16.1 INTRODUCTION

Reproductive rights concern those rights which protect the health and well-being of both men and women. Reproductive rights are, however, of fundamental importance to women because only when armed with such rights can women effectively exercise the rest of the rights enshrined in the Constitution and become full and equal members of this society. In their narrowest sense reproductive rights demand respect for women’s bodily integrity and decision-making in an environment that is free from fear of abuse, violence and intimidation. They are also said to require access to voluntary, quality reproductive and sexual health information, education and services. Viewed more broadly, reproductive rights may be linked to the provision of such social and economic necessities as food, shelter, childcare and education.

This chapter concentrates exclusively on abortion because it is at present the sole focus of the constitutional debate over reproductive rights. We would hope that as the rights, interests and values underlying the debate are discussed in the context of women’s lives in South Africa, the complex content of a right to reproductive health will not be overshadowed by the single issue of abortion.

Abortion in South Africa is legally regulated by the Choice on Termination of Pregnancy Act. The Choice Act provides that a pregnancy may be terminated upon request of a woman during the first 12 weeks of the gestation period of her pregnancy, and under broad grounds from 12 to 20 weeks. From 20 weeks onwards terminations are available under limited circumstances.

The Choice Act provides that only the consent of a pregnant woman is required for a termination. It does not require the consent of a partner or, in the case of a minor, parental consent. Non-mandatory and non-directive counselling shall be promoted by the state. Ideally, this service should be available before and after the termination of a pregnancy. The Choice Act stipulates that women shall have access to information concerning their rights in relation to the Act.

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1 We are grateful to Alfred Cockrell, Janet Kentridge, Christina Murray, and Pippa Reyburn for their comments on earlier drafts of this chapter.
2 Act 92 of 1996 (‘the Choice Act’).
3 Section 2(1)(a). ‘Termination of pregnancy’ is a broader term than ‘abortion’. Section 1(x) of the Act defines it as ‘the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman’. The definition includes abortion and induced labour. In this chapter, termination of pregnancy and abortion are used interchangeably.
4 Section 2(1)(b) of the Act provides that a pregnancy may be terminated where a woman gives informed consent and a medical practitioner, after consultation with the pregnant woman, is of the opinion that:
   (i) the continued pregnancy would pose a risk of injury to the woman’s physical or mental health; or
   (ii) there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or
   (iii) the pregnancy resulted from rape or incest; or
   (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman.
5 Section 2(1)(c) of the Act provides that a pregnancy may be terminated after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife who has completed the prescribed training, is of the opinion that the continued pregnancy:
   (i) would endanger the woman’s life; or
   (ii) would result in a severe malformation of the foetus; or
   (iii) would pose a risk of injury to the foetus.
6 Section 5(1), (2) and (3). For a discussion of these sections, see below, §§ 16.3–16.5.
7 Section 4.
8 Section 6.
The interim and final Constitutions do not deal specifically with the issue of abortion, but several of the rights they entrench are relevant to the question of whether, and in what circumstances, a woman has a constitutionally protected right to an abortion. These rights include the rights to life, privacy, religious freedom, security of the person, dignity, and equality. This chapter considers the ways in which these rights impact upon the constitutional status of abortion in South African law.¹

16.2 THE RIGHT TO LIFE

Section 9 of the interim Constitution provided that ‘every person shall have the right to life’. Section 11 of the Final Constitution provides that ‘everyone has the right to life’. We need to consider whether there is any difference in affording constitutional protection to ‘everyone’ as opposed to ‘every person’. In Christian Lawyers Association of South Africa & others v Minister of Health & others² McCreath J held that the two terms are interchangeable in the context of protecting human rights in the interim and final Constitutions. Wherever the interim Constitution referred to ‘every person’ as rights bearers, the final Constitution consistently refers to ‘everyone’. The consistent replacement of ‘every person’ with ‘everyone’ was presumably to meet the requirement of Constitutional Principle II that ‘everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties.’³ McCreath J held in Christian Lawyers Association that the change across the board from ‘every person’ to ‘everyone’ could never ‘have been intended to introduce a significant new class of rights-bearer. It is inconceivable that any new category could have been introduced by the legislature in this obscure way.’⁴ As is clear from Christian Lawyers Association, a narrow linguistic interpretation of the two terms cannot settle the question of whether a foetus is included within the term ‘everyone’. Substantive legal reasoning is required to determine whether the term ‘everyone’ is open to this interpretation.

At South African common law legal subjectivity begins at birth. According to the nasciturus fiction, however, a foetus, if subsequently born alive, is deemed to have all the rights of a child, where this is to its advantage. This fiction is used to overcome the absence of legal personality of a foetus and to confer upon the foetus particular rights in limited circumstances.⁵ Our courts have twice held that the protection provided by the nasciturus

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¹ Section 39(1)(b) of the final Constitution directs courts to consider international law when interpreting fundamental rights. In this chapter we refer to applicable international-law provisions to substantiate our analysis where appropriate. See above, Kentridge & Spitz ‘Interpretation’ § 11.12(c) and Dugard ‘Public International Law’ ch 13, for a discussion of the role of international law in interpreting the Constitution.
² 1998 (11) BCLR 1434 (T).
³ Christian Lawyers Association of South Africa at 1438A (emphasis added).
⁴ At 1438A–B.
fiction does not extend to upholding the right to life of the foetus. Of course the status of the foetus at common law does not foreclose the issue of legal personality as a constitutional matter. In Christian Lawyers Association McCreath J held that whatever the status of the foetus may be under the common law, under the Constitution the foetus is not a legal persona. His reasoning was as follows. The Constitution does not include any express provisions affording the foetus (or embryo) legal personality or protection. It is improbable that the drafters of the Constitution would not have made express provision therefor had they intended to enshrine the rights of the foetus in the Bill of Rights, particularly in light of the precedents in the common law and case law denying the foetus legal personality. One of the requirements of the protection afforded by the nasciturus rule is that the foetus be born alive. There is no provision in the Constitution to protect the foetus pending the fulfilment of that condition. 

McCreath J also considered s 12(2), which provides everyone with the right to make decisions concerning reproduction and to security and control over their own body. ‘Nowhere is a woman’s right in this respect qualified in terms of the Constitution in order to protect the foetus.’

