Reforming Malawi's Law on Abortion: A Criminal Law Perspective

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ABSTRACT

The article examines Malawi's law on abortion against certain key principles and values of criminal law. In the final analysis, it finds that the current state of the law has failed to achieve its avowed policies of protecting women from the dangers of unsafe abortion, and to protect unborn children from unjustifiable destruction. It also finds that the law offends key criminal law principles and values, including the principle of maximum certainty, principle of minimum criminalization, the equality principle and the principle of legal moralism. The article calls for the reform of the law. However, it further argues that reform of the law on abortion is not a silver bullet against the scourge of unsafe abortion in Malawi. To achieve meaningful change, legal reforms must be accompanied by the provision of safe, affordable and easily accessible abortions services throughout the country.

1 INTRODUCTION

Every year, an estimated seventy thousand women and girls in Malawi undergo unsafe abortions,[1] most of which result into death and injuries.[2] Unsafe abortions are the second leading cause of pregnancy-related mortality and morbidity in the country, and account for almost 17% of its already high maternal mortality rate.[3] Malawi's overburdened healthcare system is struggling to contain this "scourge of unsafe abortions." For instance, it is projected that 40% to 50% of admissions in gynaecological wards of the country's hospitals result from unsafe abortions,[4] and post-abortion care

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1 According to the World Health Organization, the phrase "unsafe abortion" means an abortion "not provided through approved facilities and/or persons." This definition has been adopted by many other organizations. See K. Vij, *Textbook of Forensic Medicine and Toxicology: Principles and Practice*, 4th ed., Noida, Elsevier, Noida (2008), p. 502.

2 C. Sibande, "Women are dying due to unsafe abortions," *The Sunday Times*, Blantyre, (17 February, (2013), p.9.

3 Malawi's maternal mortality rate stands at between 460 and 680 per 100,000 live births, which is one of the highest in the world. See, for instance, E. Jackson and others, "A Strategic Assessment of Unsafe Abortion in Malawi," 19 (37) *Reproductive Health Matters*, (2011), p. 133; T. Colbourn, "Maternal mortality in Malawi, 1977–2012," 3(12) *BMJ Open* (2011), p. 1.

4 E. Geubbels, "Epidemiology of Maternal Mortality in Malawi," 18(4) *Malawi Medical Journal*,

costs the country around MK300 Million,[5] a really colossal sum in a country struggling to provide its citizenry with the most basic health care services. Going through the statistics, one is confronted with a silent tragedy that is ravaging the country; a tragedy that is spoken in whispers and muted voices at funerals of victims of unsafe abortions.[6]

Most commentators blame Malawi's restrictive anti-abortion criminal law as the main reason why women and girls are having recourse to unsafe abortion. To begin with, Malawi's criminal law criminalizes all abortions except those performed by qualified medical practitioners, and only to save the life or health of a pregnant woman. This, it is argued, has meant that safe abortion services are not readily available in the country's mainstream health facilities. Further, that even where an abortion would be legal, medical practitioners prefer to be cautious by refusing to perform an abortion for fear of prosecution. Resultantly, women and girls who are desperate to terminate their pregnancies have recourse to unqualified, and oftentimes, unscrupulous traditional healers, who use unsafe abortion procedures, or even attempt to abort themselves using unsafe and life-threatening methods and substances.[7] Ironically, it is the same mainstream health facilities that are struggling to provide post abortion care, which would have been prevented if they were freed to provide safe abortion services. This is the dilemma that presents the country's health practitioners and institutions.

To remedy the situation, calls are being made for the reform of the law by decriminalizing abortion. This, it is argued, would free mainstream health facilities to offer safe abortion services to those who need it. Understandably, the loudest of these calls are being made by frontline medical practitioners who have witnessed first-hand the preventable deaths and suffering being caused by unsafe abortions, and women's rights advocates. There is little, if not nothing, from the criminal law itself, the field of law that is being accused of being the major culprit behind the tragedy of unsafe abortions in the Malawi. This article intends to fill this gap by examining the law on abortion

(2006), pp. 208 - 212.

5 G. Kamlomo, "Unsafe abortions cost K300m every year," *The Daily Times*, Blantyre, 4 October (2012), p. 2.

6 Abortion is a cultural taboo in Malawi, and is rarely discussed openly.

7 In one of the most glaring media accounts on the dilemma facing Malawi's women and girls, a woman had gone to a local newspaper to complain that doctors at one of the country's major referral hospital were refusing to terminate her one-month pregnancy, which she did not want to keep. The paper quoted the woman avowing that she will do everything possible "to get rid of the pregnancy before it gets to advanced stages but was not sure how she would achieve this." According to the story, the woman was a mother of four children, the youngest was nine months. See G. Kamlomo, "I don't need my pregnancy," *The Sunday Times*, Blantyre, 3 February (2013), p. 1.

against certain key principles and values of criminal law. It further proposes options for the reform of the law. Ultimately, the article is proposing a double strategy involving the reform of the law and the provision of safe, accessible and affordable abortion services across the country.

2. THE LAW ON ABORTION IN MALAWI: POLICY, JUSTIFICATINS AND CURRENT PRACTICES

2.1 An Overview of the Law on Abortion in Malawi

A proper starting point in a discussion about reforming the law on abortion in Malawi is a clear understanding of the law itself. Under Malawian law, abortion is regulated by the Penal Code[8] (the PC), which is Malawi's principle criminal law statute.[9] The PC has two sets of abortion related offences. The first set consists of abortion specific offences in Sections 149, 150 and 151. The second set consists of offences that are applicable where an unlawful abortion results in the death or injury of the woman. This includes such offences as murder, manslaughter, grievous harm, unlawful injury, and killing of an unborn child. The focus here is on the first set of offences.

2.1.1 Attempts to Procure Abortion

Section 149 of the PC enacts the offence of "attempts to procure abortion."[10] To commit the offence under the section, a person must do any one of the prohibited acts with the specific intention of procuring "the miscarriage of a woman."[11] The term "miscarriage" has been defined to mean a termination of a "post-implantation pregnancy."[12] The following are the prohibited acts

8 Chapter 7:01 of the Laws of Malawi.

9 The PC defines the major criminal offences under Malawian law, and also stipulates the general principles of criminal liability and punishment.

