WOMEN’S REPRODUCTIVE HEALTH RIGHTS THE RULE OF LAW AND PUBLIC
HEALTH CONSIDERATIONS IN REPEALING THE CRIMINAL LAWS ON
ABORTION IN THE REPUBLIC SURINAME

by

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Abstract

Within the Surinamese jurisdiction the Constitution grants women the right to health and imposes a legal duty on the state to facilitate the realization of this right. Also treaty law, in particular, the ICESCR article 12 and the CEDAW article 12 grant women the right to the highest attainable standard of health and the right to non-discriminatory access to healthcare. But due to the criminal law applicable to abortion women lack non-discriminatory access to reproductive healthcare and therefore do not enjoy the highest attainable standard of pregnancy related health. Despite its decision not to enforce the abortion prohibiting criminal laws, Suriname remains in a state of failure to comply with its legal duties as imposed by the Constitution and treaty law. This, due to the state’s reluctance to repeal the criminal laws on abortion and its failure to enact effective health regulations to facilitate women in need of an abortion.
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<th>Description</th>
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<tr>
<td>G.B.</td>
<td>Gouvernementsblad (Gazette before independence of Suriname in 1975)</td>
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<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>Para.</td>
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<td>Art.</td>
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<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>NHIS</td>
<td>National Health Information System</td>
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<tr>
<td>DAWN</td>
<td>Development Alternatives with Women for a New Era</td>
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<tr>
<td>D&amp;C</td>
<td>Dilatation and Curettage</td>
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<tr>
<td>SRG</td>
<td>Surinaamse Gulden (Surinamese Guilders until 2000)</td>
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<tr>
<td>PAHO</td>
<td>Pan-American Health Organization</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
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<td>ICPD</td>
<td>International Conference on Population and Development</td>
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<tr>
<td>CGL</td>
<td>Committee on Gender Legislation</td>
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<td>MDGs</td>
<td>Millennium Development Goals</td>
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<td>ECHR</td>
<td>European Court on Human Rights</td>
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<tr>
<td>U.N.</td>
<td>United Nations</td>
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<tr>
<td>MOP</td>
<td>Meerjaren Ontwikkeling Plan (Multi Annual Development Plan)</td>
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1 Introduction

1.1 The legal interpretation of abortion in Surinam placed on a chronological timeline

This thesis is a legal analysis of the matter of abortion in the Republic of Suriname. The matter of abortion will be analyzed from the perspective of abortion as a pregnancy related health intervention and thus as a reproductive health law matter. In Suriname, an independent Republic since 25 November 1975, abortion was first legally recognized in 1910 with the introduction of the Criminal Code of Suriname of 14 October 1910 (G.B. 1911 no. 1). According to the Criminal Code abortion is completely prohibited making no circumstantial exemptions in which an abortion may be legal.

With the accession without reservations to the American Convention on Human Rights (ACHR) on November 12, 1987, Suriname implicitly expressed itself in the context of abortion through article 4(1) which articulates “Every person has the right to have his or her life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” In March 31, 1993 Suriname ratified the Convention on the Rights of the Child (CRC) without reservations.

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1 Preamble of the Constitution of Suriname S.B. 1987 no. 116
2 See for example articles 292, 309, 355-358, 368, 396 in conjunction with 111 and 534 of the Surinamese Criminal Code, Act of 14 October 1910, (G.B. 1911 no. 1)
3 General Secretariat, OAS (Original Instrument and Ratifications); OAS, Treaty Series, no. 36; UN Registration: 08/27/79 no. 17955 Vol.
Based on the state report to the CRC Committee,\(^6\) article 6\(^7\) of the CRC seems to be important in the context of abortion to Suriname. Article 6 states that “(1) State Parties recognize that every child has the inherent right to life and (2) State Parties shall ensure to the maximum extent possible the survival and development of the child”.\(^8\) In its initial state report of September 23, 1998 regarding the implementation of the CRC, Suriname stated that the criminal prohibition of abortion is to protect the right to life, the survival and the development of the unborn child, but that the right to life of the woman would prevail the right to life of the unborn child in case of a conflict of those two rights which would result in the nullification of the abortion prohibition.\(^9\)

March 31, 1993 Suriname acceded to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).\(^10\) Based on the state report to the CEDAW Committee,\(^11\) article 12 of the CEDAW\(^12\) is of importance to Suriname in the context of abortion. Article 12 of the CEDAW states that

\[
(1) \text{States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.}
\]

\(^6\) Initial periodic report of Suriname, CRC/C/28/Add.11, (1998), at paras. 27, 28 & 29
\(^7\) Note of clarification: The State report most likely made an erroneous reference to article “16” instead of “6”. Article 6 deals with the right to life, survival and development of the Child, not article 16.
\(^9\) Supra note 6
(2) Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.\(^\text{13}\)

In its combined initial and second CEDAW state’s report of March 5, 2002 Suriname claimed in the context of reproductive health rights as part of article 12 that the criminal laws on abortion are not enforced and that women do have access to abortion services within hospital and clinical settings.\(^\text{14}\)

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\(^{13}\) Ibid. at article 12

\(^{14}\) Supra note 11
Based on the presented historical overview of the legal interpretation of abortion and the law in Suriname, pinpointing crucial moments in time, this thesis claims that the legal interpretation of abortion in Suriname lacks clarity. It is not clear whether abortion is considered a criminal offence aiming to protect the interest to life of an unborn child or a reproductive health right aiming at ensuring women’s right to reproductive health as articulated in article 12 of the CEDAW. This circumstance of lack of clarity on the legal status on abortion could result in the infringement of women’s right to health including their right to reproductive health.\textsuperscript{15}

1.2 Analytical approach

With regard to the approach the government of Suriname uses to abortion, the claim can be made that the dominant approach is a rights based approach. From 1993, with the accession to the CEDAW without reservations, the state recognized abortion as a reproductive health right of women.\textsuperscript{16} In addition, support for this argument can also derive from the CRC initial state report of 1998\textsuperscript{17} and the CEDAW combined initial and second state report of 2002.\textsuperscript{18} In both reports the state explicitly recognized abortion as a women’s right.\textsuperscript{19}

In the CRC context the state argued that women can exercise their right to abortion in the circumstance where a woman’s life is threatened and the termination of the pregnancy is required to safe her life.\textsuperscript{20} This means that the right to life of a woman supersedes the interest to life of


\textsuperscript{16} Supra note 10

\textsuperscript{17} Supra note 6

\textsuperscript{18} Supra note 11

\textsuperscript{19} Initial periodic report of Suriname, CRC/C/28/Add.11, (1998), at paras. 27, 28 & 29; Combined initial and second periodic report of Suriname, CEDAW/C/SUR/1-2, (2002), at 65 under “Reproductive Health”

\textsuperscript{20} Supra note 6
the unborn child. In the context of the CEDAW the state implied that Suriname has an abortion procurement enabling environment, in which women can exercise their reproductive health right to terminate a pregnancy unconditionally due to the fact that the criminal laws on abortion are not being enforced.\textsuperscript{21}

It should be noted that both claims made in the CRC and CEDAW report lack legislative support. These findings inform the research that despite the claims made by the state in its two state reports, abortion remains illegal as it is still on the Criminal Code. The state claims, though, are evidence that the state’s approach to abortion has made a transition from crime and punishment to a human rights approach, with its acknowledgement of abortion as a woman’s reproductive health right.

A strictly legislative analysis informs the research that the absolute prohibition of women to seek or to have an abortion as well as the prohibition of healthcare providers and third parties to provide an abortion and or assist with the procurement, by threatening with punishment ranging from fines to discharging from a profession to imprisonment,\textsuperscript{22} imposes a severe legal barrier on women in their pursuit to access safe and legal abortion services as part of their pregnancy related healthcare. This inability of women to access safe and legal abortion services is an infringement of their right to reproductive health\textsuperscript{23} which infringement constitutes a direct threat to their health and lives which is a violation of women’s right to security of the person.

\textsuperscript{21} Supra note 11
\textsuperscript{22} See for example articles 292, 309, 355-358, 368, 396 in conjunction with 111 and 534 of the Surinamese Criminal Code, Act of 14 October 1910, (G.B. 1911 no. 1)
\textsuperscript{23} Supra note 13
1.3 The thesis premise

Abortion is recognized and addressed as a reproductive health right by the state of Suriname.\(^\text{24}\)

With the accession to the CEDAW the state of Suriname has the legal obligation to realize optimal enjoyment of the women’s rights recognized by the CEDAW, including the reproductive health rights as part of article 12 of the CEDAW.\(^\text{25}\)

Domestic legislative action is required within the Surinamese jurisdiction especially since the existing criminal laws on abortion in Suriname are inconsistent with women’s right to an abortion as part of their reproductive rights.\(^\text{26}\)

This thesis is built on the major premise that in the exercise of their reproductive health rights women do not have access to safe and legal abortion services due to the lack of clarity on the legal status of abortion in the Surinamese jurisdiction. Maximum clarity on the legal status can only be reached by repealing the criminal laws on abortion and subsequently enact effective administrative and health laws on the matter of abortion.

This premise is based on two minor premises: (1) that the legal approach to abortion is unclear, it is either a crime and punishment or a human rights approach; (2) that the rule of law principle, which is the basis of the democratic state Suriname is undermined by the state’s arbitrary and unclear (non) enforcement decision of the criminal laws on abortion.


\(^{25}\) Supra note 13

\(^{26}\) UN CEDAW, 37d Sess., 770th Mtg., CEDAW/C/SR.770 (A), (2007) at para. 30
1.4 The research method

The research to be conducted in the light of the thesis premise will be a legal analysis following the deductive legal reasoning method. The legal analysis of the matter of abortion in the Surinamese jurisdiction will be conducted based on, for example, (1) Court rulings, (2) claims made by authoritative bodies, such as the CEDAW monitoring Committee and (3) the rule of law legal principles. Concrete decisions, recommendations, claims and comments made by courts, authoritative bodies and doctrine together with state’s claims related to abortion will be used as premises according to which the Surinamese circumstances regarding abortion will be analyzed.

The result of this deductive analysis will be presented as the research conclusions. The rationale for conducting a deductive legal analysis instead of an inductive legal analysis is that Suriname has a civil law legal system in which the deductive legal analysis is the form of legal analysis that is followed. Because of the familiarity with this method of legal analysis within the Surinamese jurisdiction it is plausible that the persuasiveness of the thesis would be increased and that the claims, conclusions and recommendations of this scholarly work will have a greater impact on the necessary legal reform with regard to abortion.

