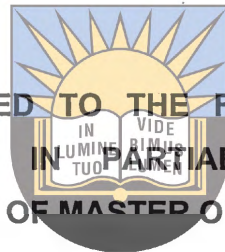


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**ABORTION LEGISLATION AND THE RIGHT TO LIFE: RESOLVING THE
PREDICAMENT AND CONFLICT BETWEEN ABORTION AND FUNDAMENTAL
HUMAN RIGHTS AND VALUES**



**A MINI DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE
UNIVERSITY OF FORT HARE, IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF ARTS IN HUMAN RIGHTS [MA
IN HUMAN RIGHTS]**

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BY

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DATE: DECEMBER 2009

DECLARATION

I NOKUTHULA MBAYIWA, STUDENT No: 200436490 declare that this dissertation is my work and that it has not been submitted for any degree or examination in any other university. All the sources used or quoted have been duly acknowledged.

Student: NOKUTHULA MBAYIWA

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For the unborn child

“The legal profession is the guardian of dignity and integrity of the nation. Our mettle as a nation will be judged by how we deal with the weakest and poorest amongst us”

Chief Justice Langa at the 2005 KZN Annual General Meeting in Durban.



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ABSTRACT

Abortion legislation in South Africa takes a casual and very indifferent approach to human life. This is a direct violation of international standards upon which South African legislation is based. The fundamental purpose of law is to preserve and better human life, in an effort to prevent the recurrence of various ills and crimes that society has witnessed. The urgency in the protection of humanity comes from the knowledge of the ability of humanity to self destruct and the ultimate desire to maintain global peace. Abortion legislation is divorced from the original purpose of law to preserve and protect human life in all its developmental stages. Abortion legislation encourages the obliteration of human life, although it is seen as a positive progress in the realization of human rights, particularly the reproductive rights.



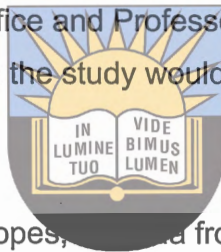
The purpose of the study is to expose the conflict between abortion and fundamental human rights legislation. The act of abortion is not only morally wrong but also legally contentious. It is unscrupulous to end the life of another from a religious and ethical point of view. From a legal perspective, an individual's right ends where that of another begins. It was later confirmed during the research that the act of abortion is a taboo within the society. The question would then be why the act of abortion has been supported through the enactment of abortion legislation.

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Thank you mum for being my number one editor.

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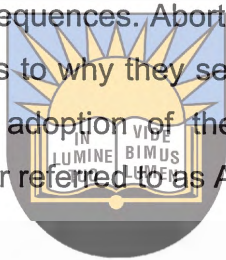
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CHAPTER ONE: INTRODUCTION

1.1 Background of study

Progressive legislation on abortion has over the years maintained a legally substandard and casual formulation of its content. Abortion legislation is contrary to the basis of law and order which is the preservation of life. In all the battles of apartheid, colonialism, genocide and even racism the responding legislation sought to preserve life and focus on its value. Ironically abortion legislation treats life casually in its content and consequences. Abortion is readily accessible to all women without objective enquiry as to why they seek to terminate a pregnancy. Such access is provided by the adoption of the Choice on Termination of Pregnancy Act 38 of 2004 [hereafter referred to as Act 38 of 2004].

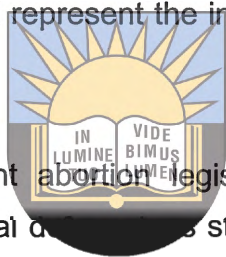


The arbitrary decision to terminate a pregnancy in terms of Act 38 of 2004 is sufficient to end a life in its developmental stages without question. The woman is given the power to dictate the value of the growing life in her womb. However, when this authority is weighed against the right to equality and dignified treatment for all human life, there is no equivalence or dignified treatment for all human life in reality. The impact of this vast liberty granted to the woman mocks all efforts of international, regional and national legislature to put an end to crimes against human life such as murder, homicide, xenophobia, and other forms of abuse. There is neither logic nor legal consistency in terminating human life whose potential has not been explored. As a consequence, it does not make sense to demand that born persons be respected and treated with dignity.

Legalizing abortion contradicts finding fault in assault, homicide, murder and any other harm caused to the body and dignity of an individual. The unborn child is the offspring of humans and not at fault for the circumstances surrounding its conception. There is more sense in demanding respect for the born person when

the same equal respect is given to the unborn child. Treating the born and unborn life differently is reminiscent of the segregating effect of apartheid.

Abortion legislation presently permits minors to access abortion without the consent of their guardians and parents. Similarly women are not required to consult nor seek the consent of their spouses or partners. This implies that legal cognizance of life is no longer determined objectively. Essentially, this means the right to life, particularly for the vulnerable and unborn child is dispensable. This is distressing from a legal and social point of view. The credibility of law lies in its ability to protect the vulnerable and represent the interests of all in an equal and non-discriminatory manner.

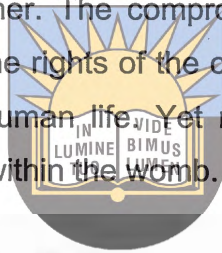


The manner in which the present abortion legislation has been developed justifies ending foetal life in its initial development state. The question is how the law, a mechanism adopted universally to protect life can condone abortion. One may respond by saying abortion legislation is the result of prevailing democracy. This for the researcher would suggest that the attitude of the society has shifted from the preservation to the destruction of life. Society has become individual oriented at the expense of the vulnerable unborn child. More importantly, such a democracy is divorced from the African perspective of *ubuntu* and is as a result, immoral.

Counseling is not provided for in the present abortion legislation. This would seem to suggest that abortion is a simple procedure when in fact it threatens physical and emotional security. Ironically, the law will find value in the unborn life when issues of patrimony affecting born interested parties arise. The unborn are developing humans not entitled to human rights, but condemned by the subjective interests of the born. Counseling would in the researchers view be necessary to establish the reason to end a life and explore less drastic alternatives. However, the fact is that the unborn child's rights are vaguely provided for by the Constitution of the Republic of South Africa, 1996 [hereafter

referred to as the Constitution of 1996]. It is therefore not surprising that the unborn child has no legal recognition.

The consequences of abortion legislation have a negative effect on society. Civic duty is compromised through the legality of abortion, primarily because of the tone of abortion legislation against the preservation of life. Abortion not only ends life but it also affects human rights progression and fulfillment. The purpose of law is primarily to preserve human life. This function should apply to all forms of human life equally in order to prevent infinite debates justifying why a particular life is more important than the other. The compromise in the protection of all human life and the vagueness of the rights of the child has resulted in incessant debates about the beginning of human life. Yet none can deny that abortion terminates the nascent human life within the womb.



The argument of democracy is normally brought up in defense of the legality of abortion. Democracy, however, speaks of impartial equality and dignified treatment for all. The centre of the discussion is the idea of liberty and human sovereignty. The two concepts are entwined with human rights and cannot be separated from its development. The idea of human rights embraces humanity collectively and individually. The fundamental goal is to preserve humanity by establishing enduring morals entrenched in the legal systems of nations. The incidents of World Wars, colonialism, apartheid and genocide have taught that humanity is capable of self-destructing. Abortion legislation is a reality because general human rights are not restricted while fundamental rights such as the right to life are not objectively defended.

The enactment of abortion legislation mocks all attempts to preserve and protect human life. The denial of the right to life for the unborn child suggests lack of understanding of what human rights really are. It also divorces the nation from the idea of indiscriminate preservation of human life. Decisions taken by the judiciary show no intention of preserving all forms of human life. In fact, in South

Africa the unborn child is not legally recognized until born alive¹. The legal exception for entertaining the rights of the gestating child is in respect of patrimonial issues. Normally, under this exception the rights of the unborn child are held in abeyance and viewed retrospectively upon the birth of the child. This process is known as the *nasciturus* fiction. Interestingly, where patrimonial gain is anticipated in the live birth of the unborn child, the unborn child is endowed with some legal consequence.

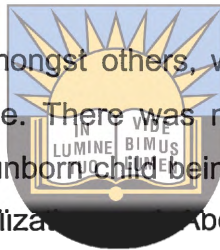
Life is not imminent at conception but grows from it, hence the inherent duty of the law to safeguard that life. The failure of the law to safeguard such a life suggests the expendability of humanity. Sadly, this mindset has grown on the conscience of the nation and manifested itself in the crimes against humanity. Abortion legislation in South Africa was introduced by a minority apartheid government, mainly consisting of white people. This could explain the stringent legal provisions permitting abortion under severely cautious supervision. Government incentives were used to encourage childbearing amongst white women. According to Guttmacher² the tax policies initiated by the Minister of Bantu Administration and Development, M. C. Botha, reflect the racist climate of the time.

The black and colored population was curtailed through contraceptives to reduce their number. The result was that contraception became associated with the harsh racist climate of apartheid. Poverty also forced the black and colored populations to opt for abortions against their natural inclinations. However, the government was in for an unexpected surprise. White women as well appreciated the availability of contraceptives as it gave them leverage to explore career possibilities by controlling the occurrence of child birth.

¹ *Christian Lawyers Association of South Africa v The Minister of Health* 1998 11 BCLR 1434 [T]; *Christian League of Southern Africa v Rall* 1981 [2] SA 821 [O] 829; *Friedman v Glicksman* 1996 [1] SA 134 [W] 1140 G.

² Sally Guttmacher, Farzana Kapadia, Jim Te Water Naude and Helen dePinho. Special Report, Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act. *International Family Planning Perspective*, Volume 24, Number 4, December 2008.

Although white women enjoyed the changes brought about by global development, it took a long time before the black and colored women could reap such benefits. Apartheid rule separated them from the development in the rest of the world. The management of small families was not an option for them but a matter of survival, as they could not afford to have large families. In the researcher's view, there may have been no placards demanding the rights of the unborn child during protest demonstrations against apartheid. However, the struggle against apartheid was resistance against violation of human dignity and the right to life, and in this regard, also respect for the life of the unborn child.

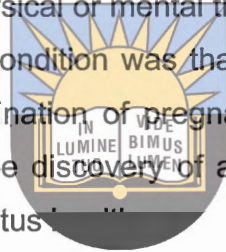


The unborn child's right to life, amongst others, was prejudiced and rendered impossible or otherwise unbearable. There was no equality of all human life, neither was there a chance of the unborn child being born with inherent dignified treatment. Prior to the initial Sterilization and Abortion Act of 1975 [hereafter referred to as the Sterilization Act], the common-law allowed abortion only where the pregnancy threatened the life and health of the woman. The Sterilization Act required two extra medical practitioners to be in support of the view of the practitioner procuring the abortion. The pregnancy had to be found to have a permanent threat to the life and mental well being of the woman.

Abortion would be granted on the ground of mental or physical handicap of the child and in cases where pregnancy was the result of a criminal offence, mainly incest and rape. The stringency of the law resulted in African women and a few poor whites opting to consult alley abortionists and traditional healers. In some cases, women performed abortions on themselves by inserting sharp instruments such as sticks into their bodies. The young and unmarried also resorted to desertion and infanticide according to Klausen³.

³ Susanne M. Klausen. Clandestine Abortion in South Africa during Apartheid. Department of History, Carleton University Ottawa, page 1-17.

Abortion legislation has been allowed to take precedence over the value and weight of human life. Emotions, misfortunes, finances, privacy and presumed integrity took preference over human life. The enactment of the Choice on Termination of Pregnancy Act 92 of 1996 [hereafter referred to as the CTOP Act of 1996] replaced the Sterilization Act and heightened the level of casualty of abortion in South Africa. The former legislation further aggravated the relationship between the law and its duty towards human life. It allowed abortion to be provided to women upon their request from as early as the time of conception to twelve weeks of gestation. Thirteen to twenty weeks gestation could be aborted if there was a physical or mental threat against the health of the woman or the foetus. One other condition was that the pregnancy had to be a result of a criminal offence. Termination of pregnancy above twenty weeks of gestation was permissible upon the discovery of a serious malformation of the foetus and risk of the woman or foetus.



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Counseling prior the abortion was afforded on a voluntary basis and no enquiries were a prerequisite for the personal decision to end an innocent life. The CTOP Act of 1996 permitted minors to abort without the consent of guardians and parents. Married women were free to abort without seeking the consent of their husbands, and abortion became basically permissible upon the individual request of a woman. The question arises as why the law could be used to violate parental, spousal and family rights, privileges and responsibilities. The family unit is essentially the most significant and foundational unit from which human life is nurtured and cultivated. Yet the sanctity and peculiarity of spousal and family relations are obtrusively invaded by abortion legislation. The African Charter on Human and Peoples' Rights [hereafter referred to as the ACHPR] states in Article 18:

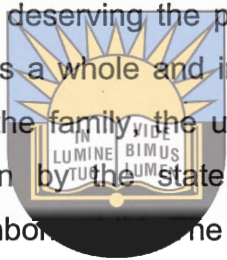
[1] The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.

[2] The state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

[3] The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and convention.

[4] The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

The ACHPR appreciates the peculiar relations established within a family setting. The family is described as innate, deserving the protection of the state for the individuals comprising the family as a whole and in their individual capacity. In comparison to other members of the family the unborn child lives outside the parameters of absolute protection by the state. The state does not give cognizance of the rights of the unborn child. The legislature and the judiciary deliberately exclude the unborn child from legal protection. The fact that parents and guardians may not want a child is a separate issue from the value of such a child and the duty of the state to protect its vulnerable citizens. The protection of the family by the state calls upon the protection of the unborn child who is part of the family.



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The ACHPR explicitly provides that the state ought not only ensure protection but eliminate discrimination, particularly on the child as provided in international declarations and conventions. This provision leaves the legality of abortion in South Africa wanting. It also begs the question why the government has stood by and condoned abortion and whether it is justifiable having regard to the preservation of human life. The protection of the disabled is affected by the perception of the unborn child who is found disabled in the womb⁴.

⁴ Nicola Pantos – Protecting the unborn who have disabilities. The Sunday Times [The Canberra Times] 23 January 2000.

The termination of the life of the disabled unborn child also affects the physical development and socialization of disabled persons in South Africa. The message being communicated is that disability makes those affected insufficient and their lives unworthy of legal cognizance. The *sui generis* relationship of spouses, partners, parents and children deserves respect. The decision to abort cannot be taken independently because the act of procreation itself is not solitary. Spouses should possess equal rights to a conceived child as the parents of the child in gestation.

In the *Fraser*⁵ case, the rights of the father of a child born out of wedlock were before the court. The court held that the father had the right to claim custody of his child instead of the child being adopted by interested third parties who had no biological relationship with the child. There is no logic in the expectation that more weight should be reasonably attached to the rights of the father of the unborn child in a marriage relationship. The principle of equality entrenched in section 9 of the Constitution of 1996 requires spouses to have equal rights with regard to matters intimately attached to their marriage. They are to be treated as equal parties in decision-making affecting such matters, including the conception of a child and the sustenance of such child's life.

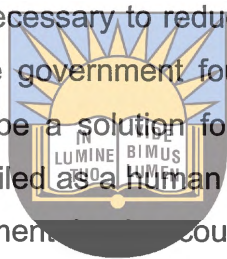
The law is required to bolster and protect equal rights of individuals and parties with shared interests without discriminating against either party. The limitation clause in section 36 of the Constitution of 1996 has not found complete application because subjective rights that ought to be reasonably restrained presently deny life, dignity and equality. In the *Makwanyane*⁶ case, Judge Chakalson in discussing the underlying values of the interim Constitution of 1993 stated that it was necessary in the interpretation of the rights accorded to give a 'generous and purposive' interpretation to each right, in such a way that the full possible measure of protection is awarded by each right.

⁵ *Fraser v Naude and Another* [CCT 14/98] [1998] ZACC 13, 1999 [1] SA 1998 [11] BCLR 1357[23].

⁶ *S v Makwanyane and Another* 1995 (6) BCLR 665(CC) at 676.

The adoption of the CTOP Act of 1996 resulted in the overcrowding of cooperating hospitals as the quick solution to abortion attracted many. The demand for trained staff became unbalanced with the number of abortions procured, which made legal abortion dangerous for want of skills and resources. The then Minister of Health, Manto Tshabalala-Msimang, communicated the government's awareness of the unjustifiably tolerant attitude of abortion legislation. It is essentially overly generous towards the interests of women and ignores the rights of the unborn child.

Abortion legislation is said to be necessary to reduce the maternal death rate in South Africa. This means that the government found legalizing the murder of human life in its initial stages to be a solution for deaths resulting from alley abortions. Abortion legislation is hailed as a human right, yet in earnest it reflects poorly on human rights development in the country. Human rights demand respect for the inherent dignity and preservation of human life in all its developmental stages.



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The problem with the CTOP Act of 1996 was that legalizing abortion meant that it could be available arbitrarily and even formally, and considered as a final and secure contraceptive. The result was a large demand for abortion being met by insufficient skills and resources. This led to the enactment of Act 38 of 2004 which substantiated section 3 of the principal CTOP Act of 1996. The latter mandated all hospitals, private and government, to provide legal abortions upon the demand of women and minors. The legal condition is that the necessary sanitary and medically trained assistance must be available within the particular medical institution.

The approval requirement from any medical or legal practitioner to procure an abortion was erased. Act 38 of 2004 relieved the national ministers from authorizing where abortions could be procured and legalizing abortion services in public hospitals. Provincial Members of Executive Councils were empowered to

allocate abortion providers and establish abortion regulations within their provinces. There appears to be a growing pressure to meet the needs of the pregnant woman at all costs. The rights of the woman are portrayed as superior to those of her spouse, partner, interested third parties and the unborn child itself. The woman's rights come out superior to the right to life which is the fountain of all other rights within the Constitution of 1996.

The basis of this argument is the fact that without life, all other rights would not be necessary. The preservation of life and the right itself mean that all forms of murder and termination of human life are unacceptable, if not illegal. There can be no exceptions to this rule because that would amount to discrimination. South Africa's judiciary has deliberately disregarded the rights of the unborn child with the exception of patrimonial interests that are held in abeyance in terms of the *nasciturus* fiction rule. The law is meant to preserve human life, in fulfillment of its duty to preserve the same. Presently the law lacks impartiality and objectivity in its duty to all categories of people and this is a threat against the security of all human life.

Abortion is offered and portrayed as the solution to handling the emotional, financial, religious and physical problems attached to the conception of a human being. From an objective legal perspective, it is hardly a solution. Abortion boldly evades the fundamental principles upon which the Constitution of 1996 is founded; namely life, dignity and equality. Abortion is a legal and political fiction, the reality of which alters the standing value of life and erodes the purpose of legislation. It frustrates the fulfillment of civil duty and ignores that every human right is restrained by an equivalent duty. The substantial, formal meaning of life, equality and dignity cannot be objectively interpreted to accommodate or tolerate abortion. Both the substantive and formal meaning of the above fundamental principles speaks of the unsullied application of the right to life, equality and dignity. If human life is to be protected equally and with dignity, this protection

must cover every aspect and stage of human life. There will be no protection in reality if particular stages of human life are discriminated against.

The ACHPR, Article 3(1) and (2) provides that all individuals are to be treated equally by the arm of the law, which includes protection and promotion of individuals rights without discrimination. Abortion legislation contradicts the history and function of law; it further indicates a paradigm shift in the morality of the nation. The attitude portrayed in the legality of abortion bears no witness to the spirit behind the eradication of all forms of discrimination and inequalities.

1.2 Problem statement



The purpose of law to protect and preserve human life has not been thoroughly considered by the South African legislature in the enactment of abortion legislation. This is a problem because failure to protect a particular stage of human life amounts to discrimination of human life. This leaves a gap for the violation of human rights as a whole. Any society that fails to protect the initial stages of human life will fail to protect life in its adolescent, teenage, adult and old age.

The crime rate in South Africa would most likely experience a significant decrease if life was respected. It is the view of the researcher that there is a link between authorizing abortion, which is a type of murder and the crime rate in South Africa. Human beings are prone to react unconsciously to situations and it is the researcher's view that legalizing abortion communicates the view that human life can be dispensed with. Lack of objectivity in the protection of life is a grey area in the legal system. The relationship between law and morals would leave one to conclude that today, human life has no value in the eyes of society based on the condonation of the termination of the life of the unborn child.

The legislation in South Africa is subject to international standards and obligations as stated in sections 39 and 239 of the Constitution of 1996. South Africa gained independence in 1994 at a time when the rest of the world had already embraced human rights. Following the effects of the Second World War and colonization, human life was given its inherent platform as the most valuable ideal in the world. The value in human life is its vulnerability. The self destructive tendencies of war, abuse, discrimination and natural disasters render human life vulnerable and powerful at the same time. The security of human life relies predominantly on the willingness of humanity to respect human rights. In drafting its abortion legislation, South Africa, a state born after the international acceptance of human rights was not exempted from honoring life as the ultimate source of all other rights.



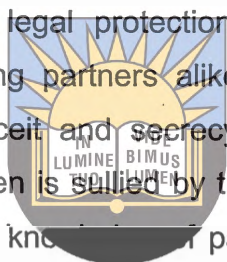
The preamble of the Charter of the United Nations⁷ states that member states are obliged to promote human rights. The law in South Africa gives no legal cognizance to the unborn child who is recorded as not being a person till live birth occurs. The question is why the presence of life is denied in the womb when the ultimate result of the gestation period is a born human being. It is certain that humans come from the conception and implantation of the forty six chromosomes of male and female during coitus. The growing product within a woman's womb should be legally protected because the expected end result is a human being and there is no other way in which human life can be recreated. The process of gestation is in fact part of human development, hence the necessity for the legal protection of the nascent child.

The problem envisaged by the researcher is that the law no longer serves its primary purpose of preserving human life. One of the results of this failure is abortion legislation which further aggravates criminal activities occurring in the country, and this opens the doors for the abuse of humanity as a whole. Failure to implement the prescriptions of the law shifts the focus of national legislative

⁷ The Charter of the United Nations, 24th of October 1945; 59 Stat. 1031, T.S. 993, Bevans 1153.

prerogatives from protecting human life against subjective values that flow from the right to life. This paradigm shift is problematic because the significance of law itself becomes questionable. The failure of the law to objectively protect life renders the legal system of the country a threat to the very existence of human life.

In failing to meet the demands of its primary purpose, the law threatens human rights which it is required to enforce. The primary focus of the law is to preserve human life. Abortion legislation does not only end life but it distorts and violates family relationships that deserve legal protection. The relationship between husband and wife and cohabitating partners alike is dishonored by abortion legislation in that it promotes deceit and secrecy. The relationship between parents, guardians and their children is sullied by the fact that adolescents now have the right to abort without the knowledge of parents and guardians. These relationships carry *sui generis* privileges, but the legality of abortion violates these privileges.



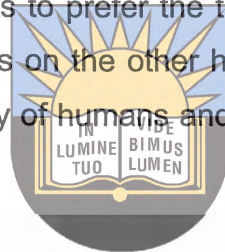
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The essence of legal privilege exists to control the level of interference from outsiders within the above relationships. Interference can also come from the law as in the case of abortion legislation particularly when the law begins to compromise the protection of fundamental human rights. The above relationships are made up of parties with equivalent rights attached to duties. The concept of equality and dignity are threatened by the lack of impartiality in the consideration of rights and duties, and the result is the degradation of the value of human life.

The legality of abortion does not stand out as an intelligent solution to decreasing the immortality rate because it officially condones the termination of life. Illegal abortions are more popular today because they are more private than legal abortions. Women favor backyard abortions because they need not worry about the queues and being sent away by hospitals that are fully booked for the procedure. Although backyard abortion may be risky, women know that they

cannot be turned away from a hospital for the cleaning procedure and by then they would not have to worry about the unborn life growing in their womb.