10 The section reads: "Any person who, with intent to procure a miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, shall be guilty of a felony and shall be liable to imprisonment for fourteen years".

11 Except for the marginal note, the substantive contents of sections 149 to 151 do not use the term "abortion" but rather the expression "miscarriage of a woman."

12 This was the position in the English case of R *(on the application of Smeaton) v Secretary of State for Health* [2002] EWHC 610. English cases are of persuasive authority in Malawian courts. In fact, section 3 of the PC states:
"This Code shall be interpreted in accordance with the principles of legal interpretation that–
(a) …
(b) Where applicable, have regard to common law and comparable English criminal law."

under the section: firstly, administering to a woman any poison or noxious thing;[13] secondly, causing a woman to take any poison or noxious thing; thirdly, using any force of any kind on a woman; and, fourthly, using any other means whatsoever. The woman may be pregnant, but it is sufficient that the person erroneously believed that she is pregnant. As a corollary, where the woman is actually pregnant, it is not necessary that the woman must actually miscarry.

A key definitional element of the offence is that the person must act "unlawfully." The unlawfulness and lawfulness of an abortion is determined by three factors. The first is the qualification of the person performing the abortion. An abortion will be deemed to be lawful if it was performed by a qualified person, and will be deemed unlawful if it was performed by an unqualified person. The second factor is the reason for the termination of the pregnancy. An abortion will be lawful if it was performed for the sole reason of saving the life or health of the pregnant woman. In contrast, an abortion will be unlawful if it was performed for any other reason. It is essential that the two factors must obtain in each case. Hence, a lawful abortion under Malawian law is one that is undertaken by a qualified medical practitioner who acts in good faith for the purpose only of preserving the life or health of the woman.[14] On the contrary, an abortion will be unlawful if it is performed by an unqualified person, or if it is performed by either a qualified or unqualified person for any other reason apart from the preservation of the life or health of the pregnant woman. Thirdly, an abortion will be unlawful, even if it is performed by a qualified person purportedly to save the life or health of the mother, if it was performed without the valid consent of the woman. The use of force or deception always negates valid consent under Malawian criminal law.

There are three things worth noting about the ambit of the offence under section 149. Firstly, the offence does not seek to punish the woman who voluntarily submits to an unlawful abortion, but rather targets third parties who perform unlawful abortions on women. Where the woman consents to the abortion, she will be punished under section 150 of the PC.

13 It has been held that the word "poison" refers to any "recognised poison," whilst the phrase "noxious thing" means any substance which is not a recognised poison but which is in itself harmful or is administered in such quantities as to be harmful (*R v Cramp* (1880) 5 Q.B.D. 307). For the purposes of the abortion-related offences, the poison or noxious thing need not be a known abortifacient (see *R v Marlow* (1965) 49 Cr. App. R. 49).

14 This position is taken from the English case of *R v Bourne* [1939] 1 K.B. 687, which is of persuasive application in Malawian courts.

Secondly, the offence targets both qualified medical practitioners who may be using the safest abortion methods, but who perform an abortion for a legally wrong reason, as well as unqualified persons who are employing life-threatening procedures. Whilst the punishment of the former group of targeted persons may be problematic, different considerations apply to the latter group of offenders.

Thirdly, it is important to draw a distinction between "lawful abortion" and "safe abortion," and between "unlawful abortion" and "unsafe abortion." Merely because an abortion is "lawful" does not automatically render it "safe." To recap, an "unsafe abortion" is a procedure for the termination of a pregnancy, either performed by a person lacking or with inadequate necessary skills, or performed using hazardous techniques or in unsanitary environments, or both.[15] The safety of an abortion has nothing to do with its lawfulness or unlawfulness. It is therefore possible to have an "unlawful safe abortion" and a "lawful unsafe abortion." It follows that merely decriminalizing abortion, i.e., making all abortions legal, will not automatically render them safe.[16] As being argued further below, to eradicate unsafe abortions in the country, it is essential that legal reforms must be accompanied by the provision of safe, accessible and affordable abortion services across the country.

2.1.2 Attempts to Procure Own Abortion

The second offence is contained in section 150 of the PC, and is entitled "The Like by Woman with Child."[17] The offence targets women who attempt to abort themselves or permits a third party, whether a qualified person or not, to procure their unlawful abortion. A woman commits the offence if she does or permits a third party to unlawfully do any of the following acts:

15 World Health Organisation, "The Prevention and Management of Unsafe Abortions" accessed at http://www.who.int/iris/handle/10665/59705

16 As one commentator rightly observed: "Legality of abortion is not a guarantee of access to safe abortion, as it depends on the availability of services. Very often, even where fairly liberal laws governing abortion exist, many illegal abortions are still performed because of ignorance of the law on the part of women, lack of services, complicated bureaucratic procedures, lack of confidentiality, and judgmental attitudes among medical personnel towards women seeking abortion." See K. Rao and A. Fau´ndes, "Access to Safe Abortions within the Limits of the Law", 20 (3) *Best Practice & Research Clinical Obstetrics and Gynaecology*, (2006), pp. 421 - 425.

17 The section states: "Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, shall be guilty of a felony, and shall be liable to imprisonment for seven years."

firstly, administering to herself any poison or other noxious thing; secondly, using force of any kind on herself; or, thirdly, using any other means. All this must be done with the intention of procuring an unlawful abortion. In cases where a woman voluntarily submits to an abortion the person performing the abortion will be charged under section 149, whilst the woman herself will be arraigned under section 150.

Most importantly, the woman must act 'unlawfully', meaning that she must seek to terminate her pregnancy or submit to a procedure for the termination of her pregnancy for any reason other than for the preservation of her life or health. She also commits the offence if she seeks the services of an unqualified person to terminate her pregnancy, even if it is for the lawful reason. It is a definitional element of the offence that the woman must be "with child." The expression "woman with child" is old English expression for a woman who has conceived, or a pregnant woman. Before a woman can be convicted of the offence, the prosecution must, therefore, establish as a matter of fact that the woman was indeed pregnant.

