THE CONSTITUTIONALITY OF ABORTION LIMITING LEGISLATION IN SOUTH AFRICA

by

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SUMMARY :

In terms of the common law abortion was justified in circumstances where the continued pregnancy constituted a threat to the life of the mother. Dissatisfaction with the state of the law lead to the promulgation of the Abortion and Sterilization Act, Act 2 of 1975. The Act allows abortion only on restricted grounds and only after strict procedural requirements have been met. The Constitution of the Republic of South Africa, states that the Constitution is the "supreme law of the Republic". Act 2 of 1975 has to conform to the Constitution in order to be valid. An interpretation of Section 8 (equality); Section 9 (life); Section 10 (human dignity); Section 11 (freedom); Section 13 (privacy) and Section 14 (religion) leads to the conclusion that the present abortion limiting legislation is unconstitutional and would probably be declared invalid if challenged in the Constitutional Court.

KEY TERMS :

Abortion; Common Law; The Abortion and Sterilization Act: Act 2 of 1975; The Constitution of South Africa: Act 200 of 1993; Equality; Right of Life; Human Dignity; Freedom; Privacy; Religion.

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" Abortion is a subject which is surrounded by deep human prejudices and dark misconceptions. This is understandable because the traditional view of abortion is directly in conflict with the physical concept of nature and is opposed to the teachings of the great religions".[1]

A. INTRODUCTION

The Constitution of the Republic of South Africa ,[2] heralds the beginning of a new era in a truly democratic South Africa. The Constitution contains a Chapter[3] referred to as the Bill of Rights or the Chapter on Fundamental Rights. A Bill of Rights is a compendium of values empowering citizens affected by laws or decisions to demand justification .[4]

In this dissertation ,I will give a brief overview of the position concerning abortion in the common law and the altered position under statutory law.[5] I will then discuss the impact that the Chapter on Fundamental Rights in the Constitution will possibly have on the existing abortion legislation, with specific reference to the following sections: Section 8,9,10,11,13,14 and 33 of the Interim Constitution. Where the text of the Final Constitution is substantially different and particularly relevant to the topic, it will be dealt with in the text. In conclusion I will submit that the existing abortion legislation will not pass constitutional muster.

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[1] OOSTHUIZEN G.C. *The Great Debate : Abortion in the South African Context* (1974) M.Timmins 139.

[2] Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution). The final Constitution was at the time of writing, being tested for constitutionality by the Constitutional Court and will probably become effective early in 1997. It is referred to as the "final text."

[3] Chapter 3 of the Interim Constitution.

[4] MUREINIK E. " A Bridge to Where? Introducing the Interim Bill of Rights" *SAJHR* 1994 10: 1 31- 48 at 32.

[5] The Abortion and Sterilization Act, Act 2 of 1975.

COMMON LAW

Before 1975, abortion was not statutorily defined in South Africa.It is therefor necessary to have regard to the views of our common law authorities, in particular the Roman-Dutch authors, to ascertain the common law position.[6] The Roman-Dutch authors unanimously endorsed the view that abortion was justified in circumstances where the pregnancy constituted a threat to the very life of the mother. The mother's interest in this regard prevailed. The Roman-Dutch authors did not lay down any further guidelines, nor did they unequivocally state that a threat to the mothers life is the only instance in which abortion is justified. It can however be accepted that abortion in other circumstances was prohibited.

THE ABORTION AND STERILIZATION ACT: ACT 2 OF 1975

Dissatisfaction with the state of the law lead to the "liberalization" of our law in regard to abortion. The situation became juridically untenable, especially in view of the widening gap between positive law and actual practice.

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6. Also see : STRAUSS S.A. *Doctor, patient and the Law* (1991) Van Schaik 207 - 218.

The government responded to demands for reform from members of both the medical and the legal professions [7] by appointing a commission to investigate the abortion question and to set forth a proposal for an Abortion and Sterilization Bill. The Bill eventually became the Abortion and Sterilization Act, Act 2 of 1975. The common law crime of abortion was repealed by the Act and substituted with a statutory form of criminal abortion.

The Act allows abortion only on the restrictive grounds set out in Section 3(1) of the Act and only after strict procedural requirements have been met.[8] The grounds for abortion set out in section 3(1) are as follows: a medical practitioner may procure an abortion where " the continued pregnancy endangers the life of the woman concerned or constitutes a serious threat to her physical health...",[9] "the continued pregnancy constitutes a serious threat to the mental health of the woman concerned..."[10], "there exists a serious risk that the child born will suffer from physical or mental defect of such nature that he will be irreparably seriously handicapped..."[11] "the foetus is alleged to have been conceived in consequence of unlawful carnal intercourse..."[12], "the foetus has been conceived in consequence of illegitimate carnal intercourse, and...the woman concerned is due to permanent mental handicap or defect unable to comprehend the consequential implications of or bear the parental responsibility for the fruits of coitus".[13]

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[7] BOBERG P.Q.R. *The Law of Persons and the Family* (1977) Juta at 19 n 20.
[8] See Sections 3,4,5,6 and 7 of Act2 of 1975 for the procedural requirements.
[9] Sections 3 (1) (a).
[10] Sections 3 (1) (b).
[11] Section 3 (1) (c).
[12] Section 3 (1) (d).
[13] Section 3 (1) (e).

B. THE RELEVANT PROVISIONS OF THE CONSTITUTION VERSUS THE ABORTION LIMITING PROVISIONS IN ACT 2 OF 1975

Section 4(1) of the Constitution states that the Constitution is the "supreme law of the Republic". All laws and executive actions will have to conform to the Constitution in order to be valid. The framers of the Constitution did not specifically state whether abortion on demand is sanctioned by the Constitution, but left the question open to constitutional interpretation. If the question thus arises whether sections of Act 2 of 1975 relating to abortion, is consistent with the provisions of Chapter 3 of the Constitution, the issue will have to be answered by the Constitutional Court which has sole jurisdiction in testing the constitutionality of Parliamentary legislation. [14] In this regard it is important to note, that the question is not whether the majority of South Africans believe that abortion on demand is either acceptable or unacceptable, but whether the abortion limiting legislation (Act 2 of 1975) is constitutional.[15]

This is the question that I will endeavour to answer.

