

# Chapter 37

## Reproductive Rights

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### 37.1 Introduction\*

While reproductive rights protect the health and well-being of both men and women, reproductive rights are of fundamental importance to women. Only when armed with such rights can women effectively exercise the rest of the rights enshrined in Chapter 2 of the Final Constitution and become full and equal members of South African society.

Even under the narrowest of constructions, reproductive rights demand respect for women's bodily integrity and an environment for decision making free from fear of abuse, violence and intimidation. Viewed more broadly, reproductive rights require the provision of information about and access to voluntary and adequate reproductive and sexual health services and may even command the provision of such basic necessities as food, shelter, childcare and education. So although this chapter focuses primarily on abortion, reproductive health engages the full panoply of rights guaranteed women in Chapter 2.

Abortion in South Africa is legally regulated by the Choice on Termination of Pregnancy Act.<sup>1</sup> The Choice Act provides that a pregnancy may be terminated upon request of a woman during the first 12 weeks of the gestation period of her pregnancy,<sup>2</sup> and under somewhat more onerous conditions from 12 to 20 weeks.<sup>3</sup>

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1 Act 92 of 1996 ('Choice Act').

From 20 weeks onwards terminations are available under more limited circumstances.<sup>4</sup>

The Choice Act provides that only the consent of a pregnant woman is required for a termination. It does not require the consent of a partner or, in the case of a minor, parental consent.<sup>5</sup> Non-mandatory and non-directive counselling are to be promoted by the state.<sup>6</sup> Ideally, this service should be available

\* I would like to thank Catherine Bailey, who co-authored this chapter with me in the first edition of this work, for allowing me to use some of that chapter's material in this new chapter.

before and after the termination of a pregnancy. The Choice Act stipulates that women shall have access to information concerning their rights in relation to the Act.<sup>7</sup> It further provides that all terminations (surgical and medical) must take place in an approved facility and authorizes provinces to approve health facilities that perform terminations.<sup>8</sup>

While the Final Constitution does not deal expressly with the issue of abortion, several of the rights are relevant to the circumstances in which a woman exercises

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2 Choice Act s 2(1)(a). 'Termination of pregnancy' is a broader term than 'abortion'. Choice Act s 1(x) defines termination as 'the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman'. The definition includes abortion and induced labour. In this chapter, termination of pregnancy and abortion are used interchangeably.

3 Choice Act s 2(1)(b) provides that a pregnancy may be terminated where a woman gives informed consent and a medical practitioner, after consultation with the pregnant woman, is of the opinion that:

- (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
- (ii) there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or
- (iii) the pregnancy resulted from rape or incest; or
- (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman.

4 Choice Act s 2(1)(c) provides that a pregnancy may be terminated after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife who has completed the prescribed training, is of the opinion that the continued pregnancy:

- (i) would endanger the woman's life; or
- (ii) would result in a severe malformation of the foetus; or
- (iii) would pose a risk of injury to the foetus.

5 Choice Act ss 5(1), (2) and (3). For a discussion of these sections, see § 37.3–37.5, and § 37.6 *infra*.

6 Choice Act s 4.

7 Choice Act s 6.

choice over the decision to terminate a pregnancy. This chapter considers the ways in which the rights to life, privacy, religion, freedom and security of the person, dignity, equality, access to information, expression and children's rights effect the right to abortion in South African law.<sup>9</sup>

## 37.2 Life

IC s 9 provided that 'every person shall have the right to life'. FC s 11 provides that 'everyone has the right to life'. The replacement of 'every person' with 'everyone' presumably reflects the apparent linguistic requirement of Constitutional Principle II that 'everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties.'<sup>10</sup> In *Christian Lawyers Association of South Africa & others v Minister of Health & others*<sup>11</sup> McCreath J correctly held that the two terms are interchangeable and that the change across the board from 'every person' to 'everyone' could never

have been intended to introduce a significant new class of rights-bearer. It is inconceivable that any new category could have been introduced by the legislature in this obscure way.'<sup>12</sup>

As *Christian Lawyers I* suggests, a technical or literal interpretation of the term 'everyone' cannot settle the question of whether a foetus is included within the term 'everyone' for the purposes of the various rights enshrined in Chapter 2.

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At South African common law, legal subjectivity begins at birth. According to the *nasciturus* fiction, however, a foetus, if subsequently born alive, is deemed to have all the rights of a child, where this is to its advantage. This fiction is used to overcome the absence of legal personality of a foetus and to confer upon the foetus particular rights in a limited number of circumstances.<sup>13</sup> The protection provided by the *nasciturus* fiction does not extend to upholding the right to life of the foetus.<sup>14</sup>

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8 Choice Act s 3(1). Medical terminations of pregnancy are carried out by the administration of mifepristone and prostaglandin hormone. The action of these drugs can take several days. Thus, a woman will, in all likelihood, have left the facility prior to the expulsion of the foetus. See *In Re A Case Stated by the Abortion Supervisory Committee* [2003] 3 NZLR 87 (Court held that a doctor did not act illegally under the Contraception, Sterilisation and Abortion Act of 1977 when performing medical abortions if the woman did not remain on licensed premises until the embryo or foetus was expelled.)

9 See Section 39(1)(b) of the Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution'). FC s 39(1)(b) directs courts to consider international law when interpreting fundamental rights. See K Hopkins and H Strydom 'International Law' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 30. See also L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32. FC s 39(1)(c) provides that courts may consider comparative law when interpreting fundamental rights.

10 Ibid at 1438A (emphasis added).

11 1998 (4) SA 1113 (T), 1998 (11) BCLR 1434 (T) ('*Christian Lawyers Association I*').

12 Ibid at 1438A-B.

The status of the foetus at common law does not determine the issue of legal personality as a constitutional matter. In *Christian Lawyers I*, McCreath J held that whatever the status of the foetus may be under the common law, under the Final Constitution the foetus is not a legal *persona*.<sup>15</sup> McCreath J reasoned as follows. Because the Final Constitution does not include any express provisions affording the foetus (or embryo) legal personality or protection, the drafters of the Constitution could not have intended to make the foetus a beneficiary of any of the rights and freedoms in Chapter 2.<sup>16</sup> Moreover, one would have expected such a clear commitment given that the common law denied the foetus legal personality:

One of the requirements of the protection afforded by the *nasciturus* rule is that the foetus be born alive. There is no provision in the Constitution to protect the foetus pending the fulfilment of that condition.<sup>17</sup>

McCreath J then considered how FC s 12(2), which provides everyone with the right to make decisions concerning reproduction and security and control over their body, might influence the construction of FC s 11:

Nowhere is a woman's right in this respect qualified in terms of the Constitution in order to protect the foetus.<sup>18</sup>

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If the drafters had wanted to protect the foetus in the Bill of Rights, McCreath J contends that FC s 28, which specifically protects the rights of the child, would have been an appropriate vehicle. McCreath J then notes that there are clear indications that the safeguards in FC s 28 do not extend to protect the foetus. A 'child' for the

- 13 *Pinchin & another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W), 260(Extended the application of the *nasciturus* rule to delictual as well as property rights.) See J Sinclair 'Family Rights in D Van Wyk, B De Villiers, J Dugard and D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 502, 526 n78.
- 14 See *Christian League of South Africa v Rall* 1981 (2) SA 821 (O); *G v Superintendent, Groote Schuur Hospital, & others* 1993 (2) SA 255 (C). In both cases the court refused to appoint a *curator ad litem* to protect the interests of the foetus against its mother, who attempted to procure a legal abortion in terms of the Abortion and Sterilisation Act 2 of 1975. See also *Van Heerden & another v Joubert NO & others* 1994 (4) SA 793 (A)(Held that a still-born baby is not a person for the purposes of the Inquest Act); S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.3(a) (On whether a foetus is the beneficiary of constitutional rights.)
- 15 *Christian Lawyers Association I* (supra) at 1443B-C, 1437C-D (On this basis McCreath J upheld the defendant's exception that the plaintiffs' particulars of claim did not disclose a cause of action. The notice of exception had alleged that: 'A foetus is not a bearer of rights in terms of' FC s 11. FC s 11 'does not preclude the termination of pregnancy in circumstances and manner contemplated by the act' and 'the right of women to choose to have their pregnancy terminated in the circumstances and manner contemplated by the act, is protected under [FC] ss 9, 10, 11, 12, 14, 15(1) and 27(1)(a).')
- 16 *Christian Lawyers Association I* (supra) at 1441H-I.
- 17 *Ibid* at 1441I.
- 18 *Christian Lawyers Association I* (supra) at 1441J-1442A (McCreath J emphasized that this does not mean that the state is prohibited from enacting legislation to regulate or to restrict abortion. The state may invoke FC s 36 for that purpose.) For a discussion of FC s 36 in the context of reproductive rights, see § 37.11 infra.

purposes of the section is defined as a person under the age of 18 years.<sup>19</sup> McCreath J writes:

Age commences at birth. A foetus is not a 'child' of any 'age'. The rights afforded by section 28(1) are in respect of 'every child' — ie all children. Yet certain of the rights could not have been intended to protect a foetus; paragraph (f) relates to work, paragraph (g) to detention and (i) to armed conflict. The protection afforded in other paragraphs of subsection (1) must accordingly also exclude the foetus . . . If FC s 28, specifically designed to protect the rights of the child, does not include the foetus within its ambit of protection, then it can hardly be said that the other provisions of the Bill of Rights, including FC s 11, can be said to do so.<sup>20</sup>

Although, rights are conferred on 'everyone' by the Bill of Rights except where a specific class of person is alone singled out for protection, McCreath believes that the foetus could not be included in the scope of protection of 'everyone'.<sup>21</sup> To acknowledge that the foetus is protected under FC s 11, McCreath reasons, would mean ascribing to 'everyone' a meaning which is different to that which it bears everywhere else in the Bill of Rights. Moreover granting constitutional protection to the life of the foetus would afford the foetus the same protection as that of the mother: Termination of pregnancy would no longer constitute abortion, but murder: '[T]he drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms.'<sup>22</sup>

McCreath J then suggests that the Final Constitution ought to be viewed primarily as an egalitarian instrument designed to eradicate systematic forms of domination and disadvantage based on race, gender and class. Once the rights of women enshrined in FC ss 9, 10, 11, 12, 14, 15 and 27 are viewed through the prism of transformation, the argument that the foetus possesses the status of a legal person loses much of its force.