Except for the legislative instruments in effect in the Surinamese jurisdiction all other used supportive evidence possesses only persuasive power. This is an essential characteristic of the civil law legal system operational in Suriname. The sources for the legal analysis will include but will not be limited to, legislation, treaty law, case law, literature and empirical data. The validity of the thesis premise will be analyzed according to the two explicitly conveyed state’s views on the existence and impact of the criminal laws on abortion in Suriname in the context of the CRC and the CEDAW.
2 The legal framework on abortion in Suriname

2.1 Characteristics of the Surinamese legal system

Suriname has a Civil Law Legal System which is based on the codification of laws. Contrary to a common law legal system, civil law legal systems do not grant the same authority to case law. A judgment does not receive a general applicable legal force but has only legal force between the involved parties. Furthermore, Suriname has a monistic system which means that within its jurisdiction national law and international law (after ratification) form a unity.

Treaty law is the highest source of law in the Surinamese jurisdiction. International legal instruments are categorized as self executing instruments; those are instruments with provisions which grant individuals’ rights by addressing entitlements directly to individuals for example ‘Everyone has the right to….’ The second category of international legal instruments is the non-self executing instruments. Those instruments are instructive norms towards the state party, but indirectly individuals can make human rights infringement claims based on the provisions that are formulated as state party obligations, such as, ‘States Parties shall…’

The second highest source of law is domestic legislation. Domestic legislation is comprised of the Constitution, the Codes and separate legislative instruments. Article 144 of the Constitution prescribes that the unconstitutionality of domestic legislation can only be challenged before the Constitutional Court. Unfortunately, this Court has never been established. Finally, customary law, doctrine, and jurisprudence within and outside the Surinamese jurisdiction referred to as jurisprudence are used as a supportive source of law.
2.2 International Law

This research has identified five most relevant international legal instruments applicable to the Surinamese jurisdiction in the context of abortion. The first instrument is the United Nations International Covenant on Civil and Political Rights (“ICCPR”), particularly article 1(1); the right to self-determination, article 3; the right to non discriminatory distinctions between males and females, article 7; the right to be free from torture, cruel, inhumane and degrading treatment or punishment, article 9(1); the right to security of person; the right to privacy and protection against unlawful interference with ones private sphere, article 17, and finally article 23(1); the right to protection of the family as a natural and fundamental group unit of society. Suriname Acceded to the ICCPR on 28 march 1977.

The second instrument is the American Convention on Human Rights (ACHR), “Pact of San Jose, Costa Rica”, article 4(1); the right to have one’s life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. Article 5(1); the right to have one’s physical, mental and moral integrity respected and sub (2) the right to be free from torture, cruel, inhumane and degrading treatment or punishment. Article 11; the right to privacy and article 17(1); the right to protection of the family as a natural and fundamental group unit of society. Suriname acceded to the ACHR on 12 November 1987.

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29 Supra note 4
30 General Secretariat, OAS (Original Instrument and Ratifications); OAS, Treaty Series, no. 36; UN Registration: 08/27/79 no. 17955 Vol.
The third instrument is the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”)\textsuperscript{31} in particular article 12; the right to the highest attainable standard of health. In the context of pregnancy related health care, this research argues that the highest attainable standard of health care should also include safe abortion services. Suriname acceded to the ICESCR on 28 March 1977.\textsuperscript{32}

The fourth instrument is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).\textsuperscript{33} The relevant articles are article 2(g) instructing the State party to repeal all national penal provisions which constitute discrimination against women and article 12(1), instructing the State party to take all appropriate measures to ensure appropriate health services related to family planning and in sub (2), to take all appropriate measures to ensure appropriate health services in connection with pregnancy. Suriname acceded to the CEDAW on 31 March 1993.\textsuperscript{34}

The fifth instrument is the Convention on the Rights of the Child (CRC).\textsuperscript{35} For the legal analysis of abortion article 6 of the Convention has relevance in the Surinamese context. Article 6(1) makes reference to the inherent right to life every child has, and 6(2) makes reference to the states Parties duty to ensure to the maximum extent possible the survival and development of the child. Suriname ratified the CRC on 31 March 1993.\textsuperscript{36}

\begin{footnotesize}
\textsuperscript{33} Supra note 12
\textsuperscript{34} Supra note 10
\textsuperscript{35} Supra note 8
\textsuperscript{36} Supra note 5
\end{footnotesize}
The ICCPR and the ACHR are self-executing legal instruments and would be effective tools in a general women’s rights claim because these instruments give entitlements directly to individuals, in this case to women. In the articulation of the articles in those two treaties every individual has the right to specific entitlements. The emphasis of this research will be on the impact of the Criminal Code provisions on abortion and government’s accountability for the subsequent violations of women’s right to reproductive health.

The main international legal instrument on which the research will be based is CEDAW, articles 2(g) and 12, which is a non-self executing instrument that requires specific State’s action. The States action includes enactment of transformation law to translate the CEDAW principles in domestic law as well as policy reforms and the reforms at the institutional level. A non-self executing legal instrument is comparable with a “target-duty” imposing legal instrument and similarly does not invoke an individual right for individuals but merely imposes a legal duty on the state.

2.3 Constitutional Law

The Constitution is a domestic legal instrument with instructive provisions towards the State. The Constitution does not regulate the direct interaction between the state and private actors or among private actors. On one hand it sets the framework within which legitimate regulation needs to be developed and on the other hand it sets the framework for state actions and duties. It is for this reason that private individuals can not make direct entitlement claims based on the Constitution. Claims open to individuals are challenges to the statutes and public policies based on their unconstitutionality and claims that the state failed to fulfil its constitutional duties. These claims

can only be made before the Constitutional Court, as legally required by article 144 of the Constitution. A third type of claim this Court is competent to hear and decide on is the claim that a domestic legal instrument or public policy is inconsistent with an international legal instrument that has become national law and equivalent to constitutional law.

The Surinamese court system lacks a Constitutional Court. This research notes that since there is no national remedy available to challenge the inconsistency of domestic laws with human rights, due to the absence of a Constitutional Court, the only possibility open to challenge the inconsistency of the domestic legal instrument with international instruments is by filing a petition against the state Suriname directly at the treaty law monitoring institutions. In general this would have to be before the Inter-American Commission on Human Rights (IACHR). 38 Specific legal challenges, for example, related to ICCPR rights violations petitions can also be filled at the monitoring ICCPR Committee because Suriname has ratified 39 the Optional Protocol to the International Covenant on Civil and Political Rights. 40 This option is not possible in, for example, the context of CEDAW because Suriname has not ratified the optional protocol to CEDAW.

Article 36 (1) of the Constitution of Suriname recognizes that every individual has the right to health. Sub (2), instructs the state to take measures to improve the public health status by systematically improving the living and work circumstances and provides information aiming at the protection of health. 41 Article 16(1) grants everyone the right to security of the person 42 and

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38 Supra note 4 at article 33(a), 40 and 44
41 Article 36(1) Everyone has the right to health. (2) The state takes measures to improve the public health status by systematically improving the living and work circumstances and provides information aiming at the protection of health
article 8(2) grants everyone the right to be free from discrimination including on the basis of their sex. This right implies an instruction norm that the state has to take all measures towards the realization of this right.\(^{43}\) In the light of the right to be free from discrimination the Criminal Code was amended in 1971 with the inclusion of article 126\(^{\text{bis}}\) which defines the term ‘discrimination’ as all forms of distinction, any exclusion, restriction, differential or preferential treatment, that aims at or results in the impediment or nullification of the recognition, enjoyment or exercise of ones human rights and fundamental liberties on the basis of equality.\(^{44}\)

### 2.4 Criminal Law

In Suriname abortion is governed by the Constitution, the relevant international legal instruments and criminal law. Among these three areas of law constitutional law and international law are supportive and complementary to each other, but the criminal law contradicts both of them. Criminal law has by its nature a negative approach; it tends to be a rather crude instrument that regulates the more severe violations of standards of social conduct and safety.\(^{45}\) According to the Black’s Law Dictionary, criminal law is the body of law that defines offences against the society at large. It regulates the methods of how suspects are investigated, charged, and tried, and finally how to establish punishment for convicted offenders.\(^{46}\)

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\(^{42}\) Article 16(1) Everyone has the right to liberty and security of the person

\(^{43}\) Article 8(2) No one shall be subject to any form of discrimination related to birth, sex, race, language, religion, origin, education, political opinion, economical or social circumstances, or any other status.

\(^{44}\) Article 126\(^{\text{bis}}\) Discrimination includes any form of distinguishing, every exclusion, restriction or preferential treatment, with the aim or resulting in, that the recognition or the enjoyment or the exercise, on equal footing, of human rights and the fundamental liberties in the area of politics, economics, social or culture or other areas of public life are nullified or impugned.


\(^{46}\) *Black’s Law Dictionary*, 8\(^{\text{th}}\) ed., s.v. “Criminal Law”
Human rights on the other hand are defined by The Black’s Law Dictionary as the freedoms, immunities, and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they live. It is a well known fact that where human rights are focused on exercising rights, criminal law is focused at restricting behaviour. In conclusion this brief analysis shows that the criminalization of abortion makes it impossible to officially address abortion as a reproductive health right.

The criminal laws prohibiting abortion distinguish between three major target populations: the pregnant woman, healthcare providers and every other person not belonging to the two previous categories of persons. In relation to women the illegal activities are, seeking an abortion, performing an abortion and consenting to an abortion. In relation to service providers, offering abortion services, promoting abortion services, referring to abortion service providers and performing abortion services are criminal activities. And finally in relation to every other person, the offences vary from aiding and abetting to acts resulting in an abortion and the death of the fetus.

A woman can be prosecuted for four indictable offences according to the Criminal Code provisions 362, 368, 355 and 70. Those indictable offences are grievous bodily harm including expulsion or death of the fetus. Article 70 makes a prosecution possible based on attempt to commit one of the offences formulated in the articles 362, 368 and 355. Article 72 (1) defines that a perpetrator is anyone who commits the act by herself or can be an intellectual perpetrator and an executor of the act or participation as principal in the second degree in the commission of

47 Ibid. “Human Rights”
a criminal offence. Sub (2) defines a second category of perpetrators. Those who provoke the perpetration of a criminal act by providing gifts, making promises, by authority abuse, using violence, by threatening or misleading or by enabling the execution of the crime by facilitation, providing tools or information.

Article 73 defines two categories of persons who can be qualified as an accomplice. The first category is those who intentionally assist in the execution of the criminal act and the second category are those who intentionally enable the execution of the crime by facilitation, providing tools or information. A healthcare provider can be prosecuted based on six indictable offences and one misdemeanour. Related to the indictable offences there are also five sub articles providing circumstances that could constitute a ground for an enhanced sentence. The indictable offences are article 292 which criminalizes the conduct of providing a minor under the age of 16 with contraceptives or anything that can cause a termination of the pregnancy and the articles 362, 356(1), 357(1), 368 all related to grievous bodily harm, expulsion and death of the fetus. The capacity of Midwife, medical doctor or pharmacist and the causal death of the pregnant woman are grounds for enhancing the sentence of the indictable offences which are regulated in the articles 369, 368, 358, 357(2) and 356(2). And also article 70 that criminalize the attempt of all indictable offences is applicable to healthcare providers.

