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# **Choice and Conscience: Lessons from South Africa for a Global Debate**

**Satang Nabaneh**

**Pretoria University Law Press**

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**2023**

*Choice and conscience: Lessons from South Africa for a global debate*

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## ENDORSEMENTS

*Choice and conscience: Lessons from South Africa for a global debate is a necessary and timely read. Abortion laws, such as South Africa's, provide formal guarantees to decide and act to terminate a pregnancy; but they fail to engage with the background rules, social and cultural contexts, and gendered power asymmetries, which in turn impede implementation.*

*Nabaneh's study of 'law in action' zeros in on South African nurses–gatekeepers who often object to the practice for reasons of “conscience. Her interviews of these nurses and her analysis complicate our understanding of challenges to abortion access, providing lessons applicable not only to South Africa and other African countries but everywhere, where there is a gap between formal law and its application.*

Mindy Jane Roseman, J.D., Ph.D, Yale Law School

*Written from an African feminist perspective, Satang Nabaneh's book offers fresh insights into our understanding of the intersection between politics, mobilisation of discretionary power and the exercise of conscientious objection to abortion by mid-level providers.*

Charles Ngwena, Professor of Law, Centre for Human Rights,  
University of Pretoria

*In Choice and conscience Satang Nabaneh offers powerful insights about how informal and background norms in health systems function constrain or enable reproductive justice. Focusing on conscientious objection to abortion by nurses (including midwives) in South Africa, Nabaneh sketches the importance of a feminist analysis that is situated in Africans' lived realities.*

Alicia Ely Yamin, Harvard University

## FOREWORD

Women's rights to equality, the highest attainable standards of physical and mental health, and the benefit from scientific progress, including access to quality services related to reproductive and sexual health, are firmly entrenched in international and regional human rights instruments. These rights and entitlements have been reaffirmed in consensus agreements and are recognised by international, regional, and national mechanisms, as well as in jurisprudence.

In 1994, the International Conference on Population and Development (ICPD) took a significant step by acknowledging the inextricable link between women's rights to reproductive and sexual health and their overall well-being. This recognition was not merely a symbolic gesture but a defining moment that solidified the understanding that any form of discrimination against women in matters of health and safety constitutes a grave affront to their human dignity. The notion of human dignity, coupled with the principle of equality, finds its articulation in the Universal Declaration of Human Rights (UDHR), a foundational document that underpins freedom, justice, and peace in our world.

I am pleased to write the foreword for this significant book, which delves into the intricate interplay between choice, conscience, and the right to sexual and reproductive health, an integral part of the right to health. As the UN Special Rapporteur on the Right to Health, I have seen first-hand the challenges that women, adolescents, girls, and all persons capable of becoming pregnant encounter when seeking quality healthcare, particularly when their health needs are placed unfairly at odds with the beliefs of healthcare providers.

Sexual and reproductive health rights (SRHR) are essential facets of the right to life, the right to health, the right to education, and the right to equality and freedom from discrimination. Ensuring access to SRHR services is a critical factor in empowering women and girls to attain the highest standards of health and well-being. This includes access to information and to safe abortion, an indispensable component of comprehensive healthcare services.

Over the past three decades, United Nations (UN) treaty-monitoring bodies and special procedures branch have recognised and affirmed abortion as a human right. This consensus is evident in concluding observations, general comments, general recommendations, independent expert reports and interventions as third parties in court proceedings, and decisions on communications brought under UN treaties' optional protocols. In Africa, the right of women to access safe abortion has been enshrined as a fundamental human right through the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Despite the positive trend toward the decriminalisation of abortion, many countries have not yet translated domestic legal reforms into access in real terms and without discrimination to safe abortion services. Even in countries where abortion is legally permitted, women often encounter barriers to accessing safe services. One significant hurdle that lies at the level of clinical care is the exercise of conscientious objection by healthcare providers, which they evoke to allow them to refuse to perform a task that goes against their conscience, and it is important to point out that this behaviour is almost always associated with services and tasks related abortion care and no other areas of medicine.

The Choice on Termination of Pregnancy Act came into effect in South Africa in February 1997, with hopes it would promote female reproductive autonomy by providing free access to abortion. While the Act is celebrated as a historic moment for women, today's reality could not be more different. Access to health services continues to be affected by spatial injustice, which reflects a combination of racial segregation, colonial and apartheid repression, and the Government's failure to address stark inequalities in the infrastructure and resources of the public health system. The legal framework is important and necessary, but it is not sufficient to ensure that women have access to abortion. As a doctor, I have seen what lack of access to safe abortions means: too many women in South Africa experience complications and preventable deaths.

