
Decriminalising abortion in South Africa: implications for the unborn's right to life

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1 Introduction

The 1975 Abortion and Sterilisation Act (ASA)¹ was the first statute to regulate abortion in South Africa. The ASA provided that abortion was illegal. Although the default legal position adopted by it appeared to be clearly pro- life, it nonetheless allowed abortion in certain circumstances. Although much more restrictive, abortion was also allowed in terms of the common law prior to the enactment of the ASA. With the formal advent of democracy in 1994, two parallel legal processes pertaining to abortion were simultaneously taking place alongside the transition from apartheid. The first process led to the statutory legalisation of abortion in 1996 when the ASA was replaced by the current statute regulating abortion, namely, the Choice on Termination of Pregnancy Act (CTOPA).² Unlike the ASA, the CTOPA assured a default legal position that clearly favoured a secular, pro-choice view. Its enactment also resulted in the offence of abortion being largely decriminalised. Since then it also became more politically correct to use the word "termination" instead of "abortion". The second process during the transition led to the adoption of a neutral position on the "right to life" clause³ in the interim Constitution⁴ which also contained South Africa's first justiciable Bill of Rights. A neutral position, because it is tantamount to fence sitting, implies support for either a pro-life or a pro-choice view but at the same time does not rule out the possibility of support for a combination of these opposing views. This neutral position remained unchanged in the current Constitution⁵ in terms of which a right to abortion is not clearly guaranteed and can therefore only be inferred from it. The CTOPA and the Constitution both entered into force in 1997, and in this order.

This essay will address and attempt to answer the following questions: Given that, during apartheid, legislation was already in place in terms of which abortion was possible, was it really necessary to introduce a new abortion law? Why was the old law simply not amended? What may have motivated, and what was achieved by, the new law uncharacteristically coming into operation literally days before a new Constitution? How has this new law fared since its inception? Is there any scope in the provisions of both the new law and the Constitution for it to be interpreted to protect the unborn? Is there any hope that criminal law and constitutional law (public law) can be combined with the

¹ Act 2 of 1975.

² Act 92 of 1996.

³ Du Plessis & Corder (1994).

⁴ Section 9 of the 1993 Constitution.

⁵ Section 11 of the 1996 Constitution.

already existing private law protections to provide the unborn with further protection?

The CTOPA did not receive blanket support from South Africans and was also not passed by the South African Parliament without controversy. It appears that in 1990⁶ and 1991⁷ South Africans had held opposing views on the ASA. The 1995 Report of the *Ad Hoc* Committee on Abortion and Sterilisation⁸ appointed to review the ASA, indicated that more "pro-life" than "pro-choice" submissions were received. The pro-choice position subsequently adopted by the CTOPA implies that the former may have been discounted. The conclusion reached by a reliable, though dated (2003-2006), study also indicated that most South Africans may still oppose abortion and view it as "wrong".⁹ Opposing views on abortion appear to be reflective of a larger rift in the broader South African society that has not yet quite closed. There can be no denying that the ravages that apartheid left behind as a legacy for the majority of South Africa's impoverished people included "unwanted" (accidental) children and "backstreet" (illegal) abortions. Although the large number of illegal abortions may have been touted as the main motivating factor for introducing the CTOPA¹⁰, this does not explain why, as recent newspaper reports and research studies highlight, illegal abortions continue unabatedly¹¹ and many children are still abandoned.¹² Salient points of some reports which are referred to in this Chapter paint a grim picture of abortion that closely resembles a scenario one would expect from a country in which it is still a crime and banned! This implies that the CTOPA appears to have largely served its intended purpose, but may not be doing so effectively nor adequately. Although pro-lifers are not necessarily anti-choice in all cases, the status quo implies that the discounting of the (majority) sentiment may have been a contributing factor. It may also imply that the adoption of a neutral constitutional position on abortion was little more than a convenient strategy to appease a pro-life sentiment, and may have had little to do with protecting the life of the unborn.

The legalisation of abortion may have meant that abortion no longer occupies a central position on the current political agenda. While it may therefore be thought that the choice of abortion for a contribution to the *Festschrift* may only be of mere historical value, it is clear from the above questions and current status quo that abortion remains an ambiguous and complex topic which still holds much current legal relevance and future interest.

The essay is divided into five sections, in addition to the Introduction, to address the stated questions. §2 provides a brief overview of the abortion statutes and focuses on the current abortion legislation. The question of "viability", the ability of a foetus to independently survive outside the uterus or womb of the mother, forms the focus of §3 and is also a theme that straddles the essay. §3 outlines the compromising role, in favour of protecting developing life, that viability currently inadvertently already appears to play in defining and reducing the legal boundaries of abortion in terms of the CTOPA.

⁶ Du Plessis (1990) 44-59.

⁷ Du Plessis (1991) 339-357.

⁸ Nkomo (1995) vi.

⁹ Mncwango & Rule (2008) 6 -7.

¹⁰ See Sarkin (1995) 63.

¹¹ See Farber (2014) 1 & 3 and Skosana (2014). A 2010 report (based on a 2008 study) indicated that 48.5% of abortions accessed by young women aged 13-19 were obtained at a place other than a hospital or clinic (unsafe). See Reddy *et al* (2010) 33.

¹² See Blackie (2014).

It is contended that there may be more scope than meets the eye in the CTOPA to base a right to prevent the abortion of a *legally* "younger" (as opposed to a *medically* "older") *viable* foetus. Such a novel interpretation has the potential to limit a woman's choice to abort as from the point of legal viability onwards and thereby prevent an abortion at an earlier stage than the medical cut-off point for viability. §3.1 explains how such an interpretation of legal viability could be strengthened by the application of the existing private law based *nasciturus* rule in terms of which an unborn is deemed to have already been born when it is to its advantage. In typical cases where the *nasciturus* rule is applied, abortion is usually not the contested issue. However, since this rule appears to protect the interests of an unborn regardless of its "age", as long as it is subsequently born alive, it is contended that it could therefore be invoked to prevent a pregnant woman from aborting a foetus as from the point of legal viability or even before this stage if the CTOPA is amended, as proposed in §4.1, to reduce the timeframe for abortion on request (demand). In both these instances the rule need not be amended nor would it be necessary to accord the unborn with legal subjectivity or personality, as has been suggested. As is currently the case, any interests accruing to the unborn during the pregnancy ought only to be secured with live birth. The application of the rule therefore has the potential to avert an abortion, which, if allowed to occur, would deprive the unborn of any such interests and negate the rule's very operation. This will also allow for closer co-operation between public law and private law, rather than treating them as independent legal silos as is often the case. §3.2 provides practical examples pertaining to succession, foetal surgery, medical emergencies and active and passive euthanasia to briefly illustrate possible ways that the *nasciturus* rule may be applied to protect legally viable foetuses and protect them against being aborted.

§4 examines possible ways forward by exploring various options, such as, amending the law (for example, by reducing the existing (extended) timeframe for an abortion on request), making adoption more attractive, as well as providing, as alternatives to abortion, for the proactive prevention of pregnancies. §5 briefly highlights the constitutional challenges associated with controversial CTOPA provisions that have resulted in recourse being had to the courts by pro-life parties who clearly are not readily going to concede. Although they have met with little success to date, the judgments in question did not leave them without hope that the position may change in the future. This is especially so since the Constitutional Court, which has hitherto only addressed the right to life in the context of capital punishment, has yet to do so in the context of abortion. A view was expressed that Christianity may have played a role in the restrictive nature of abortion law under apartheid¹³ until the interim Constitution.¹⁴ Although Christianity remains a dominant¹⁵ religion in South Africa, and this may partly explain why the court challenges were essentially initiated by Christian pro-life groups, Christianity, or religion generally, appears not to have had any impact on the new abortion and related laws which, as will be detailed in Section two and elsewhere, are clearly secular in nature. For this reason, and apart from cursory references thereto, the role of religion, or even culture for that matter, falls beyond the ambit of this essay.

