenant of Economic, social and cultural rights also outlines some indispensable rights like the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.³⁰ The right to health is not the right to be healthy. It contains both freedoms and entitlements (implicit and necessary to fulfill the right to health) .These freedoms include the right to control one's health and body, including sexual and reproductive freedom³¹

The ICSECR committee interprets the right to health ,as defined in art12(1)as inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation ,an adequate supply of safe food ,nutrition and housing ,healthy occupational and environmental conditions ,and access to health related education and information, including on sexual and reproductive health.

The proclamation of Tehran of 1968 a consensus document, proclaimed by the international conference of human rights which convened in Tehran from April 22 to May 13, to review the progress made in the twenty years since the adoption of the Universal Declaration of Human Rights and to formulate a Programme for the future, has

²⁶ Art .6 ICCPR

²⁷ Tavares vs. France(European commission of Human rights)

²⁸ Cook J. Rebecca ,Dickens M. Bernard and Fathalla F.Mahmoud, Reproductive health and human rights ,2002,p.165

²⁹ Art 9 CCPR

³⁰ Art 12 of ICESCR

³¹ General comment 14 Para 8 Emphasis added

declared for the first time in international law that parents have a basic right to determine freely and responsibly the number and spacing of their children.³²

The 1979 Convention on the Elimination of all forms of Discrimination against Woman (CEDAW) addressed the issue of reproductive health as stated in Article 12. The Article provides states shall take all the appropriate methods to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality between men and women, access to health care services, including those related to family planning. Another significant right is access to specific educational information and advice on family planning.³³ In addition article 14 (2)b asserts that all appropriate measures should be taken to eliminate discrimination in having access to health care facilities including information counseling and services in family planning. Women's health needs have biological, socio-economic and psychological distinctive dimensions, it has been suggested that states should take those factors in to account when they formulate health policies.³⁴

1.2.1 International conference on Population and Development 1994(ICPD 1994)

The International Conference on Population and Development and its program of action is one of the soft laws which clearly marked the shift of attention in the international arena given to fulfilling individual's reproductive rights and reproductive health needs. The conference made its basis of action on the definition it gave for reproductive health³⁵ and numerous rights in international law said to affect reproductive health and autonomy.³⁶

Its objectives were:

³² Article 16 of the Proclamation of Tehran

³³ Article 10 (h) of CEDAW

³⁴ General recommendation No.24 Para 12

³⁵ Supra note 5

³⁶ Para 7.2 and 7.3 of the ICPD

(a) To ensure that comprehensive and factual information and a full range of reproductive health-care services, including family planning, are accessible, affordable, acceptable and convenient to all users;

(b) To enable and support responsible voluntary decisions about child-bearing and methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law and to have the information, education and means to do so;

*(c) To meet changing reproductive health needs over the life cycle and to do so in ways sensitive to the diversity of circumstances of local communities.*³⁷

Several recommendations for action were given for the fulfillment of the above mentioned goals.³⁸

The issues of family planning ,gender equality and women’s health were given special attention in the conference and its program of action .They are outlined herein below as the main theme of the thesis revolves around these issues.

1.2.1.1 Family planning

Family planning programs must enable couples and individuals to decide freely and responsibly the number and spacing of their children and to have the information and means to do so and to ensure informed choices and make available a full range of safe and effective methods.³⁹The principle of free choice is essential to family planning programs.

Some of the objectives of the program regarding family planning were:

(a) To help couples and individuals meet their reproductive goals in a framework that promotes optimum health, responsibility and family well-being, and respects the dignity

³⁷ IBID Para 7.5

³⁸ see Para 7.6-7.11

³⁹ Para 7.13

of all persons and their right to choose the number, spacing and timing of the birth of their children;

(b) To prevent unwanted pregnancies and reduce the incidence of high-risk pregnancies and morbidity and mortality;

(c) To make quality family-planning services affordable, acceptable and accessible to all who need and want them, while maintaining confidentiality;

*(d) To improve the quality of family-planning advice, information, education, communication, counseling and services.*⁴⁰

1.2.1.2 Gender Equality and Empowerment of women

The ICPD held that the decision making capacity of women in all spheres of life including of reproduction and sexual health is a sign of empowerment and would bring about long term population policy success.⁴¹ Therefore actions were recommended to eliminate all practices that discriminate against women; assisting women to establish and realize their rights, including those that relate to reproductive and sexual health⁴²

1.2.1.3 Reduction of maternal mortality (women's health and safe motherhood)

The UN millennium development goal no.5 is reduction of maternal mortality by three quarters between 1990's and 2015. The Cairo conference of 1994, cognizant of the high number of maternal mortality set out the following objectives:

(a) To promote women's health and safe motherhood; to achieve a rapid and substantial reduction in maternal morbidity and mortality and reduce the differences observed between developing and developed countries and within countries. On the basis of a

⁴⁰ Para 7.14

⁴¹ Para.4.1

⁴² Para.4.4 (c)

commitment to women's health and well-being, to reduce greatly the number of deaths and morbidity from unsafe abortion;

*(b) To improve the health and nutritional status of women, especially of pregnant and nursing women.*⁴³

Paragraph 8.25 of the ICPD holds unsafe abortion as a major public health issue bringing about a great number of maternal mortality and morbidity. There fore the document holds the final consensus that abortion cannot be promoted as a way of family planning and countries should strive for reduction of unwanted pregnancies and abortions by improved and expanded ways of family planning. But the document does not hold a position as to abortion be legalized, it simply states where abortion is legal in national law the state should address the issue of safety. Unsafe abortion is defined as a procedure to terminate unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking minimal medical standards or both.⁴⁴

1.2.2 Beijing Declaration and Platform of Action (1995)

The Beijing declaration and platform of action of 1995(Fourth World Conference on Women) has taken up problems of women in reproductive health arena as critical areas of concern. The Beijing Declaration follows the definition of reproductive health and reproductive rights given by the ICPD of 1994.⁴⁵

One of the significant assertions of this declaration is:

*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.*⁴⁶

The fact that women are able to exercise full autonomy over their bodies and the ability of women to control their own fertility forms an important basis for the enjoyment of

⁴³ Para 8.20

⁴⁴ WHO/MSM/92.5

⁴⁵ Para 96 and 96 bis

⁴⁶ Para 97

other rights. ⁴⁷It is more than obvious that women play a major role in the process of reproduction.

The Beijing declaration has also underpinned the discussion on the issue of unsafe abortion by stating *that*

*...unsafe abortions threaten the lives of a large number of women, representing a grave public health problem as it is primarily the poorest and youngest who take the highest risk. Most of these deaths, health problems and injuries are preventable through improved access to adequate health-care services, including safe and effective family planning methods and emergency obstetric care, recognizing the right of women and men to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law*⁴⁸

As a recapitulation these two major international UN conferences, within this area have extensively dealt the issue of reproductive autonomy, reproductive health and unsafe abortion as a case threatening women's health and life expectancy. Clearly, these documents contain principles which lack adequate legal sanctioning. Nevertheless they are indicative of the focus and the direction of human right issues and future conventions.

Regarding the issue of abortion, these two instruments do not clearly and precisely deal with as to the legal measures governments should take apart from the fact the procedure should be safe whenever it is legal which is based on the higher motive to reduce maternal mortality and morbidity coming from unsafe abortion. There are still contentions that access to safe abortion on choice is a woman's human right even if they are implicitly spelt in the two relevant documents. The next section is forwards the issues surrounding access to legal abortion, as to whether it could be viewed as a right of a pregnant woman or not.

⁴⁷ Para 98

⁴⁸ Ibid

1.3 Access to legal Abortion,

Abortion is one of the most contentious issues of the world today inviting fierce arguments of moral, religious, economic or human rights nature. In this context abortion shall mean voluntary and induced termination of pregnancy thereby excluding spontaneous abortion which is basically involuntary.⁴⁹ Arguments revolving abortion are distinctly classified as pro -life and pro- choice, the former targeted for protection of the life of the unborn fetus and the latter promoting the reproductive decision making of the women or the couples who may be seeking to terminate the pregnancy for different reasons.

Although abortion has existed since time immemorial, arguments pro and against gained momentum in 20th century along with the human rights movement and specifically with women's human rights. The human rights movement has been inspired by recognition that individuals should be free to make critical decisions about their lives by their own choice, and are not involuntarily at the disposal of governmental policies and purposes.⁵⁰ Potentially, the issue of abortion holds tripartite private interests and also the public interest. These tripartite private interests are interest of the unborn child, the father's interest and the pregnant woman.

Religious and morality conceptions add a great fuel to the tension revolving abortion. The purpose of this section is to explore whether the right to access legal and safe abortion is a right supported under existing international human rights law following a Positivist approach and how international human right bodies and institutions have addressed the competing interests.

Abortion belongs to the concept of reproductive autonomy of the pregnant woman, where the woman procures the termination of pregnancy wishing a get away with the unwanted pregnancy. Nevertheless abortion is not an ordinary medical procedure that a woman

⁴⁹ Spontaneous abortion shall mean termination of pregnancy for natural causes, which could be defects with the health of the mother or the fetus.

⁵⁰ Cook &Fathalla Supra note 28 p.351

goes through, many factors pull the issue away from falling in to the exclusive autonomy of the woman. These factors are inter alia the question of right to life of the fetus, the question of the say of the father on the issue and religious and morality issues. Whether abortion is endorsed or should be endorsed in international human right documents as a right, ensuring a woman the right to access safe and legal abortion and obliging state governments to fulfill the obligation is a matter of unresolved controversy.

Around 46 million abortions occur worldwide every year⁵¹. Around half of these abortions take place in a situation which is below standard and detrimental to the life and physical wellbeing of the woman.⁵² 127 countries in the world have restrictive abortion laws where abortion is completely prohibited or allowed only to protect a woman's life or health. In 64 countries induced abortion is allowed legally either without restriction or on broad grounds of social and economic nature.⁵³

Despite its high frequency, abortion is not generally a desired means of fertility regulation. The frequency of abortions worldwide however demonstrates the fact that the prevalent restrictive laws of the world did little or no to reduce the rate of abortion.

Great disparity among the domestic laws of countries of the world caused the lack of consensus in coming up with enforceable law in the international arena putting governments in obligation to ensure the right to legal and safe abortion. Nonetheless, there are multiple state obligations and commitments, which could be invoked for the assurance of the right to get legal and safe abortion. Amongst the prominent legal arguments forwarded to advocate for the right to safe and legal abortion, the nondiscrimination norm and right to health argument are very relevant in this context.

⁵¹ <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/abortion/fact-abortion-unsafe.xml>
as visited August 2005

⁵² Ibid

⁵³ Fred Sai , International Commitments and Guidance on Unsafe Abortion African Journal of Reproductive Health, Volume 8 ,Number 1, April 2004,p.16

1.3.1 Access to Legal and Safe Abortion as an Anti _Discrimination Norm

The preamble of CEDAW states that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.’