It is difficult to comprehend how a post-apartheid government with the duty to protect national and international interests can authorize the termination of a life instead of fulfilling the duty to protect that life. This duty presumably involves intervening when parental rights stand in violation of the preservation and wellbeing of the child's life. Lack of recognition of the unborn child may be an excuse for the state not to interfere but proceed to legalise abortion. However, it remains unclear what excuse exists to prefer the termination of human life over its preservation. The consequences on the other hand are certain to encourage crimes against the physical integrity of humans and mock all attempts to prevent this.

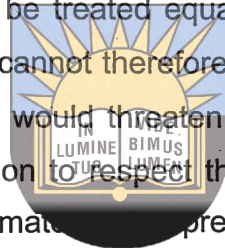


It is universally accepted that human life deserves to be treated equally and with inherent dignity. The origins of this consensus are attested to by the fact that no one can really stand and say they want to end their life. The realization that humanity can self destruct where behavior is not controlled led to this ideal. The events of the World War, colonialism, apartheid and genocide demonstrate the necessity for an objective value of human life. The lack of objective protection of human life opens the doors of the past atrocities to repeat themselves.

Xenophobia, abduction for sexual exploitation and other abhorable acts are a direct manifestation of lack of respect and preservation of human life. The dignified and equal treatment of all human life is urgent. Equality and dignified treatment are duties attached to rights that flow from the fundamental right of life. Abortion legislation causes secondary rights such as privacy, choice and expression to override the right to life. International law is based on the establishment of peaceful relationships across the borders to prevent the recurrence of wars and safeguard human life. The codification and gradual internal acceptance of the International Bill of Rights, which is made up of the

Universal Declaration of Human Rights⁸ [hereafter referred to as the UDHR] and the two International Covenants of 1966⁹ entrenched the idea that the preservation of human life is the primary object of the law.

International legislative standards were given the responsibility of influencing national legislative measures. This would ensure the undivided focus of legislation to defend human life as a global determination. Protecting human life would mean valuing all the stages of life alike without discrimination of age, race and gender amongst other pretexts. The idea of preserving human life means that all forms of human life would be treated equally with dignity simply by the virtue of being human. Human life cannot therefore be ended arbitrarily or at the hands of another life because this would threaten the pursuit for global peace. For every right there is an obligation to respect the life of another. Obligations within rights exist to protect the ultimate goal to preserve human life. This means that even the limitation clause in the South African Constitution of 1996 is meant to preserve and uphold the right to life.



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National policies and legislation are tools for safeguarding the preservation of human life. Given the above background, the enactment of abortion legislation is a problem. It is particularly dramatic that the apartheid South African history could not prevent abortion legislation from being enacted. Abortion discriminates against a vulnerable group of human beings and does not seek the common goal to preserve human life. Abortion finds its basis in the failure to give legal cognizance to a specific group as human. The strength of the two phenomena namely, abortion and apartheid, is in the annihilation of specific groups in favor of another no different from the victim.

⁸ The Universal Declaration of Human Rights of 1948.

⁹ The International Covenant on Civil and Political Rights and The International Covenant on Economic, Social and Cultural Rights of 1966.

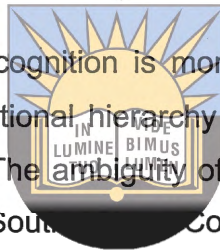
1.3 Purpose of the study

The purpose of the study is primarily to show the contradiction between the purpose of the law and the present function of the law in South Africa, with particular reference to the legality of the act of abortion. Abortion legislation in South Africa stands in contradiction with the purpose of law which is to preserve human life. The study will not go into details of how the law came to entertain abortion as the research is to show the consequences of abortion and mainly its contradiction to the purpose of law.

The study aims to contribute to the advancement of human rights in South Africa. This is an important goal through which the researcher hopes to contribute to an understanding of human rights and how they can be best interpreted for the betterment and preservation of human life. The researcher's view that the first step towards human rights progress in South Africa is to understand the content of human rights and apply it with an impartial mind. This understanding should be used as the basis for structuring policies and legislation within the country.

The basis of the study is to inspire African democracy, particularly the concept of *ubuntu* into the governing system of South Africa. Modern democracy has allowed the infiltration of modern ideas. These ideas are contrary to the ultimate purpose of the law and the premise of *ubuntu* which seeks the greater good of the community and secures the interests of the individual. Modern democracy is related to the idea of human freedom and liberty which often goes unchecked and fails to honor the obligations attached to rights, and in so doing, causes the greater part of the community to suffer. Insisting on the implementation of *ubuntu* will repair the understanding of democracy. Democracy is presently used to exaggerate the application of human rights beyond their functional purpose to preserve human life. The right to privacy, dignity and freedom of choice, for example, find their authority in the substance of life. However, they have also become the basis of ending life today in South Africa.

The purpose of the study is to encourage the use of a hierarchy of rights within the Constitution of 1996. It is the researcher's view that the lack of a distinct hierarchy in the content of the Bill of Rights has directly encouraged a paradigm shift in the purpose of the law. The right to life is the foundation of all other human rights. This is based on the fact that all rights exist because of life and therefore it is essential to preserve it. Without human life there is no need for human rights because the function of human rights is to preserve human life. This acknowledges a hierarchy in the structure of norms where the right to life is safeguarded and entrenched in the constitution as superior to all other rights.



Denying the unborn child legal recognition is more justifiable by the failure to establish an unambiguous constitutional hierarchy of norms acknowledging the right to life above all other rights. The ambiguity of the right to life and its value amongst all other rights within the South African Constitution of 1996 has a direct influence on the crime rate in the country. The assumed and passive worth of the right to life is reflected in the criminal rate of South Africa which resonates with the level at which life is respected.

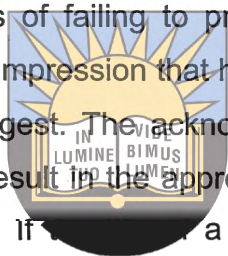
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The establishment of a hierarchy of rights within the Constitution of 1996 would produce policies and legislative measures that would not sacrifice the ultimate goal of law and order to preserve human life. This would sustain the moral fiber of South Africa and lead to a gradual decrease of crime, as respect for the next human life would increase. The purpose of the study is to bring out the unpopular side of the act of abortion. The government's adoption of abortion legislation presents the act of abortion as a quick fix to a problem. However, there are physical and emotional consequences attached to the act of abortion that affect the women who abort for the rest of their lives.

The physical consequences of abortion are often irreversible and affect the reproductive, mental and emotional health of a woman. These consequences which are not discussed with women prior to making the voluntary decision to

abort will be discussed in greater detail later on. There is a sense of loss that grows on women who go through abortion to such an extent that these women live with regret. This is because after the act of abortion the unborn child is lost forever and their consciences constantly question whether their situation which led them to entertain the idea of abortion was worth more than the vulnerable life ended.

The study will communicate the urgency of the need to recognize the importance of the right to life and defend it. This will be done by illustrating the value of human life and the consequences of failing to protect human life objectively. Aborting an unborn child gives the impression that human life is of no value but a matter of the survival of the strongest. The acknowledgment of human life as priceless will, on the other hand, result in the appreciation of civil duty, which is the respect of the life of another. If a criminal who has shown no respect for another life is protected by the law, the right of the nascent child deserves even more legal recognition and protection.



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Legalizing abortion does not alleviate the antenatal mortality rate but increases it. It is alleged that legalizing abortion will alleviate the antenatal mortality rate. However, in legalizing abortion the service is made a readily available commodity; regardless of whether it is procured legally or otherwise, the same means are achieved. A particular group of women are not inclined to go to abortion clinics and public hospitals in search of the legal service. This is because these facilities do not offer as much privacy and certainty that the procedure will be immediately provided for as illegal abortion providers.

It is hoped that the study is to incite a revolutionary understanding of the right to equality and human dignity as pillars of the right to life which is the ultimate purpose of law and order. Equality demands the dignified treatment of human life as a whole. The unborn child has the potential to be an adult human being in the future. There is no other natural means by which an adult human being comes

into existence besides going through the nascent stage. Human life exists in stages and no stage is inferior to the other because the expectation and reality of all these stages is human life. The legal preservation of each stage without discrimination would enhance the attainment of equality. Having said the above, the purpose of the study is to present the thesis that if the ultimate purpose of law and order is to preserve human life, then the unborn child has the right of passage from its mother's womb to exist independently as a member of the society. This would encourage alternatives to abortion that appreciate the ultimate goal of law to preserve life. The possible alternatives are adoption, foster care, children's homes, maintenance and surrogacy.



1.4 Objectives

- To show the contradiction between the purpose of the law and abortion legislation.
- To raise an awareness of the consequences of the enactment of abortion legislation in South Africa.

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1.5 Hypothesis

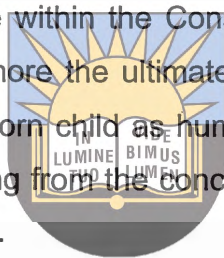
- The legalization of abortion has a negative effect on the moral fiber of the country.
- Legalization of abortion encourages most women to abort pregnancies contrary to their natural inclination.

1.6 Significance of the study

The significance of the study is divided into the theoretical and practical side, each of which will be illustrated in the literature review. The theoretical aspect will be considered first because of the researcher's legal background and interest. Firstly, the research hopes to communicate the significance of a normative

hierarchy within the Constitution of 1996. The preservation of life is the ultimate goal of law and order and is therefore the purpose of legislation. Prioritizing human life by declaring the right to life verbally and in writing above all other rights has benefits.

Presently, the right to life is disregarded by rights that are subsequent to the right to life. Where there is no life there is no need for the right of choice, privacy, equality, dignity, property and so on. Yet today the right to life is brushed aside by other rights that all owe their existence to the right to life. The absence of an unambiguous hierarchical structure within the Constitution of 1996 has made it easier for national legislation to ignore the ultimate purpose of law. The results are seen in the defiance of an unborn child as human by our legal system. The expectation of an adult human being from the conception of a child warrants the legal protection of that unborn child.



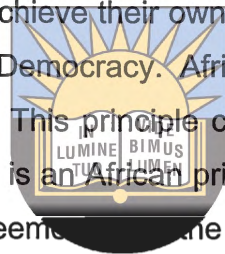
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The significance of the research is to review the function of law and order. This is relevant to the progress of human rights development, interpretation and understanding, particularly in respect of the right to life. The review of the function of the law and order requires the comparison of the intended purpose of law and its current utility. Although the introduction of the UDHR was not the first prologue of law internationally and otherwise, it however marked the beginning of a standard setting process for the promotion and preservation of the right to life. The Constitution of 1996 does not aggressively protect life due to its ambiguity in respect of the value of life because it is only assumed that life is the most valuable right.

Abortion is killing and the law is and ought to be about preserving human life. The significance of the study is to bring out how the act of abortion is unsustainable by the ultimate function of law and order. The connection between abortion and the crime rate is in the valuing of human life or the lack of it. Legalizing the termination of an unborn child makes murdering a grown adult for

financial and other reasons a trivial matter. Disrespect for human life is encouraged by the legalization of abortion. There is no dignity in taking the life of an unborn child; even the methods used can confirm this. Neither is the concept of equality truly implemented impartially.

The unborn child in contrast to the criminal is blameless, yet the law denies the child recognition even as a human being. The protection of the life of a criminal whilst ending that of an innocent unborn child establishes an inconsistent pattern in the legal system. It suggests that the physically and politically strong will manipulate justice as a means to achieve their own ends. The significance of the study is to advocate for African Democracy. African democracy involves the practice of the principle of *ubuntu*. This principle can be translated as humane, considerate and calmly behavior. It is an African principle that transcends culture and race. This principle is in agreement with the ultimate function of law and order to namely preserve human life. It frowns upon the termination of life at any stage because life in the African perspective is sacred and at the centre of all activities on earth.



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The principle of *ubuntu* teaches that the respect and preservation of human life is paramount. It is the researcher's view that the present understanding and interpretation of democracy is a modern experience inherited from a colonial history. Embracing *ubuntu* is a necessary stage that would usher in a refined and experienced African perspective of democracy. Today, the concept of liberty and choice is abused; this is reflected in how the two override the ultimate function of law. The African perspective on liberty is much friendlier to the function of law and order than the modern westernized concept of liberty. From the African perspective, the interests of the community are more important than those of the individual. This perspective secures the moral fiber of communities and in so doing ensures that foundational principles are upheld, particularly the preservation of human life. Prioritizing the needs of the community provides security for individual interests of community members.

The significance of the study is to illustrate how the right to life is overridden by the hunger for economical empowerment. Patrimonial rights and interests are more legally secure than the right to life. This is portrayed in the denial of legal recognition for the unborn child, while patrimonial interests surrounding the unborn child held by persons already born and audible in respect of their rights are legally protected. The legal system in South Africa has essentially given women the power to decide whether their unborn children have the right to life or otherwise. Once the woman decides that the life of her unborn child would compromise financial, social, religious, academic and emotional interests, the law allows her to end the life of the child.



It is not the purpose of the dissertation to debate the convictions of groups for and against abortion, but to present and motivate the ultimate function of law to preserve human life. Abortion is available to end the nascent life within the womb and prevent the birth of the life within the period of nine months. This simple undebatable knowledge illustrates that the life of a human being develops in stages. The first stage, unlike others occurs within the woman's womb where the mutilation of this life is most convenient. The convenience is in the secrecy of the presence of the existing life which can be ended without affecting the mother's personal but secondary rights.

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The significance of the study is to illustrate how abortion is a case of the defenseless life being denied justice at the mercy of those with more control. Ironically, abortion is viewed as a human rights progress when it in fact ends life. In defense of the act of abortion one may say it is necessary to preserve the life of the woman. This may be true but the number of abortions procured for medical or health reasons is an overwhelmingly tiny fraction compared to those carried out for subjective reasons. The practical significance of the study is firstly to highlight the physical and psychological consequences of the act of abortion. Women who choose to abort are not informed of either the physical nor psychological results of the act of abortion. Their decision to have an abortion is

as a result not well informed because they are not prepared for the aftermath physical and psychological effects. It may be argued that medical practitioners and their staff do not have the duty or training to counsel women that terminate their pregnancy. The failure to provide this knowledge however suggests that there is something to be hidden.

It is not enough that women get health and contraceptive advice from nurses and medical practitioners prior to aborting. The media should be used to inform women of the advantages and disadvantages of abortion as is the case with other health and wellness matters. The enactment of abortion legislation was advocated by women's rights and other feminist groups. Legalizing abortion suggests that the government is in support of the idea of women emancipation. However, the emancipation and development of marginalized groups must be subject to the ultimate function of law to preserve human life. The failure to advance emancipation of marginalized and vulnerable groups subject to the ultimate goal of preserving human life opens room for legal subjectivity and finally discriminatory behavior.

In sanctioning abortion the government would have managed to secure the votes of those who regard the termination of unborn children as emancipation of women. The experience of the termination of pregnancy however tells a different tale from the idea that abortion is emancipatory. The government stands to benefit in the legalization of the act of abortion, in that it evades responsibility of the latter as the guardian of abandoned children. If these ideas are true then abortion is a political means to an end where the defenseless are betrayed by the legal system, influenced by political interests. The paradigm shift in respect of the purpose of the law is immense. Life is dispensable for eugenic reasons and it is more frightening that this movement is welcomed as human rights progress.

1.7 Scope of study

In partial fulfillment of an MA in Human Rights Law, the researcher chose to explore the topic of abortion. The researcher was persuaded to go in this direction because of the legal, social and human rights facet revealed by abortion. It is the researcher's view that abortion has not received enough legal attention. This is to say that it has been found legal but not much thought has been given to the legalizing of abortion. It has been concluded to be a step towards human rights development and empowerment of women in particular. However, it is important to explore the effect of legalizing the act of abortion against the theory and basis of law and order. In so doing, the assumed progression in the legalization of abortion can be measured in the consequences of the act of abortion today. If the consequences of legalizing the act of abortion are found to be beneficial, then it is indeed a human rights progress. However, if the legality of abortion violates the core function of law then it is either the function of law or abortion legislation that must be eliminated depending on which is more important.

The idea of human rights encapsulates the wellbeing and growth of human life. The legal system has a duty to determine what human life is. The impartiality and objectivity demanded of a functional legal system should be the only means to ensure that human life is legally protected. Conception results in the expectation of the birth of a human being, as a result the law should protect pregnant women and the contents of their wombs equally. This is not necessarily a pro life anti abortion view. It is rather a legal perspective aspiring towards the objective fulfillment of law to preserve human life.

The issue at hand is that the function of the law is to preserve human life but the legalization of abortion prevents this. It also violates the right to human dignity and equality whilst relying on human rights that are secondary to the right to life. The history of the nation has underlined the ultimate significance of law as the

preservation of human rights for the ultimate protection of human life. The legalization of abortion has resulted in the marginalization of the unborn child such that there is no security for this unborn life. The act of abortion terminates the unborn life and prevents the experience of such a life's inherent rights, yet the function of the law is to preserve and promote life. It is from this context that the researcher decided to explore abortion from a legal perspective. The popularity of the act of abortion amongst peers made the study more worthwhile because it stands to provide a preview of the future.

It is beyond debate that the ultimate goal of law is to preserve human life. The contradiction of this legal goal and abortion legislation inclined the researcher towards the study. The undeniable ambiguity of the Constitution of 1996 towards the status and protection of the right to life made the research more compelling and worthwhile.



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1.8 Overview of the chapters *Together in Excellence*

Chapter One lays down the background to the research and states the problem; it brings out the objectives and hypothesis of the study; and outlines the significance and context of the research.

Chapter Two examines national and international legislation on the right to life and abortion. Print media, internet articles, books, unpublished thesis and journals on abortion and the right to life are also covered.

Chapter Three is about the research methodology and research design of the study.

Chapter Four is the process of data collection and the analysis of the collected data.

Chapter Five contains the recommendations and conclusions of the study.

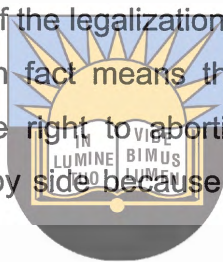


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CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

The legalization of abortion permits the termination of life in its primary stage. Human rights on the other hand seek to preserve human life in all its stages. The idea of human rights revolves around the right to life, and this includes the right to privacy, choice and freedom of expression. It is difficult to reconcile how the right to life has been superseded by secondary rights to choice, privacy and freedom of expression as a result of the legalization of abortion. It implies that the right to life is subjective, which in fact means that there is no human rights development in South Africa. The right to abortion and the right to life are opposites; they cannot exist side by side because the protection of the latter is security against the former.



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2.2 International Declarations and legislation

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The preamble of the Charter of the United Nations¹⁰ lays down the fundamental principles of international law. It expresses the common relationship between nations globally and expresses three basic premises. These are the value of life, equality and human dignity. The preamble¹¹ introduces the document as a reaction to the urgency of human rights protection. Amongst the determinations of the members of the United Nations spelt out in the preamble are;

“to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and

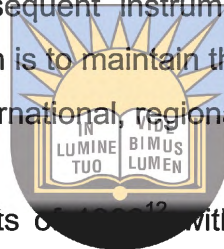
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To promote social progress and better standards of life in larger freedom,”

¹⁰ Op cit note 7 above.

¹¹ Ibid.

The United Nations was established to maintain peace and advance human rights. This was necessary because the disregard of human rights had resulted in cruel acts against human lives. It was an endorsement of the value of human rights, particularly the worth of human life, equality and dignity. Ultimately, the function of law is to preserve human life. The UDHR represents a universal expression of human rights whose ultimate goal is to preserve and better human life. The thirty Articles of the UDHR are reiterated in international treaties, regional and national legislation. This is because the UDHR has achieved the status of customary law in respect of which a global standard of behavior is entrenched and reflected in subsequent instruments. The reiteration of this document by subsequent legislation is to maintain the goal to preserve and better human life as a vital function of international, regional and national legal order.



The UDHR and the two Covenants¹² with the two Optional Protocols form the International Bill of Rights. The UDHR was necessary to identify rights that are inherent in human beings and to justify the provisions of the Charter of the United Nations¹³. The impartial and objective fulfillment of the rights guaranteed within the UDHR is however the greatest memory that can be given to the adoption of the document. Article 1 of the UDHR states that human beings are born free, equal and deserving of dignity. Objectively, this liberty is inherent, and is as a result attached to all stages of human development including gestation. This acknowledges the concept of equality and dignified treatment towards the preservation of human life.

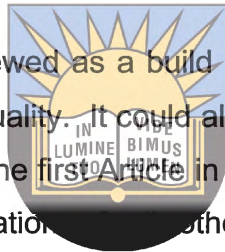
Equality and dignity cannot be realized if the ultimate function of law to preserve human life is disregarded. Article 1 of the UDHR proceeds to require that humans must behave in the spirit of brotherhood. Essentially, this is a reiteration of the concepts of equality and dignified treatment of any person. The unborn child is referred to as a child because it is a human being at a vulnerable developmental

¹² Op cit note 9 above.

¹³ Op cit note 11 above.

stage. It goes without saying that if there is any objective application of the right to life, equality and dignity, the unborn child must also be legally protected.

Article 2 of the UDHR provides that all are inherently worthy of the rights that the document guarantees. The entitlement of these rights is without bias, there can be no discrimination based on "birth or other status." The unborn child falls under the term "everyone", yet the status of the unborn child has been discriminated against. The idea that the birth of an individual should not be denied access to life, equality and dignity should be applicable in the case of the unborn child.



Article 3 of the UDHR could be viewed as a build up to what has already been stated about human dignity and equality. It could also be critiqued as a provision that should have been codified as the first Article in the UDHR. This is because it lays the background and justification for other rights. The value of life guarantees the security of the person and the liberty of the person. The legalization of abortion does not value human life because it encourages its arbitrary and subjective termination. In defense of abortion is the right to liberty, choice, dignity, privacy and sovereignty of the woman's body. This means that the law has given greater power to liberty and made it larger than life. The problem is that uncontrolled liberty restricts the application of foundational values.

Liberty and the right to choice accommodate the differences in the character of human beings and allow self expression. Freedom of choice has consequences. These consequences are determined by the appreciation of the fact that to every right, liberty and choice is attached a duty. In choosing to be sexually active one must be informed of the possibilities and the consequences surrounding that behavior. In choosing not to raise a biological child whose conception occurred under criminal circumstances such as rape and incest one places greater value to circumstance than life.

There is no dignity in the process of abortion for either of the parties involved; the medical practitioner is aware that a life is ended and prevented from growing while the woman remains with a sense of loss. The act of abortion frustrates relationships and labels the woman with societal scorn for murdering her unborn child. Abortion is not a private act, because one human life does not exist in isolation and the termination of one life threatens the security of another life. The threat presented by the arbitrary termination of one life makes legal protection necessary to enforce the equal and dignified treatment of all human life. Subjectivity has penetrated the legal system and the acceptance of abortion by first world countries has made it more acceptable in South Africa. One may conclude that the political face for subjectivity is democracy.



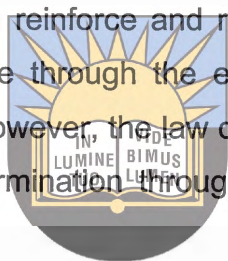
The influence of subjectivity over democracy has resulted in the interpretation that democracy is tolerant with individual interests and it will protect them beyond human life and the interests of the community. The final result is likely to be a nation where fundamental principles are unprotected in favor of individual interests. Fixating on individual interests and rights subsequent to the right to life such as the right to privacy, choice and freedom presents grave problems. Fundamental rights such as the right to life, equality and dignity end up unfulfilled and, as a result, the entire security of the nation or humanity is imperiled. It goes without saying that individual rights need to be heard and protected. However, these individual rights must remain subject to the right to life, equality and human dignity.

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The failure to limit individual interests through the objective enforcement of the basic principles mocks the existence of individual rights and violates the primary basis of their existence. The right to life is greater than the right to privacy, choice, self expression and liberty. The concept of equality and human dignity logically requires the moderation of choice, self expression and privacy because the overindulgence of these rights renders the objective preservation of life impossible. This is the factual situation that exists today; the development of

human rights for the preservation of human life is engrossed in individual interests. The fruits are the legalization of the termination of life known as abortion.