The misdemeanor is articulated in article 534 which criminalizes the act of exhibiting commodities that could terminate a pregnancy as well as the act of providing such commodities spontaneous or upon request and also the act of referencing where those commodities are available. Also the articles 72 and 73 which define the different forms of perpetrator and accomplice are applicable to the service provider. And finally there is article 76 sub. 1 which
acknowledges that besides a natural person also a legal body both in private and public law can commit indictable offences.

The third category of individuals identified by the Criminal Code against who an abortion related prosecution can be undertaken are those who are neither the pregnant women nor the healthcare providers named by the law. Except for the articles 358 and 359 of the Criminal Code provisions the remaining 10 articles applicable to healthcare providers are applicable to this category of individuals.

Besides the criminalization of certain acts, the Criminal Code does provide the accused with defense claims, to avoid a conviction or severe punishment. The defense claims recognized by the Criminal Code are divided in two categories. One category relates to the substance of the act and is referred to as the justification grounds which are article 65, force majeure (circumstances beyond ones control); article 66(1), self-defense; article 67, implementation of a legal regulation, and article 68, actions on authority of the government. A successful defense will lead to the acquittal of the accused based on the finding that the indicted offense laid at account of the accused has not been proven.

The other category of defence claims relate to the question of guilt, to reduce or exclude the sentence. These defences recognized by the Criminal Code are, article 66(2), self-defence indulgence; article 55, *non compos mentis* because of psychological impairment, and the on jurisprudence based defence ground, absence of *culpa*, introduced by the Dutch Supreme Court in the case registered as “Melk en Water arrest of 1916”\(^\text{48}\) (Milk and Water judgement of 1916). In general the Dutch Supreme Court reasoned that even in the case where the legislator did not

include guilt as an element of the criminal offence to be proven, if complete absence of guilt is proven it would be against the principle of *geen straf zonder schuld*, meaning that one can not be punished for a committed indictable offence if proven completely innocent. Successful use of one of these grounds which entails that the judge finds that the accused has committed the crime, however, due to personal circumstances qualifies for a sentence reduction or for acquittal or to the dismissal of all further prosecution.

### 2.5 The Rule of Law principle

Technically a prosecution following the death of the unborn child would be legitimate in Suriname. But this would be a circumstance in contrast with the state’s claim of non-enforcement of the criminal laws on abortion made in the combined initial and second state report\(^{49}\) submitted to the CEDAW monitoring Committee by Suriname. In the context of article 12 (health) of CEDAW Suriname reported under the heading of reproductive health that abortion is punishable according to the Penal Code. Punishable are among others women causing the termination of their pregnancy or the death of their fetus, and persons who intentionally cause the termination of a pregnancy or the death of a woman’s fetus, irrespective of the woman’s consent. The report continues with the statement that a blind eye is turned towards abortion in Suriname and that generally abortion is performed safely and the report concludes with the notion that there is no data available on abortion related complications.

According to its constitutional law, Suriname is a democratic constitutional state. This research claims that functioning as a constitutional state requires compliance with the “rule of law” principle, meaning that every legal subject has to abide by positive law as positive law

\(^{49}\) *Supra* note 11
applies to every legal subject equally without any distinction. The Constitution of Suriname distinguishes three major aspects of the “rule of law” principle.

The first aspect is the principle of legality. This principle entails that Government’s action must be grounded on a general law, state’s action should also be in conformity with the law and restrictive laws are not allowed to have retroactive effect. The second aspect relates to civil rights and is based on the equality principle that requires an equal treatment of similar cases. This principle entails that every person is equal before the law and has entitlement to equal protection of the law without any distinction. The Constitution makes a distinction between the classical civil rights which are free from state’s intervention and the social rights which imposes a state duty to progressively realize these civil rights for every person within its jurisdiction. The third aspect is with regard to the separation of powers; the executive, legislative and judicial powers. The emphasis is placed on the impartial status of the judiciary.

The Black’s Law Dictionary defines the “rule of law” as: (1) a substantive legal principle (…); (2) the supremacy of regular as opposed to arbitrary power (…) Also termed Supremacy of law; (3) the doctrine that every person is subject to the ordinary law within the jurisdiction (…); (4) the doctrine that general constitutional principles are the result of judicial decisions determining the rights of private individuals in the courts (Supreme Court case law) (…); (5) Loosely, a legal ruling; a ruling on a point of law (the ratio decidendi of a case) (…).

50 This is a general requirement throughout the Constitution. See for example Article 1(1) and article 73 the requirement of approval from the legislator of the (multi)annual government’s policy document.
51 Article 45 of the Constitution of Suriname makes reference to the equality right. See also chapter V for the classical civil rights and chapter VI for the social rights.
52 Chapter XI of the Constitution of Suriname refers to the legislative power and chapter XII & XIII to the executive power. Chapter XV the articles 133-144 are dealing with the judicial power.
53 Supra note 46 “rule of law”
“rule of law” meaning provided in point (4) is not applicable to the Surinamese jurisdiction as Suriname has a civil law legal system.

It is without any doubt that the described legal circumstances around abortion in Suriname are challenging the rule of law principle in all its aspects. This tension between the principle and the legal status quo on abortion is best illustrated by DeCoste with the citation of Ronald Dworkin’s view on the point of law:

[T]he most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble those ends, except as licensed or required by individual rights flowing from past political decisions about when forced is justified.54

As formulated by Frederick DeCoste, the “rule of law” is the institutional practice of constraining power of, and through, the state.55 In this context the relevance of the Lex Certa principle in criminal law can be traced back to the prohibition to enact restrictive laws with a retrospective effect. The principle requires a clear and transparent criminal legal system in order to guarantee legal certainty, predictability and security for every individual. But by addressing abortion simultaneously as a criminal offence and a reproductive health right leaves the justiciable in doubt on the legal status of abortion in Suriname.

Adding to this confusion is the decision at the operational level within the executive realm to declare the whole set of criminal legal instruments on abortion inapplicable, and

54 F. C. DeCoste, On coming to law: An Introduction to Law in Liberal Societies, 2d ed. (Ontario: LexisNexis Canada, 2007) at 200
55 Ibid. at 197
therefore non-enforceable. But by not-enforcing the criminal laws the state does not abide to the positive criminal laws on abortion. All these circumstances related to the criminal legal framework on abortion have created the lack of clarity on the total legal framework on abortion.

The lack of clarity undermines all three previously described aspects of the “rule of law” principle as set out in the Constitution of Suriname. For example, the aspect of legal certainty relates to the positive law on abortion which is absolute prohibition by the Criminal Code but according to the higher sources of law, the Constitution and treaty law, abortion is a women’s right as part of the right to health and more specific the right to reproductive health. This research claims that both women in need of an abortion and healthcare providers are left in doubt about the legality of the procurement of an abortion due to the application of a double and contradicting legal approach to abortion in Suriname.

With respect to the lack of predictability the research argues that predictability relates to the application of the law. Technically the criminal law can be applied legitimately to instances where a pregnancy is terminated. The practice, though, is non-enforcement of the criminal laws on abortion as the result of an arbitrary vague state’s decision at the operational level of the executive power. Subjects to the criminal law on abortion lack information on the circumstances in which the law will or will not be enforced.

Furthermore, the circumstance of non-enforcement is contrary to the absolute prohibition not supported by legislative instruments. Arguably this circumstance makes the practice an act of

56 The rule of law is a general requirement throughout the Constitution. See for example Article 1(1) and article 73 the requirement of approval from the legislator of the (multi)annual government’s policy document; The Constitution of Suriname article 45 makes reference to the equality right. See also chapter V for the classical civil rights and chapter VI for the social rights; Chapter XI of the Constitution of Suriname refers to the legislative power and chapter XII & XIII to the executive power. Chapter XV the articles 133-144 are dealing with the judicial power.
non-compliance with the law that does not provide women the entitlement to an abortion. This leads to the aspect that relates to the liberty and security of the person. Regarding this aspect the research argues that the central issue here is the protection of individuals against arbitrary criminal law actions such as investigations, prosecutions and charges due to, for example, sudden changed public views on a specific abortion related issue. One can produce multiple plausible reasons for an unannounced and sudden alteration of the decision of non-enforcement of the criminal laws on abortion.

The fact that the decision of non-enforcement is an unpublished “policy” decision and therefore not formalized exempts the state from the obligation to publicize a decision of alteration of the non-enforcement decision. The risk of sudden enforcement of the existing criminal laws remains as long as the laws are on the books. A defense based on the non-enforcement decision will not prevent the accused against a police investigation a prosecution or even a trial. The legal analysis in the sections two and three will build and expand on these aspects of the “rule of law” principles.

2.6 Conclusions

This section will specifically focus on the aspect of compliance with the law within a civil law tradition and will examine the interrelation between constitutional law, treaty law and criminal law. The analysis will be shaped by the dominant characteristic of the codification of the law in a civil law legal system, the general principal of the rule of law, and that the highest legal authority is given to the areas of constitutional law and treaty law in the Surinamese jurisdiction.

The premise of this specific section is that within the Surinamese jurisdiction article 24 and 36 of the Constitution grant women the right to health and imposes a legal duty on the state to facilitate the realization of this right. Also treaty law, in particular, the ICESCR article 12 and
the CEDAW article 12 grant women the right to the highest attainable standard of health and the right to non-discriminatory access to health care. But due to the criminal law restrictions applicable to abortion women lack non-discriminatory access to reproductive healthcare and therefore do not enjoy the highest attainable standard of pregnancy related health. The following diagram is an impression of the three most relevant areas of law related to abortion analyzed by this research.

![Diagram](image-url)

**Criminal law** prohibits abortion completely. There are no legal grounds allowing abortion. General defense claims can be called upon but will not prevent a prosecution. Subject to prosecution are all individuals involved in the procurement of an abortion including women and health care professionals.

**Treaty law** (human rights legal instruments) applicable to Suriname explicitly recognize abortion as a reproductive health right and urges the state to realize this right as an independent right but also in the context of the realization of other rights such as the right to security of the person.

**Constitutional Law** is premised on the rule of law principle that no one is above the law. It imposes a legal duty on the state to promote, protect and realize civil rights for every individual, including the right to health which includes access to abortion as a reproductive health right.

*Fig. 2: The current inter-relationship between criminal law, constitutional law and treaty law in Suriname*
The claim made by this research that the states approach to abortion has changed from crime and punishment to human rights\textsuperscript{57} finds support in the historical analysis that focuses on the enactment dates of the various legislative instruments on abortion. However, a legislative analysis based on the rule of law does not necessary support the shift of approach. As set out in the previous paragraphs of this section constitutional law and treaty law do have a higher authority than criminal law in the Surinamese jurisdiction. Consequently criminal law, which is codified in 1910, needs to be aligned with the more recent Constitution of 1987 and treaty law that has become effective after 1910. This is not the case with the criminal laws on abortion. Despite the evidence that the state recognizes abortion as a reproductive right it has remained reluctant to repeal the criminal laws on abortion.