Discrimination against women is defined in the same document as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁵⁴

Discrimination against women could be seen in two aspects, direct discrimination and indirect discrimination. Direct discrimination signifies those laws and practices which have explicitly have the aim and effect of distinguishing or excluding on the basis of sex, where as the indirect ones are neutral on the face, but have the effect which are discriminatory.

Laws that forbid abortion subjecting both the woman and the person giving the service to punishment are said to be discriminatory. Such contention is often subject to the pro life position of abortion is a violation of the right to life of the fetus. However the time of the beginning of life of the conceived child differs from country to country according to their domestic law of personality. In Ethiopia for instance, the human person is subject to rights from its birth to death.⁵⁵ Personality will be accrued to a conceived child where it is proved that the child’s interests so demand, where he is born alive and is viable.⁵⁶ Attribution of rights to the unborn is an exceptional phenomenon based on the conditions

⁵⁴ CEDAW article 1

⁵⁵ Article 1 of the 1960 civil code of Ethiopia

⁵⁶ Ibid Article 2

aforementioned. Thus the right to life of the unborn child is something which is not yet acquired consensus among the world community. So we cannot talk about the right to life of the unborn per se. This fact could be gathered from the different comments of the committee of rights of children did not mention so far the practice of abortion jeopardizing the right to life of the unborn child.⁵⁷The human right committee as well did not include the issue of abortion as a threat to the right to life of the child ⁵⁸

If liberalization of abortion laws is one of the things that should be done to achieve equality in terms of enjoyment of rights and freedoms, another competing issue would be the consent of the father in the decision of abortion in the writer's opinion. The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development.⁵⁹ Pregnancy, birth and upbringing a child imposes a disproportionate burden on women compared to the extent of responsibilities on fathers. Moreover it tampers with the realization of other rights which are deemed to be a prerequisite to bringing about de facto equality. For this reason women should be entitled to decide on the number and spacing of children.⁶⁰On its concluding observation to Turkey the CEDAW committee held that requiring spousal consent for abortion was in contravention of article 15 of the CEDAW. Decision on the number and spacing of children could be interpreted as being entitled to use possible methods of fertility regulation including abortion.

It can be contended that human dignity is highly connected with the ability to decide for oneself. The principle of the dignity of a person as understood in contemporary human rights law enables individuals to have chosen life plan,(namely ,to be free to make decisions about one's reproductive destiny with out coercion from the government or outside factors) and relinquish access to certain goods or acquire access to some others.⁶¹Control over sexuality and reproduction is closely linked to human dignity,

⁵⁷ Committee on the Rights of the child General comment 3 paragraph 11

⁵⁸ http://www.bayefsky.com/themes/life_general_general-comments.php ICCPR General Comment 6

⁵⁹ CEDAW general recommendation 20 paragraph 21

⁶⁰ Ibid

⁶¹ Maja Kirilova Eriksson, Abortion and Reproductive health :Making International law more responsive to women's needs, Women and human rights Vol.3 2001 p.60

which has been considered as an essential part of it.⁶² To put it in a different way, for a woman control of her sexuality and reproduction falls in to her autonomy and is vital part of her human dignity. Laws that criminalize medical procedures like abortion which are only needed by women and punish women for undergoing though such procedures fit squarely to laws that have the purpose and effect of preventing a woman from exercising any of her human rights or fundamental freedoms on the basis of equality with men.⁶³

Eriksson points out that how reproduction is managed and controlled is inseparable from how women are managed and controlled.⁶⁴ The ability of women to control their own fertility forms an important basis for the enjoyment of other rights: like wise the assurance of socio -economic opportunities on an equal basis with men and the provision of the necessary services and facilities enable women to take greater responsibility for their reproductive lives.⁶⁵ In order to bring *de facto* equality between men and women all measures of voluntary regulation of fertility must be available including safe, adaptable, affordable and accessible abortion services. A woman's self development is highly linked to her reproductive life, having a child has its great repercussion on the education, career and life plans of the mother. Utmost reproductive autonomy must be given to women in order to enhance their empowerment and bring equality in factual terms.

Though the letters of the CEDAW do not spell out specifically the right to get safe and legal abortion it can be interpreted from the object and purpose of the treaty to bring that effect.

As it can be read from the preamble, the main aim of CEDAW is elimination of all forms of discrimination against women and to bring about *de facto* and *de jure* equality of men and women.

One of the rules of interpretation of a treaty on the Vienna Convention on law of treaties of 1969 is:

⁶² Maja Kirilova Eriksson, Reproductive freedom in the context of International Human rights and Humanitarian law.2000,p.304

⁶³ Art .1 of the Convention for the elimination of all forms of discrimination against women

⁶⁴ Maja Kirilova Eriksson supra note 62 p.305

⁶⁵ International conference on population ,Mexico ,1984

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶⁶

It should be noted that Article 31-33 of the same convention have developed in to rules of customary international law binding even states which are not parties to the convention.

The object and purpose of CEDAW as a treaty is elimination of every form of discrimination and bring about de jure and de facto equality between men and women.⁶⁷ Empowerment of women through education and carrier development is the key factor in to bringing real equality between men and women. Bearing with unwanted pregnancy and consequences highly tampers with the woman’s aspirations of self development. If women are unable to decide on procreation matters, they will be deprived of the benefits their health, education or employment and their roles on family and public life.⁶⁸ Therefore it is obligatory for the state parties of CEDAW to make abortion legal and safe *to* promote the reproductive choice of women in order to fulfill the treaty obligation under CEDAW.

1.3.2 Access to Legal and Safe Abortion as a reproductive health issue

“.....If a woman decides she needs to have an abortion, nothing will stop her. Nothing, She will go through protesters. She will find an illegal abortionist....”⁶⁹

This speech was made to demonstrate how it would be difficult to stop a woman who has made her mind to abort.

It is estimated that complications of unsafe abortion claim the lives of 70,000 women each year around the world. Apart from the sheer numbers of deaths, many women suffer

⁶⁶ Article 31 paragraph 1 of the Vienna convention on law of treaties 1969

⁶⁷ Preamble of CEDAW

⁶⁸ Kirilova ,supra note 62page 305

⁶⁹ Susan Hill ,Executive director of National women’s Health Organization, USA, taken from <http://www.ipas.org/english/> as visited October ,2005

long-term complications including infertility, chronic pelvic pain and ectopic pregnancies.⁷⁰

As stated earlier, WHO defines unsafe abortion as a procedure for terminating an unintended pregnancy either by persons lacking the necessary skills or in an environment lacking the minimal medical standards or both.⁷¹

When induced abortion is performed by qualified persons using correct techniques and in sanitary conditions, it is a very safe surgical procedure.⁷² Nevertheless the reality today is far-flung from that.

According to a study made in 2000, 19 million unsafe terminations of pregnancies were carried out that year: making one in ten pregnancies end in unsafe abortion, and one unsafe abortion in seven live births globally.⁷³ The incidence of unsafe abortion is highly associated with the development status of countries and the restrictive legislations governing abortion. The same research demonstrates the high disparity of figures of incidence of unsafe abortion between developed and developing countries. Out of 19 million unsafe abortions in the year 2000, 18.4 million occurred in developing countries and 0.5 million happened in developed states⁷⁴. Following that fact, out of the 67,900 maternal deaths due to unsafe abortions worldwide, 67,500 occurred in developing countries.

A number of factors contribute to the safety of an abortion procedure, but the legislation and policies of a country are of paramount importance. A country with meager health infrastructure and very low economic development, might not expected to provide mostly safe abortions for technical reasons. Nonetheless figures from eastern Asia prove to the contrary magnifying the importance of liberal legislations on the matter. Around 10

⁷⁰ Okonofua E.Friday ,Breaking the silence on the prevention of unsafe abortion in Africa, African Journal of reproductive health Vol.8 no 2 p.7 2004

⁷¹ http://www.who.int/reproductive-health/unsafe_abortion/index.html as visited August 2005

⁷²Unsafe Abortion, Global and Regional estimates of the incidence of unsafe abortion and associated mortality in 2000,4th Edition, World Health organization,P.11

⁷³Ibid p.15

⁷⁴ Ibid p.19

million unsafe abortions occur in Asia, and as a consequence 34,000 women die every year.⁷⁵ The sharp comparison between countries with a liberal law and prohibitive laws is depicted through looking at the incidence of unsafe abortions in eastern Asia. In the latter, where abortion is permitted by law unsafe abortions and its ramifications are completely nonexistent.⁷⁶

This fact nevertheless doesn't lead to underestimate the importance of economic capacity's contribution to the safety of abortion. The problem of unsafe abortion will be multiplied when a country with low economic development, follows prohibitory a abortion law, which in turn forces pregnant women to resort to perilous abortion procuring methods. On top of that with such restrictive legislation the chance of modern technology crossing the boarder of that country would be very minute.

The countries where we have prohibitive or very strict abortion laws are the countries where women suffer and bear the burden of unsafe abortions. As rightly stated;

It is the number of maternal deaths not abortions, that is the most visible consequence of (restrictive) legal codes⁷⁷

It is the argument of this writer that it is possible to argue in favor of legal and safe abortion should be made available by states along the avenue of the right to health and right to life of a woman.

The right to be free from discrimination and right to health of a woman are complementary issues. Women have specific health needs which cannot be met by uniform treatment of all individuals. The need to eliminate discrimination against women also contains the obligation of taking in to consideration of the special health needs of women.

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid p. 9

The ICESCR obligates state governments to ensure the highest attainable standard of physical and mental health. The committee interprets this obligation in terms of women's right to health as:

*To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights*⁷⁸

The CESCR stresses that many measures, such as most strategies and programs designed to eliminate health related discrimination, can be pursuedthrough the adoption, modification or abrogation of a legislation .⁷⁹

On the same perspective Art 12 of CEDAW reaffirms that states should take all the appropriate measures to eliminate discrimination between men and women. The CEDAW committee held that it is discriminatory for a state party to refuse to legally provide for the performance of certain reproductive health services for women.⁸⁰In particular the committee stressed that state parties should prioritize “reduction of maternal mortality rates through safe motherhood services and prenatal assistance.”⁸¹ It also held that when

⁷⁸ CESCR General Comment 14, Paragraph 21

⁷⁹ CESCR General Comment 14 paragraph 18

⁸⁰ General Recommendation 24 by CEDAW paragraph 11

⁸¹ General Recommendation 24 by CEDAW paragraph 30 (c)

possible, legislation criminalizing abortion could be amended to remove the punitive provisions imposed on women who undergo abortion.⁸² This recommendation of the CEDAW committee on reduction of maternal mortality and promoting women's reproductive health is a follow up of the outcomes from the two conferences mentioned in section two.