In accordance with decisions made by human rights treaty bodies, even in cases where conscientious objection is permitted, governments bear the responsibility of ensuring unimpeded access to reproductive health services for women and safeguarding the principle that conscientious objection remains a matter of individual belief rather than an institutional practice. The exercise of the right to freedom of religion or belief should never be deployed as a rationale for gender-based discrimination and should not serve as a justification for obstructing the realisation the right to the highest attainable standard of physical and mental health.

In this context, *Choice and Conscience: Lessons from South Africa for a Global Debate* stands as a significant and valuable addition to the ongoing global scholarship on this critical issue. It underscores the vital concept that intersectionality should occupy a central place in our examination of how various local contexts give rise to layered forms of privilege and disadvantage. In this regard, it highlights the specific and compounding impact of power on individuals.

This book serves as a valuable resource, one that can inform and shape our collective perspective on the fundamental right to sexual and reproductive health. It reminds us that the struggles faced by women, adolescents, girls, and all individuals capable of becoming pregnant are not confined to a single region; they are universal. By sharing the experiences and lessons learned in South Africa, this book contributes to a broader international dialogue, fostering a collective understanding of the issues at hand. I highly recommend this book to a wide audience, including scholars, researchers, practitioners, human rights activists and advocates, lawyers, and policymakers, not only within Africa but also globally.

In an increasingly interconnected world, where local dynamics often have far-reaching implications, understanding the complex relationship between gendered power dynamics, and decision-making processes to providing abortion services by mid-level providers is paramount. *Choice and Conscience* provides valuable insights and lessons that will guide us in forging a more equitable and rights-based approach to these critical issues.

**Dr Tlaleng Mofokeng**

UN Special Rapporteur on the Right to the  
Highest Attainable Standard of Physical and  
Mental Health



## PREFACE

This book is the culmination of a journey that began with my research on conscientious objection to abortion in South Africa for my doctoral thesis. As a feminist scholar, I have always been fascinated by the intersection of law, policy, and social justice issues, particularly in the context of reproductive rights. However, I noticed a significant gap in the discussion surrounding conscientious objection to abortion within the African context, and the unique challenges that healthcare providers face when attempting to provide abortion care.

Through my engagement with healthcare providers, policymakers, and advocates working in the field of reproductive health and rights in South Africa and beyond, I have sought to explore the complexities of conscientious objection to abortion. This book examines the legal, social, and ethical implications of this practice for healthcare providers and the broader community through an African feminist lens.

This book has been a true labour of love, and I hope that it will serve as a resource for scholars, policymakers, and activists working towards the realisation of reproductive rights and justice for all.

During my research, I was deeply moved by the remarkable courage, unwavering resilience, and unwavering commitment of the nurses who dedicate themselves to providing abortion services. These nurses are true heroes, often working in difficult circumstances and facing significant social, political, and professional barriers. Yet, they persevere, driven by a deep sense of compassion and a desire to provide the best possible care to their patients. As bell hooks once said, “The function of art is to do more than tell it like it is – it’s to imagine what is possible.” In the context of abortion services, these nurses not only confront the realities of their work but also envision a future where access to safe and compassionate care is a fundamental right for all individuals.

Their stories challenged my preconceptions and broadened my perspective, highlighting the need to acknowledge the complexity and diversity of experiences within the nursing profession. I hope that by presenting the intersectional experiences of nurses providing or not

providing abortion services, I can contribute to a greater understanding of these experiences. By sharing their stories, I hope to bring attention to the critical role of nurses in the delivery of quality healthcare and to encourage a more empathetic and supportive approach to healthcare provision, one that was envisioned when the Universal Declaration of Human Rights was drafted nearly seventy-five years ago.

**Satang Nabaneh**

Pretoria, 2023

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I am also grateful to the CMI-UiB Centre on Law & Social Transformation for funding my doctoral studies as part of the 'Political determinants of sexual and reproductive health: Criminalisation, health impacts and game changer' project, supported by the Research Council of Norway (grant number 248159). I am privileged to have been part of the Bergen Exchanges on Law & Social Transformation community, and I will always consider myself a proud #Lawtransformer.

My sincere appreciation goes to the African Population and Health Research Center (APHRC) for awarding me the African Doctoral Dissertation Research Fellowship (ADDRF) 2018-2020. This fellowship not only provided financial support but also enabled me to participate in valuable training to enhance my research.