¹³ DuPlessis (1996) 74.

¹⁴ DuPlessis (2001) 439-466.

¹⁵ This can be gauged from population censuses taken in 1991, 1996 and 2001, although the latest (2011) census excludes religion as a consideration.

§6 concludes the essay by highlighting that although a Constitutional Court decision on abortion has yet to be written, it may remain necessary to interpret both neutral and implicit constitutional provisions in support of the right to abortion. It is contended that the reasons for doing so may have little to do with whether life is revered and more to do with current socio-economic and fiscal realities. This may be borne out by the fact that it was only after 21 years of freedom that South Africa recently ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in January 2015.

2 Historical and critical overview of abortion legislation

2.1 The Common law and the ASA

Prior to the enactment of the ASA in 1975, abortion in South Africa had not been statutorily defined, and guidance had to be sought in the Roman-Dutch common law, and case law. The common law had severely restricted abortion and considered it to be a crime with only one exception - the defence of necessity.¹⁶ The ASA was intended to clarify the application of the common law.¹⁷ Although the expectation was high that the ASA would be a progressive law¹⁸, its "liberalisation" did not entail abortion on request (demand). It was pointed out that its aim was deemed to be to protect the "potential" life of the foetus against being killed.¹⁹ The Commission of Inquiry that had been appointed by the then apartheid government to review the problem of abortion consisted only of White males.²⁰ Unsurprisingly, the ASA applied equally to, and discriminated against, all women regardless of their race although it appeared to have discriminated between Black and White women given the latter's preferred racial and class hierarchy over all other women.²¹ There was also a stage during its operation when the ASA overlapped with other laws that prohibited mixed marriages. This resulted in it being construed²² to be a racist law given that it was possible during this period to justify its use to deprive an unborn of life purely on the basis of its "mixed" race.

Abortion remained illegal under the ASA;²³ however, it retained the common law therapeutic exception²⁴ and extended the circumstances for allowing an abortion to include eugenic²⁵ and humanitarian²⁶ considerations.²⁷ The ASA contained a conscience clause which allowed doctors to refuse to perform an abortion without having to proffer any reasons;²⁸ the CTOPA does not contain a similar clear provision.

2.2 The CTOPA

The Preamble to the CTOPA clearly provides that the right to an abortion cannot be

¹⁶ A therapeutic abortion was legally allowed only if the life of the mother was in danger.

See Hawthorne (1982) 238.

¹⁷ Hawthorne (1982) 238.

¹⁸ Strauss (1968) 459.

¹⁹ See Hawthorne (1982) 252.

²⁰ Sarkin-Hughes (1990) 373.

²¹ Guttmacher *et al* (1998) 191. See also Rebouche (2011) 7-8.

²² See DuPlessis (1974) 231. The Immorality Act 23 of 1957 was repealed by the Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985.

²³ See Section 2.

²⁴ Sections 3(1) (a) and (b).

²⁵ Section 3(1) (c). An abortion is permitted if the pregnancy would end in the birth of an infant with a severe mental or physical abnormality.

²⁶ Section 3(1) (d). An abortion is permitted if the pregnancy resulted from rape or incest.

²⁷ Sections 3(1) (a)-(e).

²⁸ Section 9.

denied on the basis of race, sex or religion, and that the offence²⁹ of abortion has largely been decriminalised by it. Although the Preamble refers to access to abortion, it is of little legal value, and such right is also not clear from the text of the CTOPA.

As a secular democracy, what currently sets South Africa apart from all but three other countries in Africa,³⁰ where abortion is also legally permitted, is that it was the first country in which all women, that is, "any female person of any age"³¹ (including *minor* girls), acquired the unconditional right to obtain an abortion on request, without restriction as to reason, during the first trimester of pregnancy, that is, up to, and including, the first 12 weeks of gestation (which is roughly 10 weeks of- pregnancy) as the upper limit.³² In the second trimester (from the 13th week up to, and including, the 20th week of gestation) abortion is permitted if a continuing pregnancy would pose a risk to the woman's mental or physical health (therapeutic considerations), if it would end in the birth of an infant with a severe mental or physical abnormality (eugenic considerations), or if it resulted from rape or incest (humanitarian considerations). Additionally, and controversially, abortion is also available on request during the second trimester, if carrying the foetus to term would "significantly affect the social or economic circumstances of the woman" (social and economic considerations).³³ In the last trimester (after the 20th week, or "viability") terminations are only available in very limited circumstances and are allowed only if the continuing pregnancy would endanger the woman's life or result in a severe foetal malformation or a risk of foetal injury.³⁴

The CTOPA was amended in 2004³⁵ and 2008³⁶ to make provision for an increase in access to abortion by expanding both the pool of trained health care providers (doctors, midwives and nurses)³⁷ and types of designated public health facilities (State hospitals and clinics) that may now offer free abortion services throughout South Africa's nine provinces. Yet, restrained practical access to abortion services continues³⁸, and the grant of the right to abortion to a larger group of women, including minors, may have led to an increase, rather than an expected decrease, in pregnancies among adolescent girls.³⁹ There are cultures in which a young girl is only accepted as a woman once she has proved her fertility by having a baby.⁴⁰

Furthermore, abortion is available to all women, whether married, single, major or minor, at their request and with only their informed consent. However, the CTOPA does not contain a clear "conscience" clause that allows health care providers to refuse to perform an abortion, although such a right can be inferred,⁴¹ and may therefore conflict

²⁹ Burchell (2013) 557. See also Carstens & DuPlessis (2009) 587-634.

³⁰ They are Tunisia, Zambia and Cape Verde. See "The World's Abortion laws" (2014).

³¹ See definition in section 1 of the CTOPA. See also §5 below for a critical discussion of the implications for minor girls.

³² Section 2(1) (a).

³³ Sections 2(1) (b) (i-iv).

³⁴ See sections 2(1) (c) (i)-(iii).

³⁵ Choice on Termination of Pregnancy Amendment Act 38 of 2004.

³⁶ Choice on Termination of Pregnancy Amendment Act 1 of 2008.

³⁷ Section 2(2) indicates that providers performing the abortion include medical practitioners, trained registered nurses and midwives.

³⁸ In 2012 only 40 per cent of designated abortion facilities were operational. See Ludman (2012).

³⁹ Mchun u *et al* (2012) 426-434.

⁴⁰ "South Africa: Teenage pregnancy figures cause alarm" (6 March 2007).

⁴¹ Section 6 of the CTOPA provides that "(a) woman who in terms of section 2(1) requests a termination of pregnancy from ... [designated providers) ... shall be informed of her rights under this Act by the person concerned".

with provisions in the Constitution that allow for conscientious objection. Although objecting providers, therefore, are not forced to perform abortions, they must inform women seeking an abortion of their rights in terms of the CTOPA and provide them with related information to enable them to make informed choices⁴² and must advise minors to do so in consultation with their "parents, guardians, family members or friends".⁴³ Minors are not obliged to heed this advice and therefore parents may not only have no knowledge of the abortion obtained by their minor daughters to begin with, but their consent thereto is also not necessary.⁴⁴ However, the independent choice of minors does not relieve parents of their duty nor the State of its responsibility to still take care of them in terms of constitutional provisions that may be interpreted to have more to do with their economic welfare than the minors' best interests.

2.3 The interim and current Constitutions

It has been argued⁴⁵ that the interim Constitution did not deal with abortion because of disagreement among its negotiators. In seeking to reach a compromise between the two opposing views on abortion, the constitution makers adopted a neutral position on the right to life in both the interim and the current Constitutions. Neither Constitution therefore expressly provides for the right to an abortion on request. Section 9 of the interim Constitution simply stated that "[e]very person shall have the right to life", while section 11 of the current Constitution states that "[e]veryone has the right to life".