Since the 1990's unsafe abortion and its adverse consequences are widely recognized by the world community in the major conferences of Cairo and Beijing. The consensus at the Beijing conference was to recognize and deal with the health impact of unsafe abortion as a major public health concern.⁸³ Paragraph 107 (k) further strengthens that women should not be criminalized for having an abortion and governments should consider reviewing laws containing punitive measures against women who have undergone illegal abortions. Different UN treaty committees have expressed their views and concerns on the relationship of unsafe abortion and restrictive laws. The Human rights committee in the concluding observation it gave to Peru held that; it is of concern that abortion gives rise to a criminal penalty even if a woman is pregnant as a result of rape, and that clandestine abortions are the main cause of maternal mortality. Those provisions not only mean that women are subject to inhumane treatment but are possibly incompatible with articles 3, 6 and 7 of the Covenant.⁸⁴ This committee on the same issue on its comment to Mali held that attention should be given to the effect on women's health of the restrictive abortion law.⁸⁵ Similar position is held by the committee to on its comment to Cameroon on criminalization of abortion threatening the life women⁸⁶

The CEDAW committee suggested that Peru should review its abortion law in order to mitigate clandestine abortion and suspend or remove the punishments of individuals who have already gone through the process.⁸⁷ The committee also noticed in Namibia's case

⁸² Ibid

⁸³ Beijing Declaration and platform of action paragraph 107(j)

⁸⁴ Peru, ICCPR, A/52/40 vol. I (1997) 28 Para. 160

⁸⁵ Mali, ICCPR, A/58/40 vol. I (2003) 47 Para. 81 (14).

⁸⁶ Cameroon, ICCPR, A/55/40 vol. I (2000) 36 at Para 199

⁸⁷ Peru, CEDAW, A/50/38 (1995) 79 at Para. 446

⁸⁸that the high number of illegal abortions, the high rate of maternal mortality, and the inadequacy of the existing law on abortion contributed to the problem are of concern. The CESCR committee also made a remark to Poland that restrictions have recently been imposed on abortions that exclude economic and social grounds for performing legal abortions. It is of concern that because of this restriction, women in Poland are resorting to unscrupulous abortionists and risking their health in doing so.⁸⁹ The CESCR committee expressed concerns regarding Mexico that the fourth highest cause of death among women in the State party is illegal abortion⁹⁰

International law is in the process of progressively recognizing the problems with illegal and unsafe abortion, not only by pressurizing states to decriminalize their abortion laws but to the extent of obligating states to allow legal abortion in certain circumstances. The new African protocol which came in to force recently is witnessing the fact that international law is being concretized in the area and will be discussed in chapter two of this thesis.

The world community took vows to reduce maternal mortality by three quarters under the millennium development goals for the year 2015.

Unsafe abortion is one of the major causes of maternal mortality and morbidity in the developing world. Articulated policies should be in place in order to target such problem and thereby to fulfill the obligation to eliminate discrimination in the field of health and promote health and wellbeing of women. Liberalizing abortion laws is an immense step towards such fulfillment to preserve the life and health of women by safeguarding them from unsafe abortions. The infamous experience of Romanian law reform could be a living exemplary case for countries with restrictive abortion laws.⁹¹

⁸⁸ Namibia, CEDAW, A/52/38/Rev.1 part II (1997) 82 at Para. 111

⁸⁹ Poland, ICESCR, E/1999/22 (1998) 32 at Para. 150

⁹⁰ Mexico, ICESCR, E/2000/22 (1999) 62 at Para. 391

⁹¹ After approximately 10 years of legal abortion, the Romanian government outlawed the procedure in 1966. The number of women who died from abortion-related causes didn't fall — it rose. In 1965 there were 20 abortion-related deaths for every 100,000 live births. By 1974, there were 100 abortion-related deaths for every 100,000 live births, and by 1983, the number had jumped to 150 per 100,000.

Abortion was again legalized in December 1989, and by the end of 1990, deaths from abortions had already dropped to around 60 per 100,000 live births.

Legalizing abortion is inevitable to combat maternal mortality and morbidity and promote women's health.

Dr Mohamoud Fathala ⁹²rightly pointed out that”..... *Women are not dying because diseases we cannot treat .They are dying because societies have yet to make the decision that their lives are worth saving....*”

To the main question of whether right to access safe and legal abortion is a right existing in international law, the following conclusion could be drawn. Apart from the protocol to the African Charter of Human and People's rights on the right of women in Africa whose specific provision obligates state parties to allow abortion in certain circumstances, there is no other international ready made provision which enjoins state parties to allow abortion. Nonetheless, the right to be free from discrimination on the basis of sex and the entitlement to the highest attainable standard of health, are among the many rights of women which indirectly demand for implementation of the right to get safe and legal abortion.

As mentioned earlier, the international community is being aware of the problems adjoining with criminalization of abortion and denial of the services, basically prompted by the Cairo conference and the subsequent Beijing conference. One can see clearly, enhanced awareness and recognition on the area which keeps the optimism that soon, there will be more other treaties in the international forum explicitly providing the right to get safe and legal abortion despite some controversies in the past.

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Chapter Two

2 Unsafe Abortion in sub-Saharan Africa: In light of Regional Human Right Documents and National laws

2.1 *Problem and Prevalence of Unsafe Abortion in Sub-Saharan Africa*

All over the world, women bear the brunt of unsafe abortion and die in tens of thousands every year. This is very much true in Africa. African women suffer the world's highest abortion -related death rates estimated at 680 deaths per 100,000 abortions as compared with 330 per 100,000 for the rest of developing countries (excluding China) and 1.2 per 100,000 in developed countries.⁹³ These high numbers of maternal mortality incidents through out the continent represent high percentage as a cause for maternal mortality in many of African countries like 28% of hospital based maternal deaths in Zimbabwe, 54% in Ethiopia, 40% in Nigeria and one in eight maternal deaths in the west Africa as a whole.⁹⁴ Death being the worst case scenario, those who underwent through unsafe abortion are usually exposed to other causalities like uterine perforation, hemorrhage, sepsis, incomplete abortion, sub-fertility, pelvic inflammatory disease, chronic pelvic pain, and fistula. On top of the physical health challenges, emotional challenges such as trauma, stigmatization and isolation from families and communities are suffered by women in such circumstances.⁹⁵

Given necessary legal framework and economic preconditions, unsafe abortion could be totally preventable; however it is a cause for irreparable damages against the life and health of so many African women. The economy of Africa is a major hindrance to the realization of human rights with budgetary implications.⁹⁶ The existence and

⁹³ Whitaker and Germain, Safe abortion in Africa: Ending the silence and starting a movement, AJRH vol.3 no.2 1999 p .8

⁹⁴ Ibid

⁹⁵ Tamara Braam & Leila Hessini, "Ensuring reproductive choice, saving women's lives in Africa, A regional consultation on unsafe abortion." March 5, 6 and 7, 2003, Addis Ababa Ethiopia. P.23 unpublished

⁹⁶ Mugwanya, George William ,Human rights in Africa, Enhancing human rights through the African regional human rights system, 2003 p.209

pervasiveness of unsafe abortion and its ramifications find their roots in the very strict nature of sub Saharan African criminal laws of countries, where abortion is generally prohibited in most African countries with the exception of saving the women's life and preserving health. Nunes points out "the cause of unsafe abortion is the law".⁹⁷ As this statement may sound too extreme, it depicts the degree of significance a liberal law would contribute to the safety of abortion. China has liberal abortion laws and, though it is classified as a developing country, the rate of unsafe abortion is nil.⁹⁸ Such fact is very much in agreement with the above statement. In the case of restrictive abortion law, those determined to terminate the pregnancy will opt to get clandestine abortion which can be mostly unsafe for lack of proper training of the person undertaking it and the instruments being not appropriate or below standard. This consequence could be mainly attributable to the law albeit economic capacities of countries play a significant role too. The existing restrictive law has been an abysmal failure; it has neither preserved woman's health nor regulated any one who provides abortion services.⁹⁹

In Africa abortion is available on request only in three countries, namely Cape Verde, South Africa and Tunisia, with terminations permitted fully during the first trimester. In the South African Act on choice on termination of pregnancy, pregnancy is divided in to three terms.¹⁰⁰ Up to the 12th week of pregnancy termination of pregnancy is carried out upon the request of the pregnant woman.¹⁰¹ From the 13th week onwards, it will be carried out if the medical practitioner, with the consultation of the pregnant woman, thinks that the continued pregnancy would jeopardize the physical or mental health of the mother, or it carries a substantial risk to the foetus or its physical or mental health, in

⁹⁷ Nunes E. Frederick Safe Abortion :from Awful silence to positive action, AJRH vol 4 no 2 October ,2000,p7

⁹⁸ WHO - Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2000 ,2004,p.16

⁹⁹ *ibid*

¹⁰⁰ No. 92 of 1996: choice on termination of pregnancy act, 1996. art 2

¹⁰¹ *Ibid* Article 2(1)a

case of rape or incest, or the pregnant woman's social and economic condition.¹⁰² After the 20th week of the medical practitioner decides with another medical practitioner or registered midwife whether to have an abortion if the continued pregnancy endangers the life of the woman, or it poses severe malformation to the fetus or it risks injury to the fetus.¹⁰³ In Tunisia abortion is legal on demand of the woman or other reasons; however, it should only be done in the first trimester (the first twelve weeks)¹⁰⁴

The Cape Verde regulation of abortion permits abortion to be conducted legally on the demand of the woman, taking in to consideration the socio- economic conditions of the requesting woman, or in cases of rape. In both cases it is possible only during the first trimester. After the first trimester it is legal to go through abortion if it is conducted to save the mother's life, to preserve physical or mental health or to prevent fetal defects of the fetus.¹⁰⁵

In the rest vast majority of other African countries abortion remains both unauthorized and unsafe. Safe procedures are accessible only to the wealthier and more educated women, ensuring that poor and marginalized women suffer disproportionately. These laws are outdated remnants of the former restrictive laws of the colonial powers. The legal status of abortion changed drastically in two of those major powers –France and England-where abortions become routinely available to women. Although following independence, African nations changed many laws imposed by the former colonial powers; they selectively left others on the books, particularly those that relate to women's rights and health¹⁰⁶

Unsafe abortion is a multiple violation of women's rights in terms of their right to receive the highest attainable standard of physical and mental health, their right to life, and their right not to be discriminated as gathered from the discussion in chapter one.

¹⁰² Article 2(1)b i-iv

¹⁰³ Article 2(1)c i-iii

¹⁰⁴ http://en.wikipedia.org/wiki/Abortion_law#Africa as visited in December 2005

¹⁰⁵ Ibid

¹⁰⁶ Fred Sai, International commitments and guidance on unsafe abortion, AJRH vol 8 no 1 ,2004 p.16

Africa leads the world in the number unsafe abortion maternal deaths approximately 100 deaths per 100,000 live births.¹⁰⁷ Eastern Africa bears the highest rates being 140 deaths per 100,000 live births and Northern Africa being the lowest 10 deaths per 100,000 live births.¹⁰⁸ Comparably Western Europe, North America and eastern Asia hold zero incidences of unsafe abortion and maternal mortality and morbidity due to that.¹⁰⁹

Chapter one examined international laws and commitments which combat unsafe abortion by ensuring full reproductive choice of women .In this chapter we shall seek to scrutinize the African regional human rights system, its coverage of reproductive health rights which help to advocate on reduction of unsafe abortion, by pressurizing state governments change their laws and policies and start concrete measures to tackle the problem.