I am deeply grateful to the Ipas South Africa office, especially Dr Makgoale Magwentshu and Matokgo Makutoane, for their willingness to share information and facilitate access to healthcare facilities. Being part of the Ipas Innovation Lab, working on conscientious objection in Mexico, Bolivia, and South Africa, was a pivotal experience.

Special thanks are due to Marion Stevens, former Chairperson of the Sexual and Reproductive Justice Coalition (SRJC), for her invaluable contacts and networks, as well as to Prof Cathi Albertyn for granting me access to her remarkable archive.

I am thankful to the healthcare providers, policymakers, and researchers whose invaluable time and information made my research possible.

I owe a debt of gratitude to my extraordinary friends and colleagues at the Centre for Human Rights, whose unwavering support and friendship have been a constant source of strength throughout this journey.

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Special thank you to Dr Tlaleng Mofokeng, UN Special Rapporteur on the right to the highest attainable standard of physical and mental health, who generously wrote the foreword to this book.

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Finally, I owe a profound debt of gratitude to my family: my father and mother, Sheriffo Nabaneh and Mamanding Ceesay, and my siblings: Fatou, Lamin, and Baboucarr, for their unconditional support and prayers. I am incredibly blessed to have enjoyed the steadfast support of my second family, including the late Mamo Cham (May Allah's Blessings be Upon Her) and Papa Cham.

My beloved #MMCs: my husband, Mam Mbye Cham, my son, Mahy, and our newest addition to the family, Zaina, who came into our lives during the time of writing this book, were a constant source of support. I am endlessly grateful for their love and inspiration.



## ABOUT THE AUTHOR

Satang Nabaneh is an African feminist socio-legal scholar and human rights practitioner, dedicated to advancing human rights and equality. She holds a doctorate and master's degree in law from the University of Pretoria, a bachelor's degree from the University of The Gambia, and a newly minted Ph.D. in law from the University of Washington. She is also a Post-Doctoral Fellow with the Centre for Human Rights, Faculty of Law at the University of Pretoria, and a Research Fellow with the Centre on Law and Social Transformation, Chr Michelsen Institute, at the University of Bergen, Norway. She is a member of the Initiative for Strategic Litigation in Africa (ISLA) Panel of Experts.

Dr Nabaneh is interested in the application of black feminist legal theory, decolonial feminist pedagogy, and legal philosophy through an interdisciplinary and empirical socio-legal approach to law, rights, and justice. Her research has focused on the global human rights architecture, gender equality, women's rights, democratisation and autocratisation, constitution-making, and transitional justice. She has published several book chapters and articles on these topics.

Dr Nabaneh is currently the Director of Programs at the Human Rights Center and Research Professor, School of Law at the University of Dayton. She is also an affiliate faculty member in the university's Human Rights Studies, Women's and Gender Studies and Race and Ethnic Studies: Africana Studies programs. Nabaneh is a sought-after speaker and conducts workshops and trainings. She has co-edited two books: *The Gambia in transition: Towards a new constitutional order* (Pretoria University Law Press, 2022) and *Sexual harassment, law and human rights in Africa* (Palgrave Macmillan, August 2023).

Nabaneh's scholarly contributions have been recognised through the prestigious Florence Mahoney Award for Women in Academia, which she has received twice from She Awards Gambia. She is the Women in Law Initiative's 2023 Justitia Academia (International) Laureate and now serves on its Academic Advisory Board.

## THE CHRISTOF HEYNS MEMORIAL THESIS AWARD

The Memorial Thesis Award was introduced to honour the memory of the late Professor Christof Heyns, who passed away in March 2021. Professor Heyns was a founder of the Pretoria University Law Press and took the initiative towards the introduction of this prize. This prize underlines his exceptional passion for promoting scholarship and a life devoted to initiating innovative ideas to make the world a better place for all. There can be no better way to begin to recognise the enormous contribution that Professor Heyns has made to advancing scholarship, research and publication in Africa, by Africans and on Africa.

Students who have completed, or will complete, their doctoral studies in law at an African University in a certain year, are encouraged to submit their doctoral theses for consideration for the Christof Heyns Memorial Thesis Award, which is awarded on an annual basis.

Dr Nabaneh's doctoral dissertation, *'Power dynamics in the provision of legal abortion: A feminist perspective on nurses and conscientious objection in South Africa,'* completed in 2020, is a runner-up of the first Christof Heyns Memorial Thesis Award of 2021.