If the drafters had wanted to protect the foetus in the Bill of Rights, s 28 (which specifically protects the rights of the child) seemed particularly apposite to protect the foetus. There are clear indications that the safeguards in s 28 do not extend to protect the foetus. A ‘child’ for the purposes of the section is defined as a person under the age of 18 years. ‘Age commences at birth . . . A foetus is not a “child” of any “age”. The rights afforded by section 28(1) are in respect of “every child” — i.e. all children. Yet certain of the rights could not have been intended to protect a foetus; paragraph (f) relates to work, paragraph (g) to detention and (i) to armed conflict. The protection afforded in other paragraphs of subsection (1) must

1 See Christian League of South Africa v Rall 1981 (2) SA 821 (O) and G v Superintendent, Groote Schuur Hospital, & others 1993 (2) SA 255 (C). In both these cases the court refused to appoint a curator ad litem to protect the interests of the foetus against its mother, who attempted to procure a legal abortion in terms of the Abortion and Sterilisation Act 2 of 1975. More recently, Van Heerden & another v Joubert NO & others 1994 (4) SA 793 (A) held that a still-born baby is not a person for the purposes of the Inquest Act. See above, Woolman ‘Application’ § 10.2(a) on whether a foetus is a person who may benefit from constitutional protections. In Christian Lawyers Association & others v Minister of Health & others 1998 (11) BCLR 1434 (T) at 1441G–H McCreath J held that it was unnecessary to make any firm decision as to whether an unborn child is a legal persona under the common law. What is important for the purposes of interpreting s 11 of the Constitution is that the status of a foetus under the common law may, as at present, be somewhat uncertain.

2 At 1443B–C. On this basis McCreath J upheld the defendant’s exception that the plaintiffs’ particulars of claim did not disclose a cause of action. In the notice of exception (set out in the judgment at 1437C–D), the following had been alleged:

1. A foetus is not a bearer of rights in terms of s 11 of the Constitution;
2. Section 11 of the Constitution does not preclude the termination of pregnancy in circumstances and manner contemplated by the act, and
3. The right of women to choose to have their pregnancy terminated in circumstances and manner contemplated by the act, is protected under sections 9, 10, 11, 12, 14, 15(1) and 27(1)(a) of the Constitution.’

3 At 1441H–I.
4 At 1441–I.
5 Discussed below, § 16.5.
6 At 1441J–1442A. McCreath J emphasized that this does not mean that the state is prohibited from enacting legislation to regulate or to restrict abortion. The state may invoke s 36 for that purpose, provided the limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’ For a discussion of s 36, see below, § 16.10.

Section 28(3) of the Constitution.
accordingly also exclude the foetus.\(^1\) If s 28, specifically designed to protect the rights of the child, does not include the foetus within its ambit of protection, then it can hardly be said that the other provisions of the Bill of Rights, including s 11, can be said to do so.\(^2\)

Furthermore, rights are conferred on ‘everyone’ by the Bill of Rights in all cases, except where a specific class of person is singled out for protection. In many cases it is clear that the foetus could not be included in the scope of protection of ‘everyone’.\(^3\) To afford the foetus protection under s 11 means ascribing a meaning to ‘everyone’ which is different to that which it bears everywhere else in the Bill of Rights. Affording constitutional protection to the life of the foetus has far-reaching consequences, as the life of the foetus would have the same protection as that of the mother. Abortion would be prohibited even where the pregnancy constitutes a serious threat to the life of the mother. Termination of pregnancy would no longer constitute abortion, but murder. ‘[T]he drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms.’\(^4\)

McCreath J also supported the view that the Constitution is primarily an egalitarian constitution, and that the transformation of our society along egalitarian lines involves the eradication of systematic forms of domination and disadvantage based on race, gender, class, and other grounds of inequality. Proper regard must be had to the rights of women as enshrined in ss 9, 10, 11, 12, 14, 15 and 27. To afford the foetus the status of a legal person may impinge to a greater or lesser extent on these rights.

We think that the Constitutional Court is likely to confirm the decision in Christian Lawyers Association. The court is unlikely to consider the foetus to be a bearer of constitutional rights and accord it a ‘right to life’. This conclusion is supported at international law\(^5\) and by decisions in other jurisdictions which have held that the foetus does not have a constitutional right to life. For example, in Roe v Wade\(^6\) Justice Blackmun decided that the use of the word ‘person’ in the Fourteenth Amendment to the US Constitution, which provides that the states shall not ‘deprive any person of life . . . without due process of law’, did not include the unborn.\(^7\)

In contrast, German courts have tackled the abortion question primarily with reference to the right to life. Article 2(2) of the German Constitution provides that ‘[e]veryone shall have the right to life and to the inviolability of his person’. To a lesser extent the courts have

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\(^1\) Christian Lawyers Association at 1442D–E.

\(^2\) At 1442F.

\(^3\) At 1442F–L. McCreath J refers specifically to ss 12(1)(a), 12(1)(b), 12(2)(b), 14, 15(1), 16(1), 17, 18, 21, 30 and 35.

\(^4\) At 1443B–C.

\(^5\) Bertha Hernandez ‘To Bear or Not to Bear: Reproductive Freedom as an International Right’ (1991) Brooklyn International LJ 309 at 322 illustrates that this is the case even under the American Convention on Human Rights, which protects the right to have life respected from the moment of conception. The Inter-American Commission on Human Rights has decided that this language does not translate into a legally protected right of the foetus.

\(^6\) 410 US 113 at 158, 93 SCt 705 (1973).

\(^7\) See also R v Morgenthaler (1988) 44 DLR 385, [1988] 1 SCR 30 (Canadian Supreme Court holding that abortion provisions of Criminal Code are an unconstitutional violation of a woman’s s 7 right to fundamental justice — without ruling on foetus’s right to life).
relied on the dignity provision of Art 1(1). The supreme value accorded to the right to life in the German Constitution should be understood as a reaction to German history. Under the Nazi regime’s ‘final solution’ certain forms of life were classified as worthless. A recent decision of the German Constitutional Court involved a challenge to federal abortion legislation on the basis that ‘it did not meet the minimum standard which the constitution had set for the protection of unborn life’. Six of the eight judges held that ‘the state had a primary duty to protect human life, even before birth. This duty, which began at conception, related to every individual life and included a duty also to protect the unborn child against the mother.’

The majority conceded that this duty to protect the foetus may clash with the pregnant woman’s right to protection of her human dignity, bodily integrity and the development of her personality. Nevertheless, they maintained that there were minimum standards of protection for the foetus. The state always had to meet these standards, even if they clashed with the rights of the pregnant woman. The minority did not deny that the foetus required constitutionally based protection. They emphasized, however, that because pregnancy involves the pregnant woman from beginning to end, it was not appropriate to set up in conflict the position of the woman and that of the foetus. Therefore, in the early stages of pregnancy the pregnant woman had to be fully involved in all decisions relating to the pregnancy. Only an advanced foetus should be protected by the state by means of the criminal law.