Although the African human rights system is part and parcel of international law, the perspective of African women's rights is chosen for discussion for three main reasons. The first reason is the prevalence of unsafe abortion in Sub –Saharan Africa where it is at its worst level. The second reason is that African Regional Human rights norms have evolved so much during the decades that a new protocol on the rights of women in Africa has come in to force recently with revolutionary values regarding abortion; therefore this writer attempts to examine the impact of the new rules in prevention of unsafe abortion in Africa. The last chapter of this research deals with the national implementation of human rights in Ethiopia .Ethiopia is one of the sub-Saharan Africa countries with very high incidence of unsafe abortion the following problems of maternal mortality, disabilities and so on. Analyzing the continent's context will assist in having a better view of the national implementation in poor countries.

¹⁰⁷ Unsafe abortion ,Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2000,World health organization 2004 p.13

¹⁰⁸ ibid

¹⁰⁹ Ibid

2.2 Analysis of Regional Human Rights Documents and Commitments

2.2.1 The African charter of Human and peoples' Rights (Banjul Charter)

The basic human right document and framework in Africa is the African Charter of Human and Peoples' rights. The charter incorporates civil and political rights, economic, social and cultural rights and people's rights (group or solidarity rights) .The charter places great emphasis on group or solidarity rights because it was adopted just in the aftermath of colonization and when apartheid was still a problem. The other point of emphasis is on African culture and African values .The preamble states that:

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights¹¹⁰

The charter further places an obligation towards individuals to preserve and strengthen positive African cultural values in his/her relations with other members of the society, ¹¹¹ Moreover the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State as stated in article 17 (3) of the charter.

The tailoring of the Charter based on group rights and the emphasis on cultural has a compromising effect on individual citizen's rights; a case in point could be women's rights.

The charter does not have extensive provisions which safeguard women's rights and particularly their reproductive rights. However, while the charter does not have the specificity on women's rights, it can form a basis for having states account for the status of women and protection of their rights within their national orders.¹¹²

¹¹⁰ Preamble of The African Charter of Human and People's Rights, Paragraph 5

¹¹¹ Article 29 of the African charter

¹¹² ,Henry Onoria, Introduction to the African system of protection of human rights and the Draft protocol ,Human Rights of Women, International instruments and African experiences,p.233 2002

The preamble stresses the need to eliminate all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions¹¹³

In the substantive provisions, Article 2 the charter sets forth a wide-ranging non-discrimination clause. Thus “every individual is entitled to the enjoyment of the rights embodied in the charter without distinction such as race, ethnic group, colour, *sex*, language, religionor other status.”

Article 3 further guarantees that every individual shall be equal before the law, and every individual shall be entitled to equal protection under the law. The ‘law’ referred here is mainly national law of state parties, with of course overlapping matters with international human rights law. The two provisions taken cumulatively are intended to insure that no human being is treated differently without adequate reason.¹¹⁴ One clear case of discrimination is discrimination on the basis of sex; therefore it becomes imperative on the state to guarantee equality and uniform treatment in terms of rights.

The most important provision in the African charter regarding women and discrimination is article 18 (3) which states

....the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions...

The provision places responsibility on states to eliminate discrimination and protect women’s rights. This responsibility in effect enjoins African states to undertake positive steps to ensure that their national laws and policies seek or result in the attainment of equality and protection of women’s rights.¹¹⁵

Art 16 of the Charter states:

¹¹³ Paragraph 9 of the preamble of the African charter

¹¹⁴ Mugwanya, supra note 96 p.192

¹¹⁵ Onoria, supra note 112, p.233

1 Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick

Article 18(3) and Article 16 are very much complementary when it comes to women's reproductive rights including the right to get safe and legal abortion. The states obligation to eliminate discrimination against women in every sector coupled with the state's obligation to insure the highest attainable standard of physical and mental health would at least command the state to transform its laws and policies in to those insuring the above requirements. One must engage in to legal argumentation to come up with such a conclusion as there are no provisions directly applicable to support this view.

Notably, the African charter has been considered insufficient in many instances on the protection it affords to women. Some scholars maintain that the foremost concern of Art 18 is the family; that it would be difficult to use it to protect the rights of women, in view of the role of the woman in the traditional African family¹¹⁶ given the emphasis on the charter that the African concept of human rights should be inspired by the virtues of African tradition and the virtues of African civilization.¹¹⁷ This contention may be challenged by the call of the provision to international conventions and declarations such as CEDAW, ICPD and Beijing declaration where most African states participated.

Another drawback to the charter's art 18(3) is that it treats women and children as same. As rightly pointed "...it brings to mind connotation of equating the former and the latter ..."¹¹⁸

¹¹⁶ Evelyn A. Ankuma, *The African commission on human and peoples rights; practice and procedures* 112,p.152

¹¹⁷ *Ibid* at 153

¹¹⁸ Onoria *Supra* note 112 p.233

Health is very much essential in itself and as a precondition to the enjoyment of other fundamental rights and freedoms. This right is reaffirmed by article 16 of the Charter as mentioned earlier. Right to health is subject to progressive realization by the state nonetheless it doesn't preclude certain minimum core obligations coming to immediate effect.¹¹⁹ Obligations of such nature could be those of changing policies and legislations to promote the right. To illustrate unsafe abortion and female genital mutilation are major public health issues affecting women in Africa. Instantaneous obligation arises up on states to take legislative and policy measures despite their economic backing.

2.2.2 The Additional Protocol on the rights of women in Africa

Compared to the level of protection sought for women in Africa, the African charter provides modest ground of protection because of its brevity and lack of specificity. And little has been done by the African Commission, which is responsible for monitoring the charter, to make state parties accountable for gender based discrimination occurring within their boundaries.¹²⁰ The apparent lack of commitment to upholding the human rights of women was highlighted by a joint seminar organized by a leading non-governmental organization in collaboration of the African commission.¹²¹ It was held that no African human right document proclaimed or stated in a precise way, what are the fundamental rights of African women¹²² Thus it was decided that an additional protocol to the African charter would be the best way forward.¹²³

Significant progress has taken place towards a more comprehensive legal regime for the protection of human rights of women. The result is an additional protocol to the African charter on the rights of women in Africa adopted in July, 2003 by the African Union. The

¹¹⁹ CESCR General Comment 14 Para 30

¹²⁰ Fareda Banda ,Women, Law and human rights, An African perspective ,2005 p.67

¹²¹ The African Commission and WILDAF seminar on the African charter of Human and Peoples' rights and the human rights of women in Africa, Lome, Togo, March 1995 as cited by Fareda Banda supra note 120

¹²² Ibid p.67

¹²³ Ibid p.68

protocol came in to force twenty days after the deposit of the fifteenth ratification on December 14th 2005.¹²⁴

The corner stone legal provisions for the adoption of the new protocol are article 66 of the African charter which gives a possibility of issuing special protocols and agreements to supplement the provisions of the charter.¹²⁵ Article 2 of the charter which proclaims the principle of non-discrimination on grounds of race, ethnic group or sex is one basic consideration for the adoption of the protocol.¹²⁶ Article 18 of the charter which stresses that states need to eliminate every form of discrimination against women is supplemented and elaborated by the protocol.¹²⁷

It further domesticates CEDAW and the Beijing Declaration and Platform for Action in the African context. The protocol contains an impressive catalogue of various rights ranging from dignity and physical security, domestic relations, political, health and reproductive rights, economic and welfare rights.¹²⁸

The protocol complements the African charter in numerous ways. It defines discrimination against women in a similar fashion with CEDAW which is lacking in the charter.¹²⁹ It highlights the importance of consent and equality in marriage.¹³⁰ There is now a legal obligation in the protocol to eliminate harmful traditional practices despite the fact that the logo of the African charter was maintaining African values and traditions.¹³¹

The protocol is very detailed and is in agreement with the existing international standards both in existing international law and soft laws and commitments especially with the emphasis given at the Cairo and Beijing international conferences to women's

¹²⁴ <http://www.africa-union.org/home/Welcome.htm> as visited in December 2005

¹²⁵ Preamble of the protocol to the African charter on the rights of women in Africa Para 1

¹²⁶ preamble of the protocol ,para 2

¹²⁷ Preamble of the charter para 3

¹²⁸ Onoria supra note 112 p.236

¹²⁹ Article 1(f) of the protocol

http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol%20on%20the%20Rights%20of%20Women.pdf

¹³⁰ Article 6 of the protocol

¹³¹ Article 5

reproductive rights and reproductive health. It is a breakthrough in terms of some rights setting land mark advancement for the international community. The prohibition of female genital mutilation (article 5(b)), a right to get medical abortion in cases enlisted by the protocol (article 14 (2)(c)), treatment of widow's rights (article 20) ,regulation of the HIV /AIDS pandemic from gender perspective(article 14 (1)(d)&(e) are among the global first's introduced by the protocol.

2.3 Abortion and Reproductive Rights in the Protocol

The African protocol places more emphasis on reproductive rights of women than any human rights conventions we know to date. Under the protocol, state parties shall ensure the right to health of women, including that of sexual and reproductive health is respected and promoted.¹³²The protocol is better articulated than CEDAW's Article 12 in highlighting sexual and reproductive health rights as intrinsic parts of right to health. The protocol further enumerates sexual and reproductive health rights as

2.3.1 The right to control their fertility ¹³³

The right to control one's fertility can be interpreted as ensuring all types family planning and other methods of regulation of fertility including abortion. Article 14 1 (a) also follows the justification given by the CEDAW committee on the importance of voluntary regulation of fertility.¹³⁴Regulation of fertility is by essence broader than the concept of family planning in that in the later abortion is not included (or at least it is not a desirable method of family planning); rather family planning is viewed as a method to reduce the number of abortions. Abortion can be though considered as a method of controlling fertility.¹³⁵The formulation of the Article 14 1(a) is general in that it would virtually call

¹³² Article 14 Para 1

¹³³ Article 14 Para 1 a

¹³⁴ CEDAW Committee General recommendation 21 Para 23

There is general agreement that where there are freely available appropriate measures for the voluntary regulation of fertility, the health, development and well-being of all members of the family improves. Moreover, such services improve the general quality of life and health of the population, and the voluntary regulation of population growth helps preserve the environment and achieve sustainable economic and social development

¹³⁵ Eriksson ,Abortion and Reproductive Health, Women and International human rights law,Vol.3.p.15

any method of regulation of fertility. In contrast with art 16 1 (e) of CEDAW the protocol seems to give exclusive right to decide on fertility to women.