Article 24 of the Constitution states that the state Suriname is responsible for the creation of circumstances in which the optimal satisfaction of the basic needs can be met related to work, food, healthcare, education, energy, clothing and communication. In the context of abortion, article 24 imposes a legal duty on the state to create an enabling environment in which women can access safe and legal abortion services as part as their reproductive healthcare, directly tied to an existing pregnancy. This claim also finds support in the articulation of article 36(2) of the Constitution that the state has to increase the public healthcare by systematically improving the life and work conditions and through health promotion and education. The state has a constitutional duty to ensure the highest attainable standard of pregnancy related health for women.

\textsuperscript{57} See sub-section 1.2 “Analytical approach” at 5, para. 2
To comply with the Constitutional legal duty, statutory law is essential to prevent the state from breeching the legality requirement of the rule of law. The only statutory laws in force on abortion are the prohibiting criminal laws that date back to 1910. This circumstance places the state in the legal disposition of effectively complying with its Constitutional duties regarding abortion. The only officially reported response to this circumstance by the state is the non-enforcement of the criminal laws on abortion. The state has failed to take legislative, policy and systemic actions in its attempt to comply with its legal constitutional duty to ensure optimal access to the highest attainable standard of health for pregnant women.

In the context of the compliance with the law analysis, this research concludes that the state Suriname failed to comply with Constitutional law and treaty law at the domestic legislative level with its reluctance to repeal the criminal laws on abortion which are conflicting with women’s right to health and the state’s obligation to enable women’s access to health. Instead, the existing criminal laws are legal instruments used by the state to impede women’s access to health and thus the enjoyment and exercise of the right to health by women. Furthermore, the decision of non-enforcement of the criminal laws on abortion is an act that would need to be followed by legislative action in the form of repeal of the laws which are not being enforced.

Compliance entails among others fulfilling legal duties and the prohibition to legitimize unlawful state action as being in the best interests of a particular section of the population. This research argues that only legislative follow up can provide the decision of non-enforcement of the criminal laws on abortion the status of legality. Ultimately the inability of the state to enact

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58 Constitution of Suriname (S.B. 1987 no. 116)
59 Supra note 12 at article 2(g)
60 Ibid. at article 2(f) and 12(1)
statutes regulating the matter of abortion to ensure ready access to safe and legal abortions is a failure within the sphere of non-compliance with the law, since the Constitution is the legal framework that requires statutory laws for the implementation of rights and obligations. This failure, though, is the result of the lack of an unanimous legal interpretation of the legal status of abortion in Suriname.

As argued before the lack of clarity on the legal status of abortion is due to the criminal legal framework that is not consistent with the Constitution and treaty law. Except for the substantive inconsistencies of the criminal law with the Constitution and treaty law, there is also a lack of clarity and predictability attached to the criminal legal framework. There is a major discrepancy between the criminal law and the application of the law as the result of the decision of non-enforcement of the criminal laws. This circumstance is in itself a form of non-compliance with the rule of law principles at the level of the government.

Persons vulnerable to a prosecution, especially women and healthcare providers, are left in complete uncertainty about circumstances in which an abortion will not be prosecuted. This claim is based on three facts, the text of the criminal laws which prohibits abortion without exemption, the state report in the context of the CRC which claims that abortion is allowed in case the life of the pregnant woman is endangered and the state report in the context of CEDAW claiming that none of the criminal laws on abortions are enforced to allow women access to abortion as their reproductive health right.

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61 Supra note 2
62 Supra note 6
63 Supra note 11
The research claim of uncertainty also finds support in the empirical data that suggests that an estimated high number of unreported abortions are procured annually and that abortions are assumed to contribute significantly to the maternal mortality and morbidity rates. Also, reports in the context of the prohibiting criminal laws claim that data related to the procurement of abortions, in general, is lacking.64

The circumstance around inconsistency of the criminal law with the Constitution and international legal instruments becomes more complex at the national level with the absence of the Constitutional Court. Individuals affected by the criminal laws do not have a national remedy to challenge the laws on their unconstitutionality, which in itself is a impediment of the rule of law principle leading to severe infringements of, for example, women’s right to security of person.

3 An empirical overview of the matter of abortion in Suriname

Available empirical data informs the research that the availability of defense claims together with the policy of non-enforcement of the criminal laws on abortion are not sufficient to guarantee access to professional, readily available and legal abortion healthcare services. Argued from the basic principle of the rule of law, this research claims that the absence of available safe and legal abortion services result from a lack of clarity and predictability of the criminal legal framework on abortion. Refraining from offering abortion healthcare services is abiding by the criminal law by the healthcare providers in order to avoid a possible prosecution and its harsh consequences. The state on the other hand claims that it does not enforce the criminal laws on abortion indicating that by doing so it creates an enabling environment for women to exercise their right to reproductive health.

Although most of the available empirical data is not validated by the National Health Information System of Suriname (NHIS) and therefore not official, it will be used to illustrate the adverse impact the crime and punishment approach to abortion has on the quality of reproductive health care for women. This data will also give an indication on how the criminal laws on abortion make women’s health more vulnerable. It is a notorious fact that the lack of official validated data on abortion will generally impede the monitoring ability of the matter of abortion. Neither the legal system of Suriname nor the health system has reliable data on the matter of abortion. For the legal system the lack of data is due to the fact that there are no criminal prosecutions.65

65 Supra note 11
The lack of data within the health sector results from the fact that abortions are not registered as abortions but for example as dilatation and curettages (D&C) by hospitals or polyclinics. Curettage is defined by the American Heritage Medical Dictionary 2007, as the removal of tissue or growths from the interior of a body cavity, such as the uterus, by scraping with a curette or curettement.

Some surveys conducted in the area of sexual and reproductive health, provide a picture of the situation with regard to abortions in Suriname. A 1992 contraceptive prevalence survey suggests that approximately 11% of all women in the age range 15 to 44 have had an abortion. 1997 data provided by the Family Planning Foundation, “Stichting Lobi”, revealed that an estimated 8,000 to 10,000 abortions per year take place in Suriname. A sample survey among Stichting Lobi clients revealed that 34% had had at least one abortion.

Because abortion is criminalized and therefore illegal the health system has no official facilities that offer safe legal abortion services. This situation constitutes great risks to women’s health in general and in particular to their reproductive health. Besides the impact on women’s health, these prohibiting laws also impose a great risk on the lives of women.

A 2006 sexual and reproductive health and rights report produced by the organization “Development Alternatives with Women for a New Era” (DAWN) indicates that there is an estimated maternal mortality rate of 153 per 100,000 live births in 2004 in Suriname. The DAWN

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66 Third periodic report of Suriname, CEDAW/C/SUR/3, (2005), at 48
68 Jagdeo, Tirbani, “Contraceptive Prevalence Survey” (Paramaribo, Suriname, 1992)
69 Leckie, G., “Reproductive Health and Rights of Adolescents in Suriname” (Paramaribo, Suriname, 1997)
report also suggests that unsafe abortions make an important contribution to maternal deaths in many countries, including Suriname. The presented survey results and reports clearly indicate that there is a gap between the prohibition by the criminal abortion laws and every-day practice. The research argues that this gap has a serious impact on, for example, women’s health but that the severity of this impact can be mitigated by increasing women’s ability to access safe and legal abortion through shifting from a crime and punishment approach to a public health approach.

In 2005, the third state submitted CEDAW country report states that the abortion criminal laws are still on the books and that abortion has remained punishable by law. (Penal Code, Article 309, paragraphs 355-358). This research will not get into an abortion method analysis, but wants to shed some light on the implications for the state to develop effective abortion policies due to the criminalization of abortion.

In 2003, the World Health Organization explicitly indicates that research shows that D&C is not the safest method of abortion. In 2005, Suriname reports that D&C is the predominantly used abortion method. It is for this reason that the research argues that due to the criminal prohibition of abortion government institutions responsible for the quality of health and healthcare are not able to introduce more modern and safer methods of abortion such as vacuum aspiration or medication abortion. The state reported that the Dilatation and Curettage (D&C) abortion method is procured in hospitals for the larger part.

71 Development Alternatives with Women for a New Era (DAWN), Sexual and Reproductive Health and Rights in the English-speaking Caribbean, P. 2006
72 Supra note 66
74 Supra note 66
75 Ibid.
The state report also mentions that abortion related healthcare is not covered by health insurance. According to the Medical Registration Department of the Ministry of Health, the price for a D&C procedure increased about 500% between 1997 and 2002 (SRG 50,000 - SRG 450,000). The issue of the financial burden in seeking safe abortions by women and the impact that has on women’s health and life is also addressed in the jointly written 1998-2002 report on critical issues by the Women’s Rights Centre and Ultimate Purpose and which they submitted to the CEDAW Committee.

In their report the two organizations report that the family planning agency estimated the abortion ratio at a 1:1 with live births. The joint report also claims that the Legalization of abortion and the provision of counseling services would improve women’s lives considerably. Legal abortions would most likely be covered by health insurance and this would enable women to obtain safe abortions and decrease the recourse to unsafe abortion practices which would save women’s lives.

A study conducted in 2004 shows that 45% of health care workers in a peri-urban area in Suriname considered abortion murder, and that it should be prohibited. This data is indicative that a significant percentage of healthcare workers perceive abortion as behaviour liable to punishment. Also qualifying abortion as murder indicates that the act of abortion is viewed as a violation of the right to life of the fetus and not as a reproductive health right of the woman. This wide perception is also indicative that this opinion and its related attitude may constitute a barrier for women in need of an abortion at the operational level. In the light of the outcome of the 2004

76 Ibid.
78 Terborg, J., Grunberg, A. and Eiloof, D., Report on the Quality of Reproductive Health Services for Adolescents on Poli Clinics of the Regional Health Service, PAHO / Prohealth, Paramaribo, Suriname, P. 2004
study, this research argues that failure to effectively translate the shift from a crime and punishment approach to a rights approach to abortion in domestic legislation will make the realization of women’s right to the highest attainable standard of pregnancy related healthcare an impractical intention of the state.

3.1 Conclusions

This research is of the opinion that neither refraining from enforcing the criminal laws on abortion nor a partial decriminalization of abortion through the inclusion of some legal exceptions will result in achieving the goal of respecting women’s right to reproductive health including the availability and accessibility of ready, safe and legal abortion services. As long as abortion remains prohibited by the criminal laws, and thus illegal, tabooed and stigmatized, women in need of an abortion will continue to seek abortion healthcare services within unsafe clandestine environments.

The available empirical data on the matter of abortion provides sufficient information to inform the transferral process of abortion from the area of criminal law to the areas of health and administrative law. Irrespective of the state’s claim that abortions are procured in a hospital or clinical settings, the procurement remains clandestine due to its illegality. The estimated high rates of procured abortions in a clandestine sphere require urgent legislative action to recognize abortion as a legitimate reproductive right.