2.1.3 Supplying Drugs or Instruments to Procure Abortion

The third offence is under section 151, and targets persons who supply drugs or instruments to be used to procure unlawful abortions.[18] The offence presupposes the existence of two people: **S**, the supplier and **A**, who can be the abortionist, a woman intending to abort or any other person. The section seeks to punish **S** for supplying drugs or instruments to be used by **A** to procure an unlawful abortion. It is the act of supplying to another person or procuring for another person that is the core of the criminalisation under the section. It follows that where a person concocts a substance which he or she uses to procure an unlawful abortion, or a pregnant woman concocts the drug herself which she later uses on herself, he or she does not commit the offence.

The section does not require that what is supplied or procured must be a known abortifacient but rather "anything whatsoever." This has been interpreted to mean that what is supplied or procured must be a physical

18 The section reads: "Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, shall be guilty of a felony and shall be liable to imprisonment for three years.

object.[19] The thing supplied or procured by the defendant must have been "intended to be unlawfully used to procure the miscarriage of a woman." The intention being referred to here is not the intention of the person supplying or procuring the thing, but rather a third person to whom the thing is supplied to, or for whom the thing is procured, or any other person down the line who may obtain it from that person. The defendant must supply or procure the objects "knowing" that the object supplied to another person or procured by him is intended to be unlawfully used to procure the miscarriage of a woman.

2.2 Policies Underlying the Law on Abortion in Malawi

Reforms to the law on abortion in Malawi need to address the issue of policy,[20] besides the substantive law itself. It is therefore necessary to sketch out policies underlying the anti-abortion offences discussed above. To do so one must go back to the history of the relevant sections, particularly sections 149 and 150. The two sections were part of the country's very first Penal Code of 1929,[21] which was the first substantive criminal law statute in Malawi, then Nyasaland.[22] The offences were modelled on abortion offences under the English Offences against the Persons Act of 1861.[23] One can safely state that the policies that underlie anti-abortion offences under the Offences against the Person Act also apply to the offences in the PC. The first port of call in the search for such policies must, therefore, be England.

Literature and judicial pronouncements indicate that the enactment of anti-abortion offences in England was motivated by two key objectives: firstly, to protect women from possible injuries and deaths resulting from abortions, which were highly unsafe in seventeenth and eighteenth century

19 *R v Ahmed* [2011] 2 W.L.R. 197.

20 By "legal policy" is meant the objective(s) that a law is intended to achieve. This is also known as the "legislative purpose."

21 The enactment of the Penal Code was an integral part of the codification of criminal laws in Nyasaland, a process that was replicated in other parts of the British colonial Africa. For a general reading on the enactment of the Penal Code one can read S. Hynd, "Law, Violence and Penal Reform: State Responses to Crime and Disorder in Colonial Malawi, c. 1900-1959," 37 (3) *Journal of Southern African Studies* (2011), p. 431; and H.F. Morris, "A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876–1935" 18(1) *Journal of African Law* (1974), p. 6.

22 Nyasaland was the colonial name of the country now known as Malawi.

23 Sections 149 and 150 were modelled on sections 58 and 59 of the English Offences against the Persons Act, 1861. For a general reading on the abortion provisions in the Offences against the Persons Act of 1861, and the enactment of similar offences in former British colonies, see R. J. Cook & B. M. Dickens, "Abortion Laws in African Commonwealth Countries," 25(2) *Journal of African Law* (1981), p. 60.

England.[24] The second objective was to protect the unborn foetus from unjustifiable destruction.[25] Whilst other commentators have disputed that it was ever the purpose of earliest abortion laws in England to protect foetal life,[26] this view has been accorded judicial endorsement.[27] One can, therefore, conclude that the policies underlying abortion offences under the PC are the need to protect women from possible injuries resulting from unsafe abortions, and to protect the unborn child from unjustifiable destruction.

Besides the two objectives, there is also a moral/ cultural dimension to the prohibition of abortion in Malawi. Although this may not have been one of the underlying policies behind the enactment of anti-abortion offences in 1929, today one of the reasons for the prohibition of abortion is the fact that it is considered immoral.[28] Efforts to reform abortion laws in Malawi today are likely to be influenced by such a perception.[29] Already, with the debate on reforming the law on abortion gaining pace in the country, opposition to the decriminalization of abortion is also growing. To sum it all, there are three policy justifications for the law on abortion in Malawi: to protect women from unsafe abortion; to protect the life of the unborn child; and to restrict access to abortion services on moral grounds.

2.3 Enforcement of Abortion Offences

Besides the substantive law and the underlying policies, another aspect of the law that need to be addressed by the reforms is enforcement of the law. To begin with, abortion offences under the PC are rarely prosecuted. This failure to enforce the law operates at a number of levels. Firstly, despite the claim

24 For instance, R. J. Cook, "Developments in Abortion Laws Comparative and International Perspectives," 913 (1) *Annals of the New York Academy of Sciences*, p. 74.

25 For instance, R. M. Bryn, "The Abortion Question: A Non-sectarian Approach" 11(4) *The Catholic Lawyer* (1965), 316, p.317.

26 For a discussion of that controversy see J. Keown, *The Law and Ethics of Medicine: Essays on the Inviolability of Human Life*, Oxford, Oxford University Press, (2012), p. 119.

27 For instance, Lord Mustil in *Re Attorney–General's Reference (No. 3 of 1994),* [1998] A.C. 245, p.265.

28 The term "immoral" or "immorality" is being used here as an umbrella term that captures the various reasons for opposing abortion based on its wrongfulness, whether on cultural or religions reasons.

