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Abortion law in South Africa: Practices and growing conflicts

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Abstract

South Africa's Choice on Termination of Pregnancy Act, 1996 is hailed as one of the most exemplary liberal laws on abortion, a stark contrast to the previously stringent Abortion and Sterilisation Act of 1975. The South African Constitution further recognises women's rights to reproductive autonomy and access to abortion services as an integral element of the right to access healthcare services. This chapter argues that a significant implementation gap persists. It examines the challenges hindering the Act's effectiveness, notably the practice of conscientious objection that disproportionately affect marginalised and poor black women. By analysing South Africa's experience with abortion law reform, this chapter demonstrates how, after more than 25 years of liberalisation, there is a growing conservative movement, supported by ultra-conservative organisations from the Global North that seek to erode women's reproductive rights. Ultimately, this exploration underscores the urgent need for the South African government to fully implement the Act's provisions to ensure equitable access to safe, high-quality, and dignified abortion services for all individuals capable of pregnancy.

1 Introduction

South Africa's radical abortion reform was part of a package of rights guaranteed in the Constitution of the Republic of South Africa, 1996 which recognises the right to bodily and psychological integrity,

including the right to make decision concerning reproduction.[1] Abortion in South Africa is also regulated by the Choice on Termination of Pregnancy Act 92 of 1996, which came into force in 1997 in the context of the country's transition to democracy from its apartheid past.[2] Currently, in South Africa, one can terminate a pregnancy using medication, surgery or a combination of both. Abortions during early pregnancy, before nine weeks, can be carried out with medication.[3] For the second and third trimester, abortions are done surgically or by using medicine in combination with surgery.[4] Women who are less than 12 weeks pregnant can have abortions performed by nurses or midwives in addition to doctors who are trained as abortion providers.[5] For second trimester abortions, doctors have to perform the termination, which they mainly do with nursing support. Unlike most countries globally, South Africa allows certified midwives and registered nurses to perform abortions.[6] South Africa's public health sector is mainly responsible for providing abortion services in 'designated'[7] facilities accredited by the

1 S Nabaneh 'Abortion and "conscientious objection" in South Africa: The need for regulation' in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa: Constraints and opportunities* (2021) 17.

2 See C Ngwena 'An appraisal of abortion laws in South Africa from a reproductive health rights perspective' (2004) *International and Comparative Health Law and Ethics: A 25 Year Retrospective* 715-716.

3 See D Constant and others 'Assessment of completion of early medical abortion using a text questionnaire on mobile phones compared to a self-administered paper questionnaire among women attending four clinics, Cape Town, South Africa' (2015) 22 *Reproductive Health Matters* 83. For an analysis of the legal regime on medical abortion, see P Skuster 'How laws fail the promise of medical abortion: A global look' (2017) 18 *Georgetown Journal of Gender and the Law* 379.

4 For more in-depth analysis, see D Grossman and others 'Surgical and medical second trimester abortion in South Africa: A cross-sectional study' (2011) 11 *BMC Health Services Research* 1; B Winikoff & WR Sheldon 'Use of medicines changing the face of abortion' (2012) 38 *International Perspectives on Sexual and Reproductive Health* 164.

5 In this chapter, an abortion provider is referred to as a registered midwife or registered nurse as such under the Nursing Act 50 of 1998, as amended by the Nursing Act 33 of 2005, and who has undergone prescribed training in terms of the Act.

6 M Berer 'Provision of abortion by mid-level providers: international policy, practice and perspectives' (2009) 87 *Bulletin of the World Health Organisation* 58.

7 A facility that meets the requirements to provide termination of pregnancy services in terms of sec 3 of the Choice on Termination of Pregnancy Act and certified by the Department of Health.

National Department of Health. Private health facilities can also provide abortion services upon certification.

South Africa has signed and ratified core human rights treaties as a member of the United Nations (UN) and the African Union (AU). At the regional level, South Africa has ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), which is the first human rights treaty to expressly recognise abortion as a right.[8] Article 14(2)(c) of the Protocol obligates states to permit abortion where pregnancy poses a risk to the life or health of the woman or to the life of the foetus, or where pregnancy is a result of sexual assault, rape or incest. South Africa made an interpretative declaration on article 31 of the Protocol.[9] The declaration reads:

> It is understood that the provisions contained in article 31 may result in an interpretation that the level of protection afforded by the South African Bill of Rights is less favourable than the level of protection offered by the Protocol, as the Protocol contains no express limitations to the rights contained therein, while the South African Bill of Rights does inherently provide for the potential limitations of rights under certain circumstances. The South African Bill of Rights should not be interpreted to offer less favourable protection of human rights than the Protocol, which does not expressly provide for such limitations.

South Africa's declaration was made on the premise that since the Bill of Rights contained a limitation clause while the African Women's Protocol does not, an assumption might be made that the Protocol contains more favourable provisions. By making this interpretative declaration, it is argued that South Africa makes the bold statement that its Bill of Rights has more favourable human rights protection for women in South Africa in contrast to what the Protocol offers.[10] This is particularly true in the case of abortion, as both the South African Constitution and the Choice

8 C Ngwena 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783.

9 While the Vienna Convention does not expressly provide for or define interpretative declarations, Dugard has argued that an interpretative declaration may constitute reservation in some instances. See J Dugard *International law: A South African perspective* (2011) 418.

10 S Nabaneh 'Power dynamics in the provision of legal abortion: A feminist perspective on nurses and conscientious objection in South Africa' PhD thesis, University of Pretoria, 2020.

on Termination of Pregnancy Act offer a more comprehensive set of rights than the Protocol's circumscribed abortion grounds.[11]

Despite having a broadly liberal abortion law, South Africa does not have data readily available. The National Department of Health no longer reports on abortion-related deaths but instead categorises these as miscarriage.[12] For instance, the 2016 Saving Mothers Report revealed that 24,8 per cent of maternal deaths were ascribed to miscarriages in public health sector facilities.[13] Abortion and HIV-related deaths are also combined, making it difficult to estimate the number of abortion only-related deaths. South Africa's maternal mortality rate (MMR) is estimated at 138 deaths per 100 000 live births, compared to the estimated MMR of 61 deaths per 100 000 live births in 1997 when the Act was enacted.[14] This can be interpreted to mean that women in South Africa remain susceptible to the complications of unsafe abortion. As a result of the lack of complete official statistics, there is no data available regarding abortion conducted in private unlicensed abortion clinics or situations of self-medication by women outside the formal health systems. Girls and women still find it difficult to access abortion services due to the different barriers such as poverty, stigma, lack of knowledge on the part of women and potential providers, and geographical distance from a provider even where abortion is legal.[15] Estimates suggest that as low as 7 per cent of South Africa's 3 880 health facilities offer abortion services.[16] The belief of unencumbered access to abortion care remains a lofty and elusive goal.

11 Ngwena (n 8) 843. See also S Nabaneh 'A purposive interpretation of article 14(2)(c) of the African Women's Protocol to include abortion on request and for socio-economic reasons' LLM dissertation, University of Pretoria, 2012.

12 See National Department of Health 'Saving mothers 2008-2010: Fifth report on the confidential enquires into maternal deaths in South Africa' (2012).

13 National Department of Health 'Saving Mothers 2011-2013: Sixth report on confidential enquiries into maternal deaths in South Africa' (2016) vi. See also National Department of Health 'Saving Mothers 2017: Annual report on confidential inquiries into maternal death in South Africa' (2018).

14 World Bank Group 'Maternal mortality ratio: South Africa' World Bank Data 2019, https://data.worldbank.org/indicator/SH.STA.MMRT?locations=ZA (accessed 15 May 2019).

15 See Ipas South Africa '2018 assessment of public-sector safe abortion care in Limpopo and Gauteng Provinces' (2018).

16 Committee on Economic, Social and Cultural Rights Concluding Observations on the initial report of South Africa, 29 November 2018, UN Doc E/C.12/ZAF/CO/1 (2018) para 65.