The Constitutional Court is apt to confirm the decision in *Christian Lawyers I*, at least in part, because like McCreath J, it is unlikely to consider the foetus to be a bearer of constitutional rights and accord the foetus a 'right to life'. This conclusion is supported at international law<sup>23</sup> and by the jurisprudence in foreign

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19 FC s 28(3).

20 *Christian Lawyers Association I* (supra) at 1442D-E.

21 Ibid at 1442F-I. (McCreath J refers specifically to FC ss 12(1)(a), 12(1)(b), 12(2)(b), 14, 15(1), 16(1), 17, 18, 21, 30 and 35.) For a critique of McCreath J's interpretation of the beneficiaries of these varied rights, see S Woolman 'Application' (supra) at § 31.3(a)

22 Ibid at 1443B-C.

23 See L Hernandez 'To Bear or Not to Bear: Reproductive Freedom as an International Right' (1991) *Brooklyn International LJ* 309, 322 (Foetus not a person under the American Convention on Human Rights even though Convention protects the right to have life respected from the moment of conception); Inter-American Commission on Human Rights *Baby Boy* (Unreported, 6 March 1981) (Decided that American Convention's language does not translate into a legally protected right of the foetus.) See also Organisation of African Unity, Protocol on the Rights of Women, Article 14 (11 July 2003)(Significantly broadens the protection of the right of women to terminate a pregnancy. This protocol is not in effect as it requires the ratification of 15 African countries to bring it into effect, and has only been ratified by 12 countries.)

jurisdictions.<sup>24</sup> In *Roe v Wade* Justice Blackmun decided that the use of the word 'person' in the Fourteenth Amendment to the US Constitution — which provides that the states shall not 'deprive any person of life . . . without due process of law' — did not include the unborn.<sup>25</sup> In *Winnipeg Child and Family Services (Northwest Area) v G(DF)*, the Canadian Supreme Court confirmed that Canadian law does not recognize the unborn child as a legal or juridical person whether the case falls under family law, tort law or succession law.<sup>26</sup> The *Winnipeg Child* Court held that the state's interest in preserving fetal life may only be served by legislative solutions that are at once principled and minimally intrusive with respect to the rights of pregnant women.<sup>27</sup> This very position has also been endorsed by the European Court of Human Rights.<sup>28</sup>

In contrast, the German courts have tackled the abortion question in terms of the right to life. Article 2(2) of the Basic Law provides that '[e]veryone shall have the right to life and to the inviolability of his person'.<sup>29</sup> The supreme value accorded to the right to life in the German Constitution should be understood as a direct response to German history and the Nazi's view, during the Third Reich, that certain forms of life and certain kinds of human being were worthless.<sup>30</sup>

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24 See *R v Demers* [2003] BCJ 75, 2003 BCCA 28 (British Columbia Court of Appeal confirmed that a foetus is not captured by the term 'everyone' for the purposes of Canadian Charter s 7. Canadian Supreme Court dismissed Demer's application for leave to appeal.) See also *Kelly v Kelly* 1997 SLT 896, 1997 SCLR 749 (Scottish Second Division Court dismissed an application for an interdict by a husband seeking to prevent his estranged wife from terminating a pregnancy. Confirmed the nasciturus rule that an injury to a foetus was not actionable before birth and observed that recognising a right of the foetus to continue in the womb would inevitably create a conflict between the existing legal rights of the mother and those of the unborn child.)

25 410 US 113, 158 (1973).

26 [1997] 3 SCR 925.

27 See *R v Morgenthaler* (1988) 44 DLR 385, [1988] 1 SCR 30 (Canadian Supreme Court finds that abortion provisions of Criminal Code that violate a woman's Charter s 7 right to fundamental justice — without ruling on foetus' right to life.)

28 *VO v France* [2004] 2 FCR 577 (French Court acquitted the doctor of the offence of unintentional homicide of the applicant's child on the basis that the foetus was not a human person for the purposes of the offence. The applicant appealed to the European Court of Human Rights alleging that the French authorities' refusal to classify the taking of life of her unborn child's life as unintentional homicide, and the absence of criminal legislation to prevent and punish such an act, breached Article 2 of the ECHR: 'Everyone's right to life shall be protected by law.' The ECHR Court held that the issue of when the right to life began fell within the margin of appreciation enjoyed by contracting European states and that consensus on such protection has not been resolved within the contracting states. The Court correctly held that in these circumstances, it was neither desirable nor possible to answer in the abstract the question of whether an unborn child was a person for the purposes of Article 2.)

29 The German courts have also relied on right to dignity provision in GBL, article 1(1). See M Glendon *Abortion and Divorce in Western Law* (1987) 24–39.

30 See D Van Zyl Smit 'Reconciling the Irreconcilable? Recent Developments in the German Law on Abortion' (1994) 2 *Medical LR* 302, 303–308 (For a discussion of the history of German abortion laws, in particular the *Erbgesundheitsgesetz* of 1933, which provided for mass sterilization and abortion for eugenic purposes and restrictions on abortions for healthy German mothers.) The state has a legitimate interest in upholding the intrinsic value of potential life. However, guaranteeing a foetus the right to life under FC s 11 is not the appropriate mechanism to achieve

In 1993, the German Constitutional Court ('FCC') struck down a federal abortion statute<sup>31</sup> on the grounds that

the state had a primary duty to protect human life, even before birth. This duty, which began at conception, related to every individual life and included a duty also to protect the unborn child against the mother.<sup>32</sup>

Although the majority conceded that this duty to protect the foetus may clash with the pregnant woman's right to protection of her human dignity, bodily integrity and the development of her personality, they maintained that the Basic Law established minimum standards of protection for the foetus. The minority did not deny that the foetus required constitutionally-based protection. They emphasized, however, that because pregnancy involves the pregnant woman from beginning to end, it was not appropriate to set the rights of a woman against those of a foetus.<sup>33</sup> The majority resolved the conflict between the protection of unborn life and the pregnant woman's rights by drawing a conceptual distinction between illegality, which refers to the 'status of the conduct in the legal system as a whole', and criminality, which refers only to the criminal law.<sup>34</sup> On this view, although an abortion could never be justified constitutionally because of the duty of the state to protect unborn life, the state was not under an 'absolute duty' to criminalize all illegal abortions. The FCC therefore decided that where a woman insisted on having an abortion after she had been subjected to counselling designed to persuade her to carry the foetus to term,<sup>35</sup> and the abortion was performed within a legislatively defined period, such an abortion need not be a criminal offence.<sup>36</sup>

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this end. The Final Constitution, like the German Basic Law, marks a break with a long history of repression. The state's use of repressive criminal sanctions to prevent persons from exercising control over their reproductive lives, especially as they relate to abortion, would be inconsistent with the meaning of that historic break.

31 *BVerfGE* A III J2 (1993).

32 *Ibid* at 31.

33 The minority contended that in the early stages of pregnancy the pregnant woman had to be fully involved in all decisions relating to the pregnancy. Only an advanced foetus should be protected by the state by means of the criminal law. See *BVerfGE* A III J2 (*supra*) at 311-312.

34 See Van Zyl Smit (*supra*) at n 97 (This distinction is unique to German criminal law theory.)

35 The German court recognized that if women were encouraged by the state to continue a pregnancy to term, the state would have a duty to support these women and the children that they bear. FC s 27(1) provides: Everyone has a right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The fiscal constraints upon our health and welfare budgets, limited child care grants, high maintenance default rates, and limited mandatory maternity leave and childcare benefits mean that South African women receive limited state assistance for pregnancy and child-rearing. In this context, it is appropriate that the Choice Act provides only for non-directive counselling, allowing women to make reproductive decisions in relation to abortion free of state interference or coercion. In addition, women who have decided to have an abortion are seldom dissuaded from doing so by counsellors. Cf D Hansson and D Russell 'Made to Fail: The Mythical Option of Legal Abortion for Survivors of Rape and Incest' (1993) 9 *SAJHR* 500, 511.

36 *BVerfGE* A III J2 (*supra*) at 312-313.

Ronald Dworkin, unlike the FCC, rejects the notion that arguments about abortion turn primarily on whether a foetus is the beneficiary of constitutional rights.<sup>37</sup> Any argument that accords the foetus constitutional rights merely grants the state a derivative interest in prohibiting or regulating abortion. The real issue,

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argues Dworkin, is not whether we object to abortion because we believe that the foetus is a rights bearer whose particular interests must be defended by a third party, but whether we attach some intrinsic value to life and the potential for human life. The interest of the state in potential human life flows from its interest in protecting the sanctity of human life. Abortion is to be regarded as morally repugnant where it offends against this commitment to the sanctity of life. The state may therefore be justified in regulating abortion on grounds that are independent of the rights-bearing capacity of the foetus itself. Hence, argues Dworkin, the state has a 'detached' (as distinct from 'derivative') interest in the regulation of abortion.

The FCC appears to have conflated the detached interest and the derivative interest of the state in regulating abortion. The majority drew no distinction between pre-natal and post-natal life. Because the foetus is a bearer of constitutional rights from conception, the state was found to have a derivative interest in prohibiting abortion.

If our Constitutional Court were to hold that the foetus is a bearer of constitutional rights, it is possible that only abortions performed to save the life of the mother would be a justifiable limitation upon 'the right to life' of the foetus.<sup>38</sup> The Supreme Court of Ireland has taken this very approach. In *Attorney General v X and others*, a 14 year old girl became pregnant as a result of rape and indicated an intention to commit suicide if required to carry the child to term.<sup>39</sup> The Supreme Court held that the proper test to apply when interpreting Article 40, Section 3(3) of the Irish Constitution is that a termination of pregnancy is permissible if it is established, as a matter of probability, that there is a real and substantial risk to the life of the mother that can only be avoided by the termination of pregnancy. The *Attorney General v X* Court held that in view of the likelihood of suicide, such a risk existed.