The majority resolved the conflict between the protection of unborn life and the pregnant woman’s rights by drawing a conceptual distinction between illegality, which refers to the ‘status of the conduct in the legal system as a whole’, and criminality, which refers only to the criminal law. On this view, although an abortion would seldom be legally justified, the

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2 See Van Zyl Smit ‘Reconciling the Irreconcilable? Recent Developments in the German Law on Abortion’ (1994) 2 Medical LR 302 at 303–8 for a discussion of the history of German abortion laws. He refers to the Erbgesundheitsgesetz of 1933, which provided for mass sterilization and abortion for eugenic purposes, and restrictions which were simultaneously placed on abortions for healthy German mothers as part of this history. South Africa’s human rights violations have often been compared to those of Nazi Germany. The distinction here is not that in the South African context life should not be valued. The state does have a legitimate interest in upholding the intrinsic value of potential life. However, guaranteeing a foetus a right to life is not the appropriate mechanism to achieve this. In addition, permissive abortion legislation exists in jurisdictions that promote and protect the fundamental human rights in our Constitution, including the right to life. The South African Constitution is intended to break with our history of repression. Thus the state should resist using criminal sanction to prevent persons from making reproductive decisions, including those which relate to abortion.
3 Decision of the Federal Constitutional Court of 28 May 1993, BVerfGE A III JZ.
4 See Van Zyl Smit ‘Reconciling the Irreconcilable?’ at 308–9. He outlines the provisions of the ‘Act for Assistance to Pregnant Women and Families’, which had been approved by an absolute majority in both Houses of Parliament. The Act attempted to place abortion in the context of a population development policy, and to provide increased state support for both pregnant woman and mothers. The Act provided that when a woman decided to have an abortion and had been counselled in terms of the Act, such an abortion would be legal within the first 12 weeks of pregnancy.
5 BVerfGE A III JZ at 310.
6 BVerfGE A III JZ at 311.
7 BVerfGE A III JZ at 311–12.
8 This distinction is particular to German criminal law theory. See Van Zyl Smit ‘Reconciling the Irreconcilable?’ n 97.
9 For example, a threat to the mother’s life would be a ground for a legal abortion.
state was not under an ‘absolute duty’ to criminalize all illegal abortions. The court therefore decided that where a woman insisted on having an abortion after she had been subjected to counselling designed to persuade her to carry the foetus to term, and the abortion was performed within a legislatively defined period, such an abortion need not be a criminal offence. Nevertheless, the illegal abortion could never be justified constitutionally because of the duty of the state to protect unborn life.

The German decision can be interpreted as an attempt to protect the interest of the state in potential human life. Ronald Dworkin presents a powerful analysis of how this is best achieved. He contends that the moral and constitutional arguments in the abortion debate purport to deal with the rights or lack thereof of the foetus itself. This appears to give the state a derivative interest in prohibiting or regulating abortion (that is, an interest derived from the duty to protect the foetus itself). The real issue, argues Dworkin, is whether we object to abortion because we believe that the foetus is a rights bearer whose particular interests must be defended by a third party or because we attach some intrinsic value to life, and the potential for human life. The interest of the state in potential human life flows from its interest in protecting the sanctity of human life in general. On this account abortion is regarded as morally wrong because it offends against the sanctity of life in general. The state may therefore be justified in regulating abortion on grounds which are independent of the rights-bearing capacity of the foetus itself. Hence, argues Dworkin, the state has a ‘detached’ (as distinct from ‘derivative’) justification for the regulation of abortion.

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

If the South African Constitutional Court were to hold that the foetus is a bearer of constitutional rights, it is possible that only abortions performed to save the life of the mother would be a justifiable limitation upon ‘the right to life’ of the foetus. Arguably, all other abortions would not be a justifiable limitation on the right to life of the foetus.

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1 The German court recognized that if women were encouraged by the state to continue a pregnancy to term, the state would have a duty to support these women and the children that they bear. Section 27(1) of the final Constitution provides that ‘everyone has a right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance’. What is ‘appropriate’ requires interpretation by the courts. However, the realities of fiscal constraints upon our health and welfare budgets, the likely restructuring of state welfare grants, high maintenance default rates, and limited mandatory maternity leave and childcare benefits suggest that South African women will receive limited state assistance for pregnancy and child-rearing. In this context it is appropriate that the Choice Act provides only for non-directive counselling, allowing women to make reproductive decisions in relation to abortion free of state interference or coercion. In addition, women who have decided to have an abortion are seldom dissuaded by counsellors. See Hansson & Russel ‘Made to Fail: The Mythical Option of Legal Abortion for Survivors of Rape and Incest’ (1993) 9 SAJHR 500 at 511.

2 BVerfGE A III JZ at 312–13.


4 Questions concerning the right to life and permissible limitations of this right arose in the case of S v Makwanyane & another 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC), in which capital punishment was unanimously held to be unconstitutional. Several justices based their decisions, in whole or in part, upon the fact that the death penalty violates the right to life. See above, Fedler ‘Right to Life’ § 15.2. The issue of abortion was not considered, although it was mentioned (see, for example, the judgment of Mahomed J at para 268).

5 See above, Woolman ‘Limitation’ § 12.8.
The right to life ought not to be the sole constitutional focus of the abortion debate, and that rights to privacy, equality, freedom, and dignity must be accorded due weight in any constitutional argument concerning abortion. The right to life of women and their right to quality of life should be considered in the abortion context. This right should be applied to the lives of the women who die each year of pregnancy related causes, and particularly from unsafe, induced abortion. Permissive abortion legislation combined with accessible, affordable reproductive health care services will prevent the majority of these deaths, thereby protecting the right to life of these women. Reducing the maternal morbidity associated with unsafe abortion will also serve to enhance their quality of life.

Even if the foetus itself does not have a right to life, the state nevertheless has a ‘detached’ interest in fostering the sanctity of human life by protecting potential life and regulating abortion, particularly in the late stages of pregnancy. Once the nature of this interest is recognized for what it is, the most important constitutional question posed by abortion arises: does the state’s interest in regulating abortion justify the limitation of those rights upon which the regulation of abortion may impinge?

16.3 The Right to Privacy

Section 13 of the interim Constitution and s 14 of the final Constitution provide every person, or everyone, with a general right to personal privacy. The right to privacy is said to be a ‘right to be let alone’. At the very least it ensures that certain areas of an individual’s life remain free from state interference. This notion was encapsulated by the US Supreme Court in Eisenstadt v Baird.

1 The Medical Research Council estimates that there are at least 425 deaths in South African hospitals annually as a result of unsafe abortion. Unsafe abortion is also one of the attributed causes of South Africa’s high rate of maternal morbidity: ‘Presentation to the Parliamentary Select Committee on Abortion on Behalf of the Medical Research Council’s Incomplete Abortion Research Group’ 1995.