Article 25 of the UDHR states that all have the right to a basic standard of living. This standard includes physical wellbeing and the security of such a person's life. The unborn child is vulnerable because the growth of that life is dependent on the woman. In the same way, the fulfillment of the rights of the unborn child is also dependant on the parents and the government. The duty of the law as a life preserver demands that legislation reinforce and regulate the protection of the unborn child. This should be done through the endorsement of parental and governmental duty in legislation. However, the law does not legally recognize the unborn life and encourages its termination through the enactment of abortion legislation.



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The same Article further states that childhood and motherhood deserve individual, 'special' attention. It may be true that neither motherhood nor childhood is completely protected but there is no doubt that childhood protection is deliberately curtailed. The Article requires that all children, including those born outside of marriage, be treated equally and with dignity. If this requirement holds water, children born and unborn deserve equal and dignified legal recognition, because ultimately they are the offspring of humans. Gestation and childhood are stages through which all human life grows and are therefore part of the cycle of human life deserving legal protection.

Article 29 of the UDHR states that all have a duty to their communities in respect of which their characters can find expansion. The main duty to the community is to preserve and respect human life. Honoring this duty finds expression in the dignified and equal treatment of all human life at all stages. In enjoying individual rights the duty to honor the next life should not be overlooked. The concept of *ubuntu* is identifiable within the same Article which demands an awareness of the

next person's rights before one's own to avoid subjectivity and selfish violation of other rights. The idea of African democracy and embracing *ubuntu* would be internationally acceptable, primarily because it would preserve life with equality and dignity. However, its success requires the objective implementation of the right to life. Article 29(2) of the UDHR further provides:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.”

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The limitation of human rights for one ought to be the security of the rights of another which essentially suggests equality and dignified treatment in the implementation of rights. The right to privacy and choice which have been used to support abortion contradict the substance of Article 29. Limitation of all rights should be towards the preservation of human life because without life there is no need for all other rights as they flow from the right to life. Morality, welfare and democracy within a nation revolve around the preservation of human life. This is why subjectivity is dangerous in the implementation of human rights. It leads to partiality in the fulfillment of foundational rights, namely life, equality and dignity. Justice is determined by constant objectivity in the realization of the right to life and human rights. The conclusion of Article 29 is a duty to respect all rights flowing from the right to life.

The history of the formulation of the United Nations was against the atrocities of the two World Wars. However, the countries that sat down to establish the United Nations were involved in colonialism and basically set to protect themselves and

their interests against each other. The establishment of the United Nations has become widely accepted as necessary to prevent all forms of human suffering including colonialism, apartheid and genocide. The ultimate reason for prohibiting this kind of behavior at an international level is to preserve human life. It is therefore hypocrisy to prohibit annihilation and mass destruction of human life whilst condoning the termination of individuals for subjective reasons. The result is likely to be the mass destruction of future generations whose life span is already threatened by incurable diseases such as poverty, and HIV and AIDS.

It is often said that one's right ends where the right of another begins. The enactment of abortion legislation is destructive of the rights and freedom in the UDHR because the ultimate function of the law to preserve human life is infringed. The African Charter on the Rights and Welfare of the Child¹⁴ [hereafter referred to as the African Charter on the Child] its preamble recognizes:



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“the paramountcy of human rights and the African Charter on Human and Peoples’ Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;” and that,

“the child, due to the needs of his physical and mental development, requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security.”

South Africa gained its independence from apartheid in 1994 at a time when the idea of human rights had already been globally introduced and so it influenced

¹⁴ The African Charter on the Rights and Welfare of the Child. Adopted in July 1990 and entered into force, 29 November 1999. CAB/LEG/24.9/49 (1990).

the freedom of South African people. This fact created a reasonable expectation that South Africa would be more sensitized to the foundations of human rights and the sanctity of human life. The international standard set by the UDHR had already been reiterated in subsequent international and regional documents, including the constitutions of many African countries. This created an expectation that the new South African government would enact legislation that embodied the objective protection of human rights to preserve all human life. The experience of the segregating effect of apartheid raised the anticipation for legislation that would advocate for a dignified and equal treatment of all in an effort to preserve human life.



The practice of abortion has probably existed longer than we can tell. It is the researcher's view that colonialism, apartheid and now the legalization of abortion have increased the tolerance and practice of abortion. The concept of *ubuntu* is an African understanding of acting humanely and it may be acknowledged as an African perspective of human rights. The concept reveres human life whilst emphasizing the importance of treating each life with dignity. *Ubuntu* is reflected in various cultures and, as a result, unifies the continent of Africa. The ACHPR points out that human rights are a result of the inherent characteristics of human beings. However, human beings have basic needs but they remain diverse.

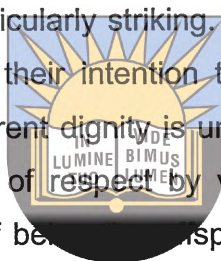
Abortion legislation condones the termination of a life and it is the result of tolerating subjectivity. The consequence of subjectivity is the violation of foundational rights, particularly the right to life which justifies the existence of all other rights. The preamble of the ACHPR brings out the importance of the security of human rights. It is a reality that the failure to protect human rights would be a failure to provide security for human life. It is certain that violation of human rights renders human beings vulnerable. The lack of objectivity in defending human dignity, life and equality results in discrimination.

Article 3 of the ACHPR specifically guarantees the equality of all before the law and further calls for the equal legal protection of all. The ACHPR uses the phrase “every individual” in guaranteeing legal protection that is equivalent for all. The unborn child is an individual growing within the womb and abortion terminates the individual who is unborn. This process does not honor the unborn child as an offspring of a human being and as a result endowed with the right to life and legal protection. The legalization of abortion is a consequence of the failure to implement foundational principles.

Articles 4-5 of the ACHPR are particularly striking. Their clarity in relation to the value of life is unambiguous and their intention to reinforce the protection of human life and respect for its inherent dignity is undeniable. Human beings are declared inviolable and deserving of respect by virtue of their humanity. The unborn child is human by virtue of being an offspring of human beings and is therefore inviolable and deserving of respect. Abortion is therefore a cruel act that is degrading of human life and compromises the security of human life in all its stages. Article 17(3) states that the endorsement and defense of traditional and moral values recognized in a community are the responsibility of the state. The principle of *ubuntu* calls for the preservation of human life as does the right to life and human dignity.

The ACHPR declares that the wellbeing of the family is the responsibility of the state. It further requires the state to eliminate all forms of discrimination against women and children. This is particularly true because the two groups are prone to being victims of family abuse. The enactment of abortion legislation adds to the already existent forms of abuse suffered by children. The state has failed in its obligation to protect the family by enacting abortion legislation that distorts family relations.

The duty to preserve human life raises the expectation that the state will devise measures that actually sustain human life and not encourage its termination. The



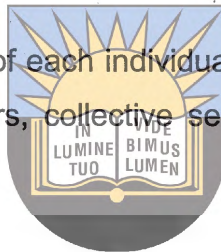
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enactment of abortion legislation is contrary to the preservation of human life. The procedure is used at least in one in twenty cases for the preservation of human life and stands out as a means of avoiding responsibility. The ACHPR emphasizes that every right attaches an equivalent legal duty. Articles 27 - 29 point out that:

“Article 27

1. Everyone individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.



Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family”

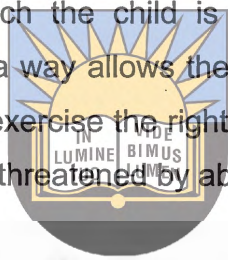
The duties attached to rights are a reflection of the moral fiber of the society. Morals have found expression through legislation since time immemorial. The fulfillment of the right to life, equality and dignified treatment for all would reflect an understanding that choice, liberty and expression are restrained. However, this is not reflected morally and in terms of legislation. In Article 1 of the African Charter on the Child, member states pledge to implement legislation necessary to give effect to the promotion and preservation of life and of the rights of the African child. This was to be done in line with the principles set in their national constitutions and the African Charter on the Child.

Article 2 of the African Charter on the Child defines a child as all human beings below the age of eighteen years. The unborn child is referred to as a child because it is the offspring of a human and falls under the age of eighteen years. Article 3 of the African Charter on the Child requires that all children enjoy the rights guaranteed by the latter regardless of reasons such as those advanced in defense of abortion. Article 4 requires the judiciary and other authority to consider in all decisions affecting children the best interests of the child as the determinant. The enactment of abortion legislation does not consider the best interests of the child.

The contents of Article 5 are alarming. This is mainly because the situation on the ground suggests that they do not exist, as is the case with other legislation that has been cited in favor of the preservation of human life. Children are said to have an innate right to life that deserves protection. The unborn child in South Africa is not a person because it does not have any legal recognition. The only exception is usually in cases of patrimonial interest where the parents or guardians attach legal interest in the welfare of the unborn child. Life is reflected as important for its financial status and potential, and beyond this it has no value. The legality of abortion undermines the function of law to preserve and promote human life and threatens the security of the life of the fully grown human being. It reflects a generation that has no appreciation for the right to life, equality and dignified treatment. This explains the occurrence of xenophobia, culpable homicide and murder of which abortion is another term.

Article 6 guarantees children the right to a name and nationality. These rights cannot find expression when the arbitrary termination of the unborn child is pronounced as legal and the unborn child denied legal recognition. If the ultimate function of preserving human life is honored, the subsequent right to a name and nationality would be without doubt secure even for those who are not yet conceived. The question is how different are the rights to a name, nationality, privacy and choice from each other when they all ensue from the right to life.

Article 7 guarantees the right to freedom of expression for every child below the age of eighteen provided they are capable of communicating their views. Freedom of expression for the unborn child would be allowing the unborn child to grow within the womb undisturbed and unthreatened. This idea comes not from being anti abortionist, but it is inspired by the significance of life in respect of which the law exists to protect and promote. The function of the law will only be meaningful when it is given objective respect. In the same manner, if there is to be any value in the concept of equality and dignity for all, the implementation of these principles must be objective. The conception of the unborn child is a natural process in respect of which the child is always never at fault. The continued gestation of the child in a way allows the child freedom of expression to grow within the womb and later exercise the right of passage. These rights for the unborn child are prevented and threatened by abortion.



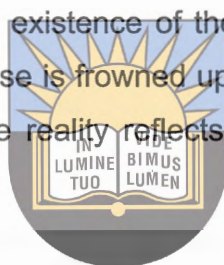
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Article 10 protects the privacy of children by demanding that they are not randomly violated in respect of their privacy. Children's right to privacy is subject to their parents and guardians ability to protect them. Abortion legislation empowers parents to violate as opposed to protecting children's rights. The question is how the rest of human life can be legally protected when the initial stage of life is legally dispensable.

Article 13 guarantees the rights of handicapped children. The latter provision demands that handicapped children be treated with dignity and given an opportunity to be self reliant. Women who discover that their children are physically disabled opt for abortion. The disabled unborn life is discarded for deformity in preference of a healthier child. Abortion on such grounds results in stigma being attached to the disabled members of our society. The study hopes to show how the compromise that has been made in the implementation of rights steals from the progress of human rights. Compromise weakens the significance of the right to life, dignity and equality for all by creating exceptions to violating these rights. It is important that society as a whole or those with relevant

authority arrive at a decision where the worth of human life is objectively defended.

Article 14 is a pledge to reduce infant and child mortality, while Article 16 guarantees the protection of the child against torture and abuse of any kind. Abortion would not be necessary if ending and preventing life from growing was not the goal. There is no protection against the killing of the unborn infant as guaranteed in Article 14 because terminating this life is actually legal. Torture and abuse of the unborn child are legally condoned as the unborn child is not given legal recognition despite the existence of the fundamental right to life for all. The mutilation of a human corpse is frowned upon legally yet the termination of a growing life is condoned. The reality reflects inconsistency in values and requires urgent redress.



Article 18 calls upon state parties to protect the family unit and ensure equality in the responsibilities existing within this unit. The nascent child belongs to a family not by birth but upon its immediate existence. The unborn child is not a product of but the offspring of the parents. This fact begs for the legal recognition of an unborn child because they are human although unfortunately at a vulnerable stage of development. Women abort their unborn children because they are afraid or unwilling to have children out of wedlock. Others fear that their financial situation would not be able to cater for themselves and the unborn infant and so they opt to terminate the life. The question is how can the right to life exist in harmony with legislation to end life.

Parental protection of children against destructive social practices is guaranteed by the African Charter on the Child. However, the unborn child does not enjoy the right to parental care and protection, especially where there is no patrimonial advantage for the parent. The unborn child does not have protection against harmful tendencies of the society reflected in the law. Abortion which has been adopted into the South African legal framework will soon become a culture, a

way of living in respect of which human life is devalued. The African Charter on the Child recognizes the process of adoption. The process is to be done in the best interests of the child. It is in the best interest not only of the child but of the human race to promote adoption as opposed to abortion. The value of human life is preserved by the process of adoption but abortion sears the conscience of the nation towards the duty to treat all life equally and with dignity.

The United Nations Convention on the Rights of the Child¹⁵ [hereafter referred to as the CRC] is an international treaty that recognizes the rights of children defined as persons who are below the age of eighteen. The protection of the unborn child is implied by this provision. Van Niewenhove¹⁶ states that countries proposed a text asserting the right to life from the moment of conception. Other countries rejected the proposal arguing that abortion for medical reasons should not be banned by the Convention and should not contain many details. Nevertheless, the word "person" that featured in the initial text was replaced by the words "human being". The phrase "inherent life" was used apparently to appease countries with a pro political argument. The ambiguity surrounding the rights of the unborn child is deliberate. It began from an international level and infiltrated regional and national legal systems.

Cases of ectopic pregnancies and other medical complications have been a convenient cover for political support towards the termination of human life. The number of abortions procured for medical reasons is in reality lower than the number of abortions procured for subjective reasons. The phrase "human being" does not alter the fact that the unborn child is the actual offspring of human beings. It actually raises a question against legalizing abortion as it discriminates against the unborn human. The standards provided for within the CRC were drawn from the contributions of various experts such as social workers,

¹⁵ The Convention on the Rights of the Child. Adopted by the General Assembly Resolution 44/25 of 20 November 1989.

¹⁶ J. Van Niewenhove. The unborn child and the United Nations Convention on the Child: Monitoring Children's Rights. JHHM Dorscheidt, 1999.

educator's, human activists, lawyers, governments and nongovernmental organizations. The goal was to protect and promote life, particularly that of children.

Abortion is readily accessible to minor children in South Africa and they do not need parental consent to go through the procedure. The act of abortion will be carried in the subconscious of these children as they grow and it teaches them that human life is readily dispensable to suit personal and individual needs. Abortion gives the minor child a false sense of security and maturity to make decisions whose consequences they cannot comprehend apart from threatening their reproductive capacity. It is likely that the earlier a woman is exposed to the process of abortion, the more abortion procedures she is likely to undergo as opposed to taking the responsibility of using contraceptives.

Article 3 requires that suitable legislative and administrative measures be implemented to secure parental duties. It further calls for the establishment of institutions in the best interests of the child. Article 6 requires all state parties to recognize every child as possessing an inherent right to life. State parties are further required to ensure maximum survival and development of the child. The legality of abortion is contrary to the ideal of maximum survival and development of the child. There can be no harmony between abortion and the preservation of life yet the two rights exist side by side in our legal framework.

Article 24 of the CRC calls to state parties to reduce child mortality. Abortion is gaining popularity as a last minute contraceptive and cannot as a result effectively reduce child mortality. The CRC gives a lot of responsibility to member states to better and promote the welfare of children. The legalization of abortion, however, threatens the life of the unborn child and sears moral value and conscience. The preamble of The Vienna Declaration of 1993¹⁷ portrays the

¹⁷ The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, Vienna 1993.

significance of human life. The irony is that the act of abortion conceals the significance of human life. It must be realized that fundamental rights deserve objective promotion and implementation to ensure their security and influence. Abortion stands to redefine the values of the nation and one can only imagine the destructive effect of humanity when the value of life is replaced by subjective rights. The Vienna Declaration of 1993¹⁸ shows the relationship and the value of human rights, it declares that;

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.”



According to the Vienna Declaration of 1993¹⁹ human rights, democracy and the honor for fundamental freedom are reinforcing principles. They are justified by the value of human life. The value of human life and equality demand that all humans be treated with dignity and respect, dignified treatment is contrary to the termination of human life. The Vienna Declaration of 1993²⁰ calls for active consideration and promotion of minority group rights. The responsibility of state parties toward minority groups requires measures to be established in respect of which the rights of minority groups can be realized.

Unborn children form part of a poignant minority group. They are particularly an easy target because they are defenseless and rely solely on the integrity of the law and the people within the society. The law condones the termination of a defenseless life over the right of another life to choice, privacy and sovereignty of the body. The question is how it has become legally acceptable to measure human rights against each other. Human Rights are in fact equal, inalienable and reinforce each other towards the preservation of human life.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

The Charter of the Family presented by the Holy See²¹ provides a religious view of the Catholic Church on the position of abortion. Article 4 states:

“Human life must be preserved and protected absolutely from the moment of conception. Abortion is direct violation of the fundamental right to life of the human being.”

2.3 National declarations and legislation.

The Freedom Charter, 1955 is a remarkable document adopted by the African National Congress [hereafter referred to as the ANC] conveying the ANC principles. The Freedom Charter, 1955 reflected the objectives of the ANC in response to apartheid and promised a future of democratic rule. According to the Freedom Charter, 1955 South Africa is a country to live within it. If color and race may not prejudice ones right to be legally recognized as South African, how can being unborn face legal exclusion and denial of a birthright. Under apartheid rule, birthright was stolen by inequality; today the same inequality validates the termination of a vulnerable human life.

The Freedom Charter, 1955 expresses the aspiration towards democratic rule and the belief that democratic rule is the best means to secure birthrights. Apartheid made the lives of the black people and their children uncertain. They were born into minority and their lives were not valued nor treated with dignity. Today abortion legislation makes the worth of human life uncertain. Its enactment suggests that ending a defenseless life is acceptable where the perpetrator protects subjective interests of choice, privacy and the sovereignty of their body. It is difficult to imagine that the drafters of the Freedom Charter, 1955 would have shared the same view in respect to legalizing abortion. The preservation of human life, equality and dignity, motivated the urgency to draft the Freedom

²¹ The Charter of the Rights of the Family presented by the Holy See to Persons, Institutions and Authorities concerned with the mission of the Family in Today's World, 1983.

Charter, 1955. Interestingly, the same political party legalized abortion and dubbed it a progressive step for human rights.

The ultimate goal of law is to ensure that all are equal and deserve dignified treatment, irrespective of color. However, race and color will not completely cease to cause strife within the country particularly where age, human development and vulnerability are causes of discrimination. The Freedom Charter, 1955 calls upon South Africa to share the wealth of the nation amongst its people. Today women abort because of financial circumstances, amongst other reasons. Sharing the wealth of the nation means providing for those who are yet unable to support themselves and equipping those in a position to provide for themselves to do so. It is the government's responsibility to create measures where the financial and social needs of children are taken care of. This can be achieved in the establishment of foster care and adoption either by members of the public or by the government itself.



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The preamble of the Constitution of 1996 declares that the people of South Africa are aware of the prejudices of the past. The awareness of past injustice also suggests that South Africa understands the duty toward the preservation of human life. The preamble expresses a level of respect for those who gave their lives during the struggle against apartheid. It is for the security of the living and the future generations that lives were given in the struggle. Dr. O Mireku²² comments on how the Constitution of 1996 is a "...value – laden document..." Ironically, the values entrenched in the Constitution of 1996 have been used to support the termination of the unborn child. The main problem is that the values within the Constitution of 1996 have not been placed in a hieratical order affirming the right to life as primary.

The unborn South African child is part of future generations for whom the struggle against apartheid was fought. The belief that South Africa belongs to all

²² Dr O Mireku. The underlying values and spirit of the South African Constitution, page 235.

that live in it guarantees the unborn life a birthright and natural access to other rights such as dignity and equality. The unborn child grows within the womb because it is alive and is the offspring of a human being developing within the womb as a human being itself. Terminating the unborn life is denying that life its heritage, birthright, equal and dignified treatment.

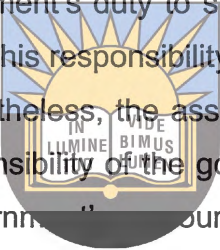
The preamble of the Constitution of 1996 contains a pledge to better the equality of life and release the latent ability of all. This pledge is not honored in the termination of life because the arbitrary termination of human life is reminiscent of apartheid rule. The founding principles of South Africa are human dignity, the advancement of human rights and equality. Dr O Mireku²³ poses a question on the nature, basis and spirit of the Constitution of 1996. It is the researcher's opinion that the objective protection and promotion of human life are the fundamental significance of the Constitution of 1996. The right to equality is entrenched in the Bill of Rights before the right to human dignity and the right to life and security of the person. This was probably a reaction to apartheid which segregated and discriminated the black and colored majority. However, the problem is that the basis to preserve human life is not unambiguously reflected within the Constitution of 1996.

The equality of human beings is provided for more extensively within the Constitution of 1996 than the right to life itself. The presence of the right to equality, human dignity, life and security of the person in their respective order should provide security and legal protection for the unborn life. However, the reality tells a different story as the unborn child lacks legal protection. The constitutional right to life, security of the person, privacy and the right to an opinion and expression are used in defense of women who terminate their pregnancy to suit personal circumstances.

²³ Ibid.

The right to life and security of the person give rise to the right to choice, privacy and expression and not vice versa. The rights that flow from life are naturally equivalent in value and ought to be equivalent in application because this is how impartial decisions can be reached and equality maintained for the preservation of human life. Section 28 of the Constitution of 1996 guarantees the rights of the child. The section grants a child's right to parental care and alternative care when parental interest is rendered impossible.

When a woman decides that she is unable to take responsibility for the well being of her unborn child it is the government's duty to step in as an alternative. The popularity of abortion suggests that this responsibility would be very taxing on the resources of the government. Nonetheless, the assistance of non governmental organizations can reduce the responsibility of the government. The difficulty that this duty may present for government resources must not eclipse the preservation of human life.

The logo of the University of Fort Hare, featuring a sun with rays, a book, and the motto 'IN LUMINE VERE BIVMUS'.

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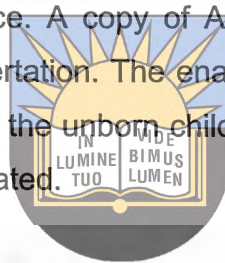
The preference given to women over the unborn life fails to appreciate all human rights equally. The enactment of abortion legislation in South Africa restricts the decision making of the judiciary to support private common law rights above the fundamental right to life. In the case of *Superintendent Groote*²⁴ , Seligson AJ expressed disapproval of the requirement that the unborn must be born alive before constitutional rights could be attached to them. His reasoning was based on the fact that the reckless behavior of the pregnant woman could threaten the existence of the unborn child²⁵. Clearly he understood that human rights exist to protect all human life equally. Judge McCreaths academic decision in the *Van Heerdan*²⁶ case on the other hand, lost site of the fact that all private rights are a consequence of the right to life.

²⁴ *G v Superintendent Groote Schuur Hospital* 1993 (2) SA 255 (C) 259.

²⁵ *Ibid* 23.

²⁶ *Van Heerdan and Another v Joubert NO and Others* 1994(4) SA 793 AD, SC.

The unborn child's basic nutritional rights are subject to the mother's decision to continue with the pregnancy. There is no protection against "maltreatment, neglect, abuse or degradation" of the unborn life. The consequence is increased inequality and undignified treatment that is expressed through assault, rape, homicide, murder and xenophobia. Act 38 of 2004 was accented to by the President on the 11 February 2005. This Act amended the CTOP Act of 1996; the former was enacted mainly to empower members of the Executive Council to endorse facilities where abortion could be practiced. Act 38 of 2004 also made it unnecessary for twenty four hour maternity service providers to obtain permission for providing the service. A copy of Act 38 of 2004 is provided in Appendix D at the end of the dissertation. The enactment of abortion legislation has initiated neglect of the rights of the unborn child who is not only the victim of abortion legislation but most maltreated.