This chapter focuses on the legal, policy and practice landscape of abortion in South Africa. The theoretical and analytical paradigm of the chapter is rooted in the observation of African women's lived experiences and builds on existing feminist theories, specifically African feminism.[17] With that goal in mind, the chapter explores the transformation of abortion law in South Africa. The following part illustrates the abortion law during apartheid. The third part charts the evolution of the Act through process tracing by doing a legislative mapping of parliamentary debates in 1996 to paint the picture of the post-apartheid position on abortion.[18] It also provides an overview of the current abortion regime. More than 25 years after the Act has been in effect, numerous gaps remain in its implementation. The fourth part explores persistent barriers to access to safe abortion. The fifth part shows the array of legal arguments and strategies currently deployed by conservative actors to inhibit the provision of legal abortion. In the sixth and final part, I highlight the need for access to safe abortion.

2 Abortion law during apartheid

Under Roman-Dutch common law, abortion was restricted in South Africa with the exception of saving the life of the woman.[19] As noted by Klausen, 'Afrikaner nationalism had a fixation with sex, an obsession fuelled by the repressiveness of the ideology of Christian nationalism'.[20] Due to the ambiguity of the law, medical practitioners were unable to perform an abortion on other grounds, as they were uncertain about the legal ramifications.[21]

From a legal-historical perspective, two court decisions in 1971 provided the courts with the opportunity to make pronouncements on

17 S Nabaneh *Choice and conscience: Lessons from South Africa for a global debate* (2023) 11-20.

18 See J Mahoney 'After KKV: the new methodology of qualitative research' (2010) 62 *World Politics* 120.

19 C Ngwena 'The history and transformation of abortion law in South Africa' (1998) 30 *Acta Academica* 35.

20 SM Klausen *Abortion under apartheid: nationalism, sexuality, and women's reproductive rights in South Africa* (2015) 59. See also See J Sarkin & N Sarkin 'Choice and informed request: the answer to abortion: A proposal for South African abortion reform' (1990) *Stellenbosch Law Review* 372.

21 See SA Strauss 'Therapeutic abortion: two important judicial pronouncements' (1972) 46 *South African Medical Journal* 275.

the grounds upon which the termination of a pregnancy may be legally justified.[22] The 1972 trial in the South African Supreme Court, in which one medical doctor and a self-taught abortionist, were criminally charged with conspiring to perform illegal abortions on 26 white teenagers and young unmarried women, led to a flurry of actions to expand the abortion law.[23] This included the tabling of a private member's motion in Parliament in February 1972, followed by the Abortion and Sterilisation Bill tabled a year later, which subsequently was referred to a select committee. The committee was then converted into a commission of inquiry, consisting exclusively of white male parliamentarians.[24]

However, this reaction was racialised as it was only aimed at addressing the ongoing problem of clandestine abortions for unmarried white girls and not other race groups, including black women.[25] In line with the goal to safeguard the procreation of the white race, white women and girls were deemed to require protection.[26] This rather racialised abortion reform effort led to the adoption of the 1975 Abortion and Sterilisation Act 2 of 1975. The Act had stringent grounds for permitting abortion that were compounded by cumbersome administrative procedures.[27] Abortion was only allowed in cases of serious threat to the life of the pregnant woman, or where it constituted a serious threat to the physical or mental health of the woman, malformation of the foetus or where the pregnancy was a result of unlawful carnal intercourse.[28] In addition, for all these grounds, abortion could only be procured if certified by two medical practitioners in writing.[29] Thus, the racial and class bias in the

22 *S v King* 1971 (2) PH 103 (T), *S v Van Druten* 1971 unreported. See also Report of the Commission of Inquiry into the Abortion and Sterilisation Bill RP 68 of 1974; SA Strauss 'Criminal abortion statistics' (1973) 90 *South African Law Journal* 184.

23 SM Klausen '"The trial the world is watching": The 1972 prosecution of Derk Crichton and James Watts, abortion, and the regulation of the medical profession in apartheid South Africa' (2014) 58 *Medical History* 210.

24 J Sarkin 'Patriarchy and discrimination in apartheid South Africa's abortion law' (1998) 4 *Buffalo Human Rights Law Review* 148.

25 H Bradford *Herbs, knives and plastic: 150 years of abortion in South Africa: science, medicine and cultural imperialism* (1991) 120-147.

26 SM Klausen '"Reclaiming the white daughter's purity": Afrikaner nationalism, racialised sexuality, and the 1975 Abortion and Sterilisation Act in apartheid South Africa' (2010) 22 *Journal of Women's History* 53.

27 SM Klausen *Abortion under apartheid: nationalism, sexuality, and women's reproductive rights in South Africa* (2015).

28 Seca 3(1)(a)-(d).

29 As above.

law was evident as it forced black women into illegal abortions, while white women could access safe ones.[30] It was observed that between 1975 and 1996, South Africa saw a large number of illegal abortions annually, ranging from 120 000 to 250 000.[31]

The 1975 Act also allowed physicians to refuse to perform an abortion, a practice known as conscientious objection. Conscientious objection is 'the refusal to participate in an activity that an individual considers incompatible with his/her religious, moral, philosophical, or ethical beliefs'.[32] Section 9 of the Act stated:

> A medical practitioner (other than a medical practitioner referred to in section 6(1)), a nurse or any person employed in any other capacity at an institution referred to in section 5(1) shall, notwithstanding any contract or the provisions of any other law, not be obliged to participate in or assist with any abortion contemplated in section 3 or any sterilisation contemplated in section 4.

This particular section allowed for conscientious objection without restrictions. Generally, the Abortion and Sterilisation Act did not take into account the realities of South African society based on structural oppression of apartheid, which resulted in persistent inequalities.[33] The law ignored these systemic barriers, making it much more difficult for marginalised groups – especially poor black women – to access safe abortion services. In contrast, more privileged groups, such as white women, were better positioned to navigate the healthcare system, exacerbating existing inequalities. The law's shortcomings not only limited reproductive choice but also contributed to higher rates of maternal mortality, unintended pregnancies and unsafe abortions.

30 R Hodes 'The culture of illegal abortion in South Africa' (2016) 42 *Journal of Southern African Studies* 80. See Nabaneh (n 10) 225-226 on narratives of nurses who provided abortion care during apartheid mainly at night.

31 S Guttmacher and others 'Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24 *International Family Planning Perspectives* 192.

32 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol 999 171.

33 See C Albertyn 'Equality' in MH Cheadle and others *South African constitutional law: The Bill of Rights* (2002) 53; T Loenen 'The equality clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 13 *South African Journal on Human Rights* 405. See also M Wesson 'Equality and social rights: An exploration in light of the South African Constitution' (2007) *Public Law* 748.

3 Post-apartheid era: The legal context of abortion

3.1 The Constitution of South Africa

The South African Constitution recognises reproductive rights in section 12(2) and section 27 and other bundles of rights that protect abortion rights. The material words of section 12(2) of the Constitution are as follows:

> Everyone has the right to bodily and psychological integrity, which includes the right –
> (a) to make decisions concerning reproduction;
> (b) to security in and control over their body; and[34]
> (c) not to be subjected to medical or scientific experiments without their informed consent.