The experience of South African women under the Abortion and Sterilisation Act provides a compelling argument against the adoption of such a restrictive approach. Thousands of women died each year of pregnancy-related causes, and particularly from unsafe, induced abortion.<sup>40</sup> In contrast, recent research has

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37 R Dworkin *Life's Dominion: An Argument about Abortion and Euthanasia* (1993).

38 See *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC) at para 268 (Capital punishment unanimously held to be unconstitutional. Several justices based their decisions, in whole or in part, upon the fact that the death penalty violates the right to life. Although an analysis of abortion was not germane to the issues considered, Mahomed DP did refer to it.) See also S Woolman and H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

39 See *Attorney General v X and others* (1992) 15 BMLR 104. This section provides that 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right'.



demonstrated that the Choice Act, combined with accessible, affordable reproductive health care services, will prevent the majority of these deaths.<sup>41</sup> The reduction of morbidity associated with safe terminations protects a woman's right to life and enhances a woman's quality of life.<sup>42</sup>

Even if the foetus itself does not have a right to life, the state nevertheless has a 'detached' interest in fostering the sanctity of human life by protecting potential life and by regulating abortion in the late stages of pregnancy.<sup>43</sup> The ECHR supports this line of argument when it writes:

At best, it may be regarded as common ground between states that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person enjoying protection under the civil law, moreover, in many states, such as France, in the context of inheritance and gifts, and also in the United Kingdom, requires protection in the name of human dignity, without making it a 'person' with the 'right to life' for purposes of Article 2.<sup>44</sup>

The state's detached dignity interest in fetal life is relevant to the question of the validity of the Choice Act. At the very least, it seems safe to conclude that the constitutional enquiry does not end with a finding that the foetus does not have a right to life.

### 37.3 Privacy<sup>45</sup>

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40 H Rees, J Katzenellenbogen et al 'The Epidemiology of Incomplete Abortion in South Africa' (1997) 4 *SAMJ* 432 (Estimates from data collected in September 1994 at fifty six public hospitals in nine provinces in South Africa that there were at least 425 deaths in South African hospitals annually as a result of unsafe abortion, and an estimated 44 686 women were admitted with incomplete abortions.) Unsafe abortion was, prior to the Choice Act, one of the chief causes of South Africa's high rate of maternal morbidity. See Parliamentary Select Committee on Abortion 'Presentation on Behalf of the Medical Research Council's Incomplete Abortion Research Group' (1995) available at [www.geocities.com/terjeskjerdal/abort\\_1.htm](http://www.geocities.com/terjeskjerdal/abort_1.htm).

41 See R Jewkes and H Rees 'The Impact of Age on the Epidemiology of Incomplete Abortions in South Africa after Legislative Change' (2005) 112 *BJOG: International Journal of Obstetrics and Gynaecology* 355 (Demonstrates convincingly that the introduction of the Choice Act has had a positive impact on maternal morbidity from incomplete abortions, and has resulted in an extremely significant reduction in abortion associated mortality. By comparison with the 1994 research cited above, the 1998-2001 mortality data indicates that there has been a 91.06% reduction in deaths from unsafe abortions.)

42 See R Cook 'Advancing Reproductive Rights Beyond Cairo and Beijing' (1996) 3 *International Family Planning Perspectives* 22 (Considers the international-law obligations of governments to reduce maternal mortality and morbidity.)

43 See D Myerson 'Abortion: The Constitutional Issues' (1999) 116 *SALJ* 50.

44 *VO v France* [2004] 2 FCR 577 at para 84.

45 FC s 14 provides:

Everyone has the right to privacy, which includes the right not to have —

(a) their person or home searched;

(b) their property searched;

FC s 14, the right to privacy, is said to be primarily about a 'right to be let alone'.<sup>46</sup> At the very least it ensures that certain areas of an individual's life remain free from state interference. In *Eisenstadt v Baird*, the US Supreme Court wrote:

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[I]f the right of privacy means anything it is the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>47</sup>

In *Roe v Wade*, the US Supreme Court struck down a Texas law criminalizing abortion on the grounds that the right to privacy embraced the right to terminate a pregnancy.<sup>48</sup> The court acknowledged the need to strike a balance between the woman's right to privacy and the state's interest in potential human life.<sup>49</sup> The *Roe* Court established a framework, known as the trimester approach, in terms of which the state's interest in protecting potential life did not become compelling until after the point of viability of the foetus.<sup>50</sup> Only at the point of viability, or in the third trimester of pregnancy, would the interest of the state in protecting potential life be sufficiently compelling to justify the restriction of a woman's right to choose to have an abortion. Even then, said the *Roe* Court, the compelling interest of the state in protecting potential life remained subordinate to the woman's life and health. A state could impose restrictions on abortion prior to viability only if the measures

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(c) their possessions seized;

(d) the privacy of their communications infringed.

Section 13 of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') provided:

'Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.'

See D McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 38.

46 Glendon (supra) at 36.

47 405 US 438, 453 (1972)(Decision provided unmarried couples with the right to choose to use contraceptives. Although the right to privacy is not specifically mentioned in the US Constitution, it is implicitly guaranteed in various of its provisions.) See L du Plessis 'Personal Rights: Life, Freedom, and Security of the Person, Privacy and Freedom of Movement' in Van Wyk et al (eds) *Rights and Constitutionalism* (supra) 212, 242 (Summary of American privacy jurisprudence); R Dworkin 'Unenumerated Rights: Whether and How *Roe* Should be Overruled' (1992) 59 *University of Chicago LR* 381, 417 ('Unenumerated Rights').

48 410 US 113 (1973).

49 *Ibid* at 158.

50 'Viability' is the point at which a foetus can exist independently outside the uterus. Courts have recently considered whether this includes living with artificial aid. See *Kassama v Magat* 767 A 2d 348 (Md Spec App 2001)(Held that 'viability' means potentially able to live outside mother's womb, albeit with artificial aid); *Carhart v Stenberg* 972 F Supp 507 (D Neb 1997)(Held that in the abortion context 'viability' of foetus occurs when there is reasonable likelihood of foetus' sustained survival outside womb, with or without artificial support, and that even as medical technology advances, the point of viability is determined not in relation to technology but in relation to when the foetus can survive without artificial support.)

were necessary to protect a woman's health and were the least restrictive means of doing so.

There are good reasons to allow a state to prohibit abortion after viability. At about that point, foetal brain development is sufficient to feel pain, which indicates that the foetus has protectable interests of its own. By then a woman has had sufficient opportunity to decide whether she believes that it is best to terminate the pregnancy. Hence she is not then denied the right to choose abortion.<sup>51</sup>

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The viability demarcation also acknowledges that abortion becomes 'morally more problematic as the foetus develops towards the shape of infancy, as the difference between pregnancy and infancy becomes more a matter of location than development.'<sup>52</sup> The reasons advanced for the limitation of a right to abortion at viability appear to be sufficiently compelling to satisfy the limitations test set out in FC s 36.

In the two decades following *Roe*, a number of US Supreme Court decisions curtailed the right to choose an abortion.<sup>53</sup> In *Planned Parenthood of Southeastern Pennsylvania v Casey*, the US Supreme Court reaffirmed that women have the constitutional right to choose to have an abortion, but abandoned the trimester framework of *Roe* and held that the state had a legitimate interest in foetal life throughout pregnancy.<sup>54</sup> A state could promote this interest by enacting restrictive measures designed to encourage childbirth over abortion, provided that the measures did not unduly burden a woman's right to choose an abortion. According to *Casey*, a restriction imposes an undue burden on a woman if it has 'the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.'

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51 The Choice Act utilizes a three-stage framework. After 20 weeks gestation, which is just prior to the point of viability, terminations are available only in limited circumstances. In addition, the Choice Act requires that two health workers be involved in a decision to terminate a pregnancy in the late stages of pregnancy, indicating the increased importance and difficulty of the decision. The limited circumstances under which terminations are available in the Act after 20 weeks protect women's health, as the risks involved in a termination increase as the pregnancy develops. The interests of health workers are also protected, as most prefer to perform an early, rather than a late, termination. Women are encouraged to exercise their choice to terminate a pregnancy in the early stages of a pregnancy, by making abortion available on request through the first 12 weeks.

52 See R Dworkin 'Unenumerated Rights' (supra) at 429-430.

53 See, eg, *Harris v McRae* 448 US 297 (1980) (Upheld a ban on federal Medicaid reimbursements for abortions except in the case of life endangerment); *Hodgson v Minnesota* 497 US 417 (1990) (Upheld a requirement that a young woman seeking an abortion notify both parents); *Ohio v Akron Center for Reproductive Health* 497 US 502 (1990) (Upheld a requirement that a young woman obtain the consent of one parent or a judicial waiver); *Webster v Reproductive Health Services* 492 US 490 (1989) (Upheld a statute that created a presumption of 'viability' at 20 weeks'; the preamble to the statute asserted that '[t]he life of each human being begins at conception' and that 'unborn children have protectable interests in life, health and well being'; the legislation also prohibited state public employees from counselling women about abortion and banned the performance of abortions at public facilities.)

54 505 US 833 (1992).

<sup>55</sup> A woman challenging such restrictive measures bears the initial burden of demonstrating 'undue' harm. <sup>56</sup>

Inconvenience, even severe inconvenience, is not an 'undue burden' on a woman's right to an abortion. Instead, a court's proper focus must be on the practical impact of the challenged regulation and whether it will have the likely effect of preventing a significant number of women for whom the regulation is relevant from obtaining abortions. To constitute an undue burden, a challenged

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state regulation must have a strong likelihood of preventing women from obtaining abortions rather than merely making abortions more difficult to obtain. <sup>57</sup> American courts have also held that the states do not violate the US Constitution by expressing a preference for normal childbirth over abortion. <sup>58</sup> The government has no constitutional obligation whatsoever to facilitate abortions, and can further restrict that right short of placing an undue burden on a woman's right to choose. <sup>59</sup> Despite the erosion of reproductive rights in these decisions, American courts have consistently held that a state may not place its interest in foetal life above its interest in the life or health of a woman at any time during the course of a pregnancy. <sup>60</sup>

As the US jurisprudence suggests, locating a right to choose an abortion within the right to privacy has numerous drawbacks. Justice Ruth Bader Ginsberg notes that

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55 Ibid.