## LIST OF ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
AIDS	Acquired immunodeficiency syndrome
APBET	Policy for Alternative Provision of Basic Education and Training Kenya
ART	Antiretroviral therapy
ARV	Antiretroviral
ASALs	Arid and semi-arid lands Kenya
ATRAHDOM	Asociación de Trabajadoras del Hogar, a Domicilio y Maquila Guatemala
AU	African Union
AUC	African Union Commission
CAL	Coalition of African Lesbians
CDC	Centre for Disease Control
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CEHURD	Centre for Health, Human Rights and Development
CESCR	Committee on Economic Social and Cultural Rights
COIDA	Compensation for Occupational Injuries and Diseases Act South Africa
COMESA	Common Market for Eastern and Southern Africa
COVID-19	Coronavirus disease 2019
CRC	Convention on the Rights of the Child
CRPD Committee	Committee on the Rights of Persons with Disabilities
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil society organisations
DWYPD	Department of Women, Youth and People with Disabilities South Africa
FCT	Federal Capital Territory
FGM	Female genital mutilation
FPE	Free Primary Education Kenya
GBV	Gender-based violence
GCC	Gulf Cooperation Council
GDP	Gross domestic product
GVAW	Gender-based violence against women
HIV	Human immunodeficiency virus
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICT	Information and Communication Technologies
ILO	International Labour Organisation
IMF	International Monetary Fund
IOM	International Organisation of Migration
IPV	Intimate partner violence

KTN	Kenya Television Network
LBQT	Lesbian, bisexual, queer and transgender
LGTIQA+	Lesbian, gay, transgender, intersex, queer, asexual and others
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
MBC	Mauritius Broadcasting Corporation
MDGs	Millennium Development Goals
MHM	Menstrual hygiene management
MTP	Medium-term plan
NACONEK	Policy Framework for Nomadic Education in Kenya
NESP	Nigeria Economic Sustainability Plan
NFE	Non-formal education Kenya
NGF	Nigerian Governors Forum
NGOs	Non-governmental organisations
NSR	National Social Register Nigeria
OHCHR	Office of the High Commissioner for Human Rights
Older Persons' Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa
OVCs	Orphans and vulnerable children
PMTCT	Prevention of parent to child transmission
PPE	Personal protective equipment
SAPS	South African Police Service
SDGEA	Solemn Declaration on Gender Equality in Africa
SDGS	Sustainable Development Goals
SGBV	Sexual and gender-based violence
SRHR	Sexual rights and health rights
STDs	Sexually transmitted diseases
STIs	Sexually transmitted infections
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UIF	Unemployment Insurance Fund
UN	United Nations
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNODC	United National Office on Drugs and Crime
WHO	World Health Organisation
WIEGO	Women in Informal Employment: Globalizing and Organizing
WMDW	Women migrant domestic worker

To my parents,  
Sheriffo Nabaneh and Mamanding Ceesay,  
For believing in me, letting me be loud and visible.

**THIS ONE IS FORYOU.**



## PROLOGUE

### FREE TO CHOOSE

The Choice on Termination of Pregnancy Act  
Was strongly opposed, but now it is a fact  
That in villages and cities country wide  
Women at last are free to decide

Free to decide, our values collide  
Bearers of light, yet helpers in plight  
If I were you and you were me  
Would we defend our right to be?

No said the patriarchs. No said the Pope  
We can't let you down this slippery slope  
But I'm here already, with my neck in a rope  
On my hands and knees – please throw me some hope

They came in their numbers; they came in their hurt  
But we turned our backs on the 'sin and the dirt'  
We scold and cajole: – 'I'd hate you to sin,'  
Pushing them nearer the back-street bin

Our staff were resistant, and also were sad  
Some of us thought these women were bad  
Not all unwilling, [though] – many turned away  
Until they heard what the women had to say

Their reasons were many, their reasons were varied  
Most came resolute, and almost all came wearied  
Some were divorced, and some were well wed  
Some came with hunger, and mouths to be fed

Some whose boyfriends once hearing had fled  
Some had been raped in their own private bed  
Some were too young, and some were too old  
But they were brave, and their stories were told

Free to decide, our values collide  
Bearers of light, yet helpers in plight  
If I were you, and you were free  
Would we defend our right to be?

*Dr Jim te Water Naude<sup>1</sup>*

1 Reproductive Rights Alliance 'Five-year review of the implementation of the Choice on Termination of Pregnancy Act, 92 of 1996: 1997-2002' *The Barometer* (2002) 1.