SECTION 9 : LIFE [16]

"Every person shall have the right to life".

The Constitution does not expressly provide that the right to "life" includes foetal life. The question can thus be asked whether the foetus is a "person" as envisaged by the Constitution and thus a legal subject bearing the rights mentioned in Chapter 3.

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[14] Section 98 (2).

[15] See in this regard *S v T Makwanyana and M Mchunu* 1995 (2) SACR 1 (CC) at 38 M. In this Constitutional Court Case, the court had to decide on the controversial question, whether the death penalty was consistent with the South African Constitution. Chaskalson J stated that public opinion does have some relevance to the enquiry, but that it is not a substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour.

[16] Section 11 of the final text is identical to that of the 1993 Constitution.

ANTI- ABORTION ARGUMENTS

Anti-abortion groups use both scientific and moral claims to support their views: [17]

1. THE SCIENTIFIC CLAIMS

Anti-abortionists claim that science has established two irrefutable facts about the foetus. Firstly, that the foetus is a person entitled to legal rights. The foetus is a distinct human life from the moment of conception, most of what is unique about an individual is fixed at this point. Secondly, from conception onwards the foetus is, in physiological and genetic terms, a separate entity from the pregnant woman within whom he/she exists. Human life must therefor be protected from conception, since it is then that the process of life begins. This argument equates the question of the legal status of a foetus with the question of whether the foetus may be classified as a form of human life based on certain scientific variables.

Anti-abortion groups reject the pro-choice views that life begins at the moment of birth. They claim that birth is the point at which the foetus is physically separate from the pregnant woman, or alternatively that life begins at "brain birth", which occurs at about 24 weeks. At that time the foetus becomes viable, in the sense that the foetus can survive outside the mother's womb without artificial respiration. [18]

2. THE MORAL CLAIMS

The moral claims are as follows: Science proves that the "blueprint" for genetic development is present at conception and therefore abortion constitutes murder.[19] The denial of legal personality to the foetus is morally repugnant, as it will undermine the general value of human life and will result in situations where certain groups of people will be deemed not to be entitled to the right to life because they are seen as less worthy.

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[17] For a discussion of these views see *The report of the Ad Hoc Select Committee on Abortion and Sterilization* 1995. The committee was required to enquire into and report upon possible amendments to the Abortion and Sterilization Act (Act 2 of 1975). The Committee was empowered to hear evidence and call for papers. Also see: BROWNSTEIN A. AND DAU P. "The Constitutional Morality of Abortion" *Boston College Law Review* 1992 xxxiii 867-959.

[18] See: *Report of the Ad Hoc Select Committee on Abortion and Sterilization* supra at X; also SARKIN-HUGHES J. "A Perspective on Abortion Legislation in South Africa's Bill of Rights Era" *THRHR* 1993 56: 1 83 - 94.

[19] See BROWNSTEIN A. and DAU P. supra at 703 - 728.

The opponents of abortion use historical arguments to illustrate the danger of separating legal personality from biological definitions of humanity. The Holocaust in the Second World War and the treatment of black people in America are frequently cited examples.

SHAFFER[20] criticises the above anti-abortion arguments. Regarding the scientific claims that the foetus is a person, she says that the question of when a human life begins, calls for a conclusion as to which characteristics define the essence of human life. While science can tell us when certain biological attributes can be detected , science can not tell us which biological attributes establish the existence of a human being. Secondly, even if it is accepted that a foetus is a person in scientific terms it does not follow that the foetus is also a person in a legal sense. Legal personality is a normative conclusion rather than a scientific concept. If one accepts this argument, then the moral objections against abortion can also not succeed.

HOW WILL THE CONSTITUTIONAL COURT ANSWER THE CONTROVERSIAL QUESTION OF WHEN LIFE BEGINS?

I mentioned previously that the Constitution does not expressly provide that the right to life includes foetal life. The Constitutional Court will have to interpret the Constitution and examine existing legislation and the common law to answer this question.

Section 35 [21] states : (1) "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter and may have regard to comparable foreign Case law." (3) "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter." [22]

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[20] SHAFFER M. " Foetal Rights and the Regulation of Abortion" *McGill Law Journal* 1994 39 58 - 100.

[21] Section 35 is the section that lays down certain principles with regard to the interpretation of the Constitution.

[22] The Chapter that is referred to, is Chapter 3 of the Interim Constitution.

It is clear from the wording of Section 35 (1) that the Constitutional Court may use comparable human rights documents, as well as foreign jurisprudence in the interpretation of Chapter 3 of the Constitution. Canadian case law is of specific relevance as the Canadian Charter of Fundamental Rights and Freedoms closely resembles the South African Bill of Rights.

In *S v Zuma and two others* [23] the court dealt with the question of interpreting the fundamental rights enshrined in Chapter 3 of the Constitution. The court followed an approach which was "generous" and "purposive", giving due regard to the language that has been used and which gives expression to the underlying values of the Constitution. The court referred to the Canadian case of *R v Big M Drug Mart* [24] in which the purposive approach was established as the correct framework for interpreting the Canadian Charter. In the case of *S v T. Makwanyana and M. Mchunu* [25] the court referred to both the above mentioned cases and approved the purposive approach in interpreting the Constitution.

SHAFFER [26] is of the opinion that the purposive approach is not suited to solve the question of whether a foetus is a person under the Canadian Charter. She states that most "Charter cases" arise when an individual who is the holder of a Charter right challenges a piece of legislation or the conduct of government actors. There is therefore no question whether the "person" who has brought the challenge is entitled to assert Charter rights.

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[23] 1995 (2) SA 642 (CC).
[24] (1985) 1 S.C.R. 295 18 D.L.R.
[25] Supra.
[26] SHAFFER M . supra at 84. Also see ALBERTYN C. and KENTRIDGE J. " Introducing the Right to Equality in the Interim Constitution" *SAJHR* 1994 10: 2 149-178.

