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ACT 92 OF 1996**

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**TERMINATION-OF-PREGNANCY RIGHTS AND FOETAL INTERESTS IN  
CONTINUED EXISTENCE IN SOUTH AFRICA: THE *CHOICE ON TERMINATION  
OF PREGNANCY ACT 92 OF 1996***

C Pickles\*

## 1 Introduction

The aim of this article is to demonstrate that although South Africa has permissive termination-of-pregnancy legislation to the extent that women can terminate first- and second-trimester pregnancies on demand and for socio-economic reasons, foetal interests<sup>1</sup> are in fact taken into account. The system of female reproductive rights progressively shelters foetal interests, albeit to a limited extent.

At common law, legal subjectivity starts at birth and requires that the child must be separate from the mother's body and must survive independently of the mother after separation.<sup>2</sup> Without any evidence of live birth, constitutional rights will not vest in the foetus. Accordingly, a tension arises between foetal interests in continued existence (as a non-legal subject) on the one hand, and women (as legal subjects) exercising their rights to autonomy by accessing termination-of-pregnancy services on the other. Within this framework, the *Choice on Termination of Pregnancy Act 92 of 1998* (hereafter the *Choice Act*) and the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*) will be examined in order to determine whether the *Choice Act* is a legislative entrenchment of the tension that arises or whether it silently balances these opposing positions.

The *Choice Act* both advances and limits female reproductive rights. In the process of limiting reproductive rights, foetal interests in continued existence are brought to the fore and taken into account. Two main factors concerning the *Choice Act* will be considered. First, the *Choice Act* advances a number of constitutional rights relevant

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1 The term "foetal interests" specifically relates to the benefit of continued existence in an unborn state up to the point of live birth. This term is preferred over "foetal rights", because "foetal rights" implies that a foetus is vested with constitutional rights, which is not the case in South Africa.

2 Boezaart (ed) *Child Law* 4-5.

to female autonomy. These rights play an important role in society and serve as the foremost reason why foetal interests are limited. Each of these rights will be considered contextually. Secondly, it is also accepted that the *Choice Act* takes foetal interests into account, since a woman's right to terminate her pregnancy is gradually limited as the pregnancy progresses. In this context, the present article will consider when the limitation of female reproductive rights takes effect and how this facilitates taking foetal interests into account. On the topic of foetal interests, the article further questions if elective second-trimester termination of pregnancies serves any purposeful role. The reasons presented for the limitations are important, since such reasons demonstrate whether a balance is achieved or not.

South Africa is in the process of successfully balancing the opposing notions of female reproductive rights and foetal interests.<sup>3</sup> There are indications that a balancing method is in place, because two extremes are avoided; that is, pregnant women may not terminate late pregnancies on demand or for socio-economic reasons, and the state does not completely prohibit the termination of pregnancies. In housing values and rights the *Constitution* ensures that these two extremes are avoided.

## **2 *Choice on Termination of Pregnancy Act*: advancing female reproductive rights**

Although the *Constitution* does not expressly deal with the "right to terminate a pregnancy", O'Sullivan states that the *Choice Act* gives effect to numerous constitutional rights that can be grouped together as female reproductive rights.<sup>4</sup> These rights include the rights to life, privacy, bodily and psychological integrity, dignity, equality, access to information and health care, and pregnant children's rights, and affect the right to terminate a pregnancy in South Africa. This is reflected in the Preamble of the *Choice Act*, where these rights are recognised as important elements in promoting reproductive rights and in extending the freedom of choice concerning early and safe termination-of-pregnancy services.

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3 This process is demonstrated in the case of, *S v Mshumpa* 2008 1 SACR 126 (E) to be discussed below.

4 O'Sullivan "Reproductive Rights" 37-2.

## 2.1 *The right to equality*

The *Constitution* includes the right to equality in terms of section 9, which provides that everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>5</sup> Further, the right to equality includes the full and equal enjoyment of all rights and freedoms. Legislative and other measures may be taken in order to protect or advance persons or categories of persons disadvantaged by unfair discrimination.<sup>6</sup> In *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, Sachs J described equality as the right to be different and stated that equality requires equal concern and respect across those differences.<sup>7</sup> At the very least, equality insists that difference should not be the basis for exclusion, marginalisation or stigma.<sup>8</sup>

In view of people's differences, the Bill of Rights is committed to a substantive understanding of equality.<sup>9</sup> This approach "addresses the forces of systemic discrimination which, in the case of gender discrimination, often result in 'neutral' or 'equally applied' rules having an adverse impact on women", since the biological fact of pregnancy and the consequences attached thereto are not taken into account.<sup>10</sup> The demand for substantive equality in the sphere of reproductive rights makes the connection between systemic discrimination against women and women's reproductive role.<sup>11</sup>

O'Sullivan states that from a substantive perspective the right to equality requires the state to take positive intervening action and to provide the minimum resources

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5 Section 9(1) *Choice on Termination of Pregnancy Act* 92 of 1996.

6 Section 9(2) *Choice on Termination of Pregnancy Act* 92 of 1996.

7 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) 549B.

8 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) 549C-D.

9 Birenbaum 1996 *SAJHR* 488.

10 Birenbaum 1996 *SAJHR* 488.

11 O'Sullivan "Reproductive Rights" 37-14. The fact that s 9(3) embraces pregnancy, in addition to sex and gender, as a prohibited ground for discrimination acknowledges that women are members of a systematically disadvantaged group whose historical and current condition requires enhanced judicial consideration.

necessary for the enjoyment of certain rights.<sup>12</sup> For example, Ngwena points out that public hospitals are required to provide free termination-of-pregnancy services.<sup>13</sup>

The *Choice Act* recognises that in order to achieve equality women must be able to decide whether or not to terminate a pregnancy, since they are best placed to make this decision.<sup>14</sup> In the Preamble of the *Choice Act* specific reference is made to the recognition of the values of human dignity, the achievement of equality, non-racialism, and non-sexism. The *Choice Act* allows for the termination of a pregnancy on request during the first twelve weeks of gestation, and from thirteen to twenty weeks for socio-economic reasons.

## 2.2 *The right to dignity*

The *Constitution* provides that everyone has inherent dignity and the right to have their dignity respected and protected.<sup>15</sup> According to *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>16</sup> honouring someone's dignity requires us at the very least to acknowledge the value and worth of all individuals as members of society. Further, according to *S v Makwanyane* dignity and the right to life are the most important of all human rights.<sup>17</sup> Entrenching a right to personal dignity is an acknowledgment that human beings are entitled to be treated as worthy of respect and concern.<sup>18</sup> O'Sullivan<sup>19</sup> asserts that "[d]enying a woman the freedom to make and to act upon a decision concerning reproduction treats her as a means to an end and strips her of her dignity". In terms of being an individual as an end in herself, women should not be treated as mere instrumental objects of the will of others, and

12 O'Sullivan "Reproductive Rights" 37-12. The right to equality provides women with the freedom to choose whether or not to have intercourse or to choose how many children to have and when, and permissive termination legislation is an issue of social justice and sexual equality.