Abortion regulations would be most effective when enacted in the areas of administrative and health law covering aspects such as healthcare insurance coverage, quality standards of care, monitoring including data collection. These aspects are shown to impose high risks to women’s

79 Supra note 11
reproductive health by their significant contribution to the estimated high rates of maternal morbidity and mortality in Suriname. Those two areas of law will also enable the government to provide post abortion care including contraceptive counseling and supply, as well as to identify those subgroups of women who are at highest risk of unwanted pregnancy and therefore in need of contraceptive services.
4 Legal implications related to the state’s perception of abortion in the context of the Convention on the Rights of the Child

4.1 The protection of the fetal interests by the criminal laws on abortion

In the initial state report submitted to the CRC Committee the state claimed that it protects the right to life of the (unborn) child through the criminal laws in effect in the Surinamese jurisdiction that prohibits abortion.\(^{80}\) In this section an analysis will be conducted based the right to life as articulated in the CRC. Important to establish is whether the interests of a fetus, referred to as unborn child in the state report, are governed by the CRC.

The CRC defines a child as a human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.\(^{81}\) Important element of the definition for this research is the status of “human being”. Because the CRC does not define the qualification of “human being” reference is made to the foundation of international human rights law; the Universal Declaration of Human Rights (UDHR).\(^{82}\)

According to article 1 of the UDHR, “human beings” are born individuals with some inherently qualities.\(^{83}\) The definition requires a live birth, it articulates the presumption that human beings have the ability to act based on their inherently qualities such as reason and conscience. In the case of a fetus the requirement of a live birth is not fulfilled. Based on the

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\(^{80}\) Supra note 6

\(^{81}\) Supra note 8 at article 1


\(^{83}\) Ibid. at article 1.
elements of the definition of “child” under the CRC and UDHR the research argues that stretching the scope of the CRC to the unborn child lacks legitimacy. Therefore making the state’s interpretation and application of the right to life of a child too broad and inconsistent with the CRC.

Remarkably and to the contrary of the initial state report, in its second periodic report to the CRC Committee, the state made no mentioning of the criminal laws on abortion as a protective measure of the right to life of the (unborn) child. In the second section titled “Definition of the child” with sub-title “legal minimum ages” the state reports with reference to the legal minimum ages for legal and medical counseling, consumption of alcohol, sexual consent, marriage, and other affairs that even a fetus (unborn) child has the legal capacity to inherit, provided that it gets born alive. 84 The emphasis placed on “even” evokes the impression with the research that in 2005 the state came to the realization that a fetus is legally not recognized as a child.

The conclusions drawn from the analysis that the legal definition of “child” does not include the fetus finds further support in the historical analysis of article 4(1) of the American Convention on Human Rights by the Inter-American Commission on Human Rights in the Case known as the ‘Baby Boy’. 85 The relevant facts of the case are that the victim whose rights were claimed to be violated was “Baby Boy,” a fetus. The rights violation claim was the killing of the victim due to an abortion process. This was argued to be in violation of the right to life as granted by the American Declaration of the Rights and Duties of Man, as clarified by the definition of the

84 Second periodic report of Suriname, CRC/C/SUR/2, (2005), at para. 43
American Convention on Human Rights. The legal question in this context is whether a fetus is a bearer of the right to life as granted by article 4(1) of the American Convention of Human Rights.

The IAHRC in its reasoning presented a historical interpretation of article 4.1 of the American Convention on Human Rights as well as on the development process of the American Declaration of Bogota, which reintroduced the concept that the right to life shall be protected by the law from the moment of conception. The words “in general” in the existing text of the Convention is according to the deliberation reports, a compromise to accommodate the insistent views on the concept “from the moment of conception” with the objection raised since 1948 at the Bogota conference, that a number of American states do have legislation permitting abortion on the grounds of for example, saving the life of the woman and in case of pregnancy caused by rape.

The IAHRC concluded in the light of the historical interpretation of article 4(1) of the American Convention, that the right to life is granted to human beings and that the phrase “in general, from the moment of conception” does not mean that the drafters modified the concept of the right to life as defined in article 1(1) of the American Declaration of the Rights and Duties of Man, by expanding the concept of a living human being to a fetus developing itself in the womb of a woman. The IAHRC concluded its reasoning by underscoring that the inclusion of the words “in general” to the definition has substantive legal differences from a definition without those words.

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86 American Declaration of the Rights and Duties of Man, Bogotá, Colombia (1948)
87 Ibid.
4.2 Conclusions

Suriname is a State party to the American Convention on Human Rights and therefore article 4(1) of the Convention has to be read in conjunction with article 1 of the American Declaration of the Rights and Duties of Man. The state’s initial CRC report informs the research that the criminal laws on abortion in Suriname aims at protecting the interest to life of the fetus against life endangering acts like battery and acts causing death. The legitimacy of the aim of the Surinamese criminal laws on abortion becomes disputable after the outcome of the analysis that both the ACHR and the CRC covers rights and interests of human beings which includes life of born children and not a fetus or so called unborn children.

Because a fetus does not fit the definition of a human being it is not entitled to the right to life as formulated in the ACHR and the CRC. The abortion prohibition is a restriction of woman’s right to reproductive health and this restriction needs to be reviewed on its legitimacy. As indicated before both the Constitution and treaty law applicable to abortion acknowledge and grant women the right to health including reproductive health but to the contrary neither constitutional law nor treaty law recognizes a fetus as a human person and therefore those two highest sources of law do not provide a right to life to a fetus similar as they provide that right to human beings.

The aim of the state to protect the fetal interest in life is in itself a legitimate state’s concern. It is for this reason that it is not the state’s interest in protecting the fetal interest in life that is under scrutiny, but the measure to realize the protection. This research argues that

attempting to achieve this goal by restricting women’s lawful rights to reproductive health will not pass the challenge of inconsistency with constitutional law or treaty law.\textsuperscript{89}

The state’s decision to protect a fetus’ interest to life at the legal hierarchy level of criminal law lacks the authority to override women’s human rights which are provided at the legal hierarchy level of constitutional and treaty law in the Surinamese jurisdiction. It is also for this reason that the restriction by criminal law of women’s right to reproductive health by means of prohibiting abortion, aiming at the protection of the life of the fetus, is argued to be illegitimate and unconstitutional. According to international human rights law, restriction of certain human rights is permissible if such restrictions are necessary to achieve overriding objectives such as the rights of others.\textsuperscript{90}

The state Suriname claimed in its CRC initial report that by prohibiting abortion it protects the interest in life of the fetus.\textsuperscript{91} The research furthermore argues that consistency with constitutional law and treaty law can be achieved only on the basis of a common understanding that the fetal interest to life can not be equated with the human right to life which is inherent to human beings. Nevertheless, the state’s interest in the protection of prenatal life can be very well achieved without violating women’s rights, through measures such as the provision of prenatal care and steps necessary to prevent recurrent miscarriage.

\textsuperscript{89} According to article 103 of the Constitution agreements with other powers and international organizations shall be concluded by or with the authority of the President, and insofar as the agreement requires shall be ratified by the President. The National Assembly shall be notified of such agreements as soon as possible; they shall not be ratified and they shall not come into effect until they have received the approval of the National Assembly. Article 105 provides that the provisions of the agreements mentioned in article 103, which may be directly binding on anyone, shall become in force upon promulgation. And finally article 106 stipulates that legal regulations in force in the Republic of Suriname shall not apply if such application should be incompatible with provisions of agreements which are directly binding on anyone

\textsuperscript{90} Supra note 45 at 157

\textsuperscript{91} Supra note 6
5 Legal implications related to the states perception of abortion in the context of the Convention on the Elimination of all Forms of Discrimination against Women

5.1 The legal force of CEDAW in Suriname

Based on article 106 of the Surinamese Constitution legal regulations in force in the Surinamese jurisdiction can not be enforced if inconsistent with provisions of agreements which are directly binding anyone (self-executing international legal instrument). Article 105 in conjunction with article 103 stipulates that provisions of the agreements with other powers and international organizations which may be directly binding every individual receive domestic force upon promulgation after being concluded by or on behalf of the President, and depending on the agreement requirement; the ratification by the President.

According to article 104 Parliament has to be notified of such an agreement without undue delay. The agreement cannot be ratified and will not come into effect without prior approval of Parliament. According to the combined initial and second periodic state report to the CEDAW Committee, the CEDAW was adopted by the Council of Ministers on April 2, 1992. Upon adoption Parliament approved the CEDAW on October 21, 1992 and in March 1993 the President ratified the Convention without any reservation and ultimately the CEDAW entered into force in Suriname on March 31, 1993. Finally, with the established that the CEDAW is in full effect in Suriname, this section will focus on the legal implications this has on the

92 Supra note 11 at 3
93 Council of Ministers missive no. 213/R.v.M., April 13, 1992
95 Memorandum S.G. No. LA41TR/221/1(4-8), 21 April, 1993
matter of abortion in conjunction with article 106 and article 144 of the Constitution of Suriname.

In the context of the right to the highest attainable standard of health, article 36(1) of the Constitution of Suriname grants everyone the right to health. 96 Similarly to article 36(2) the state has the legal duty based on article 12 of the CEDAW to ensure the elimination of all discriminatory factors that hinder women’s access to healthcare. This includes barriers to healthcare related to family planning and pregnancy. 97 In light of the right to health this research argues that the prohibiting criminal laws on abortion are a legislative barrier targeting a healthcare provision exclusively used by women and thus violating their right to reproductive health. According to article 106 this means that the criminal laws on abortion are inconsistent with both constitutional law and treaty law and therefore theoretically not enforceable.

The state’s claim that the criminal laws on abortion are not enforced 98 is argued to be consistent with article 106 of the Constitution of Suriname, but not sufficient to be qualified as complete compliance with the Constitution. The state needs to follow up with legislative actions since the CEDAW is not a self-executing treaty. CEDAW provides instruction norms to the state party to enable women to exercise their rights optimally. 99 According to article 144 of the Constitution of Suriname domestic laws and government policies inconsistent with the Constitution and treaty law are not only non-enforceable, but also lose their legality which should be followed by the repeal of the inconsistent legal and policy instruments.

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96 Supra note 58 at article 36
97 Supra note 12
98 Supra note 11
99 Supra note 12 at article 24
In this light reference is made to Alicia Yamin’s article on accountability in applying a human rights framework to health. Based on an United Nations publication “Claiming the Millennium Development Goals: A Human Rights Approach”, which claims that the *raison d’etre* of the rights-based approach is accountability”, Yamin argues that to achieve effective accountability in health it is necessary to move beyond both punishing individual perpetrators and looking solely at national states.

