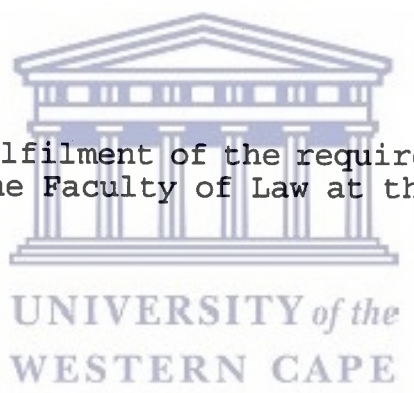
THE EFFECT OF A CONSTITUTION AND BILL OF RIGHTS ON ABORTION IN SOUTH AFRICA: A COMPARATIVE STUDY

JEREMY JULIAN SARKIN



Submitted in partial fulfilment of the requirements of the degree of Doctor of Laws in the Faculty of Law at the University of the Western Cape.

Promoter: Prof L M du Plessis
University of Stellenbosch

Co-Promoter: Prof W Landman
University of North Carolina, USA

Submitted: 5 June 1995

The financial assistance of the Centre for Science Development towards this research is hereby acknowledged. Opinions in this dissertation and conclusions arrived at are those of the author and not necessarily to be attributed to the Centre for Science Development.

CONTENTS

CHAPTER ONE	INTRODUCTION	1
CHAPTER TWO	PATRIARCHY AND DISCRIMINATION: THE LEGAL HISTORY OF FERTILITY REGULATION WITH PARTICULAR REFERENCE TO ABORTION.	
A.	**INTRODUCTION**	12
B.	**ANCIENT SOCIETIES**	14
C.	**ANCIENT GREECE**	15
D.	**ROMAN LAW**	18
E.	**THE VIEW OF RELIGIOUS INSTITUTIONS**	24
F.	**THE MIDDLE AGES**	27
G.	**ROMAN-DUTCH LAW**	28
H.	**SOUTH AFRICAN LAW**	34
I.	**INTERNATIONAL TRENDS**	53
J.	**CONCLUSION**	59
CHAPTER THREE	THE SOCIO-LEGAL CONTEXT OF ABORTION LAW IN SOUTH AFRICA.	62
A.	**INTRODUCTION**	62
B.	**THE SOUTH AFRICAN COMMON LAW**	64
C.	**PRESSURE FOR LEGISLATION**	73
D.	**THE ABORTION AND STERILISATION ACT**	88
	1. **Life and health of the mother**	93
	2. **Mental health of the mother and foetus**	94
	3. **Rape and incest**	97
	4. **Stringent procedures**	102
E.	**LEGAL ABORTIONS**	108
F.	**BACKSTREET ABORTIONS**	110
G.	**THE REALITY OF WOMEN'S LIVES**	119
H.	**LEGAL DEVELOPMENTS AROUND ABORTION FROM 1975**	122
I.	**CONCLUSION**	127

CHAPTER FOUR PROVISIONS IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND NATIONAL CONSTITUTIONS AND THEIR EFFECT ON ABORTION LAWS AROUND THE WORLD 130

A. **INTRODUCTION** 130

B. **PROCEDURAL ISSUES** 137

C. **SUBSTANTIVE ISSUES** 141

1. **Right to Life** 141

a) *Specific pre-natal protection in international treaties* 143

b) *General protection of life in international treaties* 149

c) *Specific pre-natal protection in national constitutions* 154

d) *General protection of life in national constitutions* 165

i. Austria 166

ii. Canada 167

iii. France 170

iv. West Germany and the United Germany 171

v. Italy 176

vi. Spain 179

vii. United States 181

e) *Conclusions to be drawn from right to life decisions in various jurisdictions* 183

2. **Privacy** 184

3. **Dignity** 190

4. **Security of the person** 191

5. **Freedom or liberty** 193

6. **Equality** 195

7. **Equal Protection** 198

8. **Conscience and religious freedom** 199

D. **COMPOSITION OF THE COURTS** 200

E. **CONCLUSION** 212

CHAPTER FIVE THE POSSIBLE IMPACT OF THE CONSTITUTION AND BILL OF RIGHTS ON SOUTH AFRICA'S ABORTION LAWS 215

A. **INTRODUCTION** 215

B. **THE LEGISLATURE AND ABORTION** 217

1. **The electoral system** 218

2. **The new Members of Parliament** 219

3. **The impact of the increased number of women in Parliament** 221

4. **The position of political parties** 222

a) *The African National Congress (ANC)* 222

b) *The Pan Africanist Congress (PAC)* 226

c) *The National Party (NP)* 226

d) *The Inkatha Freedom Party (IFP)* 228

e) *Other political parties* 229

5. **Extra-parliamentary attitudes** 230

6. **Law reform** 237

a) *The role of the state* 239

b) *Brain birth and viability* 243

c) *Cost implications* 259

d) *Abortion practitioners* 263

e) *Clinics or hospitals?* 265

f) *Fees* 269

g) *Counselling* 270

h) *Waiting periods* 272

i) *Statistical reporting* 274

j) *Anti-abortion protests and attacks* 275

k) *A conscience clause* 276

l) *The issue of consent* 277

C. **THE COURTS AND ABORTION** 278

1. **General issues** 279

2. **Procedural issues** 287

a) *Function of the Constitutional Court* 287

b) *Access to the Court* 290

c) *Standing* 295

3. **Substantive issues** 297

a) *Restrictions on rights* 297

i) The interpretation section (section 35) 299

ii) The limitation section (section 33) 301

b) *The right to life* 311

c) *Children* 320

d) *Equality* 323

e) *Equal protection* 330

f) *Privacy* 332

g) *Dignity* 334

h) *Freedom and security of the person* 335

i) *Conscience and religious freedom* 336

4. **Composition of the Constitutional Court** 338

C. **THE CONSTITUTIONAL ASSEMBLY AND ABORTION** 352

D. **REGIONAL PARLIAMENTS AND ABORTION** 361

E. **CONCLUSION** 364

CHAPTER SIX CONCLUSION 366

BIBLIOGRAPHY 372

BOOKS AND MONOGRAPHS 372

ARTICLES 380

CASES 395

CHAPTER ONE

INTRODUCTION

This dissertation explores the effect that the new democratic order could have on the abortion laws of South Africa. In particular, it investigates how the transitional Constitution with its Bill of Rights may impact on these laws, and some speculation on the import of the final Constitution is hazarded. The two major issues that are examined are therefore abortion and constitutionalism and it is appropriate to begin with working definitions of these concepts.

Abortion, sometimes known as termination of pregnancy, has both medical and legal definitions.[1] The selection of a definition has a lot to do with the definer's attitude towards abortion. An abortion can occur spontaneously or because it is induced.

Medically it is usually used to describe the process whereby the contents of the uterus are expelled. This is usually deemed an abortion if it occurs before viability, or the point after which a foetus can survive outside the womb independently. Medically, an induced abortion after viability is known as premature labour.

Legally speaking an abortion can take place at any point during gestation. While in the past it was largely considered criminal, no matter at what point it occurred, whether it is so characterised currently depends on the law in a particular country. Thus, the illegality of an abortion and when such

[1] See generally K A Petersen *Abortion Regimes* (1993) 4-5.

illegality arises varies from country to country.

The point at which pregnancy commences is also the subject of debate. Some fix it at fertilisation or the moment when the ovum and sperm join. Others, however, see implantation, when the developing egg or blastocyst is implanted in the wall of the uterus, as the point which marks the beginning of pregnancy.

Constitutionalism is, essentially, the demarcation and circumscription of the authority of the state so as to protect the citizens of the state. It defines the social values and objectives that ought to underpin the state and the way it functions. It can also describe the relationship between the state and the individual and the rights of the individual. The role of the courts is critical to a constitutional state and the manner in which the courts exercise judicial review is the basis for determining the effectiveness of checks on state fiat.

Constitutional law assumes major importance with a shift to a system with a supreme constitution, as all aspects of the law will be affected by constitutional law and the constitution either directly or indirectly.[2]

A critical theme of the dissertation is that patriarchy has been at the root of abortion control across the world. Use of the term 'patriarchy' in the discourse of the women's liberation movement which emerged in the latter half of the 1960s followed the cardinal insight that 'the personal is political'. As an early manifesto drawn up by a New York women's group called the

[2] See L Boulle B Harris and C Hoexter *Constitutional and Administrative Law* (1989) 20.

Redstockings put it:

> Women are an oppressed class ... We are exploited as sex objects, breeders, domestic servants and cheap labour ... our prescribed behaviour is enforced with threats of physical violence. Because we have lived so intimately with our oppressors, in isolation from each other, we have been kept from seeing our personal suffering as a political condition.[3]

That 'political condition' was identified as patriarchy.

An early attempt to formulate the concept systematically was Kate Millett's *Sexual Politics* published in 1969. She devotes an entire chapter to the task but the following extract gives some sense of the importance of the concept:

> ... a disinterested examination of our system of sexual relationship must point out that the situation between the sexes now, and throughout history, is a case of that phenomenon Max Weber defined as herrschaft, a relationship of dominance and subordinance. What goes largely unexamined, often even unacknowledged (yet is institutionalized nonetheless) in our social order, is the birthright priority whereby males rule females. Through this system a most ingenious form of 'interior colonization' has been achieved. It is one which tends, moreover, to be sturdier than any form of segregation, and more rigorous than class stratification, more uniform, certainly more enduring. However muted its present appearance may be, sexual domination obtains nevertheless as perhaps the most pervasive ideology of our culture and provides its most fundamental concept of power.
>
> This is so because our society, like all other historical civilizations, is a patriarchy.[4]

The central place which the issue of abortion has come to occupy in ongoing women's struggles across the world is partly the result of success in other areas, such as enfranchisement for women, and partly dictated by the fact that control - or the lack of it - over one's body fundamentally determines one's status in

---

[3] Cited in R Miles *The Women's History of the World* (1988) 275.

[4] K Millett *Sexual Politics* (1969) 24-5.

relation to others. As Miles notes:

> ... what use was the chance of higher education to an unmarried mother of fourteen? What was the freedom of the ballot box to a middle-aged woman who, crippled with a prolapsed uterus after the birth of her seventeenth child in twenty years, could not drag herself to the polls?[5]

Interesting in relation to both the concept of patriarchy and the centrality of the abortion issue in struggles against it, is the following comment cited by Miles and made as long ago as 1919, by a man, Victor Robinson of the American Voluntary Parenthood League:

> When women first claimed admission to the privileges of higher education, men pointed out that a female who studied in botany that plants had sex organs would be unfit to associate with her respectable sisters. When she knocked on the gates of medicine, men declared that a woman who could listen to a lecture in anatomy was unworthy of honorable wifehood. When she asked for chloroform to assuage the pangs of childbirth, men quickly informed her that if women bear their children without pain, they will be unable to love them. When the married woman demanded the right to own property, men swore that such a radical step would totally annihilate woman's influence, explode a volcano under the foundations of family union, and destroy the true felicity of wedded life, and they assured us they opposed the change not because they loved justice less, but because they loved woman more. During the many years that women fought for citizenship, men gathered in gambling-dives and bar-rooms and sadly commiserated with each other on the fact that woman was breaking up the home. Now woman demands the control of her own body, and there are men who reply that if women learn how to prevent pregnancy, they will abolish maternity. It seems there are always some men who are haunted by the fear that women are planning the extinction of the race. To attempt to reason with such men is folly, and we can only hope that a general knowledge of contraceptive methods, judiciously applied, will eliminate this type.[6]

While these discourses and struggles around gender had, and increasingly have, their counterpart in South Africa, the focus

---

[5] Miles (n3) 244.

[6] Cited in L M Newman (ed) *Men's Ideas, Women's Realities: Popular Science, 1870-1915* (1985) 105.

of political attention in this country has been largely confined until now to the eradication of apartheid and its disastrous human and socio-economic results. In consequence, other issues have not enjoyed the degree of attention which they receive in countries where democracy and democratic governance have been in existence for some time. Gender issues and issues affecting women particularly are those whose neglect emerges as striking in the new political context, where human rights are being given unprecedented emphasis and participation in international discourses is replacing the isolation of the apartheid era. Thus, while the issue of women's rights barely made the agenda of any major political grouping in South Africa until very recently, the tide is clearly turning as success against racial injustice both opens a space and establishes a paradigm for justice for women.

In this changing political context, it is not surprising that the subject of abortion has rapidly become a topic of considerable interest to South Africans, as is evident from widespread interest and debate reflected in media of all kinds over the last few years. While there was a brief flurry of media interest after the enactment of the 1975 abortion legislation,[7] it was insignificant by comparison with current coverage of the topic which now, of course, includes the powerful medium of television. This escalation in media coverage reflects the fact that debate on the issue has increased in tempo, since the politics of the 1990s announced the possibility of change, as have attempts to incorporate it into the policy documents of political parties, albeit in as neutral a way as possible.

[7] The Abortion and Sterilisation Act 2 of 1975.

Whatever the law, the practical reality is that abortion is difficult to regulate. Where severe legal restrictions are imposed, women who are unwilling or unable to bear children resort to the backstreets. Thus, the major effect of regulation is a denial, mainly to poor women, of access to services which are clean, safe and cheap. In South Africa, poor women, almost by definition, are black. The virtual prohibition of abortion in South Africa has therefore had a severely negative effect on the health and lives of black women in particular, while at the same time doing little to reduce the number of abortions that occur.

This study therefore seeks to contribute to the resolution of the abortion issue, one of the major questions still to be solved in South Africa and one around which opposing groups are beginning to organise. Given the passion with which the debate is waged by at least some of the supporters of positions perhaps unhappily described as 'pro-life' and 'pro-choice', an assessment of realistic alternatives to the present abortion laws, from a comparative and international perspective, may play a useful role.

Abortion gives rise to major ideological, religious and moral battles, as the issue involves a variety of competing interests: woman-foetus, woman-man, woman-doctor, parent-child, family-community.[8] It is not an issue on which consensus can be found since there is no solution capable of satisfying both sides of the debate at the same time. This gulf is reflected in the language deployed in the abortion debate: those who support

[8] E Ketting and P van Praag 'The Marginal Relevance of Legislation Relating to Induced Abortion' in J Lovenduski and J Outshoorn *The New Politics of Abortion* (1986) 154, 154 & 157.

abortion liberalisation use words such as 'foetus', 'termination' and 'pro-choice', while those opposed to abortion reform use 'baby', 'murder' and 'pro-abortion'.[9] Some governments, even where abortion is illegal, have sought to avoid controversy by avoiding the word 'abortion' and permitting 'menstrual regulation', involving vacuum aspiration within a few weeks of a missed period.[10]

This gulf notwithstanding, or perhaps because of it, the quest for middle ground and compromise is vital. This dissertation proposes that such middle ground is to be found in an approach that permits abortion on request during the first half of pregnancy, on the basis that this period precedes brain birth and foetal viability. Protection for the foetus thereafter would be the responsibility of the state. Viable foetuses would enjoy security except in certain exceptional circumstances.

The shift from parliamentary to constitutional supremacy in South Africa is another theme of this dissertation. Until the introduction of a justiciable Constitution in April 1994, the courts, in looking at rights issues where the state had legislated, habitually looked at procedure rather than to the substantive merits of an issue.

---

[9] K Luker *Abortion and the Politics of Motherhood* (1984) 2.

[10] In Bangladesh the government avoided abortion law reform and the concomitant controversy by permitting 'menstrual regulation', which allows vacuum aspiration after a missed period without an actual pregnancy test. See R Dixon-Mueller 'Innovations in Reproductive Health Care: Menstrual Regulation Policies and Programs in Bangladesh' (May/June 1988) *Studies in Family Planning* 272.

As Judge Didcott noted:

> Under a constitution like ours, Parliament is sovereign, and the Courts can no more assume a power which it has decreed that they shall lack, or set its enactments at naught, than can anyone else. This, although a truism, is worth stressing because it is not always understood as clearly as it should be. Our courts are constitutionally powerless to legislate or to veto legislation. They can only interpret it, and then implement it in accordance with the interpretation of it.[11]

Thus, the effect of parliamentary supremacy was to ensure that judges were mere technicians who could mitigate the effects of unjust laws only on procedural and technical grounds.

However, the role of the courts changed radically with the introduction of the entrenched justiciable transitional Constitution and its Bill of Rights[12] which is now the supreme law. It is against the Bill of Rights that legislation enacted by Parliament or other bodies will be tested by the courts when its constitutionality is at issue. Thus the newly conferred power of judicial review enables the courts to limit the power of the state, including the manner and degree in which organs of government may intrude into the lives of individual citizens. The emphasis on equality and freedom in the Bill of Rights will have major implications for this task of judicial review and both public and private law will be affected. It is even likely that the distinction between the two will largely disappear. It is in this new context of constitutional supremacy, with human rights emphasised and an enlarged role conferred on the courts, that the

---

[11] In *Nxasana v Minister of Justice and Another* 1974 (3) SA 745 (D) 747G-H.

[12] Constitution of the Republic of South Africa Act 200 of 1993.

abortion question will be decided. It is this terrain that this dissertation seeks to chart.

Chapter Two investigates the historical and socio-legal origins of the regulation of abortion and attempts to debunk some of the myths about the reasons for regulation. What emerges is that, claims to the contrary notwithstanding, abortion regulation has far less to do with protecting the foetus than it has to do with the patriarchal project of male domination. The historical roots of the concept of viability are also investigated, as is the world trend towards abortion liberalisation.

Chapter Three examines the origins and rationale of South Africa's 1975 Abortion and Sterilisation Act. It exposes one real motivation for the Act, which was to ensure an increase in the white birth rate, and argues that the legislation was not intended to stem the tide of black women having abortions. On the contrary, there were direct attempts to reduce the rate of black births. Chapter Three also examines the approach to the legislation of the white Christian male government, whose aim was an abortion regime reflecting their own beliefs. It is argued that only sympathetic public opinion was canvassed before enactment of the legislation and that individuals and groups who held opposing beliefs were ignored. Attitudes and views of individuals outside of the ruling elite were not researched and, where known, were disregarded.

Chapter Four is a comparative investigation of approaches to abortion adopted by a range of other countries with similar legal systems to ours as well as various international tribunals. The transitional Constitution enjoins the courts to use public

international law and allows them to use foreign and international case law in the task of constitutional interpretation.[13] It is therefore important, when looking at the abortion question and the manner in which the courts in South Africa may decide the issue, to examine how courts in other jurisdictions and various international bodies have dealt with it. This comparative approach is of particular use in a newly acquired constitutional system where the courts, as in South Africa, have had little experience with such questions. Cases are examined on the basis of issues, such as the right to life, equality and privacy, which were decisive and may therefore impact on a South African decision. The chapter concludes that, while the language of a bill of rights is an important determinant of decisions, the outcome of abortion cases is significantly affected by who the judges are, what their judicial philosophy is, and what they personally believe about the issue.

Chapter Five explores how the South African approach to abortion may change. It investigates what such bodies as Parliament, the courts, the Constitutional Assembly (which will draft the final constitution) and provincial legislatures could do in regard to the reform of existing abortion legislation and the enactment of new law. The stance of political parties and others towards abortion is examined and proposals are made about what the content of the law ought to be, in the light of the international experience.

It is suggested that, in view of the theories of brain birth and viability, women should be able to have an abortion performed

---

[13] Section 35(1).

on request until the twentieth week of pregnancy. After this period an abortion should be performed in very few and strict circumstances. Proposals are made in relation to who should be allowed to perform abortions as well as where they should take place. It is further suggested that neither waiting periods nor mandatory counselling should be imposed on women who wish to have an abortion. In fact, emphasis is placed on accessibility and therefore questions such as free and widespread availability are investigated.

Chapter Five also examines sections of the transitional Constitution in relation to relevant decisions in the international arena and their possible impact on the approach of the Constitutional Court when it reviews either the present or future law on abortion. The process for appointing judges to this court is investigated in an attempt to determine what type of decision it will make with regard to abortion. Finally, the chapter examines the possibility of dealing with abortion in the final constitution.

Chapter Six concludes the dissertation by noting that abortion liberalisation must occur as part of an holistic approach to health care for women. It explores the idea that abortion should be situated in an overall family planning and sex education strategy and emphasises that when alternatives to abortion are promoted, these should be realistic and viable.

CHAPTER TWO

PATRIARCHY AND DISCRIMINATION: THE LEGAL HISTORY OF FERTILITY REGULATION WITH PARTICULAR REFERENCE TO ABORTION

A. INTRODUCTION

The laws relating to abortion world-wide can be divided into three periods historically: firstly, a period largely devoid of regulation; secondly, a period of regulation influenced by patriarchy and the advent of the Catholic Church which lasted until the twentieth century; thirdly, a period marked by a movement towards liberalisation and legalisation during this century.[1]

The context within which laws were enacted is important, as the history of laws, particularly those that impact on women and therefore on abortion, is characterised by patriarchal inequalities. An evaluation of abortion policies throughout the ages reveals a strategy aimed at limiting the control women have over their own bodies.

A close examination demonstrates that abortion regulation has its roots in power relations and the preservation of patriarchal interests. These notions which underlie regulation have been concealed by moral beliefs, fashioned and enacted by men, which advocate protection of the foetus. However, it is only in relatively recent times that foetal protection has been used as the motivation for abortion control.[2] This concept has since

---

[1] L Hawthorne *The Crime of Abortion: A Historical and Comparative Study* (unpublished LLD thesis University of Pretoria 1982) 401.

[2] J Rachels *The Elements of Moral Philosophy* (1986) 51.

become the key argument for regulating abortion while patriarchy and discrimination usually underpin the discourse about the protection of life.

In South Africa this patriarchal enterprise also had a racist component, with laws designed to protect male interests also applied in a racially discriminatory manner. One result of this intersection has been unequal treatment of the different races and classes of women.

In spite of the efforts of various male-ordered societies to regulate abortion, this type of fertility regulation has been practised by women continually through the ages, often at the cost of life or health.

Where abortion has been controlled it has been subject to divisions marked by stages of pregnancy. While pro-lifers claim that life begins at conception, this chapter will show that the origin of this position was based on a mistake and that different theories about the commencement of life have been accepted at different stages throughout history. The most important of these are animation and quickening, firmly rooted in ancient history and referred to throughout the ages. In the light of the fact that they overlap during the progress of pregnancy, the notions of animation and quickening may be seen as forerunners of the viability standard.

The viability standard determines that a foetus is viable when it is able to survive independently of its mother; in other words, when its organs, and particularly the brain, are sufficiently developed to allow it to survive *ex utero*.[3] The

[3] See Chapter 6.

history and acceptance of this standard of viability are explored here, since viability, allied to the theory of brain birth, is today a convincing theory as to when life begins.[4] It is therefore argued that a woman wishing to have an abortion should be entitled to do so during the period between conception and foetal viability.

B. ANCIENT SOCIETIES

Unregulated abortion has been practised from the beginning of human existence and even infanticide was widely practised in various ancient societies.[5] In his study of 400 early societies, Devereux found that abortion was not limited to developed societies but was prevalent and widespread.[6] For example, the practice is referred to in Chinese medical books dated 2737 BC[7] and documented by Papyrus in ancient Egypt.[8] During these times abortion was widely practised with little attempt by those in authority to control it. Instances of regulation were exceptions to the general rule. Abortion regulations were introduced, for example, by the Sumerians (2000 BC), the Assyrians (1500 BC), the

---

[4] For a much fuller account see J and N Sarkin 'Choice and Informed Request: The Answer to Abortion' (1990) 1(3) *Stellenbosch Law Review* 372; J Sarkin 'A Perspective on Abortion Legislation in South Africa's Bill of Rights Era' (1993) *THRHR* 83.

[5] J Quay 'Justifiable Abortion - Medical and Legal Foundations' (1961) 49 *Georgetown Law Review* 395, 420.

[6] G Devereux *A Study of Abortion in Primitive Societies* (1976); G Devereux in H Rosen (ed) *Abortion in America* (1967).

[7] H P David *Abortion Research: International Experience* (1974) 6.

[8] P Tarnesby *Abortion Explained* (1969) 83.

Hammurabics (1300 BC), and the Persians (600 BC).[9]

C. ANCIENT GREECE

Aristotle and other Greek intellectuals were in favour of abortion until the foetus was 'alive', exemplifying the early acceptance of the idea that abortion should be permitted in the early stages of pregnancy.[10] This was intended to contain demographics and preserve a sound economy.[11] Aristotle stated:

> As to the question whether children must in every case be reared or whether exposure is sometimes permissible, there should be a law that no deformed child shall live, but established custom rules that no child must be exposed merely with a view to birth control. Yet the number of births must be limited; and so if some couples beget too many children, abortion must be procured before the embryo has reached the stage of sensitive life, upon which will depend what may and may not be done in these cases.[12]

The emphasis on the advent of 'sensitive life', before which an abortion may be performed, is an early instance of the recognition of viability as a criterion.

In the second century BC the 'gynaecologist' Soranos of Ephesus stated that an abortion could be procured to:

> conceal the consequences of adultery, to maintain feminine beauty, to avoid danger to the mother when her uterus is too small to accommodate the full embryo.[13]

---

[9] D Granfield *The Abortion Recession* (1969) 44.

[10] Aristotle VII 1335 b 25; Plato recommended it for all women over 40 or where the father was 55 years or older. Plato *Republic* V 461.

[11] See S B Pomeroy *Goddesses, Whores, Wives and Slaves: Women in Classical Antiquity* (1975) 69.

[12] Aristotle *Politics Book vii: Political Aims* (ed) J Warrington (1973) 217-8.

[13] Cited in J T Noonan (ed) *The Morality of Abortion: Legal and Historical Perspectives* (1972) 4.

However, the Hippocratic Oath, which originated in ancient Greece in the 4th century BC,[14] states: '... I will not give to a woman a pessary to produce abortion.' While this is often cited as an historical and continuing barrier to doctors performing abortions, the import of the oath has been contested by various writers.[15] Some authors argue that Hippocrates generally opposed abortion because of the risks involved.[16] However, these health risks were time-bound. Edelstein states that the oath was not and is not accepted across the board and that, in fact, it had its origins in a very small pocket of Greek opinion.[17] Violations of all the oath's principles were common and even Hippocrates himself recommended abortion at certain times.[18] Class was an important distinction in one exception to his prohibition. Thus, slave prostitutes were permitted to procure abortions.[19] Even if the Hippocratic code was widely accepted and followed, in South Africa there is movement away from the strict interpretation accorded to the code in earlier times. This was reflected by the debate surrounding the enactment of abortion legislation in the

---

[14] G Williams 'The Fetus and the "Right to Life"' (March 1994) 53(1) *Cambridge Law Journal* 71, 72.

[15] See L Edelstein *The Hippocratic Oath* (1943) 10.

[16] P Carrick *Medical Ethics in Antiquity* (1985) 96.

[17] Edelstein (n15) 10.

[18] H P David in H P David, Z Dytrych, Z Matejcek and V Schuller (eds) *Born Unwanted: Developmental Effects of Denied Abortion* (1988) 10.

[19] Williams (n14) 72.

South African Parliament in 1975. It was noted that:

> The Hippocratic Oath has become a little old-fashioned and is no longer so appropriate, and in September 1948 - it is strange how many good things happened in 1948 - the World Medical Association, of which the SA Medical Association is a member and consequently endorses the Statement, drafted the so-called 'Statement of Geneva'. Our doctors in South Africa also endorsed it. I should like to quote a paragraph from the statement ...
>
> > I shall maintain the deepest respect for human life from the time of conception. Even under duress I shall not use my knowledge of medical science in conflict with the laws of humanity. I promise this solemnly, of my own free will and on my word of honour.[20]

This indicates a move away from the blanket prohibition on the performance of abortion towards a position that merely calls for respect to be accorded to the foetus.

The attitude that abortion undermines male interests was prevalent in ancient Greece. This is borne out by the fact that the many skilled women physicians in ancient Greece were barred from practising for a period in the third century BC. This measure was a result of the influence of the Hippocratic code and because these women were seen to be performing abortions.[21] This limited women's access beyond the traditional roles reserved for them and also ensured patriarchal domination of the medical profession. Women have in fact been barred from practising various professions, including medicine, until relatively recently.

Permeating the anti-abortion stance of male doctors has been the patriarchal wish to control the fertility of women and thereby entrench the traditional view of the stereotypical

---

[20] Dr J J Vionel Hansard House of Assembly Debates col 603 (12 February 1975).

[21] H I Marieskind in C Dreifus (ed) *Seizing Our Bodies: The Politics of Women's Health* (1978) 3.

woman.[22] In line with this it is argued that the medical profession's traditional opposition to abortion has not been motivated by moral or health factors but by the attempt to gain 'economic power and professional consolidation'.[23]

D. **ROMAN LAW**

Abortion regulation and control in Roman society must be understood in the context of male ownership of woman, child and foetus. This section sketches the historical evolution of concepts in Roman law critical to the abortion debate.

Men in Rome dominated the society in every sphere and had total control over the family. *Patria potestas* gave the male head of the household extensive powers, and therefore a woman was always subject to the control of either her father or her husband or her male tutor.[24]

Laws affecting the family had at their root the maintenance of the family structure with the man at the head. Nevertheless, abortion was very widespread and frequently used.[25]

There were no laws to prevent abortion in the early Roman

---

[22] H Kunins and A Rosenfield 'Abortion: A Legal and Public Health Perspective' in (1991) *Annual Review of Public Health* 361, 364; See also J Mohr *Abortion in America: The origins and Evolution of National Policy: 1800-1900* (1978); R P Petchesky *Abortion and Women's Choice* (1984); F D Ginsburg *Contested Lives: The Abortion Debate in an American Community* (1987) 23; J Keown *Abortion, Doctors and the Law: Some aspects of the legal regulation of abortion in England from 1803 to 1982* (1988).

[23] Kunins and Rosenfield (n22) 364. See also K Luker *Abortion and the Politics of Motherhood* (1984).

[24] W W Buckland *A Textbook of Roman Law* (1963) 103; O F Robinson 'The Status of Women in Roman Private Law' (1987) *The Juridical Review* 149; J P V D Balson *Roman Women* (1962).

[25] Luker (n23) 12.

Empire as the law did not view a foetus as a person.[26] When regulation was introduced, it was aimed at curbing abortion so as to ensure male dominance and the general protection of male interests.[27] This is reflected, for example, by the fact that more severe punishments were invoked when male foetuses were aborted.

The early Romans, while not favouring abortion[28] did not apply sanctions[29] since abortion was not considered a crime.[30] Abortion was not viewed as the killing of the foetus but rather as an invasion of the rights of the father, who had sole control over the family.[31] It was only much later that abortion was classified criminal.[32]

Gender discrimination was a feature of Roman society. During the period of the kings (753-509 BC) the law determined that while a male citizen had to raise only his oldest daughter, he was required to raise all his sons.[33]

During the Republican Period (510BC - 27AD) the *paterfamilias* had supreme power in the household and if a woman

---

[26] Luker (n23) 12.

[27] Luker (n23) 12.

[28] Granfield (n9) 51.

[29] P M A Hunt 2ed *South African Criminal Law and Procedure* by J R L Milton (1982) 310.

[30] L Hawthorne 'Abortion in Roman Law' (1985) 18(2) *De Jure* 261.

[31] Luker (n23) 12.

[32] P J J Olivier *The SA Law of Persons & Family Law* (1980) 21.

[33] Hawthorne (n1) 4.

in his *potestas* aborted without his consent he could punish her. The right of the father was thus clearly one of ownership.[34]

During the middle of the second century BC the Stoic philosophy gained influence.[35] This philosophy maintained that a foetus was not a human being,[36] receiving its soul only at birth.[37] Therefore the foetus was not seen as an independent being but rather as part of its mother.[38]

It was only in the late classical period, under the Severi, that abortion seems to have become punishable.[39] The change in attitude occurred when Roman patriarchs perceived their rights within the family to be infringed by abortion. Severus and Antonius, at the time, declared that sending a woman who had procured an abortion into temporary exile was proper as:

> it could appear unfitting that she should have cheated her husband of children.[40]

Abortion was also frowned upon because the state lost a potential citizen.[41] Commenting on the impact of a woman's

---

[34] Hawthorne (n1) 7.

[35] Hawthorne (n1) 13.

[36] Hawthorne (n1) 27.

[37] Hawthorne (n1) 8-9.

[38] Hawthorne (n1) 10.

[39] J F Gardner *Women in Roman Law and Society* (1986) 159.

[40] Gardner (n39) 159.

[41] Hawthorne (n1) 13.

abortion, Cicero stated:

> She had destroyed the hopes of a parent, the remembrance of a name, the support of a clan, the heir of a household and a citizen destined for the commonwealth.[42]

Patriarchal interests were therefore paramount and abortion controls were established to protect the interest of the male head of the household. An unmarried woman who had an abortion therefore suffered no punishment.[43]

During the period of the Empire, patriarchal interests continued to be paramount in the imposition of controls on abortion. Penalties were sometimes levied according to the provisions of the *lex Cornelia de sicariis et veneficis* of 81 BC.[44] However, punishments varied according to the status of the woman concerned. Where a woman was unmarried and therefore not under the 'control' of a husband, the punishment for having an abortion was greatly reduced. If a divorced woman had an abortion, temporary exile would be imposed. If, however, a woman under the power of a husband had an abortion, the punishment imposed could be death.

From the end of the Republic through the early period of the Principate (27AD - 284AD) abortion was still widely practised.[45] The emphasis during the Principate was still on the rights of the father. The only women punished for having an abortion were married or divorced women who had failed to obtain the consent

---

[42] (D 48 19 39) Scott's translation. See Hunt (n29) 309.

[43] Hawthorne (n1) 32.

[44] D 47.11.4; D 48.8.8.

[45] Hawthorne (n1) 15.

of their husbands or ex-husbands.[46]

The crime of abortion thus was seen largely to be committed against the father and it seems that if the woman aborted with the consent of her husband there was no crime.[47] Therefore it was not the state that provided sanctions for abortion, rather the law empowered a husband to protect his interests. A husband was entitled, for example, after obtaining an order from the *praetor*, to take his wife who denied pregnancy to the house of a 'respectable' woman where three midwives selected by the *praetor* examined her. If the woman was found to be pregnant, a custodian was appointed to protect the foetus in order to safeguard the interest of her husband.[48]

The discriminatory application of the regulation of abortion has its roots in the early Roman society. While the aristocracy were easily able to persuade their doctors to perform abortions, slaves did not have the same opportunities because of their social class. Their lack of access to abortion was further exacerbated by their inability to muster the financial resources to pay for a clandestine abortion.

Abortion laws were also applied unequally to the various classes in society.

If a free person performed an abortion on a slave a 20 *solidi* fine was payable.

If a slave performed an abortion on a free woman, the slave

---

[46] Hawthorne (n1) 26.

[47] S M Davis 'The Law of Abortion and Necessity' (1938) 2 *Modern Law Review* 131; Hunt (n29) 310 fn5.

[48] M Olmesdahl 'Abortion and the Husband's Consent' (1975) *Natal University Law Review* 213.

was whipped and given to the woman who procured the abortion.

If a slave performed an abortion on another slave, 200 lashes were exacted and 10 *solidi* had to be given to the owner of the pregnant slave.[49]

If the woman upon whom an abortion was performed was a noble woman and she died as a result of it, the daughter of the abortionist was put to death.[50]

Evidence of gender discrimination is also revealed in the Roman attitude towards formation, the start of life, from which point abortion was determined to be murder. They maintained that a male embryo was formed 40 days after sexual intercourse while a female embryo was formed 80 days thereafter.[51] This belief persisted despite the fact that the sex of the embryo could not be determined and all embryos begin female and appear to be so until the fourth month of gestation.[52]

To conclude, however, the formation of the embryo was not seen to be as important as animation, or the infusion of the foetus with a soul. Animation was believed to occur at 'quickening', loosely defined as the moment the mother first felt movement in her womb.[53] Animation, with its emphasis on the arrival of a soul, and thus the creation of an independent human,

---

[49] Hawthorne (n1) 106.

[50] S M Krason and W B Hollberg in J D Butler and D Walbert *Abortions, Medicine and the Law* (1986) 197.

[51] Hawthorne (n1) 140.

[52] Luker (n23) 13.

[53] Keown (n22) 3.

must be seen as a precursor to the modern concept of viability. The two standards are also similar in respect to the moment at which they occur during gestation.[54] So while Barnard, Cronje and Olivier doubt whether viability was a necessary factor in Roman law,[55] it must be remembered that viability as a concept was unknown then, because of a lack of understanding of foetal development. However, it was contained by implication in the other theories of the time.

E. THE VIEW OF RELIGIOUS INSTITUTIONS

The advent of Christianity saw the first opposition to abortion that was not framed in terms of the rights of the father. However, the opposition of the early church was not founded upon a new attitude towards the beginnings of life. Neither was it motivated by a desire to protect the foetus, but rather by the view that:

> the pagan world had no moral objection to abortion; Christianity declared itself as opposed to paganism and all its practices.[56]

Later the church declared that it was opposed to abortion because it sought to ensure human survival.[57] This attitude was also informed by the serious risks abortion posed to the life of

---

[54] N J Davis *From Crime to Choice: The Transformation of Abortion in America* (1985) 41.

[55] Barnard, Cronje and Olivier *The South African Law of Persons & Family Law* 2ed by D S P Cronje (1990) 14.

[56] S J Drower *A Survey of Patients Referred For Therapeutic Abortions on Pyschiatric Grounds in a Cape Town Provincial Hospital* (unpublished PhD University of Cape Town 1977) 17.

[57] R N Shain 'Abortion Practices and Attitudes in Cross-cultural Perspective' (1 February 1982) 142(3) *American Journal of Obstetrics and Gynecology* 246.

the woman before the advent of modern medicine.[58] In fact, even contraception was disapproved of in the passion to ensure population growth.[59] However, the church was (and still is) controlled by men, who interpreted the word of God from a masculine perspective, allowing them to entrench their dominant position.[60]

In the third century a split in the Christian attitude began to emerge on the question of whether an abortion of an unformed foetus was murder.[61] The Catholic Church originally demanded that a woman who had procured an abortion should undertake ten years of atonement.[62] By the fifth century Augustine was stating that a foetus aborted before it had a soul was only an *informatus* and therefore aborting it should be punishable by a fine only. In 868 AD the Council of Worms declared that the abortion of a 'formed' foetus was infanticide and excommunication was the proper punishment. This was based on the view of the Catholic Church, which followed Judaic views,[63] namely that a quickened foetus deserved protection because it had a soul.[64] In 1140, when a system of church legislation was established, the distinction between a quickened and unquickened foetus was

---

[58] Williams (n14) 72.

[59] B Haring *Medical Ethics* (1972) 99.

[60] See generally Luker (n23) 12.

[61] Luker (n23) 13.

[62] Tarnesby (n8) 83.

[63] David (n18) 11.

[64] P Singer *Practical Ethics* (1979) 110.

maintained, and was invoked by Pope Gregory IX in 1234.[65]

A similar approach pertained under Islam. While abortion was permitted only in certain circumstances, quickening was seen to be the dividing line which marked the time after which an abortion could not be performed.[66] Life was seen to begin only after the foetus was 16 weeks and therefore abortion as a means of birth control was permitted until then.[67]

Across the spectrum of world religions there is no single view on abortion that holds sway. Indeed, interpretations of when an abortion is permissible has differed even within the same sect.[68] A major Protestant[69] and Jewish[70] view is that life begins only at birth: that a foetus is '*pars viscerum matris*', part of its mother, until birth and therefore not considered to be independent life.[71] Another view within Judaism is that foeticide is prohibited but not punishable.[72]

---

[65] Shain (n57) 246.

[66] Shain (n57) 245.

[67] S S Nadvi in Oosthuizen et al (eds) *The Great Debate: Abortion in the South African Context* (1974) 49.

[68] M L Lupton 'The Legal Status of the Embryo' (1988) *Acta Juridica* 205. See B Feldman *Birth Control in Jewish Law* (1968) 251-294 and D Hoffman 'Political Theology: the Role of Organised Religion in the Anti-Abortion Debate' (1986) *Journal of Church and State* 225 (Jewish); J E S Fortin 'Legal Protection for the Unborn Child' (1988) *Modern Law Review* 54 56 (Catholic); J A Robertson 'Ethical and Legal Issues in Cyropreservation of Human Embryos' (1987) *Fertility and Sterility* 371 n13 (Protestant).

[69] J A Robertson (n68) 371 n13.

[70] Feldman (n68) 251-294; Hoffman (n68) 225.

[71] Feldman (n68) 253; A Weiss in G C Oosthuizen et al (n67) 33.

[72] Weiss (n71) 33.

Prohibitions against abortion were unknown for millennia in Japan and China, since the religions practised there did not consider abortion a crime against God or society. This attitude to abortion changed in these countries only with the arrival of western colonisers in the nineteenth century.[73]

F. THE MIDDLE AGES

Abortion was not considered a crime in the early period of Germanic law (first century AD). However, for patriarchal reasons, it remained a matter to be dealt with by the male head of the household.[74] During the early Germanic period, children were seen to be an asset of the father. If a woman had an abortion without the consent of the male head of the household, thus affecting his position, the man could decide whether or not to punish her. The Lex Visigothorum[75] of the seventh century also distinguished between instances where a woman or a man procured an abortion.[76] This strong patriarchal influence continued in the Bavarian code (eighth century) which imposed higher fines in cases where male foetuses were aborted.[77] The Alamannic laws enacted in the middle of the eighth century also drew a distinction between male and female foetuses; if a male

---

[73] H P David (n7) 11.

[74] Hawthorne (n1) 108.

[75] H R Hahlo & E Kahn *The South African Legal System and its Background* (1973) 374.

[76] Hawthorne (n1) 105.

[77] Hawthorne (n1) 108.

foetus was aborted a higher fine was imposed.[78]

Male foetuses were also supposed to form more swiftly than females. Thus, an abortion was punishable if it was performed more than 80 days after intercourse if the result was a female foetus, but after 40 days in the case of a male foetus. Germanic laws therefore continued the Roman trend of drawing a distinction between the various stages of foetal growth. If a formed foetus was aborted the fine was greater than if an unformed foetus was aborted.[79]

It is clear, therefore, that over a period of many centuries there was general acceptance and reliance on the early equivalent theory of viability, with the emphasis on the formation and functioning of the various bodily organs.

G. ROMAN-DUTCH LAW

Roman-Dutch law (sixteenth to eighteenth centuries), in contrast to Roman law, did not consider abortion a crime against the father but rather a crime against the foetus. This shift was influenced by Christianity and had its roots in theory about when the soul enters the body.[80]

Roman-Dutch law distinguished between separating a foetus from its mother and so causing it to die, and killing a foetus while it was still in its mother's body. The first was seen as

---

[78] Hawthorne (n1) 101.

[79] Hawthorne (n1) 108.

[80] Hunt (n29) 310.

abortion and the second as either murder or infanticide.[81] Even a father could be found guilty of the crime.[82] A woman was guilty of the crime whether she or someone else performed the abortion, although she could escape liability if the abortion was procured without her consent. Anybody who gave information regarding the procedure of an abortion was also punishable.[83] Punishment, although not as severe, was also meted out where an abortion was caused unintentionally.[84]

Following the pattern established centuries earlier, the age of the foetus was considered vital to determination of the crime and as such affected the punishment that was imposed.[85] The Constitutio Criminalis Carolina, which was an important point in the development of criminal law, drew a distinction between the animated and non-animated foetus.[86] The writers of the University of Louvain, which was established in 1425 and played a critical role in the development of law in the fifteenth and sixteenth centuries, also subscribed to this view.[87] If the foetus was thought to be formed enough to have a soul, the death penalty was normally imposed on those found guilty of abortion. However, those who procured an abortion before the foetus was

---

[81] P J J Olivier *Die Suid-Afikaanse Persone-en-Familiereg* 2ed by A H Barnard and D S P Cronje (1980) 22.

[82] Hunt (n29) 310.

[83] Hunt (n29) 311.

[84] Hunt (n29) 311 n15.

[85] P C Anders & S E Ellson *The Criminal Law of South Africa* (1915) 43.

[86] Hawthorne (n1) 144.

[87] Hawthorne (n1) 155.

considered to have a soul, were guilty of a less severe crime.

Controversy therefore revolved around the question of when the foetus was supposed to obtain a soul. In the thirteenth century Thomas Aquinas defended the theory of animation by arguing that the obtaining of a soul was critical to human development. According to this theory, the soul does not enter the body until the foetus has a human shape and the basic human organs.[88] Curran's[89] summary of this theory is that:

> ...the soul is the substantial form of the body, but a substantial form can be present only in a matter capable of receiving it. Thus the fertilised ovum or early embryo cannot have a human soul. Man's spiritual faculties have no organs of their own, but the activity of 'cognitive power' presupposes that the brain be fully developed, that the cortex be ready. (In the view of John Donceel) the least we may ask before admitting the presence of a human soul is the availability of these organs: the senses, the nervous system, the brain, and especially the cortex.

Aquinas thus considered the shape of the foetus to be the critical indication. Ironically, this emphasis on human form played a vital role in the acceptance by the church and others in the seventeenth century of the idea that human life begins at conception. This notion became more accepted when scientists, examining a fertilised ovum, mistakenly believed that they saw a perfectly formed human being or *homunculus* within it. In accordance with the established idea that the presence of human form indicated the presence of the soul, therefore, the church accepted the notion that conception denoted the beginning of life. The biological mistake was realised later, but the

---

[88] Drower (n56) 19.

[89] C Curran *New Perspectives in Moral Theory* (1974) 186.

misconception had taken root by then.[90]

At the same time the old idea, namely that life begins only when the soul enters the sufficiently formed body, continued to find supporters.[91] Quickening was thought to occur between the 16th and 18th week.[92] This is critical to any evaluation of the issue of viability as viability also occurs at around the same time.

Viability ties in with other theories propounded by Roman-Dutch jurists. Some Roman-Dutch lawyers tended to accept that a foetus acquired a soul after half the period of pregnancy (twenty weeks), while others stated that ensoulment occurred when the foetus had obtained a fully formed body and had 'life'.[93] Other writers, however, argued that the foetus acquired a soul after 45 days of gestation.[94]

It is noteworthy that this theory of foetal ensoulment corresponds with today's viability standard, which sets viability at around twenty weeks.[95] Some will argue that the reasoning of the Roman-Dutch writers was different and therefore that viability had no relevance. But it must be remembered that the process of human fertilisation was not known until Keber discovered it in 1853. Before this date, embryology and the

---

[90] Rachels (n2) 51-2.

[91] Hunt (29) 311. See further S A S Strauss 'Therapeutic Abortion and the South African Law' (1968) 85 *SALJ* 455.

[92] Mohr (n22) 3.

[93] Hunt (n29) 311.

[94] See the comments of Diemont JA in *S v Collop* 1981 (1) SA (A) 150 at 165C-D.

[95] Sarkin (n4) 372.

stages of foetal development were not understood.[96] Metaphysics thus necessarily substituted for science. It is interesting, however, that contemporary science draws the same conclusion as the legal metaphysicians of earlier centuries. In any event, acceptance of viability in Roman-Dutch law is established by various authors.[97]

Barnard, Cronje and Olivier[98] disagree with the view of others that viability was vital in Roman-Dutch law before legal subjectivity could be conferred on a child. However, they do not dispute the theory of viability itself. Rather, they criticise what they see as the vagueness of the concept. The authors assert that, in relation to the conferring of legal subjectivity, the notion of viability was not:

> ... accepted in the law of the Netherlands when the Burgerlijk Wetboek was accepted in 1838 and it also does not form part of the Niewe Burgerlijk Wetboek - Asser Handleiding Personenrecht 3 et seq ...[99]

Even if this assertion were correct, it would not really be relevant to the acceptance of the viability principle into South African Law since by 1838, 32 years after the second English occupation of the Cape, Dutch law no longer exerted its earlier influence. From 1806 onward, therefore, it was English law, rather than a changing Roman-Dutch law, that impacted on the

---

[96] O Lee & A Robertson *Moral Order and the Criminal Law* (1973) 135.

[97] H Dernburg *Pandekten* vol 1 7 (ed) H W Muller (1902) 110-111 cited in Barnard, Cronje and Olivier (n55) 14 n8 and B Windscheid *Lehrbuch des Pandektenrechts* 9 ed vol 1 (reprint of the Frankfurt am Main edition of 1906) (1963) 233 cited in Barnard, Cronje and Olivier (n55) 14 n8.

[98] Barnard, Cronje and Olivier (n55) 14 fn8.

[99] Barnard, Cronje and Olivier (n55) 14 fn11.

South African legal system.[100] This is particularly true after 1826 when the period of maximum change occurred and the impact of English law was felt to a much larger degree.

In any case there are references in the writings of Roman-Dutch authors in which distinctions are drawn based on foetal gestation and accepting the necessity for the foetus to have life and therefore to be viable.

Huber[101] states:

> It must be said that causing the abortion of a conceived foetus, which already has a perfect body and life, is also deemed to be murder and is punished; but if the foetus has not life, then it is punished by banishment.

Van der Keessel[102] states:

> More accepted amongst many commentators is the distinction between abortion of a live foetus (*partus animus*) and an embryo (*partus non animus*), applied in such a way that the former must be punished capitally, the latter with a lighter penalty ...

Huber and Van der Keessel's comments were cited by Diemont JA in the *Collop* case,[103] where the court went on to state:

> The debate among these writers related, not to the question whether abortion was a crime, but to whether it was infanticide (kindermoord) or a lesser crime and what punishment was appropriate. To resolve that problem a distinction appears to have been drawn between the embryo and the foetus[104] ... The degree of maturity of the foetus was therefore an important consideration. If the foetus was old enough to be regarded as having a soul, procuring its abortion was considered by many writers as murder or

---

[100] Hawthorne (n1) 205.

[101] *Hedendaagsche Regsgeleertheyd* 6. 13. 39 (Gane's translation vol 11 at 433).

[102] *Praelectiones ad Jus Criminale* (Bernart and Van Warmelo's translation vol 1 at 343.

[103] *Collop* (n94) 164.

[104] *Collop* (n94) 164.

infanticide and as punishable with death.[105]

Going on to cite Carpzovius and Matthaeus as approving of this view, Judge Diemont continued:

> It is significant, however, that at no time did any of the Roman-Dutch writers suggest that the foetus must have reached a certain degree of maturity before a crime could be committed. There is, therefore, no foundation for the proposition that at common law the crime of abortion could be committed only on a woman whose pregnancy has advanced beyond what counsel was pleased to describe as 'the embryonic stage'.[106]

But the critical issue, apparent from the decision of the court, is that while abortion was seen to be criminal conduct, regardless of the age of the foetus, these writers determined that there were various stages of foetal development and, more significantly, that different punishments were appropriate dependent on the maturity of the foetus.

The important consideration is that the court, in this case, was seeking to determine whether a distinction could be drawn between an embryo and a foetus when interpreting the meaning of the word 'foetus' in the Abortion and Sterilisation Act. The court accepted that different stages of foetal growth had been recognised throughout history.

H. **SOUTH AFRICAN LAW**

Abortion has been recorded for many years in South Africa's history and was widely practised amongst the indigenous Khoisan people, particularly by unmarried women.[107] There was little

---

[105] *Collop* (n94) 165.

[106] *Collop* (n94) 165.

[107] I Schapera *The Khoisan Peoples of South Africa: Bushmen and Hottentots* (1929) 115.

restriction on abortion in pre-colonial times, despite the fact that the society was male-dominated.

Colonialism, however, saw the introduction of controls by the authorities,[108] many of which succeeded in further diminishing the status of women.[109] In this regard Russel has noted that:

> ...[a]partheid has distorted Africa's tribal tradition and warped it according to patriarchal and individualist needs.[110]

The impact of apartheid has been all-pervasive and the most affected by it have been black women, discriminated against on account of both their colour and their gender. Cock notes that:

> All women in South Africa are subjected to a sexist and patriarchal ideology which defines women as secondary, inferior and dependent.[111]

It is not surprising, therefore, that Albie Sachs suggests that one of the very few institutions that has not been affected by race in South Africa is patriarchy.[112] The subordination of women has been so extensive as to reduce the status of women, particularly black women, to that of second-class citizens.

As a result, women have been under-represented in decision-making processes. The law, in consequence, has shown little regard for the needs of women, even though they constitute a

---

[108] H Rees *Weekly Mail* November 6 to November 12 1992.

[109] H J Simons *The Legal Status of African Women* (1968); A Sachs *Protecting Human Rights in South Africa* (1991) 66.

[110] K Russel 'The Internal Relation Between Production and Reproduction: Reflections on the Manipulation of Family in South Africa' (1984) 15(2) *Journal of Social Philosophy* 18.

[111] J Cock *Maids and Madams: Domestic Workers under Apartheid* (1989) 12.

[112] A Sachs (n109) 53.

majority of the population. In the rare cases where the law has reflected gender sensitivity, it has done so in a paternalistic way, depicting women as biologically frail. It is not surprising, therefore, that there has been a lack of focus on issues concerning women, particularly black women.[113]

Women have had very little opportunity to alter these patterns as the franchise was withheld even from white women until as late as 1930. It was also only then that they became eligible to be Members of Parliament.[114] It was only in 1994 that the new Constitution[115] finally conferred on all adult South Africans the right to vote.

Of critical importance as well is the fact that women were not permitted to become legal practitioners until 1923 and were thus not able to use the legal system themselves to attack gender-biased laws. Instead they had to rely on male lawyers to do so.[116] Although women were legally able to enter the legal profession from 1923, relatively very few have had access to the profession. Limited access to schooling, university, articles of clerkship[117] have all acted as restraints, especially for black women. Moreover, the judiciary has been composed almost entirely

---

[113] B Bozzoli 'Marxism, Feminism and South African Studies' (1983) 9(2) *Journal of Southern African Studies* 220.

[114] Women's Enfranchisement Act 18 of 1930.

[115] No 200 of 1993.

[116] *Schlesin v Incorporated Law Society* 1909 TS 363; *Incorporated Law Society v Wookey* 1912 AD 623; *Hall v Incorporated Law Society* 1923 TPD 481; Women's Legal Practitioners Act 7 of 1923.

[117] J Sarkin 'Restructuring the Legal Profession and Access to Justice: The Duty of Law Graduates and Lawyers to Provide Legal Services' (1993) 9(2) *SAJHR* 223.

of white males; until 1993 there was only one woman judge.[118]

These barriers to women's access to the legal profession are of direct importance since they indicate that gender inequality was entrenched within the system and that there was little opportunity for women themselves to promote and ensure gender sensitivity from within the system. It is not surprising, therefore, that information about women and issues which concern them is difficult to come by in South Africa.[119] This is particularly true in the area of maternal health where little data, particularly as regards obstetric care, is available.[120]

There are many instances and examples of the law reflecting, and being used to ensure, the domination of women by men. An example of this is the fact that women have been under the marital power of their husbands, and were regarded by the law as minors under the control of their fathers or husbands. It was only in 1984 with the Matrimonial Property Act[121] that white, coloured and Asian women gained majority status in terms of the law. African women had to wait until 1988 when the Marriage and Matrimonial Property Amendment Act[122] conferred majority status

---

[118] Judge Leonora van den Heever who was elevated from the Cape Bench to the Appellate Division.

[119] S Marks 'Women's health in South Africa' in *Women's Health and Apartheid: The health of Women and Children and the Future of Progressive Primary Health Care in South Africa* Proceedings of the Third Workshop on Poverty, Health and the State in Southern Africa held at Columbia University (May 13-15 1988) 7.

[120] A Seedat *Crippling a Nation: Health in Apartheid South Africa* (1984).

[121] No 88 of 1984.

[122] No 3 of 1988.

on them.

Women have been regarded as chattels in terms of the law and a husband has even had the right to chastise his wife.[123] A wife was expected to follow her husband's domicile until the law was amended in 1992.

The marital rape exception, which permitted a husband to rape his wife with no legal consequences, is a revealing indication of the way that women were viewed and was repealed only at the end of 1993.[124]

The law has also discriminated against women in the work-place, an example being section 21(5) of the KwaZulu Education Act[125] which states that:

> any unmarried female permanent teacher who falls pregnant shall resign her post on 30 days notice and if she fails to do so shall be summarily discharged from the service of the department as soon as her condition becomes known or apparent ...

Section 17(b) of the Basic Conditions of Employment Act does not permit a woman to work for three months after she has given birth but does not provide that her job be kept for her while she is on maternity leave.[126] Klugman has gone so far as to assert that in fact most women are effectively dismissed during

---

[123] A Crump 'Wife Battering' (1987) *South African Journal of Criminal Law and Criminology* 231.

[124] J Sarkin 'The Prevention of Domestic Violence Bill' (1993) 9(2) *SAJHR* 288; F Kaganas & C Murray 'Rape in Marriage - Conjugal Right or Criminal Wrong' (1983) *Acta Juridica* 125-143.

[125] No 7 of 1978.

[126] B Klugman 'The Politics of Contraception in South Africa' (1990) 13(3) *Woman's Studies International Forum* 265.

pregnancy.[127]

Patriarchal control was, and is, also very prevalent in the home.[128] Cock notes that tradition has been used in both the colonial and African systems to justify the inferior position that women occupy.[129] In this regard Ramphele states:

> The family is still a major sphere in which the domination of men is served at the expense of women. Each family is a site for individual men to oppress women in their particular way.[130]

Similarly, Cock illustrates the continued subordination of African women by referring to the 1987 Ubuntu-Bond: Good Citizenship of Inkatha, which states:

> In the family the man is the head. The woman knows she is not equal to her husband. She addresses the husband as 'father', and by so doing the children also get a good example of how to behave. A woman refrains from exchanging words with a man, and if she does, this reflects bad upbringing on her part.[131]

Fertility is a critical aspect of the role of women and therefore becomes a key issue in explaining and understanding the position

---

[127] B Klugman 'Maternity Rights' (1983) 9(3) *South African Labour Bulletin* 25.

[128] T Nhlapo in S Bazilli (ed) *Putting Women on the Agenda* (1991) 119.

[129] J Cock *Colonels and Cadres: War and Gender in South Africa* (1991) 29.

[130] M Ramphele 'The Dynamics of Gender Politics in the Hostels of Cape Town: Another Legacy of the South African Migrant Labour System' (1989) *Journal of South African Studies* 121.

[131] Cock (n129) 30.

of women. According to Nhlapo:

> African women are expected to become wives at some stage in their lives and wives they are required to be, first and foremost, mothers ... The motherhood role makes possible the paradox of women in African society: revered for their fertility and restricted because of it.[132]

This contention is supported by evidence which shows that African men are unfavourably disposed towards contraceptive use because it is seen to be a threat to their control of women and to their right, and even need, to have children.[133] Abortion is perceived in much the same way.[134]

As in many other societies, patriarchal influences are strong in South Africa and are critical to an understanding of the prevalent attitude to, and regulation of, abortion. However, the patriarchal bias of the law has been consistently denied in South Africa.[135] Thus, abortion has been defined as a crime against a potential person which, once conceived, is entitled to be born. It is interesting to note, therefore, De Wet and Swanepoel's 1960 view of the purpose of the abortion laws,[136] which they saw as intended not to protect the life of a foetus but rather to bolster the expectation that a man has of having children. This opinion was deleted from later editions of their book.

---

[132] Nhlapo (n128) 111, 118 & 119.

[133] Klugman (n126) 262; H Ngubane *Body and Mind in Zulu Medicine* (1977).

[134] B Klugman (n126).

[135] P M A Hunt *South African Criminal Law and Procedure: Common Law Crimes* (1970) 307.

[136] J C de Wet and H L Swanepoel *Die Suid-Afrikaanse Strafreg* (1960) 217.

Two systems of law operate in South Africa. Roman-Dutch law, influenced by English law, is seen to be the common law but customary law plays a part as well, albeit as a junior partner. The inferior status accorded to customary law reflects the discriminatory attitude of early European settlers to the local inhabitants and their system of law.

In terms of customary law, black women are usually seen to be perpetual minors under the control of male guardians.[137] An exception is section 1(1) of the KwaZulu Code Act[138] which determines that for Zulu women living in KwaZulu, majority status is conferred on marriage or when a woman turns 21.

Control of women's reproductive capacity in African society was the primary concern of the head of the household. Morality and religious ethics relating to ending life were not issues of importance. Abortion was an offence, but the offence was against the controlling male guardian rather than the foetus. For example, a chief whose wife had become pregnant through an adulterous relationship was expected to ensure that a miscarriage occurred.[139] The wealth of a man was seen to be affected by the invasion of the bodies of the women he controlled. If these bodies were no longer untouched, then their worth was diminished.

---

[137] J Julyan in A Rycroft (ed) *Race and the Law in South Africa* (1987) 140.

[138] No 6 of 1981.

[139] H Bradford 'Her Body, Her Life: 150 years of Abortion in South Africa' paper delivered at the Conference on Women and Gender in South Africa (1991) 5.

So young women were:

> supposed to flaunt their desirability through non-penetrational sex with youths - and simultaneously preserve their virginity until fathers had sold their procreative power for cattle in arranged marriages.[140]

A woman who had an abortion was no longer a virgin and therefore was not as desirable as one who still was. As far as abortion was concerned, the crime was not killing the foetus but damaging the property of a male guardian; because the women concerned was no longer a virgin, she was not able to attract the same amount of lobola.[141]

If a woman and the person who assisted her in procuring an abortion were caught, they were brought before the tribal council. Punishment normally included 40 lashes and five or more sheep were charged as court fees.[142] The woman's husband or boyfriend could suffer 20 of the lashes in her place if he wished.[143] Amongst the MuVenda abortion was common even though people were very scared of women who had had abortions. A man feared death by consumption, if he had intercourse with such a woman. There were further ramifications. For example, if a man died of consumption his brother, who would normally inherit his estate, would refuse to do so in the conviction that he too would suffer the same fate.[144] In spite of this, abortions were not

---

[140] Bradford (n139) 4-5.

[141] H Bradford 'Herbs, Knives and Plastic: 150 years of Abortion in South Africa' Centre for African Studies Seminar 11 April 1990 3.

[142] Schapera (n107) 260.

[143] Schapera (n107) 260.

[144] H A Stayt *The Bavenda* (1968) 90.

uncommon for women who had adulterous unions. If a woman's husband found out about the abortion, both would have to go through a purification ceremony. A woman who had undergone a number of abortions was considered 'dangerous', returned to her father and the lobola already paid in respect of her was demanded back.[145]

Women who had abortions saw the situation differently, however. They did not regard themselves as killers. Many thought that life did not begin before the child moved. Some believed that life began only when a child was born, while others saw it occurring only when the child walked and talked.[146] Before the foetus had reached the stage of development regarded by these women as denoting the beginning of life, they considered the foetus as simply blood or water.[147]

The regulation of fertility in South Africa, as in earlier times elsewhere, has been applied in a discriminatory way by the state. Attempts to control abortion seem to have been aimed largely at white women and at restricting the performance of abortions by white doctors. Little was done to dissuade black women from having abortions and few sanctions were introduced to punish either black women upon whom abortions were performed or the abortionists concerned.

Relatively few people have been prosecuted for performing abortions over the years and, when the number of abortions performed outside of the provisions of the law are noted, it is

---

[145] Stayt (n145) 90.

[146] Bradford (n139) 5.

[147] Bradford (n139) 5.

apparent that South Africa is lenient in the prosecution of violations of the abortion law.[148] This is borne out by the statistics which reflect relatively few prosecutions over the years.

Cloete shows that between 1949 and 1967-8 there were fewer than 30 convictions a year[149] and between 1962 and 1972 a total of only 792 prosecutions, with 325 convictions.[150] The number of prosecutions and convictions has never been very high and one conclusion which can be drawn is that abortion, particularly in respect of black women, has been tolerated. Another is that little effort went into curbing this practice because of a censorious attitude towards the high birth rate among blacks.

While various laws were aimed at limiting contraception and abortion, policies were in fact aimed at increasing the white population and decreasing black numbers.[151] For example, it was known early in the nineteenth century that Xhosa women were ingesting herbs to induce abortions[152] and Maclean noted in 1866 that abortion was 'almost universally practised by all classes

---

[148] P Sachdev in P Sachdev (ed) *International Handbook on Abortion* (1988) 1.

[149] R Cloete in *Report of Symposium on the Termination of Pregnancy (Abortion) (Natal Council of Churches)* (May 1973) 100.

[150] Hansard House of Assembly Debates col 517 (15 February 1975). See also J Westmore *Abortion in South Africa and Attitudes of Natal Medical Practitioners Towards SA Abortion Legislation* (1977) 13.

[151] O Chimere-Dan 'Population Policy in South Africa' (1993) 24(1) *Studies in Family Planning* 32.

[152] Bradford (n139) 2.

of families in kaffir society'.[153] But very little was done to stop this practice. Abortion was also commonly practised in the early part of the twentieth century, as noted in *R v Thielke*, where Judge Kotze noted:

> It is fortunate that we are not called upon to deal with a large number of cases of this character, but the evidence which we have heard in this case shows that a very deplorable state of things exists in Cape Town.[154]

So, despite the enactment of section 2 of the Transvaal Act 38 of 1869, which specified that it was an offence to advertise any means of contraception or the procuring of an abortion,[155] the production of abortifacients grew rapidly from the middle of the nineteenth century. Little was done to curb these advertisements, particularly those aimed at black women.

The obvious discriminatory objective of South African contraceptive policy can already be detected in 1925 when the *South African Medical Record* noted that:

> The question of the preservation of the European races in this country is intimately bound up with the birth rate and the foetal and infantile death rates.[156]

In 1960 Minister of Bantu Administration M C Botha implored all white women to have a baby that year in celebration of the establishment of the Republic of South Africa. This was public

---

[153] J Maclean *A Compendium of Kaffir Laws and Customs* (1866) 67.

[154] *R v Thielke* 1918 AD 373 cited in S Burman and M Naude 'Bearing a Bastard: The Social Consequences of Illegitimacy in Cape Town 1886 - 1939' (1991) 17(3) *Journal of Southern African Studies* 379.

[155] I A Geffen *The Laws of South Africa Affecting Women and Children* (1928) 291.

[156] R L Impy 'Foetal Death' (25 July 1925) *South African Medical Record* 312.

confirmation of the political factors underlying the regulation of fertility in South Africa.[157]

This racial bias of contraceptive policy has been confirmed from other quarters. The Dutch Reformed Church, for example, stated:

> It is the duty of whites to multiply on the earth ... and thus keep the increase of the white population high ... the bantu ... could be given the pill with an easy mind ... The morals of the blacks have already sunk so low that promiscuity could not be any greater.[158]

Even in the 1980s, significant leaders were making statements about the need to increase white numbers while reducing the number of children born to blacks. In 1981, for instance, Mayor of Johannesburg, Carel Venter, stated that white women who underwent sterilisation operations threatened the survival of the white race in South Africa.[159]

It is not surprising, therefore, that black South Africans were highly suspicious of the motivation behind family planning programmes[160] or that a spectre has haunted the issue of family

---

[157] B Brown 'Facing the "Black Peril": The Politics of Population Control in South Africa' (1987) 13(3) *Journal of Southern African Studies* 267.