The section serves as a constitutional basis for reproductive choice, thereby affirming women's rights to bodily integrity, personhood and autonomy. This is envisaged within an inclusive and non-racialised and non-sexist democracy based on equality, freedom, dignity and social justice.[35]

Section 27 of the Constitution provides the right to access healthcare services, including reproductive health care. The section further obligates the state to refrain from interfering with the individual's right to pursue such services and that emergency medical treatment will not be refused.[36]

South Africa's Constitution guarantees socio-economic rights. As such, the country has very progressive jurisprudence on holding government accountable for its obligations relating to the realisation of socio-economic rights,[37] including the right to healthcare services.[38] The *Minister of Health v Treatment Action Campaign* (*TAC* case)[39] dealt with the failure of the government to provide Nevirapine for women living with human immunodeficiency virus (HIV) in public hospitals. Thus, the Constitution envisages equal access and enjoyment for health-

34 Sec 12(2) of the Constitution (my emphasis).
35 Preamble to the Constitution.
36 Nabaneh (n 1) 16-34.
37 See S Liebenberg 'South Africa' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 75-101.
38 *Minister of Health v Treatment Action Campaign* 2001 (5) SA 721 (CC).
39 As above.

related goods, services and facilities.[40] The judgment has been criticised for its marginalisation of the reproductive autonomy of black women living with HIV.[41] As Albertyn argued, '[a]bsent in the Constitutional Court judgment is any meaningful reference to reproductive autonomy of women in public hospitals, beyond a single mention of the capacity of the hospital'.[42]

With respect to access to health care, section 27 also aims to achieve substantive equality.[43] Control over one's reproduction, as guaranteed in section 12(2) of the Constitution, encompasses an important element of human dignity.[44]

3.2 The push for abortion reform

3.2.1 Legislative mapping of abortion discourse

Given the complexity of abortion regulation, parliamentary debates that preceded the passing of the Choice on Termination of Pregnancy Act illustrated beliefs and perceptions about abortion based on the pro-choice and pro-life discourses that cut across political lines, as shown below.

The former liberation movement and the post-1994 governing party, the African National Congress (ANC), its women's league feminist movement and civil society organisations (CSOs) spearheaded the abortion reform agenda. Prior to the 1994 elections, the ANC in its manifesto included legislative reform to ensure women's rights to have a termination of pregnancy.[45] The ANC in its Reconstruction and

40 C Ngwena 'Access to health care as a fundamental right: The scope and limits of section 27 of the Constitution' (2000) 25 *Journal for Juridical Science* 19.

41 See C Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court' (2013) 3 *Stellenbosch Law Review* 591.

42 C Albertyn 'Abortion, reproductive rights and the possibilities of reproductive justice in South African courts' (2019) 1 *University of Oxford Human Rights Hub Journal* 112.

43 C Ngwena 'Substantive equality in South African health care: The limits of law' (2000) 4 *Medical Law International* 2; F Freedman 'Understanding the right to equality' (1998) 115 *South African Law Journal* 243.

44 LP Freedman 'Censorship and manipulation of family planning information: an issue of human rights and women's health' in JM Mann and others (eds) *Health and human rights: A reader* (1999) 149-152.

45 Choice on Termination of Pregnancy Bill – Second reading 4814.

Development Programme outlined one of its national goals: 'Every woman must have the right to choose whether or not to have an early termination of pregnancy according to her own beliefs.'[46] This goal was aptly captured during the reading of the Bill: 'The ANC went to polls in 1994 on a platform that included the right of a woman to choose an early, safe and legal termination of pregnancy. We were voted into power on this basis. It is a mandate and a promise.[47]

The shift in political leadership ushered in an era in which it was possible to pass the law supported by the development of international norms on reproductive health and rights. The journey to reproductive autonomy was closely aligned with the development of the South African Constitution and the recognition of women as 'citizens and right bearers'.[48] The then Minister of Health, Dr Zuma, during the second reading debate of the Choice on Termination of Pregnancy Bill noted: 'This Bill allows women to uphold their religious beliefs, their cultural and moral values, and to exercise their choice accordingly.'[49]

The Democratic Party (DP), now the Democratic Alliance (DA),[50] in expressing its support for the Bill, affirmed that their vote was in line with the 'constitutional right of a woman to make choices about the private matter of reproduction'.[51] In the eyes of one of the Members of Parliament: 'Denying a woman the right to choose whether to have an abortion or not is similar to black South Africans having been denied the right to vote under apartheid.'[52] A female MP also made these sentiments clear in expressing that '[t]he right to control our bodies, the right to choose a safe legal termination of pregnancy is in the context of political, social and economic choices for women, in the context of moving our

46 ANC 'Reconstruction and development programme base document' (1994) 2.12.6.4, https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm (accessed 25 June 2019).
47 Choice on Termination of Pregnancy Bill – Second reading 4766.
48 Albertyn (n 41) 105.
49 Republic of South Africa 'Choice on Termination of Pregnancy Bill – Second reading debate' (1996) 16 Debates of the National Assembly (Hansard) – Third session – First Parliament (29 October to 1 November 1996) 4760.
50 The former Democratic Party (DP), now renamed the Democratic Alliance, is the official opposition to the governing African National Congress.
51 Choice on Termination of Pregnancy Bill – Second reading 4778.
52 Choice on Termination of Pregnancy Bill – Second reading 4806.

society towards equality, respect and healthy sharing of power and responsibility in the home and in society'.[53]

The opposition honed in on this when in expressing its dissatisfaction with the Bill. The Inkatha Freedom Party (IFP)[54] noted that the Bill was 'largely a reaction to the apartheid past rather than an investment in the future'.[55]

The extracts signify that the abortion debate was within the struggle for reform from apartheid to democracy. A nationalist discourse on abortion was utilised, which illustrates the link between reproduction and national identity. The use of women's issues to represent a symbolic momentum from apartheid is akin to what Herg describes when she writes: 'Female emancipation – a power political symbol describing at one a separation from the past, the aspirations of an activist present, and the utopia of an imagined national future – supplies a mechanism of self-description and self-projection of an incalculably more than pragmatic value in self-fashioning of nations and nationalisms.'[56]

Abortion, as a highly politicised issue, often plays out in the context of transitions.[57] In the context of South Africa, the backdrop of the debate was the 'historically racist use of population control policies under the Nationalist Party government'.[58]

Proponents further justified the reform through the ideological narratives of rights-based, public health and feminist ideas of women's equality and freedom of choice.[59] The Pan-Africanist Congress (PAC)[60] acknowledged the Bill's potential reach of removing abortion 'from the ill-handled operations in half-lit and murky backrooms, surrounded by secrecy and fear, and susceptible to manipulation and exploitation by

53 Choice on Termination of Pregnancy Bill – Second reading 4793.
54 The IFP party, with predominantly isiZulu members, is one of the oldest competing political parties.
55 Choice on Termination of Pregnancy Bill – Second reading 4772.
56 G Heng '"A great way to fly": Nationalism, the state and the varieties of third-world feminism' in MJ Alexander & CT Mohanty (eds) *Feminist genealogies, colonial legacies, democratic futures* (1997) 31.
57 See, eg, A Halkias 'Money, god and race: The politics of reproduction and the nation in modern Greece' (2003) 10 *European Journal of Women's Studies* 211; R Fletcher 'Post-colonial fragments: representations of abortion in Irish law and politics' (2001) 8 *Journal of Law and Society* 568.
58 Guttmacher and others (n 31) 193.
59 C Albertyn 'Claiming and defending abortion rights in South Africa' (2015) *Revista Direito GV* 441.
60 The PAC is a former pan-Africanist movement, now a political party.

unscrupulous elements'.[61] Dr Tshabalala-Msimang, the then Deputy Minister of Justice of the ANC government, further stated:[62]

> Reproductive rights are particularly important to women, because only when armed with these rights can women effectively exercise the rest of their rights and act as full and equal members of society ... Reproductive rights require respect for women's bodily integrity and decision-making in an environment which is free from fear of abuse, violence and intimidation.