2 See R Cook ‘Advancing Reproductive Rights Beyond Cairo and Beijing’ (1996) 3 International Family Planning Perspectives 22, where she considers the international-law obligations of governments to reduce maternal mortality and morbidity.

3 FC s 14 provides:

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

(a) their person or home searched;
(b) their property searched
(c) their possessions seized;
(d) the privacy of their communications infringed.’

Section 13 of the interim Constitution provided:

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

See below, McQuoid-Mason ‘Privacy’ § 18.3(a).

4 Glendon Abortion and Divorce in Western Law 36.
‘[I]f the right of privacy means anything it is the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.’

In *Roe v Wade* the US Supreme Court struck down a Texas law criminalizing abortion and interpreted the right to privacy to include a woman’s fundamental right to terminate a pregnancy.\(^1\) The court acknowledged the need to strike a balance between the woman’s right to privacy and the state’s interest in potential human life,\(^3\) and established a framework, known as the trimester approach, in terms of which the state’s interest in protecting potential life did not become compelling until after the point of viability of the foetus.\(^4\) Only at the point of viability, or in the third trimester of pregnancy, would the interest of the state in protecting potential life be sufficiently compelling to justify the restriction of a woman’s right to choose to have an abortion. Even then, said the court, the compelling interest of the state in protecting potential life remained subordinate to the woman’s life and health. A state


\(^3\) 410 US 113 at 158.

\(^4\) ‘Viability’ is the point at which a foetus can exist independently outside the uterus.
could impose restrictions on abortion only prior to viability if the measures were necessary to protect a woman’s health and were the least restrictive means of doing so.

There are good reasons to allow a state to prohibit abortion after viability. At about that point, foetal brain development is sufficient to feel pain, which indicates that the foetus has protectable interests of its own. By then a woman has had sufficient opportunity to decide whether she believes that it is best to terminate the pregnancy. Hence she is not denied the right to choose abortion. The viability demarcation also acknowledges that abortion becomes ‘morally more problematic as the foetus develops towards the shape of infanthood, as the difference between pregnancy and infancy becomes more a matter of location than development’. The reasons advanced for the limitation of a right to abortion at viability appear to be sufficiently compelling to satisfy the limitations test set out in s 33(1) of the interim Constitution.

In the two decades following *Roe* certain US Supreme Court decisions have undermined the right to choose an abortion. The most notable of these decisions is *Planned Parenthood of Southeastern Pennsylvania v Casey*. This case reaffirmed that women have the constitutional right to choose to have an abortion, but redefined the right to privacy in the abortion context. The court abandoned the trimester framework of *Roe* and held that the state had a legitimate interest in foetal life throughout pregnancy. A state could promote this interest by enacting restrictive measures designed to encourage childbirth over abortion, provided that the measures did not unduly burden a woman’s right to choose an abortion. According to *Casey*, a restriction imposes an undue burden on a woman if it has ‘the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion’. According to this test, the woman bears the initial burden of demonstrating ‘undue’ harm.

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


3 See above, Woolman ‘Limitation’ § 12.6.

4 See for example *Harris v McRae* 448 US 297, 100 SCt 2671 (1980) (upheld a ban on federal Medicaid reimbursements for abortions except in the case of life endangerment); *Hodgson v Minnesota* 497 US 417, 110 SCt 2926 (1990) (upheld a requirement that a young woman seeking an abortion notify both parents); *Ohio v Akron Center for Reproductive Health* 497 US 502, 110 SCt 2972 (1990) (upheld a requirement that a young woman obtain the consent of one parent or a judicial waiver); *Webster v Reproductive Health Services* 492 US 490, 109 SCt 3040 (1989) (upheld a statute that created a presumption of ‘viability’ at 20 weeks’ or more gestation; the preamble to the statute asserted that ‘[t]he life of each human being begins at conception’ and that ‘unborn children have protectable interests in life, health and well being’; the legislation also prohibited state public employees from counselling women about abortion and banned the performance of abortions at public facilities).

5 112 SCt 2791, 120 LEd 2d 674 (1992).

6 112 SCt 2791 at 2820.

7 Benshoof ‘*Planned Parenthood v Casey* — The Impact of the New Undue Burden Standard on Reproductive Health Care’ (1993) 269 JAMA 2249. Prior to *Casey* the court had consistently invoked the principle of government neutrality. This principle was found to justify a state not providing any financial assistance to women who choose to have abortions. See for example *Harris v McRae*. *Casey* was the first case which did not involve government funding where the court abandoned the principle that the government must act with neutrality in regard to a woman’s decision to terminate her pregnancy.
The drawbacks of locating a right to choose an abortion in the right to privacy are manifold. Ruth Ginsberg comments that placing the right to choose abortion in the privacy cubbyhole has made it easier for the court to justify limiting women’s access to abortion. She suggests that analysing the issue in terms of the right of women to the equal protection of the law would have made it more difficult for the court to rule, for example, that neither the Constitution nor the federal statute requires medicaid reimbursements for elective abortions.1

Research in America suggests that restrictions on abortion and the lack of access to publicly funded abortion facilities have fallen most heavily on poor, young, rural, and battered women in dysfunctional families.2 It is possible that locating the right to choose an abortion exclusively in the right to privacy will have a similar effect in South Africa. Indeed, there is a real danger that the current position of the most vulnerable women in South African society will remain unchanged. As June Sinclair has argued:

“In the US the Supreme Court in Roe v Wade held that a woman’s constitutional right to privacy prevented a state from forbidding abortion. This recognition of women’s autonomy in the “private” sphere of reproduction, however, is what has been used to justify failures on the part of the federal government to provide funding necessary to make the abortion choice meaningful to those women who cannot afford medically acceptable procedures. The duty of the state not to prohibit abortion in this sphere of privacy has come to mean that it also has no duty to intervene to protect this choice that its non-intervention guarantees. The negative right does not translate into a positive claim to safe, subsidized abortion facilities.”3

Despite these limitations, Ronald Dworkin cautions us not to dismiss the privacy argument altogether. He suggests that it should be used in conjunction with, rather than in contrariety to, an equal protection analysis.4 This approach makes sense in South Africa, where there is a long history of state regulation of reproduction.5