[158] Cited in H Bernstein *For their Triumphs and For their Tears: Women in Apartheid South Africa* (1985) 48.

[159] *The Argus* 18 February 1981.

[160] South African Institute of Race Relations *Survey* (1984) 716.

planning in South Africa.[161] This is reflected in the view quoted by Ndaba that:

> the very fact that we are persuaded to limit our families by being offered free injections and pills means that it is in their [whites'] interest to bring our numbers down.[162]

The issue has been highly politicised, as can be seen in statements such as the following:

> The only political weapon the African has got in this country is numbers. We will never let this out of our hands through family planning because it is the only means whereby we will reduce the whites to political impotence in this country.[163]

Similar sentiments were expressed during the 1976 riots when the call went out: 'Everybody get pregnant or we'll be wiped out.'[164] The same type of statement was made again during the 1986 state of emergency, for example:

> Every woman - married or not, at school or not - must be pregnant by February ... to replace the black people killed in the struggle last year. An informant said, 'They have threatened to search our handbags for contraceptives.'[165]

During the same period and for the same reasons Pedi youth

---

[161] Brown (n157) 256; N G Ndaba 'Black Perceptions of Population Growth and the Effectiveness of Family Planning Programmes in KwaZulu' (1989 unpublished report) reported in E M Preston-Whyte *Teenage Pregnancy in Selected Coloured and Black Communities* (1991) 29.

[162] Ndaba (n161) 29.

[163] Headmaster of a large African School in the 1970s cited in N J van Rensburg *Population Explosion in South Africa* (1972) 102.

[164] Bradford (n141) 14.

[165] *City Press* 26 January 1986 cited in J Cock (n129) 37.

opposed abortion, singing:

> Informers, we will destroy you. Haai! Haai!
> Witches, we will burn you. Haai! Haai!
> Those who commit abortions, you will be destroyed. Haai! Haai!
> Mrs. Botha is barren - she gives birth to rats. Haai! Haai!
> Mrs. Mandela is fertile - she gives birth to comrades. Haai! Haai! Haai! Haai![166]

Even South Africa's only abortion rights organisation, the Abortion Reform Action Group (Arag), was targeted for attack on the basis that it supported abortion to reduce black numbers. Women belonging to the South-West African People's Organisation (Swapo) urged international bodies to boycott Arag as a South African organisation.[167] Racial polarisation has affected all spheres of life in South Africa and therefore it is not surprising that Arag, a largely white, middle-class organisation, was subjected to these criticisms.

Even the Abortion and Sterilisation Act,[168] which will be dealt with extensively in the next chapter, was intended to eliminate backstreet abortions in respect of white women only, as the policy which informed the Act was to increase the white birth rate while decreasing that of blacks. This intention is reflected in the attitude of a future minister of health who directed the following remark at Helen Suzman during

---

[166] Bradford (n141) 13.

[167] Arag committee minutes 25 January 1982.

[168] No 2 of 1975.

parliamentary debate on the bill:

> I want to tell the hon. member for Houghton something else. This house is not a place for her to drag the non-whites into a debate every time she gets a chance to do so.[169]

Another revealing statement was made during the same debate by one Brigadier C C Von Keyserlingk:

> Let us be frank about this. This is surely a giant step forward from the present situation. We have made vast strides in this direction. Of course there are safeguards. Who asked for these safeguards and to whom are they given? First of all, they are there to protect the women concerned. Secondly, the safeguards are there to protect the medical practitioners who have been performing abortions with the threat of prosecution right down the years. The safeguard is also for the future of South Africa [my emphasis].[170]

Thus it can be seen that an intention of the Act was to reduce the number of white women having abortions. There was little intent to diminish the number of black women procuring abortions.

Access to abortion is an area which provides evidence of the discriminatory effects of the regulation of abortion in South Africa. In the nineteenth century abortion was controlled mainly by black herbalists, including Pedi medicine men, a system from which white people were largely excluded. However, white women were often able to obtain abortifacients from their black counterparts.[171]

The medical profession was left out of the provision of contraceptive and abortion services during the nineteenth century

---

[169] L A P A Munnik Hansard House of Assembly Debates col 661 (12 February 1975). That law was aimed at ensuring that white women did not have abortions can be seen in the work by June Cope *A Matter of Choice: Abortion Law in Reform in Apartheid South Africa* (1993).

[170] Hansard House of Assembly Debates col 601 (12 February 1975).

[171] Bradford (n139) 3.

since most whites shared the scepticism of blacks about the European credentials of the few available white male doctors.[172] The doctors felt aggrieved at being scorned and embarked on a campaign against alternative dispensers.[173] However, it took many years for the professional class to overtake and outmanoeuvre others in the abortion market.

Race and gender have been key aspects of the provision of medical services throughout South Africa's history. Women were not allowed to become medical practitioners in the Cape Province until 1891[174] and today there are still relatively few women doctors. As late as 1983, less than ten per cent of doctors were women - the majority of these being white.[175]

While the state has not been forceful in tracking down the doctors performing abortion, the male-dominated medical fraternity has been zealous. The South African Medical and Dental Council oversees medical ethics in South Africa in terms of section 49(1) of the Medical, Dental and Supplementary Health Service Professions Act.[176] The council has been extremely strict with doctors who have performed unauthorised abortions. For example, a doctor convicted on four counts of performing abortions and two counts of attempt[177] was found guilty of

---

[172] Bradford (n139) 6.

[173] Bradford (n139) 6.

[174] Section 33 Cape Act 34 of 1891.

[175] Cock (n129) 34.

[176] No 56 of 1974.

[177] *Council v K.C.S.* October 1977.

disgraceful conduct and struck off the roll.[178] In addition, while it is not illegal to refer a patient seeking abortion overseas,[179] the South African Medical and Dental Council ruled in 1973 that:

> Any medical practitioner who contravenes any law of the country, including being an accessory to an illegal abortion, irrespective of where it is performed, exposes himself [sic] to disciplinary action ...[180]

The council also ruled that it would be unethical for a doctor to refer a patient overseas to have an abortion.[181]

Wealth has been and remains an important means of frustrating attempts by the state and the medical profession to reduce access to abortion. White women have had much easier access to abortion because of their social position. Wealthy women have also been able to receive better care as they are able to pay for private medical services.[182] Bradford reports the remark of a Durban socialite of the 1930s who found she was pregnant:

> I was devastated. I went to see the doctor who did abortions for the family.[183]

Thus, pregnant white women who wanted abortions were often able to approach their expensive gynaecologists. Abortion was made 'available to the rich and withheld from the poor' and this was

---

[178] T Verschoor *Verdicts of the Medical Council* (1990) 79.

[179] S A S Strauss *Doctor, Patient & the Law* 2ed (1984) 233.

[180] Strauss (n179) 233.

[181] Verschoor (n178) 42.

[182] L Rispel and G Behr *Health Status Indicators: Policy Implications* (1992).

[183] Bradford (n139) 9.

'how money rules medicine', as a Transvaal doctor noted bitterly in the 1940s.[184] The system has ensured that access to abortion has always been greater for white women than for their black counterparts; in other words, access to abortion in South Africa has been on the basis of race and class. Black women, by and large, have had to make do with backstreet abortionists - with the expense and risk to their health this option entails.

The racial divide has been a feature of the entire health care system in South Africa. Until the late 1920s, for example, there were no maternity beds for African or coloured women in the Transvaal.[185] There have been very few black doctors serving the needs of their communities: between 1951 and 1976 only 218 African doctors graduated in South Africa. This was about one per cent of the total number of medical graduates.[186] In 1972 there were only some 150 African doctors practising in the whole of South Africa.[187] In 1991 there was approximately one doctor for every 12 000 Africans, while there was about one doctor for every 330 whites.[188]

In the rural areas, where the majority of the population is black, only 5,5 per cent of medical practitioners are to be found.[189] The doctor/patient ratio is about 1:25 000, while in

---

[184] Bradford (n139) 6.

[185] Bradford (n139) 12.

[186] World Health Organisation *Apartheid and Health* (1983) 224.

[187] N J van Rensburg (n163) 151.

[188] J Cock and E Koch *Going Green: People, Politics and the Environment in South Africa* (1991) 75.

[189] Cock and Koch (n188) 75.

the urban areas, with their much larger white concentrations, the ratio is 1:750.[190]

I. INTERNATIONAL TRENDS

During the twentieth century there has been an increasing realisation world-wide of the medical, social and economic repercussions of unwanted pregnancy and illegal abortion, and growing pressure by women to be acknowledged as competent and responsible for making decisions about their own lives and bodies. This has motivated a world-wide movement towards abortion reform.[191]

This trend towards a less patriarchal dispensation began in Russia in 1920. Before the law of 8 November 1920 was passed, abortion was considered a crime, but the new law permitted abortion during the first trimester of pregnancy. In 1936 Stalin reversed the law, permitting abortion only under very strictly restricted circumstances. The law was liberalised again in 1955.

While Russia faltered, the Scandinavian region picked up on the trend to abortion liberalisation, with Iceland liberalising its law in 1935, Sweden in 1938, Denmark in 1939, Finland in 1950 and Norway in 1960.[192] In 1948 Japan permitted abortion on broad grounds while China has allowed abortion on request since 1957.

In the United Kingdom, 1967 was the turning-point as far as abortion liberalisation is concerned, while 1803 marked the

---

[190] South African Institute of Race Relations *Survey* (1984) 712.

[191] Sarkin (n4) 85.

[192] Shain (n57) 247.

beginning of the preceding period of repression. Before 1803 abortion was not a crime in terms of British common law unless quickening had occurred. Quickening was seen to occur when the foetus moved in the womb, indicating that it had acquired a soul.[193]

Lord Ellenborough's Act of 1803[194] changed this, making abortion criminal from conception onwards. Quickening still played a role: if the abortion was performed after quickening had occurred, the death sentence could be imposed. If the abortion took place before quickening, the lesser crime of attempting to miscarry was said to have occurred.[195] The differentiation between the abortion of a quickened and unquickened foetus fell away when the Offences against the Persons Act of 1839 was enacted. Section 58 of the later Offences against the Persons Act of 1861 followed, determining that the same punishment applied, regardless of whether quickening had occurred.

However, quickening remained a decisive point in English law until 1869, when Pope Pius IX, acting on the basis of the mistake noted earlier, declared that a foetus had a soul from conception.[196] Nevertheless, the interpretation of the 1861 Act permitted an abortion to take place where necessity existed. Necessity was seen as existing in cases where the life of the woman or her health, physical or mental, was seriously

---

[193] G Williams *Sanctity of Life and the Criminal Law* (1958) 143-4.

[194] 43 Geo 111 C 48.

[195] Hunt (n29) 311.

[196] Report of the Committee on the Working of the Abortion Act (1974) 193.

endangered. The 1929 Infant Life Preservation Act followed suit, permitting an abortion to save the life of the mother.[197] When this was brought to the attention of the pope in 1930, he declared abortion sinful even where the mother's life was in danger.[198] The influence of the pope, so extensive in earlier centuries, was waning, however. In the seminal case of *R v Bourne*,[199] where an obstetrics surgeon was prosecuted for performing an unlawful abortion on a 15-year-old girl who had been raped by a group of soldiers, it was held that the term 'unlawful abortion' retained the common law defence that it had been performed in good faith to preserve the life of the mother. Bourne was acquitted and this finding served as the basis for the view that where a woman's mental health is at risk, an abortion can take place lawfully.[200]

Until 1967 necessity was seen to cover therapeutic abortions only but many doctors performed eugenic abortions without facing criminal charges.[201] While the law provided for prosecution of a woman who performed her own abortion or who permitted someone else to perform it for her, this in fact never occurred.[202]

The Abortion Act of 1967 gave official sanction to this situation. Section 58 of the Offences against the Persons Act was retained but a person who obtained an abortion was not liable

---

[197] Tarnesby (n8) 84.

[198] Tarnesby (n8) 84.

[199] [1939] 1 KB 687 [1938] 3 All ER 615.

[200] R W Durand (1938) 2 *Modern Law Review* 238.

[201] G Williams (n193) 161.

[202] G Williams (n193) 146.

under the Act if (1) two registered doctors were bona fide of the opinion that certain risks were present; (2) the abortion was performed by a registered doctor; (3) the operation was performed in an approved place. Risks permitting abortion were seen to be:

> (1) where continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated.[203]
>
> (2) where there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.[204]

Six years after abortion was liberalised in the United Kingdom, judgment was handed down by the United States Supreme Court in probably the most well-known abortion case, *Roe v Wade*[205], which will be evaluated in chapter 4. In the same year Denmark became the first country outside of the socialist bloc to permit abortion on request and Tunisia became the first Islamic state with a liberal abortion regime.

The last 20 years have seen more than 60 countries liberalise their abortion laws.[206] These include Algeria, Australia (six states), Austria, Barbados, Belgium, Belize, Bermuda, Britain, Burundi, Canada, China, Comoros, Cyprus, Czechoslovakia, Denmark, Germany, Finland, France, Greece, Greenland, Iceland, Italy, Liechtenstein, Luxembourg, New Zealand, Netherlands, Norway, Portugal, Spain, Sweden, Togo,

---

[203] Section 1(1)(a).

[204] Section 1(1)(b).

[205] 410 U.S. 113 (1973).

[206] Sarkin (n4) 385.

Vietnam and the United States.[207]

In many instances this liberalisation involves extending access to abortion by decriminalising abortion in the early stages of pregnancy, and permitting it to take place at other times in accordance with specific criteria.

Austria, Denmark, Greece, Greenland, Norway and Sweden allow abortion on request for the first 12 weeks of pregnancy. Britain, Finland, France, Germany, Iceland, Italy, Luxembourg, the Netherlands and New Zealand allow abortion within the framework of liberal health and social specifications, which in practice permit abortion upon request. In France, for example, the woman herself determines whether she is in distress and requires an abortion,[208] while in the Netherlands she decides in consultation with her doctor. Many of these abortion laws have been developed within the context of care for women's reproductive health and family well-being and impose an affirmative obligation on the government to render services, including contraception and abortion.

The courts in some of these countries have augmented liberal legislative policies by developing and reinforcing an enlightened position on abortion. The Canadian Supreme Court, for instance, has ruled that a provision restricting abortion violates the

---

[207] R Cook and B Dickens 'International Developments in Abortion Laws: 1977 - 1988' (1988) 78 *American Journal Of Public Health* 1305; R Cook and B Dickens 'A Decade of International Changes in Abortion Laws: 1967 - 1977' (1978) 68 *American Journal of Public Health* 637.

[208] Judgment of October 31, 1980, Conseil d'etat Recueil Dalloz-Sirey [D.S. Jur.] 19732 (France 1982).

Canadian Charter of Rights and Freedoms.[209] Similar situations occurred in Austria,[210] Belgium,[211] Italy[212] and Spain.[213]

International courts have also followed the general trend of abortion liberalisation. Cases have been heard in terms of the European Convention on Human Rights[214] and the American Declaration of Human Rights.[215]

At present between 26 and 35 million legal abortions are performed annually, while illegal abortions account for between 10 and 22 million, giving a total world-wide figure of somewhere in the range of 36 to 53 million abortions performed annually.[216]

Today, at least 40 per cent the world's population live in countries where abortion on request is permitted, either because the law is so stated or because the law condones a very wide and progressive view on circumstances that may justify an

---

[209] *Morgentaler, Smoling and Scott v The Queen* [1988] 44 D.L.R. (4th) 385. The United States Supreme Court as well in *Roe v Wade* struck down a restrictive law on the basis that it violated their Constitution. See text following n259 in Chapter 4.

[210] Judgment of 11 October 11 1974.

[211] Constitutional Court of Gent 12 February 1988.

[212] Judgment No. 108/81 of 25 June 25 1981.

[213] 11 April 1985 Annuario De Derecho Penal y Ciencias Penales 39:1 276 (1986).

[214] *Paton v United Kingdom*, 3 E.H.R.R. 408 (1980); *Bruggeman and Scheuten v Federal Republic of Germany* 3 E.H.R.R 244 (1977).

[215] The *Baby Boy* case. See Sarkin (n4) 92.

[216] S K Henshaw 'Induced Abortion: A World Review' (1990) *International Family Perspective* 64; Sarkin (n4) 86.

abortion.[217] Less than 25 per cent of the world's people live in countries where abortion is permitted only to save the life of the mother.[218] Significantly, in countries where the law has been liberalised, there has been a dramatic decrease in morbidity and mortality as a result of pregnancy termination[219] and, in developed countries, illegal, backstreet abortions have largely disappeared.[220] This pattern has not been mirrored in less developed countries, as geography and a lack of information often limit access to legal abortions, especially where there is a shortage of medical facilities.[221]

J. **CONCLUSION**

This chapter has examined the reasons for abortion control over the centuries. While abortion was unregulated in the earliest times, it became outlawed in consequence of the project of patriarchal societies and men in general of gaining control of women's fertility. This control was strengthened by men who were able to use their position in the emerging Catholic Church to reinforce patriarchal dominance. The negative attitude of the church towards abortion is also shown to be of recent vintage as well as being based on a misconception.

---

[217] Sarkin (n4) 385.

[218] C Tietze and S Henshaw *Induced Abortion: A World Review* (1986); C Dourlen-Rollier 'Family Planning and the Law' (1989) *World Health* 7, 8.

[219] D A Grimes, M Flock, K F Schultz and W Catz 'Hysterectomy As Treatment For Complications of Legal Abortions' (1984) 63 *Obstetrics and Gynaecolology* (1984) 457, 462.

[220] Henshaw (n216) 63.

[221] India, Bangladesh, Ghana and Togo. See Henshaw (n216) 59.

The historical roots show, in addition, that abortion regulation throughout the years has operated in a discriminatory manner and this was mirrored in South Africa where discrimination was an entrenched part of the legal system and no equality existed.[222] This discrimination operated even within the spheres of abortion control and access to health care. White women were able to gain access to such services far more easily than black women because of their ability to muster the resources to do so. The fact that there has been a massive preponderance of white male doctors was also a major factor. Evaluation of the central themes of patriarchy and discrimination in South Africa will be continued in the next chapter, which examines the effects of the common law on abortion and the Abortion and Sterilisation Act.

This chapter has also focused on the notion of viability as a distinction between permissible and impermissible abortion. It was with the development of medical science and with increased knowledge about foetal development that viability became an explicit concept, but it has its roots in much earlier theories. Viability, in essence, has been used continually as the key distinction between crime and permissible practice, and the same will be reflected in the next chapter. Viability, or the time at which the foetus gains the capacity to exist outside the womb independently, should be decisive evidence in support of legislative placement of commencement of life at twenty weeks. Such placement also reflects the brain birth theory while at the same time permitting women a reasonable period of choice.

---

[222] The importance of equality will be discussed in chapters 4 and 5.

The international trend during the twentieth century has seen many countries liberalising their abortion law and nearly half the countries in the world now permit easy access to abortion. The tendency in recent times is for more and more countries to liberalise their abortion laws. This theme will be picked up again in Chapter 4 which evaluates court decisions concerning abortion around the world.

CHAPTER THREE

THE SOCIO-LEGAL CONTEXT OF ABORTION LAW IN SOUTH AFRICA

A. **INTRODUCTION**

South Africa has been behind the international trend towards abortion liberalisation with its restrictive Abortion and Sterilisation Act.[1] This has transpired as control of the law and access to abortion has been in the hands of an extremely small segment of the population throughout South Africa's history.

While it has been usual for the government to look at the issue of abortion in terms of religious and political circumstances, a more holistic picture of the effect that the abortion laws have had on women and their children is necessary. The impact that the legislation could have on the lives of South Africa's women, particularly those who are black, was not considered when the law was drafted and is still not subject to a great deal of attention. While an attempt was made to determine public attitudes to abortion and what an abortion law ought to be before the Act came into force, the processes set up to gather such data were biased to ensure that a skewed picture emerged. This picture largely bolstered and reflected the attitudes of white, Christian, male South Africans at the expense of all others.

As the Act was intended to reduce the number of abortions occurring in the white population group, the effect that it would

---

[1] Act 2 of 1975.

have on other race groups was ignored. In fact a salient feature of the law in South Africa, all the way into the nineties, has been discrimination in terms of race and gender in that laws have favoured the dominant minority, men rather than women, black rather than white. This racial and patriarchal bias is reflected in the workings of the abortion laws.

Apartheid ensured that the structuring of the various classes of South African society mirrored the racial hierarchy. Thus, wealth has played a dynamic role in determining which group has had access to abortion services both in the country and abroad.

While the figure for legal abortions has risen from around 500 in 1975 to 1 400 in 1993, the number of abortions that occur outside of the provisions of the Act now total somewhere in the order of 250 000 per annum.[2] For this reason alone the Act can be seen to be a failure. Reasons for the high number of backstreet abortions are the very limited grounds permitted by the Act as well as the exceptional stringency of procedures mandated by the Act. Permission for an abortion must be secured from a myriad of people. The complexity of the procedures, coupled with a lack of privacy, impedes a woman's need for secrecy, confidentiality and immediacy. This perpetuates a continued dependence on backstreet abortion at great cost to the women involved, in terms of both health and finances.

When the South African courts were called upon to interpret the law where ambiguity existed, the decision, reflective of the

---

[2] See J Sarkin 'A Perspective on Abortion Legislation in South Africa's Bill of Rights Era' (1993) *THRHR* 83.

composition of the judiciary, showed a patriarchal and gender-insensitive, white, male, Christian bias. This perspective ignored the history of the concepts of quickening, animation and viability, which has played and continues to play a part in South African law.

B. THE SOUTH AFRICAN COMMON LAW

The South African courts have paid little attention to the definition of the crime of abortion in terms of the common law.[3] An early definition of what constituted abortion in South Africa is that of Clarkson in 1904 who defined it as follows:

> Abortion is the unlawful taking or administering of poison or other noxious things, or the unlawful use of any instrument or other means whatsoever, with the intent to procure miscarriage.[4]

The expulsion of the foetus from the womb, thereby killing it, was seen to be necessary for the common law crime of abortion. In *AP v the State*,[5] causing the death of a foetus which was still in its mother's womb was determined to be infanticide. This was equated with an abortion, following the writings of the Dutch jurist Van der Linden upon whose writings our courts have often relied.[6] The court, however, per Chief Justice Kotze, suggested

---

[3] P M A Hunt 2ed *South African Criminal Law and Procedure* by J R L Milton (1982) 312.

[4] H T Clarkson *Handbook of Colonial Criminal Law* (1904) 54.

[5] 1895 2 Off Rep 103.

[6] J van der Linden (translated by Sir H Juta) *Institutes of Holland* 3ed (1897) 2.5.12.

law reform, stating:

> It may be desirable that the legislature should make proper provision on this subject, but until that is done the court must follow Van der Linden.[7]

In *R v Hine*[8] the possibility was contemplated that abortion could be murder. In *R v Davies and another*,[9] however, it seems as though the Appellate Division did not regard abortion as murder.[10] While Voet defined abortion as the untimely forcing out or getting rid of an embryo,[11] Gardiner and Lansdowne[12] saw it as 'any means by which the untimely expulsion of the foetus is effected' and De Wet and Swanepoel believed it was the 'afdrywing [expulsion] van die lewende vrug'.[13] In the first edition of their book, De Wet and Swanepoel defined abortion as 'the killing and causing expulsion from the uterus of a human foetus'.[14] They stated that, according to the common law, killing of the foetus was not sufficient to constitute the crime of abortion; the foetus must also have been expelled from the

---

[7] At 105.

[8] (1910) *Cape Times Reports* 629.

[9] 1956 (3) SA 52 (A).

[10] P C Smit 'Aspekte van die Wet op Vrugafdrywing en Sterilisasie, 1975' (1976) *TRW* 156, 157-9.

[11] J Voet (translated) *Commentarius ad Pandectas* (1698-1704) 47.11.3.

[12] F G Gardiner and C W H Lansdowne *South African Criminal Law and Procedure* 6ed (1958).

[13] J C de Wet and H L Swanepoel *Die Suid-Afrikaanse Strafreg* by J C de Wet 3ed (1975) 217.

[14] J C de Wet and H L Swanepoel *Die Suid-Afrikaanse Strafreg* (1960) 308.

womb.[15]

If the foetus is not killed but is born prematurely, then the only crime with which the abortionist could be charged was attempted abortion.[16] While jurists commenting on the common law regarded expulsion as a necessary element of the crime of abortion, Hunt believes that what they actually contemplated is the killing of the foetus.[17] He bases this on the notion that historically abortion was procured by inducing labour. Therefore, he argues, jurists such as Voet, Huber, van der Linden, Carpzouius and Mathaeus implicitly refer to the killing of the foetus.[18]

In *R v Freestone*[19] it was held that an attempt to procure an abortion constitutes a crime, even if the woman involved in fact is not pregnant. If the foetus is already dead when the abortion is performed, then according to the common law no abortion has occurred. However, the woman can be prosecuted for attempted abortion.[20]

If a woman is incited to have an abortion,[21] or a third party is incited to perform the abortion,[22] then the person

---

[15] De Wet and Swanepoel (n14) 313.

[16] Hunt (n2) 324.

[17] Hunt (n2) 323.

[18] Hunt (n2) 323.

[19] 1913 TPD 758.

[20] See *R v Owen* 1942 AD 389, 394-5; *R v Davies* 1956 (3) SA 52 (AD) 59 and *R v O* 1963 (1) SA 43 (SR) 45.

[21] *R v Voges* 1958 (1) SA 412 (C).

[22] *R v C* 1961 (3) SA 675 (SR).

responsible for the incitement can be prosecuted.[23] If a person is prosecuted for inciting a woman to perform an abortion on herself, the woman cannot be found liable as an accomplice.[24]

If a woman dies while undergoing an abortion, the abortionist performing the illegal abortion can be charged with murder or culpable homicide in addition to being prosecuted for performing the abortion.[25] A backstreet abortionist or a doctor who performs abortions for money will, Hunt suggests,[26] receive a heavy sentence.[27] Where the woman has consented to the abortion she is also liable as a *socius*.[28] It has been suggested that a man who makes a woman pregnant and then 'callously incites her to have an abortion' will also be severely dealt with.[29]

One of the major areas of focus for those jurists supporting a pro-life position has been the common law maxim, rule or fiction '*nasciturus pro iam natu habetur quotiens de commodo eius agitur*' commonly known as the *nasciturus* rule.[30] The degree to which an author believes in the extension of the rule or the

---

[23] Hunt (n2) 327.

[24] *R v Voges* 1958 (1) SA 412 (C) 417.

[25] *R v Hine* 1910 CPD 371 and *R v Chitate* 1968 (2) PH H337 (R).

[26] Hunt (n2) 328.

[27] *S v King* 1971 (2) PH H103 (T).

[28] *R v Freestone* 1913 TPD 758; *R v Thielke* 1918 AD 373, 378; *R v Owen* 1942 AD 389, 392; *R v P* 1948 (4) SA 103 (C) 109; *R v Voges* 1958 (1) SA 412 (C) 417.

[29] Hunt (n2) 328.

[30] For a history see T F Uttley 'The Rights of an Unborn Child' (1891) 8 *Cape Law Journal* 133-4; Anonymous 'Nasciturus' (1892) 9 *Cape Law Journal* 59; Anonymous 'Rights of Unborn Children in the Law of Torts' (1921) 38 *SALJ* 439.

limitations that should be placed on it reflects the opinion of the author on questions such as abortion.

The *nasciturus* rule is often used to justify and promote protection of life before birth in South Africa. The intention of the maxim, however, is to accord rights to a child after it is born, if a right or interest has accrued to that child before it is born. For the maxim to apply, the child must be born alive, the interest must be to the advantage of the child and it must accrue after conception.[31]

In other words, while the maxim permits the child, after it is born, to claim an interest[32] incurred while *in ventre matris*, a number of circumstances must pertain. Firstly, the interest must accrue after conception; secondly the interest must be to the advantage of the foetus and thirdly the foetus must subsequently be born. If any of these three factors has not occurred, then the rule does not come into operation.

Whether this rule can be used to protect the foetus itself came before the courts in the case *Christian League of Southern Africa v Rall*.[33] The court was asked to appoint a curator ad

---

[31] See generally P Boberg *The Law of Persons and the Family* (1977) 9-18; J D van der Vyver and D Joubert *Persone en Familiereg* 2ed (1985) 64-69; P C Smit *Die Posisie van die Ongeborene in die Suid-Afrikaanse Reg met Besondere Aandag aan die Nasciturusleerstuk* (unpublished LLD thesis University of the Orange Free State 1976); N J van der Merwe '*Pinchin NO v Santam Insurance Company Ltd*' (1963) 26 *THRHR* 291 & J D van der Vyver '*Christian League of Southern Africa v Rall*' (1981) 44 *THRHR* 306.

[32] For succession see *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O). For delictual damages see *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297. For damage to personality interests see *Pinchin v Santam Insurance Co* Ltd 1963 (2) SA 254 (W).

[33] 1981 (2) SA 821 (O).

litem whose duty it would be to represent the foetus whose mother wished to abort it. The application was brought by the society to ensure that the interest of a foetus, whose mother had allegedly been raped, would also be taken into account.

The court refused to grant the relief sought by the League for a number of reasons. Firstly, the court found that the League had no standing to bring the matter as it did not have the interest required by the law. It was argued that a wider interpretation of interest had been permitted by the court in *Wood and Others v Ondangwa Tribal Authority*.[34] However, in the *Wood* case the activity the applicant sought to stop was unlawful and therefore the court permitted a wider interpretation of interest. In this case, what the woman wished to do was lawful in terms of the Act. In the same vein, the court found that the League's interest was very limited as it could not show a degree of relationship as had been shown in the *Wood* case.[35]

Judge Steyn held that the *nasciturus* rule did not confer legal subjectivity on the foetus and supported Hahlo[36] in his contention that there was no right to life which could be enforced. He ruled that the *nasciturus* rule does not give the foetus any rights but merely holds them in suspension until the child is born. If the child is not born, no rights come into

---

[34] 1975 (2) SA 294 (A).

[35] At 827F-830B.

[36] H R Hahlo 'Nasciturus in the Limelight' (1974) 91(1) *SALJ* 73, 75.

operation. Judge Steyn found that:

> In ons reg is 'n ongebore vrug of nasciturus nie 'n regsobjek nie, en word hy dit eers by sy lewendige geboorte, en kan dus nie die draer van regte wees, wat namens hom afgedwing kan word voor daardie tydstip nie.[37]

It was also determined by the court that adequate safeguards exist in the Abortion and Sterilisation Act to protect the foetus and therefore no curator ad litem could be appointed.

Support[38] and criticism[39] have been levelled at this judgment for a variety of reasons.

Du Plessis criticises the judgment on the grounds that the unlawfulness or otherwise of the abortion was never the issue.[40] But unlawfulness is pertinent as far as the matter of standing is concerned. The standing of the parties in the *Wood* case was accepted because of the unlawfulness of the activity being perpetrated by the defendant, whereas the abortion in the *Rall* case was lawful in terms of the Abortion and Sterilisation Act. In the *Wood* case the court had a duty to interpret standing non-restrictively as an unduly strict interpretation would have permitted the unlawful deprivation of liberty to continue.

Criticisms of and support for the *Rall* judgment reflect the attitudes of the respective authors to the question of abortion. Those who support the argument for the appointment of a curator

---

[37] At 827F-G.

[38] T Davel '*Christian League of Southern Africa v Rall* 1981 (2) 821 (O)' (1981) 14(2) *De Jure* 363.

[39] J D van der Vyver '*Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) (1981) 44(3) *THRHR* 305 & L M du Plessis 'Jurisprudential Reflections on the Status of Unborn Life (1990) *TSAR* 44.

[40] L M du Plessis in A van Niekerk (ed) *The Status of Prenatal Life* (1991) 41.

are those who believe in making abortion more difficult and giving more protection to the foetus. On the other hand, those who support the conclusions of the judgment are those who believe that there is too much emphasis in our common law on the rights of the foetus with insufficient assistance being given to the mother. Du Plessis, a critic of the judgment, notes that:

> ... jurists' appreciation of it is bound to be affected by their (varying) views ...[41]

There are a number of laws that have been invoked to suggest that the law does and should protect the life of the foetus. An example is section 278 of the Criminal Procedure Act[42] which Du Plessis has cited to support the argument that South African law protects the foetus.[43] This section states:

> When sentence of death is passed upon a woman, she may at any time after the passing of the sentence apply for an order to stay execution on the ground she is quick with child.
>
> If such an application is made, the court shall direct that one or more duly registered practitioners shall examine the woman in a private place, either together or successively, to ascertain whether she is quick with child or not.
>
> If upon the report of any of them on oath it appears that the woman in quick with child, the court shall order that the execution of the sentence be stayed until she is delivered of a child or until it is no longer possible in the course of nature that she should be so delivered.

Another law cited by those seeking to promote foetal rights is section 71(c) of the Prisons Act[44] which provides that where a woman prisoner is near to giving birth she may be released early

---

[41] Du Plessis (n40) 50.

[42] Act 51 of 1977.

[43] L M Du Plessis (n39) 54.

[44] Act 8 of 1959.

or paroled.

The question of when legal subjectivity or legal personality begins plays a critical role in the abortion debate in South Africa. Barnard, Cronje and Olivier[45] amongst others suggest that legal personality begins only at birth and until then the foetus is simply part of the pregnant woman or her viscera.[46] For legal subjectivity to come into being there must be a live birth and there must have been a full and completed separation of mother and child.[47] Besides these two milestones, authors such as van Zyl and van der Vyver[48] and Boberg[49] are of the view that, before legal subjectivity accrues, the point of viability, defined as the point after which the foetus is able to survive outside the womb, must have been passed.[50]

Viability, as the point defining when life begins, has in fact become a feature of South African law. For example, section 1 of the Births, Marriages and Deaths Registration Act[51] stated

---

[45] Barnard, Cronje & Olivier 2ed by D S P Cronje *The South African Law of Persons and Family Law* (1990).

[46] Barnard, Cronje & Olivier (n45) 13.

[47] Barnard, Cronje & Olivier (n45) 13.

[48] F J van Zyl and J D van Vyver *Inleiding tot die Regswetenskap* 2ed (1982) 385.

[49] Boberg (n31) 8.

[50] Barnard, Cronje and Olivier disagree on this point, dismissing viability as a vague concept, (n45) at 14, and one not known in Roman or Roman-Dutch Law. See also *S v Collop* 1981 (1) 150 (AD) 165E-H. Smit (n10) 31-36 and 109-115 however, believes that the concept of viability was known.

[51] Act 81 of 1963.

that:

> birth means the birth of any viable child whether such child is living or dead at the time of birth.

Viability was defined in the Act as existing if the foetus:

> has had at least six months of intra-uterine existence.

Although the Births, Marriages and Death Registration Act was repealed in 1992, the concept of viability is implicit in the new Act, the Births and Death Registration Act,[52] which contains the following definition of still-born:

> in relation to a child, [it] means that it [the foetus] had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth, and still-birth, in relation to a child, has a corresponding meaning.

While the term 'viability' is not used, the reference to a 26-week period implies a continued acceptance of the viability benchmark.

Viability is also implicit in section 239(1) of the Criminal Procedure Act[53] where it is stated that:

> At criminal proceedings of which an accused is charged with the killing of a newly-born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.

C. **PRESSURE FOR LEGISLATION**

While the common law was clear that an abortion could take place to save the life of the mother,[54] there was considerable confusion about whether an abortion could legally occur in other

---

[52] Act 51 of 1992.

[53] Act 51 of 1977.

[54] Voet op cit 47.11.3.

circumstances.[55] Before the 1975 Abortion and Sterilisation Act was passed, no legislation existed as far as abortion was concerned (except for various sections in the Native Territories Penal Code Act 24 of 1886), and there was no reported case that defined what the legal grounds for an abortion were before the Act.[56] Strauss[57] pointed out that there were many gaps in the law. For example, the law was unclear as to whether an abortion was permitted in instances where the child to be born would suffer from a mental defect or be seriously deformed.[58] This issue could not have been contemplated by jurists of the past as it was only with subsequent advancement that medical science could detect mental or physical defects prior to birth.

It was also unclear whether an abortion could be performed lawfully where pregnancy might constitute serious impairment of the mother's mental or physical health. Saving the mother's life was the only ground for abortion mentioned in the writings of old jurists.[59] Strauss, however, believes that these authorities did not outlaw abortions where there was a danger to the mother's

---

[55] See the Second Reading of the Abortion and Sterilisation Bill Hansard House of Assembly Debates col 601 (12 February 1975).

[56] Hunt (n2) 308 fn17.

[57] S A S Strauss 'Therapeutic Abortion in South African Law' (1968) 85 *SALJ* 453, 458.

[58] Strauss (n57) 461.

[59] See for example J Moorman *Verhandelinge over de Misdaden en der selver Straffen* (1764) 2.8.10.

physical or mental health,[60] stating:

> Nowhere is it unequivocally stated that abortion is justified only where it is necessary to save the very life of the mother.[61]

The courts described the common law pertaining to abortion, in 1971, as a mine-field.[62] Hiemstra J recommended law reform to reflect society's more tolerant view of the issue.[63] The court in *Van Druten's* case[64] also called for the enactment of legislation. Judicial attitude to the law was reflected in *Republic Publications (Pty) Ltd v Publications Control Board*[65] where Judge Henning declined to deem undesirable a publication which supported abortion legalisation.

In *S v King*,[66] the court found the South African position very unsophisticated in relation to regimes in other countries, but also found that South African society was becoming more permissive towards abortion.[67]

Academics such as Milton[68] and Boberg[69] called for reform

---

[60] Report of the Select Committee on the Abortion and Sterilisation Bill (SC 8-73) 61.

[61] Strauss reported in the Select Committee (n60) 61.

[62] Hiemstra J in *S v King* 1971 (2) PH H103 (T).

[63] DZ 'A Thought on Abortion' (1973) 90 *SALJ* 34; S A S Strauss 'Criminal Abortion Statistics' (1973) 90 *SALJ* 184.

[64] Unreported but commented on in S A S Strauss 'Regverdiging van Vrugafdrywing: Twee Belangwekende Uitspraake' (1972) 35 *THRHR* 56.

[65] 1971 (3) SA 399 (D).

[66] 1971 (2) PH H103 (T) 213.

[67] At 214.

[68] *Annual Survey* (1971) 505.

[69] Boberg (n31) 19.

of the law, stating that precision was needed in the formulation of circumstances which justified an abortion. Hunt described the law as belonging to the 'ultra-conservative category'[70] and as 'locked' in an 'ivory tower',[71] suggesting that:

> there cannot be respect for a law which is totally divorced from social realities and social needs.[72]

The medical profession in the early 1970s was also vocal about the need for clarity on which circumstances constituted grounds for an abortion. Many felt they could be prosecuted for performing abortions because the law was insufficiently clear.[73]

Because lawyers and eminent doctors[74] had complained and made demands for the enactment of legislation, stating that the legal position was untenable,[75] the issue was investigated. Again, as throughout patriarchal history, men, and particularly the male medico-legal fraternity, controlled adjudication of the abortion issue. Emily Moore noted in 1973 that:

> we have a celibate male religious hierarchy which is in the fore-front of opposition to the full recognition of women as persons, a male-dominated legislature and a male-dominated medical profession loath to relinquish their role as decision makers in this arena.[76]

---

[70] Hunt (n2) 308.

[71] Hunt (n2) 307.

[72] Hunt (n2) 307.

[73] *Cape Times* 6 May 1971.

[74] See J R L Milton (n68) 505-7.

[75] See H Bradford 'Her Body, Her Life' (August 1991) *Cosmopolitan* 131 and the Report of the Select Committee on Abortion (n60) 64.

[76] *Time* 29 January 1973 30 cited in T P Boulle 'The Gynaecological Aspects of Abortion' in G C Oosthuizen et al *The Great Debate: Abortion in the South African Context* (1974) 206.

Concern about such factors as the effects of backstreet abortions was of secondary importance to these male reformists although there had been calls for many years from other quarters for the law to be reformed because of the injuries and deaths resulting from backstreet abortions. Statistics reflect that 1 436 people were treated for incomplete abortions from mid-1958 to mid-1959 at Groote Schuur Hospital,[77] and that there were 302 abortion-related deaths recorded in the Johannesburg area from 1959 to 1964, yet this was not a major concern to male professionals calling for enactment of an abortion law.

While the organised medical profession, in the main, were motivated by concern for their own interests, there were individual doctors who focused on the abortion issue within its wider context. One such doctor was A C Keast who was then president of the Border Coastal Region of the Medical Association of South Africa. He noted:

> one of the main arguments in favour of legalising abortion and of extending its indications is that the present practice, based on Hippocratic principles, encourages criminal abortion with all its attendant hazards.[78]

In any event, as a result of the pressure from doctors and lawyers, a private member's motion was tabled in Parliament in February 1972 by Dr E Fisher which called for a select committee to look into the question of abortion.[79] The Abortion and Sterilisation Bill[80] was tabled a year later but was referred to

---

[77] Strauss (n57) 453.

[78] A C Keast 'Therapeutic Abortions' (1971) 45 *SAMJ* 888.

[79] Hansard House of Assembly Debates col 1410 (18 February 1972).

[80] 15 of 1973.

a select committee which could not finish its work. The committee was then converted into a commission of inquiry,[81] consisting exclusively of senior, white, male parliamentarians - with no representation of the gender most affected by the abortion issue.[82] This is not an unusual feature of the process of

[81] Proc R 162 GG 3974 of 6 July 1973 (Reg Gaz 1812). Report of the Commission of Inquiry into the Abortion and Sterilisation Bill RP 68 of 1974.

[82] Boberg (n31) 20 fn23.

abortion law enactment. Estrich and Sullivan note:

> The direct impact of abortion restrictions falls exclusively on a class of people that consists entirely of women. Only women get pregnant. Only women have abortions. Only women will endure unwanted pregnancies and adverse health consequences if states restrict abortions. Only women will suffer dangerous, illegal abortions where legal ones are unavailable. And only women will bear children if they cannot obtain abortions. Yet every restrictive abortion law has been passed by a legislature in which men constitute a numerical majority. And every restrictive abortion law, by definition, contains an unwritten clause exempting all men from its structures.[83]

However, the man who was to become Minister of Health argued in 1975 that women were not a necessary part of an investigation into abortion:

> Women are not the only ones who have a responsibility in regard to abortion. The hon. member for Houghton [Helen Suzman] is completely mistaken. I can forgive her, because she is the only member of this house who is a women, but then she must not abuse her sex and her presence here to raise a hue and cry on behalf of the women of South Africa ... One need not have women on a committee [to investigate abortion] in order to determine what is right or wrong ... if one wanted to abolish capital punishment today, surely one would not appoint a bunch of murderers to go into the matter and to see whether it should be abolished.[84]

The attitude of some of the male politicians in Parliament towards women and their ability to make decisions concerning themselves during pregnancy, is reflected in the view of Graham McIntosh, United Party Member of Parliament for Pinetown, Natal,

---

[83] S R Estrich and K M Sullivan 'Abortion Politics: Writing for an Audience of One' (1989/90) 138 *University of Pennsylvania Law Review* 119, 153.

[84] L A P A Munnik Hansard House of Assembly Debates col 659 (12 February 1975).

during the abortion debate. He stated:

> For the first trimester of a woman's pregnancy she is, medically speaking, hormonally drugged. Her hormone level is so high as to make it difficult for her to come to a rational and sensible solution.[85]

A similarly sexist view was expressed during the parliamentary debate by Dr E L Fisher, who declared:

> A woman will come and say 'I have been raped. I think I may be pregnant. Will you not do something for me please?' There are a lot of cases like that. Some of them were raped very easily, very easily indeed.[86]

In this ambience of extreme sexism the male-dominated medico-legal profession maintained control of the abortion issue during the investigative and drafting stages of the bill: four of the ten members of the select committee, all men, were medical practitioners, and two were members of the legal profession. The rest of the committee consisted of a pharmacist, an ex-minister of religion, an ex-policeman and a social worker.[87]

This male, medico-legal domination was completely contrary to the spirit of the investigation into abortion which took place in the United Kingdom. The Lane Commission, appointed to investigate the abortion question in the United Kingdom, was chaired by Mrs Justice Lane and nine out of the other 15 appointees were women.

The South African government's position was articulated at the beginning of the second reading of the bill when the Minister

---

[85] J Cope *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* (1993) 84.

[86] Dr E L Fisher Hansard House of Assembly Debates col 482 (10 February 1975).

[87] See Hansard House of Assembly Debates col 606 (12 February 1975).

of Health stated that:

> respect for the unborn child (foetus), recognition of the Christian views and moral norms which characterise our country ... and the fact that drastic action will be taken against abortions performed outside the legal provisions ... should be clearly reflected in the legislation.[88]

The bill provided that an abortion could be performed by a medical practitioner only:

a) where the continued pregnancy may endanger the life of the woman concerned or may constitute a serious threat to her physical health and two medical practitioners certify in writing that the continued pregnancy might, in their opinion, so endanger the women concerned or so constitute a threat to her health; or

b) where there is a substantial risk that the child to be born will suffer from physical or mental abnormality of such a nature that it will be seriously handicapped, and two medical practitioners certify in writing that, in their opinion, based on medical scientific grounds, there is such a risk; or

c) where the foetus is alleged to have been conceived in consequence of unlawful carnal intercourse and

   (i) two medical practitioners certify in writing

      (aa) in the case of rape or incest, and after such interrogation of the woman as any of them may deem necessary, that the pregnancy is, on a balance of probability, due to alleged rape or incest, as the case may be; or

      (bb) in the case of carnal intercourse which is alleged to have been in contravention of section 15 of the Immorality Act 23/57 that the woman concerned is an idiot or imbecile; and

   (ii) a certificate issued by a magistrate under section 7(3) is produced to the medical practitioner referred to in section 7(1).

The bill obtained the support of many, particularly the medical profession, a representative of which stated that, '[t]he medical

---

[88] Hansard House of Assembly Debates cols 472-473 (15 February 1975).

profession in general does not favour abortion on demand'.[89]

The experience in the United Kingdom is pertinent in this context as the same conservative disposition among doctors was apparent there before the 1967 Act was passed. The British Medical Association and the Royal College of Obstetricians and Gynaecologists were vehemently opposed to abortion performed for social reasons, citing ethical considerations as grounds for their opposition when the 1967 Act was being discussed.[90] However, after the Act was passed, they became aware of the benefits of the changed policy, both for women and for themselves.[91] The number of complications resulting from backstreet abortions fell rapidly. Treatment of these problems had been a major source of consternation for doctors in the past, and as these were largely eradicated by the 1967 Act, doctors came to support this law.[92] By 1975, therefore, the British medical profession was active in its support for the 1967 law.[93]

In South Africa, as noted earlier, the medical profession supported the local bill, largely for reasons of self-interest but also because it reflected their own conservative position. The chairman [sic] at the time of the Society of Psychiatrists of South Africa, Professor Gillis, stated on behalf of

---

[89] See G C Geldenhuys in Oosthuizen (n76) 27.

[90] See D Marsh and J Chambers *Abortion Politics* (1981) 73 & A Hodern *Legal Abortion: The English Experience* (1982) 17.

[91] Marsh and Chambers (n90) 78.

[92] Marsh and Chambers (n90) 78.

[93] Marsh and Chambers (n90) 75.

psychiatrists in this country:

> They and I welcome this legislation. I think it is a tidy piece of legislation. I do not know any psychiatrist who is opposed to it in principle.[94]

However, certain reservations about the bill were voiced by doctors such as Dr P Bremer, who represented the South African Society of Obstetricians and Gynaecologists. He believed the psychiatric grounds for abortion provided for in the bill to be its Achilles' heel, and suggested that this provision would be the area that could be abused by women who wished to obtain an abortion.[95]

Reaction to the bill from the legal profession was generally positive but in some instances was guarded and unclear. Strauss, for example, testifying before the select committee, ackowledged the hazards of backstreet abortion, and stated:

> Surely the law cannot forever remain insensitive to the wretched plight of pregnant women in dire need of skilled medical aid, being virtually forced to resort to desperate means.[96]

During the same proceedings, however, Strauss went on to say:

> ... in conditionally supporting the proposed reform of our law, it is not without a certain degree of hesitation that I do so. It is hard to shake off the uneasy feeling that once you ignore or stretch a sacrosanct principle you are taking the first step on the path that leads back to the jungle ...[97] I am definitely not in favour of abortion on demand. These provisions are in my respectful opinion

---

[94] Report of the Select Committee on the Abortion and Sterilisation 20-21 Bill SC 8-73.

[95] Testimony before the Select Committee 33.

[96] At 66.

[97] See also E Harrison 'Abortion: The Winds of Change Confound' (1973) 1 (2) *Natal University Law Review* 44, 48.

realistic, yet not over-permissive.[98]

Writing in 1973, at the time that the bill was being debated, Armstrong stated that the proposed legislation had a twofold purpose: to provide clarity and end confusion as to when a lawful abortion could be performed, and to reduce the number of backstreet abortions that were being performed.[99]

Hawthorne, however, disagreed with Armstrong on the latter point, suggesting that the government and the opposition concurred that no legislation, however liberal, would reduce the number of backstreet abortions.[100] Strauss's view was that the Act was 'not designed to achieve total eradication of illegal abortions', a comment that reveals the belief that the Act would impact in a major way on the number of backstreet abortions performed while not totally ending them.[101]

Armstrong's criticisms of the bill are, in fact, similar to those that continue to be made about the Act today. He stated:

> The bill is inquisitive, [and] it is this very inquisitiveness which results in the bill losing sight of the social need for secrecy and privacy, and thus it fails to alleviate the grave problem of back-street abortion ... women are driven to illegal abortion by a wealth of factors, i.e. reputation, good name, financial and domestic circumstances, etc ... Women need privacy, immediacy and

---

[98] S A S Strauss testimony to the Select Committee (n95) 66; see similar wording by Strauss 'Abortion and the Law in South Africa 1973' in G C Oosthuizen et al (76) 138.

[99] N W Armstrong 'Abortion, The New Abortion Bill - Medicine and Society' (1973) 2 *Responsa Meridiana* 247, 252.

[100] L Hawthorne *The Crime of Abortion: A Historical and Comparative Study* (unpublished LLD thesis University of Pretoria 1982) 247.

[101] S A S Strauss 'Some Comments on the Abortion and Sterilisation Act 2 of 1978 After One Year's Operation: Legal Aspects' (1977) *S A Criminal Law and Criminology* 116, 117.

secrecy...[102]

Middleton suggested that countries which had relaxed their abortion laws had begun to rethink this policy,[103] but the reverse was in fact the case. Since the early 1970s, many countries have liberalised their abortion laws as noted in Chapter 2. In fact, after surveying the laws of other countries, Armstrong concluded that the bill would not reduce the number of backstreet abortions, stating:

> on the balance of probability the bill is doomed to fail in its social purpose.[104]

Bella Schmahmann went further, noting that the bill:

> will not eliminate the disastrous activities of the backstreet abortionist because women intent on abortion will go to any lengths to get it ...[105]

Reflecting the lack of input by women, the bill took an extremely conservative stance, severely restricting the circumstances in which an abortion might be performed. Extraordinarily enough, however, Hawthorne argued that the severity of the Act was not rooted in the fact that it was decided by men, but rather in the evidence heard by the Commission which suggested that the electorate was conservative in its attitude towards abortion.[106] But can this be true if, as was noted in Parliament, very few women were prepared to give evidence, at least partly because of

---

[102] Armstrong (n99) 254.

[103] A J Middleton 'Abortion' 1972 *De Rebus* 397, 400.

[104] Armstrong (n99) 253.

[105] B Schmahmann in G C Oosthuizen et al (n76) 104.

[106] Hawthorne (n100) 239 (n179).

the male make-up and bias of the commission?[107] In addition, according to Cope, very few women in South Africa knew that a law about abortion had been proposed, and was being debated and considered by Parliament.[108] Cope states:

> Little, if any, of the debate was published in the national press, and the average South African woman remained ignorant of the legislation which was being considered ...[109]

Of critical importance, in addition, is the fact that the electorate was white and Parliament therefore was not representative of the population as a whole. Moreover, those who gave evidence about the proposed law, the doctors, lawyers and other interested parties, were white and hardly able to present the views and attitudes of the community at large.

In any event, the evidence heard by the Commission was not all conservative as Hawthorne would have it. Cope suggests that the conclusions drawn by the commission failed to take account of the evidence submitted to it, particularly the written evidence,[110] and that 'a serious misrepresentation appeared to have taken place'.[111] Asked to comment on this, Professor Tony

---

[107] C J S Wainwright Hansard House of Assembly Debates col 714 (12 February 1975).

[108] Cope (n85) 14.

[109] Cope (n85) 14.

[110] Cope (n85) 82.

[111] Cope (n85) 67.

Mathews, Dean of the Law Faculty of the University of Natal, noted:

> In my knowledge no precedent exists for a commission to have misrepresented the facts in such a manner.[112]

Further confirmation of the commission's failure to reflect the views of individuals outside of government ideology is to be found in the opinions of a number of speakers at a symposium on abortion held in Durban during May 1973. They included Dr Betty Bennet, Ms Bella Schmahmann, Dr Pam Sharratt and Dr Norman Walker, all of whom were in favour of a liberal approach to a new law.[113]

Focusing on the reality of abortion, Walker noted that:

> It is too late for cabinet ministers, church dignitaries or the hierarchy of the legal and medical profession to decide there will or will not be abortion. That decision has long since been taken. The women of the world, the women-at-risk, decided all that irrevocably at least four thousand years ago. All that is left for politicians, priests, lawyers and doctors is to be honest with themselves, uncomfortably honest, eschew wishful thinking, pious hopes, blatant hypocrisy, and boldly face fact. Only one decision remains to be taken. Will the current practice of abortion be permitted to remain the hazardous affair it certainly is now, or will it be made safe?[114]

Sharratt, agreeing with Walker's thrust and pleading for major

---

[112] Cited in Cope (n85) 72.

[113] The proceedings of the conference were published in 1974 by G C Oosthuizen, G Abbot and M Notelovitz (eds) as *The Great Debate: Abortion in the South African Context*. See (n76).

[114] N Walker 'Like Lemmings into the Sea' in G C Oosthuizen et al (n76) 199, 202-203.

revisions of the law, stated:

> Far too little attention is being paid, in the abortion debate, to the best welfare of women, children and society at large.[115]

Another response to the enactment of legislation was the establishment of South Africa's first abortion-focused groups. The South African Abortion Law Reform Group and the Abortion Reform Action Group (Arag) were founded in the early 1970s, and amalgamated in 1976.[116] To lobby support for abortion liberalisation the Group held meetings with various Members of Parliament including Messrs Van Hoogstraten, Oldfield, Fisher, Von Keyserlink, Van Rensburg, Dalling and Mrs Helen Suzman.[117] In 1973, Arag presented a petition signed by 1 500 people supporting legalisation of abortion to the select committee,[118] while a Durban group of activists collected 10 000 signatures to a similar petition after only 22 hours of effort.[119]

However, reflecting government attitude and predisposition, the Minister of Health refused to see a deputation from the groups that had organised the petition, stating that the matter had already been considered by the select committee.

The select committee did investigate the bill and produce

---

[115] P Sharratt 'Social, Personal and Psychological Indications for Legalised Abortions' in G C Oosthuizen et al (n76) 112-113.

[116] AGM minutes of the South African Abortion Law Reform League 18 August 1976.

[117] AGM minutes of the South African Abortion Law Reform League 12 June 1975.

[118] South African Abortion Law Reform League Newsletter 2 1974.

[119] South African Abortion Law Reform League Newsletter 2 1974.

a report but, as noted earlier, the committee gave way to a commission of inquiry whose shortcomings have been discussed. The Abortion and Sterilisation Bill was tabled in Parliament in 1974 and debated in February 1975. The bill was adopted by both houses, signed by the State President and published on 12 March 12 1975.[120]

D. THE ABORTION AND STERILISATION ACT

From 1975, abortions in South Africa have been permitted only in terms of the provisions of the Abortion and Sterilisation Act.[121] This Act specifically stipulates that an abortion can take place only when the stringent requirements of the Act are met.[122] Nevertheless, although it is very conservative legislation, the Act widened the grounds on which a legal abortion could be procured. Thus, Boberg saw the Act as 'largely declaratory and explanatory of the common law'[123] while Bertrand[124] complained that:

> certain provisions are dangerously more permissive than Judeo-Christian principles allow in that the objective and intrinsic human worth and rights of the unborn child have in some cases, been overruled by subjective values and rights of the mother or society.

Others have argued that the Act does nothing to look after the interests of the 'unborn child' and that no one looks after the

---

[120] A R L Bertrand 'The Abortion and Sterilisation Act 2 of 1975. A third opinion (Part II) (1978) *SACC* 264.

[121] Act 2 of 1975.

[122] Section 2.

[123] Boberg (n31) 20.

[124] Bertrand (n120) 284-85.

interests of the foetus.[125] Some have called for the appointment of an independent person such as an advocate or attorney to represent and defend the 'rights' of the foetus.[126] They argue that this would be analogous to the appointment of a curator ad litem where the interests of a minor child are at stake.[127]

Van Oosten[128] suggests, by contrast, that the Act aims to continue pregnancy rather than to protect the foetus. This is a suggestion that lends credence to the argument that the intention of the Act was to play a part in fostering growth in the white birth rate.

Criticism has also been levelled at the Act on the basis that it is unclear about what abortion is. Within the English version of the Act, which is the version signed by the State President, abortion is circularly defined as

> the abortion of a live foetus of a woman with intent to kill such a foetus.[129]

It is seen to be problematic that the drafters of the legislation chose to define abortion by using the word 'abortion', thereby creating ambiguity. The Afrikaans version of the Act defines abortion as follows:

> vrugafdrywing is: die afdrywing van 'n lewende vrug van 'n vrou met die opset om dit te dood.

---

[125] See Du Plessis (n40) 41.

[126] See *G v Superintendent, Groote Schuur Hospital, and others* 1993 (2) SA 255 (C).

[127] B Bertrand 'The South African Abortion Act - An Assault on the image of God' (unpublished paper) February 1987 11.

[128] F F W Van Oosten 'Regmatige Vrugafdrywing' (1977) *De Jure* 337, 378.

[129] Section 1.

This use of the word 'afdrywing' (expulsion) does confer some clarity on the definition of abortion. Therefore, although the English text was the one signed by the State President and thus the text to be used for interpretation, the Afrikaans version was used in *S v Collop*[130] to clarify the English text. This was the solution proposed by Van Oosten[131] who argued that the Afrikaans version must supply the meaning of abortion intended by the Act. Therefore it was the expulsion and not the killing of a foetus which transgressed the law.[132] That is, if there was a killing of the foetus but expulsion was not caused, there would be no transgression of the Abortion Act.[133] Further, if labour was not induced, that is, if vacuum aspiration was used, this would not constitute an abortion in terms of the Act.[134]

Another problem that exists is whether the contraceptive intra-uterine device (IUD) violates the Act or not.[135] The IUD does not prevent fertilisation of the ovum, but obstructs the zygote's implantation in the womb, resulting in its expulsion from the body.[136] Acceptance of the use of the IUD disregards conception as the point from which abortions are prohibited. Hawthorne attempts to circumvent this difficulty by arguing that

---

[130] 1981 (1) SA 150 (A).

[131] Van Oosten (n128) 377.

[132] Smit (n10) 158-9; Van Oosten (n128) 377.

[133] Hunt (n2) 323.

[134] Smit (n132) 158-9.

[135] See *S v Collop* 1981 (1) SA 150 (A) 153.

[136] M L Lupton 'Does the Destruction of a Blastocyst Constitute the Crime of Abortion?' 1985 *SALJ* 92, 99.

if the IUD is implanted to cause an abortion, then it is criminal, but if it is there as a contraceptive device, then there is no violation of the Act.[137] But is such a distinction really sustainable?

Du Plessis[138] relies on the reference to a live foetus 'of a woman' to argue that the IUD is not prohibited by the Abortion and Sterilisation Act. Since the device prevents implantation, the foetus cannot be 'of a woman' and its expulsion is no violation of the Act. But is this really so? The foetus is in the woman and the fact that it is not 'attached' does not really make any difference. Anyway, as is clear from the *Collop* case, the intention is to provide protection from conception and therefore an IUD must be examined in terms of what it does - and this indeed violates the Act.

Yet another problem with the Act is its use of the term 'foetus' without defining its meaning. In *S v Kruger*,[139] Judge Erasmus held that 'lewende vrug' and 'live foetus' mean the same thing. The court held further that the promulgation of the Abortion and Sterilisation Act had repealed the common law relating to abortion. This view was supported in both the lower and appeal court decisions of *S v Collop*[140] where it was argued that, medically speaking, the term 'embryo' is used for the first eight weeks after conception, and the term 'foetus' thereafter. However, the court found that for the purposes of the Act there

---

[137] Hawthorne (n100) 255.

[138] Du Plessis (n40) 44.

[139] 1976 (3) SA 290 (O) 295-6.

[140] 1979 (4) SA 381 (O) & 1981 (1) SA 150 (A).

is no distinction between these terms, that a 'foetus' exists conceptually from the moment of conception, and that any interference with the foetus from conception would transgress the Act.[141] The Appellate Division in *S v Collop*,[142] concurred, defining foetal life as beginning at conception.[143]

For the crime of abortion to have occurred, the following elements must be present: (1) expulsion from a woman (2) of a live foetus (3) unlawfully (4) with the intention of killing the foetus. There is no express requirement that the foetus must die but this, it is suggested, is implied by the Act.[144] The Act stipulates that abortion is permitted only:[145]

> (a) where the continued pregnancy endangers the life of the woman concerned or constitutes a serious threat to her physical health, and two other medical practitioners have certified in writing that, in their opinion, the continued pregnancy so endangers the life of the woman concerned or so constitutes a serious threat to her physical health and abortion is necessary to ensure the life or physical health of the woman;
>
> (b) where the continued pregnancy constitutes a serious threat to the mental health of the woman concerned, and two other medical practitioners have certified in writing that, in their opinion, the continued pregnancy creates the danger of permanent damage to the woman's mental health and abortion is necessary to ensure the mental health of the woman;
>
> (c) where there exists a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he [sic] will be irreparably

---

[141] *S v Collop* 166H-167E.

[142] 1981 1 SA 150 (A). Decision of Diemont JA with Jansen JA and Botha AJA concurring.

[143] M L Lupton 'The Legal Status of the Embryo' (1988) *Acta Juridica* 197 207.

[144] Bertrand (n144) 265.

[145] Section 3(1).

seriously handicapped, and two other medical practitioners have certified in writing that, in their opinion, there exists, on scientific grounds, such a risk; or

(d) where the foetus is alleged to have been conceived in consequence of unlawful carnal intercourse, and two other medical practitioners; have certified in writing after such interrogation of the woman concerned as they or any of them may have considered necessary, that in their opinion the pregnancy is due to the alleged unlawful carnal intercourse; or

(e) where the foetus has been conceived in consequence of illegitimate carnal intercourse, and two other medical practitioners have certified in writing that the woman concerned is due to a permanent mental handicap or defect unable to comprehend the consequential implications of or bear the parental responsibility for the fruit of coitus.

These grounds for legal abortion are examined below.

1. Life and health of the mother

Section 3(1)(a) reenacts the common law which permits abortion to save the life of the mother. However, it is more restrictive than the common law because of the additional procedures that are required by the Act. Indeed, the Act is couched in exacting terms whose purpose is precisely to ensure additional restrictions. For instance, there must be a serious threat to the woman's physical health before abortion is permitted, whereas the 1973 bill merely required the possibility that the pregnancy might endanger or threaten such health.[146]

The use of the term 'serious' in this clause, as well as the 'mental health' clause, has been criticised by Smit[147] on the

[146] Bertrand (n120) 275.

[147] Smit (n132) 161.

grounds that it is too vague. Hawthorne[148] criticises Smit in turn for an attitude which 'exposes a sad lack of trust in the integrity of the legal profession'. The issue, however, is not so much one of integrity, but rather the restrictive effect of the wording of the section. The statistics reveal how seldom this section is invoked, thereby indicating the strict application of its terms by doctors who are able to authorise abortions.

2. Mental health of the mother and the foetus

The mental health clause of the 1975 Act shows a similar narrowing of the formulation in the 1973 bill. It requires that there be a danger of permanent damage to the mental health of a woman seeking an abortion.[149] The extremeness of this requirement functions so as to almost nullify, in practice, access to abortion in terms of this clause.

Comparable constraints exist in the section permitting abortion on the grounds of a serious physical or mental defect that would result in a child that was irreparably, seriously handicapped. The 1973 bill required merely a substantial risk. Here again, the earlier formulation was tightened, again reducing the opportunities for access to abortion.[150]

Criticism of the wording of the 'mental health' clause came from different quarters. Helen Suzman, for example, attempted to replace the word 'permanent' with 'serious' but this was

---

[148] Hawthorne (n100) 260.

[149] Bertrand (n120) 275.

[150] Bertrand (n120) 277.

rejected.[151] The resulting exceedingly stringent requirements practically abolishes access to an abortion on the grounds of protecting the woman's mental health.[152]

A further difficulty when an abortion is requested on the grounds of mental health, is that one of the medical practitioners who must be consulted must be a psychiatrist in the employ of the state.[153] This is another departure from the 1973 bill which empowered an ordinary psychiatrist to authorise an abortion. The restrictive effect of this requirement is clear when one notes that in 1976 there were only 137 state-employed psychiatrists in South Africa, of whom 23 certified that an abortion was necessary.[154] In 1977 there were 135 state-employed psychiatrists, of whom only 33 signed such certificates.[155]

Even more critical is the impact, or rather lack thereof, of this requirement on the plight of black women. Women of colour have little access to psychiatrists from their own communities. In 1973, in reply to a question about the number of 'coloured or Bantu' psychiatrists in the country, the chairman [sic] of the Society of Psychiatrists replied that there was one coloured

---

[151] See the Second Reading of the Abortion and Sterilization Bill Hansard House of Assembly Debates col 605 (12 February 1975).

[152] As is evident from the modest number of legal abortions that occur.

[153] Section 3(3)(b).

[154] Hansard House of Assembly Questions and Replies col 1410 (1977).