2.3.2 The right to decide whether to have children, the number of children and the spacing of children

Art 14 1(b) further provides the above right as part and parcel of women's reproductive and sexual right. Art 14 1 (a) seems also to encompass the right provided in this article ,as the right to control one's fertility cannot be separated from the right to decide whether to have children or not, the number and spacing of children. Though redundancy is tracked explicit articulation is meritorious, especially true in majority of Africa where a woman's worth is measured through the number of children she provides. This right again is seemingly provided in the protocol exclusively for women as such family planning right is not provided under marital and family provisions(Article 6 and 7) of the protocol which are basically emphasizing on joint decisions in the marriage. This fact could be a bone of contention for it places the husband, the partner or the father out of the picture. There is a lieu way in the protocol that other international standards could be used for interpretation and this may in turn help to bring fathers or partners in to decision making process¹³⁶. The writer is nonetheless of the opinion that women should have the upper hand in the decision making process for reasons mentioned in chapter one of this thesis.

The right to choose any method of contraceptive is recognized under the protocol.¹³⁷ It should be noted that abortion cannot be treated as a method of contraceptive nor family planning consistent with the Cairo Program of Action¹³⁸.

2.3.3 Other Reproductive Rights in the Protocol

Other reproductive rights incorporated in the protocol include the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS.¹³⁹It is

¹³⁶ Preamble of the protocol Para 3

¹³⁷ Article 14 (1)c

¹³⁸ A/CONF.171/13: Report of the ICPD (94/10/18) paragraph 8.25

¹³⁹ Art 14(1)d

known that the pandemic of HIV/AIDS has its worst prevalence rate in sub-Saharan Africa, and majority of those living with the virus are women. This emanates from the fact that women have poor knowledge of reproductive health and their lack of autonomy to negotiate for safer sex practice.

The right to be informed of their health status and of their partner's health status and the right to get family planning education are also rights included in the protocol¹⁴⁰. Especially the latter right is indispensable to realize the effective implementation of the aforementioned rights of regulation of fertility.

2.3.4 Abortion as a Reproductive Right

The great advancement of the protocol is the recognition and protection of the right to medical abortion, which is the first of its kind in international law. This can be considered as a recapitulation of the long process to recognize abortion as a right of a woman. The protocol obligates state parties

*....to protect the reproductive rights of women by authorizing 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 foetus*¹⁴¹

This provision first and foremost recognizes that reproductive rights of women include the right to get legal abortion. The ratification of the protocol should immediately entail reform of restrictive laws of abortion to accommodate the specified circumstances. The decriminalization of abortion can be implemented with minimum resource implications. One question would be whether the implementation of this obligation is limited only to decriminalization or the state may be obliged to provide the abortion services in cases where the circumstances envisaged by the protocol's article arise. The phrase "authorization of medical abortion" seems to give the sense that merely decriminalization is the main essence of the obligation of the state. In other words providing the abortion service is not as such what is required of the state. In Africa, however, where the health

¹⁴⁰ Article 14 (1)e

¹⁴¹ Article 14 2 (c)

sector is almost nothing but public, the idea of the state party staying aloof of the situation would not hold water.

If it is contended that article 14 (2) c entails the duty to provide the service, it will have huge economic implication for the state. States will be expected to allocate a significant part of their health Budget. For aid dependent African countries like Ethiopia any promotion on abortion would lead to significant cuts of aid from major donors.¹⁴² Already non –governmental organizations providing reproductive health services have lost a chunk of their budget for their connections with abortion issues. Among African countries affected by the Us Mexico city policy (global gag –rule*) are Ghana, Ethiopia, Kenya, Tanzania .Zambia, and Zimbabwe.¹⁴³

In the coexistence of article 14 (1) (a) which recognizes the broad right of fertility control and article 14 (2) (a) which permits the authorization of medical abortion, it seems the former is paralyzed by the later. However as Banda notices, for countries with more liberal abortion provision than the protocol, the protocol enjoins them not to downgrade their laws by virtue of its article 31.¹⁴⁴

*...None of the provisions of the present Protocol shall affect more favorable provisions for the realization of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties..*¹⁴⁵

Requirements of proof of rape and incest and formalities to prove the health status of the pregnant woman and of the foetus might be lengthy and cumbersome enough to hinder the realization of the right.

¹⁴² http://en.wikipedia.org/wiki/Global_gag_rule

*US policy which required nongovernmental organizations to agree as a condition of their receipt of US Federal funds that such organizations would neither perform nor actively promote abortion as a method of family planning in other nations

¹⁴³ <http://www.globalgagrule.org/impacts.htm> as visited in December 2005

¹⁴⁴ Banda supra note 120 p.186

¹⁴⁵ Article 31 of the protocol

Although significant pregnancies occur because of unwanted sex or incest, it is to be questioned that whether liberalization to this extent will remove a huge portion of the problem of unsafe abortion .However it should be noted that it took a long time and effort to reach this stage and it is still moving forward to a better future.

In conclusion, the African protocol on the rights of women in Africa is to be applauded for its brave and pioneer introduction of reproductive rights of women. It is also a manifestation of the fact that the African human rights system is responding in a more accelerated fashion to the needs of women in Africa.

As the protocol contains a number of new steps from the current protection of women's rights in the international forum, it is contended that the significance and potential of the protocol go well beyond Africa.¹⁴⁶

¹⁴⁶ http://www.reproductiverights.org/pdf/pub_bp_africa.pdf
p.1 as visited October 2005

Chapter Three

3 National Implementation of Reproductive Rights regarding Unsafe Abortion in Ethiopia

3.1 *The legal regime governing reproductive rights in Ethiopia*

International law comes to force, and actually affects rights and obligations of citizens mostly through the nation-state laws. Conversely, international law will be a myth if states do not incorporate the spirit and letter of their international vows to their national legislations. International legal principles become real when they find their way to the domestic through legislations and policies appropriate for implementation.

Previous chapters dealt with the international legal foundations for the right to safe and legal abortion both in dimension of gender equality and right to health. Africa holds a great proportion of unsafe abortion numbers and adverse effects vis-à-vis the rest of the world. An attempt has been made in chapter two to look at what the regional human right documents have to offer along with other international human right documents to solve the widespread and grave nature of the problem. Although its fruits are yet to be seen, the protocol to the African charter on the rights of women in Africa is a way forward in recognition of women's reproductive rights and regulation of state actions.

Going further down to the national state level, where the international rules get grounded, we are going to consider the case of Ethiopia. Being one of the countries in sub Saharan Africa, Ethiopia is one of the countries with the worst maternal health indicators and having the highest maternal death arising from unsafe illegal abortion.

Ethiopia is a signatory to many international human right conventions and a party to major declarations governing maternal health and reproductive rights such as CEDAW, ICPD (1994), Beijing Declaration etc.

Recently the Ethiopian parliament is undergoing revision of the country's major laws in an attempt to make the old laws (many of them enacted 50 years ago) compatible with the

newly made constitution of Federal Democratic Republic of Ethiopia (FDRE) of 1995. In the process the country has substituted its criminal law with the new criminal law being in force in the year 2005.¹⁴⁷ Abortion law has been subject to a heated debate in the parliament and outside the parliament when the committee of the parliament in charge of legal and administrative affairs was conducting popular meetings in search of the popular view regarding the subject, needed for the reform of the law.

The purpose of this chapter is to examine the country's legal and policy framework especially the change of abortion law in the penal code revision in light of the different international obligations and commitments to which Ethiopia is a party, and their implementation and interpretation and the factual realities of Ethiopian women.

3.2 Sources of law in Ethiopia

The supreme law of the country is the constitution of the Federal Democratic Republic of Ethiopia of 1994 (FDRE constitution). This is the fourth written constitution to the country following the constitution of 1931, the revised constitution of 1955, and the constitution of 1987.

The constitution is the supreme law of the land.¹⁴⁸ Thus any law, customary practice or a decision of the organ of state or public official which contravenes the constitution shall be of no effect.¹⁴⁹ Parliament enacted proclamations constitute the primary sources of law. Regulations are secondary sources of law to be issued by the council of ministers (the executive) pursuant to delegation and authorization by the parliament on detailed implementations of proclamations which are more general by nature.

Customary and religious laws of the community, although sometimes the distinction between the two might be blurred, are given recognition in the constitution as:

¹⁴⁷ Proclamation No.414/2005-2006

¹⁴⁸ Article 9(1) of FDRE constitution

¹⁴⁹ Article 9 (1) of FDRE constitution

*This constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute.*¹⁵⁰

This is further corroborated by another provision in the constitution that every nation, nationality and people of Ethiopia has the right to develop and promote its culture.¹⁵¹ This may imply that a way of developing or promoting one's culture could be obedience to the customary and religious norms and including adjudication pursuant to those norms.

The role of customary and religious norms is very high in day to day life besides formal adjudication envisaged by the constitution.

3.3 Implementation of international rules in Ethiopia

Ethiopia has long history of interactions in international forum, since the establishment of the League of Nations, as it is one of the two states which remained independent from western colonization in Africa. It is a party to many of major human right treaties and soft laws.

The FDRE constitution places international treaties ratified by Ethiopian parliament are integral part of the law the land¹⁵². Which means Ethiopia follows one of the ways of domestication of international law where parliamentary ratification is mandatory. The constitution follows a dualist approach where international law, to become binding on domestic authorities and individuals, must be transformed to national law through the various mechanisms for the national implementation of the international rules freely decided up on by each sovereign state.¹⁵³ The phrase 'integral part of the law of the land' after ratification by the parliament does not make qualifications as to the hierarchy of international rules and other domestic laws. The supremacy clause of the constitution, and the fact that international rules need to be given effect by the parliament conveys the

¹⁵⁰ Article 34(5) of FDRE constitution

¹⁵¹ Art 39(2) of the FDRE constitution

¹⁵² Art 9(4) of the FDRE(emphasis added)

¹⁵³ Antonio Cassese ,International law,1st edition ,p.163

assumption that international rules are below the constitution of the country but of equal status with proclamations (*awaj*) primary laws of the parliament.

International human right laws and principle have a special status in the constitution that

.Art 13(2) of the constitution reads

.... the fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the universal declaration of human rights ,international covenants on human rights and international instruments adopted by Ethiopia...

Chapter Three of the constitution is dedicated to fundamental rights and freedoms. The above article is a provision on the interpretation of the rights and freedoms. There fore interpretation should be done in light of all international (also regional) human right instruments, both hard and soft laws. The human right instruments called on for interpretation need not be the ones ratified by parliament as the same provision states that “adoption” is enough. The question of interpretation is raised when the law becomes unclear and vague. Constitutional provisions are particularly prone to interpretation because of their generality and the difficulty of application to specific circumstances. International rules seem to have supra constitutional status in the case of human rights by virtue of the fact that the constitution itself stipulates the need to refer them.