The African National Congress (ANC) (the then incoming, and still current, ruling party) negotiators initially indicated that for them abortion was one of those issues that could only be settled in a final Bill of Rights that was drafted by a truly representative body. In hindsight, this was not what eventually transpired.⁴⁶

Several other provisions in the Constitution⁴⁷ clearly conflict with the neutral position adopted because a pregnant woman is also granted the constitutional right to reproductive autonomy which comes very close to her being afforded a right to abortion which overrides the rights of the unborn that she is carrying. Section 12(2)(a) explicitly recognises the right to make decisions concerning reproduction as part of the right to bodily and psychological integrity and guarantees the reproductive rights (construed to include abortion) and health of women.⁴⁸

The human rights contained in the Bill of Rights are not absolute. Section 7(3) provides that they are subject to the limitations contained in section 36, or elsewhere in it. Thus, the section 27(1)(a) right to access health care services is dependent on the availability of State resources (section 27(2)) and may therefore be limited, in terms of section 36 (general limitation clause), when these are lacking.

⁴² Section 5(1).

⁴³ Section 5(3).

⁴⁴ Section 5(2).

⁴⁵ See Du Plessis (2001) 440--441.

⁴⁶ Du Plessis (1994) 145-163.

⁴⁷ For example, Section 9 (equality clause) which provides for protection against unfair discrimination on grounds of, amongst others, religion, conscience, and belief, but also includes grounds like marital status, culture, sex, gender and pregnancy (sections 9(3) and (4)); section 10 (human dignity); and section 12 (freedom and security of the person)

⁴⁸ See Du Plessis (1990) 72-73 for details.

It can be inferred from sections 39(1)(a) and (b) of the Constitution (interpretation clause) that South Africa may only be obliged to apply the provisions of international United Nations (UN) instruments once it has ratified them. While it signed both the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR in 1994, and had already ratified the ICCPR in 1998, the South African government only ratified the ICESCR as recently as January 2015. While little reliance can be placed on, or further guidance obtained from, the provisions of the ICCPR (for example, see Article 6(1) for an interpretation contrary to that of section 11 (right to life) of the Constitution), the same cannot be said of the ICESCR. It is contended that the reason for the delay in ratifying the ICESCR may have been related to the creation of further financial expectations from, and strain on, State resources. For example, Article 10(2) of the ICESCR not only provides that "special protection" be accorded to pregnant women "during a reasonable period before and after childbirth" but that they also be "accorded paid leave or leave with adequate social security benefits" during this time. While South African law⁴⁹ currently provides new mothers with four months of unpaid maternity leave, it is up to employers to decide whether to offer paid maternity leave or maternity leave beyond four months. Thus, although the fact that statutory provision is already made for maternity leave can be seen as a positive measure by the State in favour of protecting the life of an unborn, Article 10(2) may yet create further financial expectations with the ICESCR's entry into force in South Africa in April 2015.

The Constitution does not contain a right to establish a family. However, Article 10(1) of the ICESCR appears to accord special status, and Article 23(1) of the ICCPR, special protection, for the family. The Constitution also does not explicitly contain any reference to the rights of parents or the protection of such rights, but clearly burdens them with the financial wellbeing of their children (including pregnant minors), for example, through its provision of a child's right to "family care or parental care" in section 28(1)(b). Such an interpretation is supported by the fact that section 27(1)(c) of the Constitution enshrines the right of everyone to access "appropriate social assistance" from the State if they are unable to support themselves and their dependants. This explains why mothers, who may be apprehended for abandoning unwanted children and face a range of criminal charges, continue to abandon them, often in the hope that someone will care for them. It is inevitably the State that ends up with the financial responsibility of providing support to such children through a Foster Child Grant (FCG). The Western Cape Province was reported to have the highest rate in the world of babies born with foetal alcohol syndrome (FAS).⁵⁰ Yet, the mothers of babies with FAS, who may have inflicted lifelong damage on their children because of heavy drinking during their pregnancies, still opt to give birth to their children. While the CTOPA allows women to have an abortion until the end of the second trimester of pregnancy for 'social reasons' without subjecting them to a potential criminal prosecution, a further financial incentive, the Child Support Grant (CSG), which

⁴⁹ See Section 25 of the Basic Conditions of Employment Act 75 of 1997.

⁵⁰ Zolotova (2011) 398-399. FAS in South Africa has its roots in colonialism and the apartheid based tot ("dop") system. See Larkin (2015) who argues that: "The dop system is one in which employers pay their labourers cheap wine, or dops. Today, the dop system is no longer legal in South Africa, but alcoholism remains one of the major challenges facing the health services in the Western Cape ... Communities report that alcohol-related trauma, exceptionally high rates of TB, child and adult malnutrition, and Foetal Alcohol Syndrome (FAS) are common in the Western Cape."

is also provided by the State, may be a major motivating factor in the decision not to abort. While the liberality of the CTOPA may encourage women to fall pregnant and opt for an abortion, the CSG, or "womb fee" as it is also commonly referred to at the grassroots level, may be seen as a major financial incentive for young girls to fall pregnant and not to have an abortion.

A further conflict is evident in yet another important constitutional provision, namely, section 15(1), which provides that "everyone has the right to freedom of conscience, religion, thought, belief and opinion". This provision appears to be wide enough to be invoked by all interested parties who may raise valid objections to an abortion. However, section 15 may hold special significance for objecting health care providers who can only rely on the CTOPA for an inferred right to object. As professionals, they are expected to provide abortion services. This is quite unlike the situation of other objectors, who may voice moral objections to, or theorise about abortion services, but who can safely ignore their views in their private lives. However, while objecting providers may be able to invoke section 15 or even section 23 (1) (unfair labour practice) of the Constitution, especially in cases where women repeatedly have 'elective' abortions, their right to object may be limited by section 36 when compelling medical situations or emergencies necessitate that abortions be performed.

Instead of allowing, and waiting for, the Constitution to finalise the abortion issue, as the ANC claimed should happen, the Constitution was not only enacted after the CTOPA, but is moreover expected to provide interpretative guidance with regard to ambiguous or conflicting provisions within the CTOPA, and to do so notwithstanding its own conflicting provisions in this regard. Women constituted the majority of the members of the Committee reviewing the ASA.⁵¹ Part of the motivation behind the need to enact the CTOPA before the Constitution was enacted may have been based on the fact that at the time the struggle for gender equality was still a "stepchild of national liberation".⁵² In hindsight, it is contended that using the window period of opportunity that the transition provided may not have been the appropriate time to introduce the CTOPA and may have resulted in women being short-changed by it. Although the CTOPA, unlike the Constitution, clearly guarantees women the right to an abortion, like the CTOPA, the Constitution does not guarantee access to a legal abortion.

The ANC had in several policy documents⁵³ already expressed a pre-defined liberal position on abortion and may have been motivated by the neutrality of the interim Constitution on abortion to in fact speed up the process. The formulation of the CTOPA must also have been influenced by provisions which favour reproductive rights, for example, Article 16(1)(e) of the 1979 UN Convention on the Elimination of Discrimination Against Women (CEDAW), signed by South Africa in 1993 and ratified by it in 1995 without any reservations. There was division on the issue of abortion within the ANC itself and therefore the CTOPA was not passed by Parliament without controversy. The ANC did not allow its members to vote freely on the Bill according to their

⁵¹ See Nkomo (1995) ii.

⁵² Andrews (2001) 326-358.

⁵³ See ANC (1994) and ANC (1995).

conscience, but compelled them to vote as a party.⁵⁴ Given that the ANC, as the majority ruling party, clearly did not have to worry about the CTOPA not being passed because of a lack of support, one has to question whether doing so meant that it may have harboured some doubts or insecurities in this regard. In the light of this, should the fact that many South Africans still consider abortion "wrong" not then be taken more seriously since the CTOPA has failed to make a difference thus far?