[155] Hansard House of Assembly Questions and Replies col 924 (1978).

psychiatrist practising at Groote Schuur hospital.[156] Indeed, psychiatrists of any description are hard to come by for the vast majority of South Africans, as Helen Suzman pointed out in Parliament:

> I am told there is only one single psychiatrist in the homelands or, rather, near the homelands, he is in Mafeking and not even in a homeland. There is hardly a single psychiatrist between Pretoria and the Limpopo.[157]

As for women who live in semi-urban areas such as Pietersburg, access to a psychiatrist is barely easier, though this did not trouble the Chair of the Society of Obstetricians and Gynaecologists, who opined that there was no problem as:

> sy gaan net na die private geneesheer, wat haar na die distriksgeneesheer verwys.[158]

No consideration was given to the cost implication of this situation, and, more importantly, the needs of women living in the rural areas were ignored. This reflects the bias against black women and it is hardly surprising that there is the view that:

> the present abortion legislation reflects the values and norms of the whites.[159]

In the light of the obstacles erected by this clause, it is interesting that about half of all legal abortions are

---

[156] Report of the select committee (n60) 32.

[157] Helen Suzman Hansard House of Assembly Debates col 401 (10 February 1975).

[158] Report of the select committee (n60) 34.

[159] F F W van Oosten and M Ferreira 'Republic of South Africa' in P Sachdev (ed) *International Handbook on Abortion* (1988) 416, 422.

nonetheless performed for psychiatric reasons,[160] the majority on white women at Groote Schuur Hospital in Cape Town.[161] It must therefore be asked whether white women are more likely than others to suffer the effects of psychiatric illness, and whether women from Cape Town are more ill than their counterparts in the rest of the country? The answer is surely one of access to abortion at some hospitals as a result of a progressive attitude among doctors at these institutions?

3. Rape and incest

Section 3(1)(d) was originally used to permit abortions in cases of incest, rape or sex in violation of section 15 of the Immorality Act, which prohibited sexual intercourse with a girl who was an imbecile or idiot.

Section 3 (1) (d) as amended now permits abortion only where rape or incest has occurred. Where pregnancy results from sexual intercourse with a girl under the age of 16, termed statutory rape, an abortion is not provided for by the Act.[162] An abortion in the case of statutory rape was rejected in the debate in

---

[160] L Luti and M Mamaila 'Time to Change Abortion Laws' (14 July 1991) *City Press*.

[161] See S Taylor *A Six Year Review of Legal Abortions Performed in a Teaching Hospital* (unpublished Masters Thesis in Community Medicine University of Cape Town (1986).

[162] J C Stassen 'Die Wet op Vrugafdrywing en Sterilisasie 2 van 1975' (1976) *TSAR* 260, 263. The meaning of the rape clause as well as the procedures to be followed by a woman who has been raped were investigated by the court in *G v Superintendent Groote Schuur Hospital*. See n295 later.

Parliament on the basis that:

> it is possible for such a girl who in a moment of indiscreet passion and emotion, finds herself in such a situation, to contract a legal marriage; in fact, two years ago we made it possible for a girl to marry at the age of 15 years without the need for ministerial permission.[163]

Incest is defined in the Abortion and Sterilisation Act as:

> Carnal intercourse between two persons who are related to each other and by reason of such relationship incompetent to marry each other.

An abortion is permitted where the parties to the pregnancy are related to each other by affinity, consanguinity or adoption.[164] There is, however, a dispute as to what the effect is where the parties do not know they are related.[165]

The Act stipulates that when abortion is sought on the ground of rape or incest, one of the certifying medical practitioners must be the district surgeon who examined the woman when and if a complaint was lodged with the police.[166] Further, a magistrate must issue a certificate[167] specifying:

(a) that the police have been informed, or the reason why not;[168]

(b) that after examining the woman and whatever other

---

[163] H J Coetzee Hansard House of Assembly Debates col 613 (12 February 1975).

[164] D Hansson and D E H Russell 'Made to Fail: The Mythical Option of Legal Abortion For Survivors of Rape and Incest' (1994) 9(4) *SAJHR* 500, 518; M L Lupton 'Medico - Legal Aspects' in I D Schaëfer *Family Law Service* (1994) J54.

[165] See Hunt (n2) 319; Stassen (n162) 263.

[166] Section 3(3)(c).

[167] See *G v Superintendent, Groote Schuur Hospital, and others* 1993 (2) SA 255 (C).

[168] Section 6(4)(a).

evidence, on the balance of probability the pregnancy is the result of rape or incest;

(c) that if the abortion is as a result of incest then the degree of relationship transgresses the laws of incest;

(d) that the woman has submitted an affidavit, or sworn under oath that the pregnancy is the result of rape or incest.

Kunst and Meiring report that magistrates issue a certificate only if the police have been informed and if the medical evidence shows that rape or incest was the cause of pregnancy.[169]

The reality of the situation is that, in most cases, neither rape nor incest victims report these occurrences since they fear a whole host of consequences. In addition to the trauma of rape or incest, women endure the burden of society's attitudes. Responsibility for pregnancy, even in the case of rape or incest, is almost exclusively imposed on the woman. Such attitudes have ramifications in terms of the law. For instance, the law imposes no requirements on the state to provide counselling or support of any kind to victims of rape or incest.

The complicated bureaucratic process of obtaining permission for an abortion is the antithesis of a system which safeguards and promotes physical and mental health. Many women who would be entitled to an abortion, even within the rigid restrictions of the Act, often resort to backstreet abortions because of the insensitive procedural requirements which take no account of an

---

[169] J Kunst and R Meiring 'Abortion law - A need for Reform' (June 1984) *De Rebus* 264, 265. See further *G v Superintendent, Groote Schuur Hospital, and others* 1993 (2) SA 255 (C).

already truamatised woman's need for immediacy, empathy and confidentiality.[170] Women, quite simply, do not wish to navigate the cold passages of the bureaucracy of the police and the courts.

Much criticism has been levelled at the procedures necessary to obtain an abortion, some of which existed even before the bill became law. Arag stated in its memorandum to the select committee:

> In the consideration of a rape victim the procedure demanded by the legislation - that of a woman seeing in all, four doctors, the police, a magistrate, and writing an affidavit to the magistrate who in turn has authority to question her, is nothing short of inhuman.[171]

The Law Commission investigated these questions in 1985[172] and held discussions with those who apply the procedures in the case of rape. The commission noted that, while the majority of respondents favoured the present procedures,[173] members of the South African Police asserted that one of the major causes of additional trauma to a woman who had been raped was the fact that she had to appear personally before a magistrate. According to these police officers, this was not necessary as an affidavit could be given by the police to the magistrate.[174] Members of

---

[170] See Strauss (n101) 117 who comments on the lack of confidentiality. See also Kunst and Meiring (n169) 265 who reflect on the procedural problems.

[171] Arag 'Memorandum to the Select Committee on the Abortion and Sterilisation Bill' cited in Bertrand (n120) 279, who believes the criticism is unfounded.

[172] South African Law Commission *The Women: Sexual Offenses in South Africa* (Research Report 3 1985).

[173] Law Commission (n172) 4.83.

[174] Law Commission (n172) 4.90.

the South African Police and the magistrates in particular, favoured a procedure that caused less trauma to the women involved.[175]

While the Law Commission noted the views of the police and magistracy,[176] the commission nonetheless held:

> it is not clear how the present procedure can humiliate her ... The only personal contact ... is the examination by the district surgeon and reporting to the police[177] ... [and] ... appearing before a magistrate is not obligatory since in terms of sec 6(4)(a)(ii) the magistrate must interrogate either the victim or any other person.[178]

But who else would the magistrate wish to 'interrogate'? How many people are usually present at a rape? Would a magistrate really want to interrogate a person other than the victim?

The commission nonetheless suggested the elimination of the personal appearance requirement[179] and stated that it should not be obligatory to interrogate the woman who has been raped. It also noted that the decision whether to grant an application for an abortion after rape should rest in the hands of a trained multi-disciplinary team attached to a provincial hospital. This team should consist of:

> medical practitioners, a forensic scientist, social workers, a representative of the SAP and a representative of a rape crisis service.[180]

In the alternative, if this was not acceptable, the commission

---

[175] Law Commission (n172) 4.83.

[176] Law Commission (n172) 4.83.

[177] Law Commission (n172) 4.91 fn70.

[178] Law Commission (n172) 4.91.

[179] Law Commission (n172) 4.93.

[180] Law Commission (n172) 5.54.

held that the decision of the magistrate should be assisted by the recommendation of such a team.[181] The commission also suggested that the 'victim (or any other person - for example a relative, husband or member of a rape crisis organisation)' be able to apply directly to the magistrate without the involvement of the police.[182]

The commission drew attention to the view that a woman who has been raped ought to be able to 'claim an automatic right to an abortion and this service should be rendered free of charge to victims (that is to say at state expense)'.[183]

In spite of all these recommendations and proposals, the Law Commission nevertheless found that the status quo should be maintained.[184]

4. Stringent procedures

In addition to the conditions laid down in section 3(1), stringent procedures stipulated by the Act must be meticulously complied with to obtain an abortion.[185] In effect, this limits access to abortion as there is insufficient information available to women about the requisite procedures. Language also plays a key part in reducing access for women who do not speak either of the former two official languages, English and Afrikaans.

---

[181] Law Commission (n172) 4.93.

[182] Law Commission (n172) 4.93.

[183] Law Commission (n172) 4.89.

[184] Law Commission (n172) 4.100.

[185] See *G v Superintendent, Groote Schuur Hospital, and others* 1993 (2) SA 255 (C).

There are not many requests for abortion from black women as they do not know about its availability.[186] Strauss noted soon after the Act came into force that there had been very few applications by African women.[187] Part of the reason is fear that the record of the application for a termination will be used later as evidence in a criminal case when no child is born. This perception continues to exist as it is known by women that less than half the applications for abortions are granted.[188] But in spite of these fears, those who are refused permission to have an abortion go to the backstreets.[189]

The Act permits an abortion to be performed only by a medical practitioner. However, a doctor may refuse to perform the abortion on the basis of a conscience clause included in the Act.[190] At first glance the language used in this clause does not appear problematic, but it is, in practice, since doctors who refuse to perform an abortion are not required to refer women to other practitioners who will render this service.[191]

If a doctor performs an abortion in an emergency, without complying with the requirements of the Act, in order to save the life of a woman, he or she is subject to criminal sanction. The

---

[186] *The Star* 7 January 1987.

[187] Strauss (n101) 117.

[188] See the *Weekly Mail* 6 to 12 November 1992.

[189] *The Star* 7 January 1987.

[190] Section 9.

[191] S Taylor (n161) 11. See also S J Drower *A Survey of Patients Referred for Therapeutic Abortion on Psychiatric Grounds in a Cape Town Provincial Hospital* (unpublished PhD Thesis University of Cape Town 1977) 65.

defence of necessity may be available in these circumstances, however.[192]

An abortion carried out by a health professional who is not a medical practitioner as defined by the Act would also transgress the law.[193] The defence of necessity could not be invoked in these circumstances.[194]

A further procedural requirement of the Act is that a doctor performing an abortion must do so in a hospital designated by the Minister of Health as a place where abortions may be performed.[195] The person in charge of the hospital is required to give written approval for the abortion[196] subsequent to a doctor's request for such permission - a request which must set out a myriad of details[197] for the hospital superintendent, who must then report such details to the Director-General of Health.[198] Two additional, independent doctors, not in partnership with the original doctor or in the employ of the same employer,[199] must attest to the legitimacy of the grounds for

---

[192] F F W van Oosten 'Abortion - Adieu Common Law?' (1976) 93 *SALJ* 393, 394; Bertrand (n120) 284-5.

[193] Hunt (n2) 316.

[194] Hunt (n2) 317.

[195] Section 5.

[196] Section 6(1)(a).

[197] Section 6(2).

[198] Section 7. This has to include name, age, marital status, race, place where and when the abortion was done, the reasons therefore, and the names and qualifications of the doctors involved at any stage.

[199] Section 3(2)(a).

the abortion[200] and may not participate in the abortion.[201] At least one of these doctors is required to have been in practice for at least four years.[202]

Further, the certifying doctor is not permitted to perform the operation. This limits a woman seeking an abortion even further as she cannot decide to let her own doctor do the termination.[203]

Prescribed forms must be used by the various individuals who must give permission and by those who must check the legitimacy of the grounds for the abortion. The extent to which these requirements limit access has been noted by Dr Marj Dyer, who suggested that black women 'would never be able to wade through the welter of man-devised forms and certificates required'.[204] Bertrand[205] replied correctly that it is the doctor who has to complete the necessary forms but Dyer's statement is true in so far as women, especially black women, have immense difficulty navigating all the obstacles placed in the way of obtaining an abortion, even when they meet the strict requirements of the Act in regard to the circumstances in which abortion is permitted.

Each step of the process required by the Act places the onus for organisation, time and finance on the woman in crisis. This has obvious repercussions for working women, economically

---

[200] Section 3(1)(a), (b), (c) and (d).

[201] Section 3(2)(a).

[202] Section 3(3)(a).

[203] Kunst and Meiring (n169) 265.

[204] M Dyer *Cape Times* 27 February 1975.

[205] Bertrand (n120) 264.

disadvantaged women, and those living in rural areas where finding any doctor is a struggle. Job security is of major concern for many women, especially those in the agricultural and domestic fields who do not have statutory protection and are guaranteed neither maternity leave nor the sick leave necessary for the numerous appointments which are prerequisites for obtaining an abortion.[206] The women who are hit hardest are black,[207] those who have been excluded from the benefits of the law and included into the lowest social and economic class because of their race and gender.

The Law Commission refused to acknowledge the fact that the complicated procedures required by the Act compel women to endure backstreet abortions.[208] It remains a fact, however. The difficulty of obtaining an abortion, even for those few women whose circumstances are covered by the Act, leads thousands of women to the backstreets, at great risk to their health and lives.

Parliament has been no more willing than the Law Commission to acknowledge the discriminatory effect of the law. When it was

---

[206] See J Cock, T Emdon & B Klugman *Child Care and the Working Mother: A Sociological Investigation of a Sample of Urban African Women in South Africa* (1983) 45-48, 69-80; J Cock *Maids and Madams; A Study in the Politics of Exploitation* (1984) 260; B Klugman 'The Politics of Contraception in South Africa' 1990 13(3) *Women's Studies International Forum* 261, 265.

[207] Van Oosten and Ferreira (n159) 423.

[208] Law Commission (n172) 4.97.

being enacted it was stated in Parliament that the

> ... rich have always been able to do what the poor could not, however when it comes to abortion there is talk of discrimination.[209]

Similarly, Noonan has stated that it is a

> ... sad and harsh probability that a large number of criminal laws bear with unequal severity in practice on the poor, who are more likely than the rich to be caught, to be prosecuted, to be unskillfully defended, to be convicted and to be punished. These de facto defects in a system of law are reasons to urge reform of the administration of criminal justice and not for the selective invalidation of criminal statutes.[210]

These comments fail to take into account the realities of South African society where a person's economic class is very often dependent on that person's race, because the privileges and opportunities available to white people have not been available to others.

Abortion has thus been more accessible to wealthy women who, because of apartheid, tend to be white. Those with money have been more able than their impoverished counterparts to find doctors willing to perform safe abortions, thereby avoiding the backstreets. One avenue for wealthy women was to travel overseas to have the procedure performed. A number of women resident in South Africa, almost exclusively white, have been going to England and Wales to have abortions. Official numbers recorded are 560 in 1983, 609 in 1985, 517 in 1986, 447 in 1987, 400 in 1988 and 439 in 1989[211], but it has been suggested that the real

---

[209] Dr E L Fisher Hansard House of Assembly Debates col 480 (10 February 1975).

[210] J Noonan (ed) *The Morality of Abortion - Legal and Historical Perspectives* (1970) 237.

[211] B Botting 'Trends in Abortion' (1991) 64 *Population Trends* (1991) 19, 20.

figure is at least double the official number, as many South African women give a local address rather than a South African one.[212] This racial aspect to abortions performed abroad was noted in 1987 when the Pregnancy Advisory Services of the Charlotte Street Clinic in London, refused to continue to permit white South African women to come to the clinic to have abortions. The clinic stated that these women were the fortunate ones who, because of the situation in South Africa, were able to afford the travel costs.[213]

In the light of the foregoing, therefore, it is not remarkable that backstreet abortion is an option resorted to frequently by South African women.[214]

E. **LEGAL ABORTIONS**

With all the limitations and procedural complexities imposed by the Act, it is not surprising that the number of legal abortions carried out since its commencement have been paltry. A demographic breakdown of the data reveals that the women who brave illegal, backstreet abortions in South Africa are mostly from a low socio-economic background, under-educated[215] and stereotypically young, unmarried, black women living in urban townships. The majority of women who obtain legal abortions are white women from more privileged socio-economic backgrounds.

---

[212] Arag Newsletter 23 October 1983.

[213] Arag Newsletter August 1987.

[214] H Rees 'Women and Reproductive Rights' in S Bazilli (ed) *Putting Women on the Agenda* (1991) 213.

[215] D Larsen 'Induced Abortion' 1978 *SAMJ* 853.

TABLE 3.1

Racial breakdown of legal abortions performed during the first years of the Act.

	1975	1976	1977
Whites	485	509	399
Blacks	21	28	46
Coloureds	56	77	78
Asians	8	11	16
TOTALS	570	625	539

In the first year of the Act, 570 legal abortions were effected, almost exclusively within the white population.[216] The same is true for legal abortions performed in subsequent and more recent years. For example, in the period from November 1984 to October 1985, 712 legal abortions were performed in South Africa. Of the women undergoing these abortions, 78,7 per cent were white, 11,1 per cent were coloured, 4,9 per cent were Asian and 5,3 per cent were black.[217] During this same period (1985), 609 South African women had abortions in the United Kingdom, putting South Africa fourth on the list of source countries of women travelling to the United Kingdom specifically to have an abortion.[218]

The figures for legal abortions in the year ending 31 June

---

[216] J Westmore *Abortion in South Africa and Attitudes of Medical Practitioners towards South African Abortion Legalities* (1977) 9.

[217] D Bourne 'Abortion in England and Wales of South African Residents' (1988) *SAMJ* 87.

[218] Bourne (n217) 87.

1989 show that the racial trend has remained constant, with 735 (76,3 per cent) of a total of 963 legal abortions performed on white women.[219] In 1992, 1 449 legal abortions occurred, of which 1 002 or 69,2 per cent were on white women.[220] In 1993, until the end of November, 1 301 legal abortions were performed of which 868 or 66,7 per cent were performed on whites.[221] These figures reflect the racial and economic barriers to access to abortion.

If the intent of the Act is to restrict access to abortions, then it has been a dismal failure, as evidenced by the various strategies employed to circumvent its provisions. For example, there are suggestions that retinoids are being used as a pretext to obtain a legal abortion. Retinoids used in the treatment of acne are known to cause foetal disorders. When doctors are told that patients have taken this drug, they feel bound to authorise an abortion. Another example is the use of Rubella vaccines by pregnant women for the same purpose. The difference between actual German measles, a disease that causes foetal defects, and a higher antibody count resulting from the vaccine, cannot easily be detected.

F. BACKSTREET ABORTIONS

Very little research has been done on illegal abortions in South

---

[219] Department of Health and Population Development *Annual Report* (1989).

[220] Department of Health and Population Development *Annual Report* (1992).

[221] Department of Health and Population Development *Annual Report* (1993).

Africa,[222] but it is estimated that every year between 100 000 and 500 000 women have a backstreet abortion in this country.[223]

In 1975, the number of backstreet abortions was estimated to be about 250 000.[224] In 1982, Grobler[225] calculated that 200 000 were performed annually, while in the same year Brown suggested that conservative estimate of the number of illegal abortions was 200 000 a year.[226] In the 1990s Erica Greathead, Director of the Family Planning Association of South Africa, stated that 500 000 backstreet abortions were performed in South Africa each year.[227]

The Law Commission in 1985 were willing to accept that only 15 000 women have backstreet abortions each year.[228] However, it seems that this figure was based on an estimate of the number of women who have had abortions after being raped. The Law Commission itself stated that this figure of 15 000 was based on figures suggested at the fifth national conference of Rape Crisis

---

[222] Van Oosten and Fereira (n159) 420.

[223] See J Sarkin 'A Perspective on Abortion in South Africa's Bill of Rights Era' (1993) 56 *THRHR* 83.

[224] M G T Cloete 'Abortion: A Criminological Review' in G C Oosthuizen et al (n76) 146. See also *The Cape Times* (13 February 1975) 11; C J S Wainwright Hansard House of Assembly Debates col 715 (12 February 1975); M Dyer *Sunday Times* (3 November 1974) 10.

[225] Hansard House of Assembly Debates cols 2023-2024 (March 1982).

[226] B Brown 'Facing the "Black Peril": The Politics of Population Control in South Africa' (1987) 13(3) *Journal of Southern African Studies* 267.

[227] *South* (13 to 17 December 1990).

[228] South African Law Commission (n172) 4.97 fn72.

held in April 1984[229] and derived from the 'assumption that 150 000 rapes per annum occur in South Africa' and that 10 per cent of rape victims fall pregnant.[230]

Table 3.2 compares the number of legal abortions performed annually with the total of reported 'operations for removal of residues of pregnancy', which is only one of the commonly used alternative channels to achieve an abortion.[231]

[229] South African Law Commission (n172) 4.87 fn64.

[230] T Segal and D Labe 'Family Violence: Wife Abuse' in B Mckendrick and W Hoffman (eds) *People and Violence in South Africa* (1991) 251.

[231] E Nash 'Teenage Pregnancy - Need a Child Bear a Child?' (1990) *SAMJ* 147 148.

Table 3.2: Legal abortions performed in terms of the 1975 Act.

Legal Abortions[232]	Operations to Remove Residues of Pregnancy
1975 570	No figures available
1976 625	"
1977 539	"
1978 541	"
1979 423	"
1980 347	29 979
1981 381	33 194
1982 464	35 759
1983 474	32 839
1984 566	29 596
1985 712	32 500
1986 770	36 062
1987 810	35 882
1988-89 963	35 038
1989-90 916	38 020
1991 1 021	33 305
1992 1 449	-
1993 1301 (until November)	- [233]

[232] Department of National Health and Population Development *Annual Reports*.

[233] No figures are available for the removal of the residues of pregnancy for 1992 & 1993. It is believed that these figures have not been released because they are too inaccurate.

It is believed that the real number of 'operations for removal of residues of pregnancy', which are resorted to in the main as an alternative means to achieve an abortion,[234] is far higher than the official figure, partly because many health-care workers ignore the laborious reporting mechanisms[235] demanded by the Abortion and Sterilisation Act.[236] In any event, 90 per cent of operations for removal of residues of pregnancy are seen to be the result of backstreet abortions.[237] Figures suggest that 95 000 such operations were performed between 1983 and 1985, with only 21 per cent involving white women and 60 per cent involving black women. Again, the implication is that many more black women than white women resort to the dangerous alternatives of the backstreets.[238] June Cope[239] notes:

> South Africa's restrictive legislation creates an industry of backstreet abortion. Gynaecological wards are crowded with its victims. Some of the women die; those who survive are nursed back to health, to be exposed to the same risk on their return home. Their vacated hospital beds are immediately filled. Hospitals across the country, particularly in the urban areas, suffer from an overload on their nursing and financial services caused by this pressure on gynaecological wards, pressure which is a direct result of a law which denies a basic human right: the right to early, safe and low-cost medical care for women faced with unwanted pregnancy.[240]

---

[234] Nash (n231) 148.

[235] See the June 1991 letter from the South African Society of Obstetricians and Gynaecologists to its members.

[236] Act 2 of 1975.

[237] Van Oosten and Ferreira (n159) 419.

[238] Van Oosten and Ferreira (n159) 419.

[239] Cope (n85).

[240] Cope (n85) 1.

Serious complications[241] resulting from backstreet abortions are common. Abortion is the major reason for gynaecological admission to hospitals in South Africa[242] and as many as 70 per cent of maternal deaths in hospitals in 1976 were the result of backstreet abortions.[243] A total of 2 881 out of 6 274 admissions to Baragwanath hospital in 1978 were for complications arising from abortions.[244]

The cost of backstreet abortions for the women involved, as well as for the health care system, is enormous. Kunst and Meiring document that the 2 881 women treated for post-abortion complications in 1978 at Baragwanath[245] spent an average of 19 days in hospital. A total of 85 days between them was spent in intensive care, costing then R150 per day.[246] The cost involved of caring for the 1 085 patients who spent more than three days in the hospital was R162 750.[247]

In Pelonomi hospital in Bloemfontein, between 1980 and 1985,

---

[241] A Richards, E Lachman, S B Pitsoe & J Moodley 'The Incidence of Major Abdominal Surgery after Septic Abortion - An Indication of Complications Due to Illegal Abortions' (1985) *SAMJ* 799.

[242] Richards et al (n241) 800.

[243] *Rand Daily Mail* (1 October 1976).

[244] J Mbere and A Rubin 1979 *South African Journal of Hospital Medicine* 193.

[245] Kunst and Meiring (n169) 265.

[246] Kunst and Meiring (n169) 265.

[247] Kunst and Meiring (n169) 265; see also M Dyer 'Abortions' Act - A Plea for a Commission of Inquiry' (1979) 15(4) *Social Work* 185.

12 out of 81 maternal deaths were ascribed directly to abortion.[248] At least 36 women died because of abortion, according to a study of hospitals in South Africa from 1980-1982.[249]

At King Edward VIII hospital in Durban, 141 women were treated for problems associated with backstreet abortions in 1991, while 228 were treated in 1989.[250] Only 17 legal abortions were performed there in that year, while up to four women a day are treated at Edendale hospital for problems arising from backstreet abortion.[251]

About 300 women a month are admitted to Baragwanath hospital for abortion-related complications of which 60 per cent are estimated to be the result of backstreet attempts.[252]

While these figures are extremely disquieting in themselves, the real statistics are unknown as there is very poor reporting of African deaths and, indeed, injuries and illness, in South Africa. It has been suggested that as much as 50 per cent of all deaths are not registered.[253] Nevertheless, existing figures for deaths due to backstreet abortion have been questioned. Some have

---

[248] B F Cooreman et al 'Maternal Deaths at Pelonomi Hospital, Bloemfontein 1980-85' (1989) 76 *SAMJ* 24.

[249] E G M Boes 'Maternal Mortality in Southern Africa 1980-82' (1984) 71 *SAMJ* 158.

[250] *Daily News* (24 January 24 1991).

[251] *The Natal Witness* (8 June 1991).

[252] I Motsapi 'Bara's Abortion Shocker' *Sowetan* (25 November 1991).

[253] M Jacobs *Situation Analysis of Children and Women in South Africa Child Health Status* (Report prepared for the United Nations Children's Rights Committee) (1992).

callously asked where all the dead bodies are of the women who die from backstreet abortions.[254] But reliable statistics for maternal mortality rates do not exist,[255] although it is thought that about three black women die daily in South Africa because of backstreet abortions.[256]

The state has argued consistently that the estimated number of backstreet abortions is highly exaggerated. One view stated in Parliament in 1975 was:

> If we are to take literally the views of a good cross-section of members of this House, not only is there a communist under every bed in South Africa; there is in fact on top of every bed a pregnant women waiting for an abortion. That is bad enough, but then there is also a cross-section in this House who find a direct correlation between what is under the bed and what is on top of it. Their confusion goes much further than that because then they want to destroy what is under the bed and preserve what is on top of the bed.[257]

The Minister of Health, on receiving a delegation of women on 15 May 1986, stated that backstreet abortion was not a problem in South Africa.[258] When the 28 596 operations to remove the residues of pregnancy in 1984 increased to 32 500 the following year, he noted that only 18 of the women involved showed signs of damage from foreign objects or injuries resulting from interference, opining that even the 1 578 septic cases had been

---

[254] Bertrand (n31) 16.

[255] L Rispel and G Behr *Health Status Indicators: Policy Implications* (1992).

[256] *Argus* (15 May 1992).

[257] R M De Villiers Hansard House of Assembly Debates col 616 (12 February 1975).

[258] ARAG Newsletter (September 1986).

due to endocrine imbalances.[259] He also disputed the 2 881 cases of complications from backstreet abortions treated at Baragwanath in 1978.[260]

Whatever the doubt concerning the incidence of backstreet abortion and resultant maternal mortality rates, backstreet abortions clearly lead to

> permanent infertility and disability, drain on medical resources and expenditure of public funds.[261]

If one of the purposes of the Act was to limit the number of illegal abortions, as has been suggested,[262] then the Act has been a dismal failure.

The sanctions set out for transgressing the law have been of little effect in curbing backstreet abortions. Identical penalties are set out[263] for medically unqualified people who perform abortions and for qualified medical practitioners who abort without the correct certification, or who issue a false certificate, or who operate from an institution not authorised for that purpose. The relatively minor penalty involved is fundamentally ineffective as a deterrent, considering the monetary gains to be made in supplying abortions to a captive market.

---

[259] ARAG Newsletter (September 1986).

[260] ARAG Newsletter (September 1986).

[261] Kunst and Meiring (n169) 265.

[262] Armstrong (n99) 252.

[263] Section 10.

G. THE REALITY OF WOMEN'S LIVES

The effect of restrictive abortion legislation on the lives of women is far-reaching and destructive. Both backstreet abortions and the continuation of unwanted pregnancies in a context often devoid of prenatal care are causing irreparable harm to women's mental and physical health.

Poor health and unplanned children have a negative effect on women's employment prospects and performance, undermining women's attempts at establishing economic stability for existing family structures.[264]

Studies have shown that 49 per cent of black women in Cape Town and the Ciskei are pregnant by the age of 20[265] and 30 per cent of all mothers in Cape Town who carry their pregnancies to term are aged 19 or younger, with five per cent under the age of 16.[266] Further studies show that South African teenage mothers are more likely than others to give birth prematurely and to receive insufficient antenatal support.[267] Associated with this is the finding that the younger the woman is when she has her first child, the fewer years of schooling she has completed. Teenage mothers are therefore unable to obtain employment and

---

[264] See generally N Caine 'Maternity Rights of Black Working Mothers in South African Law' (1989) 5(5) *Responsa Meridiana* 444; B Klugman 'Maternity Rights and Benefits and Protective Legislation at Work' (1983) 9 *SA Labour Bulletin* 25.

[265] M Roberts and M R Rip 'Black Fertility Patterns in Cape Town and Ciskei' (1985) 66 *SAMJ* 481.

[266] J De Villiers 'Tienderjarige Swangerskappe in die Paarl Hospitaal' (1967) 67 *SAMJ* 301.

[267] Nash (n231) 148.

find themselves:

> locked into unwanted motherhood, poverty, and the lack of opportunity to achieve their full potential.[268]

A poor relationship between mother and baby has been associated with premature childbearing, and it has been observed that children born to younger mothers exhibit lower IQ levels than those born to older, more mature mothers. According to Ncayiyana and Terhaar,[269] children born to younger mothers are often abused, neglected and malnourished.

Also of concern are illegitimacy rates that average 67 per cent for black mothers, 81,6 per cent for coloured mothers and 20 per cent for white mothers.[270] In Cape Town, 68,2 per cent of all African children born in 1988/1989 were born to single mothers.[271]

As far as the ability of women to claim maintenance is concerned, research in Cape Town shows that over 85 per cent of African fathers default on their maintenance orders at some time.[272] Burman and Berger have shown that:

> awards are too low, the default rate extremely high, and unless a women displays the utmost determination in instituting the case and subsequently pursuing arrears, she may well receive no maintenance.[273]

---

[268] Jacobs (n253) 31.

[269] D J Ncayiyana and G Terhaar 'Pregnant Adolescents in Rural Transkei' (1989) 75 *SAMJ* 231, 232.

[270] De Villiers (n266) 301-2.

[271] S Burman 'Capitalising on African Strengths: Women, Welfare and the Law' in S Bazilli (n214) 104.

[272] Burman (n271) 104.

[273] S Burman and S Berger 'When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa (Part 1)' (1988) 4 *SAJHR* 194. See also S Burman and S Berger 'When

This does not take into account the many women who do not apply for such an order at all.[274]

The financial burden of raising a family is disproportionately heavy for poor women[275], in South Africa primarily black women. The relative position of black women is one of severe oppression and poverty. Many of them are the sole sources of income for their families. Pregnancy often results in a loss of employment,[276] especially in a climate of increasingly high unemployment. Even if a pregnant woman is lucky enough to keep her job or find a new one, day-care for the new infant is a financial drain. Women's wages are substantially lower than those of their male counterparts.[277] It is therefore extremely difficult for a single mother to bring up a child. Child care is near impossible for those who have migrated from the rural areas.

While those opposed to abortion often point to the alternatives supposedly available to women who have an unplanned pregnancy, in reality these 'alternatives' expand or shrink in relation to race. Adoption and foster care are often suggested as viable alternatives. For example, it was noted in 1975 during

---

Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa (Part 2)' (1988) 4 *SAJHR* 334.

[274] Burman (n271) 104.

[275] See National Council of Negro Women Amicus Brief (1989) *Woman's Rights Law Reporter* 297, 303.

[276] Cock, Emdon and Klugman (n206) 45-48.

[277] Burman (n271) 104.

the abortion debate in Parliament that:

> ... we have satisfied ourselves that the unwanted child does have a place in our community and that he is accepted as such by implication. I shall tell hon. members why. We have orphanages and other institutions which adopt such children. They are not rejected but given the best.[278]

But is this true, when there are homes in South Africa for only 2 000 black children in need of care?[279] This is in contrast to the 10 000 places available for white children, a much smaller section of the population.[280]

H. LEGAL DEVELOPMENTS AROUND ABORTION FROM 1975

In spite of many calls over the years for a review of the legislation,[281] the apartheid government was consistent in its attitude that it would not investigate the views and attitudes of the general public and that no amendments would be enacted to change the basic tenet of the law.

In 1981 Minister of Health LAPA Munnik said:

> We do not intend to liberalise abortion in this country as long as we are in power.[282]

Even the draft bill (1981) that permitted an abortion in cases where there had been a failed sterilisation was withdrawn[283] after objections from the churches.[284]

---

[278] H J Coetzee Hansard House of Assembly Debates col 613 (12 February 1975).

[279] *Daily News* (18 September 1991).

[280] *Daily News* (18 September 1991).

[281] See H Suzman *In No Uncertain Terms* (1993) 260-61.

[282] ARAG Newsletter (21 May 1982).

[283] Van Oosten and Ferreira (n159) 421.

[284] Arag Newsletter (21 May 1982).

The appointment of an inquiry into the working of the Act has been requested repeatedly but unsuccessfully both in and outside of Parliament. The Minister of Health, who chaired the earlier commission in 1974, stated in 1983, and has repeated subsequently, that such a commission would serve no purpose, as the Act was working well. He noted that the SA Society of Obstetricians and Gynaecologists was satisfied with the Act at the time it was passed. But, in fact, of the obstetricians and gynaecologists surveyed by Dommisse in 1980,[285] 82 per cent favoured changes to the Act while 32 per cent favoured abortion on request. These figures were replicated in a second survey in 1990: 85 per cent of obstetricians and gynaecologists believed that the present Act ought to be changed and 40 per cent supported abortion on request.[286]

In 1990, the Department of Health asked for submissions with regard to the feelings of the public about the Abortion and Sterilisation Act. The invitation for submissions was never advertised but on 20 March 1990 the department issued a press release inviting members of the public to send in comments and motivations. This request for submissions was particularly strange as the Minister, Rina Venter, had stated repeatedly that there was no intention to change the Act. However, the Minister justified the invitation of comments on the basis that this was 'an attempt to test the broader opinion of the community'.

According to the Minister, there were a total of 48 486

---

[285] G Dommisse 'The South African Gynaecologists' Attitude to the Present Abortion Law' (1980) *SAMJ* 1044.

[286] G Dommisse 'Current Attitudes of Members of SASOG to the Present Law on Abortion' (1990) *SAMJ* 702.

responses to the invitation.[287] In a political culture where the state took little notice of the views of the community, 48 000 submissions was all but unimaginable.[288] The Minister's response to this observation was to note that, in fact, there had been only 2 187 responses, consisting of 1 876 letters and memoranda and 311 petitions. She said that the figure of 48 846 had been arrived at by counting each name appearing on the lists attached to the petitions.[289]

The Minister claimed further that less than one per cent of the submissions had been in favour of change to the law,[290] thereby implying that fewer than 500 people were against the provisions of the Act. But groups known to have made submissions and who supported changes to the Act had memberships far greater than 500. The South African Society of Obstetricians and Gynaecologists had 350 members, Arag had 400, the Civil Rights League had 400 - which is over 1 000 already. Beyond these bodies, other groups and individuals made submissions supporting amendment of the law.

But no changes were made to the Act, despite many criticisms

---

[287] *Argus* (30 May 1991).

[288] See my comments reported in P Green 'Abortion' *Cosmopolitan* (January 1991) 80.

[289] Green (n288).

[290] *The Star* (30 May 1991).

and the justification for this by the Minister was:

> I pointed out that well-motivated submissions which can improve the present Act, without changing its basic principles, will be considered. A very good response from people from all walks of life and population groups was received. It was clear that no submission made any contribution to improve the Act.[291]

But one has to doubt that not one of the nearly 50 000 people who made 'submissions' made any suggestion that was worth implementing. It is not surprising, therefore, that the following comment appeared in a women's magazine:

> Nobody ever got anything by being polite in South African politics. We need a female equivalent of MK before Rina Venter alters legislation.[292]

The only case dealing directly with the Act and its implementation since the *Collop* case, was the 1993 case of *G v Superintendent, Groote Schuur Hospital, and others*.[293] In this case, the applicant attempted to interdict her 14-year-old daughter from having an abortion after having been raped. The main questions for the court[294] were whether the provisions of the Act had been met and whether consent for the abortion had been properly obtained in terms of the Child Care Act, which provides for alternatives where the guardian of the child will not, or cannot, consent. The financial involvement[295] in the case of Pro-Life, an organisation concerned with the protection of the foetus, marked the beginning of a trend which is likely

---

[291] Written reply from Minister Rina Venter to Pippa Green of *Cosmopolitan* on file with author.

[292] C Scott *Cosmopolitan* (August 1993) 16,17.

[293] 1993 (2) SA 255 (C).

[294] Per Seligson AJ.

[295] At 258J.

to continue as the abortion issue is fought within the constitutional arena.

G v Superintendent, Groote Schuur Hospital, and others specifically involved the interpretation of two Acts of Parliament: the Abortion and Sterilisation Act and the Child Care Act. Because parliamentary supremacy still existed, all the court was able to do was to determine whether the procedures called for by the Acts had been followed.

Some of the points raised by counsel for the applicant in the case and discounted by the court were the following:

1) that the Act applies to a woman and not a female under the age of 18;
2) that the certificates issued by the doctors were invalid because of discrepancies;
3) that the magistrate's certificate was invalid as the magistrate had issued it without having all the information about the case before him;
4) that no valid consent for the abortion had been obtained as the provisions of the Child Care Act had not been complied with.

The court disagreed with the objections raised by the plaintiff and permitted the abortion, finding that the provisions of the Abortion and Sterilisation Act and the Child Care Act had been complied with.

I. CONCLUSION

Abortion regulation in South Africa has been underpinned by racism and patriarchy which have been the major reasons for abortion laws. While the role of religion has been important, it should not be overstated in the light of the fact that the law has not given legal status to the foetus. The law has only permitted certain rights to accrue to the foetus and then only if it is subsequently born alive. The foetus does not have legal personality[296] until birth. This will be a crucial factor when the issue of whether a foetus is a person or not comes before the Constitutional Court.[297]

The motivation for enactment of the existing South African abortion law was not protection of the foetus or assistance to women but rather the interests of the male medico-legal fraternity. White male doctors, white male lawyers, white male judges, white male members of the clergy and white male politicians have ensured that white male interests have taken precedence over those of women, for whom the abortion issue has much more relevance. White men controlled the process of adopting a new law and white men determined the content of the law. Their attitudes towards women were dismissive and sexist in the extreme.

The 1975 law was not, in the main, intended to impact on the black population. The attitudes of this major segment of the population and, indeed, the attitudes of women, were ignored. Where alternative attitudes were known, they were dismissed. This

---

[296] The same is true of Roman Law. See Chapter 2.

[297] See Chapter 5.

disregard of the views of the wider public's continued right into the 1990s.

Throughout the operation of the Abortion and Sterilisation Act, public opinion has been either ignored or inaccurately reported by the state. At the same time little was done to assess the damage caused by the Act, which forced women to resort to the backstreets, to the detriment of their health and lives. The procedures required before an abortion may lawfully be performed are exceptionally stringent. The complexity of these procedures, coupled with the lack of privacy they impose and a concomitant disregard of a woman's need for secrecy, confidentiality and immediacy, perpetuates a continued dependency on backstreet abortion.

The statistics testify to the ineffectiveness of the Act, revealing that between 100 000 and 500 000 South African women undergo illegal abortions annually. The statistics also reflect the near impossibility of obtaining a legal abortion, both in terms of the grounds on which an abortion can legally be obtained and the extremely arduous procedures that must be followed. Another aspect of these figures is what they show about the demographic distribution of those having abortions: the women who undergo illegal abortions in South Africa are mostly very young, poor, black women while the majority of women who obtain legal abortions are white women from more privileged socio-economic backgrounds.

The problem of backstreet abortion is among the reasons advanced for liberalising the South African abortion law. On the medical or scientific front there are other persuasive arguments

for permitting abortion on request until the twentieth week of pregnancy. They are premised mainly on the theories of brain birth and viability which are explored in chapter 5. The possible introduction of such an abortion regime and its compatibility with the Constitution will be evaluated in Chapters 4 and 5 as well as in the Conclusion to this thesis.

In the final analysis, it is the Constitution and its Bill of Rights that will decide the future of abortion in South Africa. Regardless of whether there is an abortion provision in the final constitution, abortion legislation will be reviewed by Parliament in the future. Whether it is amended or not, the legislation will become the target of constitutional litigation.

CHAPTER FOUR

PROVISIONS IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND NATIONAL CONSTITUTIONS AND THEIR EFFECT ON ABORTION LAWS AROUND THE WORLD.

A. **INTRODUCTION**

The laws concerning abortion differ from country to country. Often the type of law that exists is a reflection of the type of legal system existing within that particular polity. Where parliament is sovereign, as was the case in South Africa before the coming into force of the transitional Constitution, there is no check on the limits of state power. In such systems the legislature can adopt any law and the courts have only a procedural reviewing function.

In countries where the constitution is justiciable[1] and the courts take their role of judicial review seriously, the ability of the courts to play a role of providing checks and balances in the governing process is a major factor in the abortion context.

South Africa now has a constitutional order, with a written, rigid Constitution including an entrenched justiciable Bill of Rights. This came into force on 27 April 1994 with the coming into effect of the transitional Constitution[2] and its chapter on fundamental rights.[3]

---

[1] Justiciable constitutions are found in countries such as Belgium, Canada, Chile, Germany, India, Ireland, Italy, Philippines, Spain, Panama and the United States. See the Law Commission *Working Paper 25 Project 58: Group and Human Rights* (1989) 107-108.

[2] Constitution of the Republic of South Africa Act 200 of 1993.

[3] Chapter 3 of the Constitution.

A central feature of the new constitutional dispensation is the empowerment of the courts, and in particular the Constitutional Court, to test all laws and executive acts against the benchmark of human rights standards established in the Bill of Rights.[4] Thus, the courts are permitted to decide whether the existing abortion law, or any future abortion law, exceeds constitutional limits or is inconsistent with the rights and freedoms enshrined in the Bill of Rights.

Proponents or opponents of abortion will inevitably attempt to use one or other of the clauses of the Bill of Rights as either a sword or shield. This likelihood is reflected in a world-wide trend over the past ten years to resort to the courts to advance or retard abortion reform.[5] Moreover, because a country's constitution and bill of rights are able to play such a critical role in determining women's access to abortion, various states have adopted constitutional provisions which impact on this question.[6] This chapter examines the methodology employed in this regard in other countries with justiciable constitutions, to determine what can be learnt from the various constitutional provisions or courts with constitutional powers that have interpreted such provisions.

---

[4] The transitional Constitution states in section 4(1):
> This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.

[5] R J Cook and B M Dickens 'International Developments in Abortion Laws: 1977 - 1988' (1988) 78(10) *American Journal of Public Health* 1305, 1309.

[6] Cook and Dickens (n5) 1305.

However, cataloguing abortion adjudication issues into strict categories is difficult. While the words used in different constitutions may be similar, the way in which these words are interpreted differs from country to country, depending on the approach of the relevant court. In addition, while one court will measure a law's constitutionality in terms of one constitutional provision, another court might examine a similar law in terms of a diffferent constitutional provision.

International law, particularly international human rights instruments, will substantially affect the process of constitutional adjudication in South Africa. International experience indicates that national courts often look to international human rights instruments to assist in interpreting their domestic human rights documents.[7] This process has been useful in assisting judges to define the meaning of various clauses with counterparts in international law, to assess what is reasonable[8] and to determine reasonable limitations on the various rights.

As the democratic state of South Africa rejoins the community of nations, international covenants and other documents previously scorned can be expected to be ratified and adopted. This body of law will take on greater significance as South African policy makers and jurists compare the experiences of other countries. Apart from the general comparative value of international law, the important role that this body of law will

---

[7] J Claydon and J Lyon 'The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms' (1987) 2(34) *Connecticut Journal of International Law* 349, 350.

[8] Claydon and Lyon (n7) 354.

play is evidenced by the fact that during the drafting of the transitional Constitution, international human rights documents and the experiences of other countries were examined and utilised.[9]

Additionally, and of greater relevance, the Constitution has direct provisions which will impact on the reception and role domestically of international law. Section 35(1) states:

> In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

Thus, public international law is directly implicated in the South African legal system. The role that it will play is governed by the wording of the section which states that a court 'shall, where applicable' have regard to these standards. The phrase both imposes an obligation and confers a discretion on the courts to refer to and utilise these legal principles when performing their interpretive task.[10] Since all sections in Chapter 3 of the transitional Constitution have internationally comparable provisions, public international law will assume a broad significance.[11]

---

[9] H Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491 (fn154).

[10] See J Dugard 'The Role of International Law in Interpreting the Bill of Rights' (1994) 10(2) *SAJHR* 208, 212.

[11] Dugard (n10) 212.

The role of international law is expanded further by section 231(4) which provides:

> The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.

Thus, if a particular human rights standard has become accepted as a rule of customary international law, it must be implemented by a South African court in a decision, unless this rule is incompatible with the Constitution or an Act of Parliament. The proviso sets an importantant limit, permitting parliamentary supremacy in this area. As then Chief Justice Rumpff stated in *Nduli and Another v Minister of Justice and Others*,[12]

> [c]ustomary international law must give way to South African legislation if that legislation is clear.[13]

International treaties will also play a role in domestic South African law since the Constitution provides that the president can negotiate and sign international agreements.[14] However, as a check on presidential power, both houses of Parliament must ratify or accede to these agreements by expressly providing for their incorporation into the legal system.[15] Furthermore, the signed agreement may not be inconsistent with the Constitution. Thus the few human rights agreements to which South Africa is party[16] will play a direct role in the law only

---

[12] 1978 (1) SA 893 (A).

[13] At 898.

[14] Section 82(1)(i).

[15] Section 231(2).

[16] Before 1993 South Africa was party only to the United Nations Charter. It was only at the beginning of 1994 that a number of conventions were signed. These are: the Convention on

once Parliament expresses its willingness that these laws be received into the legal structure.

The expanded role of international law will have a marked impact on the South African legal system. However, the particular context of South Africa's Bill of Rights will remain crucial and imitative approaches that fail to account for South Africa's unique situation will be problematic.[17] Nonetheless, international law and comparative lessons on constitutional adjudication and interpretation will play a key role in the local arena.

Constitutional decisions in other countries suggest that the language of a bill of rights is only one among a number of factors guiding its interpretation. Words in a bill of rights are often vague[18] and the interpretation of expressions such as 'life', 'liberty', 'equality', 'security' and 'equal protection' by individual judges is greatly affected by the judge's economic, political and social values.[19] While the most important factor determining interpretation is the composition of the adjudicating court, factors such as public opinion also play their part. In Canada, for example, the court has not focused on the words of

---

the Political Rights of Women (1953), the Convention on the Nationality of Married Women (1957), the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962), the Convention on the Elimination of all Forms of Discrimination Against Women (1979), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989).

[17] See J D van der Vyver 'Comparative Law in Constitutional Litigation' (1994) 111 *SALJ* 19.

[18] P W Hogg *Constitutional Law of Canada* (1985) 797.

[19] Hogg (n18) 798.

the Charter and seldom on the legislative intent of the framers, but has rather adopted a 'balancing approach', which will be dealt with in the next chapter.

In spite of such reservations about the meaningfulness of the specific phraseology of a constitution and bill of rights,

> language in constitutional law is an important factor in judicial interpretation.[20]

For this reason both constitutional language and the manner in which various clauses have been interpreted in other domestic constitutions and international instruments will be examined. The manner in which other courts have interpreted various rights will have an effect on the local adjudicative process. The manner in which courts have interpreted the right to life, the right to equality, the right to dignity, the right to freedom and security of the person, and so on, are important as a guide to South African courts. At the same time, when predicting the outcome of an abortion decision one cannot ignore the South African policy factors which will play their part. Thus, the context within which the abortion decision is adjudicated, the politics of the country, as well as such factors as judicial appointment procedures, must be examined.

This chapter is divided into four sections. The first introduced the chapter. The second will focus on procedural issues, while the third will deal with substantive issues. Under substantive issues, various rights that might impact on abortion will be examined. The fourth section will deal with the effect of the composition of the adjudicating court on decisions. It is

---

[20] J Brigham *Constitutional Language* (1978) 58.

argued that more important than the wording of constitutions and bills of rights, is who decides which rights are prioritised, how competing rights are balanced, and the way in which these questions are resolved.

B. **PROCEDURAL ISSUES**

A tendency to avoid confronting the abortion issue, because of the emotion and polarisation that it engenders, is common among legislators, but courts in various parts of the world have also tried to evade considering cases concerning abortion by focusing on their procedural aspects. Issues such as mootness, ripeness and standing to sue have been used to circumvent the substantive issues involved.

This was the early strategy of the European Commission on Human Rights in cases brought before it by residents of Norway[21] and Austria[22] seeking to attack the abortion laws of their respective countries. In both cases, the commission was able to avoid the substantive merits of the issues by dismissing the action on the basis that the plaintiffs lacked standing.[23]

---

[21] *X v Norway* (1960).

[22] *X v Austria* (1976).

[23] A comparable situation occurred in the United States where the courts in certain situations have endeavored to evade making a determination. Often this merely results in a delay and eventually the court has to decide the issue on its merits anyway. An example of this are cases which dealt with the constitutionality of laws prohibiting information about, and usage of, contraception.

In the cases before *Griswold v Connecticut*, an important precedent for the *Roe* decision, the Supreme Court declined to hear substantive argument on the constitutionality of the laws in Connecticut which outlawed doctors advising about, or married couples using, contraception. See *Tileson v Ullman* 38 U S 44 (1943) and *Poe v Ullman* 367 U S 497 (1961). The court held that

The dominant trend, however, is for courts to address the substantive issues. For example, while standing was an issue in the Canadian case of *Minister of Justice of Canada v Borowski*,[24] the Supreme Court declined to dismiss the case on procedural grounds. The court[25] granted standing to a 'concerned citizen' in an application for a declaratory order that would strike down a provision of the Criminal Code because it conflicted with the Canadian Bill of Rights. The court exercised its discretion to grant standing, believing it to be in the public interest since doctors and women seeking abortions would want to challenge the provisions of the law. Justice Maitland, for the majority, wrote

> ... a person need only show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the court.[26]

In dissent, however, Chief Justice Laskin held that the applicant did not have a 'judicially cognizable interest' in the matter.[27]

---

as there was no indication that anyone would be prosecuted by the State of Connecticut for violating this law, it was not necessary for them to hear the matter as it was merely hypothetical and thus not ripe. The possibility of judicial evasion is raised in the dissent of Judge Harlan in the *Poe* decision when he noted, at 533, that the court:

> indulged in a bit of sleight of hand to be rid of this case.

[24] Because the applicant was male and not a medical doctor and thus unable to be affected by the provisions of the law [1981] 2 S.C.R 575.

[25] By a majority of 7 to 2.

[26] [1981] 2 S.C.R. 575, 598.

[27] At 587. This was similar to the finding in the South African *Rall* decision at 826-7 dealt with in chapter 3 in the text accompanying n35. On appeal in *Borowski* it was determined that the applicant did not have standing as in the interim the *Morgentaler* decison [see n159 later] had been handed down. This decision invalidated the law *Borowski* challenged and rendered the

In another Canadian decision, *Tremblay v Daigle*,[28] where the plaintiff sought to prevent his girlfriend from having an abortion, it was determined that because the woman had already undergone an abortion the issue was rendered moot. The court nonetheless heard the issue as it held that it would usually exercise its discretion to permit cases of a constitutional nature to be heard, and would do so in this case to ensure that other women would not be faced with similar injunctive threats.[29]

A similar finding on the issue of mootness was made by the United States Supreme Court in *Roe v Wade*.[30] In this case, where it was argued that the abortion laws of Texas were unconstitutional, the state submitted that the court ought not to hear the case since the woman in question was no longer pregnant. To this Justice Blackmun, for the majority, responded that

> when, as here, pregnancy is a significant fact in the litigation, the normal 226-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for conclusion of nonmootness. It truly could

---

issue a moot point. See *Borowski v Canada* [1989] 1 S.C.R. 342.

[28] [1989] 2 S.C.R 530 decided on the basis of the Quebec Charter of Human Rights and Freedoms and the Civil Code, as the Canadian Charter does not permit an action between two individuals.

[29] See Hogg (n18) 1277.

[30] 410 U.S. 113 (1973).

be 'capable of repetition', yet evading review.[31]

Interestingly, some courts have been able to avoid substantive decisions in certain cases by means of a narrow focus on a supposed vagueness in the language of the law.

In *People v Belous*,[32] for example, the California Supreme Court struck down the abortion law of California on the grounds that the language employed was so unclear as to be indistinct. The court ruled that

> Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words 'necessary' or 'preserve'. There is, of course, no standard definition of 'necessary to preserve', and taking the words separately, no clear meaning emerges ... Various possible meanings of 'necessary to preserve life' have been suggested. However, none of the proposed definitions will sustain the statute.

An opposite view was taken in Wisconsin in *Babbitz v McCann*,[33] where it was held that in the *Belous* case

> the California court found that the words 'necessary to preserve her life' in that state's abortion statute were unconstitutionally vague. While the Wisconsin statute uses slightly different language ('necessary to save'), we doubt that the distinction between the words used in the two statutes is significant. However, we do not share the view of the majority in Belous that such language is so vague that one must guess at its meaning.

In *US v Vuitch*[34] it was found that a statute of the District of Columbia permitting abortion only when 'necessary for the preservation of the mother's life or health' was constitutional

---

[31] At 125.

[32] 71 Cal. 2d 954, 458 P. 2d 194 (1969) cert denied 397 U.S. 915 (1970).

[33] 310 F. Supp. 293 (ED Wisconsin 1970).

[34] 402 U.S. 62 (1971).

and not vague.[35] In dissent, however, Justice Douglas found that the world 'health' was vague, asking:

> May [a doctor] perform abortions on unmarried women who want to avoid the 'stigma' of having an illegitimate child? Is bearing a 'stigma' a 'health' factor? Only in isolated cases? Or is it such whenever the woman is unmarried?
>
> Is any unwanted pregnancy a 'health' factor because it is a source of anxiety?
>
> Is an abortion 'necessary' in the statutory sense if the doctor thought that an additional child in a family would unduly tax the mother's physical well-being by reason of the additional work which would be forced upon her?
>
> Would a doctor be violating the law if he [sic] performed an abortion because the added expense of another child in the family budget would drain its resources, leaving an anxious mother with an insufficient budget to buy nutritious food?
>
> Is the fate of an unwanted child or the plight of the family into which it is born relevant to the factor of the mother's health?[36]

C. SUBSTANTIVE ISSUES

In this section the various human rights that have been seen by various courts to impact on the abortion issue will be investigated. These are the rights to life, privacy, dignity, security of the person, freedom or liberty, equality, equal protection, and conscience and religious freedom.

1. The right to life

The most important clause in human rights instruments must be the right to life as without it no other right is meaningful. However, this right is accorded no special status in human rights documents and in fact many texts provide for limitations to

---

[35] At 72.

[36] 402 U.S. (1971) 62, 76.

it.[37]

The first allusion to this right is found in the English Magna Carta of 1215, although the right to life is not explicitly declared in this document. The first time that a formulation definitively protected the right to life was in the United States Declaration of Virginia of 1776, which proclaimed the rights to 'life, liberty and the pursuit of happiness'.[38]

Within the abortion context the right to life is often seen as the centre-piece of the debate. This is particularly so for those seeking protection for the foetus. Notwithstanding all the attention focused on the right to life in relation to abortion, it must be remembered that this right is also relevant to other issues such as the death penalty and euthanasia. However, it is undisputed that in the context of constitutional disputes on abortion, the provision that is most scrutinised is that entrenching the 'right to life'. More often than not, however, the courts have avoided the central questions which this right poses: When does life begin? At what point should life be protected? On what basis does one decide that there is life? What is life?

---

[37] P Siegardt *The International Law of Human Rights* (1983) 130 .

[38] See J Colon-Collazo 'The Drafting History of Treaty Provisions on the Right to Life' in B G Ramcharan (ed) *The Right to Life in International Law* (1985) 33.

The right to life will be examined in this section under the following headings:

a) specific prenatal protection in international treaties;

b) general protection of life in international treaties;

c) specific prenatal protection in national constitutions;

d) general protection of life in national constitutions;

e) conclusions to be drawn from right to life decisions in various jurisdictions.

a) *Specific prenatal protection in international treaties*

The controversy surrounding the meaning of the right to life permeates all international human rights law. While all international human rights instruments have a general clause providing for the protection of life, only one document directly and explicitly mentions prenatal life.[39] The American Convention on Human Rights, which was adopted in 1969 and came into effect in 1978,[40] provides that

> Every person has the right to have his [sic] life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his [sic] life.

---

[39] See the preamble to the Convention on the Rights of the Child which refers to protection before birth, although this has not generally been viewed as a device protecting foetal life. For a fuller discussion on the convention see the text in this chapter accompanying n53-n56.

[40] More than twenty of the thirty-three countries who are members of the Organisation of American States (OAS) have ratified the convention. One country that has not done so is the United States. See J Dugard *International Law: A South African Perspective* (1994) 223.

This section was evaluated by an organ of the convention,[41] the Inter-American Commission on Human Rights, after a doctor was prosecuted and found guilty of performing a late abortion in the United States.[42] A petition was thereafter filed with the Inter-American Commission alleging that the right to life enshrined in the convention had been transgressed.

The major argument advanced by the United States was that it was not a party to the American Convention, alternatively that the right to life clause in the convention did not exclude abortion.[43]

According to the court,[44] the legislative history of the declaration did not indicate a desire to protect life before

---

[41] The commission has much earlier origins. It was established in 1959 as a part of the Organisation of American States, of which it is still an organ.

[42] (IACHR) Resolution No 23/81; case 2141 (United States of America) March 6, 1981:- *Baby Boy* case (reported in (1981) 2 *Human Rights Law Journal* 110). The case was appealed to this body after the conviction was overturned on appeal in the United States on the basis that insufficient proof existed that the foetus had been viable or had survived outside the womb.

[43] At 111. See I Brownlie (ed) *Basic Documents on Human Rights* (1971) 399. The petitioners argued that one must read the convention with the American Declaration of Rights and Duties of Man which in Article 1 reads

> Every human being has the right to life, liberty and the security of his [sic] person.

It was contended, at 116, that while life before birth is not explicitly mentioned, the intention to protect such life is provided for in the *travaux preparatoire* of the IX International Conference of American States at Bogota in 1948 where a draft of the declaration was discussed and voted on.

[44] At 117-8.

birth.[45] The court therefore held that

> ...the defendant [the United States] is correct in challenging the petitioners' assumption that article 1 of the Declaration has incorporated the notion that the right of life exists from the moment of conception. Indeed, the conference faced this question but chose not to adopt language which would clearly have stated that principle.[46]

The court held that the convention arose out of a meeting in 1959 when the Inter-American Council of Jurists was called upon to prepare a draft Convention on Human Rights.[47] The draft contained a right to life clause, ending with the following sentence:

> This right shall be protected by law from the moment of conception.[48]

---

[45] Tracing the history of the declaration, the court found that the draft read

> Every person has the right to life. This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane.

However, after consideration of all the comments and suggested changes to this draft, the working group excluded the right to life from conception. This exclusion reflected the incompatibility of abortion laws of many countries in the region with the earlier draft. At the time, Argentina, Brazil, Costa Rica, Cuba, Ecuador, Mexico, Nicaragua, Paraguay, Peru, Uruguay, the United States and Puerto Rico permitted abortion in certain circumstances.

[46] At 118. In dissent, Dr Marco Gerardo Monray Cabra argues that the history on which the majority relies is unclear. He states, at 122, that

> a review of the report and the minutes of the working group of the Sixth Committee shows that no conclusion was reached to permit the unequivocal inference that the intention of the drafters to the Declaration was to protect the right to life from the time of birth, much less to allow abortion, since this topic was not approached.

He also notes, at 122, that while the clause protecting life from conception was deleted, so was the protection for incurables, imbeciles and the insane, and he argues that no one would suggest that this group is not entitled to or would not obtain protection for their lives.

[47] In Santiago, Chile.

[48] At 118.

In 1965 this draft was evaluated. The controversial section of the life clause was its reference to the 'moment of conception' and after a majority vote the delegates agreed to add the words 'in general' so that the clause read:

> Every person has the right to have his [sic] life respected. This right shall be protected by law, in general, from the moment of conception.[49]

This formulation was adopted on the basis that many countries in that region permitted abortion and therefore the intention was not to prohibit abortion but to permit countries to prohibit it if they wished to.

While there was an attempt to delete the phrase 'in general, from the moment of conception', the majority reasoned that the clause should remain 'for reasons of principle'.[50] The court therefore held that

> [i]n the light of this history, it is clear that the petitioners' interpretation of the definition given by the American Convention on the right to life is incorrect.[51]

The court also held that as the US was not a party to the convention, no obligation rested on that country to follow the convention.[52]

Besides the American Convention, another international instrument alludes to the protection of life before birth. The Convention on the Rights of the Child of 1989, already signed by more than 100 countries, establishes universal standards for the protection of the civil, political, economic, social, cultural

---

[49] At 119.

[50] At 119.

[51] At 119.

[52] At 120.

and humanitarian rights of children. On 2 September 1990, the convention became international law binding on the countries that signed it. In a carefully worded compromise,[53] the convention defines a child as

> every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

Each country which is party to the convention is able to define for itself the point at which a human being begins 'living'. However, as a result of pressure exerted by certain delegations, the preamble to the convention was expanded to include the following passage:

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1959, the child, by reason of his [sic] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, ***before*** as well as after birth ... (my emphasis)

While this insertion could have a negative effect on access to abortion, the abortion issue per se was not discussed by the working group that drafted the document.[54] The deliberations emphasised the right of the child to prenatal maternal health care and to protection from foetal experimentation.[55] However, the declaration in the preamble could conceivably be interpreted to include a foetus in the definition of a child, although some writers believe that it supports the notion that the foetus is

---

[53] C P Cohen 'United Nations Convention on the Rights of the Child' (1990) 44 *The Review* 36, 39.

[54] Cohen (n53) 39.

[55] Cohen (n53) 39.

not protected by international law.[56] This view is based on the fact that the convention defines a child as 'every human being below the age of 18 years' and the preamble's references to a 'human person' and 'everyone', terms which have been defined by the courts to exclude prenatal life.[57] The argument is strengthened by the fact that the convention does not expressly provide for protection of prenatal life.

Nevertheless, in November 1988 the Belgian Court of Appeals, in convicting some doctors for performing abortions, relied on the United Nations Declaration on the Rights of the Child which, similarly to the 1989 convention, calls in its preamble for protection of the child before and after birth.[58] This decision of the Belgian court has been seen by some writers to be

> ... contrary to that of domestic and international human rights tribunals which have limited the term 'everyone', 'human being', 'person' and 'child' to children born alive.[59]

The abortion laws of Belgium were made more permissive in 1990 when the section of the Penal Code[60] that had banned all abortions was repealed. The revised law authorises a woman in the first trimester to request her physician to perform an abortion if she, in her own judgement, is 'in a state of distress as a

---

[56] B Hernandez 'To Bear or Not to Bear: Reproductive Freedom as an International Human Right' (1991) 17 (2) *Brooklyn Journal of International Law* 309, 334.

[57] Hernandez (n56) 334.

[58] B M Knoppers, I Brault and E Sloss 'Abortion Law in Francophone Countries' (1990) 38 *American Journal of Comparative Law* 889, 896.

[59] Knoppers, Brault and Sloss (n58) 921.

[60] Section 353.

result of her situation'.[61]

In conclusion therefore, although there are instruments which supposedly protect prenatal life, courts evaluating these documents have tended not to grant protection to the foetus. The Belgian decision was an exception to the international trend.

b) *General protection of life in international treaties*

Most human rights treaties explicitly provide for the right to life. In the preparatory stages of both the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966), there were attempts to introduce amendments to the right to life clause in order to protect prenatal life. These amendments were not accepted,[62] implying that the drafters of these clauses had no intention to protect prenatal life.

The Universal Declaration of Human Rights thus declares[63]

Everyone has the right to life ...

while the International Covenant on Civil and Political Rights, states[64]

Every human being has the inherent right to life.

Similarly, the African Charter on Human and People's Rights[65]

---

[61] Sections 348 - 352.

[62] R J Cook 'International Protection of Women's Reproductive Rights' (1992) 24 *International Law and Politics* 645, 691.

[63] Article 3.

[64] Article 6.

[65] Adopted in 1981 and coming into effect in 1986. Over forty of the fifty-one members of the Organisation of African Unity are party to the charter. See Dugard (n40) 224.

provides that[66]

> Human beings are inviolable. Every human being shall be entitled to respect for his [sic] life and the integrity of his [sic] person.

The definitional dilemmas have been left to the various courts to determine, but only the tribunals established pursuant to the European Convention on Human Rights[67] have spent time evaluating these questions. Article 2(1) of this convention states that

> Everyone's right to life shall be protected by law.

In the *Bruggeman and Scheuten v Germany* decision (1977)[68] the European Commission explicitly avoided the question of whether foetal existence could be considered life in terms of Article 2.[69] However, in *Paton v United Kingdom* (1980)[70] the European Commission found that the term 'everyone' has postnatal

---

[66] Article 4.

[67] The convention, with over twenty signatories, was adopted in 1950 by the Council of Europe and came into effect in 1953.