The question of who interprets the constitution differs according to legal traditions. The power to interpret constitutional issues including human right issues is given in Ethiopia to the house of federations which is the upper chamber of the parliament.¹⁵⁴The house of federation is a body constituted by political appointment. The house of federation discharges its duty of constitutional interpretation through a committee organized in its auspices called the constitutional inquiry committee.¹⁵⁵The judiciary, when faced with interpretation of the constitution, is bound to refer it to the house of federation. This, on face value, broad power to interpret the human rights section of the constitution may be

¹⁵⁴ Article 62(1)

¹⁵⁵ Art 62(2)

curbed for lack of independence and political will to implement human rights on the part of this body. In addition, the house of federation is not a very active chamber of the parliament; it is only expected to have at least two sessions annually.¹⁵⁶ Available, accessible and timely decisions of constitutional issues seem very questionable in such a working context.

3.4 FDRE's constitutional guarantees on Reproductive Health

One very serious threat to Ethiopian women's reproductive health is unsafe abortion leading to chronic morbidity and mortality. The country has the parentage of 54% of maternal deaths resulting from unsafe abortion based on surveys taken in the capital Addis Ababa. And in a survey conducted in five hospitals 52% of maternal deaths related to abortion.¹⁵⁷ This makes unsafe abortion a second leading cause next to tuberculosis. The country's prohibitive abortion law and meager health capacity contribute greatly to this tragedy

In order to assess the Ethiopian constitutional rights on reproductive health I will use the benchmarks that Rebecca Cook used as an indication of the full implementation of the right to reproductive health.¹⁵⁸ These components will be seen in light of the constitutional safeguards enshrined in the constitution.

3.4.1 Freedom from discrimination;

Paragraph two of the preamble of the constitution affirms "the full respect of individual and people's fundamental freedoms and rights, to live together on the basis of equality and with out any sexual, religious and cultural discrimination". On sexual discrimination, the constitution has a separate article dedicated to promoting women's rights, having nine

¹⁵⁶ Article 67(1)

¹⁵⁷ Report on the survey of unsafe abortion in Health facilities in Ethiopia, Ethiopian Society of Obstetricians and gynecologists, May 2002

¹⁵⁸ supra note 13

sub articles which cover numerous women's rights. "Women shall, in the enjoyment of rights and protections provided for by this constitution, have equal right with men."

¹⁵⁹This is the prominent anti discrimination provision in the constitution, and is corroborated by another constitutional principle which reaffirms equality of men and women by imposing an obligation on the state to eliminate discriminatory practices and laws:

The state shall enforce the right of women to eliminate the influences of harmful customs, laws, customs and practices that oppress or cause bodily or mental harm to women are prohibition ¹⁶⁰

The latter is by far a very important provision and with far reaching consequences in light of the deep rooted customary practices and laws prevailing in the country. A start has been made on the part of the government by taking different policy measures and revision of laws. For instance, the criminal law revision belongs to one of the law revision processes undertaken to create compatibility to constitution of the country and to the different international obligations that the country has entered.

Art 35(3) of the constitution states that:

The historical legacy of inequality and discrimination suffered by women in Ethiopia taken in to account, women in order to remedy this legacy, are entitled to affirmative measures. The purpose of these measures shall be to provide attention to women so as to enable them compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.

This provision gives a constitutional entitlement to women as a group to some measures of affirmative action in order to remedy past discrimination and bring about gender balance. The constitution does not only mention that such measures are not discrimination, but also give positive entitlement to all women.

¹⁵⁹ Article 35(1)

¹⁶⁰ Art 35 (4) of FDRE constitution

So far, visible affirmative action measures were implemented in the higher education sector which significantly raised the number of women enrolling and graduating from universities and colleges. Some measures of affirmative action are also being taken in the arena of employment.

Another relevant provision is Art 41(3), which states that:

Every Ethiopian national has the right to equal access to publicly funded social services.

This is a guarantee on equal access to services. Such reaffirmation on equality for access to services will meet its target when specified laws policies and regulations are in place. Illustrations could be laws and policies that ensure women's access to public health services and for health needs required by women only, such as, reproductive health services. As stated by CESCR committee, to eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's rights to health .Intervention aimed at prevention and treatment of diseases affecting women could be one of the strategies.¹⁶¹

3.4.2 The Right to liberty and security;

Reproductive self determination and health would be inconceivable with out the full protection of bodily and sexual integrity. The constitution proclaims an inviolable and inalienable right to life, the security of person and liberty.¹⁶²The right to protection against bodily harm and the prohibition against inhuman treatment, as cruel, inhuman

¹⁶¹ General comment 14 paragraph 21

¹⁶² Ibid Art 14

and degrading treatment are also explicitly mentioned. Slavery and servitude and trafficking of persons for any purpose are against the law.¹⁶³

Coming specific to women the constitution, as mentioned above, imposed an obligation on the state to eliminate all harmful customs, laws or practices that oppress or cause bodily or mental harm to women. It would be worth noting that the constitutional provision of Art 36 ,which is destined to protection of children ,doesn't incorporate a provision which could be directly applicable to the protection of the right to reproductive health of the girl child.

3.4.3 The Right to Marry and found a family;

The right to marry and found a family is the right of every man and woman on the precondition that they have attained the marriageable age prescribed by law.¹⁶⁴The right to marry as seen in terms of the right to consent to marriage is given a constitutional guarantee under article 34(2) of the constitution, that marriage should be concluded with free and full consent of the intending spouses. Men and women have equal rights in marriage as well as at the time of divorce. This promotes the agenda of international documents such as CEDAW and ICCPR.

In accordance with the constitution there has been country wide family law revision in order to change the former civil code of 1960 on family matters which contained discriminatory and anti constitutional provisions.

3.4.4 The right to access to health care

Regarding the right to access to health care the constitution states that every one should be beneficiary of publicly funded social services .The country suffers from a meager infrastructure of health. It has one of the lowest standards of healthcare in the world.

¹⁶³ Ibid art 18

¹⁶⁴ Art 34(1)

Despite that fact, the health resources should be accessible to everyone with out discrimination. The constitution puts a progressive allocation of resources to health and education facilities:

Art 41(4)

The state has an obligation to allocate ever increasing resource to provide to the public health, education and other services

The 1993 health policy of the country states that special attention should be given to women and children.

3.4.5 Rights to Information and Education

The nature of the right to information and education taken in Ethiopia's context and with regard to reproductive health would be of the similar nature as the right to health, having to depend on economic capacity of the country. The above cited provision art 41(4) would impose on the state to allocate increasing resource to provide educational, health and other similar services. Information and education play a vital role in reproductive health matters.

The FDRE constitution has a separate provision on family planning education and information:

Art 35(9)...women shall have the right to access to family planning education, information and capacity.

Capacity can be interpreted as being capable to access family planning means. There fore the right extends not only goes to information and education but actually to get the services and to be capable of family planning. Capacity could also be sided with what Rebecca Cook has outlined as the right to benefit from scientific progress outlined as bench mark for reproductive health.

The FDRE constitution in itself is a rich human right document. Not only does it cover a lot of women's human rights sufficient to start action with ,but it also gives unlimited access to international and regional human right agreements and declarations that the country has adopted.

3.5 Abortion in Ethiopia

3.5.1 Description of the regulation of abortion under the 1957 penal code of Ethiopia

Abortion is regulated in Book V Title 1 on the chapter of offences against life, and specifically section two of the chapter 1 on offences against the life of the unborn.

The deliberate termination of pregnancy is punishable under the penal code at whatever stage it is done.¹⁶⁵ The only exception, where it is not criminalized is where it is justified by medical reasons that it is done to save the pregnant mother from a grave and permanent danger to life and health and passes through the stringent procedural tests that the law puts.¹⁶⁶

¹⁶⁵ Art 528 of the 1957 penal code of Ethiopia

¹⁶⁶ **Art. 534. — Termination of Pregnancy on Medical Grounds.**

- (1) Termination of pregnancy is not punishable where it is done to save the pregnant woman from grave and permanent danger to life or health which it is impossible to avert in any other way, provided that it is performed in conformity with the following legal requirements.
- (2) Except where impossible, the danger shall be diagnosed, and certified in writing, by a registered medical practitioner, after examination of the applicant's state of health.
- (3) The termination of the pregnancy shall be conditional upon:
 - (a) the findings and concurrent opinion, after a prior period of observation where necessary, of a second doctor qualified as a specialist in the alleged defect of health from which the pregnant woman is suffering, and empowered by the competent authority, either generally or in each specific case, to issue the necessary authorization; and
 - (b) the duly substantiated consent of the pregnant woman, or where she is incapable under the provisions of civil law or on account of her physical condition of giving it, that of her next of kin or legal representative.
- (4) The doctor terminating the pregnancy cannot evade these conditions by invoking his professional duty (Art. 65) ; where he terminates the pregnancy without observing the legal safeguards, he becomes liable to the provisions relating to abortion.

The law makes induced termination of pregnancy punishable only if it is committed intentionally .If it is committed by negligence, it is not punishable.¹⁶⁷ Punishments attached to deliberate termination of pregnancy differ on who has procured the abortion. If the abortion is procured by the pregnant woman it is punishable from 3 months up to 5 years of imprisonment. ¹⁶⁸If the abortion is procured by another person or accomplice it is punishable rigorously with imprisonment not exceeding 5 years.¹⁶⁹ .If any body commits the act for gain; additional fine will be imposed on them as it is considered aggravating circumstance. Additionally, if the procurer is a registered practitioner like doctor, nurse or midwife it could even lead to bar of license for some time or for life if the offence is repeatedly committed.¹⁷⁰

3.5.1.1 Mitigating circumstances

These are circumstances which are capable of giving rise to exceptionally grave state of physical or mental distress that the woman was forced to procure abortion or seek the services of others. These could be rape, incest or extreme poverty.¹⁷¹In such cases punishment may be reduced, however the conviction remains.’

In summary the pertinent law on abortion issues is very much restricted, which renders it even unfeasible when the mother’s life is in real danger, because of the procedural hick ups that medical personnel have to meet.

3.5.1.2 Cases of abortion brought to law enforcement bodies

Although the law has specifically and stringently regulated abortion and that abortion is a widespread phenomenon, very few cases of prosecution were brought to courts in different times .A study showed that between 1986_1991 only 8 cases were brought to

¹⁶⁷ Article 528 states that termination of pregnancy by imprudence or negligence does not come to the criminal law.

¹⁶⁸ Art 529

¹⁶⁹ Art 530

¹⁷⁰ Art531

¹⁷¹ Art 133

court in relation to abortion in Addis Ababa.¹⁷² However, about 600 women in Addis Ababa were treated of the complications they suffered as a result of illegal and unsafe abortion in the year 1991-1992.¹⁷³ This figure covers only those who have had problems and came to seek treatment. There is a huge gap between the number of prosecutions and the actual number of illegal abortions undertaken. The law was a matter of limbo for the law enforcement bodies.