13 Ngwena 2004 *JL Med and Ethics* 715. However, see Harries *et al* 2012 *J Biosoc Sci* 197; Harries *et al* 2009 *BMC Public Health* 296. Each article demonstrates that although South Africa has this policy in place, the demand for termination-of-pregnancy services is rarely adequately met as a result of poor infrastructure, and a lack of physical space and personnel. The lack of personnel is linked to provider opposition to the termination of pregnancies and unwilling care providers. The shortage of termination-of-pregnancy providers undermines the availability of termination services.

14 O'Sullivan "Reproductive Rights" 37-14–37-15.

15 Section 10 of the *Constitution*.

16 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) 28D-E.

17 *S v Makwanyane* 1995 3 SA 391 (CC) 451C.

18 *S v Makwanyane* 1995 3 SA 391 (CC) 507A-B.

19 O'Sullivan "Reproductive Rights" 37-23.

this definition of dignity sets the standards below which ethical and legal behaviour may not fall.<sup>20</sup>

The right to dignity has, according to Woolman, revolutionised the body of law that deals with state regulation of the termination of pregnancies.<sup>21</sup> Woolman notes that the courts<sup>22</sup> have expressly recognised that the right to dignity encapsulates two definitions specifically relevant to women in relation to reproductive rights: "equal concern and equal respect" and "self-actualisation".<sup>23</sup> "Equal concern and equal respect" is primarily a negative obligation not to treat another merely as a means, but rather to recognise in the other person the ability to act as an autonomous moral agent.<sup>24</sup> This approach underwrites a conception of dignity as a formal entitlement to equal concern and equal respect.<sup>25</sup> As the right to dignity secures the space for self-actualisation, women are entitled to respect, since they hold the capacity to create meaning for themselves and pursue their own ends.<sup>26</sup>

### **2.3 The right to bodily and psychological integrity**

In terms of section 12(2)(a) and (b) of the *Constitution*, everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and the right to security in and control over their body. The specific recognition of reproductive freedom was probably intended to leave little room for the courts to prohibit the termination of pregnancies, and this section gives recognition to the fact that socially entrenched forms of physical oppression and exploitation relate to reproduction and sexuality.<sup>27</sup> According to O'Sullivan, section 12(2) directly confronts the fact that women do not enjoy security in and control over their own bodies, taking into account the high rates of sexual violence against

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20 Woolman "Dignity" 36-9.

21 Woolman "Dignity" 36-31.

22 *Christian Lawyers Association v. Minister of Health* 2005 1 SA 509 (T) (hereafter *Christian Lawyers* 2005); *Christian Lawyers Association of SA v. Minister of Health* 1998 4 SA 1113 (T) (hereafter *Christian Lawyers* 1998).

23 Woolman "Dignity" 36-34.

24 Woolman "Dignity" 36-10.

25 Woolman "Dignity" 36-10.

26 Woolman "Dignity" 36-11.

27 Bishop and Woolman "Freedom and Security of the Person" 40-80.

women,<sup>28</sup> and that the circumstances in which women become pregnant are often beyond their control.<sup>29</sup>

In *Christian Lawyers* 2005 it was stated that section 12(2) provides a woman with the constitutional right to terminate her pregnancy. O'Sullivan states that the freedom of choice which is entrenched in this section is reinforced by the constitutional rights to life, dignity, equality, privacy, and access to reproductive health care.<sup>30</sup> Further, the author states that the *Choice Act* promotes a woman's right to freedom and security of her body by affording her the right to choose to terminate her pregnancy safely, and that the woman concerned is in the best position to make that decision; hence only her consent is needed.<sup>31</sup>

## **2.4 The right to privacy**

The constitutional right to privacy in terms of section 14 is the right to be "left alone" and to exist free from state interference.<sup>32</sup> In *Bernstein v Bester* the right to privacy was found to shield a person's inner sanctum (family life, sexual preference and home environment) from erosion by the exercise of the conflicting rights of the community.<sup>33</sup> Privacy is based on the notion of what is necessary to have one's own autonomous identity.<sup>34</sup> David McQuoid-Mason refers to personal-autonomy privacy rights as substantive privacy rights which permit individuals to make decisions about their lives without state interference, ultimately empowering them to exercise control over procreation, contraception and child-rearing.<sup>35</sup>

Referring to the landmark American decision of *Roe v Wade*<sup>36</sup> as authority, O'Sullivan states that a balance must be reached between a woman's right to privacy

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28 The Crime Report for 2010/2011 indicates that 66,196 cases were reported involving sexual offences. The report states that 35,820 were sexual offences committed against women older than eighteen and 28,128 were sexual offences committed against children younger than eighteen. (SAPS 2011 [www.saps.gov.za](http://www.saps.gov.za) 12). These figures reflect only reported crimes.

29 O'Sullivan "Reproductive Rights" 37-17.

30 O'Sullivan "Reproductive Rights" 37-15.

31 O'Sullivan "Reproductive Rights" 37-18.

32 O'Sullivan "Reproductive Rights" 37-8.

33 *Bernstein v Bester* 1996 2 SA 751 (CC) 788D.

34 *Bernstein v Bester* 1996 2 SA 751 (CC) 788B.

35 McQuoid-Mason "Privacy" 38-23.

36 *Roe v Wade* 410 US 113 (1975).

and the state's interest in potential human life.<sup>37</sup> In the *Roe* judgment the court made use of an approach linked to the trimesters of a pregnancy and stated that, as the pregnancy advances from the first into the second and finally into the third trimester, the state's interest in protecting pre-natal life becomes increasingly compelling, justifying interference in a woman's personal life and the decisions she makes concerning the continuation of her pregnancy.<sup>38</sup> The trimester approach was abandoned in *Planned Parenthood of Southern Pennsylvania v Casey*,<sup>39</sup> where it was found that the state has an interest in foetal life throughout the pregnancy. As a result of this interest restrictions can be imposed on women, provided that women are not unduly burdened by the restrictions. O'Sullivan cautions that the right to privacy should be used in conjunction with equality rights, since relying on privacy rights in isolation introduces a number of drawbacks.<sup>40</sup> She argues that it is easier to justify limiting women's access to termination-of-pregnancy services on the grounds that the termination of a pregnancy is considered to fall within a woman's private sphere, thus ultimately removing a duty on the state to provide public funding or to intervene and protect women.<sup>41</sup>

## 2.5 *The right to have access to health care*

According to section 27(1)(a) and (2) of the *Constitution*, everyone has the right to have access to health care, including reproductive health care, and the state must therefore take reasonable legislative and other measures to achieve the progressive realisation of each of these rights. In *Soobramoney v Minister of Health*<sup>42</sup> the Constitutional Court found that the obligations imposed on the state by section 27 are dependent on the resources available for such purposes. On the topic of progressive realisation, Madala J stated:<sup>43</sup>

Some rights in the *Constitution* are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon.

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37 O'Sullivan "Reproductive Rights" 37-9.

38 O'Sullivan "Reproductive Rights" 37-9.

39 *Planned Parenthood of Southern Pennsylvania v Casey* 505 US 833 (1992).