3 The compromise role of viability in defining and reducing the boundaries of legal abortion to favour life in terms of the CTOPA

The ASA did not define a "foetus". The ASA, in the instances that it did permit abortion, allowed it at any stage of a pregnancy, that is, with no time restrictions, and therefore it appears that viability did not play a crucial role in abortion legislation prior to its legalisation. It is contended that with legalisation, the reverse may in fact be the case because the CTOPA has adopted, and operates within, a convenient trimester approach. The CTOPA, too, has not defined a "foetus". Hence, guidance regarding the issue of "viability" is to be sought from the medical field. Given that the CTOPA clearly makes provision for abortion within restricted timeframes, it is contended that there does appear to be a time (viability) when the CTOPA itself can be deemed to oblige the State to step in and protect developing life. Burchell sums up the current position as follows:

As a result of the process of conception an embryo is implanted on the wall of the maternal uterus. After about six weeks it acquires a recognisably human form (after which it is called a foetus) and begins, at 20 weeks [five months], to display signs of life ("quickening"). By about 24 weeks [six months] the foetus is able to sustain its life independently of its mother ("viability"). After about 36 weeks [nine months] it is, by the process of birth, expelled from the womb as a human being (as to when, in law, it is recognised as a human being).⁵⁵

Burchell's summary may explain why legally the removal or loss of a foetus before viability would be defined as an abortion, and doing so after viability as a premature birth. However, from a medical point of view viability is not considered a fixed point in the development of the foetus but merely an estimate of its likely survival outside the uterus (womb). Given that traditionally it is medically acceptable that viability can range from around 24 to 28 weeks, it is contended that the position in South Africa is currently that the CTOPA has legally reduced the traditional medical upper limit from around 28 weeks (7 months) as the 'accepted' cut-off point for viability to after 20 weeks (5 months).⁵⁶ Viability therefore currently stands at the midpoint between when Burchell proposes it is attained (6 months) and what the medical upper limit may deem it to be (7 months). Given that abortion is currently only legally allowed, as an exception, after 5 months of

⁵⁴ Guttmacher *et al* (1998) 193.

⁵⁵ Burchell (2013) 557 n 1.

⁵⁶ Currently, there is no internationally accepted, uniform gestational age that defines viability, scientific thresholds ranging from around 23 to around 27 weeks. See South Australian Perinatal Practice Guidelines Workgroup (2013) which makes the following important points: "Infants who are born prematurely at 21 weeks gestation or earlier are not considered viable. Their extreme physical and physiological immaturity means that survival is not possible with current technology and expertise. Infants born later, but still extremely early, for example between 22 and 24 weeks gestation, may be able to be supported with intensive care, but have a high risk of dying despite treatment. This period is sometimes referred to as the 'threshold of viability'".

pregnancy, it is contended that "viability" is, therefore, a factor that may be used to tilt the balance of life in favour of an unborn.

3.1 The application of the *nasciturus* rule to limit a woman's choice to abort

According to the common law, a person is legally deemed to come into existence at birth. Hence, in terms of South African law, legal subjectivity only starts at birth. Legal personality therefore begins when the birth is complete, that is, when the child is separated from its mother, and is breathing.⁵⁷ Support for the definition of a "child" as a person under the age of 18 is found in both the Constitution⁵⁸ and the Children's Act.⁵⁹ The ASA did not make provision for any ring-fencing of the moment of life. While the common law position that legal subjectivity only starts with live birth may have been regarded as archaic,⁶⁰ none of the above laws appear to have had a basis in Christianity or any other religion. However, that the law had, during apartheid, not formally accorded the foetus any legal status until it was born was probably acceptable, given that the default legal position in terms of the ASA was that abortion was illegal and therefore an unborn had a greater chance of survival than it would currently have in terms of the CTOPA. Protective legal measures exist in both the common law and statutory law to safeguard the interests of the unborn. A typical example is the *nasciturus* rule. However, this rule will only help an unborn to secure its interests if it was subsequently born alive. It has been pointed out that a foetus would be disadvantaged by the *nasciturus* rule because the premise upon which its operation depends, namely, subsequent live birth, will not be present because of an abortion.⁶¹ The requirement of "live birth" was therefore not regarded by all as an insurmountable obstacle and a view was expressed some 25 years ago already that the South African law was woefully remiss in providing sufficient protection to the unborn and that the time had arrived to consider amending the law. It was argued that more protection could be afforded to a foetus by according legal subjectivity and personality to it through an extension of the *nasciturus* rule as a possible "preventive protection" measure.⁶² While conceding that according legal subjectivity and personality may be stretching the law too far and may therefore garner little support, it is contended that the private law based *nasciturus* rule, because it is available to an unborn regardless of age or stage of development, may be able to work in conjunction with the CTOPA and the (neutral) Constitution in preventing the abortion of a legally viable foetus. Furthermore, if the CTOPA is amended so that the period for an abortion on request is reduced to the first trimester as suggested in §4.1, the rule could ensure such protection even before legal viability. The following examples are further indications that the rule could be invoked to prevent an abortion in terms of the CTOPA.

3.3 Practical examples of the application of the *nasciturus* rule to prevent an abortion

A woman can have a lawful abortion today on request until the end of the second trimester of pregnancy. Hypothetically, if an unscrupulous pregnant woman has

⁵⁷ Carstens & Du Plessis (2009) 588 and 593.

⁵⁸ Section 28(3).

⁵⁹ Section 17 of Act 38 of 2005.

⁶⁰ See Barnard *et al'* (1978) 346.

⁶¹ See Du Plessis (1976) 17.

⁶² The theory of extending the *nasciturus* rule as a "preventive protection" measure was proposed in Du Plessis (1990) 49-52 and Du Plessis (1991) 339, 348-350 & 353-354.

been widowed, and no-one is aware of her pregnancy, nothing legally precludes her from circumventing the application of the nasciturus rule in matters pertaining to succession by furtively seeking an abortion in order to augment her share of the inheritance. However, the outcome could be different where the woman's pregnancy was known and the foetus was viable, if the nasciturus rule was utilised. If the CTOPA is amended as proposed in §4.1 the abortion could be prevented at an even earlier stage.

There is a clear indication in the CTOPA that a foetus is capable of suffering severe physical or mental abnormality⁶³ and may be at risk of severe malformation⁶⁴ or of sustaining injury.⁶⁵ It can, therefore, be inferred from these provisions, together with the Act's determination of gestation or age by reference to periods of time, that viability ought to be a factor that could be used to accord a foetus both "mercy" and "dignity". Specialist doctors in South Africa are now performing open (intra-uterine) foetal surgery in order to avert pain and suffering to a growing foetus, and to give it a greater chance of a normal life.⁶⁶ A pertinent question would therefore be whether the nasciturus rule could be invoked by interested parties, like health care providers, to prevent a lawful abortion of a (legally) viable foetus in cases like these?

Although an earlier radical "pro-choice" view advocated,⁶⁷ in the context of a mother giving up her life to preserve that of a foetus where it poses a threat to her life or health, that such a pregnant woman be afforded the right to refuse emergency medical treatment in order to grant her unborn life when an emergency warranted a therapeutic abortion, such a situation will be dealt with very differently today. It is expected that if the pregnancy (foetus) threatens the life of the woman, a doctor will be duty bound to choose "the" life of the mother over "a" potential human life and provide an abortion as an emergency service when the woman's life is at stake. The mother's life would be deemed the more valuable of the two and the doctor cannot be found guilty of a crime since his or her conduct would be justified on the basis of necessity. Although there was no similar ground of justification (necessity) in this case, the Court in *S v Mshumpa* ruled that the killing of an "unborn child" did not constitute murder.⁶⁸

However, it remains to be seen whether the nasciturus rule can be of assistance to an unborn to prevent an abortion if an ill, pregnant woman is requesting active (as opposed to passive) euthanasia. Active euthanasia is a form of mercy killing and can occur when a person helps another to commit suicide. It is tantamount to murder and currently illegal in South Africa.⁶⁹ The unborn is out of the equation because its life does not count till its birth, and therefore there ultimately also is only one life at stake. In a recent groundbreaking decision in April 2015, the North Gauteng High Court in *Stranham- Ford v Minister of Justice and Correctional Services and Others*⁷⁰ ruled in favour of a doctor

⁶³ Section 2 (1)(b)(ii).