3.5.1.3 Outcomes of the law

The need for use of family planning methods in developing countries usually remains unmet for married and unmarried women, the situation being worse for later where they do not have the chance to access reproductive health information, counseling's and services. This is particularly true in poor countries like Ethiopia. In Ethiopia it has been reported that 8% of married women use a form of contraceptive, and 6% of the married women use modern types of contraceptives.¹⁷⁴ Apart from the availability and accessibility of family planning methods, family planning education and knowledge is also at its rudimentary level. With this meager coverage of family planning services it is not very hard to imagine how significant numbers of pregnancies could occur unwanted and unplanned. Once an unwanted pregnancy occurs, women will often resort to abortion services as a way out. This would question how the legal and infrastructural framework is ready to meet their needs.

Here one might inquire how would women who have little or no awareness about contraceptive methods, seek abortive services. Unlike contraceptives abortion has been there as a mechanism in order to avoid unwanted pregnancies for century's .It is within the expertise of traditional healers and midwives. Further evidence could be an ancient law in Ethiopia which was in place since 15th century, regulated Abortion as a crime,

¹⁷² Dimitsachen (our Voice) special edition July 2004 p.28

¹⁷³ Ibid

¹⁷⁴ <http://www.crlp.org/pdf/wowaapr-ethiopia.pdf>

“.....if a pregnant woman aborts her own pregnancy with consent, let she be beaten and exiled....”¹⁷⁵

Thus it will be a warranted guess to say there is better knowledge amongst women rural and urban, regarding abortion and its purposes than there is for contraceptive methods and family planning.

3.5.1.3.1 Maternal death, permanent and temporary complications

Women who become pregnant without their intention will often seek ways to do away with it, due to different individual, societal, economic reasons. Many women in such a desperate situation that they would rather prefer to put their life at risk than bear with the pregnancy to term. Thus in a situation where the state puts prohibitive laws and it is not possible to obtain legal abortion ,women resort to clandestine abortion which would usually be unsafe, very much true in developing and poor countries given the general status of health services and the presence of trained health personnel. The fact that it is hidden and illegal would contribute to the reason that methods and instruments are unsafe and not scrutinized by the public health sector and the personnel getting specially trained. A study by World Health Organization shows that restrictive legal framework of abortion is usually corroborated by unsafe abortions, and the fact there is prohibition would have repercussions on the willingness of the women to show up to hospitals to get post abortion care and the willingness of health professionals to extend the help, this often resulting in maternal death.¹⁷⁶

In Ethiopia clandestine abortion is very common: it constitutes 54% of all direct obstetric deaths.¹⁷⁷ This data has been taken from the number of women that turned to government health facilities to get post abortion services, the real death toll could be estimated to be higher than what these figures may show.52% of hospitalized women in maternity wards

¹⁷⁵ *Fithanegest*, chapter 48 section 7(Although this is a religious law ,it has been the law of the state from 15 to the beginning of the 20th century)

¹⁷⁶ http://www.who.int/reproductive-health/publications/unsafe_abortion_estimates_04/estimates.pdf

¹⁷⁷ Report on survey of Unsafe Abortion in Health Facilities in Ethiopia, ESOG, May 2002

in hospitals suffer from complications resulting from unsafe abortions.¹⁷⁸ 190-200 die in every 100,000 live births directly related with unsafe abortion.¹⁷⁹

This in effect shows that unsafe abortion and complications are major public health issues in Ethiopia, basically caused by the prohibitive law, resultant attitude of the society and poor health facilities. These situations tamper directly with a woman's right to life and access to health care.

Infanticide, abandoning of a child and suicide are common problems of women with unwanted pregnancies where they do not have the mental, physical and economic capacity to raise the child. A lot of adolescents are engaged in such dangers as the prevalent customary view is that it is a disgrace to have a child before marriage. Even a child born out of wedlock is labeled as '*dikalla*' (bastard) for life

3.5.1.3.2 *Forced marriage*

Marriage without consent is usual phenomenon for a woman who got raped or abducted and as result got pregnant. The pressure is dual, one from the rapist or the abductor, if these situations are concluded by marriage there will not be prosecution of any sort. The other pressure comes from the woman her self as she wants to live in the context of marriage rather than to raise a fatherless child and bear the stigma coming from family and society. This highly jeopardizes the freedom to enter in to marriage with full and free consent guaranteed by the FDRE constitution and international conventions. Access to safe and legal abortion would solve significant amount of this problem.

3.5.1.3.3 *Health Budget of the Government*

Complications resulting from unsafe abortions are difficult to cure, and the cost involved is double and triple of what is necessary to undertake a safe medical procedure of

¹⁷⁸ Ibid

¹⁷⁹ Ibid

abortion. Cost wise, it is sensible for the government to give safe abortion procedures or allow others capable to do it than public hospitals being flooded with complications resulting from unsafe abortions. In a survey taken, the average cost for treatment of incomplete abortion was estimated Ethiopian Birr¹⁸⁰ 309.08, which is a gross underestimate of the actual cost.¹⁸¹ Cost of normal delivery varies from 5-35 Birr in different public health facilities in Ethiopia.¹⁸² Disproportionate amount of public health budget goes to treatment of complication of unsafe abortion.

3.5.1.3.4 Has the law served its purpose?

The criminal law in its provisions regulating abortion issues is clearly prohibitive and restrictive. The justifications of course are to protect the life of the unborn fetus and discourage the practice of induced termination of pregnancy.¹⁸³ In my opinion the law didn't serve any of the purposes it stood for. It is not in touch with the societal realities and obviously not following the current trend of human rights in ensuring reproductive choice. One explanation could be that the law came in to force prior to the introduction of many of the modern human right instruments and the constitutional principles enshrined in the 1994 FDRE constitution of Ethiopia. These are the obligations emanating from the ICESCR to which Ethiopia is a party, the need to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.¹⁸⁴ The 1979 CEDAW and the obligations it puts forward to the states, prominently the requirement to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning¹⁸⁵, and the rights of women to decide freely and responsibly on the number and spacing of their children and to have

¹⁸⁰ Birr is the national currency of Ethiopia .1 NOK =1.25 ETB

¹⁸¹ Report on survey of Unsafe Abortion in Health Facilities in Ethiopia, ESOG, May 2002

¹⁸² Ibid

¹⁸³ The caption of the section of the law where abortion is regulated states "offences against the life of the unborn"

¹⁸⁴ Article 12 ICESCR

¹⁸⁵ CEDAW article 12

access to the information, education and means to enable them to exercise these rights;¹⁸⁶ were not considered in the making of the law.

The result of the law has gone astray of the purposes set for it and resulted great number of maternal deaths and terminal illness, setting a major public health problem.

It is not the opinion of the writer, that above problems are purely attributable to the restrictive abortion laws of the country. The problem is also a result of lack of access to contraceptives, lack of health resources and entrenched values of the society taking such matters as a matter of taboo and shame. Laws and policies have their fair share of contribution in problem solving if the right approach is followed in accordance with the modern human right developments.

3.6 Penal Law revision

The penal code of Ethiopia is nearly half a century old, and promulgated before many of the human rights documents we know today were in place. The law was considered ahead of its time and ahead of the realities of Ethiopia at the time it was made. However with things and interactions changing so fast, the government recognizes the importance of coming up a new comprehensive criminal law and procedural law.¹⁸⁷ The preamble of the new penal code acknowledges the proliferation of human right laws, especially those affecting the women and children, which Ethiopia has adopted and recognized by the constitution as a significant change¹⁸⁸ it also affirms the fact that practicing the old law in the face of such changes would be inappropriate.¹⁸⁹

The revision process started from circulation of a draft law prepared in cooperation of the Ministry of Justice and the Research Institute for Justice and Legal Affairs. Legal and

¹⁸⁶ CEDAW article 16 (1) e

¹⁸⁷ Preamble of Penal code of 2005 Para 4 (All citations from the new penal code are unofficial translations of this writer from Amharic to English)

¹⁸⁸ Ibid Para 1

¹⁸⁹ Ibid

medical professionals, psychiatrists, educational institutes and professional associations gave their comments and made their contribution to the new law.¹⁹⁰

On the issue of abortion, the draft circulated by the Ministry of Justice and the Research Institute for Justice and Legal Affairs, is based on making abortion a crime but has allowed it on the ground if the pregnancy is created because of rape and incest and if it is meant to save the life and health of the mother. The other new introduction by the drafts was making consent given by the pregnant woman to her own abortion to be punishable. The latter issue was not explicitly mentioned in the 1957 penal code, although it was a common assumption that a woman who has given consent to abortion is to be punished.

Based on the circulated draft a number of organizations, professionals and popular meetings have given feed back. This writer tries to assess the views and suggestions given which vary from suggesting a very liberal abortion law to a very strict abortion law which even seems to take away the exceptions provided by the 1957.

The analysis given by Ethiopian Women Lawyers Association¹⁹¹, a non-profit association of professional women lawyer's, on the draft, sees it as not being significantly different from the old law.¹⁹² The comment goes on questioning the new grounds that abortion is allowed in that it seems that since rape and incest are basically non-consensual, it has a connotation in other cases where consent is involved the law carries a punitive element.¹⁹³ The reflection given by EWLA examines the constitutional guarantees given in favor of women and international agreements and declaration and comes up with a proposal that:

- I) *Abortion services should be given on choice in the first trimester of the pregnancy*
- II) *Abortion should be a crime in the second trimester except in cases of*

¹⁹⁰ Ibid Para 5

¹⁹¹ <http://www.etwla.org>

¹⁹² Tsins maquaret, A reflection presented by EWLA to the house of peoples' representatives p.1 (unpublished document)

¹⁹³ Ibid

- A) to save the woman's life or preserve mental or physical health
- B) In case the fetus suffers from fatal abnormality
- C) Rape and incest
- D) Social and economic reasons

III) *Abortion should be prohibited in the third trimester except in cases*

- A) Saving the pregnant woman's life or health
- B) Where the fetus suffers from fatal abnormality

This proposal on the reform is a verbatim copy of the South African Act on choice on termination of pregnancy.¹⁹⁴ It gives right to women to a complete choice to abort on the first trimester, also provides wide ranging reasons including social and economic reasons to undergo abortion in the second trimester and for limited reasons in the last trimester. Liberalizing the law in this way has already made a difference in the South African context according to a recent study.¹⁹⁵ This study recognizes that the reform of the law has decreased significantly the number of incomplete abortions admitted to hospitals, from 46% to constituting 4.5% to all gynaecological admissions. This creates a sharp contrast to the situation in most hospitals in the sub Saharan Africa where abortion still represents 40-60 % of all gynaecological admissions.¹⁹⁶ A liberal law has proven a great benefit and potential in reduction of maternal mortality due to unsafe and illegal abortion in an African context. This writer is firmly convinced that it will be prudent and it will produce positive returns if this position were adopted in the new penal code of Ethiopia.