In the case of foetal "rights" the court must address a different question namely, to whom does Charter rights apply? She holds the view that the courts will have to do more than simply analyse the purpose underlying the particular Charter right, but instead, it demands a normative conclusion that the foetus is a "person" to whom Charter rights should attach, she states: "This analysis suggests that the entities which are recognised as having rights under the Charter must be determined in light of our linguistic, historical, cultural and philosophical understanding of the kinds of beings the Charter is meant to protect; Accordingly, entities which have not been viewed as legal persons should not be given rights under the Constitution unless the courts are convinced there is a strong normative foundation on which to base this status." [27]

Following the above argument it is clear why the Canadian Supreme Court decided in the case of *Tremblay v Daigle* [28] that the foetus does not have rights under the Civil Code or the Quebec Charter of Human Rights and Freedoms.

The facts in *Tremblay v Daigle* were as follows : Chantal Daigle had a brief relationship with Jean-Guy Tremblay during which she became pregnant. When she was 18 weeks pregnant, she left Mr.Tremblay because the relationship was deteriorating. She began making arrangements to terminate her pregnancy. Mr Tremblay sought an injunction against Ms Daigle to prevent her from obtaining an abortion. Mr Tremblay claimed that the foetus had a right to life which outweighed Ms Daigle's right to obtain an abortion. The right to life it was claimed arose from three areas of law: the Civil Code of lower Canada,Quebec's Charter of Human Rights and Freedoms and the Canadian Charter of Human Rights and Freedoms.

The Supreme Court of Canada held:

1. the foetus had no rights under the Civil Code and the Quebec Charter;
2. the common law does not recognise foetal rights;
3. the Canadian Charter does not apply to disputes between private persons (horizontally) and the court should therefore not consider the argument that the foetus had rights under this Charter.

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[27] SHAFFER M. supra at 87.
[28] (1989) 2 S.C.R. 530 62 D.L.R. (4th).

In *R v Sullivan* [29] the Canadian court once again rejected the arguments in favour of foetal rights. International Human Rights Law, as reflected in the Universal Declaration, the Political Covenant and the Convention on the Rights of the Child, also does not recognise a right to life of the unborn.[30] Our Constitutional Court will possibly follow the example of the Canadian Supreme Court and look at the question of whether a foetus is a person, in the light of what our common law and private law dictate. I am of the opinion that the court will hold that a foetus is not a person bearing the rights mentioned in Chapter 3 of the Constitution. The reason for my assumption will become evident in the discussion that follows.

Legal personality begins when a child is born alive. For a person to be a legal subject bearing rights, to come into existence, the law requires the following:[31] The birth must be completed; there must be a total separation between the foetus and the body of the mother; the child has to live after the separation even if it is only for a short period of time. The foetus thus has no legal personality.Roman law also did not regard the foetus (or *nasciturus*) as a person, because it was still part of the mother's body. From the earliest times however, the law took into account the fact that the foetus will become a legal subject and that before the foetus is born situations may arise where it would be to the advantage of the foetus to be regarded as already born.[32] The so-called *nasciturus*-fiction was also part of the Roman-Dutch law and is widely used in South African Law.[33] The *nasciturus*-fiction will however only operate once the child is born alive. If the foetus is not subsequently born alive he/she neither is nor ever was a person with legal personality.

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[29] (1991) 1 S.C.R. 489, 3 C.R. (4th) 277. In this case the court considered the status of the foetus. The case differs from *Diagle* (supra), because it was not brought in the context of abortion. The question in this case was whether the foetus was a person for purposes of the Criminal Code.

[30] DU PLESSIS L. and DE VILLE J. "Personal Rights: Life, Freedom and Security of the Person, Privacy and Freedom of Movement" in *Rights and Constitutionalism: The New South African Legal Order* VAN WYK et al (ed) (1994) Juta 229 - 232.

[31] See BOBERG P.Q.R. supra and BARNARD et al: *Die Suid-Afrikaanse Persone en Familiereg* Butterworths 12 - 20.

[32] The fiction that the law works with is expressed in the latin maxim: "*Nasciturus pro iam natu habetur quotiens de commodo eius agitur*".

[33] Examples of cases where the *nasciturus*-rule found application are *Ex Parte Administrators Estate Asmall* 1954(1) PM G4 (N); *Ex parte Boedel Steenkamp* 1962(3) SA 954 (0); *Shields v Shields* 1946 CPD 242; *Pinchin v Santam Insurance Co.Ltd.*1963 (2) SA 254 (W).

In common law the *nasciturus*- fiction mainly operated in the law of succession. The fiction has been extended in the modern South African law to provide that an unborn child may acquire a right in property, institute a claim for maintenance [34] and even claim for pre-natal injuries sustained.[35]

The argument could be raised that since abortion is prohibited by law, it clearly proves that the foetus is regarded as having a right to life. In my view, the protection of the foetus is merely a consequence of the protection the legislature accords to the interest of the community.This view is strengthened by the following two South African cases:

In *Christian League v Rall* [36] the court was requested to appoint a *curator ad litem* on behalf of the foetus in all cases where an abortion was imminent. The court held that the *nasciturus*-fiction must not be extended to protect the foetus against abortion. In the recent decision of *G v Superintendent, Groote Schuur Hospital and Others* [37], Seligson J. doubted the correctness of the *Rall* decision. He said " It seems to me that there is much to be said for recognising that an unborn child has legal right to representation, or an interest capable of protection in circumstances where its very existence is threatened..." Van der Vyver [38] also critises this decision.

DWORKIN [39] suggests that the questions ought not to be "Is the foetus a person?", or "When does human life begin?" He explains: "We do better to avoid that language so far as we can. I suggest that we consider instead, whether states can justify anti-abortion legislation on one or two grounds namely: derivative or detached grounds." He explains the derivative grounds as government's responsibility to protect the rights and interests of its citizens and most important

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[34] *Chrisholm v East Rand Proprietary Mines Ltd. 1909* TH 297; *Shield v Shields* supra; *Pretorius v Pretorius 1967* PH B 17 (0).

[35] *Pinchin v Santam Insurance Co. Ltd.* supra.

[36] 1981 (2) SA 821 (0).