⁶⁴ Section 2 (1)(c)(ii).

⁶⁵ Section 2 (1)(c)(iii).

⁶⁶ See Cole (2014).

⁶⁷ See Barnard *eta/* (1978) 349.

⁶⁸ In *S v Mslwmpa* 2008 (1) SACR 126 (E), the Court ruled that the perpetrators at most may be prosecuted only for an assault on the prospective mother.

⁶⁹ Killander (2009) 84.

⁷⁰ *Stranham-Ford v Minister of Justice and Correctional Services and Others* Case Number (27401/15) [2015] ZAGPPHC 230 (4 May 2015). See also Hartleb (2015).

assisted suicide. Given that the decision goes contrary to the existing legal position, the Justice Ministry has, not surprisingly, indicated that it would appeal the judgment. However, the case appears to suggest that the current legal position may be subject to change in the near future. If, and when this happens, it may also mean that an unborn will be entitled to even less protection than it currently has.

The position with passive euthanasia is quite different since it is currently not considered unlawful.⁷¹ For example, the removal of life support may be permitted at the request of close relatives of a pregnant patient who is in a permanent coma and is certified to be clinically dead. In such a case the unborn may or may not, depending on the stage of the pregnancy, abort spontaneously or survive when delivered. However, notwithstanding the fact that the law does not afford an unborn any rights until its birth, the CTOPA does appear to provide it with protection from the time of legal viability by limiting a woman's choice to abort from that point onwards. This position would lend support to a court ruling that it will not condone keeping such a woman on life support merely to allow an unborn that has not reached the stage of viability or may be far from reaching it to be safely delivered, especially if the woman's personal views are unknown. However, with the aid of the nasciturus rule, the matter could be viewed differently if a foetus has reached legal viability or is very near to reaching it. In such a case, and especially where family members may be giving expression to the informal or formal wishes of the woman, and are able to substantiate them, it is contended that the "best" interests of the unborn would be protected by keeping its mother on life support until it is able to be safely or prematurely delivered. However, if the woman has informally during her lifetime, or formally through a (living) will, indicated otherwise, this raises two further difficult questions: should the wishes of such a brain dead woman count and should the fact that the foetus may or may not have reached the point of viability matter? If the nasciturus rule is there to preserve the interests of the foetus, and the question is: preserve the life of the 'to be born' foetus against the 'death' of the brain dead mother- would (potential) life not trump death? In this equation, why should the wishes of the mother be of any value, whether known or unknown? Does the nasciturus rule not apply from the moment of conception, so viability is not in issue? However, perhaps there is value in the viability element combined with the nasciturus rule, to tip the balance in favour of the (to be born) foetus? A further thought that comes to mind is: could the nasciturus rule be applied after viability to deny a legal abortion? In a recent article, adopting a view which may be more in line with the law, McQuoid-Mason indicates that unlawfully and intentionally keeping a pregnant brain dead woman alive could result in a criminal charge of violating a corpse.⁷²

4 The way forward

It is contended that the following options could be considered so that an abortion either occurs early (and even before legal viability) or is avoided altogether by preventing pregnancy and through other legal measures. All options ultimately involve elements of choice and accountability.

⁷¹ Currie & De Waal (2013) 267.

⁷² McQuoid-Mason (2014)44-46.

4.1 Amending the CTOPA and related laws

Abortion in terms of the CTOPA is legally available on demand during the first two pregnancy trimesters for various reasons. As already indicated, a first trimester abortion may occur on request, that is, without having to provide any reason. Although some of the second trimester reasons may be serious, for example, rape; it is contended that none of the reasons (humanitarian, therapeutic, eugenic or social and economic considerations) that would justify an abortion in the second trimester would justify having to wait until such an advanced stage of pregnancy to have an abortion. It is proposed that a possible way forward would be to consider amending the CTOPA (and related laws) so that the default position would be to allow an abortion on request in the first trimester only; at any stage thereafter only cogent medical grounds would afford pregnant women an opportunity to make an informed choice to abort. The CTOPA's 'legal' earlier determination of viability should remain because it creates a balance between these two extremes, favours life, and has the potential to serve as a guide when dealing with the application of the nasciturus rule which could be used to protect an unborn from the beginning of four months rather than only from the beginning of six months (legal viability).

The motivation for the default position to be limited to the first trimester is explained as follows. Section 1 of the CTOPA refers to "medical" and "surgical" abortions without defining what is meant thereby. A medical abortion occurs through the use of prescription drugs and is less physically invasive than a surgical abortion which occurs by means of instrumentation. A medical abortion will allow a woman to self-induce an abortion in the confines and privacy of her own home with little need for medical supervision. However, abortifacient drugs are scheduled drugs and not readily available over the counter at pharmacies. While approving doctors may provide scripts to obtain such drugs and may themselves also dispense them, not all doctors are pro-choice. Although there are "ways" for women to obtain such drugs, these may involve time which is of the essence to a pregnant woman carrying a growing foetus. One such way would be if a woman, who knows that she is pregnant and who knows that her doctor may not consent to an abortion, still goes to her doctor and through, for example, feigning an ulcer, may still obtain the same or similar drugs from the doctor or, if he or she does not dispense such drugs, a script from him or her to legally obtain it from a pharmacy.

Although a pregnancy test may show a positive result, or a menstrual period may be missed which may indicate a pregnancy, providers are usually only able to perform an abortion at both private clinics and State institutions when the foetus is over one month old. It is contended that both the "mother" and the "baby" become the victims of such an abortion when it occurs at this early, yet "late", stage. Furthermore, given that currently a surgical abortion may be delayed because it may only be initiated once a foetus is detected, there is no such thing as a "quick" abortion. It is therefore further contended that an abortion should be encouraged to occur as early as possible, and preferably medically through drugs (because that procedure may be safer and less invasive than a surgical abortion), in order to avert both an unborn and its mother any further "pain and suffering". This contention is based on the latest research which indicates that clinically life may also begin with "brain birth" and which highlights that the human brain begins forming three weeks after conception and begins to function in the fifth week after

conception.⁷³ Women who have endured an abortion can attest to the physical and psychological trauma that invariably follows (especially when the life of the foetus has been unnecessarily prolonged) and which they often have to bear alone. Allowing women to self-abort and to do so early in the pregnancy will afford them both the dignity and privacy which the CTOPA, by giving them alone the choice to an early abortion, must have intended to be the case. Support for this view may be found in the Preamble to the CTOPA which emphasises choice in the context of an 'early, safe and legal' abortion and section 14 of the Constitution which guarantees everyone the right to privacy. Research conducted in the Western Cape Province highlighted that the prevalence of failed attempts at self-induced unsafe abortions persisted during the first trimester and resulted in increased numbers of second trimester legal abortions. Of the small sample of women, a large number were Black and unemployed and had resorted to using herbal products or tablets bought from unlicensed providers.⁷⁴ In 2010, second trimester abortions accounted for 25 per cent of all abortions.⁷⁵

Further, it appears that a female prison inmate (a criminal) in South Africa will probably stand a better chance of having a safe abortion than a poor black woman living in a township who has to resort to an illegal abortion abortifacants. It is currently possible for inmates to have an abortion in terms of the CTOPA at State expense albeit only during the second and third trimesters but not on request during the first trimester.⁷⁶ While this position would need to be rectified, it in any event appears that the Constitution⁷⁷, in addition to its equality provision (section 9), also permits inmates to consult with, and be attended to by, their own private medical practitioners at their own cost. This therefore provides women with a loophole, and a means with which to obtain a first trimester abortion with a doctor's assistance; and neither could be found guilty of having transgressed the CTOPA or the Correctional Services Act.