40 O'Sullivan "Reproductive Rights" 37-12.

41 O'Sullivan "Reproductive Rights" 37-12.

42 *Soobramoney v Minister of Health* 1998 1 SA 765 (CC) 771G.

43 *Soobramoney v Minister of Health* 1998 1 SA 765 (CC) 779F.



According to O'Sullivan, reproductive health implies that people have the ability to engage in safe sexual relationships and that women can safely progress through their pregnancies.<sup>44</sup> Further, access to safe termination services contributes to reproductive health through the reduction of maternal morbidity and mortality.<sup>45</sup>

Human Rights Watch recently finalised a report that focused on the public health-care system in the Eastern Cape province and highlighted rather appalling conditions that pregnant women are left to endure, especially when resorting to public health-care facilities while in labour.<sup>46</sup> The report describes circumstances where women have endured verbal or physical abuse by attending hospital staff, general neglect, refusal of urgent medical treatment, or have been turned away when presenting themselves at a hospital for delivery.<sup>47</sup> However, the report recognises that since the end of apartheid South Africa has passed important sexual and reproductive health-related laws that, if implemented successfully, have the potential to improve maternal health care greatly.<sup>48</sup> Further, South Africa has the highest per capita spending on health in sub-Saharan Africa, and is recognised as having a strong legal and policy framework, which includes a constitutional guarantee of the right to health. Maternity care is free and, as a result, ninety-two per cent of women attend antenatal care and eighty-seven per cent give birth in health facilities.<sup>49</sup> Even with this framework in place, women's reproductive health rights are still being undermined, and the tragic fact is that many women who eventually die from pregnancy or birth-related causes have been in contact with the health-care system, meaning that some of the deaths could have been prevented.<sup>50</sup> The problem is arguably not the South African legal framework failing women, but rather a lack of governmental accountability in the health-care system.<sup>51</sup>

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44 O'Sullivan "Reproductive Rights" 37-24.

45 O'Sullivan "Reproductive Rights" 37-24.

46 Human Rights Watch 2011 [www.hrw.org](http://www.hrw.org). Statistically, the Eastern Cape has the highest maternal mortality rate in South Africa.

47 See, generally, chapter 2 of the report, "Maternity Care Failures and Patient Abuse".

48 Human Rights Watch 2011 [www.hrw.org](http://www.hrw.org) 15.

49 Human Rights Watch 2011 [www.hrw.org](http://www.hrw.org) 15.

50 Human Rights Watch 2011 [www.hrw.org](http://www.hrw.org) 15.

51 Human Rights Watch 2011 [www.hrw.org](http://www.hrw.org) 3.

## 2.6 *The right to life*

*Makwanyane* showed that the right to life is an unqualified right.<sup>52</sup> O'Regan J stated that the right to life goes beyond mere existence; it includes the right to live as a human being, to be part of a broader community, and to share in the experience of humanity.<sup>53</sup> According to O'Sullivan, section 11 of the *Constitution* is promoted by the *Choice Act* to the extent that its less restrictive provisions provide women with access to reproductive health-care services that will prevent or dramatically reduce the majority of deaths associated with the illegal and unsafe termination of pregnancies.<sup>54</sup> During the first twelve weeks of pregnancy only the pregnant woman's consent is required, and a properly trained midwife may perform the procedure.<sup>55</sup> From thirteen weeks only a medical practitioner may carry out a termination, and after twenty weeks' gestation two medical practitioners or one medical practitioner together with a registered midwife may perform the termination-of-pregnancy procedure.<sup>56</sup>

This is in contrast to the now-repealed *Abortion and Sterilisation Act* 2 of 1975 (hereafter the *Abortion and Sterilisation Act*), where in terms of section 3(1)(a)-(d) a pregnancy could be terminated only in cases of rape or incest, or if the pregnancy constituted a serious threat to the woman's life or physical or mental health. Two medical practitioners were required to certify that abortion was necessary in the circumstances indicated. Section 3(1) was further qualified by section 3(2), which required that the medical practitioner who certified the necessity of the termination could not be the practitioner to perform the termination procedure, or even be associated with the same partnership or employer.

Ngwena states that during the implementation of the *Abortion and Sterilisation Act* it was estimated that forty thousand women accessed unsafe and illegal termination-of-pregnancy services, and that only an average of 1,200 women qualified for legal terminations.<sup>57</sup> However, in the first year of the *Choice Act*'s implementation twenty-six thousand women had access to safe and legal termination-of-pregnancy

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52 *S v Makwanyane* 1995 3 SA 391 (CC) 428B.

53 *S v Makwanyane* 1995 3 SA 391 (CC) 506D.

54 O'Sullivan "Reproductive Rights" 37-7.

55 Section 2(2) *Choice on Termination of Pregnancy Act* 92 of 1996.

56 Section 2(b) and (c) *Choice on Termination of Pregnancy Act* 92 of 1996 respectively.

57 Ngwena (Ngwena 2004 *JL Med and Ethics*) refers to SAIRR *South Africa Survey*.

services.<sup>58</sup> These figures demonstrate the gradual realisation of the value of women's lives in South Africa. Unfortunately the World Health Organisation estimated that forty-two million pregnancies were terminated world-wide in 2008 and, of these, twenty million were terminated by unskilled service providers using dangerous techniques, under unsanitary conditions, or were self-induced terminations.<sup>59</sup>

## 2.7 *Children's rights*

Children's rights are also advanced by the *Choice Act* to the extent that even a female under the age of eighteen may terminate her pregnancy without having to obtain parental consent.<sup>60</sup>

In *Christian Lawyers* 2005, the *Choice Act* came under constitutional scrutiny. Here the plaintiffs sought an order declaring sections 5(1), (2) and (3), read with the definition of "woman", to be unconstitutional and to be struck down.<sup>61</sup> The *Choice Act* defines a woman as any female of any age and, in terms of section 5(1), the termination of a pregnancy may take place only with the informed consent of the pregnant woman. In terms of section 5(2) and (3), no consent other than that of a pregnant woman is required for the termination of her pregnancy. In the case of a minor, it is required of the medical practitioner or midwife to advise the minor to consult with her parents, guardian, or a family member. Should the pregnant minor decide against consulting with such persons, the termination of her pregnancy cannot be denied on that ground.<sup>62</sup> The essence of the plaintiff's case was that females under the age of eighteen years are not capable, without parental consent or control, of making an informed decision as to whether or not to terminate their pregnancy serves their best interests.<sup>63</sup>

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58 Ngwena 2004 *JL Med and Ethics* 715.

59 WHO *Unsafe Abortion* 2.

60 *Christian Lawyers* 2005.

61 *Christian Lawyers* 2005 512B.

62 Van Oosten 1999 *SALJ* 66 asserts that this section is justified since pregnancy and childbirth may not be in the best interests of very young girls or their potential children. Further, van Oosten asserts that this provision includes the right of a minor to refuse to have her pregnancy terminated.

63 *Christian Lawyers* 2005 513C. The plaintiff relied on the following sections of the *Constitution*: 28(1)(b); 28(1)(d); 28(2); 9(1); and 7(1).