These narratives, which focused on international norms and issues of reproductive rights and health, found support in the 1994 International Conference on Population and Development (ICPD),[63] the Cairo Programme of Action and the Beijing Platform for Action.[64] These two agreements were instrumental to the entrenchment of women's reproductive rights as human rights.[65]

On the other hand, the pro-life argument mainly framed the issue using the language of the foetus's right to life. The opposition to law reform was led by two political parties – the African Christian Democratic Front (ACDF) and the Freedom Front Plus (FF+) – mainly on religious grounds. The opposition to law reform was led by two political parties – the African Christian Democratic Front (ACDF) and the Freedom Front Plus (FF+) – mainly on religious grounds. This is not surprising, given that the ACDF is based on Christian doctrines. At the same time, the FF+ is a conservative party that represents the Afrikaans speakers in the country and espouses Christian values. In pushing for the rejection of the entire Bill, the ACDP held the Bill as 'the most controversial, dangerous, irresponsible and undemocratic [Bill to] be tabled in this Parliament ... even worse than any Bill that was ever debated during the apartheid era'.[66] The FF+ rejected the Bill 'because it amounts to the

61 Choice on Termination of Pregnancy Bill – Second reading 4810.
62 Choice on Termination of Pregnancy Bill – Second reading 4789.
63 UN 'Report of the International Conference on Population and Development' A/CONF.171/13 (5-13 September 1994).
64 UN 'Report of the Fourth World Conference on Women: Beijing, 4-15 September 1995' A/CONF.177/20 (1995). See also Choice on Termination of Pregnancy Bill– Second reading 4767.
65 C Zampas & J Gher 'Abortion as human right: International and regional standards' (2008) 8 *Human Rights Law Review* 252.
66 Choice on Termination of Pregnancy Bill – Second reading 4783.

murder of innocent and defenceless unborn children'.[67] The MP from the FF+ party further went on to tap into women's maternal instinct:[68]

> I want to address myself to the women and mothers in this house, if this legislation has applied when they were expecting their children, which one of them would they have had aborted? Whether they have five or seven children today, which one of them that is playing out there would they have not wanted? [interjections] this is an important decision, because this is what the voter or the person to whom this Bill applies today, will have to decide on.

The Choice on Termination of Pregnancy Bill was considered the 'most evil law ever passed in South Africa'.[69] The opposition espoused that the passing of the Bill would have immense consequences: '[The Bill] will lead, as it is clearly intended to, to the barbaric slaughter of millions of unborn infants. The slaughter will be unimaginable catastrophe and punishment on South Africa and all its people [interjections].'[70]

The disregard for life was further buttressed by another MP who visualised the backyard of an abortion clinic to be scattered 'with hundreds of little bodies or pieces of bodies in buckets or waste bags'.[71] The National Party (NP), expressing its opposition to abortion on demand during the first 12 weeks of pregnancy, noted that 'on moral and religious grounds … [abortion on demand is] objectionable and offensive to the right to life guaranteed in the Constitution'.[72]

The religious discourse employed by the anti-choice movement was done within the historical past of the relationship between the state in apartheid South Africa and the church.[73] According to Guttmacher and others, the official church of South Africa, the Dutch Reformed Church, 'not only opposed the new law but propagated the belief that the white population must grow to maintain its supremacy'.[74] This is why, according to Ngwena, the abortion law 'sought to reverse a system which, through a combination of the pater-familial traditions of Roman-Dutch law and

67 Choice on Termination of Pregnancy Bill – Second reading 4774.
68 Choice on Termination of Pregnancy Bill – Second reading 4777.
69 Choice on Termination of Pregnancy Bill – Second reading 4788.
70 As above.
71 As above.
72 Choice on Termination of Pregnancy Bill – Second reading 4767.
73 Bradford (n 25) 120.
74 Guttmacher and others (n 31) 191.

the patriarchal orientation of African customary law, had inscribed into law a subordinate status for women'.[75]

The spirited debate illustrating both complementary and contested positions speaks to how 'abortion is a publicly controversial issue because it speaks to and draws on localised understandings of women's role, the role of the state, the sanctity of life, and society's obligation to women and the right to privacy'.[76]

In relation to laws, it has been argued that 'standards of what is rational reflect the interests of those who currently hold power'.[77] For example, it has been highlighted that due to opposition from members of the ANC on the basis of religion, members were requested to vote as a bloc and consequently denied a free vote.[78] The former ANC chief whip of Parliament spoke about the dilemma they faced:[79]

> I've been taught that abortion is wrong. But I am in Parliament as an ANC MP. People voted in 1994 for the ANC, not for Geoff Doidge. I'm not there as a Catholic MP, but as an ANC MP. In terms of that I must follow party discipline ... It was a very difficult time, wrestling with one's conscience and party loyalty. You opened the paper in the morning and saw you were threatened with excommunication. My job is to ensure that MPs vote in favour of legislation tabled by the organisation.

This meant that although the Bill was eventually passed with an overwhelming majority, it was marked by significant absenteeism.[80]

3.2.2 Choice on Termination of Pregnancy Act

The Choice on Termination of Pregnancy Act, which took effect in 1997, 'promotes reproductive rights and extends freedom of choice by

75 C Ngwena 'The history and transformation of abortion law in South Africa' (1998) 30 *Acta Academica* 46, when citing F Kaganas & C Murray C 'Law and women's rights in South Africa: An overview' (1994) 1 *Acta Juridica* 1.

76 CI Macleod & T Feltham-King 'Representations of the subject "woman" and the politics of abortion: an analysis of South African newspaper articles from 1978 to 2005' (2012) 14 *Culture, Health and Sexuality: An International Journal for Research, Intervention and Care* 737.

77 K Bartlett & R Kennedy 'Introduction' in K Bartlett & R Kennedy (eds) *Feminist legal theory: Readings in law and gender* (1991) 3.

78 B Klugman and others 'Developing women's health policy in South Africa from the grassroots' (1995) 3 *Reproductive Health Matters* 122.

79 'ANC to act over abortion vote' *Mail & Gaurdian* 15 November 1996, https://mg.co.za/article/1996-11-15-anc-to-act-over-abortion-vote (accessed 15 November 2019).

80 See Guttmacher and others (n 31) 191-194.

affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs'.[81]

The key values espoused in the Preamble include non-racialism, non-sexism and the advancement of human rights and freedoms.[82] It also recognises the state's responsibility to provide reproductive health to all and to provide safe conditions under which the right of choice can be exercised without fear or harm.[83]

The Act provides for abortion on request up to 12 weeks of pregnancy. Between 13 to 20 weeks, women can obtain an abortion on the following grounds: physical or mental health; foetal anomaly; if the pregnancy is a result of rape or incest; and on grounds of socio-economic circumstances. After 20 weeks of gestation, a woman can only terminate her pregnancy if determined by a medical practitioner that it poses a serious danger to the woman's health or life, or if the foetus will be severely malformed.[84] Consent from a woman's spouse or, in the case of minors, parental consent is not required.[85]

To increase women's access to abortion services, an amendment to the Choice on Termination of Pregnancy Act in 2008, for example, empowered registered nurses,[86] with the required accreditation to conduct the procedure, during the first trimester.[87] Training and certification are considered critical for expanding access and ensuring quality.[88] The Choice on Termination of Pregnancy Act provides that only a person 'who has undergone prescribed training in terms of this Act' may perform a termination of pregnancy.

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81 Preamble, para 7.
82 Preamble, para 1.
83 Preamble, para 5.
84 Sec 2 of the Act.
85 Nabaneh (n 1) 16.
86 The Nursing Act 33 of 2005 defines a 'nurse' as a person registered in a category under sec 31(1) in order to practise nursing or midwifery. The reference to 'nurse' in this chapter will be used as a general term with reference to professional nurse and midwife categories described in the Nursing Act.
87 The first amendment passed in 2004 was challenged on the grounds of non-adherence to the process of provincial consultation for the amendment in *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 CC. The Constitutional Court suspended the implementation of the amendment for 18 months to follow due process. It was eventually returned to Parliament and the Choice on Termination of Pregnancy Amendment Act 1 of 2008 was passed.
88 World Health Organisation (WHO) 'Health worker roles in providing safe abortion care and post-abortion contraception' (2015).