Through this approach this research analyses the effects of the criminal law and the role of the state and other entities on women’s ability to exercise their human right to reproductive health. By using a human rights approach to criminal law this research will furthermore examine the necessity of repealing the criminal laws on abortion in Suriname in order to enable women to exercise their right to reproductive health.

### 5.2 Abortion reported as a reproductive health right of women

Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly on 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. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.

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102 *Supra* note 12


In its combined initial and second periodic CEDAW country report of 2002, Suriname stated under the header “Reproductive Health”, that

According to the Penal Code of Suriname, abortion is a punishable act (Articles 309, 355-258). Punishable are among others, women who intentionally cause the abortion or death of their fetus, and the persons who intentionally causes the abortion or death of a woman’s fetus, with or without her permission. A blind eye is turned to abortion in Suriname, and it is generally performed safely. There are no data available on complications owing to abortion.

The state’s claim that it turns a blind eye towards abortion is a recognition and acknowledgement of abortion as a reproductive health right to the extend that the claim indicates that the state admits that enforcing the criminal laws on abortion would be inappropriate since that would unduly hinder women in exercising their right to reproductive health.

During the CEDAW Committee’s examination of the combined initial and second country report, the chairperson, Ms. Abaka, posted the critical question why the law criminalizing abortion was retained if a blind eye was turned towards it. No answer was given to this question by the state party representatives but to this date the criminal laws on abortion are still on the books. In the third CEDAW country report of 2005 the state reported to have established a Committee on Gender Legislation (CGL).

According to the third state report the CGL made law reform recommendations to the Minister of Home Affairs but did not make any recommendation to amend or repeal

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105 Supra note 11
106 Ibid.
108 Supra note 66 at 8-9
the abortion laws.\textsuperscript{109} The third CEDAW country report confirmed that the abortion criminal laws are still on the books and that abortion has remained punishable by law (Penal Code, Article 309, paragraphs 355-358).\textsuperscript{110}

But in the light of article 2(g) of the CEDAW the state reported that the Criminal Code is under review and revision indicating that the criminal laws on abortion will be repealed as part of the revision process. Under the header “Status of review and amendment of laws that discriminate against women” “(a) the Penal Code” the report mentioned the installation of an Advisory Committee Draft Penal Code mandated to review the Penal Code.\textsuperscript{111} This report again indicates that even though the CGL did not address the criminal laws on abortion the state is still convinced that the right to abortion is a women specific reproductive health right which is inappropriately addressed by the Criminal Code.

On January 25, 2007 at the United Nations CEDAW examining meeting of the state’s third CEDAW periodic report, the examining Committee member, Ms Pimentel, emphasized the link between maternal mortality and abortion. She questioned the provided information that all abortions were performed in hospitals, because as she explained all illegal abortions were, by their very nature, clandestine and suggested that further research was needed in that area.\textsuperscript{112} In paragraph thirteen of its final overall comments on the State’s report the CEDAW Committee

\textsuperscript{109} Ibid.
\textsuperscript{110} Supra note 66
\textsuperscript{111} Responses to the list of issues and questions with regard to the consideration of the third periodic report on the Elimination of Discrimination Against Women, Suriname, U.N. Doc. CEDAW/C/SUR/Q/3/Add.1 (2006), at 3
\textsuperscript{112} Supra note 26 at para 34
recommended that the laws restricting family planning activities and abortion services, which are dead letter laws, should be repealed.¹¹³

Also with the adoption of the Millennium Declaration 2000, including the Millennium Development Goals (MDGs), Suriname committed itself to improve the lives of pregnant women as well as their humane existence, through goal number 5 *Improve Maternal Health*. This goal will be achieved by undertaking actions to reduce the maternal mortality ratio by three quarters, between 1990 and 2015. In this light reference is made to the CEDAW Committee member, Ms Pimentel, who emphasized the link between maternal mortality and abortion.¹¹⁴

In its MDGs baseline report of 2005, Suriname stated that it acknowledges that traditionally mother and child care has been considered an area of importance within the work scope of the Ministry of Public Health. The state argued that its commitment to realize this policy goal is reflected in the long established benefits for pregnant women, mothers and babies.¹¹⁵ On the MDGs monitor site of the United Nations, the profile of Suriname provides an analysis of the 2005 baseline report which states that goal number 5, maternal health, is among the goals that gives the most cause for concern.¹¹⁶

The United Nations MDGs 2007 report also suggests that within the geographical regions to which Suriname belongs, the Caribbean and Latin American, obstructed labour and abortion account for 13 and 12 percent, respectively, of maternal mortality.¹¹⁷ The report continues by

¹¹³ *Ibid.* at para. 30
¹¹⁴ *Supra* note 112
¹¹⁶ MDGMONITOR “Tracking the Millennium Development Goals” <http://www.mdgmonitor.org/factsheets 00.cfm?c=SUR&cd=>
suggesting that healthcare interventions can reduce maternal deaths, but need to be made more widely available. The suggestion made by the United Nations MDGs 2007 on the relation between unsafe abortion prevalence and mortality rates finds support in the 2002 report on critical issues covering the period 1998-2002 by the Women’s Rights Centre and Ultimate Purpose which was submitted to the CEDAW Committee.

Among other things the report claims an estimated abortion ratio of 1:1 with live births. The report also states that abortions are not covered by health insurance and that legalization of abortion and the provision of related counseling services would most likely result in the coverage by health insurance which would improve women’s lives considerably. Legal and safe abortions would enable women to refrain from unsafe abortion practices which would benefit women’s lives. This research furthermore argues that the legalization of abortion would enable abortion services to be delivered at an earlier stage of pregnancy, therefore making abortion care safe and less costly. It would also enable the introduction of safer more modern methods of abortion and it would enable women to choose a method of abortion they find most acceptable and convenient.

Despite all the estimations, observations, reports and recommendations, on the effects of the prohibiting criminal laws on abortion Surinamese policy makers and legislators have remained largely silent on the subject of abortion. Within the health sector abortion is mentioned regularly in official sexual and reproductive policy documents. But this is mostly in the context of unwanted pregnancies as the result of “deviant” sexual behaviour. It is the research observation that this negative perception of abortion contributes to the failure to repeal the criminal laws on abortion

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118 Ibid. at 16
and to integrate abortion in the sexual and reproductive health programmes to ensure access to comprehensive safe pregnancy related healthcare services.

Because not enforcing the criminal laws does not make abortion legal, it is in itself not a desirable nor is it a sufficient measure to guarantee access to abortion. Implementing a non-enforcement strategy is argued by this research to undermine the rule of law principle. This argument is based on the circumstance that state institutions entrusted with the task to maintain law and order ignore the law and in addition indicate to private persons that it is okay to be in non-compliance with the law. This research argues that the most appropriate and legally responsible approach would be, repealing the criminal laws on abortion and reinforce abortion by law as a reproductive health right in the administrative law and health law sphere.

According to Cook et al, the initial evolution, from addressing reproductive and sexual health issues through law on crime and punishment to applying the law on health and welfare, is incomplete internationally, and the further evolution to employ human rights laws remains at its earliest stage.\textsuperscript{120} Suriname, though, still has to make the initial evolution effective by translating the transition of approach into actual and effective law and policy instruments. By shifting the matter of abortion from criminal law to the areas of health law and administrative law, it is necessary to consider at least six key legal principles that are capable of maximizing the protection and promotions of reproductive health, as argued by Cook et al.\textsuperscript{121} The six key legal principles should be made inherent to the provision of reproductive healthcare services and relate

\textsuperscript{120} Supra note 45 at 106
\textsuperscript{121} Ibid. at 107
to: Informed decision-making, free decision-making, privacy, confidentiality, competent delivery of services, and safety and efficacy of products.122

Currently the identified six legal principles are completely absent in the context of abortion as a reproductive health service in the Suriname. The legal interpretation of this circumstance, made by this research, is that there is little or no accountability for the state’s failure to realize women’s rights with regard to their reproductive health care needs, or to take steps necessary to ensure that private providers of care do the same.123 To make the identified minimum legal principles effective in Suriname, abortion has to become legal. Currently abortion is illegal, despite the fact that the prohibiting criminal laws are not enforced.124

5.3 The CEDAW related state’s claim of non-enforcement of the criminal laws on abortion

In this section the claim in favour of repealing the criminal laws on abortion on the argument of the extensive period of non-enforcement will be analyzed according to some relevant case law on the issues of “pressing social needs”, “proportionality”, “target duty”, and “effectiveness of states intervention”. The European Court of Human Rights (ECHR) reviewed the aspect of maintaining laws on the book which are not being enforced in Dudgeon v. United Kingdom.125

122 Ibid.
124 Supra note 66
The ECHR analyzed and interpreted the fact of the absence of prosecutions on the “buggery” laws\textsuperscript{126} in Northern Ireland and established with respect to the enforcement of the law that:

[I]n accordance with the general law, anyone, including a private person, may bring a prosecution for a homosexual offence, subject to the Director of Public Prosecutions' power to assume the conduct of the proceedings and, if he thinks fit, discontinue them. The evidence as to prosecutions for homosexual offences between 1972 and 1981 reveals that none has been brought by a private person during that time.\textsuperscript{127}

In Suriname a prosecution for an abortion offence can also be initiated by anyone including private persons via the Office of the Procurer General. Evidence, produced by the state in its CEDAW combined initial and second periodic report,\textsuperscript{128} also indicate that no one entitled to initiate an abortion prosecution, not private persons nor the government entities entrusted with prosecution powers, has done so. This circumstance placed against the empirical data of the estimated annual numbers of abortions\textsuperscript{129} is evidence that the despite the high rates of abortion procurement the Surinamese society as a whole does not qualify abortion as an act liable to punishment by the criminal law.

Furthermore the act of refraining from enforcing the criminal laws was also included in the analysis of the ECHR establishing that:

\textsuperscript{126} The buggery laws in this case consists of sexual intercourse \textit{per anum} by a man with a man or a woman, or \textit{per anum} or \textit{per vaginam} by a man or a woman with an animal.

\textsuperscript{127} \textit{Supra} note 125 at 29

\textsuperscript{128} \textit{Supra} note 11

[T]here is, however, no stated policy not to prosecute in respect of such acts. As was explained to the Court by the Government, instructions operative within the office of the Director of Public Prosecutions reserve the decision on whether to prosecute in each individual case to the Director personally, in consultation with the Attorney General, the sole criterion being whether, on all the facts and circumstances of that case, a prosecution would be in the public interest.  

In the Surinamese context the state reported that a blind eye is turned towards the abortion laws, adding that as the result of this state action women do have access to abortion services in hospital and clinical settings. The decision to not enforce the laws on abortion is, similarly to the Dudgeon case, a non-stated policy. It is for this reason that this research claims that the non-enforcement is not a policy but a practice inconsistent with the legality requirement of the rule of law principle that state action should at all time be based on the law.