The High Court held that instead of using age as a measure of control the legislature had rather opted to use capacity to give informed consent<sup>64</sup> as the yardstick.<sup>65</sup> Where capacity to give informed consent does not exist, despite the age of the woman, the termination of her pregnancy cannot be effected.<sup>66</sup> It was held that in the context of the *Choice Act* capacity to give informed consent is determined on a case-by-case basis by the medical practitioner, based on the emotional and intellectual maturity of the individual concerned rather than on an arbitrarily predetermined and inflexible age.<sup>67</sup> The approach adopted by the *Choice Act* prevents frustration of the minor's constitutional rights where she is emotionally and intellectually capable of giving informed consent for the termination of her pregnancy.<sup>68</sup>

It was held that the rationale behind the requirement for informed consent in medical procedures brings the court very close to the founding principles from which the right to terminate a pregnancy in itself arises: an individual's fundamental right to self-determination.<sup>69</sup> The court found that the fundamental right to individual self-determination "lies at the very heart and base of the constitutional right" to terminate a pregnancy, and that sections 10, 12(2)(a) and (b), 14, and 27(1)(a) provide the foundation for the right to terminate a pregnancy.<sup>70</sup> Further, the court stated that the:<sup>71</sup>

...commonality of the source of the right to termination of pregnancy with the ratio for informed consent, make informed consent not only a viable and desirable principle for the regulation of the right, but also the most appropriate.

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64 Informed consent consists of three elements: knowledge, appreciation and consent. Knowledge requires a woman to be aware of the nature and extent of the risk, and appreciation requires a woman to understand the extent of the risk inherent in termination procedures (*Christian Lawyers* 2005 515D). Consent means that a woman must subjectively consent to the risk, and her consent must be comprehensive to the extent that she consents to the entire transaction inclusive of all of its consequences (*Christian Lawyers* 2005 516A).

65 *Christian Lawyers* 2005 516E.

66 *Christian Lawyers* 2005 516E.

67 *Christian Lawyers* 2005 516D. The court further stated that the requirement that the medical practitioner or midwife who is to perform the termination procedure must advise the minor to consult with her parents or guardian is a regulatory measure of the Act, but certainly not a cornerstone of regulation under the Act. This regulation is subject to the proviso that if the minor decides against consulting with her parents the termination procedure cannot be denied (*Christian Lawyers* 2005 517C).

68 *Christian Lawyers* 2005 517D.

69 *Christian Lawyers* 2005 517D.

70 *Christian Lawyers* 2005 518E.

71 *Christian Lawyers* 2005 518E.

However, it was found that the right to terminate a pregnancy, like all constitutional rights, is not absolute, and that the state has a legitimate role, in the protection of prenatal life as an important value in our society, to limit a woman's right to termination.<sup>72</sup> Since the right to terminate a pregnancy is a fundamental constitutional right, state regulation cannot amount to a denial of the freedom to exercise the right. Thus, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required in terms of section 36 of the *Constitution*.<sup>73</sup> Accordingly, the court found it unjustifiable to limit access to termination-of-pregnancy services on the grounds of age.

The court concluded that the *Choice Act* allows a woman with the capacity to give informed consent to consent to the termination of her pregnancy. Since the right to terminate a pregnancy stems from fundamental constitutional rights, it would be unjustified and irrational to limit the exercise of that right based on the woman's age. The constitutional rights afforded in terms of sections 12(2)(a) and (b), 10, 14, and 27(1)(a) are afforded to "everyone", including girls under the age of eighteen, and as a result these girls are entitled to protection of their right to self-determination.

## **2.8 The right to have access to information**

Section 32(1) of the *Constitution* states that "[e]veryone has the right of access to any information held by the state, and any information that is held by another person and that is required for the exercise or protection of any rights". O'Sullivan argues that the lack of access to information concerning reproductive health will prevent women from exercising their right to reproductive decision making and will ultimately limit the control women have over their bodies.<sup>74</sup> In terms of section 6 of the *Choice Act*, medical practitioners and midwives are obliged to provide women with information concerning their rights in relation to the Act.

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72 *Christian Lawyers* 2005 527D.

73 *Christian Lawyers* 2005 527D.

74 O'Sullivan "Reproductive Rights" 37-24. O'Sullivan refers to *Brownfield v Daniel Freeman Marina Hospital* Cal App 3d 405 (1989), where the Supreme Court of California held that the duty to disclose information about reproductive health issues arises from the fact that women have the right to exercise control over their bodies. This right cannot be meaningfully exercised without adequate information upon which to base a decision. In this case a rape victim was denied access to information concerning emergency contraception.

The *Choice Act*, under the direction of the *Constitution*, sketches an image of women as equal and free autonomous agents, regardless of age. Most importantly, it is submitted that the *Constitution* and the *Choice Act* draw attention to the fact that the presence of an early pregnancy is not an invitation to introduce and impose limitations on women, but serves rather as a ground for enhanced protection. Without this protection, women may in fact be reduced to substandard citizens merely filling a reproductive role in society.

### **3      *Choice on Termination of Pregnancy Act: recognising foetal interests***

In 1998 the *Choice Act* came under constitutional scrutiny in *Christian Lawyers Association* 1998. This case clearly demonstrates the status of the foetus in the context of the South African *Constitution*. The plaintiff sought an order declaring the *Choice Act* unconstitutional in the light of section 11 of the *Constitution*, which provides that everyone has the right to life. It was argued that the right to life applies to a foetus from the moment of conception. An exception was raised on the grounds that there is no cause of action, since a foetus is not a bearer of constitutional rights in terms of section 11, and that section 11 does not preclude the termination of a pregnancy in the circumstances contemplated by the *Choice Act*.

The High Court had to determine if the word "everyone" includes a foetus, because the validity of the plaintiff's action was dependent on the assertion that "everyone" applies to a foetus from the moment of conception.<sup>75</sup> The court stated that it was not concerned with medical or scientific evidence as to when life begins and regarding foetal development, nor was it the function of the court to decide the issue on religious or philosophical grounds; this, it held, was a legal issue that had to be decided on the basis of proper legal interpretation. The question here was not if a foetus is a human being, but rather if a foetus is afforded the same legal protection as those persons born alive.

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<sup>75</sup> *Christian Lawyers* 1998 1118C.