[37] 1993 (2) SA 255 (CPD) at 259 C-G.

[38] VAN DER VYVER J.D. *THRHR* 1981 305.He is of the opinion that the foetus has legal personality. The unborn child has an interest in the pending abortion and should therefor have legal representation.

[39] DWORKIN R.M."Unenumerated Rights: Whether and How Roe Should be Overruled" *The*

amongst these is an interest in staying alive and a right not to be killed. The detached ground is the government's responsibility not just to protect the interest and rights of its citizens, but to protect human life as an objective or intrinsic good, a value in itself, apart from its value to the person whose life it is or to anyone else. The derivative claim presupposes that a foetus has rights and interests, while the detached claim presupposes that although the foetus does not have rights and interests, the intrinsic value of human life is already at stake in a foetus's life.

DWORKIN applies the above argument to the American Supreme Court decision of *Roe v Wade*.[40] The court in this case held :

1. A pregnant woman has a constitutional right of procreative autonomy; States do not have the power to simply forbid abortion;
2. States do have a legitimate interest in regulating abortion and protecting potential human life - however only after a certain point in the pregnancy.

I agree with DWORKIN that this is the only logical, objective way of deciding the question. I am of the opinion that the state will not be able to establish that a foetus has rights under the Constitution. The argument that abortion should be outlawed because it negates the unborn child's right to life therefore falls away. I, however think that the state will be able to prove that it has a legitimate interest. The interest being the protection of potential life as well as protecting the life and health of the pregnant woman.[41] Once it has been established that the state has a right to protect life and in this instance "potential life", the next question is whether this right exercised by the state violates any of the rights of the pregnant woman, contained in Chapter 3 of the Constitution. If the answer to this question is positive, the court has to establish whether the violation/s can be justified, because fundamental rights are as a rule not absolute, but can be limited by the rights of others and by the legitimate needs of society.

University of Chicago Law Review 1992 59 381 432.

[40] 410 US 113 (1972); see also BARRIE G.N. "Roe v Wade Revisited" *TSAR* 1995 3 590-594.

[41] See German Abortion case Bverge 39 1. The court held that the state had a duty to protect the foetus. For a complete discussion of this case see: KOMMERS D.P. " The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?" *The Journal of Contemporary Health Law and Policy* 1994 10 1-32 at 17.

This is the so-called "two stage" approach followed by our Constitutional Court. [42]

Any limitation to a fundamental right contained in Chapter 3 of the Constitution will be justified only if it adheres to the requirements set out in Section 33(1) (the limitation clause).

Section 33 (1) provides in part that :

" The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-

a) shall be permissible only to the extent that it is -

i) reasonable; and
ii) justifiable in an open and democratic society based on freedom and equality: and

b) shall not negate the essential content of the right in question, provided further that any limitation to-

aa) a right entrenched in section 10,11...

14(1)... shall, in addition to being reasonable as required in paragraph (a) (1), also be necessary. [43] This limitation on human dignity and freedom and security of the person must also be necessary in terms of the Interim Constitution. [44]

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[42] Adopted in *R v Oakes* (1986) D.L.R. (406) 200 227-8 and applied in *S v Zuma* 1995 (2) SA 542 (CC).

[43] Human dignity was inserted in the limitation clause in the text of the Final Constitution, as one of the pillars that a democratic society is based on. The section lists five specific factors to take into account, when deciding if a limitation is justified. This facilitates the interpretation process.

[44] This distinction is not drawn in the final text.

THE CONSTITUTIONAL RIGHTS OF THE WOMAN (MOTHER)

The limitation of constitutional rights for a purpose that is reasonable, and in the case of human dignity, freedom and security of the person also necessary, and justifiable in a democratic society involves the weighing up of competing values and an assessment based on proportionality. Proportionality calls for the balancing of different interests. In the present situation we have the right of the state to protect "potential life" as well as the life and health of pregnant women weighed up against the following rights of the mother: sections 8,9,10,11(1), and 13 of the Interim Constitution.

In the next section, each right is considered in detail.

SECTION 8 : EQUALITY

(1)"Every person shall have the right to equality before the law and equal protection of the law."

(2)"No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language,"

A democracy based on equality and freedom is the "grundnorm" underpinning Chapter 3 of the Constitution.[45] This conclusion can be drawn when reading the Preamble, Afterword and limitation clause, contained in the Constitution.

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[45] See ALBERTYN C. and KENTRIDGE J. supra at 150; KRUGER J. "Is Interpretation a Question of Common Sense? Some Reflections of Value Judgements and Section 35" *CILSA* 1995 28: 11-20; DU PLESSIS L.M. and GOUWS A. " 'n Dialektiese Perspektief op die Statutêre en Grondwetlike Verwesenliking van Vroueregte in Suid - Afrika" *Stell L .R.* 1993 4: 2 240-260.

The first paragraph of the Preamble speaks of the "need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to exercise their fundamental rights and freedoms." The Afterword envisages " a future founded on the recognition of human rights, democracy and peaceful co-existence and development for all South Africans irrespective of colour, race, belief or sex". Section 33 states that any limitation on a right mentioned in Chapter 3 must , *inter alia* be "justifiable in an open and democratic society based on freedom and equality". Read in this context it is clear that democracy rests on the pillars of freedom and equality. The importance with which Section 8 is regarded is further highlighted by the fact that it is listed as the first substantive right in Chapter 3 of the Constitution.

Section 8 (2) states that no person may be "unfairly" discriminated against. This seems to be a paradox. Albertyn and Kentridge [46] suggest that the word "unfairly" sorts permissible from impermissible discrimination. Section 8(2) recognises the difference between positive and negative discrimination and ensures that the door to affirmative action is kept open. In the final text equality is referred to in section 9. In subsection 3 it is stated that the state may not unfairly discriminate on one or more grounds, including pregnancy. This has the effect that abortion limiting legislation can in future be attacked on the basis that it violates section 9 (3).

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[46] Supra at 161 - 162.