56 J Benschoff '*Planned Parenthood v Casey* — The Impact of the New Undue Burden Standard on Reproductive Health Care' (1993) 269 *JAMA* 2249. Prior to *Casey*, the court had consistently invoked the principle of government neutrality. For example, in *Harris v McRae*, this principle was found to justify a state not providing any financial assistance to women who choose to have abortions. *Casey* was the first case that did not involve government funding in which the court abandoned the principle that the government must act with neutrality in regard to a woman's decision to terminate her pregnancy. But see *Carhart v Smith* 178 F Supp 2d 1068 (D Neb 2001) (Held that to afford no protection to the effectuation of a woman's decision to obtain an abortion would render her fundamental right meaningless); *Eubanks v Schmidt* 126 F Supp 2d 451 (WD Ky 2000)(Women have the right to choose to have an abortion before viability and to obtain it without state's imposition of any undue burden. A law will impose a prohibited 'undue burden' on the right to choose abortion if it has the purpose or effect of placing a substantial obstacle in path of women seeking abortion of a nonviable fetus. A State may pass a law aimed at decreasing number of abortions so long as law strives to reach this goal by influencing woman's choice, rather than by creating substantial obstacles.)

57 *Karlin v Foust* 188 F 3d 446 (7th Cir 1999).

58 *Women's Emergency Network v Bush* 323 F 3d 937 (11th Cir 2003); *Taylor v Kurapati* 600 NW2d 670 (Mich App 1999).

59 *Victoria W v Larpenter* 205 F Supp 2d 508 (EDLa. May 21, 2002).

60 See *Women's Medical Professional Corp v George Volnovich* 130 F 3d 187 (6th Cir 1997)(Held that even though state has right to ban post-viability abortions, and therefore applications of this ban are constitutional if woman's health and life are not at risk, post-viability abortion regulation which threatens life or health of even a few pregnant women should be deemed unconstitutional.) See also *Planned Parenthood of Rocky Mountains Services, Corp. v Owens* 2002 WL 571784 (10th Cir 2002); *Rhode Island Medical Soc v Whitehouse* 66 F Supp 2d 288 (Dis RI 1999); *McMillan v City of Jackson* 701 So 2d 1105 (Miss 1997).

analysing the right to terminate in terms of privacy — an autonomy right — has made it easier for the court to justify limiting women's access to abortion. She suggests that analysing the issue in terms of the right of women to the equal protection of the law — a solidarity right — would have made it more difficult for the court to rule, for example, that neither the US Constitution nor federal statute requires state health insurance reimbursements for elective abortions.<sup>61</sup>

Research in America suggests that the negative consequences of restrictions on abortion and the lack of access to publicly funded abortion facilities are visited primarily on poor, young, rural, and battered women in dysfunctional families.<sup>62</sup> Locating the right to choose an abortion exclusively in the right to privacy could well have a similar effect in South Africa and leave the current position of the most vulnerable women in our society unchanged. As June Sinclair has argued:

In the US the Supreme Court in *Roe v Wade* held that a woman's constitutional right to privacy prevented a state from forbidding abortion. This recognition of women's autonomy in the 'private' sphere of reproduction, however, is what has been used to justify failures on the part of the federal government to provide funding necessary to make the abortion choice meaningful to those women who cannot afford medically acceptable procedures. The duty of the state not to prohibit abortion in this sphere of privacy has come to mean

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that it also has no duty to intervene to protect this choice that its non-intervention guarantees. The negative right does not translate into a positive claim to safe, subsidized abortion facilities.'<sup>63</sup>

Despite these limitations, Ronald Dworkin cautions against dismissing the privacy argument altogether. He suggests that it should be used in conjunction with, rather than in contra-distinction to, an equal protection analysis.<sup>64</sup> This approach makes sense in a country such as ours with its long history of state regulation of reproduction.<sup>65</sup>

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61 R Ginsburg 'Sex Equality and the Constitution: The State of the Art' (1992) 14 *Women's Rights Law Reporter* 361, 362.

62 J Benshoof 'The Impact of the New Undue Burden Standard' (supra) at 2254. Under the Final Constitution, the right of access to reproductive health care services, (see § 37.8 infra), freedom and security of the person (see § 37.5 infra), and a substantive interpretation of equality (see § 37.4 infra), should make it unnecessary to rely entirely on privacy to found a right to abortion in South Africa.

63 See J Sinclair (supra) at 525. Similar criticism of these decisions has been levelled by numerous commentators. See DE Roberts 'The Future of Reproductive Choice for Poor Women and Women of Colour' (1992) 14 *Women's Rights Law Reporter* 309 ('A choice — at least where fundamental rights are concerned — means more than the abstract ability to reach a decision in one's mind. A true choice means an uncoerced selection of one course of action over another and the ability to follow one's chosen course. An indigent woman may have the legal option to decide that she wants to terminate her pregnancy. She may even feel that an abortion is essential to her economic, physical and emotional survival. But if the government will pay for her childbirth expenses and not for an abortion, and she has no money for either option, she does not have a choice.')

64 R Dworkin *Life's Dominion: An Argument about Abortion and Euthanasia* (1993) 54.

65 On the principle of procreative autonomy underlying decisions upholding the right to contraception and abortion see R Dworkin 'Unenumerated Rights' (supra) at 417.

## 37.4 Equality <sup>66</sup>

Equality has a special place in the Final Constitution. <sup>67</sup> As we try to expiate the sins of a past 'in which inequality was systematically entrenched,' <sup>68</sup> the Final Constitution sets its face against laws and practices which reinforce the subordination of disadvantaged groups and undermine their dignity. <sup>69</sup>

The Final Constitution is concerned with both substantive and formal equality. Substantive equality looks beyond abstract legal rights to the actual social, political and economic conditions of disadvantaged groups. From this perspective it is clear that, in order to secure the equal access of persons to constitutional rights and freedoms, more may be required from the state than abstention from interference in the lives of its citizens. The state may be required to intervene positively to provide the minimum resources necessary for the enjoyment of certain rights.

Because reproductive autonomy is a precondition for the sexual and social equality of women, <sup>70</sup> women ought to be entitled to claim state resources in

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that choice safely and securely. <sup>71</sup> By looking at abortion as an equality issue we can also assess reproductive choice in the whole context in which women fall pregnant and decide to terminate a pregnancy or to raise children. <sup>72</sup> The social and sexual equality of women will only be achieved when women are free to choose whether or not to have sex, and when women are free to decide on the number and spacing of their children, if any. <sup>73</sup> A legal right to early and safe abortion is an issue of individual conscience, social justice and sexual equality.

The biological facts of life determine that it is women who become pregnant. However, it is also a social reality of South African life that, in addition to the burden

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66 See C Albertyn and B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 07) Chapter 35.

67 See C A MacKinnon *Toward a Feminist Theory of the State* (1989) 246.

68 See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 33.

69 See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC) at paras 218, 262 and 322.

70 See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC), *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; *Harksen v Lane* 1998(1) SA 300 (CC), 1997 (11) BCLR 1489 (CC); *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC); *Nonkululeko Letta Bhe and others v The Magistrate Khayelitsha and others* 2005 1 SA 580 (CC), 2005 (1) BCLR 1 (CC).

71 See R Dworkin 'Why Liberals Should Care About Equality' *A Matter of Principle* (1985) 205.

72 Ibid.

73 Ibid.

of childbirth, the costs and responsibility of bringing up children are disproportionately borne by women. Goldstone J emphasised in *President of the Republic of South Africa and Another v Hugo* the acute challenges involved in child rearing for South African women:

For all that it is a privilege and the source of enormous human satisfaction and pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources, are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment.<sup>74</sup>

The social and economic consequences of pregnancy may include: losing a job or promotion, low-paid or no maternity leave, lack of adequate childcare, interrupted careers or education.<sup>75</sup> This double burden of birth has a profound impact on women's ability to participate as equal citizens.<sup>76</sup>

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The equality clause in the Final Constitution provides expressly that everyone has the right to equal protection and benefit of the law. FC s 9(2) provides that 'equality includes the full and equal enjoyment of all rights and freedoms' and supports a substantive rather than purely formal approach to equality. If we accept that the primary purpose of the equality clause is to assist disadvantaged groups to overcome the inequality of their condition, we must then separate substantive equality claims from other equality claims. This may be important if, in claiming equal protection, men or partners of pregnant women attempt to prevent women from asserting their reproductive rights. The demand for substantive equality in the domain of reproductive rights makes the connection between systemic

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74 *Hugo* (supra) at para 38.

75 In South Africa 330–400 of every 1 000 births are to young women and girls under 19. See *Youth Speak Out . . . A Study on Youth Sexuality* (NPPHCN/UNICEF (1996)). Without the option of abortion some of these women drop out of the education system and thereby forgo the benefits of education. The result is a cycle of poverty for women already trapped by their disadvantaged social circumstances. See *Mfolo and Others v Minister of Education, Bophuthatswana* 1992 (3) SA 181 (B), 1994 (1) BCLR 136 (B) (Held that a regulation prohibiting pregnant women from pursuing their studies to be inconsistent with section 9 of the Bophuthatswana Constitution.) See also *Student Representative Council of Molepolole College of Education v Attorney General* [1995] (3) LRC 447 (Botswana Court of Appeal)(Found regulations obliging pregnant students to leave Teachers Training College or miss the following semester to contravene section 15(3) of the Botswana Constitution. Section 15(3) prohibits sex-based discrimination); *Lloyd Chaduka and Morgenster College v Enita Mandizvidza*, Judgment No SC 114/2001, Civil Appeal No 298/2000 (Zimbabwe Supreme Court)(Held that a contractual provision that required women to withdraw from college if they become pregnant is contrary to public policy and the Zimbabwean Constitution.)