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Barbra Lyons²⁷ discusses how a majority of people defend discrimination by abortion legislation. They argue that the unborn child, particularly one suspected of deformity, is "spared" of anticipated misery being better off dead and judged not to be worth living. Lyons²⁸ believes that these attitudes reflect cultural ideologies that debase the physically handicapped within the society. Apparently, society finds comfort in eliminating persons with physical disability to avoid assisting such people. The concept of equality, human dignity and security of the human person are in reality swept under the carpet. Judgment is pronounced on the handicapped as worthless, undeserving of life and burdensome to those without disability.

²⁷Barbara Lyons. *Abortion Information: Discrimination Against those with Disabilities*, CPLC, State Affiliate of National Right to Life Committee, 2009.

²⁸ *Ibid.*

Clearly, there is no respect for humanity but rather a ridiculous fixation on appearance hidden by the false humility of providing options for people to have “perfect children”. Jane Gatt²⁹ states the following:

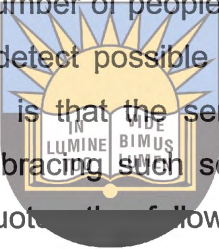
“Abortion is illegal because it springs from our most selfish and least enabling emotions. It is immoral because it cheapens our respect and reverence for life and thereby coarsens our society and weakens our families.”

The rights of women are glorified and portrayed superior to all others regardless of the fact that human rights remain equal for all sexes. It is natural for women to have expectations of bearing healthy children. However, uncertainty in life should teach us all that expectations and desires are not always granted. When a child to whom no material value can be attached is conceived in traumatic circumstances, justice must prevail and remain balanced. This can only happen where the aggressor is penalised for the crime and the unborn life preserved, as the value of life supersedes the traumatic events surrounding its conception.

A discriminatory opinion of disabled unborn children has a drastic bearing on disabled people. The hostility of abortion legislation on disabled persons has a negative effect on the present and future generations. The lesson to be learnt from abortion legislation is that the physically handicapped are less human than the physically enabled because they can be eliminated before birth. The law which is normally the will of society has contributed to the discrimination of the handicapped. Inevitably, constitutional human rights of the disabled are likely to be mocked because of this illegal contribution. The social outlook toward the physically challenged threatens their very existence and livelihood by creating social bias against them.

²⁹ Jane Gatt. “Why I am unimpressed with the argument that a foetus is only a potential human being. Asymmetrical Information, February 4, 2006.

Ann Furedi³⁰ introduces the present arguments of disabled people in Britain. The argument is primarily based on the legal provisions that allow for abortion to be procured up to twenty four weeks only. In cases where an abnormality has been detected on the foetus the right to abort exists without a time limit. She argues that it reinforces discrimination on disabled people in a manner that aggressively threatens the security of their lives and human dignity. Technological advancement allows parents of unborn children to detect physical disabilities in their children during early pregnancy. This technology is available in South Africa and has been welcomed by many as an agreeable progression in science. However, in Britain there exists a number of people who have protested against the use of antenatal screening to detect possible disabilities of the child. The resentment for antenatal screening is that the services elevate discrimination against disabled people and in embracing such services, disabled people are abused by the society Furedi³¹ quotes the following comment by a pro life activist:

The logo of the University of Fort Hare, featuring a shield with a sunburst at the top, a book in the center, and the motto 'IN LUMINE VERITATIS' on a banner below. The shield is flanked by two figures.

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“... to destroy a child because he or she is not perfect is especially unjust and elitist. Of course it is not always easy to cope, but eugenic abortion recreates and legitimizes primitive phobias against mental and physical illness just when society seems to be making real progress in outgrowing them”

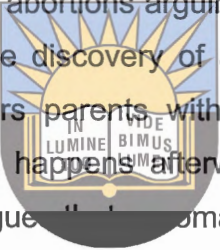
The termination of a life can never be a humanitarian act; neither should it be encouraged nor enforced by national and international legislation. However, because democracy in the twenty first century grants limitless rights, abortion is unlikely to be eradicated internationally and especially in South Africa. The law may have the responsibility to provide objective, sober grounds for abortion, but the reality is very far from this logic. Abortion legislation in South Africa and internationally indicates the obsession for perfection and elitist attitudes adopted

³⁰ Ann Furedi. Abortion and Disability, Pro Choice Forum 2008, (Powered by Live Journal) page 1- 4.

³¹ Ibid.

by the world at large. People have become fixated on image and the status attached to it. Apparently, the disabled are not 'appropriate' people and they therefore do not fit within families or societies. The legislature further frustrates their position through the enactment of abortion legislation.

The term 'eugenic' is fairly new and has many faces. However, it is certain that it seeks to justify the procuring of an abortion in particular circumstances such as emotional, financial, political and physical circumstances. Clearly, a degenerate hedonistic culture is being developed in relation to the rights of the child and abortion. Furedi³² defends eugenic abortions arguing that women are not forced to abort their pregnancies upon the discovery of a deformity in their children. Antenatal screening only empowers parents with knowledge of the physical disposition of their child and what happens afterwards is not dictated by the antenatal screening. She further argues "A woman's decision to abort is not a social or political statement about abnormality or about persons with disability.

The logo of the University of Fort Hare, featuring a shield with a sunburst at the top, a book in the center, and the motto 'LUMINE BIMS' below it. The shield is surrounded by a circular border with the text 'UNIVERSITY OF FORT HARE' and 'TOGETHER IN EXCELLENCE'.

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The woman is said to be making a personal statement in aborting her unborn child that she would not be able to cope with the responsibilities of having a disabled infant for social, emotional or financial reason. The notion presents a preference to the rights of the mother, turning a deaf ear to the rights of the vulnerable, defenceless unborn child. More importantly, it shows a rebellion against the worth and preservation of human life. Dr. L. Shettles³³ is one of the few medical practitioners who provide scientific evidence on the beginning of life at conception. He opposes abortion stating, this:

“ .. I accept what is biologically manifested that human life commences at the time of conception and because I believe it's wrong to take innocent human life under any circumstances. My position is scientific, pragmatic and humanitarian.”

³² Ibid.

³³ Dr L. Shettles and D. Rorvik. *Rites of Life: The Scientific Evidence of Life Before Birth* [Grand Rapids, MI: Zondervan Pub. 1983] 133.

Science is technical and substantial; it cannot be debated or explained away because it remains attested truth. Science is an undeniable fact because it can be proven and experienced by everyone with the consequence of the same results. Humanitarianism on the other hand, can be supported by science. It is compassionate behaviour, where the needs of the next person take priority and self absorption is denied. Jane Gatt³⁴ states how embryos have developed brain waves around seven to nine weeks of conception. This is a stage at which many people think abortion is most appropriate. She states the following:

“A living thing is anything that has an internal blueprint of itself [i.e. DNA] an intrinsic capacity to build itself based upon that blueprint. Sperm and unfertilised eggs are non human, they have only half a set of DNA, but a fertilised egg is alive. It has the full set of DNA and the intrinsic ability to build itself from the blueprint of its DNA. A fertilised egg relies on the mother for nourishment but does not need the mother for either genetic material or the building process. Those are internal to the foetus”³⁵

Life exists the moment copulation contributes twenty three chromosomes which add up to forty six and make up the DNA of a developing, living human being within the womb. Abortion would not be necessary during the first trimester or during any other stage of gestation if the dividing cells within the womb were not alive and would not result in the expectation of the birth of a human being. This means that conception is the stage at which human life begins. It may be argued religiously that human life begins prior to conception, but for legal purposes, the scientific evidence is overwhelmingly clear. The facts are simple, but legislation fails the unborn child and falls short of rigorous provisions to protect and promote human life. Jeroen Van Nieuwenhove³⁶ writes;

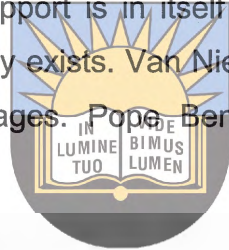
³⁴ Op cit note 29 above.

³⁵ Ibid.

³⁶ Op cit note 16.

“Some pretend that a legal person can only exist from the moment of birth. Of course, it is an important stage in the development of human life, not in the least because the physical connection with the mother is disrupted, because the child has to breathe independently and receives its nutrition by its mouth. But there are many basic human features that were already present before birth.”

The act of abortion is procured to prevent the inevitable anticipation of the birth of a child after nine months. The unborn child’s breathing which is assisted by the mother is evidence of life, and support is in itself not a complete reliance but rather, maintenance of what already exists. Van Nieuwenhove³⁷ emphasises the fact that human life exists in stages. Pope Benedict was quoted by Truth Television³⁸ that:



“ .. every human eventually dies. To argue that you are not human until you pass some developmental milestones after which you have a certain probability of survival is nonsense because ultimately, none of us survives,”

The Pope showed the innate frailty of human life, in that all people have one definite destiny, which is to die eventually. Yet all of life in its hue deserves to be protected and promoted no one has the right to take the life of another. Van Nieuwenhove³⁹ further states that:

“The human rights treaties offer no clear answer to the question whether the unborn child enjoys the right to life, because the wording of the relevant provisions is vague because it certainly was not the intention of the framers of the treaties to resolve the question in one way or another.”

³⁷ Ibid.

³⁸ Truth TV News Archive, Life site, net 05/02/2008.

³⁹ Op cit note 37.

Maslow's Hierarchy of Needs provides what Maslow⁴⁰ viewed as some of the most crucial needs of human beings namely,

"Protection, security, order, law, limits and stability..."

However, there is not enough support internationally for the rights of the unborn child and one wonders why governments opt to betray the rights of a feeble unborn child in favour of the mother's rights. It may be in the governments own interests to support abortions as a solution to some of its problems. This amounts to unwarranted behaviour on the government's part and actually marks the collapse of human rights internationally. Medical reasons are the only grounds for the justification of abortion in countries like Zimbabwe and Zambia. In these countries abortion is a criminal offence. The option of adoption is always available for partners and spouses who produce their own biological children and also for those who take pride in providing stable homes for orphans and abandoned children. The South African high courts are legally recognised as the guardians of children. They determine disputes involving children having regard to the paramountcy of the best interests of the children.

One wonders why the high court in South Africa does not protect the interests of the unborn child. The Constitution of 1996 itself leaves a lot to be desired as a child is described as a person below the age of eighteen without expressly mentioning the unborn child. Worse still in the Grootboom⁴¹ case it was held by the court that section 28 of the Constitution of 1996 must not be misconstrued to include the unborn child as the drafters did not intend to do so, because the section was meant to be read in the context of section 25 - 27 which provide for property, housing, health care, food, water and social security respectively.

⁴⁰ Maslow's Hierarchy of Needs [1990s Eight Stage Model], page 43.

⁴¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 BCLR 1969; 2001[1] SA.

The termination of a human life is not only legal in South Africa but it is also casually provided for. The untailored provision of abortion legislation in South Africa finds its support in the faults of judicial and legislative organs of the state. It may prove onerous to find abortion legislation as unconstitutional because the Constitution of 1996 has an obscure standpoint towards the rights of the unborn child. However, section 165 [4] of the Constitution of 1996 provides,

“Organs of state, through legislative and other measures must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”

Organs of the state are the executive, legislature and the judiciary respectively. They are to assist court precedent to preserve objective, impartial, transparent decisions which reflect respect for equality, human dignity and security of human life in South Africa. A balance must be found between the rights of the woman, the unborn child and the states duty to monitor the promotion and preservation of human life⁴². In the Canadian *Winnipeg*⁴³ case the respondent was addicted to glue which risked damage on her unborn child's nervous system. The question before the court was whether it could detain the pregnant woman to prevent harm on the unborn life. The courts final decision was to uphold the *nasciturus* fiction rule, holding the rights of the unborn life in abeyance until live birth.

The question to ask is why the judiciary, government and the society have allowed South African law to discriminate the unborn life. Michael D. Freeman⁴⁴ argues in favour of the unborn child's rights stating that all persons deserve equal treatment unless there exists a compelling and substantial reason in treating others differently. Inexorably, there is no reason why people should be treated differently, regardless of their stage in life. The elimination of the death penalty in

⁴² Op cit note 25.

⁴³ *Winnipeg Child and Family Services (Northwest Area) v D (FG)* 1997 (3) SCR 925.

⁴⁴ Michael D. Freeman. *Family, State and Law* Volume 1 and 11, The International Library of Essays and Legal Theory. University College London, UK. June 2000, page 231.

South African law is one classic example that all human life is valuable and deserves legal recognition and protection. Brigitte Mabandla, the Minister of Justice and Constitutional Development, said the following:

“The reason we have a Bill of Rights in our Constitution, which needs special majority to be amended, is to protect the rights of all South Africans including the marginalised minorities who cannot protect their rights adequately ... In its ruling the court said,

“it is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be sure that our own rights will be protected.”⁴⁵



There is willingness to protect criminal rights in South Africa. The notion of democracy and equal rights even for criminals appears to have been readily embraced by South Africans. Yet the incompatibility between the right to life and the enactment of abortion receives very little resistance. Abortion is the equivalent of murder in respect of which the perpetrators should be punished. Reverting back to the Ministers words, tolerating abortion is willingly disposing of the security of each life in South Africa. Derek Prince ⁴⁶ states the following Christian view:

“We are reaching a stage in society where we are much kinder to the criminal than to the victim. Why? Because we do not want to be judgemental. Why don't we want to be judgemental? I believe it is because in our hearts we know that if there is judgement for someone else, then there is judgement for us.”

⁴⁵ Brigitte Mabandla, Minister of Justice and Constitutional Development. Feast of Tascanya Celebration, 28 November 2007.

⁴⁶ Derek Prince. *Entering the Presence of God: Moving Beyond Praise and Thanksgiving to True Worship*. Whitaker House; Revised edition (January 2, 2007), page 26.

Minister Mabandla states that the reason the Constitution of 1996 exists is to safeguard the rights of all and particularly the vulnerable, which includes the unborn child. Unconsciously, the Minister qualified the unborn child for constitutional and judicial protection. The unborn child is not only amongst the weakest of humanity, but marginalised too. The insignificance of the unborn child has been brought about by legislation and case law in South Africa. This has been politicised and influenced by international law.

In the case of *Christian Lawyers Association v The Minister of Health* case⁴⁷ case the Plaintiff sought an order to declare the CTOP of 1996 unconstitutional. The violation of the right to life was cited by the plaintiffs, while the defendants cited the right to equality, dignity, life, freedom and security of the person and the right to privacy respectively. The court held that the particulars of the plaintiffs claim failed to produce a substantial cause of action and the plaintiff as a result was unsuccessful. Judge McCreath expressed the following disappointing view:

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“I turn to consider the question whether the word “everyone” in section 11 includes the unborn child. It is desirable that some consideration be given to the common law status of the foetus. A word of caution should perhaps first be sounded. In the particulars of the claim, the plaintiff alleges that the foetus qualifies for protection under section 11 because the life of a human being starts at conception and by implication human beings are from conception a person as envisaged by the said section. This is *non sequitor*. As pointed out by Professor Glenville Williams in an article entitled – the Foetus and the Right to Life [1994] Cambridge Law Journal 71-78, the question is not whether the conception is human but whether it should be given the same legal protection as you and me.”

⁴⁷ Op cit note 1 above.

In the case of *Van Heerdan and Another*⁴⁸, dictionary meanings of the word “person” were considered and the court came to the conclusion there was no proposal in any of the ascertained meanings that the word person could refer to “... a still born, an unborn, a viable unborn child, an unborn human being or living foetus”. The legal personality of the unborn child was denied in the *Christian League*⁴⁹ and *Glicksman*⁵⁰ cases where it was argued that South African law does not recognise the rights of the unborn child because the unborn child is not considered a person. Judge McCreath stated;

“Moreover, if section 11 were to be interpreted as affording constitutional protection to the life of a foetus far-reaching and anomalous consequences would ensue. The life of the foetus would enjoy the same protection as that of the mother. Abortion would be constitutionally prohibited even though the pregnancy constitutes a serious threat to the life of the mother...”

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It is unconstitutional that the unborn child is not recognised as a person and it was the duty of Judge McCreath to take note of this. It was also the responsibility of the office he holds to protect the rights of vulnerable groups without fear. The *Van Heerdan*⁵¹ case boldly professed that the word “person” does not include the unborn child, regardless of the viability and the living state of that child. In McCreath’s words there is a clear determination not to objectively protect life. In the *Glicksman*⁵² case, McCreath either has no foresight or he deliberately ignores that abortion has been used subjectively in cases where there is no life threat upon women. It appears that scientific and even general truth is evaded to suit hidden interests.

⁸ *Van Heerdan and Another v Joubert NO and Others* 1994 [4] SA 793 AD, SC.

⁹ Op cit note 1.

⁰ Op cit note 1.

¹ Op cit note 48.

² Op cit note 50.

McCreath's argument that section 11 cannot be interpreted to protect life because it would lead to anomalous situations is bizarre. The law exists to protect human life yet judicial officers find the objective promotion and protection of human life anomalous. There is a need to revisit the objective value of human life and the duty of the law towards life. The real anomaly is in the preference of one life over another. The issue of viability concerning the unborn child is itself unorthodox. However, it has become the standard of denying the unborn child a right to live based on the woman's subjective circumstances.

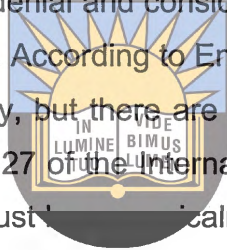
Human life is valuable not for its patrimonial value, but for its sacredness and potential. South Africa today has lost discernment of the purpose of the struggle against apartheid. The struggle occurred to establish freedom for all, including the generations to come, protecting their rights even upon their conception. The question to be asked is how abortion perverts the overriding of the function of the law. There can be no plausible explanation of why the South African legal system deliberately turns a blind eye on the rights of the unborn child. Suspicion of malicious intrusion of governmental interest in the procuring of abortion suggests that the judiciary has no actual independence in its application of the law. The subjective rights of the woman such as the right to privacy are used to manipulate the true state of abortion as an act of murder.

In as much as another right ends where the right of another begins, the right to life justifies all other rights in the Constitution of 1996. Overriding the right to life therefore questions the implementation of all other rights because without life all other rights are meaningless. As a result, there is no logic in defending the act of abortion because it is contrary to the preservation of life. Scientifically, there is no sense in prioritizing the secondary over the primary.

The legalization of abortion is based on fiction that preference and subjective rights are above the right to life. Dignity is the state of a person's character, a virtue that is morally required of humanity. However, its existence as a right does

not mean all persons automatically possess a dignified character. Dignity has to do with moral worthiness of respect, based upon the behaviour of an individual. Its existence as a right may actually be misleading to imply that all people are dignified. However, although all are not dignified, all deserve dignified treatment and security for life.

The right to dignity exists to foster esteemed treatment of each life within the society. It is necessary to foster this trait in order to prevent inequality of human life. Dignified behaviour would not seek the annihilation of another human being because it is a trait inclined to self denial and consideration for the most peaceful and amicable solution to a problem. According to English and Stapleton⁵³ there is no unanimous definition for minority, but there are elements common to groups that claim to be a minority. Article 27 of the International Covenant on Civil and Political Rights⁵⁴ states, minority must be numerically smaller than the rest of the population, it must be different from the rest, it must occupy a non dominant position in society and it must wish to preserve its special characteristics.



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The unborn child is within the margins of minority. The unborn child lives within and grows in its mother's womb for a period of at least nine months. Gestation is the most primary stage of human life and separating the unborn child from the mother before it is mature enough to breathe and control muscular reflexes could kill it. If this separation could kill the unborn child, then the unborn child is alive while in the mother's womb. The unborn child does not occupy a dominant position in society as there are more people in general than the number of unborn infants. The unborn has no authority within society because of the inability to comprehend and act responsibly.

English and Stapleton⁵⁵ ascribe the following characteristics to genocide:

⁵³ Kathryn English and Adam Stapleton – *The Human Rights Handbook: A Practical Guide to Monitoring Human Rights*, Juta Academic, 31 March 1997, page 63.

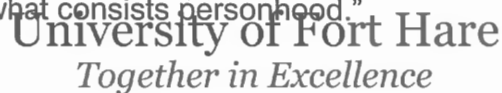
⁵⁴ Op cit note 12 above.

⁵⁵ Op cit note 53 above.

“killing people, causing serious bodily harm or mental harm to people. Deliberately inflicting conditions of life calculated to bring physical destruction in whole or in part, preventing births and forcibly transferring children.”

Abortion is killing an unborn child, a human being, by inflicting serious bodily harm on the child’s entire developing body, regardless of the methods used to procure the abortion. Gatt⁵⁶ states the following:

“There is a clear difference between preventing the forming of a zygote and the implantation of one, and killing one once it has been implanted. They are acts of commission against a theoretical possibility, omission/commission against a real entity and then commission against a specific known real entity respectively. The word entity is used to avoid arguments about what constitutes personhood.”



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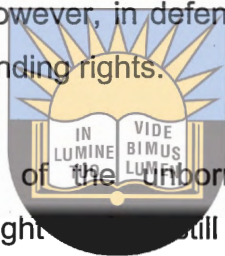
The emphasis here is that abortion is killing because it eliminates an already existent life. The developing contents in the woman’s womb during gestation are alive; if they were dead then abortion would not be required. If the arm of the law cannot extend to uplift and give cognisance to those who have been marginalised and neglected, then the law has no sting against human injustice. The situation is dire where the law actually extends its arm to protect and promote the rights of criminals more than the rights of the innocent. It actually empowers the villains of society and severs all hope for the victims of human rights injustice. It is more exasperating that until the perilous consequence of ignoring the rights of the weak in our society are comprehended, there will be no security for the rights of neither the weak nor the guilty in South Africa. Michael D. Freeman⁵⁷ argues that children easily become victims because they are

⁵⁶ Op cit note 35 above.

⁵⁷ Op cit note 44 above.

neither respected nor treated with due dignity. It has furthermore been easy to ignore their interests in favour of other interests.

The rights of the unborn child are conveniently sidelined to suit personal interests and manipulate the consequences of the future, to evade responsibility. The woman will indulge in sexual intercourse in most cases without taking any precaution and later opt for an abortion claiming that she has the right to privacy and sovereignty over her body. The issue is that rights become a justification for evading responsibility for one's actions. Obligations are never far away from rights that we all possess equally. However, in defence of abortion no duties and obligations are attached to the defending rights.



In cases where the conception of the unborn child occurred in illegal circumstances, the unborn child's rights will exist and not at fault. The government seemingly has no intention to discourage the unnecessary killing of unborn children. The consequence of maintaining orphans, providing grants to the poor and meeting the resources of an increasing population may be the basis of governments support for abortion. The result is a culture of evading responsibility etched in the future generations of the country. A right does not cease to exist merely because one does not want to apply the right or has been deprived of such a right. Children must not be brought into the wars of their parents, simply because they are innocent. They need to be protected, preferably by both parents who have the duty to care and actively participate in the establishment of their children's rights. If this proves too overwhelming for parents, adoption is the best solution and not murder.

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It is the responsibility of the government to instil a sense of value for human life above financial and patrimonial gain. Killing the unborn child degrades human life because it negatively affects the entire perception of the worth of a human being. The act of procuring an abortion needs to be treated as a crime by parliament and the society. This is the only way in which a balance can be attained in the

application of the human right to life, dignity, security and privacy. The law encourages women and society to appease their conscience on the truth about abortion.