Examining the *Constitution*, the court held that there are no express provisions affording a foetus legal personality or protection.<sup>76</sup> In terms of section 12(2) of the *Constitution*, everyone has the right to make decisions concerning reproduction, and the court found that nowhere in the *Constitution* can it be said that this right is qualified in order to protect a foetus.<sup>77</sup> However, this does not restrict the state from enacting legislation that limits and regulates the termination of pregnancies.<sup>78</sup>

Had the drafters of the *Constitution* intended to protect a foetus, the court would have expected this to have been done in terms of section 28 relating to the rights of children.<sup>79</sup> The court found that age begins at birth, therefore excluding a foetus from the provisions of section 28, since a foetus is not a child of any age.<sup>80</sup> If section 28 does not include a foetus within the ambit of its protection, then it can hardly be said that other provisions of the Bill of Rights, including section 11, were intended to protect a foetus.<sup>81</sup>

In further validation of the conclusion reached, the court turned to other provisions in the *Constitution* where "everyone" is referred to and not where a specific class of persons is singled out.<sup>82</sup> It was demonstrated that in those cases where the term "everyone" is used, it cannot be applied to or include, a foetus in its ambit.<sup>83</sup> If a foetus were to be included in the interpretation of "everyone" in section 11, that action would ascribe to the term a meaning different from that which it bears everywhere else in the Bill of Rights.<sup>84</sup>

The court stated that if section 11 were to be interpreted as affording constitutional protection to a foetus, far-reaching and inconsistent consequences would ensue.<sup>85</sup>

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76 *Christian Lawyers* 1998 1121G.

77 *Christian Lawyers* 1998 1121G.

78 *Christian Lawyers* 1998 1122A.

79 *Christian Lawyers* 1998 1122A.

80 It is not clear what the court relied on to come to the conclusion that age begins at birth. However, to justify this statement the court stated that there are certain rights in terms of s 28 that could not have been intended to protect a foetus. These rights include the rights that relate to working conditions, detention or armed conflict.

81 *Christian Lawyers* 1998 1122B.

82 The sections considered were: 12(2)(a) and (b); 13; 14; 15(1); 16(1); 17; 18; 21; 30; and 35 of the *Constitution*.

83 *Christian Lawyers* 1998 1122F.

84 *Christian Lawyers* 1998 1122F.

85 *Christian Lawyers* 1998 1122I.

To start with, the foetus would enjoy the same protection as the pregnant woman, and this would result in termination of pregnancies being constitutionally prohibited even when the pregnancy poses serious threats to the woman's life or where there is a likelihood that the foetus will suffer from a serious mental or physical defect after birth, or when the pregnancy is the result of rape or incest.<sup>86</sup> It was held that the drafters of the *Constitution* could not have contemplated such far-reaching results without expressing themselves in no uncertain terms.<sup>87</sup> The court found itself in agreement with the defendants' argument that the *Constitution* is primarily an egalitarian constitution, and that transformation of society along egalitarian lines involves the eradication of systemic forms of domination and disadvantage based on race, gender, class and other grounds of inequality. It is required of the court to have regard to women's constitutional rights, and affording legal personality to a foetus would undoubtedly impinge on these rights. The exception was therefore upheld.<sup>88</sup>

This was not the end of the matter because years later *Christian Lawyers* 2005 found that the right to terminate a pregnancy is not absolute, since the state considers prenatal life an important value in society.<sup>89</sup>

The *Choice Act* sets out the circumstances and the conditions that allow for the termination of a pregnancy. Section 2(1)(a) states that a pregnancy may be terminated upon the request of a woman during the first twelve weeks of gestation. In terms of section (2)(1)(b), from the thirteenth week up to and including the twentieth week of gestation a pregnancy may be terminated only once a woman has consulted a medical practitioner and that medical practitioner is of the opinion that continued pregnancy would pose a risk to the mother's physical or mental health; that there is a substantial risk that the foetus will suffer from severe physical or mental abnormality; that the pregnancy is a result of rape or incest; or that the continued pregnancy will severely affect the woman's social or economic circumstances. In terms of section 2(1)(c), a pregnancy that has reached the twenty-first week of gestation may be terminated only if a medical practitioner, after

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86 *Christian Lawyers* 1998 1123A.

87 *Christian Lawyers* 1998 1123A.

88 This decision has been criticized. See O'Sullivan "Reproductive Rights" 37-8; Naudé 1999 SAJHR 54.

89 See the discussion above concerning the rights of pregnant children.



consulting with another medical practitioner, is of the opinion that the continued pregnancy will endanger the woman's life, will result in severe malformation of the foetus, or will pose a risk of injury to a foetus. It is clear that as the pregnancy progresses a woman's freedom of choice is curtailed and the decision is shared with a medical practitioner and must fall within one of the stipulated grounds.

Although *Christian Lawyers* 1998 set the scene of a rather grim legal framework concerning foetal interests, *Christian Lawyers* 2005, read together with the *Choice Act*, introduced a change in approach. The restrictions contained in the *Choice Act* reveal a legislative commitment to balancing the increasingly compelling interests of the foetus (at and after viability) with women's rights to autonomy.<sup>90</sup>

### **3.1 State interest in foetal life**

It is accepted that a foetus is not a bearer of constitutional rights, but Meyerson correctly points out that this does not finalise the matter concerning foetal interests.<sup>91</sup> If that were the case, the state would pass laws permitting late terminations of pregnancies for any reason whatsoever right up to the moment of birth.<sup>92</sup> The state would also permit the creation of embryos for research purposes and license experimentation on them long past the point at which it is generally believed that such experimentation is acceptable.<sup>93</sup> Women could be paid to terminate their pregnancies in order to ensure a ready supply of cadaver foetal brain tissue, which is valuable in the treatment of disease.<sup>94</sup>

There is an obstacle to treating a foetus in such an arbitrary fashion. O'Sullivan<sup>95</sup>, for example, relies on Ronald Dworkin's<sup>96</sup> view that arguments about termination of pregnancies should not revolve round whether or not a foetus is the bearer of

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90 O'Sullivan "Reproductive Rights" 37-27. The issue of foetal viability is discussed below.

91 Meyerson 1999 *SALJ* 55.

92 Meyerson 1999 *SALJ* 55.

93 Meyerson 1999 *SALJ* 82.

94 Meyerson 1999 *SALJ* 82.

95 O'Sullivan "Reproductive Rights" 37-6. Further authors relying on Dworkin are Meyerson 1999 *SALJ* 53; and Kruuse 2009 *THRHR* 134.

96 Dworkin *Life's Dominion*.

constitutional rights, and that any argument that affords a foetus constitutional rights merely grants the state a derivative interest in prohibiting or regulating abortion.<sup>97</sup>

It is Dworkin's assertion that the argument is not if we object to the termination of pregnancies because we believe that a foetus is a bearer of constitutional rights, but if we attach some intrinsic value to life and the potential for human life.<sup>98</sup> Accordingly, the interest of the state in potential life derives from the state's interest in protecting the sanctity of human life, therefore justifying the regulation of termination laws on grounds that are independent of the rights-bearing capacity of the foetus itself.<sup>99</sup> Dworkin argues that the state has a detached interest in regulating the termination of pregnancies.<sup>100</sup> This argument accords with *Christian Lawyers* 2005, where the court describes prenatal life as an important value in our society.<sup>101</sup> This value is so important that it justifies limiting women's access to termination-of-pregnancy services.<sup>102</sup>

The justification for limiting women's rights stems from constitutional values. Meyerson<sup>103</sup> refers to the following provisions in the *Constitution*: sections 1, 7(2), 36(1), and 39(1) and (2). First, the *Constitution* recognises that human dignity, the achievement of equality, and the advancement of rights and freedoms are some of the specified values that the Republic of South Africa is founded on. Further, the Bill of Rights affirms the democratic values of human dignity, equality and freedom, and thus any limitations of rights contained in the Bill of Rights must be reasonable and justifiable in the light of the founding values. These founding values also play a central role when interpreting the Bill of Rights and legislation, or when developing the common and customary law. Meyerson states that there is more to the *Constitution* than granting and protecting rights, since it explicitly distinguishes between rights and freedoms on the one hand, and the values of human dignity,

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97 A derivative interest is an interest based on the presumption that the entity involved is a person with rights and interests, and the state's interest in protecting it stems from the fact that it is a bearer of rights. See Dworkin *Life's Dominion* 11; Kruuse 2009 *THRHR* 135.