76 The repealed Abortion and Sterilization Act operated unfairly to discriminate against women generally by denying them control over their own fertility, but also discriminated indirectly against black, poor, and rural women. Under the Abortion and Sterilization Act, 61.3% of the legal abortions performed in South Africa during 1995 were on white women. See answer to Question in National Assembly on 14 March 1996 by Dr Zuma, Minister for Health, Interpellations, questions and Replies of the National Assembly Third Session — First Parliament 1–14 March 1996.



discrimination against women and women's unique reproductive role.<sup>77</sup> With respect to disputes over reproductive rights, a man's formal right to equality must yield before a woman's substantive right to equality.<sup>78</sup> Indeed, the text of FC s 9(3) embraces pregnancy,<sup>79</sup> in addition to sex and gender, as a prohibited ground of discrimination and thereby acknowledges that pregnant women are members of a systematically disadvantaged group whose historical and current condition require enhanced judicial solicitude.

Because the social consequences of pregnancy may profoundly impair a woman's ability to participate as citizens,<sup>80</sup> FC s 9(3), recognizes that women deserve to be treated with equal concern and respect in relation to their biological difference, not punished for it.<sup>81</sup> Although the Bill of Rights addresses discrimination on the basis of pregnancy, it is likely to be many years before women are free and equal to men in their sexual relationships. The Choice Act recognizes that to achieve sex and gender equality, women of all ages must be able to decide

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whether to terminate a pregnancy. Parliament has acknowledged that women are best placed to make this choice, and has provided for abortion on request within the first 12 weeks of pregnancy.<sup>82</sup> If women present early for terminations, both doctors and properly trained midwives can perform the termination procedure.<sup>83</sup> Abortion on request, combined with access to medical terminations, heralds a new age in

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77 K Mahoney 'Canadian Approaches to Equality Rights and Gender Equity in the Courts' in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 439.

78 See G Brodsky & S Day 'Canadian Charter: Equality Rights for Women' *Canadian Advisory Council on the Status of Women* (September 1989) 192. See also *Coe v County of Cook* 162 F 3d 491 (7th Cir 1998)(Upheld principle that the constitutional right of a woman to have an abortion without interference from the man who impregnated her precludes recognition of any constitutional right of the man to interfere); *Paton v British Pregnancy Advisory* [1979] QB 276 (In the absence of the right to be consulted under the Abortion Act, a husband had no rights enforceable in law or in equity to prevent his wife from having an abortion or to stop the doctors carrying out the abortion which was lawful under the 1967 Act); *Paton v United Kingdom* (1981) 3 EHRR 408 (European Commission found that the husband's and potential father's right to respect for his private life and family life cannot be interpreted so widely as to embrace such procedural rights as claimed by the applicant, i.e. a right to be consulted, or a right to make applications about an abortion which his wife intends to have performed on her.)

79 See *Brink v Kitshoff* NO 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 42. But see *Geduldig v Aiello* 417 US 484 (1974)(Disingenuous comparison made between pregnant and non-pregnant persons); *Bliss v AG of Canada* [1979] 1 SCR 183 (Held that discrimination on the ground of pregnancy did not amount to discrimination on the basis of sex.)

80 For example, abortions in England and Wales rose by over 14 % to a six-year high in 1996 following a government public health warning that certain contraceptive pills carried an increased risk of blood clots. See 'Blood Clots Fears Only Covering Explanation: Abortions Up 14%' *The Guardian* (21 February 1997).

81 See *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Canadian Supreme Court adopted a new test, abandoning the similarly situated or male comparator test, which focuses on the impact of laws on the context of the person affected. This test analyses discrimination in terms of disadvantage, which requires judges to look at the real experience of women or other claimants and to confront systematic discrimination.)

82 Choice Act s 2(1)(a).



women's reproductive health: I say heralds, because such unencumbered access to abortion is not yet the reality for many women in South Africa.<sup>84</sup>

The right to access health care services, including reproductive health care, is guaranteed in FC s 27.<sup>85</sup> A failure by any state-controlled clinic or hospital to provide termination of pregnancy on the same scale as any other medical or surgical procedure unfairly discriminates against pregnant women under FC s 9 and violates FC s 27. Similarly, given that FC s 9 is enforceable between private persons<sup>86</sup>— as is the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>87</sup>— medical aid schemes may not be able to refuse funding for terminations of unwanted pregnancies without infringing a woman's constitutional and statutory rights.

### 37.5 Freedom and security of the person

The right to freedom and security of the person has been extended in the Final Constitution to include the right of everyone to bodily and psychological integrity. This subsection encompasses the right to make decisions concerning reproduction and to security in and control over one's body.<sup>88</sup> The decision to terminate a pregnancy falls clearly within the ambit of this right.

In *Christian Lawyers II*, Mojapelo J held that FC ss 12(2)(a) and (b) guarantee the right of every woman to determine the fate of her pregnancy — whether to terminate it or not — and that this freedom of choice is reinforced by the rights to equality, dignity, life, privacy and to access to reproductive health care.<sup>89</sup> He confirmed that while the state has a legitimate interest in the protection of prenatal life, such regulation may not amount to a denial of the right to freedom and security of the person.

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The Constitutional Court's purposive approach to the interpretation of FC s 12 — which looks at the right in its broader constitutional context and situates it within our

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83 Choice Act s 10(1)(a).

84 The Choice Act came into effect on 1 February 1997. See K Dickson, R Jewkes, H Brown, H Rees and L Mavuya 'Abortion Service Provision in South Africa Three Years After Liberalization of the Law' 34 (3) *Studies in Family Planning* (2003) 277 (Reveals that three years after enactment of the Choice Act, only 32% of the 292 designated abortion facilities were functioning; 27% of functioning facilities were in the private sector. Substantial parts of South Africa were without abortion services — resulting in gross inequalities in service availability.)

85 FC s 27(1)(a).

86 See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

87 Act 4 of 2000.

88 FC s 12(2): Everyone has the right to bodily and psychological integrity which includes the right-(a) to make decisions concerning reproduction; (b) to security in and over their body.

89 *Christian Lawyers Association v National Minister of Health and Others* 2005 (1) SA 509 (T), 526, 2004 (10) BLLR 1086, 1103 (T) ('*Christian Lawyers II*').

particular historical condition — is especially important in the context of reproductive rights: for the 'right to choose means little when women are powerless.'<sup>90</sup>

The Constitutional Court first considered the scope of freedom and security of the person under the IC in *Ferreira v Levin NO & others*.<sup>91</sup> The *Ferreira* Court construed the right quite narrowly<sup>92</sup> and limited its reach to maintaining physical integrity within the context of unlawful detention and proscribing cruel, inhuman and degrading treatment.<sup>93</sup>

In his minority judgment, Ackermann J interpreted the ambit of freedom and security of the person, and freedom in particular, to be the right of individuals 'not to have obstacles to possible choices and activities' put in their path by the state.<sup>94</sup> However, this reliance on a classically liberal notion of freedom from state intervention suffers from limitations for women similar to those created by the right to privacy. It does not, for one, ground a positive claim against the state to provide women with access to safe and affordable abortion facilities. The explicit and detailed provisions of FC s 12 recognize that the struggle of women for personal autonomy has, historically, been a struggle for inclusion in society, rather than exclusion by the state.<sup>95</sup>

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90 See C Smart *Feminism and the Power of Law* 151 (A generous interpretation of freedom does not imply absolute freedom or no state regulation.)

91 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) ('*Ferreira*'). IC s 11(1) provided that 'every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial. IC s 11(2) prohibited all forms of physical, mental and emotional torture as well as cruel inhuman and degrading treatment.

92 *Ferreira* (supra) at para 158 (Chaskalson P took the view that the constitutional challenge to s 417(2)(b) of the Companies Act 1973 should be based on the right to a fair criminal trial.)

93 See *S v Coetzee & others* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) (On the narrow construction of right to freedom in IC s 11(1)).

94 *Ferreira* (supra) at para 54.

95 See H Lessard 'Relationship, Particularity and Change: Reflections *R v Morgenthauer* and Feminist Approaches to Liberty' (1991) 36 *McGill LJ* 263, 292.

FC s 12 confronts directly the fact that many women do not enjoy security in and control over their bodies.<sup>96</sup> The extremely high rate of rape, sexual abuse, forced sex, sexual intimidation, domestic violence and femicide in South

Africa has forced the Constitutional Court to acknowledge that that 'spousal abuse and domestic violence' is a pervasive and frequently hidden problem that challenges society at every level' and that 'domestic violence is 'systematic, pervasive and overwhelmingly gender-specific.'<sup>97</sup> The circumstances in which women become pregnant are often beyond their control: their partners refuse to use condoms or to let them practise contraception,<sup>98</sup> or have intercourse with them against their will.<sup>99</sup>

HIV infection is another consequence of our coercive sexual environment. South African women in violent relationships have an increased risk of being infected with HIV than women in non-violent relationships.<sup>100</sup>

The history of reproductive rights in South Africa is a history of pervasive, highly invasive regulation. Women were subject to the marital power of their husbands and relegated to the status of perpetual minors.<sup>101</sup> As mothers, they were accorded equal status as guardians of their children as recently as 1993.<sup>102</sup> In addition the racist population control policies of the apartheid government sought to control

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96 FC s 12(1)(c) extends the protection of freedom and security of the person to be free from all forms of violence from either public or private sources and may be used to develop the common law of delict. See *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others (No 2)* 2003 (5) SA 593 (C), 2003 (3) BCLR 288 (C); *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC); R Jewkes and L Penn Kekana 'He Must Give Me Money, He Musn't Beat Me: Violence Against Women in Three South African Provinces.' (Women's Health Medical Research Council 1999) 11 (Surveyed 1306 women in 3 provinces and revealed that 26.8% of women from the Eastern Cape, 28.4% of Women from Mpumalanga and 19.1% of Women in the Northern Province had been physically abused by a current or ex-partner.) See S Matthews, N Abrahams et al (2004) 'Every Six Hours a Woman is Killed by Her Intimate Partner: A National Study of Female Homicide in South Africa' (2004) (5) *MRC Policy Brief 2* (Reported that, in 1999, 8.8 per 100 000 of women aged 14 years and older were killed by their partners, the equivalent of one woman being killed every six hours.)

97 *S v Baloyi* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC) at para 11. See also *Sonderup v Tondelli* 2001 (1) SA 1171 (CC), 2001 (12) BCLR 152 (CC) at para 34.