[68] App No 6959/75, 3 European Human Rights Reports 244 (1977). This case came before the commission on appeal after the German Constitutional Court had struck down the 1974 abortion law permitting abortion on request during the first trimester and the Fifteenth Criminal Law Reform Act of 1976. The 1976 law permitted an abortion to occur during the first twenty-two weeks of gestation with a doctor's agreement or if the circumstances fell within certain specified areas of distress for the woman. The German decision will be dealt with later in this chapter in the text following n178.

[69] D Shelton 'International Law on the Protection of the Fetus' in S J Frankowski and G Cole (eds) *Abortion and Protection of the Human Fetus* (1987) 6.

[70] 19 D.R. 248. In this case the husband of a pregnant woman, attempting to frustrate his wife's attempts at having an abortion, appealed a finding of an English court, that a foetus has no rights till born, to the European Commission.

application in nearly every other article and therefore that the protection in Article 2 pertains only to those already born.

In the light of the contending approaches, the commission had to determine whether the right to life article should be construed as:

1) not including the foetus, or

2) acknowledging foetal rights but with qualifications, or

3) acknowledging absolute rights for the foetus.

Dismissing the third option, the commission found that as there was no express limitation on the right to life of the pregnant woman in the article, it would be contrary to the aims and objectives of the convention to find in favour of absolute rights for the foetus. In addition, at the time that the convention was acceded to by the various countries, all but one of them permitted abortion to save the life of the mother.

Nonetheless, as in many other abortion decisions, the commission evaded the primary issue and deemed it unnecessary to evaluate whether prenatal life was protected under the rubric of the right to life.[71] The commission found that as there was no violation of the right to life in either of the other two possibilities, it would not have to decide between them. However, the commission did hold that

> the protection of the life and health of the woman implicitly limited the right to life of the fetus.[72]

The courts of various countries have also considered the right to life clause of the European Convention. In France,

---

[71] 3 *European Human Rights Reporter* 408. See also Cook (n62) 692.

[72] Hernandez (n56) 333.

although a 1975 Constitutional Council decision held that the court did not have the authority to determine whether a law conformed to the convention,[73] in 1990 when the abortion law was reviewed it was found to be in conformity with the convention's right to life clause.[74]

A 1990 decision in Holland reviewing Dutch abortion law, which permits an abortion in similar circumstances to French law, also ruled that the law was not contrary to the European Convention.[75]

The Italian Constitutional Court deemed that country's abortion law[76] constitutional under several articles, including the right to life clause of the European Convention.[77]

The Austrian Constitutional Court (1974) also interpreted Article 2 of the European Convention, which has the status in Austria of a constitution,[78] as not protecting life before birth.[79] The court excluded the foetus from the term

---

[73] Decision of the French Constitutional Council of 15 January 1975 EuGRZ 1975.

[74] Judgment of 21 Dec 1990 Conseil d'Etat.

[75] *Juristenvereniging Pro Vita v De Staat den Nederlanden (Ministerie van Welzijn, Volksgezondheid en Cultuur* [1990] NJ 2986 (Hof, The Hague, Feb. 8, 1990). See also Cook (n62) 693.

[76] See later n200 for the content of the law.

[77] Judgment No 108/81 of 25 June 1981, Corte Costituzionale, 57 Raccolta ufficiate delle sentenze e ordinanze delle Corte Costituzionale [Racc. uff. corte cost.] 823 (1981). See also Cook (n62) 693.

[78] P W Smits *The Right to Life of the Unborn Child in International Documents, Decisions and Opinions* (1992) 89.

[79] Cook (n62) 692.

'everyone'.[80] In coming to its decision, the court looked at the laws of states that were party to the convention and found that they did not protect prenatal life. The court also held that the precursor to the convention, the Peace Treaty of St Germain, had employed language which ensured that the term 'everyone' referred to those already born.[81]

In the *Paton* decision (1980)[82] the European Court, agreeing with the Austrian Court, held that

> both the general usage of the term 'everyone' ... in the Convention ... and in the context in which this term is employed in Article 2 ... tend to support the view that it does not include the unborn.[83]

The general trend, therefore, when examining the right to life

---

[80] The court held:

> In the first sentence of Art. 2 para.1 of the Convention ('Everyone's right to life shall be protected by law') it is left open, whether the protection of life prescribed therein related both to the life of the human being already born and to germinal human life. However, a consideration of the text of Art. 2 as a whole in its context does not support the view that the provision also includes germinal life. Limitations of the protection of life (Art.2 para.1 first sentence) are made with respect to killing of human beings already born (Art.2 para.1 second sentence and para.2, Art.15 para.2). Should the first sentence of Art. 2 para.1 of the Convention also contain the protection of the germinal life, then this protection would be unconstitutional in this respect. It would, however, not be understandable when the Convention, establishing the right to life, would have allowed killing of human beings already born in exceptional cases, but would have excluded an interfering operation into the still germinal life even if there are special indications.

Translated in Smits (n78) 95.

[81] Hernandez (n56) 333 fn102.

[82] See text earlier following n70.

[83] At 250.

provisions of the various international instruments, is to interpret them so as not to protect prenatal life.

c) *General prenatal protection in national constitutions*

While at least 80 countries in the world have constitutions that contain a broad provision protecting the right to life, only a few constitutions explicitly refer to prenatal life. Examples are Chile,[84] Ecuador,[85] Guatemala,[86] Honduras,[87] Ireland,[88] Peru[89]

---

[84] Article 19 states:
The Constitution guarantees to all persons:
1.The right to life and to the physical and psychological integrity of the individual.
The law protects the life of those about to be born.

[85] Article 25 states:
The child will be protected from conception and the support of the minor is guaranteed, so that his [sic] growth and development be adequate for his [sic] moral, mental and physical integrity, as well as for his [sic] home life.

[86] Chapter 1 Article 3 states:
The State guarantees and protects human life from the time of conception as well as the integrity and security of the individual.

[87] Article 65 states:
The right to life is inviolable .
Article 66 states:
The death penalty is abolished.
Article 67 states:
The unborn shall be considered as born for all rights accorded within the limits established by law.

[88] Article 40.3.3 states:
The state acknowledges the right to life of the unborn child, 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.

[89] Article 2 states:
Every person has the right
1. To life, to a proper name, physical integrity, and the unrestricted development of one's personality. The one who is about to be born is

and the Philippines.[90]

However, while there is supposed protection for prenatal life in these countries, in practice this does not always occur as either the legislature does not enact or enforce such a law or, alternatively, the courts do not uphold these rights in any strict way. In addition, in many of these states there are other explicit provisions in their constitutions which impact on the rights of the foetus. Many of these provisions provide protection to pregnant women from a number of different vantage points. Because foetal protection clauses do not override the protections accorded to women, conflict arises. Besides protecting women's rights directly in clauses which assert a right to health, some of these constitutions create internal conflict by protecting such rights as privacy, dignity and freedom. Other rights directly emphasise the rights of women or create family planning duties while at the same time protecting foetal rights.

Thus, for example, while the 1977 Paraguayan Constitution protects life from conception,[91] it protects the family[92] and health[93] at the same time.

---

considered as delivered with respect to all his [sic] rights.

[90] Section 12 states:
The State recognises the sanctity of family life and shall protect and strengthen the family as a basic institution. It shall equally protect the life of the mother and the life of the unborn from conception.

[91] Article 85.

[92] Article 81-88.

[93] Article 93.

In Chile a 1989 law[94] outlawed all abortions in accordance with the constitutional protection bestowed on the foetus. But the Chilean Constitution also provides for the right to health, thereby creating conflict between competing rights. A court interpreting these provisions might find that this conflict existed only in an advanced pregnancy, as early in gestation the foetus is not 'about to be born'.[95] In practice, however, the constitution and the abortion law play a marginal role as an enormous number of abortions are performed in Chile each year.[96]

Family planning rights and duties, which have been interpreted to include an element of choice, are contained in the constitutions of a number of countries. An example is the 1974 Yugoslavian Constitution,[97] the effect of which was the emergence of legalised abortion in several regions.[98] The Chinese Constitution of 1982[99] includes a duty to practise family planning, while the Vietnamese Constitution of 1980[100]

---

[94] Law No. 18,826 of 1989.

[95] See n84 for the wording of the Chilean Constitution. See further Cook and Dickens (n5) 1309.

[96] United Nations Department of Economic and Social Development *Abortion Policies: A Global Review vol 1* (1992) 83.

[97] Article 191 states:
> It is a human right freely to decide on family planning. The right may only be restricted for reasons of health.

[98] Cook and Dickens (n5) 1309.

[99] Article 49.

[100] Article 40 states:
> The state, society, and citizens shall be dutybound to provide health care and protection to mothers and children and to carry out population and family planning programs.

imposes a duty on the state to campaign for family planning. Similarly, an interpretion of the Mexican Constitution[101] would permit legalised abortion.

In the Constitution of Ecuador a conflict exists between various articles, one which protects prenatal life,[102] another[103] which guarantees equality and yet another[104] which promotes family planning. These conflicting provisions could be read together to permit abortion. The same ambivalence is evident in the Constitution of the Philippines where foetal life, women's rights to life and health,[105] and sexual equality[106] are guaranteed.[107] All these inconsistencies provide ammunition for constitutional challenges to law and administrative action.

Explicit prenatal protection is contained in the national

---

[101] Chapter 1 Article 43 states:
Every person has the right to decide in a free and responsible and informed manner on the number and spacing of their children.

[102] See n85 for the wording.

[103] Article 22 states:
The State protects the family as the fundamental core of society by guaranteeing it the moral, cultural and economic conditions that favor the attainment of its ends. The State also protects marriage, maternity and family property. Marriage is based on the free consent of the contracting parties and on the equality of rights, obligations and legal capacity of the spouses.

[104] Article 24 states:
Responsible paternity is advocated and the education suitable for the betterment of the family. It guarantees as well the right of the parents to have the number of children they can support and educate.

[105] Article XIII section II.

[106] Article II section 14.

[107] See Cook and Dickens (n5) 1311 fn45.

constitutions of countries such as Ireland and Argentina. However, even where explicit protection for prenatal life is provided for constitutionally, in practice the significance of the protection afforded depends to a large degree on the willingness of the court performing the adjudication to permit abortion.[108]

In Ireland, before the 1983 constitutional amendment, all abortions, except where a woman's life was in danger, were prohibited.[109] The right to life clause of the Irish Constitution,[110] before it was amended, read:

> (1) The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
> (2) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

Whether this clause and in particular the word 'citizen' incorporated prenatal life was unclear,[111] but Quinlan[112]

---

[108] This question will be further examined in the conclusion to this chapter where, within the realist tradition, such questions as who the judges are and what their backgrounds are will come under the spotlight to determine their effect on the outcome of decisions, particularly in the moral domain.

[109] V Randall 'The Politics of Abortion in Ireland' in J Lovenduski and J Outshoorn (eds) *The New Politics of Abortion* (1986) 67, 67-68.

[110] Article 40.3.

[111] The Constitution, in article 9.1.2., provided that the word 'citizen' must be 'determined in accordance with law'. The relevant statute, the Irish Nationality and Citizenship Act of 1956, stated that

> (1) Every person born in Ireland is an Irish citizen from birth.
> (2) Every person is an Irish citizen if his father or mother was an Irish citizen at the time of that person's birth or becomes an Irish citizen under subsection (1) or would be an Irish citizen under that subsection if alive at the passage of this Act.

maintains that a court would have to be extremely progressive to extend this clause to provide protection to the foetus.[113]

However, the Irish courts, even before the 1983 constitutional amendment, have appeared to be amenable to granting protection to the foetus.[114] Thus in 1980 in *G. v An Bord Uchtala* the court stated:

> [a child] has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth ... The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life ...[115]

The right to life of the foetus was also referred to in the 1983 decision of *Norris v Attorney-General*.[116] This case, four months before the constitutional amendment was adopted, examined the constitutionality of legislation prohibiting homosexuality. In this case Judge McCarthy, dissenting, noted:

> For myself, I am content to say that the provisions of the Preamble which I have quoted earlier in this judgment would appear to lean heavily against any view other than that the right to life of the unborn is a sacred trust to which all organs of government must lend their support.[117]

Thus birth was a prerequisite to the acquisition of citizenship. Prenatal life would accordingly fall outside the provisions of Article 40.3. See J A Quinlan 'The Right to Life of the Unborn: An Assessment of the Eighth Amendment to the Irish Constitution' (1984) *Brigham Young University Law Review* 371, 377.

[112] In spite of the Irish Supreme Court's decision in *State (Nicolaou) v An Bord Uchtala* to leave open the question whether a non-citizen could obtain the protection of this article.

[113] Quinlan (n111) 378.

[114] See *Ryan v Attorney General* 1965 Irish Reports 294.

[115] 1980 Irish Reports 32 cited in Quinlan (n111) 381.

[116] Irish Supreme Court 22 April 1983 cited in Quinlan (n111) 394.

[117] See Quinlan (n111) 394.

The move to constitutional reform occured in response to the fear that abortion would become more freely available either by legislative action or through the courts. The cataylst for constitutional revision was the 1974 Irish decision of *McGee v Attorney-General*[118] which struck down as unconstitutional a law[119] prohibiting the importation and distribution of contraceptives. As the court had relied considerably on the United States Supreme Court decisions in *Griswold v Connecticut*[120] and *Eisenstadt v Baird,*[121] and because the *Roe v Wade* decision had recently been handed down in the US, it was feared that the Irish judiciary might tackle, and liberalise, the abortion laws,[122] and that the decision of *Roe v Wade* could be implemented in Ireland.[123] This was in spite of the comment by Judge Walsh in *McGee* that the decision should not be read, or used, to infringe the rights of the foetus.[124]

Those in favour of a constitutional amendment argued that no constitution or convention had been able to protect the foetus without particular reference to prenatal life.[125] The Irish

---

[118] [1974] I R 284, 109 ILTR 29.

[119] Section 17 of the Criminal Law (Amendment) Act, 1935.

[120] 381 U.S. 479 (1965).

[121] 405 U. S. 438 (1972).

[122] Quinlan (n111) 379.

[123] P Charleton 'Judicial Discretion in Abortion: The Irish Perspective' 6 *International Journal of Law and the Family* (1992) 349, 351.

[124] [1974] I R 284, 312.

[125] Charleton (n123) 351.

voters on 7 September 1983 duly agreed[126] by a two-thirds majority to amend their constitution so as to safeguard prenatal life.[127]

The effect of this amendment is unclear,[128] however, as the wording of the amendment[129] is believed by some to be so

> vague and uncertain in its scope and operation that a change in judicial attitude might render it entirely futile.[130]

The crux of the criticism of the amendment is that the term 'unborn child' is not defined. Consequently, there is a lack of certainty whether the protection accorded by the amendment begins at conception, implantation, the first trimester, viability or even at some later point in gestation. This problem was identified during debate on the amendment and there were attempts, although unsuccessful, to replace 'unborn' with 'unborn human being' and to replace 'with due regard to the equal right of the mother' with 'subject to the right of the mother to life

---

[126] A referendum to establish such constitutional protection in Switzerland was defeated in 1985 by an almost two-thirds majority. See E Ketting and P Van Praag 'The Marginal Relevance of Legislation Relating To Induced Abortion' in J Lovenduski and J Outshoorn (n109) 155.

[127] B Girvin 'Social Change and Moral Politics: the Irish Constitutional Referendum 1983' (1986) 34 *Political Studies* 61, 61.

[128] See Randall (n109) 83; Quinlan (n111) 402.

[129] Article 40.3.3 states:

> The state acknowledges the right to life of the unborn child, 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.

[130] Charleton (n123) 375.

and bodily integrity'.[131] Also unsuccessful were attempts to add 'without interference with any existing right or lawful opportunity of any citizen' after 'practicable', and to annex the clause 'which shall not include the fertilised ovum prior to the time at which such fertilised ovum becomes implanted in the wall of the uterus' after 'unborn'.[132]

A consequence of the amendment was that many women went to England for abortions. In *Attorney-General (SPUC) v Open Door Counselling Ltd*[133] the activities of two companies that referred women overseas for abortions were investigated.[134] When the European Commission of Human Rights considered the merits of the decision in *Open Door Counselling Ltd v Ireland*,[135] it concluded that the primary effect of the amendment was to impose on the state an obligation to legislate protection for the foetus. The commission held, however, that an individual could not foresee that the provision of information on legal abortion clinics abroad would be unlawful. A critical question investigated by the commission was the impact of the European Convention's freedom of expression clause on the Irish ban on dissemination of information about abortion.

The European Commission held by a majority of eight to five

---

[131] Quinlan (n111) 389.

[132] Quinlan (n111) 389.

[133] [1988] Ir. R. 593.

[134] While it was argued that no legislation was enacted after the constitutional amendment, the court held that inactivity by the legislature did not render constitutional rights inoperative. The court therefore granted an injunction prohibiting the defendants from assisting women to procure an abortion overseas.

[135] Application No's 14234/88 and 12435/88 (7 March 1991).

that the Irish government ban had not been clearly 'prescribed by law'. Three members of the majority also found that this ban, prohibiting Irish women from learning about abortion, was not 'necessary in a democratic society'.

In 1992 in *Attorney-General v X*[136] the Irish High Court ruled that a woman who had been raped and who wanted to go abroad to have an abortion should be prevented from doing so on the grounds that it would amount to a violation of the constitution. On appeal the Irish Supreme Court set aside this decision, holding that the lower court had not given sufficient weight to the mental anguish threatening the woman's life.

A consequence of all this activity was yet another referendum in 1992 on whether information on abortion should be allowed to be distributed and whether travel to obtain an abortion should be permitted. The result of this referendum was that 65,4 per cent of the Irish population who voted supported the construction of a right to life clause that protected the foetus.[137] However, the voters disapproved of restrictions on information about abortion and also rejected prohibitions on travel abroad to procure an abortion.[138]

Thus, although the Irish Constitution explicitly protects the foetus, abortions are permitted in certain circumstances and women are able to obtain information about abortion and travel to procure an abortion. Indeed, in a number of countries where

---

[136] Appeal transcripts dated 5 March 1992.

[137] B Girvin 'Moral Politics and the Irish Abortion Referendums 1992' (April 1994) 47(2) *Parliamentary Affairs: A Journal of Comparative Politics* 203, 219.

[138] Girvin (n137) 203.

foetal life is strictly protected by the constitution, abortion is widely available, although illegal.

In Argentina, for example, it is believed that one in two pregnancies terminate in abortion[139] despite the very conservative abortion law. The Criminal Code of 1921 as amended in 1984 permits abortion in circumstances where the woman's life or health is endangered, where the pregnancy results from rape or where the woman is mentally retarded or insane.[140]

This law was reviewed in a decision of the National Criminal Court of 1989.[141] The court struck down the rape provision,[142] stating that its enactment has been influenced by the laws of other countries and that it was a provision unsuited to conditions in Argentina. The court also struck down the provision relating to mental disability, finding that there was no evidence that women who suffered from mental illness or disability would give birth to children with similar problems. The court held that these provisions were out of step with other laws in Argentina which did not tolerate abortion.[143] Thus, abortion in Argentina is permitted by law only where the woman's life or health is endangered.

In summary, then, prenatal life is mentioned in relatively

---

[139] United Nations Department of Economic and Social Development (n96) 28.

[140] United Nations Department of Economic and Social Development (n96) 28.

[141] Reported in United Nations Population Fund *Annual Review of Population Law vol 16* (1989) 25.

[142] Article 86(2).

[143] United Nations Department of Economic and Social Development (n96) 25.

few national constitutions and the extent of this protection is often unclear. The effect of the constitutional provision in reality depends on the interpretation accorded by the courts and the way in which other clauses of the constitution are read in conjuction with it. The approach adopted by judges embarking on constitutional interpretation is thus vital. This will be explored in depth later in this chapter.

d) *General protection of life in national constitutions*

The constitutional courts of Austria, Canada, France, Germany, West Germany, Italy, Spain and the United States have all heard constitutional challenges to their abortion laws since the 1970s. Yet not one court has ruled abortion absolutely unconstitutional and all have been sympathetic to abortion laws to some extent. At the same time, however, all have provided at least some protection to the foetus. The point at which protection is granted to the foetus is implicitly dependent on the understanding of the different courts of when life begins. This is so even when the particular court does not directly determine when life begins.

This section examines the abortion decisions of various countries from the perspective of the right to life. Other issues that have impacted on the outcome of these abortion cases will be examined later under the relevant headings.

i. Austria

Since 1974 when the Penal Code was amended, abortions have been permitted in Austria in the first three months of pregnancy if performed by a physician after consultation.[144] After the first trimester, an abortion is permitted if the continued pregnancy is threatening the physical or mental health of the mother, if the child would be born with a serious defect or if the woman fell pregnant before she was 14 years old.[145]

In 1974 the Constitutional Court of Austria was requested by the *Land* of Salzburg to review access to abortion during the first trimester. It was contended that this was incompatible with the European Convention which, as noted above, has the force of a constitution.[146] The applicant also argued that although there was no specific right to life provision in Austrian law, fundamental rights recognised by the law incorporated this right.[147] The court, however, upheld the laws, declaring that the protection granted by the European Convention did not extend to the foetus.

However, while Austrian women have access to safe and legal abortion services in theory, in practice the cost of having an abortion and limited availability restrict access to this service.[148]

---

[144] Section 144 of the Austrian Penal Code.

[145] United Nations Department of Economic and Social Development (n96) 33.

[146] Smits (n78) 89.

[147] Smits (n78) 89.

[148] United Nations Department of Economic and Social Development (96) 33.

ii. Canada

The South African transitional Constitution is the product of a unique negotiation process. However, the Canadian Charter of Rights[149] played an important role during the drafting stages of the transitional Constitution and the experience of Canadian constitutional adjudication will therefore be valuable to the South African courts.[150]

In Canada before 1969 an abortion could be performed when

> in good faith, [it] was considered necessary to preserve a woman's life.[151]

In 1969 the law was revised so as to permit an abortion if the pregnancy 'would be likely to endanger the woman's life or health'.[152] The law directed, however, that the abortion be authorised by a hospital committee of not fewer than three doctors and be performed in an authorised hospital.

In 1982 the Canadian Bill of Rights of 1960, which had not had the status of supreme law,[153] was superseded by a justiciable bill of rights,[154] the Charter of Rights and Freedoms. Sections 2, 7, 8, 9, 10, 12 and 17 of the charter begin

---

[149] The German constitutional experience also provided important lessons to South African negotiators.

[150] Corder (n9) fn154.

[151] Section 251 of the Criminal Code of 1961.

[152] Section 237.

[153] S G Mezey 'Civil Law and Common Law Traditions: Judicial Review and Legislative Supremacy in West Germany and Canada' (1983) 32 *International and Comparative Law Quarterly* 689, 700.

[154] Part 1 of the Constitution Act, Schedule B of the Canada Act 1982 (UK).

with the phrase 'Everyone has the right ...'. In other sections 'any person', 'members of the public' and 'anyone' are used. Of critical significance to the abortion issue is section 7 of the charter which states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Whether a foetus has a right to life has been examined a number of times by the Canadian courts. In 1983 in *Borowski v Attorney-General of Canada and Minister of Finance*[155] the constitutionality of the Canadian abortion law was challenged on the basis that the term 'everyone' in section 7 included the foetus. The court dismissed the claim but held that developments in medical science demanded that some status should be accorded to the foetus. The court pointed out, however, that

> it is the prerogative of parliament, and not the courts, to enact whatever legislation may be considered appropriate to extend to the unborn any or all legal rights possessed by living persons.

In 1987 in *Borowski v Attorney-General of Canada*[156] the court held that a foetus did not fall within the term 'everyone' in section 7 or 'individual' in section 15. On appeal to the Supreme Court in 1989 in *Borowski v Canada*[157] the only question examined was whether the issues were moot in the light of the decision discussed below.[158]

---

[155] (1983) 4 D.L.R. (4) 112.

[156] (1987) 39 D.L.R. (4th) 731 (Sask. C.A.).

[157] [1989] 1 S.R.C. 342.

[158] See the text earlier in this chapter on procedural issues.

In 1988 in *Morgentaler, Smoling and Scott v The Queen*,[159] a decision which considered liberty and security of the person, the court attempted to evade[160] the contentious issue of when life begins.[161] Judge Wilson, for example, stated:

> I have not dealt with the entirely separate question whether a foetus is covered by the word 'everyone' in S7 so as to have an independent right to life under that section. The Crown did not argue it and it is not necessary to decide it in order to dispose of the issues in this appeal.[162]

In 1989 in *Tremblay v Daigle*[163] the Supreme Court held that the term 'human being' as used in the Quebec Charter of Rights and Freedoms and the Quebec Civil Code did not include a foetus.

In 1991 in *R v Sullivan*[164] the Canadian Supreme Court determined that a foetus was not incorporated in the term 'person' in the Criminal Code for the offence of criminal negligence resulting in death.[165]

The history of constitutional adjudication in Canada

---

[159] (1988) 44 D.L.R. (4th) 385. This decision will be further examined in the section discussing security of the person. See text following n271.

[160] See the discussion on attempts by courts to avoid the resolution of the substantive issues in the section on procedural questions earlier in this chapter. However, a statement on when life begins is implicit in the decisions of the courts. This can be ascertained from the safeguards they provide to the foetus and the point at which the court believes the foetus ought to enjoy such protection.

[161] See K M McCourt and D J Love 'Abortion and Section 7 of the Charter: Proposing a Constitutionally Valid Foetal Protection Law' (1989) *Manitoba Law Journal* 365.

[162] At 564.

[163] [1989] 2 S.C.R. 530.

[164] [1991] 1 S.C.R. 489.

[165] Hogg (n18) 831 fn13.

therefore indicates that the foetus has not been incorporated in terms such as 'human being', 'everyone', 'individual' and 'person'.

iii. France

French law prohibited the advertising, inciting, or performing of an abortion until 1975. In 1975 a new Act[166] provided that if a woman was 'in a situation of distress', an abortion could be lawfully performed until the tenth week of pregnancy by a doctor in an approved hospital. After this period an abortion could be carried out if the continued pregnacy would be harmful to the woman's health or if the foetus was severely and incurably diseased.[167] This has been interpreted to mean that a woman over 18 years of age who has medical approval and has observed a waiting period of not less than eleven days, can obtain an abortion.[168]

When the Conseil Constitutionnel evaluated this liberal law,[169] the court found that it conformed with the liberty requirement of Article 2 of the French Declaration of the Rights

---

[166] The French Act No. 75-17 of 17 January 1975.

[167] A Dorozynski 'Abortion Debate' (30 September 1989) 299 *British Medical Journal* 814, 815.

[168] Dorozynski (n167) 815.

[169] D.S. Jur. 529; [1975] A.J.D.A. 134. See generally Glenn 'The Constitutional Validity of Abortion Legislation: A Comparative Note' (1975) 21 *McGill Law Journal* 673; M Allison 'The Right to Choose: Abortion in France' (April 1994) 47(2) *Parliamentary Affairs: A Journal of Comparative Politics* 222.

of Man and Citizen[170] and was not

> in violation of the principle of respect for every human being from the very commencement of life ...[171]

The court accordingly determined that the law was constitutional.[172]

iv. West Germany and the united Germany

The German Penal Code adopted in 1871 did not permit abortion in any circumstances. It was only as a result of a 1927 decision[173] that abortion was permitted where pregnancy endangered the life or health of the woman. In 1962 sanctions for unauthorised abortion were dramatically reduced and abortion was permitted in circumstances where 'undue and serious injury to body or health'

---

[170] Mezey (n153) 693.

[171] M Cappelleti and W Cohen *Comparative Constitutional Law* (1979) 578.

[172] While the liberty argument was an important factor in the decision, the court held the following as far as the issue of life was concerned:

> Considering that the Act submitted to the Constitutional Council only allows an encroachment upon the principle of respect for every human being from the beginning of life mentioned in Article 1 in a case of distress and in agreement with the conditions and limitations as provided;
>
> Considering that not a single exception provided for in the Act is incompatible with fundamental principles recognised by the Acts of the Republic nor disregards the principle enunciated in the preamble of the Constitution of 27 October 1946 ... the Act on intentional interruption of pregnancy does not contradict texts which the Constitution of 4 October 1958 refers to in its preamble or any other articles of the Constitution.

Translated in Smits (n78) 103. The court never, however, made a determination as to when life begins.

[173] Judgment of 11 March 1927, 61 RGSt (Entsch eid ungen des Reichgerichts in Strafsachen) 242 cited in D P Kommers 'Abortion and Constitution: United States and West Germany' (1977) 25 *American Journal of Comparative Law* 261.

would otherwise result.[174] The abortion laws were again amended in 1974.[175] This legislation authorised an abortion during the first 12 weeks of pregnancy[176] and for medical or eugenic reasons from then until the 22nd week.[177]

The law aroused an enormous amount of controversy and consequently half the German states and 193 parliamentarians approached the Constitutional Court for a ruling[178] on its constitutionality.[179] Although an interim injuction was requested of the court, it issued a prompt declaratory order accommodating abortion only on ethical, eugenic or medical grounds.[180]

Eight months later the court, in a majority decision, struck down section 218(a) of the Reform Act and held that until parliament enacted a constitutionally approved law, abortion could be performed for medical or eugenic reasons, if pregnancy was the result of rape, or to 'relieve hardships' during the

---

[174] Kommers (n173) 260.

[175] By the Abortion Reform Act of 1974.

[176] Section 218(a).

[177] Section 218(b).

[178] This was permitted by Article 93 of the Basic Law which sets out the powers of judicial review of the Constitutional Court. Where the compatibility of a proposed or enacted law with the Basic Law is questioned, the federal government, a state government or one-third of the members of the Bundestag can call on the Constitutional Court to address the matter. This procedure is called abstract review (*abstrakte Normenkontrolle*) as there are no parties to the matter.

[179] Kommers (n173) 264.

[180] Judgment of 21 June 21 1974.

first 12 weeks of pregnancy.[181]

The court evaluated the abortion law in the light of Article 1 and 2 of the German Basic Law.[182] Avoiding the heart of the debate, the beginning of life, the court held that:

> The process of development ... is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore, the protection ... of the Basic Law cannot be limited either to the 'completed' human being after birth or to the child about to be born which is capable of living ...[183] life in the sense of the historical existence of a human individual exists according to definite biological-physiological knowledge in any case from the fourteenth day after conception.[184]

Examining the term 'everyone', the court found that this meant 'everyone living'[185] but it nonetheless believed that prenatal

---

[181] BVerfGE 39, 1.

[182] Article 1 reads:

> (1) The dignity of man [sic] shall be inviolable. To respect and protect it shall be the duty of the state.

Article 2 reads:

> (1) Everyone shall have the right to the free development of his [sic] personality in so far as he does not violate the rights of others or offend against constitutional order or the moral code.
> (2) Everyone shall have the right to life and to the inviolability of his person.

[183] At 37. See Gorby G and Jonas W 'West German Abortion Decision: A Contrast to Roe v Wade' (1976) *Journal of Mar J Practice and Procedure* 638.

[184] Translation from the German by Kommers (n173) 267.

[185] Gorby and Jonas (n183) 638; H Gerstein and D Lowry 'Abortion, Abstract Norms, and Social Control: the Decision of the West German Federal Constitutional Court' (1976) 25 *Emory Law Journal* 849, 863.

life, just as life after birth, should be respected.[186] According to the court, it was not important to distinguish the foetus as a person or bearer of subjective rights before legal protection could be granted to it.[187]

The court opined that it did not have to determine whether the term 'person' embraced prenatal life, as both parties accepted that the right to life included life before birth.[188] However, the judges did point out that the law did not adequately balance the conflicting interests, refering to Article 2 which states that:

> Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.[189]

The court went on to say that this right to free development was qualified and therefore

> [a] balance which guarantees protection of unborn life and secures the right of a pregnant woman to procure an abortion is not possible since the termination of pregnancy always means the destruction of human life.[190]

The court did not advocate absolute protection for the foetus but condoned a balancing of interests where there were risks to the mother. The court concluded that abortion on request was

---

[186] Kommers (n173) 268.

[187] R Stith 'New Constitutional and Penal Theory in Spanish Abortion Law' (1987) 35(3) *American Journal of Comparative Law* 513, 526.

[188] J George 'Political Effects of Court Decisions on Abortion: A Comparison Between the United States and the German Federal Republic' (1989) 3 *International Journal of Law and the Family* 106, 123.

[189] Translated by Kommers (n173) 268.

[190] Kommers (n173) 268.

unconstitutional even during the first trimester.[191]

In 1976 the legislature reacted by outlawing all abortions but making allowances for an abortion

> to protect the woman from the danger of a predicament which
> (a) is so serious that it would be unreasonable to demand that the pregnant woman continue with the pregnancy and
> (b) cannot be averted in any other way which can reasonably be expected of the woman.[192]

However, a range of conditions, including pre-abortion counselling and a discussion of available alternatives had to be complied with before an abortion was permitted.[193] Despite heated debate in West Germany about this law it remained in operation until unification with East Germany in 1990.[194]

East Germany's abortion law from 1972 had permitted a woman to abort in the first trimester. The different approaches of East and West Germany were recognised in the Treaty of Unification which called for the enactment of a law protecting prenatal life. The legislature of the united Germany thereafter passed the Act for Assistance to Pregnant Women and Families which permitted a woman to choose, after counselling, to abort during the first trimester.

As in the first West German abortion case in 1974, abstract review was requested from the Constitutional Court on the basis that the Act did not respect the prenatal protection accorded by

---

[191] Stith (n187) 527.

[192] Section 218a(2)3 translated by D Van Zyl Smit 'Reconciling the Irreconcilable? Recent Developments in the German Law on Abortion' (1994) *Medical Law Review* 302 fn24.

[193] Van Zyl Smit (n192) 306.

[194] Van Zyl Smit (n192) 307.

the constitution. In a preliminary decision, the court suspended the legislation until it could examine its constitutionality.[195]

In a majority decision,[196] the court subsequently found the law unconstitutional because it did not provide protection to the foetus from conception. The court held that, as the state had a duty to protect prenatal life, pregnant women were constitutionally obliged, in principle, to give birth.[197] The court nevertheless maintained that abortion could be legal in certain limited circumstances. It reasoned that an abortion could be obtained where it could not reasonably be expected of a woman to endure the pregnancy on medical, crimonological or embryopathic grounds.[198]

v. Italy

The abortion law in Italy until 1978 was contained in the Penal Code.[199] This law held that

> [w]hoever causes a woman to miscarry, with her consent, shall be punished by imprisonment from two to five years. The same punishment shall apply to the woman who has consented to the abortion.[200]

At the same time articles of the Italian Constitution contained

---

[195] Van Zyl Smit (n192) 310.

[196] Of 28 May 1993-BVerfGe 39, 1.

[197] G Czarnowski 'Abortion as Political Conflict in the United Germany' (April 1994) 47(2) *Parliamentary Affairs: A Journal of Comparative Politics* 252.

[198] Czarnowski (n197) 266.

[199] Article 546.

[200] Cited in Smits (78) 105.

provisions relevant to abortion.[201]

When the Italian Constitutional Court evaluated the abortion law it found that

> the constitutionally protected interest in relation to the foetus can collide with other interests, which are also constitutionally protected and that, consequently, the law cannot grant to the former a total and absolute priority, denying the latter an adequate protection ...[202]

The court accordingly struck down the Italian abortion law as it permitted an abortion to occur only where there was a threat to the life of a pregnant woman.[203]

A new law[204] less inimical to women's health was enacted in May 1978. Enacted after a referendum on the issue in the same year, this law permits a woman to obtain an abortion during the

---

[201] Article 2 states:

> The Republic recognises and guarantees the inviolable rights of man ...

Article 32(1) states:

> The Republic provides health safeguards as a basic right of the individual and in the interests of the community and grants medical assistance to the indigent free of charge.

Article 31(2) states:

> It (the Republic) safeguards maternity, infancy and youth, promoting and encouraging institutions necessary for such purposes.

[202] Translated in Smits (n78) 106.

[203] Judgment of 18 Feb 1975, Corte Costituzionale, no 27, 98 Foro It. Giurisprudenia Costituzionale e Civile [Giur. Cost. e Civ.] 515 (Italy), translated in Cappeletti and Cohen (n171) 612-14.

[204] Law 194. See J Ardell 'Abortion, Politics and Gender in Italy' (April 1994) 47(2) *Parliamentary Affairs: A Journal of Comparative Politics* 238.

first ninety days of her pregnancy on the grounds of her

> state of health, economic, social, or family circumstances, the circumstances in which conception occurred, or the probability that the child would be born with abnormalities or malformations.[205]

However, the women is required to undergo counselling first and then to wait seven days. After the first trimester, abortions are permitted where there are health risks to either the foetus or the mother. If it is medically certified that the pregnancy is in its first trimester, an abortion may be obtained under the national health service.[206]

In a judgment of 14 April 1988,[207] the Italian Constitutional Court investigated whether Article 24(2) of the Italian Constitution, which states that a defence is an inalienable right in legal proceedings, could be invoked by a foetus. A question before the court was whether the abortion law was unconstitutional in that it failed to provide for the appointment of a legal representative for a foetus when a minor applied to court for permission to have an abortion. The court held that a representative was unnecessary as the object of such a hearing was to determine the minor's capacity to decide to abort and the foetus had no interest in this.[208]

Thus, the courts have ensured greater access to abortion by Italian women over the past few years.

---

[205] M A Glendon *Abortion and Divorce in Western Law: American Failures, European Challenges* (1987) 148.

[206] A Bono 'Italy' (30 September 1989) 299 *British Medical Journal* 30 September 814, 815.

[207] (IL Foro Italiano, No. 5. 7-8, 1988 pp 2109-20) cited in United Nations Population Fund (n141) 32.

[208] United Nations Population Fund (n141) 32.

vi. Spain

The Spanish Constitution of 1978 contains the provision that

> [a]ll have the right to life and to physical and moral integrity ...[209]

An earlier version of this clause had read

> All persons have the right to life ...

The earlier version was replaced as there was concern that the the word 'person' did not furnish protection to prenatal life: the term 'person' would apply to those who have personality, which the foetus did not.[210]

Before 1983 all abortions in Spain were prohibited except in circumstances of necessity.[211] In 1983 a new law was enacted[212] which permitted abortion if performed by a doctor with the woman's consent, where one of the following conditions were present:

> 1. That it is necessary in order to avoid a serious danger to the life or health of the pregnant woman.
> 2. That the pregnancy is the consequence of an act constituting the crime of rape under art. 429, provided that the abortion is performed within the first twelve weeks of gestation and the aforementioned act has been reported.
> 3. That it is probable that the foetus will be born with serious physical or mental defects, provided that the abortion is performed within the first twenty-two weeks of gestation and that the unfavourable prognosis is registered in an opinion issued by medical specialists other than the one operating on the pregnant woman.[213]

Three days after the bill had been approved by the Spanish Senate

---

[209] Article 15.

[210] Stith (n187) 521.

[211] Stith (n187) 515.

[212] Article 417 bis of the Penal Code.

[213] Translation of the bill by Stith (n187) 516.

a petition was filed with the Constitutional Court to review the constitutionality of the law.

The court held in a judgment handed down in 1985 that the bill violated article 15 of the constitution.[214] A tied vote permitted the president of the court to use his casting vote to strike down the law.[215] The court put it thus:

> Human life is a superior constitutional value ... and a Social State such as Spain has an affirmative duty to secure it by law. This life is a reality distinct from the mother from the beginning of gestation and therefore the 'one to be born' (*nasciturus*) must be considered a 'legal good' (*bien juridico*) accorded protection by the Constitution.[216]

Critical to the decision was the acceptance by the court of the fact that during the drafting stage of the constitution the words 'all persons' were replaced by 'all' to protect prenatal existence.[217]

While the court found that the foetus did not possess constitutional rights[218] and that 'full human individuality'

---

[214] Decision of 11 April 1985, STC 53/1985 (Pleno), see 119 Boletin Oficial del Estado 10. The decision bears much resemblance to the 1975 German decision and it is believed that the Spanish court was influenced by the German one. See Stith (187) 514.

[215] Stith (n187) 517.

[216] Stith (n187) 517-18.

[217] Stith (n187) 522; Smits (n78) 128.

[218] Stith (n187) 519.

came into being at birth,[219] it considered

> the foetus neither a person possessing rights, as US pro-life people argue, nor subject to a person possesing rights, as pro-choicers argue. Instead, unborn life is treated as a distinct constitutionally protected legal good.[220]

However, the court did find that an abortion was permissible and constitutional where the life or health of a woman was in jeopardy, or where a rape had occurred.

The opinion of the minority judges, however, was that the court had exceeded its authority by second-guessing the legislature in what was essentially a legislative task.[221]

vii. United States

The Fourteenth Amendment to the US Constitution states that

> [no state shall] deprive any person of life, liberty or property without due process of law.

One argument before the court in *Roe v Wade*, the centre-piece of US abortion law, was that this clause protects foetal life. In reply, Judge Blackmun observed that

> if this suggestion is established, the appellant's case, of course, collapses, for the foetus's right to life would then be protected by the constitution.[222]

However, addressing the question of when life begins, the judge continued:

> When those trained in the respected disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the

---

[219] Stith (n187) 526.

[220] Stith (n187) 514.

[221] As there was a split decision, six - six, the opinions of the dissenting judges are important.

[222] 410 U.S. 113, 157 (1973).

> development of man's [sic] knowledge, is not in a position to speculate as to the answer.[223]

The court held that the term 'person' excluded prenatal life,[224] preferring to regard the foetus as potential life. The court invoked the notion of viability in order to establish when the foetus deserved protection.[225] Implicit in this approach is a determination of when life begins.[226] The decision of *Roe v Wade*, accordingly, upholds

> the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the state ...[227]

The decision also upholds

> the state's power to restrict abortions after fetal viability, ... (and) the principle that the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the foetus that may become a child.[228]

But the methodology of the court reflects the underlying judicial

---

[223] At 163.

[224] At 133.

[225] See M J Beutler 'Abortion and the Viability Standard - Toward a More Reasoned Determination of the State's Countervailing Interest in Protecting Prenatal Life' (1991) 21 *Setan Hall Law Review* 347, 359.

[226] It is interesting to note that Judge Blackmun had been counsel for the Mayo Clinic and spent months researching foetal development before he wrote the decision in *Roe*. See B Woodward and S Armstrong *The Brethren: Inside the Supreme Court* (1979) 205; R H Blank 'Judicial Decision Making and Biological Fact: *Roe v Wade* and the Unresolved Question of Fetal Viability' *Western Political Quarterly* 584, 586. Rubin also submits that

> throughout the opinion the emphasis was on medical factors: even the viability distinction, which supplied the dividing line between permissible and impermissible abortions...

See E R Rubin *Abortion, Politics and the Courts: Roe v Wade and Its Aftermath* (1982) 69.

[227] *Planned Parenthood v Casey* 112 S. Ct. (1992) 2791, 2804.

[228] *Planned Parenthood v Casey* 112 S. Ct. (1992) 2791, 2804.

philosophy, and an understanding of the effect of the approach of the individual judges on the United States Supreme Court is fundamental to fully understanding the *Roe v Wade* decision, as well as the other decisions. This will be dealt with more fully later in this chapter in the section that deals with the impact of the composition of the courts on abortion decisions.

e) *Conclusions to be drawn from right to life decisions in various jurisdictions*

This review of the constitutional decisions of a range of courts reflects differing judicial approaches. The stringency of the courts in Spain and Germany stands in contrast to the liberalism of Austria and France, where the courts upheld liberalised laws, and of Italy, the United States and Canada, where the courts struck down conservative laws. However, even liberal courts differ in their approach. Thus, while the United States Supreme Court set up an alternative abortion system, the Canadian Supreme Court was content to leave a legal vacuum when it struck down the Canadian abortion law.

A trend that emerges from this review of abortion decisions is that the weight of international juridical opinion favours the view that the foetus is not included in such terms as 'human being' 'person', 'everyone' or 'child'. Even where explicit reference is made to the foetus in international human rights documents, international tribunals have not as a rule provided protection to the foetus. The *Baby Boy* case, as was noted in n42, demonstrates how different judges from different backgrounds can arrive at totally different decisions of the same case.

Another contemporary trend, despite variations from state to state, is greater recognition of the rights of women than has been the case in the past. Decisions that still place the pre-eminent emphasis on protecting the foetus tend, as a general rule, to be handed down in countries where religion and the authority of religious institutions are very strong.[229]

Finally, it is clear that focusing on the right to life as the predominant right raises obstacles to a fair and balanced resolution of the abortion issue. To emphasise the right to life of the foetus, especially if life is viewed as commencing at conception, is to ensure that other concerns and interests, notably those of women, are given lower priority or perhaps even ignored.

The emphasis placed on a right to life clause, and the manner in which it is read, says more about the judges, and the status of women and religion in the society that appoints them, than it does about the rights language of the constitution. This proposition will be elaborated on later in this chapter when the effect of the composition of a court on an abortion decision is examined.[230]

2. **Privacy**

The right to privacy, sometimes understood to be implied by sections in constitutions entrenching other rights, has been drawn into the international abortion debate probably as a result

[229] See further the text accompanying n318 and n319 on how the religious affiliation of the judges deciding these types of cases can influence the decision-making process.

[230] See text following n301.

of the influence of *Roe v Wade*. Although the right to privacy was introduced into the abortion discourse in the United States, it has become part of the abortion discussion in other parts of the world, though not to the same degree. In international forums the right to privacy has come to be regarded as encompassing the right to choose to have an abortion.[231].

A number of international instruments contain privacy provisions relevant to a discussion on abortion. The American Convention,[232] the European Convention,[233] the International Covenant on Civil and Political Rights,[234] and the Universal Declaration[235] incorporate such stipulations.[236]

In *Bruggemann and Scheuten v the Federal Republic of Germany*,[237] a case heard by the European Commission of Human Rights,[238] the applicants asserted that the abortion law of Germany infringed the right to respect for privacy contained in Article 8(1) of the European Convention.[239]

---

[231] A E Michel 'Abortion and International Law: The Status and Possible Extension of Women's Right to Privacy' (1981-2) 20 *Journal of Family Law* 241.

[232] Article 11.

[233] Article 8.

[234] Article 17.

[235] Article 12.

[236] Hernandez (n56) 329.

[237] Application no. 6959/75. [1976] 19 *Yearbook European Convention on Human Rights* 382.

[238] See the discussion earlier in the text accompanying n68 and n69.

[239] 16 European Commission on Human Rights 115.

Article 8 of the convention states:

> Everyone has the right to respect for his [sic] private and family life, his [sic] home and his [sic] correspondence ...

A majority of the commission held that pregnancy does not fall exclusivly within the domain of private life. However, the reasoning behind this opinion was based on the fallacious argument that many states party to the convention grant some rights to a conceived but not yet born foetus.[240] The commission invoked principles of succession as illustration but, as Cook has pointed out, these rights accrue only at live birth.[241] The same principles operate in South African law.[242]

A number of national constitutions also contain privacy clauses, for example, the constitutions of Vietnam[243] and Nicaragua.[244] How and to what extent these provisions impact on abortion is unclear, however.[245] Some commentators believe that, generally speaking, the right to privacy has no bearing on access to abortion. This is because privacy is sometimes defined as the

> freedom of the individual in terms of the information that can be acquired and communicated by, and to, others about him [sic].[246]

---

[240] Cook (n62) 707.

[241] Cook (n62) 707.

[242] See the text following n30 in chapter 3 for a discussion of the *nasciturus* fiction in South Africa.

[243] Article 71.

[244] Article 26.

[245] Cook and Dickens (n5) 1309.

[246] M McDougal, H Lasswell and L Chen *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980) 816.

As mentioned earlier, the importance of the right to privacy in the abortion context has its roots in the United States where it is the basis of the right to an abortion. The American Constitution and Bill of Rights makes no reference to privacy, however. The right to privacy was derived from the interpretation of various amendments to the constitution.

A series of cases culminating in *Roe v Wade* resulted in the formulation of the right to reproductive control on the basis of the right to privacy. In 1965 in *Griswold v Connecticut*[247] the court, finding that there was a fundamental constitutional right to privacy, relied on the Ninth Amendment to strike down prohibitions against contraceptives. The court asserted that a number of rights, though not expressly contained in the Constitution, emanated from other provisions. Douglas J wrote as follows:

> specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

Surrounding each right, in other words, is a zone that is indirectly protected so as to provide security to the explicit right.

The United States Supreme Court reinforced the role of privacy in the reproductive area in *Eisenstadt v Baird*,[248] the precursor to *Roe v Wade*. In this case Judge Brennan noted as

---

[247] 405 U.S. 438 (1972).

[248] 405 U.S. 438 (1972).

follows:

> If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[249]

The doctrine of privacy has its origins in the 1891 case of *Union Pacific Railroad Company v Botsford*[250] and thereafter in *Olmstead v United States*[251] where, in a dissenting opinion, Justice Brandeis found:

> The makers of our Constitution ... conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men [sic].[252]

Skinner v Oklahoma[253] was, however, the first case in which privacy was applied to issues of reproduction,[254] although Judge Cardozo in *Schloendorff v Society of New York Hospital* noted years earlier that

> each adult of sound mind has the right to determine what shall be done with his [sic] body.[255]

In *People v Belous*,[256] a decision which paved the way for *Roe v Wade*, the court, relying on the concept of privacy, held that a child and a foetus have different rights and cannot claim the

---

[249] At 453.

[250] 141 U.S. 250 (1891).

[251] 277 U.S. 438, 478 (1928).

[252] At 478.

[253] 316 U.S. 535 (1942).

[254] L H Tribe *The Clash of the Absolutes* (1990) 93.

[255] 211 N.Y. 125, 105 NE 92 (1914).

[256] 71 Cal. 2d at 963, 80 Cal. Rptr. 354, 458 cert denied 397 U.S. 915 (1969).

same protections.[257] The court stated that

> [t]he fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right to privacy' or 'liberty' in matters related to marriage, family, and sex ... That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right.[258]

In *Roe v Wade*[259] the court, following this trend, held that the Fourteenth Amendment right of personal privacy was

> broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[260]

The court regarded this right as fundamental but held that regulation of such rights is appropriate if it can be justified by a 'compelling state interest'.[261] In addition, the standard of 'strict scrutiny' should be applied.[262] The *Roe* court sought to balance the right of the mother to privacy and the state's interest in the health of the mother and the life of the foetus by introducing the trimester system.

Within the first trimester the decision to abort lies with the woman and her doctor. The court found that only after the first 12 weeks is there a need for the state to play a role in safeguarding maternal health. It is therefore possible for the

---

[257] At 967-8.

[258] 71 Cal. 2d at 963, 458 P. 2d at 199-200.

[259] 410 U.S. 113 (1973).

[260] At 153.

[261] At 155.

[262] This standard of review was rejected after a change in composition of the Supreme Court. In *Planned Parenthood of Southeastern Pennsylvania v Casey* 112 S. Ct. 2791 (1992), the court exhibited a more conservative attitude towards abortion and replaced the test with the lesser 'undue burden' test which places the onus on pregnant women to indicate harm to themselves.

state during the second trimester to control the technique used to perform an abortion if it is feasibly connected to maternal health. It is only in the third trimester that the state may prohibit abortion to protect the foetus, except where the abortion is necessary, in appropriate medical opinion, for the preservation of the life or health of the mother.

The *Roe v Wade* decision has had a marked influence on the abortion debate and adjudication world-wide. One example is the Canadian *Morgentaler* decision.[263] *Roe* also influenced the courts in Ireland where Judge McCarthy, dissenting in *Norris v Attorney-General*,[264] noted as follows:

> I cannot delimit the area in which the State may constitutionally intervene so as to restrict the right to privacy, nor can I overlook the present public debate concerning the criminal law, arising from the statute of 1861, as to abortion - the killing of an unborn child. It is not an issue that arises in the instant case, but it may be claimed that the right of privacy of a pregnant woman would extend to a right in her to terminate a pregnancy, an act which would involve depriving the unborn child of the most fundamental right of all - the right to life itself.[265]

3. **Dignity**

The notion of respect for human dignity in the abortion context has been raised in various abortion cases. It was raised explicitly in a Spanish case,[266] where the court held that if a woman had been raped she should not have to bear the child born as a result, as this would violate her personal dignity.

---

[263] 44 D.L.R. 4th 385 (1988).

[264] Irish Supreme Court 22 April 1983 cited in Quinlan (n111) 394.

[265] At 387.

[266] See Cook and Dickens (n5) 1309.

The same type of issue has been investigated by other courts although not necessarily under the rubric of dignity, which overlaps with other concepts such as liberty and equality. Such was the case, for example, in the decision of Wilson J of the Canadian *Morgentaler* case.[267] An invasion of the right to dignity was held to exist in the 1986 decision of *Thornburgh v American College of Obstetricians and Gynaecologists*,[268] where an insistence on record-keeping was struck down. Blackmun J was highly critical of efforts by the state to impose conditions which were time-consuming, expensive, and invasive.[269]

The other rights which overlap with dignity and the manner in which they impact on abortion will be evaluated later in this chapter.

4. **Security of the person**

The right to security of the person has been raised in various abortion decisions. In Canada, the Criminal Code permitted an abortion if, in the opinion of a therapeutic abortion committee of at least three doctors in a hospital, the continued pregnancy would be likely be a endanger the life or health of the woman.

In the 1976 decision of *Morgentaler v The Queen*,[270] the abortion law was challenged on the basis of section 1(a) of the

---

[267] At 555.

[268] 476 US 747 [1986].

[269] At 772.

[270] [1976] 1 S.C.R. 616.

Canadian Bill of Rights of 1960 which guaranteed:

> the right of the individual to life, liberty and security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law ...

But the 1960 Canadian bill was only a statute, lacking constitutional status and applying to the federal government only.[271] Moreover it was only with the passage of the Charter of Rights that the Canadian courts acquired the power to review laws.

In *Morgentaler* (1) in 1976, the applicant alleged that the object of the Criminal Code was to protect maternal health and, as modern medical abortion practices were safe, the limitation on abortion was not a proper application of the power to apply the criminal law. The unanimous decision of the court, however, was that parliament had the power to prohibit abortions and that the court could not strike down the law on the basis of the Canadian Bill of Rights.

In *Morgentaler* (2) in 1988, the Supreme Court re-examined the question and found by a majority that the Criminal Code violated the rights of a woman granted by section 7 of the charter which states that

> [e]veryone has the right to life, liberty and security of the person and the right not to be deprived therof except in accordance with the principles of fundamental justice.

Four out of five judges held that the laws limiting abortion, particularly the procedural ones, interfered with the security of the person. Some hospitals had not set up the requisite committees and, where they had, the procedures caused delays. The court found that the accreditation requirement meant that smaller

---

[271] Hogg (n18) 767.

hospitals were unable to gain this status, thus diminishing the ability of many women to procure this service. Requiring a woman to endure the procedures directed by the Act ensured delays which increased health risks and stress, thereby undermining the woman's right to security of the person.[272]

In a similar finding in the United States, although it was not made in terms of a security of the person provision, the court in *Doe v Bolton*[273] found that demanding hospital accreditation, approval from a hospital committee and the further approval of two independent doctors was contrary to the due process provisions of the Fourteenth Amendment.[274] This was reiterated in *Akron v Akron Center for Reproductive Health*[275] where the court noted that requiring hospitalisation

> imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure ... and therefore unreasonably infringed upon a woman's constitutional right to obtain an abortion.

5. **Freedom or liberty**

Liberty or freedom provisions, overlapping with dignity provisions, have also played a role in abortion decisions. This is evident in a number of cases. For example, in the Canadian

---

[272] Per Beetz J with Wilson J and Dickson CJ concurring.

[273] 410 U.S. 179 (1973).

[274] G P Crann '*Morgentaler* and American Theories of Judicial Review: the *Roe v Wade* Debate in Canadian Disguise' (1989) 47(2) *University of Toronto Faculty of Law Review* 499, 505 fn39.

[275] 462 U.S. 416 (1983).

Morgentaler decision, Justice Wilson stated that

> an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty ... [and] ... guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.[276]

While Wilson J held that state control of pregnancy termination was a violation of a woman's right to liberty, the decision could easily be contextualised within an argument upholding the right to privacy. This is alluded to in the following excerpt from her judgment:

> S7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives ... The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her something she has the right to decide for herself.[277]

While *Roe v Wade* was decided on the grounds of privacy, Justice Douglas, concurring in the decision, made reference to the wider right to liberty which, he maintained, could support numerous other rights.[278] In *Akron v Akron Center for Reproductive Health*[279] the court noted the close relationship between privacy and liberty when it stated that

> the right to privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy.

---

[276] At 554.

[277] At 490-1.

[278] At 211.

[279] 462 U.S. 416 (1983).

The liberty argument has also been utilised in other jurisdictions.[280] In France, for example, the Conseil, evaluating the French abortion law, held as follows:

> Considering ... that the Act on intentional interruption of pregnancy respects the liberty of the persons concerned to perform an interruption of pregnancy or to take part in it, when there is a situation of distress or a therapeutic reason; that therefore, the Act does not encroach upon the principle of liberty laid down in Article 2 of the Declaration of the Rights of Man [sic] and the Citizen.[281]

Section 11 of South Africa's transitional Constitution provides for the right to freedom and security of the person. In the Canadian Charter of Rights, by contrast, security of the person and the right to liberty are contained in separate provisions. In any event it is clear from decisions in Canada and other jurisdictions that the right to liberty is widely understood as including the right to free choice and the right of the individual to be left alone to make decisions without state intervention. This understanding must have an impact on the decision of the abortion issue in South Africa.

6. **Equality**

Although international law linking equality to resolution of the abortion issue is sparse, the literature connecting the two has been growing rapidly. The major point made by writers in this field is that unless women have the right to take decisions about their own bodies, they do not enjoy any substantive right to

---

[280] D P Kommers 'Liberty and Communication in Constitutional Law: The Abortion Cases in Comparative Perspective' (1985) *Brigham Young University Law Review* 371.

[281] Conseil Constitutional Decision of 15 January 1975 360 translated in Smits (n78) 103.

equality, whatever the formal constitutional provision may be.

The right to equality is contained in many international human rights instruments, including the American Convention,[282] the European Convention,[283] the International Covenant on Civil and Political Rights,[284] the International Covenant on Economic, Social and Cultural Rights,[285] the United Nations Charter[286] and the Universal Declaration.[287] However, the only document that explicitly deals with the term 'equality' in relation to women is the Convention on the Elimination of All Forms of Discrimination Against Women (1979), which in Article 1 prohibits any

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

The onus is placed on states party to the convention

> to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.[288]

---

[282] Article 1(1).

[283] Article 14.

[284] Article 2(1).

[285] Article 2(2).

[286] Preamble and Article 1(3).

[287] Article 2.

[288] Article 32.

The convention also calls on parties to guarantee to both sexes

> 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.[289]

While no court has stated it explicitly, writers such as Hernandez believe that this encompasses not only the right to have children but also the right not to have children.[290]

An example of a decision associating the right to abortion with the right to equality is the *Morgentaler* decision in Canada in which the only woman judge on the Supreme Court wrote that

> women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in 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.[291]

In the United States, while it has been argued by various commentators that the right to reproductive control is based on the Fourteenth Amendment right to equality, there has been little attempt to make use of this doctrine in the decisions of the courts.[292] Authors such as Professor Lawrence Tribe believe, however, that the right to equality must have been an underlying factor in the decision of *Roe v Wade*.[293] The relevance of equality principles to abortion decisions was made clear by Blackmun J in *Webster v Reproductive Health Services*.[294] Fearing

---

[289] Article 16.

[290] Hernandez (n56) 341.

[291] At 555.

[292] L H Tribe *American Constitutional Law* (1988) 1340.

[293] Tribe (n293) 1340.

[294] 57 U.S.L.W. 5023 (1989).

that *Roe* might be overturned by the Supreme Court as a result of conservative appointments to the Bench, he stated:

> I fear the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this court.[295]

It is therefore important to note that equality has become more noticeably an aspect of abortion decisions in other jurisdictions. While cases have not been explicitly argued or judgments reasoned on the basis of equality, this must be understood in the historical context of these countries, including the basis on which previous abortion decisions were founded.

7. **Equal protection**

The equal protection argument has been a part of the debate about the dissimilar application of laws to the different people of the same country for many years. In 1886 the United States Supreme Court in the decision of *Yick WO v Hopkins*[296] noted:

> Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authorities with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.[297]

In 1973 it was argued before the *Roe* court that the abortion laws discriminated between rich and poor, white and black, since their effect was to make abortions much more accessible to the wealthy

---

[295] At 5035.

[296] 118 U.S. 356 (1886).

[297] At 373-4.

than the poor.[298] Doctors and medical facilities were more accessible to affluent people, resulting in the 'creation of a double standard for private and indigent patients'.[299]

Equal protection has also been a consideration in other countries. In France, for example, following criticism that the French law unfairly favoured wealthy women in the obtaining of abortions, a 1982 decree provided for reimbursement for non-therapeutic abortion from the national health insurance.[300]

8. **Conscience and religious freedom**

Religion and religious institutions have played and continue to play a major role in the abortion debate. While the right to religious freedom is usually understood as the right to practise any faith, an integral part of the right is the prerogative not to practise or believe. This is critical, particularly, in countries where the population tends to be very religious and the separation between church and state tends, accordingly, to be very tenuous. In such states, morality is often legislated according to the dictates of religious institutions. In secular states, by contrast, where the right to practise, or not to practise, religion is constitutionalised, the role of religious institutions ceases to be dominant.

Despite the essentially religious character of the argument grounding abortion regulation, the right to religious freedom has

---

[298] S M Krason *Abortion: Politics, Morality and the Constitution* (1984) 205.

[299] Krason (n298) 205.

[300] Dorozynski (n167) 815.

had little impact on abortion availability, since the right to religious freedom has not been invoked in abortion decisions. The right to religious freedom has tended to be narrowly construed as preventing the state from establishing and assisting any religion and from coercing individuals to belong to a particular religion.

In terms of the right to freedom of conscience, the argument made is that abortion is a matter for the individual conscience and that the state should not unduly interfere. The argument was successful in Canada in the *Morgentaler* decision where Wilson J, applying the freedom of conscience clause of the charter, held that conscience was a key determinant in deciding whether to abort or not. Judge Wilson held that a law prohibiting abortion reflected the dominance of one viewpoint over another and was therefore unconstitutional.[301]

D. **COMPOSITION OF THE COURTS**

Constitutional abortion decisions always involve the interpretation of language in specific provisions such as those concerning the right to life, privacy, security of the person and equality. However, linguistic interpretation alone seldom determines the outcome of such decisions. In resolving linguistic ambiguities or conflicts, decision makers cannot avoid consideration of the various conflicting values that inform and contextualise the constitutional text. The weighing of constitutional values, as they compete for hierarchical status, is influenced by the values to which the adjudicating judges

[301] At 561.

subscribe. In this context, the composition of the court is an essential aspect of the reasoning process in abortion decisions.

This chapter evaluates decisions of other countries pertaining to abortion, often in terms of the language of the constitution. However, questions relating to the political realities in a particular state, including the nature of the membership of adjudicating courts, cannot be ignored. In the realist tradition, these are some of the most critical factors for an understanding of decisions that are handed down by a particular court.[302] Decisive aspects of this reality are the manner in which the court views the role of law in the state and the court's own role in this regard. For example, it has been said that in the United States

> American judges are less attentive to the letter of the law or to precedent. They move freely in wider orbits. Both bench and bar make greater use of statistical and other social studies, and the line between law and policy is often blurred.[303]

The key issue in regard to the role of the courts is the willingness of the judiciary to intervene, and the extent of such intervention, in terrain traditionally seen to be legislative. Some courts have been willing to intervene extensively, as occurred in the West German, German and United States abortion decisions. Some have gone so far as to set up an abortion regime, as occurred in *Roe v Wade*. Other courts, however, have opted for self-restraint and deference to the legislature, leaving issues

---

[302] See, for example, K Llewellyn 'Some Realism About Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222 and J Frank 'Some Reflections on Judge Learned Hand' (1957) 24 *University of Chicago Law Review* 697.

[303] A Cox *The Role of the Supreme Court in American Government* (1976) 1.

such as abortion alone.

For example, in the United Kingdom the courts, while lacking constitutional powers, have a great deal of room to interpret statutes. But they have exercised restraint in the extent to which they have involved themselves in the workings of the 1967 Abortion Act. Indeed, the trend has been for the courts to adopt a largely hands-off approach towards the Act, as a number of judgments indicate.

In *R v Smith*,[304] the court found that the opinion of the doctor was determinative in deciding whether an abortion was legal or not in terms of the Act, while in *Paton v Trustees of the British Pregnancy Advisory Service*[305] the court held as follows:

> My own view is that it would be quite impossible for the courts in any event to supervise the operation of the 1967 Act. The great social responsibility is firmly placed by the law on the shoulders of the medical profession ... Not only would it be a bold and brave judge ... who would seek to interfere with the discretion of doctors acting under the 1967 Act, but I think he would really be a foolish judge who would try to do any such thing.[306]

This dictum was cited with approval in the 1987 case of *C v S*.[307]

In the United States much of the criticism levelled against the *Roe* decision is based on the view that the court exceeded its legitimate role and that it should have left the issue for

---

[304] [1974] 1 ALL ER 376, 378.

[305] [1978] 1 ALL ER 987.

[306] At 991-2. See K M Norrie *Family Planning Practise and the Law* (1991) 31.

[307] [1987] 2 WLR 1108, 1124.

determination by the legislature.[308] In this regard Judge Rehnquist, now Chief Justice, dissenting in *Roe* stated that the majority outcome

> partakes more of judicial legislation than it does of a determination of the interest of the drafters of the Fourteenth Amendment.[309]

In the Canadian context the dissenting judges in *Morgentaler* were not happy with the application of section 7 to the case at hand. They were concerned that this was making policy and that, regardless of statements to the contrary by the majority, the outcome rested on a finding of a right to abortion.[310]

The issue of judicial activism is clearly crucial, and Cappelleti states the following in this regard about abortion decisions:

> What is common to these decisions, however, and what reminds us of the similar and, again, almost contemporaneous developments in the United States, is the issue of judicial activism. For possibly the first time in human history, judges of various countries, faced by significant and controversial problems involving social, moral, political, and religious issues, have boldly decided that it is their duty to search in the penumbrae of the constitution for value judgements and guidelines about such issues ... The search of these courts represented the serious acknowledgement that tremendously important issues of humanity - such as abortion ... can no longer be excluded from the reach of the constitutions.[311]

Judicial activism has often been decried as anti-majoritarian and contrary to the function of judges who are merely meant to

---

[308] E H Ely 'The Wages of Crying Wolf: A Comment on *Roe v Wade*' (1973) 82 *Yale Law Journal* 920.

[309] At 174.

[310] M L McConnell 'Abortion and Human Rights: An Important Canadian Decision' (1989) 38(4) *International and Comparative Law Quarterly* 905, 911.