98 O'Sullivan "Reproductive Rights" 37-7.

99 O'Sullivan "Reproductive Rights" 37-7.

100 A detached interest is an interest based on the fact that human life is itself intrinsically valuable, regardless of the status of the person. See Dworkin *Life's Dominion* 11; Kruuse 2009 *THRHR* 135.

101 *Christian Lawyers* 2005 527D.

102 *Christian Lawyers* 2005 527D.

103 Meyerson 1999 *SALJ* 55.

equality and freedom on the other.<sup>104</sup> Meyerson argues that even if no human rights are protected prior to birth, it is necessary to consider whether or not the value of human dignity might operate as a constitutional constraint on legislation governing the termination of pregnancies.<sup>105</sup>

Meyerson states that it is the value of human dignity that is under threat, because it is hard to deny that the destruction of foetal life, although it violates no constitutionally protected subject's right to life, undermines human dignity.<sup>106</sup> A foetus is not merely tissue, comparable to something like an appendix; she considers it to be a living organism, whose destruction is not a morally trivial matter but something to be regretted.<sup>107</sup>

### **3.2 Foetal viability and the inception of state interest in the light of the value of dignity**

Foetal viability is said to occur at around twenty-two weeks of gestation.<sup>108</sup> Theoretically, at this point a foetus should be capable of living independently of its mother if it is born, since all of its vital organs are developed and are able to perform their functions sufficiently.<sup>109</sup> Accepting that the value of dignity serves as the ground for the state to limit female reproductive rights in terms of the *Choice Act*, this raises the vexatious issue as to why the *Choice Act* permits elective terminations of first- and second-trimester pregnancies, since it can be claimed that these terminations also offend the value of human dignity.

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104 Meyerson 1999 SALJ 55. See *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) 962A-C.

105 Meyerson 1999 SALJ 56. Also see Woolman "Dignity" 36-19; 36-22–36-25, who states that the value of dignity can be invoked in three types of cases: where the value of dignity guides the interpretation of the right and by doing so shapes the ambit of the right; where the value of dignity can be used to justify the limitation of a right; and where the value of dignity can be used in cases where the Bill of Rights does not directly apply to the circumstances and, in this case, the value of dignity will inform the development of the common law or the interpretation of the statute (Woolman "Dignity" 36-24). The focus of this article falls within the ambit of the second and third type of cases described by Woolman.

106 Meyerson 1999 SALJ 59.

107 Meyerson 1999 SALJ 59.

108 Sarkin-Hughes 1993 THRHR 89.

109 See, generally, Cohen and Sayeed 2011 *JL Med and Ethics* 235. Cohen and Sayeed point out that there are normative societal tendencies, as expressed by the courts, to assign a particular point in development for foetal viability based on the estimate of gestational age. However, there are other factors that affect the probabilities of long-term neonatal survival, such as gender, birth weight, maternal exposure to steroids, and resource allocations.

Meyerson refers to rather controversial examples where a woman decides to terminate her early pregnancy because the foetus is the wrong sex or for some other frivolous reasons. She asserts that these issues are too controversial for the state to translate into law, where the foetus is still very underdeveloped.<sup>110</sup> Further, the limitation clause prevents the state from limiting rights for intractably disputed reasons, since a person's own moral judgments do not justify legal interference by the state when a woman decides to exercise her choice to terminate her pregnancy.<sup>111</sup> Sarkin-Hughes states in this respect that:<sup>112</sup>

[D]espite the fact that not every woman's decision will be in accordance with another's individual sense of morality, society's interest must only be an advisory one. Otherwise we will be left with the dangerous and oppressive situation of the state imposing a preconceived moral stance, which has been created in part from stereotypes of women's intellectual and physiological capabilities.

However, beyond early prenatal life, and once the foetus becomes more developed and approaches viability, its destruction at this point becomes less tied to intractably disputed views, and the weight to be afforded to human dignity in competition with female reproductive rights becomes less controversial.<sup>113</sup>

Accepting the above arguments as constitutionally valid, a concern remains regarding the termination of pregnancies for socio-economic reasons in the second trimester.<sup>114</sup> The authors referred to above describe "early pregnancy" as including first- and second-trimester pregnancies. However, it is difficult to accept that a pregnancy that has developed into the second trimester can still be described as an "early pregnancy". At this point, as a pregnancy develops through the weeks of the second trimester, the foetus begins to take the form of an infant and moves indisputably closer to viability. It has been stated that, according to Myburgh, provisions that allow the termination of pregnancies for socio-economic reasons are an "irrational and arbitrary exclusion of the unborn and [create] an imbalance in

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110 Meyerson 1999 *SALJ* 57.

111 Meyerson 1999 *SALJ* 57-58.

112 Sarkin-Hughes 1993 *THRHR* 89.

113 Meyerson 1999 *SALJ* 58.

114 In terms of s 2(1)(b)(iv) *Choice on Termination of Pregnancy Act* 92 of 1996, a woman can terminate a pregnancy from thirteen to twenty weeks' gestation if the continued pregnancy will significantly affect her social or economic circumstances.

liberal abortion jurisprudence", because only the rights of women are advanced.<sup>115</sup> By contrast, Ngweni has praised South African termination-of-pregnancy laws as radically liberal in comparison with those of our African neighbours, since South Africa is one of the very few African countries that permit the termination of pregnancies for socio-economic reasons.<sup>116</sup>

Through the lens of foetal interests, and at first glance, the socio-economic reason provision is arbitrary. However, taking a closer contextual look into second-trimester terminations in South Africa, it is argued that this provision serves a very important role for South African women. Of the total number of pregnancies that were terminated in 2009, thirteen per cent took place in the second trimester (after twelve weeks' gestation).<sup>117</sup> These statistics lead one to question why second-trimester terminations are taking place (if not for therapeutic reasons) at a time when South African legislation permits first-trimester termination of pregnancies on demand.<sup>118</sup> Going further into the inquiry, are these decisions infused with a sense of arbitrariness and tactless conduct on the part of women seeking second-trimester termination-of-pregnancy services?