98 See B Klugman and R Weiner 'Occasional Paper No 28' Women's Health Project, Centre for Health Policy, University of Witwatersrand (1992) 27 as quoted in J Birnbaum 'Contextualising Choice: Abortion, Equality and the Right to Make Decisions Concerning Reproduction' (1996) 12 *SAJHR* 485, 500 n 47.

99 Beijing Conference Report '1994 Country Report on the Status of Women' (1994) 44 (Places the number of reported rapes in 1993 at 23 318.) The South African Police Service acknowledges that rapes are radically underreported. They estimate that only 1 in 35 rapes is reported.

100 K Dunkle and R Jewkes *Gender-based Violence and HIV Infection Among Pregnant Women in Soweto* (Gender and Health Group, Medical Research Council 2003).

101 Marital power was finally abolished for all races retrospectively by s 29 of the General Law Fourth Amendment Act 132 of 1993. See F Kaganas & C Murray 'Law and Women's Rights in South Africa: An Overview' in *Gender and the New South African Legal Order* (1994) 13.

102 Guardianship Act 192 of 1993.

black women's fertility by the use of injectable contraceptives — another egregious assault on the bodily integrity, dignity and equality of women.<sup>103</sup> Until recently abortion was criminalized.<sup>104</sup> Women either carried unwanted fetuses to term or sought abortions on the backstreets.<sup>105</sup>

Our constitution's express recognition of the experience of repression and degradation by South Africa's women is a departure from international freedom and security of the person provisions.<sup>106</sup> In the course of rejecting its racist and

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sexist past, South Africa now leads, and no longer follows, in the field of human rights.<sup>107</sup>

The Choice Act promotes a woman's right to freedom and security of her person by affording every woman the right to choose to have an early, safe and legal abortion. The language is not gender-neutral. It applies to women. The Choice Act recognizes that each woman is best placed to make the decision to terminate in accordance with her individual beliefs.<sup>108</sup>

Whether the choice Act's various infringements of FC s 12 are reasonable and justifiable limitations of women's reproductive choice in South Africa is considered below.<sup>109</sup> The nature of the liberty afforded to women under FC s 12 will be important in determining whether the state has taken the requisite steps to ensure full enjoyment of this right. However, as Ackermann J suggests in his dissent in *Ferreira*, rights to freedom and security are bound up with the conditions for their exercise.<sup>110</sup> They are, in particular, contingent upon having access to the

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103 During apartheid, the government's population policy was designed to control black South African population growth. Many black women were injected with a contraceptive known as Depo Provera. As a result contraception is a highly politicized issue.

104 Abortion and Sterilization Act 2 of 1975 (Repealed by the Choice Act).

105 An estimated 42 000 to 300 000 backstreet abortions were performed annually under the Abortion and Sterilization Act. The women involved face a high risk of permanent infertility, disability and mortality from septic abortions. See ARAG Submission to Ad Hoc Select Committee on Abortion and Sterilization (1995)(text on file with author).

106 Article 3 of the Universal Declaration of Human Rights (1948) provides that 'everyone has the right to life, liberty and security of the person'. Articles 9 and 10 of the International Covenant on Civil and Political Rights (1966) provide for liberty and security of the person in the context of freedom from unlawful arrest and detention, as does Article 6 of the African Charter on Human and People's Rights (1981).

107 Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women ('Women's Convention') (1979) provides that: 'State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.'

108 In the first 12 weeks it is the woman's decision alone.

109 See § 37.11 infra.

reproductive health care services expressly provided for in FC s 27.<sup>111</sup> Without wide access to health facilities and health workers prepared to perform early and safe abortions, these FC s 12 rights will be largely meaningless.<sup>112</sup> By giving women control of their own fertility under statute and through the Final Constitution, we create a framework within which women will truly be able to enjoy the fundamental freedom to choose the number and the spacing of their children.

## 37.6 Children's rights

*Christian Lawyers II* concerned a constitutional challenge to those provisions of the Choice Act that required only the consent of a minor in order for her to obtain a termination of pregnancy.<sup>113</sup> The Act does not require parental consent. The Christian Lawyers Association alleged that women or girls below the age of 18 are not capable, without parental consent or control, of making an informed decision as

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to whether or not to have a termination of pregnancy. Since a girl is, on this view, never capable of giving informed consent, they contended that sections 5(1),(2) and (3) of the Choice Act — which do not require parental consent — are unconstitutional. In the case of a minor requesting a termination, the Act advises that she consult with her parents, guardian, family or friends before the termination. But if she chooses not to do so, she is not, under the Act, to be denied a termination. The Christian Lawyers Association sought a declaration that section 5(a) was inconsistent with the rights of children to family or parental care and to be protected from maltreatment, degradation or abuse, and (b) violated a child's best interests and the right to equal protection of the law.<sup>114</sup>

Mojapelo J considered the entire scheme of the Choice Act. The Act requires informed consent. It provides that a termination can only be performed by a medical practitioner or registered midwife at a designated facility. It obliges the state to promote the provision of counselling before and after a termination. It encourages a

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110 Ackermann J draws on the wisdom of Isaiah Berlin in order to warn us against the danger of conflating freedom with the condition of its exercise. *Ferreira* (supra) at para 52. Freedom is never lost, they both argue, and the state is under a certain obligation to promote education, health, justice, to raise standards of living, which is 'not directed at the promotion of liberty itself, but to the conditions in which alone its possession is of value. Useless freedoms should be made usable but they are not identical with the conditions indispensable for their utility.' I Berlin 'Introduction' in *Four Essays on Liberty* (1969) at liii-iv, as quoted by Ackermann J in *Ferreira* (supra) at para 52, n 55.

111 FC s 27(1)(a). See also Article 14(2)(b) of the Women's Convention, which obliges state parties to take all appropriate measures to eliminate discrimination in rural areas, which include the rights 'to have access to adequate health care facilities, including information, counselling and services in family planning.'

112 *R v Morgenthaler* (1988) 44 DLR (4th) 385, [1988] 1 SCR 30 ('*Morgenthaler*').

113 *Ibid.*

114 FC s 28(1)(b) provides: Every child has the right to family care or parental care. FC s 28(1)(d) provides: Everyone has the right to be protected from maltreatment, neglect, abuse or degradation. FC s 28(2) provides: A child's best interests are of paramount importance in every matter concerning the child.

young woman to consult family or friends prior to obtaining a termination of pregnancy. It requires that women be informed of their rights under the Act.<sup>115</sup> Mojapelo J concluded that the legislature had not, in fact, left termination of pregnancy unregulated and that the cornerstone of the Choice Act is that a pregnant woman of any age is required to give informed consent in order to obtain a termination.<sup>116</sup>

He considered what 'informed consent' means in this context: namely knowledge, appreciation and consent.<sup>117</sup> 'Knowledge' means that a woman who consents to a TOP must have full knowledge 'of the nature and extent of the harm or risk'. The requirement of 'appreciation' implies more than mere knowledge. The woman concerned 'must also comprehend and understand the nature and extent of the harm or risk.'<sup>118</sup> 'Consent' means that a woman must consent to the harm or risk associated with the termination of her pregnancy. Her consent 'must be comprehensive.' That is, 'it must extend to the entire procedure inclusive of any consequences.'<sup>119</sup> In sum, Mojapelo J writes, 'valid consent can only be given by someone with the intellectual and emotional capacity for the required knowledge, appreciation and consent.'<sup>120</sup> The Act thereby recognises that where the capacity for informed consent exists, in spite of the youthfulness or age of the person, such a person can obtain a termination of pregnancy. Age is no bar to informed consent.

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Mojapelo J went on to hold that the approach of the Choice Act in relation to minors was, in light of the requirements of informed consent, constitutional. He reasoned as follows. First, the Final Constitution affords everyone the right to make decisions concerning reproduction and security over their bodies, including girls under eighteen. Second, the right to equality makes everyone equal before the law and prevents unfair discrimination on the basis of age. Any distinction drawn on the basis of age would violate the right to equality and the party engaging in age discrimination would have the burden of proving the discrimination fair.<sup>121</sup> Third, the argument that the provisions of the Choice Act under attack do not cater for the best interests of the girl child is unwarranted. Mojapelo J writes:

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115 *Christian Lawyers Association II* (supra) at 514-515.

116 *Ibid* at 515.

117 See *Waring and Gillow v Sherborne* 1904 (TS) 340, 344 cited in *Christian Lawyers Association 2* (supra) at 515 ('It must be clearly shown that the risk was known, that it was realised, that it was voluntarily undertaken. Knowledge, appreciation, consent — these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent.')

118 See *Castell v De Greeff* 1994 (4) SA 408 (C), 425; J Neethling, J M Potgieter and P J Visser *Law of Delict* (3rd Edition, 1999) 100-101 as cited in *Christian Lawyers Association II* (supra) at 516.

119 *Castell* (supra) at 425 as cited in *Christian Lawyers Association II* (supra) at 516.

120 See *Castell* (supra) at 425 and J Neethling, J M Potgieter and P J Visser (supra) at 120 as cited in *Christian Lawyers Association II* (supra) at 516.

121 *Christian Lawyers Association II* (supra) at 528.

The legislative choice opted for in the Act serves the best interest of the pregnant girl child . . . because it is flexible enough to recognise and accommodate the individual position of a girl child, based on her intellectual, psychological and emotional make up and actual majority.<sup>122</sup>

The judge concluded that provided a girl under 18 is capable of giving informed consent, she can obtain a termination of pregnancy.<sup>123</sup>

The approach adopted by Mojapelo J is consistent with the approach of courts in other jurisdictions.<sup>124</sup> In *American Academy of Paediatrics v Lungren* the Supreme Court of California declared a statute unconstitutional which required a minor to obtain parental or judicial consent for an abortion.<sup>125</sup> The *Lungren* court emphasised that the legislation under scrutiny allowed a minor to make decisions about childcare and whether to give a child up for adoption — decisions that had potentially deleterious consequences for the minor's long term mental and physical health. The *Lungren* court held that:

It is particularly difficult to reconcile the defendant's contention — that parental or judicial involvement in the abortion decision is necessary to protect a minor's emotional and

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psychological health — with these statutory provisions authorizing a minor who has given birth to consent, on her own, to the adoption of her child. The decision to relinquish motherhood after giving birth would seem to have at least as great a potential to cause long-lasting sadness and regret as the decision not to bear a child in the first place.<sup>126</sup>

Mojapelo J's approach in *Christian Lawyers II* likewise recognises that Parliament has made a rational legislative choice in enacting the provisions of the Choice Act relating to minors and that this choice respects the autonomy of minors to make important reproductive decisions.