4.2 Preventing pregnancy and other legal measures

Is sterilisation a better socio-economic alternative to abortion in South Africa? It is contended that depending on the age of the woman, it may or may not be a viable solution but that 'implanon', a new, user friendly contraceptive device introduced in 2014, and which has been made freely available, may have taken away the need to consider such a drastic step for women regardless of their age. This is explained as follows. Women use contraception as a preventative measure when they do not want children at a particular (usually early) stage of their life. Sterilisation, because of its permanency, may be a viable solution for older women who already have children. However, sterilisation, while it may prevent pregnancies, does not exclude the risk of contracting deadly diseases, like HIV/AIDs (a pandemic in South Africa), and will still require the use of condoms which may help in preventing the transmission of sexually transmitted infections, including HIV, which can pass through the skin of the penis or vagina. Men who fail to use condoms may ultimately cost many teenage mothers their lives, when HIV turns into full-blown AIDS. The pro-life ASA regulated both abortion and sterilisation. It may

⁷³ Information obtained from the website of "ZERO TO THREE", a national non-profit organisation.

⁷⁴ See Constant *et al* (2014) 302-305.

⁷⁵ Boland (2010) 1-23.

⁷⁶ See Regulation 7(9)(b) of the Regulations accompanying the Correctional Services Act 111 of 1998 which were promulgated in 2004 and amended by the Correctional Services Amendment Act 25 of 2008.

⁷⁷ Section 35 (2) (f) (iv).

therefore even be possible to construe from the fact that abortion and sterilisation are currently separately regulated⁷⁸, and given that sterilisation has a more permanent outcome whilst a woman undergoing an abortion may have more children, that the CTOPA ultimately also favours the preservation of life.

In 2013, the then Minister of Health expressed the view that young girls are "using abortion as contraception",⁷⁹ which confirmed that abortion had become a form of failed contraception in South Africa in spite of a contrary assertion in the Preamble to the CTOPA. It also highlights that contraception may not be effective or properly utilised. This has led to the introduction of "implanon", an implant that not only prevents ovulation, but is effective for three years. Although there is no contraception that can claim to be 100 per cent effective, its effect is reversible and it is deemed to be 99.95 per cent effective.⁸⁰ By preventing pregnancy, "implanon" will hopefully allow women better reproductive freedom than an abortion. Since the effect of "implanon" is temporary, it may therefore be more a more attractive option than sterilisation. Although it will also still require the use of condoms to prevent infections, it is certainly a welcome and positive step in the direction of reducing abortions. It is therefore a great pity that it was only launched in South Africa in 2014 and not 17 years ago when it was first made available in Indonesia in 1998 when the CTOPA was barely a year old.

We allow the abandonment and infanticide of babies without seriously considering or exploring other viable legal alternatives to abortion. There are many women whose careers may have stood in the way of them having children or who may have decided not to have children of their own. There are also many women who cannot bear children naturally and have to go through great pain and expense to do so through an artificial process. There are also many parents who have lost children. Adoption, in contradistinction to abortion, may also be permanent. For example, while the outcome of an abortion is the permanent loss of life of a "yet to be born" foetus, the outcome of an adoption may also be the permanent relocation of a child with a couple who desires the experience of parenthood. Adoption is also a viable option for an unmarried prospective mother who may have contemplated having an abortion over giving birth to a child out of wedlock for fear of stigmatisation or for economic reasons. However, adoption may also be a viable option for mothers in cases other than these. Adoption will also allow the prospective biological father of such an unwanted unborn who is able to support it, an opportunity of fatherhood in ways that the CTOPA will never be able to assist him. Simplifying the complicated process and requirements for legal adoption as set out in Chapter 15 of the Children's Act could, for example, provide many people, both locally and abroad (inter-country adoption), with the opportunity of parenthood. Unlike the nasciturus rule as it currently applies and which does not protect rights unless an unborn is subsequently born alive, an adoption order does not terminate any property rights a child may have before the adoption.

⁷⁸ The Sterilisation Act 44 of 1998.

⁷⁹ See Halala (2013).

⁸⁰ The website medicines.org.uk explains that: "Nexplanon is a radiopaque, non- biodegradable, progestagen-only, flexible implant preloaded in a sterile, disposable applicator. Each radiopaque implant contains 68 mg of etonogestrel; the release rate is approximately 60-70) µg/day in week 5-6 and has decreased to approximately 35-45) µg/day at the end of the first year, to approximately 30-40) µg/day at the end of the second year and to approximately 25-30) µg/day at the end of the third year."

5 A future judicial stance in relation to the status quo

Given controversial provisions of the CTOPA, which include not requiring parental knowledge or "participation" for any type of abortion, it is not surprising that these issues were among those raised in judicial challenges brought in relation thereto.

Christian pro-life groups have, in two separate High Court cases decided in 1998 and 2004, unsuccessfully challenged the constitutionality of the CTOPA. It, therefore, seems that there is little point for the pro-life lobby to continue with a legal, or even a constitutional, challenge to abortion given that from the point of view of the Constitution itself (which "locks in" support for abortion), it will more than likely be unsuccessful. During the period of the operation of the interim Constitution, the Constitutional Court in its first case, *S v Makwanyane*, abolished the death penalty.⁸¹ It considered the right to life in the context of capital punishment and not abortion. Given therefore that there has as yet not been a Constitutional Court decision which pertains directly to abortion and which provides the last word on it, the abortion issue may not have been decided "once and for all", as many believe. However, it was predicted that if the Constitutional Court were to take its cue from private law, it would probably not recognise the foetus as a legal subject worthy of constitutional protection.⁸² Having regard to what is implicit in the following ruminations on some of the interim Constitution's implications for abortion by Mahomed J and O'Regan J, in their separate judgments in *S v Makwanyane*, such prediction may not have been wrong. Mahomed J states that:

[T]he Constitution ...prescribes in peremptory (definite) terms that "every person shall have the right to life". What does that mean? What is a "person"? When does "personhood" and "life" begin? Can there be a conflict between the "right to life" and the right of a mother to "personal privacy" ...and her possible right to the freedom and control of her body?⁸³

O'Regan J holds that:

(T]he right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life ... This concept of human life is at the centre of our constitutional values.⁸⁴

In 1998 (the CTOPA came into operation in 1997), Christian pro-life groups unsuccessfully challenged the constitutionality of the CTOPA on the ground that it violated the right to life of the foetus in *Christian Lawyers Association of SA and Others v Minister of Health and Others*.⁸⁵ McCreath J rejected the challenge on the basis that the word "everyone" used in section 11(the right to life) of the Constitution did not include a foetus within its ambit and that therefore a foetus was not a bearer of rights (yet he refers

⁸¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 22.

⁸² See Du Plessis (1994)162.

⁸³ *S v Makwanyane* para 268.

⁸⁴ *S v Makwanyane* para 326.

⁸⁵ *Christian Lawyers Association of SA and Others v Minister of Health and Others* [1998] (11) BCLR 1434 (T) 1435.

to the unborn as a 'child'). Currie & De Waal express the following view regarding the first *Christian Lawyers* case:

[T]he issue of the constitutionality of permissive abortion legislation cannot simply be reduced to the question of whether the foetus is a person ... the question is whether the state has a constitutional *duty* to protect developing human life ... If so, the extent of the duty must be established.⁸⁶

As indicated, the CTOPA governs abortions up to and including the point of viability. Given that an abortion thereafter will only be legally allowed in certain exceptional circumstances, does this not also imply that the CTOPA therefore can be interpreted to mean that the State would be responsible for the welfare and protection of the foetus from the time of viability until its birth? Although the first *Christian Lawyers* case was not expected to consider the matter from this angle, it is contended that such a challenge in the future is not precluded, and that the possibility that the unborn will be entitled to State protection once it has reached the stage of legal viability cannot be ruled out entirely.