The ECHR continued by stating that even though the authorities has refrained from enforcing the criminal laws the moral standards has not been infringed “[N]o evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.” Concluding on these two grounds the ECHR stated that maintaining these laws on the claim of an existing “pressing social need” will not be successful because there is not sufficient justification with regard to the risk of harm caused be the acts to vulnerable sections of society or the effect of these acts on the public.

A similar argument can be made with respect to the non-enforcement of the criminal laws on abortion in Suriname under article 32 of the ACHR. Article 32 addresses the relationship between duties and rights. Sub-section two (2) articulates that the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general

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130 Supra note 125 at 30
131 Supra note 11
132 Supra note 125 at 60
welfare, in a democratic society. The fact that abortions are performed on a daily basis but there are no complaints filed and no prosecutions of the offence, despite the legal opportunity provided by the Criminal Code, is indicative that the moral standards have not been infringed. The Surinamese society does not feel threatened by the procurement of abortion as a reproductive health service and therefore it denies the claimed protective value of the criminal laws on abortion.

With regard to proportionality, the Court considered that the detrimental effects of the law on its targeted population outweighed the justifications for retaining the law in force unamended. Except for the state’s view expressed in the CRC periodic state report that the abortion laws are to protect the right to life of the unborn child, this research has no other records of official state provided justifications for retaining the criminal laws on abortion in Suriname. In fact the repeated state reports in the context of the CEDAW periodic reporting and the MDGs clearly reflects the state’s concern on the detrimental effects the criminal laws on abortion has on women’s right to health.

In this light the research draws the conclusion that both on the issue of absence of a “pressing social need” and on the issue of “proportionality” the criminal laws on abortion should be repealed in the Surinamese jurisdiction. Given the absence of prosecutions due to the absence of private person’s initiatives as well as the decision by the state not to enforce the laws is

133 Supra note 4 at article 32
134 Supra note 132
sufficient evidence that there is no pressing social need within the Surinamese society to restrict women’s right to reproductive health by criminalizing the act of abortion. The estimated numbers of forced recourse to unsafe illegal abortion services, the inability to have an abortion covered by health insurance and the contribution of unsafe illegal abortions to the rate of maternal mortality and morbidity are indicators of the disproportionate effects the criminal laws on abortion has on women’s wellbeing in the Surinamese jurisdiction.

In the context of the issue of proportionality support is also found in the reasoning of the European Court of Human Rights in *Tysiac v. Poland*. The ECHR reasoned in Tysiac that:

[T]he legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under… the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect.

This establishment by the ECHR counters the expressed state’s claims which suggest that by not enforcing the criminal laws on abortion at all, or specifically in case of preserving the life of a pregnant woman, women do have access to safe abortions, because the threat with penal sanctions deters healthcare providers from providing the service. Furthermore, women may have access to relatively safe abortions, in practice, but the act of abortion remains illegal which makes the parties involved vulnerable to an eventual prosecution and liable to punishment.

137 *Supra* note 11
138 *Supra* note 6
From a right to health perspective abortions should be both safe and legal. This claim also finds support in article 2(g) of the CEDAW.

The domestic Court of Appeal of the United Kingdom reasoning in *Family Planning Association of Northern Ireland v. Minister for Health Social Services and Public Safety* \(^{140}\) is also applicable to the Surinamese circumstance. In this case the Court reviewed the legal duties imposed on the state. In Suriname the state also has a legal duty based on articles 24 and 36(2) of the Constitution to ensure availability of healthcare. According to the state’s report, its decision not to enforce the criminal laws on abortion is one aspect of the state’s effort to make abortions accessible and safe for women. \(^{141}\) The state though failed in assessing the effectiveness of this decision.

Even though the state is cognizant of the fact that it has no formal abortion policy in place and that it does not provide safe and legal abortion services, it failed to make sure that women in need of an abortion do have access to safe abortion services. This conclusion is drawn from the combined initial and second CEDAW periodic state report, in which the state stated that it has no records available on possible abortion related complications. \(^{142}\) When applying the rule of law principle to this circumstance the state should be held accountable for not complying with the law as well as for infringing women’s rights.

This argument finds support in the *Tysiak v. Poland* case \(^{143}\) where the Court in its assessment of the legal claim based on article 8 of the European Convention on Human Rights; the right to respect of his private life and the states obligation to refrain from interfering with this right,

\(^{140}\) *Supra* note 37

\(^{141}\) *Supra* note 11

\(^{142}\) *Ibid.*

\(^{143}\) *Supra* note 136 at 50, 57 & 64
indicated that a positive obligation for the state is not excluded in an effective ‘respect’ for private
life.\textsuperscript{144} The Court also stated that the concepts of lawfulness and the rule of law in a democratic
society requires that the state reassures itself of the effectiveness of its implemented measures and
indicated the need for establishing lawful and effective mechanism that could determine whether
the conditions for obtaining an abortion are met.\textsuperscript{145} Instead the applicant was in a state of
prolonged uncertainty, a circumstance that has led to severe distress and anguish when
contemplating the possible negative consequences of her pregnancy and upcoming delivery for her
health.\textsuperscript{146}

For those reasons Poland was found in violation of the right to respect for private life
since it had failed to establish a regulatory framework under which women who are entitled to an
abortion would know how to access an abortion.\textsuperscript{147} Those conditions are also present in the
Surinamese jurisdiction where the state simultaneous uses a crime and punishment approach and a
human rights approach. The mere existence of the prohibiting criminal laws on abortion has a
chilling effect on women and healthcare providers. The positive obligation on the state in relation
to the right to privacy and abortion is to facilitate both women and care providers in their efforts to
provide and obtain safe and legal abortion services. Just refraining from enforcing the criminal
laws will not create such an enabling environment.

\textsuperscript{144} Ibid. at 50
\textsuperscript{145} Ibid. at 64
\textsuperscript{146} Ibid.
\textsuperscript{147} Ibid. at 62
5.4 The discriminatory character of the criminal laws on abortion

Another legally relevant question to address in this research is whether the criminal provisions on abortion targeting women have a discriminatory affect. In this analysis the criminal laws on abortion will be analyzed against the Surinamese constitution article 8, article 2(g) of CEDAW, article 2(2) of the ICESCR and article 126\textsuperscript{bis} of the Criminal Code. According to article 2(g) of CEDAW, the State Suriname has the obligation to repeal all criminal provisions that are discriminating against women. Drawing on the outcome of the illegitimate character of the criminal laws on abortion, the presumption can be made that the criminal laws on abortion are discriminating against women, since they impose disproportionate, illegitimate and severe restrictions on women’s ability to exercise their right to health in particular reproductive health.

Article 12(1) of CEDAW, instructs State parties to ensure the right of access to health services in the context to family planning. The criminal provisions on abortion prohibit abortion in all circumstances, and by doing so forces women to carry a pregnancy to term. The functioning of these laws hinders women in exercising their reproductive health rights and subsequently impedes women’s right to security of person.\footnote{R. v. Morgentaler [1988] 1 S.C.R. 30 [see 1988 CanL II 90 (S.C.C.)] at para.55} Meanwhile, the criminal provisions also target health care providers and others providing assistance towards an abortion, further limiting women in exercising their right to health regarding their pregnancy as formulated in article 12(2) of CEDAW through safe professional health care. Article 21(2) explicitly articulates that states party to the Convention shall ensure to women appropriate services in connection with pregnancy. The text does not exclude any pregnancy related health service.

Another subtle dimension of discrimination posed against women by the criminal provisions is that the criminal laws specifically target women and women specific (reproductive)
health care. Pregnancy and its termination can not happen without the direct involvement of a woman’s body which makes abortion a women specific health intervention. In its General Recommendation No. 24 -- twentieth session, 1999 article 12 - women and health, the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women, urges member states to refrain from obstructing action taken by women in pursuit of their health goals, and to remove all existing barriers to women’s health including laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.149 This dimension of discrimination also exists in Suriname in the context of abortion.

The acknowledgement by the state of Suriname that enforcing the criminal legal instruments on abortion would be counter productive in the realization of women’s reproductive health rights makes the intention of the criminal laws indistinctive. For example, article 356(1) criminalizes everyone who performs an abortion without the consent of the woman for causing the death of the fetus. Strangely enough this act is not qualified as, for example, battery of the woman resulting in the death of the fetus. Such a formulation would make the woman’s interest in protection of her lawful rights the primary aim and the fetal interests’ secondary. Sub (2) of the article recognizes the causal death of the woman as an aggravation of the primary crime against the fetus.

If the woman survives the unlawful invasive act but with severe life threatening harm this law is not applicable. Every form of harm other than death inflicted on the woman in the process of an abortion performed without her consent is therefore left unaddressed. It is for these reasons

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that this research argues that among the other 12 criminalizing Criminal Code articles, article 356 is an example of how the existing criminal laws deny women legal protection against infringements of their legitimate interests to protection of their rights such as the right to security of the person and their right to physical, mental and moral integrity.

The Constitution grants everyone the right to be free from discrimination and the right to health in respectively the articles 8(2) and 36(1), and instructs the state to realize these rights. In the chapter of definitions of terms used by the Criminal Code, article 126\textsuperscript{bis} makes reference to discrimination as a criminal act. This provision defines discrimination as all forms of distinction, every exclusion, limitation, or preferential treatment, with the aim to or resulting in the impediment or complete eroding of the ability to exercise ones human rights and fundamental freedoms on the bases of equality. With the inclusion of article 126\textsuperscript{bis} in the Criminal Code it is undisputable that the state complied partially with its duty to enact legislation aiming at the protection of individuals against discrimination.

Essential follow up action by the state seems to be missing in its realization process of the civil and political rights. The Criminal Code definition of discrimination is, \textit{inter alia}, any exclusion that results in the impediment of exercising human rights. This definition therefore also relates to the legal barriers, such as, the criminal laws on abortion which deny women access to their right to abortion as a reproductive health right. It is therefore that these criminal laws are claimed to be discriminatory as defined by article 8 of the Constitution, article 126\textsuperscript{bis} of the Criminal Code, article 2(g) of the CEDAW and article 2(2) of the ICESCR.

The most recent definition of discrimination is articulated by the ICESCR Committee in May 2009. In its General Comment No. 20 on article 2(2) the Committee defines discrimination as
[A]ny distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.\textsuperscript{150}

The Committee also made a distinction between formal discrimination which is discrimination by the law (de jure) and substantive discrimination which is discrimination in practice (de facto). Based on the evidence provided by the empirical data and the legislative documents in this research, it is legitimate to argue that both formal and substantive discrimination are present in Suriname. The criminal laws on abortion are targeting exclusively women and have a restricting effect on women’s enjoyment of their right to reproductive health. Regardless of the non-enforcement of the criminal laws the substantive discrimination is manifest in the effect of the laws on women who do not have access to legal abortions and therefore are legally forced to seek abortions in clandestine spheres. Also the fact that even in the case where women would be able to procure an abortion in the safe hospital or clinical setting the high costs are not covered by health insurance plans and for those who can not afford the expensive safe abortions the only recourse is to the unsafe practices.