Harries *et al* conducted in-depth interviews with twenty-seven women terminating their second-trimester pregnancies for non-therapeutic reasons.<sup>119</sup> The authors found that women were accessing the health-care system in the first trimester, but that, as a result of delays, the termination procedure took place only in the second trimester. Delays experienced by women included a delay in pregnancy recognition, confirmation and response. Participants recalled signs of pregnancy, but did not initially link these symptoms to a possible pregnancy. One participant discussed how

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115 Myburgh *Humanity and the Protection of the Unborn* 60. Van Oosten 1999 *SALJ* 64 also argues that the *Choice Act* merely grants women the freedom to terminate a pregnancy for whatever reason she considers fit since the Act simply views the foetus as a "member of the pregnant woman's body, which includes the right to have her embryo killed." Van Oosten 1999 *SALJ* 76 is rather critical of the *Choice Act* and describes it as being plagued with "lacunae, contradictions, inconsistencies and incomprehensibilities, and demonstrates a stunning ignorance of basic principles of criminal law and an inexplicable ambivalence on the issue of abortion, and a surprising insensitivity to the meaning of words on the legislature's part."

116 Ngweni 2004 *JL Med and Ethics* 715.

117 Health Systems Trust Date Unknown indicators.hst.org.za. These statistics do not differentiate between elective or therapeutic termination-of-pregnancy procedures.

118 Especially since first-trimester terminations are free at public health-care facilities; see Ngweni 2004 *JL Med and Ethics* 715.

119 Harries *et al* 2007 *Reproductive Health* 8.

she bought a home pregnancy test and, even after a positive result, waited another four weeks because she was in doubt. Women reported experiencing emotional, cultural and religious pressure and manipulation. Most women stated that they were not able to support children based on their varying personal and social circumstances: they were not ready, did not have the financial means, or wanted to continue with schooling; and one woman indicated that she was HIV-positive and had limited financial means. Emotional responses were fear, indecision and conflict. One woman discussed the guilt she felt and stated that she knew she would be punished for her decision to terminate her pregnancy.

Harries *et al* further reported that some women had difficulty in accessing termination-of-pregnancy services.<sup>120</sup> Many women spoke of the negative and judgmental attitudes displayed by staff at public facilities, of staff who were reportedly rude or hostile, and of some staff resorting to imposing religious beliefs on pregnant women by bringing the Bible to consultations. Such an intolerant environment consequently drove women to find other clinics and, in some cases, to seek help from the private sector, which not only has a financial implication, but also causes further delay, since women first have to save the money required to pay for the termination. Women were also faced with clinics that were fully booked and were placed on a waiting list. This caused delays, since women were required to wait a further two weeks for an appointment.

In 2006 Chelsea Morroni and Jennifer Moodley conducted a study of 164 women who presented themselves for termination-of-pregnancy services in the Western Cape, eighty-two of whom were in the second trimester.<sup>121</sup> The authors discovered that it took an average of two-and-a-half visits to health-care facilities before initiating the termination-of-pregnancy service. The authors state that in order to decrease the proportion of second-trimester termination of pregnancies the referral pathways must be examined, requiring speedier services for women. This is an on-going problem. In 2011 Grossman *et al* conducted a study of surgical and medical second-trimester terminations in South Africa, which also discussed the fact that women experienced barriers when trying to access the health-care system for termination-of-pregnancy

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120 Harries *et al* 2007 *Reproductive Health* 8.

121 Morroni and Moodley 2006 *SAJOG* 81.

services.<sup>122</sup> The majority of participants reported three or more clinic or hospital visits, and substantial delays of up to thirty days occurring between the date of the first clinic visit to the date of admission for the termination services. Roughly forty per cent of women who required termination-of-pregnancy services were at twelve weeks' gestation or earlier at the time of the first visit to a clinic.

Morrone and Moodley stated that all of the women seeking second-trimester termination of pregnancy were faced with unplanned pregnancies: twenty of the eighty-two women were teenagers, just over one-quarter were self-supporting, while thirty-eight were still in school.<sup>123</sup> Having regard to the contextual reality that women find themselves in when looking to terminate their pregnancies, elective, second-trimester termination of pregnancy fulfils a very crucial role in South Africa. It is not only the rights of pregnant women that are being advanced, but also the rights of those with whom they already share a relationship and have a responsibility of care towards (children and dependent family members). These women would find themselves in dire circumstances if termination-of-pregnancy legislation prohibited second-trimester terminations, especially where delays in terminations are the result of external factors linked to financial resources, staff attitudes, and poor referral systems. Although these studies were limited to termination-of-pregnancy services in the public sector, they do give an indication of the hardship that the majority of South African women face in general. It can hardly be concluded that second-trimester termination of pregnancies is generally arbitrarily and irresponsibly sought after or relied on.

It also needs to be noted that second-trimester, termination-of-pregnancy services are not rendered on demand, as with first-trimester terminations. Pregnant women are required to consult with a medical practitioner, and the medical practitioner must be of the opinion that continued pregnancy will significantly affect their social or economic circumstances.<sup>124</sup>

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122 Grossman *et al* 2011 *BMC Health Serv Res* 224.

123 Morrone and Moodley 2006 *SAJOG* 82.

124 See s 2(1)(b)(iv) *Choice on Termination of Pregnancy Act* 92 of 1996. See Van Oosten 1999 *SALJ* 68.

O'Sullivan further states that there are good reasons for the state to progressively limit the termination of a pregnancy after viability. Firstly, foetal brain development is sufficient for the foetus to feel pain,<sup>125</sup> which indicates that the foetus has protectable interests of its own. Secondly, by the time the pregnancy has reached that stage of development, the woman concerned has had ample time to decide if termination is the best option for her.<sup>126</sup> Further, she argues that at the stage of viability the termination of a pregnancy becomes more problematic, because as the foetus has developed towards being an infant the difference between being a foetus and a child has become only a matter of the location of the unborn in the womb rather than its development.<sup>127</sup> These arguments fall squarely in line with the provisions of the *Choice Act*. Section 2(1)(c) requires the life of the mother or foetus to be at risk before a termination may be granted where the pregnancy has advanced past the twentieth week of gestation.<sup>128</sup>

Examination of the *Choice Act* and the constitutional provisions relating to women's rights indicates that female autonomy is the state's first and foremost concern. However, having given women the opportunity to exercise their rights during "early pregnancy",<sup>129</sup> the state's interest in female autonomy weakens in favour of the foetus. Subsequently, the state's detached interest, based on the value of human dignity, serves as a reasonable and justifiable ground to limit female reproductive rights.

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125 The ability to feel pain is a contested issue. See Ford "Nothing and Not Nothing" 27. Ford argues that scientists disagree about the gestational age at which a foetus becomes sentient. Some have argued that sentience is present in the first trimester, and there are those who doubt that foetuses are sentient at all. Ford states that there is a majority view that sentience emerges late in the third trimester, and that this is based on the fact that no sentience is possible without cortical structure in place, which occurs only between thirty to thirty-five weeks' gestation. Also see, generally, Lee *et al* 2005 *JAMA* 947; Cohen and Sayeed 2011 *JL Med and Ethics*.

126 O'Sullivan "Reproductive Rights" 37-9.

127 O'Sullivan "Reproductive Rights" 37-10.

128 Sarkin-Hughes 1993 *THRHR* 89 states that it is preferred to set the cut-off line at twenty weeks rather than twenty-two weeks, because estimates of gestational age have an approximate two-week margin of error.