[311] M Cappelletti *The Judicial Process in Comparative Perspective* (1989) 162-3.

interpret the constitution. Thus, a question that has exercised the minds of constitutional lawyers is the legitimacy of the counter-majoritarian position of judges who strike down legislation passed by elected representatives of the people, although they themselves are not representative in the democratic model.[312] The counter-argument is that a constitution emanates from the people and since this includes the right of judges to decide conflicts, no problem exists. It is also argued that unrestrained majoritarianism permits minorities to be sacrificed, and that a check on the power of the majority is essential in a constitutional democracy. Dworkin, for example, is a proponent of this view.[313]

Constitutional adjudication and interpretation is about policy making and the process is therefore political in nature. Constitutional interpretation differs fundamentally from the interpretation of statutes and gives the courts the opportunity to shape the society in which they are located. Thus the judicialisation of politics occurs, allowing the role of the courts to expand beyond the domain traditionally perceived as theirs, at the expense of the other arms of government.[314]

Criticisms of abortion decisions, either from the minority of the court or from academic writers, is often based on the idea that what the court has done is either contrary to the intentions

---

[312] A Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 16.

[313] R Dworkin *Law's Empire* (1986) 381.

[314] T Vallinder 'The Judicialization of Politics: Meaning, Forms, Background, Prospects' (1992) *Acta Societatis Juridicae Lundensis* 267.

of the framers of the constitution, or overreaches what a court should properly do. In Germany, for example, the minority criticised the decision of the majority on the basis that their decision failed to exercise self-restaint.[315] In the United States such criticism tends to involve questioning who the Supreme Court judges are and what right they have to play the role they do.

Thus the question of who is appointed to a constitutional court is clearly critical, since individual judges play a large part in determining the decisions that will emanate from that court. As Beatty suggests:

> For those whose ambition is to entrench human rights in a constitutional document as powerfully as one possibly can, it is the method by which judges are appointed to the court, much more than the language which is used to describe the constitutional guarantees, which should be the primary focus of their attention.[316]

There are many factors which play a part in the outcome of judges' decisions in a case. One is religion. In countries where religion plays a large role, the position of the church and its attitude towards abortion is played out in the decision of the court.[317] In other words, the religious views of the individual judges have a critical impact on the determination of a case that has religious facets, particularly in a country where religion has a high profile.

Thus, it has been argued that religion played an important

---

[315] Gerstein and Lowry (n185) 866.

[316] D Beatty 'Human Rights and Constitutional Review in Canada' (1992) 13(5-6) *Human Rights Law Journal* 185, 194.

[317] Such as the Belgian and Irish decisions evaluated earlier in the text accompanying and following n58 and n109.

part in the decision of the German court, as three of the eight judges who heard the 1974 case were Catholic, while three were Protestant.[318] But, the extent of the involvement of religion is not always clear, since if the church had the influential role with which it is credited, the West German court would have relied on fertilisation, rather than implantation, in its abortion decision.[319] This aside, however, one cannot understand the German decision without knowing the social and judicial realities that existed at the time.

The issue of gender also plays a critical role in adjudication since it seems clear that women judges are far more likely than men to be sympathetic in arguments and debates on issues that impact on women. Women judges in abortion decisions tend to be sympathetic to a balanced view, rather than viewing the matter simply as a life issue. Thus, in the West German decision in 1975, the only woman on the court, Judge Rupp von Brunneck, was one of the two dissenters.[320] This judge mentions the 'natural feelings of the woman' in the decision and thus calls for a term solution to the abortion issue.[321]

The importance of gender is evident also in the United States and Canadian decisions. In the Canadian *Morgentaler* case only one justice, Justice Wilson, applied a gender perspective to the abortion question.[322] Gender and the rights of women were

---

[318] Kommers (n173) 278.

[319] Kommers (n173) 278.

[320] Gerstein and Lowry (n185) 861.

[321] See Kommers (n173) 274.

[322] See Crann (n274) 3-18.

clearly a focus of hers, as can be seen from her statement during that case that

> the history of the struggle for human rights from the eighteeth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men. It has not been a struggle to define the rights of women in relation to their special place in the societal structure in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce ... is one such right and is properly perceived as an integral part of a modern woman's struggle to assert her dignity and worth as a human being.[323]

This fact of greater sympathy from women judges towards women's issues is borne out by a study of the practice of women appellate judges in the United States.[324] This research reveals that while women judges generally tend towards the two extremes of conservativism and liberalism in their decisions of cases involving women's issues, the decisions they handed down in the abortion context were normally progressive in character.[325]

In addition to understanding the impact of judicial politics and attitudes, the different abortion decisions must be placed in the context of the different circumstances, 'legal cultures' and 'socio-political values' that exist in a particular

---

[323] At 491 cited in Hernandez (n56) 342-3.

[324] D W Allen and D E Wall 'The Behaviour of Women State Supreme Court Justices: Are They Tokens or Outsiders?' (1987) 12 *Justice Systems Journal* 232.

[325] Allen and Wall (n324) 232. However, some women judges are not sympathetic to abortion issues. An example would be Sandra Day O'Connorof the United States Supreme Court.

society.[326] Kommers, for example, avers that German judges are far less sociological and intentionalist than others, and that literalism underpins their constitutional interpretation.[327] The political circumstances from which the German decision emerges are critical to an understanding of both the 1975 and the 1993 decisions. The legacy of the Nazi regime and reaction against the scant regard for life that characterised that period has had a major impact on judicial thinking and interpretation.[328]

Similarly, there is a need for an understanding of the politics involved in the *Roe* decision. While many authors dispassionately look at doctrine and constitutional theory, the politics of and between the individual members of the court was of major importance and has been the focus of much attention.[329] For example, it has been argued that even the choice of the author of the *Roe* decision was political in nature. While it is usual for the US Chief Justice to decide who will write the majority decision if he or she is part of that majority, in *Roe* Chief Justice Burger, against all custom and although he was in the minority, assigned Justice Blackmun the task of writing the majority decision.[330] One view is that Judge Blackman was suited to this purpose as he was knowledgable on medico-legal issues.[331] A more cynical view of Burger's choice of Blackmun is

[326] See Kommers (n173) 276.

[327] Kommers (n173) 277.

[328] Van Zyl Smit (n192) 305.

[329] See for example Woodward and Armstrong (n226).

[330] Rubin (n226) 63.

[331] See n227 earlier in this chapter.

that the Chief Justice considered him a methodical, slow writer and hoped that this would ensure that the decision would not come down before the 1972 presidential election.[332] It has also been argued that the Chief Justice believed he could influence Justice Blackmun to write the opinion in such a way as to reduce its impact.[333]

Justice Blackmun himself stressed the critical impact of the individual in the abortion debate when he stated in his own decision in *Roe v Wade* that

> [o]ne's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude towards life and family ... are all likely to influence and colour one's thinking and conclusions about abortion.[334]

Rubin notes that, while *Roe* was written emphasising principles and precedents, the underlying problems of

> population control, the depletion of natural resources, the changing status of women, and concern about illegitimacy, welfare costs, and child care, were not openly discussed. Yet the court was clearly not indifferent to the underlying policy considerations, although it seemed to avoid their discussion as a matter of conscious strategy.[335]

Blackmun himself noted in *Roe* that

> [i]n addition, population growth, pollution, poverty, and racial overtones tend to complicate and not simplify the issue.[336]

The impact of the judge's personal views in the process of judicial decision making was recognised also by Justice White.

---

[332] Rubin (n226) 63.

[333] Rubin (n226) 63.

[334] At 113.

[335] Rubin (n226) 57.

[336] At 113.

Criticising the majority finding in *Roe* he wrote as follows:

> I find nothing in the language or history of the constitution to support the court's judgment. The court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 states are constitutionally disentitled to weigh the relative importance of the continued existence and development of the foetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the court perhaps has authority to do what it does today, but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court.[337]

The principle that who the judges are plays a major role in determining the result of a case is widely recognised and is particularly striking in the nomination and confirmation procedure for appointment to the Supreme Court in the United States. This is a highly politicised process and the presidential nomination is in fact based on the attitude of the nominee to policy issues such as abortion.[338] Indeed, one of the major effects of the *Roe* decision was to ensure that nominations to the US Supreme Court were preceded by consideration of the attitude of possible nominees towards abortion.

Political considerations are increasingly tainting the United States judicial structure, ensuring a decrease in the confidence of the public in the legitimacy of the decisions of the court. Indeed, President Ronald Reagan was elected partly as a result of the backlash against *Roe*, declaring in his manifesto

---

[337] At 195-6.

[338] S Alumbaugh and C K Rowland 'The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgments' (Oct-Nov 1990) 74(3) *Judicature* 153, 154.

that he would appoint judges 'who respect traditional family values and the sanctity of innocent human life'.[339] During his eight-year presidency Reagan appointed conservatives to the court who supported his desire to overturn *Roe* and his administration sent many cases to the Supreme Court in an attempt to see the holding in *Roe* reversed.[340] This conspicuous attempt to redirect the court was understood by Blackmun J, author of the *Roe* decision, who noted in June 1992 in *Planned Parenthood v Casey* that

> I am 83 years old. I cannot remain on this court forever, and when I step down, the confirmation process for my successor may well focus on the issue before us today [abortion].[341]

In the Canadian context the impact of the judicial outlook was acknowledged by McIntyre J in *Morgentaler* who noted as follows:

> Difficult choices must be made and the personal views of judges will unavoidably be engaged from time to time. The decisions made by judges, however, and the interpretations that they advance or accept must be plausibly inferable from something in the Charter. It is not for the courts to manufacture a constitutional right out of whole cloth.[342]

Similarly, the Irish Constitution was amended in recognition of the fact that the activism of the Irish judges could frustrate the will of the legislature by liberalising abortion laws.[343] This was probably an unfounded fear as the judiciary, representative of a population with a strong anti-abortion

---

[339] Rubin (n226) 179.

[340] Rubin (n226) 133-5.

[341] 112 S. Ct 2791 (1992).

[342] (1988) 44 D.L.R. (4th) 385, 467.

[343] Charleton (n123) 352.

belief, would have been likely to interpret the constitution so as to mirror the strong anti-abortion attitude within the population and provide clear prenatal protection.[344] In fact the attitude of the Irish courts towards abortion was made plain only four months before the amendment passed when Chief Justice O'Higgins in *Norris v Attorney-General*,[345] stated:

> A right to privacy or, as it has been put, a right 'to be let alone,' can never be absolute. There are many acts done in private which the State is entitled to condemn, whether such be done by an individual on his own or with another. The law has always condemned abortion, incest, suicide attempts, suicide pacts, euthanasia or mercy killing. These are prohibited simply because they are morally wrong and regardless of the fact, which may exist in some instances, that no harm or injury to others is involved.

The controversial nature of abortion and the fact that the issue cannot be decided objectively simply by applying a formula confers a singular importance on the perspective of the judges doing the adjudicating. No evaluation of an abortion decision would be complete without surveying the opinions and background philosophies of those who decide the case.

E. CONCLUSION

Apparent from this review of abortion decisions is the fact that the courts in many countries have become battle zones for issues that previously were the domain of politics. There is an international trend towards using litigation to advance or retard abortion liberalisation. Thus the courts are being used as an alternative to the democratic process of changing law in

---

[344] See Quinlan (n111) 371 and 380.

[345] Irish Supreme Court 22 April 1983 cited in Quinlan (n111) 394. See the discussion on this case in the text accompanying n116 earlier in this chapter.

parliament, sometimes reducing the time involved and sometimes offering activists a second opportunity to secure a particular legal position after failing to do so through the legislature.[346] Litigation has thus become a strategy to precipitate social change in situations where the courts are ready, willing and able to hear the issue.[347]

Another conclusion that can be drawn is that initially abortion cases were decided on procedural issues, so as to avoid the complexity and controversy of the substantive issues. The tendency in recent years, however, has been for the courts to decide the issues on their substantive merits.

Evident from the review also is that in spite of trends towards liberalisation world-wide, courts have nevertheless tended to give some protection to prenatal life. In Germany and Spain this protection was justified on the basis of the good to the community. The crucial question in this regard is at what point the court decides that this protection should be accorded. The answer to this depends on the court's attitude which is often based on the prevailing community outlook.

Finally, it is clear that while the language of the constitution is critical to constitutional adjudication, the orientation of individual judges has a profound effect on their interpretation of such issues as which right to give superior weight to and how various rights ought to be balanced. Thus, who the judges are and the manner in which they are appointed is highly relevant to the outcome of an abortion decision. This is

---

[346] See George (n188) 107.

[347] Rubin (n226) 4.

especially so in the light of the fact that, in most situations where constitutional adjudication around abortion occurs, there is very little to guide the judges in the choices they make.

CHAPTER FIVE

THE POSSIBLE IMPACT OF THE CONSTITUTION AND BILL OF RIGHTS ON SOUTH AFRICA'S ABORTION LAWS

A. **INTRODUCTION**

South Africa has had a transitional justiciable Constitution in force since 27 April 1994.[1] The Constitution contains a chapter on fundamental rights. As a result of compromise, the chapter contains only those fundamental rights which negotiators could agree warranted protection during the transitional period before a final constitution is adopted.

Constitutional supremacy is established by section 4 which states:

> This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.

Other sections further entrench the supremacy of the rights in the Constitution over other law and administrative actions. Thus, section 7(2) states:

> This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

Similarly section 33(2) states:

> No law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this chapter.

Thus, in the South African constitutional dispensation, judicial review will be the major instrument for adjudicating constitutional issues. The utility of judicial review, however,

---

[1] Section 251 of the transitional Constitution Act 200 of 1993.

is dependent on robust and imaginative[2] courts which have authority and stature and are worthy of respect. If this is not manifest, the decisions of the courts will be deemed to be of little worth and a bill of rights will be seen to be of little value.

There will be various bodies that will help shape the society that South Africa will become. Those institutions which could impact on abortion, although to differing degrees, are the legislature (the National Assembly and the Senate), the Constitutional Court, the Constitutional Assembly which has to draft the final Constitution, and the nine regional parliaments. The abortion question could be addressed in any of these arenas, but at a minimum will probably be examined by the legislature and the Constitutional Court. Thus, an understanding of the political process, the role of the courts and the interplay between these two arms of government is critical to any perspective on how the abortion problem may be resolved.

This chapter will therefore examine the role of the legislature, the role of the courts, the role of the Constitutional Assembly and the possible incorporation of an abortion provision in the final Constitution, and the prospect of regional parliaments and regional constitutions impacting on abortion availability.

---

[2] G Barrie 'The Challenge of the South African Judiciary in the 1990s' (1989) *TSAR* 515, 517.

B. THE LEGISLATURE AND ABORTION

Abortion is an issue of major political importance but it is one that cannot easily be solved within the political process. It is for this reason that the courts have often been left with the task of finally dealing with the matter. Where political debate on the subject occurs it tends to be divisive and emotional, full of rhetoric and symbolism.[3]

In all countries abortion is a problem not easily addressed. Part of the reason is that political parties are often formed on the basis of core economic ideologies and do not easily accommodate uniform attitudes towards apparently unrelated issues such as abortion.[4] Lovenduski and Outshoorn believe that there have been three reactions to abortion, namely:

> abstinence, postponement and de-politicization. Abstinence occurs where governments, parties and leaders refrain from taking a stand. Postponement is less straightforward. Ostensibly simply a delaying tactic, it may also result from a perception that reform groups will be unable to sustain mobilization. De-politicization may take a number of forms. Most commonly, abortion is redefined as a technical issue enabling politicians to pass responsibility to experts. Few governments have been able to sustain strategies of abstinence or postponement for long. De-politicization offers greater flexibility but depends both on the complicity of the designated experts and on the government's capacity to maintain its definition of the issue. However, as medical practitioners and courts have indicated their preference for clear guidelines from the state, de-politicization strategies have become less feasible.[5]

---

[3] E R Rubin *Abortion, Politics and the Courts: Roe v Wade and Its Aftermath* (1982) 91-2.

[4] J Lovenduski and J Outshoorn 'Introduction' in J Lovenduski and J Outshoorn (eds) *The New Politics of Abortion* (1986) 1.

[5] Lovenduski and Ousthoorn (n2) 2 and A Cohan 'Abortion as a Marginal Issue: The Use of Peripheral Mechanisms in Britain and the United States' in Lovenduski and Outshoorn (n2) 27.

1. **The electoral system**

The electoral system is a very important factor in determining the amenability of parliamentarians to considering or supporting a law liberalising abortion.[6]

One of the important considerations in South Africa before the introduction of the transitional Constitution was that parliamentarians were elected individually by constituents to whom the parliamentarians were then accountable. Members of Parliament are now elected on the basis of proportional representation.[7] Thus, no member has a link with a particular area, except those elected from regional lists, a much wider and larger base than under a constituency system. The list system tends to reduce accountability and is likely to decrease the overt concern of individual officials with public opinion.[8] It will be more important for parliamentarians to toe the party line in order to ensure a place on the party list again.[9] Thus, under the list system, the power of the party to ensure compliance from its members increases, unless there is an overt attempt by a

---

[6] See generally on the political results of the electoral system V Bogdanor *What is Proportional Representation* (1984); A Lijphart *The Political Consequences of Electoral Laws* (1990); T D Sisk 'Choosing an Electoral System: South Africa Seeks New Ground Rules' (1993) *Journal of Democracy* 79; R Mattes 'The Road to Democracy: From 2 February 1990 to 27 April 1994' in A Reynolds (ed) *Election '94 South Africa: The Campaigns, Results and Future Prospects* (1994) 1.

[7] Sections 40 and 48.

[8] See generally P Laundy *Parliaments in the Modern World* (1989) 18.

[9] See generally B Grofman and A Lijphart *Electoral Laws and their Political Consequences* (1986); Lijphart (n6); H Kotze *President's Council Report on a Proportional Polling System for South Africa in a New Constitutional Dispensation* (1992); Sisk (n6) 79.

number of members to remain independent. Indications that this will occur on certain occasions have already begun to manifest themselves. One example was the rebellion of the African National Congress (ANC) parliamentary caucus on the question of where Parliament should be situated.[10] The debate on the suitability of the constitutional provision tying a member to a party has been raised by Deputy President F W de Klerk, who suggested that democracy would be better served if MPs could cross the floor.[11]

2. **The new Members of Parliament**

South Africa's history and the experience of large numbers of individuals now in Parliament are important factors when assessing the role of the new Parliament. The composition of Parliament is decisive in assessing what will emerge as legislation. The fact that the two major groups represented in Parliament that have been the torch-bearers for change[12] - the ANC and the Pan Africanist Congress (PAC) - hold 252 and five seats respectively, means that a majority to enact reformist legislation will be easily obtained, even without support from the other parties, if all or most of the members of the ANC support the revision.[13]

---

[10] *Business Day* 22 June 1994.

[11] *Weekend Argus* 26 June 1994.

[12] The liberation groups fought the armed struggle and the 1994 election so that South Africa would become a non-racial and non-sexist democracy. Thus the emancipation of, and rights of, women have been on the agenda of these groups for some time. This ethos impacts on the abortion debate.

[13] The composition of the 400 members of the National Assembly is 252 ANC, 82 National Party (NP), 43 Inkatha Freedom Party (IFP), 9 Freedom Front (FF), 7 Democratic Party (DP), 5 PAC

While there are about 87 members of the old apartheid Parliament still playing a role in national government,[14] many of the new parliamentarians have emerged from years of struggle aimed at achieving a democratic state with rights for all citizens. These activists gave emphasis to obtaining major reforms in all sectors of governance, including those which will impact on abortion, such as health and the status of women.

The replacement of the old government with the new in South Africa is not analagous to the conclusion of one government and the start of a new one that occurs in countries where democracy has been in existence for some time. The new government in South Africa, and in fact the new Parliament, is of a different ilk to its predecessor.[15] It is composed mostly of people who have not been in Parliament before and therefore do not feel bound, either through convention or ideology, by the legislative practices of the past. The new parliamentarians are similarly unconstrained by the traditions and bureaucratic systems that have reflected the state in the past and are likely to exhibit a greater degree of sympathy for accountability and transparency to the electorate. The emphasis on a human rights culture which has been the goal of years of political struggle will be reflected in the issues taken up in Parliament and the manner in which they are

---

& 2 African Christian Democratic Party (ACDP). In the Senate there are 60 ANC members, 17 from the NP, 5 from the IFP, 5 from the FF, and 3 from the DP.

[14] Reynolds (n6) 211.

[15] E Bulbring 'Side by Side the Old and the New' *Sunday Times* 15 May 1994.

addressed. This spirit of broad-mindedness will therefore impact significantly on many issues, possibly including abortion.

3. **The impact of the increased number of women in Parliament**

The new electoral system has seen the number of women in Parliament increase dramatically from 2,6 per cent[16] to 22 per cent of the total.[17] In the last session of the tricameral Parliament only eight out of 308 MPs were women.[18] Now women occupy 106 out of 400 seats in the National Assembly. In the Senate, however, only 16 out of 90 members are women.

This dramatic increase in the number of women in Parliament will probably have an immense effect on legislation affecting women.[19] Legislation will generally tend to be more gender-sensitive and there is likely to be more legislation and programmes aimed directly at women.[20] Obviously this increased number of women in Parliament will also be important within the abortion context, tending to ensure a greater degree of sympathy towards abortion reform. This is not because all women believe in liberal abortion laws but rather because they are likely to have a greater degree of tolerance and sympathy for women's

---

[16] See generally C Murray 'What Place Could a New Constitution Give to Women' in Margaret Lessing (ed) *South African Women Today* (1994) 23 and K Asmal and J de Ville 'An Electoral System for South Africa' in N Steytler et al *Free and Fair Elections* (1994) 1.

[17] A Reynolds 'The Results' in Reynolds (n6) 212.

[18] Murray (n16) 23.

[19] See generally M Currell *Political Woman* (1974).

[20] See generally Laundy (n8) 26.

issues. In this regard, Elizabeth Valance[21] had the following to say about women in the British parliament:

> Abortion focused attention on a particular issue and has, inside and outside the House, concentrated women's aspirations and self-awareness on one issue - rather as the suffragettes did in earlier days. Both gave women a focus, something precise and specifiable and central to their developing self-consciousness.[22]

4. The position of political parties

a) *The African National Congress (ANC)*

The need for abortion reform has largely been accepted within the various party structures of the ANC alliance, particularly among the leadership. However, the ANC has not been willing to directly support abortion law reform, fearing a backlash from some of its members and the electorate generally. Therefore the ANC has not formulated official policy on abortion.[23] While there have been attempts to secure party support for abortion reform, ambivalence on the issue has largely been the result. Article 2 of the revised ANC Bill of Rights of February 1993 reads as follows:

> The Right to Life
> (1) Every person has the right to life.
> (2) No one shall be arbitrarily deprived of his or her life.
> (3) Capital punishment is abolished and no further executions shall take place.
> Note: The question has been raised as to whether the use of the phrase 'right to life' indicates an anti-abortion position in the Constitution. In our view, the issue is left open in this clause. We feel the matter should be left open for legislative action after democratic discussion in future. The issue needs sensitive and informed debate with extensive participation by all interested parties and a

---

[21] E Valance *Women in Parliament* (1979).

[22] Valance (n21) 75.

[23] P Sidley and R Rumney 'ANC Controversy Over Abortion Plan' *Weekly Mail & Guardian* 21 to 27 January 1994.

> respect for differing views. Uninformed debate could be extremely divisive and distract attention from the basic question of equal political rights. The Constitution should not in any way pre-empt proper debate. We regard the issue as of great importance and would recommend that it receive high priority as soon as democratic institutions are in place.

The ANC bill did contain a further provision which could impact on abortion. Article 7(2) in the section dealing with women's rights stated that:

> Legislation may provide for reproductive rights, and rights associated with child birth and child-raising shall be respected.[24]

In spite of this apparent indecision on the issue, the real attitude of the ANC is revealed in many subsequent policy documents. For example, the ANC's Reconstruction and Development Programme (RDP), released in 1994, indicates support for abortion liberalisation.[25] It states:

> One important aspect of people being able to take control of their lives is their capacity to control their own fertility. The government must ensure that appropriate information and services are available to enable all people to do this. Reproductive rights must be guaranteed and reproductive health services must promote people's right to privacy and dignity. Every woman must have the right to choose whether or not to have an early termination of pregnancy according to her own beliefs. Reproductive rights must include education, counselling and confidentiality.[26]

There does, therefore, seem to be some official willingness in the ANC to act on the issue and in private many politicians are in favour of liberal abortion legislation.[27]

---

[24] Article 7(2).

[25] ANC *The Reconstruction and Development Programme: A Policy Framework* (1994).

[26] At 46-7.

[27] *The Argus* 15 May 1992.

Another insight into the real attitude of the ANC is contained in an ANC health department document of May 1994,[28] which notes:

> The Population Policy should promote reproductive freedom of choice and women's right to control their bodies. It should also recognise the human rights of individuals and couples freely and responsibly to decide the number and spacing of their children, and to have the information, education and means to do so.[29]

While the ANC is the majority party in the legislature, the government is a government of national unity, with the cabinet composed of the ANC, the NP and the IFP. The health ministry, from where new legislation will emerge, is controlled by an ANC minister, Dr Nkosazana Zuma. Dr Zuma, one of only three women in the cabinet, supports freedom of choice but her political will and ability to push through major revisions to the abortion law, both in the cabinet and in Parliament, is unknown. However, she has stated that abortion will be debated in Parliament in 1995.[30]

Pushing abortion reform through Parliament will not be an easy task. While the ANC has 252 out of 400 seats in the National Assembly, it must be remembered that the ANC group incorporates individuals from the party's alliance partners, the South African Communist Party (SACP) and the Congress of South African Trade Unions (Cosatu). However, the ANC line on the abortion issue will probably be followed by its alliance partners as their members have largely similar backgrounds and outlooks to those in the

---

[28] ANC Health Department *A National Health Plan for South Africa* (1994).

[29] At 24.

[30] *Sunday Times* 26 June 1994.

ANC. The SACP attitude towards abortion can be detected in the comments of then party leader Joe Slovo who, while making it clear that he was commenting in his personal capacity, stated that:

> No person, not even the Pope, should have the right to impose a moral or religious obstacle to people who want to have abortions.[31]

Similarly, Cosatu resolved at its national women's conference in 1988 to embark on an abortion education programme as well as to

> liaise with progressive women's organisations to demand the right to safe, free and legal abortion whenever necessary.[32]

At the Workers' Charter Conference in November 1990 a resolution was adopted calling for abortion to be legalised[33] and at a joint ANC and Health Worker Organisation conference held in Maputo in April 1990 abortion on request was also supported.[34] At a congress in 1991 Cosatu adopted a motion calling for free abortion on demand.[35]

There appears to be a strong possibility that the ANC could pass reformist abortion legislation with the majority it has in Parliament. However, the politics of the day and the fact that the government is a government of national unity, suggests a need to seek the co-operation of other parties. Thus the views on abortion of the other parties in Parliament are important.

---

[31] *Natal Witness* 17 January 1991.

[32] *Natal Witness* 17 January 1991.

[33] *Natal Witness* 17 January 1991.

[34] H Rees 'Women and Reproductive Rights' in S Bazilli (ed) *Putting Women on the Agenda* (1991) 213.

[35] Rees (n34) 213.

b) *The Pan Africanist Congress (PAC)*

The political party that will in all likelihood work most closely with the ANC within the reformist mould is the PAC, which is extremely sympathetic towards alleviating the effects of existing abortion laws on South Africa's women. In this regard PAC health secretary Dr Saman Silva has said:

> The PAC is concerned about the complications of backstreet abortions. The legislation should be replaced by new legislation that will have to reflect a balance between the moral value system of the historically indigenous people and the hard, clinical facts of backstreet abortions.[36]

It seems likely, therefore, that the PAC would support reforming the present law and it is probable that the PAC would support abortion liberalisation.

c) *The National Party (NP)*

The biggest party after the ANC is the National Party, which over the years has shown itself to be against abortion liberalisation.[37] However, a more flexible approach has come to the fore recently, illustrated by a 1991 policy document of the party which noted that:

> The question of abortion must be handled delicately. Changes to existing legislation can only be made after extensive consultation with all interested parties.[38]

Further evidence of the relaxation of the previous hardline view is reflected in the NP Bill of Rights[39] which was drafted as a

---

[36] *The Argus* 15 May 1992.

[37] See examples of this in Chapter 3 in the text accompanying n284 and the text following n288.

[38] Cited in (Aug/Sept 1993) 91 *Work in Progress* 25.

[39] Published in February 1993.

proposal for inclusion in the Constitution as the Bill of Rights for South Africa. This bill contains a clause which reads 'Every person shall have the right to life'. A note to that clause states that because of its contentious nature, the issue of abortion should be left to the Constitutional Court for resolution.

If the issue came before Parliament, the party's attitude might not be as firm as it was before, particularly given the influx of members and parliamentarians not previously represented within the party.[40] Thus the attitude of the party might change, although the strong influence of the church might be an inhibiting factor.[41] The party might therefore permit members to have a free vote on the issue. This would depend in part on how the issue was raised and what compromises and amendments were made before it reached the floor. An alternative would be the orchestration of a private member's bill to avoid party embroilment in an issue with such major political repercussions.

---

[40] However, at the party's 1995 conference in Johannesburg it was reported that delegates wanted the current legislation retained. NP spokesperson on women's affairs, Sheila Camerer said:

> There is overwhelming support for the view that the NP is basically pro-life but accepts that abortion must take place under certain circumstances.

See *Weekend Argus* 21/22 January 1995.

[41] F F W Van Oosten and M Ferreira 'Republic of South Africa' in P Sachev (ed) *International Handbook on Abortion* (1988) 416.

d) *The Inkatha Freedom Party (IFP)*

The IFP attitude towards abortion is supposedly incorporated in the KwaZulu Bill of Rights which states:

> Procreative Freedom
> All people who so desire shall enjoy the freedom of procreative choice, including the right to receive sexual education, to use contraception and terminate unwanted pregnancy when safe. Anyone who finds these practices objectionable shall have the right to protect his or her own sphere of interest from any of these practices and from the exposure thereto.[42]

The IFP has stated that it agrees with this formulation,[43] a stance confirmed in an IFP policy document on the status of women which states:

> All people shall enjoy ... the right to terminate an unwanted pregnancy. While abortion will be legalised, it will not be promoted. Individual doctors, clinics and hospitals can exclude the provision of abortion from their range of services.[44]

The extent of discussion before this policy was adopted is not known and there is doubt whether this view is widely held within the party. What is known is that the bill was drafted by two American constitutional lawyers but the extent of their consultation or the extent to which the bill reflects the views of IFP members is uncertain.

While it would seem that the policy is clear, there does appear to have been some stepping back from this articulated

---

[42] Article 27.

[43] *Speak* (September 1993) 10.

[44] Cited in (Aug/Sept 1993) 91 *Work in Progress* 25.

position and it has been suggested that the party

> has not taken a final position on the issue of abortion. The issue is controversial and there is unlikely to be complete agreement within the party on such an important matter.[45]

In the final analysis there is doubt as to what the IFP position is. It seems most likely that the issue has not been fully debated and therefore that the stance that the party will adopt cannot be predicted. While it seems probable that a reformist position will be adopted, the extent of this cannot be evaluated.

e) *Other political parties*

Amongst the smaller parties represented in Parliament there is a range of attitudes towards abortion reform. At one end of the spectrum, there is support for liberalisation from the Democratic Party (DP); at the other is the position of the African Christian Democratic Party (ACDP) which supports making the law even more restrictive.

The middle road was taken in the past by the DP, which took the view that the issue was a 'highly emotive and religious' one which remained a personal matter for members.[46] The party therefore declared that DP members were 'free to vote according to their own principles'.[47] This position was taken in spite of an extremely emotional session at the 1993 national AGM where there was an attempt to persuade the party to take a stance more sympathetic to abortion reform. As a delaying tactic the issue

---

[45] *Speak* September 1993 10.

[46] *The Argus* 15 May 1992.

[47] Dene Smuts MP cited in *Speak* September 1993 11.

was referred to a committee which reported back that the issue should remain one left to the individual.

However at the DP's 1994 AGM, delegates voted overwhelmingly for the party to support the right of every woman to choose a safe, legal termination, preferably within the first twelve weeks, by a willing, qualified medical practioner.[48]

Prior to this, the argument that ruled within the DP, and still does in some other parties, is that adopting a progressive attitude towards abortion could negatively effect public opinion towards the party. The belief was that the controversy would not be settled and would, in fact, create more friction and division and focus attention away from more important political questions. But is this the case? Will many South African voters, at this stage of their history and given their experience, really vote simply on abortion, rather than on the fundamental questions relating to the underlying ethos and historical circumstances of the parties?

5. **Extra-parliamentary attitudes**

The attitudes of parties, organisations and individuals outside Parliament towards abortion reform are also important as the views of parliamentarians alone will no longer be decisive. The spirit of openness, transparency, accountability and consultation is likely to see the opinions of others being taken into account.

Again, there is a range of stances. The Conservative Party does not support abortion reform; the Azanian People's Organisation (Azapo), a party that boycotted the elections, has

---

[48] *Cape Times* 24 October 1994.

criticised other political parties for their lack of concern about women's reproductive freedom. Nobantu Ngenya, president of Imbeleko, the women's section of Azapo, has said:

> Men must stop deciding for us. We have to come out in support of abortion. If we don't we are not helping the very people we are trying to represent.[49]

Other organisations that have come out in favour of abortion legalisation include the Abortion Rights Action Group(Arag), the Women's National Coalition, the Civil Rights League and the Black Sash, which has called for a Freedom of Choice Act which would prohibit the state from restricting the right of a woman to terminate her pregnancy.[50] The Black Sash policy statement was later endorsed by the Western Cape Women's Alliance.[51]

The attitude of individual South Africans will also bear on the type of legislation that Parliament will enact since

> abortion liberalization seldom takes place until a solid majority of the population supports it. Once this point is reached, a return to earlier, severely restrictive conditions is unheard of ... Indeed, no democracy has ever reversed the liberalization of abortion.[52]

Du Plessis[53] suggests that public opinion in South Africa favours abortion as presently legislated and is against abortion for socio-economic reasons. However, he bases this on research

---

[49] *The Argus* 15 May 1992.

[50] 91 *Work in Progress* (August/September 93) 25.

[51] C Scott 'Diary of an Abortion' *Cosmopolitan* August 1993 16.

[52] Planned Parenthood *World Population Memorandum* February 27 1976 3 cited in Rubin (n3) 170.

[53] L M du Plessis 'Jurisprudential Reflections on the Status of Unborn Life' (1990) *TSAR* 44, 48.

done in the white community by Venter.[54]

By contrast, a July 1975 Market Research Africa poll among white adults showed that 41 per cent of the total and 57 per cent of English-speakers believed that access to abortion should be easier, while 47 per cent of the total disagreed.[55] Similarly, a May 1989 *Rapport* opinion poll revealed that 71,5 per cent of English-speakers supported abortion legalisation while 43 per cent of Afrikaners supported it. A 1986 Human Sciences Research Council (HSRC) study by Mostert and Van Tonder shows a dormant desire among women in all population groups to use abortion on request if available.[56]

However, the majority of surveys on the issue were conducted before 1990. Thus the impact of the unbanning of the liberation movements, the negotiation process, democratic elections, the introduction of the Constitution and Bill of Rights, and the new emphasis on human rights and individual freedom has not been taken into account.

In addition, many studies predominantly or exclusively emphasised white opinion. Little research has been done on black attitudes.[57] However, the high rates of illegal abortion amongst

---

[54] A Venter 'Die Houdings van en Houdingsveranderings by Blanke Suid-Afrikaners Ten Opsigte van Aborsie" 1981 *Humanitas* 131. See also A Venter "Houdings van en Houdingsveranderings by Kleurlinge ten Opsigte van Aborsie" (1982) *South African Journal of Sociology* 62.

[55] *The Argus* 14 July 1975.

[56] See also South African Institute for Sociological, Demographic and Criminological Research *Sekere Houdings jeens Aborsie* (1980).

[57] See later in the text accompanying n68 on the little research done in this area.

black women must presuppose a greater tolerance for circumstances beyond those mandated by the Abortion and Sterilisation Act. In their actions these women show their need for access to safe legal abortion.

The only major survey of attitudes amongst doctors during this period indicates a movement in opinion on abortion. Of the obstetricians and gynaecologists surveyed by Dommisse in 1980,[58] 82 per cent favoured changes to the Act, and 32 per cent favoured abortion on request. A repeat of this survey in 1990 reflected that 85 per cent believed that the Act ought to be changed and 40 per cent supported abortion on request.[59] A 1994 survey of another group of doctors found that 55 per cent supported the right of a woman to decide about pregnancy termination.[60]

These surveys reflect a shift in attitude among the general population away from previously held hardline attitudes towards issues in what has been considered the moral and religious domain. The implication seems to be that political developments in the 1990s have brought about a movement in public sentiment which in all likelihood will also lead to less conservative attitudes towards abortion reform.[61]

This shift is of vital significance given that the history

---

[58] G Dommisse 'The South African Gynaecologists' Attitude to the Present Abortion Law' (1980) *South African Medical Journal* 1044.

[59] G Dommisse (1990) 'Current Attitudes of Members of SASOG to the Present Law on Abortion' *South African Medical Journal* 702.

[60] Strategic Marketing Services 'Abortion in Practice' (June 1994) *Modern Medicine*.

[61] S A Ketchum 'The Moral Status of the Bodies of Persons' (1984) 10(1) *Social Theory and Practice* 25, 25.

of abortion legislation in the United Kingdom suggests that such a change is necessary for the enactment of a liberalised abortion law. Before the 1967 Act came into operation in the UK there were six attempts, beginning in 1953, to enact an abortion law.[62] Between 1967 and 1980 there were nine attempts to amend the legislation.[63] The 1967 law was a result of the following factors

(1) the 'liberal atmosphere' which saw capital punishment outlawed in 1965, homosexuality legalised in 1967, censorship of theatre ended in 1968 and divorce law eased in 1969;[64]

(2) political party composition was changed by the influx of a younger more liberal group;

(3) David Steel, who proposed the bill, was an able diplomat who consulted widely about it and agreed to amendments to ensure passage;

(4) interest groups such as the Abortion Law Reform Association (ALRA) played a decisive role in getting Steel to propose the law and they assisted in ensuring that the bill was enacted[65] by vigorous lobbying. Opposition to the bill was not energetic as the first pro-life group was formed only during the enactment of the bill and could not play a major role;

---

[62] D Marsh and J Chambers *Abortion Politics* (1981) 13.

[63] Marsh and Chambers (n62) 1.

[64] See P Richards *Parliament and Conscience* (1970).

[65] Richards (n64) 206.

(5) public opinion favoured the liberalisation of abortion;[66]

(6) the government was at least neutral, if not more positively disposed, to getting the law passed;[67] and

(7) the thalidomide tragedy engendered a greater degree of tolerance towards abortion.

In South Africa a number of these circumstances are reflected in public opinion while others could be met at a later stage. Greater public support for abortion liberalisation could be in evidence after the law is amended, for example, as international research has shown that, where the law has changed, a change in public sentiment on the topic is caused.[68] Thus, one of the results of abortion law reform in South Africa would be likely to be increased public support for such reform.

However, there is still a great deal of resistance to abortion liberalisation in South Africa. For instance, research conducted by University of the Witwatersrand sociologist Liz Walker[69] found overwhelming opposition to abortion among black female nurses in Soweto.[70] While Walker notes that this group

---

[66] See generally B M Knoppers, I Brault and E Sloss 'Abortion Law in Francophone Countries' (1990) 38 *The American Journal of Comparative Law* (1990) 889, 889.

[67] Marsh and Chambers (n62) 17-21.

[68] See D Granberg and B W Granberg 'Abortion Attitudes 1965 - 1980: Trends and Determinants' (1980) 12 *Family Planning Perspectives* 250, 252.

[69] Reported in *Work in Progess* (August/September 1993) 24.

[70] However, studies conducted internationally show that nurses are generally likely to have more conservative attitudes towards abortion than other workers in the health field. See K A Petersen *Abortion Regimes* (1993) 103. See also N K Brown, D J Thompson, R J Bulger, H E Laws 'How Do Nurses Feel About

has to deal with the effects of backstreet abortion and is generally not representative of black women from a class perspective, she nevertheless argues that assumptions are made about abortion in South Africa, one being that women in South Africa favour abortion. She believes that there is an arrogance underlying this assumption: that of white feminists 'assuming the consciousness of African women' while at the same time ignoring the 'ambivalence' or even 'hostility' that African women feel towards abortion.[71] She suggests that in her study group:

> Most of the antipathy stemmed from the fact that, in African culture, womanhood is defined by mothering. A termination of a pregnancy is thus seen as a termination of motherhood, and thus womanhood.[72]

The survey, however, was conducted amongst a very small sample of nurses and then entirely in one geographic area.

Thus, while it seems that more liberal attitudes have come to the fore in South Africa, strong sentiment against abortion law reform still exists, particularly in the religious sector.[73] This could impact on the willingness of Parliament to enact a reformed abortion law.

Euthanasia and Abortion?' (1971) 71 *American Journal of Nursing* 1413 and U Baluk and P O'Neill 'Health Professionals' Perceptions of the Psychological Consequences of Abortion' (1980) 8 *American Journal of Community Psychology* 67.

[71] Walker (n69) 24.

[72] *Weekly Mail* 6 to 12 November 1992.

[73] A group of representatives of various religious organisations has come together to oppose the movement to 'abortion on demand'. The group does not oppose abortion in certain circumstances but is opposed to the liberalisation of the law in South Africa.

6. **Law reform**

There are signs that the new government will introduce a new abortion law or at least revise the present legislation during 1995. An indication of a possible change to the law is the fact that in June 1994 the Attorney-General of the Transvaal dropped charges pending against a Johannesburg doctor in relation to the alleged performance of abortions. This occurred after representations were made to the Attorney-General about future law reform.[74] The trial of another doctor facing similar charges in the Transvaal was postponed until 1995 pending either law reform or a Constitutional Court decision on the topic.[75]

In terms of the transitional Constitution, laws can now be initiated in either house (National Assembly or Senate) and, if passed by both houses, are then enacted.[76] If one of the two bodies rejects the bill it is sent to a committee comprised of members of both houses. This committee will then suggest alterations and send the revised bill to a joint sitting of both houses, where a simple majority is needed. Thus 246 votes out of 490 are needed to pass a law. While Parliament enacts new laws the various select committees of Parliament have taken on a much more proactive role than previously and have become major players in the legislative process. They seem to be examining draft legislation and intervening extensively in its formulation before it is examined in either of the houses of Parliament.

---

[74] *Sunday Times* 26 June 1994.

[75] *The Argus* 19 July 1994.

[76] Section 59(1).

A parliamentary select committee[77] has already been set up to investigate the abortion question.[78] The committee comprises 26 members, 15 of whom are women. Five of the men on the committee are doctors.[79]

The select committee and Parliament have various alternatives regarding abortion. They can leave the present law as it is, reform the law or draft a completely new law. What is most likely in the short term is that reform of the present Act will occur. However, this will be only an interim measure as either Parliament or the courts are going to have to structure an abortion regime for the country. It is submitted that Parliament is the correct forum for the establishment of such a law after which it will then be the task of the courts to determine its constitutionality.

Obviously, the extent of a revised abortion law cannot be ascertained as it will be the result of the political process but

---

[77] This process was used rather than a judicial commission of inquiry so as to ensure that 'more acceptable' individuals could be chosen to serve on the committee.

[78] *The Star* 9 September 1994.

[79] Members of the committee are: Dr Willem Botha (FF), Ms Sheila Camerer (NP), Mr Sam de Beer (NP), Ms Patricia de Lille (PAC), Mr Mike Ellis (DP), Ms Jennifer Ferguson (ANC), Ms Devagie Govender (NP), Ms Fatima Hajaig (ANC), Ms Brigitte Mabandla (ANC), Ms Lindiwe Mabuza (ANC), Dr Dennis Madide (IFP), Rev Kenneth Meshoe (ACDP), Father Smangaliso Mkhatshawa (ANC), Mr Peter Mokaba (ANC), Ms Thenjiwe Mtintso (ANC), Ms Yvette Myakayaka-Manzini (ANC), Ms Lindiwe Ngwane (ANC), Ms Makhosazana Njobe (ANC), Dr Sokhaya Nkomo (ANC), Ms Kuku Nqwemensha (NP), Dr Willem Odendaal (NP), Dr Rashid Salojee (ANC), Mr Wally Serote (ANC), Ms Albertina Sisulu (ANC), Ms Mary Turok (ANC) and Ms Sue Vos (IFP).
Thus the ANC has 15 members, the NP five, the IFP two, the DP one, the FF one, the PAC one and the ACDP one. There are 15 women and 11 men. There are five doctors all of whom are men. Two of the men are religious officials.

suggestions are made in this section as to how such a law could look, taking into account the experience of other countries.

One important issue is how abortion ought to be defined. The tautologous definition of the present Act[80] should be avoided and a definition sought which truly describes the procedure and accounts for all types of termination.

a) *The role of the state*

The role of the state is critical within the abortion domain. Parliament at some point will most probably pass a new Act and set down restrictions on when, where, and by whom an abortion can be performed.

However, within the context of the provisions of the Constitution and Bill of Rights the state should not determine whether women have access to legal abortion or not. The function of the state should be to facilitate and advise. If the state were to adopt the role of intruder, the result would be less the preservation of foetal life than it would be to force women on to the streets in quest of alternative abortion providers. Thus, an intrusive role for the state has direct results and implications for women's lives and health, and also ensures an additional drain on the scarce resources of the health care system.

State interest in the protection of life is appropriate and laudable. However, this interest may be pursued through less repressive methods than infringing upon a pregnant woman's constitutional rights. The obvious course is for government to

[80] See text accompanying and following n129 in Chapter 3.

pursue family planning policies far more decisively than in the past but, crucially, without the bias which haunted family planning schemes implemented under apartheid.[81] Contraception and sex education should be made available to all. The state should also support pregnant women and children by acting against starvation, malnutrition, inadequate shelter, disease, violence and abuse.

The way to reduce the incidence of abortion is not reducing access to it but providing education and alternatives to its use. Health education should include information about contraception and the media should be encouraged to play a role in raising individual and community consciousness about family planning and birth control. If access to safe legal abortion is inhibited, dependence on unsafe backstreet abortions escalates. If education about contraception is not promoted and contraceptive devices are not available, then abortion will be the only viable option and it will be resorted to. As Miller states:

> As long as we have imperfect contraceptive methods, there will be a demand for abortion services regardless of the amount of educational and counselling efforts put into improving effectiveness of contraceptive use.[82]

The reasons which motivate women to resort to abortion ought to be addressed so that abortion really becomes the practical alternative in very limited circumstances. Until such time as family planning is accessible to all, the rule should be easier access to abortion rather than more limits. At the same time,

---

[81] See the text accompanying and following n160 in Chapter 2.

[82] W B Miller 'An Empirical Study of the Psychological Antecedents and Consequences of Induced Abortion' (1992) 48(3) *Journal of Social Issues* 67, 89.

easing access to abortion in the absence of an holistic approach to health care will achieve only palliative results. As Rosalind Petchesky[83] notes:

> A full reproductive rights agenda must involve access not only to abortion services and funds but to adequate prenatal care, maternal, infant and child health services, child care, housing, sex education without stigma, drug treatment and, of course, universal health care.

The state, however, must be confined to an advisory role. Otherwise, the dangerous and oppressive situation arises of state imposition of a preconceived moral stance. As noted earlier, this stance depends in part on stereotypes of women's intellectual and psychological incapabilities - views unfortunately reflected and perpetuated by the existing legislation in South Africa which, until now, has supported the rights of the foetus above those of the woman. Rules with dire racial and gender-specific impact have been enacted and enforced with little or no regard to the wider communal mores.

The role of the state in protecting life ought to be to support women through welfare and social assistance so as to make alternatives to abortion viable and available.[84] As was mentioned in the 1975 West German decision:[85]

> What can be done here and how the assistance measures are to be organized in detail are left in large measure to the legislator and in general are removed from review by a constitutional court. In this context it will be principally a matter of strengthening the willingness of the person about to become a mother to accept the pregnancy with responsibility to self and to bring the fetus to full

---

[83] R Petchetsky 'Abortion Politics in the 1990s: Giving Women a Real Choice' (May 28 1990) *The Nation* 732.

[84] M A Glendon *Abortion and Divorce in Western Law: American Failures, European Challenges* (1987) 27.

[85] See text following n180 in Chapter 4.

> life. For all the state's duty to furnish protection one may not lose sight of the fact that the developing life has, first of all, been entrusted by nature to the protection of the mother. It should be the most eminent purpose of government efforts on behalf of the protection of life to reawaken and, if necessary, strengthen the maternal protective will where it has been lost. Admittedly, there are limits to the legislator's potential for influence in this area. Measures initiated by him often accomplish their purpose only indirectly and through lengthy educational work and the changes in societal attitudes and views which such educational work brings about.[86]

To assist women many countries in Europe provide for paid maternity leave of six months.[87] In Sweden, nine months is allowed and can be shared by the mother and the father.[88] Child care is also a crucial need and an empowering mechanism for working women. Without it women's access to the labour market is severely restricted. Day care is provided in most European countries for children aged between three and five.[89] Many countries provide a cash payment or tax break to parents to assist in the raising of their children.[90] Medical treatment is also provided and many countries permit unpaid leave to be taken after the period of paid maternity/parental leave has expired. In addition, parents are entitled to take a number of paid leave days each year to care for a sick child.[91] To promote sexual equality in Sweden, social welfare and subsidised health care provides basic security and incentives for women's employment.

---

[86] at 91. Cited by Glendon (n84) 27.

[87] Glendon (n84) 54.

[88] Glendon (n84) 54.

[89] Glendon (n84) 54.

[90] Glendon (n84) 54.

[91] Glendon (n84) 54.

There are also educational initiatives which have as their object the countering of traditional sex-stereotyping. Most importantly, women have the means and right to control childbirth.[92]

b) *Brain birth and viability*

For many the crux of the abortion debate is the question of when life begins. Answers range from the belief that life begins at conception to the position that life commences upon live birth.[93]

The belief that potential for human life exists in the embryo has been convincingly repudiated by querying the exact point at which the line of potentiality should be drawn.[94] If the embryo is regarded as potential life, then such status could just as easily be extended to individual ova and sperm. The only difference is that the genetic make-up of united ova and sperm is concluded, whereas before the union many thousands of mutations are possible.[95] If the essence of the argument for the potential life of the embryo is uniqueness, then does this add to the potentiality debate, especially if better cloning techniques[96] are devised?[97] On this basis, it does not make

---

[92] D Bradley 'Perspectives on Sexual Equality in Sweden' (May 1990) 53 *The Modern Law Review* 283.

[93] M L Lupton 'The Legal Status of the Embryo' (1988) *Acta Juridica* 204.

[94] For a detailed analysis see Lupton (n93) 210; M L Lupton 'Does the Destruction of a Blastocyst Constitute the Crime of Abortion?' (1985) *SALJ* 92, 97.

[95] Lupton (n94) 97.

[96] Where embryos are developed from human cells and are genetically identical.

sense to accord higher moral status to the embryo than to the sperm or the ovum.[98] Similar problems emerge when a number of ova and sperm are joined for *in vitro* fertilisation. If, as is often the case, more than one ovum is fertilised, what must be done with the rest of the fertilised ova?

In any event, contraceptive practice in South Africa, which includes widespread use of the intra-uterine device (IUD), already indirectly disregards conception as the point to protect, since an IUD does not prevent fertilisation of ova, but obstructs the zygote's implantation in the womb, resulting in its subsequent expulsion from the body.[99] Close examination of the theories and approaches to conception highlights a disturbing degree of inconsistency. Conception is by no means the indisputable indication of life, in its evaluative not descriptive sense, worthy of protection it is so often professed to be. Arguments to a certain conclusion cannot be based on it.

The convergence of the theories of brain birth and viability, in the light of societal concerns and women's rights, provides a solid, comprehensible and logical basis for future legislation.

Brain birth is proposed as the methodology which should be used to determine the inception of meaningful life.[100] This

---

[97] Lupton (n94) 98.

[98] Lupton (n94) 99.

[99] Lupton (n94) 99.

[100] The concept of brain birth was first proposed by B Brody in *Abortion and Sanctity of Human life: A Philosophical View* (1975) 160. See also J M Goldenring 'Development of the Fetal Brain' (1982) *New England Journal of Medicine* 307; J R Cornwell 'The Concept of Brain Life: Shifting the Abortion Standard

theory is premised on the principle that human rationality (including the capacity for abstract thought, intelligence and the like) is unique and distinguishes human beings from other animals. In other words, without a brain there cannot be a human being, and therefore brain birth, or the commencement of neocortical brain activity, should be the criterion for determining when human life starts.[101] By analogy, the almost universal acceptance of brain death as the termination of life[102] lends credence to the view that brain birth determines the beginning of life.

The neocortical distinction is significant: although the bodily systems and organs begin to operate under the direction of the brain at eight weeks of gestation,[103] human higher intelligence is directly correlated to neocortical activity. Cells in the neocortex of the brain, where thought, emotion and consciousness occur, must be developed before higher intelligence can exist. It is only at some stage after 24 weeks that dendritic spines, imperative to the cellular circuitry of the brain, suddenly emerge.[104] Simultaneously, large-scale neural connections between brain cells in the neocortex (neocortical

---

Without Imposing Religious Values' (1987) 25 *Duguesne Law Review* 471.

[101] Lupton (n93) 210.

[102] Lupton (n93) 209 citing M Lockwood (ed) *Modern Dilemmas in Modern Medicine* (1985) 11; Goldenring (n100) 564.

[103] M C Shea 'Embryonic Life and Human Life' (1985) *Journal of Medical Ethics* 205; Goldenring (n100) 307.

[104] D Purpura 'Morphogenesis of Visual Cortex in the Pre-term Infant' in G Brazier (ed) *Growth and Development of the Brain* (1975) 33; 167 Distinguished Scientists and Physicians 'Amicus Curiae Brief' (1989) *Women's Rights Law Reporter* 423, 433.

synaptogenesis) begin, although this process may be discerned to a very limited degree as early as nineteen weeks.[105] While some elementary motor activity, such as involuntary limb motion, begins between eight and thirteen weeks, the development of thalamocortical connections, which are prerequisites for neocortical reception of bodily sensation, occurs only at about 22 weeks.[106]

Electroencephalograph (EEG) waves can also be regularly detected between the 22nd and 24th weeks of gestation.[107] As brain death measured by EEG is a comprehensible and tolerated measure for determining the end of life, it has been suggested that brain birth should be determined by the beginnings of EEG activity.[108]

There is, however, debate about the relevance of EEG, as it is unclear when significant EEG activity begins. The earliest localised registering on the EEG is at fourteen weeks, but the waves are not continuous and there are long periods of inactivity.[109] While EEG activity is more generalised between 22

---

[105] (1989) *Women's Rights Law Reporter* 433.

[106] (1989) *Women's Rights Law Reporter* 433 citing Kostovic & Goldman-Raikie 'Transient Cholinesterase Staining in the Mediodorsal Nucleus of the Thalamus and its Connections in the developing Human and Monkey Brain' (1983) *Journal of Comparative Neurology* 431.

[107] Lupton (n93) 207 citing Hughes *EEG in Clinical Practice* (1982) 69-70.

[108] Lupton (n93) 207 fn47 citing Gertler 'Brain Birth: A Proposal for Defining When a Fetus Is Entitled to Human Status' (1986) *Southern California Law Review* 1061, 1068; Goldenring (n100) 564.

[109] D G Jones 'Brain Birth and Personal Identity' (1989) *Journal of Medical Ethics* 171, 177.

and 28 weeks, it is not incessant until 32 weeks.[110] While accurately assessing brain death, which is an all-or-nothing occurrence, EEG measurement is not an effective tool for determining brain birth, which in the development of the foetus is incremental rather than precisely fixed. Thus, measurement of EEG activity is not indicative of any major achievement in the developmental process of the brain.[111]

The theory of brain birth points to the beginnings of uniquely human life at approximately the 22nd week of gestation. The different systems involved in brain function develop at various times and are meaningfully coordinated only near the completion of the growth cycle, which occurs within a fairly uniform time frame. Allowing for a margin of error[112] and differences in individual foetal development, and also taking into account the realities of viability, it is suggested that the commencement of life be placed at 20 weeks.

Determining gestational age is not necessarily a simple matter, however. Normally calculated from the first missed period and thus at the second week after conception, gestational age is often difficult to fix with any degree of accuracy. For this reason it is necessary to allow for a margin of error, thus permitting abortion until 20 weeks rather than the 22 weeks which a brain birth and viability theory would suggest.

Using the point at which a foetus is viable, or the point at which the foetus is able to exist outside the womb

---

[110] Jones (n109) 177.

[111] Jones (n109) 177.

[112] Lupton (n93) 207 citing Gertler (n108) 1062.

independently, is a compelling argument in support of legislative placement of the commencement of life at 20 weeks. Complementing the brain birth theory, viability also allows a reasonable period of choice for women.

It has been proposed that the point of viability is not stationary, but shifts as technology develops. In the United States Supreme Court decision *Akron v Akron Center for Reproductive Health*[113], O'Conner J, dissenting, held that trimesters as a basis for access to abortion were no longer workable, and that the system was on 'a collision course with itself'.[114] However, the earliest point of viability today is almost exactly where it was in 1973 when *Roe v Wade* was decided. What created confusion was the phrase used in the *Roe* decision defining viability as the point at which the foetus is potentially able to live outside the mother's womb, 'albeit with artificial aid'. In fact, when defining viability in *Webster v Reproductive Health Services*[115], Blackmun J, in dissent, omitted the clause 'albeit with artificial aid'.[116] Viability is, and must be, the point at which the foetus is able to exist independently of the mother, regardless of artificial aid.

Viability is, and always has been, static. The court in *Roe* found viability to be at 28 weeks but what it meant by this was that at that time a foetus could survive outside the womb only at around 28 weeks. Viability even then, in 1973, was reached at

---

[113] 462 US 416 (1983).

[114] 462 US 458 (1983).

[115] 106 L. Ed. 2d. 410 (1989).

[116] 109 S Ct 3075.

22 weeks but medical techniques were not developed enough to assist a viable foetus; they could only assist a foetus six weeks after viability. Only in recent years has it become possible to assist foetal survival closer to viability. The threshold of viability is and always will be at 22 weeks, regardless of any medical advances.

The perception of O'Conner J that foetuses could be viable in the first trimester[117] is, at least, overstated.[118] The idea that technology may become capable of ensuring foetal survival below the threshold constituted by the biological prerequisites for survival is considered sheer fantasy.[119] Even were ectogenesis to become a reality, viability would continue to be of critical importance, as replacing a human womb with an artificial one will not change or reduce the requirements for foetal development. The foetus will still depend upon a womb to survive, whether it is a natural or artificial one, and therefore the viability concept will always be valid.

As medical technology advances, the argument goes, it will become possible to substitute some other life-supporting system

---

[117] Supported by Lupton (n93) 206 citing N K Rhoden 'Trimesters and Technology: Revamping Roe v Wade' (1986) *Yale Law Journal* 639. Lupton states:

> Results of current research indicate that future life support technology will make viability in the first trimester possible.

[118] Rhoden (n117) 641.

[119] New York State Task Force on Life and the Law *Fetal Extrauterine Survivability* (1988) 1. See B M Knoppers 'Modern Birth Technology and Human Rights' (1985) *American Journal of Comparative Law* (n6) 1. In 1976 there were authors predicting ectogenesis, or the developing of a foetus outside the uterus in the near future. See, for example, G Favole 'Artificial Gestation: New Meaning for the Right to Terminate Pregnancy' (1979) *Arizona Law Review* 755, 757-758. This is still a dream.

for a womb, and the issue of viability will lose its importance 'as foetal adoption might replace the killing of the unwanted foetus'.[120] But this would relieve the mother of the burden of bearing the child and she could then make an easy choice, allowing the foetus to become the concern of some agency or the state. While work is under way on a device which will help premature babies to survive by surrounding them in artificial amniotic fluid with blood supplied to it through tubes, a prototype is at least five years off, and will not, in any event, be able to house the foetus for more than two weeks.[121] Even the inventors of this 'womb' acknowledge that this is a far cry from anything which might support a foetus from conception.[122]

One critic of viability is Leyshon[123] who attempts to justify his rejection of viability or quickening on the grounds that the United States experience

> demonstrates that an attempt to create artificial legal distinctions within the uterus between one level of foetal development and another will not be convincing. It remains too dependent upon the state of medical technology at any given moment.[124]

Leyshon, however, cites no medical references and it seems that his concern is merely to justify ignoring these arguments and relying on the idea that life begins at conception.

---

[120] R H Blank 'Judicial Decision Making and Biological Fact: Roe v Wade and the Unresolved Question of Fetal Viability' (1987) *Western Political Quarterly* 584, 597.

[121] G Thomson '"Womb" Can Save Early Babies' *The Argus* 11 August 1993.

[122] Thomson (n121).

[123] D J Leyshon 'Abortion: In Search of a Constitutional Doctrine' (Part 2) (1991) 10(3) *Medicine and Law* 219.

[124] Leyshon (n123) 233.

While medical developments have enabled the foetus to survive outside the womb during the 23-24-week stage more frequently than was possible in 1973 when *Roe* was handed down, the point of objective viability has not changed.[125] Rather, advances in medical science have increased the probability that a foetus born at 24 weeks or later will survive.[126] Revision of the research in this field even indicates some rare cases of survival at 22 weeks,[127] and the World Health Organisation, possibly as a result, has shifted the divide between spontaneous abortion and birth to 22 weeks.[128] None of this, however, alters the fact of a fixed biological threshold below which a foetus will not survive, and no technological progress either existing or prophesied for the future can thrust the verge of viability closer to conception.[129]

The apparent movement of the viability line since *Roe v Wade* in 1973 has not made the concept of viability precarious or untenable, as some suggest.[130] Viability appeared to move

---

[125] Rhoden (n117) 641.

[126] J R Pleasure, M Dhand and M Kaur 'What is the Lower Limit of Viability?' (1984) *American Journal of Diseases of Children* 783; J S Gerdes, S Abbassi, V K Bhutani and F W Bowen 'Improved Survival and Short-term Outcome of Inborn "Micropremises"' (1986) *Clinical Paediatrics* 391, 393.

[127] R L Williams, R K Creasy, G C Cunningham, W E Hawes, F D Norris & M Tashiro 'Fetal Growth and Perinatal Viability in California' (1982) *Obstetrics and Gynecology* 624.

[128] World Health Organisation *Definitions and Recommendations: International Classifications of Disease* (1979) 763-768.

[129] 885 American Law Professors 'Amicus Curiae Brief' (1989) *Women's Rights Law Reporter* 213, 226.

[130] Lupton (n93) 205.

marginally backwards as additional aid could be given to the organs of the foetus. But before 22 weeks the organs have not developed sufficiently to function independently or accept intervention, so no aid, however technologically advanced, will assist such a foetus to survive.[131] In the absence of sufficient understanding of the developmental process prior to this period,[132]

> any speculation about technology capable of shifting the foetal survivability point to before the biological threshold is pure science fiction.[133]

The most critical factor identified by research into viability involves development of the lungs, which prior to the 22nd week are incapable of normal or even artificially assisted respiration.[134] Oxygen is essential to life and oxygen cannot enter the bloodstream without a network of interfaces between the air spaces and the blood vessels of the lung, in addition to a barrier of tissue dividing the air spaces from the red blood cells.[135] This network has not evolved adequately in a foetus below 22 weeks, nor is the barrier thin enough to allow oxygenation of the blood.[136] In addition, the brain, kidneys and

---

[131] New York State Task Force on Life and the Law (n119) 12.

[132] Holmes 'Morphological and Physiological Maturation of the Brain in the Neonate and Young Child' (1986) *Journal of Clinical Neurophysiology* 207.

[133] 885 American Law Professors 1989 *Women's Rights Law Reporter* 227.

[134] New York State Task Force on Life and the Law (n119) 6-7.

[135] West *Respiratory Physiology - the Essentials* (3ed) (1985) 21-22.

[136] Sadler *Langman's Medical Embryology* 5 ed (1985) 218; Whittle 'Lung Maturation' 1984 *Clinical Gynecology* 353 354.

immune system have not developed enough to perform the requisite life-sustaining functions. Without adequate operation of these organs and systems, life cannot continue independently and there is no available technology capable of filling the gap at any point until the foetus reaches 22 weeks.[137]

Criticisms of the *Roe v Wade* trimester system have rested largely on the problems inherent in distinguishing between a first trimester and a second trimester on the basis of the safety of having an abortion. Logically, the safety aspect has to change with medical advancement and we also now know when viability actually exists. Blank is among those who contend that the court's decision of *Roe* 'left the door open for a gradual but continuous weakening of its ruling on the very biological grounds it depended upon to make its case'.[138] Blank also characterises the court's reliance on viability as arbitrary on the basis that foetal development is continuous and 'not a set of distinct and clearly defined stages'.[139] But, in fact, Blank himself sets out clearly defined stages of foetal growth.

Relying on Southgate and Hey,[140] Blank goes into great detail about the various stages of growth which he divides into three parts: first, the period of the ovum (seven days); second, the period of the embryo (seven to 56 days); and, third, the period of the foetus (56 days to birth). He also divides the

---

[137] New York State Task Force on Life and the Law (n119) 10.

[138] Blank (n120) 586.

[139] Blank (n120) 588.

[140] D A T Southgate and E Hey 'Chemical and Biochemical Development of the Human Fetus' in D G Roberts and A M Thomson (eds) *The Biology of Human Fetal Growth* (1976) 195.

foetal stage into three phases, the first lasting for 14 days after the foetus reaches eight weeks; the second from 10 weeks to 20 weeks, and the third from 20 weeks to delivery at the 40th week.[141]

Blank states that during the period from 20 weeks onwards, organs 'rapidly mature and ready themselves for functioning outside the maternal environment'. This statement suggests acceptance of 20 weeks as a cut-off point or dividing line, a position Blank seeks to evade by insisting on development as a continuum. The statement also suggests an implicit acceptance of viability, with its reference to functioning outside the maternal environment.

Another critic of the viability standard is Fletcher,[142] who argues that viability has no ethical significance and that, as medical technology advances, so the point marking viability will move backwards. Fletcher is among those who believe that the time will come when viability will catch up with conception, but this misses the point, as was elucidated earlier.

Such criticisms notwithstanding, viability has been identified in South Africa as a useful standard. In *Fundamental Rights in the New Constitution,*[143] Cachalia et al stress viability as the point designating the beginning of protection

---

[141] Blank (n120) 587.

[142] J F Fletcher *Humanhood* (1979).