Equality can be interpreted as meaning "formal equality" or "substantive equality." [47]

FORMAL EQUALITY:

Formal equality prescribes equal treatment of individuals regardless of their actual circumstances. Formal equality gives women the same rights as men, as well as equal protection of the law. If section 8 is construed as meaning "formal equality" it can be said that women in South Africa are treated equally to men. The following example illustrates that formal equality is not enough to eradicate entrenched, structured inequalities between people. The removing of "apartheid" laws in South Africa gave black people formal equality, it however did not improve the actual social and economic conditions of the majority of black people in this country. It is therefore necessary that equality be interpreted as meaning "substantive equality".

SUBSTANTIVE EQUALITY:

Substantive equality is capable of being interpreted in more than one way. In the United States and Canada the "similarly situated" test was used in cases where equality was in question. This test requires that those who are alike should be treated alike, while those who differ, should be treated differently in proportion to their likeness or difference. In other words the "similarly situated" test requires that before it can be established that a person has been treated unequally, it must be shown that he/she had been accorded worse treatment than another person in a similar situation. [48]

In the United States this test was followed in a number of cases. [49] The Supreme Court of Canada rejected the "similarly situated" test of equality in the groundbreaking constitutional case of *Andrews v Law Society of British Columbia.* [50] The court laid down five fundamental principles in

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[47] See ALBERTYN C. and KENTRIDGE J. supra at 152; DU PLESSIS L.M. and GOUWS A. supra at 242; MAHONEY K.E. " The Constitutional Law of Equality in Canada" *New York University Journal of International Law and Politics* 1992 24 759-793.

[48] ALBERTYN C. and KENTRIDGE J. supra at 153.

[49] See BARRIE G.N. "The equal protection clause" One Hundred and Twenty Five Years On" *TSAR* 1993 4 723-731 *and Plessey v Ferguson* 163 US 16 (1896).

[50] (1989) 1 S.C.R. 143. Also see MAHONEY K.E. Supra at 243.

its discussion of equality and discrimination namely:

1. " The interests protected by section 15 [51] must be determined by way of a generous interpretation using a positive approach";
2. The meaning of equality as sameness of treatment is rejected in favour of an effects-based approach where intention need not to be proven;
3. The "similarly-situated" test is rejected;
4. A finding of discrimination requires harm, prejudices or disadvantage;
5. The scope of the equality guarantee is limited to the categories enumerated within the section or grounds analogous to them".

I submit that the "similarly situated" test is seriously deficient, because once the court finds that certain people are "different", for example a finding that men and women differ, nothing prevents discrimination against women, so long as all women are treated alike.[52] The "similarly situated" test does not take into account the nature and effects a certain law has on those who are affected by it. The "effects-based" approach makes it possible for women to set their own norms based on their needs and characteristics. It shows clearly the fact that women suffer daily from socially created inequality through a male- dominated society. Equality to be true equality must therefore be equality of result. [53]

In Canada the equality of result approach has been adopted in many cases subsequent to *Andrews* [54] the most relevant case is *R v Morgentaler.* In *Morgentaler* [55] the Criminal Code legislation relating to abortion was struck down on the basis that it violated a woman's right to"life, liberty and security of the person, and the right not to be deprived thereof except in accordance with principles of fundamental justice". The court interpreted the Criminal Code legislation from the perspective of the experiences, aspirations and problems of women, pointing

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[51] Section 15 deals with equality.

[52] This view is shared by MAHONEY K.E. supra at 170 ; also see *Bliss v Attorney-General* (1979) 1 S.C.R 183.

[53] RIOUX M.H. "Towards a concept of equality of Well-Being: Overcoming the Social and Legal Construction of Inequality" *Canadian Journal of Law and Jurisprudence.* 1994 7 127-147.

[54] The approach was adopted in *Brooks v Canada Safeway Ltd.* (1989) 1 S.C.R. 1219; *Jansen v Platy Enterprises* (1989) 1 S.C.R. 1284 .

[55] 44 (1989) 1 S.C.R. 30.

out that the experiences of pregnancy,birth and abortion are ones for which men have no analogy.

I submit that section 8 must be interpreted in a purposive manner taking account of the principles and values underlying the Constitution. The "effects-based" approach must be adopted in establishing whether legislation is constitutional. This approach to interpreting section 8 and evaluating Act 2 of 1975 will redress subordination and inequality that women experience and will lead to reparation and restitution. Taking above submissions into account, I am of the opinion that Act 2 of 1975 infringes on the woman's right to equality.

Firstly, the Act was enacted after the government appointed a commission to investigate the thorny abortion question and to propose legislation for its regulation. The commission consisted interestingly enough, of 10 white, middle aged, male politicians. The composition of the commission is of significant importance especially if seen in light of this comment made by the chairman of the commission, Dr V.V. v d Merwe, to June Cope (founder of the Abortion Reform Action Group: ARAG, in South Africa) during a meeting between them to discuss the abortion question: "You women go to a party, and you're at it all night. Next morning you're still at it and then you get off you're beds and find you're pregnant..."[56] The commission in its composition and attitude was not reflective of the experiences and concerns of women. It was nevertheless left to this commission to propose the first abortion legislation and to a Parliament consisting of 99% white males to approve the legislation.

Secondly, the Act has had a concrete and immediate adverse affect on the lives of thousands of women and indirectly on their families (children). The Act places women in an inferior position to men.It is especially the poor, young, black woman that the limitation most severely affects. Unwanted pregnancies often interfere with their education or result in loss of employment and thus financial difficulty. Even if a woman is lucky enough to retain her job there is an extra financial burden placed on her to provide for an unwanted child. It is not only the social and economical implications that effect women, but the effect the Act has on women's reproductive health and phychological well-being that is of great concern. [57] In the report of the "*Ad Hoc*

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[56] COPE J. *Abortion and Law Reform in Apartheid South Africa* (1993) PMB. 60 - 71 at 65.

[57] See COOK J.R. "International Protection of Women's Reproductive Health" *New York University Journal of International Law and Politics* 1992 24 645-727.