A reflection by a legal professional¹⁹⁷ presented to the parliament seems to emphasize the fact that the past law hasn't served the purpose it is intended for. It is therefore mandatory to pursue right policies in light of the constitution and the different international commitments Ethiopia is in regarding the rights of women.¹⁹⁸ He further

¹⁹⁴ South African act on termination of pregnancy

¹⁹⁵ J.Moodley and Vs Akinsooto, Unsafe abortions in a developing country: Has liberalization of the laws on abortions made a difference? AJRH Vol 7 Number 2 p.34-38

¹⁹⁶ Ibid p.36

¹⁹⁷ Tilahun Teshome, Associate Professor, Addis Ababa University

¹⁹⁸ Tsins maquaret bemechiw yewenjel hig linorew yemigebaw sifra. presented to parliament 2004 p.37 unpublished paper. (the place of termination of pregnancy in the future criminal law of Ethiopia)

suggested complementing the draft by making a number of points that should be considered to relax the new law, such as

I) Unwanted pregnancies created before marriage and outside marriage

II) Pregnancies created by abduction (mostly overlapping with rape)

III) Incurable mental and physical deformation of the fetus

IV) Social reasons ,early age ,lack of mental readiness

Although this seems a less liberal view, the instances mentioned by the author could be interpreted so as to enshrine a full choice on termination of pregnancy and reap the benefits thereof. Instances such as unwanted pregnancy before and outside marriage, and the inclusion of social reasons could be of great potential. In another legal professional's presentations to the parliament ¹⁹⁹ argues that Ethiopian law should take a great lesson from Austria's penal code regarding Abortion.²⁰⁰ As he cites the Austrian code regarding abortion is crime but not punishable if conducted in the first trimester of the pregnancy.²⁰¹

Although this view seems to be to some extent in line with recommendations of CEDAW on the removal of the punitive element of the law,²⁰² its feasibility in the prevention and reduction of unsafe abortions is under a lot of doubt. The fact that abortion is illegal will bar the public health sector and private law-abiding health enterprises from rendering the service.

The Ministry of Health of the Federal Democratic Republic of Ethiopia has devised a strategy to reduce the high toll of unsafe abortion as a public health problem.²⁰³ The strategy highly stresses introduction and use of family planning methods as a priority to solve the problem of unsafe abortion.²⁰⁴ On the question of legalization of abortion the

¹⁹⁹ Mehari Tadele, Legal professional and Human right activist in Ethiopia

²⁰⁰ Ketsins makuaret gar beteyayaze linesu yemichilu andand meseretawi hasaboch, March 2003 (unpublished paper) p.31

²⁰¹ Ibid p.32

²⁰² CEDAW General comment 24, Para 31 (c)

²⁰³ Strategy to prevent and eliminate unsafe abortion ,Ministry of health, Family health division

²⁰⁴ Ibid p.8

ministry stresses on the fact that pertinent infrastructure, medical instruments and specially trained personnel should be there before allowing abortion.²⁰⁵ This writer does not agree to this presumption that preparedness should precede legalization. It is simple to put forward the question, how can the government get prepared for something which is still illegal?

A conservative view was reflected in a publication made to the Parliament by a committee of medical professionals, lawyers and religious individuals.²⁰⁶ The position of this publication is to totally ban abortion even in cases of attempts to save a woman's life. This extremist view is not totally in line with the current human right development.

3.6.1 Changes introduced by the 2005 penal code of Ethiopia as opposed to the 1957 penal code

In this part I will give an overview of the new law's introductions. As a principle, abortion remains to be a crime.²⁰⁷ In case abortion is procured by the pregnant woman herself she will be punished by undefined simple imprisonment and so the person who aids and abets.²⁰⁸

In case abortion is procured by another person giving consent to the function is punishable by simple imprisonment²⁰⁹. This provision is a new introduction which was not there in the previous law.

A change has been made in extenuating circumstances, as some of the factors of such natures are promoted to be instances where abortion is permitted. In cases of extreme and permanent poverty the court is given the discretion to reduce punishment.²¹⁰

²⁰⁵ Ibid p.9

²⁰⁶ Yemot Dewel (The bell of death) September 2003

²⁰⁷ Art 545(1) of the 2005 penal code of Ethiopia.

²⁰⁸ Art 546(1) &(2)

²⁰⁹ Art 547(3)

²¹⁰ Art 550

3.6.2 Conditions where abortion is legally allowed under the new law

Under the new law abortion is allowed in four grounds listed below where done within the time limits allowed by medical standards.

- I) Pregnancy coming from rape or incest²¹¹
- II) In case delivery causes a threat to mother's life or health and when the continued pregnancy endangers the life of the fetus or the health of the mother²¹²
- III) When the fetus carries incurable and grave deformation²¹³
- IV) In the case the pregnant woman is physically or mentally handicapped or she doesn't have the mental and physical preparedness to raise the child to be born for the reason that she is still a minor.²¹⁴

Also the law has provided that procuring abortion is not punishable in case committed in necessity situations to avert grave and imminent danger.²¹⁵

The new law has made significant changes in the grounds that allow abortion which can be maneuvered to ensure greater access to abortion.

As it is a newly made law in force so far appropriate regulatory laws are not been issued for the implementation of the law. The Ministry of Health is given the mandate to issue a regulation in the manner how abortion procedures should be conducted.²¹⁶ To date, the ministry has not issued a regulation on this issue.

Another important introduction by the new penal code is the rule on the standard of proof. For the purposes of seeking abortion services mere declaration by the woman to

²¹¹ Article 551(1)(a)

²¹² Article 551(1)(b)

²¹³ Article 551(1)(c)

²¹⁴ Article 551(1)(d)

²¹⁵ Article 551(2)

²¹⁶ Article 552(1)

the fact that she is raped or the pregnancy is result of incest is sufficient.²¹⁷This saves women who are seeking the service for such reasons from having to go through cumbersome evidentiary procedures.

3.7 Assessing Ethiopia's national law in light of recent human right developments.

Unsafe abortion is a very serious public health problem, taking more than 70 thousand lives every year and subjecting equivalent others to temporary or life long disabilities and health problems. Although the causes of unsafe abortion are double-faced, the impact of the country's law on abortion is of paramount importance. Ethiopia is a sub-Saharan country with one of the greatest incidence of unsafe abortion. The case of Ethiopia was considered as a test case as the country has just gone through a change of its criminal law. The revision of the abortion law considered in light of the international and regional documents, and the constitution of the country the following remarks can be made.

The new abortion law has introduced new grounds for legal abortion, such as rape, incest, mental and physical readiness of the pregnant women, which are indeed constructive. This is a step forward in agreement with the current development of international law on the matter. Compared to the past criminal law, although to a limited extent the new law better promotes the agenda of CEDAW, ICESCR, ICPD and Beijing Declaration and Platform of Action. The new abortion regulation is in line with the protocol to the African charter on the right of women in Africa.

The proof requirement of rape and incest in the Ethiopian Penal Code of 2005 is the mere declaration of ,the pregnant women. Such loose criterion is very creative and helps women to get swift service with out having to go through the cumbersome proving process. On the other hand since there is no any other form of proof apart from

²¹⁷ Article 252(2)

declaration, women who are not raped or didn't commit incest can make use of the circumstances. In such a case, it may have a disadvantaging effect on woman who are law abiding.

Abortion is still a crime although some factors of legalizing it like rape and incest are included and the punishment corollary is relaxed a little bit. Ethiopia's new abortion law is still a restrictive law; could this really solve the problem of unsafe abortion which is the second highest cause of maternal mortality in the country?

Ethiopia is a party to Beijing Declaration and platform for action with out reservation which prominently acknowledges that unsafe abortion should be recognized and dealt with as a major public health problem.²¹⁸ One method of dealing with unsafe abortion is to review criminal laws in order to decriminalize abortion.²¹⁹ The fact that abortion is still a crime undermines the commitment the country has made to the Beijing and Cairo International conferences.

CEDAW committee has made a remark to Ethiopia that it is concerned at the high rate of clandestine abortion and its causes,²²⁰ The Committee recommended the adoption of measures to guarantee effective access for women, including young women, to health-care information and services, in particular regarding reproductive health, with the aim of reducing clandestine abortions²²¹ Reviewing the law is one major measure, as CEDAW on several instances told countries to review their abortion laws in order to deal with the adverse impacts of illegal and abortion .Peru ,St Vincent and the Grenadines are among them.²²²

²¹⁸ Paragraph 107 (j)

²¹⁹ Para 107 (k)

²²⁰ Ethiopia CEDAW A/59/38 part I (2004) Para 257
(http://www.bayefsky.com/doc/ethiopia_t4_cedaw_30.doc)

²²¹ Ibid Para 258

²²² Peru, CEDAW, A/50/38 (1995) 79 at Para. 446, Saint Vincent and the Grenadines, CEDAW, A/52/38/Rev.1 part I (1997) 21 at para.48.

Rape is a very small percentage of the cause for abortion and incest is almost none reported. The new introduction will help a little; it still becomes doubtful whether it will solve the problem of unsafe illegal abortion. It only touches up on the tip of the iceberg.

Will this law break the cycle of unsafe abortion? There is a tendency where women who went through unsafe abortion are likely enough to go through the same process again. The legal response given to abortion not only decides on the safety of the abortion, but also the repetition of the act. A woman who went through legal and safe abortion, is more likely to get post abortion counseling. And a woman who goes through clandestine abortion, and goes with out counseling, there is a high chance that she might find herself again with another unwanted pregnancy.

Restrictive law undermines the readiness on the part of the government to receive new forms of abortion technology or train personnel. Thus it can be considered a paradox when the ministry of health of the Ethiopian government holds the position that it should first feel prepared before abortion made legal. In the mean time the treatment of incomplete abortion and other complication keep emptying the budget of the health sector.

Regarding adolescents under the age of 18, the new law carries favorable situation as physical and mental incapacity of a minor child is one of the exceptions where abortion is legal.

4 Conclusion

The case of Ethiopia illustrates the interaction of international, regional and national law in the prevention of a pervasive problem of unsafe abortion.

The FDRE constitution recognizes the equal rights of women in the enjoyment of all the rights and protections provided by the constitution. It also provides a good channel for the implementation of international obligations and commitments in the country.

The new abortion law despite its limited progress has a lot of issues not resolved. It does not adequately fulfill the reproductive health rights of women guaranteed by the constitution and international obligations and commitments.

Issuing a law on such a controversial issue like abortion may not be an easy task. However legislators and policy makers should take the utmost care not to jeopardize the rights of citizens provided in the constitution and should be mindful of not only the face value of the laws but also the implications of it in terms of international obligations and commitments.

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