Current abortion legislation communicates that children are expendable for emotional, financial, social religious and academic reasons. In imagining the relationship between the right to life and abortion, it is hard to reconcile that one can find abortion as the fulfillment of human rights and simultaneously believe that murder is a crime. Murder, like abortion, takes life and the possibility of experiencing fulfillment of any other fundamental rights that flow from life. Abortion legislation encourages animalistic behaviour amongst human beings, to kill their own children for financial, social and other eugenic reasons. It is rather unusual behaviour for animals to kill their young even when they are hungry, but it is abnormal for humans to kill offspring to satiate their various appetites.

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Humanity is sacred because there is no other species that has been proven to possess the ability to add value to life and protect it. In evaluating the Interim Constitution of South Africa Act 200 of 1993 [hereafter referred to as the Interim Constitution], Dion Basson⁵⁸ points out that there are two main issues which will always be contentious, namely, euthanasia and abortion. Capital punishment would have been part of them but it was abolished by the *Makwanyane*⁵⁹ and *Harksen*⁶⁰ cases. The above author, states:

“As far as abortion is concerned the essential problem is the weighing off of competing values that is the protection of the life of an unborn child against the well being or free choice of the expectant mother. This

⁵⁸ Dion Basson – South Africa’s Interim Constitution: Text and Notes, A Cachalia et al (eds) Fundamental Rights in the New Constitution (1994) Juta and Company Ltd, page 214.

⁵⁹ Op cit note 6 above.

⁶⁰ *Harksen v Lane* NO 1997 111 BCLR 1489 [CC].

weighing off process is of course required when any fundamental right is limited in terms of s33.”⁶¹

This view brings out the convenience in the non recognition of an unborn child as a human being. The right to life does not subscribe to the competition of the significance between two different human lives. It rather calls for the dignified and equal protection of each human life. The non recognition of the unborn child makes overriding the life of the child easier. If the unborn child’s right to life was recognised, there would be no contest between the rights of the unborn child and the mother because the rights of the two individuals would be equal.



Section 33, Limitation clause in the Interim Constitution, is affirmed by Section 36 (1) of the Constitution of 1996:

“The rights in the Bill of Rights may be limited only in terms of the 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, taking into account all relevant factors, including

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

The failure to recognise the rights of the unborn child is illogical prejudice. The researcher envisages a problem in the idea of an “open and democratic society” being an anchor for the violation of the rights of the unborn child. Democracy has been given a definition closely attached to individual liberalism. Liberalism is an idea that easily gets carried away in its permissive culture and tolerance of

⁶¹ Op cit note 58 above.

human rights extremes. There is, for example, acceptance of same sex marriages and partnerships and the right to alter ones gender to suit so called sexual orientation.

Abortion unlike the examples quoted above involves the murder of an innocent life in order to find expression and fulfillment of one's right to privacy and human dignity. Human life is to be preserved at all costs and treated equally at all levels. The nature of the right to life is that it is innate to all human beings by virtue of their physical and vibrant existence, regardless of whether this existence is within the mother's womb or otherwise. Limiting the unborn child's right to life is important only for avoiding parental responsibility and dealing harshly with the consequences of population growth.



Act 38 of 2004 permits abortion in South Africa without requiring women to provide for any motivation. There are only two incidents worth discussing were the decision to abort an unborn child will most likely be tempting. In cases where the conception is the result of rape or incest, the woman is likely to feel overwhelmed by the thought of nurturing the child because of the memory the child would bring. Cases where the health of either is at stake, for example an ectopic pregnancy, also presents another scenario were the idea of abortion may be entertained.

However, the adoption of such children is the best solution that allows the biological mother to heal from the ordeal without usurping the rights of the unborn child. Government incentives to provide shelter and protection for abandoned and orphaned children are also another alternative. It must be noted that the sovereignty of the state is built up by the life within the state. Government has a vertical relationship with the people under its jurisdiction, which places a demand on the government to protect all the people of South Africa without discrimination of any kind. If this was not so, the state would have no right to claim sovereignty. The nature and extent of the limitation of the rights of the unborn child is

irrational. Furthermore, the purpose of such limitation is detestable; and void of dignity.

Life has more value than any eugenic grounds that could be manoeuvred as a justification for permitting abortion. In defining the parental role, Rebecca Probert⁶² states:

“...it was accepted that the interests of parents might better be described as “responsibility”, “duties”.. the reason and sole justification for parental status is the duty to raise the child to become a properly developed adult, physically and morally”



Proberts⁶³ view on the duty of parents is self explanatory. Parental duties begin at the conception of the child and continue up until such a child is emancipated from childhood. This inevitably means that the mother of the unborn child has the duty to ensure that her unborn infant's right to life is protected regardless of the consequences in which the child was conceived. This responsibility requires the mother of the unborn child to carry her child within the womb for at least nine months and thereafter to continue caring for her child. Parental duty also requires that the parents be directly involved in matters concerning the welfare and health of the child.

Kathryn English and Adam Stapleton⁶⁴ provide this definition for human rights:

“A right is determined by human needs that make life fulfilling and are essential for keeping us alive - like health; it is most valued when it is lost. A human right is an entitlement or legal claim you have - by virtue of being Human against the state.”

⁶² S M Cretney and Rebecca Probert. Cretneys Family Law (Text book) Sweet and Maxwell; 5th Revised Edition, 7 August 2003, page 90.

⁶³ Ibid.

⁶⁴ Op cit note 55.

Abortion legislation does not resonate with this ideal notion as the right to life is absolutely deprived from the unborn child. Human rights should not be determined by the needs of an individual because this portrays human rights as a permit to indulge in selfish whims. Human rights are in fact meant to provide for resolute sobriety and reasonable limitations to human behaviour. Cronje and Heaton⁶⁵ highlight on the responsibility of legislation and the law to impose obligations on parents to care for their children regardless of the High Court being considered the upper guardian. The plight of the unborn child requires impartiality and objectivity. Just as the day of liberating the slaves came, the day of the unborn child to be acknowledged as human, must come.

Glenn Mower⁶⁶ believes that British courts have held that a foetus is not a person to avoid the constitutional consequences that would call for the protection of the rights of the unborn child. This confirms the new governments denial of the unborn child's objective right to life. In order to gain favour of the woman who is able to vote and defend herself, the unborn child can do neither and requires the care of both the mother and the government, who choose to dodge their responsibility. Bryan S. Turner states

“Human Rights abuse is characteristically a product of state tyranny, dictatorship and state failure as illustrated by civil war and anarchy. Again a viable state acts as an important guarantor of rights. There is a valid argument, therefore that the liberties of citizens and their social rights are better protected by their own national institutions than by external legal political intervention”⁶⁷

⁶⁵ D. S. P. Cronje and J. Heaton. Casebook on South African Family Law. Second Edition, Butterworths (1999), page 403.

⁶⁶ Glenn Mower. The Convention on The Rights of the Child – International Law Support for Children, Greenwood Publishers Group(1997), page 23- 28.

⁶⁷ Bryan S Turner. Vulnerability: A Human Rights Essay on Human Rights. Pennsylvania State University Press, 17 August 2007, page 19.

International legislation has little power to persuade individual states to honour the unborn child's right to life because global disparagement has been attributed to the unborn child. The injustice experienced by women in the past and even presently has a direct bearing on the aggressive legal protection and attention given to women universally. The emancipation and empowerment of women is a noble idea, as it indicates a global desire to address human rights violations of women mainly in the area of equality. However, the rights of one group cannot be addressed by the violation of another defenceless group.

Dawes⁶⁸ in the 2003 report for the Premier of the Gauteng Provincial Government stated that abortion is the prevalent cause of death among children younger than a year in South Africa. Section 28 [1] of the Constitution of 1996 is not exhaustive of children's rights. Section 28 [2] requires that a child's best interests have paramount importance in every matter concerning the child. The vague definition of a child makes the fulfillment of Section 28 [2] unachievable. It is not possible to make decisions in the best interest of a child without knowing what a child is. Section 28 requires that children below the age of eighteen be provided with alternative care when removed from parental care. The unborn child does not enjoy this privilege because the legalisation of abortion annihilates this opportunity. Sub Section [1] d provides that the child should not be exposed to any form of abuse, neglect and maltreatment. However, disregard and abuse are part of the injustice suffered by the unborn child as a result of the enactment of abortion legislation.

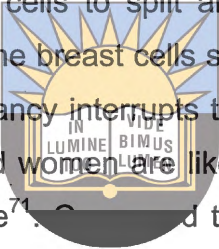
Ingrid Detter⁶⁹ argues that the right to life is modestly formulated as the right to avoid genocide, human torture and even murder. It is important that the right to life be unambiguously communicated as the most important right to avoid any

⁶⁸ Dawes A. The state of children in Gauteng: Human Sciences Research Council [HSRC], Commissioned by the Office of Premier, Gauteng provincial Government, October 2003.

⁶⁹ Ingrid Detter. The International Legal Order, Dartmouth Publishing Group, University of Michigan, 2008.

doubt in the value of life and to prevent bias in its protection. This calls for the provision of a hierarchy of rights within the Constitution of 1996.

Abortion, whether it is legal or not is not a quick fix. It could result in complications that are not as advertised as the service. Ectopic pregnancies, pelvic inflammatory diseases, miscarriages, premature births, perforated uterus and placenta praevia⁷⁰ are some of the complications that can be anticipated by women who have aborted. Abortion also has the effect of increasing the chances of developing breast cancer. Dr. Joel Brind observes that during pregnancy the oestrogen hormone causes breast cells to split and mature so that they can produce milk. This process makes the breast cells susceptible to cancer causing agents and discontinuing the pregnancy interrupts this natural process. It forces the cells to stop dividing rapidly and women are likely to develop breast cancer because of this unnatural procedure⁷¹. Coupled to financial, academic, social and religious distress, these problems are more complex to deal with.



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The main issue is that abortion is contrary to the preservation of human life. It disregards the principles of human dignity and equality which are pillars that uphold human rights in South Africa. Abortion may be politically correct but it is not a progression for women. It has stolen the essence of their being, disfiguring their bodies and consciousness in the process. The ultimate function of the law which is reinforced by the mores of society is to preserve human life. Altering this function will take the nation back to its history of segregation and denial of equal rights. The act of abortion not only segregates, but denies equality and human dignity. It sears the conscience of the nation and finds subjective excuses for terminating as opposed to preserving human life. Democracy needs to be applied in harmony with the value of human life. Like all other rights, democracy is limited to the promotion, protection and preservation of human life. There is no

⁷⁰ Miriam Cain, Peter Hammond, Martha McComb. *Fight for Life: A Pro – Life handbook for Southern Africa*, African Christian Action, 1995, page 3.

⁷¹ *Ibid.*

greater liberty than that found in preserving human life, because without life, every other right falls apart and comes to naught.



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CHAPTER THREE: RESEARCH METHODOLOGY

3.1 Research Approach

The purpose of the study is to bring out the contradictory relationship between abortion and the function of law. Legislation which is enforced as the law is influenced by the history of the country and the morals of the society. The present link between the law and abortion is incongruous to the function of the law and the implication of abortion. The research aims to discuss this contradiction between the law and abortion. The research intends to encourage the attainment of the purpose of the law to preserve human life, which demands the elimination of abortion legislation in South Africa. The methods adopted in the study have been designed to bring out the knowledge of South Africans on the function of the law and relate this knowledge to the practice of abortion.

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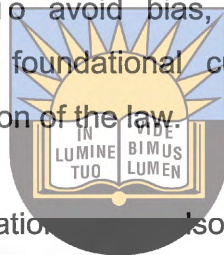
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The method has been designed to expose the reality and consequences of abortion from the perspective of those who have experienced it. This is all relevant toward advocating for the preservation and recognition of all human life as the ultimate function of law. The method, subsequent instruments, limitations and ethical considerations will be discussed below. Considering the legal nature of the research, literature review is one of the research designs that were used. It was necessary to make use of literature review as a research design because of the historical evolution of abortion legislation in South Africa. Literature review influenced the thesis statements and it was chosen because it is a method familiar to the researcher's legal background. A copy of the current Act 38 of 2004 is provided in Appendix D. Literature review was also necessary to elaborate on the function of law at the international, regional and national level through the use of basic human rights documentation such as the UDHR.

The other research design used was surveys. Survey based research is suitable for mini dissertations where a limited number of volunteers can be selected as

the miniature of a bigger picture. Surveys were used to find out the moral beliefs and opinions of people. They were preferred mainly for their ability to produce factual data.

Case studies were also used as a research methodology. This method was relevant to explore the main reasons why women have abortions and which age groups were more prone to go through the abortion procedure. These results will be presented in the data analyses. Evaluative research was also used as a method. It was relevant for the evaluation of the enactment of Act 38 of 2004 or abortion legislation in general. To avoid bias, the enactment of abortion legislation was weighed against foundational customary, conventional and regional law that spell out the function of the law.



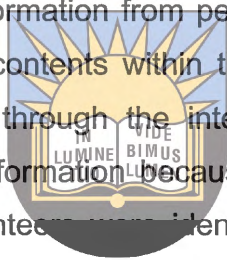
Ethnographic and action investigation also made use of as research methods. The social and legal nature of the study required participatory experience within the natural settings of the volunteers. These qualities are found in ethnographic and action studies, which also complemented the above research methods. The contribution of the methods chosen was inexpensive as it mostly required the presence and participation of the researcher. The grouping of the above methods would also serve as insurance for the reliability and credibility of the data collected. More importantly, it was also chosen to suit the qualitative nature of the research which is more interested in the behaviour of humans and the consequences thereof.

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In respect of the literature review method, legal literature of basic human rights documents was referred to by the researcher. This was important for justifying the function of the law based on codified documents that have influenced the international, regional and national understanding of human rights. The legal literature reviewed ascertained the purpose and meaning of human rights, and how it ought to be applied universally. Discussion of the legal documents supports the thesis statements made and validates the general function of the

law. The legal literature was compared with the present abortion legislation. This was done to ascertain whether the function of law to preserve life was in agreement with the function and principles contained in the abortion legislation.

The surveys and case studies were used to solicit information to represent a larger group. Instruments such as questionnaires and readily structured probing questions for interviews were used in both cases. It was necessary to make use of both questionnaires and interviews because the two complement each other. Interviews allowed the researcher to interact with the volunteers while questionnaires provided closed information from people who were not willing to interact with the researcher. The contents within the questionnaires were less personal than the data collected through the interviews. This prevented the researcher from losing valuable information because of the inability to interact with the people approached. Volunteers were identified by the researcher and given the choice to be interviewed or to respond to a questionnaire. Most people preferred an informal interview where they shared their views with the researcher.



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The researcher visited a private and public abortion clinic to experience the environment and attitudes of the participants in these clinics. Legal practitioners and representatives of the Health Department were approached together with general members of the public. This was done to establish their professional and personal views on the relationship between abortion and the function of the law. The participation of the researcher sometimes meant simple observation without the administration of questionnaires. The observation was assisted by casual interaction between the researcher and the volunteering participants. The casual interaction amounted to informal interviews that were a valuable means of collecting data without intimidating the people.

The research instruments used were questionnaires and structured probing questions. The questionnaires included closed questions that required specific

answers from the participants. This was necessary to obtain definite data to avoid the researcher making assumptions on behalf of the participants. The questions posed were very direct to avoid indecisiveness from the participants which would once again force the researcher to make assumptions. The structured interview questions focused on establishing personal views of the persons identified in respect of abortion and the functions of the law. These questions were not asked in a specific order. They were randomly presented to the interviewees. This was done to make the participants apply their minds prior to answering the questions. The questionnaire is included in the appendix together with the interview questions.



The nature of the topic presented several ethical challenges. The researcher approached the public and private abortion clinics with authority from the University of Fort Hare to carry out the research. When the research was approved the identified people were asked to participate in the research on a voluntary basis. A background and introduction to the study was provided to all participants to understand the importance of the study and their contribution. In instances where the dignity of the abortion patients seemed at stake, such as moments of hysteria, the researcher would give the patients their privacy and allow them to indicate in their own time if they wished to participate in the research.

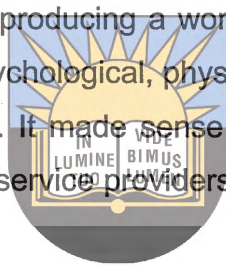
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3.2 Research sample

The practical aspect of the research was carried out in East London, in the Province of the Eastern Cape. It is a city on the east coast of South Africa and it is home to the Xhosa people from whom the Pondo dialect is taken. East London is a peaceful city where life is slower and calmer than Johannesburg. Amongst the Xhosa people are a reasonable number of Cape Coloureds and White Afrikaners. Generally, the common languages are Xhosa and English in that respective order. Amongst the nationals are foreign groups from all over the

African continent living within the Xhosa people. A wide range of reasons such as education, employment, marriage and asylum has made East London the home of these people. The Xhosa people are responsible for producing a number of prominent leaders within South Africa such as Nelson Mandela.

East London was chosen as a study area particularly for the convenience. It is a city located at least fifty kilometres from the main campus of the University of Fort Hare in Alice and this made travelling for research purposes convenient. East London offers a variety of people that come from modern and traditional communities, which is relevant for producing a work that is not one sided. East London offers a miniature of the psychological, physical and moral implications of abortion legislation in South Africa. It made sense to carry out the research in East London because the abortion service providers were manageable for a mini dissertation.



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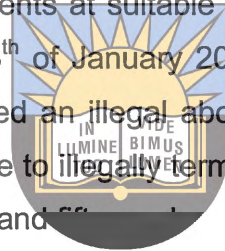
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East London was a suitable place to carry out the study because the University of Fort Hare has a campus in the city. This meant that there was continued access to the library, computers and supervision. Researching in East London also meant that there would be suitable student accommodation with fellow colleagues. In instances where it was impossible to be in East London, the researcher would arrange to travel and meet with volunteering participants during the day and return to Alice thereafter. The distance from Alice to East London made it possible to travel the two towns within a day without spending too much money as would have been the case if the research was carried out in another city.

The city of East London was chosen because within the city is a renowned abortion clinic, Marie Stopes. There are currently fourteen Marie Stopes clinics all over South Africa. The clinics offer sterilisation, gynaecological and more relevantly, abortion services, amongst others. The mission of Marie Stopes is to enable women to have children out of choice as opposed to chance and also

prevent unwanted pregnancies. Frere Hospital was chosen to carry out the study because abortion is provided within the hospital and it is within the city.

The researcher did at one point consider approaching abortion clinics whose existence is advertised within the city light poles and trees. This was decided against after realising how dangerous it could be as most of the publicly advertised clinics were illegally operated. It was interesting to note that some abortion clinics advertised within the telephone directory are also illegal. They maintain different addresses from the ones indicated in the directory as a cover up. They arrange to pick up the clients at suitable places before taking them to where they are located. On the 28th of January 2008,⁷² it was reported that a Daily Dispatch reporter had exposed an illegal abortion clinic after posing as a six-week pregnant woman. Medicine to illegally terminate pregnancies was being sold for one thousand two hundred and 55



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The research explores the legal aspects surrounding abortion legislation in South Africa. This is because researching the topic of abortion from any other angle would, in the researchers view, be a long and subjective process. It was difficult to remain objective during the research because of the nature of the topic. However, the use of questionnaires assisted in ensuring objectivity although there was also the challenge of becoming emotional whilst listening to the abortion patients talk amongst themselves, the nurses and with the researcher. There were days when returning to the abortion clinic was a draining thought because it was emotionally involving.

Exploring the legal aspect of abortion legislation in South Africa promises to yield fruitful results. This is the view of the researcher because of the wide controversy surrounding the act of abortion. The controversy surrounding the act of abortion revolves around the value of life, law and morals, and the role of the government.

⁷² Daily Dispatch. Scandal of backstreet illegal abortion by Ntando Makuba, 28 January 2008, page 1.

Susan A. Wolfson⁷³ believes that rights and privileges are produced by moral doctrine. This would mean that the right to life is the result of a moral understanding that life is valuable and this moral understanding is transformed into law to preserve human life. The contradictory enactment of abortion legislation and the attitude of the society prompted the study.

The study focuses on the purpose of the law and, as a result, assesses how the South African legal system has been faithful to fulfill the goal of maintaining law and order and preserving human life. The standard of the law to preserve human life was weighed against the enactment of abortion legislation which the researcher has identified as hostile to the preservation of human life. The research is primarily qualitative because the character of qualitative research compliments the nature of the topic. Qualitative research accommodates the research in grounded theories or case studies. This is essentially the best method of conducting social research because it is sensitive to the uniqueness and subjectivity of the matter at hand. Qualitative research gave the researcher the opportunity to describe and interpret legal and social aspects whilst revealing the attitudes surrounding the act of abortion.

There are apparently a limited number of rules that determine whether research is being done appropriately.⁷⁴ This fact offered flexibility to the researcher in handling the data. For example, although questionnaires were already drafted by the time the desired participants were approached, there were instances that required much more personal, and in some cases, less personal probing. In each case the subsequent attitude and comfort of the volunteering individuals had a substantial amount of control in respect of the probing.

Abortion being a sensitive issue, mention of the topic in identifying volunteering participants changed demeanours as well as the attitudes of the people. It was

⁷³ Susan A. Wolfson. *Children's Rights: The Theoretical Underpinning of the Best Interest of the Child*, (2009) page 1274.

⁷⁴ Earl Babbie. *The Practice of Social Research*, Cengage Learning, 11th Edition, February 2006, page 61.

interesting for the researcher to note how a right can be the cause of social and personal frustration yet it is meant to be enjoyed. A qualitative approach was chosen mainly because of its inductive character. The sensitivity of the topic required an inductive study that would enable the researcher to be absorbed into the natural setting of an abortion clinic. This was necessary to describe the events as they occurred and thereafter come up with a theory that made sense of the observations⁷⁵. This served to ensure that the research was not a biased and personal view of the researcher but a detailed study that shows the reality of the relationship between the law and abortion legislation.

The research had an insightful effect on the relationship between abortion legislation and law. It was necessary to gain the trust of the volunteers in order to produce substantial descriptions of their experiences and relate them. The experience made it difficult to avoid being emotional and consumed by the experiences of the abortion patients and nurses. To protect the validity, reliability and objectivity of the study, the researcher always carried a notebook. In this notebook the conversations, interviews and interactions that occurred between the patients, nurses and the researcher were recorded. It was initially uncomfortable for the nurses more than the patients to have everything said and done recorded, but eventually the nurses became more relaxed.

Qualitative research was chosen because it would help the researcher to understand the proceedings and behaviour of the nurses and patients. Writers refer to this as the contextualist approach and, at times, the holistic study plan of qualitative research⁷⁶. The nature of the topic meant that the researcher would be interested in idiographic rather than nomothetic research strategies. The study examines the act of abortion and its rationality against the function of the law

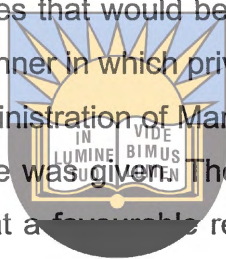
⁷⁵ Ibid.

⁷⁶ Ibid.

which makes it an idiographic research and this qualifies the use of qualitative research methods⁷⁷.

3.3 Marie Stopes

The first part of the research was held at Marie Stopes in East London. The researcher visited the clinic and made the request to carry out the study administering questionnaires to the nurses and the patients. The nurses in charge requested that the researcher leave contact details while the proposal would be looked into. Questionnaires that would be administered to the patients and nurses and also control the manner in which private interviews would be held were left for the scrutiny of the administration of Marie Stopes. There was a lot of time that passed before a response was given. The researcher often called the clinic to remind the head nurse that a favourable response was still awaited. In the mean time, the researcher attempted to administer questionnaires to members of the public.



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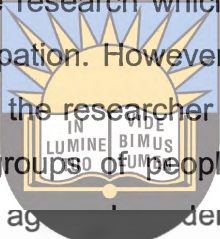
The first members of the public approached were women working in a hair salon familiar to the researcher. The owner of the hair salon was approached by the researcher to seek permission to administer questionnaires to her employees. She obliged to answer to a questionnaire herself. However, her response after viewing the questions indicated that she wished she had not personally agreed to answer the questionnaire. The owner of the hair salon sighed and refused to answer the questionnaire in the presence of the researcher. It was at that moment clear that she would not have agreed to complete the questionnaire if the researcher had not been her customer.