The outcome of the first *Christian Lawyers* case did not discourage Christian groups from bringing a second challenge to the CTOPA in 2004.⁸⁷ It is contended that while the second *Christian Lawyers* case ultimately also did not rule out the possibility of a future challenge in other courts, including the Constitutional Court, the 2005 Children's Act may have laid any such challenge to rest. In this case it was argued that minor girls below the age of 12 were not capable of giving informed consent, as defined by the CTOPA, without parental involvement. Although the plaintiff's claims were dismissed in this particular case, it appeared that the Court, per Mojaelo J, may have left the door open to deny an immature minor the right to an abortion without parental involvement.⁸⁸ However, this may not be the case after all, because in 2005 legislation pertaining to the child was amended by the Children's Act. Although some of its provisions came into operation earlier (2007), all the other provisions, including section 129, only came into force in 2010. Section 129 nonetheless defers to the CTOPA. The CTOPA, in turn, defers to the Constitution which, given its support for abortion as a reproductive right, would probably support an interpretation and conclusion requiring no need for parental consent.

Section 129 of the Children's Act sets the age limit for consenting to medical treatment at 12 years. However, section 129(1) clearly states that it is "subject to section 5(2) of the CTOPA in terms of which "no consent other than that of the pregnant woman shall be required for the termination of a pregnancy" (emphasis added).

The CTOPA's definition of "woman" means that even a minor girl under the age of 12, regardless of her maturity and capacity, has the right to give confidential permission for an abortion to be performed on her without the consent of her parents or guardians. This also technically means that a seven-year-old girl (a minor, nonetheless) who menstruates

⁸⁶ Currie & De Waal (2013) 266.

⁸⁷ *Christian Lawyers' Association v National Minister of Health and Others* (2004] (10) BCLR 1086 (T).

⁸⁸ *Christian Lawyers' Association v National Minister of Health* [2004]1094 & 1104.

and is therefore able to fall pregnant can have an abortion regardless of whether or not it may be in her "best interests" which in terms of both section 28(2) of the Constitution and section 9 of the Children 's Act ought to be 'paramount'. Two South African girls aged nine and ten are reported as having given birth in 1966 and 2009, respectively.⁸⁹ The former would not have been able to have an abortion in terms of the ASA but the latter would have been eligible in terms of the CTOPA. Thus, a minor, who is not able to possess an ID document in South Africa until the age of 16, and who is considered not to have sufficient discretion to vote in elections until the age of 18, will be able to have a legal abortion at any or whatever age. It therefore does seem that it would be futile for a parent to try and stop a minor's abortion through a court challenge in the future.

Hawthorne has argued that the mere existence of the ASA provided a sufficient basis for the protection of the rights of prospective fathers.⁹⁰ However, the CTOPA does not afford men any assurance of fatherhood. It is irrelevant today whether men, because of their maintenance obligations, may want to raise a child by themselves or may be reluctant to become fathers. If unmarried, it may be understandable that women may want to make the decision to abort alone. The fact that the law requires unmarried fathers to contribute to the maintenance and upbringing of their children, and the fact that their views are not taken into consideration with regard to an abortion, may only be questioned but not challenged, given that the CTOPA assures that women alone are to make a choice. It is contended that while fathers currently may be unable to influence a woman's decision to keep a child, a question that may yet be open to challenge is whether men, who do not want to be fathers, will be able to influence a woman's decision so that she in fact has an abortion. The latter scenario has already had deleterious consequences for an unborn, and the undue "pain and suffering" it must have endured, when in *S v Mshumpa*⁹¹ an unmarried man who did not want to become a father had arranged for the killing of his unborn at 38 weeks when its birth was imminent.

6 Conclusion

The ASA paradoxically did not confer all rights on an unborn. The CTOPA preceded the Constitution and therefore it was not necessary for the ASA to have been repealed by a constitutional or judicial challenge. The CTOPA, in turn, may not necessarily spell the death knell for life in all instances because several of its provisions may be interpreted to imply that the State may yet be duty bound to protect the unborn from the time of legal viability. It appears that it remains both necessary and possible to bridge the gulf between competing pro-life and pro-choice perspectives on abortion in South Africa. A future review of the CTOPA, and other South African laws affording protection to the unborn, should therefore not be ruled out.

The CTOPA may have many shortcomings. The manner in which it has dealt with controversial issues may even have backfired to be the very obstacles standing in the way of its successful implementation today. It may yet still face a Constitutional Court challenge. However, the CTOPA will not be abolished any time soon for reasons that may have more to do with fiscal pragmatism on the part of the State than either the welfare of

⁸⁹ There is a long list of known biological mothers under the age of 11, from as young as five. See ABC News Point (15 July 2015).

⁹⁰ See Hawthorne (1982) 278.

⁹¹ *S v Mshumpa* 2008 (1) SACR 126 (E).

the unborn or of the most underprivileged women, or, in the case of minors of all ages, their best interests. More than a decade ago we were alerted to the fact that the 'prosperity gap' between the 20 per cent rich ('overwhelmingly white') and the 80 per cent poor population in South Africa had not been closing fast enough since the advent of democracy.⁹² The CTOPA may justifiably still be viewed as a 'first world developed' law in a 'third world developing' country. The fact that South Africa has only very recently ratified the ICESCR lends further support to this view. The extended timeframe in terms of which abortion on request is currently permitted may justifiably be in need of reduction. Yet, realistically, legal abortion has to remain a woman's personal choice until the elimination of situations, such as the following: husbands or partners who are abusive and poor providers; husbands or partners who unreasonably withhold consent to an abortion; and contraception that may fail even when properly utilised. Ultimately, whether or not women exercise the choice to have abortion, is a matter of individual, cultural and religious conviction and not function of the government or religious bodies to dictate. The CTOPA, assuring women of a right to decide not to become mothers, merely provided them with a choice. When they do so indiscriminately and unnecessarily delay an abortion, it is a strong indicator that their own moral attitudes towards developing foetal life may have changed. The mere possibility of a future review of the existing law and of a Constitutional Court challenge highlights the fact that the last word on abortion in South Africa has yet to be written.

⁹² See Du Plessis (2002) 5-6.

Bibliography

- Andrews P (2001) "The Stepchild of National Liberation: Women and Rights in the New South Africa" in Andrews P & EHmann S (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* Johannesburg. Witwatersrand University Press.
- Barnard TA, Du Plessis LM, Kempff C & Oosthuizen G (1978) "Aborsie 'n Juridiese, Etiese en Regsetiese Vraagstuk" 43(4) *Koers* 330-350.
- Boland R (2010) "Second Trimester Abortion Laws Globally: Actuality, Trends and Recommendations " 18 *Reproductive Health Matters* 1-23.
- Burchell J (2013) *Principles of Criminal Law* (4 ed) Cape Town: Juta.
- Carstens P & Du Plessis R (2009) "Medico-Legal Aspects Pertaining to Children" in Boezaart T (ed) *Child Law in South Africa* Cape Town: Juta.
- Constant D, Grossman D, Lince N & Harries J (2014) "Self-Induction of Abortion among Women Accessing Second-Trimester Abortion Services in the Public Sector, Western Cape Province, South Africa: An Exploratory Study" 104(4) *South African Medical Journal* 302-305.
- Currie I & De Waal] (2013) *The Bill of Rights Handbook* (6ed) Cape Town. Juta.
- Du Plessis L (2002) "The Future of South Africa: Perspectives of Integrating Different Cultures- Means of Law" 6 *Rechtspolitisches Forum* 3-23.
- Du Plessis LM (1974) "Reg en Etiek - Enkele Implikasies" 39(4) *Koers* 220-246
- Du Plessis LM (1976) "Vraagstukke rondom die Lewe Juridies Beslen" *Potchefstroom IBC Reeks* (1976) F2 nr 9 (39p.p).
- Du Plessis LM (1990) "Jurisprudential Reflections on the Status of Unborn Life" 1 *Tydskrif vir die Suid-Afrikaanse Reg* 44-59.
- Du Plessis LM (1991) "Reflecting on Law, Morality and Communal Mores with Particular Reference to the Protection of Pre-Natal Life)" 56(3) *Koers* 339-357.
- Du Plessis LM (1994) "Whither Capital Punishment and Abortion under South Africa's Transitional Constitution?" 7 *South African Journal of Criminal Justice* 148-163.
- Du Plessis LM (1996) "A Christian Assessment of Aspects of the Bill of Rights in South Africa's Final Constitution" 96 *Journal of Theology for Southern Africa* 59- 74.
- Du Plessis LM & Corder H (1994) *Understanding South Africa's Transitional Bill of Rights* Cape Town: Juta.
- Du Plessis LM (2001) "Freedom of or Freedom from religion? An overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in the New South Africa" 2 *Brigham Young University Law Review* 439-466.
- Farber T (1 April 2014) "Illegal Abortion Drug Horror" *Cape Times* 1 & 3.
- Guttmacher S, Kapadia F, Naude J & De Pinho H (1998) "Special Report: Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act" 24(4) *International Family Planning Perspectives* 121-194.
- Hawthorne L (1982) *The Crime of Abortion: A Historical and Comparative Study* unpublished LLD dissertation Pretoria :University of Pretoria.
- Killander M (2009) "Life" in Govindjee A & Vrancken P (eds) *Introduction to Human Rights Law* Durban: LexisNexis.
- Mchunu G, Peltzer K, Tutshana B & Seutlwadi L (2012) "Adolescent Pregnancy and Associated Factors in South African Youth" 12(4) *African Health Sciences* 426-434.
- McQuoid-Mason D (2014) "Terminating the Pregnancy of a Brain-Dead Mother: Does a Fetus have a Right to Life? The law in South Africa" 7 *South African Journal of*