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122 Ibid.

123 As the case was decided on exception, the Christian Lawyers Association may amend their defective claim and proceed with a constitutional challenge. They are unlikely to proceed with the claim as it is presently conceived. As presently conceived, the Christian Lawyers Association's constitutional complaint is underpinned by the notion that a parent has a right to veto a minor's termination of pregnancy, for any reason at all and irrespective of the circumstances giving rise to the pregnancy. No exceptions are contemplated. No suggestion is made that this discretion must be exercised wisely nor of the circumstances under which the veto may be exercised. This violates a minor's right to procreative autonomy. To require parental consent in circumstances of parental rape or incest could never be in the best interests of a child. The order sought by the Christian Lawyers Association, which they suggest is necessary to cure the constitutional omission, would in fact render the legislation unconstitutional. The Christian Lawyers Association proposes parental consultation as an alternative requirement. This requirement would be at odds with the basis for the primary cause of action, namely that a minor is never capable of giving informed consent for an abortion. The suggested requirement of parental consultation is underpinned by the notion that a child is capable of giving informed consent whereas a requirement of parental consent is not.

124 2 See *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1988] All ER 402, 409 (HL)(Supports approach that is consistent with procreative autonomy and evolving capacity of minors in respect of access to reproductive health services.)

125 940 P2d 797 (Cal Sup Ct 1997).

126 Child Care Act 74 of 1983 s 18(4)(d)(Permits a minor to consent to the adoption of her child.)

## 37.7 Religion

FC s 15 protects everyone's right to freedom of conscience, religion, thought, belief and opinion. Taken together, and read with FC s 31, these rights protect the moral autonomy of both groups and individuals. When a state prohibits abortion, it invariably imposes a particular conception of morality that encroaches upon the moral autonomy of women protected by FC s 15.<sup>127</sup> However the converse is not true. The Choice Act does not coerce anyone into having an abortion, and therefore does not infringe the right to religious freedom.

Rights of conscience do, however, protect health workers who refuse to perform abortions because of their beliefs or opinions about abortion. This right is subject to certain limitations. For example, a health worker cannot refuse to perform an abortion where it is necessary to save the life of the woman concerned or to alleviate her pain. This proviso does not violate the right to freedom of conscience or religion of providers because it is grounded in the 'double effect' doctrine. This doctrine provides that any medical intervention which has a good objective, such as preserving a patient's life, may be performed despite the fact that it can only be done at the expense of what is believed to be an unavoidable harmful effect. Similarly, rights of conscience do not permit health workers to misinform or to fail to inform women of their rights in relation to the Act.<sup>128</sup> In other jurisdictions the right to conscientious objection has been narrowly interpreted. It protects the conscience of health workers who perform the actual procedure, not the conscience of every person involved.<sup>129</sup>

The right not to be unfairly discriminated against on the basis of religion, conscience and belief is also entrenched in the Employment Equity Act (EEA)<sup>130</sup> and the Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA).<sup>131</sup> These Acts provide a basis for health workers to challenge unfair discrimination by an employer in respect of conscientious objection, or an

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employer's failure to prevent such unfair discrimination.<sup>132</sup> PEPUDA also protects health workers from unfair discrimination from co-workers and other private persons. A health worker who assists in the performance of terminations and suffers victimisation or discrimination from colleagues who object to terminations may institute a complaint in terms of PEPUDA.

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127 P Farlam 'Freedom of Religion' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 43.

128 See § 37.9 infra.

129 *Janaway v Salford Health Authority* [1988] 3 All ER 1079 (HL).

130 Act 55 of 1998.

131 Act 4 of 2000.

132 See EEA s 60(3)(Provides that if an employer failed to take necessary steps to deal with unfair discrimination, and it is proved that the employee has contravened the relevant provisions, the employer must be deemed also to have contravened that provision.) See also *Ntsabo v Real Security CC* (2003) 24 ILJ 2341, 2377F, 2378A (LC).



Contraceptive coverage laws have been challenged in the United States on the basis that they violate the religious beliefs of Catholic charitable entities. In *Catholic Charities of Sacramento, Inc v The Superior Court of Sacramento County*,<sup>133</sup> a Catholic Church affiliated employer challenged the Women's Contraception Equity Act (WCEA).<sup>134</sup> The WCEA was enacted by the legislature in 1999 to eliminate gender discrimination in health care benefits and to improve access to prescription contraceptives. The WCEA requires employers that offer coverage for prescription drugs to cover prescription contraceptives. However, it includes an exception for religious employers that enables them to exclude coverage for 'contraceptive methods that are contrary to the religious employer's religious tenets.' Catholic Charities did not qualify as a 'religious employer' under the WCEA because it did not meet the four criteria of the definition of 'religious employer'.<sup>135</sup> The *Catholic Charities* Court upheld the constitutionality of the WCEA on the grounds that the WCEA was designed to remedy gender discrimination and did not interfere with the free exercise of religion. In *Catholic Charities of the Diocese of Albany v Serio*, a New York Supreme Court heard a constitutional challenge to similar provisions in New York's Women's Health and Wellness Act (WHWA).<sup>136</sup> The New York Supreme Court upheld the WHWA on the grounds that it was narrowly tailored to effect the purpose of improving healthcare for women and ending discrimination against women in healthcare coverage. The *Serio* Court also held that the Act's 'narrow exception serves to protect the rights and health of large numbers of employees who do not share their employer's religious views.'<sup>137</sup> In our secular society, the religious views of employers and health workers should not be imposed upon women in a manner that impinges upon constitutional rights to reproductive autonomy.

## 37.8 Dignity<sup>138</sup>

FC s 10 provides that everyone 'has inherent dignity and the right to have their dignity respected and protected'.<sup>139</sup> The denial of the right to choose an abortion infringes the right of a woman to human dignity. In *Morgenthaler*, Wilson J asserted that:

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133 85 P 3d 67(Cal 2004).

134 California Health & Safety Code 1367.25 and California Insurance Code 0123.196.

135 A 'religious employer' includes an entity for which each of the following is true: '(a) The inculcation of religious values is the purpose of the entity; (b) The entity primarily employs persons who share the religious tenets of the entity; (c) The entity serves primarily persons who share the religious tenets of the entity; (d) The entity is a non-profit organization.'

136 RJI No. 01-03-072905 (NY Sup Ct 2003)(New York Supreme Courts are the lowest courts in the State, not, as the name suggests, the highest.)

137 Ibid at 17.

138 See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

139 *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC).

The right to reproduce or not to reproduce which is the issue in this case is one such right and is properly perceived as an integral part of modern women's struggle to assert her dignity and worth as a human being.<sup>140</sup>

Denying a woman the freedom to make and to act upon decisions concerning reproduction treats her as a means to an end and strips her of her dignity. The right to dignity twinned with the right to life raises vexed issues with regard to the quality of life of a woman who must bring an unplanned pregnancy to term. The consequences of an unwanted pregnancy forced to term impacts not only upon a woman's quality of life but often that of her existing family and children, the newborn, and society as a whole. Access to reproductive health care services, including abortion services, enhances the quality of life of all these individuals.

Denise Myerson argues that because the concepts of human dignity, equality and freedom function differently in limitations analysis and rights analysis, even if the foetus is not a rights bearer, consideration still needs to be given as to whether the values of human dignity, equality and freedom operate as a constitutional constraint on legislation governing access to abortion. She suggests that the value of human dignity is most obviously under threat when abortion is permitted, because the destruction of foetal life, which has intrinsic value, threatens human dignity. The value of human dignity in the context of foetal life suggests permitting abortion up until the point of viability. Meyerson concludes that the Choice Act probably strikes just the right balance between these competing considerations.<sup>141</sup>

### 37.9 Access to healthcare

FC s 27(1)(a) provides that everyone has the 'right to have access to health care services, including reproductive health care services'. FC s 27(2) provides that the 'state must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of these rights'. The Final Constitution does not guarantee a right to health, only the qualified right of access to health care services. However, the right of access to health care services and the related right to health in international law must be considered when interpreting this section.<sup>142</sup> Articles 10 and 12 of the Women's Convention explicitly protect

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equal access of women to reproductive health care services. Other health provisions in international law implicitly protect reproductive health by protecting both women and the children they bear.

Reproductive health is the condition in which the reproductive process is accomplished in a state of complete mental, physical and social well-being. It is not merely the absence of disease or disorders of the reproductive process. Reproductive health therefore implies that people have the ability to practice and to enjoy 'safe' sexual relations. It further implies that women can go safely through pregnancy and childbirth and should be assured that the conditions necessary for

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140 *R v Morgenthaler* (1988) 44 DLR (4th) 385, 491.

141 D Myerson (1999) 116 *SALJ* 50, 56-57. See § 37.2 *infra*.

142 D Bilchitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56A.

infant survival, growth and healthy development exist.<sup>143</sup> Access to safe abortion services contributes to reproductive health through the reduction of maternal morbidity and mortality.

### 37.10 Access to information

FC s 32 provides everyone with a right of access to information held by the state and required for the exercise or protection of his or her rights. Moreover, it extends the application of the right to other persons and provides for the enactment of national legislation to give effect to the right.<sup>144</sup>

Article 10(h) of the Women's Convention states that the right to access to information means that women have the right 'to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.' Lack of access to information about reproductive health will prevent women from exercising their right to reproductive decision-making, which includes making informed choices, and this will consequently limit the control that they have over their bodies.