The articulated claim in favour of repealing the criminal laws on abortion and for the enactment of administrative laws and health laws to govern the matter of abortion to ensure women non-discriminatory access to reproductive healthcare finds support with the General Comment No. 14. “The Right to the Highest Attainable Standard of Health” issued by the U.N. monitoring Committee of the “International Covenant on Economic, Social and Cultural Rights”.

The General Comment states that meeting the needs, and ensuring access to health services, of vulnerable and disadvantaged groups is meeting an important human rights principle. In general women are classified as a vulnerable and disadvantaged group.

The obstacle for challenging the unconstitutionality of the criminal laws within the Surinamese jurisdiction is as stated before the absence of the Constitutional Court. A final observation in this context is that the conflict between article 126\textsuperscript{bis} and the criminal abortion laws also creates an internal conflict of the Criminal Code. The claim of internal conflict is because the Code as a coherent legal instrument through one provision, article 126\textsuperscript{bis}, declares its own laws on abortion as discriminatory since they aim and result in the impediment of women’s ability to exercise their human rights and fundamental freedoms.

5.5 Conclusions

The CEDAW is a non-self executing treaty that requires specific legislative action from the state to enable women to fully exercise their rights free from any form of discrimination. The state has recognized the right to health and in particular the right to reproductive health of women. Despite this state’s recognition of women’s right to reproductive health, the state shows reluctance in repealing the prohibiting criminal laws on abortion. In an attempt to meet its legal obligations to ensure that women experience maximum enjoyment of their right to reproductive health, the state claimed that it does not enforce the criminal laws on abortion.

It is apparent that the state failed to appropriately interpret its legal duty derived from article 12 in conjunction with article 2(g) of the CEDAW. The aim of the CEDAW is to

eliminate all forms of discrimination against women, including formal discrimination. The state’s interpretation of its legal duty in the context of reproductive health fell short. It only focuses on the safety aspect of abortion as a reproductive healthcare service. Despite the fact that the claimed safe procurements in the hospital and clinical settings are questionable, the state overlooked the aspect of the lawfulness of the abortion procurement.

The aspect of the unlawfulness of abortion procurements remains a form of formal discrimination. The formal discrimination can only be addressed effectively by repealing the criminal laws on abortion and govern the matter of abortion through health law and administrative law which are much more suitable by their nature to address the aspect of both the formal and substantive discrimination related to abortion.

According to article 78 of the Constitution the criminal laws can be repealed through the procedure referred to as the initiative law submission which is a bill submitted to Parliament by a member of parliament. This procedure is mostly used by the opposition. The coalition to the contrary makes use the procedure articulated in article 75 of the Constitution that describes the submission of a bill by the President on behalf of the government. The selection of procedure will therefore be determined by its political effects it may result.
6 Conclusions and recommendations

The premise of this thesis is that women do not have access to safe and legal abortion services to exercise their reproductive health rights. This is due to the lack of clarity on the legal status of abortion in the Surinamese jurisdiction. Maximum clarity on the legal status can only be reached by repealing the criminal laws on abortion and subsequently enact effective administrative and health laws on the matter of abortion.

6.1 Conclusions

In final conclusion of the thesis analysis the aspect of the thesis premise that women do not have access to safe and legal abortion services the exercise of their reproductive health rights can be confirmed. Based on the empirical data, both the non-validated independent studies as well as state reports and the responses and conclusions of the treaty monitoring bodies, provide us with evidence that there are many barriers resulting from the criminalization of abortion in Suriname. This research concludes that it is beyond a reasonable doubt that the majority of the clandestine abortions are procured under unsafe conditions. This conclusion is derived from the identified hindering factors: originated by the prohibiting criminal laws on abortion, which hinders women in their pursuit to procure an abortion.

The hindering factors are the “chilling effect” of the criminal laws on healthcare providers and the financial constrains due to the inability of healthcare insurance companies to cover the relatively costly procurement of abortion. Also the administrative barriers that prevents the training of health care providers in the delivery of abortion services, that inhibit the integration of abortion services into the delivery of health care more generally to ensure the delivery of abortion at the earliest stage of pregnancy and to ensure the delivery of sexual and
reproductive health services in the post abortion phase, and the introduction of safer more modern methods of abortion. Another indicator that supports the conclusion that the majority of the clandestine abortions are procured in an unsafe environment is the estimated high contribution of unsafe and illegal abortions to the estimated high rates of maternal mortality and morbidity.

With respect to the inability of women to procure a legal abortion, evidence is found in the fact that due to the absolute prohibition of abortion, any procurement is illegal and liable to punishment according to the law. The state’s decision not to enforce the criminal laws on abortion did not lift the illegality of the act of abortion. Even though the analysis shows that the criminal laws on abortion are violating the principle of “the rule of law” as well as the fact that these laws are unconstitutional and inconsistent with the applicable treaty laws, as long as they remain unchallenged at the Constitutional Court they retain their legal force and abortion will remain illegal. This circumstance is evidence that the rule of law is severely eroded in the context of abortion in Suriname.

The premise that maximum clarity on the legal status can only be reached by repealing the criminal laws on abortion and subsequently enact effective administrative and health laws on the matter of abortion also find sufficient support in the outcome of the legal analysis conducted by this research. The legal instruments applicable to abortion in the Surinamese jurisdiction present two views on the legal status of abortion one view is that abortion is a criminal offence and the other is that abortion is a reproductive health right. Legal analysis of abortions must be based on the legal view of abortion as a reproductive health right, because this view is articulated by the two highest legal sources of law in the jurisdiction, constitutional law and treaty law.
Additionally, state’s policy in the form of non-enforcement of the criminal laws, provides evidence of an attempt to comply with the highest sources of law within Suriname. That the deviating view of abortion as a criminal offence by the criminal laws has to yield to the more dominant view of abortion as a reproductive health right is unavoidable. Besides the fact that unconstitutional domestic laws have to be repealed or amended to make them consistent with the Constitution, the laws on abortion are referred to as “dead letter laws”. Especially in criminal law the principles of predictability and “lex Certa” are incompatible with the retaining of “dead letter laws” on the Code. By repealing the criminal laws on abortion the only remaining legal status on abortion will be abortion as a reproductive health law.

By repealing the criminal laws on abortion maximum access to safe and legal abortions is not ensured. It is for this reason that the premise includes the argument that effective administrative laws and health laws need to be enacted following the repeal of the criminal laws on abortion. Evidence of the present circumstances with regard to access issues and quality monitoring as well as data collection informed the research that an efficient regulatory framework is essential to enable the state party to successfully comply with its legal duties regarding ensuring the highest available standard of health to women. Due to its nature criminal law lacks the ability to facilitate individuals in the exercise of their rights. Criminal law is to react with the threat of punishment to behaviour eligible for it. Health law and administrative law to the contrary have a facilitative role.

6.2 Recommendations

Based on the conclusions the recommendation is made to repeal the criminal laws on abortion. This will allow the state to act in compliance with the law; no arbitrary non-enforcement is needed to avoid undesirable prosecutions. Repealing of the criminal laws on abortion will also make the
domestic legislation related to the right to reproductive health consistent with the Constitution and
treaty law on the aspect of reproductive health law. Finally repealing the criminal laws on abortion
as a joint activity of the executive and the legislative branch would make the absence of the
Constitutional Court less relevant, for a Court challenge of the laws on their unconstitutionality and
inconsistency with applicable treaty law would become unnecessary.

Following the repeal of the criminal laws on abortion the matter of abortion should be
regulated within the administrative law and health law sphere. Partial repeal by including
justification or exemption grounds to the criminal laws for allowing abortion in specific
circumstances will not be sufficient enough to enable women access to safe and legal abortion nor
will it encourage healthcare providers to offer professional healthcare services to women in need.
The conclusion of insufficiency of partial repeal finds support in the fact that both the formal and
substantive discrimination will remain on the remaining criminal grounds of an abortion for
women in their pursuit of their reproductive health right.

In summary, Suriname should create a transparent legal framework on abortion. The
criminal law as the lowest source of law compared to treaty and constitutional law in the
Surinamese jurisdiction should be amended to bring it in compliance with the international and
constitutional legal instruments applicable to abortion in Suriname. The legal framework has to be
clear for pregnant women and healthcare providers to be able to apply for and offer and deliver
quality reproductive health services. A clear legal framework will enable effective policy as well as
the development of training and service providing protocols that addresses abortion in accordance
with a “rights based approach”, since the Surinamese government explicitly adopted the rights based approach in its Multi Annual Development Plan.¹⁵²

¹⁵² MOP 2006-2011. *Regeringsverklaring* 2005-2010 “... zodat er sprake zal zijn van een MOP dat voldoet aan de (...) gestelde criteria van een rights based approach to development,” at 8 (Govermental Statement that the Multi Annual Development plan will be rights based)
7 Bibliography

Cases

International Legal Instruments
• American Declaration of the Rights and Duties of Man, Bogotá, Colombia (1948)
• General Secretariat, OAS (Original Instrument and Ratifications); OAS, Treaty Series, no. 36; UN Registration: 08/27/79 no. 17955
• UN Ratification Instrument: Mémorandum S.G. No. LA41TR/221/1(4-8), 21 April, 1993

Legislation
• Constitution of Suriname (S.B. 1987 no. 116)
• Wet van 14 mei 2002, houdende wijziging van de hoogte der geldboete, zoals vastgesteld in thans van kracht zijnde wettelijke regelingen (algemene geldboetewet) (S.B. 2002, no. 73) [ Act of May 14, 2002 regulating fines]

Internet sites
• MDGMONITOR “ Tracking the Millennium Development Goals” <http://www.mdgmonitor.org/factsheets_00.cfm?c=SUR&cd=>
• Office of the United Nations High Commissioner for Human Rights status of
Ratifications of the Principal International Human Rights Treaties.  


**Legal Dictionary**
- *Black’s Law Dictionary, 8th ed.*, Thomson West

**Empirical research data**
- Jagdeo, Tirbani, “Contraceptive Prevalence Survey” (Paramaribo, Suriname, 1992)
- Terborg, J., Grunberg A. and Eiloof, D., Report on the Quality of Reproductive Health Services for Adolescents on Poli Clinics of the Regional Health Service, PAHO / Prohealth, (Paramaribo, Suriname, 2004)

**Policy Instruments**
- Multi Annual Development Plan of the Republic of Suriname 2006-2011, Chapter 7 “Health Sector Reform”.
- United Nations Development Assistance Framework, Results Matrix for Suriname 2008-2011 (2008), DP/DCP/SUR/1

**UN monitoring Committee related reports**
- Responses to the list of issues and questions with regard to the consideration of the third periodic report on the Elimination of Discrimination Against Women, Suriname, U.N.


**Articles**


**Literature**