[143] A Cachalia et al *Fundamental Rights in the New Constitution* (1994).

for the foetus, noting for example:

> Doubtless the question whether a non-viable fetus enjoys a right to life will come before the courts.[144]

Viability is also accepted to some degree by the local medical profession.[145]

Arguments from foetal development, therefore, provide compelling evidence for a logical cut-off in the provision of abortion on request at 22 weeks. However, to allow for imprecise estimates of gestational age, which are subject to a two-week margin of error,[146] this cut-off should be placed at 20 weeks. Studies indicate that abortion is safe at least through the 20th week.[147] After this period just motivation exists, in terms of safety and the theories of brain birth and viability, for intervention to protect women and the potentiality for life.

With this in mind, it would make sense to separate pregnancy into two parts. The divide would be at the half-way mark or during the 20th week of gestation, taking into account that birth usually takes place around 40 weeks. This would allow a

---

[144] Cachalia (n143) 32.

[145] See S R Benatar et al 'Abortion - Some Practical and Ethical Considerations' (1994) 84 *SAMJ* 469, 472.

[146] P King 'The Status of the Fetus: A Proposal for Juridical Legal Protection of the Unborn' (1979) *Michigan Law Review* 1647, 1678. Doctors and hospitals in the United States adopt a cut-off date earlier than the accepted viability period so as not to test the limit of the standard. See Rhoden (n117) 662.

[147] R J Lilford and N Johnsen 'Surgical Abortion at Twenty Weeks: Is Morality Determined Solely By Outcome?' (1989) *Journal of Medical Ethics* 82 85; N Hyde *Half the Human Experience: The Psychology of Women* (1985) 266. Rhoden (n117 at 640 fn9) suggests that abortion is safer than delivering a child until the twenty-first week. See also R C Reiter, S R Johnson and F K Beller 'Abortion: Is There A Rational Precept?' (1991) 78(3) *Obstetrics and Gynaecology* 464, 466.

compromise between the needs of women and those of the viable foetus. Women would have the right to choose whether to continue pregnancy during the first period, until the 20th week, while during the second stage the interests of the viable foetus would be paramount, except in certain limited circumstances, and would trump those of the woman.

Such an approach would probably be constitutional in the proportionality of its objective and in its probable accord with the provisions of the limitations clause of Chapter Three of the transitional Constitution.[148]

This proposed division of pregnancy into two phases should not be confused with the trimester system, since the latter's divisions are artificial and scientifically indefensible. However, although abortion should be legal until the 20th week of pregnancy, it might be considered wise to subdivide those 20 weeks into two periods. During the first period, until the 12th or 14th week, a woman could be permitted to procure an abortion on request from any person designated by the Act to perform it. Abortion in the first 12 to 14 weeks is very safe if performed by trained individuals with proper equipment. In fact, when abortions are performed early and properly, fewer mortalities occur than in respect of women who use oral contraceptives or as a result of tonsillectomies.[149]

---

[148] See the discusion on the limitations section in the transitional Constitution and the discussion on proportionality in the text following n284 later in this Chapter.

[149] B Hartman *Reproductive Rights and Wrongs* (1987) 243; M Potts, P Drygory and J Peel *Abortion* (1977) 211; K R Niswander and M Porto 'Abortion Practices in the United States: A Medical Viewpoint' in J D Butler and D Walberg (eds) *Abortion, Medicine and the Law* (1986) 248, 260.

Thus, purely on grounds of health and safety, the first stage (until 12 or 14 weeks) should be separated from the second stage preceding foetal viability and the enabling legislation should not contain an 'in consultation' or 'after consultation' with a doctor clause. However, it might be necessary strategically to include such a clause, even in respect of the first stage, to obtain the support of the medical profession. Support for abortion reform is already widespread amongst doctors[150] but support for a new abortion law is needed and the medical view will no doubt be sought when the law is reviewed by the courts.

The percentage of first-trimester abortions has risen in Britain from 66 per cent of the total in 1969 to 86 per cent in 1987.[151] In Sweden, where abortion on request is available until 18 weeks, 95 per cent of abortions occur in the first trimester.[152]

In the United States about 90 per cent of all abortions are performed in the first trimester. In 1987 51 per cent of all abortions were carried out in or before the eighth week of pregnancy, while only 0,6 per cent of abortions were performed beyond the 20th week.[153] Only 0,01 per cent of all abortions performed in the United States occur after the 24th week of

---

[150] See text in this Chapter accompanying n59 and n60.

[151] D Munday, C Francome and W Savage 'Twenty-One Years of Legal Abortion' (6 May 1989) 298 *BMJ* 1231, 1232.

[152] Munday (n151) 1232.

[153] S K Henshaw, L M Koonin and J C Smith 'Characteristics of US Women Having Abortions, 1987' 23 *Family Planning Perspectives* 75.

pregnancy. Only 0,03 per cent are performed after 22 weeks and less than one per cent after 20 weeks.[154]

Demarcating a second period of pre-viability gestation, i.e. between 12 or 14 weeks and 20 weeks, can be justified on health grounds. Because an abortion is more hazardous during this period than in the earlier period, it might be warranted to direct that an abortion at this stage should be performed only by a qualified medical doctor in an institution sufficiently equipped for the procedure. This is not to say that the consent of the doctor should be required. The decision to terminate pregnancy should be the woman's alone.

One issue that is debated in health circles is the fact that abortion is considered a procedure before viability while after viability it is considered to be premature delivery. It is therefore argued that an abortion Act should not deal with terminations after viability. However, the approach outlined in this dissertation does see terminations occurring after viability, albeit in extremely rare cases, and even if abortions or premature deliveries are not permitted in this instance, such should be addressed in an Act.

[154] 'Late Abortion and Technological Advances in Fetal Viability' (August 1985) 17(4) *Family Planning Perspectives* 160, 160.

c) *Cost implications*

The focus of the abortion debate is often on the question of what life is and when it begins, while the health, human rights and resource ramifications are neglected.[155] The effect of backstreet abortion on health care is, however, enormous. Besides the effect on the health of individual women, the resources it consumes are huge. In South America 30 per cent of gynaecological beds are occupied by women with abortion complications.[156] There are not many statistics for Africa but it is known that at the Mama Yemo hospital in Kinshasa, Zaire, and the Kenyatta National Hospital in Nairobi, Kenya, the rate is about 60 per cent.[157] In Nigeria, complications from backstreet abortions account for 60 per cent of the occupancy of available gynaecological beds.[158]

In Brazil, about 50 per cent of the health budget allocated for obstetrics has to be used to treat complications caused by backstreet abortions, although only 12 per cent of admissions are for this reason.[159] Statistics from the Dominican Republic indicate that it costs about US $176 to treat the complications caused by a backstreet abortion which is more than twice the cost

---

[155] J L Jacobson *Women's Reproductive Health: The Silent Emergency* (1991) 7.

[156] Jacobson (n155) 42.

[157] Jacobson (n155) 42.

[158] H Kunins and A Rosenfield "Abortion: A Legal and Public and Health Perspective" (1991) *Annual Review of Public Health* 361, 379. See also U P Aggarwal and J K G Mati 'Epidemiology of Induced Abortions in Nairobi, Kenya' (1982) 31 *Journal of Obstetrics and Gynaecology East Central Africa* 67. See also Jacobson (n155) 7.

[159] J M Paxman, A Rizo, L Brown and J Benson 'The Clandestine Epidemic: The Practice of Unsafe Abortion in Latin America' (July/August 1993) 24(4) *Studies in Family Planning* 205, 211.

of performing the abortion in the first place.[160] In Chile and Columbia it has been shown that women who suffer complications after backstreet abortions remain in hospital two to three times longer than women without complications. In South America generally, backstreet abortions generally necessitate a few days in hospital, 15 to 20 minutes of surgery and the use of blood and various drugs.[161]

It has long been noted that the result of all the backstreet abortions that are occurring in South Africa is 'permanent infertility and disability, a drain on medical resources and expenditure of public funds'.[162]

The cost of a safe legal abortion is far less than the cost of treating the effects of a backstreet abortion. In Turkey and in Nicaragua it has been 'found that the costs of treating illegal abortions are over 1 800 times those of providing a safe one'.[163] Studies in Thailand show that women hospitalised as a result of complications from backstreet abortions lost 12 days recuperating, while those who did not have to be hospitalised still lost six days.[164] In the United States, each dollar spent on providing contraception is seen to save $4,40.[165] It is also

---

[160] Paxman, Rizo, Brown and Benson (n159) 212.

[161] Jacobson (n155) 43. See also J A Fortney 'The Use of Hospital Resources to Treat Incomplete Abortions: Examples from Latin America' (November/December 1981) *Public Health Reports* 32.

[162] J Kunst and R Meiring 'Abortion Law - A Need for Reform' (June 1984) *De Rebus* 264, 265.

[163] Jacobson (n155) 43.

[164] Jacobson (n155) 43.

[165] Jacobson (n155) 44.

estimated that the benefit of spending $412 million on contraception in 1987 was about 1,2 million fewer pregnancies, and therefore 509 000 fewer mistimed or unwanted pregnancies and 516 000 fewer abortions. This was estimated to have saved about $1,8 billion.[166]

Legal abortion can be performed efficiently, quickly and at little cost. In addition, when a liberal abortion regime is introduced, the rate of maternal mortality[167] declines immediately and, in the long term, death from backstreet abortion is almost completely eliminated.[168] This is borne out by research in countries that have liberalised their law. Thus, one effect of the English Abortion Act of 1967 was that the number of abortion deaths fell.[169] Deaths resulting from abortion fell from 160 in the period 1961-63 to only nine in the period 1982-84[170] and there were no deaths as a result of backstreet abortion reported in the three years of 1982-84.[171] One

[166] Jacobson (n155) 44; see also the research published by J D Forrest and S Singh 'Public Sector Savings Resulting from Expenditures for Contraceptive Services' (Jan/Feb 1990) *Family Planning Perspectives* 75.

[167] It is estimated that 84 000 women die each year around the world as a result of backstreet abortions. See N J Binkin, N N Burton, A H Toure, M L Traore and R W Ruchat 'Women Hospitalized for Abortion Complications in Mali' (1984) 10(1) *International Family Planning Perspectives* 8, 8.

[168] V Hogbery 'Maternal Mortality - A World-Wide Problem' 23 *International Journal of Gynaecology and Obstetrics* 463.

[169] M Simms 'Abortion Law Reform: How the Controversy Changed' (1970) 17 *Criminal Law Review* 567.

[170] Munday et al (n151) 1232.

[171] P Stephenson, M Wagner, M Badea and F Serbanescu 'Commentary: The Public Health Consequences of Restricted Induced Abortion - Lessons from Romania' (1992) 82(1) *American Journal of Health* 1328.

contention, however, is that the cause of this decline in mortality was not that fewer backstreet abortions were being performed but that these abortionists might have improved their procedure and hygiene.[172]

In the United States before *Roe* was handed down, it is thought that between 5 000 and 10 000 American women died each year as a result of backstreet abortions, while thousands more had to be treated for post-abortion complications.[173] After *Roe*, maternal deaths dropped by 40 per cent in the first year and now are down about 90 per cent.[174] Thus, while 235 died in 1965, the number fell to only 13 in 1976 and seven in 1985.[175]

Where abortion has been made illegal, as occurred in Romania, maternal mortality figures increased tenfold, with 10 000 deaths occurring in the 23 years between the prohibition of abortion and the reintroduction of a liberal law.[176] When the law was liberalised again in Romania in 1989, the mortality rate fell by half in the first year.[177]

In South Africa an HSRC report shows that if abortion is legalised, the number of illegal abortions will decline dramatically, reducing pressure on the health system and

---

[172] J M Finnis 'The Abortion Act: What Has Changed' (1971) 18 *Criminal Law Review* 3.

[173] C R Sunstein 'Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion and Surrogacy)' (1992) 92(1) *Columbia Law Review* 1, 37.

[174] Sunstein (n173) 37.

[175] R Morris 'The Abortion Debate' (November 1989) *Options* 180, 181.

[176] Stephenson et al (n171) 1329.

[177] Stephenson et al (n171) 1329.

impacting favourably on the lives of women.[178] Huge state financial savings occur by reducing unwanted births and the medical complications arising from backstreet abortions.

d) *Abortion practitioners*

A new abortion Act should address the performing of abortions by those in the medical field other than doctors. One reason for this is that there are insufficient numbers of doctors in South Africa to meet the needs of a large population while the number of nurses is far greater. In 1990 there were 23 139 doctors in South Africa while there were 148 558 nurses.[179] The ratio of population to doctor was 1 340 to 1 in 1990, escalating in the former homelands to 15 625 to 1.[180]

In early terminations, sufficiently trained medical professionals could perform abortions where doctors are unavailable. Thus greater access to safe legal termination would be ensured and the attraction of the backstreets would be reduced.

Should abortion be left entirely in the hands of doctors, access to abortion will remain limited unless a national health scheme ensures wide availability.[181] In India, although abortion is legal, the fact that few health workers operate outside the

---

[178] M Ferreira *Abortion and Family Planning: A literature Study* Human Science Research Council Report 5-126 (Pretoria 1984).

[179] South African Institute of Race Relations *Annual Survey* (1991/1992) 121.

[180] South African Institute of Race Relations (n179) 109.

[181] The limited number of doctors would still remain a barrier to access especially in the rural areas.

urban areas limits access, so ensuring that only about 10 per cent of abortions are performed within the system.[182] In Turkey, where abortion on request is permitted until the tenth week of pregnancy, the requirement that the procedure must be supervised by a gynaecological specialist limits access.[183]

Who is able to perform abortions and where they may occur will be of limited significance if drugs such as RU 486,[184] with its 96 per cent success rate,[185] are permitted. The advantage of RU 486 is that it obviates the need for surgery, with all its attendant risks, and is a safe, private and quick method for women. However, it can be made inaccessible if, as in France, a number of visits to a doctor are required for its use. The first visit is to request the abortion, the second to take RU 486, the third to take prostaglandin and the fourth for a follow-up.[186] Such a schedule is a burden on time and finance for women, particularly those who are working. The number of visits can and should be reduced unless places where the drug can be administered are widespread and easily accessible.

Legalising the use of RU 486 in South Africa would allow abortion to occur easily and safely, without impacting unduly on

---

[182] Jacobson (n155) 14.

[183] Jacobson (n155) 14.

[184] RU 486, which is very cheap, operates in the first nine weeks of pregnancy and no infection or injury occurs as a result of its use.

[185] Kunins and Rosenfield (n158) 376.

[186] Kunins and Rosenfield (n158) 377.

already overstretched health professionals and facilities.[187] While administering the drug would place an additional burden on the health system, the use of RU 486 as an alternative to more complex and invasive procedures could play a major part in reducing the impact of abortion liberalisation on the resources of the health care system.

e) *Clinics or hospitals?*

Whether to permit clinics rather than hospitals to perform abortion is a question which relates to the access women have to the system. The examples of India and Bangladesh show that lifting restrictions on abortion is of limited use in the context of a shortage of facilities. In Ghana, where the abortion law was liberalised, and in Togo, where legal restrictions were completely repealed, little has changed because the necessary facilities are lacking.[188]

A frequently stated reason for hesitancy about allowing clinics to be involved in abortion is the fear of commercialisation of clinics.[189] However, research suggests that hospitals are not the best places for the performance of abortions since they often lack sufficient and suitable equipment. In addition, the health care workers at hospitals are

---

[187] P C Soller 'Third World Birth Control. Is it Abortion? Drug Combination Gains Support As Alternative to Surgical Abortion' (1991) 10 *Medicine and Law* 241, 246.

[188] S K Henshaw 'Induced Abortion: A World Review 1990' (1990) 16(2) *International Family Planning Perspectives* 59, 61.

[189] E Ketting and P van Praag 'The Marginal Relevance of Legislation Relating to Induced Abortion' in J Lovendoski and J Outshoorn (n4) 165.

less specialised than those who work in clinics and also less experienced and generally less tolerant towards abortion.[190] Delays occur more often and are of longer duration in hospitals than in clinics and women admitted for abortions must in some cases stay in the maternity wing of the hospital, with the resultant distress of being surrounded by women about to give birth or having given birth.

The cost of an abortion in a hospital is also usually greater than in a clinic. There are usually many more clinics than hospitals so the greater accessibility of clinics means that women seeking abortion have to travel less, reducing the time and cost implications.[191]

In the United States it has been determined that an abortion performed in a hospital is about four times more expensive than an abortion performed in a clinic.[192] In *Doe v Bolton*, the Supreme Court[193] invalidated a Georgia statute that permitted abortion to take place only in facilities approved by the state. The basis of the ruling was that the state was unable to show that this requirement furthered its interest in protecting the mother and that there was an insufficient legitimate state

---

[190] See Petersen (n70) 104.

[191] Ketting and van Praag (n189) 166.

[192] S K Henshaw and J van Vort 'Abortion Services in the United States, 1987 and 1988' (1990) *Family Planning Perspectives* 102.

[193] 410 US 179 (1973).

interest. Thus the court held that

> the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests.[194]

Doe also struck down the need for the concurrence of two additional doctors where an abortion is sought, a requirement extant in South Africa. The court observed that 'acquiescence by co-practitioners has no intentional connection with a patient's needs'.[195]

Henshaw's study reveals that the trend in developed countries is to make abortion services available in clinics and doctors' offices.[196] Thus, 90 per cent of all abortions carried out in the US in 1988 were not performed in hospitals. Four per cent were performed by physicians in their offices, 22 per cent in health clinics and 64 per cent in clinics.[197] In Holland, 81 per cent of all abortions were performed in places other than hospitals while the figure was 70 per cent for West Germany, 51 per cent for Norway and 54 per cent for Poland, excluding abortions performed in doctors' offices.[198] In Spain most abortions take place in private clinics.[199]

Where clinics perform abortions on a regular basis and the staff are trained, the service they provide is thus far superior

---

[194] At 195.

[195] At 193.

[196] Henshaw (n188) 65.

[197] Henshaw and Van Vort (n192) 102.

[198] Henshaw (n188) 65.

[199] M Ruiz 'Spain' (30 September 1989) 299 *BMJ* 814, 816.

to what hospitals are able to provide. In Britain, for example, the rate of complication is higher in hospitals than it is in clinics.[200]

Clinics would be an effective way of providing access to safe abortions throughout South Africa. In 1992 there were around 60 196 family planning clinics in the country.[201] This reflects an increase of 8 223 clinics since 1990.[202] If the professional staff of these clinics were sufficiently trained to perform early abortions, broad access to abortion would become a reality and the temptation to resort to the unqualified backstreet abortionist would be reduced.

A new Act should provide that while all clinics or other authorised facilities may perform abortions until the fourteenth week, all state medical facilities shall provide such services. It should also be stipulated that women admitted for abortion shall not be placed in gynaecological wards where other women are delivering babies, but in a separate section removed from maternity facilities and babies.

Clinics ought to be licensed, not to limit their number but to ensure adequate service. Thereafter, random inspections ought to be undertaken by the health ministry on an ongoing basis to ensure that women's safety and health are adequately protected.

---

[200] Ketting and Van Praag (n189) 166.

[201] South African Institute of Race Relations *Annual Survey* (1992/1993) 281.

[202] B Klugman 'The Politics of Contraception in South Africa' (1990) 13(3) *Women's Studies International Forum* 266.

f) *Fees*

The Act should also address the issue of a maximum fee for an abortion. While in principle the service should be available free, limited resources might be an argument against the practice. However, if the fee for this service is not affordable, backstreet practitioners will continue to lure women away from institutions, such as hospitals and clinics, where abortions are safe. As Kunst and Meiring note:

> To ensure that any change is not confined to the statute book alone, it is essential that the authorities controlling health resources are equipped to ensure the availability of services at the earliest possible stage of pregnancy, without which safe abortion continues to be only within the means of the wealthy.[203]

In Denmark, France and Sweden national health insurance covers abortion costs[204] while in 1990 the French government started subsidising the cost of RU 486.[205]

As Jacobson argues, state funding is vital.[206] If abortion is legalised but not affordable, the result will be that once again access will be determined by wealth. Simply to change the abortion law will be of little value to the majority of women who need abortions.

---

[203] Kunst and Meiring (n162) 266.

[204] Jacobson (n155) 17-18.

[205] B Hernandez 'To Bear or Not to Bear: Reproductive Freedom as an International Human Right' (1991) 17 (2) *Brooklyn Journal of International Law* 309, 351.

[206] Jacobson (n155) 12.

g) *Counselling*

Counselling should be addressed within a new law. However, the value or significance of it should not be overstated as a common strategy used by people opposed to abortion is to emphasise the supposed negative effects of abortion on the mental health of women who have undergone the procedure.

This has been a contentious area of debate for people on both ends of the spectrum. However, in a study performed by the American Psychological Association, the conclusion reached was that 'severe negative reactions after abortion are rare'.[207] Jane Hodgson notes that:

> Studies confirm that abortion for the majority of women is not a threat to their physical and/or mental well-being. Most women feel relieved, and they return to as good or even better psychological, marital and inter-personal relationships than before the abortion.[208]

While there are some negative psychological effects for some women who have abortions, Henry David[209] shows that the main reaction after a woman has had an abortion is relief. The process before actual performance of the abortion is nonetheless seen to be a lonely and stressful one.

In a long-term study in the Swedish context, Forsman and

---

[207] G H Wilmoth, M de Altern and D Bussell 'Prevalence of Psychological Risks Following Legal Abortion in the U S: Limits of the Evidence' (1992) 48(3) *Journal of Social Issues* 37, 38.

[208] J E Hodgson (ed) *Abortion and Sterilization: Medical and Social Aspects* (1981).

[209] H P David 'Psychological Studies of Abortion in the United States' in H P David, H L Friedman, J van der Tak, M J Smith (eds) *Abortion in Psychological Perspective: Trends in Transnational Research* (1978) 77.

Thuwe[210] describe the negative effects on children and the greater incidence of psychosocial problems in situations where the child's mother was not permitted to have an abortion. In a study on women in Prague, Henry David[211] notes that

> there is considerable evidence that, in the aggregate, unwantedness in early pregnancy and subsequent compulsory childbirth has a detrimental effect on children's psychosocial development, with socially undesirable long-term implications.

In South Africa the effect of the existing effective prohibition of abortion has ensured that women are limited in their support structures as well as in the possible advice and other information that they might receive.[212] Women who wish to have an abortion performed fear humiliation and stigmatisation. This can result in potentially damaging levels of anger and frustration in addition to the negative consequences for unwanted children outlined above.[213]

Thus, institutions or individuals providing abortion services should offer relevant information but it should not be mandatory either before or after the abortion. Counselling should be client-based and non-directive. It should look at all the issues and provide information about and access to alternatives. Information (via a variety of mediums in consideration of the

---

[210] H Forsman and I Thuwe 'The Göteborg Cohort 1939-1977' in H P David, Z Dytrych, Z Matejcek and V Schuller (eds) *Born Unwanted: Developmental Effects of Denied Abortion* (1988).

[211] H P David 'Born Unwanted: Long-Term Developmental Effects of Denied Abortion' (1992) 48(3) *Journal of Social Issues* 163, 179-80.

[212] S Stanton *An Exploratory Study of Illegal Abortions With Focus on the Pre-abortion Decision-making Process* (unpublished BA (Hons) thesis University of Cape Town 1987).

[213] Stanton (n212) 36.

different languages spoken and high illiteracy rates) and sensitive counselling should be available without unnecessarily prolonging a difficult choice. Such an approach would help to ensure that women are sufficiently facilitated to make individual decisions in accord with their moral stance. However, counselling should generally be part of a comprehensive health care programme and a family planning programme in particular.

It may be necessary strategically to build counselling into abortion legislation to create alternatives to abortion. This may help in creating the proportionality the courts will look to discover when they seek to strike a balance between the foetus and the pregnant woman.

h) *Waiting periods*

In certain countries a short waiting period for purposes of education and counselling is mandated before an abortion can occur. Some 13 countries require that non-directive counselling be provided to women seeking abortion,[214] while Finland, France and Italy require governmental agencies to provide pregnancy counselling and counselling on abortion itself.[215]

The policy of a short waiting period after the woman has consulted her doctor has been sanctioned in Belgium, France and Luxembourg. In France, however, if there is a fear that the time

---

[214] R J Cook and B M Dickens 'A Decade of International Changes in Abortion Laws: 1967 - 1977' (1978) *American Journal of Public Health* 637; R J Cook and B M Dickens 'International Developments in Abortion Laws: 1977 - 1988' (1988) *American Journal of Public Health* 1305.

[215] International Women's Health Organizations 'Amicus Curiae Brief' (1989) *Women's Rights Law Reporter* 201.

limit for the abortion will be overrun, the waiting period can be dispensed with.[216] In these countries the women must be given information about alternatives.[217]

In the United States[218] waiting periods have been found to be unconstitutional because they do not assist in foetal protection but rather limit a woman's access to abortion.

In South Africa the desperate lack of widespread family planning,[219] including alternatives to abortion, and hopelessly inadequate sex education, could be argued as factors which necessitate a waiting period to guard against an uninformed and rash decision by a woman to have an abortion. However, a large number of South African women live far from health services and to require them to travel at least twice to a service point is to impose a hardship in terms of time and finance. The danger is that a mandatory waiting period will not see women making a more informed decision but rather circumventing the burden of the requirement by once again resorting to backstreet abortionists.

In addition, whether to have an abortion is never an easy decision and numerous factors come into play before it is made. Women do not simply go and have an abortion but agonise over what to do. To insist on a waiting period is to tell women that they

---

[216] B M Knoppers, I Brault and E Sloss 'Abortion Law in Francophone Countries' (1990) 38 *The American Journal of Comparative Law* 889, 914.

[217] Knoppers et al (n216) 914.

[218] *Akron v Akron Center for Reproductive Health* 462 US 451 (1983).

[219] A Richards, E Lachman, S B Pitsoe and J Moodley 'The Incidence of Major Abdominal Surgery After Septic Abortion - An Indicator of Complications Due to Illegal Abortion' (1985) 68 *SAMJ* 799.

are not sufficiently competent to make such decisions. Women do know about alternatives, although they may not know where they can receive assistance in them. Such information should be provided to them but not in a directive or judgemental way.

For all of the scenarios and analogies, the personal, political and religious reasoning, and the medical evidence from each side of the abortion issue, the ultimate decision about whether to have an abortion lies with the pregnant woman. Societal failure to recognise the moral independence of women as decision makers does not significantly affect the numbers choosing abortion, but it does drastically affect the physical, psychological, social and economic condition of women.

i) *Statistical reporting*

The present South African Act mandates a myriad of procedures before an abortion can be performed. Such an approach should be avoided in future to ensure greater access to safe legal abortion and also because the courts have not been sympathetic to unduly onerous requirements.[220] Among the requirements to be avoided is statistical reporting which includes the name of the pregnant woman, since this often is experienced as an invasion of privacy sufficient to justify or necessitate resort to the backstreets. Research in the Commonwealth of Independent States shows that,

[220] This can be seen, for example, in the *Morgentaler* decision in Canada discussed in Chapter 4. In the 1986 United States decision of *Thornburgh v American College of Obstetricians and Gynaecologists* 476 US 747 (1986) the court struck down record-keeping. Blackmun J, at 772, was highly critical of efforts by the state to impose conditions which were time-consuming, expensive and invasive.

while abortion is widely available, many women avoid the state-funded option because it has to be recorded on their work and health papers.[221]

Statistics on the workings of the Act, the type of services available, and where and when they are being provided, are useful but the names of the women concerned are irrelevant.[222] In any case, requiring the inclusion in the record of names might be seen as a transgression of rights afforded by the privacy provision of the Chapter on Fundamental Rights.[223]

j) *Anti-abortion protests and attacks*

Opponents of abortion in the United States have targeted clinics and individuals performing abortions and have harassed and intimidated women seeking abortion. It is therefore necessary to build into a new Act protection for those who wish to exercise their right to abortion and sanctions for those who interfere with this right. This need has been recognised in the United States where the Freedom of Access to Clinic Entrances Act (FACE) was enacted in May 1994. The FACE Act provides for penal sanctions against individuals who disrupt the operation of abortion clinics. A similar provision should be included in a new South African abortion law.

---

[221] Jacobson (n155) 28.

[222] In New Zealand, for example, the certifying doctor must submit a report but the name and address of the patient is not required. See Petersen (n70) 120.

[223] See text accompanying n392 and n393 in this Chapter.

k) *A conscience clause*

A necessary feature of a new abortion law would be a conscience clause which permits those health professionals who do not wish to be involved in performing abortions to withhold their services. Such a provision exists in the present Act and is invoked by doctors or nurses who do not wish to be part of an abortion.[224] A critical corollary in a new law, however, should be a clause which requires a health professional invoking the conscience clause to refer the pregnant woman speedily to an accessible person or organisation that will perform an abortion. In France, a similar provision stipulates that a doctor invoking the conscience clause must inform the woman at her first appointment of his or her unwillingness to be involved in performing an abortion.[225] In the Ivory Coast and Senegal a doctor may withdraw from involvement in an abortion but he or she must ensure that another doctor is found to provide the health care sought.[226]

One problem that needs to be addressed in this regard is the issue of doctors who refuse to do terminations while in public service, but then perform abortions when they enter private practice. A possible solution would be for the law to require a written declaration from the health professional seeking to invoke the conscience clause. Such a declaration would be binding unless and until it was revoked on application to, for example, the Medical and Dental Council.

---

[224] Section 9.

[225] Knoppers et al (n216) 918.

[226] Knoppers et al (n216) 919.

1) *The issue of consent*

In terms of the approach advocated here, a new law should not require the consent of a doctor or doctors consulted by a woman before an abortion may be performed. The aim should not be to give the medical profession control of access to abortion. Rather, the law should uphold a woman's right to make a choice. This is of great importance even though a conscience clause would, to some extent, dilute such a right by empowering medical professionals to withhold their consent to involvement in abortion.

The issue of spousal consent is one that has been evaluated in a number of countries. In Australia, Canada, France, Israel, Italy, the United Kingdom, the United States and the former Yugoslavia, attempts to empower spouses or partners to veto abortions have been rejected by the courts. In South Africa, the decision for or against abortion ought to be made by both partners and the law should facilitate that process by providing whatever is needed in the way of support, counselling and other assistance. However, when the two partners cannot agree, the final decision has to be made by the woman, as the ramifications for her, economically, socially and physically, are enormous. In addition, as noted before,[227] many pregnant women in South Africa are unmarried and their chances of receiving child support are extremely small.

On the issue of parental consent in cases of abortion sought by minor children, there has been widespread debate and decisions have differed. At present South African law, in the form of the

[227] See text accompanying n272 and n273 in Chapter 3.

Child Care Act,[228] directs that if a guardian of a minor will not agree to an operation, the Minister of Health can agree to such an operation. The Act also permits a minor over 18 to consent to an operation and a minor over 14 to decide on medical treatment without parental consent.[229]

Thus the type of service available will be critical to determining whether parental consent is necessary. If the Child Care Act provisions remain, then RU 486, for example, could be used without parental consent within the provisions of that Act. However RU 486 or other similar drugs may or may not become available in South Africa and the Child Care Act may or may not be amended. To avoid uncertainty and dependence in decisions on the type of service available, a provision on parental consent should be incorporated into a new Act.

C. **THE COURTS AND ABORTION**

The section in this chapter on the role of the courts has four parts. The first introduces general issues concerning the role of the courts. The second examines procedural issues to determine what impact questions such as access and standing will have on the abortion issue. The third part investigates substantive issues to determine what the effect of the language of the transitional Constitution and Bill of Rights will be. Those rights relevant to abortion are examined, as are the sections in the Bill of Rights on interpretation and limitation, to determine

---

[228] Section 39.

[229] See *G v Superintendent Groote Schuur Hospital* in the text accompanying and following n293 in Chapter 3.

what restrictions might be placed on the various rights. In the final part, the composition and appointment procedures of the Constitutional Court are examined to determine their possible effect on the adjudication of the abortion question.

1. **General issues**

The Constitutional Court will be the final forum for all matters relating to the Constitution and all other laws[230] and the legislature will not have free reign to make law as occurred in South Africa when parliamentry supremacy operated. Thus, the decisions that emanate from the Constitutional Court will bear on the lives of all South Africans. The Constitutional Court and, with some exceptions, the Supreme Court, have the power to determine the compatibility of the transitional Constitution's chapter on human rights with law in force both before and after the Constitution came into operation. Section 7(2) states that the chapter

> shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

The implication is that all law, including legislation and the common law, is covered by this provision. However, there is debate about whether the chapter has horizontal effect[231] and,

---

[230] Section 98(2).

[231] Bills of rights are usually vertical in that they operate against the state. Thus a citizen can bring an action against the state where the state has transgressed his or her rights. Usually this amounts to a challenge to a law or administrative act by the legislature or the executive. Horizontal application means that the bill could be invoked by one private individual against another. Thus state action would not be necessary, if the bill applied horizontally, to found an action. All law, including private law, could be tested against the provisions of such a

thus, whether it governs private law relationships.[232] While the bill is clearly vertical in ambit, there are arguments for its horizontal application. A number of sections could be read to ensure that a court does apply the bill, or at least certain parts of it, in a horizontal fashion. An example is section 7(2) which reads:

> This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

This section could be interpreted to include all law, including private law,[233] in the operation of the Chapter.

However, a section indicating the possible non-horizontal application of the bill is section 7(1) which reads:

> This Chapter shall bind all legislative and executive organs of state at all levels of government.

The argument is that as section 7(1) is silent on the judiciary the law emanating from this branch of government is not subject

---

bill of rights.

[232] See generally Cachalia et al (n143) 19-20; M Brassey 'Labour Relations Under the New Constitution' (1994) 10(2) *SAJHR* 183.

[233] Traditionally South African law has had strict divisions. Thus public and private law were completely separate and the law of one area had little effect on the other. With the move to a constitutional state these divisions will become very artificial, particularly if the Constitution and Bill of Rights intervene in all areas of the law directly. While in the past abortion was firmly rooted in private law, this is no longer the case. The Constitution will have direct and indirect effect on the law of abortion and thus the relevance of private and public law in at least this field will disappear. At the same time the applicability of the South African common law based on its historical roots of Roman-Dutch and English law will decrease. While this body of law has played a significant part in South African law, particularly in the interpretation of words and concepts in relation to abortion, this will be replaced by the courts referring to and incorporating the principles contained in the Chapter on Fundamental Rights.

to the operation of the chapter.[234] Thus private law is considered to be outside the constitutional arena.[235]

Regardless of which interpretation a court adopts on this question, it is certain that the aims and general thrust of the Bill of Rights will be incorporated into all branches of the law. Section 35(3) stipulates that when performing the

> interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.[236]

Thus, even though there is debate about whether there is direct *Drittwirkung*,[237] section 35(3) ensures the indirect application of the chapter to private law.[238]

In any event, the relevance of this debate to the abortion question is not that significant. Most of the law on abortion is contained in the Abortion and Sterilisation Act and procuring an abortion outside the parameters of the Act is an offence. Since the Bill of Rights is at least vertical, the courts will be able to apply directly Chapter 3 to the Abortion and Sterilisation Act, any revised version thereof, and even any new law relating to abortion, in terms of the vertical operation of the Constitution and Chapter 3. Even if the Bill of Rights were

---

[234] See L M du Plessis and H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 112.

[235] See generally J M Burchell (1991) 20 *Businessman's Law* 155 and 175; J Burchell *Principles of Delict* (1994) 13; J Neethling, J M Potgieter and P J Visser *Law of Delict* (1994) 34.

[236] Section 35(3).

[237] Horizontal application.

[238] See D Visser 'The Future of the Law of Delict' (unpublished paper) 1994.

determined not to have horizontal application, the courts would be able to apply Chapter 3 to the law affecting abortion which is not contained in the Act. This would flow from the indirect application of the bill envisioned by section 35(3).

An interesting question would be what would occur in the unlikely event that the legislature simply repealed the Abortion and Sterilisation Act[239] and did not replace it with anything. Would the more restrictive common law on abortion again be the law or would no law on abortion exist?

In this situation the Interpretation Act[240] would play a part. Section 12(2) states:

> Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not -
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect.

Thus the intention of the legislature is decisive in determining whether or not a previous law revives. However, whether this section includes the non-revival of the common law depends on the meaning given to the word 'anything'. Steyn is of the opinion that the common law might revive if a statute is repealed.[241]

---

[239] This Act continued to be in force after the April 1994 elections as section 229 of the transitional Constitution states:

> All laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such an area, subject to any repeal or amendment of such laws by a competent authority.

[240] Act 33 of 1957.

[241] L C Steyn *Uitleg van Wette* (1981) 176. However, it was stated in *S v Kruger* that the common law on abortion was repealed by the passing of the Abortion and Sterilisation Act. See chapter 3 n139. This view was confirmed in the *Collop* case. See chapter 3 n140.

Steyn cites *Tiffin v Cilliers*[242] in this regard, where the court held that the word 'anything' was 'wide enough to include a rule of the Common Law' but expressed some 'doubt, however, as to the correctness of that view'.[243]

Elucidating Steyn's view, Devenish[244] points out that section 12(2)(a) applies only where one law repeals another. However, this does not take the matter further as the repeal of a law would occur either when a later law on the same subject overrode it by implication, or Parliament passed a law which explicitly repealed it.

Thus, if Parliament simply repealed the Act, no abortion statute would exist and abortion would be decriminalised. However, there would still be some law on abortion as not all areas pertaining to abortion are incorporated into the Act, for example notification to parents of minors seeking abortions. If the Constitution applies vertically only, the courts could apply the spirit, purport and objects of the Bill of Rights in their interpretation of the common law. They could not, however, strike down the provisions of the common law; they could merely interpret the common law with regard to the principles contained in the Constitution. If the approach of simply repealing the Act is adopted, it will create uncertainty and have far-reaching negative effects. In all probability, however, this will not happen.

The minimum position, therefore, is that the Abortion and

---

[242] 1925 OPD 23.

[243] At 26.

[244] G Devenish *Interpretation of Statutes* (1992) 254.

Sterilisation Act falls within the ambit of the Chapter on Fundamental Rights.

The Constitutional Court will probably enter the abortion arena early in its existence to test either the existing abortion law or new legislation.[245] Groups on both sides have already begun preparing for the battle and the American pro-life group Human Life International has been investing finance, expertise and other resources in South Africa towards this end.[246]

Whether to hear a challenge to the Abortion and Sterilisation Act under the transitional Constitution will not be an easy decision for the Constitutional Court, if indeed the decision is within its discretion. While the right to life section might remain the same in the final constitution, other sections of the Bill of Rights will be amended and other rights will be added. Thus, if a court considers the abortion issue in terms of the transitional Constitution, the whole process may have to be repeated once a final constitution comes into force.

However, an issue as controversial as abortion should be settled as quickly and as permanently as possible. The Abortion and Sterilisation Act is seen by many as one of the laws in urgent need of review. The consequences of the law remaining on the statute book are severely negative for women's lives and health and it may be that review cannot wait for the completion of the final constitution. An interim resolution of the abortion question may be preferable to delaying hearing such a case until

---

[245] See C Murray 'Food for Thought in Hungary' (31 May 1994) 8(3) *Democracy in Action* 19, 20.

[246] *The Argus* 13 April 1993.

the final constitution has been adopted.

The abortion issue might be placed before the Constitutional Court in a number of different ways. Much of the controversy around abortion could be reduced if Parliament, on passing a new law or amending the old law affecting abortion, sent it to the Constitutional Court for abstract review. Should the court determine the law to be constitutional, the Act will be insulated from further challenges. This process is permitted in a number of countries, including Belgium, France, Finland, Ireland and Canada, and is permitted by the transitional Constitution as well.[247]

Abstract review can occur on request of one-third of the members of the Senate, National Assembly, or a provincial legislature.[248] The constitutionality of a bill shall be referred to the court by the Speaker of the National Assembly, the president of the Senate, or the Speaker of a provincial legislature, if they are requested to do so by at least one-third of the members of the relevant body.[249]

Of course, abstract review might not find its way into the final constitution. Thus, the timing of new abortion legislation will be important. The length of time that it takes to draft and enact such legislation may well impact on what type of review procedures are available to the courts.

---

[247] For an analysis of the comparative procedures see K Asmal 'Constitutional Courts - A Comparative Survey' (1991) 24 *CILSA* 315. In the abortion context this process has been used in Germany and Spain. See text accompanying and following n178 and n214 in Chapter 4.

[248] Section 98(a).

[249] Section 98(2)(d) and section 98(9).

The abortion issue could be raised as a constitutional question by an abortionist charged with performing an abortion. This occurred in Canada in the *Morgentaler* decision, where a doctor performing abortions challenged the validity of the criminal code's provision on abortion. The statement of McLachlin J in the Canadian case of *Boggs v The Queen* is pertinent in this regard:

> Any constitutional defect may be raised in the defence of a criminal charge. This is only just. A person should not be convicted under an invalid law.[250]

A woman facing prosecution for having had an abortion may place the issue before the court. Alternatives might be a doctor who has performed an abortion without conforming to the requirements of the Act, a person applying to court for a declaration of rights, or a group applying for a declaration that performing abortion transgresses the right to life in the Constitution.

The manner in which the case comes before the court will have an impact on the outcome of the decision. If the litigation is a planned and strategic assault on the Abortion and Sterilisation Act, the decision that the court will hand down will reflect this. Thus it is imperative that the issue is taken up by a group with the interest and resources, both in terms of finance and research capability, to pursue the case effectively, including the engagement of good advocates with a full understanding of the issues.

If the problem comes before the court as a result of a prosecution of, for example, an abortionist, who merely wants to escape conviction, then the type of argument presented to the

---

[250] [1981] 1 S.C.R. 49.

court by defence lawyers will in all probability not address all the issues relevant to the subject. In this type of instance, the court will not hear all the germane points, as the objective of the lawyers will be merely to escape sanctions for their client, rather than to obtain a decision which is in the public interest. However, even in this kind of situation, the possibility of intervention by public interest groups could help ensure a decision which is based on a hearing of all the issues. This is permitted by the courts in countries such as the United States and Canada.

2. **Procedural Issues**

a) *Function of the Constitutional Court*

The role and purpose of the courts must be seen in terms of the different processes in which the judiciary will be involved. One role of the judges on the Constitutional Court will be to balance competing interests in the light of the Bill of Rights, and in few instances will this be as controversial as in respect of abortion.

The powers and functions of the Constitutional Court are set out in the Constitution[251] and the court will be

> the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution, including:
> (a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
> (b) any dispute over the constitutionality of any executive or administrative act or conduct or

[251] An amendment to the transitional Constitution permits the jurisdiction of the other courts to be extended by an Act of Parliament. See the amendment to section 98 in terms of the Constitution of the Republic of South Africa Third Amendment Act No 13 of 1994.

threatened executive or administrative act or conduct by any organ of the state;

(c) any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;

(d) any dispute over the constitutionality of any bill before Parliament or a provincial legislature, subject to subsection (9).

(e) any dispute of a constitutional nature between organs of state at any level of government;

(f) the determination of questions whether any matter falls within its jurisdiction; and

(g) the determination of any other matters as may be entrusted to it by this Constitution or any other law.[252]

A fundamental question, however, will be the way in which the court itself views its function. The first Constitutional Court appointees will set a trend for later appointees to follow. Crucial to the issue of direction will be the type of judge appointed and the agendas of these judges. The background of the judges will determine the degree to which the court is activist, pushing through a programme of socio-economic change, and the extent to which it is restrained, leaving it to the legislative process of a democratic state to decide issues. The question of the composition of the court in South Africa and the effect of this on an abortion decision will be looked at later in this chapter.

The Supreme Court has also been granted certain constitutional powers. A local or provincial division of the Supreme Court is given powers within its area of jurisdiction to investigate

(a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;

(b) any dispute over the constitutionality of any executive or administrative act or conduct or

[252] Section 98(2).

threatened executive or administrative act or conduct by any organ of the state;

(c) any inquiry into the constitutionality of any law, applicable within its area of jurisdiction, other than an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;

(d) any dispute of a constitutional nature between local governments or between a local and a provincial government;

(e) any dispute over the constitutionality of a bill before a provincial legislature, subject to section 98(9);

(f) the determination of questions whether any matter falls within its jurisdiction; and

(g) the determination of any other matters as may be entrusted to it by an Act of Parliament.[253]

A crucial distinction between the power of the Supreme Court and that of the Constitutional Court is that the Supreme Court does not have the authority to determine the constitutionality of an Act of Parliament.[254] This was the conclusion reached by Judge Goldblatt in *Rudolph and another v Commissioner for Inland Revenue and others*,[255] although he could have interpreted 101(3)(a) in a much broader way. This decision could slow the process of the Constitutional Court. If the Supreme Court does not have power to examine the constitutionality of an Act of Parliament, then few cases will be heard and few issues resolved, particularly before a final constitution is adopted.

[253] Section 101(3).

[254] Section 101(3)(c). If, however, both parties to a matter agree that the provincial or local division should determine the issue, then in terms of section 101(6) that court shall acquire jurisdiction. Thus the Supreme Court could in certain cases determine the validity of an Act of Parliament.

[255] 1994 (2) *BCLR* 9. See M Gevisser 'Potential Logjam Could Defend the Purpose' *Weekly Mail & Guardian* 20 to 26 May 1994.

b) *Access to the court*

Vital to the discussion of how the Constitutional Court may resolve the abortion issue is the question of who will be able to petition the court to hear an issue. A crucial aspect will be the manner in which the court permits access and how it interprets section 100, which reads:

> (1) The conditions upon which the Constitutional Court may be seized of any matter within its jurisdiction, and all matters relating to the proceedings of and before the court, shall be regulated by rules prescribed by the President of the Constitutional Court in consultation with the Chief Justice, which rules shall be published in the Gazette.
> (2) The rules of the Constitutional Court may make provision for direct access to the court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction.

This section will play a role in determining if and when the abortion issue gets to the court. The court may read it as enabling a weeding-out process, such as pertains in the United States, where a *certiorari* procedure permits the Supreme Court discretion in deciding which of the few thousand applications brought each year will be heard. The result of this discretionary power is a manageable caseload of approximately 200 cases a year. A similar procedure exists in other jurisdictions. In Germany, for instance, the Federal Constitutional Court can decide not to hear a case and does not need to provide reasons for so deciding, although in practice it usually does.[256]

The experience of other countries in relation to capacity and workload is useful in assessing the possible scenario in

---

[256] J van der Westhuizen 'The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, With Reference to the German Experience' (1991) *De Jure* 1, 15.

South Africa. In Canada the Supreme Court decided only three cases in its first year of hearing cases requiring application of the Charter and only 10 in the second year.[257] In the first eight years of applying the Charter the court has given fewer than 150 judgments, therefore averaging less than 20 decisions a year.[258] In the United States, during the one-year term ending June 1992, 108 decisions were handed down by the Supreme Court.[259] The Italian Constitutional Court, with 15 judges, hands down fewer than 200 decisions per year,[260] while the Portuguese Constitutional Court decides about 500 cases per year.[261] In its first 20 years of operation, the Supreme Court in India has heard only a few thousand cases.[262]

The Constitutional Court could read section 100 as authorisation to decide which cases to hear. However, it could be argued that the provision does not permit such a discretion but refers rather to the procedures that must be followed by those who wish to approach the court. In terms of this interpretion, the court can refuse to hear matters within its jurisdiction and it can regulate the manner in which litigants gain access. This obviously has implications for the time frame

---

[257] D Beatty 'Human Rights and Constitutional Review in Canada' (1992) 13(5-6) *Human Rights Law Journal* 185, 186.

[258] Beatty (n257) 198.

[259] *New York Times* 5 July 1992 10.

[260] M Cappelletti *Judicial Review in the Contemporary World* (1989) 62.

[261] V Moreina 'The Portuguese Constitutional Court' paper at the Conference on a Constitutional Court (1991).

[262] G H Gadbois 'Indian Judicial Behaviour' (1970) *Economic and Political Weekly* 149.

in which particular decisions can be expected.

It must be remembered that the final constitution must be completed within two years of the introduction of the transitional Constitution, that is by April 1996. Given that the court will have to spend at least some of its time establishing structures, finding its feet and determining the compatibility of the final constitution with the 34 Constitutional Principles contained in the transitional Constitution, it would be unrealistic to expect it to deal with a large number of other issues. By the time the court sits, there will be a number of cases waiting for resolution and the abortion issue might not be considered a priority. This is possibile since an abortion decision delivered in the transitional period may have to be reviewed in terms of the final constitution. On the other hand, it is possible that the relevant provisions of Chapter 3 of the transitional Constitution will find their way into the final constitution unchanged, and this may influence the decision about whether to hear such a case early. Thus, lack of clarity on the final constitution may generate some degree of inertia, particularly in respect of highly controversial issues such as abortion.

An argument against interpreting section 100 as conferring a discretion to 'weed out' cases is that the Constitutional Court has exclusive jurisdiction in some areas and refusal to hear a matter would therefore allow no remedy at all. A solution may be a decision to permit the Supreme Court wider constitutional powers, including the power to invalidate Acts of Parliament, and this might result in abortion being challenged at Supreme Court

level. If this occurred, there would be more justification for the Constitutional Court to exercise discretion about whether to hear a case or not. However, even if the Supreme Court were granted these wider powers, an appeal to the Constitutional Court from an abortion decision might be delayed by that court until adoption of the final constitution.

Another issue which will affect both capacity and the timing of an abortion case is the argument that all 11 judges of the Constitutional Court must sit together. This interpretation derives from section 98(1) which states that the Constitutional Court shall consist of a 'President and 10 other judges'. This narrow reading of the section would obviously limit the number of cases the court could hear. A preferable reading would be that this section merely describes the size of the court, rather than stipulating how many judges must sit on a particular case.

However, the Constitutional Court might see as precedent the fact that when the Appellate Division considered constitutional issues, all the members of the court sat. Furthermore, the Constitutional Court Complementary Bill[263] in fact notes that a minimum eight judges need to be present for a case to be heard.[264]

The counter-argument against all judges sitting on all cases is that there are already delays of some years in the Appellate Division, and there is the further danger of the Constitutional Court being swamped by large corporations with vast resources litigating cases such as expropriation, taxes and other issues

[263] B9-95.

[264] Section 8.

relevant to themselves only. If this occurs, the function of the court will be dramatically undermined, as many pressing fundamental human rights issues will remain unaddressed and the court will be faced with a crisis of legitimacy.

The courts, generally, are more accessible to single individuals and minorities than are other branches of government. The result of this is that the

> courts can move the law forward to a more enlightened viewpoint on a controversial subject. They can stake out a position that the people may well accept only once they see it spelled out, but that an electorally accountable body would have been loathe to risk proposing in the face of current attitudes.[265]

In similar vein, Rubin points out that the political parties elected to the legislature are inclined to

> let sleeping dogs lie and resist becoming involved in unpopular battles (such as repeal of the abortion laws) that lose votes without winning any.[266]

It is therefore not surprising that the courts are often the first to be drawn into attempts to revise the law.[267] Progressive or enlightened decisions can have very positive effects for the whole society. Should the opposite occur, however, the ramifications can be detrimental and long-lasting.[268] A Constitutional Court decision cannot be reversed except by amendment to the Constitution or a subsequent Constitutional Court decision. The findings of the court can,

---

[265] P Weiler 'Rights and Judges in a Democracy: A new Canadian Version' (1983) 18 *University of Michigan Journal of Law* 51, 72.

[266] Rubin (n3) 29.

[267] Rubin (n3) 29.

[268] Rubin (n3) 31.

however, be 'circumvented, narrowed, delayed, avoided or ignored'.[269]

c) *Standing*

Procedural issues have played a crucial role in the South African legal system in the past and the courts have applied a very narrow view of *locus standi* or standing to sue. It has been usual for the courts to demand that a person appearing before them must be closely connected with the matter before the court.[270] Such a stance was adopted by the court in *Christian League v Rall* where the plaintiffs were judged not to have the requisite standing.[271]

However, the transitional Bill of Rights stipulates that a much wider rule of standing applies, one that is so broad as to permit standing to almost any person or body. Section 7 states that the relief permitted may be obtained by

(i) a person acting in his or her own interest;
(ii) an association acting in the interests of its own members;
(iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
(iv) a person acting as a member of or in the interest of a group or class of persons; or
(v) a person acting in the public interest.

A critical issue in this regard for the abortion question is whether a foetus could have the standing to bring a suit.[272]

---

[269] Rubin (n3) 115.

[270] C Loots 'Standing to Enforce Fundamental Rights' (1994) 10(1) *SAJHR* 44, 49.

[271] At 826-7 of the judgment. See text accompanying and following n33 in Chapter 3.

[272] This is discussed later in the text following n319.

Alternatively, the question is whether someone could bring a matter on behalf of a foetus in terms of subsection (iii) or whether a person bringing such a suit would be acting in the public interest.

Already the courts have shown some willingness to depart from the rigidity of the court in *Rall* on the question of standing.[273] In *G v Superintendent Groote Schuur Hospital*[274] the court was willing to, and did, appoint a curator for a foetus whose 14-year-old mother wished to obtain an abortion. Seligson AJ stated that:

> It seems to me that there is much to be said for recognising that an unborn child has a legal right to representation, or an interest capable of protection, in circumstances where its very existence is threatened.[275]

However, the court undermined this intention by appointing the same curator to look after the interests of the minor mother and those of the foetus, although the interests of mother and foetus were completely at odds.

While process issues have been used by courts around the world to avoid deciding abortion cases, eventually the substantive issues in those cases had to be faced.[276] In spite of the continued use of the word 'person', seemingly to oust the standing of a foetus,[277] it is unlikely that the Constitutional Court avoid the abortion issue on this basis as other courts have

---

[273] See text accompanying n33 in Chapter 3.

[274] 1993 (2) SA (C) 252.

[275] At 255.

[276] See the discussion on procedural issues in Chapter 4.

[277] See the discussion on this point in the text following n319 later.

done.[278] The court will have to decide the abortion issue without using standing or other procedural issues, such as mootness, as a bar to deciding the problem on the merits.

3. **Substantive issues**

In South Africa the perception, at least in some quarters, is that the right to life is the central right around which the abortion debate revolves, while all other rights play secondary and minor roles.[279] However, there are other relevant rights, some of which might play a greater role in the deliberations and resolution of the abortion question. Besides the rights to privacy, dignity, security of the person, freedom, equality, equal protection, conscience and religious freedom which could be seen by the court to indicate abortion liberalisation, the section on children could, together with the right to life section, be employed to limit abortion availability, should the court or any of the judges wish to do so.

a) *Restrictions on rights*

At the centre of constitutional interpretation of a bill of rights must be the realisation that rights are not absolute. Even if a bill of rights contains no general limitation clause, all rights have limitations.[280] A right must be seen in the context of other rights. If rights were absolute, there would be no

---

[278] See text accompanying n23 in Chapter 4.

[279] A Harber cited in A Emslie 'Women in Politics: Carpe Diem' (January 1994) 36(3) *Sash* 12, 14

[280] See P van Dijk and G J H van Hoof *Theory and Practice of the European Convention on Human Rights* (1990) 575.

solution if one right conflicted with another. Rights at times need to be ranked and often one right has to be balanced against another. This ranking and balancing of rights is suggested within section 33(2) of the transitional Constitution which states that, besides the limitations provided for by section 33(1), 'other provisions of this Constitution' can limit rights.

To take an absolutist view on rights would set up an unworkable rights system. In addition to the inherent limitation on rights, rights sometimes contain internal qualifications. Thus, for example, the term 'personal' before 'privacy' in section 13 of the transitional Constitution is a limitation contained within the clause itself. Other sections also contain exceptions to the particular right so, for example, the use of the term 'affirmative action' is constitutionalised as an exclusion from the equality section. Additionally, rights can be restricted in terms of the transitional Constitution by three sections that regulate rights in the chapter: section 35 (the interpretation section), section 33 (the limitation section) and section 34 (the suspension section).

While sections 33 and 35 impact differently on the abortion question, section 34 will play no role, as it applies to states of emergency and the suspension of rights in terms of these.

i). The interpretation section (section 35)

Section 35 of the transitional Constitution reads:

1. In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable case law.
2. No law which limits any of the rights entrenched in this chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this chapter, provided such law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.
3. In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.

The question of freedom, in terms of both this section and the limitation clause (section 33), becomes a key concept in the South African human rights domain. The status of the individual has shifted in tandem, from a position of subjection to parliamentary control, to the centre of an order where individual freedom and human rights have become paramount. This new ideology emphasising the individual will underpin much of the law in the future. An intrusive state which tried to regulate the lives of South Africans has been replaced by a liberated society, with proper checks and balances on state power. The introduction of a human rights protection system as an entrenched part of the law will foster greater tolerance of individual choice and there will be far less scope for state attempts at regulation. A ruling that a woman has a right to choose to have an abortion would be based, ultimately, in the reality of the major shift in South Africa

from a system of parliamentary sovereignty to a constitutional state based on the rule of law.

The interpretation section reinforces some of the principles that a court must follow in terms of the limitation section, and extends the body of law that can be used from the principles of Roman-Dutch and English law to that which can be found generally in the international arena. The fact that South Africa has rejoined the United Nations and the Commonwealth represents an important shift towards recognition of norms and principles found in the international legal arena. The transitional Constitution and the Bill of Rights emphasise the importance of international and comparative law. This means that all legislation enacted by Parliament or other administrative bodies can be tested by the courts to determine whether they are constitutional in terms of international standards.

The interpretation section also contains a saving provision for laws that are seen by the courts to transgress constitutional limits. This presumption of constitutionality[281] states that even though a law exceeds permissible limits, it should be read so as to be valid if this is possible. Thus the validity and importance of language and words in the text are reduced.

One issue of major constitutional significance is the relationship of the limitation section to the rights enshrined in the Constitution. The issue that will need to be addressed is whether the internal construction limiting a clause is sufficient alone or whether the limitation section must be used to determine the extent of the rights in question and what limits can be

[281] Cachalia et al (n143) 122.

placed on those rights. Thus it will be essential to determine whether there is one round of balancing, where either the limitation section or the internal construction of the right in question is used or, if there are two rounds of balancing, whether both are used.

ii). The limitation section (section 33)

While the substantive issues in the first case before the Constitutional Court will be important, it is the question of how the limitation section operates that will set the tone for future cases before the court.

Section 33(1), reads:

> The rights entrenched in this chapter may be limited by law of general application, provided that such limitation-
> (a) shall be permissible only to the extent that it is-
> (i) reasonable; and
> (ii) justifiable in an open and democratic society based on freedom and equality; and
> (b) shall not negate the essential content of the right in question.
> and provided further that any limitation to-
> (aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or
> (bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,
> shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.

Thus the limitation section sets a number of tests which legislation has to meet if it is to be constitutional notwithstanding its restriction of a right or rights contained in Chapter 3.

The first hurdle that must be met in terms of section 33(1) is that the rights contained in the bill 'may be limited by law

of general application'. While this could be interpreted in a number of ways, a court will at least determine that the law under consideration does not apply to one person only. If it does, it will not be of general application. Additionally the law must be certain and not vague or lacking in precision.[282] Those affected by the law must be able to determine what is expected of them. Should they be unable to do so, then the law would fall foul of this test.[283] In the *Sunday Times* case it was noted by the European Court that

> the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible. The citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his [sic] conduct: he [sic] must be able - if need be with appropriate advice -- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable.[284]

Section 33(1)(a) further demands that a law, when it impinges on a right, must meet the test of being 'reasonable' and 'justifiable in an open and democratic society based on freedom and equality'. Thus, proportionality is called for: the various

[282] See M W Janus and R S Kay *European Human Rights Law* (1990) 297.

[283] See P Sieghardt *The International Law of Human Rights* (1983) 92.

[284] Decision of 27 October 1978 paragraph 49.

rights and laws impinging on those rights must be balanced. Proportionality will therefore be important to the debate about what are reasonable restrictions on rights. As Beatty notes in the Canadian context:

> It is the attitude of each of the judges to the way in which the proportionality and balancing principles should be applied which will be decisive in determining how rigorous the protection of human rights will be.[285]

However, the phrase used in section 33(1)(a), 'justifiable in an open and democratic society based on freedom and equality', is vague and will need to be interpreted within the South African context. Such interpretation will obviously play a significant role as far as abortion is concerned, where one of the fundamental questions will be whether abortion can be justified as a limitation on the right to life. While this will probably be answered in the affirmative, the real dilemma for a court will be to determine how far this limitation should be permitted to provide for access to abortion.

The trend internationally in determining the meaning of terms such as 'justifiable', 'open', 'democratic', 'freedom' and 'equality' will obviously have bearing on the interpretative endeavors of the South African Constitutional Court.[286]

Sieghardt states, in the European context, that to evaluate

---

[285] Beatty (n257) 194.

[286] See the discussion on role of international law in South Africa in the text accompanying and following n7 in Chapter 4.

a democratic society one must consider

> ... the needs or objectives of a democratic society in relation to the right or freedom concerned; without a notion of such needs, the limitations essential to support them cannot be evaluated. The aim is to have a pluralistic, open, tolerant society. This necessarily involves a delicate balance between the wishes of the individual and the utilitarian 'greater good of the majority'. But democratic societies approach this problem from the standpoint of the importance of the individual, and the undesirability of restricting his or her freedom.[287]

Canadian jurisprudence will also be of relevance, particularly as section 33(1)(a) is based on section 1 of the Canadian Charter which

> guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a democratic society.

To determine the meaning of section 1, Canadian judges in the first few Charter cases sought a uniform method to determine the constitutionality of laws.[288] this was achieved only at the end of the second year of its operation when the court delivered its judgment in *Regina v Oakes*.[289] In the *Oakes* decision the Supreme Court established the criteria for what is reasonable and demonstrably justified in a free and democratic society and the values at the core of section 1. Dickson CJ suggested that these include

> respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[290]

---

[287] Siegardt (n283) 93.

[288] Beatty (n257) 186.

[289] (1986) 26 D.L.R. (4th) 200.

[290] At 136.

The *Oakes* court decided that the method of judicial review it would follow would be a two-stage process. The first stage would allow the applicant to show how the legislation in question infringed any of the rights and freedoms which were enshrined in the Charter, both as a matter of interpretation and also factually. The second stage, to determine whether the law adopted was reasonable and demonstrably justified, would allow the state to justify the law as far as its purpose was concerned and also its concurrence with a three-part proportionality test. To pass this hurdle the state had to show the following:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question ... Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.[291]

Thus, as Beatty states,

> ... in virtually every single case in which the court has struck down a law as being unconstitutional, it was because the court felt that the means adopted by the government to carry out its programme were not proportional to its ends. The law was seen by the court to be too draconian, too heavy-handed for the objectives it was trying to achieve. Further, the law was written in terms that were (i) overly broad, or (ii) unnecessarily absolute or (iii) they were more discretionary and uncertain than they needed to be.[292]

The principle of proportionality is also used to interpret the

[291] At 227; see also Beatty (n257) 186.

[292] Beatty (n257) 192.

European Convention so that limits can be placed on rights

> only when it is necessary in the light of the interests advanced as weighed against the requirements of a democratic state.[293]

Proportionality is a testing principle in a number of other countries in Europe.[294] In Germany, when an individual's rights are to be affected, the state has to meet three requirements - suitability, necessity and proportionality.[295] As far as proportionality is concerned, a balance must be struck between the competing interests by looking at the advantages of the measure, the disadvantages thereof, and then weighing these up against each other.[296] In its abortion decision the German court applied a balancing test to evaluate the strengths of the various competing interests.[297] In respect of abortion, proportionality has been incorporated by the German courts within the principle of the 'least detrimental settlement'.[298] This rule was applied so as to dispense protection to the foetus.[299] Thus the German

---

[293] Van Dijk and Van Hoof (n280) 583.

[294] See J Jowell and A Lester 'Proportionality: Neither Novel nor Dangerous' in J Jowell and D Oliver (ed) *New Directions in Judicial Review* (1988).

[295] J de Ville 'Proportionality as a Requirement of Legality in Administrative Law Under the New Constitution' (unpublished paper 1994) 5.

[296] See De Ville (n295) 9.

[297] H Gerstein and D Lowry 'Abortion, Abstract Norms and Social Control: The decision of the West German Federal Constitutional Court' (1976) 25 *Emory Law Journal* 865.

[298] Gerstein and Lowry (n297) 865.

[299] Gerstein and Lowry (n297) 865.

court rejected the trimester system and held that

> [a] decision orientated to Article 1, paragraph 1, of the Basic Law must come down in favour of the precedence of the protection of life for the child *en ventre sa mere* over the right of the pregnant woman to self-determination.[300]

In addition to the constitutional directions that limitations on rights be 'reasonable' and 'justified', section 33(1)(aa) of the transitional South African Constitution states that any limitation to rights in section 10 (dignity), 11 (freedom and security of the person), 14 (conscience and religion) and 30 (children), amongst others, must also be 'necessary'. (While section 33(1)(aa) and 33(1)(bb) impose necessity as a requirement for the constitutional limitation of other rights, only rights that have possible application to abortion have been mentioned.) This demand that limitation be 'necessary' overlaps with the proportionality interpretations mentioned above, as the proportionality principle has often been construed as including necessity.

This additional criteria for limitation seems to have been added to deal with the phrase 'as little as possible' or the 'minimal impairment test', which has been seen by Woolman to attract judicial involvement in the legislative process in which, according to him, the courts are not skilled.[301] Wolman suggests that the 'necessary' requirement in section 33(1)(aa) and (bb) sets up different tests. In Canada when separate tests were established, the courts had great difficulty in deciding when to

---

[300] Gorby and Jonas (n183) 643.

[301] S Woolman 'Riding the Push-me Pull-you: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause' (1994) 10(1) *SAJHR* 60, 65.

apply the more stringent benchmark test.

Comparative jurisprudence can assist in determining the meaning of the term 'necessary'. Sieghart states that it

> implies the existence of a 'pressing social need' which may include the 'clear and present danger' test (as developed by the US Supreme Court), and must be assessed in the light of the circumstances of a given case. It is for the national authorities to make the initial assessment of the reality of the pressing social need implied in the notion of necessity in this context.[302]

'Necessary' was defined by the European Court in the *Handyside* case[303] so as to be different from 'indispensable', 'useful', 'reasonable' or 'desirable'. The court held that the context had to be looked at to determine what was needed within the 'reality of the pressing social need'.[304]

The Canadian abortion law was seen by most judges on the *Morgentaler* court to have 'unnecessary' medical barriers and prohibitions.[305] The many procedures and limited circumstances mandated by the South African Abortion and Sterilisation Act could also fall foul of the 'necessary' requirement when measured against the right to dignity (section 10), the right to freedom and security of the person (section 11), and the right to religion, belief and opinion (section 14(1)).