The women working in the salon had been conversing when the researcher approached them. The majority of the women were above thirty years and only one appeared to be at least twenty. The research was introduced to the women

⁷⁷ Ibid.

and silence followed. A woman who appeared to be more vocal and, perhaps older than the rest, immediately requested that the researcher should not disturb their conversation. She expressed how they were not interested in discussing abortion and answering questionnaires and mumbled some other things that were not audible. The silence that followed was louder than the unexpected response.

The researcher thanked the women for their time and proceeded to thank the owner of the salon for her tolerance. The response of the women in the salon left the researcher afraid that the entire research, which had only just begun would not be successful for lack of participation. However, with some encouragement from the supervisor and colleagues, the researcher attempted to approach other members of the public. Specific groups of people were approached by the researcher whilst paying attention to age and gender.

The logo of the University of Fort Hare, featuring a shield with a sunburst at the top, a book in the center, and the motto 'IN LUMINE VERITAS' on either side. Below the shield is the text 'UNIVERSITY OF FORT HARE' and 'Together in Excellence'.

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Regardless of the first encounter at the salon, female members of the society were more obliging than male members of the society. Security guards, street vendors, university students, cleaning staff, lecturers, passengers in commuter buses and shop tellers were approached. The response was always different at first and then it became more predictable and grew with time. However, it was important that the researcher would prolong the administering of questionnaires to members of the public in order to obtain enough information that would render the study credible. The result was that even after nurses and patients in abortion clinics had been identified, the researcher continued to approach the public because the initial intention was to obtain at least forty questionnaires from the public. Ten questionnaires would come from males and females between the ages of fifteen and thirty five. A further ten questionnaires were to come from men and women between the ages of thirty five and fifty five.

Whilst some people were willing to respond to the questionnaires, others felt insecure at the idea. Some would smile and walk away, others would state that

they had no time, and quite a number preferred to engage in a casual conversation with the researcher. The particular age groups were chosen because they were most likely to be receptive to the idea of answering questionnaires and the possibility of being interviewed by the researcher. These people were also more likely to be employed or otherwise identifiable and residing within the city centre of East London. Most of the members of the public approached were hesitant to answer the questionnaires, preferring to engage in the topic casually. The result in such instances was that they would ask the researcher questions probably to discover the views of the researcher concerning abortion and thereafter decide to share their own. Some of the most popular questions addressed to the researcher were why this particular topic was chosen for study and whether the researcher was supportive of the enactment of the abortion legislation.



In cases where the researcher approached groups of people, some would influence their friends and colleagues not to participate in the research. This was interpreted to be discomfort with the subject or simple indifference toward researching students. Most young girls said they would abort to secure a better future. However, they would not tell anyone about their decision for fear of ridicule. Some of the girls approached vouched that they would never abort because they were afraid of the procedure. Others argued that people who abort are usually afraid of what others would say about them having fallen pregnant, yet going through an abortion is bound to turn more heads than not. Some females were more mature and honest and said that they did not know how they would react in specific situations such as a result of rape, incest and even casual sex. One of the discoveries was that most women do not honestly know how they will react to abortion until they actually find themselves in predicaments that threaten their own life.

Such women live with regret and self hatred for having deemed themselves as righteous or above the act of abortion. These women feel that they cannot trust

themselves nor forgive themselves for failing to face the challenges that would have come out of being unprepared for pregnancy. Interestingly, very few women were recorded to be willing to advise a friend to abort, especially those who had gone through the procedure. This was however contrary to the high number of women who visited abortion clinics as patients whilst escorted by female friends. Some women felt that abortion was totally wrong while others were willing to allow their friends and relatives to make personal decisions which they would in turn support.

At least ninety percent of the members of the society approached agreed that the government grant given to minors with children was very little and it did not make being a mother any easier. The more mature members of the society between the ages of thirty and fifty stated how they thought that daughters were probably aborting without informing them. At least 70% of the women communicated this fact on separate occasions and others were agreeable that this was probably happening. This idea was shared with frustration by these women, most of who felt that abortion was equivalent to murder. One woman added that it did not matter what she thought of abortion because it is legal and so she could not stop her daughter if she had made up her mind to abort. This woman spoke with some frustration in her tone which was interpreted as unhappiness over the legalisation of abortion.

Some women expressed how they were personally not in favour of abortion. However, the availability of the service set them free from financial responsibility for their children, although most parents are willing to assume the responsibility of their grand children. There are always solutions that could be considered as an alternative to abortion in the researchers view. The difference between abortion and seeking an alternative is that with the former one has to live with eternal regret and possible physical reminders of the act. Seeking an alternative will force one to bear the responsibility of their actions or the responsibility of respecting another life towards the goal of preserving human life.

Some women stated how they felt that abortion promoted general irresponsibility amongst today's youngsters. They pointed out how very few young women actually use government grants on the wellbeing of their children. They proceeded and blamed the government for encouraging irresponsibility by legalising abortion as an easy way out of avoiding the consequences of ones behaviour. One of the most apparent things that were displayed in the conversations with elderly women was that they had no control over their daughters. Their views and advice did not matter and could not alter their children's irresponsible attitudes. Some elderly women felt that todays young women had it easy because of the availability of government grants and legalized abortion. One woman actually pointed out that abortion had always existed and that the only change the researcher would discover in that area was that it was more rampant as a result of it being legalized.



Some street vending elderly women were very passionate about how they feared most girls would not be able to have children when they were finally ready. They argued that the government would give people what was in its power, especially if it would have a positive effect on the popularity of such a government. However, it was the responsibility of people to be careful for their own interests. When probed further to explain what they meant these women pointed out that it was an individual and not the government who would be unable to produce children within marriage. They recommended how they had seen women within their communities lose their marriages for lack of producing children. One of them pointed out that a single abortion may not cause a problem but several abortions were likely to affect reproductivity and the legality of abortions encouraged women to have several abortions as far as they were concerned. From this conversation and several others it was apparent that women who could not produce children were accused for having aborted at some time in their lives prior to marriage.

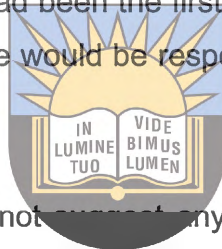
The men approached were very evasive in completing the questionnaires. In most cases, the men preferred not to know that their spouses and partners had abortions whether it was because of incest or rape. Members of the society who assumed a motherly position preferred not to know about their daughters aborting because they did not want to jeopardise the image they had retained of the innocence of their daughters. For the men, the choice of ignorance appeared to have something to do with personal ego and the views of the society. However, for most women the subject of abortion was an embarrassing topic that lowered the way in which men perceived them.

One woman relayed how she resented how the pregnancy of a daughter was always interpreted as failure of the mother to instruct the child. Talking about abortion is unpopular amongst women in the presence of men who tend to evade the subject altogether. Hence, even fewer men participated in the research than men. This is as a result of men who have been traditionally incubated from maternal issues. They tend to distance themselves from either abortion or child bearing as they can escape from the consequences thereof.

The majority of members of the society approached would not be comfortable with a family member working in an abortion clinic. The elderly men were totally against the idea with at least two participants finding it hard to give a straight answer. At least five women expressed that because abortion was legal; working in an abortion clinic was a responsible form of employment which allowed pregnant women in a desperate situation the right to choice. Younger men approached said they were unable to trust a girl with a history of abortion. They argued that it reflected that she could not be trusted and probably meant that she had loose morals. Some went on to state how they believed girls who had aborted were in their eyes too clever and unlikely to be good wives when they wanted to settle down. When questioned on the prejudice against females who had abortions as a result of rape and incest, most young men would sympathise

but remained unwilling to change their negative attitude towards women who have aborted.

Interestingly, young men between the ages of fifteen and twenty stated how they would encourage girl friends to abort especially if they had indulged in casual sex. Others stated that they only expected to have children when they were married. Hence abortion would be a pleasant option. One particular young man said he told his girl friend that she had been stupid when she fell pregnant. He believed that she intended to trap him into commitment. He told her that out of all the women he knew sexually she had been the first to fall pregnant because she had intended to trap him and so she would be responsible for her choice without his involvement.

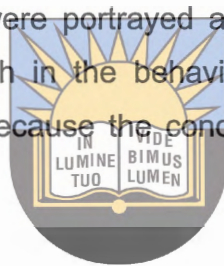


Some men stated that they would not support anything to women but let them decide whether to terminate or not. When probed further to give reasons for their choices these men argued that women are often naive, assuming that pregnancy would lead to some form of commitment on the men's part. Others pointed out that women are normally negligent and get carried away in relationships that clearly have no future; hence they fail to use contraceptives. A few men said they would take responsibility and willingly support their children. Only three out of the entire research participants said they would consider marriage in addition to taking responsibility for the children. This group provoked banter amongst other men who warned the three of being foolish.

Infidelity amongst women was cited as a major reason why considering marriage was deemed foolish. The men argued that most women at the age of twenty have at least one child which proved how the majority of women are loose. Others pointed out that men will never know whether they were truly responsible for the pregnancies, hence their indifferent attitudes towards abortion. They believed that most women were in relationships for financial security and this

meant that they had more than one partner which lessened the chances of definite paternity.

Two things were certain after these conversations. Firstly, there is a definite stigma attached to abortion which would force women to keep the act a secret. Secondly, men have little respect for women and this affects their ability to empathise in cases of incest and rape. While absorbing this data, the researcher's mind went back to the ultimate function of law to preserve human life. There was no sense of equality and dignified treatment in the statements made against women; the latter were portrayed as naive objects of pleasure. Although there may be some truth in the behaviour patterns of women, the ultimate function of the law fails because the conduct of society attaches very little value in the next human life.



Upon receiving a favourable response from Marie Stopes in East London, the research on abortion patients and medical practitioners began. There were at least five medically trained female nurses; they were friendly and somewhat sympathetic to the researcher's choice of a topic because they felt that collecting data would prove very difficult and frustrating. The atmosphere was very calm and professional; there was no sense of intimidation or judgement towards the women who made appointments and came for the procedure. The women were informed about the research after an explanation of the procedure in a private room with one of the nurses. This explanation was in the form of health and reproductive counselling. This was the only counselling provided because the service providers were not trained to provide psychological and emotional counselling.

The patients were told in the presence of the researcher that their participation was strictly voluntary and it would not require personal contact details. This was an awkward moment for the researcher but with time the researcher learnt to smile politely with each introduction and accept the responses as they came.

Procuring an abortion with Marie Stopes is much quicker than doing so in a public hospital. Appointments were normally made telephonically and the patients would have to visit the clinic only once in most cases. The patients were required to state how far along the pregnancy was in order to determine the type of procedure to be used to terminate the pregnancy and establish whether the termination was legal in terms of the law. The older the pregnancy was, the more expensive the process of termination would be.

A medical abortion by the use of a pill cost seven hundred and fifty. The termination of pregnancy procedure known as TOP where the pregnancy was below twelve weeks cost six hundred and thirty. TOP for pregnancies between twelve and fourteen weeks cost seven hundred and fifty. TOP for pregnancy between sixteen and eighteen weeks cost one thousand and forty, and for pregnancies between eighteen and twenty weeks cost one thousand two hundred rands. The most expensive form of termination of the pregnancy was the non surgical alternative of taking a pill which was said to fail to terminate the pregnancy in some instances.

It was interesting to note the number of men that escorted women to terminate pregnancy despite the different attitudes revealed in the research. The nurses informed the researcher that fathers were known to escort their daughters and this included reverends and pastors. The women's details would be taken down while the appointment was processed for administrative purposes. Naturally for ethical reasons these details were not shown to the researcher. Walk-in patients were able to obtain the service on the same day. This was because the clinic was hardly packed and the nurses mentioned that within a week, they would service at least ten TOP patients.

When introduced to the researcher some patients merely glanced towards the researcher indifferently. The patients who did speak indicated they would consider answering the questionnaire after undergoing the procedure. When

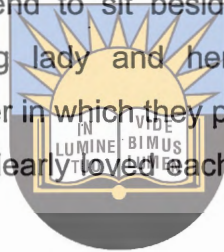
asked why they preferred to answer to the questionnaire after undergoing the procedure, they expressed fear of having their intentions changed. When the women arrived at the clinic on the date set for the appointment, they would be taken into a private room by one nurse. The procedure for terminating the pregnancy would be explained to each woman individually in the presence of the escorting persons, if they wished. Thereafter the women would be advised to make use of contraceptives and a variety of contraceptives would be discussed so that they can make a choice.

When the women would make a choice as to which contraceptive they would like to use it would be given for free. In some cases the women simply said they would abstain from sexual activities. The nurses would not force them to choose a contraceptive method in such cases or probe further into the matter. The nurses often empathised with the patients informing them that their problems were not as bad as they thought they were. In some cases, they would actually directly try and dissuade the patients from terminating the pregnancy depending on the disposition of the patients. However, there was no case at Marie Stopes clinics where a woman changed her mind and decided to continue with her pregnancy during the research. The women who went to Marie Stopes were willing to pay more than they would have to in a public hospital. It may be that these women were more convinced of what they wanted to do and the privacy offered at Marie Stopes did nothing to discourage them.

After the procedure was explained and contraception discussed, the women were encouraged not to consider the termination of pregnancy as a contraceptive. The nurses would further state that they did not wish to see them again as abortion patients because abortion was in actual fact terminating a life; therefore it was not recommendable because it was not a natural procedure. This was communicated without judgement and it rarely offended the women. Thereafter, the women would be injected with a substance that would help open their uterus so that the child could be vacuumed easily. They would be made to

relax and wait for the substance to begin its work and most of them would at this time absorb the reality of their pregnancy and the imminent termination.

During this time, the women were shown the development of the unborn child on the scanner. This was necessary to confirm pregnancy. One of the young women, twenty three years of age who had been escorted by her boy friend did not want him to see the progress of the child. She said she felt uncomfortable seeing that the unborn child was about to be terminated and therefore she did not want to frustrate her boy friend by making him go through the same thing. She however allowed the boy friend to sit beside her when the termination procedure was done. This young lady and her boy friend agreed to be interviewed very calmly. The manner in which they presented a united front made the termination sad because they clearly loved each other and were traumatised by the event.



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The young woman was grieved by the termination of her unborn child. She wept uncontrollably and when asked why she had cried she said she could not believe that she had aborted her baby voluntarily. She told the researcher she was frightened because suddenly she felt she did not know herself. Her boy friend tried to console her but she could not be comforted as her heart was sore, she cried even as they left the clinic. The young man looked overwhelmed without an idea of how to respond; he simply held her and thanked the nurses for their help as they left.

The couple were university students from christian backgrounds. The young woman felt it was hard to face her parents who she said trusted and bragged a lot about her. The thought of disappointing them was her main reason for aborting. The young man stated that he did not want to interfere with her academic dreams, besides the fact that he was not ready to be a father. It was clear that the couple regretted terminating the pregnancy even when they reflected on the reasons they had cited. When asked if they would encourage

family and friends to terminate pregnancy both said they would not do so because the sense of loss and regret was too much to bear.

A forty three year old woman escorted by a much older boy friend said she was terminating her pregnancy because if people found out they would laugh at her. She did not attempt to explain why her pregnancy would provoke such a response. It was left to the researcher to assume that she felt too old to be pregnant or that the father of the child was a married man. The man accompanying her appeared very tense and kept walking in and out of the abortion clinic. He sat in the car and waited for the woman while she completed the questionnaire. It appeared odd to the researcher that a forty year old woman would terminate the pregnancy especially since she had no other children.

A forty eight year old woman terminated her pregnancy for health reasons. She went through the procedure alone and explained that she and her boy friend were in agreement that her health was more important. She cited high blood pressure as one of her health conditions that had led the doctor to recommend an abortion. She had two children already by another man and her boy friend treated them as his own.

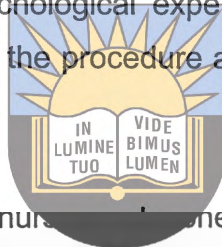
One of the staff members at Marie Stopes informed the researcher that she had gone through two abortions herself. She pointed out that she appreciated the legalization of abortion because it gave women a choice and that it was not anything to be ashamed about. A white woman aged twenty five terminated her pregnancy because she found out that her fiance was unfaithful. This led her to decide that she would not marry him nor continue with the pregnancy because she wanted to cut all ties with him. She could not stop sobbing because of her thoughts for her unborn child but she was determined to terminate none the less. Her fiance was not aware that she was pregnant and she did not tell him because she felt it would not change his infidelity which was the cause of the abortion. She seemed to regret not using protection which would have prevented

her from conceiving. She stated that she was not willing to be constantly reminded of the infidelity of her ex fiance by continuing with her pregnancy. She referred to her childhood where her father's infidelity had cost her mother's happiness and expressed how she would not allow her mother's history to repeat itself in her life.

One woman arrived early in the morning at Marie Stopes; she was rather rowdy and her indifferent attitude attracted much attention. She spoke at the top of her voice that she would not have the child of a foolish man because that child would be foolish like the father. She spoke to no one in particular and expressed how there was no point in giving a poor man a child because she and her child would starve to death. She did not agree to complete a questionnaire and wanted to terminate her pregnancy because she felt her relationship with the father of the child was casual. Another woman stated that the father who was a non South African and likely to have a wife was also seeing her casually. She appeared depressed and spoke in a low tone making it difficult to hear all that she said.

Ninety nine percent of the women that walked into Marie Stopes for abortions regretted what they were about to do and carried that regret thereafter. It was interesting to note how these women seemed to have an urge to explain themselves to anyone, particularly someone they did not know. They informed the researcher that they felt free to communicate their reasons and grief towards abortion with the researcher because they were strangers and unlikely to meet again. Quite a handful of women went through the procedure secretly. One woman said she had no one that she could tell because she was a member of the choir and youth leader in her church. Confiding in someone would mean exposing herself as having failed to live the life she preached every day. She resented herself for it but believed that God had forgiven her; hence she found comfort in that knowledge. Some of the women who did not find it easy to confide in anyone agreed that a stranger was unlikely to judge them because they had no idea who these women really were.

For some of the women the experience of abortion had a very sobering effect. They neither cried nor said much appearing eager to leave the premises. Not all the women agreed to be interviewed or to answer the questionnaire. Some young women felt uncomfortable with the researcher's age while in some cases, the patients and the researcher were familiar with each other. In such cases the researcher tried to be as scarce as possible to give these women their privacy and allow them to relax. One of the problems common to the nurses was that most women seemed to expect professional counselling. This made their work difficult because they were ill equipped to provide such services as they were only medically trained without psychological experience. They were only in a position to inform the women about the procedure and give advice on the use of contraceptives.



Out of the four medically trained nurses, only one nurse in charge agreed to complete the questionnaire. The others were only willing to engage the researcher in discussions and comment on the responses given by the head nurse. Although this was a disappointing twist, the researcher was appreciative of the willingness to engage in causal discussions. The nurses said they viewed themselves as pro-choice supporters who gave women the right to choose. However, they were quick to point out their frustration because family and friends were sometimes hostile because they worked in abortion clinics. They maintained that they had a right of employment and found support in the fact that abortion is a legal service in respect of which one can face charges for denying its provision. One of the nurses was open enough to express that she hoped to leave her job and pursue another career in the medical profession.

One other problem that seemed to frustrate the nurses above others was that some of the women would be uncooperative during the abortion procedure. They would refuse the nurses to continue with their job or make the task difficult due to outbreaks of hysteria. The nurses despised this kind of behaviour because they felt that the patients were acting as though they have been forced to terminate

their pregnancy. It was also dangerous as failure to cooperate could cause unnecessary scraping of the uterus or render the process incomplete which would result in great pain for the patient. The nurses explained that they were in no position to give a direct instruction to the women to either terminate or continue with the pregnancy because it was not their choice. They were willing to empathise but it remained the patient's voluntary choice to terminate the pregnancy and they expected the patient to cooperate when they decided to abort.

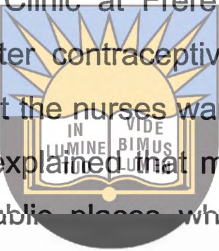
It was interesting how only one of the nurses said she would encourage a family member or friend to abort. The others said they would not encourage it but their support would be given without judgement to whoever needed it. After the abortion procedure, each woman was warned to rest and refrain from sexual intercourse and lifting heavy objects for at least two weeks to allow the uterus to settle in its position without further disturbance. They were informed that they were welcome to return for a check up if they noticed foreign discharge. The clinic was also willing to give the women contact details of a gynaecologist in case there was a need for a thorough check up and pap smear. Most of the women said they felt a great sense of loss when the scan showed an empty womb. The contrast between a pregnant and an empty womb seemed to awaken them to the reality that there was no turning back at that moment.

3.4 Frere Hospital

The researcher had written a formal letter requesting to carry out the research at Frere Hospital. In exactly two weeks a favourable response was received. The researcher had visited Frere Hospital twice to enquire how to obtain permission for conducting the research. The matron in the maternity ward was very helpful but firm on the researcher obtaining the required authority from the hospital manager. Upon obtaining authority the researcher was introduced to a junior nurse who was handling administrative duties at the Women's Health Clinic

within the Maternity ward of Frere hospital. The nurse was instructed to escort the researcher to the Women's Health Clinic and introduce the researcher to the head nurses who were awaiting the researcher's arrival.

There are at least two head nurses in charge in the Women's Health Clinic and they are assisted in rendering the service by a third trained nurse. The fourth nurse found in that department handles the administrative details of the patient and records appointments. This particular nurse is not permanent in this division of the hospital as a duty roster determines who would be in that particular office each week. The Women's Health Clinic at Frere Hospital not only provides abortion services but they administer contraceptives to women for free. The initiative was inspired by the fact that the nurses wanted to encourage women to make use of contraceptives. They explained that most women complained that there were long queues at the public places where they could go and get contraceptives monthly while others felt that contraceptives were too expensive in pharmacies.



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On arrival at the Women's Health Clinic the researcher found at least fifteen young women sitting on benches queuing for the attention of the nurses. Later the researcher was informed that these young women had come to make appointments for termination of pregnancy. One or two women were there to request contraceptives or solicit some advice in line with reproductivity. The clinic can only provide the service to ten women a day because of the unavailability of utensils and bedding. The ten women that are attended to on each day would have made an appointment with the clinic within the maternity ward on a prior date.

The process for obtaining the service is as follows. Most of the women would visit the clinic to make an appointment. During the first visit to the clinic the women would be asked to produce their identification card or student card as most of them are normally students. Thereafter they are requested to produce proof of

pregnancy or take a free pregnancy test at the clinic. Only one girl aged twenty discovered that she was not pregnant when she took a test and immediately requested that she be given contraceptives. Her relief was evident, as she returned to the benches to sit and appreciate the fact that she was not pregnant. Thereafter, the women would be required to drink some water so that their pregnancy would reflect clearly on the scanner. The women would return with documents from the doctor in the maternity ward indicating how far along their pregnancies were.

The clinic was only in a position to provide the termination procedure from two weeks to twelve weeks of gestation. Women who were fourteen weeks to twenty weeks pregnant were referred to the gynaecologist within the maternity ward. It was explained that pregnancies above twelve weeks were too advanced to be handled by the nurse in the Women's Health Clinic and likely to cause greater discomfort and pain for the patient. Pregnancies above twelve weeks would require the patient to spend more time in hospital recovering and Women's Health Clinic was not in a position to provide bed rest for such. When the women returned to the clinic from the scanner they would be told if they qualified for an abortion or not. Thereafter a diagram indicating the progress of the pregnancy and the development of the child would be shown to the women. This was used as a way of deterring the women from aborting.