129 However, see Harries *et al* 2012 *J Biosoc Sci*; Harries *et al* 2009 *BMC Public Health* 296. Also see Ngwena 2012 [www.chr.up.ac.za](http://www.chr.up.ac.za). Ngwena argues that the liberal termination-of-pregnancy laws do not always give rise to practical implementation, and that the termination-of-pregnancy rights may exist as paper rights only. The issue of poor access to early termination-of-pregnancy services makes one doubt that women have been given the "opportunity" to exercise their rights.



#### 4 ***S v Mshumpa*: Contribution to the process of balancing foetal interests and female reproductive rights**

In the *Mshumpa* case the Eastern Cape Division of the High Court had to deal with the topic of third-party foetal violence that terminates prenatal life. The two accused, Mshumpa and Best, plotted to have Best's pregnant girlfriend, Shelver, shot in the stomach under the guise of a hijacking.<sup>130</sup> In accordance with the plan, Mshumpa shot Shelver in the stomach twice, causing the stillbirth of her thirty-eight-week-old fetus.<sup>131</sup> Both accused were charged with the murder of the fetus and the attempted murder of Shelver.<sup>132</sup> The state argued that the court should give effect to medical reality and community convictions and extend the crime of murder to include a fetus.<sup>133</sup>

The court found that the intentional killing of a fetus does not fall within the scope of the definition of murder, as the person being killed has to have been born alive.<sup>134</sup> The principles of legality found in section 35(3)(l) of the *Constitution* prevented the court from extending the definition of murder to include the killing of a fetus, and the court was not prepared to make a prospective declaration of a new or extended crime, as this task was best suited to the legislature.<sup>135</sup>

The court reiterated that the *Constitution* does not bestow any fundamental rights on a fetus and that there had been no South African court that had held to the contrary.<sup>136</sup> However, the *Constitution* does protect everyone's right to bodily and psychological integrity, including the right to make reproductive decisions.<sup>137</sup>

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130 *S v Mshumpa* 2008 1 SACR 126 (E) 134E.

131 The state showed, through the use of expert medical evidence, that prior to the incident the fetus was viable. It was proved further that as a result of being shot the fetus had tried to breathe in reaction to the pain, causing it to drown in its own blood. Moreover, amniotic fluid and parts of the fetus's cervical spinal cord had also been shattered.

132 *S v Mshumpa* 2008 1 SACR 126 (E) 134B. Various other charges were filed, but they are irrelevant for purposes of this discussion here.

133 *S v Mshumpa* 2008 1 SACR 126 (E) 149A.

134 *S v Mshumpa* 2008 1 SACR 126 (E) 149A.

135 *S v Mshumpa* 2008 1 SACR 126 (E) 152E.

136 *S v Mshumpa* 2008 1 SACR 126 (E) 150B.

137 *S v Mshumpa* 2008 1 SACR 126 (E) 151I.

Accordingly, harm to a foetus may be dealt with through the use of existing crimes against pregnant women.<sup>138</sup>

The court found that the two accused were guilty of the attempted murder of Shelver and that the aggravation of the assault, in the form of assault on the foetus, would be taken into consideration at the sentencing stage.<sup>139</sup> The court stated that the common law crime of assault offers sufficient protection to pregnant women; this is as a result of the "unique togetherness" shared by Shelver and the foetus.<sup>140</sup>

Even though the court did not develop the position of foetal interests in South Africa to the point that a foetus can be a murder victim, the decision does not bring this matter to an end. The court's refusal to consider the foetus a victim of murder ensured that the balance achieved between the *Choice Act* and the value of dignity is maintained. Had the court developed the crime of murder to include a foetus, a foetus would be granted the status of a legal subject and constitutional rights would attach to it. Female autonomy would be severely limited for the duration of a woman's pregnancy, and the termination of a pregnancy would be a violation of the foetus's right to life, even in the case where continued pregnancy would endanger the woman's life. This is an unacceptable consequence that the court rightly avoided.<sup>141</sup>

## 5 Conclusion

The *Choice Act* is an expression of female autonomy and gives effect to fundamental rights in the Bill of Rights. At first glance there is an impression that our permissive termination-of-pregnancy legislation deepens the tension between female autonomy rights and foetal interests, since the *Choice Act* provides women with the legislative

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138 *S v Mshumpa* 2008 1 SACR 126 (E) 152A.

139 1 *S v Mshumpa* 2008 1 SACR 126 (E) 51H.

140 *S v Mshumpa* 2008 1 SACR 126 (E) 151I. The court stated that an assault on one is an assault on both. There are recommendations and suggestions being made on how to address the problem faced by the court in *Mshumpa*. See Kruuse 2009 *THRHR* 134; Pickles 2011 *THRHR* 546; Pillay 2011 *Stell LR* 230.

141 See, generally, Meredith *Policing Pregnancy*. The author discusses the competition between female autonomy rights and foetal interests in the United States of America and the United Kingdom in circumstance relating to the maternal duty of care, the medical treatment of pregnant women, and child-welfare protection laws. The author specifically links the introduction of crimes against foetuses to the diminution of female autonomy rights.

space to terminate foetal life. The decision taken by a woman to exercise her right to terminate a pregnancy is in opposition to the foetus's interest to continued existence, since a successful termination terminates foetal life. However, case law shows that even though a foetus is not a bearer of constitutional rights, as a potential human being a foetus is vested with intrinsic worth and finds worthiness in the constitutional value of dignity.

The *Choice Act* is an example of how constitutional rights and values are used to achieve a balanced relationship between a woman's right to terminate her pregnancy and the value of dignity. As a pregnancy progresses up to and beyond viability, the *Choice Act* is less permissive and more restrictive. The *Choice Act* also plays the role of the protector of foetal interests and partially accommodates and shelters foetal interests, as far as is constitutionally permissible. Contemplating the circumstances in which women find themselves, the provisions of the *Choice Act* have proven to be socially relevant.

Moving beyond the context of the *Choice Act*, *Mshumpa* is an example of the fact that the process of maintaining a state of balanced rights and interests is an ongoing exercise, and that the balance achieved by the *Choice Act* is relevant to all spheres of the law.

This article sought to demonstrate the constitutional setting of women's termination-of-pregnancy rights on the one hand, and foetal interests on the other. It may be concluded that this conflicting position, rather than being deepened, is in fact balanced in South Africa, by legislation and relevant case law.

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**List of abbreviations**

BMC Public Health	BioMed Central Public Health
BMC Health Serv Res	BioMed Central Health Services Research
J Biosoc Sci	Journal of Biosocial Sciences
JAMA	Journal of the American Medical Association



JL Med and Ethics	Journal of Law, Medicine and Ethics
SAIRR	South African Institute of Race Relations
SAJHR	South African Journal on Human Rights
SAJOG	South African Journal of Obstetrics and Gynaecology
SALJ	South African Law Journal
SAPS	South African Police Service
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaags Romeins-Hollandse Reg
WHO	World Health Organisation