The next barrier to be negotiated is section 33(1)(b) which states that limitations on rights 'shall not negate the essential content of the right in question'. This provision is similar to

---

[302] Sieghardt (n283) 93 (footnotes omitted).

[303] *Handyside v United Kingdom EHRR* 737 (1976).

[304] At paragraph 48.

[305] See the discussion in the text accompanying n272 on the *Morgentaler* decision in Chapter 4.

article 19.2 of the German Basic Law[306] which states that

> [i]n no case may the core element of a basic right be impaired.

That the essential nature of the right should not be negated (33(1)(b)) is believed by some to embody

> the principle of proportionality (the essence of a basic right should thus be determined from case to case) while others support the view that the essence of every basic right can be determined in the abstract.[307]

On this point Rautenbach states that rights should be limited only after very careful analysis and only in some circumstances.[308]

Chief Justice Corbett, in his Memorandum Submitted on Behalf of the Judiciary of South Africa on the Draft Interim Bill of Rights, states that, since section 33(1)(b) determines that a right can be limited 'only if it does not negate its essential content', both the death penalty and abortion are prohibited. But can this really be what was intended by the drafters or what a court in the South African setting would decide? If abortion were totally outlawed, this would be a position more extreme than in almost any other country in the world.[309]

---

[306] See Woolman (n301) 71; Cachalia et al (n143) 115.

[307] L M Du Plessis and J De Ville 'Bill of Rights-Interpretation in the South African Context: Diagnostic Observations' (1993) *Stellenbosch Law Review* 385.

[308] I M Rautenbach 'Grondwetlike Bepalings ter Beskerming van die Wese van Menseregte' (1991) *TSAR* 403, 412.

[309] See Chapter 2.

Du Plessis[310] comments that the Corbett view suggests that

> taking ... life, *ipso facto* amounts to a negation of the essential content of the right to life. Looking at the wording of section 33 (1)(b) in a literalist way, this indeed seems to be the case. The matter is, however, not all that simple ... If the formula in section 33(1)(b) is understood as denoting proportionality, then it is possible to argue that, in certain circumstances, taking a life is justified on the basis that it is a proportionate response in the circumstances.[311]

Thus, while some would believe that section 33(1)(b) rules out abortion it is not really a feasible option for a court in South Africa to oust abortion completely. Collins[312] believes that in coming to a decision courts 'seek a climate of opinion, the dominant informed view' to ensure that the outcome the court arrives at is 'legitimate and acceptable'.[313] To prohibit abortion would be to ignore that 'climate of opinion'.

The interpretation of the limitation section will thus play a large part in constitutional adjudication. The manner in which it restricts rights will probably be used by a court to justify an abortion decision.

---

[310] L M du Plessis 'Whither Capital Punishment and Abortion Under South Africa's Transitional Constitution?' (unpublished paper 1994).

[311] Du Plessis (n310) 7.

[312] H Collins 'Democracy and Adjudication' in N McCormick and P Birks (eds) *The Legal Mind: Essays for Tony Honoré* (1986) 67, 74.

[313] Collins (n312) 77.

b) *The right to life*

For many, and especially those in the anti-choice camp, the heart of the abortion debate is the question of when life begins, although some courts have attempted to avoid evaluation of this issue.[314] The importance of the right to life section generally is seen when it is noted that section 34(5)(c) states that the right to life may never be suspended. However, the drafters of the Constitution did not intend this to impact on abortion. In fact the subject of abortion was avoided during the drafting of the transitional Bill of Rights as some of the negotiating parties demanded that issues such as abortion should not be addressed, but left until the drafting of the final constitution.[315]

However, it was anticipated that the abortion law could be challenged or amended during the phase of the transitional Constitution, and negotiators therefore decided to adopt a broadly formulated right to life section which would allow the Constitutional Court to interpret its meaning.[316]

Earlier drafts of the constitution contained, in addition to the section on the right to life, one which stipulated that a law in force relating to abortion 'shall remain in force until repealed or amended by the legislature'.[317] This section, which would have insulated the Abortion and Sterilisation Act from

---

[314] See Chapter 4.

[315] Du Plessis (n310) 3.

[316] H Corder 'Towards a South African Constitution' (1994) *Modern Law Review* fn145.

[317] Du Plessis and Corder (n234) 146.

judicial attack, was criticised and subsequently dropped.[318] However, the attempt to include it clearly predicted a challenge to the Abortion and Sterilisation Act on the basis of its possible unconstitutionality. Dropping the ouster clause suggests that the question will be investigated, but at what point is uncertain.

Despite the apparent refusal by those drafting the interim Bill of Rights to decide the issue one way or the other, there are indications of an inclination to facilitate resolution of the abortion debate in a manner that would advance the rights of women. A striking example is their frequent use of the word 'person', which appears in the right to life section as well as in the legal standing section, where it is used seven times. In the equality section 'person' appears four times and, indeed, it appears in almost every other section. But the intention of the drafters is not a sound basis for constitutional interpretation in the South African context, as the drafters certainly were not representative of the people of South Africa and there was no consensus on what the Bill of Rights should contain or on what sections ought to mean. The struggle between those who supported a full bill of rights and those who aimed only for a framework bears testimony to this. Mureinik put it crisply when he noted

[318] See J Sinclair 'Brief Comments On Some Aspects of the Draft Bill of Rights - Technical Committee, Sixth Progress Report.' 26 July 1993. June Sinclair was one of the 25 nominees for appointment to the Constitutional Court who appeared before the Judicial Services Commission.

that

> a court may, and probably should, decide that the drafting history is irrelevant.[319]

Nevertheless, a crucial question in regard to the abortion issue will be whether a foetus is a person or not. The probable answer inspired attempts in Canada, during the drafting of the Charter, to replace 'everyone' with the term 'every person'. 'Everyone', however, was retained on the basis of the argument that usage of the term 'every person' would unfairly advantage the pro-choice side of the abortion debate.[320] Nevertheless, the term 'person' in the European Convention has not been defined by any of the courts doing the adjudication to include the foetus and even other words such as 'everyone' have been understood by various courts not to grant rights to the foetus.[321] Internationally, even where a human rights instrument has specifically protected the foetus, these rights have not been secure.[322]

A South African court's first step in interpreting section 9 would be to determine what is meant by the right to life. Integral to the question is exactly who falls under the protection of the right. The second step would be to determine

---

[319] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *SAJHR* 31, 48.

[320] M Mandel *The Charter of Rights and the Legalization of Politics in Canada* (1992). 274. 'Everyone' was defined in Germany to mean 'everyone living'. Nevertheless the court found that foetal life ought to be respected. See text accompanying n186 in Chapter 4.

[321] See, for example, the English case *R v Tait* [1990] 1 QB 290 (CA) where the court held that the term 'person' used in the Offences against the Persons Act 1861 did not encompass a foetus.

[322] See the right to life section in Chapter 4.

whether that right had been infringed by a particular law and, if this has occurred, whether such infringement could be justified by the limitation section.

In the 1994 case *Van Heerden and Another v Joubert NO and Others*[323] the Appellate Division was asked to define 'person' as used in the Inquest Act. The case, before Appellate Judges Hefer, Nicholas, Groskopf, Mahommed and Harms, revolved around whether a foetus is a person and should therefore have an inquest to determine its cause of death. The court, mindful of the significance of this case to any consideration by the Constitutional Court of whether a foetus qualifies as a 'person',[324] unanimously decided that a foetus was not incorporated into the term 'person' as used in the Inquest Act.[325]

Thus, while the outcome of an abortion decision cannot be predicted, the foetus will probably not be granted constitutional status if the court follows South African private law.[326] There will be a similar outcome if the court is guided by international trends. Nevertheless, it is at least theoretically possible for the court to decide that a foetus is a person, or that even though it cannot be classified as a person, a foetus is still worthy of protection.

However, even if the decision is that life begins at

---

[323] 1994 (4) SA 793 (A).

[324] See C Ricard and J Maker 'Why Did Our Baby Girl Die?' *Sunday Times* 15 May 1994 15.

[325] At 798.

[326] Du Plessis (n310) 15.

conception, it must be recognised that life is not always viewed as sacrosanct but is, and does, get taken away in certain circumstances such as passive euthanasia,[327] where the death sentence is imposed,[328] justified killing in self-defence[329] and a justified use of deadly force by the police.[330]

If, however, the court does opt to come down on the side of the foetus, the line drawn and the obstacles placed in the way of those wishing to have abortions will reveal the extent to which other views and attitudes have been taken into account. The question also goes to the extent to which it is believed that the state should intrude into the lives of individuals. While some argue that abortion is not an individual decision but impacts on the very fabric of society, many see abortion as a choice best left to the individual conscience. Attempts to impose the views of some on others necessarily result in confrontation and alienation from the group and this has particular significance

---

[327] See G C Oosthuizen, H A Shapiro and S A S Strauss (eds) *Euthanasia* (1978); C Hoexter 'The Right to Life, Liberty, and Security' in M Robertson (ed) *Human Rights for South Africans* (1991) 33; U van Zyl 'The Right to Die: A South African Perspective' (1989) *Medicine and Law* 417; L A Lacewell 'A Comparative View of the Roles of Motive and Consent in the Response of the Criminal Justice System to Active Euthanasia' (1987) *Medicine and Law* 449; see also *Clarke v Hurst* 1992 (4) SA 630 (D) and J Taitz 'Euthanasia and the "Legal Convictions of Society" in a South African Context' (1993) *SALJ* 440.

[328] Section 277 of the Criminal Procedure Act No 51 of 1977.

[329] Ex parte Die Minister van Justisie: in re S v Van Wyk 1967 (1) SA 488 (A). See P Q R Boberg *The Law of Delict: Vol 1 Aquilan Liability* (1984) 789; J Neethling, J M Potgieter and P J Visser *Law of Delict* (1994) 68.

[330] Section 49 of the Criminal Procedure Act No 51 of 1977; *R v Hartzer* 1933 AD 306; *R v Koning* 1953 (3) SA 220 (T); *Mazeka v Minister of Justice* 1956 (1) SA 312 (A); *S v Swanepoel* 1985 (1) SA 576 (A); *Prince and Another v Minister of Law and Order and Others* 1987 (4) SA 231 (E).

for the success of the transition to democracy in South Africa. Such imposition, with little or no regard to the wider communal mores, was a notorious feature of the apartheid era. What was legislated and vigorously enforced was the attitude of a tiny proportion of the population, often out of touch with the beliefs and experience of the larger society.

Du Plessis may aver that

> pre-natal and post-natal life are both life and ought to be respected and protected accordingly,[331]

but, while this deserves consideration as an opinion, it is only an opinion and may well be not only a minority opinion but an ill-considered one. Many would argue that his is too wide a proposition and cannot be accepted for two main reasons.

Firstly, many people do not regard all prenatal life as worthy of protection since individuals differ in opinion as to when life worthy of protection begins. Secondly, even if the foetus has life, to provide protection to it from conception ignores other morally significant issues as well as other interests within the abortion debate. In this context Judith Jarvis Thompson[332] adds a rider to her stated belief that life begins at conception, stating that

> having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continuous use of another person's body - even if one needs it for life itself.[333]

Thompson also points out that women have a property interest in

---

[331] Du Plessis (n53) 52.

[332] J J Thompson 'A Defence of Abortion' (1971) 1 *Philosophy and Public Affairs* 47.

[333] Thompson (n332) 56.

their own bodies and it is against this interest that the property rights of the foetus have to be balanced. She states further that as the woman's right is at least as strong as that of the foetus, a woman must be able to claim the right to ensure that the foetus does not trespass. Thompson also argues that, in any case, at certain times the taking of life is not unjust.

The property rights argument is also advanced by Jennifer Nedelsky:[334]

> Carrying a baby is perhaps the most intimate physical-emotional relationship there is. Unless the relationship is desired, it does violence not only to her bodily integrity and autonomy, but to her capacity for intimacy. Sexual intercourse is a good analogy. When this relationship is desired, it offers unrivalled pleasure, fulfillment, and connection. When sexual intercourse is coerced, it is one of the most horrible forms of violation. No woman should be forced to undergo the nine-month relationship of pregnancy.[335]

The simple statement that prenatal life ought to be protected clearly does not take into account the other dimensions and facets of the debate. When the right to life is discussed, should the life of the mother not be considered? How should life be defined and should all life be safeguarded and protected, regardless of the quality of that life? And at what cost? Should all other factors be excluded, with only a vague notion of what life is and when life begins to rely on? When 'alternatives' to abortion are cited as reasons not to abort, are these realistic alternatives? Do they, in fact, turn out to be reasonable options? Are they really available? Should the debate about

[334] J Nedelsky 'Property in Potential Life? A Relational Approach to Legal Categories' (1993) 6 *Canadian Journal of Law and Jurisprudence* 343.

[335] Nedelsky (n334) 364.

protecting life not be widened beyond the foetus to include life after birth and the protection and assistance accorded to children? Do the thousands of children whose parents cannot afford to feed or shelter them receive the attention of groups trying to protect life?

In this regard the Indian Supreme Court has held that the right to life must include the question of what the quality of life is.[336] In *Frances Mullin v Union Territory of Delhi*[337] the court stated that

> the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter.[338]

It is not enough simply to protect 'life' from whatever point it is determined to begin. A holistic approach is required, with an emphasis on quality of life. This insight has been central to the debates in South Africa about the inclusion of socio-economic rights in the Bill of Rights and the reason behind the major government focus on the implementation of the Reconstruction and Development Programme (RDP).[339]

One of the major questions that the court must consider in this regard, is whether a foetus should be given any rights.

---

[336] *The State of Himachal Pradesh v Umed Ram Sharma* (1986) 1 SCR 182 and *Olga Tellis v Bombay Municipal Co-operation* (1985) 3 SCR 545. See Cachalia et al (n143) 33.

[337] (1981) 2 S.C.R. 516 (India).

[338] At 529.

[339] See ANC *The Reconstruction and Development Programme: A Policy Framework* (1994) 3.

Martha Shaffer[340] argues that the foetus should not be accorded any rights but that at a certain point prenatal life ought to be safeguarded by the state. She believes that to grant rights to the foetus would be to encroach on women's rights. However, even if the court finds that the foetus is not a holder of rights, it must nevertheless still decide whether the foetus is worthy of protection and, if so, from what point during gestation.

Our present law seems firm on the position that a foetus does not have rights and that rights accrue only on birth. The *nasciturus* fiction applies to events that occur during gestation, but birth has to occur for these rights to come into operation.[341]

The law must therefore achieve a satisfactory balance between the various competing interests and concerns. Admittedly, there is a point in pregnancy at which there is life and it becomes the right of the state, and possibly the duty, to intervene to protect it. That point, however, must be rationally and validly determined, with the aid of scientific expertise and an approach that accounts significantly and progressively for the competing 'interests'.[342]

In the constitutional context, if the Abortion and Sterilisation Act in its present form was examined by a conservatively minded court it is possible that the court would deem it to be in violation of the right to life section of the

---

[340] M Shaffer 'Foetal Rights and the Regulation of Abortion' (1994) 39(1) *McGill Law Journal* 59.

[341] See text accompanying and following n31 in Chapter 3.

[342] See the discussion earlier in the section on brain birth and viability.

Chapter on Fundamental Rights. This is because the Act permits an abortion to occur at any point during gestation. However, such a court could equally determine that the restrictive circumstances and difficult procedures decreed in the Act are sufficient safeguard for the foetus and therefore determine that the Act is constitutional in its present form.

It is, however, more likely that the court doing the adjudication will be more progressive and determine that a foetus is not incorporated into the term 'person'.

c) *Children*

The rights contained in section 30 of the transitional Constitution could be employed by those who wish to ensure protection for the foetus. However, when the reasons for the inclusion of this section as well as its actual meaning are investigated it will become clear that there was no attempt to accord rights, and that no rights accrue, to the foetus.

An inclination to give emphasis to the protection of children's rights is evident in the recent adoption by the South African government of the Convention on the Rights of the Child.[343] The drafters of the transitional Constitution gave similar emphasis to the issue by including a separate children's rights section in the Bill of Rights.

The purpose of the Convention on the Rights of the Child, as discussed in Chapter 4, was not to give rights to the foetus but to ensure at certain times support to the mother while

[343] See n15 in Chapter 4.

pregnant.[344] The chidren's rights section in the transitional Bill of Rights to some extent follows the concept of the Convention. For instance, its reference to birth is similar to the formulation in the preamble to the Convention.

The provisions of section 30, relevant to abortion, read:

> (1) Every child shall have a right-
> (a) to a name and nationality as from birth;
> (b) to parental care;
> (c) to security, basic nutrition and basic health and social services;
> (d) not to be subject to neglect and abuse; and
> (e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.
> (2) .....
> (3) For the purposes of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.[345]

The question that needs to be determined in relation to the abortion issue is whether the definition of a child includes a foetus. This question must be looked at in terms of section 30(3) which uses the word 'person' to define who qualifies as a child. International practice is to exclude the foetus from the ambit of the term 'person' and this could be followed by a South African court. However, a court could interpret the word 'person' broadly so as to avoid attracting the narrow definition accorded to it internationally and in South African private law.

It is possible also that the court could look at section 30(1)(a) and, on the basis that only this subsection mentions birth, decide that, by implication, birth is not a condition for

---

[344] See the text accompanying and following n53 in Chapter 4.

[345] Section 30.

enjoyment of rights enshrined in the other subsections. However, Cachalia et al argue that section 30(1)(a) comes into operation at birth against the state and is intended to prevent statelessness.[346] The phrase 'as from birth' should not be read so as to exclude birth from the other subsections. Rather, it stipulates that, in respect of name and nationality, a right exists as from birth, rather than from some later point in the child's life, which is the case for certain other subsections. The incorporation of the words 'as from birth' is not intended to play a part in the abortion arena but is aimed at preventing a child's statelessness.[347]

Foetal rights could also be argued on the basis of section 30(c) which protects a child's right to security. Proponents of foetal rights could argue that this section[348] must indicate an intention of the drafters to accord protection to the foetus, since chidren's right to security is already covered by section 11.[349]

However, the right to 'security' enshrined in section 11 is rather 'security of the person', a much narrower right which refers to physical and mental well-being of the person. Section 30(c) refers to more of a second-generation right in respect of the well-being of the child.

---

[346] Cachalia et al (n143) 100.

[347] Cachalia (n143) 100.

[348] Section 30(c).

[349] Cachalia (n143) 101.

d) *Equality*

Internationally, equality provisions have not been used by the courts to found a right to abortion. This is because the right to equality has only in recent years been linked to abortion. In those countries where the courts have constitutionalised abortion, precedent ensures that the other rights which established abortion as a right continue to be used. Equality issues, however, often underlie these decisions.

The right to equality will be a major focal point of the courts and the legislature in South Africa since racial oppression and its eradication has been at the centre of the struggle for liberation and the transition to democracy. The whole thrust of the negotiating process was to obtain a 'non-racial, non-sexist South Africa'.[350]

The attainment of equality is of equal relevance to the oppression of women, although this aspect of the issue has not received anywhere near the same attention as racial oppression. It is only recently that the rights of women have been placed on the national agenda, although gender discrimination has been an explicit feature of the legal system.[351] Indeed it was only in 1993 that some attempt was made to rid the statute book of some of the laws that discriminated against women.[352] This attempt was criticised by many as an electioneering ploy by the National

---

[350] *Sunday Times* 8 August 1993.

[351] See Chapter 2.

[352] Laws introduced into Parliament to remove gender discrimination included the Abolition of Discrimination against Women, the Promotion of Equal Opportunities and the Prevention of Domestic Violence bills, all of which completely ignored abortion.

Party government.

Constitutional protection for women is emphasised by the fact that the Constitution explicitly refers to women and gender a number of times[353] and three Constitutional Principles[354] promote gender equality. The preamble to the Constitution emphasises equality, including gender equality, as follows

> [w]hereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

Equality is also stressed in the limitation section as well as in the interpretation section, which demands that when the

[353] Examples of where women are included , either explicitly or implictly, are: the Preamble, section 7 (application), section 8 (equality), section 10 (human dignity), section 13 (privacy), section 19 (residence), section 20 (citizen's rights), section 23 (access to information), section 25 (detained, arrested and accused persons), section 30 (children), section 31 (language and culture) and section 32 (education).

[354] The three Constitutional Principles:

1. The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.
3. The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.
5. The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

See Schedule 4 of the transitional Constitution.

Constitution is being interpreted

> a court of law shall promote values which underlie an open and democratic state based on freedom and equality.[355]

Thus both equality and freedom are stressed. While they could be contradictory at times, in the case of abortion freedom (which would include reproductive freedom) they could be mutually complimentary and strengthening.

The right to equality is the first right entrenched in the chapter on fundamental rights.[356] It reads:

> (1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language ...

While section 8 can be interpreted in different ways,[357] the constitutional emphasis placed on equality makes it likely that an abortion decision in the South African context could centre on this provision.[358] However, what is defined as equality is far from clear and the relevance and applicability of the definition to the abortion issue has largely been overlooked.[359]

---

[355] Section 35(1).

[356] Section 8.

[357] C Albertyn and J Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10(2) *SAJHR* 149, 152.

[358] See also D J Leyshon 'Abortion: In Search of a Constitutional Doctrine (Part 2)' (1991) 10(3) *Medicine and Law* 219, 225.

[359] See C Albertyn 'Achieving Equality for Women: The Limits of a Bill of Rights' CALS (Wits University) Working Paper 17 (June 1992); Albertyn and Kentridge (n357) 149; R Pretorius 'The Equality Debate and Women in a Post-Apartheid South Africa'

However, while the Constitution protects the rights of women, legal systems and laws in general, particularly in South Africa, are male-orientated and thus unequal. In addition, the tools of legal reasoning reinforce the status quo.[360] This is reflected by a number of authors, including Catharine MacKinnon and Carol Smart, who indicate how the law and legal principles contain male values and principles.[361] Similarly, Finley[362] states the following:

> Many doctrinal areas of the law are ... fundamentally structured around men's perspectives and experiences ... In the language of criminal law, the paradigmatic criminal is a male and women criminals are often viewed as doubly deviant. Another example of the manifestation of the male reference points is how self-defence law looks to male notions of threat and response to assess what is reasonable. ... All of this suggests that for feminist law reformers, even using the terms 'equality', 'work', 'injury', 'damages', 'market', and 'contract' can involve buying into, and leaving unquestioned, the male frames of reference. It also leaves unspoken, and unrecognised, the kinds of work women do, or the kinds of injuries women suffer.[363]

The interpretation of what equality is and how it ought to be achieved will be crucial to rights in South Africa in general and will have strong bearing on the resolution of the abortion debate

---

(1991) 3 *Witwatersrand University Student Law Review* 54; D Meyerson 'Sexual Equality and the Law' (1993) 9 *SAJHR* 237; D Meyerson 'Sex and Gender' (1993) 9 *SAJHR* 291; Cachalia et al (n143) 24.

[360] M J Mossman 'Feminism and Legal Method: The Difference It Makes' (1986) 3 *Australian Journal of Law and Society* 30.

[361] See E A Sheehy 'Women and Equality Rights in Canada: Sobering Reflections, Impossible Choices' in S Bazzilli (ed) (n34) 262, 266.

[362] L M Finley 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886.

[363] Finley (n362) 898.

in particular.

A major debate in relation to the meaning of equality revolves around 'equal treatment' or 'strictly identical treatment' versus 'special treatment' (sameness versus difference). Formal equality in the absence of substantive equality is of little benefit to those who have been disadvantaged.[364] Albertyn argues, for example, that equality should mean that all 'receive equal benefit and effects of the law' and that when equality is interpreted and evaluated, what should be determined are the effects of the law and whether or not it achieves equality.[365]

While the Canadian courts have used the 'similarly situated' test in the past,[366] a shift to a standard of equality of result has occurred.[367] In *Andrews v Law Society of B C* McIntyre J noted that the intention of the equality clause in the Canadian Charter was

> to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration.[368]

The emphasis on the achievement of substantive equality is clear. Laws that intend to achieve equal status and equal opportunity need to influence the conditions found in the household, the

---

[364] See generally Albertyn and Kentridge (n357) 153.

[365] Albertyn (n359) 17-18.

[366] Cachalia et al (n143) 26.

[367] See *Andrews v Law Society of BC* [1989] 1 SCR 143, 56 DLR (4th) 1 and *Mahe v The Queen* 42 DLR 4th 514.

[368] *Andrews v Law Society of BC* [1989] 1 SCR 143, 56 DLR (4th) 1, 15.

workplace and the rest of society.[369]

With regard to the relationship of equality to abortion, the argument is that if women are not able to choose when to reproduce, they are in consequence not able to be involved in the affairs of their nations on an equal footing with men.[370] In the absence of reproductive freedom, women's traditional subservient roles are perpetuated, women's dependency on men continues and the ability of women to develop themselves economically is restricted. Women are thus:

> deprived of their right to equal participation in the social, economic, educational and cultural affairs of the state.[371]

Similarly, McDougal et al state that

> most of the women in the world are still denied freedom to control their own fertility because of either legal or religious prohibitions or the lack of relevant information, resources, and family planning services. The inability to decide freely and responsibly on the number or spacing of children (if any) has, in turn, deprived many women of benefits regarding their health, education, or employment and their roles in family and public life.[372]

Equality is thus crucial within the abortion debate. Numerous authors have commented on the close relationship between

---

[369] See G W Seidman 'No Freedom Without the Women: Mobilization and Gender in South Africa, 1970 - 1992' (1993) *Signs: Journal of Women in Culture and Society* 291.

[370] C Germain 'The Christopher Tietze International Symposium: An Overview' (1989) *International Journal of Gynaecology and Obstetrics* 1, 2 Supp 3. See also Hernandez (n205) 341; M McDougal, H Lasswell and L Chen 'Human Rights for Women and World Public Order: The Outline of Sex-Based Discrimination' (1975) 69 *American Journal of International Law* 497, 504.

[371] Hernandez (n205) 343.

[372] McDougal, Lasswell and Chen (n370) 504.

reproductive freedom and health and the status of women.[373] In the absence of such substantive equality, there is a high incidence of reproductive infirmity and mortality, and women tend to be socially, politically and economically disadvantaged.[374] Access to abortion, therefore, is a good litmus test for the status of women in a particular society.

For the achievement of real gender equality, the status of women in our country must change fundamentally. Societal failure to recognise the moral independence of women as decision makers is an unfounded and damaging state of affairs which places the biological ability of women to conceive and bear children within a context of obligation. Control of reproductive capacity is a prerequisite to the exercise of other fundamental choices, including participation in the public world and self-definition of one's personal life and family structure.

The physical burden of pregnancy, particularly if it is forced upon women by refusing them access to abortion, has a major effect on the lives of many women. Moreover, the ability of women to access education[375] and progress within the economic field is dramatically altered by their child-bearing capacity.[376] Many employers perceive women negatively as short-

---

[373] See eg S R Schuler and S M Hashemi 'Credit Programs, Women's Empowerment, and Contraceptive Use in Rural Bangladesh' (1994) 25(2) *Studies in Family Planning* 65.

[374] Jacobson (n155) 6.

[375] H Sanders, E Nash, M Hoffman 'Women and Health' in Lessing (n16) 139, 147.

[376] See D Shapiro and B O Tambashe 'The Impact of Women's Employment and Education on Contraceptive Use and Abortion in Kinshasa, Zaire' (1994) 25(2) *Studies in Family Planning* 96.

term workers who will leave work on pregnancy, if not marriage.

In South Africa the fact that so many women shoulder parenthood alone increases the limiting effect of pregnancy and child rearing on self-determination and equal status.[377] Thus, access to abortion must be available if true equality between men and women is to begin to be realised.

e) *Equal protection*

The equality section also contains an equal protection provision[378] which could be important to abortion.[379] Regan argues, for instance, that forcing a woman to bear a child against her will compels her to be a 'good Samaritan' and an equal protection clause forbids this.[380] Similarly, Lawrence Tribe sees resolution of the abortion question as rooted in the right to equal protection.[381] He suggests that laws restricting access to abortion

> place a real and substantial burden on women's ability to participate in society as equals.[382]

Abortion has always been accessible (albeit the backstreet variety) to wealthy women in South Africa who, because of

---

[377] Fuchs 'Women's Quest for Economic Equality' (1989) 3 *Journal of Economic Perspectives* 25.

[378] Section 8(1).

[379] D Regan 'Rewriting Roe v Wade' in C E Schneider and M Vinouskis (ed) *The Law and Politics of Abortion* (1980) 3.

[380] Regan (n379) 3.

[381] L H Tribe *Clash of the Absolutes* (1990).

[382] Tribe (n381) 105.

apartheid, are overwhelmingly white.[383] The key issue is access to safe abortion which has always permitted those with money to find doctors willing to perform an abortion.[384] Women from higher social classes who have direct access to a doctor on a regular basis do not have to suffer the pain and danger of backstreet abortion.[385]

Thus, a court could rule that the provisions of the Abortion and Sterilisation Act violate the right to equal protection.[386] Equally, the provision that a pregnant woman who seeks an abortion under the mental health section of the Act[387] must be examined by a psychiatrist employed by the state[388] could be deemed unconstitutional since it raises obstacles to access to abortion particularly for rural and black women, as almost all state employed psychiatrists are based in the urban areas.[389]

[383] See the discussion following n210 in Chapter 3.

[384] See text accompanying n210 in Chapter 3.

[385] See text following n48 in Chapter 2.

[386] See Chapters 3 and 4.

[387] Section 3(1)(b).

[388] Section 3(3)(b).

[389] See Chapter 3.

f) *Privacy*

It is in terms of the right to privacy that the courts in the United States have determined a right to abortion to exist.[390] The courts in Canada and Ireland have also held that this right impacts on abortion.[391] However, the privacy section of the transitional Bill of Rights (section 13) is worded in a manner which could invoke a limited view of the right to privacy. It reads as follows:

> 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.

The right to privacy could be limited if the courts define 'personal privacy' in a restrictive manner. Whether or not a narrow view is taken of this right, it will still have some bearing on abortion. Certain sections of the Abortion and Sterilisation Act could be deemed unconstitutional for even infringing a narrowly defined right to privacy. For example, it is possible that the section in the Abortion and Sterilisation Act demanding that the name, age, marital status and race of the woman who has had an abortion be transmited to the Director-General of Health and Welfare[392] will be struck down as a violation of the right to privacy or even the right to dignity.[393]

---

[390] See the section on the right to privacy in Chapter 4.

[391] See text accompanying n263 and n264 in Chapter 4.

[392] Section 7(1)(a).

[393] This occurred in the United States in the *Thornburgh* case. See text accompanying n268 and n269 in Chapter 4.

If a more inclusive definition of the right is adopted, then the right to privacy could be read by a South African court to incorporate a woman's right to have an abortion. Thus, if the more liberal interpretation given to 'personal privacy' by the United States Supreme Court is followed, then abortion reform will occur.[394]

One of the major criticisms of using privacy as a basis for the right to abortion is that, as Mackinnon states,

> seeking protection behind a right to privacy is to cut women off from collective verification and state support in the same act ... when women are segregated in private, separated from each other, one at a time, a right to that privacy isolates us at once from each other and from public recourse. This right to privacy is a right of men 'to be let alone' to oppress women one at a time. It embodies and reflects the private sphere's existing definitions of womanhood ... It is at once an ideological division that lies about women's shared experience and that mystifies the unity among the spheres of women's violation. It is a very material division that keeps the private beyond public redress and depoliticizes women's subjection within it.[395]

She argues further that

> to guarantee abortions as an aspect of the private, rather than of the public, sector is to guarantee women a right to abortion subject to women's ability to provide it for ourselves. This is to guarantee access to abortion only to some women on the basis of class, not to women as women ...[396]

Thus, a court decision that a ruling on abortion would be an intrusion into the realm of privacy would support the perpetuation of the subjugation of women.[397] Contextually, the

---

[394] See the text on privacy in Chapter 4.

[395] C A Mackinnon 'Privacy v Equality: Beyond *Roe v Wade*' in C A MacKinnon (ed) *Feminism Unmodified* (1987) 101.

[396] C A Mackinnon 'The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion' (1983) 17 *Radical America* 23, 24; see also K O'Donovan *Sexual Divisions in Law* (1985).

[397] See the discussion on privacy in Chapter 4.

view of abortion as a privacy issue maintains the notion that a woman's role is properly outside of the public sphere, restricted to domestic situations.[398]

g) *Dignity*

An invasion of the right to dignity has been construed by the courts in South Africa in the past in terms of private law to mean anything which detrimentally affects the status, honour, reputation or esteem of an individual in the eyes of others.[399] The transitional Constitution notes in section 10:

> Human Dignity
> 10. Every person shall have the right to respect for and protection of his or her dignity.

The right to dignity has generally been deemed to be the right of individuals to be treated with dignity by the state when it deals with them.[400] In some countries, such as Canada, Spain and the United States, laws which have restricted abortion have been held to fall foul of constitutional protection of this right.[401] However, what the right to dignity means in South Africa is unclear and whether it will impact on the abortion question will depend on the interpretation given to it by the courts. The provisions of the present Act which require interrogation of a pregnant women who seeks an abortion after

---

[398] See D Taylor 'Women: An Analysis' in *Women: A World Report* (1985) 3.

[399] See *University of Pretoria v Tommy Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A).

[400] Cachalia et al (n143) 33.

[401] See the section on the right to dignity in chapter 4.

being raped[402] and that a pregnant woman go through a myriad of procedures to obtain an abortion could be deemed an invasion of her right to dignity. The mandatory checking by two other doctors that the required circumstances laid down in the Act exist could be struck down on the same grounds, as has occurred in the United States.[403] This could result in the situation that only one doctor's opinion would be necessary to determine whether a pregnant woman met the circumstances prescribed by the Act for an abortion. This would ensure a de facto liberalisation of the current abortion legislation.

h) *Freedom and security of the person*

The right to freedom and security of the person often overlaps with dignity provisions. This right is concerned with the protection of the bodily and mental character of the individual. In some countries, provisions on the right to security of the person impact negatively on restrictive abortion laws.[404]

In South Africa section 11 the transitional Constitution provides:

> 11. (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial ...

This provision is similar to that of the Canadian Charter in terms of which various abortion regulations were struck down in

---

[402] Section 3(1)(d) and section 6(4)(a)(ii).

[403] In the case *Doe v Bolton* this requirement was held to violate the due process provision of the US Constitution. See the text accompanying n274 in Chapter 4.

[404] See the section on security of the person in Chapter 4.

the *Morgentaler* decision.[405] Aspects of the Abortion and Sterilisation Act which could fall foul of this provision are the numerous procedures which cause delays,[406] the necessity that the abortion be performed in a state-controlled institution[407] or one authorised for the purpose[408] by the Minister of Health and Welfare,[409] and the requirement that two additional doctors certify that the reason for the abortion conforms to the circumstances permitted by the Act.[410]

(i) *Conscience and religious freedom*

The laws of abortion in any society reflect to some degree the level of religious influence on outlooks and standards. The type of law is also indicative of the relative importance the society accords to the personal and to communal mores.

In South Africa the transitional Constitution contains the

[405] See text between n271 and n272 in Chapter 4.

[406] This occurred in the *Morgentaler* decision in Canada. See text accompanying n272 in Chapter 4.

[407] In the *Akron* case decided by the United States Supreme Court it was held that requiring an abortion to be performed in a hospital was unconstitutional as a violation of the due process provisions of their constitution. See text accompanying n275 in Chapter 4.

[408] In Canada the court in the *Morgentaler* decision held that requiring hospital accreditation violated the right to security of the person as women were limited in their ability to procure an abortion. See text between n271 and n272 in Chapter 4.

[409] Section 5.

[410] Section 3. Requiring two doctors was ruled unconstitutional in the United States *Akron* decision. See text accompanying n275 in Chapter 4.

following provision in section 14 on religion, belief and opinion:

> Religion, belief and opinion
> 14. (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

In the Canadian *Morgentaler* ruling, a woman's consideration of whether or not to have an abortion was determined to be a moral choice which only the woman herself could make.[411] This decision could find a South African counterpart in terms of the religion, conscious and belief section of the transitional Constitution. As Albie Sachs states:

> What becomes vital then is that the law and social practice tolerate a variety of opinions.[412]

In a similar vein, Ronald Dworkin[413] argues that the government should not restrict abortion because the reasoning behind such restrictions are religious tenets which a government ought not to uphold. Rather, abortion should be an issue which individuals are able to decide for themselves. This should be so especially in a multi-religious, multi-ethnic society like South Africa.[414]

Under the new constitutional order in South Africa, the power and the influence of the churches,[415] or at least certain

---

[411] See n311 in Chapter 4.

[412] A Sachs *Protecting Human Rights in a New South Africa* (1990) 68.

[413] R Dworkin *Life's Dominion* (1993).

[414] L Hawthorne *The Crime of Abortion: A Historical and Comparative Study* (unpublished LLD thesis University of Pretoria 1982) 409.

[415] In fact, the role of the church has been criticised as failing 'to get involved with specific problems women were experiencing ... such as ... abortion ...' R Kadalie in D

sections of them, will be reduced and the attitude of other religious denominations as well as opinions and beliefs outside of organised religion will also become important. A much stricter differentiation and separation between church and state will exist. While the church will still be able to influence individuals, it will not have the power that it had before to affect government policy.

Thus, this section of the Constitution could be employed by a court to strike down the provisions of the Abortion and Sterililisation Act as being rooted in a religious attitude which does not permit alternatives for those who do not share that attitude.

4. **Composition of the Constitutional Court**

A bill of rights must be seen as a written text transmitting meaning by way of language. However, for language to be meaningful, context is vital and therefore policy considerations are important to the interpretation of a bill of rights. In other words, language is contextualised in relation to the values judges wish to subscribe to. Constitutional interpretation is therefore not exact or binding; rather it is a question of making political choices.[416]

To determine the meaning of certain words the courts might

Ackerman (ed) *Women Hold Up Half the Sky: Women in the Church in Southern Africa* (1191) 392.

[416] A Allen 'Autonomy's Magic Wand: Abortion and Constitutional Interpretation' (September 1992) 72 *Boston University Law Review* 683, 685-686.

look to the ends they seek to achieve.[417] The limited usefulness of actual language is implied by section 35(2), which has its origins in provisions in Canada and Germany, and which reads:

> No law which limits any of the rights entrenched in this chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this chapter, provided such a law is reasonably capable of a more restrictive interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

In the Canadian context Mandel states:

> You do not have to read the thousands of pages of contradictory judicial opinions on their meaning to realize that the words of the Charter neither restrain nor guide the judges.[418]

Similarly, in the South African situation Murphy notes:

> If a new constitutional court in South Africa falls into line with the approach followed in other jurisdictions applying bills of rights, usually it will be extra-textual considerations which are decisive when interpreting human rights clauses.[419]

The composition, structure and functioning of the Constitutional Court and, to a lesser degree, the Supreme Court, are critical in gaining an insight into a likely decision on abortion. McWhinney argues that the judges' decision on abortion will

---

[417] See N Haysom 'The Bill of Fundamental Rights: Implications For Legal Practice' (February 1994) *De Rebus* 125, 128.

[418] Mandel (n320) 37-38.

[419] J Murphy 'Social Reform, Property Rights and Constitutional Review' in Community Law Centre UWC *Land, Property Rights and the New Constitution* (1994) 121, 125.

largely reflect their own views on the subject since

> judges ... having little in the way of constitutional text prescriptions to guide them, seem left with their own personal policy preferences or prejudices, and not much more, to guide them to a wise decision.[420]

While judges could endeavour to hide behind their Constitutional Court robes, they will be playing at least a quasi-political role because of their ability to invalidate legislation or administrative regulations.[421] Judges, particularly in respect of abortion, have little to guide them in interpreting the Constitution and are able to decide the issue in terms of their own values. However, judges are constrained, at least by their own backgrounds, which usually include legal education and legal experience which help to shape decisions. More importantly, judges are constrained by the fact that judicial review is a political process - one that cannot be ignored - and this probably makes them more accountable to public opinion than they might otherwise be.

Thus public opinion and attitudes (or at least the beliefs of sectors of the society) play a part in decisions on abortion. In the United States, when *Roe* was decided, opposition to the decision was 'overwhelming' but 'there was evidence that the public mood was changing'.[422] However, Collins notes that the Supreme Court scrutinised the opinion of the professionals

---

[420] E McWhinney *Supreme Courts and Judicial Law-making: Constitutional Tribunals and Constitutional Review* (1986) 289.

[421] Cappelleti (n260) 54.

[422] A Hill 'The Political Dimension of Constitutional Adjudication' (1990) 63 *Southern California Law Review* 1237, 1280.

involved in medicine and law.[423] Collins suggests that what the courts do is to investigate the views of organised groups and accord weight to those views in proportion to the perceived 'social prestige' of the group.[424] This is borne out by research on the responses of courts in other countries. An example is Germany where, although public opinion was favourably disposed towards abortion liberalisation in the 1970s, the court interpreting the West German Constitution followed the opinion of German doctors, who were against reform.[425]

The obvious question to be asked in this regard is why courts have not canvassed the opinions of the general public, and particularly those with the greatest interest in the issue and most affected by it, namely women. It may be hoped that South African courts will pioneer a more democratic approach but the likelihood of this happening is uncertain.

In South Africa commentators across an unusually broad section of the political spectrum have long been calling for a fairer process of judicial appointment than that which pertained in the past. This would secure a wider variety of input and thus add broader representation and credibility to the bench. Judicial independence and impartiality are crucial, especially where the courts have powers of judicial review. In the absence of judicial independence and impartiality, public trust and confidence will

---

[423] Collins (n312) 79.

[424] Collins (n312) 79-80.

[425] J George 'Political Effects of Court Decisions on Abortion: A Comparison Between the United States and the German Federal Republic' (1989) 3 *International Journal of Law and the Family* 106, 120-2.

not repose in the courts and the decisions that they hand down. It has been suggested that

> care must be taken that the pivotal question of the appointment of judges not be left aside ... A Bill of Rights enjoys little hope of being generally respected where appointment to the judiciary remains within the gift of the prime litigant in constitutional matters.[426]

The procedure for appointing judges to the Constitutional Court is set out in the transitional Constitution.[427] This procedure was the subject of much controversy during the multi-party talks that preceded finalisation of the Constitution, reflecting the importance of judicial appointments in determining the outcome of constitutional decisions.

The president of the Constitutional Court and the 10 other judges,[428] are appointed for a non-renewable period of seven years,[429] and must be South African citizens,[430] who are 'fit and proper person[s]'.[431] They must either be judges of the Supreme Court, have been advocates, attorneys or law lecturers for 10 years,[432] or as a result of training or experience, have expertise in the field of constitutional law[433] although not

---

[426] J Gauntlett 'Appointing and Promoting Judges: Which Way Now?' (April 1990) *Consultus* 23, 27.

[427] Section 99.

[428] Section 98(1).

[429] Section 99(1).

[430] Section 99(2)(a).

[431] Section 99(2)b).

[432] Section 99(2)(c)(i).

[433] Section 99(2)(c)(ii).

more than two judges can come from this last category of persons.[434] In fact all eleven judges appointed were lawyers. This will have profound repercussions for the type of decisions handed down. Non-lawyers on the court could have ensured a movement away from a strict legalistic approach.

The president of the court, in terms of the constitution, must be appointed by the President of South Africa 'in consultation with the cabinet and after consultation with the Chief Justice'.[435] The president, however, must choose the president of the court from a motivated list of four names supplied by the Judicial Services Commission (JSC). Exempted from this requirement was the first appointment to the office of president of the court and no list was supplied to the president by the JSC, leaving him free to appoint any person who met the requirements laid down for appointment.[436]

The appointment of Arthur Chaskalson as first president of the Constitutional Court suggests that the court will adopt a progressive stance.[437] Chaskalson's role will be vital as he will set up the rules for determining which cases ought to be heard[438] and also the type of decision that should be handed

---

[434] Section 99(4).

[435] Section 97(2)(a).

[436] Section 99(6).

[437] Chaskalson began and ran the Legal Resources Centre South Africa's major public interest law firm. He has also been at the forefront of many human rights cases. *Sunday Times* editor Ken Owen described him as that 'awesome left-winger', see the *Sunday Times* 12 June 1994. He has also been described as an 'idealist' in *Business Day* 8 June 1994.

[438] Section 100.

down.[439]

Four of the judges of the court were appointed from the ranks of existing judges.[440] They were appointed by President Nelson Mandela 'in consultation with the cabinet and after consultation with the Chief Justice'.[441] Sitting judges therefore make up a large component of the court, but those selected represent the more progressive sector of the current judiciary.

The remaining six of the judges of the Constitutional Court must be appointed by the president

> in consultation with the cabinet and after consultation with the President of the Constitutional Court.[442]

For the first set of appointments, the six must be selected from a motivated list of 10, submitted by the JSC.[443] Should the president of South Africa not wish to appoint any of the nominees, he or she must furnish reasons to the JSC[444] and the

---

[439] One of the first decisions taken by Chaskalson was to hear argument on the constitutionality of the death penalty. See *Weekly Mail and Guardian* 21 to 27 October 1994. The outcome of this case will have a bearing on a future abortion decision as the right to life clause of the transitional Constitution will be interpreted.

[440] These judges are Laurie Ackerman, judge of the Cape Provincial Division formerly Professor of Human Rights at the University of Stellenbosch, Ismail Mohammed, judge of the Transvaal Provincial Division, Richard Goldstone, judge of the Apellate Division and chairperson of the Goldstone Commission, and Thole Madala of the Transkei Supreme Court. These judges have for many years, unlike many of their colleagues, been involved in, and have advocated, the advancement of human rights.

[441] Section 99(3).

[442] Section 99(4).

[443] Section 99(5)(a).

[444] Sction 99(5)(b).

JSC must provide another list of names from which the president is obliged to appoint the six judges.[445]

The JSC will normally consist of 17 members comprising:

(a) the chief justice, who shall preside at meetings of the commission (Judge M Corbett);
(b) the president of the Constitutional Court (Judge A Chaskalson);
(c) one judge president designated by the judge presidents of the various divisions of the Supreme Court (Judge JA Howard of Natal);
(d) the minister responsible for the administration of justice or his or her nominee (Adv D Omar);
(e) two practising advocates designated by the advocates' profession (Adv Trengrove and Adv Moerane);
(f) two practising attorneys designated by the attorneys' profession (Mr L van Zyl and Mr N Mojapelo);
(g) one professor of law designated by the deans of all the law faculties at South African universities (Prof E Mureinik of the University of the Witwatersrand);
(h) four senators designated en bloc by the Senate by resolution adopted by a majority of at least two-thirds of all its members (I Direko, E Mchunu and B Ngcuka, all of the ANC, and R Radue of the NP);
(i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the president in consultation with the cabinet (D Gordon SC, G Bizos SC, K Moroka, and J Erentsen);
(j) on the occasion of the consideration of matters specifically relating to a provincial division of the Supreme Court, the judge president of the relevant division and the premier of the relevant province.[446]

Crucially, the commission is and will be composed largely of members of the legal profession and, as Beatty suggests, this is decisive in determining appointments.[447]

The crucial nature of the composition of the commission was at the root of the delay in setting it up. Section 105(1)(i) was the subject of a major dispute between the Association of Law Societies (ALS), which represents practising attorneys, and the

---

[445] Section 99(5)(c).

[446] Section 105(1).

[447] D Beatty 'The Rule (and Role) of Law in a New South Africa: Some Lessons from Abroad' (1992) 109 *SALJ* 408, 426.

General Council of the Bar (GCB), which represents advocates, on the one hand, and the National Association of Democratic Lawyers (Nadel) and the Black Lawyers' Association (BLA), on the other. The dispute was over who had the right to appoint members of the commission. BLA and Nadel argued that the ALS and GCB were not representative of the views of the profession and that while these groups were larger in number, the fact that they were made up largely of white male lawyers would skew the selection process of judges of the Constitutional Court. The drafters of the Constitution anticipated such a problem to some extent and therefore the Constitution contains the provision that the process

> shall have regard to the need to constitute a court which is independent and competent and representative in respect of race and gender.[448]

It is not surprising, therefore, that progressive lawyers have been appointed to the court.[449] These judges will be more tolerant than their predecessors in their approach to problems

---

[448] Section 99(5)(d).

[449] In fact all five the appointees who were not already judges are ANC supporters. See C Rickard 'ANC Newcomers Join 'Old' Judges On Bench' *Sunday Times* 16 October 1994. There were about 100 nominations to the JSC for appointment, although these names were never released. The JSC then shortlisted 24 who appeared before the JSC for one hour. The hearings were open but not televised. The 25 nominees were: Prof John Dugard, Judge John Didcott, Prof June Sinclair, Adv Bernard Ngoebe, Adv Pius Langa SC, Judge Johan Kriegler, Prof Johan van der Westhuizen, Prof Gerhard Erasmus, Attorney Navi Pillay, Prof Carole Lewis, Adv Louis Skweyiya SC, Prof Charles Dlamini, Judge Pierre Olivier, Prof Albie Sachs, Prof Edwin Cameron, Mr Fikile Bam, Mr Antonie Geldenhuys, Ms Nono Goso, Judge Willem Heath, Judge Craig Howie, Prof Yvonne Mokgoro, Prof Catherine O'Regan, Adv Justice Poswa and Adv Zac Yacoob. Of these Dugard, Didcott, Langa, Skweyiya, Dlamini, Sachs, Mokgoro, O'Regan, Kriegler and Ngoebe were selected by the JSC for the list of 10 that was given to President Mandela. The six judges finally chosen were Sachs, Langa, Mokgoro, O'Regan, Didcott and Kriegler.

that impact on women, such as abortion. In addition, the role of the two women on the court[450] will be crucial. As noted earlier, patriachy has been at the root of abortion regulation and this could be reflected in cases decided by a largely male judiciary.[451] But, as Murray states:

> There is, however, no guarantee that a judge who is female will take the disadvantage of women seriously, just as there is no guarantee that a man will not.[452]

Pretorius[453] agrees with Murray that the appointment of women judges will not necessarily result in a judiciary inclined towards decisions that will impact positively on women. She suggests that the experience in Canada is that women judges are sometimes harsher than older male members of the judiciary because they have internalised male values. The key to ensuring a more sympathetic judiciary is therefore education.[454]

These cautionary notes notwithstanding, a female judge is more likely to be sympathetic to women's issues than a male judge[455] and the history of both women appointed to the Constitutional Court suggests that they will indeed be so inclined.[456] This sympathy may well extend to a pro-choice inclination on the abortion issue. O'Regan, for example, was one

---

[450] Yvonne Mokgoro and Catherine O'Regan.

[451] A Sachs and J H Wilson *Sexism and the law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (1979) 9.

[452] Murray (n245) 27.

[453] Pretorius (n359) 65.

[454] Pretorius (n359) 70 fn75.

[455] See text following n319 in Chapter 4.

[456] See Rickard (n449).

of the authors of a draft bill of rights which contained an abortion clause.[457] She has also expressed the opinion that the right to dignity of a women could counter the right to life of a foetus as far as abortion is concerned.[458]

The appointment of academics to the Bench[459] was rejected in 1988 by the then chairperson of the Bar Council, Henri Viljoen SC, on the grounds of their lack of experience.[460] However, the inclusion of academics among the judges of the Constitutional Court opens the possibility of broadening the outlook of the court beyond the shared horizon of lawyers in the practising branch of the profession. Academic lawyers have been elevated to the Bench in various other countries, especially to courts that concentrate on constitutional adjudication. In the United States, for example, Justices Frankfurter and Douglas, both academics, were appointed directly to the Supreme Court.[461]

Besides Mokgoro and O'Regan, Professor Albie Sachs is the other academic who has been appointed to the Constitutional

---

[457] H Corder, S Kahanavitz, J Murphy, C Murray, C O'Regan, J Sarkin, H Smith, N Steytler *A Charter for Social Justice* (December 1992) which proposed, in Article 4, the following right to life clause:

(1) Everyone has the right to life.
(2) Nothing in this article shall prevent legislation permitting abortion.

[458] See S Wescott 'Bill of Rights Faces No "Base Beast"' (31 August 1994) 8(5) *Democracy In Action* 14, 15.

[459] See E Kahn 'The Judges and the Professors, or Bench and Chair' (1979) *SALJ* 560.

[460] See E Kahn 'The Judges III' (1989) *Businessman's Law* 201, 202.

[461] Academics appointed to the local Constitutional Court are Associate Professor Yvonne Mokgoro, Associate Professor Catherine O'Regan and Professor Albie Sachs.

Court. Sachs has stated that those against abortion will not have a right to impose positions on others with different opinions.[462] He believes that a future abortion regime in South Africa will see to it that:

> Those who are against birth control or against abortion will have the right to argue their views and work towards finding alternative approaches, but will not have the right to impose their positions on others who hold different opinions. Similarly, those who favour contraception and the right to terminate unwanted or dangerous pregnancies should be free to put forward their positions but not have the right to insist on birth control and abortion for those who do not want it.[463]

Sachs states further that there should be a duty on the state to provide facilities for the exercise of 'free and informed' choice and that there should be 'access to hygienic and dignified abortions for those who wish to terminate their pregnancies'.[464]

In summary, it is clear that the process of appointment to the Constitutional Court has played and will play a pivotal role in determining the character of the bench, marking a distinct departure from the judiciary of the apartheid order. The dominance of old white men has given way to a diversity in age, gender, religion and outlook. This will have a major effect on the type of decision handed down from this court, including a decision on abortion. However, it is extremely difficult to assess how the Constitutional Court will decide the abortion issue. While the court may prefer a piecemeal attack on the law, declaring parts of it vague,[465] it could strike down the whole

---

[462] See Sachs (n412) 68.

[463] Sachs (n412) 68.

[464] Sachs (n412) 69.

[465] See text between n32 and n36 in Chapter 4.

law in terms of a number of sections of the Bill of Rights.

In making a finding the court has wide powers to shape 'appropriate relief, which may include a declaration of rights'[466] but the Constitution states that, if the court declares a law unconstitutional,

> it shall declare such law or provision invalid to the extent of its inconsistency: provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within the period specified by the court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.[467]

What must be guarded against, and it seems that the Constitution does make such provision, is the type of situation that occurred in Canada after the *Morgentaler* decision struck down the Canadian law on abortion. The effect of the ensuing legal vacuum[468] was precisely what the *Morgentaler* decision sought to avoid - unequal access to abortion. In addition, in the absence of any national law, the provinces could legislate and regulate.[469] The result was that while hindrances to access were supposedly removed, disinclined hospitals and doctors could still refuse to perform abortions and refuse to refer patients to doctors who would perform them.

Thus the consequences of a law being struck down can be more problematic than the original law itself. However, such problematic results are pre-empted to some extent by the

---

[466] Section 7(4)(a).

[467] Section 98(5).

[468] P Sachdev 'The Abortion Battle: The Canadian Scene' (1994) 13 *Medicine & Law* 1, 3.

[469] Sachdev (n468) 2.

provision in the Constitution which allows the legislature time to rectify a law which infringes one or more of the fundamental rights enshrined in Chapter 3.

If a law is struck down and a new law has to be drafted, one major issue that arises is how the new law is to conform to the wishes of the court that will probably review it at some point. After the *Morgentaler* decision in Canada, the Minister of Justice complained that the court had not explained how the law should account for foetal rights.[470] He complained further that not one but three majority opinions had come out of the court, each containing a different reasoning, and that it was therefore unclear how a law could be drafted reflecting all these views. Finally, one could not be sure that the law would be reviewed by the same judges,[471] who in any event left major questions unanswered. Therefore there was room for a future law to be struck down on the basis of any of these unanswered issues.[472]

Questions that need to be answered directly include the following: Where can abortions be performed? By whom? What delays or waiting periods are permitted? What type and degree of counselling is permitted? May the counselling be directive or not? What record keeping can be demanded? What partner or parental notifications are required? Must doctors who use the conscientious objection clause refer the patient to another more willing doctor? Who must pay? How much can be charged, if anything?

---

[470] Mandel (n320) 278.

[471] Mandel (n320) 278.

[472] Mandel (n320) 278.

C. THE CONSTITUTIONAL ASSEMBLY AND ABORTION

The determination of what will be included in the final Constitution and Bill of Rights will be the task of the Constitutional Assembly. An evaluation of the composition of this body is therefore crucial in assessing whether an abortion provision will be incorporated.

There are 400 members of the National Assembly[473] and 90 members in the Senate.[474] Together these two bodies constitute Parliament as well as the Constitutional Assembly. Membership of these bodies is on the basis of proportional representation.

The ANC occupies 312 of the Constitutional Assembly's 490 seats; the PAC five, the NP 99, the IFP 48, the Freedom Front 14, and the ACDP two. Much of the politics discussed earlier in connection with Parliament has relevance to the Constitutional Assembly but the processes will be slightly different because both Houses of Parliament sit together in the Constitutional Assembly and a two-thirds majority must be obtained for decisions - a total of 327 votes.

The drafting of a final constitution and its adoption is not open-ended. The final constitution is subject to the 33 Constitutional Principles in Schedule 4 of the transitional Constitution which were agreed to in multi-party negotiations. To ensure accord between these principles and the final constitution, the transitional Constitution provides that, while the final constitution is being drawn up, one-fifth of the members of the Constitutional Assembly can request the

---

[473] Section 40.

[474] Section 48.

Constitutional Court to determine whether any part of it complies with the 33 Constitutional Principles.[475] In addition, the final Constitution must be in place within two years of the first election[476] and it is the duty of the Constitutional Court to determine and certify that the final constitution conforms to these Constitutional Principles.[477]

In addition to the requirement that the final constitution must be agreed to by two-thirds of the Constitutional Assembly, where provisions relate to the functions and powers of the provinces they must also be approved by two-thirds of the members of the Senate.[478] If the final constitution is approved by the majority of the Constitutional Assembly, but not by a two-thirds majority, it must be referred to a panel of constitutional experts which has 30 days to advise on amendments which might achieve the required two-thirds majority.[479] If the panel cannot unanimously agree on the required amendments, or if the required two-thirds majority of the Constitutional Assembly still cannot be achieved, or if the constitution is not adopted within two years, the president shall call a referendum on the text of the constitution.[480] If the Constitution receives the support of 60 per cent of the electorate in such a referendum then the

---

[475] Section 71(4).

[476] Section 73(1).

[477] Section 71(2).

[478] Section 73(2).

[479] Section 73(3).

[480] Section 73(9).

constitution is adopted.[481] Should the text of the constitution not receive the required 60 per cent support of the electorate, then new elections for the National Assembly and Senate will have to occur and the new Constitutional Assembly will be required to adopt the constitution within one year with a 60 per cent majority.[482]

What the final constitution will look like and what rights will be included in its bill of rights remain open questions. If an abortion section is contained in the constitution then, other than changes on the margins, the issue is largely decided once and for all. All the energies and resources that would otherwise be used to fight the issue in the courts could then be spent on directing family planning services and promoting the welfare of women and their children.[483]

Should a section relevant to abortion not find its way into the constitution, then the type of emotional and extremist reactions that exist around the issue in the United States could be echoed in South Africa. In the United States the effect of the *Roe* decision was that almost 200 laws were proposed in state parliaments in 1973.[484] This trend continued each year so that in 1990 close to 400 abortion laws, from both sides of the issue, were introduced in 41 legislatures in that country.[485]

---

[481] Section 73(8).

[482] Section 73(9) and (10).

[483] Jacobson (n155) 6.

[484] Rubin (n3) 187.

[485] A B Shostak 'Abortion' (July/August 1991) *The Futurist* 20, 22.

Traditionally the purpose of a bill of rights has been seen as being to

> withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[486]

However, while a bill of rights can be a force for national unity, decisions interpreting the bill, such as those relating to abortion, can be extremely divisive.[487] When courts must interpret a vaguely worded clause, the result can be a devaluation of the legitimacy of the courts. In the United States, *Roe v Wade* has been seen to have

> [a]lmost overnight ... politicized millions of people and helped to create a mass movement of social-issue conservatives that has grown into one of the most potent forces in our democracy.[488]

A further ramification of *Roe* was that a constitutional right to life amendment was attempted. This was one factor which ensured that the women's Equal Rights Amendment (ERA) failed to pass into law because of the uproar over abortion.[489] Opponents of *Roe* saw the ERA, if passed, as a further obstacle to overturning *Roe*.[490]

With this background to the implications of leaving abortion

---

[486] Judge Jackson in *West Virginia Board of Education v Barnette* 319 U.S. 624, 638 (1943).

[487] P W Hogg *Constitutional Law of Canada* (1985) 796-7. See also W Russell 'The Political Purposes of the Canadian Charter of Rights and Freedoms' (1983) 61 *Canadian Bar Review* 30, 31-43.

[488] TRB 'Abortion Time Bomb' (25 February 1985) *New Republic* 4 cited in Mandel (n320) 288.

[489] Rubin (n3) 187.

[490] J J Mansbridge *Why We Lost the ERA* (1986) 127.

solely to the courts, it is clear that the simplest solution would be for the abortion question to be addressed in the final bill of rights.[491] This seems to be the case in spite of the attitude of some courts, such as in the 1985 Canadian case of *Hunter et al v Southam Inc*[492] where it was held that

> [a] constitution ... is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historic realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.[493]

Similarly, Crann states that

> ... it is ludicrous to expect to find the specific word 'abortion' in a constitutional document. The constitution is intended to endure a long time. As a result, constitutional provisions are wisely drafted in general and open-ended language to allow for new circumstances in the future.[494]

However, abortion is an issue which will not go away and thus it is unlikely that 'new circumstances' would compel revision of a clause dealing with abortion. In addition, inclusion of an abortion provision in the final constitution would spare the Constitutional Court from having to make extremely controversial policy choices with no real bases or reasons for its conclusions on the topic. As it is, the court will have enough attention

---

[491] See Leyshon (n123) 224.

[492] (1985) 11 DLR (4th) 641.

[493] At 649.

[494] G P Crann '*Morgentaler* and American Theories of Judicial Review: the *Roe v Wade* Debate in Canadian Disguise' (1989) 47(2) *University of Toronto Faculty of Law Review* 499, 508.

focused on it, with all the pressure that entails, and the kind of controversy likely to surround an abortion decision may only undermine the process.

An abortion provision in the constitution would also accommodate those against a counter-majoritarian role for the courts, saying that judges are not equipped to decide issues of policy and that it is far more democratic to allow such matters to be decided by

> ordinary political processes and the popularly elected institutions of government, and if need be, by the constituent processes and the constitutional amending power.[495]

Thus a balanced approach should be adopted between a bill that totally ignores controversial topics and one that points the courts towards allowing the legislature to decide some of the issues. This would reduce the feelings of illegitimacy that surround contentious decisions while at the same time it would avoid being definitive, allowing the bill of rights and Parliament to accommodate changing circumstances, events and attitudes. This kind of bill would still permit the courts to intervene and play a protective role, but under more explicit direction, and would enable the legislature, and thus the electorate, to have a much more direct role in the resolution of controversial issues.

When the Charter was being drafted in Canada, an amendment was proposed which read as follows:

> Nothing in this Charter affects the authority of Parliament to legislate in respect of abortion.

The proponent of the amendment, David Crombie MP, argued for it

---

[495] McWhinney (n420) 289.

on the basis that supporters of all positions on the issue agreed that parliament should be able to decide the issue, rather than leaving it to the courts.[496] The Canadian Abortion Rights Action League (CARAL) countered with a much more far-reaching proposed clause, namely that:

> Nothing in this Charter is intended to extend rights to the embryo or foetus nor to restrict in any manner the rights of women to a medically safe abortion.[497]

Speaking against the Crombie motion in parliament, Prime Minister Pierre Trudeau[498] argued that

> [t]he Charter does not say whether abortions will be easier or more difficult to practise in the future. The Charter is absolutely neutral on this matter ... The House will probably have to decide in the weeks, months or years ahead, depending on the wishes of its members, whether the Criminal Code should be amended to make abortion less readily or more readily available. The onus will be on us.[499]

He went on to state explicitly that

> should a judge conclude that, on the contrary, the Charter does, to a certain extent, affect certain provisions of the Criminal Code, under the override clause we reserve the right to say: Notwithstanding this decision, notwithstanding the Charter of Rights as interpreted by this judge, the House legislates in such and such a manner on the abortion issue.[500]

However, such a contest between legislature and judiciary did not occur and since the *Morgentaler* decision struck down the abortion law in 1988 no law on abortion has existed in Canada, resulting

---

[496] Canada House of Commons Debates (27 November 1981) 13436.

[497] Mandel (n320) 274.

[498] Crann (n494) 512-513.

[499] Canada House of Commons Debates (November 27 1981) 13438.

[500] Canada House of Commons Debates (November 27 1981) 13438.

in a legal vacuum.[501]

It is against this background that proposals for reference to abortion in the final South African bill of rights must be evaluated. An example[502] is *A Charter for Social Justice*[503] which proposed the following right to life section:

> (1) Everyone has the right to life.
> (2) Nothing in this article shall prevent legislation permitting abortion.[504]

Thus, an additional sentence should be annexed to the right to life section contained in the transitional Bill of Rights to ensure that a court cannot oust abortion. Such an additional sentence would ensure that the legislature could make a determination about, for example, abortion limits. The amended section could read as follows:

> Every person has the right to life. This principle shall not be construed so as to restrict the right of women to procure an abortion.[505]

Such a formulation would restrict the ability of the courts to strike down a balanced approach by the legislature which was responsive to changes in prevailing attitudes. It would also serve an educative function while permitting the legislature to decide this issue without excluding a role for the courts. It is an interesting anomaly that political parties which seem to be sympathetic to liberalising the abortion laws will not say so

---

[501] Sachdev (n468) 6.

[502] Leyshon (n123) also suggests the inclusion of a clause on abortion, although he would wish it to protect the foetus.

[503] Corder et al (n457).

[504] Article 4.

[505] See J Sarkin 'A Perspective on Abortion Legislation in South Africa's Bill of Rights Era' (1993) (56) *THRHR* 83, 94.

openly, while, as in the case of the ANC, not hesitating to publicly support the ending of capital punishment, which is also an emotional and divisive issue. Public opinion is vehemently opposed to ending capital punishment,[506] yet the ANC's support for its abolition is unwavering. Similarly, the transitional Bill of Rights takes a sympathetic stand on gay issues[507] which, once again, is not a position that has been canvassed and may well be one that does not enjoy public support. The conclusion which may be drawn is that contentious issues pursued vigorously by certain lobby groups have been taken on board as political party concerns while abortion, which is a women's issue, is supposedly too controversial and requires 'more debate'.[508] However, the situation is somewhat more complex, since a section suggested by the ANC in its final draft bill could impact on abortion. This section reads:

> Legislation may provide for reproductive rights, and rights associated with child birth and child-raising shall be respected.[509]

Were this section to be included in the final constitution it would impact on the outcome of a constitutional case as it would emphasise women's rights directly in the abortion arena. Pragmatically speaking, this type of section is more likely to be included in the final constitution than a section which focuses openly on abortion because of the sensitivity and

---

[506] See *The Argus* opinion poll 1993 and the vote in Parliament.