29 See, for example, Malawi News Agency, "Malawi: Parliament Should Not Pass Safe Abortion Bill" < http://allafrica.com/stories/201310250071.html> (accessed 1 February, 2015); N. Meki, "Malawians against legalising abortion says Commission", *The Daily Times,* Blantyre, (2 July (2014), p. 2, where the author quoted the Chairperson of the Special Law Commission on the review of abortion, Justice Esmie Chombo, as saying that "generally people [in Malawi] are saying that we should not legalise abortion, meaning we should not open all doors wide so that abortion can be procured on demand. People want the law to be liberalised so that only certain avenue are opened so that abortion can be procured in certain situations."

that most Malawians oppose abortion, members of the general public rarely report to the police suspected or known cases of abortion. Secondly, even where reports are made, the police rarely investigate such cases, let alone prosecute them. This is the case even where death or serious injury ensues from an unlawful abortion.[30] Actually, one of the local dailies reported that abortifacients are "selling freely" in pharmacies across the country.[31]

This state of affairs has a number of implications. Firstly, by showing a general reluctance to report suspected or well-known cases of abortion, this may be interpreted to mean that the general public does not consider abortion as a serious social wrong, worthy punishing. One can see the differences in the public's perception and reaction to abortion and similar offences, for instance, incest, defilement, rape, and others, which are widely reported to the police. Secondly, by not investigating and prosecuting reported cases of abortion, one can conclude that the police consider abortion as a less serious offence. Thirdly, this means that, in its current state, the law is incapable of achieving its policy objectives of protecting women from unsafe abortions, or protecting unborn children, or even safeguarding public morals. Fourthly, the lack of enforcement of the law puts into serious question the assertion that the current law is actually fuelling unsafe abortions in the country, and that reforming or repealing the law will automatically stop women from resorting to unsafe abortions. This calls for serious rethinking about the real linkage between the current law and unsafe abortion.

3. ABORTION LAW AND KEY CRIMINAL LAW PRINCIPLES AND VALUES

Having outlined the law on abortion in Malawi, its underlying policies, and its enforcement practices, this part seeks to examine the law, policies and enforcement practices against certain key criminal law principles and values.

3.1 A Dead-Letter Law

The current enforcement practices in effect render the law on abortion a dead-letter law, which remains unenforced whilst the mischief it was intended to

30 See D. R. Camack "Malawi" in S. Coliver, (ed.) *The Right to Know: Human Rights and Access to Reproductive Health*, Philadelphia, University of Pennsylvania Press (1995), 207, p.221.

31 G. Kamlomo, "Abortion Drugs Selling Freely" *The Daily Times,* Blantyre, (27 November (2012), p. 1.

remedy remains widespread. Such a dead-letter law offends the rule of law principle that laws must be enforced, if not as an end itself, then for deterrent and preventative purposes. It does not make sense to retain a law that is not being enforced.

3.2 Failed Criminal Law Policy

Apart from being a useless dead-letter law, the law has also obviously utterly failed to achieve its avowed objectives. Whether the objective is to protect women from unsafe abortions, or the protection of unborn children, or to preserve public morality, the law has failed at all levels. If at all the law has been effective, it is in scaring away well-meaning and qualified medical practitioners from offering safe abortion services to desperate women and girls, whilst unskilled and unqualified practitioners, mostly operating from unsafe environments and using life-threatening procedures, remain undeterred. This makes a mockery of the law. The criminalization of abortion in Malawi is, therefore, a failed criminal law policy.

3.3 The Principle of Maximum Certainty

Further, the law is also problematic with the criminal law principle of maximum certainty.[32] The principle, which especially applies to the definition of criminal offences, requires that criminal laws, particularly criminal offences, must be defined with sufficient clarity and certainty so as to provide meaningful guidance to law enforcement agents, courts and the general public. The principle is justified on two grounds. First, it provides a fair warning to citizens on what conduct is punishable and what conduct is not.[33] Secondly, clarity and certainty of the law constrains the discretionary powers of both law enforcement agencies and courts.

32 For a general reading on the principle see A. Ashworth, *Principles of Criminal Law*, Oxford, Clarendon Press (1995), pp.73–74; J. Holder, "Criminal Attempt, the Rule of Law, and Accountability in Criminal Law," in L. Zedner and J. V. Roberts (eds.,) *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, Oxford University Press, Oxford, (2012), pp.37-38.

33 To borrow the words of Ashworth: "Even in their most minimal formulations, the 'rule of law' and the principle of legality require that the criminal law should serve its guidance function by giving fair warning of prohibitions to those affected by them. In order to give fair warning, prohibitions should be as clear and as certain as possible, not least when a significant sanction (such as imprisonment) may follow". See A. Ashworth, "Preventive Orders and the Rule of Law" in D. J. Baker and J. Horder (eds.,) *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams*, Cambridge University Press, Cambridge, (2013), pp.62–63.

The offences under sections 149 and 150 violate the principle of maximum certainty because of their lack of clarity and certainty on the circumstances when an abortion is (or is not) lawful. The widely accepted meaning of the term "unlawful" as used in the sections comes from the English case of *R v Bourne*, where it was held that the word is used to render lawful only those abortions carried out in good faith for the preservation of the life or health of the mother. But that interpretation has not yet been expressly incorporated into Malawian law by either the High Court or the Supreme Court of Appeal. Its application under Malawian law is, therefore, speculative.

But even if it were, *R v Bourne* was decided in 1939, when our understanding of human health was limited, and in between there have been major improvements in knowledge about psychological and mental health. So, is the preservation of the mother's health limited to physical health, or does it extent to psychological and mental health? There is a dire need for clarification on the point, particularly considering that the ambiguity of the law is scaring away mainstream medical professionals from conducting legal abortions for fear of falling foul of the law. It is abundantly clear that a clarification of the law will be beneficial to courts of law, law enforcement agents, defence lawyers, the medical profession, and even members of the general public who, for whatever reason, want to know what the law provides in this highly controversial area.