Challenges to the Act

While progress has been noted, there has also been a growing mobilisation of the pro-life movement rooted in morally based arguments and fuelled by right-wing political parties, including the African Christian Democratic Party (ACDP), the Pan Africanist Congress (PAC) and the New National Party (NNP).[89] In this context, the conservative voice merged vigorously and strategically to roll back the Act. The Act's constitutionality was first challenged in *Christian Lawyers Association v National Minister of Health* on the grounds that the right to terminate a pregnancy violates the constitutional right to life of the foetus.[90] The Pretoria High Court dismissed the claim, holding that foetuses were not rights bearers, as the wording of the Bill of Rights provisions under the Constitution did not envisage this.[91]

The second case was in 2004 when the Christian Lawyers Association challenged sections 5(2) and 3 of Act, which allows adolescent girls to choose abortion without the consent of, or in consultation with, parents.[92] The High Court dismissed the challenge, noting that girls who have the emotional and intellectual capacity to consent could do so.[93] The Court noted that enforcing a mandatory parental involvement would infringe on the constitutional rights of girls, including their reproductive freedom, dignity, privacy and access to reproductive health care.[94]

In 2004, Doctors for Life International challenged the initial attempt to amend the Act on the grounds that the amendment process did not adhere to the rules of consultation at the provincial levels.[95] This resulted in the decision of the Constitutional Court to suspend the implementation of the amended Act for 18 months in order for the state to follow due process. It was eventually returned to Parliament, and the Choice on Termination of Pregnancy Amendment Act 1 of 2008 was passed. The

89 Reproductive Rights Alliance 'Media coverage on termination of pregnancy over January to August 1999' (1999) 3 *Barometer* 15.
90 *Christian Lawyers Association v National Minister of Health* 1998 (4) SA 1113 (T).
91 As above.
92 *Christian Lawyers Association v National Minister of Health* 2005 (1) SA 509.
93 *Christian Lawyers Association* (n 92) 519.
94 As above.
95 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 CC.

2008 amendment expanded the list of medical personnel performing abortions under section 10. Hence, termination of pregnancies during the first trimester (12 weeks of gestation) or less can be performed not only by a medical practitioner but also by a registered nurse or midwife,[96] who has completed the prescribed abortion training.

4 Barriers to accessing safe abortion services

Although abortion can be obtained in South Africa on request, different challenges hinder access. Rebouché notes that liberal laws do not necessarily lead to increased access to abortion services.[97] This is true for South Africa. The most common barriers to accessing abortion services include the lack of a legal framework to regulate conscientious objection; accessibility difficulties for poor or marginalised women; stigma; and a lack of information on how to access safe abortion services.[98]

This part focuses on the limited access to safe abortion services for marginalised women due largely to the unregulated nature of the practice of conscientious objection. Despite the need for more robust research, there is sufficient evidence to indicate that healthcare professionals' refusal to provide care is a substantial obstacle to accessing abortion services.[99] The persistence of widespread advertisements for quick abortions suggests a significant demand for abortion services that are not being adequately met by the formal healthcare system.[100] This, coupled with the lack of reliable data on unsafe abortions, raises concerns about the potential for women to seek out clandestine and potentially dangerous procedures.

96 According to the Act, a 'registered nurse' or 'registered midwife' means a person registered as such under the Nursing Act 33 of 2005, and who in addition has undergone prescribed training in terms of this Act.

97 R Rebouché 'A functionalist approach to comparative abortion law' in RJ Cook and others *Abortion law in transnational perspective* (2014) 101.

98 See KA Trueman & M Magwentshu 'Abortion in a progressive legal environment: The need for vigilance in protecting and promoting access to safe abortion services in South Africa' (2013) 103 *American Journal of Public Health* 398.

99 See, eg, J Harries and others 'Health care providers' attitudes towards the termination of pregnancy: A qualitative study in South Africa' (2009) 9 *BMC Public* Health 3.

100 R Jewkes and others 'Why are women still aborting outside designated facilities in metropolitan South Africa' (2005) 112 *British Journal of Obstetrics and Gynecology* 1236.

4.1 Marginalised women

South Africa remains one of the most unequal societies in the world.[101] In a World Bank report on poverty and inequality in South Africa, the authors claim that the persistence of gender disparities in South Africa's labour marker is an enduring legacy of apartheid.[102]

There are general inequalities in the healthcare system and uneven distribution of human resources for health care across provinces, between urban and rural areas, and between the public and private sectors. For example, 43,6 per cent of people living in the rural areas are served by only 12 per cent of the country's doctors and 19 per cent of nurses.[103] A 2007 study on inequalities in healthcare spending and capacity among South Africa's provinces found that the Northern Cape received more government funding, US $168 per capita, compared with Limpopo's US $101, which are mostly poor and black provinces.[104] This translated into the Northern Cape having roughly twice as many doctors per capita and four times as many hospitals per capita as Limpopo.[105] The study further found that the richest province, the Western Cape, had 60 private hospitals, 55 public hospitals, and 1 246 doctors for a population of 4,8 million, compared to the poorest province, Limpopo, which had only six private hospitals, 44 public hospitals, and 882 doctors for a population of 5,7 million.[106] These inequalities have major consequences for the availability of services in the country, generally, and abortion, specifically.

Abortion services in public sector facilities are available free of charge. In contrast, private abortion clinics charge fees that range from ZAR 800 to ZAR 1 500 ($55 to $100 approximately) depending on the gestational age and type of abortion procedure.[107] Women who can afford private

101 See V Sulla & P Zikhali *Overcoming poverty and inequality in South Africa: An assessment of drivers, constraints and opportunities* (2018).
102 Sulla & Zikhali (n 101) xiv.
103 National Department of Health 'Human resources for health South Africa 2012/2013-2016/2017' (2011) 3.
104 D Stuckler and others 'Health care capacity and allocations among South Africa's provinces: Infrastructure/inequality traps after the end of apartheid' (2011) 101 *American Journal of Public Health* 169.
105 Stuckler and others (n 104) 170.
106 Stuckler and others (n 104) 168.
107 These prices were obtained from observations when the author visited private abortion clinics in Gauteng and Limpopo.

health care are able to access safe abortions from doctors or nurses in the private sector, whether these are legally designated facilities or not.

Despite a conducive legal framework, this remains the norm with a dramatic increase in lamp post advertisements for 'pain free, same day' abortions which, in many cases, have led to severe consequences.[108] Poor women are tremendously affected by the deteriorating healthcare systems, the lack of political will and non-vibrant civil society, stigma and opposition.[109] For those women who are rich (and white), they can afford private healthcare services, while poor women (primarily blacks) rely on the state or illegal providers increasingly seen on lamp post advertisements.[110]

Women in South Africa, particularly black women, continue to have fewer opportunities than men, and are unable to fully partake in the economy due in part to the characterisation and distinction of labour along the lines of gender in the household.[111] The consequences of such a cycle of gender inequality is explained by Freedman: 'Inequality – imbalances in power and access to resources – makes the control of women's reproduction by others both more possible and more likely. At the same time, such external control of reproduction and sexuality – and thus of women and their place in society – reinforces of inequality.'[112]

The social and historical context was influenced by factors such as race, class and gender. On the inequality suffered by women due to their gender roles, Justice Goldstone presented it as follows:

> For all that it is a privilege and the source of enormous human satisfaction and pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South Africa women, the difficulties of being responsible for the social and economic burdens in circumstances where they have few skills and scant financial resources are

108 Trueman & Magwentshu (n 98) 398. See also S Ferguson 'Abortion is legal in South Africa – But illegal clinics are thriving. Why?' *The Development Set* 3 April 2017.

109 Albertyn (n 59) 430.

110 R Jewkes and others 'The impact of age on the epidemiology of incomplete abortions in South Africa after legislative change' (2005) 112 *British Journal of Obstetrics and Gynaecology* 355.

111 Jewkes and others (n 110). See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 38.

112 LP Freedman 'Censorship and manipulation of family planning information: An issue of human rights and women's health' in JM Mann and others (eds) *Health and human rights: A reader* (1999) 150.

> immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in the labour market. [113]

Given this historical context of inequality, the quest for equality is not merely for political equality but also focuses on socio-economic status. The right to equality demands the articulation and implementation of state obligations addressing discrepancies based on racial and gender dimensions in accessing healthcare services.[114] This finds support in the 2018 report of the Guttmacher-Lancet Commission on Sexual and Reproductive Health and Rights, which affirms that the right to make decisions concerning one's body is a key component in the attainment of gender equality and economic development.[115] Access to safe abortion is a gender equality matter as a woman's control of her reproductive rights is key to her ability to equally contribute in society.[116] Equality is about ensuring fairness for all citizens.. As for the struggle to safeguard equality within a liberal polity, Ngwena holds that '[t]aking equality seriously means taking steps to protect the equality rights of a vulnerable social group by countering discriminatory and obstructive barriers that are unconstitutional or superfluous and have the effect of delaying or ultimately thwarting the exercise of legal rights, thus perpetuating the status quo'.[117]

4.2 Conscientious objection

Lack of accessibility is further compounded by the shortage of healthcare facilities that provide abortion services. In 2015 it was estimated that less

113 *Hugo* (n 111) para 38.
114 See C Ngwena 'Accessing abortion services under the Choice on Termination of Pregnancy Act: Realising substantive equality' (2000) 25 *Journal of Juridical Science* 25-26.
115 AM Starrs and others 'Accelerate progress – Sexual and reproductive health and rights for all: Report of the Guttmacher-Lancet Commission' (2018) 391 *Lancet* 2642.
116 US Supreme Court Justice Ginsburg quoting *Planned Parenthood v Casey* 505 US 833 (1992) in *Gonzales v Carhart* 550 US (2007) 4.
117 C Ngwena 'Taking women's rights seriously: using human rights to require state implementation of domestic abortion laws in African countries with reference to Uganda' (2016) 60 *Journal of African Law* 133.

than 40 per cent of designated facilities provided abortion services.[118] According to Amnesty International, as of November 2016, the National Department of Health has confirmed that there are 505 facilities of 3 880 government healthcare facilities (13 per cent) that have been designated to provide abortions services, but only 264 healthcare facilities (7 per cent) were providing first and second trimester services.[119]

However, what makes this situation worse is the inadequacy of health system information, as there is no available data to tell where to find these 264 public healthcare facilities. The healthcare system deficiencies, including the limited number of abortion facilities, can be ascribed to the shortage of healthcare professionals willing to provide the service, worsened by the unregulated practice of conscientious objection. A fundamental shortcoming of the Act is that it does not have an explicit provision for conscientious objection by healthcare professionals.[120]

South Africa's failure to provide an adequate legal framework to regulate the exercise of conscientious objection has resulted in it serving as a major barrier to women's access to safe, legal abortion.[121] The Council of Europe, in its report on conscientious objection, noted that the lack of regulation when it comes to the exercise of conscientious objection is a central element in effectively blocking women's access to abortion.[122]

It has been reported that fewer than 7 per cent of designated healthcare centres in South Africa provide abortion services due in large part to the invocation of conscientious objection by medical personnel.[123] Although the percentage of conscientious objectors in these facilities cannot be ascertained, the practice has been said to be rampant and a significant impediment to the procurement of legal abortions. It is posited that one of the main reasons for the continued existence of the clandestine abortion industry despite a progressive legal framework is the ability of healthcare professionals, including nurses, to opt out of providing abortion services.

118 Albertyn (n 59) 429-454.
119 Amnesty International 'Briefing: Barriers to safe and legal abortion in South Africa' (2017) 8.
120 See Ngwena (n 114) 1-18.
121 Nabaneh (n 1) 2.
122 Council of Europe 'Women's access to lawful medical care: The problem of unregulated use of conscientious objection' Doc 12347 (2010) paras 44 & 53.
123 ESCR Committee (n 16) para 65.

Global studies have also shed light on conscientious objection as a barrier to accessing safe abortion services that drive women to unsafe abortion.[124] The exercise of conscientious objection in reproductive health care, in particular for abortion services, has the potential to undermine the dignity and autonomy of women and stigmatises their healthcare needs.[125] Stigma is defined as 'an attribute that links a person to an undesirable stereotype leading individual to reduce the bearer from a whole and usual person to a tainted discounted one'.[126] Building on Goffman's conceptualisation of stigma, stigma relating to abortion is defined by Kumar and others 'as a negative attribute ascribed to women who seek to terminate a pregnancy that marks them internally or externally, as inferior to ideals of womanhood'.[127] Research further demonstrates that stigma related to abortion provision influences ways and the extent to which women can access care.[128]

The failure to regulate the practice of conscientious objection contravenes international human rights obligations of the South African government, which require that where states allow healthcare professionals to refuse to provide abortion care on grounds of conscience or religion, they must establish an effective legal and oversight framework to ensure that such refusals do not hinder women's access to legal abortion in practice.[129] For instance, the African Commission on Human and Peoples' Rights (African Commission) unprecedentedly addressed states' duty to adequately regulate the practice of conscientious objection in the reproductive health sphere through General Comment 2 on articles 14(1)(a), (b), (c) and (f) and articles 14(2)(a) and (c) of the Protocol on Reproductive Health Rights on 28 November 2014.[130] General Comment 2 thus focuses on measures to promote and protect the sexual

124 W Chavkin and others 'Regulation of conscientious objection: An international comparative multiple-case study' (2017) 19 *Health and Human Rights Journal* 55.
125 C MacLeod 'Harm or mere inconvenience? Denying women emergency contraception' (2010) 25 *Hypatia* 11.
126 E Goffman *Stigma: the management of spoiled identity* (1963) 11.
127 A Kumar and others 'Conceptualising abortion stigma' (2009) 11 *Culture, Health and Sexuality* 628.
128 See KA Hessini & L Mitchell 'Conceptualising abortion stigma' (2009) 11 *Culture, Health and Sexuality* 625.
129 Nabaneh (n 1) 29-30.
130 African Commission on Human and Peoples' Rights General Comment 2 on arts 14(1)(a), (b), (c) and (f) and arts 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2014). See Nabaneh (n 1) 20-21.

and reproductive rights of women and girls in the African region and particularly on access to safe abortion.[131] The General Comment observes that healthcare providers directly involved in providing abortion services may invoke conscientious objection, but not in emergency situations.[132] Premised on their obligations under the African Women's Protocol, states are obliged to '[e]nsure that health services and healthcare providers do not deny women access to contraception/family planning and safe abortion information and services because of, for example, requirements of third persons or reasons of conscientious objection'.[133]

In addition, the General Comment further notes that state obligations relating to an enabling and political framework also entail ensuring that healthcare providers do not deny women access to safe abortion information and services.[134] General Comment 2 is a critical resource for ensuring access to safe and timely legal abortion. In particular, the African Commission sends a clear message to African states that permit conscientious objection, that is, they must establish and implement an effective regulatory framework to guarantee that such refusals do not undermine women's access to legal abortion services. It is important to note that even where conscience-based refusals are enshrined in law, they do not always work in practice. Yet, the regulation of conscientious objection is vital.[135]

A widely held view is that the National Department of Health and its provincial departments have not engaged in any meaningful awareness campaign since the enactment of the Act, which has led to a lack of awareness, obscurity and vagueness about the obligations of healthcare providers, resulting in the ineffective implementation at the expense of women's access.[136] This is further compounded by the National Department of Health's conceptualisation of conscientious objection in that there is no proof of the systematic use of conscientious objection, as

131 CG Ngwena and others 'Human rights advances in women's reproductive health in Africa' (2015) 129 *International Journal of Gynecology and Obstetrics* 184.
132 General Comment 2 (n 130) para 26.
133 General Comment 2 (n 130) para 48.
134 General Comment 2 (n 130) paras 26 & 48.
135 Research reveals this in various countries, including Mexico City and Italy. See G Ortiz-Millan 'Abortion and conscientious objection: Rethinking conflicting rights in the Mexican context' (2017) 29 *Global Bioethics* 1; F Minerva 'Conscientious objection in Italy' (2015) 41 *Journal of Medical Ethics* 170.
136 Nabaneh (n 10) 250.

healthcare providers are merely not participating in abortion services.[137] A study on the attitudes of healthcare providers in relation to abortion termination found that providers do not have a clear understanding of what constitutes conscientious objection due, in part, to an absence of a comprehensive regulatory framework.[138] In its Concluding Observations to the initial report of South Africa, the Committee on Economic, Social and Cultural Rights (ESCR Committee) noted its concern about the limited accessibility of facilities offering abortion services, particularly in rural areas, largely due to the invocation by medical personnel of conscientious objection.[139] What emerges from this is a picture that indicates that the exercise of conscientious objection by healthcare professionals is largely unregulated, creates harm to women and remains a major barrier to access services.[140]

5 The opposition: Current trends

The strategy of the opposition generally is an attempt to fight against the expanding protections for women while peddling the narrative that the pro-sexual and reproductive rights movement is subverting 'traditional family values'.[141] The context of South Africa makes it difficult to erode advances due to the strong constitutional and legal framework. In recent years, there has been a rallying cry by conservative actors in South Africa to curtail sexual and reproductive rights and links between the tactics deployed on the issues are observed.