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2 Benshoof ‘The Impact of the New Undue Burden Standard’ at 2254. Under the final Constitution the right of access to reproductive health care services (discussed below, § 16.8), the extended freedom and security of the person right (discussed below, § 16.5), and a substantive interpretation of equality (discussed below, § 16.4) should circumvent a privacy right being used in isolation to found a right to abortion in South Africa.
3 See Sinclair ‘Family Rights’ at 525. Similar criticisms of the American decisions have been made by numerous commentators. See Roberts ‘The Future of Reproductive Choice for Poor Women and Women of Colour’ (1992) 14 Women’s Rights Law Reporter 309. Roberts comments that: ‘A choice — at least where fundamental rights are concerned — means more than the abstract ability to reach a decision in one’s mind. A true choice means an uncoerced selection of one course of action over another and the ability to follow one’s chosen course. An indigent woman may have the legal option to decide that she wants to terminate her pregnancy. She may even feel that an abortion is essential to her economic, physical and emotional survival. But if the government will pay for her childbirth expenses and not for an abortion, and she has no money for either option, she does not have a choice.’
4 Dworkin Life’s Dominion 54.
5 On the principle of procreative autonomy underlying decisions upholding the right to contraception and abortion, see Dworkin ‘Unenumerated Rights: Whether and How Roe should be Overruled’ (1992) 59 University of Chicago LR 381 at 417.
16.4 Equality

Reproductive autonomy is a precondition for the sexual and social equality of women. Equality has a special place in the Constitution. It is a recurrent theme as we try to redress our past ‘in which inequality was systematically entrenched’. The Constitution as a whole, and the equality clause in particular, appears to set its face against laws and practices which reinforce the subordination of disadvantaged groups. Put another way, the Constitution seems to be concerned with both substantive and formal equality. Substantive equality looks beyond abstract legal rights to the actual social, political and economic conditions of disadvantaged groups. From this perspective it is clear that, in order to secure the equal access of persons to constitutional rights and freedoms, more may be required from the state than abstention from interference in the lives of persons. The state may be required to intervene positively to provide the minimum resources for the enjoyment of certain rights. When the question of a right to abortion is considered as an issue of sex equality, women — apart from being free to choose to terminate an unwanted pregnancy — are entitled to claim state resources in order to carry out that choice safely and securely.

By looking at abortion as an equality issue we can also assess reproductive choice in the whole context in which women fall pregnant and decide to terminate a pregnancy or to raise children. The social and sexual equality of women will only be achieved when women are free to choose whether or not, and when, to have sex, and to decide on the number and spacing of their children, if any. A legal right to early and safe abortion is both an issue of individual conscience and more broadly of sex equality. Women’s liberty and equality rights are mutually supportive in the area of reproductive choice and span a range of fundamental rights for women as individuals and as members of a systematically subordinated group.

The biological facts of life determine that it is women who become pregnant. However, it also a social reality of South African life that, in addition to the burden of childbirth, the costs and responsibility of bringing up children are disproportionately borne by women. The social and economic consequences of pregnancy may include: losing a job or promotion, low-paid or no maternity leave, lack of adequate childcare, interrupted careers or education.

1 See further above, Kentridge ‘Equality’ ch 14.
3 See unanimous judgment of the Constitutional Court in Brink v Kitshoff NO 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 33.
4 See the comments of O’Regan J in S v Mkwanyane 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC) at paras 218, 262, 322.
7 Ruth Colker argues that equality is a better framework than privacy in which to view reproductive rights, as it focuses on the entire context of women’s lives. See R Colker ‘Reply to Sara Burns’ (1990) 13 Harvard Women’s LJ 207 at 211.
9 In South Africa 330--400 of every 1 000 births are to young women and girls under 19 (Ministry of Welfare and Population Development for South Africa, cited in Youth Speak Out . . . A Study on Youth Sexuality NPHPN/UNICEF Braamfontein 1996). Without the option of abortion some of these women drop out of the education system and thereby forgo the benefits of education. The result is a cycle of poverty for women already trapped by their disadvantaged social circumstances.
This is the double burden of birth which has a profound impact on women’s ability to participate as equal citizens. The recently repealed Abortion and Sterilization Act operated unfairly to discriminate against women generally by denying them control over their own fertility, but also indirectly against black, poor, and rural women.  

There have been a few important changes to the equality clause in the final Constitution. The equality clause now provides expressly that everyone has the right to equal protection and benefit of the law. In addition s 9(2) provides that ‘equality includes the full and equal enjoyment of all rights and freedoms’ and clearly appears to support a substantive rather than purely formal approach to equality. If we accept that the primary purpose of the equality clause is to assist disadvantaged groups to overcome the inequality of their condition, it is necessary to separate substantive equality claims from other equality claims. This may be important if, in claiming equal protection, men or partners of pregnant women attempt to prevent women asserting their reproductive rights. Certain rights necessarily conflict. However, equality in the area of reproduction requires legal norms to go beyond gender neutrality and treating men and women alike. It makes the connection between discrimination against women and women’s unique reproductive role.

Hence, in the context of making decisions about abortion, men’s rights to formal equality are subject to the substantive equality rights of women to measures designed to assist them in overcoming inequality. Because of their unique reproductive capacity and the systematic character of sex discrimination, the interests of women’s equality require that such claims are resolved in favour of women.

The second major change to the equality clause is the inclusion of pregnancy, in addition to sex and gender, as a prohibited ground of discrimination. This acknowledges that pregnant women are members of a disadvantaged group systematically disadvantaged because of their unique and fundamental reproductive capacity. The need to prohibit such systematic patterns of discrimination and to remedy their results are the primary purpose of the equality clause.

Women bear the social consequences of pregnancy, which profoundly impairs women’s ability to participate as full and equal citizens. The inclusion of pregnancy as a prohibited ground for discrimination is also an indication of how far the South African Constitution and

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1 Under the Abortion and Sterilization Act 61.3 % of the legal abortions performed in South Africa during 1995 were on white women. See answer to Question in National Assembly on 14 March 1996 by Dr Zuma, Minister for Health, Interpellations, questions and Replies of the National Assembly Third Session — First Parliament 1–14 March 1996.

2 See s 9 of the final Constitution. For a full discussion on equality under the interim and final Constitutions, see above, Kentridge ‘Equality’ ch 14.

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


5 The inclusion of pregnancy will, it is hoped, prevent decisions such as Geduldig v Aiello 417 US 484 (1974), where the disingenuous comparison was made between pregnant and non-pregnant persons, and Bliss v AG of Canada [1979] 1 SCR (1978), where the court came to the bizarre conclusion that discrimination on the ground of pregnancy did not amount to discrimination on the basis of sex. See O’Regan J’s comments on s 8 of the interim Constitution in Brink v Kitshoff NO 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 42.