3.4 The Principle of Minimum Criminalization

The current law on abortion also violates the principle of minimum criminalisation. The principle advocates for keeping the ambit of criminal law to a minimum. To achieve that, legislatures are advised to use criminal law as a means for controlling anti-social conduct or behaviour only as a measure of last resort, and when it is "absolutely necessary."[34] Most importantly, even in cases of serious anti-social conduct, the decision to criminalize should be made after assessing "the probable impact of the criminalization, its efficacy, its side-effects, and the possibility of tackling the problem by other forms of regulation and control."[35]

34 J. Herring, *Criminal Law: Texts, Cases, and Materials*, Oxford University Press, Oxford, (2012) p. 1; V. M. O'Connor, *Model Codes for Post-Conflict Criminal Justice, Vol. 1: Model Criminal Code*, United States Institute of Peace Press, Washington, (2007), p. 37.

35 A. Ashworth, *Principles of Criminal Law, supra*, p. 64.

The principle of minimum criminalization is pertinent to the abortion offences in the PC. Firstly, the attitude of the general public towards suspected cases of abortion in their own communities, coupled with the reluctance of the police to investigate and prosecute the few reported cases of abortion, raise serious doubts as to whether abortion is serious anti-social conduct worthy criminalization. The mere fact that the general public does not approve of abortion is not, in itself, a good reason for its criminalization. Secondly, there are obvious difficulties in enforcing abortion offences. This raises serious questions about the efficacy of the law in dealing with the mischief it was intended to remedy.

Thirdly, there are serious negative side effects of the criminalization. As has been argued, instead of reducing unsafe abortions and the attendant injuries and death to thousands of women in Malawi, the law has actually exacerbated the problem. The literature actually suggests that unsafe abortions could be effectively reduced, not through criminalization, but through social interventions such as universal availability of family planning and teaching the youth on the dangers of early sex and other reproductive health issues. Abortion is, first and foremost, a social issue. It arises from unwanted and unplanned pregnancies, and the social and economic plight of women in the society. In point of fact, some of the countries with the least number of abortions in the world, such as Belgium and the Netherlands, allow for all abortions. In these circumstances, minimum criminalization does not support the continued criminalization of abortion in Malawi.

3.5 Violation of the Equality Principle

The manner in which the offences are enforced offends the principle of equality.[36] As a principle of criminal law, equality has both substantive as well as procedural components. In terms of the first, it requires that Parliament must not create an offence that targets one section of the population or a group of individuals. Its procedural component requires that law enforcement agencies may not enforce the law selectively to target a section of the population or certain individuals. In short, if a criminal law is applied to an individual, then it must also be applied to other individuals in the same circumstances. The current sporadic enforcement of abortion

36 It should be mentioned that equality before the law is listed as one of the "fundamental principles" of the Constitution of Malawi. The Constitution has also incorporated the principle of non-discrimination as one of its human rights.

offences, particularly the offence under section 150 of the PC, offends this procedural aspect of equality.

The enforcement of the offence against few women who undergo abortion, whilst the majority are not prosecuted, amounts to selective enforcement of the law and, hence, an affront to the principle of equality. This is more so considering that it is mostly poorer women who are likely not only to have unsafe abortions but also to face prosecutions. Richer women have access to safe abortion services, and are not likely to be prosecuted. By the way, abortions are often reported after the woman has suffered adverse effects, otherwise they remain hidden.

3.6 The Principle of Legal Moralism

The law on abortion in Malawi cannot even be saved by the principle of "legal moralism."[37] The principle states that the State is justified to prohibit and punish conduct that is considered by the majority of members of the society to be morally wrong. As a matter of fact, the Malawian PC endorses this view by classifying certain offences as "offences against morality,"[38] plainly signifying that the reason for the criminalization of the conduct involved in these offences is that such conduct is immoral. It is important to note that the abortion-related offences under sections 149 to 151 of the PC are similarly classified.

Now, even if it is accepted that abortion is morally (or culturally) wrong, the disinclination of the general public to report known or suspected cases of abortion, and of law enforcement agencies to investigate and prosecute, raise doubts as to whether the principle of legal moralism can be used to justify the retention of these offences. Two of the most important elements of the principle are: firstly, that not all moral wrongs ought to be criminalised; and, secondly, only those moral wrongs that evoke "feelings of intolerance, indignation, and disgust among ordinary members of society"[39] ought to be criminalised. Only those moral wrongs that evoke such feelings are the proper object of criminal law; all other moral wrongs are to be left to other forms of social control.

These elements suggest that in the Malawian context the principle

37 For a general reading on the principle see L. Alexander, "Harm, Offence, and Morality," 7 *Canadian Journal of Law and Jurisprudence,* (1994), p. 199.

38 Chapters XV and XVA of the PC provide for "Offences against Morality" and "Offences against Morality Relating to Children" respectively.

39 A. Ashworth, *Principles of Criminal Law*, p. 42.

of legal moralism would not support the criminalization of abortion. Reports indicate that abortions are rampant, but the public does not appear to express any open feelings of intolerance, indignation and disgust against it. This is not an indication of societal approval of abortion. Women who abort do face stigmatization at all levels. But the question here is whether abortion should be criminalized or not. And the point being made is that abortion does not evoke strong feelings of intolerance, indignation and disgust amongst the people to warrant its criminalization. In other words, there is a noticeable growing tolerance to the practice even though strong objections remain. That is why the general public has remained largely acquiescent to private clinics that offer abortion services and suspected or known women who abort are not reported to the authorities. In short, the current state of things doesn't support the criminalization of abortion in pursuance to the principle of legal moralism.

Further, it has been noted that the criminalization of conduct based on legal moralism requires "a secure definition of morality, not one which confuses it with mere feelings of distaste and disgust."[40] This requires that the immorality of abortion must be precisely agreed upon. And there is a problem here: there seems to be no coherent reason why abortion is immoral or culturally wrong. Particularly, some of the reasons advanced against abortion are founded on pure ignorance. For instance, some of the cultural reasons against abortion include mythical perceptions that abortion renders women infertile, that men who have sex with women who abort die, and that communities become "infected" by women who have had an abortion.[41] People are also advised not to marry women or girls who are known to have procured an abortion.[42] For sure, these perceptions are based on ignorance and misconceived fears. Before legal moralism can be used as a justification for the criminalization of abortion, there is a need for clear grounds on why abortion is immoral.