Only one girl aged twenty decided that she could not go through the termination when she saw the progress and development of her child. The nurse praised her and encouraged her to communicate with her parents and boy friend about her pregnancy. She was convinced after seeing the development of her fourteen week unborn child on a diagram that she would be committing a murder. The women were not pressured to make any decision and as proof of this they were required to sign a consent form that they voluntarily sought the termination of their unborn child.

One of the administrative processes involved requiring the reason for procuring an abortion. The response to this question came in different ways. Some women were at liberty to state their reasons without embarrassment while others demanded that the nurses prove the question was part of the administrative process. The reasons ranged from infidelity, infection, academia, financial and social reasons.

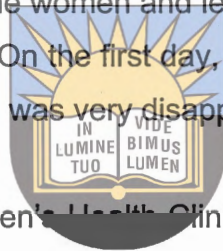
Most of the women already had children who were under the care of their grandparents while the parents studied. They could as a result not have second children lest their parents would decide to stop their education and require them to take full responsibility of their children. The women who qualified for abortion in the clinic were asked to shave their pubic hair on the day the procedure would be provided and required to be at the clinic as early as seven o'clock.



Upon arrival on the day the procedure would be administered these women would be counselled by one of the head nurses. Most of the women were escorted by female friends and mothers. This was different from the prevalent situation in Marie Stopes where most women visited the clinic alone. The women were encouraged to make use of contraceptives simultaneously with condoms. The nurses would explain that the contraceptives would prevent unwanted pregnancy and the condoms would protect them from sexual infection. The nurses would discuss the variety of contraceptives and encourage the women to choose one that complimented them.

The disadvantages of abortion such as pain, uterine scarring, failure of the procedure and failure to conceive were shared with the patients. They were advised not to go through the procedure if their reception for pain was low and warned that abortion was not a contraceptive. In most cases, the patients would be informed about these facts on their first and second visit as the nurses would not separate those who were already booked for termination until they were ready to prepare those that had been scheduled for the particular day.

The women who would go through the termination procedure were warned that if they arrived late they could be turned away. They would be given tablets to assist the process some hours prior the actual procedure and requested not to scream during the procedure because there were other patients outside requesting the service. On the researchers first day at the Women's Health Clinic, within the maternity ward, one of the head nurses was in the middle of giving a lecture to the patients as explained above. When she had finished she called the researcher to the open corridor where the waiting patients were positioned, directly facing the adjoined rooms where women were being prepared for TOP. The researcher was introduced to the women and left with them to administer the questionnaire on a voluntary basis. On the first day, only two women volunteered to complete the questionnaire which was very disappointing.



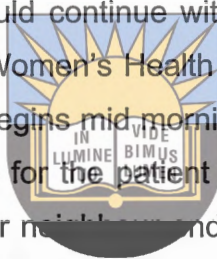
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There was less privacy at the Women's Health Clinic compared to Marie Stopes where the patients were addressed on a one on one basis and attended to in separate as opposed to adjoined rooms during the procedure. The consultations were done in one big office where at least two nurses attended to different patients. The nurses allowed the researcher to be present during these consultations and often asked the researcher to give some advice to the patients. The TOP service was provided to the patients for free. However, it could not be provided within a day and patients could not make appointments over the phone because the clinic insisted on carrying out administrative procedures in the presence of the patient.

The researcher noticed trays with different files. One of the trays had a tag written 'women who decided not to abort'. The number of files within that tray was substantial but very little compared to the abortions that had been recorded in other trays. A white girl of sixteen years had been crying while she awaited her turn to terminate her pregnancy. She had been escorted by two elderly white women one of whom was her mother. Some girls that came to make appointments for termination could hear her crying from the corridor. One

particular girl was thoroughly irritated and stated that she was not supposed to be crying because she knew exactly why she came to the clinic and she should have cried at home. The reaction of the other women in the room was different, some laughed while others remained indifferent to the crying and comments.

On one occasion, a woman lied how far along her pregnancy was. This came to the attention of the nurses when the woman had been sent to the scanner, which showed that she was not eligible for an abortion because she was twenty weeks pregnant. On the same day, a girl expected to come for an abortion absconded. She probably decided that she would continue with her pregnancy or opted to pay for a private termination. The Women's Health Clinic closes at 14:00 hours. The termination procedure mostly begins mid morning and there is normally a lot of screaming. It was uncomfortable for the patient in the next adjoining room to anticipate her turn while hearing her neighbour endure the pain. Thereafter only patients who wanted to make a booking for termination were seen by the nurses together with those that needed reproductive advice or contraceptives.



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The nurses at Frere hospital were just as friendly as those for Marie Stopes. They were very candid with the patients and took their time to encourage them to make use of contraceptives. They shared a common frustration in receiving one patient more than once for the service, something they hoped to avoid by giving out free contraceptives. They felt that it was disrespectful of women to expect them to render the service more than once to the same woman because they were in their own words 'human' and they had their own personal convictions about abortion. The nurses pointed out how women failed to realise that their privilege to access abortion was also attached to the nurse's rights and morals too. The nurses were offended each time a patient returned to have another abortion. Their frustration was evident in how they would talk strongly to the individual to establish the problem that would have led to an unwanted pregnancy for the second time.

A fifteen year old came to the clinic for an abortion. She found that she was already twenty eight weeks pregnant and as a result, not eligible for an abortion. She broke down into tears and stated that she had not realised she had been pregnant for so long but she could not afford to have the child because she already had one and needed to complete her studies. She was advised by the nurses to go to the social welfare departments where they could assist her with other options such as accessing a child grant, foster care and adoption. She had given birth last year in July and could not believe that she was pregnant again. For some reason, she had thought that she would not fall pregnant the second time. The nurse explained to her that she would conceive for as long as she did not make use of contraceptives.



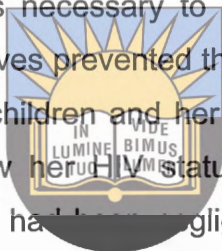
The researcher's personal frustration with the girl was that she had not realised how far along she was all this time. She was naive and not ready to engage in sexual intercourse as she could not comprehend the consequences of her behaviour. It was worrying that she was afraid to reveal her pregnancy to her mother because she was due to deliver soon and had never seen a doctor to check on her and on the wellbeing of the child. One girl who suspected that she was pregnant began to menstruate on arrival at the clinic. The nurses sent her to the scan just to be sure that she really was not pregnant and discovered that she was not. She was relieved and immediately requested that she be given contraceptives.

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A thirty seven year old woman with four children came to the clinic for her second abortion in less than a year. When the nurses realised this they were immediately annoyed and sat her down to ask her why she wanted a second abortion. There was a long discussion where mainly the nurses did most of the talking while the woman simply kept asking for forgiveness and understanding in vernacular. It was established that the woman probably did not make use of contraception because she did not live with her partner. Her partner would come and go as he pleased, which made her hesitant to use contraception. The nurses addressed

this woman strongly about HIV and AIDS related diseases that she was risking. It was an awkward moment when the nurses asked the researcher to advise the woman, especially because of her age.

The nurses believed that research should involve the researcher's direct participation advising and challenging the behaviour patterns of the patients. The researcher pleaded with the woman to protect herself from unwanted pregnancies through the use of contraceptives as abortion was not a contraception which the woman did not seem to understand. It was therefore explained to her that abortion was necessary to end a life that was already growing within her while contraceptives prevented that life from establishing itself in the womb. For the sake of her children and her own, she was urged to use condoms, contraceptives and know her HIV status together with that of her partner. It was established that she had been negligent and felt pregnancy was impossible simply because her partner did not live with her although he probably requested sexual intercourse every time that he did see her.



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One of the most hilarious cases at the Frere Women's Clinic was a little girl aged seventeen who told the nurse that she was afraid of an injection and did not want to ruin her figure by taking tablets. It was hilarious but sad at the same time because an abortion was obviously more painful than an injection and it was amazing that she preferred the worst of the two. One of the nurses was so annoyed that she decided she would speak to all the young women waiting to be attended in the passage, although she had done so earlier that morning. She spoke about the value of life and self esteem. She pleaded with them to discuss sex openly with their parents or seek professional counselling so that they would be informed correctly and not rely on what they told each other as friends.

One of the patients who came with her boy friend was a young girl aged twenty two. She was a student and her boy friend was employed. The young man was very supportive of her. He sat through the reproductive counselling in the

morning and answered all the administrative questions on her behalf. The nurses seemed to appreciate that he was taking some responsibility at least by being there. He explained that her pregnancy was unexpected as they did not use protection only once.

A mother and her daughter visited the clinic one morning and when it was time to record personal details for administrative purposes the mother and the daughter began to argue. Apparently both mother and daughter were pregnant. The daughter told the mother that she could not terminate her pregnancy because she felt it was morally wrong. She had the impression that they were at the clinic because the mother was interested in terminating her own pregnancy. The nurses told the mother that the service was provided on a voluntary basis and no one could be forced to terminate. They were advised to seek professional counselling for their relationship and requested to leave the premises because of the commotion they were causing.

The logo of the University of Fort Hare, featuring a sunburst design with the motto 'IN LUMINE VERITAS' and 'LUMINE VERITAS' written below it.

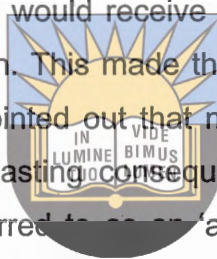
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A twenty nine year old with children born in 2006 and 2007 informed one of the nurses that she wanted to terminate her pregnancy because she had recently discovered that she was HIV positive. She narrated how her husband had often been unfaithful and that it was one of his mistresses that warned her she was likely to be infected. One of the patients visited the clinic with her two year old son. She explained that she had decided to rely on condoms as a contraceptive method because she had gained lots of weight. The nurses encouraged her to try out different contraceptive methods until she could find a method that did not cause weight gain.

When approached to complete the questionnaire, only the two head nurses agreed while their assistant said all she wanted was to help women make a choice for motherhood and that is all she had to say. The other nurses also stated that their role was to empower women with the ability to choose. However, they wished that there was a stipulation that limited the number of abortions one

could have. They felt that the right was being abused and women were unable to recognise that it was not recommendable for their health because it was not a natural process. On certain occasions, the nurses were approached by members of the media acting as though they were ordinary women in need of the service. This frustrated them because they felt their rights were violated.

One of the nurses pointed out that the positioning of the Women's Health Clinic at Frere hospital presented a problem. Most women would get lost and thereafter ask for directions from the staff they saw around. On enquiring where to find the Women's Health Clinic, the women would receive spiteful comments from staff members that were against abortion. This made the women hostile by the time they found the clinic. The nurse pointed out that most women were not aware that the act of abortion had long lasting consequences. Some of the women suffered from what the nurses referred to as an 'anniversary syndrome' where they would mentally go through the events of the TOP procedure the following year. Other women were known to dislike children that would be the same age as their aborted children would have been. Some women would have their conscience to answer to while others would fail to have children as a result of physical complications suffered during the process of abortion.



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3.5 Limitations of this Research

The limitations experienced in the collection of the data were varied. In respect of literature reviews, it was not possible to collect all the basic legal documents. There are a number of such documents that were established internationally and regionally with the progression of human rights. The researcher selected a handful of basic legal documents that have a direct bearing on the constitutional framework of South Africa. It was difficult selecting authorities on the topic of abortion that portrayed the contradiction between the right to life and the former. This was because most abortion authorities either support or speak against abortion but rarely contrast the right to that of life.

Survey and case studies were limited by the risk of losing time, focus and objectivity. A case study and survey required the participation of volunteers. Sometimes the volunteer's may delay to return questionnaires whilst others may take a long time to respond to the request of being interviewed and answering the questionnaire. In some cases, the questionnaire was never returned to the researcher despite the promises.

It was impossible for the researcher to assess and analyse data when some of it had not arrived. It was also difficult to maintain focus during the ethnographic and action research. The nature of the topic made it tricky to exclude ones emotions and personal opinions, especially since most abortions are arbitrary. The evaluation method was limited by the fact that there was no hierarchy of rights in the legal structure and general human rights against which abortion legislation was measured. This made the core argument on the function of the law more difficult to prove and defend. Ethnographic research also presented ethical limitations. It would have been beneficial to be with the patients during the abortion procedure but this would have been an invasion of their privacy and a threat to the dignity of the abortion patients.

The use of closed questions did not guarantee perfect response to the questions. Some of the participants decided not to respond where they could not give a direct response while others provided scanty information that left the research questions unanswered. Questionnaires deprived the researcher of the opportunity to engage participants in a discussion. In some cases, people felt threatened by filling out questionnaires because they thought their handwriting would be identified. The interviews and casual conversations presented the problem of forcing the researcher to provide some form of counselling to the participants when they became emotional. This limited the researcher because the researcher is not a professional counsellor. It also required the researcher to interpret well the emotional needs of the participants to avoid the abrupt end if each interview.

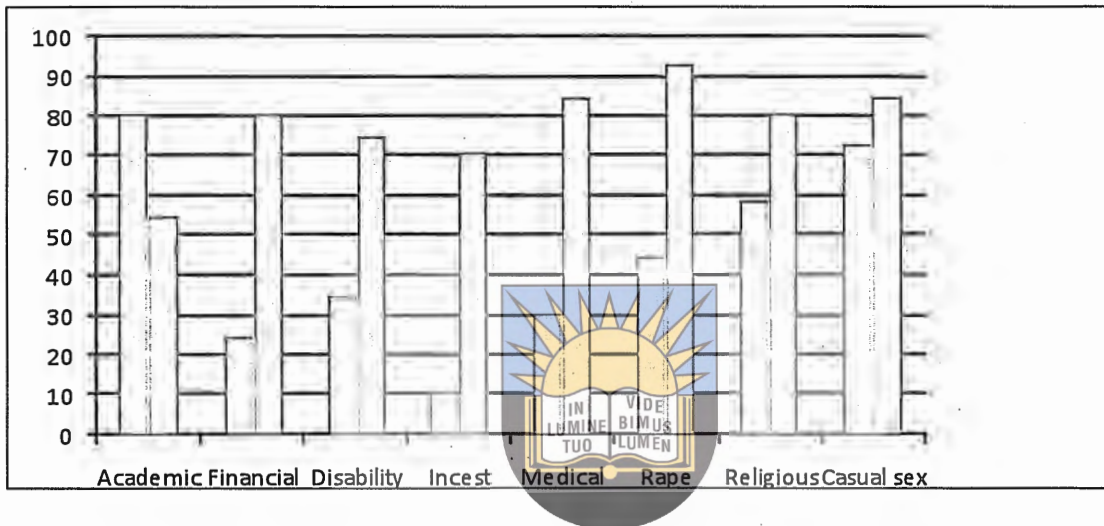
Time was a great limiting factor for the researcher. East London has a number of public hospitals as stated above and a handful of legal abortion clinics. Apart from these facilities, East London has organisations such as Life line dedicated to professional counselling for diverse reasons. The time taken to receive correspondence from these service providers and the time in respect of which the researcher was expected to produce her complete work were in conflict. The result was the researcher had to work under pressure and forget about the unanswered and delayed volunteer responses. However, for the purpose of the partial fulfillment of the Human Rights course, interviewing the patients from Marie Stopes and Frere hospital was sufficient and both public and private service providers were represented.



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CHAPTER FOUR: DATA ANALYSES

4.1 CHART A: PERCENTAGE FOR ABORTION AND REASONS CITED FOR ABORTING.



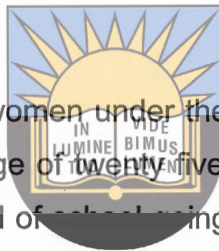
Key

Column 1 (Blue) - Represents women below 25 years of age.

Column 2 (Red) - Represents women 25 years and above.

Chart 'A' shows the reasons advanced for abortions during the study and the percentage of women plus minus twenty five who would consider abortion. Generally, fewer women below the age of twenty five found abortion to be an option compared to women above the age of twenty five. This was unexpected by the researcher who anticipated that women below the age of twenty five would find abortion as an option more than women above twenty five. Women below the age of twenty five were more prone to abort for academic reasons and less likely to abort in cases where the child was conceived in an incestual relationship. Women below the age of twenty five were also the least likely to abort where the child would be born with physical deformity as compared to those above twenty five.

Sexual offences committed are not all reported. Perhaps this is why women below the age of twenty five are least likely to abort on the grounds of incest because they may be overwhelmed and fearful of reporting who the father of the child is. During the research, some of the young women, below twenty five did not even know that they were pregnant during the first trimester and, in some cases, right up to the second. Some of them went to the abortion clinics when they were already ineligible for abortion. This may explain why women below the age of twenty five are less likely to abort based on incest and physical defect on the child because they never know their condition and that of the unborn child until it is too late.



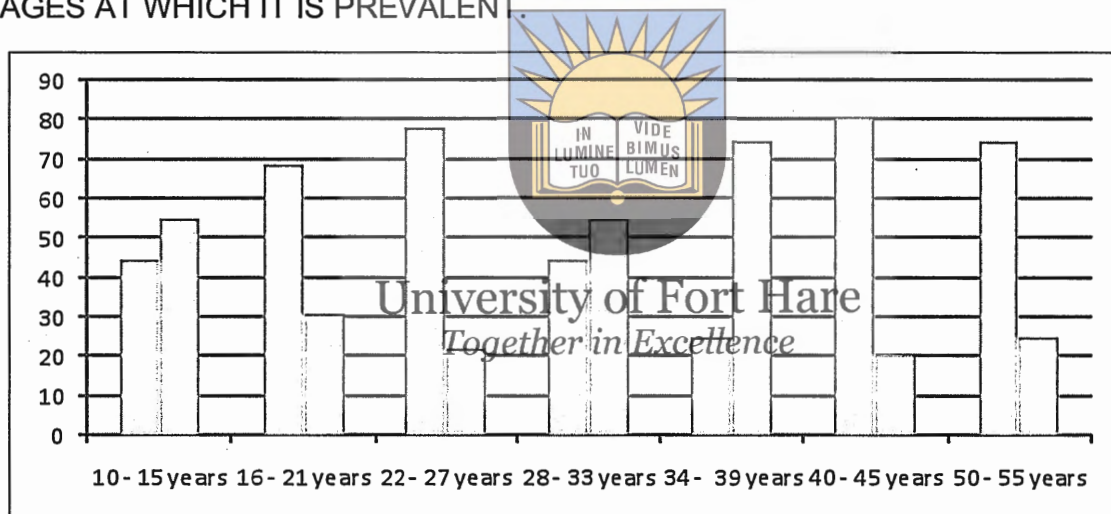
The research results suggest that women under the age of twenty five value life more than the women above the age of twenty five. On the other hand, women below the age of twenty five are still of an adolescent age. Their financial security is largely the responsibility of guardians and parents in most cases so abortion is not the immediate solution because their unborn children become the responsibility of their parents until they are able to assume the responsibility.

The number of women below the age of twenty five opting for abortion in cases of religious beliefs, casual sex and physical defect of the child reflect self absorption. In reality, it is life that is devalued when we engage in irresponsible sex; cover up fault so as to preserve doctrine and other people's perception of us. Shame and being unwilling to nature a disabled person largely because of the immense responsibility involved is a trait of self absorption. The irony is that the choice to abort in these instances confirms that each of these women place some value on their individual lives. Unfortunately, to edify their own lives financially, academically, socially, emotionally and otherwise, the enactment of abortion legislation allows for the destruction of an innocent life.

The study shows that women above the age of twenty five are more prone to abort because of rape when compared to women below twenty five. These

women are also more sexually active. The researcher had assumed that women below twenty five were more reckless with their sexuality because of the assumed experimental excitement of the younger generation. The legality of abortion offers these women a second chance in their academic, financial and social lives as opposed to promoting the preservation of all human life which is the ultimate purpose of law. In essence, the aspects of life such as religion, finance, academics and status are esteemed than life itself.

4.2 CHART B: PERCENTAGE OF TERMINATION OF PREGNANCY AND AGES AT WHICH IT IS PREVALENT.



Key

Column 1 (Blue) - Represents the percentage of women that would abort in a particular age group.

Column 2 (Red) - Represents the percentage of women that would not abort in a particular age group.

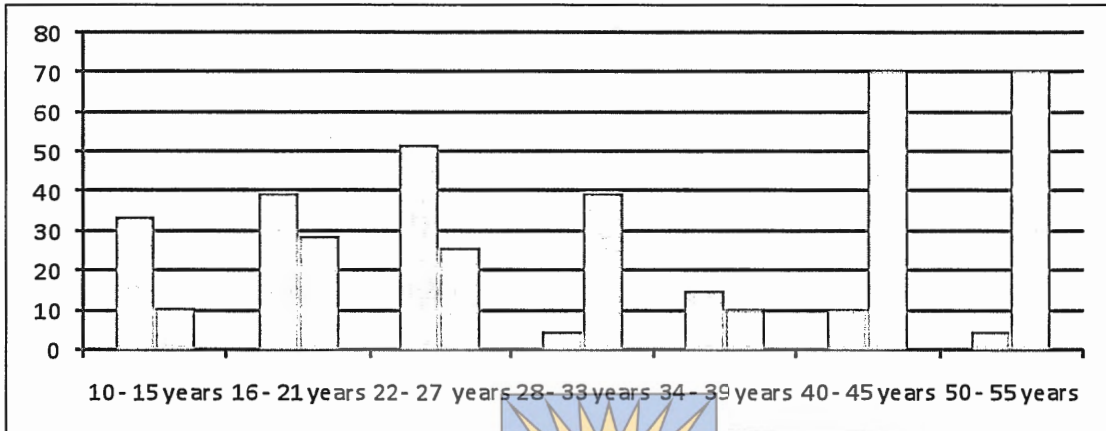
Chart 'B' shows how many women in particular age groups were prone to abort. Most women between ten and fifteen would not have abortion. Initially, referring to the females between ten and fifteen as women was awkward for the researcher. This age group is not physically and mentally mature to comprehend sexual intercourse and its consequences. Nonetheless, minors in South Africa

have access to contraception, condoms and abortion for which the consent of a parent or guardian is not a prerequisite. The law whose function is to protect life is now enabling our society to take life and place more value on the features of life. It was relieving that the majority of females between ten and fifteen would not abort. This age group is young and fragile; in fact they are children just like the unborn child.

The research showed that most women between sixteen and twenty one were likely to abort. This confirmed that as the younger generation grows older, they grow with a distorted appreciation of life or none at all. It is the researcher's fear that by the time these women are forty, they would have exposed themselves to so many abortions that a full term pregnancy may not be achievable even when they are ready for motherhood. This would further suggest that the life of the unborn child is only worth preserving when the mother of the unborn child finds it convenient to preserve the unborn life. Again, the law enables the destruction as opposed to the preservation of human life. Women between twenty two and thirty three were also found to be more likely to abort. It may be that these women are at the prime of their lives and career and they believe motherhood could slow them down. Of all the women that the researcher interviewed, none of them said they did not want children completely. They all wanted children but only under circumstances that suit their goals.

A higher number of women between the ages of fifty and fifty five were also more likely to abort. This means only women between ten and fifteen, thirty and thirty nine are the only two groups that recorded the least likelihood to abort. This means that the majority of women in our society are likely to consider abortion and actually go through with the procedure than not. Women above forty probably abort because most may believe they are too old to raise children. Again it is about the mother's personal circumstance that is held in esteem and not the preservation of life.

4.3 CHART C: PERCENTAGE THAT WOULD STILL ABORT EVEN IF ABORTION WAS ILLEGAL.



Key

Column 1(Blue) - Represents the percentage of women that would abort even if it were illegal.

Column 2 (Red) - Represents the percentage of women that would not abort if it were illegal.