6 For example, abortions in England and Wales rose by over 14 % to a six-year high in 1996 following a government public health warning that certain contraceptive pills carried an increased risk of blood clots: ‘Blood Clots Fears Only Covering Explanation: Abortions Up 14% After Pill Warning’ Guardian Friday, 21 February 1997.
Bill of Rights have gone in reformulating traditional human rights, which historically failed to accommodate women’s experience. The Constitution recognizes that women deserve to be treated with equal concern and respect in relation to their biological difference and not punished for it.¹

Although the new Constitution and Bill of Rights seek to address discrimination on the basis of pregnancy, it is likely to be many years before women are free and equal to men in their sexual relationships. The Choice Act recognizes that to achieve sex and gender equality, women of all ages must be able to decide whether to terminate a pregnancy. Parliament has acknowledged that women are best placed and able to make this choice, and has provided for abortion on request within the first 12 weeks of pregnancy.² If women present early for terminations, both doctors and properly trained midwives³ can perform the termination procedure. It is hoped that this will ensure wide access to abortion, particularly in the rural areas.⁴

Importantly, the right to access health care services, including reproductive health care, is also guaranteed in the Bill of Rights.⁵ Wide access to health care facilities is essential in ensuring real reproductive choice. Accordingly, a failure by any state-controlled clinic or hospital to provide termination of pregnancy on the same scale as any other medical or surgical procedure unfairly discriminates against pregnant women. Similarly, if rights protected in the Bill of Rights are to be enforceable between private persons,⁶ medical aid schemes will not be able to refuse funding for terminations of unwanted pregnancies without infringing women’s fundamental rights.⁷

16.5 Freedom and Security of the Person

The scope of this right has been extended in the final Constitution to include the right of everyone to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and to security in and control over their body.⁸ This is a broad subclause for reproductive rights particularly relevant to women, who now enjoy the constitutional freedom to choose whether to have sex and if, when, and how many children they will have. The decision to terminate a pregnancy is a decision concerning both reproduction and control over the body and is included in this right. The challenge is now to

¹ In Andrews v Law Society of British Columbia 1 SCR 143 (1989) the Canadian Supreme Court adopted a new test, abandoning the similarly situated or male comparator test, which focuses on the impact of laws on the context of the person affected. This test determines discrimination in terms of disadvantage, which requires judges to look at the real experience of women or other claimants and to confront systematic discrimination.
² Section 2(1)(a).
³ Section 10(1)(a).
⁴ The Choice Act came into effect on 1 February 1997; in the first days of abortion being legal the Johannesburg General Hospital received between 15 and 44 abortion requests and performed an average of 4 terminations of pregnancy a day: see ‘A Nightmare Week for Hospitals’ Weekly Mail & Guardian 7–14 February 1997, p 11.
⁵ Section 27(1)(a) of the final Constitution.
⁶ See the discussion on horizontal application under the final Constitution above, Woolman ‘Application’ § 10.8.
⁷ Action by anti-choice groups blocking access to clinics as well as failure by the police or state to protect clinics and health workers will also be unconstitutional.
⁸ Section 12(2)(a) and (b).
create the conditions to make this a real part of women’s experience. The Constitutional Court has adopted an interpretive approach which seeks to give rights their generous and purposive meaning. This approach, while not ignoring the language, gives expression to the underlying values of the Constitution and looks at particular rights in the broader constitutional context and in relation to the history and background to the adoption of the Constitution. Any court interpreting the Bill of Rights must promote the values that underlie an open and democratic society based on dignity, freedom and equality. It is important that the nature and purpose of this right is interpreted generously to take into account the fact that the ‘right to choose means little when women are powerless’.

The Constitutional Court first considered the scope of freedom and security of the person under the interim Constitution in Ferreira v Levin NO & others. Chaskalson P, supported by the majority of the Constitutional Court, interpreted this right narrowly. He perceived it as limited to physical integrity and within the framework of unlawful detention and proscriptions against cruel, inhuman and degrading treatment. However, in his minority judgment Ackermann J interpreted the ambit of freedom and security of the person widely. Ackermann J regards the right to freedom as distinct from that to security of the person and gives freedom its meaning in a negative sense, that is the right of individuals ‘not to have obstacles to possible choices and activities’ put in their path by the state. However, this classical notion of liberty as freedom from state intervention holds similar drawbacks for women as the right to privacy. It does not ground a positive claim against the state to provide women with access to safe and affordable abortion facilities. The struggle of women for personal autonomy has historically been a struggle for inclusion in society, rather than for exclusion of the state.

The explicit and detailed provisions of s 12 of the final Constitution are therefore welcome, and it is likely the Constitutional Court will soon be called on to revisit the ambit of this right.

A focus on the nature and purpose of this right means confronting the fact that many women do not enjoy security in and control over their bodies. There is a disturbingly high rate of rape, sexual abuse, and forced sex or sexual intimidation in South Africa. As a result,

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2 Section 39(1)(a).
3 See C Smart *Feminism and the Power of Law* at 151. A generous interpretation of freedom does not imply absolute freedom or no state regulation. This right is subject to a limitations analysis, discussed below, § 16.10.
4 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). Under the interim Constitution s 11(1) provided that ‘every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial’; and s 11(2) prohibited all forms of physical, mental and emotional torture as well as cruel inhuman and degrading treatment.
5 *Ferreira v Levin NO & others* (supra) at para 158. On the facts Chaskalson P took the view that the constitutional challenge to s 417(2)(b) of the Companies Act 1973 should be characterized and founded on the right to a fair criminal trial.
6 The narrow right to freedom in s 11(1) was also considered by the Constitutional Court in *S v Coetzee & others* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC). See further below, Currie & Woolman ‘Freedom and Security of the Person’ ch 39.
7 *Ferreira v Levin NO* (supra) at para 54.
9 This has been recognized and may be separately actionable under s 12(1)(c), which extends the protection of freedom and security of the person to be free from all forms of violence from either public or private sources.
the circumstances in which women become pregnant are often beyond their control, as their partners refuse to use condoms or to let them practise contraception, or have intercourse with them against their will. Historically the reproductive autonomy of women was regulated in every respect. Women were subject to the marital power, which relegated them to the status of perpetual minors, and as mothers were accorded equal status as guardians of their children only in 1993. In addition the racist population control policies of the apartheid government sought to control black women’s fertility by the use of injectable contraceptives, which was another assault on the bodily integrity, dignity and equality of women. Until recently abortion was criminalized, forcing women either to carry unwanted foetuses to term or on to the backstreets.

The extended scope of the right to freedom and security of the person which includes women’s experience is a departure from the internationally framed freedom and security of the person provisions. However, South Africa has, in rejecting its past, sought to lead in the field of human rights. This includes women’s rights, which are also becoming more universal in nature, in particular reproductive rights and health.

The Choice Act promotes reproductive rights and extends freedom of choice by affording every woman the right to choose to have an early, safe and legal abortion. The language is not gender-neutral. It applies to women. The Choice Act recognizes that each woman is best placed to make that decision in accordance with her individual beliefs.