4. REFORMING THE LAW ON ABORTION IN MALAWI

40 *Ibid*, p. 43.

41 See, for example, B. A. Levandowski, L. Kalilani-Phiri, L. F. Kachale, P. Awah, G. Kangaude and C. Mhango, *"Investigating Social Consequences of Unwanted Pregnancy and Unsafe Abortion in Malawi: The Role of Stigma," 118 (2) International Journal of Gynaecology and Obstetrics*, (2012), pp. 167-171.

42 *Ibid*.

4.1 The Three Options

Having concluded that the current law on abortion is in dire need for reform, the next, and probably critical, issue is the direction for such reforms. Following trends from other countries both within the sub-Saharan African region and beyond, the country has three main options before it.

4.1.1 Complete Decriminalization of Abortion

The first option involves the complete decriminalization of abortion by repealing the offences under sections 149, 150 and 151 of the PC. Under this option, abortion will not only be decriminalized, but, most importantly, all abortions regardless of the reason(s) for the termination of the pregnancy will be legally allowed. A woman seeking to terminate her pregnancy will not need to provide justificatory reasons to anyone why she needs an abortion. If she wants it, she must get it as long as she meets a doctor who is willing to perform the abortion. This is variously referred to as "at-will abortion," "abortion-at-will" or "abortion on request."[43]

One should be quick to point out that this option does not entail that abortion will be totally unregulated. Abortion will still be regulated but by the ordinary rules and principles that regulate all other medical procedures. Practically, it will mean that the decision whether or not to abort will be made privately between the woman and her doctor, just like a decision to extract a tooth is a private matter between a patient and his or her dentist. Where, however, an abortion procedure results into the death or injury of the mother, criminal or tortious charges will ensue and will be resolved by the standard principles of law governing medical care.

4.1.2 Widening the Permissible Grounds for Abortion

The second option is to widen the permissible grounds for abortion by including other socio-economic grounds besides the preservation of life or health of the pregnant woman. Under this option, abortion will remain a criminal offence but the grounds for legally permissible abortions have to be expanded. Such possible grounds would include the woman's economic (and

43 M. Z. Stange, *Encyclopaedia of Women in Today's World, Volume 1*, Thousand Oaks, Sage Reference, (2011), p. 11.

financial) position, her age, civil status, the number of children she already has, or cases where the pregnancy arose from a rape, defilement, incest or any other crime. Abortion for any other reason besides the legally prescribed grounds will, however, still be criminal. Zambia is one country in the sub-Saharan African region that has such type of legislation.[44]

4.1.3 The Trimester Approach

The trimester approach was first mooted by the Unites States Supreme Court in the landmark decision of *Roe v Wade*.[45] The approach has been subsequently modified in both the Unites States and in other jurisdictions where it has been adopted. The approach divides the pregnancy into three stages, or "trimesters." The first trimester covers the period from conception to the end of the thirteenth menstrual week. During this period, a woman can terminate her pregnancy for any reason. The decision to terminate the pregnancy is solely between the woman and her doctor. In other words, during this period all abortions are allowed.

The second trimester covers the period from fourteen weeks to twenty-six weeks of pregnancy. During this period abortion is regulated but solely for reasons related to the life or health of the mother. In other words, all abortions are allowed except where the termination of abortion will prejudice the life or health of the mother. In the third and last trimester, the State can regulate or even criminalise abortions except where it is performed for the preservation of the life or health of the mother. In this trimester, one of the reasons for criminalising abortion would include the need to protect the life of the foetus as a potential human being. It is believed that during this period the foetus will have become viable. South Africa has this type of legislation.[46]

44 The Zambian Termination of Pregnancy Act, 1972 (Act No. 26 of 1972) was enacted in 1972 and amended in 1994 (as Act No. 13 of 1994). In terms of section 3 of that statute, abortion is legally permissible when the continuation of the pregnancy would involve (1) risk to the life of the pregnant woman; (2) risk of injury to the physical or mental health of the pregnant woman; (3) risk of injury to the physical or mental health of any existing children of the pregnant woman; (4) risk that the child will be born mentally or physically handicapped. Further, section 142 of the Zambian Penal Code allows for abortion where the pregnancy is a result of rape or defilement. The Termination of Pregnancy Act specifically requires that any termination of pregnancy must be carried out in a hospital. It also allow for conscientious objection.

45 410 U.S. 113 (1973)

46 The South African Choice on Termination of Pregnancy Act was enacted in 1996 (Act No. 92 of 1996). The statute gives women an unfettered right to terminate a pregnancy during the first 12 weeks of the gestation period of a pregnancy "upon request" of the woman. From the 13th up to and including the 20th week of the gestation period, the woman may terminate the pregnancy if a medical practitioner, after consultation with the pregnant woman, is of the opinion that (1) the continued

4.2 The Need to Balance Competing Interests

Having concluded that the current state of the law on abortion is indefensible, the next question the country must resolve is which of the three options outlined above is best for Malawi? When answering that question one must take into consideration the social, economic and political realities of the country, and must balance a number of competing interests. To begin with, the policy objectives of the law on abortion need to be reconsidered. Firstly, the need to protect women and girls from the dangers of unsafe abortion must remain the key guiding principle of any law on abortion in Malawi. As regards the protection of unborn children, we propose that such a policy must be fine-tuned so that it applies to foetuses that have reached viability only. As regards the enforcement of morality, that policy must be rejected in total. This policy lacks sufficient clarity as to guide the future development of the law.

In terms of the substantive law itself, a difference must be made between the offence and section 149, and the offences under sections 150 and 151. For the latter offences, we recommend their complete repeal as they serve no useful purpose. Threatening women with prosecution for procuring their own abortion cannot make them seek safe abortion services. Actually, such a threat will only make them seek clandestine abortion services, or attempt to abort themselves.