Bioethics and Law 44-46.

- Nkomo SA Republic of South Africa Report of the *Ad Hoc* Select Committee on Abortion and Sterilization 1995 [C3-95] (Nkomo (1995)).
- Rebouche R (2011) "The Limits of Reproductive Rights in Improving Women's Health" 63(1) (1) *Alabama Law Review* 1-42.
- Reddy SP, James S, Sewpaul R, Koopman F *et al* (2010) *Umthente Uhlaba Usamila -The Second South African Youth Risk Behaviour Survey 2008* Cape Town: South African Medical Research Council.
- Sarkin JJ (1995) *The Effect of a Constitution and Bill of Rights on Abortion in South Africa: A Comparative Study* LLD dissertation Bellville: University of the Western Cape.
- Sarkin-Hughes J & Sarkin-Hughes N (1990) "Choice and Informed Request The Answer to Abortion: A Proposal for South African Abortion Reform" 1 *Stellenbosch Law Review* 372- 387.
- Strauss SA (1968) "Therapeutic Abortion and South African Law" 85 *South African Law Journal* 453-462.
- Zolotova E (2011) "Fetal Alcohol Syndrome: Dashed Hopes, Damaged Lives" 89 *Bulletin of the World Health Organisation* 398-399.
- Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T).
- Christian Lawyers Association v National Minister of Health and Others* 2004 (10) BCLR 1086 (T).
- S v Makwanyane and Another* 1995 (3) SA 391 (CC).
- S v Mshumpa* 2008 (1) SACR 126 (E).
- Stransham-Ford v Minister of Justice and Correctional Services and Others* Case Number (27401/15) [2015] ZAGPPHC 230 (4 May 2015), available at <http://www.saflii.org/za/cases/ZAGPPHC/20151230.html> (accessed 11 May 2015).
- Abortion and Sterilisation Act 2 of 1975.
- Basic Conditions of Employment Act 75 of 1997.
- Children's Act 38 of 2005.
- Choice on Termination of Pregnancy Act 92 of 1996.
- Choice on Termination of Pregnancy Amendment Act 38 of 2004.
- Choice on Termination of Pregnancy Amendment Act 10 of 2008.
- Constitution of the Republic of South Africa Act 200 of 1993.
- Constitution of the Republic of South Africa Act, 1996.
- Correctional Services Act 111 of 1998.
- Correctional Services Amendment Act 25 of 2008.
- Immorality Act 23 of 1957.
- Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985.
- Sterilisation Act 44 of 1998.
- ABC News Point (15 July 2015) "Top ten youngest birth mothers of all time", available at <http://www.abcnewspoint.com/top-10-youngest-birth-mothers-of-all-time/> (accessed 7 May 2016).
- ANC (1994) A National Health Plan for South Africa, available at <http://www.anc.org.za/show.php?id=257> (accessed 20 February 2015).
- ANC (1995) Policy Proposals for the Final Constitution available at

<http://www.anc.org.zalshow.php?id=284> (accessed 20 February 2015).

Blackie D (20 May 2014) "Fact Sheet on Child Abandonment Research in South Africa", National Adoption Coalition South Africa, available at <http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa-Final2.pdf> (accessed 20 February 2015).

Cole B (16 October 2014) "Marvel of foetal surgery" Daily News, available at <http://www.iol.co.za/dailynews/news/marvel-of-foetal-surgery1.1765827#.VDe4C1eH9wO> (accessed 20 February 2015).

Halata C (29 July 2013) "Teens using abortion as contraception", available at http://www.iol.co.za/lifestyle/family/kids/teens-using-abortion-as-contraception-11554238#.U_T2nVeH9w1 (accessed 20 February 2015).

Hartleb T (30 April 2015) "Terminally ill man wins right to assisted death" Mail & Guardian Online, available at <http://mg.co.za/nrticle/2015-04-30-court-grants-man-right-to-assisted-death> (accessed 2 May 2015).

IRJN (6 March 2007) "South Africa: Teenage pregnancy figures cause alarm", available at <http://www.irinnews.org/report/70538/south-africa-teenage-pregnancy-figures-cause-alarm> (accessed 20 February 2015).

Larkin A (2015) "Ramifications of South Africa's Dop System", available at <http://www.sahistory.org.za/article/ramifications-south-africa-dop-system-alexandra-larkin> (accessed 7 May 2016).

Ludman B (16 November 2012) "Laws may allow abortion, but it's much harder to change attitudes" Mail & Guardian Online, available at <http://mg.co.za/article/2012-11-16-00-laws-may-allow-abortion-but-its-much-harder-to-change-attitudes> (accessed 20 February 2015).

medicines.org.uk, available at

<https://www.medicines.org.uk/emc/medicine/23824/SPC/Nexplanon+6B+mg+implant+for+subdermal+use/>

(accessed 7 May 2016).

Mncwango B & Rule S (2008) "South Africans against Abortion" Social Attitudes Survey 6-7, available at

<http://www.hsrc.ac.za/uploads/pageContent/1607/South%20Africans%20Against%20Abortion.pdf> (accessed 20 February 2015).

Skosana I (29 September 2014) "Obstacles Persist for Safe, Legal Termination" Mail & Guardian Online, available at <http://mg.co.za/article/2014-09-29-obstacles-persist-for-safe-legal-termination> (accessed 20 February 2015).

South Australian Perinatal Practice Guidelines Workgroup (2013) "Practice Guidelines for Perinatal Care at the Threshold of Viability", available at cywhs.perinatalprotocol@health.sa.gov.au (accessed 7 May 2016).

"The World's Abortion Laws" (2014), available at

<http://worldabortionlaws.com/map/> (accessed 20 February 2015).

Willyard C (2008) "Tinkering in the Womb: The future of Fetal Surgery" 14

Nature Medicine 1176- 1177, available at

<http://www.nature.com/nm/journal/v14/n11/full/nm1108-1176.htm> (accessed 7

May 2016).

"Zero to Three", available at

<http://main.zerotothree.org/site/PageServer?pagename=ter>

<http://main.zerotothree.org/site/PageServer?pagename=ter>

(both accessed 20 February 2015).

[_key_brainFAQ](#) and

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