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2 Statistics from the Beijing Conference Report: 1994 Country Report on the Status of Women (Pretoria, 1994) 44 place the number of reported rapes in 1993 at 23 318. However, the South African Police Service acknowledges that only 1 in 35 rapes is reported.
4 Kaganas & Murray ‘Law and Women’s Rights: An Overview’ n 102; Guardianship Act 192 of 1993.
5 Many black women were injected with a contraceptive known as Depo Provera. As a result contraception is a highly politicized issue.
6 During apartheid, the government’s population policy was designed to control African population growth. An estimated 42 000–300 000 backstreet abortions are performed annually. The women involved face a high risk of permanent infertility, disability and mortality from septic abortions. See ARAG Submission to Ad Hoc Select Committee on Abortion and Sterilization, 1995.
7 Article 3 of the Universal Declaration of Human Rights (1948) provides that ‘everyone has the right to life, liberty and security of the person’. Articles 9 and 10 of the International Covenant on Civil and Political Rights (1966) provide for liberty and security of the person in the context of freedom from unlawful arrest and detention, as does Article 6 of the African Charter on Human and People’s Rights (1981).
8 Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women (the Women’s Convention) (1979) provides that: ‘State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women; the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.’
9 In the first 12 weeks it is the woman’s decision alone.
The Choice Act clearly promotes the values of the Constitution and limits the availability of abortion after 12 weeks on certain grounds, and severely restricts access to abortion after 20 weeks. These rights and freedoms will have to be exercised in a responsible way and the Choice Act encourages women who fall pregnant and do not want to continue with the pregnancy to present at hospitals and clinics early.

Whether these restrictions are reasonable and justifiable limitations of women’s reproductive choice in South Africa is considered below.\(^1\) The nature of the liberty afforded to women under s 12 will be important in determining whether the state takes steps to ensure full enjoyment of this right. Importantly the right to have access to reproductive health care services is also expressly provided for in the Constitution.\(^2\)

Ackermann\(^3\) draws on the wisdom of Isaiah Berlin in distinguishing between liberty and the conditions of its exercise and warns against the dangers of conflating the two concepts. Freedom is never lost, but the state is under a certain obligation to promote education, health, justice, to raise standards of living, which is ‘not directed at the promotion of liberty itself, but to the conditions in which alone its possession is of value. Useless freedoms should be made usable but they are not identical with the conditions indispensable for their utility.’\(^4\)

There are two aspects to this. It is clear that without wide access to health facilities and workers prepared to perform early and safe abortions, this right will be meaningless to women.\(^5\) However, it is also important that in seeking to guarantee access, fundamental freedoms are not infringed.\(^6\) Giving women control of their own fertility at the legal and constitutional level creates a framework for the enjoyment of the fundamental freedom to choose the number and spacing of their children.

### 16.6 Religious Freedom

Section 15 of the final Constitution\(^7\) provides every person with the right to freedom of conscience, religion, thought, belief and opinion. Taken together, these rights protect the moral autonomy of both groups and individuals. When a state prohibits abortion it dictates the morality which should govern women’s decisions concerning pregnancy and childbearing. Such prohibitions, it could be argued, encroach upon the moral autonomy of women protected by s 15.\(^8\)

South Africa is now a secular state. In upholding religious freedom the Choice Act increases the choices available to women. The Act does not coerce anyone to have an abortion, and therefore does not infringe the right to religious freedom.

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\(^1\) See below, § 16.10.

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

\(^3\) Ferreira v Levin NO 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 52.

\(^4\) Isaiah Berlin ‘Introduction’ in Four Essays on Liberty (Oxford University Press 1969) at liii–lv, as quoted by Ackermann J in Ferreira v Levin NO (supra) at para 52 n 55.


\(^6\) ‘Freedom is the opportunity to act, not action itself’: Berlin op cit at xlii.

\(^7\) See also IC s 14.

\(^8\) See below, Smith ‘Religion’ §§ 19.2–19.6.
Conscience rights also protect the freedom of conscience of health workers who refuse to perform abortions because of their beliefs or opinions about abortion. The right is subject to certain limitations. For example, a health worker cannot refuse to perform an abortion where it is necessary to save the life of the woman concerned, or refuse to alleviate her pain. Nor can health workers misinform women of their rights in relation to the Act. In other jurisdictions the right to conscientious objection has been narrowly interpreted. It protects the conscience of health workers who perform the actual procedure, not the conscience of every person involved.

16.7 DIGNITY

Section 10 of the final Constitution provides that everyone ‘has inherent dignity and the right to have their dignity respected and protected’. In addition human dignity is included as a foundational value and an interpretive guide in the final Constitution. The right to human dignity was held to be pre-eminent among the rights enshrined in Chapter 3 of the interim Constitution. The Constitutional Court has taken the view that, in certain contexts, the right to human dignity amplifies and gives meaning to the other fundamental rights set out in the Chapter. These rights include the rights to privacy, equality, freedom and security of the person, and religious freedom. To the extent that the denial of the right to choose an abortion infringes these rights, it also infringes the right of a woman to human dignity.

In the Morgentaler case Wilson J asserted that:

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

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

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1 See below, § 16.9.
2 Janaway v Salford Health Authority [1988] 3 All ER 1079 (HL).
3 Section 1(a).
4 S v Makwanyane & another 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC). See below, Liebowitz & Spitz ‘Dignity’ ch 17. Section 10 of the interim Constitution provided that every person had the ‘right to respect for and protection of his or her dignity’.
5 S v Makwanyane (supra).
16.8 HEALTH CARE

Section 27(1)(a) of the final Constitution provides that everyone has the ‘right to have access to health care services, including reproductive health care services’. Section 27(2) provides that the ‘state must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of these rights’. The Constitution does not guarantee a right to health, only the qualified right of access to health care services. However, the right of access to health care services and the related right to health in international law must be considered when interpreting this section, and particularly international-law provisions that apply to reproductive health.

Reproductive health is

‘a condition in which the reproductive process is accomplished in a state of complete mental, physical and social well being and is not merely the absence of disease or disorders of the reproductive process. Reproductive health therefore implies that people have the ability to practice and enjoy sexual relation. It further implies that reproduction is carried to a successful outcome through child and infant survival, growth and healthy development. It finally implies that women can go safely through pregnancy and childbirth and that fertility regulation can be achieved without health hazards and people are safe in having sex.’

Articles 10 and 12 of the Women’s Convention explicitly protect equal access of women to reproductive health care services. Other health provisions in international law implicitly protect reproductive health, by protecting both women and the children they bear.

Access to safe abortion services is an essential element of reproductive health care and protects reproductive health by contributing to the reduction of maternal mortality and morbidity. All rights are interdependent and should be interpreted together, as they interact and inform each other. Lack of access to terminations and other reproductive health care services impacts negatively on women’s ability effectively to exercise their other human rights, most importantly their fundamental right to life.