For the offence under section 149, it should be pointed out that the offence targets both qualified medical practitioners who procure an abortion for any reason other than to save the life or health of the pregnant woman as well as unscrupulous traditional healers who attempt to terminate a pregnancy through dangerous abortion practices. The type of conduct being targeted by the offence is therefore wide and goes beyond the straightforward case of a qualified medical doctor who is operating from a safe environment and using the safest abortion procedures. Hence, if the goal is to protect

pregnancy would pose a risk of injury to the woman's physical or mental health; (2) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; (3) the pregnancy resulted from rape or incest; (4) the continued pregnancy would significantly affect the social or economic circumstances of the woman. After the 20th week of the of the gestation period, a pregnancy may be terminated if a medical practitioner forms the opinion that the continued pregnancy (1) would endanger the woman's life; (2) would result in a severe malformation of the fetus; or (3) would pose a risk of injury to the fetus. The statute requires that a termination must be performed at designated facilities. It also provides for counselling of the woman and conscientious objection. Only the consent of the woman is necessary for an abortion. It is an offence for any person who is not a qualified person under the Act to terminate a pregnancy. It is also an offence to prevent the lawful termination of a pregnancy or obstruct access to a facility for the termination of a pregnancy.

women from possible injuries or death that may result from unsafe abortion, then the section need not be completely repealed but must be changed so as to allow qualified medical practitioners the freedom to decide whether an abortion is appropriate in any individual case, whilst at the same time punishing unqualified individuals who perform unsafe abortions that put the life of women and girls in danger. Further, the law may still have to criminalize those who force women to terminate pregnancies against their will. A blanket call for the repeal of the offence may, therefore, not be the best course of action on the matter.

Further, insisting on a complete repeal of the section may complicate efforts at reforming the law as such a course of action is likely to face stiff resistance from some sectors of the society. It is a basic fact that Malawi is still a relatively conservative country and one that prides itself as a "God fearing nation." Any effort to completely decriminalize abortion will therefore be easily interpreted as a move to encourage abortion. Actually, this is one major challenge that efforts at reforming the law on abortion continue to face. The backlash to any such move will be too hot for the country's politicians to handle. It is highly unlikely that any politician in his or her right mind would go to her constituents and argue for a complete repeal of the law on abortion. Actually, a story in one of the local dailies revealed that even female Members of Parliament find "abortion too hot to handle" and are afraid that pushing for the liberalization of the law will make them become unpopular in their constituencies.[47] The same resistance was recently reported involving a leading civil society organization working in the area of health rights which went public to oppose abortion for any other reason apart from medical reasons.[48] In these social and political circumstances, asking for a complete repeal of the offence will be asking too much for the time being.

It is important that the reform efforts must mediate between different competing interests, i.e., those advocating for total decriminalisation and those advocating for stricter regulation. In order to reach that balance, it is important that the law must heed calls for reform by clarifying the law on abortion and allow for more grounds for legal abortion with less or no

47 S. Khunga, "MPS find abortion too hot to handle," *Daily Times*, Blantyre (31 January, 2013) 3.

48 See C. Juma, "Catholic Church takes stand on rights," *The Daily Times*, Blantyre (5 March, 2013) 3, where the author is quoting the executive director of Malawi Health Equity Network, a leading public health organization in Malawi, saying that her organization does not support abortion "particularly where there are no medical grounds to support termination of pregnancy."

regulation in terms of first-trimester pregnancies and more regulation for third-trimester abortions. Further, there may be a need for the regulation of who can perform legal abortions and in what facilities to root out unsafe abortions and the law must also allow for conscientious objectors. There is also a need to legally protect the privacy of the women who seek abortion services. Leaving abortion unregulated in a developing country like Malawi can actually be counter-productive as it may open a floodgate for more unsafe abortions performed by untrained (or even scrupulous) individuals operating in the most unsafe environments to the detriment of women who were intended to be saved by reform of the law.

It is also important for the law to heed those who object to change in the law on abortion on moral grounds. There are serious moral issues relating to abortion that still linger. Whilst one may not agree with the moral arguments being advanced, but that does not change the fact that there is a significant section of the general public, including amongst legislators, lawyers, judges, police officers and medical personnel, that consider abortion immoral. This may affect the provision of safe abortion services, or enforcement of rights of women who want to abort. Most importantly, health facilities that will be performing abortions will have to work in communities that greatly oppose the practice and this may lead to tensions (or even open conflicts) between members of the community and health personnel. This may in turn lead women to seek abortion services elsewhere or even attempting to abort themselves. By the end of the day, the problem of unsafe abortions will continue unabated. It is important to remember that the issue of abortion is highly controversial and emotive worldwide, in both so-called developed as well as developing countries. Being on either side of the debate does not really reflect any educational or intellectual sophistication whatsoever. As one author has observed, "honest, intelligent, knowledgeable, and well–intentioned persons have come to opposite conclusions. There are many such persons on either side."[49]

4.3 Beyond Legal Reforms

Whilst reforms are undoubtedly necessary, it is important to note that a mere change in the law may not in itself end unsafe abortions in the country. A

49 T. Pogge, *Politics as Usual: What Lies Behind the Pro–Poor Rhetoric*, Cambridge, Polity, (2010), p. 124.

lot more needs to be done. Besides the reforms, the country also needs to address the problem of stigma. Research has revealed "community level and institutionalised stigma" associated with unwanted pregnancies and abortions in Malawi.[50] Such stigma has nothing to do with the fact that abortion is criminal or not, but arises from the way society views pregnancies outside wedlock, or a pregnancy arising from an adulterous relationship. There are many countries that have liberalized the law on abortion but still suffer from stigma, which in turn force women to resort to unsafe abortions.[51]

The second issue the country must deal with is that of unqualified traditional healers who perform abortions. It is important to note that merely because an abortion is "lawful" does not automatically render it "safe." An "unsafe abortion" is a procedure for the termination of unwanted pregnancy, either, performed by a person lacking (or with inadequate) necessary skills, or, performed using hazardous techniques or in unsanitary environments, or both.[52] This has nothing to do with the lawfulness or unlawfulness of the abortion itself. It is therefore possible to have an "unlawful safe abortion" and a "lawful unsafe abortion."[53] Actually, research has revealed that countries that have achieved long-term and sustainable reduction in abortion-related complications and deaths have done so by following the twin-pronged approach: policy and law reforms coupled with the provision of safe abortion services and other reproductive health interventions.[54] Conversely, countries with liberal abortion laws but that lack the necessary safe abortion services will continue to experience high incidence of abortion-related mortality.[55]

50 B. A. Levandowski *et al, op cit* p.169.

51 One such country is South Africa. Despite having one of the most liberal laws on abortion in sub-Saharan African, South Africa still grapples with the problem of unsafe abortions arising from stigma. See, for instance, P. Orner et. al., "'It hurts, but I don't have a choice, I'm not working and I'm sick': decisions and experiences regarding abortion of women living with HIV in Cape Town, South Africa," 13 (7) *Culture, Health & Sexuality: An International Journal for Research, Intervention and Care,* (2011), p. 781.