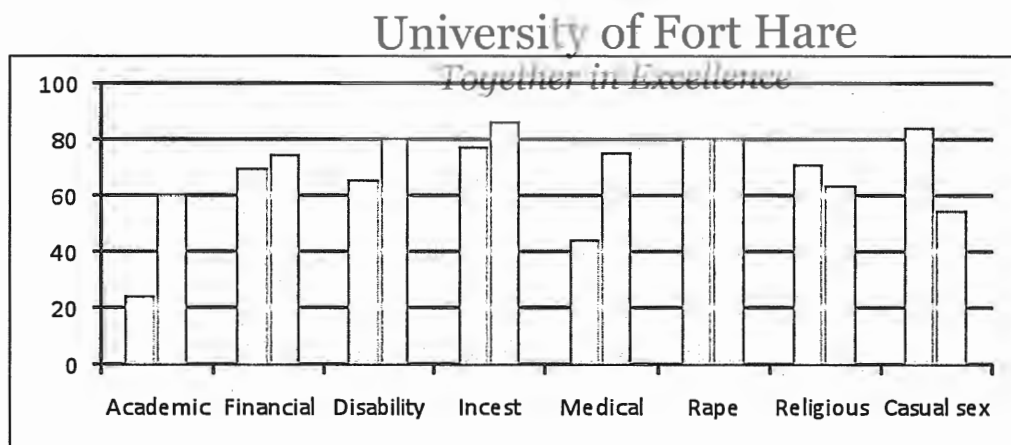
The researcher was of the mind that most people would not have abortions if abortion was illegal. The graph shows that this idea is not necessarily correct especially for the younger age group between ten and twenty seven years. The younger age group between ten and twenty seven is likely to abort because of academic and financial reasons. Women at this age are still young and also likely to engage in casual sexual relationships that may lead to unwanted pregnancy. Women between twenty eight and thirty three are less likely to abort because this is generally a ripe age for motherhood. Generally, most women who already do not have children at this particular age begin to consider having them and also entertain the idea of settling down. It is not surprising that the majority of women between forty and fifty five would not consider abortion if it were illegal. These women are mature and in most cases not answerable to anyone for their choices. This age group is in a position to appreciate the value of life and also calculate the consequences of going through an abortion. However, one may

have expected a reasonable number to consider abortion as pregnancy at this age may be dangerous and is not advisable.

It is the researcher's opinion that younger women are more likely to go through abortions even if it were illegal because they have grown into the culture of abortion. Their perception of abortion is that it is normal and a natural choice available as a definite preventative control over unwanted pregnancy. This is regrettable because it illustrates that in the future, the right to life will suffer greater injustice. The influence of legislation is illustrated in the legalisation of abortion. The law can easily change moral convictions and replace them with discriminative principles when objectivity is replaced by subjectivity.



4.4 CHART D: AGE PERCENTAGE OF MEN PRO ABORTION AND THE VARIOUS REASONS CITED.



Key

Column 1(Blue) - Represents men below 25 years of age.

Column 2 (Red) - Represents men above 25 years of age.

Chart 'D' shows percentages that are almost related for men below and above twenty five. It appears that men are not against the idea of abortion generally, the

lowest reason for which they find abortion to be justified is academic and the highest is for incest and casual rape. Men below twenty five found casual sex to be a reason for abortion more than men above twenty five. Men above twenty five found medical, financial, disability and incest as reasons to justify abortion more than men below twenty five.

Abortion in South Africa was legalised to reduce the number of backstreet abortions and antenatal deaths. However, abortion is termination of a life. It is murder and it cannot be converted to be a life saving technique. When abortion is not taking life it is disrupting the life of the perpetrator who becomes emotionally, physically, mentally and socially affected. The right to life is supported by two pillars, equality and human dignity. The trio attest to the viability and worth of each individual human right and the value of humanity collectively. These rights require objective interpretation and implementation. The lack of transparency and objectivity is reflected in the continued controversy surrounding the discriminative interpretation and implementation of the trio when it comes to the unborn child. Equality, dignity and the right to life automatically change their hue when it comes to the unborn child and subjective rights suddenly take priority.

The attitude of men in respect of abortion speaks volumes on the fulfillment of equality, dignity and the right to life. The results of the research show that men in general have very little respect for women. A loving husband, partner, brother and father would not subject any woman to abortion. The results also confirm that abortion is seen as a quick solution for evading responsibility and also mainly sought for subjective reasons. The objective purpose of the law to preserve human life has become overshadowed by subjective rights flowing from the right to life.

CHAPTER FIVE: CONCLUSION

5.1 The function of the law

The right to life is the essence of law. The structure and content of law must reflect the significance of the right to life. National legislation is regulated by the Constitution of 1996; therefore the latter must affirm the significance of the right to life adequately. This would mean the direct codification of the right to life as above all other rights. This would in turn influence subsequent legislation and judicial precedent to relentlessly preserve human life. The result would be the abolishment of abortion legislation because abortion is, after all, murder. It is surprising that capital punishment was abolished but abortion became legalised when the sentence in both cases is death.



The inherent nature of the right to life requires the application of equality and dignity of the law to prevent discrimination. Jim Bohm is quoted by Hofstee that "success is the natural consequence of consistently applying the basic fundamentals."⁷⁸ The success of the South African legal system is in continued and objective application of equality, dignity and the right to life. It is significant that South Africa gained independence at a time when most of the world had begun to comprehend human rights. This fact pressurised the new government of South Africa to explore human rights at greater heights than it had been possible for fellow countries within the region. The concept of democratic rule added onto the pressure and brought individual freedoms to perhaps a dangerous level. Arguably, this is the reason why South Africa has a tendency to imitate western ideas. South Africa was the first country to embrace sexual orientation and also one of the first countries to provide abortion upon demand. The consequences of the latter enactment is the condonation of the termination of life.

⁷⁸ Erik Hofstee. *Constructing A Good Dissertation: A Practical Guide to Finishing a Masters, MBA or PhD on Schedule*. EPE (2006), page 239.

Law is synonymous with a commandment, regulation a decree. It was established to ensure security and the sustenance of humanity through its final or otherwise absolute nature. Human rights appear to have changed the directive quality of law by accommodating subjectivity, which has in turn overshadowed the ultimate function of the law. The problem is that when law loses its directive quality and function it ceases to protect the fundamentals of life. The enactment of abortion legislation protects that which is subsequent to the fundamental right of life and not the right to life itself. It makes no sense to speak of equality, dignity, privacy and choice where there is no life because all these are consequences of the right to life. It further makes no sense to create law without reinforcing its ultimate goal. A hierarchy of rights would manage the problem of subjectivity in our legal system by ensuring that the fundamentals remain uncompromised.

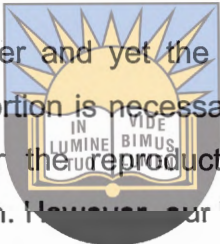


Our legal system has lost its directive nature in the enactment of abortion legislation. The result is a paradigm shift in the essence and function of law to preserve and promote human life from all forms of abuse, to its very destruction. Society needs a constant reminder of the function of the law and legalising abortion does not provide such a reminder. The codification of the function of the law is more precise and exact than its assumptions. In the future, it must not come as a surprise when the value of human life is not worthy of its promotion and protection because the law would have erased conservative moralism. Children are the personification of national and global values alike. The effectiveness of mores and the law today in preserving human life will be proven in the future by the conduct of children when they become adults.

The results of the study reflect the influence of law on our society. What is important is to note that once society loses focus of the imperative of the law, the fundamental values of society will be exposed to abuse. Life and its preservation are sacrificed for rights peripheral to that of life. It is crucial that the function of law be revisited and reinforced by the establishment of a hierarchy of rights.

When this is done, it will be clear that the enactment of abortion legislation compromises the directive of law. Society has no security when the preservation of life is altered or taken away. It is crucial that the function of the law be reinforced by the executive and the legislature. The government of South Africa is expected to have learnt from apartheid, colonialism and western ideals. Unrestrained liberty, choice and freedom, have the potential to corrupt the value of human life and, as a result, collapse the security of life as a whole.

5.2 Abortion



Abortion is synonymous with murder and yet the research shows that it is a condoned reality in our society. Abortion is necessary to eliminate the life in the womb; there is no other way for the reproduction of mankind except for conception and subsequent live birth. However, our legal system dictates that life begins after birth and not at conception as though the recreation process begins at birth. The enactment of abortion legislation changes the face of law completely by compromising the right to life whose ultimate preservation and promotion is the utility of the law. The problem is that supporting the destruction of life is a regression to the moral and social development of South Africa. It essentially means there is no actual practice of equality, human dignity and ultimately, security for life in general. The failure to preserve these three fundamentals will be reflected in the nature of the problems faced by South Africa. Violence, corruption, crime and xenophobia are consequences of the failure to respect and preserve human life with equal dignity.

Feminist groups view abortion as a form of emancipation allowing women to control child bearing. True emancipation does not bring about negative physical and emotional consequences. True emancipation allows for rediscovery, self development and leads to fulfillment. Abortion leads to regret, physical complications, social rejection and moral degeneration. It is true that abortion can be necessary in cases where pregnancy is dangerous to the wellbeing and the

life of the woman. In such cases, it should be treated as a necessary medical procedure that is not an option for any other scenario just like drugs are permissible to reduce physical pain for cancer patients. The study showed that abortion is favourable for subjective reasons, which essentially means that a life can be destroyed to suit the subjective interests and needs of another. The question is how does the law preserve and promote life when the legalisation of abortion is designed to end life arbitrarily.

Abortion is a destructive option more costly than other alternatives that do not receive as much attention. Adoption, foster parenting, children's homes, maintenance and government grants are alternatives to abortion that reinforce the preservation of life, equal and dignified treatment of all life. The experiences of real women tell a different story from what abortion is made out to be. Abortion violates parent, child and marital relationships by promoting subjectivity as opposed to the objective preservation of life. The rights of the unborn child's father are also violated because he is excluded from the decision in as much as the parents of a minor are excluded from her decision to terminate her pregnancy. Women risk breast cancer, puncturing the uterus and or not being able to reproduce when they abort. However, these consequences are not thoroughly presented when dealing with abortion.

The legality of abortion has further led to the increase of back street abortion. Back street abortion providers give women privacy that cannot be achieved in a public hospital or private abortion clinic. This is because the back street abortions are provided discreetly even in residential areas. Some women are not eager to go to private abortion clinics because they are expensive. Therefore they may have to wait on a long list in public hospitals. Abortion is murder because it terminates life. It is therefore contrary to the purpose of law and should be alienated from our legal system.

5.3 Recommendations

The preservation of human life is the ultimate imperative of the law and the enactment of abortion legislation threatens this goal. Therefore, the first recommendation is that the enactment of abortion legislation be abolished. Abortion should be illegal and only available as a medical procedure to save the life of a woman that is threatened by continued pregnancy as opposed to being readily available to the public for any other reason.


A distinct hierarchy must be provided within our legal system and even in the structure of human rights. The establishment of such a hierarchy will reinforce the function of law, which is to protect, promote and preserve human life. Codification of such higher norms will prevent deviation from the function of the law. The right to life must be recognized as the most important right in the Constitution of 1996 and the structure of human rights. Equality and human dignity must follow the right to life as supporting pillars under which every other right will be measured.

Our legal system must interpret every right objectively. The subjective interpretation of rights distorts transparency and the responsibilities that are attached to every right. Objectivity will ensure the impartial and equal treatment of all. It will also avoid contentious arguments like when life begins because the main issue will be to objectively protect life at all its stages.

Alternatives to abortion must be vigorously pursued and popularized so that they can become popular and known to the people. Adoption, foster care, children's homes, maintenance and government grants need to be explored in order to encourage their further development as alternatives to abortion. The country's adoption system needs to be improved with legislation that will be in the best interests of the child. Foster care allows the mother and child to remain in each other's lives while receiving external help from what can be termed surrogate

parents. Children's homes in the country can be increased both in numbers and quality. They will be a solution for women who do not want their unborn children and to be a part of their lives in the future. Maintenance policies can be explored to see how best the financial needs of the child and mother can be met without violating the rights of the father. Government grants can be reviewed annually to see how best to provide for children's homes, orphans and young or financially incapable mothers. More alternatives to abortion can be developed from those already stated above for as long as they will respect the fundamental right to life, equality and dignity.

The acceptance of the above mentioned recommendations is likely to provoke debate and resistance. Nonetheless, the researcher maintains that these recommendations are the best towards the preservation of human life and society's morals. In the event that abortion legislation is not removed from our legal system, the following is recommended.



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Abortion must not be allowed to interfere with privileged relationships such as marriage, parent - child and partners relationships. This essentially means that stringent rules should be prerequisite to abortion. The consent of a spouse, partner, parent and guardian should be sought before abortion can be granted.

Women seeking abortion should explore alternatives to abortion with trained experts before they can be allowed to abort. Women must not be allowed to make use of the abortion procedure more than once to prevent arbitrary abortions. The risks of abortion must be vigorously explained to each woman seeking the procedure and made known to the general public who may not seek abortion at the particular time. Hopefully, this will deter arbitrary abortions and in some way, awaken our society of the significance of life.

Vigorous investigations of illegal abortion providers should be carried out. Presently, several posters on the streets advertise illegal abortion providers and

their contact details. These illegal service providers must be sought out by the law and sentenced for their illegal behaviour. It is the researcher's view that illegal service providers are encouraged by the legalization of abortion. Their availability ensures quicker and more discreet service provision which the legal service providers cannot offer. Professional counselling for women must be mandatory prior to, and after, abortion. The negative psychological aspect of abortion is not popular amongst those who seek the service but it is known to the women who have had abortions and the service providers. There is room to investigate how to avoid the physical, emotional, psychological and other long term consequences of abortion. However, abolishing abortion from our legal system would be the best solution.



There is room for further study on how to improve objectivity, impartiality and transparency in our legal system. This is essential to the successful implementation of fundamental rights to life, equality and dignity. There is room to conduct a study on how the relationship between primary and secondary rights can be best kept free of controversy. The study of the two relationships will assess how best to measure and limit their subjectivity and objectivity. It is the researcher's view that the strict promotion and protection of the right to life, equality and dignity is the best measurement of applying primary and secondary human rights. There is room for the development of our legal system, and its structures, and to reinforce the implementation of law that respects life above anything else.

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APPENDICES

Appendix A: CONSENT FORM

This is a document that invites all persons approached to assist in the undersigned student research by agreeing to be interviewed or to answer a questionnaire by the undersigned researcher. The invitation requires the voluntary knowledgeable consent of the persons invited because of the nature of the topic.

The identity of the persons providing information in the questionnaire and during an interview is private and confidential. Interviews must be carried out individually to protect the privacy of the voluntary participants.

Persons approached have the right to refuse to be interviewed and to answer a questionnaire. You will not be forced and this will not alter the kind of treatment obtained in the abortion clinic. The persons approached are free to choose either to be interviewed or to answer a questionnaire administered by the researcher.

The name and contact number of the researcher will be provided in a separate sheet. If you reconsider or would like to assist the researcher undersigned, please feel free to contact her on the provided contact details.

Do you agree?

To be interviewed	YES	NO
To answer a questionnaire	YES	NO
To none of the above		

Thank you ☺

Appendix B: QUESTIONNAIRE FOR MEMBERS OF THE SOCIETY

PLEASE TICK THE RELEVANT BOX

1. Please state how old you are.

.....

2. Would you encourage a family member or friend to go through an abortion procedure?

YES	NO
-----	----



Please state the reason for your answer.

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.....
.....

3. Do you agree with abortion being legalized?

YES	NO
-----	----

Please state the reason for your answer.

.....
.....
.....

4. Are there any grounds in your opinion that could justify an abortion?

YES	NO
-----	----

Please state a reason for your answer.

.....

.....

.....

5. Are you aware of any disadvantages of procuring an abortion physically and otherwise?

YES	NO
-----	----



6. Would you be comfortable with your spouse, family member or friend working in an abortion clinic or carrying out the abortion procedure at work?

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YES	NO
-----	----

Please state the reason for your answer.

.....

.....

.....

7. What is your understanding of the law and its purpose?

.....

.....

Thank you ☺

Appendix C: QUESTIONNAIRE FOR THE PATIENTS IN THE ABORTION CLINIC.

1. Please state how old you are.

.....

2. Please state your marital status

SINGLE	
ENGAGED	
DIVORCED	
MARRIED	



3. Please indicate if you are comfortable giving reasons for your answers?

YES	University of Fort Hare <i>Together in Excellence</i>
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4. Do you feel there is a need for counseling after the procedure?

YES	NO
-----	----

Please give reason for your answer.

.....

5. Did you inform a family member, spouse or friend about the procedure?

YES	NO
-----	----

Please give a reason for your answer.

.....
.....
.....

6. Are you happy with the services provided here?

YES	NO
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Please give a reason for your answer.



.....
.....
.....

7. If you can, please state why you decided to go through the procedure?

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.....
.....
.....

8. Would you encourage a family member or friend to go through the procedure in the future?

YES	NO
-----	----

Please give a reason for your answer.

.....
.....
.....

9. Is this your first time going through the procedure?

YES	NO
-----	----

If not please state when you first went through the procedure and why.

.....
.....
.....

10. Are you aware of advantages and disadvantages of going through the procedure?

YES	NO
-----	----



11. Would you consider having another abortion in the future?

YES	NO
-----	----

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Please give a reason for your answer.

.....
.....
.....

Thank you ☺



Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 476 Cape Town 11 February 2005 No. 27267

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THE PRESIDENCY

No. 129

11 February 2005

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 38 of 2004: Choice on Termination of Pregnancy Amendment Act, 2004.



AIDS HELPLINE: 0800-123-22 Prevention is the cure

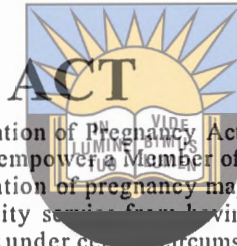
Act No. 38,2004 CHOICE ON TERMINATION OF PREGNANCY
AMENDMENT ACT, 2004

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President.)
(Assented to 4 February 2005.)



To amend the Choice on Termination of Pregnancy Act, 1996, so as to amend a definition and to insert others; to empower a Member of the Executive Council to approve facilities where a termination of pregnancy may take place; to exempt a facility offering a 24-hour maternity services from having to obtain approval for termination of pregnancy services under certain circumstances; to provide for the recording of information and the submission of statistics; to enable a Member of the Executive Council to make regulations and to provide for matters connected therewith.

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ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 92 of 1996

1. Section 1 of the Choice on Termination of Pregnancy Act, 1996 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion after the definition of “gestation period” of the following definition:

“‘Head of Department’ means the head of a provincial health department;”

(b) by the insertion after the definition of “medical practitioner” of the following definition:

“‘Member of the Executive Council’ means the member of the Executive Council of a province who is responsible for health in that province;”

(c) by the substitution for the definition of “registered midwife” of the following definition:

“‘registered midwife’ means a person registered as such under the Nursing Act, 1978 (Act No. 50 of 1978), and who has in addition undergone prescribed training in terms of this Act;” and

(d) by the insertion after the definition of “registered midwife” of the following definition:

“‘registered nurse’ means a person registered as such under the Nursing Act, 1978 (Act No. 50 of 1978), and who has in addition undergone prescribed training in terms of this Act;”.

Substitution of section 3 of Act 92 of 1996

2. The following section is hereby substituted for section 3 of the principal Act:

“Place where termination of pregnancy may take place

3. (1) Termination of a pregnancy may take place only at a facility which—

- (a) gives access to medical and nursing staff;
- (b) gives access to an operating theatre;
- (c) has appropriate surgical equipment;
- (d) supplies drugs for intravenous and intramuscular injection;
- (e) has emergency resuscitation equipment and access to an emergency referral centre or facility;
- (f) gives access to appropriate transport should the need arise for emergency transfer;
- (g) has facilities and equipment for clinical observation and access to in-patient facilities;
- (h) has appropriate infection control measures;
- (i) gives access to safe waste disposal infrastructure;
- (j) has telephonic means of communication; and
- (k) has been approved by the Member of the Executive Council by notice in the *Gazette*.

(2) The Member of the Executive Council may withdraw any approval granted in terms of subsection (1).

(3) (a) Any health facility that has a 24-hour maternity service, and which complies with the requirements referred to in subsection (1)(a) to (j), may terminate pregnancies of up to and including 12 weeks without having to obtain the approval of the Member of the Executive Council.

(b) The person in charge of a health facility contemplated in paragraph (a) must notify the relevant Member of the Executive Council that the health facility has a 24-hour maternity service which complies with the requirements referred to in subsection (1)(a) to (j).

(4) The Member of the Executive Council shall once a year submit statistics of any approved facilities for that year to the Minister.

(5) Notwithstanding anything to the contrary in this Act, the Minister may perform any of the functions that the Member of the Executive Council may or must perform, if it is necessary to perform such function in order to achieve any of the objects of this Act.”

Amendment of section 7 of Act 92 of 1996

3. Section 7 of the principal Act is hereby amended—

- (a) by the substitution in subsection (3) for the words preceding the proviso of the following words:

“The person in charge of a facility referred to in section 3 shall, within one month of the termination of a pregnancy at such facility, collate the prescribed information and forward it by registered post confidentially to the [Director-General] relevant Head of Department”; and

- (b) by the substitution for subsection (4) of the following subsection:

“(4) The [Director-General] Head of Department shall—

~~(a)~~ keep record of the prescribed information which he or she receives in terms of subsection (3); and

(b) submit to the Director-General the information contemplated in paragraph (a) every six months.”

Act No. 38.2004

CHOICE ON TERMINATION OF PREGNANCY
AMENDMENT ACT. 2004**Substitution of section 8 of Act 92 of 1996**

4. The following section is hereby substituted for section 8 of the principal Act:

“Delegation

8. (1) The [Minister] Member of the Executive Council may, on such conditions as he or she may determine, in writing delegate to the [Director-General] Head of Department or any other officer in the service of the State, any power conferred upon the [Minister] Member of the Executive Council by or under this Act, except the power referred to in section 9. 5

(2) The [Director-General] Head of Department may, on such conditions as he or she may determine, in writing delegate to an officer in the service of the State, any power conferred upon the [Director-General] Head of Department by or under this Act [or delegated to him or her under subsection (1)]. 10

(3) The [Minister or Director-General] Member of the Executive Council or Head of Department shall not be divested of any power delegated by him or her, and may amend or set aside any decision taken by a person in the exercise of any such power delegated to [him or her] that person.” 15

Substitution of section 9 of Act 92 of 1996

5. The following section is hereby substituted for section 9 of the principal Act:

“Regulations

9. The [Minister or Director-General] Member of the Executive Council, in consultation with the Minister, make regulations relating to any matter which [he or she may consider] it necessary or expedient to prescribe for [achieving the objects] the proper implementation or administration of this Act.” 25

Amendment of section 10 of Act 92 of 1996

6. Section 10 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Any person who— 30

- (a) is not a medical practitioner, or a registered midwife or registered nurse who has completed the prescribed training course, and who performs the termination of a pregnancy referred to in section 2(1)(a);
- (b) is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2(1)(b) or (c); [or] 35
- (c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy; or
- (d) terminates a pregnancy or allows the termination of a pregnancy at a facility not approved in terms of section 3(1) or not contemplated in section 3(3)(a), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.” 40

Substitution of certain expression in Act 92 of 1996

7. The principal Act is hereby amended by the substitution for the expression “registered midwife”, wherever it appears, of the expression “registered midwife or registered nurse”. 45

Act No. 38,2004

CHOICE ON TERMINATION OF PREGNANCY
AMENDMENT ACT. 2004

Transitional provision

8. Any facility designated in terms of section 3(1) of the principal Act prior to the commencement of this Act must be regarded as having been approved by the Member of the Executive Council in terms of section 3(1)(k) of the principal Act as amended by this Act.

5

Short title

9. This Act is called the Choice on Termination of Pregnancy Amendment Act, 2004.



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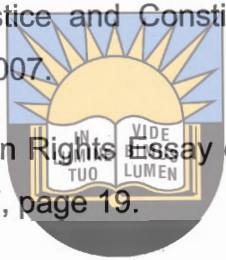
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