Select Committee on Abortion and Sterilization" [58] the committee relying on statistics of well-known medical scientists, reported that " there are more than 33 000 procedures performed in respect of "removal of residues", in public hospitals per year, and the "majority" of these were related to backstreet abortions... every year 44 687 women present themselves at South African hospitals with incomplete abortions which are the result of either spontaneous miscarriages or illegal abortions..., 425 die every year as a result of septic abortions and 12 847 can be regarded as having undergone an abortion in unsafe conditions". [59]

The Act criminalizes access to medical procedures that only women need, namely abortion. The Act ignores the injustices that result from the biological fact that women bear the exclusive burden of unwanted pregnancies. The neglect of reproductive health reflects women's inferior status within their social, political, economic, religious and cultural communities.

Thirdly, the Act makes it impossible for women to enjoy their other constitutional rights (embodied in Section 10, 11(1) and 13) equally to men. This discussion will now focus on the infringement of these rights.

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[58] Supra at par 5(1)(e)-(f).

[59] See Strauss supra for a description of the methods of abortion that women are "forced" to subject themselves to and also Schwär T.G. et al (ed) *The Forensic ABC in Medical Practise a Practical Guide* (1988) Haum 318 - 324 at 322 Fig.17.8.

SECTION 10 : HUMAN DIGNITY [60]

"Every person shall have the right to respect for and protection of his or her dignity".

In our constitutional order the right to dignity is specifically protected. It can only be limited by legislation which passes the stringent test of being "necessary". The values embodied in our Constitution demand that weight be given to human dignity specifically due to the fact that human dignity in the "apartheid"- era was of very little concern.

I submit that the woman's right to dignity is infringed by Act 2 of 1975 because of the procedural aspects contained in the Act (with relation to procuring an abortion). The procedural requirements further delay abortions, thereby increasing the risk to women's health to pregnancy termination. The procedures exclude legal abortions for women who are ignorant of the law or cannot understand it or cannot afford the time and cost necessitated by compliance with them.The vast majority of legal abortions are obtained by women who are white, educated and well-off. [61]

The procedures required in rape situations "Where the foetus is alleged to have been conceived in consequence of unlawful carnal intercourse" [62] shall be used to illustrate the view that the Act infringes on a woman's right to dignity.

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[60] Section 10 of the final text reads as follows: "Everyone has inherent dignity and the right to have their dignity respected and protected." The section has not been altered in substance.

[61] See HANSSON D. and RUSSELL D.E.H."Made to Fail. The Mythical Option of Legal Abortion for Survivors of Rape and Incest" *SAJHR* 1993 9:4 500-524.

[62] Section 3(1) (e) of Act 2 of 1975.

Section 3(1)(e) provides that an abortion may be procured by a medical practitioner only after two other medical practitioners have certified in writing after, such interrogation of the woman concerned as they or any of them may have considered necessary, that in their opinion the pregnancy is due to the alleged unlawful carnal intercourse. Section 4(a)(i)provides further that where the pregnancy is alleged to be the result of unlawful carnal intercourse, the abortion shall not be procured unless a certificate, issued by a magistrate of the district in which the offence in question is alleged to have been committed, is produced. This certificate will only be issued by the magistrate if he is satisfied:

(a) that a complaint was laid with the police that the victim was raped or if such a complaint has not been laid, that there is a good and acceptable reason why a complaint has not been lodged, and

(b) after an examination of any relevant documents submitted to him by the police and interrogation of the woman or any other person as he may consider necessary, that, unlawful carnal intercourse did take place; and

(c) the woman concerned alleges, in an affidavit submitted to the magistrate or in a statement under oath to the magistrate, that the pregnancy is the result of that unlawful carnal intercourse.

The victim in this scenario has to relate the humiliating experience of being raped first to the police officer, then to at least three medical doctors, and then to a magistrate, all of whom have the right to "interrogate" her, and all of whom in all likelihood will be male. These decision-makers are hardly equipped to understand the best interests of the "applicants". Many doctors do not wish to become involved in these situations because it is time-consuming or because of their personal anti - abortion attitudes. It can thus become an almost impossible task for a woman to find a doctor willing to apply on her behalf for a legal abortion.The victim in this instance is treated as the "criminal" who wants to destroy life while she is the one who suffered the greatest humiliation and degradation at the hands, of not only the rapist but also at the hands of a male-dominated and victim-blaming medico-juridical system .[63]

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[63] See COPE J. supra at 96-102; HANSSON D. and RUSSELL D.E.H.supra; JAGWANTH S. et al (ed) *Women and The Law* (1994) 241-251 at 246 HSCR Publishers; MOOSA I. "Pro Choice or Pro Life?" *ALR* 1993 4: 2 34-43.

SECTION 11 (1) : FREEDOM AND SECURITY OF THE PERSON

" Every person shall have the right to freedom [64] and security of the person ..."

In *R v Morgentaler* [65] the Canadian Constitutional Court declared, that the procedures established by the Criminal Code delayed timely abortions or denied them altogether to women whose continued pregnancy threatened their life or health and are thus unconstitutional, because it deprived women of their rights to security of the person. The majority applied "the security of the person" to actual physical risk only. Two of the majority judges however, went further and included psychological hardship in "security of person."

PANTAZIS [66] is of the opinion that this is an argument for personal autonomy that could be used to strike down any legislation which restricts abortion. The procedures in Act 2 of 1975 cause both physical and psychological risk (as discussed supra) and I submit that it violates the right of women to "freedom and security of the person". Section 12 of the final text is wider than Section 11 of the Interim Constitution. Section 12 (1) (c) states that the right to freedom and security of the person includes the right "to be free from all forms of violence from both public and private sources". Section 12 (2) gives a person the right to bodily and psychological integrity which includes the right : (a) "to make decisions concerning reproduction" and the right, (b)"to security in and control over the body". It can be argued that the "new" Section 12 bestows upon women the right to decide whether to continue a pregnancy or whether to abort.

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[64] The "freedom" right that is referred to in this part of the paper, is the pregnant woman's right to reproductive freedom. This right is now embodied in Section 12 (2)(a) and (b) of the final text.
The report of the Fourth World Conference on Woman, held in Beijing, Document A/Conf. 177/20, New York, 1995, (par 96) advanced the human rights of woman to include " their right to have control over and decide freely, and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences".

[65] Supra.