16.9 ACCESS TO INFORMATION

Section 23 of the interim Constitution and s 32 of the final Constitution provide everyone with a right of access to information held by the state which is required for the exercise or protection of his or her rights. Section 32 extends the application of the right to other persons and provides for the enactment of national legislation to give effect to the right which may provide for reasonable measures to alleviate the administrative and financial burden on the state.

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


16–16 [Revision Service 2, 1998]
The Choice Act stipulates that medical practitioners and midwives must provide women with information concerning their rights in relation to the Act. In other jurisdictions medical practitioners who refuse to perform a termination are advised to provide woman with information about facilities where they can obtain a termination. Our courts will have to decide whether this clause is a reasonable and justifiable limitation upon the freedom of conscience of health workers.

16.10 LIMITATIONS

Reproductive rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It is clear that reproductive rights, including abortion, are by nature central to women’s enjoyment of fundamental rights, including equality, freedom, dignity, privacy, life, and religious freedom. These rights are not mutually exclusive but preconditions for the enjoyment and exercise of each other. However, no rights are absolute and, to the extent that the state attempts to regulate the right to choose an abortion, it is necessary to determine the permissible limits of coercing a woman to continue an unwanted pregnancy to term.

The purpose of the Choice Act is to provide for early, safe and legal abortion. It provides a legal framework for women to exercise their reproductive rights in a responsible manner. In so doing it also limits the right to terminate a pregnancy in certain important respects. For example, abortion on request is available only in the first 12 weeks of the gestation of the pregnancy and on limited grounds up until 20 weeks. Some pro-choice activists argued that 14 and 24 weeks were more appropriate time limits. However, as registered midwives will also be able to perform the termination in the first 12 weeks, a compromise of an earlier date is not unreasonable.

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

2 The authors wish to dissociate themselves from the limitations section in the original service of this chapter. The section was written not by them, but by the editors.
3 See s 36 of the final Constitution. For a detailed discussion on the changes from the interim to the final Constitution in the limitations clause, see above, Woolman ‘Limitation’ ch 12.
4 Because it is difficult to predict with accuracy the actual date of conception, the date is counted from the ‘gestation of pregnancy’, which means from the first day of the last menstrual period (‘LMP’). Many women will only conceive in the 14-day period after the LMP. Accordingly, many women will only be 10 and 18 weeks pregnant respectively, at 12 and 20 weeks’ gestation.
5 See ARAG Freedom of Choice (Abortion) Bill.
6 The specified grounds are listed above, § 16.1.
The availability of abortion after 20 weeks of gestation of pregnancy is severely curtailed.\(^1\) In other jurisdictions late terminations are rare.\(^2\) The restrictions contained in the Choice Act are an attempt to balance the increasing interests of the foetus, which become compelling at viability.\(^3\)

The state does have an interest in protecting potential life and this interest has to be balanced against women’s rights. Abortion is a litmus test in a democracy that recognizes the moral independence of women as decision-makers.\(^4\) In the Morgenthaler case Wilson J condemned the criminalization of abortion in Canada as a failure to treat women as autonomous human beings with equal concern and respect for their inherent dignity as Charter rights holders. By linking liberty and equality rights, Wilson’s judgment in Morgenthaler provides persuasive authority that it is unconstitutional for the state simply to subordinate the physical integrity and moral autonomy of women to other state interests.\(^5\)

The Choice Act could have been broader; it is not the least restrictive means for providing early, safe and legal abortion.\(^6\) However, Parliament and the Ministry of Health consulted widely and debated the proposed Bill at length.\(^7\) Many individuals and organizations made oral and written submissions and were actively involved in the democratic process of law-making. In a free and democratic society a court should defer to legislative policymaking which involves exercising democratic choices within the constitutional framework.\(^8\)

### 16.11 Conclusion

In Christian Lawyers Association\(^9\) anti-choice activists launched the first attack on the Choice Act. Their attack was made on the basis that the foetus enjoys rights which are fundamentally infringed by permissive abortion legislation. It accordingly turned on the meaning of ‘everyone’. The attack failed. McCreath J concluded that the foetus is not a legal persona and hence is not protected under ‘everyone’ in the Bill of Rights. This conclusion cannot be faulted. Writers caution against the separation and abstraction of the foetus from

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1. Section 2(1)(c).
2. In 1992 only 53 out of approximately 160 000 terminations in the UK occurred after 24 weeks, 50 because of severe foetal handicap and 3 to prevent grave permanent injury to the physical or mental health of the pregnant woman. See Office of the Population Census & Survey (UK). Recent scientific evidence indicates that the foetuses do not have a conscious appreciation of pain before 26 weeks of gestation; see ‘For Debate: Do Foetuses Feel Pain?’ British Medical Journal vol 313, 28 September 1996 at 795.
3. See above, § 16.3. The area of reproductive technology is constantly changing and the law must be sufficiently flexible to be able to respond to these changes.
5. R v Morgenthaler (supra) at 25.
6. See s 36(1)(e) of the limitations clause in the final Constitution.
7. During 1995 written and oral submissions were made to a multi-party Ad Hoc Select Committee on Abortion and Sterilization. The National Assembly Portfolio Committee on Health also invited written comments and heard oral submissions over three days on the Termination of Pregnancy Bill which was tabled in Parliament on 17 September 1996. See ARAG Newsletter November 1996.
its position of unique dependency on its mother. The foetus should not be the object of a separate and distinct public policy.\textsuperscript{1} The interpretation clause in the Constitution\textsuperscript{2} directs the Constitutional Court to have regard to international instruments. The Universal Declaration of Human Rights (1948), from which all modern rights instruments are drawn, limits rights to ‘all human beings born free and equal in dignity and rights’. Similarly, we should limit rights to those who are born.\textsuperscript{3} The decision as to what constitutes a society based on dignity, freedom and equality will be fleshed out by the Constitutional Court in the future. In \textit{Morgenthaler}\textsuperscript{4} Wilson J describes the notion of liberty in a free and democratic society as one which ‘does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them’. In relation to abortion there is a need to subject custom, culture and religion to the principle of sex equality.\textsuperscript{5} If abortion is regarded as a matter of each women’s individual conscience, then, in order that women as a group enjoy sex equality, it is essential that beliefs of others do not interfere with that choice.

\textsuperscript{1} See R Copelon ‘Sexual and Reproductive Rights?’ in \textit{The Constitution of South Africa from a Gender Perspective} (1995) at 209.

\textsuperscript{2} Section 39(1)(b).

\textsuperscript{3} In England the Court of Appeal held that the term ‘everyone’ in the Offences against the Person Act did not include the foetus: \textit{R v Tait} [1990] 1 QB 290 (CA).

\textsuperscript{4} \textit{R v Morgenthaler} (supra) at 486.