52 See K. A. Rao and A. Fau´ndes, "Access to safe abortion within the limits of the law," 20 (3) *Best Practice & Research Clinical Obstetrics and Gynaecology*, (2006), p. 421.

53 To quote Rao and Fau´ndes: "Legality of abortion is not a guarantee of access to safe abortion, as it depends on the availability of services. Very often, even where fairly liberal laws governing abortion exist, many illegal abortions are still performed because of ignorance of the law on the part of women, lack of services, complicated bureaucratic procedures, lack of confidentiality, and judgmental attitudes among medical personnel towards women seeking abortion." Rao and Fau´ndes, *ibid*, p. 425).

54 See, for instance, J. Benson and others, "Reductions in abortion-related mortality following policy reform: evidence from Romania, South Africa and Bangladesh" 8 *Reproductive Health*, (2011), p. 39, where the authors demonstrated how the countries of Romania, Bangladesh and, closer home, South Africa, achieved significant declines in abortion-related mortality by following this approach.

55 One such country is Zambia, whose abortion law is said to be one of the most liberal on the African continent yet has one of the highest abortion-related mortality rates because of, among other things, lack of safe abortion services. See, for example, W. Koster-Oyekan, "Why resort to illegal abortion in Zambia? Findings of a community-based study in Western Province", 46 (10) *Social Sciences &*

Further, a change in the law must be accompanied by the provision of accessible and affordable safe abortion services throughout the country. This may prove to be a bigger challenge for the country than reforming the law. It is no secret that Malawi is still struggling to provide its citizens with adequate health services and infrastructure. Introducing safe abortion service countrywide, particularly in the rural areas where they are needed most, will be an easy task. This requires the country to acquire the necessary medicines and equipment and distribute them throughout the country, and also to train personnel in safe abortion procedures and deploy them in all health facilities throughout the country.

A major impediment in achieving this will be the fact that a good percentage of health care facilities, particularly in remote parts of the country, are owned and managed by the Christian Health Association of Malawi (CHAM.)[56] Further, most nursing training institutions in Malawi are owned or managed by CHAM. The dominant role played by CHAM in the provision of health services and the training of nurses will have an impact on the provision of abortion services in the country and the training of nurses in safe abortion services considering that the stiffest opposition to the liberalization of the law on abortion in Malawi is emanating from the same Christian organizations.

The country has also to address the issue of conscientious objectors, that is to say, medical personnel who on moral or ethical grounds would not want to be involved in the provision of abortion services. Worldwide, abortion remains one medical procedure to which many nurses and doctors hold a conscientious objection. We don't think that in Malawi the situation will be anything different where stigmatization against abortion has been found even amongst the health personnel.[57] Such stigma, which gives expression to entrenched social attitudes towards pregnancies outside the wedlock and abortions, cannot vanish with a mere change in the law. And considering that health facilities in remote parts of the country have one or two medical personnel, any conscientious objection will cripple the provision of abortion services in those areas.

Touting mere law reforms as a sure panacea to the scourge of

Medicine, (1998), p. 1303.

56 CHAM is an umbrella organisation whose membership consist of Christian organisations health care services in Malawi. Almost 37% of health services in Malawi are provided by hospitals or health facilities operating under CHAM. Most importantly, it is estimated that almost 90% of CHAM's health facilities are located in rural areas.

57 See B. A. Levandowski *et. al. op. cit.* p.169.

unsafe abortions in Malawi is misleading. For any meaningful change, it has been proposed that the formal law reforms must be accompanied by the following: putting into place new standards and guidelines for abortion care services; the provision of adequate trained personnel who are willing to provide abortion services; the existence of administrative regulations that prevent unnecessary delays; the provision of necessary drugs and equipment in all facilities providing abortion services; restructuring the health system to accommodate the provision of abortion services by, among other things, allocating funds for such services; and putting in place adequate security measures to protect the personnel and facilities providing abortion services.[58]

5. CONCLUSION

The law on abortion in Malawi is in serious need of rethinking and revision, regardless of the position one may take as to the direction the reforms should take. Those supporting the law as it currently is should be wary that the law is not being enforced and is utterly failing to achieve its policy objectives. On the other hand, advocates for the reform of the law are also worried that the law is a barrier to the provision of safe abortion services and, hence, is contributing to the scourge of unsafe abortions currently killing and maiming thousands of women and girls in Malawi. From a criminal law perspective, the law is just indefensible. It violates too many fundamental principles of criminal law. We therefore join the chorus that is calling for the reform of the law. As to which direction those reforms should take, all that can be said is that the reform efforts must be guided by the need to protect women and girls from unsafe abortions. That should be the guiding principle. It is, however, important to remember that the mere change in the law will not, in itself, change the situation on the ground. There are many social and political barriers that must be surmounted before change is registered on the ground. The country must also explore other strategies for reducing unwanted pregnancies which are ultimately the real source of the problem of unsafe abortions in the country. It is, therefore, important to remember that reforming the law on abortion is just one step in a long, long journey ahead.

58 See A. J. Gerhardt, "Abortion Laws into Action: Implementing Legal Reform," 2 (1) *Initiative in Reproductive Health Policy,* (1997), p. 1.