[66] PANTAZIS A. " " A Matter of Choice : Abortion Law Reform in Apartheid South Africa" by

SECTION 13 : PRIVACY [67]

"Every person shall have the right to his or her personal privacy".

The question to be answered is whether this section confer on a woman the right to have an abortion.

The Constitutional Law of the United States is the most sophisticated on the right to privacy. A brief discussion of the case law in the United States that deal with abortion and the right to privacy will illustrate that the right of a woman to have an abortion is indeed protected by her constitutional right to privacy.[68]

In *Roe v Wade*[69], the American Supreme Court was called upon to pronounce on the Constitutionality of the Texas statute which made abortion a crime, except upon medical advice, for the purpose of saving the life of the mother. The majority of the court held that the right to privacy was broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The court further held that this right was not absolute and must, at some point yield to one or both the state's compelling interests in either protecting the mother's health or prenatal life. The court applied a "strict scrutiny" test to ascertain whether the limitations on the fundamental right are justified by the compelling state interests. The court held that the state's interest in protecting the mother's health, becomes compelling at the beginning of the second trimester (14-24 weeks) of pregnancy, the state can therefore regulate abortion procedures at this time, to protect the mother's health. The state's interest in protecting prenatal life, becomes compelling at the beginning of the third trimester (24-40 weeks), when the foetus becomes viable and the state may at this point, regulate or even proscribe abortion.

J.Cope : Book Review" *SAJHR* 1994 10: 3 405-411.

[67] Section 14 of the final text is substantially the same as section 13 of the Interim Constitution.

[68] For a discussion on the relevant case law also see : MADITSI A. "The right to privacy in America : What does it mean?" *De Rebus* 1992 297 659-663; ALLAN A.L. "Autonomy's Magic Wand : Abortion and Constitutional Interpretation" *Boston University Law Review* 1992 27 683-691; ALBISA C. "The Last Line of Defense. The Tennessee Constitution and the Right to Privacy" *University of Memphis Law Review* 1994 25 3-35.

[69] Supra.

The Supreme Court supported its holding in *Roe's* case in subsequent cases, wherein the court struck down statutes regulating abortion. [70]

In *Webster v Reproductive Health Services* [71] the majority of the court reached a different conclusion. The court rejected the characterisation of the right to abortion as a fundamental right. It held as constitutional a ban on the use of public facilities and employees as well as public funds for performing abortions.

The court reaffirmed the constitutional right to abortion in the case of *Planned Parenthood of Southern Pennsylvania v Casey,* [72] while at the same time allowing restrictions. [73]

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[70] See *Akron v Akron* 462 U.S. 416 452 (1983) (the court held a statute forcing a 24 hour waiting period before allowing a woman to abort unconstitutional); *Planned Parenthood v Danforth* 428 U.S.52 69 (1976) (the court held a requirement requiring spousal consent, before allowing an abortion during the first trimester, unconstitutional); *Thornburgh v American College of Obstetricians and Gynaecologists* 476 U.S. 747(1986) (the court struck down a Pennsylvania Statute requiring, *inter alia,* informed consent, determination of viability and risk disclosure).

[71] 492 U.S. 490 (1989).

[72] 1992 W L 142546; for an in depth discussion of this case also see; McCLARD P. S. " The Freedom of Choice Act: Will the Constitution Allow It?" *Houston Law Review* 1994 30 2041-2050 ; BROWNSTEIN A. "How Rights are Infringed. The Role of Undue Burden Analysis in Constitutional Doctrine" *The Hastings Law Journal* 1992 45 867-959; METZGER G.E. " Understanding the Undue Burden Standard Orienting Casey in Constitutional Jurisprudence" *Columbia Law review* 1994 94 2025-2089.

[73] The difference between *Casey* and *Roe* lies in the standard of review the courts used to evaluate abortion restrictions. In *Roe* the court used the "strict scrutiny" test. In *Casey* the court applied the "undue burden" standard, under which a state regulation on abortion that places an undue burden on a woman wanting to procure an abortion, is regarded as being unconstitutional.

The above case indicate that the American courts hold the right to privacy as the basis for a woman's claim that she has the right to decide whether or not to undergo an abortion. The courts are, however, moving away from the decision in *Roe* in which regulating abortion in the first trimester was found to be unconstitutional and are now accommodating abortion laws that restrict abortion so long as no undue burden is placed on the pregnant woman. [74]

I submit that Section 13 encompass a woman's right to abortion. The Abortion Act, Act 2 of 1975 thus clearly violates a woman's right to privacy. This submission is shared by LABUSCHAGNE [75] and PANTAZIS. [76]

C. THE BALANCING PROCESS

In the first stage of this inquiry I contended that the state has a legitimate right to protect prenatal life as well as the life and health of pregnant women. On the other hand women have the right to choose to have an abortion and the abortion legislation, as it stands, violates the rights of women contained in Section 8, 9, 10, 11, and 13 of the Interim Constitution. Section 12 (2) (a) and (b) of the final text now makes it particularly clear that a woman has a fundamental right to make decisions concerning reproduction and to security in and control over her body. The right of a woman to procure an abortion is thus, I contend, protected by the Constitution.

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[74] For a further example of this approach see *Bellotti v Baird* 443 U.S. 622 (1979). Although striking down the statute in issue, Powell J. indicated that requiring a minor to obtain parental consent before procuring an abortion would be constitutional so long as the state provided consent before a judicial bypass procedure through which a minor could obtain a waiver of parental consent.

[75] LABUSCHAGNE J.M.T. "Outonomie van die Vrou by Vrugafdrywing" *TSAR* 1994 3 567-571.

[76] PANTAZIS A. supra at 411.

The second stage of this inquiry deals with whether the rights of women can be legitimately limited.[77] In this regard it must be stressed that while the rights of women are rights protected by the Constitution, the rights that the state rely on, are not so protected.

THE ESSENTIAL CONTENT OF THE RIGHT : [78]

There is an opinion that the question as to the limitation of rights should begin by asking whether the limitation negates the essential content of the right. If the essential content of the right is negated, it is pointless to examine such questions as reasonableness, justifiable in an open democratic society based on freedom and equality, or even necessity. [79]

The "essential content of a right" could be interpreted subjectively from the point of view of the individual affected by the invasion of the right or objectively from the point of view of a constitutional norm. It is my submission that the negation should be viewed both objectively and subjectively.