The state's failure to provide information about reproductive health could be an actionable offence. In *Brownfield v Daniel Freeman Marina Hospital*, the Court of Appeal of California held that a rape survivor who was denied access to information concerning emergency contraception by a Catholic hospital could sue for medical malpractice.<sup>145</sup> The hospital asserted that providing the morning-after pill constituted performing an abortion. The *Brownfield* Court concluded that this treatment constituted prevention (ie. birth control) rather than a termination of pregnancy<sup>146</sup> and that 'a women's right to control her treatment must prevail over [the hospital's] moral and religious convictions.'<sup>147</sup> The *Brownfield* Court reasoned that the duty to disclose information about reproductive health arises from the fact that an adult of sound mind has

the right, in the exercise of control over [her] own body, to determine whether to submit to lawful medical treatment. Meaningful exercise of this right is possible only to the extent that

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patients are provided with adequate information upon which to base an intelligent decision with regard to the option available.<sup>148</sup>

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143 See R Cook 'Human Rights and Reproductive Self-Determination' (1995) 44 *American University LR* 975, 1002.

144 See J Klaaren and G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62.

145 208 Cal App 3d 405, 412-414 (1989) ('*Brownfield*')

146 See also *Margaret S v Edwards* 488 F Supp 181 (EDLa 1980)('[A]bortion as it is commonly understood, does not include the IUD, the 'morning-after' pill, or, for example, birth control pills.')

147 *Brownfield* (supra) at 6.

148 *Brownfield* (supra) at 8.

The Choice Act demands that medical practitioners and midwives provide women with information concerning their rights in relation to the Act. In other jurisdictions, medical practitioners who refuse to perform a termination are advised to provide woman with information about facilities where they can obtain a termination. Our courts will have to decide whether this clause is a reasonable and justifiable limitation upon the freedom of conscience of health workers. <sup>149</sup>

### 37.11 Freedom of expression

Abortion implicates the right to freedom of expression in so far as the dissemination of information assists or dissuades women from terminating a pregnancy. In *Africa Christian Action v Marie Stopes South Africa*, the Advertising Standards Authority heard argument that the advertising of 'safe' and 'pain free' abortions is misleading and offensive and that there was no evidence to substantiate such claims. <sup>150</sup> The Advertising Standards Authority Appeal Committee dismissed the complaint. The Committee concluded that there was sufficient evidence to substantiate Marie Stopes' advertising of abortions as 'safe' and 'pain free'. <sup>151</sup>

In relation to whether the advertisement was misleading and offensive, the Committee ruled that having regard to the constitutional right of reproductive autonomy and a woman's statutory rights under the Choice Act, it cannot be said that this advertisement caused widespread offence. Although the advertising may

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be offensive to certain segments of our society, such offence does not meet the stringent requirements of the relevant test. <sup>152</sup> The Committee held that:

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149 See § 37.12 *infra*.

150 *Africa Christian Action v Marie Stopes South Africa* (Advertising Standards Authority Final Appeal Committee, 22 April 2004) available at [www.wlce.co.za/litigation/Heads%20ArgumentMarieStopes.pdf](http://www.wlce.co.za/litigation/Heads%20ArgumentMarieStopes.pdf) (accessed on 7 June 2005) ('*African Christian Action*').

151 *Ibid* at paras 10.2–10.5. The Committee relied on the strict requirements in the Choice Act for the approval of designated abortion facilities, similar World Health Organisation standards and evidence from the World Health Organisation that abortion when performed by trained healthcare providers with proper equipment, correct technique and sanitary standards is one of the safest medical procedures. The Committee also considered the constitutional protection afforded to reproductive decision-making and the preamble to the Choice Act which provides for access to safe, effective, affordable and acceptable methods of fertility regulation. Marie Stopes produced evidence to demonstrate that conscious sedation is a technique to reduce the pain and anxiety associated with a TOP. The Committee concluded that the average reasonable person knows that the phrases 'safe and unsafe abortions' are used in the context of terminating a pregnancy by persons with the necessary skills in an acceptable medical environment compared with termination by persons without the necessary skills in an environment that fails to meet acceptable medical standards. A reasonable person would know that every medical or surgical procedure by its nature connotes risk, and that errors of judgment in carrying out the procedure, or post-operative complications may render the procedure itself unsafe. The record included the Department of Health's view that 'any restriction on advertising abortion may prevent women from obtaining much needed information about the availability of safe and high quality abortion services in their vicinity, thus denying them the opportunity to make informed choices.' The Committee concluded that in weighing up these interests, the balance must favour the respondent's interest in informing society that they do provide a 'safe' abortion service.

152 *African Christian Action* (*supra*) at para 12.

Even if it were found that the advertisement is offensive one would have to balance the right of freedom of expression against the offensiveness to public values in the context of an open and democratic society based on human dignity, equality and freedom.<sup>153</sup>

In *Open Door and Dublin Well Women and others v Ireland*, the applicants complained that an injunction issued by the Irish Supreme Court ordering that the applicants, 'their servants or agents be perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by making for them any travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise' impaired their freedom of expression.<sup>154</sup> The European Court of Human Rights ruled that the issuing of the injunction constituted an infringement of Article 10's right to freedom of expression.<sup>155</sup> Although the restriction pursued the legitimate aim of the protection of morals — of which the protection of the right to life of the unborn in Ireland is but one aspect — the injunction preventing applicants from receiving or imparting information about abortion facilities outside Ireland was disproportionate to the aim pursued.<sup>156</sup> The counselling of pregnant women neither advocated nor encouraged abortion, the Court observed, but was confined to an explanation of the available options. Furthermore, the injunction was found to be ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain.<sup>157</sup> In fact, the Court found that the injunction created a risk to the health of those women seeking abortions at a later stage in their pregnancy due to a lack of proper counselling and appropriate medical supervision.<sup>158</sup>

## 37.12 Limitations

The purpose of the Choice Act is to provide for early, safe and legal abortion. It provides a legal framework for women to exercise their reproductive rights in a

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153 *Ibid* at para 13.1.

154 14234/88 [1992] ECHR 68 ('*Open Door*').

155 Article 10 of the European Convention of Human Rights provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

156 *Open Door* (supra) at para 73.

157 *Ibid* at para 76.

158 *Ibid* at para 77.

responsible manner. In so doing it also limits the right to terminate a pregnancy in certain important respects. For example, abortion on request is available only in the first 12 weeks of gestation, and on limited grounds up until 20 weeks.<sup>159</sup> Some pro-choice activists argued that 14 and 24 weeks were more appropriate time limits.<sup>160</sup> However, as registered midwives will also be able to perform the termination in the first 12 weeks, a compromise around an earlier date is not unreasonable.

After 12 weeks the decision is no longer the woman's alone. The decision is then shared by the woman and a medical practitioner. The latter must be of the opinion that the pregnant woman falls within one of the specified grounds.<sup>161</sup> This balances the need for later abortions, particularly for young women or rape survivors who may not realize they are pregnant until an advanced stage of pregnancy, and the need to encourage women who present early to act in the interests of their own health and well-being.

The availability of abortion after 20 weeks of pregnancy is severely curtailed.<sup>162</sup> In other jurisdictions late terminations are rare.<sup>163</sup> The restrictions contained in the Choice Act are an attempt to balance the increasingly compelling interests of the fetus at and after viability.<sup>164</sup>

Abortion is often treated as a litmus test when individuals are assessed as to their suitability for the bench. But a litmus test of what? I'd like to suggest that a democracy — and the individuals citizens therein — can have its moral maturity measured by the reproductive rights it secures for women. Democracy is, after all, grounded in a belief that individuals can and, indeed, ought to become autonomous, self-governing moral agents. Only a regime that accords women meaningful reproductive rights can claim to treat the better half of its population seriously as citizens and decision-makers.<sup>165</sup> In *Morgenthaler*, Wilson J roundly condemned the criminalization of abortion in Canada for this very reason: it failed to treat women as

159 Because it is difficult to predict with accuracy the actual date of conception, the date is counted from the 'gestation of pregnancy', which means from the first day of the last menstrual period ('LMP'). Many women will only conceive in the 14-day period after the LMP. Accordingly, many women will only be 10 and 18 weeks pregnant respectively, at 12 and 20 weeks' gestation.

160 See ARAG Freedom of Choice (Abortion) Bill.

161 See § 37.1 supra (Discusses specified grounds).

162 Choice Act s 2(1)(c).

163 In 1992, only 53 out of approximately 160 000 terminations in the UK occurred after 24 weeks, 50 because of severe foetal handicap and 3 to prevent grave permanent injury to the physical or mental health of the pregnant woman. See Office of the Population Census & Survey (UK). Research indicates that fetuses do not have a conscious appreciation of pain before 26 weeks of gestation. See also 'For Debate: Do Foetuses Feel Pain?' 313 *British Medical Journal* (28 September 1996) 795.

164 See § 37.3 infra (Reproductive technology is constantly changing and the law must be sufficiently flexible to be able to respond to these changes.)

165 See R Copelon 'Sexual and Reproductive Rights?' in *The Constitution of South Africa from a Gender Perspective* (1995) 233.

autonomous human beings worthy of the equal concern and respect demanded by the Charter. By so linking liberty and equality rights, Wilson's judgment in *Morgenthaler* provides persuasive authority for the proposition that the South African state cannot simply subordinate the physical integrity and moral autonomy of women to other state interests without doing violence to the

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very conception of citizenship to which the Final Constitution and the Bill of Rights seeks to give birth.<sup>166</sup>

The Choice Act could have been more permissive. It is certainly not the least restrictive means for providing early, safe and legal abortion.<sup>167</sup> That said, Parliament and the Ministry of Health consulted widely and debated the proposed Bill at length prior to its promulgation. The regulatory framework of the Choice Act reflects a rational and a democratic choice consistent with the 'objective normative value system' manifest in our Bill of Rights.<sup>168</sup>

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166 *Morgenthaler* (supra) at 25.

167 See FC s 36(1)(e).

168 During 1995, written and oral submissions were made to a multi-party Ad Hoc Select Committee on Abortion and Sterilization. The National Assembly Portfolio Committee on Health also invited written comments and heard oral submissions over three days on the Termination of Pregnancy Bill. The Bill was tabled in Parliament on 17 September 1996. See *ARAG Newsletter* (November 1996).