[507] See section 8(2).

[508] See Article 2 of the ANC Bill of Rights in the text following n23 in this Chapter.

[509] Article 7(2).

emotional impact of the issue. However, given the composition of the Constitutional Assembly, neither is likely.

D. REGIONAL PARLIAMENTS AND ABORTION

Another possibility, albeit unlikely, is that the abortion issue could be left for solution at the provincial level. The ability of the provinces to legislate and regulate abortion will be governed by the authority vested in the provinces in terms of the transitional Constitution, although these powers could be amended by the final constitution. The provincial structures and powers of the provinces are contained in sections 125-162. In terms of the transitional Constitution the provinces are competent[510] to make laws with respect to a list of spheres contained in Schedule 6. One area listed in this schedule that could impact on abortion is health services, although welfare services could conceivably also affect the issue.

However, section 126 also stipulates circumstances in which an Act of Parliament will prevail over provincial legislation. Section 126(3)[511] reads as follows:

> A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as-
>
> (a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
>
> (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the

[510] Section 126 of the Constitution. See Constitution of the Republic of South Africa Amendment Act, Act No 2 of 1994.

[511] See Constitution of the Republic of South Africa Amendment Act, Act No 2 of 1994.

Republic;

(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;

(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

Section 126 (4) provides as follows:

> An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

These sections could see that abortion is regulated at a national rather than a provincial level. While there are powers for the provinces to make law on health services, the provisions contained in sections 126 (3)(a),(b),(c) and (e) will probably determine that abortion is a matter that should be regulated from the centre. Were different principles to apply in the different provinces, women would simply travel to the province with the most liberal abortion laws. The implications for health in 126(3)(e) are particularly pertinent in this regard.

The transitional Constitution also provides for the adoption of provincial constitutions.[512] However, section 160 (3) stipulates that a provincial constitution shall not be inconsistent with either the transitional Constitution[513] or the final constitution.[514] Determination that the required

[512] Section 160.

[513] Section 160(3)(a).

[514] Section 160(3)(b).

consistency exists shall be made by the Constitutional Court before the provincial constitution comes into force.[515] The question of vital interest, yet to be answered, revolves around the status of these provincial constitutions and the extent and manner in which they will impact on fundamental rights.

The United States is a prime example of a federal system having implications for the abortion issue. Before *Roe v Wade*, the various states making up the United States had their own abortion laws which could be tested by the courts in terms of the constitution of a state. This occurred in some states where abortion legislation was struck down.[516] Consequently, the period 1969 to 1973 saw the abortion laws of Florida, California, Texas, New Jersey, Wisconsin, Connecticut, Georgia and the District of Columbia being declared unconstitutional by the courts.[517] At the same time, Alaska, Hawaii, New York and Washington legalised abortion while attempts to do the same in Arizona, Maryland and Vermont failed narrowly.[518]

The possible impact of provincial constitutions on abortion in South Africa is, however, an open political question and its resolution will hinge on the extent of powers accorded to the provinces in the final constitution. What will determine whether abortion can be legislated and then tested by the courts at this

---

[515] Section 160(4).

[516] See, for example, *People v Belous* 71 Cal 2d 9541, 80 Cal Rptr. 354, 458 cert denied 397 U.S. 915 (1969) (California) and *U.S. v Vuitch* 402 U.S. 62 (1971) (District of Columbia).

[517] N J Davis *From Crime to Choice: The Transformation of Abortion in America* (1985) 214.

[518] Davis (n517) 214.

level is the type of legislative powers that the provinces have, the provisions of provincial constitutions, the extent and exclusivity of those constitutions, and whether an abortion decision by the Constitutional Court binds the whole country. Thus, the legal regulation of abortion could be litigated at a provincial level if one abortion regime is not adopted for the whole country.

E. CONCLUSION

There will be various branches of government involved in the abortion issue. The national legislature will need to decide whether to leave the present legislation in its present form, whether to amend it, or whether a new law should be enacted. It will then be up to the courts to decide its constitutionality.

However, the abortion issue by the courts may be part of either or both of two constitutional periods - the period of operation of the transitional Constitution and, secondly, the period ushered in by adoption of the final constitution. The issue may be left unsolved by the Constitutional Court, for reasons of pragmatism, until the final constitution is adopted.

In interpreting the transitional Constitution the courts in this country may well give particular weight to the right to equality, given the extent to which inequality suffered particularly by black women, has characterised South African history. In the light of the need to make a radical break with the past and to establish a society based on democratic and non-sexist principles, equality will play a principal role in the reformation of many areas of the law. Should abortion reform

occur through the courts, the right to equality could be the right grounding a right to abortion.

CHAPTER SIX

CONCLUSION

Control of abortion has been part of the attempt by men to subjugate women.[1] It has had very little to do with safeguarding life. The perception that it has been the church which has advocated abortion regulation only to promote the sanctity of life has been exposed as incorrect and the real motivations for its adoption of an anti-abortion stance laid bare. This stance, even at its most stringent in the Catholic Church is only of recent vintage and then its adoption was based on a mistake. In any event, the different religions found in South Africa are far from uniform in their attitude to abortion.[2]

It must also be remembered that the law-making process both within the church and the secular world have been controlled by men who have used it to entrench patriarchy. Abortion laws in particular have been used by men to secure male dominance and, in the South African context, to entrench apartheid.[3] Measures aimed at outlawing abortion have operated to ensure inferior status for women, a problem compounded for black women by racial discrimination.[4] Thus the political system has impacted on women

---

[1] See Chapter 2 and Chapter 3.

[2] See Chapter 2. This is crucial given the range of religions existing in South Africa and given the fact that the influence of the church over the state will be far less than that which the Dutch Reformed Church was able to exert in the past. The Constitution and Bill of Rights will also ensure a greater separation of church and state - one that will probably be enforced by the Constitutional Court.

[3] See Chapter 3.

[4] See Chapter 2 and Chapter 3.

to different degrees, depending on their race. Wealth has been intimately tied to race in South Africa and, with race and class correlating, access to abortion has been available to those who could afford it.

Abortion laws were racially aimed to encourage an increase in the white birthrate. Where abortion providers were targeted for disciplinary action, this was mainly the result of attempts by the white medical fraternity's own organisation to limit abortions performed by their membership.[5]

The law in South Africa must adapt to changing times and circumstances. While the law in the past often forbade abortion, the reasons for these prohibitions no longer can hold sway. Under the new democratic dispensation, with its emphasis on human rights and individual freedom, a greater degree of acceptance of access to abortion will be a reality. The fact that the world trend is towards liberalisation, and individual choice, must influence what occurs in South Africa.[6] In the past South African law has been overly concerned with the position in Roman and Roman-Dutch law without being sufficiently concerned with examining the reasons for those positions. The status of women and patriarchal control is hardly ever correlated to determine motivations for abortion regulation. The law needs to be less reliant on what ancient societies and jurists of bygone times did and believed. Rather the effect of law on society and what is just, fair and promotes equality should be key determinants in legislating on and adjudicating such issues.

---

[5] See Chapter 2.

[6] See Chapter 2.

While the law in South Africa used to be what the politicians said it was, the shift to a constitutional system will mean that the law will be what the judges say it is.[7] While in the past many judges attempted, in a postivistic way, to claim that their role was entirely mechanistic, this will certainly not be believable in the future.[8]

The shift to a constitutional system emphasising individual human rights will impact on abortion, since regulations which intrude unnecessarily into an individual's life will probably not be tolerated. A balanced approach will be sought to address competing concerns but issues in the moral domain are likely to be left to individuals to decide for themselves. The emphasis in the Constitution on freedom and equality,[9] and the lessons learnt from other jurisdictions,[10] will ensure a greater degree of autonomy for all and for women in particular.[11] Thus, the right of women to choose to have an abortion is likely to be recognised and protected, within acceptable limits.

The role of the courts, particularly the Constitutional Court, will be fundamental to this transformation.[12] The past subservience to parliament of the courts has given way to a greater and more influential role for the courts which is certain to impact critically on the abortion issue. It will be in the

---

[7] See Chapter 5.

[8] See Chapter 5.

[9] See Chapter 5.

[10] See Chapter 4.

[11] See Chapter 5.

[12] See Chapter 5.

main the judges of the Constitutional Court, many of whom were not part of the old judicial order, who will decide the fate of abortion regulation. Since this is not an issue which can be resolved judicially in a neutral and dispassionate way, who the judges are, and what they personally believe, will be critical.[13] The presence of progressive-minded individuals, women and academics on the Constitutional Court bench will conceivably produce abortion law that is far more appropriate to South African circumstances than the old regime.[14]

As policy on very sensitive issues such as abortion is determined by the institutions of the new democratic order, all the economic, political, religious, cultural and social perspectives and ramifications will be taken into account.[15] All relevant issues will be examined and questions previously ignored, such as the effect of abortion control on women's lives and health, are likely to receive emphasis.[16]

---

[13] See Chapter 4 for the comparative examples of this, and Chapter 5 for the impact of this in the South African situation.

[14] See Chapter 4 for the affect of these factors in other jurisdictions, and for the discussion of the relevance of these considerations in South Africa see Chapter 5.

[15] One of these that might impact on abortion is population growth. Monica Ferreira in a Human Sciences Research Council Report (HSRC Report s-126 (1984)) noted

> South Africa will not be able to control its population growth without the application of legal abortions and sterilization in its population programme. In fact, to date no population programme in the world has succeeded without it. The government should give serious attention to this matter in order to ensure the successful functioning of its family planning service.

See also B Brown 'Facing the "Black Peril": The Politics of Population Control in South Africa' (1987) 13(3) *Journal of Southern Africa Studies* 256, 272.

[16] See Chapter 3.

It is likely, therefore, that South Africa's law will be liberalised and it is possible that abortion on request will be available, although this might not be the direct implication of the law in the beginning. In addition, the time period within which a new law would entitle women to obtain an abortion might be quite short initially, as a result of compromises required by circumstances.

Based upon theories of brain birth and viability,[17] a raising of consciousness around women's basic rights and needs, and international legislative precedent,[18] there are convincing reasons for availability of abortion until the twentieth week of pregnancy on request of the woman.[19] Similarly, there is a strong case for requiring specific conditions in respect of petitions for abortion after this period.

While this dissertation focuses on abortion, the issue cannot be seen in isolation. It has to be an integral part of a reproductive health[20] scheme and part of an overall health, and

---

[17] The historical roots of viability were discussed in Chapter 3.

[18] See Chapter 2.

[19] In consultation with, as opposed to with the permission of, a medical professional.

[20] Women's reproductive health must be seen as a process which is

> accomplished in a state of complete physical, mental and social well-being and is not merely the absence of disease or disorders of the reproductive process. Reproductive health, therefore implies that people have the ability to reproduce, to regulate their fertility and to practise and enjoy sexual relationships. It further implies that reproduction is carried to a successful outcome through infant and child survival, growth, and healthy development. It finally implies that women can go safely through pregnancy and childbirth, that fertility, regulation can be achieved without health hazards and that people are safe in

in particular maternal, health plan.[21] In other words it must be addressed holistically. Where abortion is part of an overall health or reproductive health strategy, as in Denmark, France, Holland, Ireland and Italy the abortion rate has fallen.[22] Attempts to resolve the abortion issue in isolation fail to address the underlying reasons for use of abortion. An holistic approach, on the other hand, reduces reliance on abortion.

---

having sex.
M Fathalla 'Reproductive health: A Global Overview' (1991) 628 *Annals of the New York Academy of Sciences* 1.

[21] See N F Henry 'Regional Dimensions of Abortion - Facility Services' (1982) 34(1) *Professional Geographer* 65, 65.

[22] J L Jacobson *Women's Reproductive Health: The Silent Emergency* (1991) World Watch paper 102, 24.

BIBLIOGRAPHY

BOOKS AND MONOGRAPHS

Ackerman D Draper J A and Mashinini E (eds) *Women Hold Up Half the Sky: Women in the Church in Southern Africa* (Pietermaritzburg 1991).

Albertyn C *Achieving Equality for Women the Limits of a Bill of Rights* CALS (Wits University)- Working Paper 17 (Johannesburg 1992).

ANC *The Reconstruction and Development Programme: A Policy Framework* (Pretoria 1994).

ANC Health Department *A National Health Plan for South Africa* (Pretoria 1994).

Anders PC and Ellson S E *The Criminal Law of South Africa* (Cape Town 1915).

Aristotle *Politics Book VII: Political Aims* circa 330BC; Warrington J (9ed) (London 1973).

Austin G *The Indian Constitution: Cornerstone of a Nation* (London 1955).

Balsdon J P V D *Roman Women: Their History and Habits* (London 1962).

Barnard A H Cronje D S P and Olivier P J J *The South African Law of Persons and Family Law* (2nd ed) (Durban 1990).

Bazilli S *Putting Women on the Agenda* (Johannesburg 1991).

Beatty D (ed) *Human Rights and Judicial Review* (Amsterdam 1993).

Bernstein H *For their Triumphs and For their Tears: Women in Apartheid South Africa* (London 1985).

Bickl A *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York 1962).

Boberg P Q R *The Law of Delict: Vol 1 Aquillian Liability* (Cape Town 1984).

Boberg P *The Law of Persons and the Family* (Cape Town 1977).

Bogdanor V *What is Proportional Representation* (London 1984).

Boulle L Harris B and Hoexter C *Constitutional and Adminstrative Law* (Cape Town 1989).

Brigham J *Constitutional Language* (Westport 1978).

Brody B *Abortion and Sanctity of Human Life: A Philosophical View* (Cambridge 1975).

Buckland W W *A Textbook of Roman Law* (Cambridge 1963).

Burchell J *Principles of Delict* (Durban 1994).

Cachalia A et al *Fundamental Rights in the New Constitution* (Cape Town 1994).

Cappelletti M *The Judicial Process in Comparative Perspective* (Oxford 1989).

Cappelletti M and Cohen W *Comparative Constitutional Law* (Indianapolis 1979).

Carrick P *Medical Ethics in Antiquity* (Dordrecht 1985).

Clarkson H T *Handbook of Colonial Criminal Law* (Cape Town 1904).

Cock J Emdon T and Klugman B *Child Care and the Working Mother: A Sociological Investigation of a Sample of Urban African Women in South Africa* (Carnegie Conference paper no 115 1983).

Cock J *Maids and Madams: Domestic Workers under Apartheid* (London 1989).

Cock J *Colonels and Cadres: War and Gender in South Africa* (Cape Town 1991).

Cock J and Koch E *Going Green: People, Politics and the Environment in South Africa* (Cape Town 1991).

Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* (Pietermarizburg 1993)

Cox A *The Role of the Supreme Court in American Government* (Boston 1976).

Curran C and Curran E *New Perspectives in Moral Theory* (Indiana 1974).

Currel M *Political Woman* (London 1974).

Davis J N *From Crime to Choice: The Transformation of Abortion in America* (Connecticut 1985).

Devenish G *Interpretation of Statutes* (Cape Town 1992).

Devereux G *A Study of Abortion in Primitive Societies* (New York 1976).

De Wet J C and Swanepoel H L *Die Suid-Afrikaanse Strafreg* (Durban 1960).

De Wet J C and Swanepoel H L *Die Suid-Afrikaanse Strafreg* (Durban

1975).

Drower S J *A Survey of Patients Referred For Therapeutic Abortions on Psychiatric Grounds in a Cape Town Provincial Hospital* PhD thesis (University of Cape Town 1977).

Dugard J *International Law: A South African Perspective* (Cape Town 1994).

Du Plessis L M and Corder H *Understanding South Africa's Transitional Bill of Rights* (Cape Town 1994.)

Du Toit D M *Die Christen en Aborsie* (Pretoria 1978).

Dworkin R *Law's Empire* (London 1986).

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

Edelstein L *The Hippocratic Oath: Text, Translation and Interpretation* (Baltimore 1943).

Ely J *Democracy and Distrust: a Theory of Judicial Review* (Cambridge 1980).

Feldman B *Birth Control in Jewish Law* (New York 1968).

Ferreira M *Abortion and Family Planning: A literature Study* Human Science Research Council Report 5-126 (Pretoria 1985).

Fletcher J F *Humanhood* (Buffalo 1979).

Gardiner F G and Lansdowne C W H *South African Criminal Law and Procedure (6ed)* (Cape Town 1958).

Gardiner J F *Women in Roman Law and Society* (London 1986).

Geffen I A *The Laws of South Africa affecting Women and Children* (Johannesburg 1928).

Ginsburg F D *Contested Lives: The Abortion Debate in an American Community* (New York 1987).

Glendon M A *Abortion and Divorce in Western Law: American Failures, European Challenges* (Cambridge 1987).

Granfield D *The Abortion Recession* (New York 1969).

Grofman B and Lijphart A *Electoral Laws and their Political consequences* (New York 1986).

Hahlo H R and Kahn E *The South African Legal System and its Background* (Cape Town 1968).

Hartman B *Reproductive Rights and Wrongs* (New York 1987)

Haring B *Medical Ethics* (Slough, England 1972).

Hawthorne L *The Crime of Abortion: A Historical and Comparative Study* Ph.D. Dissertation (University of Pretoria 1982).

Hodgson J E (ed) *Abortion and Sterilization: Medical and Social Aspects* (New York 1981).

Hogg W P *Constitutional Law of Canada* (Ontario 1985).

Hogg W P *Constitutional Law of Canada* (3ed) (Ontario 1992).

Hordern A *Legal Abortion: The English Experience* (Oxford 1987).

Hunt P M A *South African Criminal Law and Procedure* (vol 2) (Cape Town 1970).

Hyde N *Half the Human Experience: The Psychology of Women* (1985).

Jacobs M *Situation Analysis of Children and Women in South Africa Child Health Status* (Report prepared for the United Nations Children's Rights Committee) (1992).

Jacobson J L *Women's Reproductive Health: The Silent Emergency* (New York 1991).

Jordaan J and Mfono Z and Tshabalala M *Population Growth - Our Time-Bomb* (Pretoria 1991).

Keown J *Abortion, Doctors and the Law: Some aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (New York 1988).

Kotze H *President's Council Report on a Proportional Polling System for South African in a New Constitutional Dispensation* (Cape Town 1992).

Krason M S *Abortion: Politics, Morality and the Constitution* (Maryland 1984).

Laundy P *Parliaments in the Modern World* (New York 1989).

Lee O and Robertson A *Moral Order and the Criminal Law: Reform Efforts in the US and West Germany* (The Hague 1973).

Lessing M (ed) *South African Women Today* (Cape Town 1994).

Lijphart A *The Political Consequences of Electoral Laws* (New Haven 1990).

Lotter J M and Glanz L *Sekere Houdings Jeens Aborsie* Human Sciences Research Council report SN-11 (Pretoria 1980).

Luker K *Abortion and the Politics of Motherhood* (Los Angeles 1984).

Maclean J A *Compendium of Kaffir Laws and Customs* (Cape Town 1866).

Mandel M *The Charter of Rights and the Legalization of Politics in Canada* (Toronto 1992).

Mansbridge J J *Why We Lost the ERA* (Chicago 1986).

Mark G *A Follow-Up of Therapeutic Abortions - a Social Work Perspective* MA thesis (University of South Africa 1981).

Marsh D and Chambers J *Abortion Politics* (London 1981).

McDougal M Lasswell H and Chen L *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven 1980).

McWhinney E *Supreme Courts and Judicial Law Making: Constitutional Tribunals and Constitutional Review* (Dordrecht 1986).

Milbauer B *The Law Giveth: Legal Aspects of the Abortion Controversy* (New York 1983).

Miles R *The Women's History of the World* (London 1988).

Millett K *Sexual Politics* (New York 1969).

Milne D *The New Canadian Constitution* (Toronto 1982).

Milton J R L *South African Criminal Law and Procedure* (vol 2) (Cape Town 1982).

Mohr J *Abortion in America: The Origins and Evolution of National Policy 1800-1900* (New York 1970).

Mostert W P and Van Tonder J L *Die Voorgestelde Suit-Afrikaanse Bevolkingsprogram van die Presidentsraad: Insette ter Bereiking van Fertilitietsdoelwitte* Human Sciences Research Council Report s-142 (Pretoria 1986).

Natal Council of Churches *Report of Symposium on the Termination of Pregnancy (Abortion)* (Durban 1973).

Neethling J Potgieter J M and Visser P J *Law of Delict* (Durban 1994).

Newman L M (ed) *Men's Ideas, Women's Realities: Popular Science, 1870-1915* (New York 1985).

New York State Task Force on Life and the Law *Fetal Extrauterine Survivability* (New York 1988).

Ngubane H *Body and Mind in Zulu Medicine* (London 1977).

Norrie K M *Family Planning Practise and the Law* (Dartmouth 1991).

Noonan J J (ed) *The Morality of Abortion: Legal and Historical Perspectives* (Cambridge 1972).

Noonan J J (ed) *A Private choice: Abortion in the Seventies* (New York 1979).

Olivier P J J *The SA Law of Persons and Family Law* (Durban 1980).

O'Donovan K *Sexual Divisions in Law* (London 1985).

Oosthuizen G C et al *Euthanasia* (Cape Town 1978).

Perry M *Morality, Politics and Law: A Bicentennial Essay* (New York 1989).

Petchesky R P *Abortion and Women's Choice* (Boston 1984).

Petersen K A *Abortion Regimes* (Dartsmouth 1993).

Pomeroy S B *Goddesses, Whores, Wives and Slaves: Women in Classical Antiquity* (New York 1975).

Potts M Drygory P and Peel J *Abortion* (Cambridge 1977).

Preston-Whyte E M *Teenage Pregnancy in Selected Coloured and Black Communities* Human Sciences Research Council report SD 2 (Pretoria 1991).

Price H *Psychological Adjustments of Pregnant Adolescents who Seek Legal Abortions* MA thesis (University of Witwatersrand 1984).

Rachels J *The Elements of Moral Philosophy* (New York 1986).

Richards P *Parliament and Conscience* (London 1970).

Rispel L and Behr G *Health Status Indicators: Policy Implications* (Johannesburg 1992).

Rode H L *Enkele Aspekte van Aborsie: 'n Literatuurstudie* Department of Welfare and Pensions (Pretoria 1974).

Rubin E R *Abortion, Politics and the Courts: Roe v Wade and its Aftermath* (New York 1987).

Sachdev P (ed) *International Handbook on Abortion* (New York 1983).

Sachs A and Wilson J H *Sexism and the Law: A study of Male Beliefs and Legal Bias in Britain and the United States* (New York 1979).

Sachs A *Protecting Human Rights in a New South Africa* (Cape Town 1991).

Sadler T *Langman's Medical Embryology* (5ed) (New York 1985).

Schapera I *The Khoisan Peoples of South Africa: Bushmen and Hottentots* (London 1929).

Seedat A *Crippling a Nation: Health in Apartheid South Africa* (London 1984).

Sieghart P *The International Law of Human Rights* (Oxford 1983).

Simons H J *African Women: Their Legal Status in South Africa* (London 1968).

Singer P *Practical Ethics* (Cambridge 1979).

Smith H L *Ethics and the New Medicine* (New York 1970).

Smit P C *Die Posisie van die Ongeborene in die Suid-Afrikaanse Reg met Besondere Aandag aan die Nasciturusleerstuk* LLD thesis (University of the Orange Free State 1976).

Smits P W *The Right to Life of the Unborn Child in International Documents, Decisions and Opinions* (Bedum 1992).

Snyman C R *Criminal Law* (Durban 1983).

South African Department of Health and Population Development *Annual Reports* (Pretoria 1976-1993).

South African Institute for Sociological, Demographic and Criminological Research *Sekere Houdings jeens Aborsie* (Pretoria 1980).

Stayt H A *The Bavenda* (London 1968).

Steyn L C *Uitleg van Wette* (Cape Town 1981).

Strauss S A S *Doctor, Patient and the Law* (2nd ed) (Pretoria 1984).

Suzman H *In No Uncertain Terms: Memoirs* (Johannesburg 1993).

Swanepoel A M E *Aborsie as Etiese Probleem* MA thesis (University of Pretoria 1983).

South African Institute of Race Relations *Annual Survey* (Johannesburg 1985-1991/1992).

South African Law Commission Project 45 *Women and Sexual Offences in South Africa* (Pretoria 1985).

South African Law Commission Project 58 *Group and Human Rights* (Pretoria 1989).

Stanton S *An Exploratory Study of Illegal Abortions With Focus on the Pre-abortion Decision-making Process* BA (Hons) thesis (University of Cape Town 1987).

Tarnesby P *Abortion Explained* (London 1969).

Taylor D *Women: An analysis in Women: A World Report* (New York 1985).

Taylor S *A Six Year Review of Legal Abortions Performed in a Teaching Hospital* Masters in Community Medicine thesis (University of Cape Town 1986).

Tribe L *Constitutional Choices* (Cambridge 1985).

Tribe L *American Constitutional Law* (Mineola, New York 1988).

Tribe L *The Clash of the Absolutes* (New York 1990).

United Nations Department of Economic and Social Development *Abortion Policies: A Global Review vol 1* (New York 1992).

United Nations Population Fund *Annual Review of Population Law vol 16* (Cambridge 1989).

Valance E *Women in Parliament* (London 1979).

Van Dijk P and Van Hoof G J H *Theory and Practice of the European Convention of Human Rights* (2nd ed) (Amsterdam 1990).

Van Rensburg N J *Population Explosion in South Africa* (Pretoria 1972).

Van der Linden J (translated by Sir H Juta) *Institutes of Holland* 3ed (Cape Town 1897).

Van der Vyver J D and Joubert D *Persone en Familiereg* (2ed) (Cape Town 1985).

Verschoor T *Verdicts of the Medical Council* (Pretoria 1990).

Voet J (translated) *Commentarius ad Pandectas* (1698-1704).

Von Regenmortel P J *The Reproductive Behaviour of Young Coloured Mothers and Knowledge, Attitudes and Practices with Respect to Birth Control Amongst a Group of Coloured Mothers Between the ages of 15-20* MA thesis (University of Stellenbosch 1975).

West R *Respiratory Physiology - the Essentials* 3 ed (1985).

Westmore J *Abortion in South Africa and Attitudes of Natal Medical Practitioners towards SA Abortion Legislation* (Durban 1977).

Williams G *Sanctity of Life and the Criminal Law* (London 1958).

Woodwood B and Amstrong S *The Brethren: Inside the Supreme Court* (New York 1979).

World Health Organisation *Definitions and Recommendations:*

International Classifications of Disease (Geneva 1979).

World Health Organisation *Apartheid and Health* (Geneva 1983).

ARTICLES

Aggarwal U P and Mati J K G 'Epidemiology of Induced Abortions in Nairobi Kenya' (1982) 31 *Journal of Obstetrics and Gynecology East Central Africa* 67.

Albertyn C and Kentridge J 'Introducing the Right to Equality in the Interim Constitution' (1994) 10(2) *South African Journal on Human Rights* 149, 152.

Allen A 'Autonomy's Magic Wand: Abortion and Constitutional Interpretation' (1992) 72 *Boston University Law Review* 683.

Allen D W and Wall D E 'The Behaviour of Women State Supreme Court Justices: Are They Tokens or Outsiders?' (1987) 12 *Justice Systems Journal* 232.

Allison M 'The Right to Choose: Abortion in France' (April 1994) 47(2) *Parliamentary Affairs: A Journal of Comparative Politics* 222.

Alumbaugh S and Rowland C K 'The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgements' (Oct-Nov 1990) 74(3) *Judicature* 153.

Anonymous 'Nasciturus' (1892) 9 *Cape Law Journal* 59.

Anonymous 'Rights of Unborn Children in the Law of Torts' (1921) 38 *South African Law Journal* 439.

Ardell J 'Abortion, Politics and Gender in Italy' (April 1994) 47(2) *Parliamentary Affairs: A Journal of Comparative Politics* 238.

Armstrong N W 'The New Abortion Bill - Medicine and Society' (1973) *Responsa Meridiana* 247.

Asmal K 'Constitutional Courts - A Comparative Survey' (1991) 24 *Comparative and International Law Journal of South Africa* 315.

Asmal K and de Ville J 'An Electoral System for South Africa' in Steytler N C et al (eds) *Free and Fair elections* (Cape Town 1994).

Baluk U and O'Neill P '"Health Professionals" Perceptions of the Psychological Consequences of Abortion' 1980 8 *American Journal of Community Psychology* 67.

Barrie G 'The Challenge of the South African Judiciary in the 1990s' (1989) *Tydskrif van Suid Afrikaanse Reg* 515.

Beatty D 'Human Rights and Constitutional Review in Canada' (1992) 13(5-6) *Human Rights Law Journal* 185.

Beatty D 'The Rule (and Role) of Law in a New South Africa: Some Lessons from Abroad' (1992) 109 *South African Law Journal* 408.

Benatar S R et al 'Abortion - Some Practical and Ethical Considerations' (1994) 84 *South African Medical Journal* 469.

Bertrand A R L 'The Abortion and Sterilisation Act 2 of 1975: A Third Opinion' (1977) *South African Journal of Criminal Law and Criminology* 263.

Bertrand A R L 'The Abortion and Sterilisation Act 2 of 1975: A Third Opinion (Part 11)' (1978) *South African Journal of Criminal Law and Criminology* 264.

Bertrand B 'The South African Abortion Act - An Assault on the Image of God' (unpublished paper 1987 on file with the author).

Beutler M J 'Abortion and the Viability Standard - Toward a More Reasoned Determination of the State's Countervailing Interest in Protecting Pre-Natal Life' (1991) 21 *Setan Hall Law Review* 347.

Binkin N J Burton N N Toure A H Traore M L and Ruchat R W 'Women Hospitalized for Abortion Complications in Mali' (1984) 10(1) *International Family Planning Perspectives* 8.

Blank R H 'Judicial Decision Making and Biological Fact: *Roe v Wade* and the Unresolved Question of Fetal Viability' (1987) *Western Political Quarterly* 584.

Boes E G M 'Maternal Deaths at Pelonomi Hospital, Bloemfontein 1980-85' (1989) 76 *South African Medical Journal* 24.

Bono A 'Italy' (30 September 1989) 299 *British Medical Journal* 30 September 814.

Botes M 'Septic Abortion and Septic Shock' (March 1973) *South African Medical Journal* 432.

Bourne D E 'Abortion Statistics' (1980) *South African Medical Journal* 852.

Bourne D E 'Abortion in England and Wales of South African Residents' (1988) *South African Medical Journal* 87.

Bozzoli B 'Marxism, Feminism and South African Studies' (1983) 9(2) *Journal of Southern African Studies* 220.

Bradford H 'Herbs, Knives and Plastic: 150 years of Abortion in South Africa' Centre for African Studies Seminar (11 April 1990).

Bradford H 'Her Body, Her Life: 150 years of Abortion in South Africa' paper delivered at the Conference on Women and Gender in South Africa (1991).

Bradley D 'Perspectives on Sexual Equality in Sweden' (May 1990) 53 *Modern Law Review* 283.

Brown B 'Facing the 'Black Peril': The Politics of Population Control in South Africa' (1987) 13(3) *Journal of Southern African Studies* 267.

Brown N K et al 'How do Nurses Feel About Euthanasia and Abortion' (1971) 71 *American Journal of Nursing* 1413.

Bulbring E 'Side by Side the Old and the New' *Sunday Times* 15 May 1994.

Burman S and Berger S 'When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa (Part 1)' (1988) 4 *South African Journal on Human Rights* 194.

Burman S and Berger S 'When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa (Part 2)' (1988) 4 *South African Journal on Human Rights* 334.

Burman S and Naude M 'Bearing a Bastard: The Social Consequences of Illegitimacy in Cape Town 1886 - 1939' (1991) 17(3) *Journal of Southern African Studies* 379.

Caine N 'Maternity Rights of Black Working Mothers in South African Law' (1989) 5(5) *Responsa Meridiana* 444.

Charleton P 'Judicial Discretion in Abortion: The Irish Perspective' 6 *International Journal of Law and the Family* (1992) 349.

Chimere-Dan O 'Population Policy in South Africa' (1993) 34(1) *Studies in Family Planning* 32.

Claydon J and Lyon J 'The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms' 1987 2(34) *Connecticut Journal of International Law* 349.

Cohen C P 'United Nations Convention on the Rights of the Child' (1990) 44 *The Review* 36.

Collins H 'Democracy and Adjudication' in McCormick N and Birks P (eds) *The Legal Mind: Essays for Tony Honore* (Oxford 1986).

Colon-Collazo J 'The Drafting History of Treaty Provisions on the Right to Life' in Ramcharan B G (ed) *The Right to Life in International Law* (1985).

Cook R and Dickens B 'A Decade of International Changes in Abortion Laws: 1967 - 1977' (1978) 68 *American Journal of Public Health* 637.

Cook R and Dickens B 'Abortion Laws in African Commonwealth Countries' (1981) 25 *Journal of African Law* 60.

Cook R and Dickens B 'International Developments in Abortion Laws: 1977 - 1988' (1988) 78 *American Journal Of Public Health* 1305.

Cook R J 'International Protection of Women's Reproductive Rights' (1992) 24 *International Law and Politics* 645.

Cooreman B F 'Maternal Deaths at Pelonomi Hospital, Bloemfontein 1980-85' (1989) 76 *South African Medical Journal* 24.

Corder H Kahanavitz S Murphy J Murray C O'Regan C Sarkin J Smith H Steytler N *A Charter for Social Justice* (Cape Town 1992).

Corder H 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491.

Cornwell J R 'The Concept of Brain Life: Shifting the Abortion Standard Without Imposing Religious Values' (1987) 25 *Duguesne Law Review* 471.

Crann G P '*Morgentaler* and American Theories of Judicial Review: the *Roe v Wade* Debate in Canadian Disguise' (1989) 47(2) *University of Toronto Faculty of Law Review* 499.

Crump A 'Wife Battering' (1987) *South African Journal of Criminal Law and Criminology* 231.

Czarnowski G 'Abortion as Political Conflict in the United Germany' (April 1994) 47(2) *Parliamentary Affairs: A Journal of Comparative Politics* 252.

Davel T '*Christian League of Southern Africa v Rall* 1981 (2) 821 (O)' (1981) 14(2) *De Jure* 363.

Davey D A 'The Right to be Born' (1989) 7 *Medicine and Law* 475.

David H P 'Psychological Studies of Abortion in the United States' in (ed) David H P et al *Abortion in Psychological Perspective: Trends in Transnational Research* (New York 1978).

David H P 'The Abortion Decisions: National and International Perspectives' in Burtchaell J (ed) *Abortion Parley* (Kansas City 1980) 57.

David H P 'Overview: A Brief History of Abortion and Studies of Denied Abortion' in David H P et al (eds) *Born Unwanted: Developmental Effects of Denied Abortion* (Prague 1988).

Davis S M 'The Law of Abortion and Necessity' (1938) 2 *Modern Law Review* 131.

D'Oliviera J 'Vrugafdrywing as Nog 'n Regverdigingsgrond' (1982) *De Jure* 321.

Devereux G 'A Typological Study of Abortion in 350 Primitive Ancient and Pre-Industrial Societies' in Rosen H (ed) *Abortion*

in America (Boston 1967).

De Ville J 'Proportionality as a Requirement of Legality in Administrative Law Under the New Constitution' (Unpublished paper 1994 on file with the author.

De Villiers J 'Tienderjarige Swangerskappe in die Paarl Hospitaal' (1967) *South African Medical Journal* 301.

Dommisse G 'The South African Gynaecologists' Attitude to the Present Abortion Law' (1980) *South African Medical Journal* 1044.

Dommisse G 'Current Attitudes of Members of SASOG to the Present Law on Abortion' (1990) *South African Medical Journal* 702.

Dorozynski A 'Abortion Debate' (30 September 1989) 299 *British Medical Journal* 814.

Dugard J 'The Role of International Law in Interpreting the Bill of Rights' (1994) 10(2) *South African Journal on Human Rights* 208.

Du Plessis L M 'Jurisprudential Reflections on the Status of Unborn Life' (1990) *Tydskrif van Suid Afrikaanse Reg* 44.

Du Plessis L M 'Jurisprudential Reflections on the Status of Unborn life' in Van Niekerk A (ed) *The Status of Pre-Natal Life* (Cape Town 1991).

Du Plessis L M and De Ville J 'Bill of Rights-Interpretation in the South African Context: Diagnostic Observations' (1993) *Stellenbosch Law Review* 385.

Du Plessis L M 'Whither Capital Punishment and Abortion Under South Africa's Transitional Constitution' (Unpublished paper 1994 on file with the author).

Dyer M 'The Abortion-Act - a Plea for a Commission of Inquiry' (1979) 15(4) *Social Work* 185.

DZ 'A Thought on Abortion' (1973) 90 *South African Law Journal* 34.

Ely E H 'The Wages of Crying Wolf: A Comment on *Roe v Wade*' (1973) 82 *Yale Law Journal* 920.

Emslie A 'Women in Politics: Carpe Diem' (January 1994) 36(3) *Sash* 12.

Estrich S R and Sullivan K M 'Abortion Politics: Writing for an Audience of One' (1989/90) 138 *University of Pennsylvania Law Review* 119.

Favole G 'Artificial Gestation: New Meaning for the Right to Terminate Pregnancy' (1979) *Arizona Law Review* 755.

Finley L M 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886.

Finnis J M 'The Abortion Act: What Has Changed' (1971) 18 *Criminal Law Review* 3.

Forrest J D and Singh S 'Public Sector Savings Resulting from Expenditures for Contraceptive Services' (Jan/Feb 1990) *Family Planning Perspectives* 75.

Forsman H and Thuwe I 'The Goteburg Cohort 1939-1977' in David H P et al (eds) *Born Unwanted: Development effects of Denied Abortion* (New York 1988).

Fortin J E S 'Legal Protection for the Unborn Child' (1988) *Modern Law Review* 54.

Fortney J A 'The Use of Hospital Resources to Treat Incomplete Abortions: Examples from Latin America' (November/December 1981) *Public Health Reports* 32.

Fuchs L 'Women's Quest for Economic Equality' (1989) 3 *Journal of Economic Perspectives* 25.

Gadbois G H 'Indian Judicial Behaviour' (1970) *Economic and Political Weekly* 149.

Gauntlett J 'Appointing and Promoting Judges: Which Way Now?' (April 1990) *Consultus* 23.

George J 'Political effects of Court decisions on Abortion: A Comparison Between the United States and the German Federal Republic' (1989) 3 *International Journal of Law and the Family* 106.

Gerdes J S Abbassi S Bhutani V K and Bowen F W 'Improved Survival and Short-term Outcome of Inborn 'Micropremises' (1986) *Clinical Paediatrics* 391.

Germain C 'The Christopher Tietze International Symposium: An Overview' (1989) *International Journal of Gynecology and Obstetrics* 1, 2 Supp 3.

Gerstein H and Lowry D 'Abortion, Abstract Norms, and Social Control: the Decision of the West German Federal Constitutional Court' (1976) 25 *Emory Law Journal* 849.

Gertler D 'Brain Birth: A Proposal for Defining When a Fetus Is Entitled to Human Status' (1986) *Southern California Law Review* 1061.

Gevisser M 'Potential Logjam Could Defend the Purpose' *Weekly Mail and Guardian* May 20 to 26 1994.

Girvin B 'Social Change and Moral Politics: the Irish

Constitutional Referendum 1983' (1986) 34 *Political Studies* 61.

Girvin B 'Moral Politics and the Irish Abortion Referendums 1992' (April 1994) 47(2) *Parliamentary Affairs: A Journal of Comparative Politics* 203.

Glenn J 'The Constitutional Validity of Abortion Legislation: A Comparative Note' (1975) 21 *McGill Law Journal* 673.

Goldenring J M 'Development of Fetal Brain' (1982) *New England Journal of Medicine* 307.

Gorby G and Jonas W 'West German Abortion Decision: A Contrast to Roe v Wade' (1976) *Journal of Practice and Procedure* 638.

Granberg D and Granberg B W 'Abortion Attitudes 1965 - 1980: Trends and Determinants' (1980) 12 *Family Planning Perspectives* 250.

Green P 'Abortion' *Cosmopolitan* (January 1991).

Grimes D A Flock M Schultz K F and Catz W 'Hysterectomy As Treatment For Complications of Legal Abortions' (1984) 63 *Obstetrics and Gynaecolology* (1984) 457.

Hahlo H R 'Nasciturus in the Limelight' (1974) 91(1) *SALJ* 73.

Hansson D and Russell D E H 'Made to Fail: The Mythical Option of Legal Abortion For Survivors of Rape and Incest' (1994) 9(4) *South African Journal on Human Rights* 500.

Harrison E 'Abortion: The Winds of Change Confound' (1973) 1(2) *Natal University Law Review* 44.

Haysom N 'The Bill of Fundamental Rights: Implications For Legal Practice' (February 1994) *De Rebus* 125.

Henshaw S K Koonin L M and Smith J C 'Characteristics of US Women Having Abortions, 1987' 23 *Family Planning Perspectives* 75.

Henshaw S K and van Vort J 'Abortion Services in the United States, 1987 and 1988' (1990) *Family Planning Perspectives* 102.

Henshaw S K 'Induced Abortion: A World Review' (1990) *International Family Perspective* 64.

Hernandez B 'To Bear or Not to Bear: Reproductive Freedom as an International Human Right' (1991) 17 (2) *Brooklyn Journal of International Law* 309.

Hill A 'The Political Dimension of Constitutional Adjudication' (1990) 63 *Southern California Law Review* 1237.

Hoexter C 'The Right to Life, Liberty and Security' in Robertson M (ed) *Human Rights for South Africans* (Cape Town 1991).

Hoffman D 'Political Theology: the Role of Organised Religion in the Anti-Abortion Debate' (1986) *Journal of Church and State* 225.

Hogbery V 'Maternal Mortality - A World-Wide Problem' (1985) 23 *International Journal of Gynaecology and Obstetrics* 463.

Holmes B 'Morphological and Physiological Maturation of the Brain in the Neonate and Young Child' 1986 *Journal of Clinical Neurophysiology* 207.

Impey R L 'Foetal Death' 25 July 1925) *South African Medical Record* 312.

Jones D G 'Brain Birth and Personal Identity' (1989) *Journal of Medical Ethics* 171.

Jowell J and Lester A 'Proportionality: Neither Novel nor Dangerous' in Jowell J and Oliver D (ed) *New Directions in Judicial Review* (London 1988).

Julyan J 'Women, Race and the Law' in Rycroft A (ed) *Race and the Law in South Africa* (Cape Town 1987) 140.

Kaganas F and Murray C 'Rape in Marriage - Conjugal Right or Criminal Wrong' (1983) *Acta Juridica* 125-143.

Kahn E 'The Judges and the Professors, or Bench and Chair' (1979) *SALJ* 560.

Kahn E 'The Judges III' (1989) *Businessman's Law* 201.

Keast A C 'Therapetic Abortions' (1971) 45 *South African Medical Journal* 888.

Ketchum S A 'The Moral Status of the Bodies of Persons' (1984) 10(1) *Social Theory and Practice* 25.

King P 'The Status of the Fetus: A Proposal for Juridical Legal Protection of the Unborn' (1979) *Michigan Law Review* 1647.

Kingdom E 'Legal Recognition of a Women's Right to Choose' in Brophy G and Smart L (eds) *Women in Law* (London 1985).

Klugman B 'Maternity Rights' (1983) 9(3) *South African Labour Bulletin* 25.

Klugman B 'The Politics of Contraception in South Africa' (1990) 13(3) *Woman's Studies International Forum* 265.

Knoppers B M 'Modern Birth Technology and Human Rights' (1985) *American Journal of Comparative Law* 1.

Knoppers B M Brault I M and Sloss E 'Abortion Law in Francophone Countries' (1990) 38 *American Journal of Comparative Law* 889.

Kommers D.P. 'Abortion and Constitution: United States and West

Germany' (1977) 25 *American Journal of Comparative Law* 261.

Kommers D P 'Liberty and Communication in Constitutional Law: The Abortion Cases in Comparative Perspective' (1985) *Brigham Young University Law Review* 371.

Kriz H 'The Intentional War Against Choice' *Cosmopolitan* (June 1992) 11.

Kunins H and Rosenfield A 'Abortion: A Legal and Public and Health Perspective' (1991) *Annual Review of Public Health* 361, 363.

Kunst J and Meiring R 'Abortion Law - A Need for Reform' (1984) *De Rebus* 265.

Lacewell L A 'A Comparative View of the Role of Motive and Consent in the Response of the Criminal Justice System to Active Euthanasia' (1987) *Medicine and Law* 9.

Larsen J V 'Induced Abortion' (May 1978) *South African Medical Journal* 265.

Leyshon D J 'Abortion: In Search of a Constitutional Doctrine' (Part 2) (1991) 10(3) *Medicine and Law* 219.

Lilford R J and Johnsen N 'Surgical Abortion at Twenty Weeks: Is Morality Determined Solely By Outcome?' (1989) *Journal of Medical Ethics* 82.

Loots C 'Standing to Enforce Fundamental Rights' (1994) 10(1) *South African Journal on Human Rights* 44.

Lovendoski J and Outshoorn J 'Introduction' in Lovendoski J and Outshoorn J (eds) *The New Politics of Abortion* (London 1986).

Lupton M L 'Does the Destruction of a Blastocyst Constitute the Crime of Abortion?' 1985 *South African Law Journal* 92.

Lupton M L 'The Legal Status of the Embryo' (1988) *Acta Juridica* 205.

Lupton M L 'Medico - Legal Aspects' in I D Schaëfer (ed) *Family Law Service* (1994) J54.

Luti L and Mamaila M 'Time to Change Abortion Laws' (14 July 1991) *City Press*.

MacKinnon C A 'Privacy v Equality: Beyond Roe v Wade' in MacKinnon C.A. (ed) *Feminism Unmodified* (Cambridge 1987) 101.

MacKinnon C A 'The Male Ideology of Privacy: A Feminist perspective on the Right to Abortion' (1983) 17 *Radical America* 23.

Marks S 'Women's health in South Africa' in *Womens Health and*

Apartheid: The Health and Women and Children and the Future of Progressive Primary Heath Care in South Africa Proceedings of the Third Workshop on Poverty, Heath and the State in Southern Africa held at Columbia University (May 13-15) 1988).

Marrieskind H I 'The Woman's Health Movements: Past Roots' in Dreifus C *Seizing our Bodies: The Politics of Women's Health* (New York 1978) 3.

Mattes R 'The Road to Democracy: From 2 February 1990 to 27 April 1994' in Reynolds A (ed) *Election '94 South Africa: The Campaigns, Results and Future Prospects* (Cape Town 1994).

Mbere J M and Rubin A (1979) *South African Journal of Hospital Medicine* 193.

McDougal M Lasswell H and Chen L 'Human Rights for Women and World Public Order: The Outline of Sex-Based Discrimination' (1975) 69 *American Journal of International Law* 497.

McConnell M L 'Abortion and Human Rights: An Important Canadian Decision' (1989) 38(4) *International and Comparative Law Quarterly* 905.

McCourt K M and Love D J 'Abortion and Section 7 of the Charter: Proposing a Constitutionally Valid Foetal Protection Law' (1989) *Manitoba Law Journal* 365.

Meyerson D 'Sexual Equality and the Law' (1993) 9 *South African Journal on Human Rights* 237.

Meyerson D 'Sex and Gender' (1993) 9 *South African Journal on Human Rights* 291.

Mezey S G 'Civil Law and Common Law Traditions: Judicial Review and Legislative Supremacy in West Germany and Canada' (1983) 32 *International and Comparative Law Quarterly* 689.

Michel A E 'Abortion and International Law: The Status and Possible Extension of Women's Right to Privacy' (1981-2) 20 *Journal of Family Law* 241.

Middleton A J 'Abortion' (1972) *De Rebus* 397.

Miller W B 'An Empirical Study of the Psychological Antecedents and Consequences of Induced Abortion' (1992) 48(3) *Journal of Social Issues* 67.

Moreina V 'The Portuguese Constitutional Court' paper delivered at the Conference on a Constitutional Court (1991) on file with the author.

Morris R 'The Abortion Debate' (November 1989) *Options* 180.

Mossman M J 'Feminism and Legal Method: The Difference It Makes' (1986) 3 *Australian Journal of Law and Society* 30.

Motsapi I 'Bara's Abortion Shocker' *Sowetan* (25 November 1991).

Munday D Francome C and Savage W 'Twenty-One Years of Legal Abortion' (6 May 1989) 298 *BMJ* 1231.

Mureinik E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31.

Murphy J 'Social Reform, Property Rights and Constitutional Review' in Community Law Centre UWC *Land, Property Rights and the New Constitution* (Cape Town 1994) 121.

Murray C 'What Place Could a New Constitution Give to Women' in Lessing M (ed) *South African Women Today* (Cape Town 1994) 23.

Murray C 'Food for Thought Hungary' (31 May 1994) 8(3) *Democracy in Action* 19.

Nash E 'Teenage Pregnacy - Need a Child Bear a Child?' (1990) *South African Medical Journal* 147.

National Council of Negro Women 'Amicus Brief' (1989) *Woman's Rights Law Reporter* 297.

Ncayiyana D J and Terhaar G 'Pregnant Adolescents in Rural Transkei' (1989) 75 *South African Medical Journal* 231.

Nedelsky J 'Property in Potential Life? A Relational Approach to Legal Categories' (1993) 6 *Canadian Journal of Law and Jurisprudence* 343.

Niswander K R and Porto M 'Abortion Practices in the United States: A Medical Viewpoint' in Butler J D and Walbert D (eds) *Abortion, Medicine and the Law* (New York 1986) 248.

Olmesdahl M 'Abortion and the Husband's Consent' (1975) *Natal University Law Review* 213.

Packwood B 'The Rise and Fall of the Right to Life Movement in Congress: Responses to the *Roe* Decision 1973-83' in (eds) Butler J D and Walbert D *Abortion, Medicine and the Law* (New York 1986).

Paxman J M Rizo A Brown L and Benson J 'The Clandestine Epidemic: The Practice of Unsafe Abortion in Latin America' (July/August 1993) 24(4) *Studies in Family Planning* 205.

Petchetsky R 'Abortion Politics in the 1990s: Giving Women a Real Choice' (May 28 1990) *The Nation* 732.

Pitch T 'Decriminalization or Legalization? The Abortion Debate in Italy' in Feinman C (ed) *The Crimininilization of a Woman's Body* (New York 1992).

Pleasure J R Dhand M and Kaur M 'What is the Lower Limit of Viability?' (1984) *American Journal of Diseases of Children* 783.

Pretorius R 'The Equality Debate and Women in a Post-Apartheid South Africa' (1991) 3 *Witwatersrand University Student Law Review* 54.

Purpura D 'Morphogensis of Visual Cortex in the Pre-Term Infant' in Brazier G (ed) *Growth and Development of the Brain* (New York 1975).

Quay J 'Justifiable Abortion - Medical and Legal Foundations' (1961) 49 *Georgetown Law Review* 395, 420.

Quinlan J A 'The Right to Life of the Unborn: An Assessment of the Eighth Amendment to the Irish Constitution' (1984) *Brigham Young University Law Review* 371.

Ramphele M 'The Dynamics of Gender Politics in the Hostels of Cape Town: Another Legacy of the South African Migrant Labour System' (1989) *Journal of South African Studies* 121.

Randall V 'The Politics of Abortion in Ireland' in Lovendoski J and Outshoorn J (eds) *The New Politics of Abortion* (1986) 67.

Rautenbach I M 'Grondwetlike Bepalings ter Beskerming van die Wese van Menseregte' (1991) *TSAR* 403.

Rees H 'Women and Reproductive Rights' in Bazzilli S (ed) *Putting Women on the Agenda* (Johannesburg 1991).

Regan D 'Rewriting *Roe v Wade*' in Schneider C E and Vinouskis M (eds) *The Law and Politics of Abortion* (Lexington Massachusetts 1980) 3.

Reiter R C Johnson S R and Beller F K 'Abortion: Is There A Rational Precept' (1991) 78(3) *Obstetrics and Gynaecology* 464.

Rhoden N K 'Trimesters and Technology: Revamping *Roe v Wade*' (1986) *Yale Law Journal* 639.

Ricard C and Maker J 'Why Did Our Baby Girl Die' *Sunday Times* 15 May 1994.

Richards A Lachman E Pitsoe S B and Moodley J 'The Incidence of Major Abdominal Surgery after Septic Abortion - An Indication of Complications Due to Illegal Abortions' (1985) *South African Medical Journal* 799.

Roberts M and Rip M R 'Black Fertility Patterns in Cape Town and Ciskei' (1985) 66 *South African Medical Journal* 481.

Robinson O F 'The Status of Women in Roman Private Law' (1987) *The Juridical Review* 149.

Robertson J A 'Ethical and Legal Issues in Cyropreservation of Human Embryos' (1987) *Fertility and Sterility* 371.

Ruiz M 'Spain' (30 September 1989) 299 *British Medical Journal*

814.

Russel K 'The Internal Relation Between Production and Reproduction: Reflections on the Manipulation of Family in South Africa' (1984) 15(2) *Journal of Social Philosophy* 18.

Russell W 'The Political Purposes of the Canadian Charter of Rights and Freedoms' (1983) 61 *Canadian Bar Review* 30.

Sachdev P 'The Abortion Battle: The Canadian Scene' (1994) 13 *Medicine and Law* 1.

Sarkin J and N 'Choice and Informed Request: The Answer to Abortion' (1990) 1(3) *Stellenbosch Law Review* 372

Sarkin J 'A Perspective on Abortion Legislation in South Africa's Bill of Rights Era' (1993) *Tydskrif vir Hedendaagse Romeinse Hollandse Reg* 83.

Sarkin J 'Restructuring the Legal Profession and Access to Justice: The Duty of Law Graduates and Lawyers to Provide Legal Services' (1993) 9(2) *South African Journal on Human Rights* 223.

Sarkin J 'The Prevention of Domestic Violence Bill' (1993) 9(2) *South African Journal on Human Rights* 288.

Sarkin J 'The Right to Health' in Louw R (ed) *South African Human Rights Yearbook* (Durban 1995).

Schuler S R and Hashemi S M 'Credit Programs, Women's Empowerment, and Contraceptive Use in Rural Bangladesh' (1994) 25(2) *Studies in Family Planning* 65.

Segal T and Labe D 'Family Violence: Wife Abuse' in McKendrick B and Hoffman W (eds) *People and Violence in South Africa* (Cape Town 1991).

Seidman G W 'No Freedom Without the Women: Mobilization and Gender in South Africa, 1970 - 1992' (1993) *Signs: Journal of Women in Culture and Society* 291.

Scott C 'Diary of an Abortion' *Cosmopolitan* (August 1993).

Shaffer M 'Foetal Rights and the Regulation of Abortion' (1994) 39(1) *McGill Law Journal* 59.

Shain R N 'Abortion Practices and Attitudes in Cross-Cultural Perspective' (1 February 1982) 142(3) *American Journal of Obstetrics and Gynecology* 246.

Shapiro D and Tambashe B O 'The Impact of Women's Employment and Education on Contraceptive Use and Abortion in Kinshasa, Zaire' (1994) 25(2) *Studies in Family Planning* 96.

Shea M C 'Embryonic Life and Human Life' (1985) *Journal of Medical Ethics* 205.

Shelton D 'International Law on the Protection of the Fetus' in Frankowski S J and Cole G (eds) *Abortion and Protection of the Human Fetus* (1987) 6.

Shostak A B 'Abortion' (July/August 1991) *The Futurist* 20.

Sidley P and Rumney R 'ANC Controversy Over Abortion Plan' *Weekly Mail and Guardian* January 21 to January 27 1994.

Simms M 'Abortion Law Reform: How the Controversy Changed' (1970) 17 *Criminal Law Review* 567.

Sinclair J 'Brief Comments On Some Aspects of the Draft Bill of Rights' Report to the Technical Committee, Sixth Progress Report.' 26 July 1993. On file with the author.

Sisk T D 'Choosing An Electoral System: South Africa Seeks New Ground Rules' (1993) *Journal of Democracy* 79.

Smit P C 'Aspekte van die Wet of Vrugafdruwying en Sterilisasie (1976) *Journal for Juridical Science* 156.

Soller P C 'Third World Birth Control. Is it Abortion? Drug Combination Gains Support As Alternative to Surgical Abortion' (1991) 10 *Medicine and Law* 241.

Southgate D A T and Hey E 'Chemical and Biochemical Development of the Human Fetus' in Roberts D G and Thomson A M (eds) *The Biology of Human Fetal Growth* (New York 1976) 195.

Stassen J C 'Die Wet op Vrugafdrywing en Sterilisasie 2 van 1975' (1976) *Journal of South African Law* 260.

Stephenson P Wagner M Badea M and Serbanescu F 'Commentary: The Public Health Consequences of Restricted Induced Abortion - Lessons from Romania' (1992) 82(1) *American Journal of Health* 1328.

Stith R 'New Constitutional and Penal Theory in Spanish Abortion Law' (1987) 35(3) *American Journal of Comparative Law* 513.

Strategic Marketing Services 'Abortion in Practice' (June 1994) 19(6) *Modern Medicine* 38a.

Strauss S A S 'Therapeutic Abortion and the South African Law' (1968) 85 *South African Law Journal* 453.

Strauss S A S 'Criminal Abortion Statistics' (1973) 90 *South African Law Journal* 184.

Strauss S A S 'Regverdiging van Vrugafdrywing: Twee Belangwekende Uitspraake' (1972) 35 *Tydskrif vir Hedendaagse Romeinse Hollandse Reg* 56.

Strauss S A S 'Some Comments on the Abortion and Sterilisation Act 2 of 1978 After One Year's Operation: Legal Aspects' (1977)

S A Criminal Law and Criminology 116.

Sunstein C R 'Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion and Surrogacy)' (1992) 92(1) *Columbia Law Review* 1.

Taitz J 'Euthanasia and "Legal Convictions of Society" in a South African Context' (1993) *South African Law Journal* 440.

Thompson J J 'A Defence of Abortion' (1971) 1 *Philosophy and Public Affairs* 47.

Thomson G '"Womb" Can Save Early Babies' *The Argus* 11 August 1993.

TRB 'Abortion Time Bomb' (25 February 1985) *New Republic* 4.

Uttley T F 'The Rights of an Unborn Child' (1891) 8 *Cape Law Journal* 133.

Vallinder T 'The Judicialization of Politics: Meaning, Forms, Background, Prospects' (1992) *Acta Societatis Juridicae Lundensis* 267.

Van der Merwe N J '*Pinchin NO v Santam Insurance Company Ltd*' (1963) 26 *Tydskrif vir Hedendaagse Romeinse Hollandse Reg* 291.

Van der Vyver J D '*Christian League of Southern Africa v Rall*' (1981) 44 *Tydskrif vir Hedendaagse Romeinse Hollandse Reg* 305.

Van der Westhuizen J 'The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, With Reference to the German Experience' (1991) *De Jure* 1.

Van der Vyver J D 'Comparative Law in Constitutional Litigation' (1994) 111 *South African Law Journal* 19.

Van Oosten F F W and Ferreira M 'Republic of South Africa' in Sachdev P (ed) *International Handbook on Abortion* (New York/London 1988) 416.

Van Oosten F F W 'Abortion - Adieu Common - Law?' (1976) *South African Law Journal* 393.

Van Oosten F F W 'Regmatige Vrugafdrywing' (1977) *De Jure* 337.

Van Zyl U 'The Right to Die: A South African Perspective' (1989) *Medicine and Law* 417.

Van Zyl Smit D 'Reconciling the Irreconcilable? Recent Developments in the German Law on Abortion' (1994) *Medical Law Review* 302.

Venter A 'Die Houdings van en Houdingsveranderings by Blanke Suid-Afrikaners Ten Opsigte van Aborsie' 1981 *Humanitas* 131.

Venter A 'Die Houdings en Houdingsveranderings van Kleuringe ten Opsigte van Aborsie' (1982) *The South African Journal of Sociology* 62.

Visser D 'The Future of the Law of Delict' (Unpublished paper 1994 on file with author).

Weiler P 'Rights and Judges in a Democracy: A new Canadian Version' (1983) 18 *University of Michigan Journal of Law* 51.

Wescott S 'Bill of Rights Faces No "Base Beast"' (31 August 1994) 8(5) *Democracy In Action* 14.

Whittle B 'Lung Maturation' (1984) *Clinical Gynecology* 353.

Wilhelm J 'SA Parliament a World Leader in the Fight for Sexual Equality' *Sunday Times* 29 May 1994.

Williams G 'The Fetus and the "Right to Life"' (March 1994) 53(1) *Cambridge Law Journal* 71.

Williams R L Creasy R K Cunningham G C Hawes W E Norris F D and Tashiro M 'Fetal Growth and Perinatal Viability in California' (1982) *Obstetrics and Gynecology* 624.

Wilmoth G H de Altern M and Bussell D 'Prevalence of Psychological Risks Following Legal Abortion in the U S: Limits of the Evidence' (1992) 48(3) *Journal of Social Issues* 37.

Woolman S 'Riding the Push-me Pull-you: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause' (1994) 10(1) *South African Journal on Human Rights* 60.

CASES

Belgium

Decision of November 1988.

Canada

Andrews v Law Society of B C [1989] 1 S.C.R. 143.

Boggs v The Queen [1981] 1 S.C.R. 49.

Borowski v Canada [1989] 1 S.C.R. 342.

Borowski v Attorney-General of Canada [1987] 39 D.L.R. (4th) 731.

Borowski v Attorney-General of Canada and Minister of Finance [1983] 4 D.L.R. (4) 112.

Hunter, et al v Southern Inc [1985] 11 D.L.R (4th) 641.

Minister if Justice v Borowaski [1981] 2 575.

Morgentaler v The Queen [1976] 1 S.C.R. 616.

Morgentaler, Smoling and Scott v The Queen [1988] 44 D.L.R. (4th) 385.

R v Sullivan [1991] 1 S.C.R. 489.

Regina v Oakes [1986] 26 D.L.R. (4th) 200.

Trembley v Daigle [1989] 2 S.C.R. 530.

European Commission on Human Rights

X v Austria (1976).

Bruggeman and Scheuten v Germany App No 6959/75 3 European Human Rights Reports 244.

X v Norway (1960).

Paton v United Kingdom 19 D.R. 248.

France

Decision of the French Constitutional Council of 15 January 1975 EuGRZ 1975.

Judgement of 21 Dec 1990 Consel d'Etat.

Holland

Juristenvereniging Pro Vita v De Staat den Nederlanden (Ministerie van Welzijn, Volksgezondheid en Cultuur [1990] NJ 2986 (Hof, The Hague Feb 8, 1990)

India

Frances Mullin v Union Territory of Delhi (1981) 2. S.L.R. 516.

Ireland

Attorney-General (SPVC) v Open Door Counselling Ltd 1988 Irish Reports 593.

Attorney-General v X Appeal transcripts dated 5 March 1992.

G v An Bord Uchtala 1980 Irish Reports 32.

McGee v Attorney-General 1974 Irish Reports 284.

Norris v Attorney-General Irish Supreme Court 22 April 1983.

Open Door Counselling Ltd v Ireland Application No's 14234/88 and 12435/88 (7 March 1991).

Ryan v Attorney-General 1905 Irish Reports

Italy

Jugement No 108/81 of 25 June 1981, Corte Costituzionale 57 Raccolta Ufficiate delle senteze e ordinanze delle Corte Constituzionale [Racc. uff. corte cost.] 823 (1981).

Judgement of 14 April 1988 (IL Foro Italiana, No 5-7-8 1988.

South Africa

AP v the State 1895 2 Off Rep 103.

Chisholm v East Rand Proprietary Mines Ltd 1909 TH 297.

Christian League of Southern Arica v Rall 1981 (2) SA 821 (O).

Ex parte boedel Steenkamp 1962 (3) SA 954 (O).

G v Superintendent, Groote Schuur Hospital and Others 1993 (2) SA 255 (C).

Nxasana v Minister of Justice and Another 1974 (3) SA 745 (D).

Pinchin v Santam Insurance Co Ltd 1963 (2) SA 254 (W).

R v Chitate 1968 (2) PH H337 (R).

R v Davies and Another 1956 (3) SA 52 (A).

R v Hine (1910) Cape Times Reports 629.

R v O 1963 (1) SA 43 (SR).

R v Thielke 1918 AD 373.

Republic Publications (Pty) v Publications Control Board 1971 (3) SA 399 (D).

S v Collop 1979 (4) SA 381 (O).

S v Collop 1981 (1) SA 150 (A).

S v King 1971 (2) PH H103 (T).

R v Owen 1942 AD 389.

R v Voges 1958 (1) SA 412 (C).

S v Kruger 1976 (3) SA 290 (O).

Wood and Others v Ondongwa Tribal Authority 1975 (2) SA 294 (A).

Tiffin v Cilliers 1925 OPD 23.

Rudolph and another v Commissioner for Inland Revenue and others 1994 (2) BLR 9.

Van Heerden v Joubert NO and others 199 (4) SA 793 (A).

United Kingdom

C v S [1987] 2 WLR 1108.

R v Bourne [1939] 1 KB 687 [1938] 3 All ER 65.

R v Smith [1974] 1 All ER 376.

Paton v Trustees of the British Pregnancy Advisory Service [1978] 1 All ER 987.

United States

Akron v Akron Center forReproductive Health 462 U.S. 416 (1983).

Babbitz v McCann 310 F. Supp. (ED Wiscunsin 1970).

Doe v Bolton 410 U.S. 179 (1973).

Eisenstadt v Baird 405 U.S 438 (1972).

Griswold v Connecticut 381 U.S. 479 (1965).

Olmstead v United States 277 U.S. 438 (1928).

People v Belous 71 Cal. 2d 954, 458 P.2d 194 (1969).

Poe v Ullman U.S. 497 (1961).

Roe v Wade 410 U.S. 113 (1973).

Schloendorff v Society of New York Hospital 211 N.Y. 125, 105 NE 92 (1914).

Skinner v Oklahoma 316 U.S. 535.

Thornburgh v American College of Obstetricians and Gynaecologists 476 U.S. 747 (1986).

Tileson v Ullman 38 U.S. 44 (1943).

Union Pacific Railroad Company v Betsford 141 U.S. 250 (1891).

U.S. v Vuitch 402 U.S. 62 (1971).

Webster v Reproductive Health Services 57 U.S. L.W. 5023 (1989).

Yick WO v Hopkins 118 U.S. 356 (1886).

Planned Parenthood v Casey 112 5 Ct 2791 (1992).

West Germany and Germany

Judgement of 11 March 1927, 61 RGST 242.

Judgement of 21 June 1974.

Judgement of 28 May 1993 - BVerfGe 39,1.