In 2017, Cheryllyn Dudley of the ACDP introduced a private member Bill before Parliament, which proposed several amendments to the Choice on Termination of Pregnancy (CTOP) Act. Proposed changes included mandatory counselling for women seeking an abortion; the requirement for an ultrasound examination; participation of additional professionals in the abortion process; and limitation on the possibility of seeking an abortion if it would pose a risk to the

137 Nabaneh (n 10) 108.
138 Harries and others (n 99) 4-5.
139 ESCR Committee (n 16) para 65.
140 J Harries and others 'Conscientious objection and its impact on abortion service provision in South Africa: A qualitative study' (2004) 11 *Reproductive Health* 16.
141 See H McEwen 'Weaponising rhetorics of "family": The mobilisation of pro-family politics in Africa' (2018) 10 *African Journal of Rhetoric* 142.

foetus.[142] This amendment is similar to both the Texan and Kentucky law, which require doctors to show and describe ultrasound images to women seeking an abortion, even if the patient objects and shows signs of distress.[143] The United States Supreme Court on 9 December 2019 upheld the 2017 law, which a federal judge previously struck down on the grounds that it was meant to dissuade women from choosing an abortion.[144] Despite these failed efforts geared towards legislative and policy processes, their language or strategies are fed into court-centred strategies that other conservative organisations undertake.

A recent issue that the ACDP has also championed is supporting healthcare workers to refuse to provide abortion services. In August 2019 a doctor was prohibited from practising medicine and is currently facing a six-member disciplinary inquiry panel of the Health Professions Council of South Africa (HPCSA).[145] This followed an incident that occurred at the 2 Military Hospital in Wynberg when he mentioned to a patient that he believed that abortion constituted the killing of an unborn human being.[146] On 29 October 2019 the Panel dismissed his appeal to drop the charges. If found guilty, he could potentially be sanctioned with a warning, a fine, suspension, or the termination of his registration with HPCSA.[147] A year later, HPSCA dropped the charges of unprofessional conduct against him due to the complainant not wishing to further pursue the matter.[148] While the reason for the sudden

142 Choice on Termination of Pregnancy Amendment Bill (B34-2017).

143 E Nash and others 'Policy trends in the states, 2017 Guttmacher Institute' (2018), https://www.guttmacher.org/article/2018/01/policy-trends-states-2017# (accessed 31 December 2022).

144 *EMW Women's Surgical Ctr v Beshear* 920 F.3d 421 (6th Cir 2019).

145 A Viljoen 'Vague charges against pro-life doctor hold up case and career for two years, says attorney' *Gateway News* 29 August 2019, http://gatewaynews.co.za/vague-charges-against-pro-life-doctor-hold-up-case-and-career-for-two-years-says-attorney/ (accessed 3 January 2023).

146 K Brandt 'Doctor barred from practicing over abortion view to face HPCSA Panel' *EWN Eyewitness* 27 August 2019, https://ewn.co.za/2019/08/27/doctor-barred-from-practising-over-abortion-view-to-face-hpcsa-panel?fbclid=IwAR0mq91OduwEuPIt16pdJ_dTdF9pGMVvMHupMib0KEjBUJHU9f1C27axqxY (accessed 3 January 2023).

147 D Adriaanse 'Pro-life doctor Jacques de Vos' bid to have charges dropped dealt a blow' *IOL News* 30 November 2019, https://www.iol.co.za/capetimes/news/pro-life-doctor-jacques-de-vos-bid-to-have-charges-dropped-dealt-a-blow-36291824 (accessed 3 January 2023).

148 S Fokazi 'HPCSA lets anti-abortion doctor off the hook after complainant withdraws' *Herald Live* 7 October 2020, https://www.heraldlive.co.za/

decision of the complainant was not stipulated, the council noted that it 'received an affidavit from the complainant indicating that she no longer wishes to proceed with the complaint that was filed against Dr De Vos. She further advised that she does not wish to testify against De Vos nor participate in the hearing.'[149]

This was a long drawn-out process lasting over three years. Healthcare workers from Wynberg Military seemed to be intimidated at the HPCSA hearings by the huge presence of ACDP supporters.

In addition, there is a general drive to make this doctor a martyr and to politicise the issue, as evidenced by the statement of the ACDP MP Marie Sukers in praising the doctor as having taken a bold and unpopular stand in choosing to be a voice for the voiceless.[150] She further goes on to state:[151]

> The ACDP believes in the sanctity of human life, and we look forward to a time when the life of an unborn child will be given the reasonable protection it deserves. Dr De Vos is to us an indication that the time for that is not far off. His statement, which has landed him in hot water with the HPCSA and 2 Military Hospital, shows that there are people who know that we cannot value human rights without valuing human life.

Doctors for Life also operates the 11th Hour Abortion Helpline, touted as a safe space to speak to abortion counsellors for those pregnant and finding it challenging to come to terms with their situation. Besides, this service is also available for 'post-abortion syndrome', a way of dealing with guilt and depression. This assertion is based on a Doctors for Life's claim that women who have had an abortion are more likely to suffer from mental health illnesses than women who have not had an abortion, as well as a higher risk of illnesses such as cancer. There currently are no findings establishing an association between abortion and mental health in South Africa. Global reviews have shown that there is no

news/2020-10-07-hpcsa-lets-anti-abortion-doctor-off-the-hook-after-complainant-withdraws/ (accessed 3 January 2023).

149 As above.

150 'ACDP in solidarity with anti-abortion doctor ahead of HPCSA inquiry' *IOL News* 26 August 2019, https://www.iol.co.za/news/south-africa/acdp-in-solidarity-with-anti-abortion-doctor-ahead-of-hpcsa-inquiry-31348694 (accessed 3 January 2023).

151 As above.

strong relation between abortion and subsequent mental health issues.[152] Despite unclear evidence on such a phenomenon, Doctors for Life pedals the abortion and mental health controversy based on publications by Priscilla Kari Coleman, a professor of Human Development and Family Studies at Bowling Green State University in Ohio who has ties with the anti-abortion movement. She claims that there is a statistical correlation or causal relationship between abortion and mental health problems.[153] This notwithstanding, reviews conclude that her research is deeply flawed and the meta-analysis's conclusions are invalid.[154]

Another tactic deployed is the establishment of pregnancy crisis centres. The Africa Cares for Life is a network of 'life-affirming' pregnancy help and community organisations in South Africa. The organisation's mission is to support and assist families impacted by unplanned pregnancy. Africa Cares for Life (now Pregnancy Health Network) is an affiliate of Heartbeat International, an organisation that opposes abortion and has affiliates worldwide. Open Democracy's analysis of US financial filings reveals that Heartbeat International has supported Africa Cares for Life, which has received over $200 000 from the organisation since 2007.[155] The investigation revealed that the staff at the pregnancy crisis centres were giving directive counselling and

152 See National Collaborating Centre for Mental Health at the Royal College of Psychiatrists *Induced abortion and mental health: a systematic review of the mental health outcomes of induced abortion, including their prevalence and associated factors* (2011); B Major and others 'Abortion and mental health: Evaluating the evidence' (2009) 64 *American Psychologist* 863; GE Robinson and others 'Is there an "abortion trauma syndrome"? Critiquing the evidence' (2009) 17 *Harvard Review of Psychiatry* 269; VE Charles and others 'Abortion and long-term mental health outcomes: A systematic review of the evidence' (2008) 78 *Contraception* 436.

153 PK Coleman 'Abortion and mental health: Quantitative synthesis and analysis of research published 1995-2009' (2011) 199 *British Journal of Psychiatry* 180.