REASONABLE, (NECESSARY) AND JUSTIFIABLE IN AN OPEN AND DEMOCRATIC SOCIETY BASED ON FREEDOM AND EQUALITY :

The following test laid down in *R v Oakes* [80] can be utilised in determining whether a limitation is reasonable, necessary (section 10 and 11) and justifiable as envisaged in Section 33: "First, the measures adopted must be carefully designed to achieve the objective in question ... In short they must be rationally connected to the objective.

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[77] See Section 33 (1) supra.
[78] Section 36 (1) of the final text merely mentions the nature of the right.
[79] See MALAN J.J. "Die Konstitusionele Bestaanbaarheid van Bewysregtelike Vermoedens na Aanleiding van *S v Zuma*" SACJ 1995 8:2 SAS 214 224 at 22; also see *Nortje v Attorney-General of the Cape of Good Hope* 1995 (2) BCLR 236 (C) at 258 G-H.
[80] Supra.

Second, the means... should impair "as little as possible" the right or freedom in question : ... Third, there must be a proportionality between the effects of the measures which are responsible for the Charter right or freedom and the objective which has been identified as of " sufficient importance." [81]

With the law regulating abortion, the state seeks to protect the life of the unborn child and the physical health of the woman concerned. It must therefor to be considered whether the criminal sanction as a measure is effective and proportionate in achieving these aims.

It is evident from statistics available that the criminal sanctions do not prevent high incidence of illegal abortions. [82] The few cases in which criminal prosecutions are instituted have a low rate of conviction. The abortion law does not serve as a deterrent to woman who want to procure an abortion. A desperate woman will go to great lengths to procure an abortion without considering the legal implications her actions may result in. Some say that South Africa already has abortion on request if seen in the light of statistics that prove that every year between 100 000 and 500 000 women have abortions in this country; of these, legal abortions account for less than one percent of the total number. [83] A high number of illegal abortions result in death or serious complications, causing irreparable harm to the woman's health. The number of unwanted pregnancies are also not reduced by criminal sanctions. Only an asserted effort to provide sex education, family planning, education and counselling centres for pregnant women could alleviate the problem of unwanted pregnancies and abortions.

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[81] See *R v Edward Books and Canada Art Ltd* 35 DLR 4th 1 at 81.
[82] See *Report of the Ah Hoc Select Committee on Abortion and Sterilization* supra.
[83] SARKIN - HUGHES J.supra at 83.

It is very clear from the above that the abortion legislation does not achieve the objectives in question, namely to protect prenatal life and the lives and health of pregnant women.
The legislation infringes on the constitutional rights of women contained in Sections 8, 9, 10, 11(1) and 13, without being reasonable, justifiable or necessary and without there being proportionality between the effects of the legislation and the objective being sought. I submit therefor that the present abortion legislation, Act 2 of 1975, is unconstitutional.

SECTION 14 (1) : RELIGION [84]

" Every person shall have the right to freedom of conscience, religion ... "
There are groups especially in the "pro-life" camp, who perceive the question of abortion as essentially a religious one.

In my view the morality of abortion is a matter of controversy among religious groups, since it is declared immoral and sinful by some (i.e. the catholic church), - while it is permissible by others (the islamic approach holds that abortion up to 16 weeks is a lawful way of contraception). The Constitution provides for religious freedom and freedom of conscience. Rights of individuals cannot be restricted and prohibited merely because others have different moral values and beliefs. As the court stated in *Makwanyana* [85], public opinion may have some relevance in answering questions of this nature, but it is not a substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour.

E. CONCLUSION : SUGGESTED LEGISLATION

The *Ad-Hoc Committee on Abortion and Sterilization* [86], recommended that the current Abortion Act be repealed. The Committee made the following recommendations for new legislation in the form of the Freedom of Choice (Abortion) Bill: [87]

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[84] Section 15 (1) of the final text is generally the same as section 14 (1).
[85] Supra.
[86] Supra.
[87] A Termination of Pregnancy Bill was subsequently assented to by the cabinet but is still being streamlined by the State's legal advisers. Reported in Beeld, August 13, 1996.

a) "The Act should provide for abortion, on request of the woman, up to 14 weeks gestional age, and between 14 and 24 weeks under certain broadly specified conditions.
b) The current cumbersome, time-consuming and discriminatory procedures should be simplified. The requirement that two doctors should be consulted, should be removed. A wider range of health personnel should be trained and authorised to perform abortions, additional health facilities should be provided and existing ones should be improved in order to increase access to women in areas where there are fewer doctors, if any.
c) Counselling should be available to all women requesting abortion, but it should be non-directive. It should be non-mandatory, except in the case of minors.
d) The consent of the woman's partner or husband should be mandatory. In the case of a minor, she should be advised to consult parents or responsible family members or friends, but abortion should not be denied if she does not choose to consult.
e) Statistics should be collected by a central authority. The name and identity of the woman should not be passed on to the central statistics collection point.
f) Any doctor or other health worker who has conscience objections to taking part in the abortion procedure, should be free to recuse himself or herself. They must, however, refer the woman to others who are willing to take part in such procedure."

The main thrust of the envisaged new Act is that women will have a right to "abortion on demand" during the first trimester of pregnancy, during the second trimester abortion will be regulated (the scope of the regulations are unknown) and during the third trimester abortion will be prohibited. Recognising the right of women to freely have an abortion during the first trimester of pregnancy will, I submit, promote women's rights to equality, life, dignity, freedom and privacy, while allowing abortion during the last trimester will add little to women's sexual autonomy.

The envisaged new Act in my opinion gives due regard to both the rights of pregnant women and the right of the state to protect prenatal life and the lives and health of pregnant women. A golden middle ground in the abortion debate will be achieved by this Act. It should not be forgotten that the point of changing the legislation is not to force abortions on women, but simply to give women the right to choose whether or not to terminate a pregnancy.