154 JR Steinberg and others 'Fatal flaws in a recent meta-analysis on abortion and mental health' (2012) 86 *Contraception* 430.

155 K Cullinan, M Modjadji & C Nortier 'Government vows to act against US-linked anti-abortion "clinics"' *Daily Maverick* 11 February 2020, https://www.dailymaverick.co.za/article/2020-02-11-government-vows-to-act-against-us-linked-anti-abortion-clinics/ (accessed 3 January 2023).

spreading misinformation about abortion procedures,[156] as part of a 'global campaign of misinformation'.[157]

The Crisis Pregnancy Centres under Africa Cares for Life are known to give directive counselling contrary to the provisions of the Choice on Termination of Pregnancy Act. Some 60 pregnancy crisis centres are to be found in South Africa, some of which are physically housed in government hospitals and clinics. This gives the impression of legitimacy. Thus, they remain largely unregulated spaces for religious propaganda.[158]

These different organisations and actors are aligned with conservative perspectives as opposed to clinically informed research and evidence. For instance, there has been a rise in interest around the burial of pregnancy remains. In the matter between *Voice of the Unborn Baby*[159] the applicants sought to have declared certain sections of the Births and Deaths Registration Act 51 of 1992 (BADRA) unconstitutional as they do not provide 'bereaved parents' the right to bury a foetus that has died before the age of viability (26 weeks *in utero*).[160] The case was brought in 2017 in the Pretoria Division of the High Court by Cause for Justice, an anti-abortion legal group and the Catholic Church. On 28 May 2018 the Women's Legal Centre (WLC) and Legal Resources Centre (LRC), representing Women's Legal Trust and Women in Sexual Health (WISH) respectively, applied to be admitted as *amici curiae*.[161] They argued that the Court ought not to accept the applicant's argument that 'many' parents who experience loss of pregnancy want to be able to elect to bury the foetus as there is no empirical evidence to support this. They further argued that a burial right would result in undue burden as it would entail needed resources such as separation and storage, and the

156 K Cullinan, M Modjadji & C Nortier 'Revealed: US-linked anti-abortion centres "violating the law" in South Africa' *OpenDemocracy* 11 February 2020, https://www.opendemocracy.net/en/5050/revealed-us-linked-anti-abortion-centres-violating-the-law-in-south-africa/ (accessed 3 January 2023).

157 C Provost & N Archer 'Exclusive: Trump-linked religious "extremists" target women with disinformation worldwide' *OpenDemocracy* 10 February 2020, https://www.opendemocracy.net/en/5050/trump-linked-religious-extremists-global-disinformation-pregnant-women/ (accessed 3 January 2023).

158 On research on abortion counselling, see JJ Mavuso & CI Macleod '"Bad choices": Unintended pregnancy and abortion in nurses' and counsellors' accounts of providing pre-abortion counselling' (2021) 25 *Health* 555.

159 *Voice of the Unborn Baby NPC & Catholic Archdiocese of Durban v The Minister of Home Affairs & Minister of Health* Pretoria High Court, Case 16402/17.

160 *Voice of the Unborn Baby* (n 159) paras 5 & 14.

161 *Voice of the Unborn Baby* (n 159) para 38.

disincentive that this would create for facilities that may otherwise offer abortion services.[162] The implementation of the burial rights will increase the financial and administrative burden of offering abortion services, which can further limit the number of facilities that are willing and able to provide the services.

The matter was subsequently heard on 14 and 15 November 2019 before Mnqibisa-Thusi J. The applicants approached the Court to declare that where a foetus has died at a gestational age of younger than 26 weeks, the parents of the foetus should be given an option to bury the foetus. This is typically referred to as a miscarriage or spontaneous death. Currently, in these cases of pregnancy loss, there is no option to bury. One may only bury a foetus where the pregnancy loss occurred at or after 26 weeks – this is legally referred to as a 'stillbirth'. The applicants argued that parents should be allowed to bury the foetus irrespective of whether the pregnancy loss was through natural causes or human intervention and the foetus's gestational age. According to the applicants, to refuse parents this right infringes on their constitutional rights to dignity, equality, privacy and freedom of religion.

The Court held on 26 February 2021 that the impugned provisions of BADRA and the regulation are inconsistent with the Constitution to the extent that it excludes the issuance of a still-birth notice in the case of a pregnancy loss other than a still birth. However, it held that this declaration of invalidity does not apply in the case of a pregnancy loss due to an inducement.[163] Accordingly, this means that the conferring of burial rights on bereaved parent or parents excludes the accrual of such rights on a person who seeks pregnancy loss under the voluntary termination of pregnancy regime. The judgment does not go so far as to expressly provide appropriate mechanisms to be put in place to ensure that the practical fulfilment of that right does not disproportionately interfere with pregnant women's right to access a termination of pregnancy procedure. In addition, it is also important to note that this decision should be that of a pregnant woman in all circumstances and not just in the case of abortion.

It is equally interesting that the arguments furthered by the applicants resonate with current foetal burial litigation or legal issue in the US.

162 *Voice of the Unborn Baby* (n 159) para 39.
163 *Voice of the Unborn Baby* (n 159) para 50.

On 28 May 2019, in *Box v Planned Parenthood*,[164] the Supreme Court of the United States decided to uphold the constitutionality of the Indiana abortion law that mandates any clinician or facility providing abortion to bury or cremate fetal remains.[165] Indiana is one of eight states that has passed such laws that require that fetal remains be interred or cremated rather than disposed of as medical waste. This outcome is what the opposition hopes to achieve with the Choice on Termination of Pregnancy Act.

6 Conclusion

Abortion regulation in apartheid South Africa was underpinned by racism, which led to the 1975 abortion law. The subsequent enactment of the Choice on Termination of Pregnancy Act, assented to by President Mandela on 12 November 1996 and entered into force in February 1997, aimed to redress past injustices of inequality. Abortion has since then been liberalised in South Africa for the past 25 years. Unfortunately, despite this radical legal regime, women continue to face significant barriers to accessing safe abortion services. The most common barriers to accessing abortion services include the lack of a legal framework to regulate conscientious objection, accessibility difficulties for poor or marginalised women, stigma and lack of information on how to access safe abortion services. There has also been growing visibility of anti-abortion organisations employing similar tactics and co-opting similar discourses that ultra-conservative actors from the Global North use.

The right to access safe and legal abortion as provided for in the Act is emboldened by certain international human rights law norms and standards. In interrogating a liberal abortion law, I argue that ambiguity in the law on conscientious objection makes accessing abortion services unpredictable in light of competing rights claims – to reproductive autonomy and to freedom of conscience. South Africa's failure to provide an effective legal framework to regulate the exercise of conscientious objection has become a major barrier to women's access to safe, legal abortion. In order to ensure women's right to exercise

164 *Box v Planned Parenthood of Indiana and Kentucky*, Inc 587 US 18-483 (2019).

165 See D Fox, IG Cohen & JD Petrie-Flom 'The law and ethics of fetal burial requirements for reproductive health care' (2019) 322 *Journal of the American Medical Association* 1347.

reproductive autonomy and access to timely legal abortion services in South Africa, domestic laws must effectively regulate and oversee the practices of healthcare professionals in relation to their implied right to conscientious objection.

Expanding access to abortion services requires increasing the number of healthcare providers authorised to perform abortions, particularly in underserved areas. It is also essential to reduce barriers by streamlining administrative procedures, minimising waiting times and removing unnecessary restrictions. Providing comprehensive sexuality education is crucial to empower individuals with accurate information about sexual health, contraception and reproductive rights, enabling them to make informed decisions. Additionally, addressing stigma and discrimination through public health campaigns can help shift negative attitudes towards abortion and sexual health. Ensuring adequate funding is equally important, as public healthcare facilities need sufficient resources to deliver quality abortion services.

Only by eliminating these barriers and actively fulfilling its obligations can the South African government ensure that the provisions of the Choice on Termination of Pregnancy Act are fully realised. This will guarantee all persons capable of falling pregnant in South African, regardless of their socio-economic status, the right to safe, high-quality and dignified abortion services.

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